

So, you have a right to terminate a contract. Think again!

Many commercial contracts for the supply of goods and/or services contain a mutual term whereby either party to the contract has the right to terminate it, if the other party commits an act of insolvency. In respect of a company, that can include the other party going into liquidation, entering into a voluntary arrangement or administration, the appointment of a receiver or a moratorium comes into force in respect of a company (“an Act of Insolvency”).

However, due to Covid-19, the UK government introduced a ban on termination for insolvency in July 2020 – see s.233B of the Insolvency Act as inserted by the Corporate Insolvency and Governance Act 2020 s.14 (“the Legislation”) – even if a contract provides for it.

In short, that means your contractual right to terminate a contract for a company’s Act of Insolvency is now unlikely to be enforceable or only for a further short period of time.

Further, you are prohibited from making your on-going supply of goods and services after an Act of Insolvency has occurred conditional on payment of outstanding sums that fell due before the Act of Insolvency occurred.

The Legislation applies if a company entered into an Act of Insolvency after 26 June 2020. It applies to:

- Companies;
- Mutuels (including co-operatives and community benefit societies but not credit unions);
- LLPs;
- Other bodies and associations, whether or not incorporated.

It applies to suppliers that are:

- Companies;
- Mutuels (as above);
- LLPs;
- Other bodies and associations (as above);
- Individuals carrying on a trade or business.

Exclusions apply to:

- Financial services firms and contracts;
- Public-private partnership project companies;
- Utilities, communications and IT service providers that are already covered by sections 233 and 233A of the Insolvency Act 1996.

There is also a temporary exemption to the Legislation for small suppliers but that only lasts until **30 September 2020**.

Section 15 of the Legislation provides that s.233B of the Insolvency Act does not apply to (small) suppliers where two or more of the following conditions applied at the time the company entered into an Act of Insolvency:

“Where the supplier is not in its first financial year at the relevant time, ... in relation to its most recent financial year:

- *Condition 1: the supplier’s turnover was not more than £10.2 million;*
- *Condition 2: the supplier’s balance sheet total was not more than £5.1 million;*
- *Condition 3: the number of the supplier’s employees was not more than 50.”*

(“the Small Supplier Exemption”)

There are further provisions for assessing the exemption eligibility for small suppliers that are in their first financial year.

So, if you have a right to terminate a contract with a company, you qualify as a small supplier and wish to terminate for an Act of Insolvency, you need to get on and do so by 30 September 2020 at the latest.

If you are not a “small” supplier but have a right to terminate a contract with a company due to an Act of Insolvency, and you still want to terminate it, how might you do so:

- in a case where the company has become subject to a relevant insolvency procedure such as administration, receivership, liquidation or a provisional liquidator is appointed, obtain the office-holder’s consent to the termination of the contract;
- in any other case, get the company to consent to the termination of the contract; or
- check whether the Act of Insolvency has ended (eg when a moratorium ends or the appointment of an administrator ceases). If it has, the Legislation no longer applies; or
- if after the Act of Insolvency, you supply goods and services which are not paid for on the usual contractual terms, you can terminate the contract;
- by application to the Court and it is satisfied that the continuation of the contract would cause the supplier hardship and grants permission for the termination of the contract; or
- this legislation does not apply to a company entering into a scheme of arrangement or the appointment of a fixed charge receiver (as opposed to an administrative receiver) over the company’s assets. So check if that is the position.

The Legislation is permanent and will continue to apply even after any threat of Covid-19 has passed, so this prohibition on termination clauses is here to stay. That being the case, how can new contracts include provisions to deal with the effects of the Legislation. Some suggestions are:

- The supplier including a right to terminate for convenience on notice.
- Guarantees or security for payments from others related to your company counterparty being obtained.
- Reduced payment periods to highlight a company counterparty’s payment difficulties sooner rather than later.

HOW CAN CONEXUS LAW HELP?

Businesses and individuals will need legal advice to help them understand the risks they may face and the options that may be open to them.

We are available to assist in reviewing the laws in many jurisdictions across the world, and to review specific contracts. We are also available to provide practical, business-orientated advice on how to best protect yourself from the ongoing commercial effects of Covid-19.

Contact

For further advice on renegotiating your contractual obligations or pursuing your contractual rights, please contact **Ian Timlin**.

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ABOUT CONEXUS LAW

Conexus Law is an independent specialist law firm providing legal and commercial advice to clients who work in sectors where the built environment, technology, engineering and people converge. We work on projects across the globe.

Built environment: We work on complex or mission-critical projects, where the “normal rules” may not apply. These projects might present complex procurement challenges, might be one-of-a-kind, or might relate to the construction of mission critical facilities where the risks of project failure far outweigh the initial capital outlay.

Connected world: This is where the built environment and the digital and virtual worlds operate and converge. Our work relates to projects such as data centres and other digital infrastructure, cloud deployment, smart cities, internet of things, blockchain and the like.

Cutting edge: Our clients in this sector are visionaries and entrepreneurs; autonomous cars, drone technology, artificial intelligence, new energy, big data and virtual reality. Clients might be early stage companies looking to move from proof of concept to early deployment, or the innovation teams of more established players.