

COVID-19 commercial contracts and other disputes: some Frequently Asked Questions for England & Wales

How BCLP's commercial disputes group can help

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Our commercial disputes team is managing numerous client issues developing in the contractual and commercial space owing to the COVID-19 pandemic. Here are some key aspects you should be thinking about under the laws of England & Wales – and on which we are ready to help. A clear review now, and formulation of a disputes strategy may well pay dividends later.

What's the contractual position?

We are seeing issues arising in all types of commercial contracts from supply agreements, service agreements, asset/share sales and purchases, finance agreements and more. In every case the starting point is a careful contract review.

Ask us for help - we can review single contracts or contract portfolios of hundreds. BCLP Cubed's ability to integrate the latest machine learning technology, volume legal delivery and complex advice means that it is ideally placed to conduct large scale reviews of contracts. Ask us for more details.



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Here are some answers to questions we are frequently being asked:

Issue	Advice
 Do jurisdiction and governing law clauses matter?	Yes: chosen law will determine the interpretation of any contractual positions, including how force majeure and frustration might apply. They will also control how disputes will be determined including any required escalation steps, for example, whether an injunction can be sought and if so how and where.
 Should I assert force majeure? Or might force majeure be asserted against me?	In English law governed contracts, force majeure (as a ground for excusing non-performance of contractual obligations) must be expressly included in the contract. Consider whether COVID-19 might fit in the events listed within the force majeure clause. Check also across the whole contract – for example other exclusion clauses might exclude a force majeure ground or affect its application. Look carefully at the effect of triggering any rights of force majeure. Check, and follow, the formalities of how to issue, or respond to, any force majeure notice under the contract.
 What is frustration and could it apply?	In English law, there is a very high threshold in order to establish that a contract has been frustrated. However, especially where the contract has no force majeure provision, we can consider with you whether the doctrine could apply in respect of contracts which are no longer capable of being performed.
 What is a Material Adverse Change clause?	These usually provide that where a material adverse change has occurred, a party to the contract may walk away/terminate the agreement. They are often found in finance and M&A agreements. Bear in mind that the courts favour the enforcement of signed deals where the commercial risks are discernible by the parties – but a careful review along with other clauses may provide remedies.

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 Does the contract provide for damages?	Look for liquidated damages provisions. They provide a formula or a fixed sum for damages payment upon certain breaches. That pre-agreed sum is insulated from legal issues of causation, remoteness and proof of loss, although it may be subject to the rule against penalties. Check what your contract provides – there may be more certainty on what is owed, which means a better negotiating position now.
 Should I terminate? What if my counterparty tries to?	Be very careful and take advice before making any decision to terminate. Doing so incorrectly, or hastily, may create more risk in the long term. Likewise if your counterparty is attempting to terminate, consider carefully the contractual mechanisms they are using to do so, and take care not to accept termination, or behave as if you accept, until you have taken advice.

How can I protect my position now?

Issue	Advice
 Should I consider an injunction?	You may wish to take urgent action, assisted by the courts, to preserve a contractual position or oblige performance by court order. Our commercial disputes team have significant experience of injunctive relief in urgent matters and are experienced in crisis management. The courts are committing to facilitating urgent applications and we are ready and able to do so, including by running remote hearings. We can advise you if there are urgent steps we could take to protect you now.
 If this becomes a dispute, what should I be careful of?	What you do now, or assert now, may change the strict legal rights you have under the contract. You may be held to any assertions, concessions or representations you make – take advice and have a plan before you or your staff enter into discussions. Be very careful about creating notes or documents setting out urgent strategies, commercial concerns or confidential information– they may not be privileged and may need to be disclosed in due course.
 Can I resolve immediate issues by varying terms?	To preserve relationships and keep business moving you may be tempted to seek to agree contractual variations. That may be a sensible approach, but first check and first understand your rights and obligations under the existing contract, as well as any contractual formalities for effective variation of terms.

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What's the insurance position?

Issues concerning insurance cover for COVID-19 are not straightforward. We are seeing lots of variations in whether there is cover. It is therefore important to carefully review all policies.

Issue	Advice
 What cover do I have?	We are actively advising clients on a range of corporate/commercial issues, including property risks (denial of access and pandemic cover), officer/director duties, securities/disclosure issues, supply chain/business interruption issues, and key contractual provisions (including business continuity obligations and force majeure and MAC clauses). We are also assisting clients with strategizing for anticipated counterparty risks, including potential insolvency or bankruptcy events involving customers, vendors, and suppliers.
 Can BCLP help review coverage?	We offer a fixed price per policy for review and reporting/advising on its terms. Our US colleagues are offering a similar fixed price package. We have already reviewed numerous policies in the context of the COVID-19 pandemic's effects so are well-placed to advise quickly and comprehensively on how policies may respond. Contact us for more information.
 Is there specific cover for disputes?	You may have legal expenses insurance contained in various policies. We can help you ascertain existing cover, or advise you on appropriate funding and insurance for any claims or defences you may be facing. In our experience, early approaches can lead to the most cost-effective packages to mitigate the financial risk of litigation.

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THE BCLP TEAM

If you have any questions, or would like to discuss any of these issues with our team, please get in touch.



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This document provides a general summary only and is not intended to be comprehensive nor to provide bespoke legal advice. Given the fast moving nature of the coronavirus outbreak and that fact that the UK government is introducing new legislation and measures on a regular basis to address it, employers need to adopt a dynamic approach. Specific legal advice should always be sought in relation to the particular facts of a given situation.

Bryan Cave Leighton Paisner (the "BCLP Group") is an international law firm comprised of a network of affiliated firms and entities ("BCLP Firms"). The locations of our offices and further jurisdiction-specific information, including a description of each of the BCLP Firms and where we are authorised and regulated to provide legal services can be found through the country links on our website (please see our legal notice for further details: <https://www.bcplaw.com/en-GB/legal-notices/legal-notices.html>). In certain jurisdictions (such as Singapore and Mainland China) the firm is licensed as a foreign law firm, and in certain others (such as Indonesia) we do not have a local office and operate a virtual desk supported by local counsel. Where legal services are required concerning other jurisdictions, we will refer the matter to and work with relevant local counsel where necessary.

Getting in touch

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