

## CLIENT ALERT

### UK Government Guidance Calls for Responsible Contractual Behaviour in Contracts Materially Impacted by the COVID-19 Pandemic

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In May 2020, the UK Cabinet Office published a document entitled “Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency.” The Guidance is available [here](#). Its stated purpose is to encourage parties whose contracts have been affected by COVID-19 to act responsibly and fairly, to support the government’s response to COVID-19, and to protect jobs and economy.

As commercial parties struggle with the challenges of the emerging business landscape, we are likely to see an uptick in disputes concerning failure to perform contractual obligations – adequately or at all. The Guidance recognises this likelihood and cautions against the danger that a “plethora of disputes” can have on the effective operations of markets. The government appeals to contractual parties to prevent avoidable defaults where possible and to manage their disputes responsibly, taking into account not only their own self-interest but also the national interest at the time of unprecedented challenges.

#### Overview

The Guidance is precisely that: guidance. It has no legal effect and is not binding on parties. However, the government strongly encourages contracting parties to adhere to it for their collective benefit. The Guidance is directed with immediate effect to both the public and private sectors in England (it expressly excludes the devolved administrations). It sets out what the government considers to be responsible and fair contractual behaviour in contracts impacted by COVID-19, albeit with particular emphasis on the supply chain arrangements - where contractual performance is crucial to the nation’s immediate response to the pandemic.

The key purposes of the Guidance are to protect the economy and to achieve the following objectives:

- Where possible, to maintain contractual performance which is required to support the immediate response to COVID-19 to protect public health, jobs and the economy; and
- to ensure that contractual and economic activity can be preserved while avoiding destructive disputes and insolvencies, and to ensure cashflow is maintained to pay the workforce, individuals and businesses throughout the supply chain.

#### The Government Recommendations

The Guidance sets out what constitutes “responsible and fair” behaviour when performing and enforcing contracts materially impacted by COVID-19, this includes:

- being reasonable and proportionate in response to performance issues and contract enforcement (including dealing with any disputes);

- acting in a spirit of cooperation; and
- aiming to achieve practical, just and equitable outcomes while having regard to the impact on the other party and availability of their financial resources as well as the protection of public health and the national interest.

In particular, this kind of behaviour is “strongly encouraged” in respect of:

- Requesting and giving relief for impaired performance, including allowing extensions of time for delivery, completion and payments;
- Making and responding to *force majeure*, frustration, change in law, relief event, compensation event and excusing cause claims;
- Making and responding to claims for damages, including under liquidated damages provisions;
- Returning deposits or part payments;
- Exercising remedies in respect of impaired performance, including enforcement of security, forfeiture of property, calling of bonds/guarantees or the initiation or continuation of insolvency/winding up proceedings;
- Requests for variations or alternative performance; claiming breach of contract and enforcing events of default and termination provisions;
- Commencing and continuing formal dispute resolution procedures, including proceedings in court; and
- Enforcing judgments.

Unsurprisingly, this list covers the majority of the kinds of recourse we would expect a party to have under a commercial contract. In practice, what constitutes ‘fair’ and ‘responsible’ behaviour will invariably depend on the underlying circumstances and will differ from case to case. The principles and remedies in contract law are well established and there is no expectation that the Courts will alter, suspend, or place a gloss on these – even on a temporary basis. Rather, the Guidance encourages parties to exercise restraint when considering whether to enforce strict contractual rights. That said, it may be that contractual requirements for a party to act “reasonably” are considered in light of the Guidance, or that the extent of any forbearance will be scrutinised when the Courts exercise their discretion in awarding costs.

In keeping with the Court’s general approach that recourse to litigation should be a last resort, the Guidance places significant emphasis on resolving disputes responsibly through negotiation and alternative dispute resolution to achieve equitable outcomes without the need for court proceedings. Where this involves the parties working towards a mutually-acceptable resolution of their dispute, there may be greater scope for consideration of the perceived “fairness” of their conduct beyond the pure legal merits of their respective positions.

### **Practical Consequences**

As noted, the Guidance does not affect a party’s strict legal rights, nor does it override any express contractual provisions. The wording of each contract therefore remains the starting point for any analysis of a party’s rights and responsibilities. Directors continue to have a duty to act in the best interests of their company. However, it may be, for the time being, that some parties do take a more equitable approach to the enforcement of their rights, particularly in circumstances where both parties may be experiencing difficulties with contractual performance (or may anticipate they will).

Where parties are prepared to accept altered performance, they should, following the decision of the Supreme Court in **Rock Advertising Limited v MWB Business Exchange Centres Limited** [2018] UKSC 24, document any agreed variations in accordance with the contract. In particular, they need to pay careful attention to any provisions precluding oral modifications.

While the Guidance has no legal force at present, the government has noted that it will continue to review contractual dealings, with the first review due to take place by 30 June 2020. If there is evidence of non-compliance, the government has indicated that it may take further measures to enforce its recommendations, including through the introduction of legislation in the future. Until then, the government is only appealing to commercial parties' better natures. Whether this will have any meaningful effect – particularly among those without high public profiles - remains to be seen.

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