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An A to Z of contract clauses

Navigating a commercial contract and appreciating the implications, both legal and practical, can be a daunting task. This article provides a snapshot of key clauses typically found in a standard commercial contract and looks at the implications of those clauses for the contracting parties.

A is for Assignment

English law states that, in the absence of express drafting to the contrary in a contract, either party to that contract may:

1. Assign their *rights* to a third party (subject to limited exceptions); but
2. May not transfer *obligations* arising under that contract to a third party.

This 'default' legal position exposes the parties to the undesirable reality that a contract they have entered into can be freely assigned to a third party without their consent. Particularly in services contracts this is far from ideal as it could expose the service provider to the situation where a third party of which they have no knowledge (including its ability to pay) is utilising its services under a contract.

It is therefore common to see the inclusion of the following clause, or some variation on it:

Neither party may without the prior written consent of the other, such consent not to be unreasonably withheld, assign or in any way dispose of its rights under this agreement to any third party.

Such drafting is neutral and protects both parties from the eventuality discussed above. However, it would not be unusual to see a one way obligation to seek consent to assign, if the party seeking to impose that obligation on the other party has concerns as to who might end up providing it with services or products.

B is for Boilerplate

'Boilerplate' describes provisions which are common to most commercial contracts and which do not relate to the main object of the contract but which are required for regulate its operation. Although such clauses are often considered 'standard', their ramifications are far from so, and careful thought should always be given to the impact of the clause in the specific commercial context of the contract.

C is for Confidentiality

Contracts will typically include a clause requiring the parties to protect each other's confidential information. The inclusion of such a confidentiality clause is imperative in the situations where the parties' confidential information will be exposed to the other. The wording below is a simplified example of a confidentiality clause:

The parties shall keep confidential all Confidential Information and not, without the prior written consent of the other party, disclose the Confidential Information to any other party save to the extent required by law.

The definition of 'Confidential Information' is often drafted widely to include all written, pictorial, machine readable or oral information which relates to trade secrets, customers, suppliers, or business associations or

information that is financial, technical or commercial in nature. It is vital that the definition of 'Confidential Information' satisfactorily captures the information particular to your business to ensure all such information remains confidential and protected from disclosure to third parties who could be potential competitors.

D is for Dispute resolution

In the early stages of contract negotiation, dispute resolution provisions are rarely given much consideration. Focus tends towards level of payment, defining the scope of the service or product(s) to be provided, negotiating warranty and indemnity provisions and payment mechanisms. However, it is important to ensure that your contract contains suitable and appropriate wording dealing with disputes which may arise under the contract to ensure clarity for all parties as to the precise procedure to be followed in the event of a dispute.

Frequently the parties will agree to an escalation procedure, whereby clear steps and processes are stipulated prior to the matter being referred to the courts. As a matter of principle, it is the duties of the parties to a contract to "help the court further the overriding objective" (Civil Procedure Rules-Part 1 CPR 1.3). This "overriding objective" is to ensure that all cases are dealt with justly and "to encourage the parties to co-operate with each other in the conduct of proceedings" (CPR 1.4). In the light of these duties it is important that pre-court conduct also adheres to these principles which in short encourages communication and co-operation between the parties.

Typically a notice setting out the dispute/ breach will be served on the breaching party, giving them a specified period of time to rectify the breach. In the event that the notice is not complied with, there will be a number of steps to be taken – for example the managing directors meeting to attempt to resolve the dispute/ an arbitrator is appointed to settle the dispute. Only after these steps have been followed will the non-breaching party be able to take the dispute to court. You should always ensure that the escalation procedure and time frames given are feasible in the circumstances.

E is for Entire agreement

It is common to see the following clause (or similar) inserted into a contract:

This agreement constitutes the entire agreement between the parties with respect to its subject matter. It supersedes all previous agreements and understandings between the parties and each party acknowledges that, in entering into this agreement, it does not do so on the basis of or in reliance upon any representations, promises, undertakings, warranties or other statements (whether written or oral) of any nature whatsoever except as expressly provided in this agreement.

The purpose of such clause is as follows. Under English law, a basic principle is that outside evidence cannot be admitted to supplement or vary a written contract (this is known as the 'parol evidence' rule which was established in 1833). However, if it can be shown that the written contract was not intended to capture the entire agreement between the parties, outside evidence can be adduced to vary or supplement the contract. This exposes parties to the potential of unwritten non-contractual terms being added into the contract which is far from ideal.

The entire agreement clause is designed to exclude this exception and provide certainty to the parties that the written agreement

they have signed has captured all terms agreed between the parties. This clause is standard boilerplate, is rarely reviewed and yet it commonly generates litigation. In essence the clause is a statement which stipulates that the document contains the entire agreement and any preceding statements, negotiations or representations, unless encapsulated by the contract, are of no relevance and it is the contract alone which can be relied upon. In short, if such a clause is included in your contract, ensuring all agreed terms are encapsulated within the contract is vital as it is this document alone that can be relied upon.

F is for Force majeure

The effect of a force majeure clause is to excuse the affected party from performance under the contract as long as the force majeure event continues. It should be noted that there is no legal definition of 'force majeure' and accordingly the precise definition as provided for under the contract is important. The clause will typically provide for a time limit whereby if the force majeure event continues, the contract will terminate automatically with both parties being excused from their liabilities under it. Examples of force majeure events are fire, explosion, strikes, riots, terrorist activity and acts of God.

Recently the clause has been extended to include 'acts of nature which prohibit travel' to capture the recent disruptions caused by volcanic ash. This serves as a reminder that force majeure clauses are not set in stone – so thought should always be given to the potential risks the contract could be exposed to and drafted accordingly.

I is for Indemnity

In the context of commercial contracts, an indemnity is an undertaking (in other words a legally enforceable promise) to meet a specific potential legal liability of another. The purpose of an indemnity is to provide a guaranteed remedy for a specified event. Indemnities are a highly negotiated point in commercial contracts and consideration will have to be given to the specific risk(s) arising under the commercial contract and indemnities sought as required.

J is for Jurisdiction

A commercial contract will stipulate which court will have jurisdiction should any dispute arise which requires resolution in the court system. In commercial contracts there is often a foreign element involved and it is essential to ensure the jurisdiction selected best suits the context from a practical perspective. Many European countries' judicial authorities place much greater emphasis on written submissions as opposed to the oral evidence favoured by the UK courts. Practical considerations might include the economics of pursuing a case, the limitation periods under each jurisdiction (which can range from 1-30 years) and research into the costs position (in some jurisdictions legal costs are not recoverable from the losing party), as well of course as the locations of the parties.

L is for Liquidated damages

A liquidated damages clause sets out the fixed sum (or calculation of that sum) agreed by the parties that will be payable on breach by either party. If the figure is deemed by the courts to be punitive, the clause will be unenforceable so care should always be taken to ensure the clause includes an appropriate figure which reflects the contractual context and could not be deemed to be punitive.

N is for No partnership or agency

Contracts frequently contain boilerplate provisions stating that the relationship between the parties is not to be construed as a partnership or agency. This is because both of those legal forms may arise implicitly, without the parties realising that they have done so, and both have a range of legal and tax implications for the parties. If the parties do not intend for them to arise, it may be safer to state expressly that the contract does not create either form of relationship, to ensure that no unintended consequences flow from the contract.

> ... careful thought should always be given to the impact of the clause in the specific commercial context of the contract.

R is for Retention of title

Retention of title provisions are often hotly debated in contractual negotiations. Where a supplier sells a product to its customer and is not paid immediately upon delivery, then the supplier will wish to provide that it retains title to (ie ownership of) the products until payment is made. The supplier will also want to impose various related obligations on the customer, covering issues such as how the products are stored, how they are identified as belonging to the supplier and whether or not the customer may sell them on before title has passed.

T is for Termination

It is common is most commercial contracts to see a termination clause which enables the parties to terminate the contract prior to the expiry of the contract's stipulated term. The clause sets out automatic triggers which enable immediate termination of the contract or termination on notice. The clause may provide that the position of both parties in respect of termination is equal – thought should be given as to whether this is appropriate or desirable in each individual case.

W is for Waiver

In the absence of a waiver clause, where a party fails to take action in respect of a breach or default under the agreement, or delays in taking action, that party may lose its rights to take action in respect of that breach of default. A waiver clause is designed to ensure that a party's rights, powers and remedies will not be lost as a result of any delay or omission in exercising or enforcing them and to expressly provide that any partial exercise/ enforcement of a party's rights or remedies shall not thereby extinguish or otherwise reduce those rights and remedies.

X is for eXclusion of liability

An exclusion clause's purpose is to exclude or restrict liability and (where the contract is between businesses) will often exclude or restrict the party from pursuing a right or remedy (for example the right to reject goods where they are not of satisfactory quality).

Such exclusion clauses are subject to a 'reasonableness test'. What can and cannot be excluded will turn in the facts of each case but as a general rule it may be permissible to exclude the following if the clause satisfies the reasonableness test:

- negligence (save where the negligence causes death or personal injury);
- breach of the implied conditions of fitness for purpose or correspondence with description or sample;
- breach of contract; or
- misrepresentation.

It is important to remember that if an exclusion clause is found to be unreasonable, it will be wholly unenforceable.

LG will be hosting a SmartLaw seminar on 15 September 2010 ('A-Z of Contract Clauses'), which will explore this topic in greater depth.

Competitor contacts condoned? New guidance on agreements between competitors

The European Commission has published a draft of its revised guidelines on the applicability of competition law to agreements between competitors. These new provisions are the latest step in the European Commission's programme to update all competition law legislation and guidance and follow the new block exemption for vertical agreements which came into force earlier this year.

Agreements between competitors

Any agreement between competitors will need to be assessed in relation to the prohibition on anti-competitive agreements. Competitors are defined as companies that operate at the same level of production or distribution in the market. This includes potential as well as actual competitors. However, just because an agreement is between competitors does not mean that it will contravene competition law. Indeed, competition regulators recognise that certain agreements between competitors are in fact beneficial and pro-competitive. Therefore, any agreements between competitors need to be assessed to ensure that the co-operation will not reduce competition but instead provide economic benefits and be pro-competitive.

The draft guidelines

The proposed new guidelines are intended to replace the current guidelines which were adopted in 2000. It is intended that the new guidelines will come in force in December 2010.

The guidelines are very useful when businesses are considering entering into agreements with competitors and set out how compliance with competition law can be assessed in such circumstances. Therefore, these moves to update the guidelines to reflect changing circumstances are welcomed.

The key change in the draft guidelines is the introduction of a section dealing with agreements for the exchange of information between competitors. This is the first time that the European Commission has set out general guidelines for the exchange of information between competitors.

Exchange of information

Information exchange between competitors is an extremely sensitive subject which, unless extreme caution is exercised, can lead to accusations of serious breaches of competition law and to the potential of severe sanctions being imposed. For example, the exchange of information between competitors can facilitate the operation of a price fixing cartel. However, the European Commission has recognised that, in certain circumstances, the exchange of information between competitors can be pro-competitive, leading to increased competition or improved efficiency and subsequent lower prices.

Where there is an agreement to exchange information, the draft guidelines state that the main competition law concerns relate to the co-ordination of companies' competitive behaviour and the foreclosure of competition. To this end, it is recognised that any exchange of information between competitors that includes specific data regarding intended future prices or quantities is likely to amount to a serious breach of competition law. Such an exchange will contravene competition law. Likewise, any exchange of information that has the potential to reveal intentions on future behaviour is also likely to be viewed as a serious breach of competition law.

In the draft guidelines, the European Commission sets out the key factors that will be relevant to considering whether information exchange between competitors is likely to breach competition law. These factors

include the characteristics of the industry in question and the nature of the information to be exchanged. In relation to this second point, specific points to consider include:

- Whether the information is commercially sensitive;
- Whether the exchange is being made publicly or in private;
- The age of the information exchanged:
- Whether any data is aggregated; and
- The frequency with which information is exchanged.

Therefore, a one-off exchange of historical, aggregated information between smaller competitors in an industry with a number of different participants is less likely to be problematic than regular exchanges of future prices between the two largest competitors in a concentrated industry.

Other changes in the draft guidelines

The draft guidelines contain revised guidance on standardisation agreements. Standardisation agreements are agreements between competitors or potential competitors which are intended to set out agreed definitions of technical or quality requirements with which products, production processes, services or methods should comply. The European Commission notes that standardisation agreements may restrict competition by reducing price competition and/or limiting or controlling production, markets, innovation or technical development. However, it is accepted that such agreements may also be beneficial to competition, for example by promoting new entry, encouraging the development of new markets and improving supply conditions. Given changes in the application of competition law to such agreements over the last ten years, the European Commission has updated and revised its guidance on the application of competition law to standardisation agreements.

The draft guidelines also provide clarification on the application of competition law to joint ventures, in particular to the relationship between a joint venture and its parent companies. In particular, the European Commission notes that an agreement to limit the capacity and production volume of a joint venture is unlikely to infringe competition law.

Conclusion on the draft guidelines

The publication of these draft guidelines is an important step. For the first time, the European Commission has provided guidance on general agreements for the exchange of information between competitors. This will be of great assistance to many businesses which may have found their activities curtailed due to competition law concerns. Now it will be much clearer when and to what extent information can be shared amongst competitors without risking the severe sanctions that can be imposed for breaches of competition law.

New rules for R&D and specialisation agreements

At the same time as publishing the new draft guidelines on horizontal agreements, the European Commission published draft new block exemptions covering specialisation agreements and research and development agreements. The new block exemptions are also expected to come into force in December 2010.

The research and development block exemption provides an exemption to the prohibition on anti-competitive agreements for certain agreements concerning the joint research and development and the joint exploitation of the results of such research and development. The main change in the new draft block exemption compared to the current block exemption is the fact that it is now made clear that the exemption is only available if, prior to starting the research and development, it is agreed that existing and pending intellectual property rights relevant for the exploitation of the results by the other parties will be disclosed in an open and transparent manner.

The specialisation block exemption provides an exemption from competition law to certain agreements where one or more parties agree to cease (or refrain from) producing certain products and agree instead to purchase them from another party. The draft specialisation block exemption is generally unchanged from the existing block exemption, although clarification is provided in relation to a number of points.

Bullseye!
OFT publishes views on online targeted advertising and pricing

On 15 October 2009 the Office of Fair Trading (OFT) launched two separate studies: one on online targeting of advertising and pricing and another on advertising of prices. The first explored the practice of tailoring prices to individuals using information collected about a consumer's internet use. The second looked at pricing practices which may potentially mislead consumers, including how these practices are used online. On 25 May 2010, the OFT published a market study on the former. The report finds that, although industry self-regulation addresses some concerns about behavioural advertising, more could be done to provide consumers with better information about how personal information is collected and used. It also sets out how regulation might apply to these new and emerging practices. On 28 May 2010, the OFT published a legal discussion paper and two research papers as part of its ongoing market study into advertising of prices.

Online targeting of advertising and prices and behavioural advertising

The OFT's study on this addresses two types of behaviour:

- Targeted pricing – tailoring prices individually using information about a consumer's internet use, for example, offering price discounts only to new customers and retracting those offers from consumers who have visited the site already; and

- Behavioural advertising – using information about an individual's web-browsing behaviour to select advertisements to display to them. Information is usually collected through 'cookie' files placed on a user's computer after a first visit to a website. Behavioural advertising is spreading – Google is looking to roll-out its Interest-Category Advertising later this year and Sky and Google have announced plans to implement mobile phones in such advertising.

The benefits

The OFT recognises that behavioural advertising has some benefits to customers; improved targeted advertising decreases suppliers advertising costs which feed through to customers, (ie by enabling free access to content). It also reduces the chances of consumers receiving adverts that are not of interest to them.

The concerns

Consumer concerns relate to privacy, misuse of data, inappropriate advertising shown on shared computers, and a general dislike of being tracked and monitored.

The OFT's research has revealed that consumers' concerns decrease the more transparent the practice is and the more control they have. Concerns increase with the sensitivity of the data collected and the degree to which this is shared. However, the OFT concluded that none of these concerns significantly inhibit internet use – 5 per cent of consumers would reduce their internet use as a result of behavioural advertising.

Action

The OFT seeks to address these concerns by the following means:

Self Regulation

The Internet Advertising Bureau (IAB) the trade association for online advertising, abide by a set of Good Practice Principles. The OFT aims to work with the IAB to provide clear notices alongside behavioural adverts and propose the following recommendations to improve the self-regulation framework:

> The OFT's research has revealed that consumers' concerns decrease the more transparent the practice is and the more control they have.

- Provide clearer guidance around sensitive information and the use of that data for behavioural advertising;
- Increase awareness of the Good Practice Principles amongst publishers and advertisers seeking to engage in behavioural advertising;
- Consider extending the coverage of the self-regulatory scheme to include more first party advertisers, and consider whether retargeting companies and social networking sites should be included;
- Consider whether the Good Practice Principles should include a commitment to maximum length of data storage for the purpose of behavioural advertising;
- Include non-industry, independent stakeholders on the IAB to deal with complaints.

Privacy
Under the Privacy and Electronic Communications (EC Directive) Regulations 2003 (Privacy Regulations) companies must inform consumers when using a tracking system to store data about them on their computer, and give them the opportunity to refuse this. They must also make consumers aware if third parties collect personal data. This is commonly set out in a privacy policy. The report encourages the Information Commissioner's Office (ICO) to work with industry to find *"better ways of explaining complex online information collection and analysis to consumers"* and ensure the fair collection of information by formulating clear views on when consent is necessary and when notice will suffice.

Consumer Protection
The OFT considers that failing to clearly inform a consumer of the collection of information about their browsing behaviour may breach the Consumer Protection Rules if that knowledge would have dissuaded them from taking a transactional decision. Under the OFT's broad definition of "transactional decision", this would include a decision on whether or not to visit a website. However, the OFT found that price targeting is currently "a possibility but not yet a reality in the UK" and it is therefore an area which it is keen to discuss further.

Memorandum of Understanding
The OFT and the ICO propose to agree a Memorandum of Understanding to establish the circumstances in which each would take appropriate enforcement action. In the event that the Memorandum of Understanding covers areas where OFT and Ofcom have overlapping jurisdiction, both bodies would discuss who would be best placed to act.

Advertising of prices

The OFT investigation into the advertising of prices is continuing. The final report will be published in September/October 2010. However, the OFT has published a discussion paper and two research papers which provide an insight into the OFT's current thinking. Two main factors motivated the study into advertising:

- The diversification of advertising and pricing practices on the internet; and
- The introduction of the Consumer Protection from Unfair Trading Regulations (CPRs), which came into force on 26 May 2008 and contain rules which will impact on this sector.

The consultation process completed in August 2009 and canvassed the views of the government, trade organisations, consumer groups and the advertising industry. The study examines potentially misleading pricing practices and provides a useful insight into the main areas of concern for the OFT, as follows.

Drip pricing

Drip pricing occurs where consumers see an element of the price upfront, but price increments 'drip' through during the buying process as the product cannot be purchased without incurring the additional costs (ie flights advertised at £10 which rise in cost with taxes). The OFT's preliminary finding is that failures to provide upfront information could constitute a breach of the CPRs.

Reference pricing

Reference pricing occurs where sale prices are compared to a fictitious 'original' price. Comparisons based on former prices which were in existence, but for a short period of time, may also be classed as misleading; the claim is technically true, but is presented in a manner that exaggerates or distorts the meaning.

Bait pricing

This practice entices customers with discount prices, but results in consumers purchasing a more expensive product due to the limited availability of discounted products, or because they upgrade during the sales process, for example, where tickets are advertised at a discounted price, but all have sold out. Such pricing may still be classed as misleading where there are just a few left at the price stated.

Complex or confusing pricing

Complex pricing offers can make it difficult for consumers to assess and compare prices. The OFT has highlighted volume pricing (where the unit price changes with the volume, such as '3 for 2' offers) as a particular concern.

Time-limited offers

Time limited offers arise where discounts are advertised as only being available for a short period of time. This includes statements without a specified time limit such as "hurry whilst stocks last".

Use of the word 'free'

The preliminary view of the OFT is that this term can be used where it is clear that the price has not been inflated to recover the costs of the free item, that the quality of the product has not been reduced and that the consumer is aware of their liability for costs. The OFT has identified certain usages of the term which will be subject to further investigation.

What next?

The OFT states that its discussion paper sets out its current, not definitive, views. The OFT has a range of actions available to it:

- The OFT could make recommendations for self-regulatory or regulatory change to the industry or to government (including publishing consumer information, encouraging firms to take voluntary action or make recommendations to government for regulatory changes).
- Take investigative and enforcement actions against companies suspected of breaching consumer or competition law.
- If the OFT discovers evidence of anti-competitive conduct by any of the market participants it could commence an investigation under the Competition Act 1998.
- If the OFT identifies features of the market that prevent, restrict or distort competition, it may make a market investigation reference to the Competition Commission.

The OFT's findings are expected to be published in September/October 2010.

Supplying to the public sector
What you need to know

The public sector spends over £100 billion each year on procuring goods and services. The new coalition Government has made clear its intentions regarding sector cuts, which many believe will result in outsourcing and thus further opportunities for the private sector to assume responsibility for the provision of public services. In light of these developments, this article considers some key issues for private sector businesses bidding for public sector contracts.

Regulation, regulation, regulation

While the English law principle of freedom of contract applies whether you are dealing with the public or private sector, there is no doubt that public sector contracts (together with the whole process of public sector out-sourcing) are much more closely regulated than equivalent arrangements in the private sector. Businesses dealing with the public sector must be aware that such contracts may offer great rewards but may also bring with them issues that are unfamiliar in B2B contracts in the private sector.

This regulation of public sector contracts stems from a number of sources. These include administrative law (which regulates what public bodies have the power to do and the way in which they may exercise that power) and EU law (which affects matters such as the process that the public body must follow to award a contract, and the need to ensure that the contract price is not such that state aid issues arise), on top of the usual raft of contract law issues.

Procedure

The process governing the letting of public sector contracts stems from the EU public procurement rules. These rules apply to contracts for the supply of goods or services and for the provision of works (ie construction related contracts), where the value of the contract in question exceeds the stipulated threshold. Even where a contract has a value below that threshold or is of a type not covered by the procurement rules, EU law requires it to be advertised and awarded in an open, transparent and fair manner that does not discriminate between suppliers on grounds of nationality. This is to enable cross-border provision within the EU.

A compliant procurement procedure has a number of stages. Those businesses who regularly supply to the public sector may be familiar with the jargon surrounding the procedure and with what is commonly perceived as high levels of bureaucracy that accompanies public procurement. For those less familiar with the regime, it can seem daunting and time consuming, without necessarily producing a satisfactory result. Typically, a public procurement procedure will be made up of the following stages:

- Advertisement: the contract will be advertised in the Official Journal of the European Union (OJEU). The advertisement will describe the contract and outline the timetable for the procurement, as well as setting out next steps for bidders.

- Pre-qualification: businesses that have expressed an interest in tendering are usually invited to complete a pre-qualification questionnaire which tests their suitability for the contract. Some or all of those whose responses exceed the required level will be invited to tender.

- Tender stage: at this stage, bidders receive further detailed information about the public sector purchaser's requirements and must respond in writing setting out how they will meet those requirements.
- Evaluation: the public sector purchaser reviews the bids that it has achieved in line with its advertised award criteria and selects its preferred bidder.
- Contract award: details of the contract are finalised and the contract is then signed.

Need to know

Whilst the procurement procedure can often seen opaque and cumbersome (despite the imperative for the public sector purchaser to be open and transparent), by law there are a number of things that bidders for public sector contracts must be told. These include the following:

- Requirements: the purchaser must spell out its requirements clearly so that bidders can understand precisely what is required. If the purchaser's requirements change during the course of the procurement process, it must consider whether the changes are material enough such that the identity of the bidders involved could have differed if the amended requirements had been advertised in the first place and, if so, it must restart the procurement process.
- Award criteria: the award of a public sector contract may be based either on 'lowest price' or on 'most economically advantageous tender'. At the start of the process, the public sector purchaser must publicise the criteria which it will use as the basis for its choice of winning bid. Where it is using 'most economically advantageous tender' it must specify which criteria it will consider to evaluate tenders on this basis. If possible, the weightings that will be attached to these criteria must be disclosed at the same time, but at the very least the criteria must be listed in descending order of importance.
- Sub-criteria and sub-sub-criteria: recent case law makes it clear that if the award criteria are to be split out into sub-criteria (or even sub-sub-criteria) and knowledge of that split could make a difference to the way in which bidders prepare their tenders, then the sub-criteria (and any sub-sub-criteria) must be disclosed in advance of the tender stage.
- Marking schemes/marking methodology: as with sub-criteria, if the purchaser is using a marking scheme or a methodology, knowledge of which could make a difference to the preparation of tenders, it must be disclosed in advance of the tender stage.
- Reasons for award: once the public sector purchaser has chosen its winning bidder, it must inform each other bidder who have been involved in the procurement process of the name of the winner, the reasons for its decision (including the characteristics and relative advantages of the winning bid and the scores). The purchaser must wait at least 10 days from sending this notice before it can execute a contract with its winning bidder.

Local authorities and Best Value

Where the public sector purchaser is a local authority, it is bound by a regime for improving service delivery through 'Best Value'. This is a statutory regime which requires local authorities to "secure continuous service improvements in the way their functions are exercised having regard to a combination of economy, efficiency and effectiveness". Local authorities are required to monitor their own performance against indicators set nationally and locally as well as to subject themselves to external scrutiny by the Audit Commission.

Private sector businesses providing services to a local authority will be affected by these requirements. Most significantly, the contract will require the private sector supplier to help the contracting authority to meet its Best Value obligations. This may include matters such as assisting the local authority in carrying out Best Value reviews and in preparing performance plans, participating in performance and benchmarking exercises and undertaking customer satisfaction surveys.

… there is no doubt that public sector contracts (together with the whole process of public sector outsourcing) are much more closely regulated than equivalent arrangements in the private sector.

Vires issues

Public bodies cannot act beyond the powers that they have been given by law. In practice it is accepted that it is not possible, or indeed necessary, to identify a separate power for every activity undertaken or proposed to be undertaken, and so public authorities are permitted to do things which are not otherwise prohibited and which are calculated to facilitate, or are conducive or incidental to, the performance of a function. Private sector contractors must therefore take care to ensure that the public sector body with which they are contracting is acting within its powers in entering into the contract. If not, the agreement will be unenforceable.

Freedom of Information

The Freedom of Information Act (FOIA) has been a hot topic since it came into force in 2005. It gives a number of rights to members of the public to request information held by public bodies. Disclosure may be refused in certain limited circumstances, which may either be absolute or qualified. "Qualified" means that the public sector body can refuse to provide the information only if it believes the public interest in withholding outweighs the public interest in disclosing

Private sector bodies bidding for public sector contracts should bear in mind that information they submit during the course of the tender process may become the subject of an FOIA requires. Under the FOIA, such information may be exempt from disclosure if it is a trade secret or if its release is likely to prejudice commercial interests – however, this is a qualified exemption and therefore will not offer total protection to the private sector party concerned. It is advisable for any confidential information in a tender to be identified as such and provided in a separate schedule which also sets out why that information should be protected.

During the term of a contract, a private sector provider may find that the public sector purchaser receives FOIA requests relevant to that contract. As a protective measure should these circumstances arrive, the former may wish to include obligations in the contract which require the public sector body to notify it if such a request is received, to have regard to its views on the potential impacts of disclosure and to notify it of the decision on whether to disclose.

State aid

A further regulatory consideration when contracting with the public sector is the state aid regime. These rules derive from EU law and prevent a state body from giving any form of economic advantage to a particular business or industry. So any contract with a public body must be at arm's length and at market value. If not, and the state aid rules are invoked, the public body is at a duty to recover the advantage from the contractor with interest – something that would clearly be undesirable from the private sector provider's point of view.

News and views

New advertising codes published

Following a two year review process and extensive public consultation with over 30,000 submissions, the British Codes of Advertising, Sales Promotion and Direct Marketing published by the Committee of Advertising Practice and the Broadcast Committee of Advertising Practice have published new Codes. The new Codes come into effect on 1 September 2010.

Currently the CAP Code governs online advertisements in 'paid-for' space, ie banner advertisements and pop-up advertisements, advertisements and sales promotions (including prize draws and prize competitions), commercial text messages, flyers, brochures etc. and there is no legislation or self regulatory code which extends to online advertising. However, in March 2010 the advertising industry recommended an extended online remit to CAP. CAP is now assessing this recommendation with the aim of brining the new remit into effect as soon as possible. SmartLaw will provide further updates on this extension of remit

New rules for vertical agreements

New rules on the application of competition law to agreements between businesses at different levels of the supply chain (so called 'vertical agreements') have been published by the European Commission. The new rules see two major changes: firstly, the market shares of both supplier and purchaser are now relevant in determining whether the vertical agreement is exempt from competition law; and secondly, there is a revised approach to the restrictions that may be imposed on internet sales.

As regards market shares, previously the rules provided that where the supplier had a share below 30%, the agreement would benefit from a 'safe harbour' from competition law enforcement. The new rules provide that both supplier and purchaser must have a share below 30% in order for the agreement to be 'safe'. The increased significance of sales over the internet has also been noted by the European Commission. Now, except in limited circumstances, distributors and retailers cannot be restricted from reselling goods over the internet. Only very limited restrictions on internet sales will be permissible.

The new rules came into force on 1 June 2010 and apply immediately to all agreements entered into from this date. There will be a transitional period of one year up to 31 May 2011 for existing agreements already in force that comply with current rules in order to allow amendments to ensure compliance with the new rules.

Consultation on product placement

A recent EU Directive (the Audiovisual Media Services Directive) has clarified that product placement may legitimately be used in the EU, subject to certain restrictions. Following this clarification, Ofcom has launched a consultation on new rules to allow product placement as permitted under the Directive and on revisions to the existing rules that it considers are necessary in light of the Directive. Ofcom anticipates that it will publish the revised Code by the end of 2010.

Clarification on lawful disclosure of personal information

In its recent decision in *Roberts v The Information Commissioner* the Information Tribunal has considered when disclosure of personal information may be fair and lawful. The Tribunal rejected an appeal against the Information Commissioner's decision that the Department for Business, Innovation and Skills (BIS) had not been obliged to provide information about the people who created documents held within a BIS database. In addition to making points directly relevant to the facts of the case, the Tribunal held that when considering the public interest in disclosing information, it is the interest of the public generally that should be taken into account and not just that of the person making the request.

Diary dates

17 September 2010
Ofcom's consultation on product placement ends.

September 2010
The new edition of Incoterms will be published in September 2010, and will take effect from 1 January 2011.

31 December 2010
New European Commission guidelines on horizontal agreements come into effect.

Forthcoming LG Events

The 2010 SmartLaw Seminar Series

Wednesday 15 September 2010
A to Z of Contract Clauses

Friday 10 December 2010
Commercial Law Update

8 November 2010

Insolvency & Restructuring Conference

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