Commercial Brief

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Change of Terms Necessary for some On-line Retailers

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In a recent case before the European Court involving Amazon and an Austrian Consumer Association (Verein für Konsumenteninformation v Amazon EU Sàrl (Case C-191/15) EU:C:2016:612 (28 July 2016)) *international on-line retailers of goods or services were warned off a common practice.*

Consumers have the right, when buying at home, to have the contract made subject to the laws and jurisdiction of "home". Even when dealing with on-line retailers from abroad.

They can however agree to a different law and jurisdiction and most on-line sellers ask the customer to "agree" to the laws of the seller.

The Court decided that would be unfair unless the consumers were simultaneously informed that, irrespective of their choice, they would still be entitled to protection under "mandatory laws" of "home". That is to say, laws of the consumer's home jurisdiction which are protective of the consumer and which cannot be contracted away.

The Court's decision was on the terms of The Unfair Terms in Consumer Contracts Directive (93/13/EEC) the UK version of which is now contained in the Consumer Rights Act 2015. It provides no direct assistance to consumers but does give enforcement authorities the right now to force e-retailers to amend their terms so that the consumers' options under "home" law are made clear to them.

On-line retailers selling into more than one country should look at their terms of business.

If your business trades online and you would like to discuss your terms of business, you can contact Geoffrey on his email above, or click here for further details.

Privacy Shield replaces Safe Harbour

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On 1st August the EU Commission published its decision, implementing the EU-US Privacy Shield as a replacement for the Safe Harbour provisions ruled unlawful by the European Court.

The Safe Harbour arrangements were created to permit data transfers to the US, a country that the data protection authorities in the EU deemed unsafe for the data of its citizens.

They were not necessary where there were individual consents from the data subjects to the transfer of their data to the US. Nor were they necessary where the US recipient of the data signed up to the "Model Clauses", or the transferor and recipient adopted "binding corporate rules" which are only suitable for transatlantic groups of companies. Otherwise the US company had to be signed up to the Safe Harbour provisions.

Edward Snowden's disclosures about US government data monitoring caused the collapse of the Safe Harbour. EU businesses still relying on the Safe Harbour are now in breach of data privacy laws.

Companies can check whether the US based potential recipients of personal data are part of the Privacy Shield by checking on https://www.privacyshield.gov/list.

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Gender Pay Gap Reporting

As of 1st October 2016, all large employers in both the private and voluntary sectors are required to publish an annual Gender Pay Report under the Equality Act 2010 (Gender Pay Gap Information) Regulations 2016. Emma Kemp, Employment Lawyer, here explains what these regulations mean and the actions you need to take should these apply to you.

In this context, the term 'large employer' refers to those with over 250 employees, and includes LLPs, companies, partnerships and any other employing entity. It does not include the public sector. On the 30th April each year, starting from April 2017, employers will need to view their number of employees for the preceding pay period in order to ascertain whether they have 250 employees.

If they do fall into this category, the following details are to be compiled into the gender pay report:

- The overall gender pay gap figures showing both the **mean** and **median** average hourly pay based on the employer's chosen pay cycle e.g. weekly or monthly.
- The amount of male and female employees in each of the four pay bands. These bands are based on the employer's overall pay range which is then divided into four equal amounts.
- The difference between male and female employees' **mean** bonus pay.
- The proportion of male and female employees who received a bonus.

Within the Regulations the term 'pay' includes most types of remuneration paid through payroll such as bonus pay, but excludes overtime pay and expenses.

Following the analysis of the gender pay report each April, the company findings have to be published within the next 12 months, clearly in English, on the company's website. They must be accompanied by a written statement of accuracy signed by the most senior employee and must be accessible for at least the next 3 years. As well as a written statement of accuracy, employers are encouraged to include an explanation for any pay gaps, and what action they intend to take to address them. Listed companies are also required to include the information in their strategic reports. In order to encourage compliance with the new regulations the government will run checks and publish tables of employers' reported gender pay gaps. They are also considering publicly identifying any employers that have not complied with the Regulations.

If your company has over 250 employees and you will be required to complete a gender pay gap report, you can contact Emma on the email address above, or find further details here.

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How do virtual reality games impact your commercial property?

Experts across the world are focusing on property laws and how they will stand up to the growing popularity of reality gaming, following on from the global success of Pokémon Go. Helen Porter, Commercial Lawyer, advises business and property owners of their rights when trespassing is becoming an increasing concern.

Pokémon Go became a worldwide phenomenon in the Summer this year, and for those who are not familiar with the craze, users are directed to certain landmarks and buildings in their area for them to hunt and 'catch' Pokémon Go characters. While the game has been praised by some for encouraging participants to be more active, others are more divided in their response; namely business owners. Some welcomed the additional traffic to their premises and therefore their brand and have even dropped "lures" within their business. For others, the game has posed the risk of potential trespass, or unwanted disturbance at the very least.

With the popularity of Pokémon Go and the recent launch of virtual reality headsets from the likes of PlayStation and Sony, it is expected that this is not the last virtual reality game we will see. Digital life will further collide with reality, raising some concerns around the consequences of different game scenarios, such as the virtual violence of Grand Theft Auto.

One of the big issues raised by experts is around where virtual reality and property law meet and the rights of property owners when digital characters or structures appear on their virtual property. Players may be a nuisance if they congregate around a host property, but currently landowners cannot control their property in this virtual world, beyond asking game developers to remove their site from the game.

Where rights are clearer, is when there is a physical presence on land, for example when a player trespasses, whether negligently or intentionally. This allows the landowner to deal with the unwanted intrusion, but can lead to unforeseen responsibilities as well. A landowner or occupier may find themselves liable for any injury caused while virtual reality players are on their private land, whether they are there with permission or not.

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VAT on intra EU business post Brexit

Part of the Single Market is its "customs union"—we don't pay duty on goods or services supplied over internal borders.

In fact rather than paying duty on many imports we now pay VAT. Importers in EU member states (VAT is an EU tax) self charge VAT on the value of their imports and generally recover the amount paid as input tax in their VAT calculations. The VAT has no real cost to them.

Exporters across EU internal borders can generally avoid charging VAT to their business customers. VAT in the UK will probably survive Brexit as it produces much tax income for the Government. It will however cease to be a pan-European tax so the existing deals — exporter to the UK charges no VAT, importer self charges VAT — will disappear.

Once we are no longer part of the customs union, the VAT rules that apply to EU exports to us should be the same as currently apply to other non EU countries. If so, the B2B exporter will charge no VAT. It's speculation but we will probably still have to self charge VAT on imports and will still be able to recover it as input VAT.

Similarly the rules that currently apply to us when we export to outside the EU will in future probably apply to our exports to the EU — no VAT charge by us but the importer will probably have to self charge VAT.

Nothing is certain but it looks as though Brexit will have no adverse VAT effects on our trade with the EU. Contracts for the sale or purchase of goods or services between the UK and the remainder of the EU may, however, contain VAT provisions which take account of the current arrangements. They should be reviewed with the aim of producing flexibility, enough to deal with the changes, whatever they are.

If you have any questions about how Brexit could impact your business, you can contact Geoffrey on his email above, or click here for further details.

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General Data Protection Regulation: The new obligations for consent and what these will mean for businesses

The use of personal data in the UK is currently governed by the Data Protection Act 1998 (DPA) which was implemented in order to comply with the European Union's (EU) Data Protection Directive (DPD). The General Data Protection Regulation (GDPR) replaces this current legislation and is in force with effect from the 25th May 2018, in a bid to harmonise practices across all member states. The GDPR is directly applicable and has effect without the need for local legislation. Furthermore, it is going to affect UK businesses offering any type of service to the EU market, therefore the decision for the UK to leave the EU does not mean that businesses are exempt from complying.

UK businesses have become familiar with the DPA and its requirements when using, distributing and retaining individuals' personal data. There are of course also businesses that take advantage of gaps in the legislation and its enforcement, and choose to sell contact lists or fail to make it clear to individuals what their data is being used for. These are the type of practices that the GDPR aims to prevent. It does this by introducing several new stringent obligations on businesses that handle personal data and couples them with some hefty penalties for non-compliance. Some of the new obligations could mean significant reorganisation and adjustments in order for businesses to come in line with the GDPR and obtaining consent for the use of personal data is one of the areas which faces significant change.

Consent is currently a lawful basis for using or transferring personal data and this will not change with the introduction of the GDPR. However, the rules on obtaining, seeking and recording consent have been considerably tightened. As it stands, businesses in the UK can rely on implied consent through silence or inactivity for processing data. This means that certain 'opt-out' practices, such as using pre-ticked boxes, have been sufficient methods of obtaining consent for personal data to be shared.

Under the GDPR this type of implied consent will no longer be permitted. The new regulation requires the individual to make a clear affirmation, action or statement to signify their agreement to the processing of their personal data. This must be a specific, freely given, informed and unambiguous indication of their wishes. Requests for consent must be presented in a clear and unambiguous language which avoids using fine print and burying them deep within privacy policies. Furthermore, prior to the individual giving their consent, they must be advised of their right to withdraw it at any time and their entitlement to request that the business deletes their personal information. The idea behind this requirement is that consent should be able to be withdrawn as easily as it was given. The additional information that must be provided by businesses when obtaining consent is reasonable to do when giving this information on paper, but could prove more difficult in situations where communication is only via the telephone.

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The implications of a Landlord's right to carry out works

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A recent case provides helpful guidance for both landlords and tenants of mixed use and other commercial buildings in relation to the relationship between a standard landlord's right to enter property for particular purposes during a lease (e.g. to develop other parts of it) and its obligation to allow the tenant quiet enjoyment of the premises.

The case involved was Timothy Taylor Limited vs Mayfair House Corporation Limited (2016). The landlord in this particular case owned a multi-floor building in London. At ground floor and first floor level was a commercial premises operated by a tenant as an art gallery.

In 2013 the landlord commenced works in relation to the upper floors within the building, converting them into residential apartments. The lease contained a provision allowing the landlord to enter the building in order to alter it in such manner as it saw fit even though by doing so, this could materially affect the tenant's use and enjoyment of the art gallery. The lease also contained a standard landlord's quiet enjoyment covenant in favour of the tenant.

The tenant brought a claim against the landlord seeking an injunction to regulate the ongoing works and a claim for damages arising out of the interference and disruption caused by the landlord's works on the basis this breached the landlord's quiet enjoyment covenant.

The court found in favour of the tenant. It accepted that while the tenant could not prevent the landlord undertaking the works in question, it could regulate the way in which they were carried out with a view to ensuring that the minimum of inconvenience or disturbance was caused.

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In Brief…

In each issue of our Commercial Brief, we will bring you brief references to recent legal developments that could be of interest to our readers.

This issue of the In Brief includes the following topics:

- Companies receive hefty fines for sending unwanted texts
- Hyperlinking OK — if not for profit
- Nursing home receives £15,000 fine for breach of data protection rules
- All UK granted patent specifications from 1900 now available online
- The High Court underlines importance of serving a claim form at the correct address
- Another one slips the hook: "Nano" trademark found to be invalid for fishing products

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To read more on these topics, simply click here.

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