

Negotiating construction contracts post COVID-19

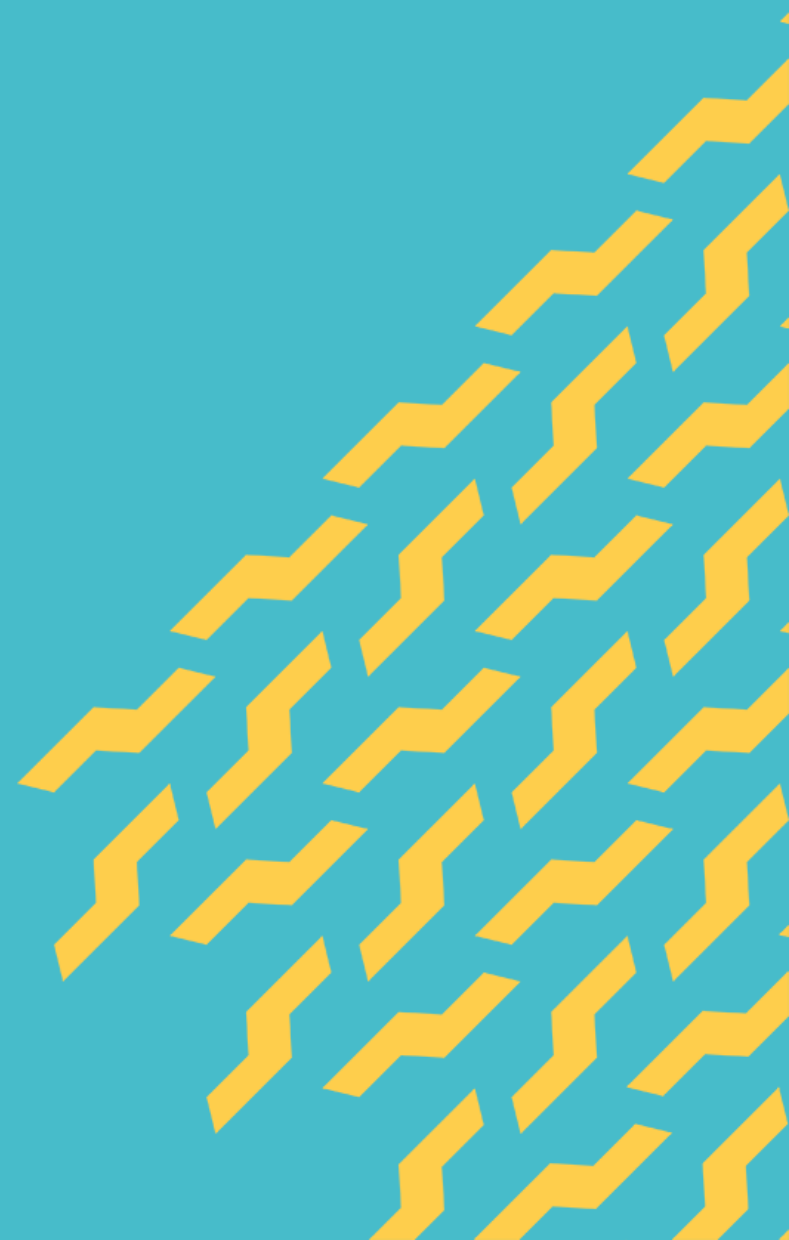
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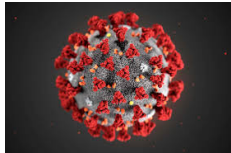
Structure of Session

- Timeline: where are we now
- *Force majeure* to the rescue?
- Covid-19 clauses
- Points of negotiation
 - Payment
 - Suspension
 - Termination
 - Limitations on liability / delay damages
 - Execution
- Q&A

Covid-19 timeline



Covid-19 timeline



8 December
First patient develops
Wuhan coronavirus



7 January
Identification of new
virus Covid-19

29 January
BA suspends flights
to/from mainland China



18 March
UK death toll passes
100

23 March
PM orders
lockdown



31 March
Government
encourages construction
workers back to site

16 April
Captain Tom completes
100 laps

2019

2020

11 January
First death in China
recorded

5 March
First death
in UK

11 March
WHO declares
pandemic

20 March
Furlough scheme
announced /
Schools shut

27 March
PM Boris Johnson
tests positive

6 April
UK death toll passes
5,000



Covid-19 timeline



2020

6 May
UK death toll passes 30,000

5 June
UK death toll passes 40,000

4 July
CLC produces its Site Operating Procedures (v5)

27 July
Google staff told to work from home until at least July 2021

1 September
Schools start to return

?

10 May
Construction workers encouraged to return to work and ease lockdown

28 June
Leicester lockdown

4 July
Pubs and places of worship reopen

28 August
Government encourages people to return to work in September

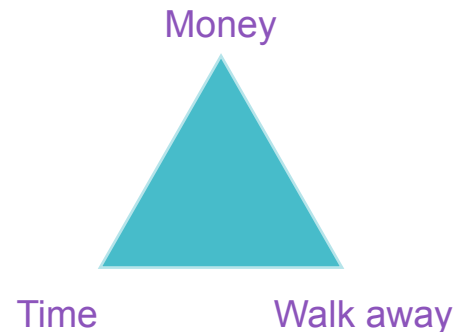
31 August
UK government's Eat Out to Help Out scheme comes to an end



Force majeure to the rescue?

- English law has no general concept of *force majeure*.
- Needs to be drafted into the Contract.
- *Force majeure* events are usually defined as acts, events or circumstances beyond the reasonable control of the party concerned.
- *Force majeure* clauses often exclude foreseeable and/or foreseen events.
- NEC4 Prevention Event (Clause 19.1):
 - “...an experienced contractor would have judged 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.”
- 11 March 2020: World Health Organisation declares Covid-19 outbreak a pandemic.

- Allocation of Covid-19 risk:



- **CLC Future Proofing Guidance** drafted in response to the Government's drive for fair and responsible behaviour in the performance and enforcement of contracts impacted by Covid-19 .
- CLC guidance gives three options for Covid-19:
 1. Only an extension of time to be granted
 2. An extension of time in addition to the payment of all the Contractor's loss and expense incurred in dealing with Covid-19
 3. Allows for an extension of time and for the Contractor to be paid a predetermined percentage of the loss and expense incurred

- Covid-19 now is the Oxford English Dictionary:

“An acute disease in humans caused by a coronavirus, which is characterized mainly by fever and cough and is capable of progressing to pneumonia, respiratory and renal failure, blood coagulation abnormalities, and death, esp. in the elderly and people with underlying health conditions.”

- Legal definition:

“the coronavirus disease (COVID-19) or severe acute respiratory syndrome coronavirus (SARS-COV-2) or a mutation of these.”

Covid-19 clauses – Employer’s perspective

- Express acknowledgment that the Contractor has programmed and priced the Works to comply with Covid-19 measures.
- Express acknowledgements that Covid-19 events are not to be treated as a force majeure and do not trigger loss and expense claims
- Limiting the trigger for time to the Contractor taking proper measures to implement operating procedures required by the CLC which are more onerous or restrictive than version 5 of the Site Operating Procedures dated 4 July 2020
- Contractor’s duty to mitigate Covid-19 delays and losses. JCT CI 25.6.1:
“the Contractor shall constantly use his best endeavours to prevent delay in the progress of the Works or any Section, however caused, ...”
- Enhancing and expanding on this duty:
 - express duty to obtaining labour, materials and/or goods from alternative suppliers and/or making alternative arrangements for the supply of labour, the transport and delivery of materials and/or goods

Covid-19 clauses – Contractor's perspective

- Wider scope for Covid-19 triggering entitlements:
 - *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),*
 - *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*
 - *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.*
- Specific Covid-19 risk on the job
- Are there circumstances where additional loss and/or expense should be recoverable?
- Ability to propose for approval alternative materials/goods (including materials/goods as a temporary measure) and/or labour in deviation from the Employer's Requirements as a result of Covid-19

Covid-19 clauses

- Alternative commercial mechanisms to consider:
 - Pain/Gain Mechanisms
 - Break Clauses – subject to appropriate break points
 - Good faith?

Covid-19 negotiations



Payment terms

- Payment terms / retention sums under negotiation
- Non-payment not automatically a termination right
- Construction Act provides good protection already:
 - prescriptive payment mechanism,
 - right to suspend for non-payment, and
 - right to adjudicate at any time
- Watch out for extended periods to terminate or suspend for non-payment in collateral warranties!
- *Rochford Construction Ltd v Kilhan Construction Ltd* [2020] EWHC 1947 (TCC)
 - payment mechanisms coming under scrutiny
 - contract linked the 'final date for payment' to the issue of a VAT invoice
 - found not to comply with the Construction Act



Suspension / Termination

- Rights to terminate for convenience
- Covid-19 break clauses
- Suspension provisions – JCT CI 8.9.2 (2 months)
- Deferred possession
- Sectional completion



Limiting liability

- Contractor's liability not limited at common law
- Needs express drafting:
 - Net contribution clauses
 - Exclusions of consequential losses or specific losses
 - JCT Clause 2.17.3 - contractor liability for loss of use, loss of profit and consequential loss
 - Overall limitations on liability – each and every claim vs aggregate cap
 - Time bar provisions
 - Sub-caps on liability
- Watch out for exclusions!



Execution

- Traditional 'wet ink' signatures / witnessing can be problematic
- Counterpart provisions can be included in the contract to assist
- Datarooms - incorporation by reference?
- Deeds: must be signed by two signatories:
 - two directors,
 - a director and company secretary, or
 - an individual director in the presence of a witness
- Electronic signatures are now valid but no provision for witnessing signatures electronically
- The Companies Act does not expressly prohibit a family member acting as a witness when an 'independent' party is not available. Best practice is use an 'independent' party wherever possible!
- Wills can now be witnessed by video / zoom / facetime etc... Does not apply for deeds.



Any questions?



**FENWICK
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The construction &
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Thank you

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