



Coronavirus: implications for English law contracts

The impact of the novel coronavirus (COVID-19) outbreak has been widespread with implications for multiple sectors of the global economy. We set out below some practical steps businesses could take to assess potential upheaval and identify some implications of coronavirus for English law contracts.

What practical steps can I take now?

With the rapidly developing situation, it is important to closely monitor the outbreak, its business impact and how it may affect your contracts. Some practical steps that may be taken include the following:

- assess if your performance of contractual obligations may be affected and take reasonable steps to work around the identified risks or discuss them with your counterparty. Where you can perform some but not all of your contracts, think carefully about which contracts you prioritise, bearing in mind applicable laws and relevant contractual provisions;
- in a supply chain context, identify whether you are dealing with different laws applying to different points of the chain and what that means in relation to the overall performance of the contract. If your supply chain is exposed to the effects of the outbreak, line up fall-back options;
- consider whether your insurance policies cover the outbreak or its knock-on effects;
- assess what rights you have and what you need to do protect them. For example, be aware of notice requirements which are preconditions to exercising a force majeure clause or insurance protection;
- keep a detailed record of how the consequences of the coronavirus outbreak are impacting your performance – this may be useful in later disputes. Consider carefully the text of any communication or record that is created working on the basis that what you write may be later scrutinised by the other party's lawyers and by a court. Check effective dispute resolution provisions are in place;
- consider the longer-term relationship with your counterparties, and whether force majeure, frustration or the other principles discussed below might be used as leverage to negotiate a sensible commercial solution to current issues;
- consider other commercial and reputational risks that may arise from the outbreak, including HR/employment issues and the risk of counterparties becoming insolvent; and
- assess whether and how to communicate with counterparties pre-emptively to seek solutions to the issues raised.

How might coronavirus affect my contract?

Contracts may be affected by the legal and economic consequences of the outbreak, amid supply chain disruption, travel restrictions and turmoil across different markets. The first step is to review existing contracts and those being negotiated (including standard terms of business).

In current contracts, parties may struggle to perform them properly or to get out of them altogether. Whether a contract counterparty is excused from its contractual obligations or could seek to terminate a contract will depend on the terms of each contract and the relevant factual circumstances. You'll need to consider both express contractual rights, such as force majeure and Material Adverse Change (MAC) clauses, as well as remedies in law such as frustration – we discuss these below.

In contracts which are being drafted at the moment, you may wish to include additional commercial terms to try to protect yourself against the effects of the outbreak. For example, pricing adjustment clauses for contracts relying on tariffs or affected by exchange rate fluctuations, or step-in or buy-out rights to address performance concerns.

Can I or my counterparty terminate an English law contract because of coronavirus?

This will depend on the drafting and the particular facts. Potential options open to a party include:

- **Force majeure clauses:** these relieve a party from the consequences of a failure to comply with an obligation where that failure is due to the occurrence of an event outside its control and may allow for termination of the contract without liability. The clause should be analysed to see whether the outbreak falls within its scope and the impact of the outbreak on the contract. Is there specific reference to an epidemic, pandemic or contagious disease? (The World Health Organisation's declaration of the coronavirus outbreak as a 'Public Health Emergency of International Concern' may be relevant). Unlike the position with frustration, a force majeure clause can cover existing or foreseeable events. For new contracts, parties may therefore want to expressly include (or exclude) coronavirus-related events.
- **MAC clauses:** these permit a party to terminate an agreement (or, in the context of a loan agreement, to call an event of default) where there has been a MAC (also called a 'Material Adverse Effect' (MAE)). They normally require a high threshold before they can be invoked (they may be specifically drafted this way or, for more general provisions, tend to be interpreted this way). A decision to call a MAC can be highly subjective and is usually a last resort. In determining whether the outbreak of COVID-19 would trigger a business MAC on market standard terms in commercial contracts, the key question is the extent of the impact of the outbreak on an individual company/group. A business MAC on market standard terms would only be triggered if the impact of COVID-19 constituted a material adverse effect on a company's business (qualifications often apply), but bespoke clauses may differ – in all cases, the drafting of clauses should be checked. For some companies – particularly those in sectors which have been significantly impacted by the outbreak – economic repercussions of the outbreak in the short or medium term may give creditors grounds to argue for a MAC/MAE on a company's business, financial condition or prospects.
- **Frustration:** can be relied on if something occurs after contract formation, which is not due to either party's fault, that makes it physically or commercially impossible to fulfil, or renders a party's obligation radically different from that undertaken when the contract was entered into. The doctrine is narrow. It will not be available (i) if the contract provides, expressly or impliedly, for the risk of supervening events that have occurred; (ii) simply because a contract has become less economically lucrative; or (iii) if the circumstances were foreseeable. Whether a party can invoke frustration as a result of the outbreak will turn on the length and intensity of the disruption, and whether this can be overcome with time or not. For example, a contract for the supply of goods may be frustrated if travel restrictions have made it impossible for the supplier to deliver the goods by a certain date where time is of the essence.

What other contractual points should I be aware of?

- **Commercial terms:** these may need to be renegotiated to reflect customs and excise procedures and tariffs, supply chain impacts or restrictions on movement of people. Consider whether the underlying economics of the contract may have changed as a result of the outbreak.
- **Representations, warranties and undertakings:** should these continue to be given? For example, representations that there is no default under a material contract, or no material contract which cannot be performed. For contracts being negotiated, consider carve-outs or qualifications, limitations on liability or disclosures. For existing contracts, waivers may be required.
- **Invalid terms:** this standard boilerplate clause could become critical if there is a change in law. What if new legislation is passed seeking to restrict the outbreak which results in provisions becoming illegal or unenforceable? Parties may need to amend clauses or sever them from the agreement. Aside from any express invalid terms/partial invalidity clause, don't forget about the common law doctrine of severance.
- **Remedies:** will damages will be an effective remedy? Would specific performance be more attractive or an obligation to

negotiate in good faith or a variation procedure?

- **Currency fluctuations:** currency values may affect pricing so in new contracts consider how to allocate future risk such as through flexible pricing or hardship clauses.
- **Business Day definitions:** where a definition of ‘Business Day’ refers to a day “on which banks are open for general business”, consider the implications of bank closures, as seen in China, and consequent impact on completion dates for M&A and funding dates for financings.

Using Freshfields’ contract review AI tools, we can assist clients by quickly identifying and extracting key contractual provisions, including force majeure, MAC, and change in law. By leveraging this technology, we can deliver substantial time savings when compared to manual review of contracts – regardless of volume. If you would like to discuss the contract review technology available, please speak to your usual Freshfields contact.



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