

IT BYTES

ANSWERING YOUR COMMON IT CONTRACT LAW QUESTIONS

WHAT IS THE PREVENTION PRINCIPLE AND WHAT ROLE DOES IT PLAY IN IT CONTRACTS?



WHEN DOES THIS QUESTION TEND TO ARISE?

Delays, variations and other unforeseen complications are not uncommon when it comes to IT contracts (some would say that they are typical!). Often these contracts will provide for liquidated damages or other remedies for the customer where there are delays in performance. However, complications may arise where the customer's own conduct has contributed to a delay - for example, if the customer has failed to provide necessary access to its IT systems or requested extra work beyond what was originally contemplated in the contract. In these circumstances, the prevention principle may serve as a valuable shield for the service provider.

WHAT DOES THE LAW SAY?

The prevention principle provides by default that each party to a contract must not prevent or delay the other party in performing its obligations under the contract. In practice, this principle takes many forms and the remedies available to the innocent party depends significantly on the nature of the 'preventative conduct' and the circumstances which lead to non-performance.

The Victorian Court of Appeal in *Bensons Property Group Pty Ltd v Key Infrastructure Aus Pty Ltd* [2021] VSCA 69 recently articulated the following three requirements:

- First, the preventative conduct must amount to a breach of an express or implied term of the contract.
- Second, the preventative conduct must have deprived the innocent party of a substantial chance to fulfill its obligations.
- Third, the preventative conduct must have caused a failure to perform on time or at all.

Some common applications of the principle include where:

- A party fails to perform a contingent obligation (e.g. by not obtaining approvals or giving instructions), which prevents a counterparty from fulfilling its obligations.
- A party breaches an express or implied duty to cooperate (e.g. by not providing access to relevant systems or providing other necessary inputs), which prevents a counterparty from fulfilling its obligations.
- A party prevents a counterparty from meeting a contractual deadline (e.g. by requiring a variation to the work that was to be delivered by the deadline), which may result in the fixed deadline being converted to an obligation to complete the work within a reasonable time.
- A party expressly or impliedly indicates that the counterparty does not need to perform an obligation.

In each of these scenarios, the innocent party's original performance obligation is said to be dispensed or treated as satisfied. In these circumstances, the party responsible for the preventative conduct is precluded from insisting on performance of that obligation (or at least performance within the specific contractual deadline) and cannot claim damages for breach (including any liquidated damages that may be specified in the contract as a remedy for delayed performance).

However, as with any default rule, the prevention principle is subject to exclusion or modification. In particular, there will be limited scope for the principle to apply where the contract itself already specifies the consequences of potential preventative conduct. The most common way to do this is through an express extension of time (EOT) regime. Such a regime will allow for a contractual deadline to be extended where delays are caused by the other party or by extraneous events and are common in contracts where a project is to be completed within a defined timeframe. If an EOT regime is properly drafted and adhered to, it limits the scope for the prevention principle to apply as the contract will already expressly deal with the consequences of a delaying action by the other party.



WHAT ARE THE PRACTICAL IMPLICATIONS FOR YOUR CONTRACT?

When drafting an IT contract, it is important to consider a range of possibilities including where one party's actions could affect another party's ability to perform its obligations under the contract. Depending on the nature of the contract and how you wish to allocate risk, there are broadly three options through which you can address the potential application of the prevention principle:

- **Accept** - Accept that the prevention principle will apply to the contract by default, either by remaining silent or expressly acknowledging the application of the principle in the contract.
- **Exclude** - Expressly exclude the prevention principle by providing that there is an absolute obligation to perform irrespective of the conduct of the other party. One way to do this is to include an express provision to the effect that the performance obligation is not contingent on any inputs or assistance from the other party (or alternatively providing an exhaustive list of inputs or assistance that will be required).
- **Limit** - Limit the application of the prevention principle by drafting an EOT regime or other mechanism that expressly specifies the consequences when one or more parties causes delay or prevents another party from performing. In this case, while the principle may not apply in relation to the conduct covered by the express mechanism, it may still apply to other preventative conduct under the contract or where the regime's requirements are not met. Accordingly, careful drafting is required in order to ensure that the mechanism covers all likely contingencies.

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