

COVID-19 IMPACTS ON SUPPLY CHAINS

How Force Majeure in Contracts May Apply

Coronavirus is resulting in substantial disruption of supply chains. Does a *force majeure* clause provide protection for parties affected by this disruption?

The short answer is, it depends on:

1. whether there is a force majeure clause in a contract; and
2. the language of the specific force majeure clause.

Force majeure provisions operate by excusing the affected party from its contractual obligations, during the period it is prevented from performing them due to a force majeure event. Force majeure is relatively common in *supply of goods* contracts (especially long-term supply contracts) but is less common in *provision of services* contracts (for example, construction contracts, professional services contracts).

In common law jurisdictions like Australia, force majeure is a creation of the contract. This means that, outside of a contract, there is no implied definition of force majeure. Rather, in order to determine whether a particular event falls within the ambit of force majeure, the specific wording of the relevant force majeure clause in the contract is critical.

If there is no force majeure clause in a contract, then the concept of force majeure does not apply to that contract.

Two types of force majeure clauses

A force majeure clause would typically be drafted in one of two ways – as an inclusive clause or an exhaustive clause.

An **inclusive force majeure clause** would generally define a force majeure event as an unforeseeable event that makes it impossible or substantially more difficult for a party to perform the contract. An inclusive force majeure clause then usually provides a list of examples of events that would constitute force majeure event, such as earthquake, flood, war, terrorism etc. If an epidemic or infectious disease is not part of that list, it still may be able to be construed as a force majeure event if it's an unforeseeable event that makes it impossible or substantially more difficult for a party to perform the contract.

An **exhaustive force majeure clause** would define a force majeure event by reference to specific events, such as earthquake, flood, war, terrorism etc. If an epidemic or infectious disease or similar is not part of this list then it would not be a force majeure event.

Force majeure in existing contracts

Therefore, if your project is impacted by delay or disruption caused by coronavirus, the first step is to check whether your contract contains a force majeure clause and then interpret that clause to see if the disruption caused by coronavirus falls within the ambit of this clause and how to trigger its application.

Once you identify whether delay caused by coronavirus may fall within the contractual definition of the force majeure event, it is important to follow the notification process that's usually prescribed in a force majeure clause. If the relevant notice is not given within the prescribed timeframe, it may preclude the affected party from being able to rely on the force majeure provision.

Force majeure in new contracts

For new contracts, it may be a good idea to include a force majeure provision that expressly covers epidemics and infectious diseases. It may even be advisable to refer to coronavirus expressly. For example, the following can be included as one of the force majeure events:

“any occurrence of any local or international epidemic, pandemic or infectious disease, including COVID-19”.

However, it is not enough just to include this in the list of force majeure events, it is also important to ensure consistency within the force majeure provision. Force majeure clauses often say that a force majeure event must be unforeseeable and must occur after the commencement of the contract. Clearly, coronavirus is now here and delays it may cause are arguably foreseeable, so clear drafting is required to ensure that such delays are properly captured in a force majeure clause.

Need help?

We are always happy to help with interpreting or drafting force majeure clauses in your contracts. Contact [Stanislav Roth](#) if your business needs assistance.

Check out other COVID-19 Employer Response resources on the Source website: <https://www.sourcelegal.com.au/covid-19-response/>