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Brexit: Love It or Hate It— The Contractual Aftershocks, Part 2

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Commercial Litigation

Last week, a dispute between Tesco and Unilever about where the pain caused by the devaluation of sterling should lie provided some initial evidence of the “turbulence” and “rollercoaster” rides the Chancellor of the Exchequer, Philip Hammond, has warned of since the June 23, 2016 Brexit vote.

As the press reported, Unilever was demanding a 10 percent rise in the wholesale price of many of its well-known brands, including Marmite, to reflect the increase in the price of imports that resulted from the devaluation of sterling that has followed the Brexit vote. Tesco refused to pay the increased prices and removed the brands in question from its online offering. Although less than 24 hours later the dispute appeared to have been resolved, similar disputes are likely to arise in relation to many contracts involving the supply of imported products—in particular in long-term supply agreements under which many products, such as pharmaceuticals and foods, are distributed.

This alert considers the circumstances in which a customer can *compel* its supplier to supply in accordance with the agreed prices, notwithstanding that supplier costs have increased significantly since the contract was concluded. In these circumstances, and absent a contractual mechanism dealing with currency fluctuations, a supplier may be reluctant to realise lower-than-expected revenue by delivering, and a customer may struggle to find an available market in the same goods.

The traditional remedy available to the customer would be damages for losses caused by the supplier’s failure to supply at the contractually agreed price. However, one way in which English law is responsive to such circumstances is through the remedy of specific performance, where the customer can obtain delivery at the agreed prices.

Specific Performance

Specific performance is an equitable remedy that is generally available only where damages are not an adequate remedy for the breach. Broadly speaking, damages will be inadequate where the asset is not reasonably readily available on the market from an alternate source or where the damage suffered is not capable of financial recompense.

Alternative sources may not be available for branded goods particularly those with exclusive or restricted distribution arrangements. Consequently, the more closely managed a distribution chain, the more likely it is that this limb of the specific performance test may be satisfied. Further, with a unique and specific branded product such as Marmite, it would be difficult to argue that another product could be an alternative source (whether Bovril is a substitute to Marmite is a vexed question which would not have arisen here as Unilever also owns Bovril).

On the other hand, specific performance will be refused if the customer could have obtained the goods on the market, even at a higher price than that contracted for with the supplier. If the customer can find an alternative source for the goods, and in this regard the conduct of the customer’s competitors facing a similar price hike by the supplier may be relevant, the law requires him or her to do so but will permit him or her to recover damages equivalent to the difference between the contract price and the cost of the substitute.

Equally, if the damage to the customer is that it cannot sell particular products and is therefore losing revenue and profit, in principle, that loss is capable of being remedied by payment of damages and hence, specific performance will be refused. For damages to be deemed inadequate, non-pecuniary losses such as loss of reputation, loss of some opportunity (for example, first mover advantage) or, in the extreme, loss of jobs and/or potential insolvency, will be required.

Sale of Goods: A Statutory Basis for Specific Performance

There is also a statutory basis for specific performance where the contract involves the sale of goods (section 52 of the Sale of Goods Act 1979). In fact the statutory remedy has been said to be the only remedy by way of specific performance in the case of goods. This allows for an application to be made at any time before judgment but, as with the equitable remedy, applies to "specific or ascertained goods." Therefore, if the goods are generic and thus unspecific and non-ascertainable—for example, "10,000 packets of aspirin"—the remedy will not be ordered.

Further Considerations

Specific performance that requires "personal" performance is usually considered inappropriate. The usual example given is the specific performance of an employment contract, which is usually considered inappropriate because of the mutual trust and confidence underpinning such relationships. Similarly, and potentially significantly in a Brexit context, the courts will not normally require a supplier to continue performing a loss-making activity whose losses exceed the damages suffered by the customer. Further, the courts are reluctant to order specific performance where it would require ongoing supervision by the court.

Finally, while the courts have developed an established body of law in this area, the principles do not operate without controversy, and have been debated heavily among commentators. Litigation around these issues would be unsurprising in the years to come.

Key Takeaways

As anticipated by our first Brexit contractual update, a number of contractual doctrines will come into play, and therefore under the spotlight, in a world of continuing Brexit-related uncertainty. It would be prudent to review major and long-term contracts to identify latent Brexit-related issues—for example price (exchange rate fluctuations), timing, geographic scope, triggers related to third party actions, the scope of relevant warranties and indemnities, enforcement—with subsequent regular monitoring programmes. Covington's litigation team is well placed to assist with this.

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