

Legal Alert

Commercial

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Coronavirus and Force Majeure Clauses in Contracts

With the spread of Coronavirus (COVID-19) the potential impact of force majeure clauses in contracts has come under increased scrutiny.

What is a Force Majeure Clause?

Force majeure clauses seek to deal with the impact on contracts of events which are out of the control of the contracting party. They govern the relief that is available when a party is not able to perform their obligations under the contract.

To successfully invoke a force majeure clause performance of the contract must be impossible. It is not enough that performance may have become inconvenient or too costly it must be actually impossible.

Force Majeure Clauses as a Contractual Term

Contracts that include a force majeure clause may define the events that will trigger the clause. As a general rule force majeure clauses will not be implied into contracts. Therefore the starting point is to examine the terms of your contract. In the absence of a force majeure clause do not despair (read further on).

What is needed for COVID-19 to trigger a force majeure clause?

This will depend on whether your contract defines the events that trigger a force majeure clause. If it does then you will need to examine the defined events and determine whether or not the conduct that you wish to rely on falls within one or other of those events. The contract may contain references to defined events, natural disaster, Government intervention, epidemics and even pandemics. The last of course is particularly relevant given that [on 11 March 2020 the World Health Organisation declared Coronavirus a pandemic.](#)

In the event that your contract contains a force majeure clause but does not define the events then the scope for you to invoke the clause is in fact far broader. Your ability to invoke the clause is of course not restricted to events in Australia. If one of the contracting parties is from another country and that country is affected with a consequential impact on your ability to fulfil a contract you may be able to invoke the clause. Current examples would be China and Italy. In fact the China Council for the protection of international trade announced on 30 January 2020 that it would issue "force majeure certificates" where Chinese entities were contracted to foreign entities.

What Should your Business do now?

In the event that you wish to rely on your force majeure clause you will need to carefully examine your contract to determine what the relevant notice provisions are to trigger the clause.

You need to bear in mind that if you want to trigger the clause the onus of proving that COVID-19 has rendered your contract impossible to complete will rest with you. Until you are able to establish this an early attempt to trigger the clause could have other unfortunate consequences under the contract including in certain circumstances amounting to a repudiation.

Before seeking to trigger the clause, you should carefully consider all of the available options for completion of the contract including any possible alternatives to mitigate the fallout. This may involve considering whether the entire contract is affected or whether there are parts of the contract that you can still complete. Consideration should be given to whether there is only a temporary interruption to the performance of the contract or whether completion will in fact be impossible.

What if the Contracting Party is an Overseas Entity?

Some countries do codify what happens in the event of a force majeure event. You will need to examine your contract to see whether it contains any clause seeking to define which jurisdiction's law governs the performance and interpretation of the contract.

What to do if your Contract does not have a Force Majeure Clause?

You may need to consider whether your contract has been "frustrated". A contract can be frustrated where an event occurring after the contract was entered into has occurred through no fault of the contracting party. In some states there is specific legislation that deals with this. In South Australia it is the *Frustrated Contracts Act 1988*. This Act defines what amounts to frustration and provides that in the event that a contract is frustrated it discharges all parties from "all contractual obligations" and allows for an adjustment between the parties for part performance.

Before Acting

Before you seek to enact the force majeure clause or determine the contract for frustration you need to carefully consider the consequences including any financial impact of your decision.

You May Also be Interested in:

[Coronavirus \(COVID-19\) – A Legal Overview](#)

[Insurance Contract Considerations in Response to Coronavirus Outbreak](#)

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