

Lexis®PSL Commercial Contract variation



Contract variation

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Variation

It is a commercial reality that parties doing business together do not simply enter into self-contained discrete contracts with each other but engage in a business relationship that evolves and can change over time. This can lead to the need to make changes to contracts already in place.

Contracts can be varied in a number of ways:

- in writing
- orally
- by conduct
- unilaterally (if permitted under the contract)
- waiver, or
- sustained minor breach

Methods of variation

Written variation

It is standard practice to include in written contracts a term stating that any amendment or variation of an agreement is to be made in writing and signed by all parties or their authorised representatives. An example would be:

'No variation of this agreement shall be valid or effective unless it is in writing, refers to this agreement and is duly signed or executed (as the case may be) by, or on behalf of, each party.'

The purpose of a requirement for all variations to be in writing is to prevent an accidental variation and exclude the possibility of an informal variation. However, it is now clear that contracts may be varied orally even where the contract contains a clause prohibiting oral variation (see the section 'Oral variation' below).

Regardless of the effectiveness of any prohibition, an existing contract may be varied provided that the usual rules for the creation of a binding agreement are followed, including consideration.

Oral variation

It was unanimously confirmed (albeit *obiter*) by the Court of Appeal in *Globe Motors v TRW Lucas* that it is possible to enter into a legally binding oral variation of a contract in spite of the existence of a clause which prohibits variations other than in writing.

References:

Globe Motors, Inc and others v TRW Lucas Varity Electric Steering Ltd and another [2016] EWCA Civ 396, [2016] All ER (D) 171 (Apr), *MWB Business Exchange Centres Ltd v Rock Advertising Ltd* [2016] EWCA Civ 553

This approach was endorsed by the subsequent case of *MWB Business Exchange Centres v Rock Advertising*. See News Analysis: [Validity of oral variation clauses in licence agreements](#).

Prior to these cases, there was significant uncertainty due to conflicting case law, see for example *I-Way v World Online Telecom* and *United Bank Ltd v Asif*.

References:

I-Way Ltd and another v World Online Telecom Ltd [2004] All ER (D) 283 (Feb), *United Bank Ltd v Asif*, unreported, CA 11/2/00

Variation by conduct

Contracts can be varied by an act or omission. This often occurs with construction contracts or contracts where the supplier or contractor is obliged to complete performance by a certain date. The variation will normally be to the time required for performance. If an act or omission of the customer or client has prevented performance by the supplier or contractor, the time required to complete performance will normally be varied by the 'prevention principle'. The effect of the prevention by the customer or client will put time 'at large' and replace the time period stipulated in the contract with a reasonable time in which to complete performance unless there was an extension of time clause in relation to the relevant acts (*Multiplex Constructions (UK) v Honeywell Control Systems*).

References:

Multiplex Constructions (UK) v Honeywell Control Systems [2007] EWHC 447 (TCC), [2007] All ER (D) 79 (Mar)

The operation of the prevention principle will result in a term being implied into the contract extending time. However, an act of prevention will not result in a term being implied if there is clear and unambiguous provision for completion of performance by certain dates. This can occur where the parties insert long stop dates for completion of each phase of a project and an act of prevention delays completion of a phase but has no effect on the completion of a later phase. In these circumstances a court will refuse to imply a term extending time on the basis that the parties' intentions were clear at the outset. Any ambiguity relating to time and its extension will be decided in favour of the performing party (*Trollope & Colls v NW Metropolitan Hospital Board*).

References:

Trollope & Colls v NW Metropolitan Hospital Board
[1973] 2 All ER 260

Time will not be 'at large' if there is an applicable extension of time clause in the contract—*Adyard Abu Dhabi v SD Marine Services*. It is important to ensure that any provision allowing an extension of time covers all preventative events. Where the provision allowing an extension of time provides for an extension if some events occur but not others, the events that are not covered may cause time to be put 'at large'.

References:

Adyard Abu Dhabi v SD Marine Services [2011] EWHC 848 (Comm), [2011] All ER (D) 113 (Apr)

A contract should contain a coherent regime to deal with variations. Consider what may constitute an act of prevention and ensure that they are covered in any extension of time clause.

If an act of prevention occurs and there is no provision in the agreement for extending time, it would be prudent to make a formal request to extend time regardless of which party caused the delay.

Unilateral variation

Generally a contract cannot be unilaterally varied by a party (*Morris v C H Bailey Ltd*), however where a contract allows a party to unilaterally vary a contract then:

References:

Morris v C H Bailey Ltd [1969] 2 Lloyd's Rep 215

- no further formality is required, and
- there is no need for the change to be supported by consideration unless the contract specifically requires this

A power to vary a contract unilaterally is limited where one of the contracting parties is a consumer as:

- the power to vary may amount to an unfair term, and
- any change is subject to the provisions of the **Consumer Credit Act 1974** if a regulated agreement

Where a party is a consumer, the power of the commercial party to make minor changes to the provisions of an agreement unilaterally may not be unfair.

Waiver

Waiver is almost exclusively an equitable concept and may not be a permanent solution to effectively varying a contract. It is possible to effect a variation in equity where there is no apparent consideration. A party who waives their rights under a contract for a period of time may be stopped from going back on that

intention and seeking performance of the original contractual terms (*Central London Property Trust v High Trees House*).

References:

Central London Property Trust v High Trees House
[1956] 1 All ER 256

Sustained minor breach

Where there is no apparent written or verbal variation of a contract, equity can nonetheless play its part. Linked very closely with waiver, a party that has persistently accepted minor breaches by the other party may be stopped from claiming that there has been no variation and while the courts do not treat such events as a genuine variation they will not allow the history of the parties' actions or inactivity to pass unnoticed (*Hazel v Hassan Akhtar*).

References:

Hazel v Hassan Akhtar [2001] EWCA Civ 1883, [2001] All ER (D) 151 (Dec)

Effecting a variation in writing

Variation or novation

Parties whose rights under a contract may be lost if a variation is validated have sought to argue that the purported variation constituted a discharge of the original contract and the creation of a new contract with different parties equivalent to a novation (*Langston Group Corpn v Cardiff City Football Club*). To date, this argument has not been successful but highlights the uncertainty with regard to variation and drafters should objectively appraise their efforts to ensure rights and obligations under the contract are not inadvertently varied or discharged.

References:

Langston Group Corpn v Cardiff City Football Club [2008] EWHC 535 (Ch), [2008] All ER (D) 301 (Mar)

Consideration

As with contract enforceability, consideration is a key ingredient for the variation of contracts by mutual agreement. It has been held that a variation which confers a practical benefit coincident with the performance of existing, as opposed to new or varied, contractual obligations may provide good consideration (*Williams v Roffey Bros & Nicholls (Contractors)*).

References:

Williams v Roffey Bros & Nicholls (Contractors)
[1990] 1 All ER 512

However, this decision was criticised in *Adam Opel GmbH and another v Mitras Automotive UK Ltd* with the court noting

that '*Williams v Roffey* would seem to permit any variation of a contract, even if the benefits and burdens of the variation move solely in one direction'. It went on to say that '[t]he law of consideration is no longer to be used to protect a participant in such a variation. That role has passed to the law of economic duress, which provides a more refined control mechanism, and renders the contract voidable rather than void'.

References:

Adam Opel GmbH and another v Mitras Automotive UK Ltd
[2007] All ER (D) 272 (Dec)

A variation agreement that is not supported by consideration will not make any amendments effective (however see 'Waiver' section above). Consideration can usually be found in the mutual grant, assumption and/or release of obligations, rights and liabilities. Where the amendments favour one party only it may be more difficult to establish an effective binding contract. If there is any doubt working such as the following could be inserted:

'In consideration of the parties mutually agreeing to waive the enforcement of any outstanding rights existing at the date hereof, the parties agree to [vary the agreement, with effect from [insert date]] as follows: [terminate the agreement with effect from the date of [insert date]].'

Alternatively the variation agreement could be executed as a deed.

Past consideration is not good consideration but there are exceptions and consideration may not always be present to have an effective variation.

Deeds

Consideration is not required for execution of agreements as deeds and this can be a useful tool to satisfy all the criteria for an effective agreement if there is ever any doubt over the parties' intentions. A number of contractual scenarios in English law are required by statute to be effected in writing and it is by far the safer way to conduct transactions. Deeds do not have to be varied by way of a further deed but variation of a deed should at least be in writing and consideration supplied. The alternative to execution by deed is to include a term of stated consideration as set out above. The added advantage of execution as a deed is that it will extend the limitation period to 12 years.

See Practice Note: [Deeds](#).

Third party rights

Where a third party is recognised as having a legally enforceable benefit, consider whether the third party's consent is needed to effect the variation. Decide at what point the legal right is created as this will impact on the contracting parties' rights to vary the contract. Parties to a contract may not vary or rescind a contract so as to vary or extinguish a third party's rights if that right has

already crystallised. This may arise in three ways:

- where the third party has acknowledged the right by word or conduct directly to the promisor
- where the third party has relied on the right and the promisor is aware of the reliance, or
- where the third party has relied on the right and the promisor could be reasonably expected to be aware of the reliance

If any of the above have occurred the third party right will have crystallised and cannot be varied or withdrawn without the consent of the third party. However, by including in written contracts a term removing the need for third party consent to a variation or stipulating prescribed procedures for variation, the requirement for third party consent can be avoided.

References:

C(RTP)A 1999, s 2(3)

Third party guarantees

There is a significant risk of inadvertently discharging a third party guarantor who is not party to the underlying contract from his obligations if a variation is made to the underlying contract that is to the detriment of the guarantor and the third party guarantor does not consent to the variation.

It was stated in *Triodos Bank v Dobbs* that a clause in a guarantee that enables the parties to vary the underlying contract in such a way as to vary the underlying obligations without the guarantor's consent to the variation will only be effective and apply to the rescheduling of obligations and cannot fundamentally vary the contract (*Holme v Brunskill*).

References:

Triodos Bank v Dobbs [2005] EWCA Civ 630,
[2005] All ER (D) 364 (May)
Holme v Brunskill (1877) 3 Q.B.D. 495

By analogy it may be that where amendments to a contract result in the imposition of newer different obligations so that it cannot be said that they are amendments or variations of the original agreement, the result may be that a third party who is liable under the original agreement is no longer bound (*Triodos Bank v Dobbs*).

Practical consequences of variations

A short variation agreement or letter is useful when a limited number of changes are being made to an existing contract. If the changes to the underlying agreement are substantial practitioners may wish to produce an amended and restated or conformed copy for ease of reference.

Alternatively minor changes may be required on more than one occasion, for example increases in price. Where a contract is intended to run for several years and where the persons originally involved may no longer be available, the following may be helpful in terms of documenting changes from time to time:

- provide each variation agreement/letter with a distinguishing title so it is easily identified (e.g., variation agreement no. 1 relating to *[insert details of contract]* etc)
- provide a narrative in each form of variation as to what has occurred and how each document relates to the others, and
- keep the original agreement and all variations together

Further Guidance

LexisPSL provides a wealth of related research and guidance for contract variation. See Precedents: [Variation agreement](#) and [Letter of variation](#).



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