
**Coronavirus – Contractual
considerations**

March 2020



Overview

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- If a business cannot comply with its contracts:
 - What legal remedies might it have?:
 - Force majeure clause
 - Doctrine of frustration
 - Try to negotiate a solution?
- Some other practical considerations

Force majeure clauses

What is a Force majeure clause?

Wikipedia:

"a common clause in contracts that essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties, such as a war, strike, riot, crime, plague, or an event described by the legal term act of God (hurricane, flood, earthquake, volcanic eruption, etc.), prevents one or both parties from fulfilling their obligations under the contract"

NZ law: Force majeure does not have an independent, recognised meaning. It is vital to assess the specific wording of the force majeure clause.

Do I have a force majeure clause?

- Check your contract.
 - Courts will not imply a force majeure clause into a contract.
- If so, review and carefully analyse the exact wording of the clause.

(Also check the Governing Law clause in your contract).

Analyse the force majeure clause

- Does the force majeure clause cover pandemics or government orders?
 - Usually, but not always...
 - Sometimes there is a list of events which trigger the rights under the force majeure clause.
 - Sometimes the clause refers to any “event beyond the Parties’ reasonable control”.
 - Does the clause apply for both parties’ benefit?

Was the breach caused by the pandemic / government order?

- To rely on the clause you will need to prove the breach of contract was caused by the pandemic / government order.
- Has it become physically or legally impossible to perform the contract because of the pandemic / government order? Or was the breach caused by other reasons? Has it simply become uneconomic or inconvenient to perform the contract?
- Are there reasonable steps that could have been taken to mitigate or avoid the breach?

Analyse the force majeure clause – Need to given notice?

- To claim relief under the force majeure clause, what steps need to be taken?
 - Written notice to the other party?
 - You are only excused from liability for that breach. You still need to comply with the other obligations in the contract.

What if you receive a force majeure notice?

- Check the contract does have a force majeure clause and that it applies to the circumstances at hand.
- Request regular updates.

Frustration

Frustration

- If there is no force majeure clause, you might be able to rely on the doctrine of frustration to bring the contract to an end.
- Frustration is where, by no fault of either party, an unforeseen intervening event makes performance of the contract impossible or radically different.

Negotiating changes

Negotiating changes

- Being in breach of a contract is not an ideal situation to be in, but it is important to remain proactive and practical in finding a way out.
- This may mean resorting to legal remedies or it may mean trying to negotiate a solution.
- A good understanding of your contractual rights might give you leverage to negotiate solutions.
- Be proactive and negotiate before you are in breach (Especially for financing arrangements).

Negotiating changes

- During negotiations be mindful of:
 - important longer-term relationships;
 - the reality of the challenges that many businesses are facing in the current environment (risk of insolvency?);
 - reputational risks.

Variation / Waiver

- The solution might involve a variation to the contract or a "waiver" of the breach.
- Get these recorded in writing.
- A variation agreement does not need to be signed in wet ink: Under NZ law an electronic signature is considered just as valid as a written signature for almost all documents, and for almost all legal requirements.

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