

Proactively managing contracts impacted by the coronavirus (COVID-19) pandemic

The pace at which the novel coronavirus (COVID-19) is spreading across the globe is having a broad and significant impact on business operations. Disruption to supply chains, both locally and globally, are of critical concern. Now is the time for businesses to assess key contractual arrangements to evaluate legal and commercial risks, and the extent to which they can be avoided or mitigated. Consideration is given below to the position of customer as well as supplier, although many companies will fit into both categories, depending on their position in the supply chain.



FOR CUSTOMERS

1. Review all vendor contracts which may be impacted

- Consider which suppliers may be impacted by closures or delays (e.g. manufacturing base in 'red zones', etc.).
- Talk to suppliers about their ability to meet delivery commitments, supply forecasts and whether they have activated business continuity / disaster recovery plans.
- Make sure key contractual rights / remedies are preserved as much as possible during these discussions.

2. Is it possible to source alternative suppliers?

- Check for exclusivity commitments.
- If so, are there exceptions for delay or non-performance or might termination be an option (see below)?

3. Is there a force majeure clause?

- If so, assess whether the supplier is likely to be relieved of performance obligations on this basis.
- A typical clause will relieve the party from any delay or non-performance that is directly caused by unforeseen events.
- Whether or not COVID-19 will be out of any contracting party's control will depend on the exact wording of the clause.
- Note the non-performing party is usually obliged to take reasonable steps to mitigate or overcome non-performance.

4. Has the contract become impossible to perform?

- Consider whether the supplier may be able to establish that the whole purpose of the contract is prevented from happening because of the pandemic.
- Whilst very difficult to establish, the supplier may be entitled to relief under the common law principle of "frustration".

5. Is termination an option?

- This may be particularly important in the case of exclusivity.
- Carefully review termination provisions, including termination for cause and termination for convenience, including any exit fees.
- Make sure you check for relevant exclusions and consider broader ramifications, including potential reputational harm.

6. Is there scope to renegotiate or vary the contract?

- Can you identify elements likely to impact the supply chain for which you might each agree a proportion of risk and cost sharing?
- Can you amend certain terms in the contract, e.g. grace periods for lead or delivery times during the period?
- Again, it is important to ensure key contractual rights / remedies are preserved as much as possible.



FOR SUPPLIERS

1. Assess ability to discharge existing contractual obligations

- Consider which suppliers may be impacted by closures or delays (e.g. manufacturing base in 'red zones', etc.).
- Talk to suppliers about their ability to meet delivery commitments, supply forecasts and whether they have activated business continuity / disaster recovery plans.
- Make sure key contractual rights / remedies are preserved as much as possible during these discussions.

2. Engage with customers

- Engage with customers at the earliest possible stage to foreshadow issues with supply.
- Attempt to negotiate any relief or relaxation of contractual commitments and if possible, document in writing.
- Make sure key contractual rights / remedies are preserved as much as possible during these discussions.

3. Consider various relief clauses under contract

- The supplier may be able to rely on contractual rights, such as force majeure or frustration (see above).
- Note also the potential for "change of law" provisions to be triggered by Government responses to the pandemic.

4. Consider insurance position

- Assess relevant insurance policies (e.g. business interruption, travel, WorkCover, debtor/trade credit insurance, etc.).
- It is important to read the fine print. Policies of this nature often contain exclusions covering infectious diseases, etc.
- Notice periods usually apply in relation to insurable events, so contact your broker to discuss requirements as soon as possible.