



Construction & Engineering

Latest information from the World Health Organisation shows that COVID-19 has spread to over 120 countries. The outbreak raises significant health and safety, employment and worker issues for businesses across the globe. In the UK and Ireland, COVID-19 is having a major impact on the construction sector as with all other areas of life and business.

Following the UK Government announcing a nationwide lockdown on 23 March 2020, many construction sites in the UK have closed. Those which continue, are working to new challenging operating practices. Workforce availability has been reduced due to illness and quarantining. Those that are still working face longer procedures to ensure disinfection of surfaces, equipment and safe distancing from team members. The effect of COVID-19 is global, extending to the supply chains in the UK and abroad. As an example, The Committee for European Construction Equipment estimate that 30% of factories had closed as of the end of March.

Construction Sites: Open or Closed?

Decisions as to whether to continue are having to be taken by contractors and employers. The UK Government is keen for construction sites to continue to operate where safe to do so and has paid tribute to the UK construction sector for continuing to operate and support the UK economy. In Scotland, current guidance has been that sites should close unless the work is essential.

Many of the large contractors have taken the decision to close sites. A smaller number have remained open, some to carry out works necessary to support the ongoing essential services and hospital expansion measures. Others have re-opened after a short shutdown to evaluate how they can continue to operate facing the current challenges. Presently, it is estimated that one third of sites remain open in the UK adhering to Government and industry published guidance on site operating procedures and social distancing.

When considering if a construction should continue or not, Government and industry advice is that work should only continue if:

- it can be carried out per guidance issued by Public Health England/Health & Safety Authority in Ireland
- it can be undertaken without compromising safety and health i.e. no work involving skin to skin contact, two metres social distancing, minimal contact between workers and where face to face contact is essential, to be no longer than 15 minutes (N.B. in Ireland advice remains keep 2m separation)
- it is carried out in accordance with the Site Operating Procedure¹
- workers can travel safely and responsibly to sites.

¹ Site Operating Procedures cover: self-isolation; procedure if someone falls ill; travel to site; site access points; hand washing; toilets; canteens and eating arrangements; changing facilities; avoiding close working; cleaning. See <http://www.constructionleadershipcouncil.co.uk/wp-content/uploads/2020/04/Site-Operating-Procedures-23-March-2020-v1.pdf>



Site Closures and Restrictions to Working

The site closures and restricted working conditions, can be expected to present challenges over the coming weeks and months:

- Extended and disrupted construction periods, increases where time related costs
- Reduced ability to maintain machinery
- Potential increased risk to those undertaking working operations on site
- Reduced labour force/potential decrease in availability of skilled supervisors
- Potential termination of projects before programme completion
- Construction companies and suppliers ceasing to be able to trade.

The Construction Leadership Council has published advice on temporary suspension of sites where it is not possible to continue to stay open. This includes guidance on understanding the contract forms and contractual requirements, closedown planning, site safety, protecting excavations, stabilising part-built works, mothballing cranes, draining down services, isolating power, reducing fire risk and securing the sites.

Suppliers need to be notified and assets, not required, at risk of damage or theft need may need to be removed.

Contractors should examine whether the cessation of works periods in the insurance cover are adequate and if policy cover needs to be extended or other endorsements considered.

Contract Forms and Force Majeure

In the UK and Ireland it is common to use NEC, FIDIC and JCT forms of contract. Whilst each construction contract differs, all make some reference to force majeure i.e. the occurrence of an event which is outside the reasonable control of a party prevented from performing its contractual obligations. However, there is no general concept of force majeure in common law and the JCT and NEC suites do not provide a definition.

At the contractual level, it is likely that COVID-19 would be classed as an event of force majeure.

The general rule applied for whether a force majeure event has occurred considers three factors:

- Is the event beyond the control of the affected part?
- Is the affected party's ability to perform its contract hindered or prevented by the event?
- Has the affected party taken all reasonable steps to avoid or mitigate the event or its consequences?



As an example, the force majeure provision per clause 2.26.4 JCT D&B 2016 entitle the contracting party to an extension of time (in the JCT Design & Build contract, force majeure is specified as a Relevant Event but not a Relevant Matter). Thus, while entitlement may be given for extension of time this does not extend to include additional cost. NEC3/4 ECC contains brief force majeure provision but the effects of force majeure on time and cost are not stated. Under FIDIC and other contracts, the contractor may be entitled to additional costs.

Termination of Contract as Option

In extreme cases, depending on the severity of the impact of COVID-19 to the construction programme, costs and the parties involved, it may be deemed mutually preferable to end the contract rather than continue to incur losses. Only after conducting a full assessment of the consequences and implications of undertaking such a decision, should an employer and main contractor consider termination of the contract as an option.

Some contracts will contain provisions providing that if works have been suspended for a specified length of time, notice can be served by either party terminating the contract.

JCT Design & Build B 2016 clause 8.11, provides *“suspension is permissible for force majeure or as a result of the exercise by the UK Government or any Local or Public Authority of a statutory power which directly affects the execution of contract works.”*

Claims Impact

The full effect on the nature and number of claims arising under CAR/EAR policies has yet to be fully realised. Where sites are closed, the level of demobilisation, protection and maintenance/security measures in place will be proportional to the risk of losses that may arise through thefts, collapse, fires and water damage.

Already, we are seeing contractors advising of increases in ongoing claims for CAR contract works losses, where reinstatement has yet to be completed. Delays will have knock on effects of increases to preliminaries costs and contractors will be seeking to recoup prolongation costs. We expect to see a rise in plant losses including theft and damage, engineering losses for breakdowns, liability claims for injury and property damage.

There has already been an increase in claims notified, where Delay in Start Up or Advanced Loss of Profit cover has been included in the CAR/EAR insurance policies.

Delay in Start Up (DSU) and Advanced Loss of Profits (ALOP)

DSU insures project owners for the financial consequences of a delay to a project completion arising from an insured physical damage event. Many policies include wording that extends the cover for delay/disruption due to circumstances arising from denial of access or the occurrence of a notifiable disease. The wordings should be carefully read to ascertain the level of cover and circumstances that the policy cover will respond.



The intention of DSU/ALOP is to give developers added protection during the construction phase of a project. The DSU cover indemnifies against loss of revenue suffered following damage to the contract works that causes a delay in completion. The level of protection dictated by the length of the indemnity period should not be confused with the construction period.

Subject to the DSU insurance responding, and it remains early days as to how various policies will respond, the policy only indemnifies for delays arising from the Insured losses during the construction period and not concurrent issues such as poor contractor performance. Claimed delays may include for uninsured events, accordingly the reasons for the delay need to be identified, therefore good forensic programme assessment is useful.

Notifiable Diseases

Where proviso exists in the DSU/ALOP wording setting out that indemnity extends to include financial loss sustained by the Insured in consequence of delay in completion of the project resulting from the occurrence of a notifiable disease, the insuring parties are having to carefully consider the scope to which this wording may respond. The wording will typically define what is meant by notifiable disease in the policy cover. It will likely include exclusions and/or restrictions which should be carefully read and understood. The cover under this section may have a reduced indemnity period available.

McLarens' Approach

McLarens UK and Ireland have established a specialist COVID-19 Complex Technical Team of senior adjusters and accountants to lead the claims arising from the pandemic, providing technical guidance and ensuring consistency in approach. The Team comprises:

William Wilson	Head of Major Loss – Ireland	william.wilson@mclarens.com
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David Fillingham	Technical Lead – UK Casualty	david.fillingham@mclarens.com
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All new losses to McLarens should continue to be instructed through the normal channels.

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