As the number of cases continues to rise in the UK, and the effects of the virus both domestically and internationally increase, previously we commented that it was within the realms of possibility that COVID-19 would further impact construction and infrastructure projects in the UK with labour and material shortages, or even halting progress altogether. We are now in that reality.

The Government’s increased measures to slow the spread or ‘flatten the curve’ of COVID-19, including closing schools, advising working from home and restricting personal freedoms, has created enormous uncertainty for projects and construction in terms of how these restrictions apply to site operations. Things are getting a little clearer, for now at least.

On 31 March 2020, the Secretary of State for Business sent a letter to the construction industry confirming that people working in the construction industry can continue to travel to work and effectively endorsed the Site Operating Procedures published by the Construction Leadership Council (CLC). The procedures “introduce consistent measures on sites of all sizes in line with the Government’s recommendations on social distancing” and will be kept up-to-date with the latest guidance from Public Health England.
The Coronavirus Act 2020 (the Act) was given Royal Assent on 25 March 2020 and is now in force. Section 52 and Schedule 22 confer on the Government the right to close premises during a "public health response period". As far we are aware, we are not currently in a public health response period in England because no declarations have been issued to that effect, so the Government is not yet entitled to issue a direction of this nature under the Act. Scotland, however, issued a declaration on 27 March 2020 commencing a public health response period, but we have not found any directions given under it. Directions must be "published in a manner as the Secretary of State (or in the case of Scotland, the Scottish Ministers) considers appropriate to bring it to the attention of other persons who may be affected by it." Despite the Government not specifically ordering construction sites to close, the industry has been facing pressure to do so of its own accord, with numerous major contractors having decided to close their sites across the UK.

This article provides an overview of some of the key contractual provisions and takes a brief look at the common law doctrine of frustration, which parties involved in construction projects in the UK should consider in order to protect their commercial position as a result of the additional risks and issues caused by the COVID-19 pandemic. It considers the approach of two of the most widely used domestic standard forms - JCT and NEC - to the situation, and provides practical tips for those who might be affected and how they might mitigate the risks that may arise.

Entitlement to Extensions of Time / Loss and Expense

Contractors concerned that they could face delays or increased costs as a result of the COVID-19 outbreak would be well advised to consider whether they have any express entitlements to relief under their contract.

For example, a contractor may seek an entitlement to extensions of time and/or additional payment in the event that:

- shortages of labour arise as a result of preventative measures to alleviate the outbreak spreading and/or due to infection, or potential infection, and the resulting quarantine, or self-isolation, required;
- shortages of plant and materials arise due to delays in their importation or transportation or the closure of plant hire companies or suppliers;
- the site is closed or access is restricted as a result of measures to contain the COVID-19 outbreak; and/or
- the contractor is not able to carry out the works as a result of action by governments to prevent the spread of the outbreak.

We consider below the possible entitlements under JCT and NEC standard form contracts.

JCT

Force Majeure

Force majeure is a foreign law concept, originating from French civil law, which has been introduced into English law contracts, where it remains a creature of contract and not a common law doctrine. It is usually used to refer to circumstances that are outside of the parties' control. Whether it can be relied upon in relation to the COVID-19 outbreak will depend on how the clause is triggered in the contract. The JCT suite of contracts makes express reference to "force majeure" being a "relevant event" (see, for example, Clause 2.29.15 of the JCT Standard Building Contract 2016) and a potential termination trigger (at Clause 8.11 of the same form).
Force Majeure as a Relevant Event

As epidemic or pandemic events are not listed as separate relevant events, entitling a contractor to an extension of time, contractors seeking entitlements resulting from the COVID-19 outbreak would most likely seek to do so under the "force majeure" relevant event.

Notably, in an unamended JCT there is no contractual definition of force majeure. Parties should, in the first instance, check for a contractual definition of the term in any schedule of amendments. Some force majeure clauses set out an exhaustive or non-exhaustive list of events or circumstances that may amount to force majeure (floodings, fire, war etc.); some use broad wording such as "an event beyond the reasonable control of the parties" (or a combination of the two); and some clauses leave force majeure as an undefined occurrence. Force majeure clauses also often build in the concept of foreseeability but there is no mention of this in an unamended JCT.

English law authority on force majeure is few and far between. A statement of the meaning of force majeure by Goirand was approved by McCardie J in Lebeauvin v Crispin [1920] 2 KB 714 as applying to many English contracts, and suggests that an epidemic may constitute a force majeure event:

"Force majeure. This term is used with reference to all circumstances independent of the will of man, and which it is not in his power to control... thus, war, inundations and epidemics are cases of force majeure; it has even been decided that a strike of workmen constitutes a case of force majeure."

In Clifford Gardner v Clydesdale Bank Limited [2013], it was said obiter that a flu pandemic was force majeure. It is not force majeure, however, if the contract has just become more expensive to perform (Thames Valley Power Ltd v Total Gas & Power Ltd [2006]). There are no reported cases testing the scope of the term "force majeure" in the context of JCT contracts.

Without a specific definition provided in the JCT, and without common law precedent relating to JCT, the meaning of force majeure may have to be determined by case law in the courts. Some commentators have indicated that interpretation of force majeure under JCT is likely to be restrictive because similar matters, which would typically constitute force majeure, are already expressly dealt with as relevant events. As an epidemic / pandemic is not covered by other relevant events, it would seem to be reasonable, however, for contractors to seek to rely on the force majeure relevant event to cover such circumstances. Whilst, we would like nothing more than to be able to give you a concrete answer on this, ultimately it will turn on the facts relating to the build in question, including the stage of the build.

Importantly, and as to be expected, the contractor must notify the Architect/ Contract Administrator forthwith, stating the applicable relevant event(s), "if and whenever it becomes reasonably apparent that the progress of the Works or any Section is being or is likely to be delayed" and must (either in that notice or as soon as reasonably practicable thereafter) give particulars and estimates of its expected effects (i.e. programming and the durations of delays). The obligation to notify is continuing and material changes in the estimated delay or any other particulars must be notified. Failure so to notify is likely to result in the contractor losing this entitlement, so it’s imperative to stay on top of notices.

Employers should make sure that they enforce these provisions around programme information because an up-to-date copy of the programme is a very effective tool when analysing extension of time claims to see where the critical delay lies. In unamended JCT Contracts, extensions of time can be awarded in respect of concurrency between relevant events and other contractor culpable delays, and so, whilst it may be the case that force majeure need not be the sole cause of the delay (as is normally required), a Contractor would still need to show
that this event was on the critical path of the programme and any extension of time given would likely take into account other causes of delay.

Contracts often provide that a party seeking to rely on force majeure will need to be able to show that they have sought to mitigate the effects of the event and JCT contracts are no exception. There is a requirement on the contractor, albeit not expressly related or limited to force majeure, for example at clause 2.28.6.1 of the JCT Standard Building Contract 2016, to "constantly use his best endeavours to prevent delay in the progress of the Works or any Section ... and to prevent the completion of the Works or Section being delayed or further delayed beyond the relevant Completion Date". A Contractor would have to demonstrate that it had made reasonably considerable efforts (including potentially some additional expenditure) to mitigate the delay. This obligation should not be overlooked because, again, a failure to do so could result in a loss of entitlement to an extension of time under the JCT contracts or at least a reduction to reflect the lesser delay that would have resulted if the Contractor had properly complied. Contractors will likely take certain steps as a matter of course, such as seeking alternative supply sources, but should also be taking steps to minimise the impact of the virus itself, for example by adapting site attendance protocols and working practices, now in accordance with the CLC Site Operation Procedures.

It is worth noting that 'force majeure' is not included in standard form JCTs as a "relevant matter", so whilst the contractor may be entitled to an extension of time for a force majeure event, they would not be entitled to loss and expense. The effect of this is that a contractor does not have to pay damages for delay, but he must bear any cost resulting from the delay (effectively meaning that a 'force majeure' event is treated as a neutral event, where the financial risk is split between the contractor and employer).

**Force Majeure as a Termination Trigger**

In a worst case scenario, as alternative to claiming for additional time, parties may wish to consider their termination rights. Clause 8.11 of the un-amended JCT Standard Building Contract 2016 provides for termination by either party by reason of force majeure. Even if sites are not ordered to close (and no order for site closures has happened yet), the current restrictions in place and the wider effects of COVID-19 could continue for the foreseeable future and the economic benefit of preserving the contract may be eroded given the degree of uncertainty and the real risk of accumulating costs or losses from delay.

The right to terminate under Clause 8.11 arises if the carrying out of the whole or substantially the whole of the uncompleted works is suspended for the period set out in the contract particulars (the default position being two months). In the event of suspension for the specified period due to a force majeure event, either party may give notice to the other that, unless the suspension ceases within seven days of receipt of the notice, the contractor's employment may be terminated on the service of a second notice (which is given upon the expiry of the first notice period).

Parties should be conscious of the risk of terminating for reason of force majeure - if the event (i.e. the virus outbreak) is deemed not to be "force majeure", the party seeking to rely on it could leave itself open to a claim for repudiatory breach of contract. That is not a good position to be in, as it entitles the innocent party to compensation putting it in the same position as if the contract had been properly performed – potentially a significant sum. In addition, parties should consider carefully the other potential effects of triggering a termination event, such as reputational risks, and the potential damage to long-term supply chain relationships.

**Other Relevant Events**

In addition to force majeure, the JCT standard form also includes the following as a relevant event: "the exercise after the Base Date by the United Kingdom Government of any statutory power which directly affects the
execution of the Works". It is questionable whether at this point the Government has exercised such powers, which would give grounds for an extension of time claim for this relevant event.

The CLC Site Operating Procedures are guidelines and not statutory requirements. The Government has the power, under the Health Protection (Coronavirus, Business Closures) Regulations 2020 to close certain premises and businesses, as listed in the Schedule to the Regulations, which does not include construction sites. As mentioned above, as far as we are aware, a "public health response period" has not been declared yet under the Act - during which period the Government would be able to issue directions under the Act in respect of the closure of premises, because no declaration to such effect has yet been made (in England at least). So it would seem, at least for now, that contractors are unlikely to be able to rely on this relevant event.

Government intervention has not yet gone so far as to close sites or prevent works from continuing, so it is up to the parties to decide what to do. Contractors will be reluctant to abandon sites for fear of being in breach of contract and employers will be reluctant to issue an instruction denying access to site because this could constitute a Change under clause 5.1.2, for which loss and expense may become payable under clause 4.21.1. If and when construction sites are required to close, then employers will need to word carefully any related notice to avoid such notice being deemed to be an employer's instruction.

NEC

Compensation Event

Clause 60.1(19) of the NEC 3/ NEC 4 Engineering and Construction Contract entitles a contractor to an extension of time as well as compensation if an event occurs which:

- "Stops the Contractor completing the whole of the works; or
- Stops the Contractor completing the whole of the works by the date for planned Completion shown on the Accepted Programme.

and which:

- neither party could prevent;
- an experienced contractor would have judged at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it."

The final limb of the test may prove troublesome at this stage for a contractor looking for an extension of time / compensation under a contract signed in the last few weeks, given the scale and impact of the outbreak. For those contractors it would be difficult to argue that the effects of COVID-19 had such a small chance of occurring that it would have been unreasonable to have allowed for it. Contractors that had already entered into an un-amended NEC standard form by the time the COVID-19 outbreak was widely reported are more likely to succeed in arguing that such an outbreak had such a small chance of occurring that they could not reasonably have allowed for it.

As with JCT, if the employer (or its project manager) were to close the site outside of a requirement by the Government to do so, then the contractor would potentially have further grounds to claim an extension of time and compensation, for example under clauses 60.1(2) and 60.1(4) of NEC4. These provisions cover the employer not allowing access to and use of each part of the site and the project manager giving an instruction to stop or not to start any work.
NEC is rooted in the principle of mutual trust and cooperation, which applies equally to the process for notifying compensation events. Whilst the notification process is designed to give early warning to encourage collaboration and to mitigate risks contractors should be mindful of the somewhat proscriptive procedure for notifying compensation events. Contractors must notify the project manager of a potential compensation event under 61.3, within 8 weeks of becoming aware of the event or risk losing their entitlement to additional time or money. This is on top of the obligation at clause 15.1 which requires a contractor to give early warning when they become aware of any matter which could increase the price, delay completion or a key date, or impair performance of the works.

**Future Contracts**

These unprecedented times are highlighting that construction documents are not generally drafted to deal with circumstances like these. The increasing prevalence of epidemics (including, for example, recent outbreaks of swine flu, Ebola, and SARS) does raise questions as to whether parties might increasingly be expected to make allowances for such outbreaks. Going forwards, parties should consider including amendments expressly allocating the risks between the parties, including programme delay and any associated additional costs, as well as responsibilities in the event of site closure, including site security and de- and re-mobilisation, arising as a result of COVID-19, and indeed epidemics and pandemics more widely.

Contractors will not want to bear the risk of events like these and equally employers will not want to see longer programmes and more expensive build costs that could potentially arise from contractors factoring in eventualities like these. Maybe the way forwards is some sort of risk sharing, if funders will allow it - even they may have to take a more flexible stance than usual if negotiations are to progress. We are already seeing COVID-19 related amendments and hopefully, risk allocation and contractual amendments will evolve and become clearer as parties navigate their way through this.

**Frustration**

Parties may also consider whether the doctrine of frustration applies. The doctrine was developed to deal with situations where something occurs after the formation of the contract which "strikes to the root of the contract" rendering it physically or commercially impossible or illegal to fulfil the contract or transforming the obligation to perform into an entirely different obligation from that which the parties contemplated at the time of entering into the contract.

Unlike force majeure, where frustration does apply, the contract is automatically terminated upon occurrence of the frustrating event. As neither party is at fault and therefore no party is able to claim for damages, the common law provides that losses are dealt with where they lie. This used to lead to inequitable results, as, for example, a party might not be able to recover a pre-payment made under the contract. To address this, the Law Reform (Frustrated Contracts) Act 1943 was introduced to allow pre-payments to be recovered or, conversely, where a party has derived considerable benefit from a contract prior to the frustrating event equity can intervene to require that the party receiving the benefit makes fair payment for it.

Some of the consequences of COVID-19 may render some contractual obligations impossible (if, for example, the outbreak resulted in whole cities being locked-down). Parties should, however, be aware that, perhaps due to the finality of the remedy, the courts are usually reluctant to find that a contract has been frustrated. As a result, the threshold for proving frustration is likely to be higher than for force majeure.

As frustration is a permanent remedy, it should only be considered as a last resort. As the burden of proving frustration is a heavy one, where parties are not yet in contract, it would be sensible to consider how COVID-19 could impact the contract and specifically provide for this in express terms.
Conclusion

Parties to construction contracts will naturally be concerned about the commercial effect of the Coronavirus outbreak on their operations.

We urge parties to carefully review the terms of their contracts, particularly any amendments to the standard forms, in order to determine the rights and obligations of both parties in relation to extensions of time and entitlement to additional payment as well as the obligations of the parties in the event of site closure. In this regard, parties should also consider the wider reaching effects of the outbreak, including changes in legislation or regulations and the knock-on effect this might have on site access, supply of materials and availability of labour.

It would appear that the construction industry is currently in a bit of a stalemate because there are potential contractual ramifications for whichever party takes the first step in stopping the works. In these unprecedented and uncertain times where related contractual provisions are varying shades of grey at best, the most sensible thing to do would seem to be to discuss the issues at hand and agree the best way forwards for all concerned.

Going forwards it may well be worth - in light of the coronavirus outbreak and the others that have gone before it, such as SARS and swine flu - giving more thought to epidemics and pandemics than previously, especially in this increasingly global economy of ours. Parties should consider expressly providing for such events in their contractual arrangements with a view to dealing at the outset with the risks associated with them.

Please do not hesitate to contact us if you would like our assistance in considering your contractual rights and obligations, and so that we can help better protect your business in light of COVID-19 and its potential consequences.


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