

COVID-19: CONSTRUCTION INDUSTRY - OPERATING IN A PANDEMIC

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UK Construction Alert

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The current pandemic is having a serious impact on construction operations across the globe and our COVID-19 Global Task Force is here to guide our clients through a full spectrum of practical solutions. The Construction industry should continue to follow the most up to date government guidance and trade bodies such as Build UK are offering guidance on a daily basis on this ever-evolving climate.

In this alert we offer additional guidance for the *construction sector* based on questions and issues arising in real time for clients and the industry more broadly.

CONSTRUCTION INDUSTRY/IMPACT OVERVIEW

Construction sites across the globe have already shut down as governments of various countries enforce "lockdowns," and this is severely impacting the building and construction industry at all levels. Strategic construction sites, such as hospitals and infrastructure projects, will be critically important in the months ahead, and the images we witnessed of the Wuhan hospitals being rapidly constructed are all too clear. However, other projects are grinding to a halt and in Italy only "key projects" are currently allowed to proceed. Issues as to what constitutes a strategic construction site are questions which will already be facing the UK construction industry. The "lockdowns" are now all much closer to home and our clients are facing a number of questions about their own projects, be it at developer or supply chain level. Hospitals and key infrastructure projects are easier to designate as key or strategic, but nevertheless will face all the usual requirements, such as maintaining safety on site, and social distancing is critical.

Now more than ever it is important to take stock and familiarise ourselves with some of the key contractual terms in construction documents, but it is also important to keep an open dialogue with all involved on the construction project. With initial lockdown provisions being in place for 3 weeks, the industry is somewhat in limbo as to next steps and next government-led guidance. In this alert we will set out some of the legal contractual provisions in construction contracts and also some of the practical steps our clients can take.

JCT Contracts

Most contractors will have entered into a standard form JCT contract. Our COVID-19 Task Force has already issued detailed advice on when Force Majeure can be implemented, including [here](#) and [here](#). However, in many

UK JCT standard forms there is no contractual definition of Force Majeure and therefore the first step is to review the contract and assess how this is dealt with, and what if any amendments have been agreed.

Delay Provisions in the Contract

Delays are not unusual in construction projects and there are often provisions which clearly set out what will happen if the target for the date of completion is not met. This will usually involve notice provisions and either party is usually able to provide notice of potential delay to the other, which then operates to mitigate the potential loss. There are often practical steps which follow allowing for an extension of time. This will often involve giving notice and a failure to give notice may result in the loss of an entitlement to an extension of time. The issue with exercising Force Majeure is that in the current climate extensions of time are uncertain and often the primary consideration is the recovery of expenses or losses which aren't necessarily covered by Force Majeure.

Legislation Updates

The UK Government is bringing forward new legislation on an almost daily basis on how we run and operate our daily lives. As our Boston alert demonstrates other countries have brought forward legislation to entirely stop whole construction operations and so in these circumstances the new legislation could operate to implement the extension of time provisions.

Is Termination After Only a Short Period of Lockdown Possible?

Force Majeure may operate as an event entitling a party to terminate. Usually the contract will stipulate that termination is not available until the work has been suspended as a result of the event for an appreciable time, which is usually a period of two months, but issues such as what happens if lockdown is initially three weeks and then is extended are obviously key questions for our clients. The contract will need to be reviewed carefully to look at interaction with other terms.

Contracts in Course of Negotiation

COVID-19 is now very much an event which is foreseeable and therefore would not constitute a Force Majeure event. Now is the time for parties to consider contract amendments which anticipate pandemics and their associated costs and delays. It is likely though that some of this will be somewhat academic as parties are likely to postpone work on site possibly even for strategic projects which are not already in lockdown.

Frustration

The doctrine of Frustration applies to all contracts where after the contract is completed an event "strikes at the root of the contract" rendering it impossible or illegal to fulfil. Frustration is different from Force Majeure as termination is automatic and neither party are liable for damages. Common law provisions deal with where the losses lie. COVID-19 will already be rendering contractual obligations impossible particularly where whole cities

such as London are being locked down. Historically Frustration has been a difficult remedy to pursue but this may change.

Review Amendments to the Standard Form

Many JCT contracts contain standard provisions but now is the time to specifically check out any amendments to the standard form, particularly with regard to extensions of time and payments. There may be entitlements to relief under the contract, for example, if the site is closed or access is restricted. Landlords and tenants may also want to review their agreements for leases in terms of the construction obligations, particularly the timing of the completion of the works and any extensions thereof.

Force Majeure

Our COVID-19 Task Force has produced much guidance on the doctrine of Force Majeure. For the construction industry the JCT contracts anticipate Force Majeure being a "relevant event" and that means that it is a potential termination clause. However, detailed advice would need to be given on individual contracts as there is no contractual definition of Force Majeure in a standard JCT document.

Insurance

Carefully consider current insurance provisions and get advice on interplay with insurance claims in conjunction with contractual terms.

Supply Chain

Speak to suppliers and look ahead to alternative supply chain options.

Funding

Speak to banks now and alternative funders regarding the line of credit and payments due. This is a new era where legislation is being put in place to give rent holidays, for example, in the landlord and tenant sector. An open dialogue with banks, in the period pending formal concessions/legislation, could be critical.

Health and Safety

Consider health and safety of those on site – particularly in light of social distancing measures.

Keep up to date with alerts from the construction industry trade organisations as they will be at forefront of latest developments - Build UK and Civil Engineering Contractors Association.

CONCLUSION

Our real estate and construction team are on hand to help you navigate these difficult issues we face, and the situation we find ourselves in.

SOME USEFUL RESOURCES AND INFORMATION

- COVID-19.Task.Force@klgates.com
- [COVID-19: guidance for employees, employers and businesses](#)
- BuildUK.org : Coronavirus
- [British Business Bank : Coronavirus Business Interruption Loan Scheme \(CBILS\)](#)

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