



briefing

dispute management – autumn 2008

using key terms in a commercial contract to control disputes

When a commercial contract goes wrong, it can take a great deal of time and involve many people to achieve continuity of service. Attempting to resolve any disputes that have arisen, can also become costly, especially if Court proceedings are commenced. However, having the following key terms in a contract can help you to control any dispute that might arise.

Governing Law and Jurisdiction Clauses

These clauses are very important if you contract with anyone based outside England and Wales. That includes Scotland, Ireland and any companies which are wholly owned by foreign registered companies.

The governing law clause specifies which country's law will apply to the interpretation of the contract in the event of a dispute. It is obviously most advantageous for this to be your home jurisdiction as this will reduce costs and give you a greater degree of control. In the absence of an express choice being made in the contract, the Courts will decide which country's law applies. Generally, this will be the law of the country with the closest connection to the contract. In contracts for the provision of services, this is usually the country in which the services are performed. However, it is best to have the clause properly drafted to achieve certainty and avoid the expense and delay of the Courts deciding the issue.

The jurisdiction clause should support the governing law clause by stating that the Courts of England and Wales will have exclusive jurisdiction to hear the matter. It is possible, in certain circumstances, for foreign courts to hear the matter under another country's law but this is both expensive and impractical.

Entire Agreement Clause

This prevents a party from seeking to rely upon any statement or representation other than those expressly set out in the contract. This helps to achieve commercial certainty in relation to the obligations under the contract and also acts as a safeguard against unauthorised or misconstrued statements by staff.

Ideally, the clause requires two parts – firstly, that the contract contains the whole agreement between the parties and supersedes any previous agreement, and secondly, that no party relied upon any representation which is not set out in the contract.

You should also consider the time periods over which termination can place and whether immediate termination is practical in relation to other obligations such as transfer of assets, staff, insurance and continuity of service.

If you require the ongoing cooperation of the other party, you should make sure that such cooperation is a written requirement in the contract. This could include the transfer of licences, novation of agreements, signatures for the release of particular assets, the return of equipment or confidential data, or providing initial support to the replacement supplier/provider.

The circumstances in which you are entitled to terminate the contract must be clear. Material or persistent breaches are often a justification for termination, but if you have defined these concepts clearly in the contract it removes much scope for argument as to whether you are justified in terminating. If ambiguous terms are construed against you, you may face a loss of profits claim from the service provider who has just lost a high income stream from a long term contract.

Dispute Resolution

A good dispute resolution clause will be drafted to suit the specific needs of the contract. In order to avoid a 'mini-trial', the clause can start with an obligatory period of negotiation which can aid a swift and effective

commercial resolution without reliance on legal technicalities and while maintaining the working relationship. Misunderstandings, which are the root of many problems, can be cleared up during this period.

If negotiation is unsuccessful, the next step could be a referral to mediation. If this step has been written into the contract, there can be no worry about being perceived to be weak by suggesting mediation over litigation.

Only once these steps have been taken, might it be possible for parties to issue Court proceedings if the dispute still has not been resolved.

Tactical Considerations

If a dispute does arise, taking legal advice at an early stage will help to clarify your options and is likely to assist the early resolution of the dispute. There are also procedural and practical steps you can take.

Firstly, make use of the pre-action protocols, which oblige the parties to exchange information and documentation before Court proceedings are commenced. As a Claimant, you must send a sufficiently detailed letter of claim to the Defendant, along with any documentation which will allow the Defendant to investigate the claim. As a Defendant, upon receipt of the above from the Claimant, you can investigate the claim and, if you dispute it, must set out why in a clear manner (again providing sufficient information and documentation). This process helps the parties to realistically assess their respective positions and consider whether they really want to take the claim through the Courts.

Secondly, you can make a formal offer of settlement under the Court rules (called a Part 36 Offer). You can make this offer whether you are Claimant or Defendant. The Courts are keen on early settlement and making a Part 36 Offer at an early stage will put you in a strong position as, should the other party refuse the offer and fail to beat it at trial, the Court will impose costs and/or interest penalties.

Mediation is another process than can be used (even if not mentioned in the dispute resolution procedure under the contract). Mediation brings with it the added benefits of privacy and savings in both time and costs when compared to litigation.

Practical considerations include having effective internal procedures to ensure that disputes are picked up quickly, rather than festering in somebody's in tray, and that somebody with appropriate authority can investigate and, hopefully, settle the dispute at an early stage. The worst reaction to a dispute is to ignore it!

Finally, you must not put yourself in breach of your contract, even though it may be tempting to stop paying

a party who is failing to provide a service. This could give the other party a claim against you.

Considerations when dealing with a dispute

- When negotiating a contract, look for:
 - **Governing law and jurisdiction clauses.** In the absence of an express choice being made in the contract, the Courts will decide which country's law applies which can cause delay and expense.
 - **Any entire agreement clause.** This prevents a party from seeking to rely upon any statement or representation other than those expressly set out in the contract.
 - **The termination provisions clause.** One party seeking to withdraw from the contract is a situation that causes more disputes than any other.
 - **A dispute resolution clause.** Misunderstandings, which are the root of many problems, can be cleared up during this period.

Consider Mediation. Mediation brings with it the added benefits of privacy and savings in both time and costs when compared to litigation.

- Check your internal procedures to ensure a dispute is picked up and dealt with quickly. Do your staff know what to do when faced with a dispute?
- If a dispute does arise, taking legal advice at an early stage will help to clarify your options and is likely to assist the early resolution of the dispute. The worst reaction to a dispute is to ignore it!

David Hudson

Associate

T: 029 2038 5403

E: david.hudson@morgan-cole.com

[Image]

David deals with a wide variety of commercial disputes in both the High Court and the County Court. He acts for a range of public and private sector clients and regularly advises on alternative means of settling disputes, including mediation.

David has a particular specialism in dealing with disputes arising from the procurement and supply of IT software, systems and facilities management services. He also deals with disputes involving general contractual issues, intellectual property rights, commercial agency contracts, contracts for the supply of goods or services and judicial Review proceedings.