



Coronavirus: 10 tips for contract triage

The need for contract triage to manage the impact of COVID-19 is inescapable. It can seem a daunting task - knowing where to start, when there is a bewildering amount of considerations, isn't easy. It's further complicated because what to consider in respect of existing contracts isn't always the same as what to consider in respect of new (or re-negotiated) contracts.

These tips give provide a "ready reckoner" that will assist you. They are a distillation of the most common pieces of advice we have found ourselves providing in respect of COVID-19 contract triage during the recent coronavirus crisis.

Triaging existing contracts - what to consider:

1. Frustration

Don't write it off without considering it - but frustration is unlikely to be very relevant in the vast majority of circumstances.

2. Force majeure

Force majeure is likely to be a much more important consideration than frustration. In fact, if a force majeure clause is intended to deal with the event in question, English law will preclude frustration applying to that event.

3. Forgotten boilerplate?

It may be a "boilerplate clause" - but that doesn't mean force majeure clauses are always easy to analyse. Often such clauses are poorly drafted, perhaps because they were boilerplate and received less attention during negotiations than they warranted.

4. Accurate interpretation

Because such provisions aren't often considered or heavily negotiated, they are often erroneously interpreted - for example a common mistake is to think force majeure is relevant to a party's loss of utility from a contract (which it usually isn't) as opposed to a party's ability to perform (which it almost always is).

5. FAQs

Because of what we say about force majeure above, please be sure to read our [Force Majeure FAQs](#) – they cover everything you need to know about this.

6. Don't forget the rest of the contract

When assessing which clauses in a contract are relevant to COVID-19, often frustration and the force majeure clause are not the most important considerations. So (and sorry for this!) you will probably need to work your way through the contract to find other relevant clauses. Here's a flavour of only a few of those other clauses/legal principles which often are very relevant (visit our [Coronavirus Resource Center](#) for further briefings on this):

- Customer dependencies and "Excusing Cause" & "Relief Event" regimes
- Changes in law
- Advance warnings
- Most favoured/preferred customer clauses
- Minimum volume/spend commitments
- Step in
- Financial distress
- Set-off
- Business continuity & disaster recovery

Amending existing contracts and entering new contracts:

7. Waiver and inadvertent change

Before embarking on negotiations to change an existing contract, make sure you:

1. • preserve all your rights and remedies to avoid any risk of affirmation, waiver and/or acquiescence; and
 - avoid inadvertent contract amendments arising from changes in how it is performed by (i) continuing to perform the contract strictly on its terms and (ii) diligently documenting any changes you and your counterparty agree to make to it.

8. Different force majeure consideration

Treatment of COVID-19 in force majeure clauses in new/renegotiated contracts needs to be treated with care. This is because (depending on the drafting, of course) just because COVID-19 exists and its ability to prevent/delay contractual performance in the future is easily foreseeable, that won't preclude it being a valid force majeure event in the future – unless you get the drafting correct

9. Execution process/formalities

With social distancing and related measures in place, plan ahead for how you will execute your new/renegotiated contract using counterparts clauses, exchange of email or electronic solutions such as DocuSign. If the contract needs witnessing, who will witness (and how)? Contracts where formalities require "wet ink" signature need extra thought. Finally, be aware of practical challenges for homeworkers such as dealing with large, colour hard copy plans or spread sheets.

10. Contract Management

When contracts are to operate in dynamic circumstances:

1. • *information is power* – give additional consideration to your governance, reporting and management information provisions, to make sure all the required information and communications flow seamlessly between the parties in a way that allows you to manage that dynamism
- *change happens* – familiarise yourself with any variation/change control procedures in your contract so they can be quickly and easily deployed when required

Useful Resources and Contacts:

- Our **Covid-19 Supply Chain Advisory Team** is a team of experienced lawyers with proven tools, processes and AI to quickly and efficiently analyse the impact of Covid-19 on supply chain, technology and outsourcing contracts. For more information contact: Covid-19SupplyChainAdvisoryTeam@dlapiper.com
- Read our [Force Majeure FAQs](#) – they cover everything you need to know about force majeure
- Our [Coronavirus Resource Centre](#) is where we host a plethora of multi-jurisdictional and sector specific briefings, articles and webinar invites and recordings.

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