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Level 4 Alert - Implications for Commercial Contracts and Leases

The latest business restrictions announced by the Government will impact a number of commercial contracts and leasing arrangements. We have been receiving a number of enquiries regarding the impact of these events on commercial contracts and leases and, in particular:

- Whether contractual rights are suspended under force majeure clauses?
- Whether there is any rent relief available under commercial leases?

We set out below a general overview on each of these topics but it is important to note that each contract or lease needs to be carefully reviewed in order to properly assess your position.

Force Majeure Clauses

It is reasonably common in commercial contracts for the parties to have agreed a force majeure provision, which usually provides that the party's obligations are suspended during any period when an event has occurred that prevents a party from being able to fulfil their obligations (and often a non-exhaustive list of examples is outlined).

If your contract has a force majeure mechanism then the recent announcement of the Level 4 alert is likely to be a covered event. However, it is important to understand that the suspension of obligations is governed by the specific clause in your contract, which means that a careful analysis needs to be undertaken of the types of events covered by the clause and the consequences of those events. The onus will be on the party claiming the force majeure event to prove that the event is covered.

Notification

If the event is a force majeure event, the party claiming the event of force majeure will normally need to notify the other party and the contract may contain strict notification requirements that need to be met. It is best not to assume that force majeure is "obvious" or "assumed" and it is always best to clarify the position with the other party.

Termination

Often force majeure mechanisms provide that if the force majeure event continues for a certain period then this may lead to termination rights for the parties. With that in mind, and given the recent restrictions by the Government are likely to materially affect both parties, you may wish to approach the other party and agree a period of suspension outside of the force majeure regime to ensure that the contract remains in place and no termination rights are triggered.

What about new contracts?

If an event is known to the parties before a contract is signed then it is unlikely that the event will qualify as a force majeure event. This is because as the event is known the parties will have had an opportunity to consider the impact the event might have and allocate the risks associated with the event expressly in the contract.

Commercial Leases

Payment of rent is an essential term under leases and the non-payment of rent may have serious repercussions. Leases do not normally contain any force majeure clauses and as a result any failure to pay rent may result in the tenant being in breach of the lease. However, the 6th edition of the standard Auckland District Law Society (ADLS) lease does contain a limited rent relief provision in the event of an emergency. Clause 27.5 of the 6th Edition of the ADLS lease provides that if there is an emergency and the tenant is unable to gain access to the premises for certain reasons, including any restriction on occupation of the premises by a competent authority, then a fair and reasonable proportion of the rent and outgoings shall cease to be payable during the period when the tenant was unable to gain access. The definition of "emergency" in the lease specifically refers to an epidemic.

However, a word of caution, if access to the premises is denied (or can be forecasted to be denied with reasonably certainty) for the "No Access" period defined in the lease then both parties may have termination rights. We would therefore strongly recommend that tenants obtain legal advice on these provisions of their lease before approaching the landlord.

This article is of a general nature and is not intended to be relied upon as legal advice. Please contact Andrew Skinner at Martelli McKegg if you wish to discuss (09 300 7622).

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