<b>Joanna:</b> Hi, it's Joanna Oakey here and welcome back to Talking Law. A podcast proudly brought to you by our commercial legal practice Aspect Legal. Now today we are talking about a topic that you may have heard a little bit about unless you have been bunkered down on some sort of bomb shelter for the last few months, the Coronavirus. I know everyone who's talking about coronavirus at the moment, but what we want to do here at aspect legal is be beacons of light, positivity, but also information because we know we moving into unchartered territory at the moment and a position locally, but also globally where things are really uncertain and this obviously has a massive impact on business. Now today we are going to talk particularly about the implications of coronavirus on commercial contracts, but into the future we're actually going to be releasing a number of episodes that talk all about the implications of Coronavirus on businesses as a whole.

<h2>Why are we talking about this?</h2>

<b>Joanna:</b> And so stay tuned for future episodes where we look at different strategies that businesses can put into place and different things that businesses should be aware of. And we really going to be looking at focusing in a positive light on how business can protect itself, but also arm itself for the future. But we also think it's really important that we get information out there to assist business owners and our larger businesses out there who are dealing with some of the impacts that are coming through from the uncertainty that Corona virus is causing. So without further ado, I want to say very, very big welcome to Robyn Purdy from Aspect Legal who's on here to talk to us today about the implications on commercial contracts. Robyn, welcome to Talking Law.

<h2>What is in the Force Majeure Clause?</h2>

<b>Robyn:</b> Thank you Jo. Pleasure to be here. And this is my official first podcast with Aspect Legal. I'm very excited to join you all here today. As Jo has indicated, I would like to talk to you all about the unfortunate reality that we are fighting ourselves in and that is the impact that coronavirus is having on our client's businesses. We've got situations where we have international trade and commerce interrupted. Supply chains are obviously being affected, we've got labor shortages, we've got government closures including in relation to workplaces as well as ports. And obviously this is all going to have some sort of profound impact on our client's businesses. We do a lot of work with clients in relation to this supply contracts and other sort of distribution type agreements. And one of the common clauses that we see in these types of agreements are force majeure clauses, which is basically aimed at allowing parties to exit the contract or excuse their failure to perform their obligations in certain circumstances Jo.

<h2>Why we should pay attention to the Force Majeure Clause</h2>

<b>Joanna:</b> Yeah. And I think one of the most important things to start off with here is the fact that people may not realize that forced majeure clauses, you know, genuinely speaking they don't look at which generally speaking might be located at the end of a contract in the boilerplate provisions in the bit where everyone just glosses over and doesn't pay much attention to, I think there's this general feeling out there that force majeure clauses are all the same, all operating the same way. The force majeure has a defined meaning. And of course as we know here in legal land and why are we passing on this information to you is that force majeure itself is something that is defined under the contract. So it's, so the concept of force majeure or the definition of force majeure is something that's unclear and depends on the contract. Just as each of the ways that a force majeure event, however that's defined under the contract is also dealt with. So this is not one of those things where you can just assume there's one way that fits all contracts and that will cover all contracts. Is that right Robyn?

<h2>What does the Force Majeure Clause cover</h2>

<b>Robyn:</b> That's exactly right, Jo and that's the situation that we're finding at the moment. But you know, typically speaking, as you sort of alluded to, their force majeure clauses are at the back. They are, they sort of standard type causes that everybody sort of sees and pays a bit of lip service to. And and then we move on. And it's only, you know, in circumstances like this with the outbreak of Corona virus that we're now having to pay a little bit more attention to these types of clauses and really reading to what they mean for the, for the parties. And whether they actually operate as, you know, as we hope that they do or as the parties had hoped that they would in situations like this. So I'll give you an example. You know, generally speaking, you'll, you'll see force majeure clauses are either really quite detailed and they might allude to all different types of events like earthquakes, hurricanes, government strikes, wars, terrorists a bit and the list can go on and on and on. And then you've got a, you know on the opposite side of the coin you've got situations where these clauses are very quite vague in nature and they refer to things like circumstances beyond a party's control, acts of God and in those sorts of circumstances it's not always clear whether the party's going to be able to rely on those causes to obtain the relief that they are looking for. And in that circumstance it's usually about trying to exclude their nonperformance under the contract.

<b>Joanna:</b> Well yeah. And on the flip side it might also be in relation to a supplier agreement that you have. So, so I guess there's two sides of this, aren't they? There is where you are a supplier or your seeking protection under a force majeure clause. And on the flip side might be where you are seeking enforcement of contractual obligations and your supplier or counterparty is seeking protection under a force majeure clause.

<b>Robyn:</b> Absolutely.

<b>Joanna:</b> We might have issues in either sense.

<b>Robyn:</b>

Yes, that's exactly right. You know, both parties are going to have their own set of sort of reasons why they might want to rely on a force majeure clause or why they might not want to allow the other party to rely on the force majeure clause, whether or not they can is always going to depend on the specific circumstances of each individual case.

<h2>Examples of when force majeure clauses can create huge loss for an organisation</h2>

<b>Joanna:</b> Yeah. And this is then where we get down to this nitty gritty of looking at these contracts and saying, well what do the clauses actually saying? We might find I'm on this reflection. And I think a lot of people will be pulling out their contracts and if they're not right now, then after this podcast, I absolutely will be pulling out their contracts and having a look at the force majeure clause I mean I've seen force majeure clauses in the past that have been, you know, as crazy as you know, force majeure, being defined as anything that's outside of a party's control at all. And you know the meaning of that could, the implication of that could be any supply chain. Therefore it's something that might trigger a force majeure event.

<b>Robyn:</b> Absolutely. That could extend very much to basically any interruption in the supply chain that the party couldn't reasonably control is going to be permitted under that force majeure clause.

<b>Joanna:</b> And people are just, I think people will just don't realize that as their eyes are glossing over the force majeure clause, which I think has an absolute meaning generally and is essentially dealt with in the same way from contract to contract. The reality is it's not and you need to go back to, you know, and if supply is an important part of your business, you need to understand, particularly if there's a financial issue for your business based around a failure to supply or a delay in supply. Then you need to really understand how force majeure clauses might operate in your own supply chain. And also to ensure that you have some sort of backing or mirroring between contracts where you are required to supply versus the contracts that you have for supply with your suppliers. So making sure you've got back to bat provisions or mirror provisions between those situations. I was actually having a discussion with another lawyer today who was, who was talking about I was talking about force majeure clauses and they said, well it's funny you mentioned that because we've got an issue at the moment with, they had an issue with a large publisher who was planning to come to Australia to provide video content effectively for this particular organization that had a really a large ad campaign about to, about to be produced and then delivered.

And one of the problems was the force majeure clause in this contract between the Australian entity and the publisher from overseas who now couldn't come to Australia because of course the events that have caused the issues with people coming in from overseas now being needed to go into isolation for two weeks. The force majeure clause just did not deal with this situation. So the force majeure clause was really vague and you know, it became this end client now had this issue that potentially they were going to be exposed to paying for the services without the services being able to be provided. Now this is an example of how force majeure clauses when not dealt with enough detail, you know, it can create a lot of loss for an organization who hasn't thought through these sorts of issues.

<b>Robyn:</b> Absolutely. You want to make sure in those sorts of circumstances we've got back to back obligations between different parties that the force majeure clause line up until it in each individual contract. So that way you've got some potential exposure. You're mitigating that exposure in terms of your supply chain.

<b>Joanna:</b> So maybe if we then just talk really quickly about some action points for people can think about moving forward. I guess the very first thing to think about is do you have any potential supply issues or delivery issues? And if so, what do your contracts at the moment say about this? What are the force majeure provisions?

<h2>Pull out your contracts out look over the Force Majeure Clause</h2>

<b>Robyn:</b> Absolutely. Pull your contracts out and have a look at these force visual causes and start sort of taking an analysis of what those clauses, say, whether you think you're going to be covered if your supply chain is interrupted because of the coronavirus outbreak. And then, you know, it may be a situation where we can look at making appropriate amendments to contracts to address the pandemic. In an ideal world, if we, if you're currently in the midst of your contract negotiations, these are the sorts of issues you want to be addressing now before the terms of the agreement have finalized. We want to be having a look at those force majeure clauses now and making sure that they cover things like pandemics, epidemics, infectious diseases, viral outbreaks, quarantine periods biological contaminations as well as things like territory entry and exit restrictions of work stoppages. And then generally speaking, other adverse actions by government agencies. Those are the sorts of issues that we're finding now. Things that we want to say being dealt with in these force majeure clause.

<b>Joanna:</b> Absolutely. And I guess the other point is if you have issues in a supply relationship or client relationship where the force majeure causes are not clear, which it's quite possibly the case um..

<h2>Explore the ways to stay on the front foot when dealing with uncertainties in your contracts</h2>

<b>Robyn:</b> This is something that's very, you know, nobody's really had to deal with it at this level before, certainly not now in our lifetimes and during our years as practitioners. So you know, it's highly unlikely that we're going to be seeing force majeure clauses in contracts that are addressing, pandemics, epidemics and biological hazards and things like that. Cudos the people that saw all that coming and included it. I don't know how many of those are out there? So I think you're right, Jo. I think what we're going to say is probably a situation where the contracts and not either not including the force majeure clause or more likely than not adequately worded and to address the impacts of credit of ours at the moment. And so in those situations, I strongly encourage you to take your contracts down to your lawyer, have them properly looked at. And then, you know, there, there are options. There are always options that we can say, can they maybe an amendment of the clause, if the parties agree in the contract allows. And then you know, in the situation where force majeure is not adequate and amendments not possible for whatever reason. There are, you know, other options that we can explore with you. Things like relying on frustration, which is I think the subject of a whole separate podcast Jo.

<h2>Tips to take away</h2>

<b>Joanna:</b> And we are not talking however, the frustration that everyone is frustrated at the moment. I guess the other thing is, well is it, it's also about taking it, it's stepping out on the front foot. So it's also driving discussions right now. So one of the things that parties can do at the moment where this might be an issue in their business and where the clauses that they're dealing with relating to force majeure aren't sufficiently clear is really driving discussion with your counter parties, being on the front foot and using legal mechanisms to set the position first. So there's a lot of things that we can do from a legal perspective to try and help set you up properly, to put you on the front foot. To try and deal with any, you know, lack of clarity or vagaries in the contractor around this. So I think the message out there is number one where supply is an issue either for you as a supplier or in relation to your supply chain. Number one, pull out the contracts, have a look at the force majeure provisions. Number two get on the front foot. And I think we are expecting to see a lot of enquiries in relation to force majeure clauses. And of course let's be honest, we will be saying, we are saying a lot of enquiry in relation to termination of contracts, cancellations courses as well as employment issues, which we'll talk about later on. But in relation to these areas from a contractual perspective, the recommendation is get on the front foot, speak to your lawyers and of course we can assist but very quickly so that you're ahead of the issue rather than you know, now having to put out fires after the event.

<b>Robyn:</b> I mean absolutely. And I think it's always a better position generally speaking in business to be on the front foot rather than reactive to circumstances. So yeah, I think you're, you're right there Jo. The message is get the contracts out now before you start experiencing these issues if you haven't already. And before you know, your counter party starts coming to you with termination of contract, you know, be on the front foot and she said, let's review, let's see what your options are and then we can just take it from there and really set you up so that the impact on your business from coronavirus is minimalized and mitigated as much as possible.

<b>Joanna:</b> Absolutely. Well, look, that's it from us here at Aspect Legal today. As I said in the introduction, we're looking at providing you with proactive advice that will help protect your businesses going into this uncertain area. We will continue to be providing information about what you can be doing in your businesses and within your contracts and dealing with your contracts moving forward. So watch out for our future episodes of talking law. And if you're interested in speaking to Robyn or any of our other amazing legal Eagles here at Aspect Legal about any of your contracts or in particular your forced majeure clauses then head over to our website talkinglaw.com.au or our legal firm website aspectlegal.com.Au there you'll be able to find a download of information all about our discussion about the implication on commercial contracts and a transcript of this episode. But you'll also be able to find out how to contact Robyn and our other legal Eagles for free for an initial discussion on our website via our speak to a lawyer now button.

We hope that that has been useful information for you. We'll be back next week with some more. Robyn, thank you so much for coming on board to chat to all of our listeners today.

<b>Robyn:</b> Thank you for having me, Jo. I look forward to the next one.

<b>Joanna:</b> And that's it for today's episode. As we said, in the future, we'll be publishing more information to help businesses prepare and deal with the uncertain times that we living in. But we're aiming to do this from a positive perspective for you all. So anyway, don't forget to hit the subscribe button if you enjoyed what you heard today. Thanks again for listening in. You've been listening to Talking Law a podcast proudly brought to you by our commercial practice Aspect Legal see you next time.