



COVID-19 – Impacts on UK Construction and Development Projects

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Overview of the Effect of COVID-19 on the UK Construction Industry

Brief Overview of Immediate Effects of COVID-19

- What has been the effect of COVID-19 on the UK construction industry
 - Double whammy this year for construction projects – BREXIT and COVID-19
 - What can employers expect to see?
 - Parties will be looking to protect their respective positions
- How have contractors and consultants reacted to COVID-19
- Current and future projects
- Some practical steps
- Effect on related agreements

Immediate Effect of COVID-19

- Shortage of labour:
 - Shortage of numbers due to current workforce being infected
 - Revised methods of working mean less operatives able to attend site
- Shortage / inability to get materials to site:
 - Factory shut downs
 - Restrictions on importation of goods into the UK
- More focus on getting designs right / review of the procurement processes



Reaction of Contractors and Consultants

Reaction of Contractors and Consultants

- Initial confusion
- Government initially slow in providing guidance
- Contractors electing to close sites?
 - Fear of health and safety claims later – health and safety at work obligations
 - Behavioural issues
- Large numbers of contractors and consultants have chosen to furlough staff
- How far down the supply chain have the effects been felt?
- On the whole – construction has proved itself to be resilient and adaptable



Current Projects

COVID-19 and Current Projects

- The approach which the parties are taking will very much depend upon the stage the project has reached
- Current projects vs new projects

Current Projects:


- Employers ought to be expecting early warning notices or notices under the contract requesting extensions of time
- Contractors will be examining their contracts
- What remedies are potentially available
 - Force majeure
 - Exercise of statutory power after the base date i.e. instructions to close sites. **Note** this needs to be more than guidance or good practice.

COVID-19 and Current Projects

- Relevant event **NOT** a relevant matter
 - Additional time but not additional money
- Notices and burden of proof
 - Onus will be on the contractor to serve notices and burden of proof that COVID has given rise to delays to the date for completion
 - **Note** JCT contracts differ from engineering style contracts – “use it” or “lose it”
- Mitigation
 - Best endeavours obligation to prevent delay

COVID-19 and Current Projects

- Other contract provisions
 - Variations and changes – employer instructions to restrict or close access to the site
 - Instruction to postpone part of the works
 - Act of prevention on the part of the employer
- NB: Some of these events will give rise to entitlement to time **and** money
- Who will blink first?
- Termination – prolonged force majeure / exercise of a statutory power – 2 months



**Future Projects - How Will
Contracts Change Following
COVID-19**

Future Projects

- What protections are contractors and consultants looking for:
 - Likely that it will no longer be a force majeure event **BUT** what about a second wave?
 - COVID-19 specific clauses
 - Contractors and consultants looking to push the envelope
 - Employers will want to ensure that any events remain neutral
 - Both Parties will want to avoid triggering termination events under their contracts – extension to prolonged suspension periods
- Market
 - Contractors – narrowing / restrictions of clause
 - Consultants – protections not being afforded due to different role and ability to carry out much of their work off site NB inspections

Future Projects – A Different Approach to Contracting?


- Contracts will still be drafted and concluded on the basis of who is the best party to manage any particular risk
- What enhanced procedures might Employers employ prior to letting contracts:
 - Greater contractor due diligence
 - Greater interrogation of Contractor's programmes and method statements
 - Increased supply chain due diligence
 - Review of risk allowances and contingencies
- He who hesitates?

Future Projects – A Different Approach to Contracting?

- Adjustment of traditional employer / contractor positions to avoid impact on costs and programme
- Greater importance / regard to health and safety
- Greater use of cost sharing arrangements
- Protection of supply chain
- Cash still remains the focus at all levels of the industry
 - Some housebuilders are recognising this



**Some Practical Issues Arising
from COVID-19**



What Should I Do If My Site Has to Close?

Practical Steps – What If My Site Has to Close?

- Leave site safe and secure
- Buildings to be made water / weather tight (depending on stage of build)
- Removal / storage of portable plant and equipment
- Insurances
 - Contractor's confirmation that insurances remain in place
 - Effect of periods of abandonment on insurances
 - Review any other insurances that may be in place including delay in start-up advanced loss of profits
- Discuss and agree with the contractor position regarding loss and expense – nobody likes surprises after all!
- Discuss and agree mitigating steps regarding the supply chain
- Review of materials ordered, title and liens over any materials
- Valuations of works completed at date of closure



**So My Site is Ready to Re-open –
What Do I Need to Think of?**

Re-opening Sites – Practical Considerations

- Health and safety
- Construction leadership council – site operating procedures – Rev 3
 - Travel arrangements
 - Material supply and delivery
 - Safe site operations
 - PPE
- Method statements – review of proposals
- Revised dates of possession and dates for completion
- Collaboration



So What Next for Construction?

So What Next for Construction?

- Greater collaboration – no one party is likely to be willing to shoulder all of the risk
- Review and protection of the supply chain
- Will we see a further review of payment streams?
- Greater emphasis on modular construction?



Impact on Other Agreements

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Any property agreement with an element of construction work may be affected for example:

- Development agreements
- Development management agreements
- Forward funding agreements
- Agreements for lease with landlord's works

The main impact on these agreements will be delay caused by closure of construction sites and labour and materials shortages and the interplay with target periods, longstops and KPIs contained in them.

Target Periods and Longstops

A well drafted development agreement, forward funding agreement or agreement for lease will typically contain:

- A target period for practical completion which is equal to the build programme (subject to extension if properly due under the building contract);
- An obligation on the developer/landlord to use reasonable or all reasonable endeavours to achieve practical completion of the development within the target period; and
- A longstop date (following which if practical completion has not been achieved the agreement may be terminated) of at least twice the anticipated build programme.

In the current situation where an agreement has been drafted in line with these principles the target date will be extended and there should not be an immediate problem.

If a project is already late as a result of some other difficulty and the longstop date is close, the parties may need to consider extending the longstop date to accommodate the current circumstances.

Liquidated Damages

- Where the development is a time sensitive build (for example student accommodation) the development / funding agreement is likely to include a liquidated damages clause that is triggered if practical completion is not achieved before a key date.
- The provision for payment of liquidated damages is generally accepted on the basis that it is passed on the contractor via the building contract.
- On the face of it such liquidated damages provisions should remain enforceable under the development / funding agreement.



Conclusion

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- COVID-19 took the construction industry by surprise
- The industry has shown itself to be resilient and adaptable
- Many sites have continued to operate
- This is only likely to be the beginning
- A sensible approach has been adopted to date BUT this is going need to continue or the technology and construction courts are likely to be very busy

Questions?





For more information,
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