

Commercial Law

Guidance for Procurement



This knowledge paper is supportive of Procurement professionals operating at Professional level of the CIPS Global Standard



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1. Introduction

From the 18th century, when the major steps in the development of commercial law took place, commercial law developed continuously. This development was driven by the interaction of law and commerce, both of which were also subject to rapid technological changes. In the 19th century commercial laws were codified for the first time to make law more accessible (Furmston, 2010).

Commercial law is "concerned with commercial transactions in which both parties deal with each other in the course of business" (Sealy and Hooley, 2008:4). Commercial law governs many types of commercial activities: the sale and supply of products, carriage of goods, insurance of goods, finance of sale and leasing contracts. The content of commercial law may evolve to reflect the changing nature of business practices, such as developing technology (Sealy and Hooley, 2008). Commercial law is based on transactions, centered on contracts and the usages of the market, and concerned with dealings between merchants.

Laws governing purchasing and supply chain management include regulations concerning buyer-supplier relationships, pricing, liabilities from contracts, product control laws, transportation, warehousing and even personal liabilities of purchasing managers. The most frequently reported issues in SCM include performance, non-performance, breaches of contract, warranties and pricing (Cavinato, 1984). Purchasing and supply chain management professionals can manage relationships with the help of external and in-house legal experts. Typical situations in which lawyers should be consulted include the following: interpreting and advising on complex legislation, drafting terms and conditions of contract, evaluating tenders (as part of an in-house team), and handling legal disputes arising from the interpretation of contracts and performance (CIPS: Use of lawyers in P&SM;).

2. Definition

Commercial law is the body of law that governs the way business firms enter into contracts with each other, execute contracts and remedy problems that arise in the process (Monczka et al., 2010).

A contract is "an agreement between two or more parties which is intended to be enforceable by the law."

The law of contract is concerned with four basic questions

- Is there a contract in existence? The answer depends on the presence or absence of five essential elements: Agreement (offer and acceptance), consideration, intention to create legal relations, contractual capacity and correct form.
- Is the agreement one which the law should recognise and enforce? Some contracts will be wholly or partly invalid at law because of a vitiating factor, such as illegality, mistake or misrepresentation, which means that consent has not really been given – there is not consensus ad idem (agreement as to everything)
- When do the obligations of the parties come to an end? The most common method of termination of a contract is when each party performs his contractual obligations
- What remedies are available if either party is in breach of his contractual obligations? The usual remedy is damages (monetary compensation).

3. Successful Application

It is beneficial for purchasing and supply management professionals to acquire the minimum knowledge of commercial law and to recruit procurement professionals who have a sufficient level of competence in dealing with routine legal matters related to their work. It is also advisable to use lawyers where there is a knowledge gap and when expert legal advice can add most value (CIPS: P&SM; professionals' competence with the law; CIPS: Use of lawyers in P&SM;).

4. Potential Advantages

- Arbitration, which exists in commercial law and can be found in many supply chain contracts, can be a very useful system for settling disputes involving contract issues between buyers and sellers. It may help resolve the problems before they reach the court (Cavinato, 1984).
- The existence of anti-trust laws in the US (and of competition law in the UK) helps prevent market abuses (Cavinato, 1984).
- Commercial law helps strengthen the position and can help develop the economic opportunities of small firms (Cavinato, 1984).

5. Potential Disadvantages

- Focus on litigation can be damaging to relationships between supply chain partners (CIPS: Use of lawyers in P&SM;).
- When applying commercial law, complicated proof and interpretation processes may be necessary, and they can be very costly in terms of both money and time (Cavinato, 1984).
- If the authority granted to the purchasing manager has not been carefully and precisely defined, although it is normally the firm and not the purchasing manager who can be exposed to liability from a lawsuit, situations could arise in which the purchasing manager can be personally liable to civil or criminal action (Cavinato, 1984).

6. Case Studies

- A good example of a type of conflict governed by commercial law is a 2007 dispute between B&Q and its Chinese kitchen cupboard supplier, Yadier Decoration & Garment. B&Q held back the payment of £1.8m after the sales of the Yadier range fell below the set targets. The scandal escalated when four other firms and an industry association claimed that B&Q withheld revenues and used its vast retail networks to 'cheat and bully' the Chinese suppliers (The Independent, 2007).
- In 2009 Muller Dairy UK started a legal dispute with their supplier of automated solutions, RTS Flexible Systems. No formal contract was agreed between the parties before the building, delivery and installation of an automated kit (estimated at £1.7m) commenced. The dispute, which arose regarding liabilities and payment terms, led to expensive litigations. This demonstrated the importance of reaching an agreement before any work begins (Food Manufacture, 2010; The Supreme Court, 2010).
- Despite the fact that in the 1980s in the USA several major legislative acts shaped pricing practice and infrastructure in the area of transport and logistics, many firms used a regulatory loophole and negotiated lower prices with shippers than those filed with the ICC (Interstate Commerce Commission). In the 1990s the motor carrier trustees sued shippers for the difference between the

rate that was filed with the ICC and the lower negotiated rate, which was \$27bn in claims (Bowersox et al., 2007).

- In 2000, BSkyB (Sky) appointed Electronic Data Systems (EDS, now owned by HP and called HP Enterprise Services UK) to design and implement a new customer relationship management (CRM) system. As part of its sales process, EDS made various claims regarding time, cost, technology and implementation methodology.
- The project quickly ran into difficulties. In 2002 Sky took over, completing the project itself at a cost of £265 million. Sky sued EDS, claiming that EDS had, prior to Sky entering into the contract, fraudulently misrepresented its ability to perform the contract, in particular about the development and timescale of the project. Had it not been for these misrepresentations, Sky claimed, it would have awarded the contract to another bidder.
- EDS denied the allegations, claiming that the time and cost overruns were caused by a lack of specificity on the part of Sky, leading to changes in requirements for the CRM system and consequent delays.
- The judge considered the meaning of “fraudulent misrepresentation”, focusing in particular on claims about timescales made by one employee. He held that EDS was liable for fraudulent misrepresentation in respect of the statements made by its employee, but as EDS’s sales processes generally did not involve fraudulent misrepresentation, dismissed some of Sky’s other claims of fraud (Kelly 2010)

7. Further Reading/Reference

Web Resources

- Company law https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31649/12-560-company-law-flexible-framework-discussion-paper.pdf
- HM Government: UK Legislation <http://www.legislation.gov.uk/>
- UNCITRAL: United Nations Commission on International Trade Law <http://www.uncitral.org/uncitral/en/index.html>
- Publications from centre for commercial law <http://www.ucl.ac.uk/laws/commercial/index.shtml?books%20%20>
- Commercial law <http://www.allaboutlaw.co.uk/index.php/pre-uni/areas-of-law/commercial-law/>

Books

Legal Aspects of Purchasing and Supply Chain Management, Longdin, ISBN 978-1903499368

Law for Purchasing and Supply, Griffiths & Griffiths, ISBN 978-0273646792

EU Procurement Law, Bovis, ISBN 978-1847209474

Commercial Law, Sealy & Hooley, ISBN 978-0199299034

Commercial Law, Goode & McKendrick, ISBN 978-0141030227

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- Kelly L (2010) BSKyB v HP Enterprise Services UK (formerly EDS) What happens when a supplier misrepresents its capability in order to win a contract? Supply Management
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- Sibun, J. (2011) Tate & Lyle in ethanol legal dispute. The Telegraph. October 21st. [online] Available at: (www.telegraph.co.uk/finance/newsbysector/retailandconsumer/8517279/Tate-and-Lyle-in-ethanol-legal-dispute.html) [Accessed 26 October 2011].

The Independent (2007) B&Q sues Chinese supplier amid pay row. July 14th. [online] Available at: (www.independent.co.uk/news/business/news/bampq-sues-chinese-supplier-amid-pay-row-457232.html) [Accessed 26 October 2011].

Video

Saab production discrepancies following another dispute with suppliers over payments
https://www.youtube.com/watch?feature=player_embedded&v=pGlu2oD8t5A

