

COVID-19 Issues Affecting Construction Contracts and Development Projects

July 16, 2020

In this note we consider practical issues affecting developers, contractors and funders of development projects balancing practical implications of the COVID-19 crisis with the need to progress works and comply with legal obligations in development, construction and loan agreements.

1. Contractual Considerations – Does COVID-19 Constitute Force Majeure?

What is Force Majeure?

There is no implied concept under English law of relief from performance of contractual obligations due to an event of *force majeure* – generally accepted as being an event beyond the control of the parties to a contract which prevents the performance of the obligations of a party to that contract.

Position under JCT Standard Form

Most UK construction contracts contain express provisions in relation to *force majeure*. The standard form JCT construction contract (under which almost all UK commercial and residential accommodation developments are carried out) sets out detailed provisions for claiming relief from performance of obligations due to an event of *force majeure*.

The standard form JCT contract does not define what events constitute "*force majeure*", but this is often defined by the parties in a schedule of amendments to the JCT contract. *Force majeure* constitutes a "*Relevant Event*" which allows the contractor to claim:

- An extension of time for completion of the works;
- Relief from the payment of any liquidated damages which would otherwise be payable due to late completion of the works; and
- Termination of the contract if the event continues for a specified period (usually assessed either in aggregate or individual time periods).

Note, however, that *force majeure* does not constitute a "*Relevant Matter*" under the JCT contract, meaning the contractor is not entitled to claim additional loss and expense incurred because of the event of *force majeure*.

Termination of the contract can occur if the event continues for a prescribed period (usually assessed either in aggregate or individual time periods).

Position under NEC Standard Form

The NEC3 and NEC4 standard form construction contracts (under which almost all UK civil engineering projects are carried out) do not refer expressly to an event of *force majeure* but instead entitle a contractor to claim a "*compensation event*" if an event occurs that:

- Stops the contractor completing the works, or completing them by the Accepted Programme date;
- Neither party could prevent;
- An experienced contractor would have judged at the contract date to have had such a small chance of occurring that it would have been unreasonable for them to have allowed for it; and
- Is not one of the other compensation events set out in the relevant contract.

In response to the COVID-19 crisis, [the NEC published this guidance note](#), but each construction contract must be assessed on its own terms on a case-by-case basis to take account of any project-specific amendments which may be applicable to the contract in question.

Best Practice Approach

When reviewing each construction contract (whether adopting JCT/NEC or any other form) the following questions should be considered:

- Is there a schedule of amendments to the standard form contract (whether JCT or NEC)? This will almost always be the case and each schedule of amendments must be considered carefully.
- Does the schedule of amendments require *force majeure* to render performance physically and/or legally impossible or will *force majeure* arise if performance is simply rendered more difficult or is otherwise hindered?
- What mitigation measures are required from the contractor to sustain a successful application for relief due to *force majeure*? Contractors are sometimes subject to an obligation to use "*best endeavours*" mitigation measures (requiring a contractor to take all the steps in its power to take and capable of producing the desired result even if contrary to its own commercial interests).
- What notice requirements must be satisfied? What details of the event must be included in the notice and, critically, when must such a notice be given and what are the consequences of a failure to provide a notice within any required timescale? This point is important from the perspective of a contractor obliged to give such a notice. A failure to give the proper notice within the prescribed time could act as a time bar to any claim for relief.

2. Contractual Considerations – Does the Contract Include Other Grounds for Relief From Performance Due to COVID-19?

Whilst *force majeure* may be the most obvious reaction to the effects of COVID-19 on operational construction contracts, there are also other considerations to bear in mind. For instance, the JCT contract offers temporary relief from performance due to:

- Government action, such as a prohibition on gatherings or other public health measures that interfere with site operations;
- An employer instruction or act of prevention, such as a responsible welfare decision to suspend works (not mandated by government) to protect employees and contractors, or in view of wider health and safety responsibilities;
- Labour issues caused by civil commotion or union action, such as mass walkouts;
- Non-performance by utilities providers or delays in receipt of statutory permissions and consents (e.g. due to their own labour or supply constraints).

The introduction of the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and the general policy of the Government towards keeping construction sites operational indicates that "*government action*" may justify a relief from performance of obligations under a construction contract and this should be reviewed as further Government guidance is issued.

A Note of Caution for Employers, Lenders, Project Managers and Project Monitors

Government guidance not only places the onus on contractors to proceed with works safely but also requires contractors to deal with the costs of delay and disruption to works and supply chains.

Employers, lenders and those acting on their behalf (project managers and project monitors) should be careful not to issue inadvertently any form of instruction or guidance to contractors which constitutes an "*employer instruction*" to suspend or vary work – for instance, developers should avoid making the decision to close a site or to vary working practices on site. Under a JCT Contract, such an instruction would constitute a "Relevant Matter" and entitle a contractor to claim not just an extension of time but also additional payments for loss and expense.

What Next?

The gradual return to normal construction operations is clearly in the interests of all involved in construction projects. However, not all contractors and supply chain members will survive the crisis and insolvencies will occur.

Employers and developers may wish to consider as far as possible contractor requests for more time and flexibility to avoid construction period insolvencies but should also review the terms of construction contract performance security.

For instance, some parent company guarantees include stress-tests which allow a lender to call for additional security if the covenant strength of a parent company drops below a defined threshold.

It is clearly in the interests of all development parties for a contractor to remain in business and complete a project. However, that does not mean employers, developers and lenders should not be aware of all the options and it would be prudent to be prepared for what is likely to be a prolonged period of market disruption, claims and insolvencies.

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