

Contract drafting and management in the COVID-19 era

Tuesday 24 November 2020, 4.00 - 5.00 pm GMT

Key Takeaways...

from Baker McKenzie's Future of Disputes spotlight session

The session focused on the constant challenge for companies, and their in-house counsel, of how to manage contract risk to avoid future disputes. Whilst dispute resolution lawyers generally focus on assisting clients when a problem arises, value can also be offered through helping clients to avoid the pitfalls associated with disputes in the first place. Focusing in particular on long-term contractual relationships, the session explored the lessons learnt from the recent past and during the current COVID-19 pandemic, and looked to where the team anticipates issues arising in the future.



Pre-contract management and the importance of effective due diligence

Before entering into any contract, it is important to identify the correct type of contractual counterpart, and think critically on how to mitigate potential risks. In a supplier relationship, consideration of multi-sourcing to manage pandemic or Brexit challenges, or to aid geographic diversification, was recommended by the speakers, as was a risk assessment to take account of relevant sanctions, import/export restrictions and regulatory issues, amongst others. Effective due diligence, be it financial, operational, or regulatory and compliance, will aid understanding of a contractual counterpart. With increased stakeholder engagement and regulation, sustainability is also becoming a key consideration for effective pre-contract management.



Getting the contract right; aligning the contractual terms to the commercial reality

The session discussed how COVID-19 is impacting the contracting process itself. The speakers noted that there are three main themes that they are seeing clients focus on in negotiations, which are likely to have a material impact on the types of disputes which might arise in the future. These are: (1) deal shape; (2) contractual evaluation mechanisms, and (3) the ability to cope with change and the unexpected.

Exploring trends in the COVID-19 era, Baker McKenzie carried out a survey with colleagues globally on how contract negotiation has altered due to the pandemic. The results showed that in 36% of cases, "The definition of force majeure was modified to expressly refer to pandemics and epidemics". However, 16% expressly excluded and 17% expressly included COVID-19 as a force majeure event, illustrating the impact of parties' relative bargaining powers. In addition, in 14% of cases, the contract included an express COVID-19 clause, showing the apparent insufficiency of a usual material adverse change clause to cover COVID-19 performance issues. Looking to the future, the survey recorded that in almost 60% of cases there had been no steps taken, to date, to amicably resolve issues outside the contractual framework. Such a result leads to speculation as to whether formal disputes may arise in the future. Drawing upon these results, the session highlighted the importance of drafting clear termination and dispute resolution mechanisms from the outset, thus potentially minimising discussions down the line.



Understanding the deal; how to make the most of contractual mechanisms to suit you

From the point at which the ink has dried on a final agreement, the contract execution team steps in. At this juncture, it is crucial that all key stakeholders pause to consider the contractual terms they are inheriting, to ensure those terms and roles are understood. The session highlighted the importance of in-depth handover meetings between key personnel, to share valuable know-how and the parties' subjective understanding of the contracted deal. The importance of good contract storage, in particular of the final form agreement, and the use of practical tools to aid contractual understanding, such as key term summaries and the diarising of key dates, were stressed as a means to set up successful contract management.

The session stressed that by implementing best practice in those early contractual stages, a party will ensure not just that they are not acting to prejudice their position but that, in the right circumstances, they improve it.



Protecting your interests; how to prepare for, and position yourself favourably in, the early dispute stages

The session concluded by discussing the choices and actions to take in the early stages of a dispute in order to assist in resolving that dispute as soon as possible, and avoid the need for protracted and expensive litigation or arbitration. To that end, the importance of asserting contractual rights in a calm, reasoned and evidenced manner was emphasised, as was the benefit of being aware of alternative dispute resolution options, such as the increasingly popular mediation, or expert determination. Looping back on previous points, the importance of creating and maintaining contemporaneous written records throughout the life of the contract and dispute was underlined as a key mechanism to collect the evidence required in any dispute. The session culminated in its message as to the importance of considering contract management as a cyclical and complementary process.



Rigorous contract management and regular health checks; keeping contract operation on track

The importance of contract management and regular health-checks cannot be understated. Noting the significant external pressures businesses have been subject to recently, the session highlighted the correlation between how well the business was, and is, able to cope with these pressures and the systems that they have in place. By advocating a systematic and regular 'health check' performed by an external contract management team, a business is able to identify real critical issues, and any discrepancy between what the contractual reality 'is' and what it 'should be'. Through approaching a project with fresh eyes, an external health check can ensure your business is in the best position in any possible formal dispute, and help prevent a dispute arising at all.

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