

COVID-19 and Contract Law

New contracts entered into during a pandemic

In the short time of COVID-19's existence, it has had a significant impact on global workforces as a result of the measures being put in place to minimise the risk of transmission and the health implications of infection. With no clear end in sight, these measures and implications will be in place for some time and will continue to be dynamic to meet the ever-changing circumstances.

In this article, we discuss what needs to be considered by businesses entering into new contracts in the foreseeable future.

Can we rely on the usual contract wording?

In our article, **COVID-19 and Contract Law - How does it affect you?** we discussed how certain provisions in current contracts may respond to the impact of the virus.

From our experience, very few contracts include any provisions dealing with pandemic, epidemic or disease outbreak situations. Many contracts have no express provisions which respond at all and by their terms would expect both parties to continue to perform the contract or otherwise be in breach.

It is therefore imperative that contract wording is reviewed to see whether the contract responds at all to COVID-19 and, where it does, whether that response is acceptable to your business. As to the latter, it is highly unlikely that contracts will respond in a satisfactory way to the challenges now faced, when those contracts were drafted in times when a global outbreak of a novel virus were almost unimaginable.

Businesses should be aware that contracts entered into after the COVID-19 outbreak are unlikely to be able to rely upon the common law doctrine of frustration. This doctrine allowed a contract to be terminated where an event outside the control of the parties made contractual obligation incapable of being performed because the circumstances would make performance radically different from that which the parties intended. A party would now be expected to contemplate the effects of COVID-19 on a new contract.

What can be done?

New contracts should have specific provisions inserted to deal with the effects of the COVID-19 virus.

The provision will need to contemplate the commercial impacts of the virus on contractual performance including:

1. What level of performance can be carried out presently and into the future? Whilst a contract might presently be able to operate, what eventualities have been taken into account for future limitations that may be imposed?
2. Who should bear the costs of the impacts of the virus?
3. What are the thresholds establishing when relief from performance is allowed?
4. What will be the obligations of the parties once the effects of COVID-19 abate?
5. Should there be a provision which allows termination of the contract if the COVID-19 effects are persistent or make the contract unviable?
6. Should the provision be expanded to cover other pandemics or disease outbreaks?

The answers to these questions will depend on the circumstances of the parties and the type of contract contemplated.

What should you do?

- Review the wording of any new contract being contemplated. Determine whether it will respond to the effects of COVID-19 on the parties and in what way.
- Unless the contract already adequately deals with the current and possible future effects of COVID-19, insert provisions into the contract to expressly deal with its eventualities.

If you have any questions or wish to discuss provisions to be inserted into new or template contracts, please contact:

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