



## Précis Paper

### Managing Contractual Relationships in a post COVID-19 world

A discussion about the status of contractual relationships and the ways in which contractual negotiations are carried out during Covid-19 and subsequently, in a post Covid-19 world.

#### Discussion Includes

- Force Majeure
- Considerations when drafting
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# Managing Contractual Relationships in a post COVID-19 world

In this edition of BenchTV, Ana-Maria Cindric (Associate, Coleman Greig Lawyers, Sydney) and Rebecca Hegarty (Principal Lawyer, Coleman Greig Lawyers, Sydney) discuss the status of contractual relationships and the ways in which contractual negotiations are carried out during Covid-19 and subsequently, in a post Covid-19 world.

## Force Majeure

1. Covid-19 brought to the fore some interesting aspects of contractual relationships and contractual negotiations and for many people and businesses it was the first time that they pulled out their terms and conditions to scrutinize them to establish what was their position in terms of moving forward with the many struggles and contingencies of Covid-19.
2. One of the more interesting clauses that came to the spotlight was the force majeure clause.
3. Force Majeure is a clause that is pre-agreed in an agreement or contract where it provides relief to one party in performing their contractual obligations when an unexpected event, like Covid-19, happens.
4. Typically, there is an all-encompassing clause which would look at certain events such as war, riots, natural disasters and on some occasion a clause that would account for an epidemic or pandemic.
5. In Australia, there is not an implied force majeure clause and as such, it must be an express one contained in the contract.
6. The importance of the clause is that it relieves a person from performing their contractual obligations, however it will depend upon how it is drafted.
7. A force majeure clause fits into this category as in many people's minds it is a very standard clause that sits within some terms and conditions or an agreement.
8. However, there are many different varieties of the clause and how it is drafted.

## Considerations when drafting

9. The first consideration when drafting a force majeure clause is causation. This refers to understanding in terms of how the clause is drafted, what actually triggers the force majeure. For the party who wants to invoke the force majeure clause, it means assessing whether the event is sufficient for triggering the clause.
10. The second consideration is notice. That is, some force majeure clauses require notice and further detail the process required to be followed to serve notice.

11. There also may be mitigation requirements such as whether a party has actually taken steps to reduce the loss that has occurred.
12. It is also imperative to consider timing of your contract. For example, relying on a force majeure clause which was drafted in the midst of the Covid-19 pandemic would be different to one which was drafted a year prior.

#### The right to terminate under a force majeure clause

13. Some circumstances allow for termination under a force majeure clause whereas some do not allow for termination. It all centers around the drafting of the clause and the intentions of the parties.
14. How one intends to draft the scope of the force majeure clause is important and it will be interesting to see the case law that comes out of Covid-19 and the enforceability of force majeure clauses.

#### Frustration

15. There is an alternative route to take if a force majeure clause cannot be used and that is under common law, the principle of frustration.
16. This is usually used where the contract is impossible to perform and what has been agreed to has been radically changed. Ultimately, it is a termination clause and brings an end to the contract.
17. Frustration should be used as a last resort because ultimately the effect of it is that if you do make a mistake and invoke this principle of frustration and get it wrong, you may be liable to the other party for having repudiated the contract.
18. It is a high burden that is borne by a party in proving that the very character of the contract has changed or altered by the event such that it does make it impossible to perform to any extent.

#### Other options

19. It would be useful for a party who cannot complete a contract based on a change in circumstances to talk directly to the other party to the contract, be it a supplier or customer to try to work through an alternative solution. It is important to try to negotiate with the other party to try to mitigate the impact that these events can have.
20. The most important thing when negotiating is to check over the amendment or variation clauses in the agreement and to follow the requirements to ensure that you are not breaching the contract and to ensure that the variation is in fact enforceable.

21. It is also important to have the amendment or variation in writing, whether it is a short deed that reflects the variation. This enables a party to provide evidence that a material term of the contract has been mutually varied between the parties.

#### Negotiating an indemnity clause

22. Indemnity clauses are controversial because you are effectively altering the statutory and common law position of a party's rights and effectively providing an additional means for one party to recover against the other as the result of certain actions by the other party or if there is a specific event.
23. It is important for a party to check with their insurance company to see whether the insurance policy covers the scope of the particular indemnity clause.
24. An indemnity clause is not always required, so it is a matter of assessing the level of risk to be appropriated by either party.
25. It is important to be mindful of any mitigation clauses, where actions have been taken by one party to mitigate the damage, then the indemnity clause should account for that.
26. There may also an opportunity to limit the amount of the indemnity on some occasions where a certain financial cap is drafted into the indemnity clause or an amount of time to which that limitation clause extends to can be drafted.
27. It is important to be mindful of the statute of limitation in Australia is 6 years to bring a cause of action, but then there is an additional 6 years to bring legal proceedings to enforce the indemnity clause as it is considered as a separate breach if the other party has not complied with it. Consequently, an action on the indemnity to seek recovery of its loss may be brought many years after the right to bring damages for a breach of contract has expired.

#### Amendments to the unfair contracts regime

28. There have been changes to the Australian Consumer Law in terms of unfair contract laws particularly as they now apply to small business contracts.

#### Insurance policies

29. What type of insurance policy a party should have depends on whether they are supplying services or goods and should include the usual product liability insurance, public liability insurance, travel insurance and work cover insurance.
30. Often insurance policies do not actually cover events such as the pandemic and epidemic.

#### Changes to executing contracts

31. In May 2020, the Federal Government introduced a determination providing that the way we sign and execute documents can now be electronic. In the case of companies where there is more than one signatory, split execution is permitted to facilitate the ease of executing business documents.
32. It is important when executing a clause, to have the entire document there to verify that it is the same document being signed.

#### Key considerations when negotiating a new contract

33. It is a matter of looking at the contract and seeing what the scope is to be able to assess the situation, amend it, renegotiate or in the last resort, terminate it.
34. The two key things to do are to assess the situation and the contract and to consider alternative suppliers provided the contract allows for it. There may be an option for customers to trigger step in rights where they step into the shoes of the supplier and fulfil the supply themselves, however this really depends on what the contract terms state.

#### Time is of the essence clauses

35. The time of the essence clause can be quite harsh depending on if there is a specific date set in the contract and if it is defined to be a time of the essence clause. A time of the essence clause means that whether there is a force majeure clause or not, if a party does not meet that deadline it will be considered a breach of contract. If there is a breach, the non-defaulting party may sue for damages.
36. If, in light of the circumstances, this would be a difficult clause to comply with, it may be a clause that could be negotiated.
37. If there is no mechanism to deal with a delay in any respect, it backs a party into a corner in respect of a potential liability for breach of contract.

#### Mitigation

38. With regards to loss mitigation parties should ensure they keep records of how the loss is mitigated and demonstrate that all reasonable actions have been taken to mitigate loss in the supply chain both up-stream and down-stream including records of communication with and notices sent to supply chain stakeholders of the steps taken which can include evidence of different options or solutions provided or considered with the customer.

#### Consumer Law

39. In terms of the definition of consumer under the Australian Consumer Law, there is a change to that definition coming into effect from 1 July, 2021.

40. The importance of the definition of consumer is that as a consumer, you are guaranteed certain protections under the Australian Consumer Law (ACL). Under the old scheme, a consumer is a person who is supplied goods and services which do not exceed \$40,000 or in the instance that they do exceed \$40,000 it is for goods ordinarily acquired for personal, domestic, or household use or consumption.
41. That monetary threshold is being increased to \$100,000 and as such will capture a lot more business transactions than it does currently.
42. The guarantees under the ACL for goods include a guarantee that they are of acceptable quality and for services include that they are exercised with due care and skill.

#### Section 47A Fair Trading Act

43. The amendments under section 47A of the *Fair Trading Act* 1987 (NSW) began on 1 July 2020 and the transitional period ended in December 2020. It involves a new disclosure requirement which applies to businesses and the intention behind it is to flag certain clauses in terms and conditions or contracts with consumers that they define as 'substantially prejudicial to the interests of the consumer.'
44. The new changes to the definition of consumer will broaden the scope to which this new disclosure clause will apply.
45. For example, if you have clauses that exclude the liability of the supplier completely and provide that the consumer is liable for damage to delivered goods, you will need to put the consumer on extra notice from what you would have had to in the past.
46. There are not any exemptions to this new rule and the penalties are quite high for a corporation it is \$110,000 and for an individual it is \$22,000.
47. Now is the time for businesses to review their terms and conditions and highlight the clauses that are substantially prejudicial to the interests of the consumer.
48. One should almost err on the side of caution and determine that potentially a clause could be prejudicial to the consumer and highlight it accordingly.

## **BIOGRAPHY**

### Ana-Maria Cindric

Associate, Coleman Greig Lawyers, Sydney

With over 4 years' experience in Commercial and Taxation Law, Ana-Maria has worked with a diverse range of clients across multiple industries – placing a particular focus on providing technical tax and commercial law advice to entities looking to undertake restructuring for asset protection, business succession and refinancing purposes, particularly in the property sector. She has also assisted clients with compliance and government works.

### Rebecca Hegarty

Principal Lawyer, Coleman Greig Lawyers, Sydney

From developing effecting commercial policies and procedures, contract negotiations and commercial transactions, through to her particular knowledge of the Personal Property Securities Act 2009 (Cth) (PPSA) and expertise in insolvency issues. Rebecca is a trusted advisor to a wide range of Coleman Greig's clients. Having strong ties to Western Sydney and its business community, Rebecca currently holds the position of Vice President of the Parramatta District Law Society. She is also a professional member of the Australian Restructuring Insolvency and Turnaround Association (ARITA) and a member of the Board of the Cumberland Business Chamber.

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### Legislation

*Fair Trading Act 1987 (NSW)*