

## Life after lockdown – Ten contract trends to watch for

David Thomson, Andy Martin

18 May 2020

No one has been immune to the disruption of COVID-19, and even when this pandemic is finally spoken of in the past tense, a return to "the way it was" seems unlikely. The reality is that no one can say with certainty what the "new normal" will look like for most businesses.

Businesses globally have needed to deal with the consequences of lockdown and what has been one of the world's biggest force majeure events. Contracts that might otherwise have gathered dust in a bottom drawer have been retrieved. Clauses that normally sat quietly, minding their own business at the back end of contracts have been put under the blowtorch. Contractual parties have been frantically turning their minds to what they agreed, what they intended, and what might have been.

The list of "key risks" to cover off at contract negotiation time has just been rewritten, or at least added to. The shape of the average contract might also be about to change.

Below are some predictions on changes or trends we might see in commercial contracts, as businesses come to terms with life after lockdown.

- **More suspension rights:** Most commercial contracts have termination rights that apply for breach, and some have a force majeure clause that permits termination in certain circumstances. However, termination rights are a blunt instrument, and unlikely to be the preferred option for dealing with a lockdown. We expect to see the development of more refined and thoughtful suspension rights that address the risk of a future lockdown or similar circumstances. We anticipate more parties articulating events that trigger a suspension (but not termination) right, with more detail around what supporting information needs to be exchanged between the parties, and clearer risk and cost sharing mechanisms that allocate a financial outcome for each party if suspension occurs. One of the lessons of COVID-19 is that a bit more detail can take the parties a long way. Just saying "obligations are suspended" has been proven to result in parties arguing over what that means in practice, and can result in a windfall for one and significant costs for another.
- **Comprehensive force majeure clauses:** Force majeure clauses are often seen as boilerplate clauses, but the lockdown highlighted that they can be key provisions that allocate risk and have serious consequences. Not all force majeure clauses are the same, and the lockdown has challenged the wording of many, with some counterparties taking liberal interpretations to give themselves termination rights that may not have been intended. We anticipate these clauses finding their way into more prominent positions within contracts, and becoming more detailed and more heavily negotiated. Clauses will need to contemplate the possibility of both parties being the "affected party" and the average period specified for force majeure events (prior to any termination right) will probably be a few weeks longer. Previous references to "10 days" or other short timeframes before termination rights kick in are unlikely to remain acceptable. We will see parties paying more attention to these clauses, with more tailored regimes setting out who, how and when a party may rely on the clause, and the rights and obligations of the respective parties that apply while a force majeure event subsists.
- **Termination at will:** There is always a trade-off between certainty of term and flexibility. Termination at will provisions undermine the term of a contract, letting a party "pull stumps" at any time by giving the requisite notice, and are often resisted by parties seeking long-term commitments. The lockdown will have brought termination at will provisions into focus for suppliers and customers alike, and many contracting parties may have wished for an easier way to terminate an arrangement. We expect to see more negotiating parties standing firm on including termination at will provisions to ensure flexibility. The inclusion of these provisions may ultimately just need to be priced into more deals.
- **Sharing the pain:** At the other end of the spectrum, some businesses have a real need to keep a contractual relationship alive - business critical suppliers that can't easily be replaced are a good example. Those situations may lend themselves to pain sharing mechanisms where the parties agree how to allocate the financial burden of another lockdown (or similar event) between them, to maximise the chance of surviving the storm together. How that could work in practice will depend on specific circumstances and parties may look for creative options. While parties may be tempted to include a simple nod to their mutual intention to share the pain of another lockdown, that is unlikely to be enough to create enforceable obligations.
- **Remote preparedness plans:** Expect to see more businesses asking key suppliers to provide "Remote Preparedness

Plans" that demonstrate a supplier's ability to maintain continuity of supply through a lockdown or other emergency. Businesses will always need to comply with the terms of an Order from the Director-General of Health, but most of us now have a clear view on the value of being prepared in advance for maintaining business continuity in times of emergency or rapid change.

- **Time frames, KPIs and liquidated damages:** With the possibility of further COVID-19 disruption, we may see more suppliers seeking to avoid giving warranties or agreeing KPIs around performance within specified timeframes, or at least building in additional flexibility by using carve-outs or relaxing timeframe commitments in certain circumstances. Parties being asked to agree to liquidated damages provisions for delays will need to be very clear as to how those may play out if there was another lockdown.
- **Exclusivity:** Contracts that grant exclusivity of supply to a supplier typically include carve outs that allow the purchasing customer to obtain goods/services from a third party - for example, where the supplier is unable to supply. COVID-19 caused disruptions to supply chains, and carve outs to many exclusivity provisions will have been triggered. Parties negotiating exclusivity provisions will be more focused on these carve outs going forward.
- **Minimum purchase volumes:** No-one wants to be locked into paying for unwanted goods/services, and we expect to see purchasers being more cautious and seeking to expressly limit exposure where their ability to consume goods/services is compromised due to circumstances beyond the purchaser's control.
- **COVID-19 clauses:** The above points all relate to consequences that apply to specific contractual obligations in the context of another lockdown or similar event. Parties may choose to include new wording in individual provisions or alternatively they may prefer to have a "COVID-19 pandemic" clause that deals with all of the consequences and implications of another lockdown in one place. Irrespective of how the parties choose to record any new COVID-19 specific arrangements, the relationship between those new arrangements and the force majeure, suspension and termination provisions will need to be clear.
- **Electronic signatures:** The lockdown highlighted the difficulty of signing documents when not everyone could print, sign, scan and return a document from home, forcing people to move towards electronic signatures. The laws around electronic signatures are not particularly straight forward, and not all electronic signatures are equal. At one end of the spectrum, electronic signatures can be cut and pasted into a document, resembling a school project of sorts (which may be fine in many situations), while at the other end electronic signatures can be created and applied using specialist electronic signing and identity verification software. We will see an increase in the use of signing software not just for future lockdowns, but also to facilitate flexible working arrangements generally. Standard counterpart clauses may also evolve to expressly permit parties using electronic signatures in accordance with Part 4 of the Contract and Commercial Law Act 2017.

The extent to which a business will seek to address COVID-19 related risk issues in their contracts going forward will depend on many factors, such as the nature, term and value of the contract, the goods/services provided, the parties' existing relationship (if any), and their relative negotiating power. While common themes will apply to all, everyone will have slightly different interests to protect. We don't envisage an "off the shelf" standard form COVID-19 clause appearing any time soon. Businesses will need to consider their own unique circumstances and sensitivities, and choose how best to deal with them.

## Auckland

PwC Tower  
188 Quay Street  
Auckland 1010

PO Box 1433  
Auckland 1140  
New Zealand

P: +64 9 358 2555  
F: +64 9 358 2055

## Wellington

Aon Centre  
1 Willis Street  
Wellington 6011

PO Box 2694  
Wellington 6140  
New Zealand

P: +64 4 499 4242  
F: +64 4 499 4141

## Christchurch

83 Victoria Street  
Christchurch 8013

PO Box 322  
Christchurch 8140  
New Zealand

P: +64 3 379 1747  
F: +64 3 379 5659