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Webinar Q&As: 2024 ‘Clause & Effect’ Series | Negotiation Fundamentals in Commercial Contracts

Piper Alderman provides answers in response to the questions received during our 2024 Clause and Effect – Negotiation Fundamentals in Commercial Contracts event on 20 August 2024.

We received a lot of very good questions when we conducted the webinar on 20 August 2024. We will be publishing a number of Insights that address some of those questions.

This document is contains a selection of those questions, which relate to the drafting of commercial contracts and the answers that we provide to those questions.

1. Is a deed needed for contract renegotiation if no consideration is being provided by one side?

Yes, a deed is often needed for contract renegotiation when no consideration is provided by one side.

In contract law, consideration refers to something of value that is exchanged between the parties involved in a contract. For a contract to be legally binding, there generally needs to be consideration from both parties. However, if you want to modify or renegotiate a contract and one party is not providing any new consideration, the modification may not be enforceable under standard contract law principles.

A deed, on the other hand, does not require consideration to be enforceable. It is a formal legal document that must be signed, witnessed, and delivered to be valid. By using a deed for the renegotiation, the parties can make changes to the contract even if one side is not providing new consideration. This is often done in situations where one party is giving up a right or agreeing to something without receiving something in return.

2. Is backdating illegal? Can you give some examples of issues created by back-dating practice? Isn’t this common?

Backdating a document can be illegal, depending on the circumstances and the intent behind the action. Consider the following:

- If a document is backdated to deceive someone or to commit fraud, it is illegal. This could involve altering the document to misrepresent the date of an agreement, contract, or other important action to gain an unfair advantage or to avoid legal consequences.
- In some situations, backdating a document is permissible if all parties involved agree and there is no intent to deceive. For example, if two parties orally agree on a contract on one date but formalize it in writing later, they might agree to backdate the written document to reflect the original oral agreement date. But be careful – this practice should be specifically documented and should not be undertaken without seeking legal advice.
- Backdating documents for tax benefits, regulatory purposes, or to comply with legal requirements can be illegal. Authorities typically view this as an attempt to evade taxes or avoid legal obligations.

For organisations and businesses, backdating can violate record-keeping regulations, leading to penalties or legal action.

3. Do you consider there’s a difference between “will” and “must”? Is “will” usually more binding than “shall”?

Yes, there is a difference between “will” and “must,” both in their meanings and in how they are used.

Will:

"Will" is primarily used to indicate future actions or events. It expresses what is going to happen or what someone is going to do. For example, "I will go to the store tomorrow." It can also indicate a person's willingness, intention, or determination to do something. For example, "I will help you with your project." "Will" is less forceful than "must" and often suggests a choice or a plan rather than a requirement.

Must:

"Must" is used to express obligation, necessity, or a strong requirement. It indicates that something is essential or mandatory. For example, "You must wear a seatbelt when driving." It can be used to give a strong command or to enforce that something is important or required. For example, "You must finish your homework before watching TV." Unlike "will," "must" leaves no room for choice or discretion; it conveys that something is non-negotiable or compulsory.

4. I thought in Australia, there was no material difference between best and reasonable endeavours?

In Australian law, there is a difference between "best endeavours" and "reasonable endeavours," even though they are often used interchangeably and can sometimes result in similar practical obligations depending on the context.

"Best endeavours" is generally considered a more stringent obligation. It requires a party to take all steps reasonably available to achieve the desired outcome, considering their own circumstances and resources. This does not mean they must do everything possible regardless of cost or consequence, but they must do what they reasonably can to achieve the objective, even if it involves some sacrifice or inconvenience.

"Reasonable endeavours," on the other hand, implies a less demanding standard. It requires a party to take one or some of the reasonable steps to achieve a desired outcome, but not necessarily all of them. This means that a party is expected to balance their efforts to achieve the objective with their own commercial interests and resources. If a party can demonstrate that a particular step would be too onerous or costly, they might not be required to take it under a "reasonable endeavours" obligation.

Australian courts have recognised this distinction in several cases. For example in *Transfield Pty Ltd v Arlo International Ltd (1980)* the court explained that an obligation to use "best endeavours" requires a party to take all reasonable steps which a prudent, determined, and reasonable person acting in his own interests and desiring to achieve that result would take. In *Hospital Products Ltd v United States Surgical Corp (1984)* the court suggested that the standard for "reasonable endeavours" may be less stringent than "best endeavours," requiring a party to take reasonable steps in the circumstances to achieve the objective, but not necessarily all possible steps.

5. What are your thoughts on using "commercially reasonable endeavours"?

"Commercially reasonable endeavours" (sometimes referred to as "commercially reasonable efforts") is a term used in contracts to specify a standard of effort that a party must use to fulfill a contractual obligation or achieve a certain outcome. This standard is often used to balance the expectations of performance with practical, commercial considerations. Here's a breakdown of what "commercially reasonable endeavours" generally means in commercial terms:

Key Elements of Commercially Reasonable Endeavours are:

1. The party is expected to take actions that are reasonably achievable without undue expense or significant sacrifice. The efforts required should be proportionate to the desired outcome and do not require the party to incur losses or take actions that are disproportionately costly relative to the benefit gained.
2. The efforts should align with what a reasonable person in the same industry, under similar circumstances, would do. This involves taking into account the usual practices, norms, and standards of the industry in question.
3. The term acknowledges that the party has its own commercial interests and allows for a reasonable consideration of those interests. A party is not expected to act against its own economic or business interests to achieve the desired outcome, as long as their actions are still reasonable in light of the circumstances.
4. While not as strict as "best endeavours," commercially reasonable endeavours require a genuine attempt to achieve the objective. The party should not merely go through the motions or act in bad faith, but should take appropriate steps that reflect a reasonable effort to fulfill the obligation.
5. The standard of what constitutes "commercially reasonable" can vary depending on the specifics of the situation, including market conditions, the nature of the transaction, the relationship between the parties, and any other relevant circumstances.

Consider these examples

- A supplier may be required to use commercially reasonable endeavours to source materials or fulfill orders. This means making a genuine effort to meet supply commitments without having to go to extraordinary lengths, such as paying above-market prices or bypassing standard supply chain procedures.
- A distributor might agree to use commercially reasonable endeavours to promote and sell a product. This could involve reasonable marketing efforts based on standard industry practices, but not necessarily requiring them to prioritise the product over others if it would be commercially detrimental.
- In the context of a merger, a party might be obligated to use commercially reasonable endeavours to obtain regulatory approvals. This may involve taking the necessary steps to secure approval without having to, for example, divest key business units unless explicitly required by a regulatory body.

6. Do you have to capture changes in a deed of variation? Can an agreement be used? What is appropriate consideration to include in a variation agreement (where no money is exchanged)?

When altering the terms of an existing contract, it is essential to document the changes clearly and effectively. This can be done either through a Deed of Variation or a Variation Agreement, depending on the circumstances and legal requirements.

A deed is a special form of legal document that is executed with formalities, such as being signed, sealed, and delivered. In Australia, a deed does not require consideration to be legally enforceable. Therefore, if one party is not providing any new consideration for the variation, a deed is often used to ensure that the change is binding and enforceable. A Deed of Variation is particularly useful when the parties want to avoid the complexities of proving consideration or when one party is giving up a right or accepting a change without any direct benefit.

A Variation Agreement is a standard contractual document that outlines changes to the original contract. Under general contract law principles, for a Variation Agreement to be enforceable, it typically must have consideration from both parties—something of value exchanged as part of the agreement.

The need for consideration can complicate the enforceability of a Variation Agreement if one party is not providing any new consideration. This is why variation agreements can often be challenged when consideration is lacking. Appropriate consideration does not always need to be monetary; it can be anything of value exchanged between the parties. That can include mutual promises, waiving rights, additional obligations, releases from obligations and liabilities, or modification of conditions.

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