

# Coronavirus and your business

**The coronavirus outbreak has affected businesses and their employees around the world. This briefing examines whether the non-performance of contractual obligations due to the outbreak can be classified as ‘force majeure’ and the take-home points for businesses. It also provides guidance in relation to immigration and employment law issues.**

## Contractual obligations

It is inevitable that some contracting parties will look to the coronavirus to justify non-performance of contractual obligations. Justification is likely to be placed on what lawyers call “force majeure”.

Force majeure is usually treated as meaning the occurrence of an event outside of the control of the parties that prevents a party from fulfilling a contract. It is a provision often found in commercial contracts. But how it works will depend on:

1. the terms of the force majeure clause itself; and
2. the circumstances which it is said have resulted from the occurrence of the force majeure event.

## The force majeure clause

“War”, “strike”, and “riot” are often listed in a force majeure clause. Their meanings can be considered to be quite clear. Equally, “act of God”, whether it be hurricane, flood or earthquake. But, “epidemic”?

Whether or not the coronavirus will come within a force majeure clause will vary depending on the words used, the subject matter of the contract, and the event in question.

## The circumstances

If the coronavirus does come within the force majeure clause, can it be said that the circumstances flowing from it justify non-fulfilment of the particular contractual obligation? For example:

- Given the timeframe that has elapsed since the effects of the of the coronavirus became public, can it be said that an event is out of the control of the parties in circumstances where the parties could have taken steps to mitigate its effects by now?
- Could it be argued that a supplier should have already lined up an alternative source of supply, foreseeing that supply lines could be impacted by epidemics?
- An event of force majeure may be outside the control of the parties, whether or not it was unforeseeable.

## The issues

*Relying on force majeure to justify your own non-performance?*

A party considering relying on force majeure to justify non-performance should give thought as to how it will be possible to demonstrate that it is legally or physically impossible for it to perform its contractual obligations, and not simply unprofitable or more difficult to do so.

*Is your counterparty looking to rely on force majeure?*

If a party is concerned that there is a risk that its counterparty may seek to rely on force majeure (for example, due to the location or industry that the parties are in) it may want to consider ways in which its counterparty can continue to operate. In doing so it may make it difficult for the counterparty to demonstrate that its obligations under the contract have become impossible.

Usually, the force majeure clause will provide that the occurrence of a force majeure event suspends the performance of the contract for the duration of the force majeure event.

It follows that it is possible to envisage, for example, that whilst an instalment of a production run might be affected, other production runs will not be. As such, even if reliance can be placed upon the occurrence of a force majeure event, this may provide only temporary or limited relief to a party looking to exit the contract. However, it is also likely that the force majeure clause provides for a right to terminate the agreement if the force majeure event continues past a certain period of time.

**Take home points**

Whether it is a delay in goods being manufactured, travel plans disrupted, or the signing of a contract being delayed, the consequences of the coronavirus are likely to be with us for a time. Below are some key points to consider, now and in the coming weeks, in relation to the coronavirus, force majeure and your business.

*Business contracts*

1. Check your contracts that you consider may be impacted by the coronavirus so that you can readily point to the rights and obligations under the contract if necessary:
  - 1.1. Is there a force majeure clause in the contracts?
  - 1.2. If so, would coronavirus come within the definition of a force majeure event?
  - 1.3. Is there an obligation to give notice if a force majeure event occurs?
  - 1.4. Is there a maximum period during which obligations of the parties are suspended? Does this apply to both party's obligations or only the party whose actions under the contract are impacted by the coronavirus?
  - 1.5. Is there a right to give notice to terminate the agreement if the force majeure event continues for a certain period? Is this a right for both parties, or only the party that is no longer receiving the benefit of its counterparty's performance under the contract?
2. Check whether your contracts provide for certain payments to be made to you, or by you, if there is a breach of certain performance obligations. However, keep in mind the risk of such payments being categorised as unenforceable penalty payments under English law!
3. If you receive a notice from your counterparty that it is seeking to rely on force majeure, or, you give such notice, you should consider what steps you can take to mitigate your loss.

4. If you and your counterparty agree as to the coronavirus constituting a force majeure event, whilst this may offer you an opportunity to bring an unfavourable agreement to an end ahead of schedule, be careful what you wish for. Consider what your back-up plan is:
  - 4.1. do you have another counterparty in mind that can step into the contract at short-notice?
  - 4.2. do you need to conduct an audit on your new counterparty – if so, how long will this take?
  - 4.3. what onwards contractual obligations are you tied to that could be impacted by a change in your contractual relations?

### Immigration law issues

At present UK visa application centres in China remain closed. Although they were expected to open from 17 February, it is reasonable to expect that they will remain closed until further notice.

On 17 February the Home Office released guidance for individuals who are unable to return to China from the UK due to coronavirus, and have launched a dedicated coronavirus helpline. The guidance confirms the following:

- Chinese nationals in the UK whose visas expire **between 24 January 2020 and 30 March 2020** will be granted **automatic visa extensions to 31 March 2020**, so long as they have complied with their visa conditions.
- Chinese nationals in the UK as intra-company transferees under Tier 2 of the points based system and who would like to switch to Tier 2 (General), which allows them to settle in the UK following five years spent here in that capacity, will need to apply for a Tier 2 (General) Certificate of Sponsorship, pay the relevant fee and meet all the requirements of a Tier 2 (General). This may require their employers to advertise the position inside the UK and EU before they are able to issue the CoS.
- Tier 2, Tier 4 or Tier 5 sponsors do not need to report student or employee absences related to the coronavirus, which they have approved, to the Home Office. **Sponsors (employers or educational establishments) do not need to withdraw sponsorship** if they consider there are exceptional circumstances when a student will be unable to attend for more than 60 days, or an employee is absent from work without pay for four weeks or more.
- The Home Office has acknowledged that the current situation is exceptional and have confirmed that they will not take any enforcement action against students or employees who are unable to attend their studies or work due to the coronavirus outbreak, or against sponsors which authorise absences and continue to sponsor students or employees despite absences.
- The Home Office has opened a dedicated coronavirus immigration helpline on **0800 678 1767**; or enquiries can be made by email to [CIH@homeoffice.gov.uk](mailto:CIH@homeoffice.gov.uk).

### Employment law issues

The normal duties on employers under the Health and Safety at Work legislation and the implied terms of the employment relationship to maintain a healthy and safe working environment must now be interpreted by employers in the new context of coronavirus. Employers should consider the working patterns of their own workforce and be guided by the latest advice provided by the NHS, the Foreign Office and the World Health Organisation.

Employers will be used to carrying out health and safety risk assessments in a variety of different situations and should use their usual methodology to assess situations such as:

- Hosting an international conference involving employees and/or third-party delegates. Is it safe to run it or should it be cancelled? Should some of the sessions be run by video conference? Should some of the employees/third party delegates from China and the other high-risk countries be asked to stay away?
- Business trips to China and other high-risk countries for employees. Follow official advice to avoid liability for exposing employees to unacceptable risk.
- Individuals (including employees) from China and other high-risk countries visiting your office. Again, follow the official advice and consider independently what steps ought to be taken to minimise risk. Can the visitor obtain a certificate from local health authorities that they are not carriers?

### In conclusion – key points

Check your business contracts as outlined above and review your insurance cover to check whether you have the relevant protection.

There are likely to be delays in relation to offering sponsorship to future employees from China. Consider too the concerns of Chinese nationals in your own workforce who reside outside China.

Be guided by NHS and FCO advice, as well as alert to the needs and concerns of your own workforce, when considering in-bound visitors who have been in South-East Asia as well as out-bound travel.

Be alert to the need to keep communications with your customers, suppliers and employees under review given the changing nature of the situation.

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