

CLC COVID-19 CLAIMS AND DISPUTES IN CONSTRUCTION

11 January 2021

1.0 INTRODUCTION

1.1 The coronavirus (COVID-19) pandemic continues to have a significant impact on firms in the construction supply chain. Throughout this period the Construction Leadership Council (CLC) has provided support and guidance to the industry on [responsible and fair behaviour in contractual arrangements](#). Under the leadership of the CLC Business Models Workstream, the Contractual Practices Working Group have produced extensive guidance including:

- [CLC COVID-19 Contractual Best Practice Guidance](#) - outlining how to navigate and accommodate the impact of COVID-19 on existing contracts in order to avoid disputes, reach settlement and safeguard project delivery and supply chains. This guidance also offers templates for instigating collaborative dialogue within a safe and secure legal framework.
- [CLC COVID-19 Contractual Disputes & Collaboration – Summary Guide](#) - giving a high-level summary of the above guidance, tools and templates available and explaining how to manage the process of collaboration.
- [CLC COVID-19 Contractual Disputes & Collaboration – Record Keeping Guidance](#) - highlighting the need for forensic record keeping in order to underpin collaborative contractual relations and settlements.
- [CLC COVID-19 Future Proofing Guidance: JCT/NEC Contracts Amendments](#) - offering template drafting options and guidance for standard form contracts, to incorporate and share the risk of COVID-19 disruption to project delivery.

1.2 Feedback indicates that this guidance has been well received, and there have been positive reports of proactive and collaborative responses to address issues by parties to construction contracts. However, there remains a real concern that in 2021, as we reach the completion of projects entered into pre-pandemic and the end of financial/tax years, businesses will become embroiled in costly and long-running disputes over the effects of COVID-19 on projects.

1.3 Over the last few months, the Working Group has conducted a questionnaire and a series of interviews with a range of leading industry professionals in the field of construction claims and disputes and contracting parties in the supply chain. Many respondents represent a significant client base from within the construction supply chain and across many sub-sectors. The aim

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was to help improve the CLC's understanding on the impact of COVID-19 on contracts and the possible nature and volume of potential claims and disputes now, and in the future. The following summary provides a snapshot of current thoughts and perceptions.

- 1.4 The Contractual Practices Working Group of the CLC Business Models Workstream continues to monitor the situation with respect to the potential for widespread disputes and urges all parties to act fairly and responsibly to preserve the competence, capability and capacity within industry to meet the challenges of 2021.

2.0 IMPACT OF COVID-19 ON CLAIMS AND DISPUTES

A. Experience to date – Majority of respondents indicated:

- An increase in the level of notifications and claims under construction contracts because of COVID-19. This includes both chasing issues on legacy projects to increase cash reserves, and chasing the recovery of commercial positions due to the direct impact of COVID-19 on current projects.
- An increase in the number of claims under construction contracts being rejected because of COVID-19. Initial indications found that whilst parties may be inclined to settle an entitlement to additional time for completion, there is a reluctance to agree financial losses, costs and expenses (which is the greater source of contention).
- It is too early to know what will happen with those rejected claims. However, there have been positive early signs of commercial settlement to avoid disputes, but at present lower value disputes were considered easier to pursue, leaving COVID-19 related disputes – being more complicated – to a later date in 2021.
- Commercial behaviour has changed since COVID-19. In the short term many reports indicated a positive and increased level of collaboration (especially from public sector and proactive clients/Tier 1s) within Q2 and Q3 of 2020. However, in longer term, indications were that commercial behaviour was hardening throughout the supply chain, including greater emphasis on management of existing contracts, increased tender lists and sub-economic pricing, increasing insolvencies and robust protective discussions on risk allocation in new contracts.
- It is expected that there will be a rise in the number of claims that turn into more formal disputes during 2021. Data shows that this is a natural progression but dependent on numerous factors. The key triggers for which are reaching final account, tightening cash-flow within industry, financial reporting requirements, project/client type and reduced good will.

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- Indications were that 2021 may bring the perfect storm of: a negative economic environment; EU Exit; reduced construction market activity; the end of government business support schemes; the introduction of reverse charge VAT; and a significant increase in the number of claims across the supply chain.

B. Wider commentary

- There was mixed opinion on the impact of reduced productivity and programme delay, which has had a varied impact on subsectors within the industry and in different regions, as lockdown rules have varied. Disputes arise over the right to entitlement for time and potential liability for delay or loss before parties can address the substantive issues of quantum of either time or money.
- Government statements on the continuation of construction work and the CLC Site Operating Procedures provided significant support to the sector, although evolving iterative guidance could compound the volume of disputes.
- Patterns in commercial behaviour are typically steered by client/project type. Central Government – looking to sustain the supply chain. Private Sector and non-central government – strong commercial stance can easily generate disputes.
- Trends in notifications and/or claims are difficult to establish as dependent on the respondent's client base and nature of contract/project. Although there was a general comment that high rise projects and finishing and commissioning trades may see greatest contractual difficulties. It is worth noting that:
 - Research involved an even mix of JCT and NEC contracts.
 - Claims being made or considered mostly related to time, but also included payment timescales/valuations, variations, change in law and force majeure.
 - Claims were generally up to 25% of the original contract value.
 - Problems were being seen across small, medium and large sized businesses within all tiers of the supply chain.
 - The volume of 'Smash and Grab' adjudications were already rising.

It is inevitable that there has been an increased number of notifications /claims. It is likely that the number of disputes will increase in 2021.

Pre-COVID-19 tendered contracts and new contracts – are already seeing far greater rigour, future proofing against pandemics and transfer of risk, which may not bode well if the transfer is to the project delivery tier, which is unable to manage that risk effectively.

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As society and industry continue to grapple with the pandemic, the CLC Business Models Workstream would remind the sector that without proper fair and reasonable administration of construction contracts, COVID-19 could have a significant and detrimental effect on the industry. An industry which is expected to play a central role in helping the economy recover from the effects of COVID-19.

"The CLC asks that industry works together to support the long-term health of our sector by constructively resolving all contractual disputes arising from the pandemic."

If you have any comments or feedback, please email:
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