

MemberUpdate

No. 5 of 2020 • 23 March 2020

TOPIC: COVID-19 Notice on Force Majeure

DISTRIBUTION: GTA Members – primary contact list. Please circulate to all appropriate internal parties.

1. Purpose

To provide Members with further information on Force Majeure with regards to COVID-19.

2. Background

- GTA has had a number of inquiries as to whether the COVID-19 Pandemic constitutes Force Majeure under GTA Trade Rule 21 as incorporated into GTA Contracts.
- Unfortunately, GTA has no legal ability to make a declaration of Force Majeure or issue an interpretation of *Rule 21 – Force Majeure*.
- Even if GTA were to amend the Trade Rules to provide clarity, it would not apply retrospectively and would only apply to new contracts written after any amendment took effect.
- The interpretation of Rule 21 in the context of any particular contract will ultimately fall for determination by a GTA Arbitration Tribunal, based on the particular facts and legal argument put before that Tribunal. The GTA Dispute Resolution service has the capacity to facilitate urgent determinations if required.
- GTA can offer the following guidance:
 - a) The COVID-19 Pandemic may be an ‘Act of God’, and any relevant government orders or directives may constitute an ‘act of government’, for the purposes of Rule 21.
 - b) Rule 21 only applies to a ‘delay in delivery or shipment’ occasioned by the Force Majeure event. In other words, the party seeking to rely on the clause will need to prove that the delay in delivery was caused by the Force Majeure event, and not some other event.
 - c) Rule 21.2 contains notice requirements which must be complied with.
 - d) The effect of Rule 21 is to extend the time for performance by up to 60 days, and if the contract is not performed by that time, the normal default rules apply.
 - e) Parties should also be aware of the legal doctrine of frustration of contract but will need to take their own legal advice on this topic.
- GTA would encourage all Members and Market Participants to:
 - Review their contracts and GTA Trade Rules (available on GTA website)
 - Always to act in good faith, and wherever possible seek commercially amicable solutions to any execution or contract challenges.
 - Assess their own business risks and where appropriate activate their own Business Continuity Plans and risk mitigation actions

- Make Grower and other clients aware of the recently updated "[Guide to Selling grain using Grain Contracts \(Producers booklet\)](#)" which was released in [Member Update 2 of 20](#).
- Share this Member Update with their clients, by referencing them to [GTA website](#) links.
- Maintain well documented records of all communications and actions with regards to all grain contracts. Documented evidence is generally more persuasive than verbal-only evidence (in any proceeding).
- Obey any Government issued directives

3. Further Information

Further Information please contact admin@graintrade.org.au