

Pause Game - Coronavirus and Contracts

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Please note: the information contained in this legal update is correct as of the original date of publication

The true impact of coronavirus on the games industry is yet to be seen, but there is no doubt that it is currently impacting the industry. Last week, the ESA announced the cancellation of E3, one of the world's biggest and most anticipated industry events for both industry professionals and fans, due to concerns over the spread of coronavirus. Other key events including the Game Developers Conference as well as numerous esports tournaments have also been postponed for the same reason. These cancellations are a blow to those in the industry who rely on these big events to reveal new hardware, meet with potential investors, secure critical deals and for devs in particular who are super excited to showcase their new projects.

The impact of the virus is going beyond just the cancellation of key industry events. With the virus shutting down most of China's production, there is a very strong likelihood of prolonged supply and demand disruption and possibly game delays. Nintendo's CEO has already confirmed that the virus has caused direct disruption to the production and onward supply of the Nintendo Switch Console, Joy-Cons and accessories such as Ring Fit Adventure in Japan and we suspect that this may also affect other markets. Many dev studios are encouraging workers to work from home to help minimise the spread of the virus, which may well impact on the development timetables and milestones under publishing agreements.

But what happens legally if you are unable to carry out your obligations under an agreement due to the impact of coronavirus? Let's take a look.

The “Force Majeure” – Pause game

Generally speaking, if you are a party to a contract and you fail to do what you say you will do in that contract, then you may be liable for a breach of contract and you will more than likely have to pay damages to the other party. However, there is a “get out of jail for free card” only if your contract includes an express clause, called a “Force Majeure” clause (which can sometimes be found in the “general” bit of the contract).

Put simply, force majeure clauses generally provide that, upon the occurrence of a specified act, event or circumstance which is outside of a party's reasonable control, the party who can't perform all of, or part of its obligations under that contract because of that event will not be punished for failing to perform those obligations for as long as the force majeure event continues. Essentially, those obligations are suspended until after the event has ended. The contract is paused.

Sometimes these clauses will allow both or one of the parties to decide whether to continue with the contract if the delay or the prevention of performance lasts for a set amount of time. Sometimes, the clause may even let you add on time to account for the delay. Some clauses may go as far to state that if the event causes a delay for a set amount of time, or a party is unable to perform for certain amount of time, the whole contract can be terminated. But this really depends on how the clause is drafted.

We all know that not all contracts are the same, so the effects of a force majeure event on a party's obligations really depends on how exactly the clause is drafted in that specific contract. If you want to rely on force majeure to pause your obligations under a contract, you will need to consider the following:

- To rely on force majeure, an event or circumstance must trigger it and you will need to check the contract for the list of acts, events or circumstances that will trigger it. Some contracts will include a long list of trigger events which may include pandemics or government actions. As coronavirus is now officially classed as a “pandemic” by the World Health Organisation, if pandemic is listed as a trigger event, it is likely that the clause is triggered. In contrast, some clauses simply include a “catch all” definition such as “acts of God”. You will then need to consider whether coronavirus is an act of God. You may be in luck if the contract is relatively new. If the person drafting the clause is savvy, the clause may specifically refer to coronavirus as a trigger event. As a separate point, look carefully to see if the clause is triggered by an event which completely prevents performance (which means that you are physically or legally impossible to perform your obligations) or if the clause is triggered by an event which delays performance (meaning you can still perform your obligations, but there is just a delay in you doing so). These are two different things.
- If your “trigger” box is ticked, you will need to prove that coronavirus alone has caused either a) the prevention, b) the hindrance or c) the delay of your obligations under the contract. If the only impact of coronavirus is that it will make it more expensive for you to perform your obligations then force majeure is unlikely to help you out. If there are other unrelated reasons why you can’t perform your obligations, (for example if the contract is a venue hire agreement for a conference and the venue wasn’t ready for the event which was unrelated to coronavirus) you may not be able to rely on the force majeure clause. This requirement is often tricky to meet and is varies from case to case.
- You will need to prove that the impact of coronavirus upon your ability to perform your obligations under the contract is beyond the reasonable control of the parties and you have taken all steps which could be taken to avoid or reduce the impact of coronavirus. This is now potentially harder to prove given that coronavirus has received wider attention.
- You will also need to check the contract for any additional specific terms which need to be met for an event to be declared as force majeure event under the contract. For example, are there any provisions in the contract which require you to give notice of the event? If you haven’t complied with these additional terms, your claim may fail.

The most important thing to remember is that if you don’t have this clause in your contract, you cannot rely on it. This is why it is important to include robust force majeure clauses in your contracts. Although you won’t be able to rely on force majeure, you could potentially rely on the doctrine of frustration (see below)

Frustration – End Game

The legal doctrine of frustration allows a contract to be terminated if an event occurs which the contracting parties could not have foreseen, which is the fault of neither party and makes the contract physically or commercially impossible to fulfil, or the event transforms the obligations of a contracting party into a completely different one to the extent that the running with the change will be unjust. For example if you have a supply contract with an overseas company and there is a law imposed in that country which means that all supply has to be stopped to prevent the spread of coronavirus, your overseas supplier will be breaking the law in that country if it continues to supply to you. This is not fair on the supplier.

An important thing to remember is that in order for the doctrine to apply, coronavirus must be fundamental to the contract and the impact it must be more than just making the performance of the parties more expensive or difficult. The good news is that if a contract is deemed frustrated, it terminates immediately and permanently. End game.

The bad news is that frustration is very rarely used successfully as a defence due to its high thresholds, so it may not help when it comes to coronavirus. So don’t assume that if you don’t have a force majeure clause in a contract you can automatically rely on frustration. Literally frustrating!

Pro-Tip

Something else to look out for - some contracts may actually contain an express right for you to cancel the contract outright (for any reason), but again the wording of the contract will need to be reviewed to see if this right is included.

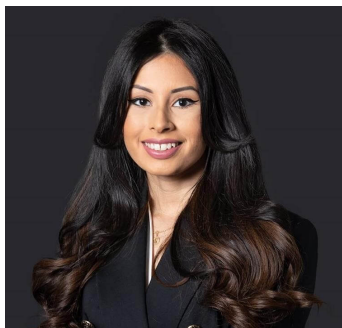
So what next?

Events like coronavirus highlight the importance of having robust terms that deal with force majeure. If your obligations under a contract are affected as a result of coronavirus, you can:

- Check your contract to see if there is a force majeure clause

- If you are entering into new contracts, make sure that there is the right wording included to cover you, to stop you having to rely on doctrines such as frustration
- If you are unsure, get a lawyer to look over your contract.

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