TRG Executive BRIEFing – DECEMBER 2017

CAN A CONTRACT CONTAINING A MISTAKE BE CORRECTED?

Overview:
The short answer is 'yes'. Contracts are often negotiated and rushed through to completion in a great hurry to meet an urgent deadline. There is always the chance, particularly where multiple drafts are involved, that the parties will use the wrong document when the time for signature comes. Should that happen and the parties cannot agree on the way forward, it is possible that the Courts will correct the position to bring the terms of the contract in line with what they understand to have been the parties' intentions.

What types of mistake can the Courts correct?
There are two categories of mistake where the Courts can order a correction – common and unilateral.

Common mistake:
- This is where both parties mistakenly believe the document in question reflects their common understanding. For example, if it is clear from the evidence that the parties had agreed and documented an updated position and did not realise that they were signing an out of date version, the Courts will allow correction of the document provided the necessary evidence of the mistake exists.
- Evidence will include previous drafts as well as correspondence between the parties and their advisors. Such evidence is not typically strictly allowed to be presented in relation to the interpretation of contracts by the Courts. For this reason, those making a claim may raise arguments based on a mistake if they think that the Court might come to a conclusion in their favour if the judges see pre-contract correspondence.

Unilateral mistake:
- This occurs if one of the parties realises there is a mistake before signature but seeks to take advantage of it and fails to alert the other party. It is not clear what degree of knowledge of the mistake is required but 'wilfully shutting one's eyes to the obvious' or 'wilfully and recklessly failing to make such enquiries as an honest and reasonable person would make' have been found to be enough.
- There is therefore clearly a risk in failing to make enquiries if you suspect the other side has made an unintended mistake in the drafting of a document.

Action point:
It is always best to check signature versions carefully to avoid inadvertently signing the wrong document. However, it is comforting to know that the correction of an error is possible should a genuine mistake occur.

BE CAREFUL WHEN ENDING A CONTRACT

Overview:
Great care needs to be taken when seeking to end or terminate a contract – if an innocent party terminates wrongly in circumstances where it did not actually have the right to do so, that party can inadvertently become the party in breach of contract. This could then allow the party who was thought to be at fault to itself end the contract and potentially claim compensation.

Why is this a risk?
This is a particular risk because most contracts permit termination following a 'material breach', which has an inherently uncertain meaning and so can be interpreted differently by different people.

What should you do?
- If possible, you should set out in the contract certain and objective instances of non-performance which would amount to a material breach justifying termination; specific levels of late or non-payment are obvious examples.

- Do not delay unreasonably when considering terminating as by simply saying nothing, you may unintentionally have waived your rights to terminate. What will amount to an unreasonable delay will depend upon the individual circumstances.
- Be careful if you become aware of facts giving you a right to terminate an agreement but you positively act in a manner which suggests that you regard the contract as still continuing. This may occur if you carry on performing obligations in accordance with the contract and demand that the other contracting party does likewise. You could lose your right to terminate in these circumstances so consider writing to the other contracting party to put it on notice that you are 'reserving your rights' to terminate for a finite limited period. This should be effective in preserving your position whilst you gather additional evidence, consider your position or seek to negotiate a settlement.

What is a 'no waiver' clause?

- Many contracts contain a so-called 'no waiver' clause which states that a simple delay by one party in enforcing its rights under the contract will not prevent that enforcement by amounting to a 'waiver' of those rights.
- But beware, the effectiveness of such provisions is doubtful. Case law has suggested that even with such a clause in a contract, an unreasonable delay could be treated as a binding and enforceable waiver of your rights.

So is terminating a contract akin to walking a perilous tightrope?

Yes! Act too quickly before a breach is sufficiently material and you risk putting yourself in breach. Fail to act with sufficient speed and you may be taken to have waived your rights. You have been warned …

ENSURE NOTICES TO END A CONTRACT ARE GIVEN PROPERLY

Overview:

A party wishing to end or terminate a contract should comply exactly with the requirements in the contract which set out how a formal notice to terminate should be given to the other party.

Not known at this address?

- In a recent case notice of a claim for breach under a share purchase agreement had to be given to the sellers by a particular date at the address set out in the notices clause or as otherwise notified by the sellers to the buyer. In the event one of the sellers had moved house but had not informed the buyer of its change of address.
- On the last day on which notice of a claim could be given, a courier went to the address in question only to be told that the individual had moved house. The courier therefore left, taking the notice with him.

What was required for delivery of the notice to be effective?

- The Court decided that what was required was delivery of the notice to the address specified in the contract as opposed to ensuring it was actually received by the named individual. It was irrelevant that the individual in question soon become aware of the claim via an indirect route.
- The delivery required could be achieved by posting the notice through the letter box, pushing it under the door or leaving it with a person at the address. The Court said that notice provisions are intended to assist the party who has the obligation to give or serve the notice and provide certainty. The purpose of such provisions is not to bring the notice to the attention of the receiving party and it makes no difference whether that party is unaware of the notice.
- The Court commented that if a party chooses not to notify the other party that its address has changed, it bears the risk that a binding notice may be delayed in coming to its attention, but it does not affect the validity of the notice.

Action point:

As a general rule, ensure that you notify any change of address to the other party. Otherwise there is a significant risk that although a notice may not ever come to your attention, the notice may nevertheless be validly served. The party receiving the notice in the case mentioned was extremely fortunate that the buyer's courier did not leave the notice at the relevant address and therefore escaped liability. However, things could have turned out very differently if the courier had not taken the notice away.

CONTRACTS AND RIGHTS OF THIRD PARTIES

Overview:
For many years it was a fundamental principle of English law that a contract could only be enforced by and against the parties to the contract. This was the so-called 'privity of contract' principle which was abandoned when the Contracts (Rights of Third Parties) Act 1999 ("**1999 Act**") came into force. So someone who is not a party to a contract (a 'third party') can now benefit from it.

How can a third party benefit from a contract?
- To enable a third party to have the benefit of a contractual right, that party must either be identified in the contract by name or be within a particular class or description.
- Shortly after the 1999 Act became law, the Court of Appeal took quite a restrictive approach when deciding whether a particular third party had been sufficiently identified as being part of the class in question. However, more recently the High Court has made comments which suggest a more pragmatic approach may be taken in future.

In which countries does the 1999 Act apply?
The 1999 Act only applies in England and Wales. That is partly explained by the fact that Scottish contract law has long recognised the principle that a contract may give enforceable rights in favour of third parties. However, the rules governing the creation of such rights have been considered as being inflexible. One of the primary concerns has been that Scottish law requires that once granted, the extent of the third party rights cannot be varied by the contracting parties acting alone. Proposals have therefore recently been published for a Contract (Third Party Rights) (Scotland) Act which may come into force soon. This is a useful reminder that the law of contract which applies in England and Wales is distinct from the Scottish law of contract in some respects.

Action point:
If it is intended to allow third party rights in favour of a particular class, care must be taken to ensure that the qualifying class is identified with precision. Otherwise possible beneficiaries may find the rights impossible to enforce.

DATA PROTECTION DEVELOPMENTS

Overview:
As the date when the General Data Protection Regulation ("**GDPR**") comes into force (25th May 2018) gets closer and closer, data protection issues are almost perpetually in the news. We would like to specifically mention two areas where developments have taken place recently. Also, note the GDPR refers to 'controllers' and 'processors' instead of 'data controllers' and 'data processors'.

Exporting personal data outside the EEA:
- Many organisations transfer customer and employee data overseas from the UK. These transfers can be made without additional restrictions if they are within the European Economic Area ("**EEA**"). However, to comply with data protection laws, transfers by UK controllers to countries outside the EEA ('third countries') must be on the basis that there is an 'adequate' level of protection for individuals' rights to that of the EU. Once Brexit happens, the UK will become a third country and will be required to satisfy the requirement of 'adequacy' so that personal data transfers from the EU to the UK can continue to take place.
- One of the ways that organisations in third countries can meet this requirement is by the use of a data-transfer agreement incorporating certain contractual clauses, known as the 'Standard Contractual Clauses' or 'Model Contract Clauses' but the legality of this method has recently been questioned.
- The Irish Data Protection Commissioner, who is concerned that the Model Contract Clauses do not provide sufficient effective legal remedies for individuals in the EU whose personal data is transferred overseas, most notably to the US, wants a ruling by the European Court of Justice on whether the Model Contract Clauses are valid.
- Such a decision is absolutely critical as for many organisations, the Model Contract Clauses represent the only available means by which they can lawfully transfer personal data to the US and elsewhere. Unfortunately, the European Court of Justice typically takes an average of one and a half years before making a decision so the issue is unlikely to be resolved very quickly.

- In the meantime this is good news as it means nothing has to change immediately so organisations can continue to rely upon the Model Contract Clauses.

Contracts and liabilities between controllers and processors:

- In September 2017 the UK Information Commissioner's Office ("**ICO**") issued some draft guidance on contracts and liabilities between controllers and processors ("**Draft Guidance**"). Under the GDPR processors will have new responsibilities and liabilities in their own right and both controllers and processors may be liable to pay compensation or be subject to significantly increased fines or penalties.
- The ICO ran a short consultation asking for views on the Draft Guidance regarding what contractual provisions need to be included in contracts between controllers and processors. The consultation closed on 10th October 2017 and the ICO aims to publish its finalised guidance by the end of the year.
- Notably the Draft Guidance does not set out any Model Contract Clauses. Instead it provides some useful background to explain those areas that need to be covered contractually to conform with the requirements of the GDPR whilst leaving it to the parties involved to specify and agree wording that they believe is appropriate.

Apportioning liability for data security breaches

- Critically, the Draft Guidance does not give any indication as to what contracts should say regarding the liability of processors for data security breaches, which is entirely unsurprising given that the GDPR does not itself specify this either. This is, by far, the most contentious area between processors and their controller clients, which will only increase with the potentially much larger fines and liability to pay compensation that the GDPR will allow.
- Rather worryingly, however, what the Draft Guidance does say is that "*the contract could specify the extent of any indemnity you have negotiated*" (our emphasis added). It then separately goes on to include a checklist which suggests that each contract should "*reflect any indemnity*" that has been agreed. An indemnity is effectively a contractual undertaking by a party to take sole responsibility for a particular risk or liability.
- These references to indemnities seem unfortunate given that they appear to be encouraging controllers to positively seek indemnities for data protection breaches. We would argue that indemnities, particularly if uncapped, are not the answer to apportioning data security risks between controllers and individuals. For many processors indemnities will simply represent an unacceptable degree of risk, one that is unlikely to be covered by insurance and which cannot be passed on to companies who provide data hosting facilities. This is an issue that will be of real practical importance to all kinds of contracts in the months and years to come.
- It is not yet certain whether the final form of the ICO's guidance will deal with the apportionment of liability in greater detail. In any event it will be interesting to see how controllers and their processors handle this increased risk. So far it seems many controllers will be looking to pass more of that risk on to their processors.

Further information:

TRG has developed a GDPR compliance questionnaire and explanatory slide deck on the changes and requirements of the GDPR. If you would like a copy of either or both of these, please email Angela Cornelius.

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