



## What is consequential loss and how do I deal with it in my contract?

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You lose a lucrative contract as a result of your supplier's failure to meet its contractual obligations to you. You terminate your contract with the supplier and look to recover the profit you would have earned under the lost contract from the supplier but, oh no, the contract says the supplier won't be liable for "consequential loss". You didn't even realise that provision was there, let alone what meant, but you're told that your prospects of recovering any lost profit are slim to none.

"So what *exactly* is consequential loss?" we hear you ask. The courts in Australia have in recent times sought to redefine the meaning of consequential loss and, in doing so, they have left many of us a little befuddled as to what the term now actually means. It seems that consequential loss is loss that is not "normal" loss (being a loss that any person in a comparable situation would suffer), but the term must be construed in light of the context in which it is used. So to put that simply, *it depends!*

We won't go into the detail of these cases, but it is important to be aware that there is a clear move towards a broad view of what types of loss are covered by the term "consequential loss" when used in a contract. Things like:

- loss of profits or revenue;
- loss of production;
- loss of a business opportunity;
- loss of anticipated savings;
- loss of or damage to goodwill or reputation;
- loss of use or corruption of data or information; and
- increased financing costs,

are very likely to fall within the scope of "consequential loss" in the context of a contract if that term is not otherwise defined.

It is very common for commercial contracts to contain a clause excluding liability for consequential loss, and that is understandable – businesses want to ensure that that in contracting with another party they do not expose themselves to liabilities that may be disproportionate to the value of the contract or the nature of any breach. On the other hand, certain

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consequential losses may not be insurable, or may be costly to insure, and may in fact amount to significant loss or damage to a party's business if the other party were to do the wrong thing, so it is not always appropriate to include a blanket exclusion of consequential loss.

So what is the best way to deal with consequential loss? There is certainly no one-size-fits-all approach when it comes to negotiating limitations or exclusions of liability under a contract, but here are some things to consider when you are next negotiating a contract:

- The term "consequential loss" seemingly now covers a lot more than was historically the case. If you are the one who is more likely to have a liability under a contract, then you may in fact be best served by a generic exclusion of all consequential loss. Having said that, if there are certain losses that you don't want to be liable for, specifically address them to avoid later having an argument about whether or not they are consequential in nature.
- If you are the one who is more likely to suffer loss and damage if the other party doesn't perform, then think about what loss you are likely to suffer and what you would expect to be compensated for in those circumstances. If these losses are of the kind or similar to those types of losses listed above, then be sure to specifically carve them out of any general exclusion for consequential loss. The best advice we can give is be specific about what you *are* entitled to recover.
- If all of your losses, or a significant part of them, would be "consequential" in nature, then you might want to think about proposing a different way to give the other party some comfort around what their exposure might be if they are insistent on excluding consequential loss. This may entail caps on liability and obligations to insure certain losses.
- Remember that, even if your contract does not exclude consequential loss, there is still the issue of remoteness. As a general legal principle, in order to be recoverable a loss must not be "too remote". This issue is outside of the scope of this article, but, in short, making the other party aware of any specific loss or damage you will suffer if they don't perform *before* you enter into the contract would be well-advised.

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