

# UK Government's "Guidance on responsible contractual behaviour" – toothless for now, but laying foundations for further measures

On 7 May 2020, the Government published a document entitled "Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency" (the "guidance"). In this short article, [Sean Brannigan QC](#) and [Kajetan Wandowicz](#) summarise the guidance, and discuss its potential implications for commercial parties. It was prepared jointly by the Cabinet Office and the Infrastructure and Projects Authority, and apparently issued under the authority of the former. It is described as "Non-statutory guidance for parties to contracts impacted by the COVID-19 emergency".

The first paragraph of the guidance bears quoting in full: "The guidance in this note is that parties to contracts should act responsibly and fairly, support the response to Covid-19 and protect jobs and the economy." This is, in fact, a very precise summary: the guidance indeed repeatedly implores contractual parties to act "responsibly" and "fairly", and to support the Government's response to the ongoing pandemic; but what it fails to do is to set out what is meant by acting in such ways. At times, the guidance reads like a political statement: paragraph 5 stresses that "Responsible and fair behaviour in contracts now – in particular in dealing with potential disputes – will result in better long-term outcomes for jobs and our economy." This is to be contrasted with unspecified "bad behaviour" which "will be bad for jobs and will impair our economic recovery."

The guidance is expressly non-binding. As the guidance acknowledges, it cannot override general law, and parties' strict rights and obligations; further, paragraph 7 makes it clear that it is subordinate to any detailed guidance and policy notes. As a result its only effect for the time being is that all individuals, businesses, and public authorities are "strongly encouraged" to follow it in the national interest.

In many ways, the non-binding status of the guidance is a function of the British constitution, which prevents the Government from altering substantive rights and obligations by decree, unless authorised to do so by Parliament. This can be contrasted with a few international examples discussed below, where either a decree of the government is enough, or corresponding legislation has been passed. That said, notwithstanding the lack of legal effect, it is still worthwhile for commercial parties to consider the guidance, because:

1. its overarching theme is that the Government is open to at least considering intervening in the commercial sphere by means more radical than a non-statutory policy note if it should come to the view that the guidance is being ignored. Given that the Government enjoys a stable majority in Parliament, there is a distinct possibility that legislation may follow; and
2. it is possible that third parties asked to resolve disputes between parties – such as adjudicators might take it into account and/or give effect to it in unpredictable ways, particularly where exercising any form of discretion.

*Summary of the guidance: a soft-touch approach*

The substantive directives are to be found in paragraphs 14 and 15. This is where the guidance comes the closest to expanding on the concepts of acting "responsibly" and "fairly".

Paragraph 14 outlines the main directives:

1. Reasonable and proportionate responses to performance issues and enforcing contracts (including dealing with any disputes);
2. Acting in a spirit of co-operation; and
3. Aiming to achieve practical, just and equitable contractual outcomes, having regard to the impact on the other party (or parties), the availability of financial resources, the protection of public health and the national interest.

Unlike civil law systems, English law does not import a general concept of good faith into contractual relations: the starting premise is that parties are free to pursue their own commercial interests as they see fit. Deception is actionable under various causes of action; but sharp commercial practice is not. The main exception to this rule are contracts giving rise to fiduciary duties, such as those creating partnerships or trusts. The duties of loyalty in such relationships, however, will often go rather further than the guidance. The other exceptions are contracts which contain express obligations of good faith, or possibly contracts into which such obligations may be implied under the principles set out by Leggatt J in Yam Seng Pte Ltd v International Trade Corp [2013] EWHC 111 (QB). In effect, paragraph 14 of the guidance signals the Government's (non-binding) expectation that for the foreseeable future all parties to contracts should consider themselves bound by at a general high-level duty of good faith.

The next paragraph expands this by giving 15 broad examples. However, the examples are not of contractual behaviour expected, but of areas in which parties are particularly strongly encouraged to act "responsibly and fairly". In any event, the list is general and broad enough to encompass virtually every conceivable action or situation governed by the contract: and so, "responsible and fair behaviour" is "strongly encouraged" in relation to, inter alia, payment, extensions of time, impaired performance, variations, claims for liquidated and unliquidated damages, deposits and part payments, remedies, enforcement, claiming breach of contract, termination, requesting and giving information, giving notices, keeping records, requesting and giving consent, dispute resolution, and enforcing judgments.

Nor does the guidance address the problem that any indulgence or advantage in a contractual relationship comes with the corresponding disadvantage for the other side. Thus, for example, parties are strongly encouraged to act responsibly and fairly in relation to requesting and allowing extensions of time. In a construction context, this presumably means that the contractor should only request an extension if necessary because of coronavirus-related reasons, and conversely the employer should allow such an extension. This idea may seem attractive on its face, but it trivialises the commercial and legal complexity of a construction project: the parties' contract is likely to contain provisions dealing with events outside their control, and, crucially, who takes the risk of such events. The contractor either will or will not be entitled to an extension under the risk allocation which was considered and agreed in advance. It is very difficult to see how one is to adjudge what is a "fair" allocation of the financial pain caused by Covid-19 in that situation save by reference to that pre-agreed allocation of risk – but the purpose of the guidance appears to be to encourage the parties to adopt some other standard.

This point is even more apparent in relation to example 15(c): "*making, and responding to, force majeure, frustration, change in law, relief event, delay event, compensation event and excusing cause claims.*" On the face of it, it is difficult to understand what was intended on this point. First, if the coronavirus pandemic provides a reason to depart from a precisely drafted force majeure clause, then what is the purpose of such a clause? Second, as with the other examples, one is left guessing at what exactly is "*responsible and fair behaviour in relation to*" making a claim under a force majeure clause. From whose perspective is one to judge such fairness?

In summary, the purported detailed guidance in paragraphs 14 and 15 adds little, if anything, to the overarching directive to "act responsibly and fairly". What that general directive means remains unexplained.

### *Consequences of perceived non-compliance*

Given the status of the guidance, and the lack of clarity on what behaviour would be perceived as a contravention, it is difficult to predict the effect of non-compliance, or how it will influence those asked to decide parties' disputes. One can foresee that it will certainly be relied upon by parties seeking to argue that their position is "fair". But given the fact the guidance acknowledges that it cannot override general law, and parties' strict rights and obligations it is difficult to see how a decision maker can give any effect to it save in relatively rare cases where a party has a contractual obligation to exercise a discretion fairly.

It may be asked whether the guidance may possibly affect the issue on the margin in situations where the court is (1) making a factual assessment of whether a party has acted in good faith in the rare circumstances where this arises; and/or (2) exercising its discretion in the interests of justice. It seems unlikely that there would be any such effect, not least because to the guidance's lack of clarity. Since all the guidance does is imploring parties to act "fairly", it is difficult to envisage any circumstances in which it would add anything to the factors which the court would be considering in any event. As for good faith obligations, if the court would conclude that such an obligation was breached in absence of the guidance, then the guidance will not add anything; if absent the guidance it would not find a breach, then it is difficult to see how the guidance could change that assessment. The position should be similar in situations where discretionary considerations arise, such as the grant of an injunction: to the extent that factors related to the Covid-19 pandemic would lead the court to, say, refuse to grant a mandatory injunction which it would otherwise have granted, it is difficult to see the guidance having any impact on that decision.

Rather, it appears that some form of "*enforcement by politics*" may be intended, by sending a message to commercial parties that the Government is monitoring the situation, and that it will not shy away from measures more interventionist than non-statutory guidance if it considers that the guidance is not observed. Paragraph 20 makes clear that "*the Government will continue to review behaviours in contracting ... as we emerge from this public health emergency to ensure that contractual arrangements can function effectively and maximise their contribution to jobs and the economy*". If this passage was intended as a somewhat thinly-veiled threat of legislative intervention in the law of contract, paragraph 23 leaves the reader in no doubt that this is precisely what was meant, by stating expressly that "*further measures may be taken in respect of the guidance and recommendations in this note, including legislation*".

This is unusual territory and it is difficult to make accurate predictions as to what situations the Government is envisaging that may push it into introducing legislation, still less what such legislation may entail. However, if one were to venture a guess, worse starting points could certainly be adopted than looking at relationships characterised by significant disparity of commercial strength in markets dominated by relatively few major players (whether sellers or buyers), be that retail banking, supermarket supply, or large-scale housing development. The Government is likely to be keeping a close eye on such markets, and if it perceives "abuse" of the dominant positions – through acting "unfairly" – may well look at legislative solutions. Conversely, it would be surprising if relationships between commercial entities in areas characterised by lesser market concentration, especially in less politically-visible fields, were the Government's top priority for regulation. At the far end of the scale, the prospect of any intervention into global markets governed by internationally-agreed rules, such as shipping, appears remote.

### *International comparisons*

Some notable jurisdictions have adopted a much more active approach to intervening in contractual relations, and the Government may well be looking to those jurisdictions to consider the effects of their approaches. Singapore is a notable example.

As long ago as on 7 April 2020, the Singaporean Parliament enacted the [COVID-19 \(Temporary Measures\) Act 2020](#), introducing wide-ranging temporary measures to the contract, insolvency and company law of Singapore. Part 2,

entitled “Temporary relief for inability to perform contracts”, will be of particular interest. It applies to certain kinds of contracts (listed in the Schedule) entered into before 25 March 2020, including notably construction contracts, certain loan facilities, performance bonds in construction contracts, business-related hire-purchase agreements (such as ones for plant, machinery, or commercial vehicles), and leases and licences for non-residential property. Section 5 deals with general relief from consequences of non-performance: in summary, to qualify for relief:

1. A party must be unable to perform an obligation to be performed on or after 1 February 2020.
2. That inability must be caused to a material extent by the pandemic, or by the operation of coronavirus related law of Singapore or of any other country.
3. The party must serve an appropriate notification on the other parties to the contract, as well as any surety or a guarantor.

If a party fulfils those conditions, it is protected from any of the specified actions (including inter alia court proceedings, arbitration, enforcement of security, insolvency proceedings, termination of leases or enforcement proceedings) in relation to the subject of the inability until either the temporary measures are lifted, or the party withdraws its notice. Section 6 introduces additional measures in relation to construction contracts, most notably relief from liquidated damages.

This protection is achieved by a the powerful dual device in s 7 of (1) a prohibition placed on the other party to the contract from taking or continuing the specified actions (under criminal sanctions), and (2) the obligation placed on any court or tribunal to dismiss any action brought in contravention of s 5, presumably leading to the loss of the substantive right even when the protection is lifted.

It is of course much more difficult to assess the situation in countries where the Government has (legal or effective) power to rule by decree. A notably difficult jurisdiction is Saudi Arabia, a commercially important market especially for the construction industry, but whose legal system is largely uncodified outside of certain discrete aspects of commercial law. The Saudi government has officially declared the coronavirus pandemic an “extraordinary event”, and issued various decrees, in effect implementing a furlough scheme for employees of private employers. This suggests that Saudi courts may well view the pandemic as an event meriting extraordinary relief from contractual obligations. Similarly, on 22 March 2020 the Iraqi Government declared the coronavirus pandemic a *force majeure* event “for all projects and contracts”, effective from 20 February. This apparently sweeping announcement is likely to introduce much legal uncertainty into any international commercial relations in Iraq. For example, it remains unclear how Iraqi courts will address the tension between *force majeure* clauses in contracts governed by foreign law and domestic Civil Code provisions relieving parties from performance of contracts affected by *force majeure*.

*Conclusions: business as usual, but watch this space*

At the present time, the guidance changes little, as it is difficult to see it having any direct legal effect in itself. Equally, the encouragement to resolve emerging contractual issues commercially was unlikely to be needed, as commercial parties are well alive to the fact that it is usually far quicker and cheaper to resolve disputes prospectively, or by means alternative to arbitration or litigation.

However, it may be that the guidance will have some of the soft political effect that appears to have been intended, for example by pushing trade bodies to create voluntary codes of practice for dominant players, and aimed at demonstrating to the Government that any legislative intervention in their field is unnecessary. It is also possible that it will have some effect on the margins, when parties are already under a contractual duty to exercise a discretion in a fair or reasonable way.

As its concluding paragraphs make clear, the guidance is far from the last word on the subject. The construction sector

will keep a close look out for expected guidance and recommendations from the Construction Leadership Council, foreshadowed in paragraph 18. The general guidance itself is likely to be developed and updated: it is suggested that it may be supplemented with “a set of Frequently Asked Questions and Answers as the situation develops”, as well as being “revised and reissued as necessary”, with the first review planned no later than 30 June 2020.

The guidance document can be found on the [UK Government website](#).

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