

CorporateBites

Updating you on company and commercial issues



April 2010 has been a remarkable month. We've experienced election fever, the impact of a volcano and now a debt crisis which is hitting parts of the EU. While the long term effect of these events on UK businesses may be uncertain, company directors already have plenty to be concerned about. A raft of legislation received Royal Assent in the wash-up period following the election announcement, much of which will require companies to take action to be ready for its introduction later this year. This month's issue looks at one of the new Acts, the Bribery Act 2010, which aims to set out an effective legal framework to combat bribery in the private and public sectors. The new strict liability criminal offence of failure to prevent bribery is likely to give directors particular cause for concern. Next month we will look at the new Equality Act 2010 which is also expected to come into force in the Autumn.

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The (Eyjafjalla)jokull' be on you if you don't remember force majeure.

The extraordinarily wide ranging implications of mother nature's latest escapade has left businesses reaching for their force majeure clauses as they struggle to deal with the aftermath left by the closure of significant parts of the world's air space earlier this month due to the eruption of the Eyjafjallajokull volcano.

Standard "force majeure" clauses attempt to relieve parties of contractual liability when faced with an event preventing contractual performance. Force majeure is not implied into English contracts; failure to include these valuable clauses into an agreement can leave parties groping for antiquated (and hard to prove) concepts such as frustration and mistake to relieve them of their contractual obligations.

The recent use of force majeure by Lufthansa, Europe's largest airline group, illustrates the protection that these clauses can offer. Lufthansa, when faced with the prolonged closure of the European airspace, quickly utilised the force majeure provisions in its contracts to cancel deliveries of jet fuel. Without the benefit of force majeure provisions, Lufthansa could have been contractually liable for a failure to accept these fuel deliveries or would have had to pay additional storage costs for this excess fuel.

Remember, careful drafting is integral to the success of force majeure clauses; these clauses need to strike a balance between not giving the other party too much scope to escape its obligations while still allowing you to avoid liability for factors they can't control.

Editor



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The Bribery Act 2010 - are your anti-corruption procedures robust enough?

The Bribery Act 2010 received Royal Assent on 8 April and is expected to be brought into force in the Autumn, though a change of government might alter this timetable.

Due to the new "strict liability" corporate criminal offence of failure to prevent bribery, for which the penalty is an unlimited fine, it amounts to a new risk factor for businesses of all types. All businesses, especially those which operate in jurisdictions where bribery is common in the form of so-called "facilitation payments", would be well advised to review their compliance policies. If you can show that you have "adequate measures" in place to prevent bribery and corruption then this will help in mounting a defence against the new offence. Guidance on what such "adequate procedures" might look like is expected to be published in the summer.

More information on the Bribery Act 2010 is available [here](#).



For further information, contact [Jenny Beresford-Jones](#).

Information Commissioner can now flex increased enforcement muscle

The Information Commissioner, who oversees compliance with the Data Protection Act (DPA) in the UK, is limbering up to use his new enforcement powers.

Since 6 April, the Information Commissioner has gained the power to impose monetary penalties of up to £500,000 for serious contraventions of the DPA likely to cause substantial damage or distress. He has long made it clear that he intends to use the new power and has previously indicated that breaches such as the widely-reported HMRC data loss would have been likely to give rise to a penalty. Actual penalties will depend on issues such as the nature of the breach, the extent of damage caused and the number of people affected.

The Information Commissioner's Office has been sending out warnings that businesses should ensure that their houses are in order and come clean about any breaches to avoid being the first to receive a monetary penalty. David Smith, Deputy Information Commissioner, recently said "those that try to cover up breaches which we subsequently become aware of are likely to face tougher regulatory sanctions".

Data protection specialists anticipate that the Information Commissioner will use his new powers within months as a warning to others of the risks of non-compliance. Suddenly data protection is on the board room agenda. Given the potential size of the penalties, FDs should take note!



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Who has authority to sign?

Brawn GP (now the new Formula One team Mercedes GP Petronas) managed to resolve a legal dispute with German consumer products group Henkel just in time for the start of the current Formula One season.

In an interesting case which created embarrassing headlines for both parties, Henkel filed legal proceedings against the F1 outfit on the basis that it was adamant that a three year sponsorship contract, reported to be worth £80 million, was void because the agreement was signed by a former employee without authorisation. The two companies eventually reached a settlement and legal proceedings were dropped.

Brawn and Henkel have confidentiality restrictions in place and therefore we do not know the detail of the arguments raised or the settlement reached. This situation does however highlight the need to ensure that the person signing the contract for the other contracting party does actually have authority to do so



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and also to ensure that companies have robust internal policies in place to make sure that they are not unwittingly bound to contracts where they do not wish to be.

If companies are unsure whether a proposed signatory has due authority, they might be wise to obtain written confirmation from a current director that the relevant signatory indeed has the proper delegated authority to bind the company. Companies should also ensure their employees have a clear understanding of who, internally, may and may not sign off on certain contracts and, at the earliest opportunity during any negotiation process, should ensure that this is communicated to the third party.

Directors disqualified for FSA breaches

In the recent case of *Secretary of State for Business, Innovation and Skills v Aaron and Ors*, the Secretary of State succeeded with an application to disqualify two directors of a regulated company that provided investment services and which stood accused of mis-selling Structured Capital at Risk Products, commonly called SCARPS. The Secretary of State successfully argued that by breaching FSA rules the directors had failed to exercise the reasonable skill and care expected from directors in managing a company.

The directors argued that disqualification would be unfair as breaches of the FSA rules were not fundamental to their wider ability to manage a company and that disqualification would restrict their ability to work as a director with any company in the future. The court rejected this argument saying that the failure to concern themselves with their relevant responsibilities was a "grass roots failing" and was sufficient to disqualify them from the management of any company.

The court also accepted the argument that, in the case of a FSA authorised company, a director's duty to that company to exercise reasonable care, skill and diligence extends to taking all reasonable steps to ensure that the company complies with its regulatory obligations.



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Preventing former employees from using your data - an alternative approach?

Companies have traditionally relied upon the law relating to "confidential information" and restrictive covenants as a means of preventing former employees making use of the information obtained as a result of their employment. While this approach continues to be valid, employers have also started to deploy additional tactics, such as using the law on intellectual property, to prevent the unauthorised use of their information by former employees.

In the recent case of *First Conferences Services Ltd v Richard Bracchi*, Mr Bracchi copied large parts of the client database and sales information, which he then sent to his private email address to set up a competing business. First Conferences successfully sued Mr Bracchi for infringement of its database rights and copyright.

The court held that the employer had invested a substantial amount of time in collating the relevant information, verifying it and structuring it for their own purposes. On this basis, the collection of information qualified for protection as a database. In addition, First Conferences could also rely on the fact that they had copyright over the documents.

This decision provides a useful alternative method of attack for employers faced with former employees using or threatening to use confidential information.



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The CRC Energy Efficiency Scheme - are you committed?

After a lengthy consultation process, the Carbon Reduction Commitment Energy Efficiency Scheme (CRC) finally came into force on 1 April.

The CRC is a new compulsory carbon emissions trading scheme that will have a significant impact on many large UK public, private and third sector organisations including companies, partnerships, universities, local authorities and NHS bodies. Those required to participate must register between April and September 2010. From April 2010, participants will have to monitor and record emissions and, from April 2011, pay to emit carbon dioxide. The scheme provides financial and public relations incentives to reduce emissions and to invest in energy efficiency programmes.

The CRC forms part of the Government's wider climate change policy agenda as set out in the Climate Change Act 2008. In that Act, the Government entered into a legally binding commitment to reduce the UK's greenhouse gas emissions by 80 per cent by 2050, with an interim target of a 34 per cent cut by 2020.

A link to our briefing note on the CRC can be found [here](#).



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