



Force Majeure?

Ordinarily under a business contract, if one party fails to comply with their contractual obligations to the other party to the contract, they may be liable to compensate the other party for any losses or damages they suffer as a consequence of the breach of contract.

However, if circumstances outside the control of the defaulting party or an unexpected event such as the current COVID-19 Pandemic either limits or totally precludes them from delivering on their contractual obligations, they may be able to seek relief if the business contract contains a Force Majeure clause.

What is the Force Majeure Clause?

Also known as an 'Act of God' clause, a Force Majeure clause contains provisions that provide that if a specified event occurs that is beyond the control of either party that prevents or hinders the performance of the contract by either or both of them, then for the duration of the Force Majeure event, their contractual obligations will be put on hold. The contractual obligations of the parties will then only recommence once the Force Majeure event has ended or dissipated to an extent that enables the parties to resume performing their contractual obligations.

What's in a Force Majeure Clause?

Force Majeure clauses vary in terms of detail and may be quite simple clauses or be more detailed specifying a list of events considered beyond a party's control. These may include events such as:

- outbreaks of disease or epidemics
- cyber or ransomware attacks
- war or acts of terrorism
- civil war or disorder
- earthquakes or hurricanes
- acts of government authorities

Force Majeure clauses may also outline the type of behaviour expected in order to be excused from liability or failure to perform. The clause may for example require that a party provide the other party with written notification as quickly as possible of the Force Majeure event, state the nature and extent of the delay; and make a diligent effort to perform their obligations or to alleviate the delay.

Some Force Majeure clauses will also define how long the event must go on for before the contract can be terminated.



What if there is no Force Majeure?

In Australia, Force Majeure clauses are not implied. This means that if they are not in the contract, you cannot use Force Majeure as a reason to not deliver or perform. In limited circumstances, a party may seek to rely on the common law doctrine of "Frustration". This may bring a contract to an end in circumstances where an intervening event has occurred, through no fault of the parties, which makes a contractual obligation impossible to perform or transforms a contractual obligation into a fundamentally different obligation. The doctrine of frustration has a very narrow scope and frustration will not arise where there has been mere hardship where the event in question has been foreseen or whether the change is only temporary.

If you want advice about your companies contractual obligations in this current time or would like assistance with any company or business matter, please call [John Bateman](tel:0247315899) or [Michael Battersby](tel:0247315899) on 02 4731 5899 or email commercial@batemanbattersby.com.au.