

Article Information

Author: Maria Capati

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We're still dealing with COVID-19 and now a shortage of AdBlue - time to consider force majeure clauses in your transport contracts!

2022 is shaping up to be as disrupted by COVID-19 as the previous two years. With Governments no longer implementing lockdowns and borders opening, the spread of COVID-19 throughout Australia has been fast and fierce, resulting in the isolation and quarantine of critical workforces and again disrupting essential supply chains.

Many transport businesses in Australia as well as other parts of the world have also had to deal with the AdBlue shortage crisis, with fears that transport operators will have no choice but to ground their fleets if they run out of AdBlue.

Accordingly, it is important for transport operators to be aware of mechanisms that may allow them to avoid liability for breaches of contract.

Force majeure clauses are one such mechanism which entitle parties to a contract to be excused from performing their obligations or terminate the contract upon the occurrence of an event beyond their control.

The concept of force majeure

Most transport contracts already incorporate a force majeure provision to protect against an event outside the reasonable control of the affected party.

In Australia, force majeure is not a doctrine recognised under common law or statute, therefore it must be expressly referred to and defined in a contract. Parties will negotiate force majeure clauses and so what is considered a force majeure event will be specific to each contract.

Common examples of force majeure event are:

1. acts of God, lightning, storm, explosion, flood, landslide, bush fire, tsunami or earthquake;
2. act of public enemy, war, terrorism, sabotage, revolution, riot, insurrection or civil commotion;
3. a pandemic or epidemic; and
4. industrial relation actions.

Understanding your entitlements under current contracts

You need to understand how the force majeure mechanism works in each of your contracts.

For example, in relation to COVID-19:

- Review the definition of "force majeure event" in your contract - is there a reference to 'epidemic' or 'pandemic'?
- Does the effect of the epidemic or pandemic on your business meet all the elements in the force majeure definition - are the consequences of COVID-19 beyond your control and could not have been prevented, overcome or remedied if you exercised a standard of care and diligence consistent with that of a prudent and competent person under the circumstances?
- Have you meet the strict notice provisions within the force majeure clause?
- Has COVID-19 as a force majeure event triggered another force majeure event - for example, as well as being a pandemic it may also trigger 'industrial relations action' if bus drivers decide to strike because they are concerned

for their health and safety while driving.

It is also crucial that you understand how the force majeure mechanism works in your current contracts, as the subsisting of a force majeure event for a specified time will normally result in a termination right for the other party to the contract.

How should you approach force majeure in new contracts?

In light of the above, if you are currently negotiating a new contract, pay attention to what is defined as a 'force majeure event'.

Not only do you need to ensure that your new contract includes 'epidemic' or 'pandemic' in the force majeure definition, but you will now need to consider other critical items to your operations, including AdBlue or fuel shortages as a force majeure event.

It was entirely unforeseen how COVID-19 could impact so many global supply chains, so you need to carefully and diligently consider what are the critical items you need in order to perform your obligations under your new contract.

Conclusion

The effects of COVID-19 are constant and not likely to cease any time soon. Accordingly, it is important for transport operators to be aware of their obligations and any mechanisms that can assist them when their businesses are impacted by COVID-19 and any supply chain disruptions.