

Businesses have been adopting unusual and novel practices to ensure their operations can continue during the period of the COVID-19 outbreak. The lockdown has forced many businesses to temporarily (or in some cases permanently) close down offices and other premises, and divert attention to remote working and the utilisation of workforces predominantly working from home.

Whilst these efforts to adapt to the current situation are extremely commendable, still it cannot be ignored that these changes to operational practices are creating new practical difficulties for businesses. One of these practical difficulties relates to the serving and receiving of contractual notices for the non-exhaustive reasons set out below.

- **Method of service** – Often, a contract will require notice to be sent by post. Postal and other delivery services are very stretched at the current time and, therefore, a business may run into problems were it to try to serve notice this way. This will be of particular concern where a contract dictates that notice is deemed served at the point of posting, as opposed to the time of receipt. Businesses' own internal postage systems have also been affected by the lockdown, with many companies only running a skeleton service for use by employees. This will be making it more difficult for businesses, acting as the serving party, to send notice by post.
- **Address for service** – Most notice provisions will include a party's registered office or usual place of business as the address for service. If businesses are not currently operating from their usual premises, this could mean that they are unable to receive notice or would be unaware whether notice had been served on them.

To address the problems highlighted above, some businesses are looking to alter their contractual notice provisions so that they provide for service and receipt of notice via email. This is an attractive option and a sensible solution for businesses that are unable to comply with their notice obligations at this time. Notwithstanding, it is advisable that businesses properly consider their position before taking steps to change contractual notice provisions. As part of this, businesses are advised to ask and answer the following questions in respect of their contracts.

## Does the Contract Allow for Alteration/ Variation?

Non-variation provisions are very common in commercial contracts. These provisions expressly prohibit parties from varying contracts, apart from in a small number of limited circumstances. They are included to provide legal certainty and prevent the informal change of contract, either by accident or without proper thought.

Until recently, there was some uncertainty within the case law as to whether non-variation clauses were actually binding on contractual parties. This was clarified by the Supreme Court in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd [2018] UKSC 24*, in which it confirmed that contracting parties are required to follow non-variation clauses set out in their contracts.

Consequently, as a general rule, businesses should try to give effect to any non-variation clauses included in their contracts, even if this means they are prevented from altering their notice provisions at the current time. If a party chooses to ignore restrictions, then any action it takes in breach of the non-variation provisions will inevitably carry a level of legal risk.

This is not to say, however, that a variation made in departure from the express terms of contract will be invalid in all circumstances. In some cases, it may be that a variation is acceptable, provided the contracting parties have shown a clear need and intention to make variations. The law recognises the need for contracts to be flexible; parties need to be able to adapt them so that they take account of regularly changing commercial circumstances.

Accordingly, as a first step, it is important for a business to evaluate its specific contracting circumstances in order that it can then form a commercial view on whether to attempt an alteration of its contractual notice provisions.

## Is the Other Contracting Party Likely to Agree the Variation?

Put simply, a party will not be able to vary its notice obligations where the other contracting party (or parties) does not agree to the variations. Whilst some contracts may provide one party with a unilateral right to make certain changes, still agreement will normally be necessary. It is, therefore, important that contracting parties are in contact early on to ensure they are both committed to resolving their contractual difficulties and are generally agreed in their approach to varying their notice provisions.

## How Must the Variation Be Agreed?

Non-variation clauses do not generally restrict the overall ability of parties to vary the terms of their contract, but rather they will dictate the method by which such variations must be agreed (usually requiring entry into a formal variation agreement signed by both parties).

Where a contract requires parties to agree variations in writing, they should endeavour to do so or else they will be risking the variation being deemed invalid later on.

It is also possible for contracts to allow contracting parties to agree variations orally. This will be preferable to most businesses at this current time and, therefore, it is worthwhile determining whether a contract allows for this. That being said, it will still be sensible for any variation agreed orally to be documented in writing, whether that be through a chain of email correspondence or some other form of written record. This record can be relied upon later should any misunderstanding arise between the parties as to the terms of the oral variation agreement.

## Do Any Other Clauses in the Contract Need to Be Altered?

If contracting parties agree to vary notice provisions, this could have a knock-on effect on the operation of other clauses in the contract. This reiterates the need for businesses to conduct a comprehensive review of their contracts, before taking any steps to amend provisions.

## Alternatives to Varying Notice Provisions

Where a business is unable to vary its contractual notice provisions to provide for service and receipt by email, it needs to consider what other steps it could take in order to safeguard its performance of its notice obligations.

### Receiving Notice

If a business has been forced to close its premises as a result of the lockdown, then it needs to consider what alternative arrangements it could put in place to ensure it receives any notice sent by the other contracting party (or parties).

Whilst a contract may not allow for the formal variation of terms, it might, on the other hand, allow parties to notify each other of alternative addresses for service. If a contract allows this, it will be prudent for parties to notify one another of alternative addresses as soon as possible.

Alternatively, a business might consider setting up either a forwarding service with Royal Mail or an external post box at an accessible location to ensure receipt of any notice served. Again, a party should promptly inform the other contracting party (or parties) of any change to its postal arrangements.

Where it remains physically possible for post to be left at fully locked-down premises, it is worth considering whether arrangements could be made to collect post. This might involve speaking to the relevant landlord about obtaining access to the premises once or twice a week for this purpose.

### Serving Notice

As the serving party, a business needs to ensure it is sending notice to the correct address in order to meet its contractual obligations. Where a party is concerned that it will not be able to meet its service obligations due to business closure, it should contact the business in receipt of service to find out how they are accepting service at this time – they may have adopted one of the strategies set out above, e.g. made arrangements for collection.

It is also important for a business looking to serve notice to consider when notice needs to be served. Accordingly, a serving party should review the relevant notice provisions to see if the contract provides a long-stop date for service or requires the completion of any steps conditional for serving notice. As part of this, it is worth considering if service could be delayed to allow time for the receiving party to make alternative arrangements for accepting service.

## Key Points

Businesses cannot simply relax their notice obligations and start serving and receiving notice by email.

If a business wants to change the method by which it must serve and/or receive legal notices, it needs to **formally amend** its notice obligations in agreement with the other contracting party (or parties). Management time will need to be spent reviewing contracts to understand the scope of notice provisions and any or all restrictions applying to them.

**Watch out:** If a contract does **not** include a notice clause, that contract could still be subject to certain statutory provisions which dictate the notice obligations applying to the contract.

This advice relates solely to the serving and receiving of contractual notices. This does not apply to documents served in the course of litigation. As under normal circumstances, service of these documents remains subject to the Civil Procedure Rules and Practice Directions. These Rules and Practice Directions are being regularly updated at this time, so that they take account of the current reality of COVID-19. Any party seeking to advance proceedings should ensure it is consulting the latest court guidance prior to taking any further steps.

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