

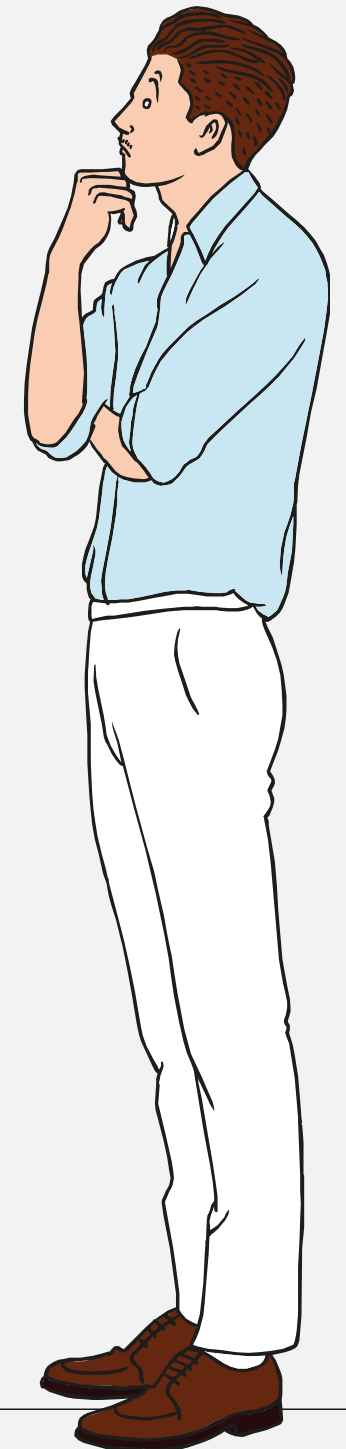
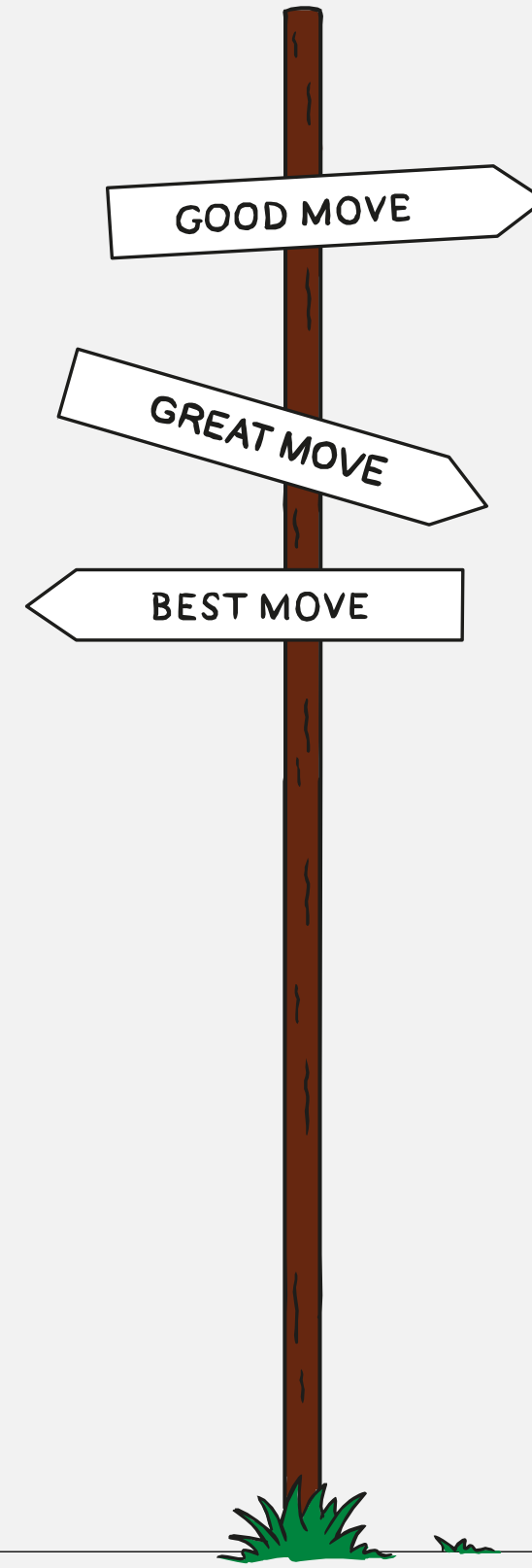
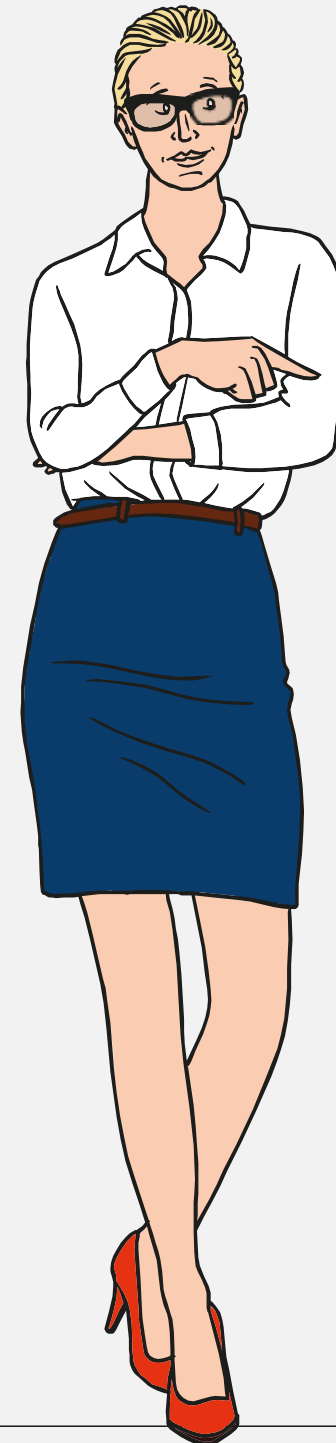
**Capital**

# Contractual Obligations & Insurance COVID-19

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# 01 Disruption

- Impact of COVID-19 pandemic on businesses has been immediate and is having an increasingly crippling effect.
- The emerging government guidance and new legislation, the workforce issues driven by safety and the tightening of cash-flow are all hindering businesses from being able to perform existing contractual obligations.

# 02 Supply Chain

- Businesses are finding themselves on both sides of the issue: for some it's the need for suppliers to keep supplying goods and services and for others it's ensuring customers pay.
- A failure to comply with such contractual obligations will put the defaulting party in breach of contract and liable to the other.

# 03 Exceptions

**A business will not be in breach of contract as a result of non-performance due to the COVID-19 pandemic if:**

- it can rely on a force majeure clause in the contract,  
or
- the contract has been frustrated.

Whether these are of help depends on the wording of the contract and the factual circumstances in each case.

# 04 Force Majeure

- Force majeure describes a type of contractual clause: not in all contracts.
- If validly triggered, the clause will excuse a business from performing its contractual obligations due to the occurrence of a particular event — such as the COVID-19 pandemic.
- The business must show that the event in question falls within the clause and that non-performance was caused by that event.

# 05 The Event

- Whether the event falls within the clause depends on the wording.
- The event could be specifically included — such as ‘pandemic’.
- It could be included as being a type of event that is listed in the clause albeit not specifically mentioned.
- On the other hand, if the clause mentions some events but not of a type like a ‘pandemic’ it may be concluded the contracting businesses didn’t intend to include it — even if neither business actually thought about it.

# 06 The Cause

There must be a causative link between the force majeure event and the non-performance; for instance, a party will not be automatically excused from an obligation to pay simply because the pandemic has shrunk the economy.

# 07 Trigger

- Invoking a force majeure clause will typically require a positive step and won't excuse performance automatically.
- Typically, the party relying on the clause will need to serve notice — there may be time constraints for doing that.
- Often there are obligations to avoid the force majeure event or mitigate its impact.
- Invoking a force majeure clause could also set time running for terminating the contract by notice.



# 08 The Effect

Often the effect will be to suspend the duty to perform for so long as the force majeure event continues, but some clauses will also contain language entitling one or both parties to terminate.

# 09 Frustration

- It caters for circumstances which are so serious and unforeseen that the law cannot justifiably expect the parties to continue with their contract.
- Whether an event is capable of frustration must be considered in the context of the contract as a whole and the parties allocation of risk and their knowledge and assumptions — i.e., what did the parties intend to happen to the contract upon such an event?

# 10 Unexpected

- If an event was foreseen by the parties then it will usually, though not necessarily, prevent that event from frustrating the contract when it materialises.
- For force majeure, the opposite is usually true: the fact that parties have alluded to an event in their contract naturally suggests that, at least to some extent, they have already foreseen that very possibility.

# 11 Illegality

- A change in the law is an obvious supervening event that could frustrate a contract — which has some relevance to the current COVID-19 pandemic.
- The emergency measures provided by the Coronavirus legislation disrupt how businesses may operate with suppliers and customers — i.e., operation of ports, social gatherings, events and movement of people.
- It is also possible that, even absent a strict legal prohibition, the reality of the situation might create a de facto prohibition capable of frustrating the contract under ordinary principles.

# 12

## Outcome

- The threshold for proving frustration is high and a question of fact in each case.
- The effect is to terminate the contract immediately upon the occurrence of the frustrating event and to release the parties from their obligations immediately.

# 13 Actions

- Care must be taken when invoking force majeure and frustration.
- The implications of doing so are substantial and should be carefully assessed and planned.