

Struggling to meet your contractual obligations?

What are the issues and options?

Life and business has got a lot more difficult and complicated since the classification of COVID-19 as a pandemic. As a result, all businesses have or will be looking at their financial and logistical obligations to third parties. If you are struggling to meet any of those obligations, please consider the following guidance to see if you can implement any of the suggestions below.

IF YOU HAVE A WRITTEN CONTRACT LOOK TO SEE IF ITS TERMS CAN ASSIST

- Does it contain a *force majeure clause*? If so, consider the scope of that clause – does it allow you to suspend or terminate your obligations and cover matters completely outside of your control (eg COVID-19) or refer to epidemics or pandemics? Under English law, no force majeure clause in a contract means no right to force majeure.
- Is there a *break clause* or right to terminate the contract at any time? Look at all the termination provisions in the contract and see if any do or could apply.
- Is there a *material adverse change* clause?
- Look to see if the counterparty to the contract is going to find it difficult or impossible to be able to perform its own obligations now or in the future (particularly in the short term). That may give you scope to negotiate *sensible variations* all round.
- Is your contract *frustrated*? Where a contract does not provide for force majeure for a party, you may be able to rely on the principle of frustration to avoid performing your contractual obligations. As a starting point, the principle of frustration is hard to prove under English law (the onus will be on you to do so if you allege it) and it has been sparingly used with limited success in the past because of the difficulties with proving it – although we may see more of it being raised from now on.
 - > A contract is frustrated when a supervening event occurs which so fundamentally affects the performance of the contract so that it is automatically terminated and the parties are discharged from future performance of the contract. For example, I let you a concert venue to hold a concert for which you will pay a fee after the event has been held, but before the night of the concert, the venue is destroyed by fire. In those circumstances, the contract would be frustrated and you would not need to pay the fee to hire the venue. Another example of the frustration of a contract is when war breaks out and it therefore becomes illegal to supply goods to a customer in a particular country, even though you have a contract requiring you to do so.

- > For a contract to be frustrated, it must be the position that any further performance under it must be impossible or illegal.
- > Working out if frustration of a contract is going to assist you is going to require a very fact sensitive analysis and is likely to be difficult in the current state of this crisis.

OPERATING PURSUANT TO AN ORAL AGREEMENT OR A COURSE OF DEALINGS

Try and work out in your own mind what your obligations are even though they are not written down. Is there scope for you to argue that some of those obligations were one off requirements and do not apply in the future?

COMMUNICATION – WITH OR WITHOUT PREJUDICE

If required, talk to the other party to see if you can reason with them and agree a payment plan or postponement of obligations that are causing/going to cause you difficulty. We have already seen a number of landlords deferring payment of the March 2020 quarter's rent to be paid in March 2021 under a written rent postponement agreement. Given the current crisis, you may find that they are willing to agree to a staged or postponed payment plan or extended delivery period. It may actually suit your customer not have to deal with the receipt of goods and services at its premises in a time of lockdown.

Communication, especially by telephone and video conferencing, will be very important at this time as it allows you to nuance what you are saying/asking for and deal with any queries the other party has, rather than getting into "email ping pong" that may be anodyne or open to a number of different readings/interpretations.

The without prejudice rule will generally prevent statements made in a genuine attempt to settle an existing dispute, whether made in writing or orally, from being put before the court as evidence of admissions being made by a party. One reason for having the without prejudice rule is to encourage parties (or potential parties) to try to settle their disputes out of court. Without prejudice communications allow parties to speak freely.

However, do not think that just because you start your written communication or your conversation with "Without Prejudice" or "this conversation is on a without prejudice basis" that it may not be used against you in the future. For the "Without prejudice" moniker to cover your written or oral communications, there must be a dispute on foot and the communication must be a genuine attempt to resolve it.

If a party writes to you demanding payment, it is easy to deal with that to crystallise a dispute. You write one letter/email back simply denying the liability in whole or part thereby creating a dispute, and at the same time send them a separate letter/email stating at the top of it "Without prejudice" and making your settlement proposal or payment/postponement plan. Alternatively, the Without Prejudice letter/email could ask them to inform you when is a good time for you to call them to have a without prejudice conversation about this dispute.

More difficult is if you want to make the first move before there is a dispute on foot with your contractual counterparty. In those circumstances, you might write or call your counterparty stating that you are reviewing all your options and want to explore certain matters with them (eg a payment plan/postponement or some other variation of the contract). You should make it clear that these are just exploratory discussions and if they ask, confirm that you are aware of your obligations under the contract and that you understand that the contract continues.

OTHER CONSIDERATIONS

- Review any insurances that you may have to see if they can assist in the current crisis.
- Document in writing (by an exchange of emails, a letter signed by both parties or a short agreement) any variations or postponements of your contractual obligations that are agreed.

HOW CAN CONEXUS LAW HELP?

Businesses and individuals will need legal advice to help them understand the risks they may face and the options that may be open to them.

We are available to assist in reviewing the laws in many jurisdictions across the world, and to review specific contracts. We are also available to provide practical, business-orientated advice on how to best protect yourself from the ongoing commercial effects of Covid-19.

Contact

For further advice on varying, discharging or meeting your contractual obligations or on how to avoid a dispute, please contact **Ian Timlin**;

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ABOUT CONEXUS LAW

Conexus Law is an independent specialist law firm providing legal and commercial advice to clients who work in sectors where the built environment, technology, engineering and people converge. We work on projects across the globe.

Built environment

We work on complex or mission-critical projects, where the “normal rules” may not apply. These projects might present complex procurement challenges, might be one-of-a-kind, or might relate to the construction of mission critical facilities where the risks of project failure far outweigh the initial capital outlay.

Connected world

This is where the built environment and the digital and virtual worlds operate and converge. Our work relates to projects such as data centres and other digital infrastructure, cloud deployment, smart cities, internet of things, blockchain and the like.

Cutting edge

Our clients in this sector are visionaries and entrepreneurs; autonomous cars, drone technology, artificial intelligence, new energy, big data and virtual reality. Clients might be early stage companies looking to move from proof of concept to early deployment, or the innovation teams of more established players.