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LATE PAYMENT OF COMMERCIAL DEBTS

Unpaid suppliers of goods and suppliers of services have a statutory right to claim interest on overdue debts and compensation for late payment under the Late Payment of Commercial Debts (Interest) Act 1998 (as amended by various subsequent regulations) ("the Act").

The Act applies to debts arising under most contracts for the sale of goods and/or supply of services made between businesses.

Until the Act, interest on overdue debts could only be claimed where the contract specifically allowed, or where the supplier sued for payment through the courts, save for a few limited exceptions. The effect of the Act is to imply certain terms into contracts covered by the Act entitling creditors to interest automatically from the due date for payment, until payment is made, with a set rate of interest of 8% above base rate (simple interest) and to compensation at fixed rates. Compensation is recoverable depending on the level of the debt: for debts of less than £1,000, £40 is recoverable; for debts of £1,000 or more but less than £10,000, £70 will be recoverable; and for debts of more than £10,000, £100 is recoverable. It is also possible to recover reasonable debt recovery costs, which exceed these amounts.

The Act applies to debts arising under most contracts for the sale of goods and/or supply of services made between businesses. Certain types of contract (such as a consumer credit agreement, a contract for mortgage, pledge or other security and employment contracts) are excluded.

Although originally only applying to 'small businesses', for contracts made on or after 7 August 2002, any business, regardless of size, may recover both interest and compensation from its debtors.

WHEN DOES INTEREST BEGIN TO ACCRUE?

Under the Act, the date from which interest accrues depends on when the contract was made and whether or not the contract specifies an agreed payment date. If the payment date is specified, interest generally accrues from the day after the agreed payment date. If the payment date is not specified then:

- for contracts made on or after 14 May 2013, interest accrues from 30 days after the latest of delivery, invoice or acceptance. This means 30 days after the later of the date: (i) goods or services have been provided; (ii) notice of the amount owed has been provided; or (iii) any acceptance procedure is complete (i.e. the procedure for checking whether goods or services conform with the contract);
- for contracts made before 14 May 2013, 'acceptance' is not a factor so interest accrues from 30 days after the later of delivery or invoice.

For contracts made on or after 14 May 2013, parties can delay the date from which interest will accrue.

DELAYING THE START DATE FOR INTEREST

For contracts made on or after 14 May 2013, parties can delay the date from which interest will accrue, for example by agreeing a late payment date or adding an acceptance procedure. However, the parties' ability to delay the start of interest is limited.

Agreeing a late payment date

If an agreed payment date is more than 60 days after delivery, invoice or acceptance (whichever is the latest) and this is grossly unfair to the supplier then interest will run from the end of that 60 day period.

The position is stricter for public authority customers. If the customer is a public authority and an agreed payment date is more than 30 days after delivery, invoice or acceptance (whichever is the latest), then interest will run from the end of that 30 day period (regardless of whether this is fair or unfair to the supplier).

Addition of an acceptance procedure

If in practice an acceptance procedure lasts more than 30 days after delivery, and that is grossly unfair to the supplier, then the acceptance procedure is deemed to be completed at (and interest will run from) the end of that 30 day period. However, if the customer and supplier have agreed to a longer acceptance procedure in the contract, and this is not grossly unfair to the supplier, then interest will run from the end of that longer acceptance procedure.

What is "grossly unfair"?

All circumstances must be taken into account when determining what is "grossly unfair" to a supplier including those areas which are gross deviations from good commercial practice and are contrary to good faith and fair dealing, the nature of the goods or services in question and any objective reason for agreeing the long acceptance procedure or the late payment date.

By agreeing a late payment date and/or adding an acceptance procedure, customers can therefore delay the start date for accrual of interest by up to 60 days for public authorities or up to 90 days (or for more than 90 days where this is not grossly unfair to the supplier) for other businesses.

Special rules apply where there is advanced payment (including where delivery is made by instalments).

CAN PARTIES CONTRACT OUT OF THE ACT?

It is possible to vary the entitlement provisions in the Act by the terms of the contract, for example by providing a later payment date (although note the restrictions described above) or a lower interest rate. However, the contract must still provide a "substantial contractual remedy for the late payment" and if it does not a court will imply the terms of the Act. A remedy is "substantial" if it provides sufficient compensation for late payment, is fair and reasonable as against the statutory right and serves to deter late payment. The courts will have regard to all of the relevant circumstances at the time the terms were agreed, including such matters as the importance of commercial certainty, the strength of the parties' bargaining positions, whether the term was imposed on the other party and any inducements given to agree the term.

The courts are able to reduce or disallow part or all of the interest payable to the supplier under the Act if the interests of justice so require, having regard to the supplier's conduct.

INTERNATIONAL ELEMENT

If the contract has an international element (e.g. it is governed by foreign law or will be performed in a foreign jurisdiction) specific rules apply to determine whether the Act will apply to that contract.

COMMENT

The Act aims to provide both a deterrent to late payers and adequate compensation to a creditor which reflects accurately the actual cost of funding the additional credit.

Businesses of all sizes should ensure they understand the implications of the Act. Creditor companies should be aware of their entitlement under the Act. Debtor companies should consider reviewing their payment procedures and terms of business to avoid falling foul of the payment requirements.

Brexit will have no direct effect on the Act as the Act preceded the EU directives that it implements and although the UK will be free to amend the Act to depart from those directives, this is unlikely to be a priority following Brexit.

Businesses should also bear in mind that, in addition to potential liability under the Act, there may be other regimes affecting their obligation to pay suppliers. For example, businesses signed up to the voluntary Prompt Payment Code have committed to pay suppliers in accordance with contractual payment terms (which should in any event be no greater than 60 days), and industry-specific regimes such as the Grocery Suppliers Code of Practice may also apply.

KEY CONTACTS

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