



COVID-19
CONSTRUCTION

PROJECTS AND CONSTRUCTION

COVID-19 and Construction: Defining the “New Normal”

by **Jamie Ritchie**

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Actions that you can take now to protect your project pipeline.

Globally, at every level, project contract chains are currently reviewing their position in response to the COVID-19 pandemic. The legal implications of “suspended animation” within the construction industry are particularly complex. There have been multiple articles in the past few weeks focusing on “Force Majeure”, “Disruption” and “Termination Rights”. These publications are clearly essential reading for any construction professional in the current climate and we also explain some of these concepts below.

However, our aim through this article is to set out some alternative legal and commercial mitigation strategies which can be deployed during this crisis. It has been heartening to witness the level-headedness and commercial goodwill that many in the industry have adopted in confronting this once in a lifetime event.

At LK Shields we typically find ourselves in the middle of the project, negotiating upstream with banks, forward funders, institutional purchasers and simultaneously downstream with main contractors, professional team members and subcontractors. Our challenge with each project is to ensure that upstream requirements combine downstream in a fair and equitable manner that meets the project objectives.

Our experience of working in this central coordinating role has afforded us with some unique insights on what actions you can take now in order to protect your project pipeline.

1. Focus on tasks that are not contingent on being physically on site

If you are in the process of finalising contracts, it will be important to reach out to your project partners and review the current situation. From a practical point of view, it is advisable to jointly consider what aspects of the project can be progressed remotely. This will also be a good time to assess the commercial appetite of all parties in proceeding to the construction phase in the future. Once you have a clear understanding of each parties’ parameters, speak to your lawyers and task them with creating workable solutions which can accommodate those new parameters within the contractual framework. This may include amending the draft contracts so that they can still be signed now but with design work (and other off-site activities) proceeding in the background.

One way of achieving this is by updating the contract so that the construction phase will not come online until the crisis has subsided. There are multiple ways in which this can be accomplished, including by introducing the concept of an “Agreed Variation” or an “Effective Date” that takes account of any delay and disruption caused by COVID-19 (as defined by the Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020). The intention here being that downstream parties will not be unnecessarily exposed to Liquidated Damages come the end of the project due to the period within which the site will be shut down.

Another way in which this can be achieved is by drafting a bespoke Letter of Intent which authorises the Main Contractor to proceed with a design package (and placing of certain orders) in the background, pending execution of the Main Contract.

2. Existing Contracts

The CIF issued a [statement](#) welcoming the new social distancing guidelines from the HSE to the industry on 20 March 2020. There is clearly recognition from government that *“the industry and its 147,000 employees are critical to both the economy and wider society as essential emergency works, housing, hospitals, roads, schools and other projects are delivered.”*

To the extent that projects can remain safely operational, there is clearly an appetite to facilitate this. It is important to undertake a considered review of your existing contracts in conjunction with your lawyers. If you are a contractor and your project is halted due to a mandatory lockdown in the coming weeks, it will be essential to check whether your “Force Majeure” provisions are robust enough to address any delay during this period. Force Majeure is essentially an unforeseeable event that would prevent one party from fully complying with its obligations under the contract.

Below is a summary of the position under some of the standard forms used in Ireland:

Type of Contract	Position and Considerations
RIAI (Blue Form and Yellow Form) 2017	<p>Clause 30</p> <p>Clause 30 sets out the standard position in relation to “force majeure”. The Architect assesses whether an Extension of time upon a notification of such event by the Contractor. The Contractor may be entitled to additional time, but not financial compensation. Additionally, “force majeure” is not defined under standard form RIAI contracts.</p>
JCT (SBC/Q 2016)	<p>Clause 2.29</p> <p>Clause 2.29 lists “force majeure” as a “Relevant Event”. Subject to an appropriate notification being made to the Contract Administrator, the Contractor will be entitled to an extension of time for the period of delay, but not additional money. Once again, “force majeure” is not defined under the standard form JCT contract.</p> <p>If the contract is suspended for a period of time longer than a period stated in the “Contract Particulars” then either party may terminate the contract under 8.11.</p>
NEC	<p>Clause 60.19</p> <p>NEC does not provide for “force majeure” in the way other standard forms do. However, NEC harnesses a detailed process for “Early Warning notification” and subsequent “Compensation Events” (Clause 60.19) which together potentially operate to provide a Contractor with an increase in the total Prices and extension of time.</p>

Notwithstanding the above, the reality is that a large number of mid-market construction projects are bespoke. This is particularly the case for third party funded projects. Your contracts may therefore contain a multitude of additional notification requirements that are not anticipated by the standard forms. This would most certainly be the case on larger forward funded projects, involving development agreements and extensive security packages.

Likewise, engineering, procurement, construction management (EPCM) agreements typically contain detailed provisions apportioning risk. The precise configuration of these agreements usually depends on each party’s respective bargaining power at the time of entry into the contract. In every case, you should be

consulting your lawyers to consider what innovative solutions can be found to nurture the project to completion in a manner that causes minimal disruption.

If you are an Employer, you should also be considering and agreeing a demobilization plan with your project partners in order to ensure that when the project does come back online that each project team member will be suitably positioned to restart the development in the most efficient manner. The completion date in contracts can also easily be amended by way of a side letter.

3. Reviewing security packages and restructuring

The majority of private sector projects in Ireland are third party funded in one form or another. Many projects which we would class as “soft infrastructure”, namely forward funded PRS schemes, student accommodation projects, hotels, office blocks, renewable energy and private care developments are significantly dependent on an intricate web of contractual obligations which are owed upstream by the Employer / Developer. Such obligations may be owed to an institutional purchaser who is seeking a yield from the completed project or to a bank which may be funding the project in the background.

It is worth exploring what options are available in terms of restructuring debts in order to keep their projects moving. Our Construction Team, together with our Banking and Finance Department are well placed to advise as you consider the implications of the current crisis and what actions you should be taking with your funders in the present circumstances. If you have an existing funding facility in place, you should be very mindful that your funding arrangements are likely detailed and may contain project specific notification requirements regarding any changes in your construction programme(s). Generally speaking, funder’s legal teams are still fully operational (albeit on a remote basis) and are available to consider and review proposed changes in underlying construction contractual frameworks. Once again, full disclosure and frank discussions with your upstream counterparts are encouraged in conjunction with your lawyers.

4. Insurance

You should be speaking with your insurance broker to see what solutions are available within the confines of your existing policies. Business interruption insurance may cover issues for contractors relating to COVID-19. Likewise, robust Owner Controlled policies may also make provision for Employers to mitigate some of the potential delay issues associated with the current crisis. To the extent that is possible, we would encourage you to facilitate engagement between your insurance advisors and your construction lawyers. In our experience, this is helpful in ensuring that the legal team are fully aware of any gaps in liability and what areas of the contract require specific attention.

5. Supports

The Government has recently announced a range of supports available to contractors and employers to help maintain a business through these challenging times. One such example is the Strategic Banking Corporation of Ireland’s working capital scheme which has a specific fund for helping businesses impacted by COVID-19 with loans granted up to €1.5m. You should also get in touch with your bank about making the terms of your facility more flexible, if required. If your facility is with one of the pillar banks you may qualify for support under the Credit Guarantee Scheme.

6. Cooperate and Collaborate

Finally, it is important to remember that the fundamental commercial objectives that were in place before the COVID-19 crisis are likely to still exist when projects go live again in the future. The underlying needs necessitating developments which have been precipitated by the housing crisis, the needs of the adult social care sector and Ireland’s shortfall in its renewable energy targets (to name but a few examples) are not going to go away because of the current situation. As such all levels of the contractual matrix should try to work together to reach a flexible solution that can allow the project to continue. Contractors, subcontractors and professional team members are just as worried as Employers about the outbreak and will likely do everything they can to come to a solution that works for you both.

In conclusion, the COVID-19 pandemic does not mean the end of your construction contract. Flexibility and foresight can help you maintain your project into the future.

The LK Shields Construction team are available to provide legal advice and practical insights to any Employer or Contractor concerned with how COVID-19 might affect how they do business. For more information, please contact Jamie Ritchie at jritchie@lkshields.ie or our cross-disciplinary crisis advisory team at crisisadvisoryteam@lkshields.ie.

To view our cross-disciplinary coverage of business continuity during the COVID-19 outbreak, please [visit our dedicated special insights page](#) and sign up to our mailing list by [clicking here](#).

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