



## The impact of the coronavirus outbreak on contracts

Without losing sight of the terrible impact that the coronavirus outbreak is having on people around the world, we cannot ignore the economic impact that businesses in the BVI and elsewhere are currently facing.

The mitigation measures that have been put into place by governments have disrupted the availability of customers, labour and materials. These measures will inevitably have an impact on how businesses pay their operating expenses, produce their goods, deliver their services and generally comply with their contractual obligations.

### Understanding the nature of the contractual obligations

An important first step for businesses facing these challenges is to review and understand the nature of their contractual obligations and to assess whether those contractual obligations can be performed at the present time.

Depending on the nature of the contract, there may be some leeway in determining how the contract is to be performed. For example, there may be an option in the contract to substitute materials or personnel from those originally specified, which would enable the contract to be performed.

### Variation

Where it is clear that the contract is unable to be performed as originally intended, there may be scope for the contracting parties to mutually agree a variation. This approach would be appropriate where the parties wish to continue their contractual relationship but recognise that the existing contractual obligations do not properly reflect what can be delivered at the current time.

Contractual variations should be in writing and signed by or on behalf of all relevant parties to ensure that there is no dispute over what has been agreed. Given the uncertain outlook it may be appropriate for the terms of the variation to specifically cover how the parties should proceed where the parties remain unable to perform their contractual obligations by certain pre-determined milestones.

### Mitigation

Where an innocent party to a contract suffers loss because of a breach by another party, it may be tempting for that party to do nothing and to make a claim against the party at fault for breach of contract. Contracting parties should bear in mind that an innocent party has a duty to take reasonable steps to mitigate the loss suffered as a consequence of a breach of contract. The nature of those reasonable steps will depend upon the circumstances in each case. A failure to take reasonable steps to mitigate the loss suffered will result in the

innocent party being unable to claim damages in respect of those losses that could have been avoided had the duty to mitigate been adhered to.

### Force majeure

Businesses should also check their contracts carefully to ascertain if those contracts contain a *force majeure* clause that excuses the parties from performing their obligations or from doing so in accordance with the original timescale. A *force majeure* clause is an express clause within a contract that alters the obligations and/or liabilities under a contract when an event or circumstance beyond the control of the parties to the contract prevents one or all of them from fulfilling those obligations.

Determining whether a party may rely on a *force majeure* clause to excuse performance is always a fact-specific exercise and early legal advice should be sought. The remedy that will be available in the event that a *force majeure* clause is invoked will depend upon the specific wording of the clause in question.

### Frustration

The concept of *force majeure* does not exist in isolation, and it is incapable of being relied upon unless there is an express clause in the contract. If there is no such clause, a party that is unable to comply with its contractual obligations will have to consider other options that might excuse performance. In certain very limited circumstances, it might be possible for the affected party to rely on the doctrine of frustration.

In general terms, a contract may be frustrated if an unforeseen event occurs after the contract has been formed and as a result of that event:

- the contract becomes impossible to perform; and/or
- the obligations under the contract are changed into something so radically different from that which the parties originally intended that it would be unfair to hold the parties to their obligations.

It is very difficult to show that a contract has been frustrated and it is insufficient that the performance of the contract has simply been made more difficult or expensive as a consequence of the unforeseen event. In addition, the unforeseen event must not have been caused by the actions of either party.

Frustration may be commercially undesirable in some circumstances, since its effect, regardless of the wishes of the parties, is to bring the contract to an end and to discharge the parties from any obligations under it.

For more help in understanding your contractual obligations and to discuss these and any other ways in which the coronavirus outbreak may have an impact on your business, please feel free to email us at [ghp@ghpbvi.com](mailto:ghp@ghpbvi.com) or reach out to one of our lawyers using the contact details below.

## Contact Us

---

SHEILA C GEORGE

Managing Partner | George Henry Partners LP

☎ +1 284 393 7001 | +1 284 340 3322

✉ sheila.george@ghpbvi.com

JOHANN E HENRY

Partner | George Henry Partners LP

☎ +1 284 393 7002 | +1 284 340 3422

✉ johann.henry@ghpbvi.com

PAUL E MELLOR

Counsel | George Henry Partners LP

☎ +1 284 393 7003 | +1 284 340 4822

✉ paul.mellor@ghpbvi.com

---

Copyright © George Henry Partners LP

The content of this guide is intended for general information purposes only and is current as at the date of publication indicated. This guide does not constitute legal advice and should not be relied upon as such. You should always seek specific legal advice that takes into account your individual circumstances.