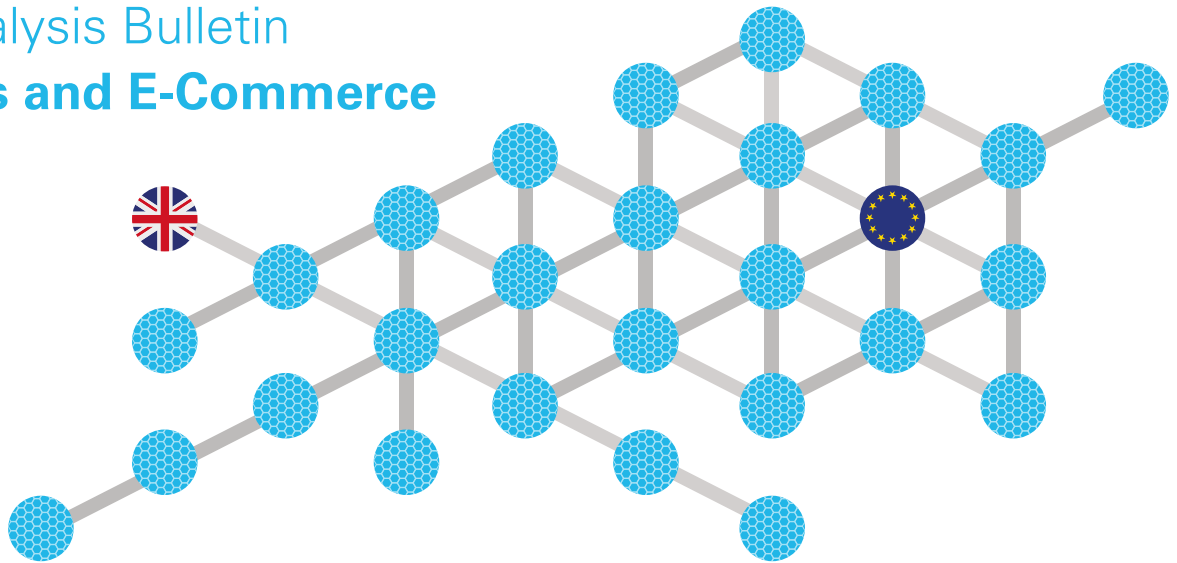


## Brexit Analysis Bulletin

### Contracts and E-Commerce



In the UK's current constitutional arrangement as part of the EU, much of the law which governs the formation and interpretation of commercial contracts is harmonised throughout the EU. This bulletin will consider in particular: Choice of Law clauses, consumer protection and e-commerce. As in other areas, the consequences of a Brexit will largely depend on the model adopted by the UK upon leaving. As discussed in our other Brexit Bulletins ([available here](#)), there are a variety of options which the UK might adopt.

#### Choice of Law

The current regime which controls the applicable law for contractual obligations is set out under the Rome I EU Regulation. It is almost certain that the Rome I Regulation would not apply to the UK after Brexit.

However, this does not necessarily mean there would be a great upheaval in the law. If, following EU exit, the UK ceases to apply the Rome I Regulation then it is likely that the Rome Convention Treaty would apply. This is the set of principles which the Rome I Regulation was based upon and is fairly similar. The Rome Convention Treaty is implemented into UK law by the Contracts (Applicable Law) Act 1990. However, its application is currently limited so that it does not apply to contracts which fall under the Rome I Regulation. With the Rome I Regulation falling away following a Brexit, the 1990 Act would no longer be so constrained. In relation to Choice of Law clauses, the Convention, like the Rome I Regulation, protects the contractual freedom of the parties. This allows parties to decide which law will apply to their contractual obligations.

It is therefore unlikely that, immediately following a Brexit, choice of law provisions would become ineffective. However, the Supreme Court would become the ultimate arbiter of the UK's obligations. A divergence between UK and EU practices may develop

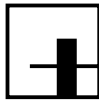
which could be detrimental to UK businesses dealing with undertakings due to conflicting interpretations. This could be detrimental to UK businesses if it results in less certainty than under the current regime.

#### Consumer Protection

The law regarding consumer rights in the UK draws heavily on EU law. The latest Consumer Rights Directive was implemented into UK law by statute in 2015. The Directive provides consumers with rights in relation to costs of distance selling, cancellation and cooling off and a prohibition on excessive charges for payment by credit cards and premium rate phone lines.

The Directive has been fully implemented into UK national law and so it is unlikely to change if the UK were to leave. However, as above, there will be scope for the UK to move away from the EU position as the law develops and the Supreme Court replaces the Court of Justice of the European Union (the CJEU) as the authority on interpreting the law.

The European Commission is currently undertaking a fitness check of EU consumer protection law. This is a long running programme assessing the effectiveness of the law and providing a roadmap for future amendments. The results are due to be published in spring of 2017 and may result in the Commission recommending reform. As



a member of the EU, the UK is able to feed into this analysis. A *leave* vote would reduce the UK's ability to influence the future of the reforms. This may result in a disparity between the UK and the EU regime.

Much depends on the position following a Brexit. If the UK joins the EEA then it will have to continue to apply EU consumer protection law, despite not being able to influence the development of these laws. If it does not join the EEA then it will have more freedom to make its own regulations. However, EU consumer protection laws will always apply to dealings with consumers residing in the EU. As such, there is a risk that businesses that sell to consumers both in the UK and in the EU will be faced with dual regulation of their consumer contracts.

### E-Commerce

E-commerce has become a crucial aspect of almost all product markets in the UK. The current law is set out in EU's Electronic Commerce Directive 2000 which was implemented into UK law in 2002. The regime covers almost every commercial website and is not restricted to online buying and selling but any service provided for remuneration at a distance using electronic means.

Following a Brexit, the UK would have to consider the model it would adopt. If the UK were to join the EEA then it would be required to implement the EU Directive. As the current law is not directly effective in the UK but rather implemented through secondary legislation, it is possible that the UK could simply maintain the European regime even outside the EU and the EEA. However, the EU is obliged to re-visit the Directive every two years. A divergence between the EU and the UK is therefore possible.

A major consideration in the field of e-commerce is the on-going e-commerce sector inquiry, launched in May 2015 by the Commission. The purpose of this review is to identify any barriers to cross border e-commerce and then work to remove these obstacles where possible. In so doing, the Commission aims to create an effective single market in the field of online retail.

The digital economy remains one of the key priorities of the Commission, and it is therefore likely that they will progress this inquiry expediently. The present timelines indicate that a preliminary report will be published mid-2016 for stakeholder comment, with the final report due to be published in Q1 of 2017. Given the estimated dates for publication being within the next year, following a Brexit, UK stakeholders will not be removed from the scope of the inquiry and will be able to comment on any interim report.

As occurred with the energy and pharmaceutical sector

inquiries, the final report next year could lead to the opening of investigations into competition law infringements by individual companies. If any such enforcement action is taken against UK-based retailers, investigations could be opened that may take several years to conclude and may lead to substantial financial penalties. This will be the case even if a Brexit occurs, as a UK-based business, if deemed to have infringed EU Competition Law, will continue to be affected by enforcement actions in the same way that Swiss, US and Far Eastern businesses are currently.

### Change of Law and Material Adverse Change

Certain contracts contain a provision that should a change in the law render the performance of a contract unlawful or impossible then the contract may be terminated by either party. A Brexit would be implemented by legislation repealing the European Communities Act 1972. This may be sufficient to trigger a change of law clause, for example in a contract which used reference to the EU to define its geographical scope.

Similarly, Material Adverse Effect or Material Adverse Change (also known as MAC) clauses could be triggered by a Brexit. MAC clauses allow parties to re-negotiate or terminate a contract if the change of circumstances means that the original intention of their agreement is no longer represented.

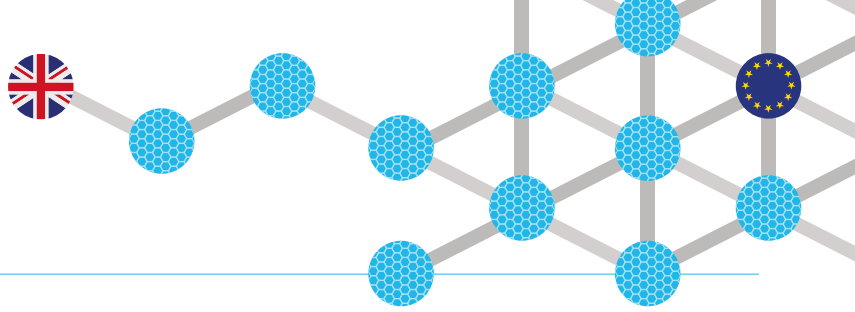
On a practical level, businesses should consider whether their contracts could be frustrated if the UK leaves the EU. If a party's obligations under that contract were in relation to a specific piece of EU legislation then that party may no longer be able to fulfil those obligations. For example, if an agency was contracted to place workers at short notice in different member states it may be unable to fulfil its obligations if the free movement of persons no longer applied to the UK.

In practice, the number of contracts which become unenforceable or frustrated by a Brexit are likely to be limited.

In this regard, the actions of the UK government following a *leave* vote are of key importance. The government will have to decide what sort of trade relations the UK should have with its trading partners and to what degree it will allow EU law to continue operating.

From a risk management and business continuity point of view, the greater concern will be the possibility of a gap period between the Brexit and the UK's ultimate settlement.

Under Article 50 of the Treaty of the EU, there is a two year negotiating period between a member state



intimating that it is leaving the EU and exit day. It is possible for this period to be extended with unanimous consent of the remaining member states. This creates the risk of the UK exiting the EU before the necessary agreements are in place resulting in a gap period such an extension is not granted.

A gap period between a Brexit and the UK agreeing a final trade settlement with the EU would be much more likely to constitute a MAC than a smooth transition. Shepherd and Wedderburn have previously considered the position of the UK banking system if the UK leaves the EU (available here). If payment systems were to become disrupted then UK businesses may become unable to fulfil their contractual obligations.

### To conclude

The risk that the EU referendum creates in relation to their contracts is a factor which businesses will need to look into closely. Although there is much uncertainty, there are steps which businesses can start taking now to help mitigate these risks. The first stage will be to review contracts to ascertain which relationships could be affected. Going forward, businesses should consider their current transactions and contract negotiations. These should be drafted with the possibility of Brexit in mind.

The key risk remains the possibility of a gap period between a Brexit and final settlement with the EU and the UK's other trading partners.

## SHEPHERD AND WEDDERBURN'S BREXIT ADVISERS JOINING THE DOTS OF THE EU REFERENDUM

### What If?

Shepherd and Wedderburn has been for many years offering balanced and impartial advice on how the different scenarios might play out in the event of constitutional change.

With the EU referendum now only months away, members of our dedicated Brexit Advisers will continue to interrogate the 'what if' questions, relating to specific sectors, that will emerge when the UK decides whether to remain in or leave the EU.

For further information in the first instance, please contact:



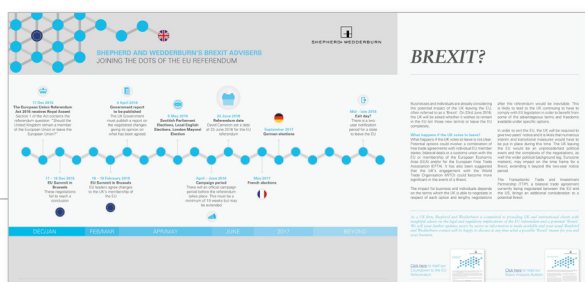
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