

Navigating the Challenges & Opportunities Arising From Business Immigration, Recruitment & Commercial Contracts

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Introduction

Cleaver Fulton Rankin is:

- Committed to delivering a client focused service. This means excelling at servicing our clients, understanding the needs of our clients and delivering the best possible results to them.
- A leading law firm according to UK Legal Directories, Chambers & The Legal 500.
- Located in the heart of Belfast City Centre with established links with Dublin, London, regional UK and international law firms. We provide an 'all-island' and wider UK and international service to our clients.
- Cleaver Fulton Rankin is a leading commercial law firm in Northern Ireland, providing a full legal service to both commercial and private clients, including local businesses, government bodies, national and international institutions and corporations.
- .
- A responsible business, with a CSR programme focused on contributing positively to the environment in which we operate. We are Business in the Community members and have been awarded the Bronze Diversity Charter Mark by Diversity Mark.
- Investors in People accredited, demonstrating our commitment to good people management.



Jonathan Braden

Corporate & Commercial Solicitor @ CFR:

- **5+ years working in business development for Series-B start up, scale-up and Fortune500 company.**
- **Has advised in the acquisition/disposal of high value assets, numerous mergers & acquisitions and commercial negotiations.**



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Today we will discuss...

1 Legal Risks in B2B Manufacturing Contracts

2 Managing Risk in Contract Negotiation

3 Reviewing Existing Contracts

4 Q&A



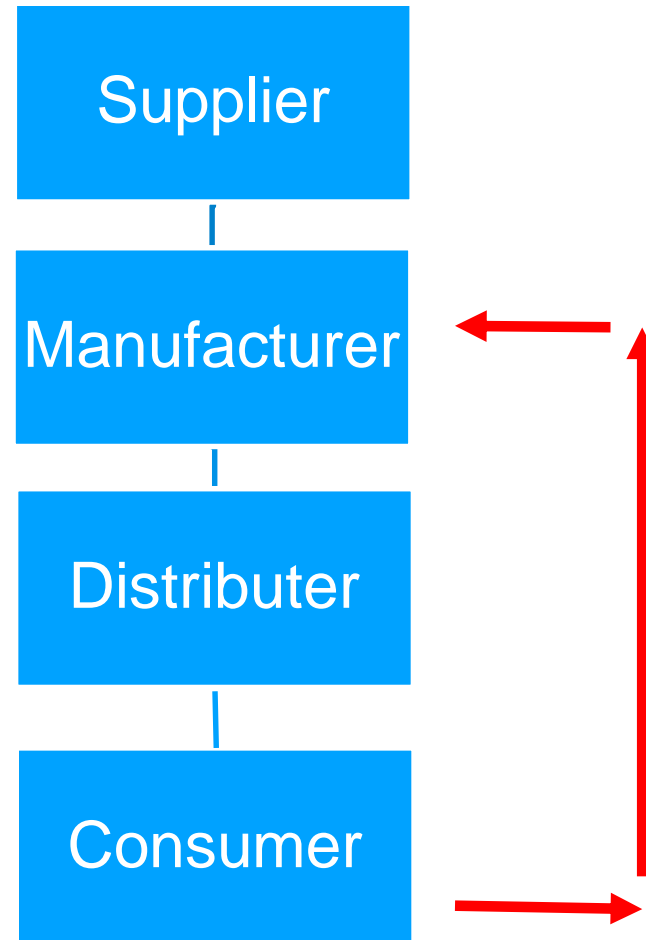
Legal Risks in B2B
Manufacturing Contracts

Product Safety: What can go wrong?

- Product liability is typically apportioned based on fault and the ability to have prevented the damage or injury.
- A producer may be responsible for the consequences of many types of safety issue
 - Product failure.
 - Poor product design.
 - Inadequate labelling.
 - Product claims that go beyond those authorised by manufacturer.
 - Incorrect instructions
 - Failure to provide proper warnings

Strict Liability

- Part I of the Consumer Protection Act 1987 (CPA)
- Consumers can bring claims under the CPA for damage suffered from defective goods.
- Primary liability under the CPA rests with the manufacturer.
- Liability is strict, so a consumer will have a claim irrespective of whether the producer is at fault.
- If, however, the producer is insolvent, untraceable, or outside the UK, then a claim could be made against the distributor, supplier or retailer instead.
- **Strict liability focuses on nature of the product**



Consumer must prove:

1. **Product was “defective”**
2. **Consumer suffered “damage”**
3. **A causal link between defective product and damage**

Negligence

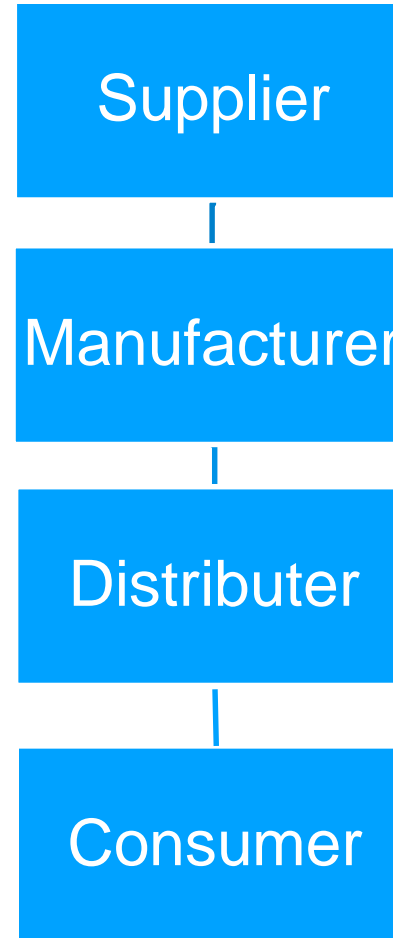
- A claim in negligence can be made against any party in the supply chain, if their actions were negligent and caused loss or harm to a party who has purchased the product
- Usually be the case that a manufacturer owes a duty to the intended users of its products.
- This will include not only the end-users, but also the intermediate parties in the supply chain if the product is a component.
- **Negligence focuses on the behaviour of the manufacturer**

Claimant must prove on the 'balance of probabilities':

- 1. The manufacturer owed them a duty of care.**
- 2. The manufacturer breached that duty.**
- 3. The breach caused the damage in question.**
- 4. The manufacturer could reasonably have foreseen the damage.**

Breach of Contract

- Any party purchasing products at any stage along the supply chain (including the ultimate consumer) can bring a contractual claim against the party from whom they directly purchased the product.
- The law will imply certain contractual terms about the quality and nature of goods purchased even if such terms are not specifically or expressly referred to in the contract when the goods are bought
- Most common breaches:
 - the goods aren't fit for purpose
 - the goods are of unsatisfactory quality
 - the goods don't match the seller's description



Breach of Contract – Implied Terms B2B

Terms may be implied into a contract from both statute and case law.

- **The Sale of Goods Act 1979**
 - **Quality & fitness for purpose**
 - Must meet the standards that a reasonable person would regard as satisfactory
 - If buyer makes it known the purpose for which the goods are bought, the goods supplied are to be reasonably fit for that purpose
 - **Sale by sample**
 - Bulk of goods must correspond with the sample in terms of quality
 - **Sale by description**
 - Must correspond with description
 - It is not sufficient that bulk of goods match with sample if they do not also match description
- ***J Murphy & Sons Ltd v Johnston Precast Ltd 2008***
 - Specialist suppliers of particular products are subject to an implied term that they will advise purchasers of problems which are, or reasonably ought to be, known about the product.
 - Places duty on supplier to proactively warn about known problems.



Managing Risk in Contract Negotiation

Negotiating the Exclusion or Restriction of Liability

Cannot Exclude

- Death or personal injury caused by negligence.
- Good title
- Defective products
- Fraud

Can restrict to certain extent

- Negligence
- Misrepresentation
- Breach of contract
- Correspondence with;
 - Description
 - Sample
 - Fitness for purpose

Unfair Contract Terms

- If party A enters into agreement with Party B based on Party B's standard terms, Party B cannot (subject to reasonableness):
 - Restrict/exclude liability for their own breach
 - Claim to be entitled to provide substantially different contractual performance

Restrictions on Buyer's Rights & Remedies

- Restrictions on Buyer's rights & remedies often inter-relate with terms implied by SGA.
- By including a contractual provision that excludes terms implied by statute, a supplier can remove the benefit of the conditions implied by the SGA, which prima facie entitle the customer to reject defective products and terminate the agreement.
- A supplier may therefore want to replace the SGA rights with much more limited rights to have the defective products repaired, replaced or refunded, and impose conditions on the circumstances in which defective products may and may not be rejected, and the customer's remedies for purchasing defective products

Indemnities

Indemnities generally provide better protection than warranties.

The remedy for a warranty is a claim in damages and the onus is on the injured party to demonstrate that the warranty has been breached and quantifiable loss has been suffered.

In contrast, an indemnity will effectively transfer the risk on to the indemnifying party and allow the indemnified party to recover the loss.

When giving an indemnity

- Limit indemnity to things for which you are directly responsible
- Ensure indemnity contains a financial cap
- Ensure indemnified party has to comply with requirements:
 - Control/co-operation of defending claim
 - Notice
 - Mitigating losses

Additional Clauses

Licenses & Consents Obligations

- Are any licenses/consents necessary to sell product?
- Customer can include a positive obligation on the supplier
- Who carries cost of license?

Packaging specifications

- Compliance with statutory provisions.
- Prevent repackaging or impose conditions on repackaging.

Sampling Obligations

- Helps reduce product safety issues.
- Who will have obligations to conduct sampling?

Product Information

- Who will have obligation to provide product info to end consumer?



Reviewing Existing Contracts

Current Contracts Review - Checklist

- Does it provide appropriate conditions, warranties and indemnities from any suppliers?
- Does it provide for appropriate standards of safety and quality in products supplied?
- Does it contain appropriate exclusions of liability or liability caps with customers?
- Does it contain a specific product liability allocation clause?
- Whose obligation is it to hold insurance for product liability and recall?
- Is an appropriate level of products liability insurance held, including to cover the costs of taking unexpected action in relation to products, particularly recalls?
- Does it cover the obligations of appropriate parties in relation to co-operation in issuing warning notices or a product recall?
- Does it include obligations on securing and maintaining appropriate product licences and consents in place?
- Does it set out who is to have obligations for sampling, testing, storage, distribution or providing information on products (and who is not to have these obligations), and what these obligations are?
- Does it contain obligations about the use of specific packaging, including the use of appropriate warnings and instructions for use?
- Does it include obligations to maintain information on customers and the uses that products are put to in practice (including complaints and returns) and to pass on full information in the chain of distribution, whether back towards producers or forwards to users?

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