



# Contracting tips in light of COVID-19

In addition to impacting on our professional and personal lives, COVID-19 is changing how parties are currently negotiating their commercial arrangements. Based on our experience, we have prepared 4 key tips to keep in mind during this period:

## 1. Are you protected if you or the other party is unable to perform?



Does your agreement include a *Force Majeure*, *Change of Law* or similar type of clause?

If not, you should consider including these protections. These protections are designed to provide you with relief if there are circumstances beyond your control, or there is a change in law, that impact on your (or the other party's) ability to perform under the contract.

## 2. Are your protections fit for purpose



If you include a *Force Majeure* or a *Change of Law* clause, you should ensure:

- The definition of *Force Majeure* includes "pandemics" and the definition of *Law* includes Commonwealth, State and Territory orders, directions, guidance, or anything similar. Where there is an international supply chain, consider whether foreign Laws should also be covered.
- Relief is provided in circumstances appropriate for your agreement. For example, should relief be provided if you are **unable to, or prevented from**, performing, or should relief also be provided if performance is **materially or substantially affected**?
- The type of relief is appropriate. For example, are you excused from performing for an appropriate period of time, are your costs during that period of time covered, and is there a termination right at some point (and if so, should this be mutual or just for the benefit of one party)?
- Appropriate steps are required to trigger the relief. For example what are the notification obligations, are the parties required to take mitigation steps and, if so does this require additional resources (and at who's cost?).
- You expressly cover how the remaining parts of the agreement should operate. For example, are fees still payable or related obligations still required to be performed or otherwise impacted (eg knock on effects on subsequent milestones)? Should you receive (or give) priority of supply, e.g. in cases where supply is restricted but not completely cut off?

## 3. Do the fees relate to specific obligations?



Fees should directly relate to the performance of the relevant obligation. For example, if you are purchasing goods and related services, a separate fee should be agreed for the goods and each service. This provides clarity if a party can only perform some obligations and may allow each party to take advantage of additional remedies under general law.

## 4. Have you expressly covered COVID-19?



If COVID-19 affects your ability to perform, you should discuss this with the other party, agree how this will be managed and ensure this expressly reflected in the agreement. Do not avoid this topic and assume you will be able to rely on the *Force Majeure*, *Change of Law*, or similar rights under the agreement. There is a risk these rights will not apply because COVID-19 existed at the time of entering into the agreement.

Types of issues to consider include those listed in key issue 2 above.