



What can I do if an event like Covid-19 prevents me from complying with the terms of my Contract?



If you are a party to a commercial contract and you are prevented from complying with your obligations under the Contract due to unexpected events, you may be able to rely on certain provisions within your contract to protect you from a breach of contract situation.

Many commercial contracts contain what is known as “Force Majeure” Provisions (“**FM Provisions**”). FM is a legal construct designed to provide relief to parties affected by an unavoidable or unforeseeable event. Literally translated ‘force majeure’ mean ‘superior strength’ and relate to events which are outside the reasonable control of a party and which prevent a party from fulfilling its obligations under a contract.

FM Provisions are express provisions and the Court’s will not generally consider them an implied term of the Contract. Each FM Provision is different however, there are some common elements of all FM Provisions. These include:

1. the event must be beyond the reasonable control of the affected party;
2. the affected party’s ability to perform its obligations under the contract must have been prevented or adversely affected by the event; and
3. the affected party must have taken all reasonable steps to reduce or avoid the event or its consequences.

If you are unable to fulfil your obligations and your contract contains a suitable FM Provision, then there is usually a requirement for you to give notice to the other party and



provide them with evidence that the FM Provision has been invoked. Ordinarily, you are also required to provide additional information in the notice such as, what the likely consequences of the event are likely to be and the duration of time the Contract is likely to be impacted

What if your contract does not contain FM Provisions?

All is not lost. In the absence of an express FM Provision, parties may be able to rely on the doctrine of frustration. This doctrine will apply where:

1. There is no express FM Provision
2. The underlying event is not the fault of any party to the contract;
3. The event or circumstance occurs after the formation of the contract and was not foreseen by the parties; and
4. it becomes physically or commercially impossible to fulfil the contract, or changes the party's obligation to perform into a different obligation from that undertaken initially.

The doctrine of frustration results in the contract automatically coming to an end. The parties to

the contract will no longer be bound to perform their future obligations. Of course, this is often not a desired outcome in these types of situations.

Are there any other remedies?

In addition to the above options, there may be other specific contractual provisions that may assist such as "change of law" provisions which make it impossible to fulfil contractual obligations.

What you should do?

If you are concerned about your position under a Contract, have been served with an FM Provision notice or are looking to end a contract seek legal advice. We can advise you on what steps you ought to be taking to reasonably mitigate the impacts under the contract in question.

If you would like further information on any of the above or to discuss your situation then please contact us at Bailiwick Legal on **08 9321 5451** or email **admin@bailiwicklegal.com.au**

Disclaimer: This information is of a general nature only and is not intended to be a substitute for specific legal advice. It is recommended that these matters be discussed with your lawyer.

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