

Protecting your position – COVID-19 disputes in the UK

BCLP's Commercial Disputes team addresses some key questions




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The COVID-19 pandemic is causing commercial and contractual issues across sectors. Whilst organisations are busy dealing with urgent issues day to day, in reality it will take some time for issues and concerns to crystallise into disputes for court or arbitration. It is prudent now to think about both how to manage in the short term, but also the impact which today's decisions might have on a longer term outcome for disputes which do emerge.

We have created the table below to help you as a quick reference guide to a number of key considerations when addressing the impacts of COVID-19 on your commercial contracts. They should help you protect your position in case you do need to make a claim or defend proceedings which emerge out of the current crisis:

Issue	Advice
 Emergency action: do I need to seek help from the courts now?	In urgent situations the court may support you by issuing an injunction to stop certain behaviour by your counterparty, force them to take required steps, or freeze assets, to preserve the position until a trial can determine the outcome of a dispute. Such relief will require you to act quickly and give full and frank evidence of both sides of the argument. You should take immediate legal advice if you think you need to take these steps.
 Does the contract have notice and termination provisions?	<ul style="list-style-type: none">• Review your contracts carefully - understanding what the contract requires early on is crucial.• If you think the situation amounts to an event of default, a material adverse change, or force majeure, the contract may have strict requirements about how you serve any such notice. If not followed to the letter your notice may be invalid and have no effect.• Similarly, check exactly what is required in order to terminate under the terms of the contract, and take advice before acting. Invalid notices, or terminating when the circumstances do not actually allow it, may put you in breach of the contract.
 Will negotiation or variation of terms provide the solution?	<ul style="list-style-type: none">• Whether your contract requires it or not, it is worth considering whether and when it might be worthwhile attempting to reach a compromise with your counterparty.• Varying terms or settling a current issue may be a more certain and controlled outcome than risking litigation to enforce your strict legal rights. Remember to follow any procedure in your contract for how to vary validly.• Be mindful of the timing of these discussions to achieve maximum impact, and make sure you are careful to ensure all parties are aware that any overtures made towards settlement are done "without prejudice" to your legal position.• Keep minutes or a record of your virtual meetings and correspondence with your counterparty - use language

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	<p>to preserve your legal position, if you have not yet had time to take detailed advice, and avoid language that might be later held against you as a waiver of your rights under the contract.</p>
 <p>Dispute clauses: what is required?</p>	<ul style="list-style-type: none"> • Check your contract for the dispute resolution clause and follow it: this is likely to deal with where (and how) any formal dispute should be run, but may also include an escalation procedure for steps the parties are required to take before embarking on formal litigation or arbitration. • Many clauses require the parties to attempt to discuss and negotiate, or even mediate first – which could save time and costs in the long run and help resolve issues sooner rather than later.
 <p>What are the losses, and how can you record them?</p>	<ul style="list-style-type: none"> • When considering what steps to take and whether to negotiate with your counterparty, think about any losses you have or may suffer, and your mitigation of risk. • Take steps now to collate and preserve materials: any eventual trial or hearing – which could be years away - will require you to produce evidence of losses caused to you. • Clear record keeping could prove vital: you may have data about your historical revenue and/or costs, and how and why that is changing day to day during the pandemic – log it and preserve it, alongside any evidence of what you are doing to reduce or mitigate your losses. • Check your organisation's usual document destruction policies, and how you can ensure vital information like this is preserved regardless. • Consider using a forensic accountant at an early stage to help collate the financial information and prepare an initial assessment of loss – this could put you in a strong position for any negotiations or settlement discussions that may take place.
 <p>Be very careful in creating new documents and records</p>	<ul style="list-style-type: none"> • Whilst preserving evidence is crucial, you should remain mindful of privilege. • Be very careful about creating notes of internal conversations or documents setting out urgent strategies, commercial concerns or confidential information. • New documents, including emails and instant messages, created about the contract or commercial issues may not be privileged and so may need to be disclosed to your opponent, the court, or regulatory authorities in the

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	<p>future.</p> <ul style="list-style-type: none">• Establishing a Privilege Protocol can help guide your teams about how and why to take care over creating and sharing documents.
 <p>Is it worth suing? Check your counterparty's position</p>	<ul style="list-style-type: none">• Given this unprecedented situation, it is important to check and monitor the financial standing of any key counterparties where you anticipate a possible dispute arising.• Keep a watch out for any market announcements, change in their financial position, or likely insolvency events.• Insolvency will radically affect the approach to any disputes and settlement strategy, but so will an informed position on the particular financial or investor pressures a counterparty might be experiencing.
 <p>Should you notify your insurer?</p>	<ul style="list-style-type: none">• It is vital to check what cover you have, and comply with notification obligations early.• Insurance coverage for any losses, but also potentially for legal expenses for future disputes, may radically affect your strategy.• We are actively advising clients on a range of coverage issues, as well as assisting clients with strategizing for anticipated counterparty risks, including potential insolvency or bankruptcy events involving customers, vendors and suppliers.
 <p>Can I get an early assessment of my dispute?</p>	<p>BCLP's Clear/Cut service offers a fixed fee package to help you and your business to quickly and more confidently answer two fundamental questions that arise when disputes loom: how bad is it? And should we fight or settle? We use AI to review and analyse your documents quickly, and can provide a report on the merits of your position and a decisive recommendation on how to proceed.</p>

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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.

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