

The coronavirus disease 2019 (COVID-19) pandemic has affected construction projects across all areas of the industry in the UK. This note explains the impact it has on the most common forms of UK construction contracts, namely JCT and NEC.

Contractors and employers will, unfortunately, have already experienced COVID-19-related disruptions. For example, site closures, furloughing of staff, arranging site security and demobilisation. Where sites do manage to remain open, consideration needs to be given to Construction Leadership Council (CLC) guidance (which covers safety procedures while working on construction sites during the COVID-19 pandemic), as well as dealing with immediate challenges such as the shortage of labour and materials. For developers/employers, there will be multiple concerns, relating primarily to delays to the overall project but also in relation to contractual obligations to tenants, purchasers and funders (subject to provisions under the relevant development agreement or agreement for lease) and claims from contractors for extensions of time and loss and expense. These issues need to be dealt with quickly and efficiently.

Force Majeure

We often see *force majeure* (FM) clauses in construction contracts. The Cambridge English dictionary defines “force majeure” as “an unexpected event such as a war, crime, or an earthquake, which prevents someone from doing something that is written in a legal agreement.”¹ FM clauses provide a party who has been adversely affected by an FM event to alter its existing obligations and liabilities under the contract. There is no established meaning under English (or Scottish) common law of FM. Drafting of such clauses is, therefore key, as it will define what might constitute an FM event in a given contract.

Many standard forms of contract will closely follow the dictionary meaning of FM, being an event that prevents or delays performance and is outside the control of the parties and was not foreseeable at the time of entering into the contract. More usually, an FM clause will specify events such as war, civil commotion, and natural disaster, etc. This can be either an exhaustive or non-exhaustive list. Where contracts have not listed epidemic or pandemic as an FM event, parties relying on such a clause may find it difficult to argue that COVID-19 has triggered the FM clause.

There are certain “catch-all” wordings in an FM clause, which refer to events that “cannot be reasonably avoided and beyond a party’s reasonable control”. Then, depending on the relevant facts of a given project, COVID-19 may or may not qualify as an FM event. Where a party has genuine difficulties performing its obligations and has supporting evidence as to how the current situation has affected its performance, it is likely that a court or an adjudicator will interpret this as an FM event.

JCT Design and Build (DB) 2016

Force Majeure

There is no defined meaning of FM under the standard JCT forms, thus it does not provide a list of what may comprise an FM event. As discussed above, FM clauses generally cover events that are outside a party’s control and it will be up to the courts or adjudicators to determine what it means. Case law² suggests that an event such as COVID-19, i.e. a pandemic, may in fact constitute an FM event. This applies particularly for existing contracts entered into prior to the COVID-19 outbreak. However, as regards contracts negotiated during and/or after the COVID-19 outbreak, where the parties can reasonably foresee the potential disruptions it could cause, then FM might not apply under the contract. In any case, under the JCT DB provisions, the contractor will need to (1) demonstrate the expected effects of COVID-19; (2) estimate the relevant delay on the programme; and (3) estimate the effect such delay has on the critical path. Employers should be advised not to simply accept extension of time claims, but follow the JCT provisions (for example, in relation to notice provisions) and request the contractor to provide details and supporting evidence of the actual impact on its performance of the works.

FM is listed as a Relevant Event under clause 2.26.14 of JCT DB 2016 (it is also listed as a Relevant Event under JCT SBC and ICD forms). JCT MW forms do not mention FM, but provide an extension of time provision in relation to delays as a result of “reasons beyond the control of the Contractor... that are not occasioned by a default of the Contractor”. This means the contractor may be able to make a claim for an extension of time and avoid paying liquidated damages. However, FM is not listed as a Relevant Matter under the JCT forms; therefore, the contractor is not entitled to make any claims for loss and expense as a result of an FM event.

¹ <https://dictionary.cambridge.org/dictionary/english/force-majeure>

² *Lebeaupin v Crispin and Company* [1920] 2 KB 714

Termination

If the performance of the works have been suspended as a result of the FM event for more than two months or the period otherwise stated in the Contract Particulars, then following the period of suspension, either party may terminate the contractor's employment by giving no less than seven days' written notice to the other party (unless the suspension ceases within the seven-day period). A separate notice of termination is then needed to actually terminate the contractor's employment.

Notice Requirements/Obligations

The following notice provisions under JCT DB 2016 should be considered:

- Procedure for notifying delay to progress (clause 2.24).
- Duty to use best endeavours to prevent delay to progress of the works (clause 2.25.6.1).
- Procedure for notifying a Relevant Matter (clause 4.20).

NEC4 ECC

Force Majeure

There is no express mention of FM events under NEC contracts. Instead, clause 19 of NEC4 ECC form (as well as NEC3 ECC form) deals with prevention and will be considered as a Compensation Event (clause 60.1(19)) if the test under clause 19 is satisfied. This is very similar to FM type of events. Under clause 19, these are events that:

- Prevent the contractor completing the whole of the works either completely, or **by the date for planned completion** [emphasis added] as stated on the Accepted Programme
- Neither party could prevent
- An experienced contractor would have considered it to have such a small chance of occurring at the time the contract was signed it would be unreasonable to have allowed for it

In essence, the event must have such an effect that the overall completion date is delayed. This means that if a delay does not impact on the critical path of the Accepted Programme, then it falls outside of the scope of clause 19 and the contractor will be unable to make a claim for delay.

Unlike JCT forms, A Compensation Event under clause 19 will entitle the contractor to claim for both an extension of time and loss and expense.

Termination

In terms of termination, unlike JCT DB 2016, which allows for mutual termination, the NEC4 ECC (as well as NEC3 ECC form) only allows the client to terminate the contract, not the contractor (clause 91.7). A client may terminate the contract, where a Compensation Event has prevented the contractor from completing the works or has delayed the completion date of the whole of the works by more than 13 weeks.

Notice Obligations/Requirements

NEC forms of contracts are considered more "contract management heavy" and there are more notice requirements/obligations compared with JCT forms. The following notice provisions under NEC4 ECC should be considered:

- Early warning of any event that could delay completion or increase cost (clause 15.1)
- Attending early warning meetings (clause 15.2)
- Revising programme (clause 32)
- Notifying Compensation Events (clause 61)
- Referring and resolving disputes (Option W1, W2 or W3 as appropriate)

Exercise of Statutory Powers Preventing Performance

Both JCT DB 2016 (clause 2.26.12) and NEC4 ECC (Option X2 Change in Law) provide for delay caused by the exercise of statutory powers by the relevant authority. However, our understanding is that there is no current government mandate in the UK to close any construction sites. Many contractors are continuing to work on sites, adopting site rules to allow for current guidance on social distancing, deploying suitable PPE and similar measures to progress with the projects. Delay of this type will probably not be considered as "government imposed" and thus employers, for the time being, will have a strong argument to object to any claims made by contractors. However, this may change in the future.

Frustration

Frustration is sometimes relied on to release parties from obligations under a contract. It occurs when something happens following the formation of the contract, which (1) makes it physically or commercially impossible to fulfil the contract, or (2) where the parties' original obligations have to be altered so drastically from when the contract was entered into and it is not the fault of either party. Very rarely are attempts to argue frustration successful due to its narrow common law definition.

CDM Regulations

As of the date of this note, parties' obligations under CDM Regulations have not changed. Parties to construction projects should continue to observe CDM Regulations as usual. There has been limited guidance from the Health and Safety Executive in the form of general advice jointly published with the TUC and the CBI. The UK government has provided information on Site Operating Procedures which were developed by the CLC in addition to guidance provided by Public Health England (not construction industry specific). Given this is such an unprecedented event, it would be prudent for parties to discuss issues relating to CDM Regulations and how construction sites are kept safe. They should also consider adopting the CLC's guidance on a case-by-case basis.

The circumstances surrounding the COVID-19 outbreak are fast-moving and government and industry guidance is doing its best to adapt to new developments. As with contract management in general, it is in the interests of all contracting parties to come together and seek an amicable and realistic arrangement to deal with the current unprecedented situation and to establish a plan going forward – in relation to contracts that are currently in force but also for those that are currently being negotiated and have not yet been entered into. As part of these discussions, the parties should consider risk allocation and seek to collaborate as transparently as possible so as to identify and assess the impact of COVID-19 on both sides. Alternatively, where co-operation and agreement cannot be reached, this will undoubtedly contribute to an increase in extension of time and loss and expense claims from contractors relating to COVID-19. It will be interesting to see how the construction industry responds when there is existing financial pressure due to the already challenging environment in which construction companies operate. In any event, parties should not forget the construction equivalent of the World Health Organization’s mantra of “test, test and test” which is “records, records and records” – as always, construction parties should be as prepared as possible, especially in such uncertain times.

Contacts

Ray O’Connor

Partner, Birmingham
T +44 121 222 3129
E ray.oconnor@squirepb.com

Julian Scott

Partner, Manchester
T +44 161 830 5282
E julian.scott@squirepb.com

Amy Scott

Senior Associate, Manchester
T +44 161 830 5318
E amy.scott@squirepb.com

Lei Jiang

Associate, Birmingham
T +44 121 222 3288
E lei.jiang@squirepb.com