

## Reaching an agreement on varying a contract

As a result of COVID-19 the need to amend the terms of commercial relationships has increased exponentially for some businesses. It may no longer be possible to perform certain contracts due to changes in the law or the issue of government guidance. Supply and demand issues may mean profitable contracts now result in a loss and the parties simply cannot operate as they did previously. Depending on how the contract is drafted, it may not be possible (and most parties would not want) to simply terminate the agreement or to argue that the contract is frustrated. To do so may expose a business to significant financial liability. The parties to the contract should try to negotiate a commercially viable way forward. Once an agreement to vary a contract is secured, the parties need to think carefully about how to vary the contract effectively so that it is enforceable in the future.

### Effective variation

Ordinarily parties doing business together do not enter into a single self-contained contract. They engage in a commercial relationship that evolves over time. In such circumstances the parties to the contract should try to negotiate a commercially viable way forward. This often gives rise to the need to vary the terms of the relationship and most commercial contracts contain a clause which sets out the basis on which a contract may be varied.

A contract can be varied orally or in writing, although most commercial contracts include an express clause which requires any variation to its terms to be in writing – often referred to as a “NOM” (no oral modification) clause. This affords businesses some certainty in their dealings and helps to ensure contracts are not varied inadvertently. If the law requires a contract to be in writing, then any variation will also have to be in writing.

Any agreement that varies the terms of an existing contract must either be supported by consideration or executed as a deed. What can constitute consideration can vary. For example, if the variation results in a benefit or prejudice to either party, that may be sufficient consideration. There is also some legal precedent which suggests that, in certain circumstances, performance of an existing obligation itself provides a practical benefit such as saving time or inconvenience, and this can constitute consideration.

### Key issues

- Agree how the ‘new’ agreement will affect the original contract. Will the original contract continue with the variations set out in the ‘new’ agreement, or will the original contract be terminated and replaced by a new contract?
- Agree how long you want any variation to last – you might only want to operate on varied terms to ensure the viability of the contract in the short term and in light of an unprecedented situation such as COVID-19.
- Consider any reputational issues. The Government has issued general guidance to businesses, particularly those in stronger bargaining positions, which advocates that parties should “play nicely” in these unprecedented times. One business looking to unfairly exploit another will not be perceived well by the Government, the court and possibly the general public.

## Practical points to consider

### *Evidence of negotiations*

Should disputes or uncertainties arise in relation to a contract variation, it is important to keep a good record of what has been discussed and agreed.

### *Original contract*

If the parties decide to terminate the original contract, they would not be able to rely on it unless they have incorporated its terms by reference. Care should therefore be taken to ensure that the terms of the new contract are comprehensive and fully reflect the parties' commercial relationship.

### *Entire contract review*

It is important to review the contract as a whole. The parties may only want to expressly vary certain terms but may inadvertently vary others.

### *Current and future breaches*

- If the other party is already in breach of the contract, you need to ensure that any renegotiation does not waive any rights to seek a remedy in relation to that breach.
- Each party should consider the possibility of future breaches and check that it can realistically perform the terms they are agreeing to. Non-performance may lead to an anticipatory or repudiatory breach of the varied contract or new contract, which in itself will give rise to legal consequences.

### *Knock-on effects*

For example, if multiple contracts govern the parties' commercial relationship, the amendments they make to one contract may need to be reflected elsewhere in the contract chain.

### *Third party rights*

Consider whether the contract affords any third-party rights and, if so, how a variation will impact their rights. Certain contracts require the parties to obtain consent from third parties if the variation affects their rights.

### *Force majeure*

- Parties should carefully consider what force majeure provisions are in place and should either engage with their counterparties to vary their contract(s) or agree new contract(s) to clearly set out what should happen in the unfortunate event of another pandemic.
- If a contract does not have a force majeure provision, a court is unlikely to imply such a provision and therefore there is no guarantee that a particular form of relief will follow. As a result, even if a party is unable to perform, it may be in breach of contract if its obligation to perform is absolute. Unless the contract specifically says so, fault is not a requirement for breach. The other party may then be able to claim damages and possibly terminate the contract.



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