



Corporate & Technology Bulletin June 2010

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Welcome to our latest bulletin. If you would like to discuss any of the issues covered, please get in touch with a member of our team.

This edition covers:

- **Contract Tips – Time is of the essence** – In all contracts there will be pitfalls and traps for the unwary such as the judicially recognised phrase “time is of the essence”.
- **How far can you go to limit your liability to your customers?** – What options do you have for reducing or, indeed, eliminating the liability you may have towards your customers? Your terms and conditions are the obvious place to do this but there are some pitfalls to avoid.
- **Model Behaviour** – As part of an initiative of the European Confederation of Directors' Associations, the UK Institute of Directors has issued general corporate governance guidance for unlisted companies.
- **Pulling no punches** – There have been significant increases in fines for breaches of the Data Protection Act.
- **Company Name and Trade Mark Checker** – If you are starting a new business or launching a new product you want to avoid the risk of passing off by ensuring the name you choose is not already in use.
- **Removal of 14 day concession for rejected accounts** – the 14 day grace period to resubmit erroneous accounts has been withdrawn and Companies House has issued some guidance to help businesses avoid the risk of late penalty fees.

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Contract Tips - Time of the Essence

Time is of the Essence - What does it mean?

Many people believe that all deadlines in a contract should be regarded as important. However, the reality is slightly different and may lead to unexpected results. In general terms, a “time is of the essence” clause enables the party relying upon the clause to terminate the agreement and/or claim damages against the defaulting party for performance failure by not meeting the specified deadline.

Needless to say, a view on the reasonableness of a “time is of the essence” clause may well depend upon whether an individual enters into contracts ordinarily as a supplier or as a customer.

The Office of Fair Trading and the Financial Services Authority have both recommended that, in consumer contracts, legal jargon such as “time is of the essence” should not be used as it is not immediately understandable by parties without legal advice. That having been said, such a phrase is certainly normal and may be appropriate in commercial contracts.

However, it would be better to state expressly what the phrase means so that neither party is confused as to the consequences of missing a deadline. It is our view that the consequences of missing a deadline should be clearly set out, namely that late delivery of goods or services would or would not (as the case may be) entitle a non-defaulting party to terminate the agreement. If a right to terminate is not included, there may still be a right to claim damages for breach of contract.

Another suggestion is that “time of the essence” should only apply in relation to specific circumstances and to only specific dates and times; so that the parties do not inadvertently leave the entire agreement subject to potential termination if a minor date or time for action is missed. Many contracts include timescales or dates that are not really time critical and should not necessarily lead to the termination of the agreement, if missed. Focusing on the key deadlines and dates, should lead to a better contractual relationship.

What should I include instead of a “time is of the essence”?

There is no doubt that where performance or delivery by a specified date is important, a “time is of the essence” provision should be included in the agreement to ensure strict compliance with the deadline. Examples of relevant agreements would include commercial contracts or contracts for the sale of land.

However, it is our view that the consequences of missing a deadline should be made clearer. The precise wording will vary depending on whether you enter into contracts primarily as a supplier or a customer but there are various options that you can consider. You will need to take care that any new provisions tie in with the existing definitions, termination and limitation of liability provisions of your agreements and so seeking legal input is important to protect your position.

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How far can you go to limit your liability to your customers?

Terms and conditions of business introduce certainty and act as a safety net to determine what will happen when things do not go to plan. For a company which supplies goods or services, the clauses in its terms and conditions that are most commonly contested are the exclusion and limitation of liability clauses. Both of these types of clause seek to apportion risk away from the supplier. However, the person receiving the goods or services may argue that the supplier's terms and conditions are unfair.

A limitation clause will seek to reduce and/or place a cap on the supplier's liability. On the other hand, an exclusion clause will seek to reduce the supplier's liability to zero. On the whole, it is probably fair to say that limitation, rather than exclusion, provisions may be looked at more sympathetically by the courts.

A court may consider many factors to determine if a supplier can properly limit or exclude its liability in its terms and conditions including:

- the bargaining strengths of the parties;
- whether an inducement was offered before entering into the contract;
- whether the provisions in question were brought to the other party's attention;
- whether the contract was negotiated;
- the commercial experience and awareness of the parties;
- the availability of insurance;
- the actual wording of the contract.

In each instance the supplier is expected to act in "good faith" or, in other words, openly and fairly.

The courts may deem as "unfair" a limitation or exclusion provision if there is a significant imbalance in the parties' rights under the terms and conditions to the detriment of the customer, contrary to good faith. However, recent court rulings in relation to limitation of liability clauses (as opposed to exclusion clauses) have been "pro-supplier".

You should consider the following points when assessing the enforceability of the limitation and exclusion provisions in your terms and conditions:

- it is not possible to exclude liability for death or personal injury caused by your negligence, otherwise limiting loss for negligence must be "reasonable";
- consumers will only be liable for a supplier's negligence or breach of contract if it is reasonable to do so;
- a supplier can only limit its liability for breach of contract if it is reasonable to do so;
- you cannot limit liability for providing goods to a non-business customer that are defective or are not of a satisfactory quality, but you can seek to do so in a business to business transaction where it is reasonable;
- the burden of establishing fairness and reasonableness lies with the party seeking to rely on it – normally the supplier;
- generally you cannot exclude liability for any terms implied by law.

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Model Behaviour

As part of an initiative of the European Confederation of Directors' Associations, the UK Institute of Directors issued general corporate governance guidance for unlisted companies. The Institute of Directors' *Corporate Governance Guidance and Principles for Unlisted Companies In Europe* provides both general advice and principles of good practice. For more information visit:

https://www.iod.com/MainWebsite/Resources/Document/policy_article_corp_gov_unlisted_companies_eu.pdf

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Pulling no punches: Increase in Fines for Breaches of the Data Protection Act

In recent times, reports of data loss and poor data security have become increasingly common, much to the concern of the Information Commissioner's Office (ICO), the body charged with the task of enforcing data protection law. In a bid to crack down on serious data protection breaches, the maximum penalty the ICO can impose has been increased from £5,000 to £500,000 as of 6 April 2010. For more information in relation to the increased penalties, as well as general enforcement powers of the ICO, please visit:

http://www.ico.gov.uk/what_we_cover/data_protection/our_legal_powers.aspx

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Company Name and Trade Mark Checker

Are you starting a new business or launching a new product? Avoid the risk of passing off by ensuring that the company or product name you choose is not already in use. The Government's 'Business Link' website contains a free search engine which allows you to check whether your chosen name is available. To go to the Company Name and Trade Mark Checker, please visit:

<http://www.businesslink.gov.uk/nameandtrademark>

Removal of 14 Day Concession for Rejected Accounts

Did you know that the 14 day grace period to re-submit erroneous accounts has been withdrawn? Companies House advises that to avoid the risk of late penalty fees, companies should ensure that their accounts are submitted well in advance of their due date, leaving time for any errors to be corrected should the accounts be rejected. For further guidance, please visit:

<http://www.companieshouse.gov.uk/about/miscellaneous/removalConcession.shtml>.

If you would like to discuss any of the issues raised please contact a member of our corporate team.

If there are any topics which you would like to see covered in our future bulletins or you require additional copies in paper or electronic format to distribute to your colleagues or clients, please get in touch.

contact us

Alasdair Cummings, Partner

T: 0131 656 5672

E: alasdaircummings@lindsays.co.uk

Alastair Keatinge, Partner

T: 0131 656 5746

E: alastairkeatinge@lindsays.co.uk

David Wood, Partner

T: 0131 656 5682

E: davidwood@lindsays.co.uk

David Lindgren, Partner

T: 0131 656 5634

E: davidlindgren@lindsays.co.uk

Jamie Millar, Partner

T: 0131 656 5693

E: jamiemillar@lindsays.co.uk

Leigh Davidson, Partner

T: 0131 656 5598

E: leighdavidson@lindsays.co.uk

Anthony Murray, Director

T: 0131 656 5703

E: anthonymurray@lindsays.co.uk

Peter Sinclair, Director

T: 0131 656 5664

E: petersinclair@lindsays.co.uk

Alastair Smith, Solicitor

T: 0131 656 5633

E: alastairsmith@lindsays.co.uk

Shona Tennant, Solicitor

T: 0131 656 5742

E: shonatennant@lindsays.co.uk

Raymond Baudon, Solicitor

T: 0131 656 5754

E: raymondbaudon@lindsays.co.uk

Claire Hurst, Company Secretarial
Executive

T: 0131 656 5635

E: clairehurst@lindsays.co.uk