Dispute Resolution

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DISPUTE ESCALATION CLAUSES

In days long gone, most contracts did not have any dispute resolution clauses.

In certain sectors, construction for example, provisions which set out how disputes were to be resolved became much more prevalent.

Traditionally this would involve earmarking the English court (or sometimes an overseas court): the other frequent alternative was arbitration.

With increasing consumer protection and the influence of the EU, increasingly prescriptive rules have prescribed mandatory jurisdictions (generally when a business is dealing with a consumer, the court in which any dispute is to be resolved is the home court of the consumer, irrespective of any contractual terms which might suggest otherwise).

In business-to-business contracts, not only might a particular court (or arbitration panel) be given express jurisdiction, but there might be formal procedures that the parties are expected to comply with before court or arbitration procedures can be commenced.

Nowadays, commercial contracts increasingly include layered dispute resolution provisions, comprising, for example:

1. account managers to discuss;
2. escalation to board level of the respective parties;
3. mediation via an independent third party or the appointment of an expert to make an interim award;
4. and only then court or arbitration.

Traditionally the courts have been unwilling to enforce some of the rather more softly-softly, informal dispute resolution steps prescribed in a contract, but it now appears that they will increasingly do so, stopping litigation or arbitration if one of the parties has not engaged in the earlier pre-action steps stipulated in the contract.

As ever, the devil is in the detail of the particular dispute resolution provision. If steps in it are too vague, then they will be unenforceable. As a general note, they ought to contain deadlines by which a particular tier of dispute resolution should be concluded. Otherwise it will be open to a party in whose interests it will be to delay to do just that.

Also be alive to the risk that time bar problems could arise during the informal dispute resolution steps, as it is only if court or arbitral proceedings have been issued or a time suspension agreement has been reached with the other party that time for limitation purposes will not continue to run during whatever informal dispute resolution processes are being undergone.

European Orders for Payment

Obtaining recognition and enforcement of court judgments abroad can be costly and time-consuming. However, since December 2008 it has been possible for creditors to utilise the European Orders for Payment regime, which can make matters much easier where the debt is uncontested.

The procedure means that it is simpler to deal with cases concerning uncontested money claims. The regulation allows for the free circulation of European orders for payment through EU countries by laying down minimum standards, compliance with which renders unnecessary any intermediate proceedings in the EU country of enforcement.

The European order for payment procedure applies to civil and commercial matters in cross-border cases, whatever the nature of the court or tribunal and irrespective of the value of the uncontested debt. A "cross-border case" is one in which at least one of the parties is domiciled or habitually resident in an EU country other than the country of the court who would have jurisdiction to hear a claim relating to the debt (except Denmark).

The procedure does not extend to revenue, customs or administrative matters. It also does not include matrimonial property regimes, bankruptcy proceedings, social security issues or claims arising from non-contractual obligations.

The court to which an application for a European order for payment has been made (using Standard Form A) considers whether the applicability conditions have been met and examines whether the claim is "well-founded".

If the conditions for applying for a European order for payment are met, the court issues the order as soon as possible and normally within 30 days of the lodging of the application.

A European order for payment is issued solely on the basis of the information provided by the claim and is not verified by the court. The order becomes enforceable unless the defendant lodges a statement of opposition with the court of origin within 30 days.

If that period expires and the defendant has not produced a defence, the claim will be honoured and the decision becomes irrevocable. It is therefore important to act quickly if on the receiving end of a European Order for Payment.

Termination Rights: Valilas v Januzaj [2014]

The recent Court of Appeal decision in the case of **Valilas v Januzaj [2014]** has implications which are relevant in any commercial field. The case concerned whether one party, Mr Januzaj, was entitled to terminate the contract between himself and Mr Valilas because of alleged repudiatory breaches of contract by Mr Valilas.

The facts of the case were that the parties, both dentists, had an oral contract whereby Mr Valilas paid 50% of his receipts each month to Mr Januzaj as payment for his use of the premises, equipment and support staff, all of which were owned by Mr Januzaj. In 2010 the relationship between the parties deteriorated and in August 2010 Mr Valilas stopped making payments to Mr Januzaj. He also warned Mr Januzaj that, because of the stress which the breakdown of their relationship was causing him, he was not carrying out as much dental work as before. The parties understood that this was likely to lead to a situation where Mr Valilas would have to refund some of the advance monies which he had received from the Primary Care Trust for dental services. Since half of that money had gone to Mr Januzaj, there was a risk (never previously before considered in the oral contract) that Mr Januzaj would also have to refund some of the money he had received from Mr Valilas to the PCT.

Further correspondence was exchanged between the parties in which various proposals were put forward by both parties to resolve their dispute, but no agreement was reached. Eventually, in November 2010, Mr Januzaj gave notice to Mr Valilas terminating their agreement with effect from 10 November 2010. The following day Mr Valilas was excluded from the premises.

Mr Valilas brought a claim against Mr Januzaj for damages for breach of the oral contract, arising from Mr Januzaj's wrongful termination. Mr Januzaj counterclaimed for the outstanding monthly payments, alleging that he had given adequate notice of termination or, alternatively, that Mr Valilas' various breaches of contract (including his failure to pay) entitled Mr Januzaj to terminate the contract for repudiatory breach.

In the course of its judgment, the Court of Appeal considered the various attempts which had been made in the past to formulate a principle to identify cases in which a repudiatory breach of contract had occurred. The two expressions most commonly used are circumstances where one party has been "deprived of substantially the whole of the benefit of the contract"; and circumstances where a breach is such that it "goes to the root of the contract". The Court of Appeal noted that both of these expressions were somewhat vague, but felt that issues concerning repudiatory breaches of contract were so myriad that it was unlikely any satisfactory fixed rule could reasonably be formulated.

In Valilas, the Court of Appeal decided to use "deprived of substantially the whole benefit" test and held that a court's evaluation of this test would take into account all facts relating to the nature of the contract and the relationship that it created; the nature of the term which had been breached; the kind and degree of the breach; and the consequences of the breach for the injured party. On the facts, it concluded that, taking into account the correspondence from Mr Valilas where solutions to the dispute had been proposed, the likelihood was that Mr Januzaj would receive payment under the contract, albeit late. This, coupled with all the other circumstances of the case, led the Court of Appeal to conclude that Mr Valilas' breach of contract had not deprived Mr Januzaj of substantially the whole of the benefit of the contract.

The Valilas case emphasises the significant risks associated with terminating on the basis of a repudiatory breach of contract. If a party to a contract cannot rely on a contractual right to terminate, but nevertheless wishes to bring a contractual relationship to an end, careful legal advice should first be taken so that the risks associated with termination based on a possible repudiatory breach of contract can be fully understood.

UPCOMING EVENTS:

9 September – Business Academy Ipswich and
17 September - Business Academy Chelmsford

Topic: Family Businesses
External speakers: Dan Aldworth and Alex Scarfe of Griffin Chapman
See prettys.co.uk/events for more information

CANCELLATION RIGHTS FOR DISTANCE SELLERS

The *Consumer Contracts (Information, Cancellation and Additional Payments) Regulations 2013* (the "**Regulations**") have replaced two existing regimes on distance sales (currently set out in the Distance Selling Regulations) and doorstep sales. The key changes for distance selling are:

1. Minimum statutory cooling off period of 14 calendar days (currently 7 working days);
2. A 12 month period for the consumer to cancel if the business fails to provide information on the cancellation right (currently 3 months);
3. Introduction of a model cancellation form for distance sales (although cancellation will still be valid if the consumer uses a different form);
4. Ban on default pre-ticked boxes for additional payments;
5. Obligation to deliver goods within 30 days unless otherwise agreed;
6. Changes to the mandatory pre-contract information to be provided; and
7. Ban on premium rate helplines for order queries

The Regulations also specifically recognise digital downloads as a separate form of product or service for the first time and contain different rules for cancellation rights in respect of these.

Where the cancellation right is exercised, the retailer will still be obliged to refund delivery costs as well as the cost of the item; however, where the customer has paid for a delivery service over and above the basic service, the retailer will only have to fund an amount equivalent to the cost of the basic service.

The customer will bear the direct cost of returning the product (unless of course the retailer has either agreed to do so or failed to inform the customer that they are responsible for this in their terms and conditions). The information which retailers are required to provide before the contract is made has also increased (the number of items required has roughly doubled).

The Regulations implement the European Consumer Rights Directive, which also contains provisions restricting excessive payment surcharges. The excessive payment surcharge provisions are actually already part of UK law following the coming into force of the *Consumer Rights (Payment Surcharges) Regulations 2012* in April 2013.

The Payment Surcharges Regulations ban excessive payment surcharges (for example for credit and debit card payments) which exceed the cost to the business of using such payment methods.

There are a few specific pitfalls for online retailers to be aware of as a result of the Regulations. These include requirements to:

1. Provide a button which states 'Order with obligation to pay' for use when customers confirm orders;
2. Obtain explicit acknowledgment from a customer that they do not have a right to cancel once a digital download has started;
3. Not levy a deduction by reference to the extent that use of the goods by a customer has reduced their value, e.g. if it was reasonable for the consumer to remove the packaging to inspect the item; and
4. Ensure that help line charges are limited to geographic, free-phone or mobile numbers only. Using premium rate numbers for this purpose is no longer permitted.

The Regulations don't apply to every kind of contract. There are a number of exclusions such as personalised or bespoke goods, investment items whose values may fluctuate and items where hygiene concerns apply such as earrings.

The Regulations go beyond online retail though; providers of professional services who sign up clients remotely will also need to consider the new rules and make sure that clients have given an express request for the supply of services to start before the end of the cancellation period.

Under the new Regulations, the right to cancel is only lost once the service in question has been fully performed. If this isn't the case then even if the consumer has made an "express request" for the service to be provided before the end of the 14-day period then they will still be able to cancel, provided they pay a proportional amount based on the extent to which the service has been provided.

Where the total price quoted is "excessive" the consumer will only be required to pay the relevant proportion of the market value of the services (calculated by comparing prices for equivalent services from other traders) (see Regulation 36(5)).

If the trader hasn't provided the required information on cancellation rights and the amount payable for cancellation (or the services weren't provided during the cancellation period at the "express request" of the customer) then the customer won't have to pay anything for the services provided during the cancellation period.

The Regulations now apply to all contracts entered into after 13 June 2014. Distance selling businesses need to review and update their terms and conditions as soon as possible to avoid being caught out.

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