

Practical Guidelines for the Drafting of Long Term Contracts

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Key points

1. All long term contracts must deal with uncertain future circumstances. Drafting techniques can be employed to help control these known unknowns.
2. The most likely sources of problems that will arise over a long term contract's duration are changes in law (whether legislative or otherwise), a party's inability to perform, changes in market conditions, and disputes.
3. There are drafting solutions for all of these potential problems: clauses creating flexibility in changed circumstances, clauses allocating risk, price adjustment mechanisms, change of law provisions, *force majeure* clauses, and dispute resolution provisions.

Introduction

There is a great deal of commentary on the drafting of long term contracts, including commentary on the most common and suitable provisions for inclusion in long term contracts and the changes in drafting techniques that can be evidenced throughout recent history. The intention of this paper is to consider the long term contract from a commercial perspective, and to provide practical guidance on drafting techniques.

The expression 'long term contract' encompasses a wide variety of contracts. Of particular relevance to this paper is the extent to which each long term contract constitutes a 'relational contract'.¹ A relational contract focuses principally on the relationship between the parties rather than on specifically delineating each party's contractual obligations, and generally contains a greater degree of flexibility than other contracts. This paper assumes that parties to most long term contracts have an ongoing relationship that they wish to maintain and strengthen, and are therefore willing to incorporate a degree of flexibility into the terms of the contract. The extent to which parties are willing to be flexible does, however, vary between transactions.

¹ See Chapter 1 page 5 for a discussion of the concept of 'relational contracts'.

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