

Business Law Newsletter



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Professional Contract Drafting for Business

March Edition

What's in this Month?

| | |
|---|-----------|
| Arts levelling up | 2 |
| Arts Council funding to be redistributed | 2 |
| Brexit | 2 |
| Brexit Benefits bulletin | 2 |
| Post Brexit trade volumes in decline | 3 |
| Singapore Trade Deal | 3 |
| Covid-19 | 4 |
| Living with Covid | 4 |
| Contracts | 4 |
| Time of the essence | 4 |
| What does it take for a course of dealing to become part of a contract? | 4 |
| Smart contracts are give a boost by senior judge | 5 |
| Contract Tip of the Month- Maintaining confidentiality | 5 |
| E-commerce | 5 |
| 'The Online Rip-Off Tip-Off' | 5 |
| Employment | 6 |
| Retaining confidential information after employment has ended | 6 |
| HMRC | 6 |
| Latest Employer Bulletin | 6 |
| Coronavirus (COVID-19) updates and information | 6 |
| Tax updates and changes to guidance | 6 |
| Looking at an Online sales tax | 6 |
| Media | 7 |
| Music streaming market enquiry | 7 |
| Film & TV Production Restart Scheme - Process Evaluation | 7 |
| Public Procurement for SMEs | 8 |
| Government public procurement guide for SMEs published | 8 |
| Ukraine | 8 |
| The Russian Sanctions | 8 |
| Breaching the Russia trade sanctions | 9 |
| META'S (formerly Facebook) response to the invasion | 9 |
| Crypto aid donations | 9 |
| Contract cancellations in public sector | 9 |
| Publisher's Notice: | 10 |

Arts levelling up

ARTS COUNCIL FUNDING TO BE REDISTRIBUTED

The DCMS has announced an additional £75m in funding for the arts by 2025 and more than 100 location to be prioritised for new arts funding. DCMS also expects investment by the Arts Council England across England outside London to rise to almost £250m by 2025.

The Arts Council England says: “*As part of our [Delivery Plan for 2021-24](#), we identified 54 places across England in which our investment and engagement is too low, and opportunity for us to effectively increase investment and engagement is high – and so we’re prioritising working with them from 2021 to 2024.*

In every one of our Priority Places we will work with local stakeholders to set bespoke objectives, hold ourselves accountable for increasing staff time and investment across a range of funds, and track the impact of our investment.”

The priority areas to benefit from the initiative can be found online [here](#).

[Read more about the funding and its implications here](#)

Brexit

BREXIT BENEFITS BULLETIN

The cabinet office has published 'the benefits of Brexit: how the UK is taking advantage of leaving the EU'. The policy paper sets out what the Government sees as the achievements so far, following the UK's withdrawal from the EU two years ago, and its existing plans to reform regulation.

Some of the main business benefits highlighted in the paper include:

- UK regulators have the ability and the resources to make sovereign decisions about globally significant mergers.
- Simplifying the reporting burdens for small and medium companies.
- Establishing our own subsidy regime to support British businesses and innovation.
- Reforming and simplifying our public procurement rules so that the public sector can buy more local goods and services.
- Delivering eight Freeports in England and at least one Freeport in each of Scotland, Wales and Northern Ireland.
- Back in control of our own VAT rates.
- Setting out a new UK pro-competition regime for digital markets.
- Developing our distinctive, pro-innovation approach to artificial intelligence regulation.
- Reforming our data laws and setting a new direction for data regulation.
- Reforming EU financial services regulations.
- £180 million committed to modernise and streamline our import and export controls by creating the Single Trade Window.
- Our own tariff regime set via the UK Global Tariff.
- Taken back control of our waters.
- Restored the UK Supreme Court as the final arbiter of the law that applies in the UK.
- Ensuring our iconic British products all get the recognition they deserve, through our own domestic Geographical Indication (GI) regime.
- Enabling businesses to use a crown stamp symbol on pint glasses.

[Read the benefits paper in full here.](#)

[Back to Menu](#)

POST BREXIT TRADE VOLUMES IN DECLINE

The Public Accounts Committee (PAC) has published a report explaining that, since Brexit, UK trade volumes have been suppressed by the impact of coronavirus (COVID-19), the EU exit and wider global pressures, adding costs to business and causing concern.

The total amount of goods traded between the UK and the EU dropped 25% less in quarter one of 2021 compared to the same period in 2018, the last “normal” year before trade flows were impacted by the pandemic and Brexit preparations, according to ONS figures. The fall was “far greater” than drops in the UK’s trade with the rest of the world, the report found.

The report considers the impact of the new border arrangements and the future risks relating to the management of the border, summarising with eight recommendations. The report concludes with the Committee explaining that while the Government’s plans to create ‘the most effective border in the world’, ‘it is optimistic, given where things stand today’ and isn’t convinced that its plan is sufficient to deliver it.

- The new border arrangements have yet to be tested with normal passenger volumes and may be further challenged when the EU introduces requirements for biometric passport checks.
- The new controls in place over the movement of goods from the UK to the EU have created additional costs for businesses and affected international trade flows.
- More could be done by Government to ensure small and medium sized enterprises (SMEs) are prepared to face the additional costs and administration required by new border requirements.
- Government intends to introduce full import controls in phases from January 2022, but much work remains to be done.
- There is more to be done to ensure that traders and hauliers across the 27 EU countries are prepared for UK import controls.
- Government’s arrangements for goods arriving from the EU is untested and could be exploited, increasing regulatory and fiscal risks.
- Government’s ambition for the UK to have the “world’s most effective border by 2025” relies on cross-government digital programmes, in which it does not have a good track record.
- Businesses have faced challenges operating under the Northern Ireland Protocol which need to be resolved.

[Read the PAC’s report here](#)

[Back to Menu](#)

SINGAPORE TRADE DEAL

The UK and Singapore have signed a Digital Economy Agreement, which the Government has hailed as

“..the most innovative trade agreement ever signed, and the first by a European nation. It will strengthen our trading relationship with Singapore – worth £16 billion in 2020 – by ending outdated rules that affect both goods and services exporters, making it easier for UK business to target new opportunities in both Singapore and the wider region.”

The DEA covers a wide range of activities including digital markets, data flows, consumer and business safeguards, digital trading systems, financial services, tech partnerships, information sharing and submarines cable landing systems.

Specifically, on SMEs the UK Government announced that:

*“The UK and Singapore will tackle barriers to the participation of small and medium-sized enterprises (SMEs) in the digital economy, helping companies – no matter how small they are – take advantage of the vast opportunities offered by digital trade and the digital economy.
This will include activities such as:*

- *promoting co-operation between SMEs on digital trade and SME jobs and growth*
- *encouraging SME participation in platforms linking them with commercial contacts*
- *exchanging information and best practice across a range of areas to help SMEs adapt to digital trade.*

[Read more about the trade deal with Singapore here](#)

[Back to Menu](#)

Covid-19

LIVING WITH COVID

On 21st February, the Government published its [strategy for living with Covid-19](#) in England, and its plan to remove the remaining legal restrictions while protecting people most vulnerable and maintaining resilience, click for below for details:

- [Living with Covid-19 and removing the last restrictions](#)
- [Protecting the vulnerable](#)
- [Maintaining resilience](#)

[Back to Menu](#)

Contracts

TIME OF THE ESSENCE

The High Court has held: that time was of the essence for the performance of a contract for the supply of five million facemasks in weekly tranches of 500,000 made in March 2020 at the beginning of the COVID-19 pandemic; that the defendant who delivered the first tranche but not the remainder was in breach of contract; that although the claimant had chased for updates from the defendant for a period of some weeks it had not affirmed the contract since it was entitled to a reasonable time to consider its position.

The Court's decision that time was of the essence was made taking into account the circumstances in which the contract had been agreed and therefore the defendant was in breach when failing to make delivery by the agreed dates. However, in the light of the reassurances given by the defendant that delivery was 'on the way' the Court decided that the claimant had a reasonable time to accept the repudiatory breach and was entitled to do so on 3 June 2021. Accordingly, the claim for repayment of the £720,000 succeeded and the counterclaim for specific performance was dismissed.

[Read more about this case](#)

[Back to Menu](#)

WHAT DOES IT TAKE FOR A COURSE OF DEALING TO BECOME PART OF A CONTRACT?

In a recent case, the Commercial Court has decided that a course of dealing over a five-year period meant that a supplier's standard terms and conditions were incorporated by reference into the contract with its buyer.

It's will be question of fact and degree, including the number of previous contracts, how recent they are, the similarity of subject matter and the way in which they were concluded, as to whether or not particular terms are effectively incorporated into a contract as a result of prior dealings between the parties.

In short, it has to be obvious from the parties' dealings with each other that they intended the relevant terms and conditions to apply to their contractual relationship.

The case is: *Provimi France SAS and other companies v Stour Bay Company Ltd*

[Back to Menu](#)

SMART CONTRACTS ARE GIVE A BOOST BY SENIOR JUDGE

The Master of the Rolls, Sir Geoffrey Voss (head of England & Wales' Civil Justice), made an important speech on 24th February 2022 at the launch of the [Smarter Contracts Report](#), the aim of which is to explain how smarter contracts and blockchain technology are being used.

Amongst Sir Geoffrey's notable comments about the emerging technology were:

"The blockchain is now at a stage in its development equivalent to where the internet was in or around 1995. The internet was unstoppable in 1995 and blockchain technology is unstoppable now."

"Many people do not realise that English law governs trading in €600 trillion of OTC derivatives annually, in €11.6 trillion in metals trading, in £250 billion in M&A deals, and in £80 billion in insurance contracts every year – just to take a few examples. My hope is that English law will prove to be the law of choice for borderless blockchain technology as its take up grows exponentially in the months and years to come."

"There are three main developments that will kick start decentralised finance, smarter contracting and the mainstream use of distributed ledgers. First, the launch of wholesale or retail central bank digital currencies. Secondly, the use of digital transferrable documentation such as electronic bills of lading, and thirdly the widespread use of digital/smart commercial documentation in place of analogue applications such as PDF and Word."

"Blockchain technology is not something that might happen in years to come; it is happening now."

[Read the entire speech here](#)

[Back to Menu](#)

CONTRACT TIP OF THE MONTH- MAINTAINING CONFIDENTIALITY

Protection of a company's confidential information is a key objective. Well-drafted express confidentiality provisions setting out their employees' obligations, both during and after employment is therefore important. These will include:

- Clearly written definitions of what is (and is not) confidential information, including naming specific types where required;
- A requirement for employees to return company property on termination, including any hard and soft copy documents, laptops, memory sticks or other cloud-based storage and devices;
- An obligation to delete permanently (at the employer's direction) any corporate documents stored that are stored on personal devices or email; and
- An obligation that the confidential information remains confidential for a set period of time (which may be in perpetuity depending on its nature and importance) after employment ends.

Consultants and other individuals who have access to confidential information ought to be required to sign similar provisions when they enter service agreements with a company.

[Back to Menu](#)

E-commerce

'THE ONLINE RIP-OFF TIP-OFF'

With almost one-third of all retail purchases now taking place online, after the pandemic fuelled a surge in internet shopping, the Competition and Markets Authority (CMA) has become increasingly concerned about the impact of these "sneaky" sales tactics on consumers.

On 9th February 2022, the CMA launched 'The Online Rip-Off Tip-Off' campaign aimed at helping customers to spot and avoid misleading online practices. A recent survey of over 2,000 UK adults showed

that seven out of ten respondents experienced such practices, 85% believed that businesses using them were being dishonest and 83% of those surveyed were less likely to shop with the businesses in the future. The research also found that 85% of those who experienced misleading online practices were most concerned about hidden charges, 83% about subscription traps, 80% about fake reviews and 50% about pressure selling. [Read the CMA's announcement](#)

[Take a look at the 'The Online Rip-Off Tip-Off' campaign's website](#)

Employment

RETAINING CONFIDENTIAL INFORMATION AFTER EMPLOYMENT HAS ENDED

In a recent High Court case, a former employee (the Global General Counsel of Nissan) was ordered to return the confidential documents he had kept after his employment had ended.

The Court held that whether the documents in question had been retained to help the employee get legal advice did not matter and was not justification for their retention.

[Read more about the case](#) courtesy of law firm Lewis Silkin, who acted for Nissan, including their practical points for employers for protecting a company's confidential information:

[Back to Menu](#)

HMRC

LATEST EMPLOYER BULLETIN

HMRC has published its Employer Bulletin for February '22, including the information on the following:

PAYE: basic PAYE tools / changes to the Helpline / NI increase / new national minimum wage

Coronavirus (COVID-19) updates and information

- [Claiming back Statutory Sick Pay due to Coronavirus](#)
- [Update to Job Retention Scheme claims information on GOV.UK](#)

Tax updates and changes to guidance

- [Umbrella Companies: call for evidence due to close on 22 February 2022](#)
- [VAT reverse charge for construction and building services](#)
- [Changes to the Construction Industry Scheme](#)
- [Making Tax Digital for VAT is coming — are you ready?](#)
- [Parental Bereavement Leave and Pay in Northern Ireland — new employment right coming into force — 6 April 2022](#)
- [Impact of the change to National Minimum Wage on Statutory Maternity Pay](#)

[Read the full bulletin content here](#)

[Back to Menu](#)

LOOKING AT AN ONLINE SALES TAX

HMRC has launched a consultation to gather evidence and inform government policy on the proposal for an online sales tax (OST) as a means to rebalance the taxation of the retail sector between online and in-store retail. The consultation will run from 25 February to 20 May 2022.

Some of the questions that are being looked at include:

- Which goods and services would be in-scope of the tax?
- How does one define an online sale and should this extend to ‘remote’ sales made by phone or post?
- What would be the distinction between a reservation and a completed transaction for the purposes of an OST?
- Would any exemptions be appropriate, such as for click and collect purchases or for certain goods and services?
- At what point in the transaction would an OST be levied – consumer, or vendor?
- What would be the role of intermediaries such as marketplaces?
- What would be the territorial scope of an OST?
- How would cross-border sales be treated?
- Would a threshold or allowance be appropriate to account for smaller firms or those with a lower proportion of sales made online?
- How would an OST be reported to tax authorities and what would the payment schedule be? And what data and systems would be required?

[Read about the consultation here](#)

[Back to Menu](#)

Media

MUSIC STREAMING MARKET ENQUIRY

Streaming has changed the way we listen to music. In the UK, more than 80% of recorded music is now listened to via a streaming service rather than using traditional physical media like CDs and vinyl.

The Competition and Markets Authority (CMA) has launched a study that will examine the music streaming market from a creator to consumer perspective, paying close attention to the roles played by record labels and music streaming services. In its study, the CMA will consider whether innovation is being stifled and if any firms hold excessive power in relation to how well the market caters for audiences. Additionally, the CMA will assess whether the lack of competition between music companies could affect musicians, singers and songwriters.

[Read about the CMA’s study](#)

[Back to Menu](#)

FILM & TV PRODUCTION RESTART SCHEME - PROCESS EVALUATION

The Department for Digital, Culture, Media & Sport (DCMS) has published its process evaluation report on the Film & TV Production Restart Scheme. The evaluation focuses on the delivery of the Scheme, the pros and cons of its implementation, and sets out recommendations that can be utilised for similar interventions in the future. The Scheme, which officially launched on 16th October 2020, aims to allow UK film and TV productions to restart after disruptions caused by coronavirus (COVID-19) by providing direct compensation to production companies to meet costs incurred via delay or abandonment of productions. A separate evaluation will be commissioned to evaluate the Scheme's impact and value for money.

The report’s recommendations included:

- allowing sector representatives and industry groups to play a central role in the design, delivery, and promotion of similar schemes
- develop a succinct overview document for future schemes with complex rules and registration requirements to ensure potential applicants are well informed
- consider the use of online systems to allow for a more streamlined process
- the government should encourage the return of commercially viable insurance and provide information on the outcome of discussions

- consider the stabilising nature of emergency responses in relation to any changes or updates being made during delivery

[Read about the evaluation](#)

[Back to Menu](#)

Public Procurement for SMEs

GOVERNMENT PUBLIC PROCUREMENT GUIDE FOR SMES PUBLISHED

The government has published a public procurement guide for SME to sell their goods and services more effectively to government. The guide highlights how to find contracts, join the supply chain and frameworks that allow access to differently sized contracts offered by government. The guide also covers requirements such as prompt payments, the public procurement review service, and the small business commission, whose role is to support SMEs in their payment disputes with larger businesses.

“Contracts Finder is the government’s single online portal on which contracts valued above £10,000 in central government and above £25,000 in the rest of the non-devolved public sector are listed. It’s free to use to find opportunities: www.gov.uk/contracts-finder. You don’t have to register, but if you do, you can set up an account to have new opportunities that suit your business emailed to you on a regular basis.”

[Read the new Selling to Government Guide here](#)

[Back to Menu](#)

Ukraine

THE RUSSIAN SANCTIONS

Since Russia’s invasion of the independent sovereign state of Ukraine the UK Government has started to introduce a series of trade and other sanctions.

These include the freezing of assets of certain Russian banks, including VTB its largest bank and preventing Russian companies from borrowing on the UK markets.

The UK is moving to ban the export a range of high-end critical equipment and components in sectors including electronics, telecommunications and technological development.

Certain Russian individuals are also being sanctioned and prohibited from travelling to the UK.

The sanctions either already introduced or in process include:

- asset freezes against all Russian financial institutions;
- measures to prevent Russian companies from issuing transferable securities and money market instruments in the UK. This will form a sweeping addition to existing financial restrictions. This is in addition to the prohibition of the Russian state raising sovereign debt in the UK already announced;
- a power to prevent designated banks from accessing Sterling and clearing payments through the UK. This will match the power the US already has. Banks subject to this measure will be unable to process any payments through the UK or have access to UK financial markets;
- new restrictions to cut off wealthy Russians’ access to UK banks including £50,000 limits on bank accounts;
- a set of measures to strengthen significantly our trade restrictions against Russia. This will include a prohibition against the export of a range of high-end and critical technical equipment and components in sectors including electronics, telecommunications, and aerospace;
- the previously announced extension of financial and trade measures applying to Crimea to the DNR and LNR regions.

[Read more about the sanctions](#) courtesy of law firm Baker McKenzie

[Back to Menu](#)

BREACHING THE RUSSIA TRADE SANCTIONS

The Gov.uk website makes clear that any breach of the trade sanctions prohibitions in the Regulations is triable either way and carries a maximum sentence on indictment of 10 years' imprisonment or a fine (or both). Any breach of the trade licensing provisions is also triable either way and carries a maximum sentence on indictment of 2 years' imprisonment or a fine (or both).

[Read more about the trade and other sanctions](#)

[Back to Menu](#)

META'S (FORMERLY FACEBOOK) RESPONSE TO THE INVASION

Meta has announced its policies on state-controlled media outlets, stating that it has restricted Russia Today and Sputnik across the EU, following Regulation (EU) 2022/350 that has banned the transmission or distribution by any means such as cable, satellite, IP-TV, internet service providers, internet video-sharing platforms or applications, whether new or pre-installed.

Facebook itself is being blocked in Russia and has announced as a result:

"...due to the difficulties of operating in Russia at this time, ads targeting people in Russia will be paused, and advertisers within Russia will no longer be able to create or run ads anywhere in the world, including within Russia"

[Read Meta's announcements on the Ukraine crisis here](#)

[Back to Menu](#)

CRYPTO AID DONATIONS

Elliptic, a blockchain analysis provider, has reported that, as at the date this Newsletter is published, the Ukrainian government and non-governmental organisations (NGOs) raised more than US\$56.8m via over 113,000 cryptoasset donations since the start of the Russian invasion on 24 February 2022.

As crypto assets allow for quick, cross-border donations which bypass financial institutions, they have become an important crowdfunding alternative. The majority of donations have been in Bitcoin and Ether, but non-fungible tokens have also been donated.

[Read about Elliptic's report on aid to Ukraine](#)

[Back to Menu](#)

CONTRACT CANCELLATIONS IN PUBLIC SECTOR

There are reports that [certain Local Councils](#), in response to the Russia's invasion of Ukraine, are looking at terminating gas supply contracts with Gazprom. Also, on 3rd March, the Health Secretary, Sajid Javid, was reported as telling NHS bosses to stop using Gazprom for its energy supplies.

[Back to Menu](#)

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Note: This publication does not necessarily deal with every important topic nor cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. The information contained in this document is intended to be for informational purposes and general interest only.

E&OE

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