

Construction and COVID-19

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The Government's announcement on 9 March 2020 that it will move into the next stage of the Covid-19 planning to delay its spread, raises a number of issues for the construction industry.

Whilst the Government has provided general advice, the UK's Chief Medical Officer for England and Wales, Professor Whitty said that *"...we are close to the time, probably in the next 10 to 14 days..."* that the UK will move to a new phase to contain the virus. In real terms, one only needs to look at the actions taken by the Italian Government at short notice on, as to what might happen and quickly.

Given the above, it is worth considering the following and how it impact on the sector:

1. **Force majeure** - is described as; *"...This term is used with reference to all circumstances independent of the will of man, and which it is not in his power to control...thus, war, inundations and epidemics are cases of force majeure..."*¹ However care should be taken when attempting to invoke this type of event, not least as the effects of the clause may vary from Contract to Contract. Whilst at first blush Covid-19 might fall within the ambit of a force majeure event, it is not necessarily clear cut. As one example it might depend on how the Government classifies Covid-19 as to whether it is a *"pandemic"* or *"epidemic"* and whether in fact there is a difference. It shouldn't naturally be assumed that as a contract has a force majeure clause, that it can be invoked to recover and delays or cost overruns.
2. **"Emergency Powers"** - the Government may consider wider emergency powers to prevent the congregation of people, much like in Italy. An example being; the placing of bans on the congregation of more than 100 people at "public" and "private" locations, this could include places of work and sites. A number of Standard Forms of Contract deal with this type of emergency legislation. This may be a Relevant Event as a piece of legislation that all parties need to comply with².
3. **Frustration** - is extremely rare in practice. In very simple terms it applies when there is an exceptional and unforeseen event that occurs, which causes a loss. There are a number (at least five) types of frustration, but the law concludes each requires a mixture of factual and legal enquiry to be undertaken. Importantly doctrines of frustration also mean that parties are discharged from future obligations, but not the events that led up to the event.
4. **Conditions Precedent** - As with all legal advice, it revolves around the Contract or Agreement in place. Even if a "Force Majeure", "Relevant Event" or "Compensation Event" occurs, these may still have to be notified to the other party. Accordingly even if these events happen, Contracts still have to be complied with and that includes Conditions Precedents to claims.
5. **Insurance** - it may be advisable to check what Insurance policies are in place and what the scope of the cover might be.
6. **Employment rights** - employers owe duties to employees and therefore depending on what the Government might say in the next couple of weeks, this may well have an impact on how workforces. We will need to wait and see what happens regarding sick pay, whether employees have to attend sites and general obligations regarding travel.

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