

CLIENT ALERT

What Impact is Coronavirus (COVID-19) Likely to Have on Documentation of Energy and Infrastructure Projects in the UK?

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Infrastructure analysis: Stefanie Atchinson, Lydia Taylor, counsels, and Robin Baillie, partner, at Crowell & Moring, discuss the impact of coronavirus (COVID-19) on project finance, with a particular focus on project documentation.

Works phase

While the UK government is maintaining that construction sites can continue to operate (provided the requisite measures are in place), HS2's 'notice to proceed' aside, many in the sector have stopped all but 'essential work' and this has resulted in a number of sites being shut down.

Where sites remain open, contractors face difficult decisions about how best to protect their workforces while mitigating delay to the works. Other issues likely to cause significant disruption include:

1. travel restrictions (including to and from site)
2. unavailability of labour (including as a result of quarantine, illness or furlough)
3. altering the works programme in order to prevent trades operating too close on site
4. shortage of equipment and materials, and
5. funding restrictions and impact on cash flows

Going forward, as the lockdown begins to ease and construction picks up again we are likely to see a staggered return to work and also short term issues with supplies as demand once again picks up. Contractors will also be expected to enforce rigorous social-distancing protocols and strict cleaning regimes. We expect the [Construction Leadership Council](#) to continue issuing guidance on appropriate practical measures to take as sites reopen.

Operation phase

Almost all operational projects will be impacted by at least one of the issues listed above. Project parties will have to come together to agree on a sensible approach to maintaining service provision to the extent possible in the circumstances. Given inevitable performance failures resulting from coronavirus, parties may also consider agreeing appropriate moratoria on related penalties—to protect the longer-term continuity of the project for the benefit of its stakeholders.

In the majority of projects, contracts will not provide a clear answer to most of the issues that arise from lockdown and we will expect to see a significant increase in potential disputes (e.g. claims for delays or increased costs) and litigation. Early engagement with other project parties to agree what measures can be taken now to limit the scope of these disputes is recommended.

What impact has been seen in project documentation?

Operational projects

In some circumstances, parties have agreed temporary amendments to operational project contracts: e.g. to document necessary additional services/reallocate personnel (such as enhanced cleaning); or to agree that particular KPIs/service levels will be suspended if impacted by coronavirus (e.g. timeframes for non-essential maintenance).

Any amendments should be properly documented and communicated to wider project stakeholders where required (e.g. lenders).

Parties should not forget that being able to remobilize rapidly once the current situation abates will be crucial for getting operations back to business as usual. Any contract amendments should be pragmatic and flexible and avoid any unnecessary procedural requirements before action can be taken.

Considerations for new contracts

For parties looking to enter into contracts in the midst of this pandemic, it is worth considering whether express provisions should be included to allocate the risks given the parties are unlikely to be able to assert force majeure and similar forms of relief as coronavirus is no longer an event which is not foreseeable.

To cover off such cases, from a contractor's perspective, the safest way is to include coronavirus generally as a compensation event.

If this is resisted, we suggest the parties look instead at more specific events in light of what is currently known about coronavirus. Examples may include:

1. inability to procure materials
2. inability to travel safely to site
3. agreeing that while coronavirus in itself does not qualify for force majeure relief, the contractor may claim relief if its workforce is impacted
4. specific provision for delay caused by any further impact of coronavirus, and
5. allowing an extension of time if the government exercises any statutory power which affects the execution of the works (where relevant)

Are there any other practical steps that project parties should be taking?

1. a key area of risk appears to be shortage of materials and equipment. Early communication with the sub-contractors and suppliers will be crucial to assess exposure and it may be that measures can be implemented to reduce delays. Consideration should also be given to contingency planning in the supply chain (e.g. pre-ordering of goods/materials)
2. comply with obligations to avoid or mitigate the consequences of any delay. Contractors, in particular, should maintain an audit trail to demonstrate all possible steps are being taken to mitigate disruption

3. given the restrictions and uncertainty around travel, developers may wish to use more local contractors so that they would be less susceptible to any disruption due to travel restrictions
4. if usual notice procedures are made impossible due to social distancing, make sure that alternative arrangements are agreed and documented so that parties do not jeopardise their ability to claim relief as a result of procedural failures
5. make the most of technology to avoid delays in finalising contracts—electronic signatures and pdf apps are very helpful
6. the government has implemented a wide-ranging support package for different businesses. Project parties should investigate whether there are any appropriate measures that they can benefit from for the wider longevity of the project—e.g. the Job Retention Scheme, business interruption/grant funding, rates relief etc

What will the ‘new normal’ look like?

The post-coronavirus landscape is near-impossible to predict. The sector was already facing a number of challenges, including skills shortages caused by Brexit, but the coronavirus crisis has brought new complications.

Unfortunately, it is inevitable that some businesses in the construction sector will struggle to survive the current crisis given liquidity is now the critical issue, and it will be necessary for government to support the industry over the coming months. Measures such as facilitating public sector supply chain cash flow via [Procurement Policy Note 02/20](#) are crucial.

One key difference from the financial crisis we experienced in 2008 is the strength of the banking industry at the time. This time round, the equity funds and banking industry are financially robust and once the dust has settled, they will play a key role in getting industry back on track.

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