

## Article Information

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## Force Majeure in the age of COVID-19

**On 27 February, the Prime Minister Scott Morrison announced a Coronavirus Emergency Response Plan, “getting out well ahead of the World Health Organization”, in preparing for a global pandemic. Recent events gives rise to the question, how may parties legally be exposed or protected where supply chains are interrupted by global crises? Force majeure provisions can relieve performance obligations for events beyond the reasonable control of contracting parties.**

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COVID-2019 continues to spread rapidly around the globe. Governments world-wide continue to implement travel bans and trade restrictions. The Australian government has warned that a pandemic is imminent. In China, epicentre of the crisis and the world’s manufacturing powerhouse, many businesses and factories have closed. *The Economist* quotes predictions that Chinese manufacturing production may reach only 60% to 80% of normal production levels by the end of February 2020<sup>[1]</sup> leaving a dire impact on the global economy.<sup>[2]</sup>

This has critical implications on business, both international or domestic. Due to the globalised nature of business, companies rely heavily on the operation of global supply chains in making their own contractual supply commitments. The Australian construction industry, for instance, relies heavily on the import of materials and components from China and other countries. The disruptions to business and manufacturing in China and around the world therefore pose a major risk to the industry.

Despite the significant effects that the coronavirus has already had world-wide and the various actions already taken by governments in response to the crisis, the World Health Organisation is yet to declare a pandemic. However, on 28 February 2020, the World Health Organisation raised to the global risk of an outbreak of the life threatening coronavirus to ‘very high’, the highest level in its assessment system. The declaration or otherwise of a pandemic can have significant implications in considering contract protections.

### Force Majeure

*Force majeure* is a legal construct designed to provide relief to parties affected by an unavoidable or unforeseeable event. However the application, operation and meaning of force majeure are far from being universal concepts. The concept operates differently across jurisdictions and, in Australia, from contract to contract. Whereas some “civil code” legal systems (including China’s) operate to broadly apply principles like force majeure, irrespective of private contract agreements, in “common law” jurisdictions such as Australia, force majeure relief is solely a creature of contract and therefore, will only apply to the extent agreed in the terms of a contract.

Whilst there is no real “standard” force majeure clause in Australia, most clauses have similar features. In the context of construction contracts, force majeure clauses:

- describe what qualifies as a “force majeure event”. Contracts generally define “force majeure event” in one of two ways; either by reference to an exhaustive list of events or by reference to a general description of the event (e.g. “an event beyond the reasonable control of the parties”) accompanied by a non-exhaustive list of events that qualify. Events commonly constituting a force majeure event include certain weather events, contamination of various kinds, acts of war, and health related events (such as epidemics and/or pandemics). In some cases, the definition of “force majeure event” limits the qualifying effect of those events to effects at the “site” (but not to the “supply chain”);

- oblige a party affected by a force majeure event to notify the other parties to the contract that a force majeure event has arisen or may arise;
- suspend the affected party's obligations under the contract, but excludes such relief to the extent that the force majeure event is caused or contributed to by the party seeking relief;
- permit termination by either party where suspension has endured for an extended period.

With respect to COVID-19, an affected party will need to assess whether their contract contains a force majeure clause, and secondly, whether the coronavirus falls within the definition of force majeure.

As a pandemic has not yet been declared, it is likely that in many cases, contract protections are yet to be triggered. Commonly, "force majeure event" is defined by reference to an exhaustive list of possible events (including, for example, pandemic and epidemic), where these are yet to be declared, protections are yet to be enlivened. Where a non-exhaustive list of force majeure events is used in the drafting of a clause, it will be more likely that a broader set of circumstances (such as the current outbreak) may qualify as a force majeure event. Ultimately, how and when protections apply will be depend on the terms of an individual contract.

### **Australia: no relief, unless contractual**

It has been reported that on 17 February, the *China Council for the Promotion of International Trade* revealed that it had issued over 1,600 "FM certificates" to firms in 30 sectors covering contracts worth over \$15bn<sup>[3]</sup>.

To the extent that relief afforded by Chinese government action may protect exporters in China, it will do little to protect contractors in Australia relying on the delivery of these goods to meet their own "downstream" obligations. Unless the Australian supplier is protected by a contractual force majeure provision, the declaration of force majeure under another country's laws (or even under the terms of an upstream supply contract) is of no benefit in terms of that supplier's liability for delayed or failed supply.

### **Mind the gap**

Parties are particularly exposed where "upstream" supply contracts for supply to them contain force majeure protections, but the terms of their "downstream" supply agreements to their customers do not provide equivalent relief. In these circumstances, where supply is interrupted, the upstream supplier is protected whilst liability to the downstream client still remains. This can arise in circumstances where the downstream contract contains no force majeure clause at all or where the terms of relief under that clause is narrower than that under the terms of the upstream contract.

### **5 Questions on Force Majeure protections**

In considering risk and exposure in terms of events such as COVID-19, parties should ask the following:

- Do I rely on key/significant imported plant equipment or materials in order to meet hard date contractual obligations?
- Is my supply chain for that equipment particularly exposed to force majeure events?
- Do my suppliers have the benefit of force majeure relief?
- Does my contract provide me with relief for this type of event and does it limit that relief to events at site only or through the supply chain?
- Is there a gap between the relief to which I am entitled and the relief to which my suppliers are entitled?

### **In Conclusion**

In a global economy reliant on international trade in goods and materials, the performance of local services can be greatly affected by disruptions to the supply chain, near and far. These can expose parties to serious commercial and legal consequences. Force majeure provisions can operate as a protection to these risks, however, their existence under our legal system as a creature of contract, makes them only effective to the extent expressed by the contract. The narrow operation of Force Majeure under our legal system is in contrast with those in civil code countries where protections may operate irrespective of contract terms. Parties, in considering their own contract protections, also need to take into account the way these issues might be dealt with in upstream and downstream supply arrangements.

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[\[1\] The Economist, Chinese firms use obscure legal tactics to stem virus losses, \(20 February 2020\)](#)

[\[2\] Georgina Lee, 'China offers force majeure escape clause for factories that breach supply contracts as coronavirus](#)

[\*shutdowns leave assemblies idle' \(online, South China Morning Post\) \(3 February 2020\)\*](#)

[3] [\*The Economist, Chinese firms use obscure legal tactics to stem virus losses, \(20 February 2020\)\*](#)