

## Force Majeure and COVID-19

In the course of the COVID-19 pandemic, suppliers and other parties to commercial arrangements with government agencies may exercise rights under force majeure clauses. A force majeure clause is a contractual method by which parties seek to manage the impact of events beyond their reasonable control.

### KEY POINTS

In managing commercial transactions during the COVID-19 pandemic, agencies should:

- ▶ in the context of existing commercial contracts, ascertain if those contracts include force majeure clauses and, if so, determine:
  - whether the definition of “force majeure event” encompasses the COVID-19 pandemic
  - the consequences of the force majeure regime applying and
  - the relationship of the force majeure regime with other contractual rights, such as a right to terminate for convenience
- ▶ consider how best to manage COVID-19 related risks in new contractual arrangements. It may be preferable to draft specific provisions, tailored to deal with COVID-19 related risks, rather than rely on a force majeure regime.

A force majeure clause is a contractual risk allocation tool. It is a mechanism by which parties seek to manage the impact of events beyond their reasonable control. In general:

- Force majeure is not implied as a matter of law in Australia. Accordingly, the wording and scope of a force majeure clause is critical
- Force majeure clauses are interpreted strictly by reference to their particular wording and the specific facts. In the case of ambiguity, a force majeure clause is interpreted against the interests of the party seeking to rely on it.

As to whether the COVID-19 pandemic would constitute a force majeure event, the terms of the “force majeure event” definition will be key. However, the following general points can be made:

- if the definition refers to a pandemic or epidemic, it would capture the COVID-19 pandemic
- it is unclear whether an “act of God” would extend to the COVID-19 pandemic. According to the case of *Nugent v Smith* (1876) 1 CPD 423, an act of God is

an event “*due to natural causes directly and exclusively, without human intervention, and that ... could not have been prevented by any amount of foresight and pains and care reasonably to be expected*” (James LJ at 441)

- even if the definition includes a general catch-all at the end (such as “any other event beyond the reasonable control of the parties”), the catch-all may be limited in scope by reference to the specific examples of events that precede it (see, for example, *Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd* [2006] FCA 1324, Kiefel J at [62]).

If the definition of “force majeure event” encompasses the COVID-19 pandemic, consideration must be given as to:

- whether it is the cause of a party’s inability to perform as per the terms of the force majeure regime and
- the contractual rights and remedies that flow, including the regime’s relationship with other risk allocation provisions.

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