

Commercial Update April 2020

Termination and COVID-19; Space Sector Contracts

In the second of a series of briefings prompted by the unprecedented impact on business and general life that the Covid-19 virus is causing, Alden Legal looks at practical questions that arise in relation to the termination of contracts in the current circumstances

Practical Steps

If you have concern over any of your key supplier and customer contracts, you should check them now to understand which contracts you may wish to exit from and what you need to do if a counterparty seeks to exit an agreement with you. Be aware of the notification requirements (including when notices are deemed to be received), any remedy periods and the respective obligations of the parties on and after termination.

If you anticipate that a counterparty may seek to terminate an agreement, we advise that you seek to begin dialogue with that counterparty as early as possible to try to avert the potential termination and so protect either your revenues or your supply chain.

If you receive a notice of termination, you should acknowledge receipt and reserve your position and then take legal advice. In the event that legal proceedings do follow, it is recommended that detailed records are kept of the termination process.

Introduction

Given the impact of Covid-19 on businesses and trade, it is important for you to be aware of what rights and risks exist in relation to termination in your agreements. This applies whether you are considering terminating an agreement or have

received (or anticipate receiving) a termination notice from a counterparty. We expect that many companies will want to review their existing agreements and may look to terminate those that create material business risk.

Key action points for companies:

- *If there is a Force Majeure clause and Covid-19 qualifies as a Force Majeure event, there will usually be an associated termination right.*
- *The English courts set the threshold for material breach at a high level, in particular this is likely to be true in the current circumstances.*
- *Termination for frustration of the agreement may be possible.*
- *Be aware of the practical steps that need to be followed such as notice and remedy periods.*
- *If in receipt of a termination notice, protect your position by initially acknowledging receipt and reserving your position until further advice has been taken.*
- *Be aware of the risk of repudiatory breach.*

Termination for Force Majeure

In our [last Orrery Commercial Briefing](#), we considered the application of Force Majeure clauses to the Covid-19 pandemic. If an agreement contains a Force Majeure clause it will usually also include an associated termination right. Please see our previous briefing for a further discussion of this.

Termination for Breach or Material Breach

Most agreements will contain a right to terminate for either any breach or, more commonly, a material breach. Where an agreement is on a supplier's standard terms it is not unusual for the right to terminate for breach to only be exercisable by the supplier so you should check whether this right is mutual.

If the agreement contains a right to terminate for any breach or for a specific failure (for example failing to deliver goods by 1st April) the right to terminate should be relatively clear depending on the facts.

The threshold to terminate an agreement for material breach is, however, set by the English courts as a high bar. Although it will depend on the facts in each case, the courts do not look favourably on parties who seek to terminate an agreement simply because it has become too costly or onerous. The breach must deprive the innocent party from a substantial part of the benefit of the agreement or be a breach of a clause that is key to the agreement. In each case, this is judged against the facts. In the current circumstances it is likely that the English courts will not look favourably on parties who they feel are seeking to terminate an agreement opportunistically without a genuine reason.

Rights to terminate for (material) breach will often also include a remedy period which allows the breaching party a set period after notice within which to remedy the breach. You should be aware of the remedy period and allow any counterparty the right to seek to remedy their breach.

Frustration of Contract

Frustration is a common law concept and as such does not have to be an express provision in an agreement to be applicable. It is not a commonly used right as the English courts have seen it as a last resort to allow termination where any other result would be inequitable.

The doctrine of frustration allows an agreement to be terminated where its performance becomes impossible due to a subsequent change to the agreement's subject matter. It has been applied in circumstances where, after the execution of the agreement, the acts contemplated by an agreement became illegal or where the subject matter of the contract ceased to exist (eg. in wartime). Where a contract is terminated for frustration each party is released from any future obligations under the agreement and the courts have a right to require the repayment of prepaid monies or the payment of monies for work already undertaken where the agreement terms are in arrears.

Termination for frustration is not available where the agreement contains a Force Majeure clause that covers the terminating event, or where the agreement is simply onerous or costly to comply with or where the terminating event is caused by the acts or omissions of one of the parties.

Beware Repudiatory Breach

It is important that you only seek to terminate an agreement if you are certain that you have good contractual grounds to do so. Purporting to terminate an agreement without an appropriate contractual right is deemed to be repudiatory breach which will give the other party the right to terminate the agreement and to claim damages for wrongful breach.

This briefing considers termination clauses under English law, if your contracts are formed under another law, the analysis may differ. This briefing provides general guidance and does not constitute legal advice.



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