

# COVID-19: HOW TO PROTECT YOUR BUSINESS

## General overview

The health effects of COVID-19 are well-documented – in this article we review the wider economic consequences and how to protect yourself and your business.

There has already been a blow to tourism and travel, from which some companies will not recover. Less obviously (except to those in the affected sectors) there is an impact on manufacturing, education, finance, technology, construction, energy, and insurance.

- Chinese consumption is down massively, meaning that globally businesses will probably suffer from lack of liquidity, even if you don't trade directly with China. Chinese consumer behaviour will be mirrored to some degree in every other country hit by the virus.
- Factory closures or go-slows in China have already upset global supply chains. These have affected not just those who source products from China, but others further down the line who might never have given a thought to where the parts on the goods they acquire come from. Again, this dynamic will repeat for other countries.
- Across the world, travel restrictions are preventing people getting to where they need to be, and preventing goods moving. This affects all kinds of projects, particularly infrastructure, but also basic import and export of goods.
- Startling photos from China have shown the dramatic drop in emissions in just a month resulting from a drop in demand for energy as people move less and economic activity slows. This is already leading to falling oil prices and overcapacity. Prices have fallen by 24% this year.

## How to prepare your business for the impact of Coronavirus (or COVID-19)

There is a range of steps that every business leader can take to ensure that they are as prepared as possible for the economic effects of the virus. As well as considering your employees, your actions need to maintain efficient working, and financial or structural moves.

You also need to review your business relationships in the light of COVID-19, in terms of both statutory law and contractual provisions – the rights and obligations which the first requires are quite distinct from your contractual rights and obligations.

## How to minimise the potential risk of COVID-19 to your workforce

Consider the range of HR and [employment](#) issues involved, including:

- ensuring your workforce is aware of the symptoms, in line with NHS guidance
- a review of your sick pay entitlement policy and how absence associated with COVID-19 will be treated. Employers who actively monitor sickness absence levels, for example under the Bradford Factor, may wish to consider exempting any absence related to the virus from scoring, and notifying employees in advance that this will apply. This may help limit employees attending work when they should not do so
- considering your non-sick pay entitlement policy e.g. when employees need time off to care for a dependent who is in self-isolation, who has been quarantined with a diagnosis and/or where there are school closures relating to COVID-19

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- consider advising staff of updated Foreign and Commonwealth guidance advising against all but essential travel to specific destinations and the impact of self-quarantine following travel to these affected areas
- considering your flexible working and home working policies, including implementing one specifically designed for this circumstance
- communicating as positive a message to staff as possible that payroll will remain unaffected if the workplace needs to close temporarily
- maintaining a channel of calm and open communication with your workforce, ensuring that relevant updates are given.

## How to safeguard business continuity during the COVID-19 outbreak

Consider:

- ordering additional laptops and mobile phones for employees who do not currently have them
- asking staff who can work at home to ensure, in advance of any such flexible working taking effect, that they have fully operational laptops and phones and can therefore continue to work as normal from home
- reviewing licensing on software to ensure that they have sufficient remote user permissions, so that employees can work remotely with minimal disruption
- making it clear to staff working from home, if this is not the standard arrangement, that this is a temporary measure whilst COVID-19 is affecting usual business practice
- consider whether staff can access and run all vital procedures remotely, for example payroll and billing, in order to minimise cash flow disruption to employees and financial strain on the business.

**NB You should also consider whether insurance policies cover COVID-19 and its effects.**

## What can I do if my business is facing insolvency?

Even if your own business does not yet appear to be affected, your supply chain is likely to be feeling the effect. For instance, dependence on China has cost some companies a great deal. Anyone whose business model is totally dependent on the China supply chain and has not already hedged against it, needs to consider exit, either sale of the business to someone who has hedged already, or even liquidation. For most, it is too late if they have not done their research pre-outbreak.

If you can see difficulties looming, you can mitigate the risk to your business by acting fast and taking advice – your concerns could relate to cash flow, the need for a bridging loan, laying off staff or mothballing production facilities, among others. Our team of experienced restructuring and insolvency lawyers can help you to develop strategies to take your business forward.

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## How can the law help me with COVID-19?

The legal issues involved are, in terms of statute, the concepts of frustration (i.e. the inability to perform an obligation) and force majeure (i.e. events beyond a person's control), and related laws, further complicated by the fact that the laws of different countries may apply. As far as your contract terms are concerned, the relevant clauses will be those that deal with force majeure (FM), material adverse change (MAC), and change of law clauses.

## Commercial contracts in the context of COVID-19

**Commercial contracts** will commonly include FM clauses. These typically refer to flood, drought, earthquakes, war, and so on. Chinese companies often argue for matters like government action or legislation to be included, although non-Chinese counterparties tend to push back. References to outbreaks of sickness are less common.

Even if there is a reference to epidemics (COVID-19 is currently classed in this way) in the FM clause, someone wanting to rely on the clause would need to show that their inability to perform their obligations arose from the epidemic.

In the context of COVID-19, check your commercial contracts for:

- notice requirements for invoking FM, e.g. the form of the notice and how many days the counterparty has to respond. Your contract might allow you to avoid liability if you cannot deliver or perform because of the virus, but you might need to give 30 days' notice, or notify in a particular way for the notice to be legally effective
- broader options - you might be entitled to invoke one of the contractual clauses to get out of performing or delivering, but consider the long term – when the outbreak is over, you want your counterparty to be in a good position and not to think badly of you. It might be preferable to use your contractual right as a bargaining chip rather than actually acting on it, i.e. reduce your obligation rather than avoiding it completely
- be careful if you decide to prioritise some counterparties over others, as these could lead to claims by those who think you have prioritised others over them.
- be wary of using COVID-19 as a reason or excuse to deal with other problems with the contract or counterparty, as the reality usually becomes apparent all too quickly, causing more problems
- maintain accurate and detailed records of how COVID-19 has affected you, and where appropriate share information with others in your industry especially if you can in turn understand how it has affected them. This will be particularly useful where there is future discussion about how you have dealt with the situation.

## Can the law override your contracts because of COVID-19?

Force majeure is often thought of as a clause in a contract, especially by English and US lawyers, but in many countries (China, France and Germany, to name a few), civil law allows someone to escape their obligations because of FM; for instance, during SARS in 2003, Chinese law was clarified by the Supreme People's Court to include disease outbreaks to be included in law on FM.

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In these circumstances FM means “an objective situation that cannot be foreseen, is unavoidable, and is insurmountable” which covers natural phenomena, such as earthquakes and typhoons, and social phenomena, such as military operations. Chinese law allows the party suffering from FM to terminate the contract or be exempted partly or wholly from non-performance, but not automatically.

Currently Chinese companies wishing to rely on FM are finding it relatively easy to meet the requirements, because government authorities issue them with certificates attesting to force majeure. We expect some EU countries to follow suit, as most use civil law.

Note that the other party has the right to challenge claims of force majeure on the facts of the case via the dispute resolution clause in the relevant contract. Our advice is not to accept such a notification just because it comes with an official looking certificate – some companies have been successful in challenging people who claim statutory FM when the facts do not support it.

## How will ‘frustration’ help me in the context of COVID-19?

Frustration – a concept familiar to English and other common law practitioners - relates in this instance, to unforeseen events and how they affect your obligations. If, after the formation of a contract, an unforeseen event either renders contractual obligations impossible, or radically changes the party’s principal purpose for entering into the contract, that contract can be set aside. For example, in the hotel industry, contracts to book rooms are being set aside because the guests cannot travel to the town where the hotel is located. Similarly, where time is of the essence, the principle of frustration is being invoked where travel restrictions prevented goods being delivered on time.

If you are trying to rely on the concept of frustration to avoid an obligation, it is important to note that you cannot do so if the frustrating event was anticipated in the contract.

You also need to be aware that there is a high bar to reach for any claim that a contract has been frustrated to be successful, so do take advice before using this approach.

## Imprevision – another weapon in your armoury?

The concept of imprevision – which means that drastic and unpredictable changes to conditions under which a contract is implemented – might entitle affected parties to modify or terminate contracts, so it is worthy of consideration in relation to COVID-19.

The right is separate to FM and under Chinese law, the changes must not relate to an FM event, in fact. If FM does not apply, imprevision can still be triggered; bear it in mind.

## Material adverse change clauses

Loan facilities often contain material adverse change clauses (MAC clauses) to allow the lender to treat an adverse change in the borrower’s circumstances as a default.

Similarly, share or asset purchase agreements in M&A deals allow the purchaser to change its mind about buying a company before completion, if there is an adverse change for the target company.

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COVID-19 might activate a MAC clause if the precise wording of that clause does cover it. It need not mention epidemics specifically – for example, if it refers to disturbance to supply chain or loss of revenue, this might be sufficient.

## Check your contracts for change of law clauses

A change of law clause gives a party the right to terminate or amend the contract if a change in law makes it difficult or impossible for that party to perform its obligations. If the COVID-19 outbreak results in legislation that, for example, restricts travel or closes workplaces, it could be argued that a change of law clause is activated.

This is a purely contractual matter, so if your contract has no such clause, the parties to that contract cannot invoke it.

If the contract does have such a clause, however, then it is important to pay attention to legislation, and in particular to check whether the clause refers to the governing law of the contract only, or refers to “applicable law.” The latter is broader – for example if the contract is governed by English law but one party is in China, then arguably new Chinese legislation would still count as a change in law for the purposes of the clause.

## Can I pick and choose what part of my contract I perform?

You might find yourself being able to perform some, but not all, of your contractual obligations, in which case you need to consider the terms of each contract carefully and balance the pros and cons of;

- (a) partially performing all
- (b) performing those that bring you the most benefit
- (c) performing the contract that carries the greatest risk of being successfully sued if you breach.

This situation usually arises when you have insufficient stock to meet demand, but there are other situations. Legal advice is necessary when trying to calculate risk under (c) above, but (a) and (b) are largely commercial considerations where lawyers’ input is advisory at best.

## Conclusion

One major point of difference between COVID-19 and other epidemics is that the constant sharing of information has resulted in social and economic consequences disproportionate to the threat to life. It may therefore, with hindsight, be viewed like Brexit or the 2008 financial crisis, as primarily a significant economic disrupter.

A company that takes steps to reduce legal risk by reference to contracts and applicable law (whether it is English law or overseas law) will be much better placed to ride out the storm than a one whose leaders simply hopes for the best or relies on commercial negotiation alone.

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Our legal experts are well-placed to help you to weather the storm – please contact us.



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