

Factsheet for businesses

This document is intended to provide general commercial law advice for businesses in light of the current coronavirus pandemic and is based on latest government and public health service guidance available at the time and date stated above.

We will update this document as a live document from time to time. Please check the latest version on our website (www.tinsdills.co.uk) to be sure the information you receive is entirely up-to-date (see disclaimer below).

Coronavirus (COVID-19) is likely to affect most, if not all, businesses in the coming months. This factsheet is intended to provide simple guidance on the current best practice for businesses dealing with coronavirus.

For information on how coronavirus is likely to affect you as an employer, please see the latest version of our 'Coronavirus: Factsheet for employers' guide (also available on our website).

Non-performance of contractual obligations

With coronavirus being declared a pandemic by the World Health Organisation, the effect of the virus on individuals are being widely publicised. However, the effect on businesses is likely to be less than desirable with performance of contractual obligations becoming increasingly difficult, if not impossible.

At first glance, non-performance of obligations under a contract (whether for sale of goods, supply of services or otherwise) appears to constitute a breach of that contract. This is subject to two key exceptions:

1. there being an express **force majeure** provision within the contract; and
2. in the absence of such provision, a reliance on the common law doctrine of **frustration**.

The way you deal with contracts with consumers and businesses will differ. See below for more information.

Force majeure

Unlike in other countries, force majeure is not recognised as a standalone principle of English law. It is therefore a matter that parties need to expressly deal with in their contracts and the protection afforded by the clause will depend on the precise drafting. **Not all contracts will have force majeure provisions and those that do may not specifically mention epidemic or pandemic crises.** In practice, this means the defaulting party must prove that:

1. one of the events referred to in the clause has occurred;
2. they have been prevented, hindered or delayed from performing their contractual obligations as a result of that event (and that it was due to circumstances beyond their control);
3. there were no reasonable steps that could have been taken to avoid/mitigate the event or its consequences.

It will be necessary to check whether the definition of force majeure in your contract is wide enough to cover coronavirus or its impact – e.g. supply chain disruption. If pandemic is not specifically referred to, it may fall within one of the itemised 'Force Majeure Events' listed in the contract (if any) as these usually include things like: epidemics, acts of government, restrictions on import and export and failures in supply chains.



Business to Consumer Contracts

Businesses seeking to rely on force majeure provisions in their contracts with **consumers** for delays in performance caused by the coronavirus, or to relieve them of their contractual obligations, will need to consider whether:

1. the term has been effectively incorporated into the contract, determined in accordance with common law principles; and
2. the term is fair, determined in accordance with the Consumer Rights Act 2015.

If the force majeure clause has not been effectively incorporated into the contract, or is unfair, it will not be enforceable against the consumer.

An act of God?

In its legal sense, the term 'act of God' means an extraordinary occurrence or circumstance which could not have been foreseen, could not have been guarded against, is due to natural causes, directly and exclusively without human intervention and could not, by any amount of ability, have been foreseen or, if foreseen, could not by any amount of human care and skill have been resisted.

Proving, in court, that a set of circumstances constitutes an 'act of God' is difficult and not always successful. There is much legal debate on whether an act of God is provable and so it is more beneficial to rely on specific drafting of force majeure provisions (referred to above) when non-performance has occurred or is likely to occur.

Force majeure checklist

1. Check to see whether your contract contains force majeure provisions or provisions with a similar effect. However, note that:
 - a. the term 'force majeure' may not necessarily have been used;
 - b. the provisions may be a standalone clause and/or incorporated in clauses dealing with matters such as extensions of time and/or compensation for loss and expense.
2. If your contract does contain force majeure provisions, do not assume that they will necessarily be triggered by the impact of coronavirus as it will depend on the wording of the relevant provisions and the impact of coronavirus on performance.
3. Consider:
 - a. whether force majeure (or similar) is a defined term;
 - b. whether the contract provides any examples of what will be considered a force majeure event – e.g. disease, epidemic/pandemic, government actions;
 - c. if the contract gives any explanation as to what will constitute a force majeure event;
 - d. the impact of coronavirus on performance;
 - e. whether, in supply chains or other multi-contract scenarios, force majeure clauses and definitions are consistent across all contracts. Identify any gaps that could break the flow down or flow up of rights and obligations;
 - f. whether the force majeure clause requires an event to 'prevent' performance or simply make it more difficult;
 - g. what steps you have taken to mitigate the effect of the force majeure;
 - h. relevant notice provisions and timings in the contract and whether you have complied with them; and
 - i. whether any force majeure notice received from a supplier or customer is valid.

Particular consideration should also be given to any specific regulatory requirements that your business may be subject to (for example: the FCA, OFSTED, CQC or General Medical Council).



Frustration

Under English law, if a contract becomes *impossible to perform* as a consequence of the outbreak, it may be open for a party to argue that it has been frustrated.

The financial consequences of a contract being frustrated are complicated, but the parties are discharged from further performance of their obligations.

However, it is difficult to establish frustration. In particular, it cannot be used:

- where the parties have contractually agreed the consequences of an interrupting event (such as coronavirus) – this includes use of a force majeure clause;
- where an alternative method of performance is possible;
- because performance has become more expensive; or
- because a party has been let down by one of its suppliers.

Whether coronavirus frustrates the contract will vary for each and every contract as it has the potential to impact different contracts in different ways.

It will essentially depend upon whether the existence of coronavirus renders further performance of the contract impossible, illegal or something different from what was contemplated by the parties when entering into the contract.

In determining whether coronavirus frustrates a given contract, the courts will:

1. construe the terms of the contract in light of the nature of the contract and the circumstances in place at the time the contract was made;
2. examine the facts existing following coronavirus to determine how the parties' contractual obligations would be performed if the words of the contract were enforced in the new circumstances;
3. compare performance of the contractual obligation in the original circumstances with performance of the same obligation in the new circumstances and, in comparing the two, determine whether the new obligation is a radical or fundamental change from the old obligation.

Other important contractual provisions

You should also consider any other potentially relevant contractual provisions.

As an alternative to force majeure, check whether the contract may expressly provide that the exercise of a statutory power by a government and/or a change in law entitles the contractor to certain relief (such as additional time for performance and/or termination).

Risk management steps

Risk management measures which corporates should consider include:

1. inserting express infection disease/epidemic wording into new contracts and amending existing contracts (if possible);
2. checking whether your contracts requires you to give early/advance warning of anything that might impact on your performance under the contract;
3. where funders/lenders are involved, considering whether any notices must be given under relevant funding documents;
4. checking insurance provisions and whether any losses are covered. Make sure claims are made in accordance with the requirements of the policy;
5. conducting risk assessments with consideration being given as to factors specific to suppliers and working conditions;
6. keeping up-to-date with details of the affected areas through WHO's Disease Outbreak News;
7. auditing suppliers and reviewing their respective work health and safety systems and policies;
8. engaging with health and safety managers, ensuring there is ongoing communication with workers, providing updates and training refreshers on the outbreak as and when required.



Data protection considerations

If you are unable to fulfil contractual obligations due to sickness absence of your workforce, you should have particular regard to the fact that information regarding an employee's health, such as whether the employee is suffering symptoms of coronavirus, or has been diagnosed as having the virus, is special category data under the General Data Protection Regulation (GDPR) and the Data Protection Act 2018. Additional requirements and obligations apply to the processing of such data.

**Ensure you keep up-to-date with [latest government and public health advice](#).
Refer to the [NHS 111 online coronavirus service](#) for more guidance.**

If you would like further advice on dealing with coronavirus in the workplace, please contact a member of **our Business Services team** on:

01782 652300

or through our online contact form at:

<https://tinsdills.co.uk/about-us/contact-us/>

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