

## **Remote learning and managing its accidental impact on energy contracts**

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The Covid-19 pandemic has forced Higher Education Institutions (HEIs) to move almost exclusively to remote learning for large periods of the last year. But, longer term, HEIs will no doubt be looking at the benefits of continuing with remote learning and/or a hybrid of in-person and remote learning.

When considering whether to make that move, HEIs should also consider the potential knock-on effect it can have on their energy contracts. Often these contracts have long terms, and so it is important that HEIs understand the potential implications and the options that may be open to them, including a potential right to seek a price review with suppliers or to terminate. Based upon our recent experience advising clients on these matters, we have set out below the various considerations and options.

### **Before any steps are taken, review the contract carefully to see if any change in consumption will have an impact upon the contract and prices**

Energy contracts often have a minimum volume of energy that must be consumed on an annual basis. Therefore, a drop in consumption will not negate the liability to pay for that minimum volume. Even if there is no minimum volume, the contracts often have clauses defining the size of the buildings being supplied and that those buildings must (1) not be demolished and (2) remain occupied. Changes in occupancy levels often trigger a review of charges, which could result in an increase in those charges.

### **Consider varying the contract**

Given the length of energy contracts, it would be wise to see whether the parties can work together to find a workable solution. A negotiated solution could take a variety of different forms, depending upon the commercial strategies of the parties. This could include, for example, amending the length of the contract, decreasing the committed volume, and/or changing the pricing structure.

Reaching a negotiated solution is often the best scenario for both parties. If the parties agree to vary the contract, then it is important to ensure that the variation is carried out in accordance with the contractual process and that it is properly documented.

### **Check if there is a right to change the price**

Another option is to try to force a price change for the energy. If a variation cannot be agreed between the parties, then whether one party has the ability to actually force a change to the price depends upon the wording of the relevant clause in the contract. Often these clauses require the parties to engage in good-faith discussions followed by arbitration (or less frequently expert determination), if the parties cannot reach agreement. In some situations, the clause may permit the contract to be brought to an end if an agreement is not reached. Understanding the process and the ultimate goal is fundamental to formulating the correct strategy.

# Check if there is a right to trigger a review of the financial model

The pandemic does not automatically mean that HEIs will have the ability, under their energy contracts, to demand an immediate review of the financial model. This is because, typically, long-term energy contracts already have those reviews at various intervals (e.g. five years, 10 years, 15 years etc), depending upon the length of the term. Unfortunately, this means that it is down to luck as to whether a review of the financial model falls at the right time.

If there is a right to trigger, HEIs will then have to consider whether the review will achieve the aim of the clause, i.e. to restore the contractual bargain between the parties, based on the revised consumption needs.

If HEIs can trigger the review of the financial model, then they should make sure that they follow the procedural steps outlined in the clause. HEIs should also make sure that they are aware of the potential outcomes that could follow by triggering the review, before taking any steps, as, for example, these contracts sometimes only provide for an upwards-only review of the charges. Therefore, whilst energy consumption might have decreased, triggering a review might actually result in fixed charges increasing.

## Consider the dispute resolution procedure

If there is a dispute, then HEIs should check any dispute resolution clause within the contract and invoke the prescribed procedure. Most contracts contain a dispute resolution clause, which is often found towards the end of the contract (and forgotten about!).

The dispute resolution clause usually specifies how disputes are to be resolved and this may include: (1) a series of escalating stages through which the parties will attempt to resolve the dispute, i.e. a meeting with the manager and then escalation to a senior manager; (2) negotiation; (3) mediation (optional or compulsory); and (4) arbitration or litigation. Generally, whichever procedure is specified in the contract, the parties are required to follow it to save time and avoid incurring unnecessary legal costs. It can often be possible to reach a resolution with an energy provider through the dispute resolution procedure without matters escalating.

## Consider termination

Commercial contracts typically include clauses that give parties the right to terminate in particular circumstances: for example, when certain specified breaches of the contract take place, or on the occurrence of force majeure or insolvency events. However, for the purpose of this article, we are only looking at situations where contracts allow a party to terminate for convenience (aka 'no-fault') where no breach or relevant event has occurred.

Generally, clauses that allow termination for convenience cannot be invoked until after a certain notice period or minimum term has passed. A party looking to exercise a right to terminate must make sure that it actually has the right to terminate, i.e. that all the conditions allowing termination are satisfied. If so, then effecting termination will be a simple matter of following the correct procedural steps. It is critical that any contractual notice provisions are complied with.

It is important that HEIs consider their termination strategy carefully, and do not rush into a decision without properly analysing the legal position, as wrongful termination may give rise to exposure to significant damages.

## Summary

With remote learning likely to result in a sustained decrease in energy consumption, HEIs should consider whether their energy contracts still provide an attractive commercial position. If they do not, then HEIs should take steps to review their contractual rights, obligations and options in order to ascertain the best way forward. We are here to help if you need any support when assessing your options.

If you have any queries arising from the issues raised in this article, then please contact us.

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