

# **“Acting in the ‘Spirit of Trust and Co-operation’ under NEC3, Clause 10.1: Introducing the Duty of Good Faith?”**

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Section on: Contract Drafting, Claims and Variation Order Management

## **OUTLINE**

### **1. The acceptance of the duty of good faith in U.K. Contract law**

#### 1.1 Recent developments in UK law:

- case law in 2013, in comparison to Civil Law (French, German, Dutch law) [e.g. *Yam Seng*, EWHC, 2013; *Mid Essex Hospital*, EWCA, 2013]
- Standard Contract Forms: NEC3, Acting in ‘spirit of mutual truth and co-operation’, Clause 10.1: introducing the duty of good faith?

#### 1.2 Duty of good faith: its relation to contractual interpretation, in particular:

- ‘contextual and purposive’ interpretation in case of unforeseen circumstances, e.g. *Lloyds TSB*, UKSC, 2013;
- ‘business common sense’ as criterion of interpretation, e.g. *Rainy Sky*, UKSC, 2011;
- implied terms, as instrument of contractual interpretation;
- ‘relevant trade usages’, Article 17.1, ICC Arbitration Rules;
- ‘Entire agreement’ clauses. Rectification as instrument

### **2. Introduction of the New Engineering Contract, Version 3: NEC3. Its characteristics, in comparison to FIDIC Contracts**

#### 2.1 The NEC ‘Family of Standard Contracts’ as an alternative for the FIDIC ‘Rainbow’

a ‘Project Management Procedures Manual’ *versus* a ‘Contract’

#### **Characteristics of NEC3**

#### 2.2 History of NEC1, NEC2, NEC3 (EEC, Engineering and Construction Contract)

- the ‘Philosophy’ of NEC (EEC) compared to FIDIC
- NEC Editions 1992-2009; Latham Report 1994: *Constructing the Team*; Egan Report 1998: *Rethinking Construction*.

- Aims and Objectives of NEC: Flexibility, Clarity and simplicity, Stimulus to good management

### **General Obligations under NEC3**

#### **2.3 Clause 10.1 and the ‘spirit of mutual trust and cooperation’**

The ‘shall’ word, in combination with good faith *à l’anglaise*;  
cf. Michael Rowlinson, *Practical Guide to NEC3*, 2012, p.20;  
Keating on NEC3, 2012, p.11

#### **2.4 The position and obligations of the Project Manager (PM), compared to the Engineer under FIDIC (fairness and reasonableness)**

- NEC3, in general; Justice Jackson in: *Costain v. Bechtel*, 2005
- FIDIC, Clause 3.5, ‘fair determination’ ... ‘taking due regard of all circumstances’; Clause 20.4, Engineer acting as DAB, ‘fairly and impartially’, fees paid by Employer
- Compare Humphrey Lloyd, 2008 *Internat. Construction Law Review*

### **Consequences of applicability of U.K. Law**

#### **Common Law and Civil Law approaches to Contract compared**

#### **2.5 Interpretation of NEC3 Contracts**

- The role of the *NEC Guidance Notes* for interpretation
- Construction of contract (interpretation) under U.K. law, and the use of implied terms; *ICS* case: Lord Hoffmann in *Investor’s Compensation Scheme v. West Bromwich Building Society*, 1998; *Chartbrook v. Persimmon Homes*, 2009; *Rainy Sky*, 2011. ‘*Purposive* interpretation’ (context + purpose)
- Comparison with interpretation of contract in civil law and the use of implied terms, e.g. French law: *l’interprétation créatrice du contrat*; Charles Jarrosson, 1987; cf. Jossierand, 1933: *le forçage du contrat*; Clémentine Caumes, diss. Avignon 2010; Aurore Portefaix, Nimes 2007; Fanny Bugnet, Montpellier 2007
- The misunderstanding of (purposive) interpretation under French law in the U.K.: Lord Hoffmann in *Chartbrook* (2009); Jonathan Morgan, *Great debates in Contract Law*, 2012, p.99
- The ‘*Entire Agreement* clause’ of NEC3: the irrelevance of pre-contractual dealings; cf. *Costain v. Bechtel*, 2005; Keating on NEC3, 2012, p.38 ff.; Jonathan Morgan, pp.80 ff., 97 ff.
- *Rectification* as additional instrument under U.K. law; *estoppel*, *waiver* and *good faith*; cf. Keating on NEC3, p.39; Keating on Construction Contracts, 2012, pp.139, 411 ff.; Jonathan Morgan, p.99 ff.
- Recent English case law on interpretation of contract and the (implied) duty of good faith: *Yam Seng v. International Trade Corp*, 2013; *Lloyds TSB*, 2013

### **P.M.:**

#### **2.6 Compensation Events, compared to Force Majeure under FIDIC**

- NEC3, Clauses 19, 60-65; FIDIC, Clause 19 (*jo.* 17.3); Clauses in EDF Contracts
- Compare on Clause 63.5: Humphrey Lloyd, 2008 *Internat. Constr. Law Review*
- ‘*force majeure*’ in common law (U.K.) vs. civil law (France): a term vs. a doctrine; reliance on civil law for a claim, e.g. French law (EDF Dunkerque Contract, 2010); Solution in FIDIC Gold Contract: ‘*Exceptional Events*’
- *Force majeure* and *frustration of contract*, a matter of interpretation of contract?

Risk-allocation in stead of ‘foreseeability’ standard.

Compare: Jan van Dunné, *Internat. Constr. Law Review*, 2002, p.162-186.

### **3. The development of Construction of contract (interpretation) under U.K. law, and the use of implied terms, before 2013**

*ICS case: Lord Hoffmann in Investor’s Compensation Scheme v. West Bromwich Building Society*, 1998; *Chartbrook v. Persimmon Homes*, 2009; *Rainy Sky*, 2011.  
‘*Purposive* interpretation’ (context + purpose)

### **4. Recent English case law on interpretation of contract and the (implied) duty of good faith, in 2013:**

- \* *Yam Seng v. International Trade Corp*, EWHC, 2013
- \* *Mid Essex Hospital*, EWCA, 2013.
- \* *Lloyds TSB*, UKSC 2013

### **5. The Great Divide: Common Law versus Civil Law, *alias* the Great Misunderstanding**

- What’s going on? General principles of Contract Law, their true nature under Civil law. The role of the good faith principle in contract law: *fides phobia* in the U.K. and elsewhere, is it justified? How does good faith (*bona fides*) actually work as a principle, in theory, and above all, in practice? The *French connection*.

The common view on the application of good faith (*la bonne foi*) in French law (or civil law in general):

- Lord Hoffmann in *Chartbrook* (2009)
- In text books: Jonathan Morgan, *Great Debates in Contract Law*, , 2012, p.99.
- What went wrong? Source: Catherine Valcke, Univ. Toronto, 2008: ‘subjective interpretation’

Comparison with interpretation of contract in civil law and the use of implied terms, *e.g.* French law:

- *l’interprétation créatrice du contrat*; Charles Jarrosson, 1987;
- cf. Jossierand, 1933: *le forçage du contrat*; Clémentine Caumes, diss. Avignon 2010;
- Aurore Portefaix, Nimes 2007; Fanny Bugnet, Montpellier 2007

See also the Contract Law text books:

- Ghestin, 1994
- Starck, 1995
- Malaurie, 1990

Discussing: ‘l’interprétation objective’; ‘la thèse objective’; ‘le forçage du contrat’, etc.

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