

Avoiding close relationships: force majeure

The escalation of the COVID-19 crisis around the world has forced many to review their contractual relationships. In particular, the term 'force majeure' has become the focus of close scrutiny. It is likely to be a concept which is tested and developed further as the true nature and scale of the crisis unfolds.

What is force majeure?

Often referred to as an "act of God", it has been defined as an extraordinary occurrence which could not have been foreseen and which could not have been guarded against.¹ A creature of contract, it is a provision which provides for performance to be excused if rendered impossible by unavoidable causes (that can also include excusing performance of the contract in whole or part, triggering an entitlement to suspend or terminate, or claiming an extension of time for performance).

The clauses vary depending on how they are drafted, but they typically cater in some way for circumstances which would otherwise constitute a breach of the contract.

The burden is on the party seeking to rely on a force majeure provision to satisfy a court or arbitrator that the event in question is the cause of the non-performance (or late performance).

What can trigger the clause?

The force majeure provision will usually list the specific events or circumstances such as war, terrorism, acts of

government, epidemic or circumstances beyond the parties' reasonable control. To the extent that epidemic or pandemic is specifically listed as an event, then there is unlikely to be much doubt COVID-19 is covered.

However, as is so often the case, where the relevant event is not specifically listed, it will be a matter of interpretation of the provision as to whether the parties intended such an event to be covered. Where parties have gone to the trouble of listing certain events, but not included others, they are likely to face an uphill battle persuading a judge or arbitrator that a specific event was intended.

That recognised, in the exceptional circumstances which COVID-19 has created, it is likely that somewhat broader references such as "circumstances beyond the parties' reasonable control" are likely to be met with a more generous or sympathetic interpretation from the courts.

What is the impact on the party's ability to perform contractual obligations?

Even if it is established that an event comes within the scope of the force majeure provision, the party will nonetheless still have to demonstrate that late or non-performance was due to circumstances outside their control and also could not be prevented or mitigated by taking reasonable steps (e.g. sourcing materials or labour from elsewhere).

Typically, the force majeure provision will also specify the impact the event must have in order for it to be triggered, often by reference to the event having *prevented, hindered or delayed* performance:

- **Prevented:** it is not sufficient to claim that performance is more difficult, more costly or less profitable – it must be physically or legally impossible to perform. War is the classic example and reflects the high standard to show performance being prevented.

¹ *Pandorf v Hamilton* (1886) 17 QBD 670.

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- Hindered: performance is substantially more difficult, but not impossible. Whilst this is a lower standard than performance being prevented, it still would not entitle a party to avoid performance on the grounds that it would be less profitable, if alternative means are available (e.g. sourcing materials from an alternative supplier).
- Delayed – the current lockdown in New Zealand is an obvious example where the unavailability of labour is likely to make contractually agreed timescales substantially more difficult to meet.
- Even if there is no specific force majeure provision, other clauses may be relevant (e.g. material advance change, termination etc).

Want to know more?

If you would like further information or have any queries or concerns, please do not hesitate to contact our specialist [dispute resolution](#) or [commercial contracts](#) teams.

How can force majeure help the affected party?

The provision will specify the remedy available to the party, and subject to any notice provisions, it will typically entitle the affected party to:

- avoid liability under the contract;
- extensions or suspension of time;
- rights of termination (which may be a useful lever in contract negotiations).

What should you do?

- Review your contracts to establish if they contain a specific 'force majeure' provision.
- Exercise caution and seek legal advice before relying on a force majeure provision – a party that inappropriately seeks to rely on a force majeure provision could find themselves liable for damages on account of wrongful repudiation of the contract.
- Comply with any notice provisions which may well act as a condition precedent.
- Maintain good documentary records evidencing why performance has been prevented, hindered or delayed, and what steps have been taken to explore alternatives and mitigate loss.