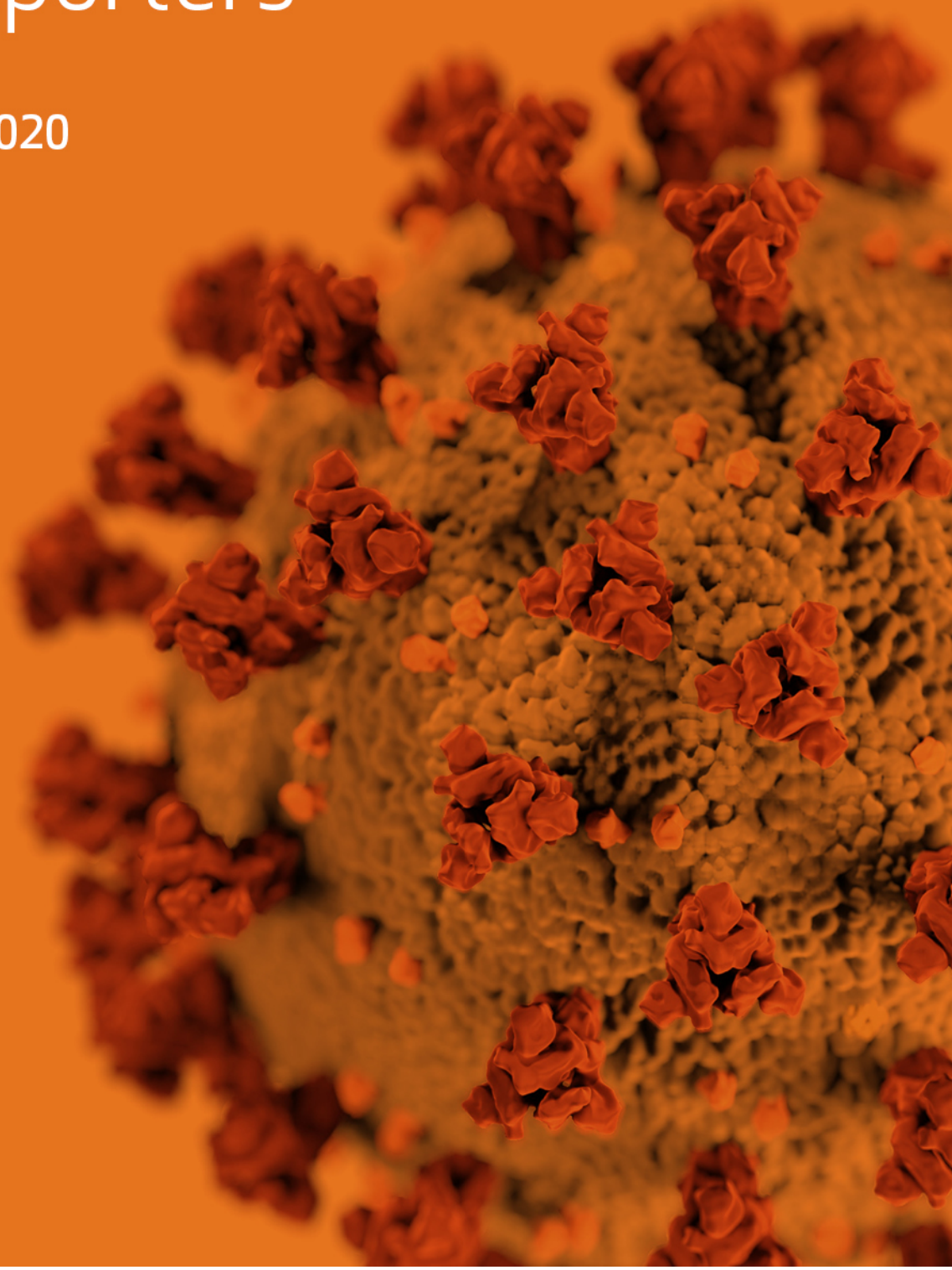


COVID-19 considerations for importers and exporters

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COVID-19 – Considerations for importers and exporters

As New Zealand enters an unprecedented lockdown, businesses are having to adjust to the increasingly significant impacts of COVID-19.

For importing and exporting businesses, disruption to global supply chains will be top of mind, even as the Government works to keep freight moving. This disruption will inevitably lead to legal questions as events make contracts impossible or difficult to perform, or demand changes to previously agreed bargains.

New Zealand Government agencies have put together a number of helpful resources for businesses to help them mitigate the impacts of COVID-19. See:

[*New Zealand Trade and Enterprise \(NZTE\) COVID-19 Information for Exporters*](#)

[*New Zealand Government COVID-19 Resource Page*](#)

[*Ministry of Foreign Affairs and Trade \(MFAT\)'s Advice on COVID-19 and Trade*](#)

In this note, we consider some of the key legal issues that businesses will also have to consider related to their supply chains.

SUPPLY CHAIN LEGAL ISSUES

As you consider supply chain issues, you should review your contracts carefully to make sure that you are fully aware of your rights and responsibilities, and those of the other party. This includes considering the risks and consequences of a default or breach under the contract, and whether it is possible to negotiate delays or alternatives.

WHOSE LAW APPLIES?

A key part of understanding your rights and responsibilities is knowing what law governs your contract – is it New Zealand law, or the law of another country? Or, in some cases, it might be the terms of the United Nations Convention on the International Sale of Goods 1980 (*CISG*) – this applies by default to contracts for the supply of goods between businesses of any of its 91 member states where the parties have not excluded its application. This includes contracts between traders in New Zealand and Australia, most EU states, China, the United States, Japan, South Korea, Singapore, Chile, Argentina and Brazil ([*listed here*](#)).

FORCE MAJEURE

Many contracts contain force majeure clauses. These clauses excuse a breach of contract (such as a failure to supply goods) for the duration of a so-called 'force majeure event'. They are of particular relevance to contracts with a long-term or ongoing supply. A force majeure event is one that is outside the party's reasonable control, such as a flood or other natural disaster. Every contract is different, however, so you will need to carefully read your contracts to see whether COVID-19 would be covered. This might not be straightforward – for example, is it the disease causing the difficulty, or the response of governments in the wake of the disease?

The release from liability that is granted by force majeure clauses generally only lasts as long as the event in question, so this is another aspect to be aware of. You should also look carefully at any force majeure clause to see if it requires you or the counter party to take steps such as providing notice and mitigating any loss caused to the other party. Sometimes the impact of force majeure will be different depending on which party is invoking it, and it may give one party the right to cancel the entire contract.

One thing to be aware of when it comes to your international contracts is that, unlike in New Zealand, in some civil law jurisdictions, *force majeure* can be implied, even if not expressly stated in the contract itself. The CISG includes a *force majeure* clause (Art 79).

FRUSTRATION

Frustration is one of those legal concepts that you won't see expressly mentioned in your contracts, but that is being widely discussed in the context of the current pandemic. In essence, frustration is a common law doctrine that arises when it becomes impossible for the parties to do what they initially agreed to do under a contract because of a factor outside their control and for which they are not responsible. If a contract is frustrated, then it automatically comes to an end, and neither party has any further rights or responsibilities under it.

Frustration is not commonly invoked in practice. Courts apply a high standard before they will consider a contract frustrated. This means that you shouldn't assume that you will be able to get out of your responsibilities on the grounds of frustration. Rather, if you think that a contract has been frustrated, it is best to get legal advice as otherwise you might have to pay the other party for wrongful termination.

Some countries may have similar doctrines to frustration. For example, in China, and in many civil law countries, there is a doctrine of "change of circumstances" which – subject to certain conditions – operates where there is an unforeseeable and material adverse change to the fundamental assumptions on which the parties relied when they entered into the contract. Where applicable, parties may apply for a contract to be terminated or modified under this doctrine.

WAIVER AND FLEXIBILITY

It is inevitable that businesses will have to make changes over the coming months. You may need to seek alternative supply sources, vary volumes, break exclusivity clauses, etc. Many contracts have provisions that allow for change or variation of their terms, or waiver of performance. You should make sure that you fully understand what your contracts allow for and what steps you need to take in order to make those changes or seek waivers (including whether any variations need to be in writing).

You should also make sure that, if you are discussing possible changes in arrangements with contractual partners, that you are clear as to whether or not you actually intend to enter into a legal obligation to vary your contract or waive your rights. You don't want to find that you have unintentionally agreed to a variation or waiver that you didn't intend.

In some civil law jurisdictions, there is a doctrine of hardship in contract law that allows for the variation and/or suspension of contractual obligations where performance of the obligation becomes more onerous as a function of unforeseen events outside the control or influence of either party.

OTHER CONTRACTUAL PROVISIONS

There are a number of other contractual provisions to be aware of that you may wish to invoke, or that your counterparties may seek to invoke, for example:

- **Price adjustment clauses** – parties may seek to adjust all or part of the contract price for goods due to increased costs (e.g. due to increased supply chain strain).
- **Change of law clauses** – some long term contracts might have a "change of law" clause that entitles a party to terminate or renegotiate the contract where a change in the applicable law (such as government travel restrictions or quarantine requirements) makes it impracticable or impossible for a party to perform its contractual obligations.
- **Limitation or exclusion clauses** – some contracts have limitation of liability or exclusion of liability clauses. Parties may seek to rely on these (especially in the absence/inapplicability of a *force majeure* clause) to limit or exclude liability for non-performance. The ability to do so will depend on the wording of the clause.

- **Material adverse change clauses** – the outbreak of COVID-19 could trigger a ‘material adverse change’ clause in a contract, entitling parties to call a default if there is a “material adverse change” in one of the parties’ position or circumstances. The ability to invoke this provision, and repercussions for doing so, will depend on the wording of the clause, and how it is interpreted.
- **Termination or suspension provisions** – a contract might have a clause that provides for the right to terminate or suspend obligations, whether for breach or otherwise. You should know what provision your contracts make for termination and when you or your counterparty might be able to rely on this right.

OTHER ISSUES: REGULATORY COMPLIANCE

As an importer or exporter, you may well have regulatory obligations in New Zealand or other jurisdictions, such as ensuring that your products meet certain health and safety standards. You should make sure that you are fully across your supply chain so that you know if there are any issues that might make it difficult for you to meet these regulatory standards or requirements.

THINKING AHEAD

While we are in the midst of the storm now, it is also important to plan ahead. Some key points to consider from a legal and practical perspective include:

- **New contracts:** if you are entering into new contracts you should think about the risks that COVID-19 might present to both your and the counterparty’s ability to perform obligations. For example, are you dependent on suppliers who might struggle to meet their commitments to you? You should make sure that your contract deals with these risks, such as by clauses that deal with the financial consequences of delay in supply.
- **Maintaining long-term relationships:** long-term relationships are important. The best way forward will very often be to negotiate a commercial solution to contractual difficulties, rather than resorting to dispute resolution clauses and claims for damages.
- **If a dispute does arise:** History has shown us that, despite best intentions, disputes will arise. You should keep detailed notes of how COVID-19 and its impacts are affecting your day to day activities. This could be useful if a future contractual dispute arises over liability. Also be careful about how you reference the effects of the outbreak in discussions and internal or external communications. Check for time bars in your contract that require you to notify disputes within certain timeframes. And consider inserting binding international arbitration clauses in any new contracts, as arbitration is most easily adapted to a possible context of virtual hearings, and will have the best international enforceability.

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OTHER LEGAL RESOURCES

Chapman Tripp's COVID-19 Series

Chapman tripp has looked into some of the other impacts and immediate implications of the covid-19 pandemic. Briefings can be found on our website:

[Http://www.chapmantripp.com/publications/covid-19-series](http://www.chapmantripp.com/publications/covid-19-series)

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