HFW

# COMMODITIES BULLETIN

FEBRUARY 2023

## Bienvenue and welcome to the first edition of the Commodities Bulletin for 2023

It is pleasure to introduce a series of articles from colleagues across Europe and the Middle East. The first of these comes from me and focuses on new French legislation which makes it mandatory to include certain provisions in the sale of agri-food products and which is causing challenges for traders of soft commodities in both France and wider Europe. Next, my Dubai colleagues, Partner Ian Chung and Associate Adela Motyckova, anticipate some of the consequences of the current global economic squeeze for the commodities sector. One of those consequences is the risk of fraud and London partner Barry Vitou provides a brief update on the new "failure to prevent" offence in legislation currently before the UK Parliament. We have an article on the new EU Deforestation Regulation from London Partner Anthony Woolich and a look at risks and developments in relation to Russian oil sanctions from Geneva Partner Sarah Hunt and Associate Hermance Schaerlig. Finally, we welcome Partner Michelle Chance from the London office. Michelle is an employment specialist and her piece identifies issues to consider at the outset of employment contracts in order to minimise the risk of dispute in the event of termination. On the back page you will find team news and details of where to meet us next. Enjoy reading!

**VINCENT BÉNÉZECH**
Partner, Paris

**VINCENT BÉNÉZECH**
PARTNER, PARIS

# PANIC IN THE AGRI-FOOD TRADING INDUSTRY DUE TO FRENCH LEGISLATION ("EGALIM II") CREATING MANDATORY PROVISIONS IN SALE CONTRACTS

## Purpose of the "Egalim II" law

There was panic among agri-food traders on the French market as the end of 2022 marked the final opportunity to postpone some of the mandatory provisions of the bill known in France as "Egalim II".

In an industry where contracts are based on years of business practice and well-established standard agreements (Incograin, Rufra contracts), with a large proportion of transactions still being concluded over the phone, the intention of the French legislator has been to create a much more stringent legal framework for all parties along the distribution chain of agri-food products, including producers, traders, manufacturers, distributors and consumers.

This is an example of the legislator using the law to modify the balance of power in economic transactions. The purpose is to create a legal framework where the price of agricultural products is transparent along the chain and less subject to economic pressure.

This has first resulted in traders being required to enter into written transactions with their suppliers. These written contracts must include some mandatory provisions, in particular in relation to price.

## The "renegotiation" clause

A key innovation is the obligation for *all contracts for the sale of agricultural and food products*[1], whoever are the parties, to stipulate that the parties will have to meet to discuss and renegotiate the initial agreed price in the event that the transaction has been significantly affected by the fluctuations of raw material prices, energy prices, transportation costs and packaging costs.

This renegotiation clause must stipulate precisely the objective conditions upon which the renegotiation process will be triggered, including for example a percentage price fluctuation. Where the contractual requirements for renegotiation are met, the parties must discuss in good faith and try to agree a new price.

There is no obligation for the parties to reach an agreement on a new price. However, should there be no agreement, the party affected by the increase in costs shall have the right to go to court or arbitration and the judge/arbitrator may rule that the contract shall be amended or even terminated.

The negotiation process shall also have a maximum duration of one month and the parties will be required to draft minutes of their discussions.

Such a renegotiation clause is considered under French law to be an internationally mandatory provision (loi de police), with the consequence that it will apply to any sale of agricultural products delivered on or exported from French territory, whatever law is chosen by the parties to govern the contract. Any foreign court judgment which violates this provision of French law may not be recognised in France.

Parties which do not include a renegotiation clause in violation of Egalim II will be subject to an administrative fine of maximum 75,000 euros (for individuals) or 375,000 euros (for companies).

## Not appropriate for grain trading

Trading commodities usually requires legal stability and predictability. In this respect, the legal principles according to which the parties are bound by their agreement are essential, particularly when trading in sectors such as grains where certain circumstances can cause price fluctuations, as we have seen in recent months.

1 L. 441-8 Code of Commerce.

The obligation to include a renegotiation clause creates instability and legal insecurity. It has raised such serious concerns in France and abroad in relation to the trade of grain of French origin that the issue has been put to the French government by grain trade associations. We have had the opportunity to assist Intercereales in these discussions.

Traders were first reassured by the fact that the renegotiation clause is only mandatory for contracts with a duration of more than three months. However, this exemption was ultimately deemed insufficient, and discussions were begun with the French government to obtain wider exemptions. The government accepted by decree that all grain sales involving related derivative transactions on the MATIF market shall be exempted from the obligation to include a renegotiation clause. However, there are still concerns for purely physical sales of grains.

We have recently made proposals to amend Egalim II to provide wider exemptions to this obligation to include a renegotiation clause. These proposals are currently being considered by the French parliament.

We will continue to monitor the government's discussions and hope to see an outcome that will allow traders of French-origin grain once again to benefit from a legal framework which facilitates trade rather than creating instability.

**VINCENT BÉNÉZECH**
Partner, Paris
**T** +33 (0)1 44 94 40 50
**E** vincent.benezech@hfw.com

Assistance provided by Anna Royneau, Stagiaire and Sophie Dent, Trainee Solicitor.

**IAN CHUNG**
PARTNER, DUBAI

**ADELA MOTYCKOVA**
ASSOCIATE, DUBAI

# SHIFTING SANDS: RECOMMENDATIONS FOR COMMODITIES TRADERS, FINANCIERS, DIRECTORS AND MANAGERS IN TURBULENT FINANCIAL TIMES

**Economic conditions are changing fast. There has been a long period of low interest rates and low inflation, with governments and central banks intervening to ensure liquidity within financial markets and to target market stability, no more so than during the pandemic.**

However, over the last 12 months, this has changed dramatically. Inflation and interest rates are up and the effects are impacting all sectors and industries. In the commodities sector, there have been price swings, reduced availability of trade finance, significant increases in the cost of trade finance and limits in the capacity of trade financiers.

The recent volatility has challenged the business models of many of our clients and in the next six to nine months, we anticipate that much of our focus will be on helping them adjust to the current environment. Clients have already begun approaching us to discuss their contractual rights to escalate prices or to terminate, to restructure their liabilities and, in the worst cases, if the business is no longer sustainable, to determine what exposures the management and directors may have.

In this article we highlight some key considerations for commodities clients in these turbulent times.

## The rules of the game have changed

Highly leveraged, low margin businesses that could grow and function when the cost of capital and finance was low may find that such a model is no longer workable, as interest rates remain high. Capital intensive businesses may find it increasingly difficult to fund from traditional sources.

Adding to this strain has been increased margin requirements on derivative trades (both exchange traded and OTC), with the increased volatility caused by the shock to energy prices and inflation affecting commodities prices as a whole.

As a consequence, we expect to see many small and medium sized businesses encounter more challenges in obtaining funding for working capital and credit lines to trade, with a number of such entities failing.

## With financing unavailable, open account trades are inevitable

Open account trades and deferred payment are two of the mechanisms used to fill the void where financing is unavailable. We have seen an increase in the proportion of trades taking place on an open account, unsecured basis. Alternative options can include ECA / government backed transactions, alternate financiers (which can operate in the form of funds, private equity or trading companies that interpose themselves between trades) or trade credit insurance that can be used to defray the risk of a transaction and, in some cases, offer regulatory capital relief.

Our view is that if conditions continue to be challenging and financing remains difficult to obtain, a number of counterparties will be unable to pay. In light of this, we recommend that:

- where there is no letter of credit in place, traders should pay close attention to monitoring debtors and payment terms.
- financiers need to be close to their customers and ready to take swift action if needed. Conducting risk based due diligence on a customer's buyer, tracking the cargoes or vessels on a trade, checking the relevant transaction documents regularly and being ready to take aggressive prompt legal action can help increase the prospects of recovery. In our experience, taking prompt action can lead to a recovery that would not happen even a couple of months later.

### Fraud could be exposed

Unfortunately, in times of economic stress, as it becomes increasingly difficult to rollover existing provisions or obtain the necessary liquidity to fill gaps, there is a tendency for poor trading behaviour and fraud to be uncovered. The pandemic led to a number of significant fraud and insolvency cases and the current economic conditions will likely uncover more. In many cases, losses may be genuine, caused by the volatility of the last 12 months. However, our expectation is that fraud that has been hidden by the facade of cheap liquidity and the easy availability of finance is more readily exposed.

### Focus on managers and directors

In times of financial distress, the past and present actions of managers and directors become subject to much greater interest. Such scrutiny may come from several directions – from creditors, employees, shareholders and regulators. With that in mind, the importance of adopting diligent corporate governance practices and exercising due care and judgement in decision-making cannot be overstated. In particular, we recommend:

- **Clear and well-documented decision making**

  Directors and managers should take care to ensure that decisions made for the company are clearly justified and sufficiently documented, particularly if there are any concerns about the ongoing viability of the business. Should they have concerns or reservations regarding decisions taken by the company, it is important that these are put on record.

- **Understanding obligations**

  It is not unusual for us to see the same individual appointed as a manager or a director in a number of businesses across an international group of companies. It is important that they understand:

  - what are their legal responsibilities under the relevant laws in each of the jurisdictions where the businesses they manage are incorporated and/or operate.
  - the point at which they are no longer able to make decisions for the company.

- **Sometimes insolvency is the answer**

  Inevitably, there are times where a business is not capable of surviving. In these cases, bankruptcy or liquidation may be the only real solution to limit losses and provide some degree of protection and finality for directors, managers and shareholders.

  In many jurisdictions, directors and managers may expose themselves to potential civil and criminal liability, if:

  - they fail to file for bankruptcy within a prescribed timeframe from when a company became insolvent; and/or
  - a company that is found insolvent has failed to maintain sufficiently detailed commercial books that reveal its financial position.

In this context, directors and managers need to ensure that the company's accounts are properly maintained and that they assess the company's financial position continuously.

**IAN CHUNG**
Partner, Dubai
**T** +971 4 560 6621
**E** ian.chung@hfw.com

**ADELA MOTYCKOVA**
Associate, Dubai
**T** +971 4 560 6617
**E** adela.motyckova@hfw.com

**BARRY VITOU**
PARTNER, LONDON

# FAILURE TO PREVENT FRAUD – A SIGN OF THINGS TO COME

**As 2023 gets underway, the Economic Crime and Corporate Transparency Bill ('the Bill') is moving through the Parliamentary stages in the UK as the criminalisation of corporate law continues.**

On 25 January, it was confirmed for the first time by the Security Minister Tom Tugendhat that the Government 'intend to address the need for a "failure to prevent" fraud offence' following an amendment to the Bill proposed by Robert Buckland MP. The suggested amendment discussed in the House of Commons follows years of consideration, lobbying, a call for evidence and the more recent findings of the Law Commission Report on corporate criminal liability reform.

The anticipated offences of failure to prevent fraud and money laundering are likely to mirror the existing offence of failure of a commercial organisation to prevent bribery, in section 7 of the Bribery Act 2010.

While the devil will be in the detail of the final wording, this will represent a sea change in the law and make it far easier to attribute liability to companies for fraud perpetrated by employees and others. The impact is likely to be similar to that experienced on the introduction of the Bribery Act but in respect of a far broader range of activity.

Businesses are advised to get ready to update risk assessments and check and update existing policies and procedures.

**BARRY VITOU**
Partner, London
**T** +44 (0)20 7264 8050
**E** barry.vitou@hfw.com

**ANTHONY WOOLICH**
PARTNER, LONDON

# THE EU DEFORESTATION REGULATION: KEY QUESTIONS FOR THE COMMODITIES SECTOR

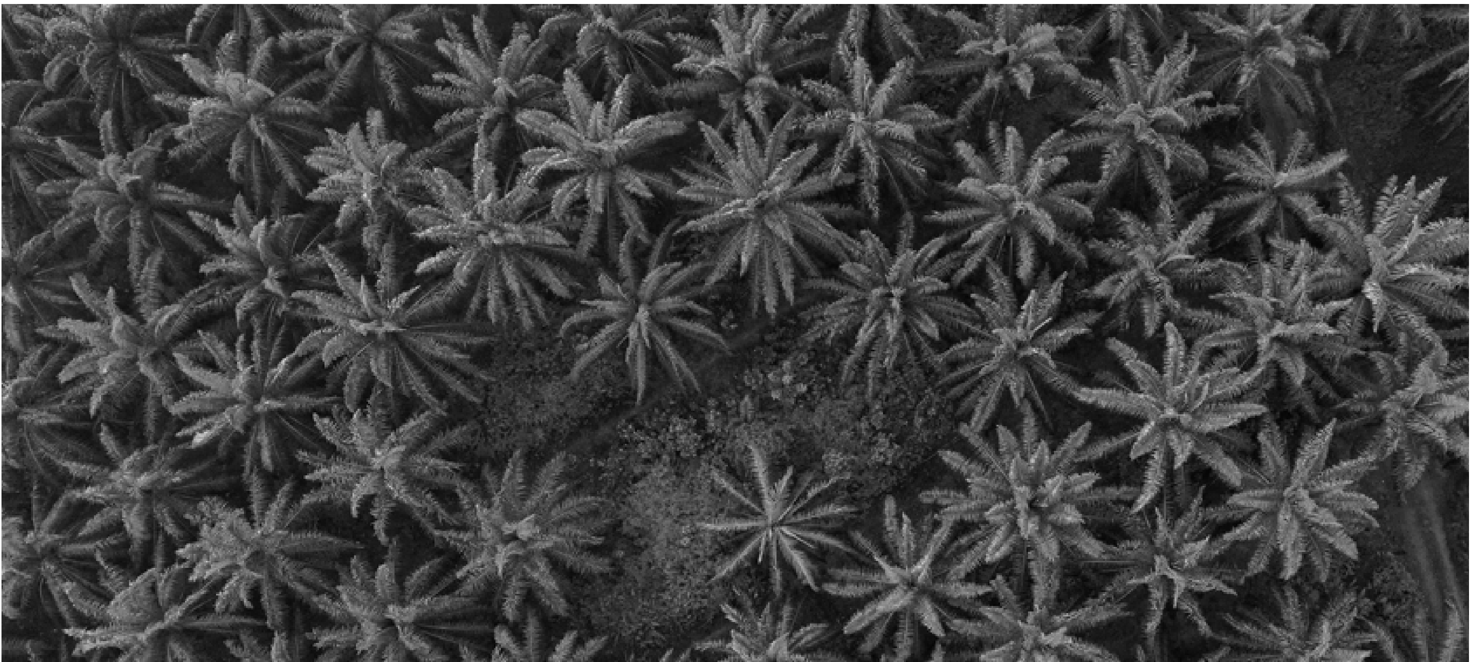
### What has happened?

On 22 December 2022, the European Parliament (**Parliament**) agreed the text of a Regulation[1] which would prohibit the placing on the internal market, or export from the EU, of seven commodities if they are produced on land deforested after 31 December 2020. The seven commodities are: cattle, cocoa, coffee, palm oil, rubber, soy and timber, as well as products derived from them, such as beef, furniture, chocolate, tyres and paper. The Parliament had sought to include maize, swine, poultry and sheep within the scope of the Regulation, as well as extending protection to savannah and scrubland ecosystems, but these provisions were not included in the final text.

This represents part of the EU's efforts to halt global deforestation by 2030, as agreed at the UN's COP26 climate conference in Glasgow. It is estimated that 23% of worldwide emissions come from agriculture and associated deforestation and this Regulation aims to address both the biodiversity loss caused by deforestation as well as its climate impacts. The seven commodities were identified by the European Commission (**Commission**) as among the biggest drivers of deforestation. As a major commodities consumer, any action by the EU will have a significant effect worldwide. The UN's Food and Agriculture Organization estimates that EU consumption accounts for approximately 10% of deforestation worldwide.[2]

1 Regulation of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010

2 Here's a smart 5-point plan to tackle deforestation | World Economic Forum (weforum.org)



### How will the Regulation work?

Once fully implemented, importers of the listed products will have to prove that they were not produced on land deforested after 31 December 2020, and that all relevant laws in the place of production have been complied with. The Regulation will apply regardless of where in the world the products were produced, including within the EU.

Those placing products on the EU market will have to submit a statement confirming that the required due diligence has been conducted. In particular, this must include the geographic coordinates of the farm or plantation where the products were produced, which is essential for monitoring and compliance.

### What are the due diligence requirements?

There are three main parts to the due diligence requirements for producers under the Regulation:

- First, they must obtain information about the origin of the products they are selling, including the geographic coordinates. A precise link is needed in order accurately to monitor any land use change over time via satellite images, which is the key to determining whether a product is deforestation-free.
- Secondly, companies must use the information gathered to evaluate the deforestation risk of their products. A product can only be placed on the market if the deforestation risk associated with it is negligible or non-existent.
- Thirdly, they must adopt adequate and proportionate mitigation measures against any risks identified.

A benchmarking system will categorise all countries, or parts of countries, by risk level (low, standard or high). This will determine the proportion of products which will be subject to compliance checks. Products from low risk countries will only require simplified due diligence. A high risk level will indicate that more care is needed to ensure that the products are deforestation-free. At the time of writing, the Commission is yet to announce the details of this system.

### When will it come into force?

Because of the complexity of these due diligence requirements, there is a lengthy implementation period. The Regulation is expected to enter into force in mid-2023, following which there will be an 18 month implementation period, extended to 24 months for SMEs.

### What are the penalties for getting it wrong?

Penalties for infringement are designed to correlate with the amount of environmental damage caused and to *"effectively deprive those responsible of the economic benefits derived from their infringements"*. They can include fines of up to 4% of EU revenue, confiscation of the products, temporary exclusion from public procurement or public funding, and/or even a temporary prohibition from placing products on the EU market.

### What has been the response?

The Regulation has attracted significant criticism from some producer countries, most notably Indonesia and Malaysia. These two countries account for around 85% of global palm oil production, of which the EU is a major importer. Press reports indicate that both countries' governments have become particularly vocal since the text of the Regulation was approved, with Malaysia's Deputy Prime Minister accusing the EU of wanting to cripple the countries' palm oil industries and Malaysia threatening to halt palm oil exports to the EU. They are particularly concerned about the costs for smallholders of complying with the traceability and due diligence requirements under the Regulation, and have criticised the exclusion of rapeseed oil, the main competitor to palm oil in the EU, from the scope of the Regulation.

**ANTHONY WOOLICH**
Partner, London
**T** +44 (0)20 7264 8033
**E** anthony.woolich@hfw.com

Assistance provided by Lawrence Eastwell, Trainee Solicitor

**SARAH HUNT**
PARTNER, GENEVA

**HERMANCE SCHAERLIG**
ASSOCIATE, GENEVA

# SANCTIONS ON RUSSIAN OIL IN 2023: KEY DEVELOPMENTS AND RISKS

**In this article, we consider some of the key developments and key risks to be aware of in relation to Russian oil at the start of the year.**

## Developments regarding the oil price cap

Under UK and EU sanction rules, it is prohibited to purchase, import or transport sanctioned Russian crude and oil products into the UK/EU and respectively to trade, broker or transport sanctioned Russian oil outside of the EU and to transport sanctioned Russian oil outside the UK after certain time limits, subject to certain exceptions. Importantly, related services such as technical and financial services (including insurance) have also been prohibited. One notable exception to these prohibitions is under the price cap, which came into effect for the transport of Russian crude oil on December 5, 2022. Russian crude oil bought at or below US$60 per barrel for transport outside the EU is exempt (purchase price not including ancillary costs). A similar price cap for refined oil products (such as gasoline or diesel) came into effect on 5 February 2023 2023: US$ 100 per barrel for diesel and US$ 45 for other cheaper oil products for transport outside the EU. The price caps are agreed together among G7 countries and reviewed periodically.

In response, Russia announced it would prohibit the sale of oil to countries that observe the imposed price cap. The decree stated that Russia would halt crude oil sales to these countries from February 1 to July 1, 2023, and a separate prohibition for refined products will take effect at a later date.

## Key Risks Looking Ahead to 2023

### Market disruption

The effects of the first price cap on Russian crude caused volatility in the market and further impact is to be expected following the price cap on products.

### Operational risks

A declining number of ship owners have been willing to haul Russian oil cargoes, likely contributing to the reported substantial increase in voyage time of shipments. At the same time a higher level of ship-to-ship transfers has been reported. Shipments to Europe have decreased, whilst there has been an increase in worldwide shipments showing no clear end-destination. In response, government agencies have increased their efforts and added significant resources aimed at enforcing sanctions.

To assist maritime actors, the U.S. Department of Treasury, Office of Foreign Assets Control has provided a list of risk red flags to watch out for, including a reluctance to provide price information, trans shipment through one or more jurisdictions for no apparent economic reason, and AIS manipulation[1].

In the current climate, there is an increased risk of inadvertently purchasing a blend including Russian crude disguised as non-Russian. There is also a heightened risk of dealing with a sanctioned entity, person, or transaction, in particular when dealing with third parties and intermediaries. In a recent UK enforcement decision against a UK registered company dealing in wine and spirits, the Office of Financial Sanctions Implementation imposed of monetary penalty of £30,000 on the company for payments and products received from a designated Russian entity.[2] To avoid such breaches, businesses including service providers, insurers, traders, banks, owners, and others involved, should screen carefully potential parties in a trade before proceeding.

### Insurance Risks

The EU has put in a place a rule prohibiting EU-based insurers from providing insurance to vessels that knowingly breach the price cap for

1 05142020_global_advisory_v1.pdf (treasury.gov)

2 https://www.gov.uk/government/collections/enforcement-of-financial-sanctions

90 days following the date when cargo purchased above the price cap is unloaded. If this rule is breached, member states may themselves enforce against insurers. EU-based insurers must therefore conduct extensive due diligence and, as part of their screening, apply a "look back" period of 90 days to ensure that the vessel has not discharged any cargo in breach of the price cap.

We are currently actively advising on these issues. If you require such checks to be carried out or advice on third-party contracts, please do not hesitate to contact us.

**SARAH HUNT**
Partner, Geneva
**T** +41 (0)22 322 4816
**E** sarah.hunt@hfw.com

**HERMANCE SCHAERLIG**
Associate, Geneva
**T** +44 (0)22 322 4803
**E** hermance.schaerlig@hfw.com

"...government agencies have increased their efforts and added significant resources aimed at enforcing sanctions."

**MICHELLE CHANCE**
PARTNER, LONDON

# BEING PREPARED: KEY EMPLOYMENT ISSUES TO CONSIDER ON COMMENCEMENT AND TERMINATION OF EMPLOYMENT

**This article deals with some key areas of dispute which can arise in an employment relationship, typically in termination scenarios, and which should be addressed at the outset of the relationship, when negotiating the terms of the employment contract, in order to avoid costly and protracted disputes in the event of termination.**

## Bonus

A large part of many employees' total remuneration package consists of their bonus payment. Most bonuses are based on individual, team and company performance. If the bonus is partially based on individual performance, then either at the beginning of the employment relationship or at the start of each financial year as appropriate, employers and employees should agree upfront individual targets and key performance indicators by which performance will be measured, to provide clarity and avoid room for dispute.

Whilst most bonuses are discretionary, when deciding whether to pay a bonus and if so how much, employers must exercise their discretion in a way that is fair and reasonable and not irrational or capricious. Being able to demonstrate that these principles have been followed will minimise the risk of successful challenge.

Most well drafted bonus clauses or bonus scheme rules contain a "forfeiture" clause, which provides that if the employee is not in employment on the bonus payment date, or is under notice given or received, they will not receive a bonus payment. Employees should try to carve out from the scope of the forfeiture clause both constructive dismissal and any not 'for cause' termination by the employer. These carve outs are also important to include in any clawback clause relating to a guaranteed sign-on bonus. The clawback clause usually applies over the first 3 years of employment on a sliding scale, to ensure that a new employee is retained for a specified minimum period.

## Equity Entitlements

Equity entitlements such as shares, stock and options also make up a large part of the total remuneration package of senior executives. Whilst the rules of a long-term incentive plan are unlikely to be changed for an individual, because they apply to many employees, it can be possible to have some of the key terms relating to equity entitlements tailored in an individual's employment contract.

In order to be well-prepared in the event of termination, the key provisions on which to focus in a long-term incentive plan and any other equity documentation are the good leaver and bad leaver provisions. Employees should try to carve out constructive unfair dismissal (as described in the bonus section above) from any bad leaver provisions and ensure that they will be treated as a good leaver in all cases, apart from their voluntary resignation (other than for constructive dismissal) or a 'for cause' termination. They should also try to ensure that they can only be deemed a bad leaver following a fair investigation and disciplinary process, during which they have had the opportunity to state their case and have it properly considered before any decision is made.

## Post-termination restrictive covenants

Most well drafted employment contracts will contain post-termination restrictions which can prevent an employee from:

- competing with the employer's business
- soliciting and dealing with their clients and customers
- soliciting or employing their staff
- interfering with their suppliers

“Agreeing a well-drafted and comprehensive employment contract upfront can minimise the risk of a lengthy and expensive dispute for both parties, and allow an employee to exit with their dignity intact whilst also protecting the employer’s reputation and brand.”

These restrictions usually apply for a limited period of between 6 and 12 months following an employee’s termination date. The best time to negotiate the scope of the restrictive covenants is before an employee accepts a job offer. An employee’s ability to do so will depend on the extent of their bargaining power and their level of seniority.

The starting point with restrictive covenants under English law is that they are void as a matter of public policy, as they are in restraint of trade, unless they exist to protect the employer’s legitimate business interests. These include interests such as confidential information, client connections and stability of the workforce. In order to be enforceable, restrictive covenants should be no wider in scope than is reasonably necessary to protect the employer’s legitimate business interests.

Good, clear drafting is important for avoiding disputes. If covenants are poorly drafted or ambiguous, they can be open to challenge. This can be used to the employee’s advantage, as any ambiguity will be interpreted against the party drafting the clause (here, the employer).

In a termination situation, if there has been a fundamental repudiatory breach of contract by the employer, the employee can argue that the restrictive covenants fall away and the employer cannot enforce them. Bear in mind that a fundamental, repudiatory breach of contract by an employer need not be a breach of an express contractual term; it could include a breach of the implied term of mutual trust and confidence which the employer owes the employee.

We often advise on the enforceability of restrictive covenants and act for both senior executives and employers in High Court cases and injunctions involving their enforcement. It is advisable to obtain legal advice on restrictive covenants both when entering into them and before exiting a business.

## Conclusion

Where employment relationships break down or do not work out, this is often because of a personality clash or external economic and business factors beyond the parties’ control. Agreeing a well-drafted and comprehensive employment contract upfront can minimise the risk of a lengthy and expensive dispute for both parties, and allow an employee to exit with their dignity intact whilst also protecting the employer’s reputation and brand.

**MICHELLE CHANCE**
Partner, London
**T** +44 (0)20 7264 8384
**E** michelle.chance@hfw.com

## Where you can meet the team next

- **Barry Vitou** will be speaking at our Global Investigations and Enforcement webinar in conjunction with Lexology on 1st March. Click here to register for the webinar.

**For more information on upcoming HFW events, click here.**

## Team News

- HFW has been recognised as the top firm for commercial litigation in English High Court. Independent data reveals that HFW handled more commercial litigation in the English Commercial Court than any other law firm over the past eight years – both by number of cases and days in court. Read more about the data here.
- We have been ranked Band 1 in Climate Change in Chambers and Partners Asia-Pacific. Click here to find out more about this ranking and to see our individual lawyer rankings.
- **Barry Vitou**, appeared on BBC Radio 4's Today programme to discuss upcoming UK legislation that will make "failure to prevent" fraud a criminal offence. You can listen to the interview here starts at 21:35 registration required.
- **Damian Honey** and **Frazer Watt** ran and presented at the SCoTA Crash Course on 7th-8th February 2023
- **Michael Buffham** is featured in the February 2023 edition of Gaftaworld discussing the *Court of Appeal decision on assessment of damages for non-acceptance under the Default Clause*. Read his article here. Please note that you must be a member of Gafta to access the full newsletter.
- **Ami Brett** and **Sadhvi Mohindru** were featured in list of Singapore's 30 Most Influential Lawyers Under 40 2022 by Singapore Business Review. The list recognises 30 young lawyers who have raised the bar for legal professionals across all fields. Read more here.
- **Ben Bury**, **Karen Cheung** and **Kevin Warburton** were featured in the list of Hong Kong's 10 Most Influential Lawyers Under 40 2022 by Hong Kong Business. The list recognises 10 high calibre young lawyers who have raised the bar for legal professionals across all fields in 2022. Read more here.
- **Gavin Vallely**, Managing Partner, HFW Australia and Partner **Ranjani Sundar** were both interviewed on The Lawyers Weekly Show in 2022 - their episodes have both made it into the top 22 most-downloaded for the year. Click here to listen!

**HFW has over 600 lawyers working in offices across the Americas, Europe, the Middle East and Asia Pacific. For further information about our commodities capabilities, please visit hfw.com/Commodities.**

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