



COVID-19

This guidance is to allow ECA Members to give consideration to those contractual risks which would usually be overlooked, such as biological contamination, pandemics and/or natural catastrophes.

1. Catastrophes & Coronavirus

Uncertainty has dogged the construction supply chain, almost relentlessly, for the last few years;

- 2012 London Paralympics
- 2014 bird flu
- 2015 Ebola
- 2016 Brexit referendum
- 2017 Grenfell
- 2018 Carillion
- 2018 'beast from the east'
- 2019 Brexit again and again

have provided ample causes for concern in UK business.

The COVID-19 virus is fast spreading throughout the world. An estimated 70 per cent of the global supply chain of raw materials is controlled by China – and further by other countries – meaning the impact of the virus will be keenly felt by millions of businesses around the globe.

Experience tells us the consequences of a global pandemic are hard to predict. The 2003 SARS outbreak, the MERS outbreak of 2012 and the Ebola virus outbreak of 2014 all sparked similar fears for businesses worldwide, but these ultimately did not come to pass.

Coronavirus is turning out to be an altogether different adversary – the integration of supply chains and the increased globalisation of the last decade mean that it is easier now than at any other point in human history for a virus like COVID-19 to propagate.

The UK Government has so far followed a methodical plan centring around containment measures to ensure the spread of the virus was contained, but as the UK gets set to move into the delay and mitigation phases, ECA Members must take proactive:

- a) steps to risk assess their business; and,
- b) decisions to mitigate that risk.

2. Risk assessment

We suggest ECA businesses consider the impact of COVID19 in the following ways:

- **Insurance** – Ensure you act in line with your insurance policy requirements for business continuity, employer's liability, public liability, contractors' all risks and professional indemnity, so that you do not undermine your coverage and reserve your ability to make claims. You may wish to ask your insurers what their expectations are of you in regard to each type of cover.

Business interruption insurance policies in particular may cover disruption caused both by the disease itself and by public policy responses to it, such as enforced quarantines. However, there are often exclusions in such policies for example:

- Severe Acute Respiratory Syndrome (SARS)
- Anthrax
- Any mutation (swine flu) or H5N1 (bird flu) that manifest itself as a human infectious or human contagious disease
- Any infectious diseases which have been declared as a pandemic by the World Health Organisation (Coronavirus)

Insurers only tend to cover these circumstances where Government issues edicts (not just guidance) forcing society to conform to disruptive rules.

The policy coverage may only compensate for damage suffered, rather than simply disruption caused by the virus. This is an important but subtle difference in the policy cover.

You should also be aware of; the notification requirements so that you do not undermine your ability to claim, and the caps on the policy cover - it is rare for any insurance policies to be unlimited.

- **Clients** – ask clients to inform you of their contingency arrangements so that you can reassure them of your business continuity and be perceived as proactively managing the situation.
- **Funders and banks** – if your finance function can model various scenarios to your cash-flow that may inform you on if you need to secure additional credit. Remembering the interest rate may be low, but the industry is seen as low margin and high risk for insolvency which in the event of global recession can lead to vastly reduced lending capacity to the SME construction market.
- **HMRC** – HMRC have set up a specific Coronavirus helpline on 0800 0159 559 to discuss arrangements for delaying payment of taxes www.gov.uk/difficulties-paying-hmrc. If you are upfront and proactive – you must reach out to HMRC before you are overdue - HMRC will most likely discuss a Time to Pay Arrangement with HMRC is a debt repayment plan for your outstanding taxes. Companies that have defaulted on their payments to settle their Corporation Tax, VAT and/or PAYE can ask HMRC for extra time to pay. They will usually agree that you can pay it back over 6-12 months.
- **Communications** - Setting up project specific communication networks with your supply chains.
- **Safety** - Reviewing safety critical elements of your projects will help manage and mitigate the risk.
- **Programming** - Review programmes to factor in disruption from COVID19.

Other issues are addressed in our guidance on business continuity.

3. Who holds the risk?

In the construction supply chain, there is one constant which remains unchanged whenever a pandemic strikes - the legal risk-holder for any resultant business disruption. With international and/or national restrictions being placed on people and goods/materials contractors will need to be aware of the impact this may have on the ability to deliver their contracts.

Time & Money

What are your programming/time obligations under the contract and how do you operate them?

You may be obliged to notify your client of delays to completion, milestones and/or sectional completion. For example, JCT sub-contracts require the sub-contractor to notify forthwith of any delays and/or loss and expense, whilst NEC requires you to give 'early warning' notices which have the effect of preserving your right to make claims later on for 'compensation events'. NEC also

requires you to make claims within an 8-week period before becoming time-barred from being able to do so.

Also remember to check any bespoke amendments to the industry standard forms which may change the processes, procedures and risks involved.

The following clauses of your contract may become relevant:

- **Instructions/Variations/Changes** – Where your client instructs you, you will want to formalise that instruction so that it is incorporated into the contractual machinery and gives you any rights to claim back any additional time and money you may be entitled to, so that you do not bear the risk of the disruption to your delivery caused by COVID19. Do not take oral communications as good enough under the contract!
- **Materials** – Where materials are free issued, the contractor should claim for a delay, impediment or prevention by the client or those for which it is responsible. Where you are responsible for supply of materials, you will want to ensure you are, in addition to contingency planning with your own suppliers, not responsible for delays due to circumstances beyond your reasonable control and that this includes where materials are simply unavailable. You may also have to consider alternative suppliers where the risk of delay or impediment sits with you.
- **Change in law** – where the UK Government introduces specific legislation to deal with the current arrangements, your contract will dictate who takes the risk of changes in law.
- **Suspension** – Does either party under the contract have a right to unilaterally suspend the contract? – what if the site is shut. If so, what is the procedure? What are the circumstances? Does it lead to termination after a consecutive or cumulative period of suspension? What can you get paid for?
- **Notice provisions** – What are the contractual procedures for sending contractual notices and what should be included? Make sure you do not fall foul of the contract, by simply not complying with the prescribed procedure. The contract will follow a prescribed process and stick to this rigidly supplying all possible record keeping in support of time and money claims.
- **Time-bars & conditions precedent** – Ensure you comply with any pre-conditions for making claims or giving notices, so that you are not barred from doing so because you have not complied with a time constraint or pre-condition.
- **Duties to mitigate** – If the contract states you must take all steps (reasonable or otherwise) to mitigate the effect of delay and disruption or instructions, ensure you have done so and have kept meticulous records.
- **Bespoke amendments** – Ensure that you have a complete record of the contract and are complying with additional terms and not just the standard form industry contract on which the actual contract is only loosely based.
- **Force Majeure**

Affected parties should consider whether their contracts contain force majeure clauses and whether the outbreak falls within the protection offered by the relevant clause.

“Force majeure”, from the French “superior force” (read: ‘Act of God’) describes circumstances outside of the control of either party in a contract which prevents work from proceeding.

In English law, “force majeure” has no recognised meaning. A clause stating that the “parties agreed that if performance is disrupted or prevented by force majeure, the parties right and remedies shall be as follows...” will almost certainly be held void for uncertainty unless the term is defined elsewhere within the document.

The protection afforded by the clause will depend on the precise drafting. In the event of a dispute as to the scope of the clause, the English courts will apply the usual principles of contractual interpretation.

An example clause is below:

Notwithstanding anything else contained in this Agreement neither party will be liable for any delay in performing its obligations herein, if such delay is caused by circumstances beyond its reasonable control (including without limitation any delay caused by an act or omission of the other party).

In difficult cases, the client may try and argue the circumstances were not beyond the contractor's reasonable control as the consequences of COVID19 have been emerging over the past 8 weeks and allegedly could have been planned for. We would hope this argument would not be tolerated by a judge or adjudicator, but in spurious cases it might be used as a reason, in the interim, to delay payment.

The words '*including without limitation...*' ensure that it is not just circumstances arising from an act or omission of the other party that allow the clause to be enacted.

Subject to the party so delaying promptly notifying the other party in writing of the reason for the delay and the likely duration of the delay, the performance of such party's obligations will be suspended during the period that the said circumstances persist, and such party will be granted an extension of the time period for performance of duties and obligations under this agreement equal to the period of the delay.

Note this gives you time but not money. What if the extension, i.e. the consequential effect on the contractor's ability to deliver the contract is greater than the '*period that the said circumstances persist*'? Under this clause you will only be able to claim an equivalent period.

Either party may, if such delay continues for more than 5 weeks terminate this Agreement on giving notice in writing to the other in which event neither party will be liable to the other by reason of such termination.

Is 5 weeks an appropriate period? Whilst neither party will be liable, what can the contractor claim – works done to date (complete or not?) Loss of profit on the remaining works? Wasted expenditure to date? What is the process for wrapping up your account?

Are you relying on COVID19 or Governmental regulation/guidance following COVID19?

Is there a test 'prevention', 'hindering', 'unable to deliver' – this will dictate the burden and nature of proof required in order to present a robust claim with the required level of substantiation (record keeping will be paramount to proving your claim).

- **Prevention principle - frustration**

Under English law, if a contract becomes impossible to perform as a consequence of the coronavirus, it may be open for a party to argue that it has been frustrated from completing its contractual obligations.

However, this cannot be used as an argument where:

- a) the parties have contractually agreed the consequences of the event (for example by the use of a force majeure clause),
- b) an alternative method of performance is possible,
- c) just because performance has become more expensive or (d) because a party has been let down by one of its suppliers.

It must have become physically or commercially impossible to fulfil the contract which is incredibly difficult to prove.

The following factors will be relevant for a court in deciding if this argument works:

- a) terms of the contract
- b) the factual background
- c) knowledge of risk at the time of entering the contract
- d) ability to foresee and factor the risk of Coronavirus into project delivery.

If this argument fails, you will most likely be in breach of contract.

4. JCT

Clause 2.26.14 of the JCT suite cites “force majeure” as constituting a Relevant Event (presumably intentionally) without defining what “force majeure” actually includes.

Relevant Events entitle the contractor to an extension of time and an event (which under clause 8.11.1) also entitles either party to terminate the contract, but ‘force majeure’ is not a Relevant Matter and therefore gives no entitlement for the contractor to loss and expense as a result of disruption caused by the ‘force majeure’ event (as with exceptionally adverse weather – which also allows the contractor extra time as a Relevant Event, but not extra money as it is not a Relevant Matter).

The downside to the lack of definition of “force majeure” is that the party seeking to rely on it must prove that works have experienced an unexpected and exceptional event that allows one party to terminate or claim under the contract without being liable for damages, i.e. an unexpected and disruptive event that may operate to excuse a party from its obligations under a contract.

5. NEC

Under NEC, clause 60.1(19) equally allows the contractor to claim a compensation event where it:

- a) stops the Contractor from completing the works OR stops the Contractor from completing the works by the date shown on the Accepted Program,
- b) neither Party could prevent it and
- c) an experienced Contractor would have judged it at the Contract Date to have such a small chance of occurring that it would have been unreasonable for him to have allowed for it.

Only if the above test is satisfied will the contract allow the contractor to claim both time and money and give rise to an event of termination under clause 91.7. With such significant consequences.

Other provisions that will be relevant include:

- Suspension - if ordered by employer/engineer/architect due to virus - clause 60.1(4) will apply allowing you to claim time and money
- Change in law - if the contractor needs to comply with any new law or regulation in relation to coronavirus - if provided for in NEC Option X2 / additional condition.
- Access restrictions (clause 60.1(2))
- Variations (if a Change ensues as defined in the contract)), or breach (clause 60.1(18))
- Supplies by employer or third parties (clauses 60.1(3), (4), (16) and (18))
- Delay as a result of engineer / architect / employer’s flexible working arrangements - clauses 60.1(3), (5), (18) and (19)

However, be careful as often these clauses are changed through bespoke amendments to remove your ability to claim money leaving you with just an extension of time.

6. Mitigate the risk and get advice

As part of your business continuity plans, you should undertake an audit of your existing contracts to check the terms for protection.

On any new contract ensure you have the right to claim time and money where you experience disruption due to reasons beyond your reasonable control and ensure your duty to mitigate is only to the extent that you can take reasonable steps to do so.

Good legal drafting should provide clarity and resolution for any such issue and this should now include unknown viruses, or more particularly ‘biological contamination’.

ECA provides up-to-date and comprehensive legal advice to its members. To find out more, visit <https://www.eca.co.uk/business-industry-support/commercial-and-contracts>

ECA wishes to identify and inform the engineering services sector and ECA Members' decisions on what represents 'fair, reasonable and good contractual practice'. ECA remains committed to fair and open competition and this document is not designed to in any way dictate what may be an appropriate risk allocation, or act as a substitute for ECA Members obtaining project and context specific legal advice and making their own commercial decisions.



ECA, Rotherwick House, 3 Thomas More Street, St. Katharine's & Wapping, London E1W 1YZ

Tel: 020 7313 4800 **Email:** info@eca.co.uk **www.eca.co.uk**

ECA wishes to identify and inform the engineering services sector and ECA Members' decisions on what represents 'fair, reasonable and good contractual practice'. ECA remains committed to fair and open competition and this document is not designed to in any way dictate what may be an appropriate risk allocation, or act as a substitute for ECA Members obtaining project and context specific legal advice and making their own commercial decisions.