Brexit: Customs Border Delays and Contractual Issues

How will Brexit affect goods crossing the EU border? If your goods are delayed for any reason, what comeback do you have? You need to check the contract and our new article shows you how to do that.

It is widely predicted that Brexit and the trade agreement reached just before Christmas will have a very limited effect on our Contract Law. However, it is undoubtedly going to have an effect on some of the specific terms and obligations of certain contracts.

It has been widely reported in the news about the severe delays that are being experienced at the borders - both of goods leaving the UK and those entering the UK from the EU. There have been eye-catching headlines of meat beginning to rot in the back of lorries whilst waiting to be exported to the continent and also that some UK Retailers are suggesting burning goods which they have stored in the EU as it would be cheaper than bringing them to the UK.

The post-Brexit trade agreement signed last month means there are no tariffs on goods sent across to the EU but new regulatory and customs checks now apply. This article is going to consider what I predict will be the most common issue to arise at the moment, that of delay. Specifically, goods being delayed reaching the expected destination, which could in turn, potentially result in contractual penalties, possibly termination and then civil claims for breach and damages thereafter.

It is recommended that the place to start, as with nearly all contractual issues, is the contract itself. For the foreseeable future, it would be prudent for businesses to assess whether any contract that they are due to fulfil / perform is likely to be delayed and to have contingency plans in place.

This is particularly relevant to perishable goods. Companies need to consider what effect the delays caused by additional custom requirements and checks at the Channel ports could have on their products, including whether these goods are likely to deteriorate and if quality will be affected.

Businesses should, in advance, be clear regarding any specified dates for delivery and should, where reasonably practicable, take any additional steps required to meet the deadlines.

This could include sending deliveries early, by alternative methods and / or sending vehicles capable of maintaining the quality of the goods for longer.

Businesses will therefore also need to consider if any contract will ultimately become more difficult, more expensive or even impossible to perform.

If a contract has become impossible to perform, it could be deemed as "frustrated". The test for the English law doctrine of frustration is outlined in the case of *Nation Carriers -v- Panalpina (1981)*. Frustration occurs when:

> "*...there supervened an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and / or obligations from what the parties could reasonable have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulation in the new circumstances*."

Courts are somewhat reluctant to apply frustration and when they do so, it is a very narrow application. Therefore, each potentially affected contract/situation would have to be considered individually and we would recommend that you seek specific legal advice.

Generally, when the doctrine of frustration applies, any monies are refunded, less any reasonably incurred expenses. This is, however, not guaranteed.

If a contract has only become more difficult or expensive, it is unlikely to be deemed to be frustrated. However, businesses may to wish to consider the commercial viability of fulfilling the contract and it may be worthwhile scrutinising the figures and balancing any termination penalties against the cost of completing the contract.

Consideration must be given to the termination clauses. These clauses will usually set out when and how the contract can be terminated, along with any relevant notice periods or termination penalties. It is important to carefully consider and to strictly follow these clauses to ensure termination is done correctly. Invalid termination will undoubtably cost you significantly more and could put you in a worse position then if you had satisfied the contract.

As above, each contract would have to be considered individually and we would recommend that you seek specific legal advice.

Commercial contracts can also include a “Force Majeure” clause or other similar clauses. These clauses allow for the contract to be varied or even terminated if a certain event or events occur. The event or events will usually prevent one or both of the parties from satisfying part or all of the contract.

Careful consideration must be given to the clause and how it is worded, including any process set-out that a party must follow to rely upon the clause e.g. written notice within 7 days. Some clauses can define these intervening events and deal with them in a more general way.

The party seeking to invoke such a clause must prove or supply evidence that not completing the contract was due to a Force Majeure event and is under a duty to mitigate any losses.

It is important to check that a contract has such a provision included with its terms because a Court will not imply any such term into the contract.

When drafting a Force Majeure or similar clause, it is important to carefully deliberate on how concisely to draft the clause and the reasonably practicable process to be followed by a party seeking to trigger it. There is some case law on the explicit wordings of such clauses, which may affect their validity and therefore it is important to seek legal advice, given the potentially vast ramifications.

Conclusion

We believe your starting position must be to consider the terms of the contract and how these may apply. When drafting and entering into any new commercial contracts, it makes commercial sense to include comprehensively drafted clauses to deal with any delays. Again, specialist legal advice should be sought when doing so.

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