

# COVID-19 Pandemic – What Should I Do if a Transaction that I Have Been Negotiating Suddenly Collapses?

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The ongoing COVID-19 pandemic and the related economic downturn are impacting businesses worldwide. Many deals and transactions that were under negotiation in the period leading up to the current health crisis are now falling apart as counter-parties decide that they are no longer able, or willing, to proceed with them.

If you have been negotiating a transaction where your negotiating partner or counterparty no longer wishes to proceed with the transaction, what can you do?

This checklist is designed to enable you to decide whether:

- (i) it is possible to compel the other side to proceed with the transaction; or
- (ii) you can recover costs for the time that you have spent pursuing the transaction.

The remedies available to you will depend on the stage that the transaction had reached and whether a legally binding agreement was in place at that point.

If there is a binding contract, the counterparty's failure to proceed with the transaction is likely to constitute a breach which the Court may be willing to enforce by granting specific performance, or to award damages.

## Is there a binding agreement?

The first step is therefore to consider whether or not you have a binding agreement:

### Stage 1 - Heads of Terms

At the start of negotiations, parties often record the key commercial terms in the form of Heads of Terms ("HoTs").

Because they are often informal and are designed to record the headline terms whilst subject to more detailed legal documentation, HoTs usually expressly state that they are

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not binding.

If your negotiating partner no longer wishes to pursue the transaction and you have signed HoTs, but have not proceeded further, you should:

1. Look at the HoTs for any wording which indicates that they are not binding, for example, “*subject to contract*” or “*terms to be agreed*”.
2. If this wording is present, it is unlikely that the counterparty can be compelled to proceed.
3. However, this is not always fatal. Even if non-binding indicative wording exists in the HoTs, a binding agreement can sometimes be regarded as sufficiently formed if:
  - a. all of the really essential terms of the transaction have been agreed and identified in the HoTs; and
  - b. the parties have begun to perform that contract, in which event the Court may be satisfied there is evidence of a binding agreement having been reached on the facts (for example, by transferring purchase money to a shared escrow account or by beginning to fit out a property).
4. If the HoTs do not contain any non-binding indicative wording, and the essential terms of the transaction are set out clearly in the HoTs, then a binding agreement may be regarded as having been formed.

## **Stage 2 – The Transaction Agreement has been signed by both parties**

If, following HoT's, both parties have signed the more detailed transaction documentation, then there will in most cases be a binding agreement and failure to complete is likely to constitute a breach.

If the counterparty no longer wishes to complete the transaction, you should:

1. Check the agreement for the existence of any pre-conditions which have to be satisfied before the contract does become binding.
2. In such event, check whether the agreement requires the counterparty to take action to fulfil those conditions, for example, by including a “further assurance” clause that requires the counterparty to take steps necessary to complete the transaction. If satisfaction of the conditions is within the counterparty's control and the counterparty does not take steps to satisfy them, the Court may force the counterparty to satisfy the conditions by way of specific performance.
3. If there are no such pre-conditions, and the counterparty's obligations are clear, then the court may be willing to assist by ordering the counterparty to complete, or requiring it to pay damages.

## **Stage 3 – The Transaction has completed**

If the transaction has completed, but the counterparty is refusing to progress with post-completion matters, for example, by handing over share certificates, you should:

1. Check whether the agreement contains a further assurance clause requiring the counterparty to carry out any post-completion matters. Failure to do so would be a breach of contract and the court may be willing grant an order requiring the counterparty to carry out the necessary steps.
2. Consider whether such steps are necessary, or whether, post-completion, you might

be able to carry them out yourself.

### **What can I do if the agreement is binding?**

If you have entered into a binding agreement and the counterparty is refusing to proceed with the transaction, then it will almost certainly be in breach of its obligations.

#### **Forcing the other side to proceed**

In those circumstances, you may be able to force the counterparty to proceed by making a claim to the Court for “specific performance”.

Specific performance is a remedy which, if granted, compels a party to perform its contractual obligations. Specific performance is only available at the court’s discretion and where:

- a legally binding agreement has been entered into;
- any conditions in the agreement have been satisfied;
- the terms of the agreement are sufficiently clear and precise; and
- monetary compensation is not an adequate remedy. For example, this is likely to be the case if the shares that are the subject of the transaction are in a private company and so are not easy to purchase on the open market.

In circumstances where a claim for specific performance is successful, you will likely be able to claim back some of the money you have spent pursuing the claim from the other party.

#### **Claim compensation for the loss**

If the other side has breached a binding agreement, and you do elect to seek specific performance, then you will be entitled to claim compensation for any losses you have suffered, including lost profits and the transaction costs.

Unless fraud or misrepresentation by your counterparty can be proved:

- compensation is not normally available in the absence of a binding agreement; and
- in contrast to some other jurisdictions, in particular civil law jurisdictions, English law does not impose a “good faith” obligation on parties or a requirement that a party who discontinues negotiations should pay the other side’s cost.

### **What can I do if the transaction agreement has not been finalised?**

In circumstances where the Transaction Agreement has not been finalised, but the parties have started to act in accordance with it, you may be able to make a claim to the Court for “quantum meruit”, which may allow you to recover any money that you have spent if you have started to perform your obligations. This could be the case if you have been negotiating HoTs or a transaction agreement, but you have not yet signed, and have incurred costs carrying out your obligations which the counterparty would be liable

to pay you for under the agreement.

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