

# The new normal of a post-lockdown environment

**Caroline Hooton** and **Tammy Samuel** explore force majeure, relevant events and compensation events in a post-lockdown environment

A number of articles in the legal and professional press greeted the introduction of lockdown and social distancing restrictions in March, examining their impact on contract management by focusing on force majeure, relevant event and compensation event clauses. With the position evolving, their application should be re-examined to assess whether they continue to be available should the restrictions be reapplied, new restrictions introduced or, in a worst-case scenario, a completely new virus unrelated to Covid-19 arrives in the UK that requires different measures altogether.

On 23 June 2020, the UK Government announced that from 4 July 2020 the social distancing rule in England would be relaxed from two metres to one metre plus where mitigating factors are in place, such as installing screens, and handwashing facilities in enclosed spaces. In the case of public transport, it remains mandatory for passengers to wear face coverings.

With Northern Ireland, Wales and Scotland also announcing plans and pathways to ease lockdown and restrictions, many businesses within the rail sector will be planning for life post-Covid-19 and a return to more 'normal' operations. However until a vaccine is developed for general distribution, the government has warned that caution and vigilance must remain watchwords and that the restrictions, including regional lockdowns such as that announced in Leicester on 29 June 2020, will return if the spread of Covid-19 increases again. What does this mean for rail contractors, in particular in relation to construction or facilities management contracts, which are commonly governed by JCT or NEC terms?

## What are force majeure clauses?

By way of reminder, force majeure clauses detail what happens if there is an extraordinary event that adversely affects the performance of the parties' respective



Caroline Hooton

obligations. The drafting varies depending on how detailed the parties have chosen to be but they generally address the following:

- An event has occurred after contract signature. This can be either a specific event identified within contract as constituting a force majeure (e.g. war, act of God, pestilence or disease) or a more general requirement that it be an event that was unforeseeable and beyond the reasonable control of the parties
- The event has prevented, hindered or delayed the affected party (usually, but not always, the contractor) from performing its obligations under the contract
- The impact of that event was outside the control of the affected party
- There was nothing that the affected party could have reasonably done to avoid or mitigate the event or the impact on its performance

The occurrence of the force majeure event excuses the affected party from performance of the relevant obligations for the duration of the event. In many contracts (including relating to construction and manufacturing), this typically means granting extra time to a contractor to complete the relevant works or explicitly suspending their obligation to



Tammy Samuel

do so, thereby excusing them from paying liquidated damages. In service contracts, it usually means excusing the contractor from performing the services and thus paying service credits that would otherwise accrue due to such non-performance. The clause will usually go on to provide for termination of the contract if the force majeure event continues for a prescribed period of time and what, if any, payments are due and owing at that point.

The JCT suite of contracts treats force majeure as a relevant event, entitling the contractor to additional time and money. Although the NEC3/NEC4 forms of contract do not specifically use the term 'force majeure', they do include analogous wording within their compensation event drafting.

## What are relevant event clauses in JCT contracts and compensation event clauses in NEC3/NEC4 contracts?

Relevant events and compensation events perform the same function. They are events that are not the fault of the contractor and keeps the contractor whole to the extent that the event affects prices or completion of the works/services. In other words, should a relevant event or compensation event occur then the contractor will be entitled to both extra time and money.

Although force majeure is specifically included as a relevant event in JCT contracts, unhelpfully, there is no definition and so it is open to interpretation as to whether a pandemic such as Covid-19 would fall within it. The NEC3/NEC4 suite of contracts does not specifically include force majeure by name within its compensation event wording. However, there is equivalent drafting that captures events: (i) that prevent the contractor from completing the works/services by the planned date; (ii) could not be prevented by either party; and (iii) an experienced contractor would have judged to have such a small chance of occurring that it would have been unreasonable to allow for it.

Note that notwithstanding the relevant events and compensation events set out in the JCT and NEC3/NEC4 forms, the drafting can be dis-applied, amended or extended by the parties and so the final signed contract should always be checked.

Whether the re-imposition of lockdown or reintroduction of stringent social distancing restrictions on a national or regional basis would allow relief (for force majeure or otherwise) under the relevant contracts depends on:

- if there is first a complete lifting of restrictions by the UK government for England (and, in turn, by the Welsh, Scottish and Northern Irish assemblies for those respective regions)
- the drafting of the clause in question.

#### **What if restrictions and lockdown are completely lifted before being reintroduced?**

Bespoke force majeure or other relief provisions often require the affected party to serve notice when the force majeure event is over and it is able to resume performance of its obligations. If the affected party has served such a notice, then any reintroduction of restrictions or lockdown would leave it free to initiate a new force majeure event. This is because in the absence of drafting to the contrary, there is nothing to prevent an affected party from claiming for recurring force majeure events during the term of a contract.

The lack of such notice provisions does not prevent the affected party from arguing that a new force majeure event has occurred or indeed that a force majeure or relief event is ongoing. In the case of JCT and NEC3/NEC4 contracts, the contractor will need to start the process of claiming for a relevant event/compensation event again. This is important because both sets of contracts have onerous notice requirements. For example, the NEC3/NEC4 standard form wording gives the contractor eight weeks to make a claim for a Compensation Event, failing which they lose the ability to claim additional time or for any losses, and it is common for this time period to be reduced. Similarly, JCT contracts require notice of a relevant event to be given by the contractor when it becomes 'reasonably apparent',

which is generally taken to mean within a working week. Failure to do so can reduce any extension of time that the contractor may otherwise be entitled.

However, it would be wrong to regard any new force majeure or relief claim as a 'replay' of the March 2020 situation. The affected party's mitigation obligations may well now be more stringent given that lockdown and social distancing are a known quantity. The affected party should therefore have revised its business continuity and mitigation plans to specifically deal with the same, including having made such adjustments to its staffing and supply arrangements as may be necessary and making contingency for regional restrictions if applicable to the works/services to be performed. Force majeure clauses do not absolve the affected party from performance just because it is more difficult or expensive to perform the contract. The affected party is still obliged to find a way to perform and if stop-start restrictions and lockdowns become a feature of every-day life, then it needs to accommodate the same in its operations. Indeed, under the JCT suite of contracts, the contractor must use best endeavours to do so, which is a high legal standard requiring adherence even when it is against the contractor's economic interests to do so.

This position holds true if new restrictions or lockdown are introduced because Covid-19 mutates into a completely new strain or because a disease or virus that is unrelated to the coronavirus strain causes a public health emergency. Essentially, unless the restrictions and lockdown measures are unprecedented and render performance completely impossible, the affected party must try to adapt to ensure it can meet its obligations.

#### **What if there is no initial lifting of restrictions/lockdown?**

If there is no lifting of restrictions/lockdown and the country instead moves to rolling restrictions of greater or lesser severity on a national or regional basis, then this will likely be a deemed continuation of the initial force majeure event. The main issue for the employer/purchaser here is that the longer any national restrictions remain in place the more likely it is that the parties will reach the termination threshold. In this case, the employer/purchaser will need to examine the termination drafting to see if the right of termination is open to either party or restricted to the non-affected party.

Where regional lockdown/restrictions apply, the position depends on both the drafting of the clause and the extent to which the contractor's obligations are affected. Looking at the Leicester lockdown, for example, a cleaning contract for train stations in Leicester and Nottingham would only be incapable of full performance in Leicester so if the contract allows for partial termination due to force majeure, then this could occur for the Leicester obligations only.

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Termination whether in whole or in part is important for train operators because the costs and difficulties in procuring a replacement contractor (especially for a partial set of obligations) may make it preferable to try to keep the existing contract in place for as long as possible even if it the contractor cannot fully perform it. Equally, a contractor may take the view that it is better to remain in a contract that it cannot currently perform (even if it is not receiving payment). This is because once the crisis does end, then it will find itself having to bid for new work, resulting in a 'lag' that could exacerbate existing cash flow issues.

Additionally, to the extent that a contractor is currently dependent on emergency loan support from banks, then the fact that it has kept contracts in place can provide support for the longer-term viability of the business. Equally, contractors are generally wary of partial termination, because it could make the remaining contract much less profitable, e.g. if mobile crews were used to cover both Leicester and Nottingham stations and the Leicester element is removed, then the contractor could be left with too many employees for service provision to be profitable.

Note that until termination, the affected party remains subject to the mitigation requirements described above. It must therefore constantly reassess which of its obligations it can perform as restrictions and lockdown by turns tighten and loosen, and which obligations are affected by any

regional lockdowns and restrictions. The NEC3/NEC4 suite of contracts assists here through risk reduction meetings that are callable by either the contractor or the project manager to manage the compensation event.

#### Flexibility and communication for the 'new normal'

It is clear that rolling lockdowns and social distancing restrictions will be a feature of the coming months, whether on a national or regional basis. Therefore, both rail industry bodies and their contractors need to adopt a flexible approach to contract management in order to manage the challenges ahead and preferably one that involves communication and candour from both parties.

Rail industry parties may find it useful to diarise regular phone calls or virtual meetings with their contractors to discuss the current state of performance and what the contractor believes will be achievable in the foreseeable future. Establishing forums or liaison committees to which all contractors are invited would also assist in brainstorming management and performance strategies to identify best practice and share knowledge on flexible working arrangements and the

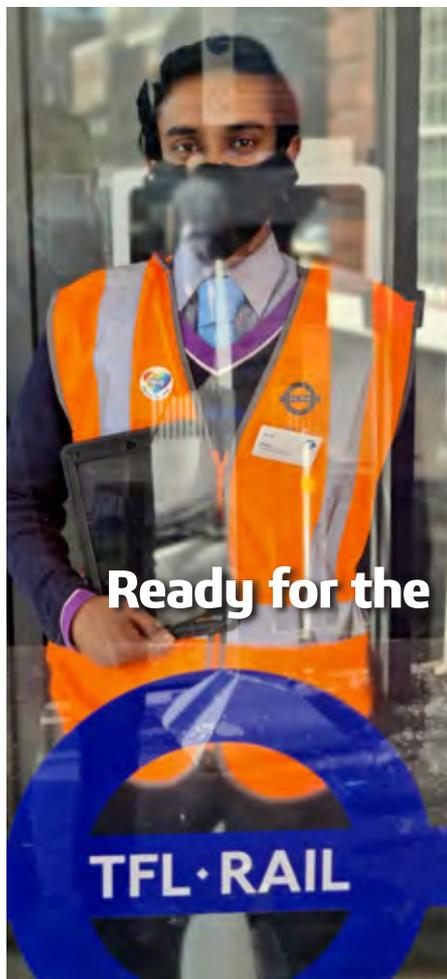
implementation of social distancing restrictions. There may be sensitivities here in terms of sharing specific information on commercial arrangements, e.g. lead in times for goods or equipment, but this should not discourage high-level discussion of general principles where common ground could be found. Such forums may be particularly beneficial if scheduled after government/devolved government announcements on the progress of restrictions as against their respective Covid-19 roadmaps. This is because they would enable speedier coordination of contractual responses and ensure assist contractors in joining up when needed, e.g. if multiple works contractors are working in the same depot.

Such a collaborative approach would demonstrate regard for the UK government's 'Guidance on Responsible Contractual Behaviour in the Performance and Enforcement of Contracts Impacted by the Covid-19 Emergency' (issued on 7 May 2020). This 'strongly encourages' responsible and fair behaviour in contract management, including in: requesting and giving relief for impaired performance; requesting and allowing extensions of time, substitute or alternative performance and compensation; and making and responding to force majeure, relief event, delay event,

compensation event and excusing cause claims. Establishing such forums would demonstrate that the rail industry is attempting to act in the requested spirit of cooperation to achieve practical, just and equitable contractual outcomes. In England at least, it may also draw goodwill from the Department of Transport at a time when government scrutiny of the industry has been increased due to the emergency measures agreements currently in place and the UK government in particular is keen to minimise the number of corporate insolvencies resulting from the Covid-19 crisis.

With the way ahead remaining uncertain for the coming months, rail industry parties and their contractors alike may find that terminating a contract for force majeure and/or not providing for sensible relief creates more headaches in the long-run than solutions. Adopting a pragmatic approach to contract management and contract performance could be to the advantage of both sides in ensuring continuity of works and services once the pandemic is finally over and life is able to return to normal.

Tammy Samuel is Head of Rail, and Caroline Hooton is a senior associate, at international law firm Stephenson Harwood LLP



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