

Future Projects: the impact of Covid-19 and Brexit



The duration of the coronavirus pandemic is unknown, but the Government is looking to recovery and transition following the emergency lockdown. Its initial publication Action Note PPN 04/20, which updates and builds upon PPN 02/20, applies to the public sector for the period 1st July to 30th October 2020. The document states:

‘As the Government moves into the next phase of the response to the COVID-19 outbreak, it is clear that this is not a short-term crisis. It is possible that across the world, COVID-19 will circulate in the human population long-term, creating a risk of periodic epidemics. The Government will need to steadily redesign the current social distancing measures with new, smarter measures that reflect the level of risk at that point in time, and carefully wind down economic support schemes while people are eased back into work.’

Although that documentation is both sector and time limited, it provides essential pointers regarding considerations for all those involved in construction before entering [a] contract for new projects, both at present and in the future. Brexit and the end of the transition period on December 31st, 2020 adds a further dimension.

PPN 04/20 requires that all contracting authorities should review their contract portfolio and whether it is appropriate to continue with any contractual relief given. This advice can equally apply to private clients and contractors alike because all parties will need to understand the implications upon existing projects in the move out of the transition phase. The process of review is invaluable for the future as many of the underlying issues will transpose from existing projects to the consideration of new ones. Its reference to *‘unreasonable expectations around transfer of risk and cost are likely to increase the probability of contract failures and may mean suppliers exit the market and weaken competition.’* and *‘that the basic commercial assumptions that underpinned the viability of the original contract can no longer be maintained.’* were written in the context of existing contracts but as we exit from transition those references are also pertinent to the consideration of contracts for new projects.

The guidance generally stresses the need for those involved with construction projects to work fairly, in partnership, and creating an effective dialogue with the objective of maintaining supply chains. During the Covid-19 emergency further reference has been made to the Prompt Payment Code, the avoidance of disputes, the use of alternative dispute resolution and transparency. At the commencement of the emergency, the Government made the point that it will continue to review behaviours in contracting so that, as the country emerges from the Covid-19 emergency, contractual arrangements can function effectively and maximise their contribution to jobs and the economy. The intention is for the Covid-19 emergency to be used to accelerate those behavioural and practice changes which are underway; something which JCT fully supports. Indeed, it already provides in the wide range of JCT contracts for:

- a proper payment scheme
- collaborative working
- transparency
- sustainability
- notification of disputes
- a hierarchy of dispute resolution that includes negotiation of differences, mediation, and alternative dispute resolution

The CLC's Covid-19: Contractual Disputes and Collaboration Guidance (CDCG) not only builds upon its Best Practice Guidance regarding existing contracts but as a consequence of its Contractual Clauses survey which revealed that many in the industry required guidance on amendments to new contracts to deal with the impact of Covid-19. The reason for the request is because some contract provisions were considered not to be as precise as they might be and in instances did not specifically refer to the type of delay arising from Covid-19.

The CLC has set out a range of possible amendments for use in both JCT and other contracts. The amendments relate to what it describes as 'A *Pandemic Event*' and sets out clauses for three optional approaches that are dependent upon the risk allocation determined. The options cover:

- time (extension of time for delay)
- time (extension of time for delay) and money (additional costs caused by the delay)
- time (extension of time for delay) and percentage of money (percentage of additional costs caused by the delay)

CDCG includes reference to an amendment by way of a Pandemic Event because it believes that under the current position contracts may not adequately provide for delay caused by Covid-19.

JCT's principal contracts provide for an extension of time for delay that arises from:

'the exercise after the Base Date by the United Kingdom Government or any Local or Public Authority of any statutory power.... which directly affects the execution of the Works'

and for

'force majeure'

The operation of those provisions regarding projects running at the commencement of the Covid-19 emergency was outlined in '*Coronavirus (Covid-19) and JCT Contracts*' in April. However, the position regarding new projects is different.

To obtain an extension of time as a result of the exercise by the UK Government etc. of statutory powers affecting the works, such intervention must be after the Base Date as stated in the contract. That means that all interventions by the UK Government prior to the Base Date which delay the project would not give rise to an extension of time. Consequently, such delay is at the contractor's risk and would need to be priced for in the tender. Of course, new Government interventions, including changes to previous interventions, after the Base Date, could give rise to an extension of time. The primary difficulty is knowing what is known at the Base Date. Spelling this out in the contract documents by reference to published documents is a fair way of dealing with this issue.

To secure an extension of time under this provision for delay caused by Covid-19, or any other virus, means that the UK Government must exercise powers of intervention in relation to the disease. Without such intervention, after the Base Date, the risk is with the contractor unless some other ground for extension can be established, such as the Relevant Event of force majeure. As the [JCT's] April article indicates, force majeure in JCT contracts is not defined because it is intended to embrace the unknown and to enable the contract provisions to remain operative in all circumstances, thus avoiding the application of the legal concept of frustration. Force majeure is normally held to mean all circumstances beyond the will of man, and which it is not in his power to control (*Lebeaupin v Crispin* (1920)). This would embrace epidemics. But it can be relied on only for events which prevent (rather than hinder or render more onerous) a contracting party's performance.

It might now be argued that it would not apply to the current emergency for new projects because clearly it is known. However, the consequences of the emergency are not fully known, nor could they be, and in that respect, force majeure may still become relevant as it might if some other such event arose. Nevertheless, there are limitations to the use of force majeure, and it would be appropriate to take advice on its use before entering a new contract.

Force majeure in the context of suspension and termination is a separate issue dealt with later.

CLC's amendments proposed in CDCG for consideration, and which leaves the fundamental risk apportionment between time and cost as it currently is under the Design and Build Contract and Standard Building Contract, involves:

Adding a new Relevant Event of '*a Pandemic Event*' in the extension of time provision and the inclusion of a definition of that term which reads:

"A Pandemic Event means:

- i) any pandemic (including, but not limited to, the COVID-19 coronavirus outbreak and/or any mutation thereof and any other outbreak of an infectious human disease),*
- ii) any measures, recommendations, regulations and legislation issued by the government and/or public authorities in relation to any pandemic from time to time, and/or*
- iii) any consequences of any pandemic which are outside the reasonable control of the Contractor, which affects the Works including without limitation the Contractor being unable to reasonably access the Site, delay in or non-delivery of any materials required for the Works, the Contractor being unable to reasonably adequately resource the Works."*

One can see the temptation for such a clause but as drafted it is problematic not least because of its definition. The definition refers to any pandemic, not just Covid-19, but what constitutes a pandemic is not stated. Presumably, it is one pronounced as such by the World Health Organisation (WHO). One can see potential problems here with determining the promulgation date and what happens if the WHO ceases to exist but more importantly it must be a pandemic, whereas it might be an epidemic that is not declared a pandemic. The distinction between epidemic and pandemic is important because the former could cause greater problems for a specific project.

Furthermore, paragraph ii) of the definition overlaps an existing JCT Relevant Event. That Relevant Event is clearer, as it refers in the clause specifically to the exercise of any statutory power. It seems likely that should other pandemics arise, or indeed an epidemic, that Government would intervene on public health grounds and, where it does, it provides a clear trigger point for the Relevant Event covering UK Government intervention.

Lastly, in paragraph iii) it refers to *'any consequences of any pandemic which are outside the reasonable control of the Contractor'*. This is widely written and gives scope for claiming almost anything, however remote, and it should at least be restricted to those aspects which directly affect Works.

Additional cost from such an event would not flow under the JCT Design and Build Contract or Standard Building Contract because the defined risk apportionment excludes it by making it a neutral event rather than a Relevant Matter. By way of contrast JCT Constructing Excellence Contract provides for a bespoke risk apportionment.

Force majeure in the context of suspension and termination

An event, such as Covid-19, may cause delay during the construction of the work and delay may be sufficient to constitute force majeure under the current principal JCT forms of contract. Where the whole or substantially the whole of the uncompleted works becomes suspended for a continuous period of two months or other period inserted in the Contract Particulars, then either party may upon expiry of that period give notice that the contractor's employment may terminate. If the Works remain suspended for a further seven days and a further notice to terminate is given, termination then takes place. Importantly, this is now subject to the Corporate Insolvency and Governance Act, referred to in the article *'Government's updated Covid-19 guidance identifies specific issues'*.

The CLC amendments suggest an additional termination event of *'a pandemic'* as defined previously. It also requires a specific period of suspension arising from such an event to be stated. The need for such an event turns on whether one takes the view that force majeure is sufficient by including within its scope, events such as pandemics and epidemics. As to the separate time-period for suspension, this poses an interesting question as to why this is thought necessary – would it be shorter or longer period than for other reasons? Any force majeure event by its nature is unforeseeable in terms of occurrence and duration, in a similar way to a specified peril.

Site Operating Procedures

The Site Operating Procedures (SOP) were prepared by the CLC to assist contractors by providing an appropriate framework within which to operate for the duration of the Covid-19 restrictions. The guidance was first published on the 23rd March and subsequently updated with the latest edition (Version 5) being published on the 4th July. That version is based on government guidance set out in *'Working safely during the COVID-19 in construction and other outdoor work'* (Working Safely) first issued on the 11th May and updated. Since the publication of Version 5 of SOP, Working Safely has undergone further updates, with the latest being issued on the 12th August. One can check for further updates at www.gov.uk/workingsafely

It is the latest documents that contractors must follow and need to take account of when pricing new work. The changing nature of restrictions and their duration is a difficult issue and reference to the version current at the Base Date should be recorded.

The practicability of complying with SOP may depend on whether the works are new build or works of alteration and indeed whether existing buildings are occupied. Version 5 continues to stress that the health and safety requirements of any construction activity must not be compromised. If an activity cannot be

undertaken safely, it should not take place. As to the use of face masks in construction the CLC issued a statement on the 14th August as follows:

'Where construction workers are not required to wear PPE for their specific task and their workplace meets all of the criteria below, their employer should make available, as a minimum, face coverings:

- an enclosed space
- where social distancing isn't always possible
- where they come into contact with others they do not normally meet'

Attention needs to be given to all those factors when preparing a price for the works.

The **'Site Operating Procedures'** are available at <https://www.constructionleadershipcouncil.co.uk/wp-content/uploads/2020/07/Site-Operating-Procedures-Version-5.pdf>

Fluctuations

The amounts of monetary and fiscal stimulus that have been seen not just in the UK but across the world cause many to worry about the prospects for inflation. However, most commentators see little prospect of a spike in inflation in the short term, not least because of the current economic background and levels of unemployed people. Nevertheless, it is risk which is much higher than before the Covid-19 emergency and building the effect of inflation into the contract price is fraught with danger. Not least because the Brexit transition comes to an end at the close of the year and the impact on supply chains and prices is another factor. A factor that is highly dependent on whether a UK/EU Trade Deal is secured and, if it is, its actual terms. The CLC recognises the significance of Brexit and on the 18th August announced the setting up of a dedicated working group, which amongst other things will help to produce guidance on construction related matters including procurement and contracts.

It is advisable that in such circumstances those entering contracts for projects of more than a few months should consider the desirability of using a suitable fluctuations provision. Note under the principal JCT contracts that the default position is that JCT Fluctuations Option A applies. Option A only provides for changes to contribution, levy, and tax fluctuations, which occur after the Base Date.

Using JCT Contracts

Obviously, the impact of Covid-19 will alter the contracting parties' perspective of risk and the ability to strike a mutually acceptable deal within some forms of construction contract may prove difficult. However, JCT provides a range of contracts for different types of projects and for use where different risk apportionment is required. Consideration also can be given to using the JCT Constructing Excellence Contract which adopts a distinct approach in terms of payment, includes a Risk Register, Risk Allocation Schedules, and Relief Events, which collectively can deal with just about any situation. In the light of the increased risk associated with contracting in the current environment, it is essential to choose a contract that is appropriate.

JCT's guide to selecting the appropriate main contract can be found at <https://www.jctltd.co.uk/docs/Guide-to-selecting-the-appropriate-JCT-main-contract-2016.pdf>



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September 2020