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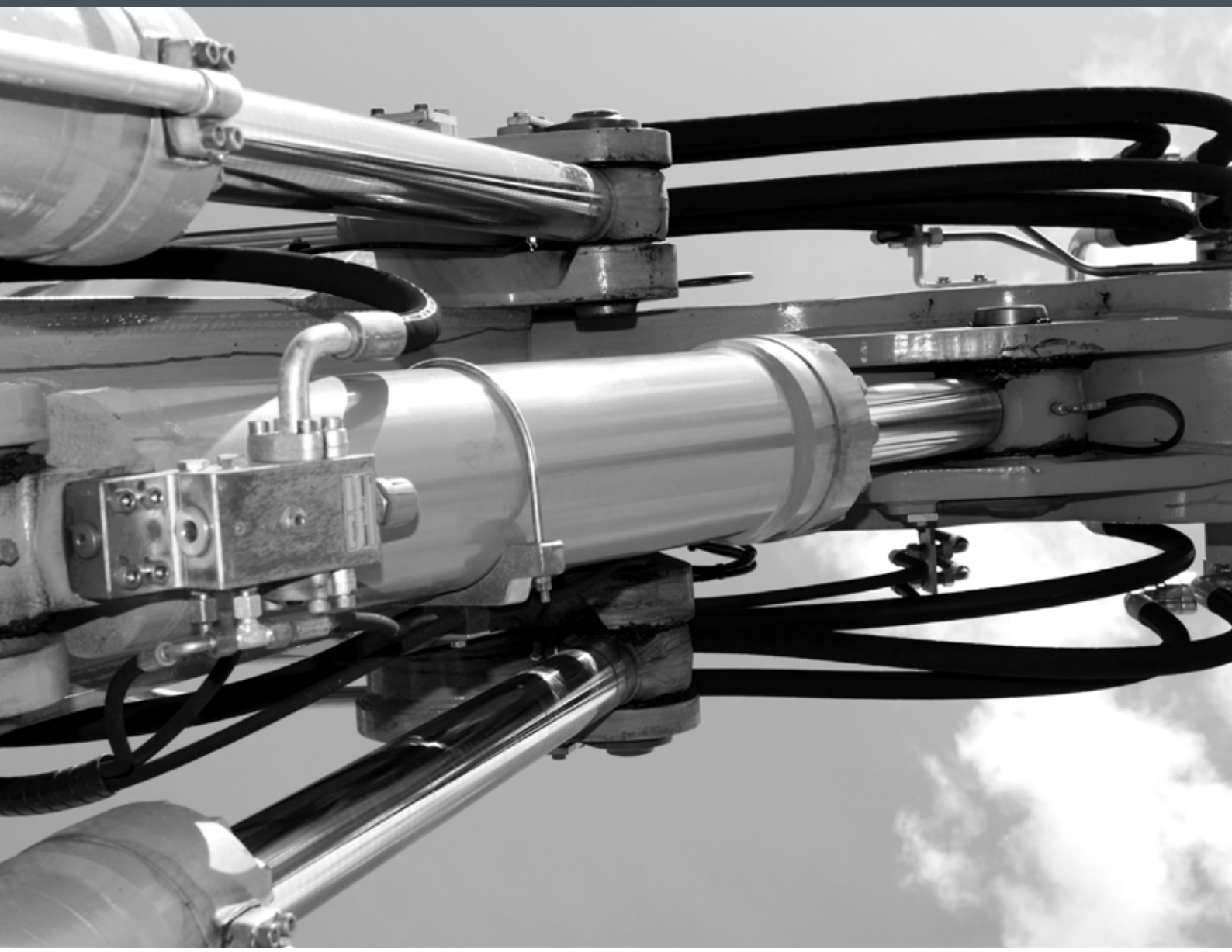

A COVID-19 LEGAL TOOLKIT FOR THE CONSTRUCTION INDUSTRY – FORCE MAJEURE & CHANGE IN LAW

In this briefing, HFW covers how the Covid-19 Pandemic may give time and/or cost relief under construction contracts, either as Force Majeure or a Change in Law.

Nobody saw it coming

A consensus has formed in the construction industry that Covid-19 is a Force Majeure event. It's easy to see why, considering the exceptional and unforeseen disruption and delay the pandemic has caused to construction projects. However, because Force Majeure will often only give an extension of time and not money, many contractors hope that government level reaction to Covid-19 will also amount to a change in law in order to trigger cost entitlement for the substantial losses being suffered on projects impacted by Covid-19.

This briefing considers whether Covid-19 constitutes Force Majeure or a Change in Law, and the extent to which either mechanism gives a contractor time and/or cost entitlement. We consider the position by reference to three commonly used standard form contracts: FIDIC 1999, NEC4 and the JCT DB 2016.

Covid-19 and Force Majeure

It is worth noting that the term 'Force Majeure' is not used in all the commonly used standard forms of construction contract, perhaps reflecting the fact that it is not an established concept in many common law jurisdictions. However, the standard form contracts do all contain provisions that deal in one form or another with the impact of unforeseen and exceptional events such as Covid-19. These provisions are included to provide a mechanism for controlling the effect of unforeseen supervening events, such as Covid-19.

The table opposite considers how unamended FIDIC 1999 Yellow Book, NEC4 and JCT DB 2016 forms of contract provide for Force Majeure type events.

The parties, however, frequently amend standard form Force Majeure clauses, meaning contracts must be considered individually. A common amendment, for example, is to include an exhaustive list of force majeure events, or to perhaps exclude the impact of a Force Majeure event on labour or other resource availability.

FIDIC Yellow Book 1999 Clause 19	Clause 19 provides that Force Majeure must be • an exceptional event, • beyond the parties' control, and • the party relying on the event could not reasonably have provided against it before entering into the contract. It is therefore likely that Covid-19 meets these criteria, assuming the contract was entered before the effect of Covid-19 had become known.
NEC 4 Clauses 19 and 60.1(19)	NEC does not use the term Force Majeure, instead the contract adopts the concept of 'prevention' in Core Clauses 19 and 60.1(19). An event meets the 'prevention' criteria if: • it stops a contractor from completing the works, • neither party could have prevented it, and • an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable to have allowed for it. It is therefore likely that Covid-19 meets these criteria, assuming the contract was entered before the effect of Covid-19 had become known.
JCT Design & Build 2016 Clause 2.26.14	'Force majeure' is a Relevant Event (but not a Relevant Matter). JCT does not define what is meant by 'force majeure' and interestingly does not include 'foreseeability' criteria. In our view it is likely that the current Covid-19 pandemic would constitute force majeure for the purpose of a JCT contract, possibly even if the contract is entered after the effect of Covid-19 had become known.

Is Covid-19 a Force Majeure Event?

Accordingly, and whilst fact specific, for contracts concluded before Covid-19 first became known, the virus outbreak is likely to qualify as a Force Majeure event under unamended standard form contracts.

The issue becomes less clear for contracts entered into during 2020. At what point was it reasonable to foresee that Covid-19 would cause delays, costs and disruption? Who could have foreseen the unprecedented lockdowns and restrictions on social movement that followed? To illustrate: was Covid-19 'reasonably foreseeable on':

- **4 January 2020:** when the World Health Organisation (WHO) reported a cluster of pneumonia cases in Wuhan, with no deaths?
- **30 January 2020:** when the WHO declared Covid-19 an international public health emergency?
- **11 March 2020:** when the WHO declared a global pandemic?

For contracts which have yet to be entered into Covid-19 is no longer 'unforeseeable' and as a result it will not be a Force Majeure event (save perhaps for JCT contracts which do not contain a foreseeability test for force majeure). For future contracts it is therefore essential to expressly provide for the time and cost risk of Covid-19 in the contract.

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The practical implications of Covid-19 as a Force Majeure event for current and future projects

Current Projects: Delay, Disruption and Cost	**Notification: When does the clock start ticking?** Most construction contracts will require that claims for Force Majeure events are notified within a reasonable time after the contractor became aware (or should have been aware) of the event and its impact. Some contracts will limit or exclude claims that were not notified within a reasonable time. Because of the fast-moving nature of developments around the pandemic, determining if a notice was given within the time period required by the contract is likely to be contentious. If there is any uncertainty, then in our view a notice should be given. **Time is not always money** The FIDIC 1999 Yellow Book and NEC4 contracts both envisage the award of time and additional costs for a Force Majeure event. However, whilst still permitting the recovery of time, the later FIDIC Yellow Book 2017 only permits the award of additional costs for a limited list of events – that does not include pandemics or epidemics such as Covid-19. The JCT DB 2016 only grants additional time for Force Majeure. Covid-19, however, will cause both delays and costs and contractors need to consider whether a Force Majeure event claim will fully cover their exposure from Covid-19. To fully recover, contractors may have to base claims on alternative grounds, such as Employer's instructions, changes in law or other grounds available in the applicable jurisdiction. **Claim entitlement where construction sites remain open** In some countries, for example in England, construction sites have been permitted to remain open subject to social distancing rules. Other countries have specifically ordered sites to shut. Some contractors may be able to work but will not be able to do so in way that meets social distancing guidelines. If governments introduce social distancing 'guidelines' for construction sites but do not change the 'law' then is this a change in law? Are these contractors entitled to additional time and costs?
Future Projects: Allocation of risk for future Covid-19 impact	**Covid-19 will no longer qualify as Force Majeure** Covid-19 will not be 'unforeseeable' for contracts that were recently concluded or those currently being negotiated. As with the timing of claim notifications, determining when Covid-19 became foreseeable and whether this impacts on a claim for Force Majeure needs to be considered carefully. **Working in the new normal** As Covid-19 is unlikely to qualify as a Force Majeure event for future projects, parties need to allocate risk and manage future Covid-19 impact through the addition of so called 'coronavirus clauses'. Parties should also reconsider Force Majeure clauses in general to learn lessons from the Covid-19 pandemic, in particular to ensure the mechanisms take effect for similar pandemics in the future.

Covid-19 and Change in Law

Whilst contractual provisions dealing with Force Majeure are an obvious place to begin when considering entitlement for the impact of Covid-19, there may be scope for a contractor to argue that other contract provisions are relevant – particularly those dealing with Change in Law, variations or suspension. Some contracts grant additional time, but not costs, for Force Majeure – but will grant both forms of relief for a Change in Law. Future bulletins will return to variations and suspension in relation to Covid-19, but this bulletin focuses on the relief available for Change in Law.

Covid-19 is such an unprecedented threat that it has led to the introduction of a raft of governmental actions (i.e. 'advice' or 'recommendations') as well as new legislation around the world. There is therefore a strong possibility that the Covid-19 impact on projects may trigger Change in Law entitlement under many construction contracts. As is the case with Force Majeure, the concept of a Change in Law and the available contractual relief is dealt with in different ways under the major standard-form constructions contracts. We highlight opposite the approach taken by these contracts.

As with Force Majeure provisions, it is likely that the standard form contracts will have been heavily amended in terms of applicable change in law provisions. It is therefore important to check each contract carefully. For example, a common amendment is to allocate the risk of reasonably foreseeable changes in law to the contractor.

FIDIC Yellow Book 1999	**Clause 8.4:** The contractor is entitled to additional time if it is delayed due 'unforeseeable shortages in the availability' of labour or materials because of an epidemic or governmental actions. **Clause 13.7:** Compensation is granted for delays and costs caused by a Change in Law.
NEC 4	**Clause X2:** If parties select this optional clause – a change in law of the country where the site is located is a compensation event entitling a contractor to additional time and costs.
JCT Design & Build 2016	**Clause 2.26.12:** Additional time for delays caused by the exercise of any statutory power by the UK Government or any local or public authority. **Clause 2.15.2.1:** A change in statutory requirements after the base date, which necessitates an alteration or modification to the Works, will constitute a variation.

Countries have legislated to manage Covid-19 – but is it a Change in Law?

Countries have responded in a variety of ways to the Covid-19 pandemic. The key question is whether these responses amount to a Change in Law?

As an example, the UK published the Coronavirus Act 2020 (the Act) on 25 March 2020, which provides a legislative framework for its pandemic response. It contains provisions which could conceivably affect specific construction sites – such as powers to order the closure of premises (including offshore installations and vessels) and to prohibit gatherings if there is a risk of Covid-19 transmission and threat

to public health. These provisions, however, have not been specifically used by the UK Government (yet).

Rather than use its powers under the Act, the UK Government has instead encouraged sites through the issue of 'guidance' or 'recommendations' to remain open, provided that they do so in a way that meets social distancing Standard Operating Procedures (SOPs) published by the Construction Leadership Council. The latest such guidance was published on 15 April 2020. Importantly, this confirmed that the Health and Safety Executive (HSE) is the enforcing body for the SOPs – which raises the prospect that the HSE could use its powers of inspection, cautions, notices and enforcement orders.

Change in law and Covid-19 in practice

In practice, whether a contractor is entitled to additional costs due to a Change in Laws will be fact specific and decided on a contract-by-contract basis. Where countries have introduced legislation to require the closure of construction sites, contractors may be entitled to rely on the relief available for a Change in Law. The question that may arise is whether Governmental 'guidance' or 'recommendations', or the prospect of enforcement action being taken by the HSE (in the UK) to enforce compliance with such 'guidance', amounts to a Change in Law. This is likely to be the subject of future debate and dispute.

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