



## COVID-19 – What do Force Majeure and Frustration mean for contracts?

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Due to the economic downturn caused by COVID-19, Matthews Folbigg Lawyers has been receiving a lot of enquiries from clients seeking advice in relation to contracts with a view to either getting out of their contracts or alternatively, seeking to enforce their contracts.

Two relevant legal concepts in this landscape are force majeure and frustration.

### Force Majeure

Force majeure is a French term meaning “superior force”.

Many contracts contain a force majeure clause, the key features being:

- a set of defined events referred to as an “event of force majeure” – this could include war, terrorism or natural disasters, but could also include events relevant to COVID-19, such as epidemic, pandemic, or acts or restraints by government authorities
- typically, the force majeure clause will provide that where a force majeure event is **preventing, restricting or delaying** performance under the contract, the parties that are affected by the force majeure event will be **excused** from performing under the contract



for the duration of the force majeure event

- in some cases, the force majeure clause will allow an affected party to **terminate** the contract if the force majeure event continues for a certain period of time (eg, 3 months)
- the parties are usually required to take steps to mitigate the effects of the force majeure event

It is important to note that a force majeure clause is a creature of contract – it must be **expressly** written in the contract to be binding (and will be construed according to those express terms). Force majeure clauses are **not** implied.

## Frustration

By contrast, frustration is a common law doctrine – it arises by operation of the law and is **not** based on the express terms of the contract.

Frustration has three key elements:

- a supervening event occurs
- which was not caused by the parties and which is outside of their control, and
- which renders performance of the contractual obligations **impossible** in the circumstances (such circumstances being **radically different** from those contemplated by the parties when they first entered into the contract)

The consequence of frustration is that the contract automatically comes to an end upon the happening of the frustrating event, with the parties **discharged** from further performance. In New South Wales, the *Frustrated Contracts Act 1978* deals with the **financial** implications of frustration (for example, adjusting any payments already made under a frustrated contract).

## Words of warning

It is vital that you seek legal advice before varying or terminating a contract or walking away from your obligations.



Unlawful termination of a contract could amount to **repudiation** and may expose you to a damages claim.

The individual circumstances of each matter must be looked at. For example:

- performance must generally be “**impossible**” in the circumstances – mere economic hardship (caused by a market downturn) is usually not enough
- due to the serious consequences for the parties (ie, discharge from the contract), frustration is said to be “applied within **very narrow limits**”

We see that many contracts have been prepared by parties with obviously little attention to formal or standard type clauses such as the force majeure clause which are usually found towards the end of the contract. Whilst it is understandable that people pay more attention to the clauses that reflect the commercial deal, these difficult and unusual times should remind us that **all of the contract** should be carefully prepared and reviewed before signing.

### How can we help?

Please contact our commercial law team at **Matthews Folbigg Lawyers** on **9635 7966** or email us at **[info@matthewsfolbigg.com.au](mailto:info@matthewsfolbigg.com.au)** if you would like our advice regarding your contractual rights and obligations or for contract preparation or review before signing.

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