



Legal implications & practical considerations for commercial dealings

The coronavirus outbreak is having a significant impact on commercial dealings. The biggest challenge that each business will face in relation to the virus is understanding what effects the outfall of the virus will have upon them. This will differ from sector to sector and, indeed, from business to business within a sector. For some businesses the impact will be marginal and for others it will be much more profound. A common issue faced by clients is the extent to which the outbreak excuses them or their counterparties from their contractual obligations.

This briefing provides general guidance on this issue and highlights ways in which you can review certain aspects of your business in light of the challenges ahead. This guidance focusses only on English-law governed contracts.

What parts of my business are likely to be affected?

Carefully consider the terms of your contracts. Consider what obligations are potentially affected or disrupted.

- **Supply Chain:** Where you are supplying goods and/or services to your clients, consider how coronavirus may affect your performance under those agreements. Check whether there are any set dates for performance or whether dates are estimates only. If you have agreed set dates and these are not met, your client may be able to terminate the agreement if you are unable to meet your obligations. How specialist is your industry? Can a replacement supplier be found?
- **Delivery Costs:** Check whether your supplier can charge you for any increase in costs for packaging and delivery or whether this is included as part of the charges. Customers may seek to renegotiate pricing terms or seek to defer deliveries or acceptance of services.



Is there a potential breach and what are the consequences?

- Damages: There might be specific clauses which deal with damages for breach of contract. In general a party has a right to damages if there is a breach of contract, subject to certain limits. At a basic level, loss is limited to that which arises in the ordinary course of business or within special circumstances known to the parties. If the loss does not clearly fall within these categories, there is likely to be an argument that it is too “remote”.
- Termination rights: Would the potential breach of a term be one which will provide a party with a right to terminate the contract? There might be an express right to terminate or, if not, there might be an implied right because of the nature of the clause or statute. Any clauses which make “time of the essence” often give rise to a right to terminate even if the delay is slight. There might also be termination rights in less obvious places in the contract (such as a material adverse change (“MAC”) clause) which might give a party termination or other rights under the contract.

What clauses can I rely on if I am unable to fulfil my obligations under a contract?

- Frustration: English law provides that a contract may be discharged for frustration where something occurs after the formation of the contract that makes it physically or commercially impossible to fulfil the contract, or transforms the obligation to perform into a radically different obligation. The threshold for establishing frustration is very high and English law makes it difficult to prove. If there is a force majeure clause, it may be better to rely on this.
- Force majeure clause: Is there a force majeure clause in the contracts? Sometimes referred to as “acts of God”, “exceptions” or “unforeseen events”. If so, would coronavirus come within the definition of a force majeure event? If neither epidemics nor pandemics are mentioned, the clause could still be triggered for example where it covers labour and supply shortages (which are caused by coronavirus) or broadly defines events as exceptional, beyond one party’s control, unavoidable and not attributable to the other party (but check carefully that all these conditions are fulfilled).
 - Is there an obligation to give notice if a force majeure event occurs?
 - 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?
 - 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?



- 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. Check such payments are not categorised as a penalty, these are unenforceable under English Law.
- 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. In general, a claimant cannot recover loss caused by the other party's breach that it could have taken reasonable steps to avoid.
- **Limitation on Liability:** It is usually the supplier who is at greater risk of facing a damages claim from the customer than the other way round. It is vital to review your exposure under any agreements and check whether there is a cap on your liability and if exclusions for consequential and indirect loss, which the customer may claim to suffer as a result of your non-performance of the agreement, apply.
- **Other:** If there is no force majeure-type clause or the event is not covered by the contract wording, consider relying on provisions such as those dealing with material adverse change, price adjustment, exclusions, extensions of time, variations or changes in law (for example, laws prohibiting employees or transport from working, which slow down the supply chain).

What practical steps can I take now to help mitigate my loss?

- **Alternative supply:** Can you find alternative sources of supply at short notice and is this permitted in your current contractual arrangements?
- **Re-negotiate Terms:** Try and find transitional arrangements with key clients to deal with delays caused by coronavirus for example:
 - Agree revised dates for performance and delivery.
 - Could delivery for goods and services be provided outside normal working hours.
 - Are you able to get ahead of timescale by bulk ordering items so that your business is not affected?
- **Dispute Resolution:** Is there is a structure within which the parties may be able to reach a relatively amicable resolution without the need to go to court. A dispute resolution procedure clause can help to maintain good commercial relationship between the parties, and can save significant amounts of time and money, when compared with litigation or arbitration.
- **Notice Periods:** Comply strictly with contractual notice periods.



Practical considerations beyond contractual analysis?

- Consider preventative steps (eg early delivery, re-schedule delivery slots).
- Consider whether negotiated solutions, if desirable, are possible.
- Consider insurance policies and notification obligations.
- Keep accurate and detailed records of events and any third party discussions. Facts are crucial to establishing or defending a claim.
- Consider obtaining specialist advice to analyse, preserve or protect your position.
- Consider obtaining specialist advice to analyse, preserve or protect your position.
- Use any business “downtime” to consider your business model, review of general terms and conditions or potential acquisitions or joint ventures that may help protect or even grow your business.
- Consider your business structure – are you protected by limited liability?
- Consider your loans or whether to obtain more financial assistance especially from new government initiatives currently offered by the government.

Who do I contact for support and advice?

For more information on how we can support you during this time please contact one of our Corporate & Commercial law specialists.



Diane Yarrow
Partner

T: 01628 671636

E: d.yarrow@gardner-leader.co.uk



Hannah Davies
Associate

T: 01628 502449

E: h.davies@gardner-leader.co.uk



Shipla Khanum
Solicitor

T: 01628 502442
E: s.khanum@gardner-leader.co.uk



Niall Doherty
Paralegal

T: 01628 502443
E: n.doherty@gardner-leader.co.uk

Newbury Office

White Hart House
Market Place
Newbury
Berkshire
RG14 5BA

01635 508080

Maidenhead Office

First Floor
7 Frascati Way
Maidenhead
Berkshire
SL6 4UY

01628 671636

Thatcham Office

Winbolt House
The Broadway
Thatcham
Berkshire
RG19 3HX

01635 508080