



# Coronavirus COVID-19: The legal impact on force majeure events (Australia)

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On Thursday 30 January 2020, the World Health Organisation (WHO) declared a “Public Health Emergency of International Concern” following the outbreak, and rapid spread, of the 2019 novel coronavirus (now officially known as COVID-19).[1] Whilst the WHO is yet to escalate the outbreak to the level of a “pandemic”, namely, the worldwide spread of a new disease, the Chinese Government, and several foreign governments, have imposed a number of restrictions including mandatory office closures, full or partial lockdown of cities, and travel bans to prevent spreading coronavirus. Similarly, some businesses are partaking in voluntary closures and have implemented travel bans (not only in and out of China but more generally) for their employees. These restrictive measures have resulted in affected parties considering whether coronavirus, as a global health emergency, could be considered a force majeure event so as to delay or absolve a contracting party of its contractual obligations.

## What is a force majeure clause?

Force majeure is a civil law concept which aims to ‘keep the contract alive’ in circumstances where “innocent” contracting parties, who are not in default, are prevented from performing their contractual obligations due to disrupting supervening events beyond their control. The inclusion of a force majeure clause allows contracting parties to agree to the occurrence of certain events which excuse a party’s performance of its contractual obligations and can, accordingly, prevent the contract from becoming frustrated.

As a creature of contract, the scope and effect of any force majeure clause is dependent on its construction and drafting. Typically, force majeure clauses are construed to cover events which:

- are beyond the reasonable control of the party affected;
- cause or result in default or delay in the affected party’s performance of its contractual obligations;
- are without the fault or negligence of the affected party; and
- the affected party could not reasonably have been expected to prevent, avoid, or overcome, the event by exercising a standard of skill, care and diligence.

In most cases, force majeure events are contemplated to cover acts of God, extreme weather events, riot, war or invasion, government or regulatory action including strikes, terrorism, or the imposition of an embargo.

## What are the consequences of declaring force majeure?

It is less common to see force majeure clauses that expressly contemplate a global health emergency, pandemic

or epidemic as a force majeure event. Contracting parties must, therefore, be cautious in declaring a force majeure event on the basis of the recent coronavirus outbreak and ceasing performance of their obligations.

Incorrectly declaring a force majeure event may result in a contracting party repudiating the contract and may provide the other party with a right to damages.

### Declaring force majeure

Interestingly, on 30 January 2020, the China Council for the Promotion of International Trade (CCPIT) encouraged businesses which have, as a result of the coronavirus epidemic, failed to perform on time, or failed to fulfil an obligation in an international trade contract, to apply for a “force majeure certificate” excusing their performance. For example, CCPIT issued its first “force majeure certificate” to a manufacturing company in Zhejiang province to help stem the firm’s losses arising from its inability to meet its contractual obligations with Peugeot’s African plant, potentially exposing it to a damages claim of approximately USD4.27 million. [2]

Of course, whether the outbreak of coronavirus could be considered a force majeure event will be dependent on the drafting contained in your contract.

The following points, whilst not constituting legal advice, may provide guidance to companies considering declaring a force majeure event:

- **Scope:** Does your force majeure clause contemplate a global health emergency, pandemic or epidemic as a force majeure event? Could mandatory office closures, full or partial lockdowns of cities, and travel bans be considered government or regulatory intervention beyond the parties’ control?
- **Reasonable foreseeability:** Arguably, the previous SARS epidemic in 2003 may suggest the effects of the coronavirus were reasonably foreseeable and could have been prevented, avoided or overcome. Have you taken measures to limit the effects resulting from the spread of disease?
- **Notification:** Are you required to notify the other party(ies)?
- **Obligation to mitigate:** Do you have an obligation to mitigate the consequences of a force majeure event, including reasonable expenditure of funds, rescheduling resources, and minimising resulting delay? Can you show you have taken reasonable steps to mitigate / avoid the effects of a force majeure event?
- **Seek legal advice:** DLA Piper has significant experience on advising some of the world's largest companies on all manner of business-critical national and international commercial transactions, including navigating the contracts that bind them to their suppliers, customers, licensors, distributors and other strategic partners. Our worldwide presence and experience means we are uniquely positioned to advise on contracts relating to cross-border transactions.

The effects of coronavirus on business operations and profits may have created additional hardships on contracting parties to satisfy their contractual obligations. Parties who have experienced interruptions to their businesses as a result of the coronavirus should review the wording and scope of the force majeure clause in their contracts prior to ceasing performance and declaring a force majeure event.

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[1] World Health Organisation, *Statement on the second meeting of the International Health Regulations (2005) Emergency Committee regarding the outbreak of novel coronavirus (2019-nCoV)* (30 January 2020) <[https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-\(2005\)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-\(2019-ncov\)](https://www.who.int/news-room/detail/30-01-2020-statement-on-the-second-meeting-of-the-international-health-regulations-(2005)-emergency-committee-regarding-the-outbreak-of-novel-coronavirus-(2019-ncov))>.

[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) <<https://www.scmp.com/business/china-business/article/3048767/peugeot-parts-supplier-risk-missing-overseas-orders-amid>>.

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