

'Play nicely, children': Cabinet Office guidance on responsible contractual behaviour during the pandemic

On 7 May 2020, the Cabinet Office released 'Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the Covid-19 emergency'. This non-statutory guidance encourages 'responsible and fair behaviour' by all parties where the performance of contracts is materially affected by the coronavirus pandemic.

Particular emphasis is placed on the importance of responsible behaviour in complex contractual arrangements constituting a supply chain. The guidance expressly does not apply to contracts which already allocate pandemic-related risks, or to speculative transactions, such as on the financial markets.

Four objectives are stated: to maintain contractual performance, maintain cashflow, preserve supply chains and preserve economic activity. The aim appears to be that when the crisis eases, contractual infrastructure will remain in place without parties being mired in lengthy and intractable litigation, such that business as usual can be resumed as swiftly as possible.

'Responsible behaviour' is described by reference to impact on each party, financial resources, public health and the national interest. Numerous examples are given of particular areas where such behaviour is encouraged. These cover both dealings between the parties – such as requesting payments, or returning deposits – and litigation, from commencing proceedings through to enforcing judgments. Parties are expressly encouraged to consider alternative methods of dispute resolution, including industry adjudication schemes, to resolve disputes at an early stage.

Commentary

It is all but inevitable that a good deal of litigation will arise out of the current pandemic. This guidance is an exhortation to parties to attempt to manage the amount of that litigation, particularly where the consequence of protracted disputes may be that supply chains are disrupted.

The courts have long encouraged litigants to consider ADR. This guidance further underlines that parties should consider all options for resolving their disputes, particularly where the volume of disputes is likely to be greater, the burden on the court system heavier, and the economic consequences of disrupted supply chains more severe.

What is 'fair' and 'responsible' will, of course, differ from case to case. It may be that parties who are later perceived to have acted unfairly or irresponsibly in pursuing litigation, having particular regard to the circumstances of the pandemic, find that to be reflected in costs orders later down the line.

Overall, however, this is generalised and non-statutory guidance. The legal and practical consequences of the pandemic will be played out in months and years to come and much will depend on the circumstances of each individual case. Where protracted litigation may result in significant disruption to supply chains, parties are likely to have regard to their commercial interest in resolving disputes quickly.

The guidance is available here:

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883737/_Covid-19_and_Responsible_Contractual_Behaviour__web_final___7_May_.pdf