

Q&A

Q: Are there any measures that businesses can take to mitigate the financial effects of swine flu?

A: As a result of a flu pandemic, businesses may be unable to fulfil their contractual obligations or suffer loss because suppliers cannot fulfil theirs. A claim for damages for breach of contract would be a possible remedy however, if it is clear that the contractual failure was principally caused by the flu pandemic, a claim for breach may not be viable because either:

- There is an applicable ***force majeure*** clause in the contract
 - This clause typically excuses one or both parties from performance of the contract in some way following the occurrence of certain events. Because ***force majeure*** has no recognised meaning in English law, its scope varies from agreement to agreement. Businesses should review their contracts to see if any ***force majeure*** clauses cover business disruption caused by pandemic situations. Generally, businesses should consider amending their standard terms of business to ensure their ***force majeure*** clauses cover pandemic situations and comparable civil emergencies

or



- The judicial doctrine of ***frustration*** applies.
 - This applies where a significant change of circumstances renders performance of a contract radically different from the obligations originally undertaken. Such a change must be due to an outside event or change of situation that occurs without the fault of the party seeking to rely on it.

The fact that these defences could be available does not mean that a business can assume it will get away with flu as an "excuse" for any contractual failure. Businesses may want to review some contracts if they believe pandemic flu could cause a breach, and assess whether they can bring, or suffer, a claim in those circumstances.

If business fears serious disruption from a contractual failure by a key supplier or other counterparty due to flu disruption, it may be worth discussing this with the counterparty now. They could be asked to offer appropriate contingency planning and/or give some additional assurances.

For further information contact John Holder on 01634 811444 or email jkh@stephens-son.co.uk