

## Construction Law Update

### COVID-19 or “Coronavirus” - The Likely Effects on your Company and How Best to Mitigate them

The impact of the COVID-19, or Coronavirus, outbreak has been felt by businesses at every corner of the globe and the UK construction industry is far from immune. With the recent announcement from Public Health England that widespread transmission of the disease in the UK is “highly likely” in the coming weeks and months, we consider what this might mean for you and your construction company.

#### What are the potential implications of Coronavirus on a construction project?

There are two main ways that Coronavirus is likely to impact UK construction projects (and, in turn, companies). The first is by causing problems along the supply chain. Most projects will rely on the provision of materials, components or services from China, or another impacted country at some stage and, currently, many of the suppliers in question have been forced to suspend operations. It will not be long before the significant effects of this are felt in the UK. The second is the risk that a company’s workforce becomes infected. The government guidelines currently state certain individuals should self-isolate and, as construction workers cannot work from home like those in other sectors, this is likely to have a significant effect on a project. Both issues are likely to affect a company’s ability to perform its obligations under a construction contract.

#### What are the potential commercial implications?

The serious and inevitable impact that Coronavirus is having on parties up and down the construction “chain” is evidenced by the recent changes in the stock market. It was reported in Construction News last week that the that combined share value of Balfour Beatty, Kier, Morgan Sindall and Costain had dropped by £325 million from Monday to Friday. Large housebuilders were also reported to have been affected with Persimmon, Barratt, Taylor Wimpy, Vistry and Berkeley suffering a £4.5 billion combined drop in market value.

#### What steps should you take now to mitigate the effect on your company?

There are several steps that companies should take without delay to mitigate any harm which the outbreak may cause.

##### 1. Ensure employee safety

The first step is to attempt to avoid the spread of the virus and focus on the safety of employees by deciding on a company policy for situations whereby an employee may be infected and making employees aware of the same. It may also be useful to provide employees with guidance on prevention – i.e. hand hygiene and encouraging employees to carry tissues to cover their mouths if they cough/sneeze. Upcoming business trips should also be reviewed.

##### 2. Create continuity plans

The second step is to come up with continuity plans to minimise the disruption to projects. This may involve surveying suppliers and planning for material shortages, considering options to offset short-term cash-flow issues, keeping up to date with government announcements which may assist/advise and reviewing how best to counteract a potential shortage of manpower.

##### 3. Review live contracts

The third step is to review the contracts that are currently being worked under and consider your company’s rights and obligations. If your company cannot perform its obligations under a contract due to the Coronavirus outbreak, this could potentially amount to a breach of contract. The consequences of that potential breach for your business will depend on the terms of the contract and, in particular, whether it protects you against the risk of an epidemic.

#### How might your contract protect you and what is the position in the common standard forms?

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Where your project has been delayed by Coronavirus you may be entitled to claim an extension of time and additional payment from your employer. This will depend on how the contract deals with the risk of epidemic/disease, directly or indirectly.

### NEC

The NEC suite of contracts does not specifically deal with epidemics; however, a potential argument is that the effects of an epidemic fall under NEC3 clause 60.1(19). Under this clause a contractor is entitled to claim a compensation event whereby an event which neither party could have prevented, and had such a small chance of occurring that it would have been unreasonable to have allowed for it, stops the contractor completing the works at all and/or in accordance with the Accepted Programme.

### JCT

The JCT suite of contracts is likewise silent on epidemics, however, allows for an extension of time (and thus relief from liquidated damages) for *force majeure*. Force majeure is not defined in the JCT, so its meaning is open to interpretation; however, the widely replied upon definition, approved in *Lebeaupin v Crispin*, states “*all circumstances independent to the will of man and which is not in his power to control... thus, war, inundations and epidemics are cases of force majeure...*” notably “*any direct legislative or administrative interference,*” would also fall within the scope of force majeure.

### FIDIC

The 1999 FIDIC Red Book clause 8.4(d) specifically allows for an extension of time in the event of “*unforeseeable shortages in the availability of personnel or goods by epidemic or governmental actions*”.

Whilst the above is the position in the unamended standard forms, schedules of amendments commonly amend risk allocation meaning parties should be careful to check the precise wording of contracts.

### How might common law protect you?

If your contract does not provide protection as above, a last port of call may be the common law doctrine of frustration. This doctrine provides that where a change of circumstances makes performance of the contract physically or commercially impossible, a party is discharged from its obligations under a contract. Cases whereby frustration is successfully relied upon are rare, however, the serious effects of Coronavirus may well give rise to such a scenario.

### Practical considerations – act now!

In order to secure the protection outlined above, a party will undoubtedly need to jump through certain hoops within its contract. These hoops may include notifying its employer of the circumstance leading to it making a claim within a certain period of becoming aware of it. If this is the case, notice should be given now. Further requirements may include submitting revised programmes outlining delay, submitting early warning notices and submitting regular progress reports. Complying with such requirements will be key to mitigating the overall effects of Coronavirus on a company and should be identified and addressed as soon as possible.

### Comment

Whilst the above provides general guidance, we strongly recommend seeking legal advice as to a party’s protection/obligations in any specific contract which is likely to be affected. This will allow a party to protect its position by flagging up specific obligations it is required to comply with thereby ensuring additional costs/extensions of time will be available when required.

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