COVID-19: (AUSTRALIA) WHAT TO DO ABOUT YOUR SUPPLY CHAINS?

Date: 23 March 2020

Australia Corporate/M&A Alert

By: Clive Cachia

**This information is accurate as of 10.00 am Friday 20 March 2020 and is subject to change as this situation evolves.*

BACKGROUND

With the exponential growth in the number of cases of COVID-19 and with border closures, industry lockdowns and liquidity pressures intensifying by the day, the world's supply chains are facing unprecedented stresses as consumers and business seek to navigate what could be the most severe disruption to their operations in a generation.

Whilst the ultimate trajectory of the pandemic is uncertain, business must make decisions now regarding how to secure their raw goods and services and maintain supply to key customers.

The priorities of each business and industry will be different but there are a number of immediate steps businesses should consider with respect to their supply chains to mitigate the growing risks.

STATUS OF SUPPLY CONTRACTS

An audit of each business' supply chains and contracts is recommended to determine particular stresses and vulnerabilities amongst suppliers and customers.

Particular attention should be paid to the ability to:

- claim force majeure to suspend operations and certain contractual obligations;
- vary the terms of purchase orders including timings of customer deliveries and suspending or reducing customer orders
- amend pricing, payment obligations and the contract generally, or
- terminate the contract for convenience, frustration or counterpart default.

The application of one or more of each of these options will depend upon the precise drafting of the relevant contract and the particular commercial relationship under review. It is important that each of them are considered judiciously given the risks an unlawful exercise may have on your business.

©2005-2026 K&L Gates LLP. All Rights Reserved.

FORCE MAJEURE

A force majeure clause is a legal construct commonly used in contracts to redistribute risk among the contracting parties, allowing one or both parties to be excused from performing their obligations without being held liable for breach or a failure to perform due to an intervening event, typically beyond the party's reasonable control. Typically, this intervening event must have the effect of preventing, hindering or delaying a party's ability to discharge their contractual obligations.

Under Australian Law, force majeure cannot be implied into a contract. Rather it is an express provision and as such, the scope and effect of any such clause is dependent on its construction and the contract as a whole. Where a party seeks to invoke a force majeure clause, it generally has the burden of proving the event is within the meaning set out in the clause. Further, invoking force majeure may have wider consequences as the clause may allow the unaffected party to terminate the contract after an extended period of time.

Whilst contracts may contain a force majeure clause, whether COVID-19 will be considered a force majeure event will depend upon the wording and construction of the clause.

NOT ALL FORCE MAJEURE CLAUSES ARE THE SAME

Generally speaking, short form force majeure clauses do not specify examples of events and instead broadly reference "any act, event or cause" that prevents, hinders or delays a party for performing its obligations and is beyond its reasonable control. It will be incumbent on those claiming force majeure to demonstrate how COVID-19 has prevented, hindered or delayed the performance of such obligations.

In contrast, long form clauses provide more certainty for both parties and are more common in longer term supply contracts where the potential impact of a force majeure event could be significant with severe impacts on the parties involved. Long form clauses allow the parties to tightly control:

- the types of events that would qualify as a force majeure event
- the obligations on an affected party to notify the other parties of the nature and effects of the force majeure event
- the right to terminate if the relevant event and adverse effects subsist for a certain period of time.

Further, long form clauses often oblige affected parties to take reasonable steps to mitigate and avoid the more serious effects of the relevant event.

It is worth nothing, even where a supply contract's force majeure clause directly refers to an epidemic, pandemic or unforeseen acts of Government, the party seeking to rely on the clause will still need to establish that the force majeure event was the true cause of preventing discharge of its obligations, with no alternative means of discharge or mitigating the effects of the event.

VARIATION OPTIONS

©2005-2026 K&L Gates LLP. All Rights Reserved.

If a business can realistically foresee that it can trade through this pandemic and if available alternative suppliers or customers become limited, businesses may seek to vary the terms of their existing supply contracts for a limited period.

Provisions regarding exclusivity, the size and frequency of purchase orders and customer deliveries, product and service specifications and all pricing, delivery and payment terms may be able to be re-negotiated to lessen the severe but temporary nature of the pandemic's effects and to position to business to quickly taken advantage of the likely upswing in commercial confidence when it comes.

TERMINATION

If force majeure relief or variation options are not feasible or appropriate, businesses may need to consider terminating the particular contract.

Some contracts include hardship provisions which enable certain parties to terminate all or part of a contract where the ongoing performance of such provisions become overly burdensome.

Others will contain termination for convenience clauses which enable one or more parties to terminate the contract for any reason.

Given the cascading order of effects COVID-19 is having on the entire economy, other named events of default may be relevant including insolvency events, breach of representations and a cessation of any part of a counterparty's business.

WHAT ABOUT FRUSTRATION?

Alternatively, a party may argue that the contractual doctrine of "frustration" applies. Frustration operates to terminate a contract where an intervening event has meant contractual obligations are impossible to perform and are changed completely beyond what was contemplated by the parties at the time of the agreement.[1]

However, establishing frustration is not easy as the obligations must be rendered impossible and not merely difficult or more burdensome. It is also more extreme in operation as it terminates the contract entirely rather than excusing a party from performing its obligations.

In any event, it will be important to get advice before unilaterally seeking to terminate contracts to avoid potential liability from wrongful termination.

NEXT STEPS

Due to the uncertain nature and effect of COVID-19 upon businesses and global supply chains, parties to supply contracts should:

- regularly audit their supply contracts and seek advice regarding available options
- implement appropriate strategies and processes to combat disruptions to supply chains
- proactively contact relevant stakeholders and seek updates on their continuity plans

©2005-2026 K&L Gates LLP. All Rights Reserved.

- review business interruption and other applicable insurance policies to cover COVID-19 related losses.

---

[1] *Davis Contractors Ltd v Fareham Urban District Council* (1956) AC 696, at p 728; *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) NSW ConvR 55-070; (1982) 56 ALJR 459.

KEY CONTACTS



CLIVE CACHIA
PARTNER

SYDNEY
+61.2.9513.2515
CLIVE.CACHIA@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.