

February 2024

CIF Weekly – issue 65

A Quick Guide to Contractual Break-Ups - Guidance on Termination

Issues arising out of the termination of contracts are not in short supply. We are often presented with clients who are seeking advice on whether to terminate a contract, how to validly terminate, and what to do once a contract has been terminated. Whilst the provisions and the interpretation of each contract will differ, what is certain is that parties must strictly adhere to the contract in order to validly terminate it.

In this article we briefly discuss the different types of termination and offer guidance on what will constitute a valid termination under common law and under contract.

Types of contractual termination

Under English law, a contract can be terminated in one of two ways. Either under common law as a result of a repudiatory breach by one party, or under contract pursuant to express contractual provisions.

Common law termination

The common law right to termination will be available to parties unless specifically excluded by clear wording in the contract. Common law termination can be achieved by one party accepting a repudiatory breach (or anticipatory repudiatory breach) of contract by the other party. What constitutes a breach will be determined by the law that governs the contract.

Although there is no clear definition of repudiatory breach under English law, it is commonly accepted that to be considered as repudiatory, the breach must be so severe as to go to the root of the contract itself. A repudiatory breach can be a refusal to perform contractual obligations (renunciation), a breach of a condition, or a sufficiently serious breach of an intermediate (or innominate) term.

Acceptance of a repudiatory breach can be oral or by conduct, but good practice necessitates that it is done in writing.

Termination under contract

Contracts will commonly grant a party, or both parties, a right to terminate under specific contractual provisions, whether or not this failure amounts to a repudiatory breach. For example, if performance of the contract becomes unlawful due to a change in the law, or on the occurrence of a certain event.

Most standard form contracts will contain these provisions, and a party wishing to terminate will almost always need to adhere to termination notice requirements in the contract.

Where the right arises under both common law and contract

A right to termination may arise under both contract and common law. An example of this can be found in clause 68.1.2 of BP's General Terms & Conditions for Sales and Purchases of Crude Oil and Petroleum Products (2015 Edition) where a repudiatory or renunciatory breach is considered a 'Default Event' under the contract.

So long as both rights are available, the party terminating can choose to exercise the most favourable option. When choosing which right to invoke, parties should consider, amongst other things:

- Financial consequences: generally, wider loss may be recoverable under common law by way of damages, whereas remedies for termination under contract are likely to be limited to those specified under the contract. Occasionally, common law damages may be available in addition to contractual damages unless this has been specifically excluded by the contract.

- **Timing:** the period in which a party will be able to terminate under common law and under contract may differ. Parties should be aware of the time limits in respect of both before making a decision.
- **Surviving obligations:** terminating under contract may require parties to fulfil certain obligations on termination (for example, clause 14.10 of the SCoTA Standard Terms (Version 8a) requires a 'Transaction Settlement' to be calculated on termination). Parties should therefore be aware of what obligations they may have on termination.

Where a party has an overlapping right to terminate under contract and common law, there is a danger that it may be too late to accept a repudiatory breach if the party has already terminated under a contractual provision. To be safe, parties should therefore include wording to the effect that any contractual right to terminate is without prejudice to other rights and remedies.

Valid Termination

Common law termination

As mentioned above, acceptance of a defaulting party's repudiatory and/or anticipatory breach may be done orally or by conduct. However, it is advised that this is always done in writing, particularly where this is provided for in the contract (further discussion on this below). Parties should be aware that delay in exercising this right to terminate may extinguish the right depending on the contractual provisions.

Termination under contract

Parties often assume that if a contract includes a right to terminate that is triggered by the happening of an event, they can simply wait for the contract to terminate automatically, freeing them from their obligations thereunder. However, this is not always the case. Whether a contract will automatically terminate or whether the parties must actively exercise their termination rights will be a matter of construction of the contract. For example, use of the word 'may' or 'elect' suggests that there is a choice to be made.

Where the wording of the contract is clear, the Court of Appeal in *Artpower v. Bespoke Couture*¹ held that the party seeking to rely on the clause "*has to take some positive step to bring the agreement to an end*"².

In order to exercise this right, termination provisions will generally require the terminating party to give notice to the other party of the termination. Contracts will differ as to what is required for valid notice, but this may include that notice is given within a particular time, in a particular form, and using particular wording. Whatever the requirements are, they must be strictly adhered to for the termination to be valid. As Lord Hoffman in *Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd*³ held:

*"if the clause had said that the notice has to be on blue paper, it would have been no good serving a notice on pink paper, however clear it might have been that the tenant wanted to terminate the lease"*⁴

Under English law it is commonly accepted that a notice to terminate a contract must be sufficiently clear, unambiguous and leave the recipient in no doubt that the contract has in fact been terminated.

As Baroness Hale held in *Geys v SocGen*⁵:

"Although [Mannai Investments Co Ltd v Eagle Star Life Assurance Co Ltd] was concerned with the effect of a mistake in an otherwise clear and unambiguous notice, the principle is clear. The reasonable recipient has to be told that the right is being exercised, how and when it is intended to operate."

Anything less will not be considered a valid termination, leaving the terminating party open to possible claims for breach of contract.

Key Considerations

Contracting parties should be extremely careful when terminating a contract. A few points to keep in mind:

- Before terminating, parties should consider whether termination is the best remedy for them commercially, taking into account their circumstances.
- If parties want to terminate, they should be certain that a right to terminate has in fact arisen, and when considering termination, should seek advice as to whether they have this right.
- If they have the right to terminate under common law and under contract, parties should decide carefully which right to exercise as this may affect their recovery.

¹ [2006] EWCA Civ 1696

² Arden LJ at paragraph 13

³ [1997] AC 749

⁴ Paragraph 776

⁵ [2013] 1 AC 523 at paragraph 52

- When terminating, parties need to ensure that all notice provisions are strictly adhered to, and any notice is clear and unambiguous as to its meaning. Failure to terminate a contract properly may result in a repudiatory breach on the part of the party trying to terminate. If in doubt, parties should seek legal advice to make sure that termination has been affected properly.

Contact us

We hope that you find this update both useful and interesting. If you have any comments or would like to learn more about this topic, please get in touch with either your usual SH contact or any member of our commodities team by clicking [here](#).

Authors



Kelly Hubble

Associate

D: +44 20 7809 2214

E: kelly.hubble@shlegal.com