

# Cabinet Office advice for contractual behaviour which is impacted by the Covid-19 emergency

On the 7th May 2020, the Cabinet Office released its guidance on responsible contractual behaviour for both public and private sectors relating to the performance and enforcement of contracts which have been “materially impacted” by the coronavirus.

20 May 2020

**Please note: the information contained in this legal update is correct as of the original date of publication**

On the 7th May 2020, the Cabinet Office released its guidance on responsible contractual behaviour for both public and private sectors relating to the performance and enforcement of contracts which have been “materially impacted” by the coronavirus. This is non-statutory guidance which has the aim to promote fair and reasonable behaviour for the collective benefit between parties and for benefit of the UK economy.

Contracts play a vital role in our economy and the functioning of our day-to-day life and so, in this guidance individuals, businesses and public bodies are being asked to think about the wider ramifications that their contractual decisions have. The Government’s objectives are:

1. To maintain contractual performance - this will support the immediate response to the pandemic as well as protect public health, jobs and the economy;
2. To ensure cashflow in contracts – this will also ensure that payment is provided throughout the supply chain;
3. To ensure contracts are preserved where contractual performance is not possible in the current crisis or if it is not essential – this should avoid disputes and insolvencies;
4. To preserve contractual and economic activity and to ensure that it can continue after the emergency is over – this will support the economy and the UK’s productivity.

## Responsible and fair contractual behaviour

Due to changes in all aspects of life because of the coronavirus outbreak, there will be performance issues in many contracts. The Government is asking for proportionate and reasonable behaviour from all parties to an agreement when dealing with any struggles and disputes that may occur. Parties should act cooperatively in order to achieve a practical and just outcome; this includes thinking about the impact on the other party and the wider complications that the coronavirus has caused; for example, the protection of public health and the availability of financial resources. The guidance particularly encourages responsible and fair contractual behaviour regarding:

- Relief for impaired services – in respect to the time for delivery/ completion, the nature of goods, making payments etc.
- Extension of time, compensation, substitution or alternative performance
- Payment provisions under the contract
- Returning deposits or part payments
- Claims:
  - relating to force majeure, frustration, change in law, relief/ delay/ compensation event
  - for damages, including those under liquidated damage provisions
  - for breach of contract and termination provision, including those arising by insolvency or potential insolvency
- Requests:

- for information and data under the contract
  - for consents, including funder consents
  - for mediation or ADR
  - for contract changes and variations
- Giving notices, providing reports or keeping records
  - Enforcing judgments and starting or continuing any formal dispute resolution procedures

## Analysis

It is very unclear as to how much impact this guidance is likely to have. You can see what the Government is trying to do: remind people that we are all in this together and should be supporting each other. Which is absolutely right in principle. However, it assumes that parties are in a position to take these steps, which is often not going to be the case. It is more likely to be able to be put into practice for contracts between the public and private sectors. While some private sector businesses will have cash reserves allowing them to postpone payments from a customer, many will not. The guidance does state that contracts should be considered on an individual basis, which is one way of recognising that it will not be possible for some businesses to take a “big picture” approach.

In the public sector, there is already PPN 02/20 advising public sector organisations to retain contracts by paying even where no services are being delivered. For bodies already doing that and agreeing other changes to contracts to accommodate the effects of lockdown, it doesn't feel like this guidance will change their approach.

This guidance does not apply to those in the devolved administrations so any contracts between an English party and its counterparty in Scotland, Northern Ireland or Wales will not be covered. In addition, the guidance only applies to those contracts which are materially impacted by the coronavirus. There is no clear indication of what this means, at the moment the majority of life is impacted by coronavirus and it could be that two parties to a contract have a different view as to whether their agreement is being “materially impacted” or not.

What will happen if businesses don't follow the guidance, which is stated to be non-statutory? There can be no legal penalties for not taking it into account. The guidance does say that Government will continue to monitor contracting behaviours – mainly anecdotally in the private sector, you assume - and may consider other measures, including legislation in the future. Will parties who didn't play nicely have a black mark against their name?

One area that it may have more of an impact on is disputes. It will be interesting to see whether there is a huge surge in alternative dispute resolution requests or mediated settlements.

In conclusion, while it is nice to be reminded that everyone in the country is being impacted by coronavirus and that we should be kind, I am sceptical of what impact it will really have – unless it becomes law.

Co-authored by [Anja Beriro](#) and Tara Cole.

## Contact



**Anja Beriro**

Partner

[anja.beriro@brownejacobson.com](mailto:anja.beriro@brownejacobson.com)

+44 (0)115 976 6589

