Friday 15 October 2021

THE FUTURE OF THE COMMERCIAL CONTRACT IN SCHOLARSHIP AND LAW REFORM

Panel 3: Building back better

Commercial Contracts: what have we learned from Covid?

Outline of talk by

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Commercial contracts: what have we learned from Covid?

1. Crisis? What crisis?

As far as the drafting of commercial contracts is concerned, I don't think we have learned - or can learn - much. We have always had problems with unexpected events affecting long-term contracts. Some contracts have been amended to deal with Covid, but that is not the real issue. The real issue is how to deal with future unanticipated events; and, by the very nature of the problem, we can't draft for what we don't know about - except in very general terms which almost certainly won't do the trick.

It is instructive that frustration is pretty much a dead letter in English law, and that we don't have an English expression for force majeure. Commercial parties want certainty. Practitioners don't like endeavours clauses. They want to know that A must do X on Y date. Force majeure clauses are common in some types of contract - but not across the board. One could try to beef up force majeure wording, but that will meet resistance from the counterparty. Covid hasn't changed that.

I don't think that there is need for reform of the law – either by the courts or by Parliament. That would be a very blunt instrument. The problem can only be resolved by the parties – by drafting or (as happens all the time in practice) by agreeing to step outside the contract to deal with a problem which affects both parties.

2. Don't interfere

One approach to Covid has been to pass legislation to override the rights and powers of parties to commercial contracts during the pandemic. In my opinion, that is misconceived. The Corporate Insolvency and Governance Act 2020 is an example. It does two things in particular which worry me.

First, it allows directors to obtain a moratorium which allows them to refuse to pay their company's debts for eight weeks whilst the directors remain in office. That

is not only wrong in principle but pointless in practice. You can't turn round an insolvent company in eight weeks.

Secondly, it invalidates termination clauses in certain types of long-term contract for the supply of goods or services during an insolvency process. So a person which has the contractual power to terminate a contract on insolvency - which is pretty well universal - can't enforce that power. It is bound to continue to supply. Again that is not only wrong in principle, but pointless in practice. It will simply force commercial parties to avoid long-term contracts for the supply of goods and services, and encourage those with long-term contracts to terminate them long before an insolvency process occurs - which is in no-one's interests.

If there is one thing which 40 years in practice has taught me, it is that the only people who benefit from these types of restriction on freedom of contract are the lawyers.

3. **Make it easy on yourself**

We have learned one lesson from the pandemic - the importance of ensuring that commercial contracts can be entered into easily and without formality. I spent most of last spring dealing with the issue of how to get deals done and get contracts signed when no-one was in the office.

English law is pretty good on this. There are no formalities for most commercial contracts. All you need is evidence of intention to be bound. The main problem is with deeds, and the Law Commission will be looking at that.

The pandemic did encourage law firms to get on with setting up platforms for the electronic execution of documents. In my opinion, that was a real benefit of the pandemic.

Richard Calnan