

Tweaking your contract to work in COVID 2.0

MAR
QUE

Contracts are drafted with a whole spectrum of contingencies in mind. What if a party doesn't pay? What if it can't be performed on time? But those contingencies may not contemplate the ebb and flow of COVID related restrictions. As best we can plan, a rise in COVID cases can result in overnight, unforeseen changes to your business model.

So what do you do? Not every COVID related change will lead to a force majeure ([see here](#)) or a termination right. Varying an agreement can help build in terms which deal with the world as we now know it. Yet while they might just tweak the terms of your original agreement, they are actually a secondary contract and need to be drafted as such to be enforceable.

Here are a couple of tips to protect your amendments:

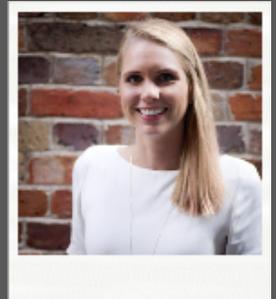
- A variation is only effective if it is, in itself, a properly enforceable contract. It must have certainty, consideration, and both parties must intend to be legally bound by it.
- Consideration is typically the overlooked element of a variation, but it is fundamental. Consideration need not involve money and it might be inherent in the variation, if the variation is capable of benefiting either party.

Here's an example: The NSW Court of Appeal recently found that the reduction of a loan term from 15 to 5 years was, in the circumstances, sufficient consideration as it was capable of benefiting both the bank and the customer. The bank was able to apply the loan funds in a more profitable way and the customer would be able to refinance the loan after expiry on a potentially more profitable basis.

- Be conscious of any pre-contractual representations (including silence) or conduct surrounding the variation contract. Because of the current contractual relationship, you may have a higher obligation to disclose matters than you did when negotiating the original.
- For clarity ensure the terms are either consistent (or expressly overrule) the terms of the original contract.

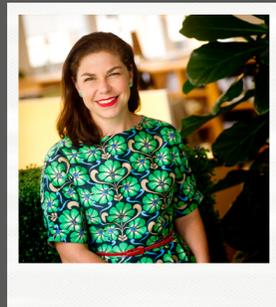
If you have already agreed to an amendment and you want to enforce it, then check it is a valid variation. Attempting to enforce an invalid variation may repudiate the original contract, exposing you to a claim for damages.

Questions? Give us a call.



Kiera Peacock
Partner (Litigation)

+61 2 8216 3021
[Email Kiera](#)



Kim Middleton
Partner (Commercial)

+ 61 2 8216 3016
[Email Kim](#)

Marque Lawyers Pty Ltd
Level 4, 343 George St
Sydney NSW 2000

Ph : +61 2 8216 3000
Fax: +61 2 8216 3001

[Visit Website](#)

