

Impact of Covid-19 on Construction Contracts

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Intro

As the World Health Organisation announced last week that Coronavirus can now be classified as a pandemic [[WHO Director-General remarks on COVID-19](#)] we are hearing from more and more clients worried about the impact of Covid-19 on their construction contracts.

Worries surrounding the supply of materials, shortage of labour and delays to projects are concerning much of the construction industry. In this article, we will take a look at how construction contracts deal with issues such as these and the steps you can take to mitigate risks.

First Points

Firstly, has your contract been modified? And if so, how? If a specific reference to pandemics or government action is included, where has the risk been placed? Given the seemingly limited likelihood of the country being shut down, this may be something which gained little attention during contract negotiations but will suddenly be more important.

The outcome of a claim or dispute arising from the outbreak may depend upon when you entered into your contract. The first death from unknown cause pneumonia was reported to the World Health Organisation in China on 31st December 2019. So would a global response or shut-down have been reasonably foreseeable after the media started reporting the incident around January 10th 2020? Could this be an argument put forward should a dispute arise?

JCT

Under the unamended JCT Design and Build 2016 contract, the contractor carries the risk for time and cost for delay events which are under its control. If a neutral event (i.e. not an employer risk event) causes the delay, then the contractor is entitled to time but not money. If the employer causes delay (i.e. prevention, changes etc) then the contractor is entitled to time and money.

The circumstances under which a contractor can claim for additional time include those which are deemed a change. Under clause 5.1.2. a change can include impositions by the employer which affect access to site, limitations to working space or hours or the execution or completion of the works in any order. If these limitations

are imposed by the employer, it is vital that they are received in writing. Additional time would also be awarded if the employer suspends the works.

JCT also contains provisions for Force Majeure, but unfortunately as we recently discussed in our article on weather [[Clarkslegal Updates on what are the rules in contract and law](#)] the JCT does not define Force Majeure. Generally, force majeure excludes liability for events outside of a party's control and unforeseeable at the date of the contract. In some cases, you may be able to argue that a global pandemic qualifies. However, it is fairly common to see a definition added to the schedule of amendments, so you will need to scrutinise the contract and any amendments thoroughly.]

It is very important that the contractor gives the required contractual notice to the employer of the delay event and its expected impact on the completion date.

NEC

Unlike the JCT contract, under NEC the contractor is entitled to both time and money in the case of a compensation event.

Compensation events are those which stop the contractor completing the whole of the works by the completion date on the accepted programme which neither party could prevent and an experienced contractor would have judged as having such a small chance of occurring that it would not have been allowed for at the time the contract was entered.

If your contract was entered in to prior to the outbreak, it may be reasonable to argue that Covid-19 was an unforeseen event. However, with global pandemics on the rise, it may be the case that parties will increasingly be expected to make allowances for these types of events.

The NEC relies on an early warning notification system. Therefore, it is vital that you comply with your notice provisions as soon as you are aware of any impact from Covid-19.

Again, as with JCT, any amendments will need to be scrutinised in close detail, to ensure the risk profile of any changes to the contract. Something that may have seemed trivial during contract negotiations could now be very pertinent.

What to do next

Assess your projects for your obligations and risks. Regardless of which form of contract you have entered, your review should consider the progress of the works and the likely impact of Covid-19 on your project.

Compiling the relevant information will allow you to prioritise areas where you may be impacted most. When reviewing your contract documents you should consider:

- The commencement and completion dates in order to ascertain if any projects can be suspended by agreement.
- Interim application dates and requirements for applications for payment.

- Provisions dealing with entitlement to time and money – and any amendments to these.
- Requirement to give notice to the employer, including timing, content and conditions precedent.
- Relevant termination provisions.
- Any mitigating steps you can take against delay and prolongation costs (you are required under the JCT to use best endeavours to avoid delay).
- Any risks specific to your project.

This information should allow you to ensure you abide by any contractual obligations and manage your projects effectively. Ensure that you keep detailed records and understand any contractual requirements to notify your employer of any changes in circumstance.

Insurance

Now would be a good time to review insurance policies so you are clear on your position. Many will require timely notification of an insured peril, so be certain you have made a note of the time restrictions in your policy. Sadly, being able to demonstrate a pandemic occurred may not be enough if notification was not provided within required timescales.

Taking the JCT form, there is a requirement for certain items to be covered by insurance:

fire, lightning, explosion, storm, flood, escape of water from any water tank, apparatus or pipe, earthquake, aircraft and other aerial devices or articles dropped therefrom, riot and civil commotion.

As can be seen – there is no mention of international pandemic, so this may be something which had not been considered. The exact wording of each policy may need to be scrutinized to try to identify where risks lie.

Similar to contractual requirements, records will be critical. We always try to emphasise the critical importance of good, structured and organised record keeping. This will be absolutely crucial in the coming weeks. The precise impact of each change to the business and projects will need recording carefully.

New Contracts

If you are in the process of negotiating a contract (especially if you have already started works on site) you need to think very carefully about what commercial amendments you may need to agree to take into account what are likely to be significant delays and limitations on your method and sequence of working. In addition, you may want to include specific wording that allocates the risk of Covid-19 and entitles you to time and/or money and to terminate.

Security / Workforce and Supply Chain

Security on site may become an issue as labour forces become subject to rapid change. Perhaps consider what policies and systems you have in place for maintaining quality in that regard, and what you can do to maintain standards. There will normally be an obligation to secure site and in many cases a minimum provision in that regard – should staff become unavailable, are you able to fulfil the requirements of the contract?

With regard to supply chain and sub-contracts, it may be worth checking that agreements are designed to ensure you meet your client's requirements. What remedy is available to you in the event the supply chain experiences delays. The industry has a significant reliance, for example, on glazing from Germany, steel supplies from China, and other products from Italy, Spain and the Netherlands. These are all likely to be affected. Those countries represent the top five suppliers to the UK construction industry and with the possible exception of the Netherlands, are all badly affected by COVID-19. [Monthly Statistics of Building Materials and Components](#)

Conclusion

As always, the key here is understanding your contract and keeping good records. Sadly if your contract is not clear, things are likely to be difficult, but often the law can step in to assist. Key things to remember include:

- Check your contract terms.
- Ensure you do not take any steps without giving notice in writing as specified in the contract.
- Keep good records that will help you demonstrate the direct link between a causal event and delay / disruption to your project.
- Review insurance policies to identify what (if anything) can be recouped through insurance.
- Check your supply chain, ensure your contracts and agreements with suppliers and sub-contractors are not putting you at risk.

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