



COMMERCIAL CONTRACTS - CLAUSES TO CONSIDER POST COVID-19

Businesses should now be conducting a wider review of their contracts to consider what changes could be made to better protect them in the Covid-19 trading environment. Here's a breakdown of some key clauses it is worth considering going forwards, along with a summary of matters to consider if your contractual relationships break-down.

1. Price variation clauses

Given the increased risk of material fluctuations in currency exchange rates, raw material and supply component costs in the wake of Covid-19, suppliers should:

- think very carefully before entering into a long term contract with a fixed price of supply
- consider provisions which allow them to increase the price charged for goods in the event that the cost of goods increases outside an agreed range.

2. Delivery commitments

Suppliers should be carefully considering contracts which require them to commit to delivery of goods or services on or by a certain date. This is particularly important where goods or services are supplied internationally, or where a supplier is reliant on sub-contractors, who may be at greater risk of failure, or staff or material shortages.

3. Service credits and liquidated damages

Suppliers should avoid or minimise, where they can, exposure to Service Credits or liquidated damages (a financial penalty) for late delivery.

4. Minimum purchase commitments

Businesses will need to be wary of contracts which contain an obligation to commit to certain minimum purchase volumes, given the risk of reduced demand in many sectors.

5. Term

It is likely that there will be an initial shift towards shorter-term contracts in the wake of Covid-19 as businesses contend with cash flow and supply issues.

What if the relationship does break down? What should be considered?

Termination on notice

Are you able to terminate the contract “on notice” i.e. for convenience? If so, it gives a business the flexibility to walk away if the contract becomes more difficult or expensive to perform in the future.

Termination for material breach

If you or the other party are unable to perform your contractual obligations - if it becomes more difficult or expensive - it is likely to result in a breach of contract and possibly, a claim for damages.

A failure to perform according to the contract terms can be a breach, even if the party is not morally to blame. If the failure to perform is a breach, it will normally give the other party the right to claim damages.

It may also give the other party the right to end the contract, if the breach goes to the heart of the contract (i.e. it deprives the party of substantially all the benefit of the contract). The other party can then claim damages for all its loss caused by the termination. Therefore, abandoning the contract without the other party's consent is risky.

Force majeure

Given there is no general rule of force majeure in English law, you can only rely upon it if it is expressly covered in the contract. It is generally defined as “an event beyond a party’s control”. Typically, it will enable you to be relieved from some or all of your contractual duties, but it will depend what it says in the contract itself. Therefore, going forwards, the wording of any force majeure clause should be carefully considered to ensure that it is appropriate and offers the right level of protection.

Frustration

Where a contract becomes impossible to perform, you may be able to argue that the contract is “frustrated” i.e. if performance of the contract has become legally or physically impossible through no fault of the parties. Consequently, the parties are discharged from their duties under the contract.

A frustrated contract ends automatically and immediately, without any action by the parties, who then have only limited rights to redress.

Frustration is notoriously difficult to establish. The threshold for frustration is very high, and the test is strict.

A mistaken allegation may amount to a breach of the contract, which may result in the counterparty itself terminating the contract and claiming damages.

Dispute resolution clause

Finally, it is important to give consideration to any dispute resolution clause within the contract, which typically sets out where a dispute will be tried, as well as the law which applies. This will avoid a lengthy



Conclusion

The above provide a flavour of the issues that we are currently advising businesses about in light of Covid-19. Our dispute resolution and commercial teams can offer your business expert advice and help in this area.

Please contact Stephen Thomas of our commercial team at sjthomas@hcrlaw.com or Jenny Raymond, of our dispute resolution team at jraymond@hcrlaw.com for further advice and guidance.



Steve Thomas,
Partner, Commercial

E: sjthomas@hcrlaw.com



Jenny Raymond,
Partner, Dispute Resolution

E: jraymond@hcrlaw.com