

Business Law Newsletter



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Professional Contract Drafting for Business



Spring'23 Edition

Spring '23 Edition Contents

Editorial	2
The importance of well drafted commercial contracts	2
Action Plan for SMEs	2
The Plan's Ambition	3
The Plan's Help to Grow strategies.....	3
Definition of an SME.....	3
Brexit	4
The Windsor Agreement.....	4
Chat about ChatGPT	5
We asked ChatGPT to introduce itself to us:.....	5
A ChatGPT health warning:	5
Contracts	5
What does 'loss' mean in commercial contract?.....	5
Direct Loss:.....	5
Consequential and Indirect Loss:.....	5
Loss of Profits:.....	5
Loss of Goodwill	6
Excluding Liability	6
Reducing Risk of contract Disputes	6
Difference between 'reasonable' and 'best' endeavours.....	7
Voting rights in a limited company.....	8
Contract Tips for Spring	8
Tip#1 Know Your Goals and Priorities:	8
Tip#2 Understand the Other Party's Interests:	8
Tip#3 Be Willing to Compromise:	9
Tip#4 Getting a good price:.....	9
Data Protection	9
Good data practice advice for SMEs.....	9
Privacy protection in new technology.....	10
Dividends	10
Dividend Tax allowance reduced from April '23.....	10
Dividend Refresher	11
Employment	11
Important changes in the law	11
Using ChatGPT in the workplace.....	12
Late payments	12
Tips to avoid late payments.....	12
Publisher's Notice:	13

Editorial

THE IMPORTANCE OF WELL DRAFTED COMMERCIAL CONTRACTS

We don't disagree with a word of the following statement:

Commercial contracts are the backbone of business transactions, outlining the rights and responsibilities of each party involved. These contracts are legal documents that govern the relationships between parties and provide the framework for how transactions will be conducted. Given their crucial role in business dealings, it is imperative that commercial contracts are well-drafted and written in clear and concise language, particularly in English law.

The importance of well-drafted commercial contracts cannot be overstated. They establish the terms of the agreement, including payment, delivery, performance, and liability. Clear language and precise definitions help prevent disputes and misunderstandings between the parties. Without a well-drafted contract, the parties may have different expectations of what is required, leading to costly and time-consuming disputes.

Furthermore, well-drafted commercial contracts can help businesses avoid costly mistakes and legal pitfalls. By clearly outlining the rights and obligations of each party, contracts can help businesses identify and address potential problems before they arise. Additionally, well-drafted contracts can help protect businesses from liability by ensuring that they are in compliance with all relevant laws and regulations.

In conclusion, well-drafted commercial contracts are crucial to the success of any business transaction. In English law, in particular, they are essential in establishing the rights and obligations of each party involved. By taking the time to carefully draft contracts in clear and concise language, businesses can avoid disputes, protect themselves from liability, and ensure that their transactions are conducted smoothly and efficiently.

Yours Contractually,

[ChatGPT](#)

(edited for content)

[Back to Menu](#)

Action Plan for SMEs

The Department for Business, Energy & Industrial Strategy (BEIS) has released a policy paper setting out their previous procurement processes and its future action plan for 2022–2025 to improve opportunities for small and medium enterprises (SMEs) that supply BEIS. BEIS intends to increase the diversity of BEIS' supply base, improve its resilience, and welcomes innovation.

SMEs make up an essential component of the private sector business landscape. According to the [2021 Business Population Estimates](#) there were almost 5.6 million businesses in the UK at the start of 2021. SMEs accounted for 99.9% of the total number. Importantly, SMEs employed 61% of the private sector workforce which was 16.3 million employees. They also earned 52% of the turnover of UK plc which is equivalent to £2,300 billion.

THE PLAN'S AMBITION

“BEIS recognises the value that micro enterprises and small businesses bring to the economy, through their creativity and entrepreneurial spirit, in helping to deliver our ambition to make the UK one of the best places in the world to start and grow a business. BEIS is developing an Enterprise Strategy which we plan to publish in due course. The Strategy aims to create an enterprising culture where everyone that wants to start a business has the confidence to become an entrepreneur, where we widen opportunity to all places and parts of society to engage in enterprise, and where every business that wants to invest and grow has the means and know-how to do so.”

THE PLAN'S HELP TO GROW STRATEGIES

Help to Grow: Management is an intensive national training programme that looks to improve SME leadership and management skills. This programme aims to support 30,000 SME business leaders to increase productivity, seize investment opportunities and grow their business. This 12-week programme, which includes 1:1 mentoring, is designed to fit around full-time work, is delivered by leading business schools across the UK and is backed with a 90% government subsidy. Visit [Help to Grow: Management](#) for more information.

The **British Business Bank**, which was established by and is sponsored by BEIS, increases the supply and choice of finance for SMEs. They are providing the opportunity for SMEs to invest and grow, creating additional jobs and economic activity.

Start Up Loans provide new and early-stage UK businesses with access to affordable finance and mentoring support. Over 93,000 loans have been delivered with an average size of nearly £10,000 and this comes with 12 months free access to an expert business mentor, to help with every aspect of setting up a business

British Patient Capital helps UK businesses with high growth potential to access the long-term financing they need to scale up. By co-investing with the private sector, they de-risk the investments for venture and growth capital funds

[Read the Action Plan for SMEs here](#)

DEFINITION OF AN SME

In relation to its procurement activities, the UK Government currently defines Small and Medium Enterprises (SMEs) in accordance with the table below (but why, we ask, in Euros not Sterling?):

Size of Business	Staff Headcount	Annual Turnover	Balance Sheet Total
Medium	Under 250	Under € 50m	Under € 43m
Small	Under 50	Under € 10m	Under € 10m
Micro	Under 10	Under € 2m	Under € 2m

[Back to Menu](#)

Brexit

THE WINDSOR AGREEMENT

What you need to know about the legal basis for this historic agreement reached between the UK and the EU.

“The Windsor Framework is an international arrangement between the UK and the EU under which the parties commit to binding international law obligations, including changes to the Protocol itself. The UK and EU have made clear in the Political Declaration accompanying the Windsor Framework that the amended Protocol is governed by the Vienna Convention on the Law of Treaties.

The Windsor Framework addresses the Government’s position as set out in the July 2021 Command Paper. It respects the Act of Union and the Belfast (Good Friday) Agreement and deals with the everyday issues people and businesses in Northern Ireland had faced as a result of the operation of the Protocol.

The proposed measures are fully aligned with and advance the UK’s commitments and responsibilities under the Belfast (Good Friday) Agreement and the Act of Union, including protecting the economic rights of the people of Northern Ireland and ensuring just and equal treatment for the identity, ethos and aspirations of both communities.

An agreement between the parties in this way provides for a durable and secure basis both to safeguard the Belfast (Good Friday) Agreement and ensure respect for the Act of Union, as opposed to reliance on domestic primary legislation that would be temporary; only justified by a basis in the doctrine of necessity that would have to be continually under review; and which would be exposed to litigation in arbitration proceedings or before the Court of Justice of the EU.

Effect of the Windsor Framework on the Northern Ireland Protocol Bill

As envisaged by the UK Government in June 2022, given the terms of the Windsor Framework and the clear availability of a durable negotiated solution, there would now be no legal justification for enacting the Northern Ireland Protocol Bill.

With the Windsor Framework, implemented as envisaged, the Bill will no longer be the “only way” in which the issues caused by the previous Protocol arrangements can be resolved. This statement and this assessment is without prejudice to any future situation which may arise, or the UK’s rights under international law to protect its interests.” [HMG Legal Position: The Windsor Framework, 27th February 2023](#)

[The Windsor Framework in full](#)

[Back to Menu](#)

Chat about ChatGPT

We asked ChatGPT to introduce itself to us:

"Hello! I'm ChatGPT, a large language model developed by OpenAI. I'm designed to assist and communicate with humans using natural language. I can understand and respond to various topics, from general conversations to more specific questions on a wide range of subjects, including science, technology, history, current events, and many more.

I was created using a deep learning technique called the Transformer architecture, which allows me to generate responses that are fluent and coherent with human-like language. I have been trained on vast amounts of text data from the internet, including books, articles, and websites, which enables me to provide insightful and informative responses to a wide range of questions.

I am constantly learning and updating my knowledge base to provide accurate and relevant information to my users. So, feel free to ask me anything, and I'll do my best to provide you with a helpful response."

[Back to Menu](#)

A ChatGPT health warning:

When launched, OpenAI's website warned that 'ChatGPT sometimes writes plausible sounding but incorrect or nonsensical answers'. So, misinformation could be presented as fact. ChatGPT can only be as good as the source of the information it is trained on, and we all know that the internet is not a wholly reliable source. ChatGPT was also trained using data sets available in 2021, rendering queries or searches requiring more up to date information pointless.

Contracts

WHAT DOES 'LOSS' MEAN IN COMMERCIAL CONTRACT?

Direct Loss:

This is generally regarded as referring to losses within the first limb of a case by the name of *Hadley v Baxendale* to mean losses that arise naturally, according to the ordinary course of things, from a breach of contract. For example, compensation payments made to a customer arising from problems with a billing system.

Consequential and Indirect Loss:

This has generally been regarded as referring to losses within the second limb of *Hadley v Baxendale* to mean potentially foreseeable losses, which were in the reasonable contemplation of the parties at the time they entered into the contract.

To bring a claim for consequential loss, a business will need to establish that the losses were in the reasonable contemplation of the other party when it entered into the contract. It may be possible to demonstrate this from the contract itself, or from other evidence such as pre-contractual correspondence.

Loss of Profits:

What constitutes a claim for 'loss of profits' will depend on the context and the drafting.

Types of loss such as 'loss of profit' (and loss of revenue and savings) are claims which involve at least an element of speculation, involving a variety of counterfactuals: for example, what benefits would the contract have brought if it had been performed? What additional profits would have been made as a result of the contract? They are difficult to estimate in advance and can be notoriously open-ended. It is therefore common to exclude liability for it.

Loss of Goodwill

'Goodwill' can have different meanings, depending on the context.

The courts will apply the usual rules of contract interpretation when determining what is meant by 'goodwill' and will look at its meaning as used in the context of the contract as a whole, and as understood against the factual background. In one case, the court held that, 'goodwill' referred to *'a type of proprietary right representing the reputation, good name and connections of a business, and is different to the particular or specific meaning attributed to the term by accountants'*.

[Back to Menu](#)

EXCLUDING LIABILITY

Exclusions and limitations of liability can take many forms in commercial contracts, including:

- exclusions of implied warranties and conditions
- exclusions of specific types of loss—e.g. loss of profits, loss of data, indirect and consequential loss
- terms permitting a party to unilaterally vary their obligations under the contract
- time bars and time limits e.g. time within which a claim must be brought or notified
- financial caps for payment of damages
- exclusions of remedies—e.g. excluding the right to set-off
- conditions on ability to exercise remedies
- exclusive remedies clauses
- indemnities
- force majeure provisions
- entire agreement clauses or non-reliance clauses
- liquidated damages for a breach

These types of clause are usually subject to the Unfair Contracts Terms Act 1977, which contains provisions controlling and directing how they are to be used and interpreted.

[Back to Menu](#)

REDUCING RISK OF CONTRACT DISPUTES

Contractual difficulties and disagreements can arise in commercial contracts for a wide variety of reasons. Increased or reduced demand for goods or services, difficulties in supply chain and workforce availability, higher prices, inflation, shortages due to war, pandemic or climate change, and changes in laws (both local and international) can all have a serious impact on the profitability and expectations of the parties and their ability to fulfil their obligations.

Finding a way to deal with issues arising, is key to avoiding escalation into a full blown dispute.

To get an idea of how to head off a dispute we checked a number of online resources (not ChatGPT) and decided to go with the New South Wales' (yes, we scour the world for the best help) [Small Business Commissioner's](#) top 10 tips to avoid disputes, as all are eminently sensible:

1. Have a written agreement at the outset that outlines the goods and services to be provided, and the price or basis for calculating charges.
2. Always read written contracts before signing them. If you sign a contract, you are likely to be bound by its terms and conditions. Do not rely on representations that are made by the other party as to the meaning and effect of the contract.
3. Where possible have both parties sign the agreement so there is documentary evidence of acceptance of the terms of the agreement.
4. Ensure that all terms, including payment terms, are included in the agreement prior to providing goods or services. Do not attempt to add terms and conditions to tax invoices.
5. If you are providing services that are to be charged on a time basis provide an estimate of the likely cost, and maintain detailed work sheets showing times and a description of the work done.
6. Properly identify the person with whom you are dealing. Identify whether you are dealing with a company or an individual. Look behind the business name to identify who is operating the business.
7. If you are operating a business, ensure that your employees are aware of the scope of their authority to enter into contracts on your behalf.
8. If you are dealing with another business, make enquiries as to whether the person you are dealing with has authority to bind the company or the proprietor of the business. Identify the position title that person holds within the business.
9. If a service agreement is for a fixed term, read the contract to understand what rights or penalties apply if you have to end the service agreement early.
10. If a dispute arises, communicate with the other party to attempt to settle the dispute. Taking a claim to court should be a last resort.

[Back to Menu](#)

DIFFERENCE BETWEEN 'REASONABLE' AND 'BEST' ENDEAVOURS

Both these frequently crop up in contracts and it's easy to gloss over their meaning.

So, is there a difference between them? The answer is an emphatic 'yes'!

A best endeavours obligation imposes a requirement that no less than a party's best efforts must be used to achieve the specific result. In other words, that party is required to 'leave no stone unturned' to achieve the desired result, within the 'limits of reason'. This is a very strong obligation.

Determining whether best endeavours have been used in any particular case is highly fact sensitive and a conclusion reached on one set of facts may be different to another set of facts, even if the facts only differ in minor respects

There is no requirement that a company subject to a best endeavours obligation must act in a way that would cause financial ruin or be in complete disregard of the interests of the company's shareholders. Instead, it requires that the directors of the company do what can reasonably be done in the circumstances.

A 'reasonable endeavours' requirement imposes an obligation to take all practicable action, but only to the extent that it is not to the detriment of the party having to comply. An "all reasonable endeavours" obligation in a commercial contract is widely accepted to be interpreted in the same way as "reasonable endeavours".

[Back to Menu](#)

Companies

VOTING RIGHTS IN A LIMITED COMPANY

Voting rights in a limited company are the rights of shareholders to vote on certain company matters that are beyond the scope of the directors' decision-making powers. Details of shareholders' voting rights are specified in the 'prescribed particulars' of the rights attached to shares.

Limited companies decide which voting rights to attach to shares. They have the option to provide full voting rights, voting rights only in specified circumstances, multiple votes per share, or no voting rights. However, this all depends on the company's articles of association.

Ordinary shares, which are issued by the most newly formed companies, generally carry one vote per share. A shareholder who owns at least one ordinary share has the right to attend general meetings and vote on certain company decisions. This is the only class of shares you can issue if you adopt "model" Articles of Association on formation.

Different classes of share can be created with or without the right to vote, such as 'preference', 'redeemable', and 'alphabet' shares. Whilst others, such as 'non-voting shares', never carry the right to vote.

[Back to Menu](#)

Contract Tips for Spring

Here are our four Spring tips to help you negotiate a favourable commercial contract:

Tip#1 Know Your Goals and Priorities:

It's important to have a clear understanding of what you want to achieve from the contract. Identify your main goals and priorities, such as pricing, payment terms, delivery, warranties, indemnification, and termination provisions. This will help you stay focused during negotiations and to avoid concessions that could be detrimental to your business.

Tip#2 Understand the Other Party's Interests:

Negotiation is not only about getting what you want but also understanding the other party's interests and concerns. By understanding their motivations, you can identify areas

where you can make concessions or offer incentives that are valuable to them. This approach can help build trust and goodwill, leading to a more productive and successful negotiation.

Tip#3 Be Willing to Compromise:

Negotiation involves a give-and-take process, and it's unlikely that you will get everything you want. Therefore, be prepared to compromise on some issues which are not critical to your business. Also, consider alternative options and creative solutions that could benefit both parties, such as phased deliveries, volume discounts, or longer-term commitments.

Tip#4 Getting a good price:

Try offering additional services or features to increase the value of what you are offering. Value-adding may include things like installation, training, technical support, or customisation. Highlighting these kinds of additional features, you can negotiate a better price as part of the overall package you are offering.

[Back to Menu](#)

Data Protection

GOOD DATA PRACTICE ADVICE FOR SMES

The Information Commissioner's Office (ICO) has advised UK's SMEs on implementing good data practices from the start of their business and checking that the right data protection practices are in place.

The ICO reported that a recent survey showed 91% of people were worried that their personal information was being sold to another company without their consent

The ICO says that good data practices benefit companies' reputations.

Businesses are legally required to look after people's personal information properly and fairly but the ICO noted other benefits of doing so such as saving owners time and money and increasing customer trust.

The ICO's provides free resources with advice and guidance on good data practices on its SME hub, which can be accessed [here](#).

These are [five recommended ways](#) to make data complaint handling easier for businesses:

1. Keep good records
2. Write a data complaints procedure*
3. Create a template*
4. Train staff

*[Contracts Direct](#) is able to help with items 2. and 3. – [please get in touch](#).

Related data protection information links from the ICO:

- [Getting started with data protection – top tips for beginners](#)
- [11 practical ways to keep your IT systems safe and secure](#)
- [Four simple ways to make your next subject access request easier to handle](#)

- What are some of the most common data protection complaints the ICO receives about small businesses?
- What data protection training should I give to my staff, and how often?

[Back to Menu](#)

PRIVACY PROTECTION IN NEW TECHNOLOGY

The Information Commissioner's Office (ICO) is encouraging developers to consider integrating privacy at early stages when implementing new technologies to maintain public trust and confidence.

The ICO's Tech Horizons Report, looks at technologies emerging over the next two to five years and warns that the significant benefits they offer could be lost if people feel companies are misusing their data.

The report covers four categories:

Consumer HealthTech- wearable devices and software applications that help people assess their health and wellbeing;

Next-generation Internet of Things- physical objects that connect and share information, with the ability to sense, respond to or interact with the external environment;

Immersive technology- augmented and virtual reality hardware that creates immersive software experiences for users; and

Decentralised finance- software that employs blockchain technology to support peer-to-peer financial transactions.

The report found that businesses must consider transparency, what control people have over their data, and the amount of data gathered to ensure their services are data compliant and developed with consumer privacy at the forefront.

[Read the Tech Horizons Report in full here.](#)

[Back to Menu](#)

Dividends

DIVIDEND TAX ALLOWANCE REDUCED FROM APRIL '23

At present, the dividend allowance (i.e. the tax-free allowance for dividend income) is set at £2,000.

From 6th April this year, the allowance is going to be reduced to £1,000. And there's more to come; from 6th April '24, the allowance is being halved again to £500.

If you receive dividends above the £1,000 allowance (or £500 allowance for 2024/5), there is no change to the amount of tax payable on the dividend income, which depends on the income tax band you fall into.

The dividend tax rate (once you go over the allowance) is:

- 8.75% if your income tax band is **the basic rate**
- 33.75% if your income tax band is **the higher rate**
- 39.35% if your income tax band is **the additional rate**

To calculate your tax band, you need to add the dividend total to any other income that you may have.

Dividend tax is charged at lower rates to the regular income tax rate. This is because dividends are distributed from a company's retained profits after companies have already been charged the current 19% Corporation Tax on those earnings.

[Back to Menu](#)

DIVIDEND REFRESHER

A dividend is a way of taking out profits from a company limited by shares. When a company generates profit and has retained earnings, the directors can reward eligible shareholders with financial pay-outs in the form of cash dividends.

In most small companies, dividends are issued on a regular basis. This provides shareholders with a steady stream of income on their investment in the company's shares.

The amount that is paid out in dividends will depend on how much profit is available to distribute at the time and what percentage of shareholdings each member has.

For example:

- If you are the only shareholder and you own one ordinary share with a right to dividends, that share entitles you to 100% of available profits in the form of dividend payments;
- If your company has 4 shareholders with each owning one ordinary dividend yielding share, each shareholder is entitled to 25% of available profits in the form of dividend payments

These are very basic examples, but profit distribution in small companies is often quite straightforward.

There is no strict timetable for issuing dividends. The frequency of distributions varies from company to company and is at the discretion of the directors. Many smaller companies decide to pay dividends on a monthly basis to provide their shareholders with regular income. Others may only pay dividends at irregular intervals and when the company has profits available to distribute.

In some companies, different types of shares carry different dividend rights and some shares may carry no dividend rights.

[Back to Menu](#)

Employment

IMPORTANT CHANGES IN THE LAW

- The minimum wage is increased to £10.42 per hour from 1st April for those aged 23 and over. Lower rates apply for younger workers, and apprentices will get £5.28 per hour.

- Maternity, paternity, adoption, shared parental and parental bereavement pay is being increased to £172.48 per week.
- Statutory sick pay is being increased to £109.40 per week.
- Employees will be able to request flexible working from their first day of employment, and employers will have to respond within two months of a request.

USING CHATGPT IN THE WORKPLACE

“There are a few potential risks associated with using ChatGPT in the workplace, including:

1. **Confidentiality and privacy:** ChatGPT is an AI language model that can generate responses based on the data it has been trained on. If sensitive or confidential information is discussed with ChatGPT, there is a risk that the information could be exposed or leaked. It's important to ensure that any conversations with ChatGPT are not confidential or sensitive.
1. **Bias and accuracy:** AI language models like ChatGPT are only as accurate as the data they have been trained on. If the training data contains biases or inaccuracies, ChatGPT may generate responses that are also biased or inaccurate. It's important to be aware of this risk and to double-check any information provided by ChatGPT.
2. **Overreliance on AI:** It's important to remember that ChatGPT is an AI language model and not a human being. While it can generate responses to a wide range of questions and topics, it may not always provide the most appropriate or nuanced answer. Overreliance on ChatGPT could lead to a lack of critical thinking or independent problem-solving skills.
3. **Legal and ethical issues:** Depending on the industry and context, there may be legal or ethical considerations to using AI language models like ChatGPT. For example, in healthcare, there may be regulations around the use of AI for diagnosing or treating patients. It's important to ensure that the use of ChatGPT is compliant with any relevant laws or ethical guidelines.

Overall, the risks of using ChatGPT in the workplace can be mitigated by using it appropriately and with awareness of its limitations. It can be a useful tool for generating quick answers or ideas, but it should not be relied on as a substitute for critical thinking or independent problem-solving.”

Written by ChatGPT (unedited)

[Back to Menu](#)

Late payments

With reports suggesting that as much as 65% of all invoices owed to small businesses are late, now is the time to take stock of what can be done to help get paid on time.

TIPS TO AVOID LATE PAYMENTS

[Enterprise Nation: How small business owners are dealing with late payment](#)

[Back to Menu](#)

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Note: This publication does not necessarily deal with every important topic nor cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. The information contained in this document is intended to be for informational purposes and general interest only.

E&OE

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