

Protections When Contracting - Improve Your Chances Of Getting Paid!

The challenging economic climate means protecting cash flow is of paramount importance. Effective credit control is paramount - however you can bolster your chances of recovery with some front-ended measures at the time of contracting.

- **Credit Check Your Customers - prevention is better than cure**

Prior to contracting, ascertain the financial status of your customer - particularly if payment is due after performance - as you are, in effect, offering credit. Use, for example, credit rating firms online, and trade references - remembering these will likely be "best case scenarios"! You can also consult public registers, such as Companies House, which holds (albeit slightly historic) accounts and directors details. From this you can glean any worrying performance trends in either the annual accounts or the directors' track records. The Edinburgh and London Gazettes publish all insolvency notices.

- **Maintain Good Practice - clear terms and conditions, clear invoicing**

Have your solicitor draw up a standard set of terms and conditions and use them! Also, issue clear invoices and maintain records. In a recent case concerning statutory interest on late payments, the judge commented that, when considering the interest rate to be applied, the court has recourse to the conduct of the supplier, which in this case included unclear invoicing. The judge noted an invoice is a two-fold statement - (1) "this is what I think you owe" and (2) "pay me now" - and whilst this could include a breakdown of services and evidence of work done, it should be clutter-free and comprehensible.

- **Contractual Steps, Safeguards and Deterrents**

Several commonly-used contractual provisions can help safeguard your business and protect revenue streams. Whilst not exhaustive, these include:

- Retention of Title clauses - precluding transfer of goods ownership to the buyer until payment's been made;
- All Sums Due clauses - forfeiting the right to pay in instalments upon default;
- Interest clauses - bearing in mind the provisions of the Late Payment of Commercial (Debts) Interest Act 1998.
- Performance Bonds - these are a form of guarantee, most common, but not exclusive to, the construction industry. There are two types - On Demand and Conditional bonds - and parties should be aware of provider's differing treatment of each. Your solicitor can advise which is most appropriate.
- Lien - incorporation of express terms within your standard conditions - can augment a creditor's common law right to retain debtor's moveable property until payment;
- Directors' Guarantees - are another form of security that could be insisted upon when the financial performance of the customer is in question, remembering that the guarantee is only as good as the covenant of the guarantor.

- **Insurance**

Many businesses protect revenue streams by maintaining insurance against loss - known as a trade credit insurance whole-turnover policy. However, insurance costs

have risen with the transactional markets downturn, with many insurers reducing the amount of cover and/or inflating the premiums. For businesses that don't currently maintain cover, there's a competitive market amongst insurers for business and this may be worth considering. For those with insurance in place, the government's Trade Credit Insurance top-up scheme initiative aims to help businesses who have seen their existing policy cover reduced. Open to new applicants until 31 December 2009, all businesses trading in the UK of any size and holding a whole turnover trade credit insurance policy are eligible.

These options are not an exhaustive guide to contracting in a failsafe fashion; however the old adage "forewarned is forearmed" is never truer than in the context of extending any kind of credit. If you know your debtor, you can prepare for the worst and negotiate a contract to deal with that.

Gillian Craig is a Senior Associate at MacRoberts LLP and specialises in Commercial Litigation. For further information, please e-mail gillian.craig@macroberts.com

This article featured in the October 2009 issue of Project Scotland.

[See our website for full Copyright notice and Disclaimer.](#)

© MacRoberts LLP 2009