

Wine

March 2020

Coronavirus (COVID-19): Force Majeure Clause Answers for the Wine Industry

This content is current as at **20 March 2020**

You can generally only invoke a “force majeure” clause to relieve you from your obligation to perform under a contract if performance is **impossible**.

Effect of force majeure clauses

Force majeure clauses seek to relieve a party from its obligation to perform under a contract due to the impact of an event which is beyond the control of that party. To successfully invoke a force majeure clause, performance of the contract by the party must generally be impossible. Subject to the wording of the particular clause, it is not enough that performance may have become inconvenient or costly; it must actually be **impossible**.

Which law applies?

The key preliminary point is that you need to consider the law of which country governs the contract. Some countries have codified force majeure law. Australia has not done so; thus force majeure law in Australia is a matter of construing the relevant provision of the contract in question.

What do force majeure clauses generally cover?

Force majeure clauses usually define the events that will trigger the clause. As a general rule, force majeure clauses are not implied into contracts.

If your contract contains a force majeure clause, you will need to analyse the defined events and determine whether or not the event that has occurred falls within the relevant classes.

Wine industry contracts often define “force majeure” as including drought, fire, frost, hail, storm, flood, earthquake, disease, accident, explosion, war, national emergency and sometimes other adverse climatic conditions, unavailability of transport, machinery breakdown or act of

government (such as expropriation or imposition of trade barrier).

The reference to disease is normally designed to cover grape vine diseases. However, it may indeed cover a human virus.

Often force majeure clauses will refer to an “act of God”. It is arguable that COVID-19 falls within this general concept.

Disruption of wine shipping arrangements may well trigger some force majeure clauses that specify unavailability of transport as a force majeure event.

Impact on wine supply agreements

You may be in a situation where you have a wine supply contract with a buyer, perhaps a foreign buyer, under which they are required to draw down certain volumes of your wine at certain times. They may have purported to issue a force majeure notice to avoid the obligation to take delivery of the wine.

If they are relying on COVID-19 to support their notice, and the contract is governed by Australian law, and if a pandemic such as COVID-19 falls within the scope of the force majeure clause (perhaps because “disease” is specified or it is an “act of God”), they will only be legally entitled to issue the notice and trigger the force majeure clause if it is impossible for them to take delivery of the wine. The fact that the buyer cannot sell the wine because the market has collapsed would not prevent them from taking delivery.

The buyer might argue that they cannot take delivery of the wine due to logistical impediments caused by COVID-

19 (e.g. shipping disruption). It depends upon the construction of the particular clause, but, even though the clause may specify shortage of transport as a force majeure event, the fact that shipping is delayed for a relatively short period, but not ultimately prevented, would not normally allow a party to avoid performance altogether. In fact, many force majeure clauses expressly allow performance to be suspended, but require it to be discharged once the impediment is removed.

It is interesting to note that 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. That may have an impact where the contract is governed by Chinese law, but we would not expect it to alter the above analysis for contracts under Australian law (if litigated in Australia).

Contracts for the supply of inputs

Demand for your wine products might have declined due to the impact of COVID-19 on your export markets and distributors, as well as on your cellar door and on-premise business. You might, therefore, want to produce less wine. However, you may have already entered into contracts for the purchase of fixed volumes of inputs such as grapes, dry goods or chemicals. Can you trigger a force majeure clause in those supply contracts?

Again, assuming COVID-19 is a force majeure event, it would normally depend upon whether your ability to take delivery of those inputs is impossible. We expect that you would generally be able to discharge those obligations, precluding your ability to “call force majeure”.

What if your contract does not have a force majeure clause?

It may be that 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, for example, it is the *Frustrated Contracts Act 1988*.

If the contract is frustrated, it discharges all parties from their obligations under it and normally allows for an adjustment between the parties for part-performance.

What you should do before you act in relation to a force majeure notice you have received or are wanting to serve?

You need to carefully consider, and seek advice concerning, the impact of your decision. If, for example, you call force majeure in circumstances in which you are not entitled to, your act may amount to a repudiation of the contract, leaving you liable for a damages claim.

Other information

For other information concerning the legal impact of COVID-19, including in relation to insurance aspects, please see the COVID-19 page of our website by clicking [here](#).

[Coronavirus \(COVID-19\): The Insurance Contract Obligations I Must Consider](#)

[Coronavirus \(COVID-19\): Workplace Update & Guidance for Employers](#)

[Coronavirus \(COVID-19\): Policy in Place with Respect to Wills, Estates & Succession Planning](#)

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