

PRESSURE POINTS: PREPARING FOR THE 'NEW NORM' OF ON AND OFF RESTRICTIONS

24 June 2020 | Australia

Legal Briefings - By **Kwok Tang and George Psaltis**

As most of Australia contemplates the ongoing easing of emergency measures taken by State, Territory and Commonwealth governments in response to Covid-19, Victoria has announced it will extend its state of emergency until at least 20 July after a spike in cases. Further away, cities in China and South Korea have had to reinstate social distancing restrictions following their own uptick in positive cases.

Warnings from health experts of a “second wave” of Covid-19 which may require the reinstatement of previous, or the introduction of new, emergency measures appear prescient.

This means that parties dealing with the current impacts on their contracts, and parties entering into new contracts, will need to prepare for:

- the easing of emergency measures, possibly bringing an end to any performance relief obtained under a force majeure provision or similar;
- a possible second wave of emergency measures potentially impacting on performance; and
- for this easing and reinstatement of restrictions to be an ongoing cycle as governments across the country react to the flattening and expanding of the Covid-19 curve.

Whatever the situation, it is essential for parties to consider now how their situation may evolve in light of any potential cycle of easing and re-imposition of restrictions, and what they need to be doing at each stage to ensure that they obtain the best contractual protection available.

THE LAW

As “force majeure” relief is a creature of contract, its scope and effect will depend on the precise wording in each provision and the context in which it appears and operates. You can find out more about force majeure relief from our [previous article](#) on this issue. We have also prepared a [global guide](#) on the approach taken by key jurisdictions with respect to force majeure.

A RETURN TO PERFORMANCE

There are two key issues that arise from the State, Territory and Commonwealth governments’ on-going easing of emergency measures:

1. Does this end the relief from performing obtained under a force majeure provision, and if so, at what point?
2. Does this impact on any other rights under the agreement?

WHEN DOES RELIEF END?

The precise language in the force majeure provision is key in assessing when the relief ends. Typically, the contract will provide relief for as long as performance of the contract is affected in the manner prescribed in the provision. In practice, there will likely be a difference of views as to when the impact has ended and, in the case of partial force majeure relief, at what point individual obligations are no longer affected. A key risk during this period is that if the party benefitting from the force majeure relief continues not performing after the point in time the force majeure provision ceases providing relief, that party may breach its contractual obligations. These parties should constantly monitor the impact that the force majeure event has on their ability to perform to ensure they resume performance as soon as that impact ceases.

CAN PARTIES STILL EXERCISE TERMINATION RIGHTS?

It is common for force majeure provisions to include a right for one or all parties to terminate the agreement if a force majeure event continues for a prolonged period of time. This right is commonly tied to the length of time that a party is affected in the manner prescribed in the provision, which again focuses attention on when an affected party is able to resume performance. Parties considering exercising this right should take particular care as restrictions are being eased. A key risk at this time is that the other party may challenge the termination which, in turn, could give rise to a claim of repudiatory breach of contract, entitling the innocent party to either affirm the agreement or terminate it and seek damages.

FORCE MAJEURE - AGAIN?

The prospect of a second wave of Covid-19 means parties should prepare for the risk of the reinstatement of previous, or the introduction of new, emergency measures. Similar to when these measures were implemented the first time, parties should consider:

- which obligations might be affected;
- which provisions might provide relief including force majeure, delay, material adverse change, change of law, service level or liquidated damages regimes or termination rights;
- whether performance is rendered illegal;
- whether the agreement is frustrated; and
- whether performance is excused due to the non-performance of the other party.

DOES FORCE MAJEURE PROVIDE RELIEF AGAIN?

Whether force majeure provides relief during a second wave depends on the same considerations described above. However, the parties should not assume the provision will apply in the same manner as it did for the first wave of Covid-19. For example:

- A second wave of Covid-19 may result in different emergency measures. Parties should consider whether these new measures fall within the definition of force majeure.
- Different emergency measures may have a different impact on performance. Parties should not assume the continued existence of Covid-19 continues to impact performance in the same manner, and must consider whether new measures affect performance in the manner prescribed in the provision.
- If the force majeure provision requires the party seeking to rely on it to show it could not have reasonably protected against the impact of the relevant event, this hurdle may be more difficult to satisfy because the parties have had a longer period of time to act and implement certain measures. Merely relying on the same steps taken in response to the first wave is unlikely to be sufficient. The steps that a party should take will be highly dependent on what is reasonable in the circumstances.

WHAT ELSE SHOULD PARTIES KEEP IN MIND?



NOTICE

Parties should consider any notice requirements, which are commonly conditions precedent, and ongoing requirements, to obtain relief. Even if a party has not been able to resume performance before previous measures are reinstated, or new measures imposed, it may be required (or at least prudent) to issue a new notice indicating that performance is affected by additional or other matters.



TERMINATION

As mentioned above, it is common for force majeure provisions to contain a termination right. While some termination rights are triggered by a single force majeure event continuing for a prescribed period of time, others simply require performance to be affected for a continuous or aggregate number of days, either due to a single, or across multiple, force majeure events. If the provision requires a single force majeure event to continue for a period of time, parties will need to consider whether a second wave of restrictions constitutes a separate force majeure event or whether the first and second waves are part of the same event i.e. the overarching Covid-19 pandemic. This requires careful consideration of the precise wording in the agreement. If the right is not exercised properly, or if it is later found that the force majeure clause did not apply, the purported termination could be considered a repudiatory breach of contract entitling the innocent party to either affirm the agreement or terminate it and seek damages.



MITIGATION

The affected party is typically required to take reasonable steps to mitigate the impact of the relevant event. Parties should be careful about assuming this will be satisfied by adopting the same or similar mitigation measures adopted during the first wave. This is because different emergency measures may be adopted during the second wave, requiring different mitigation steps, and what is “reasonable” will be considered in light of the then-current surrounding circumstances. This means it may be reasonable for an affected party to implement mitigation measures faster and more effectively.

WHAT TO DO TO PREPARE

We have [written previously](#) on the steps businesses can take to prepare for a second wave of Covid-19. With the lessons learned from the constantly developing situation, it is important to add that parties entering into new contracts should also expressly deal with the consequences of new waves and not simply grant relief and excuse a party from performing for as long as the new wave continues. For example, if one party is unable to perform and that party is excused from performing, the agreement should expressly state whether the other party is expected to continue to perform its obligations, including the payment of fees, and whether there should be a commensurate reduction in the fees.

[More on COVID-19](#)



If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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