

# COVID-19 – CONTRACTS AND PERFORMANCE

**Start Here:** This flow chart aims to provide general guidance on whether or not you can excuse yourself from performing a contractual obligation when unable to do so due to circumstances associated with Covid-19.

**Importantly,** each case will depend on the exact terms of the relevant contract and the particular factual context. **In all cases specific advice should be sought before taking any steps.** (See **Note 1**).

**Question:** Does your contract have a “force majeure” clause? (The clause could be called something else, but should mention terms like “acts of God”, “epidemic”, or “events beyond the parties’ control”.)

Yes

The next step is to see if Covid-19 or the government’s reaction to the situation constitutes a “specified event” which triggers the force majeure clause.

**Question:** Does the clause specifically mention “epidemic”, “acts of government or state” or similar events as a trigger event?

Yes

No

There may still be other events or circumstances which you may be able to rely on to trigger the force majeure clause.

**Question:** Does the clause specifically mention other events which you are currently affected by – e.g. “shortage of labour or materials” or phrases such as “any other circumstances beyond the parties’ reasonable control”?

Yes

Let’s check whether you can rely on the force majeure clause.

**Question:** Unless your contract states otherwise, you must be able to confirm all of the following statements as correct:

- 1.The event is the reason why you can’t perform your obligation.
- 2.The event was beyond your control/unexpected (See **Note 2**).
- 3.You could not have reasonably avoided the event or its effects.

No

**Keep looking:** You might still be excused from your contractual obligation if the contract is “frustrated”.

**Question:** Has your contract become impossible to perform or has it been otherwise frustrated (e.g. contracting to hold a large event when the government has banned large gatherings of people) ? However, a contract is not frustrated just because a change in circumstances makes it more expensive, difficult or inconvenient to perform.

Yes

You can only rely on the frustration doctrine if the event or its effects were not foreseen.

**Question:** At the time you entered into the contract, did the parties foresee the event or its effects (or were these reasonably foreseeable) (See **Note 2**).

Yes

**Relief:** If the contract is frustrated, it will come to an end, and you will not need to perform any future obligations under it. The court may allow you to recover money paid up to the date of frustration or claim compensation for work done before that date (and vice versa for your counterparty). You should seek specific legal advice before relying on the frustration doctrine.

No

**Keep looking:** There may be other terms in your contract that provide some relief. For example, if you can terminate the contract without fault by giving a notice, is it better to terminate it at this time?

No

No

Yes

**Relief:** You should be able to rely on the force majeure clause. What you can do (e.g. whether you can delay your obligations and/or cancel the contract) will depend on how the clause is worded. It is also important that you follow the procedures (if any) set out in the force majeure clause or the contract before you rely on it.

## Notes:

1.This note provides a summary only. It does not purport to provide legal advice. Specific advice must be obtained in individual cases. If you require any advice or further information, please contact the partner/associate in Lowndes Jordan who normally advises you, or alternatively Michael Busch ([mwb@lojo.co.nz](mailto:mwb@lojo.co.nz)) or Karl Stolberger ([kfs@lojo.co.nz](mailto:kfs@lojo.co.nz)).

2.The doctrine of frustration or a force majeure clause is in principle capable of applying to leases of land, however, in practice the circumstances in which a tenant can apply the doctrine (or invoke the force majeure clause) successfully are likely to be very rare.