

Contract termination checklist

May 2024

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- Assess the position** - Including whether you have grounds to terminate, and, if so, on what basis. The consequences of getting it wrong can be serious. Terminating without a right to do so may well amount to a repudiatory breach, which the counterparty could accept and then sue for damages. Terminating on the wrong basis may rule out valuable claims or counterclaims.
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- Consider whether termination is the best commercial option** - In some circumstances, even if the counterparty is in breach, it may make better commercial sense for you to affirm the contract (e.g. where the counterparty is one of a limited number of suppliers of particular goods or services) or seek a variation.
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- But don't take too long** - You'll have a 'reasonable' period to act, which will depend on the nature of the contract and when your contractual obligations are due to be performed. If you wait too long before acting, you may be held to have affirmed the contract, and to have lost the right to terminate. Consider serving a reservation of rights letter or notice where appropriate.
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- Take legal advice as appropriate** - It's best to be sure of your position before acting.
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- Communicate position/decision to relevant groups, departments or individuals internally** - Anyone who deals with the counterparty in respect of the contract concerned should be informed of the position, to prevent them inadvertently taking any action which could be construed as an affirmation of the contract.
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- If it's a remediable breach** - Consider providing a cure period.
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- If a breach is time sensitive** - Consider serving a notice making time of the essence.
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- Check the contract provisions regarding service of notices** - You should strictly adhere to any contractually prescribed regime to ensure service of any termination notice is effective. If there has been a change of address from that specified in the notice provisions (be that a physical address or an email address) consider serving more than one notice, to both the address set out in the contract and a new known address or addresses.
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- Think about provisions which will survive termination** - In particular those relating to confidential information and intellectual property, and any obligation to destroy copies in your possession or return the same.
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- Consider mitigation** - Even if there has been a repudiatory breach of contract this does not affect the duty of an innocent party to take reasonable steps to mitigate its loss. Consider practically what you need to do to try and mitigate losses you have suffered or will suffer as a result of the breach.