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Recent developments in commercial contracts (2020)

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1

Recent developments in commercial contracts (2020)

The law as stated during this webinar is up to date as of **17th December 2020**



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2

Introductions



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3

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4

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Legal Update
Recent Developments in Commercial
Contracts (2020)

5

CIGA
Overview and Contract Implications

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Focus in this section

- Corporate Insolvency and Governance Act (in force from 26 June 2020)
- The Key Changes:
 - most notably*
 - new bar on a supplier of goods and services terminating a contract
 - other points to note*
 - new form of company moratorium
 - sits outside of the insolvency regime
 - can be a precursor to insolvency
 - introduced a new restructuring plan

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7

The New Moratorium

- CIGA applies:
 - to contracts for the supply of goods and services (including contracts entered into before CIGA).
 - where a customer becomes subject to a relevant insolvency procedure on or after 26 June 2020.
- Key features of the new moratorium:
 - no need for any existing or subsequent insolvency process (and where a winding up petition has been presented already there is a need to apply to the court)
 - up to 20 days
 - an insolvency practitioner is appointed to monitor the moratorium
 - an extension can be obtained for up to 20 days without creditor consent
 - with creditor consent the moratorium can last up to a year

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8

Key Effects

- Key effects on the company
 - payment holiday in respect of all **pre moratorium** debts
 - must pay for goods and services supplied **during** the moratorium
 - must pay rent, wages and salaries
 - must pay financial services contracts, such as a bank loans
- Key effects on creditors:
 - **cannot** commence insolvency process
 - **cannot** commence or continue legal proceedings
 - **cannot** enforce securities
 - **cannot** repossess goods or premises
 - **cannot** crystallise a floating charge
 - **cannot** enforce judgments
 - **cannot** terminate the relevant agreement

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9

Applicability of CIGA

- CIGA is likely to apply to most contracts for the supply of goods and services although there are limited exclusions for example for essential supplies which is broadly defined as:
 - gas, electricity, water,
 - communications services (being goods and services for the purpose of enabling or facilitating anything to be done by electronic means (e.g. computer hardware and software, information, advice, technical assistance, data storage and processing and website hosting))
- Essential supplies may be governed by a existing separate (more limited) regime.
- Otherwise CIGA applies.

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10

Contractual Considerations

- Clauses to consider:
 - Termination for:
 - pre-insolvency steps
 - financial position deteriorating
 - convenience
 - non-payment
 - Requirement to provide regular financial information including notification of any pre-insolvency or insolvency events.
 - Tighter payment terms including:
 - payment / part payment in advance
 - payment by instalments
 - reducing payment periods
- Structuring considerations:
 - structuring the contract as a series of separate contracts that a supplier is free to decline.

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11

Practical Considerations

- Steps to take:
 - Review existing contracts.
 - Amend standard form templates and review internal processes for enforcement.
 - Consider training for contract managers so they know what they should and should not do if a customer shows signs of financial distress.
 - Consider greater due diligence on customers pre-contract and throughout.
 - Actively monitoring each customer's payment performance and financial position.
 - Ensure invoices are paid when due and tighten debt collection procedures.
 - Consider invoice finance options / trade credit insurance.

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12

The Future

- Wider considerations:
 - Intention: allow businesses to trade through difficulties
 - Effect: many suppliers might seek to be more pro-active in managing their contracts and reserve rights to terminate when they want ('for convenience') or if insolvency is merely threatened.
- Too aggressive management of this may push businesses into insolvency earlier than would otherwise be the case.
- The full impact of the Act won't become clear until:
 - The market has had time to react to the new processes; and
 - the courts pass their judgment on how certain sections work.

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13

Brexit
The impact on commercial contracts

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14

Brexit: Legal Effects

Brexit will affect UK legal practice in many ways:

- On 31 December 2020 the UK will repatriate its law-making powers (in those areas previously "outsourced" to the EU).
- The challenge in the months and years to come is to understand how, in practice, our laws may change.
- This is likely to be complex and multi-faceted.

But limited impact on English contract law

The greater impact is in commercial areas

This section sets out the most common contractual considerations

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15

Brexit: Commercial Effects

This is a starting point only and is **not exhaustive**

Remember: there is **no one size fits all**

- Sector-specific requirements
- Subject-specific requirements
- Party-specific requirements

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16

Brexit: Commercial Considerations

- Performance risks
- Supply chain
- Market conditions
- Border controls and customs formalities
- Freedom to provide services
- Labour market and free movement of people
- Place of performance

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17

Brexit: Commercial Considerations

- Licences, permits and consents
- Tariffs
- Currency exchange rates
- Regulatory
- VAT
- Other factors

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18

Brexit: Some more to think about

- Incoterms
- Rules of origin
- Data Protection
- Defining territories
- Governing Law
- Jurisdiction

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19

Brexit: Mitigations

- Binding supply / purchase obligations
- Brexit Clause / Hardship clause / material adverse change
- Change control clause
- Statutory references / Change of law
- Duration, termination and exclusivity

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20

Brexit: Reliefs?

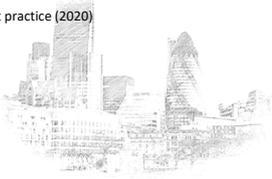
- Interpretation
- Implied terms
- Frustration
- Force Majeure

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21

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- Consumer law in 2020
- Data protection for commercial lawyers (2020)
- (Brief) Supply chain management update: the draft Corporate Insolvency and Governance Bill (2020)
- The latest in competition law (2020)
- The latest tax cases (2020)
- Execution of documents: pitfalls and best practice (2020)



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22

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23

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24
