

# ARE YOUR CONTRACTS CRISIS READY?

**Agile contract drafting**

**Towards contract  
resilience**

**Finding a balance**





## Challenges in the current environment :

- the COVID-19 pandemic,
- geopolitical threats such as the recent invasion of Ukraine,
- supply chain disruptions such as the floods in KwaZulu Natal and
- the current lockdown in China

**are unpredictable. The likelihood that your business will be hit by a highly threatening, unexpected event has never been higher.**

# WHY IS EFFECTIVE CRISIS PREPARATION SO UNCOMMON?

A decorative graphic in the bottom-left corner consisting of overlapping, semi-transparent red and white curved shapes, resembling a stylized wave or a modern logo element.

## **Necessary organisational changes:**

- close co-operation across organisational boundaries
- increasing awareness of possible issues
- bridging the gap between plan and implementation that may feel awkward at first.

**Contracts that define the working relationship between parties have teetered due to the period of uncertainty, and has caused plans and budgets to be re-assessed**

# 3 CRUCIAL FACTORS



People (connections and governance structure)



Readiness (planning and execution)



Testing (rehearsing actions in advance)

# Murphy's Law

Anything that can go wrong...  
Will go wrong.

## To be prepared:

- ◇ Assess your clients, suppliers, and internal staff
- ◇ establish appropriate governance structures
- ◇ create, and test your strategy
- ◇ reassess your readiness

**Doing this will benefit you more than waiting for a disaster to occur**



## Scrutinise contracts to determine exposure and implement measures to mitigate the risks

Agile contract drafting and planning for the unexpected

Preparedness is no longer limited to a few areas. We are forced to consider how this affects existing contracts and how to make our contracts work in a way that ensures business continuity.

It can be challenging to envision anything that can improve the situation during difficult times

Seek solutions that allow us to continue with the contracting process without liability or with minimal disruption to business continuity.

# HOW DO WE GO ABOUT DOING THIS?

## **Creating agile contracts that :**

- identifies business priorities and focuses on the deliverables.
- is tailored to meet specific objectives but maintains a fair amount of flexibility to allow for unavoidable changes in circumstances.

The disorderly spread of COVID-19 on a global scale raised legal issues that forced us to analyse and debate the contractual force majeure clause conundrum through multiple lenses.

Stronger focus to realise that legal issues relating to non-compliance with contracts during a crisis would have to undergo newfound scrutiny.



# Force Majeure

*['fòrs mā'yü-ər]*

A clause included in some legal contracts which protects one or more parties from liability in the event of a major unforeseen event.





Be cautious of Restrictive Language in a force majeure clause

Language appended after a comma can significantly alter the scope of the force majeure clause.

A comprehensive force majeure clause would include the all inclusive phrase “any event arising beyond the control of the parties rendering performance impossible”.



**Analyse the events to ensure that the following elements of force majeure are met:**

## **THE EVENT**

- **must take place after the contract has been signed**

- **must be unforeseeable**
- **If it was foreseeable, then force majeure may not be applicable**

- **must be outside of the parties' control, that it renders performance impossible or impractical**

# Consider the following questions:

**Is COVID-19 a type of event that triggers the relevant clause?**

**Are we the affected party or the unaffected party?**

**Must performance be "prevented" (essentially impossible) or is it sufficient for performance to be "delayed" or "hindered" for the clause to excuse contractual obligations?**

**What is the impact of the party's own actions in contributing to its inability to perform?**

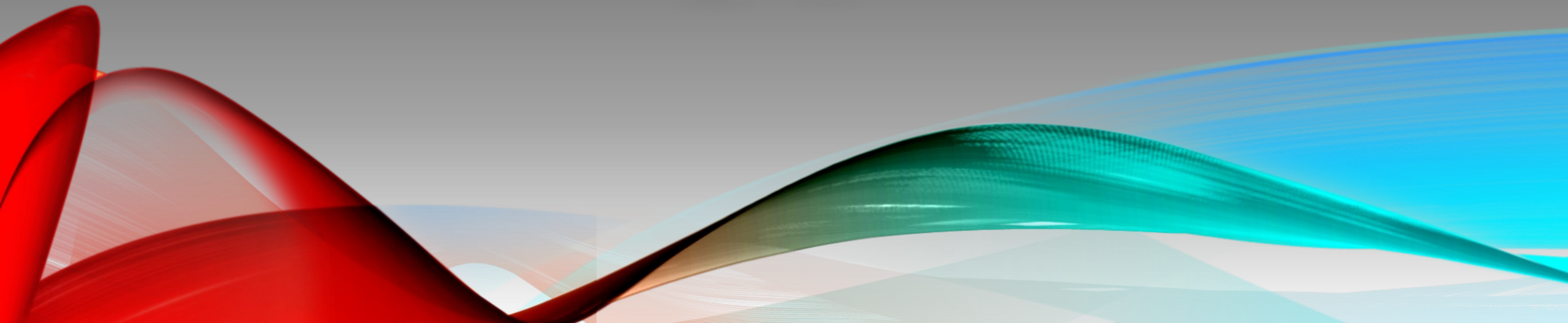
**When should notice be given?**

**Does giving notice have adverse contractual effects?**

**Is there an obligation to take steps to mitigate the consequences of the event?**

**Does either party have the right to terminate or delay performance of the contract if the clause has been invoked? If so, after how long?**

**WHAT'S  
NEXT?**



# The onus is on the party seeking to rely on force majeure to:

- immediately notify the other party
- show that it is the consequence of a force majeure event that may render performance impossible
- make reasonable efforts to minimise the consequences of the force majeure
- resume performance of its obligations as soon as possible after the termination of the force majeure

**There may be circumstances where parties would consider excusing underperformance and explore viable options**



# WHAT HAPPENS IF A CONTRACT DOESN'T CONTAIN A FORCE MAJEURE CLAUSE?

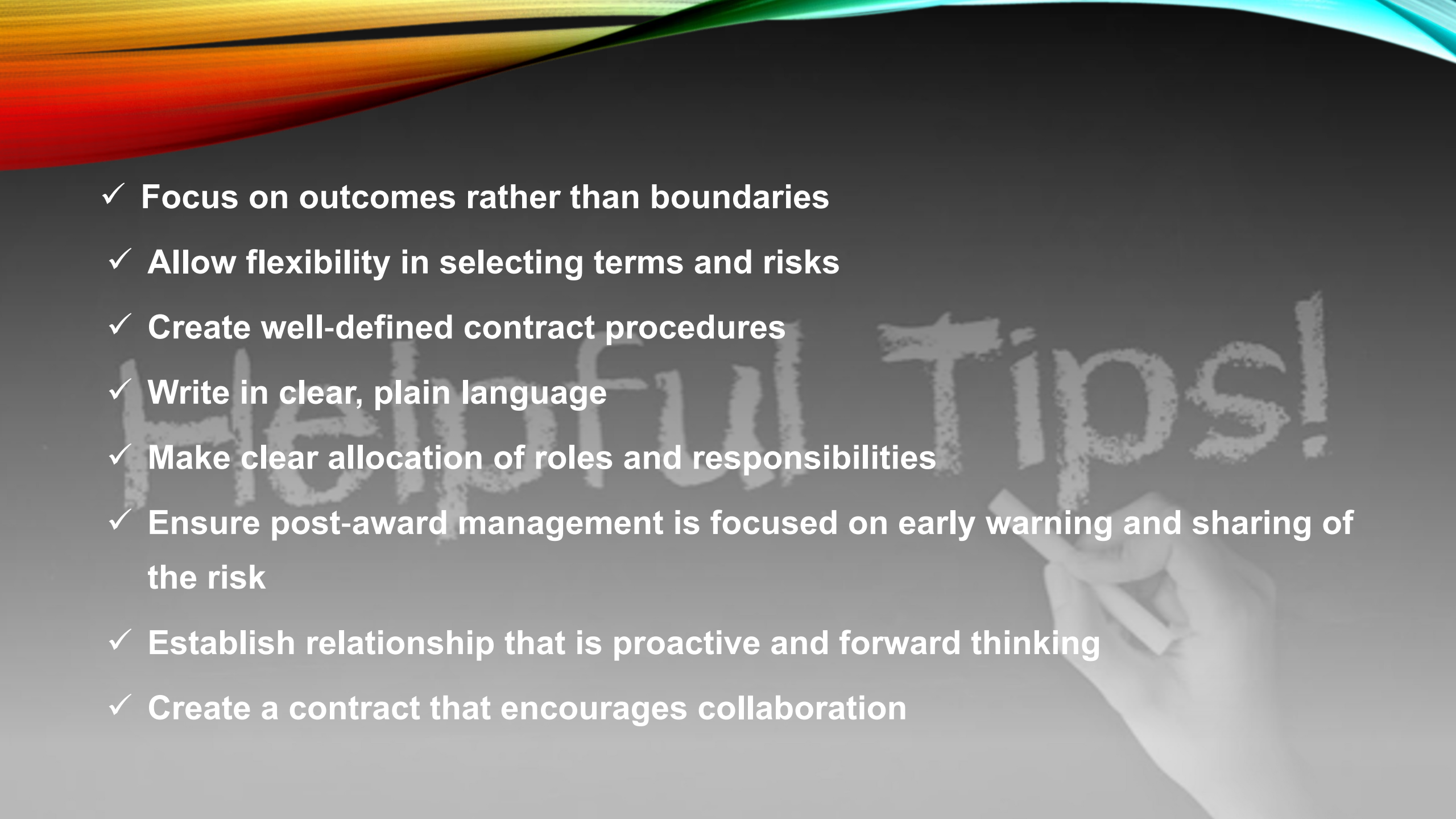
## ➤ **Supervening Impossibility:**

- the onus is on the party seeking to rely on the principle of to show that performance is objectively impossible and not just difficult or economically onerous

## ➤ **The role of Suspensive Conditions:**

- a condition which suspends the operation or effect of one, or some, or all, of the obligations under a contract until the condition is fulfilled. If the condition is not fulfilled, then no contract comes into existence


**Common Law and  
Suspensive  
Conditions**

- 
- ✓ **Focus on outcomes rather than boundaries**
  - ✓ **Allow flexibility in selecting terms and risks**
  - ✓ **Create well-defined contract procedures**
  - ✓ **Write in clear, plain language**
  - ✓ **Make clear allocation of roles and responsibilities**
  - ✓ **Ensure post-award management is focused on early warning and sharing of the risk**
  - ✓ **Establish relationship that is proactive and forward thinking**
  - ✓ **Create a contract that encourages collaboration**

# How to Mitigate the Impact of a Crisis:

- Timely review
- Prioritise the continuation of services
- Outcomes-based contracts
- Build strong stakeholder relationships
- Be mindful of the critical importance of the relationships with stakeholders to driving adaptation.
- Strategic Sourcing
- Follow the protocol in the case of Force majeure
- Record-keeping
- **NB. Remember to address the following:**
- is modification of contractual rights intended to be permanent;
- how long will the arrangements last.
- Will any of the amendments be revived on the recurrence of the force majeure event;
- Under what terms and conditions would payments continue without services





Stop  
worrying  
about the  
potholes in  
the road and  
enjoy the  
journey.

- Babs Hoffman



ANY  
QUESTIONS?

