Contract Management

Lindsay Henshaw, Howard Ashcraft

SOLO tag: **mmpm10m5cm**

Course Aims and Objectives

Major programmes require contractual arrangements that provide for the continuing rights and obligations of the parties involved over a substantial period of time. They are quite different to contracts relating to specific transactions at a particular point in time (such as business or share purchase agreements). As such, they describe the contractual environment in which the major programme is to be undertaken.

In major programmes, effective contractual arrangements minimise the space for disagreement but maximise the space for a productive relationship between the parties by acknowledging the collaborative nature of the venture. The contractual arrangements also have to achieve a delicate balance between addressing every conceivable situation which might arise during the programme and providing binding governing principles for addressing unforeseen situations. The broad scope of services and the difficulty of describing those services and verifying service levels, the broad geographic coverage and the transformational expectations which characterise major programmes can make it difficult to ensure that the contractual arrangements are complete.

Contracts do not exist in a vacuum. Capable programme managers must understand the legal contexts that can affect the interpretation and enforcement of their agreements. Rapid technological changes, such as increasing use of artificial intelligence and large public and private data sets, create new issues that intersect with traditional contractual and legal principles. In addition, major programmes increasingly rely on collaborative project delivery systems that draw on relational as well as legal principles. Programme managers must understand how relational forces affect their commercial arrangements and can be used to improve the likelihood of a successful outcome.

The course considers the role of contractual documentation in the creation and management of the programme in both common law and civil law jurisdictions, some of the commercial and legal problems which may arise throughout the programme lifecycle, the impact of the digital revolution, the trend towards collaborative project delivery, and the due diligence and contractual protection required to address the principal legal risks inherent in and external to the programme.

Day 1 begins with an overview of the week, placing the sessions into context. It continues with pre-contract considerations, an overview of common law principles and key contract terms and liability techniques. Day 2 starts by introducing legal principles applicable to intellectual property and then continues with a discussion of civil law and major programmes and then extends the earlier discussion of intellectual property to incorporate the current digital revolution. The day concludes with examining commercial agreements

from a relational perspective and discusses how programme managers can strengthen relational forces that lead to mutual satisfaction. Day 3 expands on the relational principles and demonstrates its applicability, and limits, in strategic alliances, collaborative ventures and integrated project delivery. Recognizing the importance of international standards, the day transitions to a discussion of the FIDIC contracts used widely around the world and looks at procurement and major programmes under European Union protocols. Day 4 begins with examining major programmes from a due diligence perspective, and then focuses on legal remedies and dispute processes used for distressed projects. Day 4 concludes with a discussion of the assignment.

The learning objectives of the course can be summarised as:

To review:

- The significance of pre-contractual statements made during negotiations
- Key features of civil and common law relevant to major programmes.
- Contractual terms and techniques for managing liability.
- Legal principles and concepts applicable to intellectual property and the digital revolution.
- How the digital revolution is affecting major programmes.
- How commercial agreements function when governed by relational forces.
- The principles and forms of strategic alliances, co-operative ventures, and integrated projects.
- The key features of international infrastructure agreements, such as FIDIC.
- European Union procurement protocols for major programmes and collaborative projects.
- Resolving disputes in major programmes: remedies and alternative dispute processes.

To facilitate debate on:

- The process of due diligence and its links with the assessment of risk
- The allocation of risk within the programme and limitation of liability
- Remedies to problems which may arise throughout the programme lifecycle in the context of provisions on dispute resolution.

Lecturers

Lindsay Henshaw – Saïd Business School, email: lindsay.henshaw@sbs.ox.ac.uk
Howard Ashcraft - Partner at Hanson Bridgett & Adjunct Professor at Stanford, email: hashcraft@hansonbridgett.com
Harvey Maylor – Saïd Business School, email: Harvey.Maylor@sbs.ox.ac.uk
Andrew White – Partner at Bird & Bird
Prof. Dr. Antje Boldt – Partner at Arnecke Sibet Dabelstein
Jenna Rennie – Senior Associate, White & Case
Mark Leach – Partner at Bird & Bird
Dr. Virginie Colaiuta – Partner at LMS Studio Legale

Lennart Schuessle – Partner at Bird & Bird

Course Text(s)

McKendrick, E. (2019) *Contract Law*, Thirteenth ed., London: Macmilan International Higher Education .

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Various earlier editions also available. Click SOLO tag: **mmpm10m5cm**

This excellent and very readable academic textbook will introduce you to some fundamental features of the English law of contract. Its focus is on the rules that make up the English law of contract, including English case law.

You may wish to read the whole book or only the extracts referred to below. They have been chosen to give you an overview of the legal principles which form the basis of contract creation and management and which underlie the topics we will look at on the course.

We will address how the principles can come up in practice, but the course does not aim to be an introduction to contract law for non-lawyers.

There are summaries at the end of each chapter (starting at chapter 2).

Chapter 1.6 – 1.8:	Introduction – a European/international contract law?
Chapter 3.1, 3.5 and 3.7:	Contract formation – offer and acceptance
Chapter 4.1 – 4.4:	Certainty of terms
Chapter 8:	What constitutes a term of the contract?
Chapter 9.6:	Interpretation of contract terms
Chapter 10:	Classification of contract terms
Chapter 11.1 – 11.7:	Exclusion clauses
Chapter 12:	Duty to disclose material facts
Chapter 13:	Misrepresentation
Chapter 14.8 – 14.9:	Force majeure
Chapter 20:	Breach of contract
Chapter 21.1, 21.2, 21.8 – 21.12:	Damages for breach of contract
Chapter 22.1 – 22.6:	Remedies

You will see from the section below entitled ‘Course structure’ that many of the extracts are relevant to more than one session.

Course Reading List

Day 1

Learning objectives:

- To review the content of key terms and key schedules in the agreements associated with major programmes
- To review some of the provisions of the law on misrepresentation and examine the significance and effect of pre-contractual statements made during negotiations in the context of a dispute between BSkyB and HP
- To examine the rules of contract interpretation and some specific concepts of English law from a commercial perspective
- To review the life cycle of a signed contract including management and termination, and highlight some key legal relevant principles
- To examine the owner's role in supply chain management and how intelligent (and not intelligent) clients can affect supply chain performance

Session 0

Introduction and Module Overview – Howard Ashcraft

A brief overview of the lectures and their relationship to Major Programme Management. In major programmes, contracts express the parties' essential agreements, but are executed within different legal and organizational frameworks and are strongly affected by the relational bonds amongst the parties. Moreover, programme management methodologies must reflect the transformations programmes undergo from conception to execution. Commercial leadership requires creating the appropriate legal and organizational structures that will the programme throughout its life cycle.

Session 1

Pre-Contract and Misrepresentation: BSkyB v. HP – Lindsay Henshaw

In the context of the contracts which form the basis of major programmes, it's important that the parties are clear what the terms of those contracts are and therefore what their obligations amount to. In this session we will look at the significance and effect of statements made during the negotiation of those contracts: not all will become terms of the contract. Should a statement which led one party to enter into the contract be untrue, what remedies might be available if that party suffered loss as a result?

Topic outline:

- BSkyB v HP
- Misrepresentation
- 'Entire agreement' clauses
- Limitation and exclusion of liability

Reading:

McKendrick, E. (2019) *Contract Law*, Thirteenth ed., London: Macmilan International Higher Education

Search Oxford Libraries Online for this book

Various earlier editions also available. Click SOLO tag: **mmpm10m5cm**

- What constitutes a term of the contract: chapter 8
- Interpretation and classification of contract terms: chapters 9.6 and 10
- Exclusion clauses: chapter 11.1 – 11.7
- Duty to disclose material facts and misrepresentation: chapters 12 and 13
- Breach of contract: chapter 20
- Damages and remedies: chapters 21.1, 21.2, 21.8 – 21.12 and 22.1 – 22.5

BSkyB Limited v HP Enterprise Services UK Ltd [2010] EWHC 86 (TCC).
We will be discussing this (remarkable) case in the context of statements made during the course of pre-contractual negotiations. Again, you are not required to read the whole judgment: it runs to 468 pages. Rather, the link is provided so that you can read it, should you wish to do so.

Session 2

Contract Law Relevant for Major Programmes – A Common Law Perspective – Andrew White

It's an unavoidable fact that many contracts for major programmes are long, complex and filled with legal jargon. How can you manage and generate value from such contracts? The purpose of this session is to demystify the jargon and outline some core concepts in plain English. The goal is to empower senior executives involved in contracting with tools both to negotiate contracts effectively and to generate the maximum benefits from them, hopefully achieving a win-win contractual outcome.

Topic outline:

- What is inside and outside scope (eg procurement law, contract enforcement)
- Highlighting the slideshow resource - English contract law for non-English lawyers
- Why have a contract?
- Contract formation and 'agreements to agree'
- Performance obligations (including endeavours)
- Cooperation obligations and interdependencies
- Audit rights and reporting
- Good faith obligations - what impact do they have
- Implied terms
- Interpretation of contracts
- Termination rights
- Change of circumstances (including Brexit, force majeure and frustration)

Reading:

McKendrick, E. (2019) *Contract Law*, Thirteenth ed., London: Macmillan International Higher Education

Search Oxford Libraries Online for this book

Various earlier editions also available. Click SOLO tag: **mmpm10m5cm**

- Offer and acceptance: chapter 3.1, 3.5 and 3.7; chapter 4.1 and 4.2

- What constitutes a term of the contract: chapter 8
- Duty to disclose material facts: chapter 12.10
- Interpretation and classification of contract terms: chapters 9.6, 9.8 and 10
- Breach of contract: chapter 20.6 – 20.9

English Contract Law

The slideshow provides background legal reading and tools, and we hope that the cohort find it valuable. Please note the fact it is a very long slideshow, and therefore takes a long time to read / print.

Session 3

Key Contract Terms / Techniques for Managing Liability – Andrew White

Everyone recognises that major programmes involve risks, of various types. Under English law, the parties have extensive freedom to allocate or offload risk. But to do this effectively, it is essential to understand the underlying principles and techniques for managing liability. This session addresses those techniques. Armed with this knowledge, it is far more likely that contracting parties engage in business-focused discussions addressing real-world areas of risk, and avoid the stalemates and standoffs which are such a common feature of liability negotiations.

Topic outline:

- Scope
- Delivery
- Commercial terms
- Remedies
- Management
- Teaming agreements
- Subcontract tiers
- Framework agreements
- Key schedules

Reading:

McKendrick, E. (2019) *Contract Law*, Thirteenth ed., London: Macmillan International Higher Education

Search Oxford Libraries Online for this book

Various earlier editions also available. Click SOLO tag: **mmpm10m5cm**

- Certainty of terms: chapter 4.1 – 4.4
- What constitutes a term of the contract: chapter 8
- Interpretation of contract terms: chapter 9.6
- Exclusion clauses: chapter 11.1 – 11.7
- Breach of contract: chapter 20
- Remedies: chapter 22.1 – 22.5

Session 4

Commercial Leadership, Major Projects and the Intelligent Client – *Prof. Harvey Maylor*

This session explores the client's role in achieving successful outsourced programmes. Although it is generally recognized that clients have enormous influence on programmes, many clients continue to exhibit behaviours that undermine their programmes. The intelligent client recognizes and counters the behaviours discussed during this session.

Topic Outline

Role of the client in supply chain management
Common errors m
ade by clients that undermine programmes
Strategies employed by intelligent clients to improve supply chain performance

Reading:

Intelligent Client White Paper 

Day 2

Learning objectives:

- To review the creation and exploitation of intellectual property rights generated during the life of the programme.
- To examine some principles of contract law from the perspective of a practitioner from a civil law jurisdiction
- To understand how data analysis ("big data") and artificial intelligence affect implementation of major programmes.
- Introduction to a relational perspective on contract creation, management and performance

Session 5

Intellectual Property, Data and Artificial Intelligence – Andrew White

The world is adapting to the knowledge and digital economy. And in this environment, an understanding of the laws surrounding intellectual property becomes highly important. This session will demystify some core IP concepts, explain their commercial context within the world of major programmes and highlight some practical tips for managing intellectual property as effectively as possible.

Topic outline:

- Protecting knowledge economy assets
- Demystifying intellectual property
- How intellectual property disputes arise
- Data and databases - how to protect and exploit them
- Personal privacy challenges
- Data security challenges

Reading:

McKendrick: None

Session 6

Contract Law Relevant for Major Programmes – a Civil Law Perspective – Lennart Schuessler

Commercial leadership of major programmes in civil law jurisdictions requires understanding the civil law perspective on contract formation and execution. What are the expectations under civil law. How does it vary among civil law jurisdictions? What tools are available to the commercial leader for managing the programme and resolving disputes?

Topic outline:

Introduction – towards commercial harmonisation?

- EU harmonisation and comparison between English Law and Civil Law

Contracting under German Law

- Standard Terms and Conditions
- Statutory warranties:
  - Sale vs. lease on the example of software licensing
- Limitation of liability
  - Handling liability in risk contracts
- R&D Projects
  - General framework
  - IP issues with employees
- Enforcement
  - Dispute resolution in a technology context
  - IP enforcement
  - Pan-European contracting

Reading:

McKendrick: None

Session 7

Transformational Implications of Big Data, Private Data and Artificial Intelligence on Major Programmes– Mark Leach

Across the world organisations are being transformed by a wave of technological change – and at a speed and scale which is arguably unprecedented. The Big Data phenomenon, the Internet of Things, the massive growth of broadband connectivity and Cloud Computing and advances in machine learning and artificial intelligence are rapidly disrupting established business models and changing the way organisations operate in both the public and private sectors. Many, if not all, major programmes will be impacted by these developments either directly or indirectly. This session will provide a brief introduction to these new technologies and how they provide the context for modern major programmes. It will then examine some of the legal, contractual and practical challenges that these technologies present and the issues you will need to be aware of in managing your programme in this new environment.

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Session 8

Commercial Agreements from a Relational Perspective – Howard Ashcraft

A traditional legal perspective analyzes contracts by anticipating breach and creating tools that enable external parties – judges, juries, and arbitrators – to enforce the parties' agreements and impose legally appropriate remedies. But only a small fraction of contract issues is resolved through external dispute processes. And in programmes of extended duration, it is extremely difficult to determine during contract formation, precisely how a disagreement should be resolved. In practice, the execution of complex programmes require continual readjustment to achieve the parties' goals and is reinforced by relational forces amongst the parties. The major programme manager must understand how relational forces affect and can be used for programme management and the implications for commercial leadership as programme success relies less on formal contract terms and more on relational reinforcement.

Topic Outline:

- What extra-legal ("relational") forces affect contract performance?
- Key psychological factors in decision making in uncertain situations.
- How should contracts be drafted to take advantage of these relational forces?
- What are some implications of a relational perspective on contracts?
- How should project managers use relational forces to improve the success of their projects.
- When are traditional legal contract principles preferred?

Reading:

Kahneman, D. (2012) *Thinking Fast and Slow*, New York: Penguin.

Chapters 26

Chapters 27

Chapters 28

Chapters 29

Search Oxford Libraries Online for this book

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Day 3

Learning Objectives

- To understand the principles according to which strategic alliances are formed and managed in terms of their objectives and governance
- To understand how structural elements can affect project performance
- To become acquainted with the key features of FIDIC contracts used internationally
- To develop an understanding how European procurement affects traditional and collaborative project delivery

Session 9

Strategic Alliances – Co-operative Ventures and Collaborative Contracts – Lindsay Henshaw

Some major programmes may be more efficiently organized if the parties involved enter into a strategic alliance. In this session we will look at some forms and objectives of strategic alliances and the principles on which they might be based and managed. We will also focus on the importance of collaborative contracts in the long-term contractual relationships which characterize major programmes.

Topic outline:

Co-operative ventures
- objectives
- principles
- structures
- governance/control

Collaborative contracts
- objectives
- principles
- navigation through uncertainty
- alignment of risks and interests

Reading:

Gil, N. (2009) 'Developing Cooperative Project Client-Supplier Relationships: How Much to Expect from Relational Contracts?', *California Management Review*, 51(2): pp.144 -169.

Lahdenperä, P. (2012) 'Making sense of the multi-party contractual arrangements of project partnering, project alliancing and integrated project delivery', *Construction Management and Economics*, 30(1): pp.57-79

Session 10

Integrated Project Delivery / Project Alliancing – Howard Ashcraft

Integrated Project Delivery is a project delivery methodology used in North America and elsewhere that seeks to create a virtual organization aligned to achieving programme

objectives. It emphasizes close collaboration of key participants from project conception, joint management to agreed goals, a business model that severs the tie between profit and cost, very limited change orders and broad contractual waivers amongst the parties. The IPD structure is commonly coupled with Lean/Agile management philosophies and appropriate technology utilization.

Topic outline:

- Dysfunctions in traditional contracting
- Structural considerations in optimizing performance
- Key features of Integrated Project Delivery

Essential Readings:
AIACC (2014) *Integrated Project Delivery: An Updated Working Definition* [online]. Available from <http://www.aiacc.org> Students will need to sign up with their email to download the free pdf.

Ashcraft H. (2018) 'Integrated Project Delivery', Chapter 11 in Martin, S.A. & Rochwarg, L.A. (2018) *Construction Law Handbook*, 3rd ed., Wolters Kluwer (.pdf provided)

Ashcraft H., Integrated Project Delivery Contract 2018

Background Readings:

Fischer, M., Khanzode, A., Ashcraft, H.W. & Reed, D. (2017) *Integrating project delivery*, Hoboken, NJ: Wiley.
Ebook available on Ebook Central

CIDCI/IPDA/Charles Pankow Foundation (2018) *Integrated Project Delivery: An Action Guide for Leaders* [online]. Available from <https://leanipd.com>

Session 11

International Construction Contracts – FIDIC and others - Dr. Virginie Colaiuta

The contract documents developed by the International Federation of Consulting Engineers (FIDIC) are widely used in major infrastructure programmes in many parts of the world. Many funding agencies view them as "industry standard" and require their use. In February of 2019, the World Bank entered into a 5-year agreement to use the FIDIC documents. So what are the FIDIC documents, what are their key features and what does a major programme manager need to understand about the FIDIC document sets?

Topic Outline

What are FIDIC Contracts?
- Different types of FIDIC Contracts

Where are FIDIC Contracts used?
Principal features of FIDIC contracts.

Session 12

Procurement of Major Programmes and Collaborative Projects under EU Procurement – Prof. Dr. Antje Boldt

European public procurement law has specific requirements for the awarding of planning and construction services. In this session we will deal with the particular challenges involved in the implementation of multiparty contracts and discuss the legal framework of public procurement law. Especially the EU commitment to supporting small and medium-sized enterprises, the selection procedure for qualified construction companies and the Determination of remuneration and limits due to budgetary regulations will be reviewed in detail.

Topic Outline

Primary issues under EU procurement law.
EU procurement for traditional project delivery.
EU procurement for collaborative project delivery.

Readings:

EU Guidance on public procurement (2018):
European Commission (2018) *Public Procurement Guidance for Practitioners*, February. Available from <https://ec.europa.eu/>.

Finnish Transport Agency (2018) *Rantatunneli – Value for money report*. Available from <https://julkaisut.liikennevirasto.fi/>

UK Government (2014) *Government Construction Strategy 2011: The Integrated Project Insurance (IPI) Model – Project Procurement and Delivery Guidance*, July 2.
Available from < http://constructingexcellence.org.uk/>

Day 4

Learning objectives:

- To examine the process of due diligence and its links with the assessment of the risks inherent in and external to the programme
- To understand the remedies available if a contract is breached
- Discussion of the assignment.

Session 13

Risk and Due Diligence – Lindsay Henshaw
This session examines some of the principal legal risks which might affect the parties in their creation and management of major programmes. Those risks might be inherent in or external to the programme, or both. We look at the risks from a contractual perspective and how the

information from the due diligence exercise can address those risks, be they, for example, financial, social, environmental or associated with the host country.

Topic outline:

- Purpose of due diligence
- Aspects of due diligence in the context of risk
- Conditions, warranties and indemnities
- Limitation and exclusion of liability
- Agreed remedies, liquidated damages

Readings:

McKendrick, E. (2019) *Contract Law*, Thirteenth ed., London: Macmillan International Higher Education

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What constitutes a term of the contract: chapter 8

Classification of contract terms: chapter 10

Exclusion clauses: chapter 11.1 – 11.7

Duty to disclose material facts: chapter 12

Force majeure: chapter 14.8 – 14.9

Remedies: chapter 21.1 – 21.5

Session 14

Remedies and Dispute Resolution: Escalation: ADR: Arbitration: Liquidated Damages – Jenna Rennie

This session will consider the various means by which disputes that arise during the course of a major project can be resolved. It will cover the use of escalation clauses; litigation; arbitration; mediation and other forms of ADR. It will then go on to discuss the various remedies that may be available, including: common law damages; liquidated damages; injunctions and specific performance.

Topic outline:

- Dispute resolution and escalation clauses
- Litigation
- Arbitration
- Mediation (and other forms of ADR)
- Liability (1): Common law damages; contractual (liquidated) damages and penalties
- Liability (2): injunctions; specific performance
- Whistleblowing, investigations and Deferred Prosecution Agreements

Readings:

McKendrick, E. (2019) *Contract Law*, Thirteenth ed., London: Macmillan International Higher Education
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- Chapter 20 (breach of contract)
- Chapter 21 (21.1, 21.2, 21.8-21.12) (Damages for breach of contract) and
- Chapter 22 (22.1-22.5) (Obtaining an adequate remedy).

Session 15

Presentation and Discussion of Assignment; Course Review, Questions; Learning and Links Going Forward – Howard Ashcraft & Lindsay Henshaw

No Readings

Course pedagogy

The course will combine an academic perspective with contributions from legal and contract management practitioners. The emphasis will be on class participation and the sharing of experience of contract management in the context of major programmes.

There will also be contributions from specialist practitioners in the law of intellectual property and dispute resolution.

Participants are encouraged to contribute actively to the course by providing, where possible, first-hand accounts of programme management challenges that they have encountered in their career.

Assessment

The recommended reading will introduce many of the concepts and the terminology of contracts as they apply to major programmes.

The course will be assessed by individual assignment on a topic, details of which will be available and discussed on the last day of the course.

A note on common law and civil law systems

Common law states are those influenced by the Anglo-Saxon legal tradition such as the United Kingdom, Australia, the United States (except Louisiana), Canada (except Québec), Hong Kong and India. Civil law states are those with legal systems influenced by the Roman legal tradition such as France, Austria, Germany, Brazil and Spain.

The common law system is based on judicial precedent rather than the formal codification of legal rules. A precedent is a rule of law established for the first time by a court in a particular type of case and then referred to in deciding similar cases. So common law rules and principles emerge from reported judgments on matters relating to particular facts within the context of disputes decided previously by national courts. They provide the basis for the application of statute (legislation). The doctrine of precedent requires cases to be de cided the same way when their material facts are the same. This ensures that lower courts must take account of and follow the decisions made by the higher courts (and that, as a general rule, courts follow their own earlier decisions or those of other courts of the same level).

In the UK, the highest court of appeal is the Supreme Court which hears appeals from the Court of Appeal which itself hears appeals from the **High Court of Justice.**

By contrast, the civil law system is based on a civil code which is a systematic collection of laws and which contains the rules and principles of private law. Those rules are expressed in general and non-restrictive terms and their interpretation by the national courts is designed to reveal the legislative intent behind them.

In common law systems, the rules are expressed in precise terms in their application to particular situations. Interpretation and construction of those rules is designed to resolve uncertainties or ambiguities in the wording of a statute. The courts have developed a number of rules and presumptions to assist in the interpretation and construction of statute.

The approach to the reporting of cases differs between the two systems. The reports of cases decided in civil law jurisdictions focus on the legal principles relevant to the facts of the case. Those of cases decided in common law jurisdictions focus on a comparison with the facts of previous cases to determine or develop the applicable principle.

Common law courts tend to use an adversarial system, in which the parties in dispute present their case to a neutral judge and the role of the court is primarily that of an impartial referee. Civil law courts, on the other hand, tend to use an inquisitorial system where the court is actively involved in investigating the facts of the case.

The law of the European Union (EU)

The UK's current membership of the European Union means that EU law (Regulations, Directives and Decisions), where applicable, takes precedence over national law and is binding on national authorities in the UK. In matters relating to the interpretation of EU law and the acts of the EU institutions, the European Court of Justice (ECJ) is supreme and its decisions are binding on all English courts, including the UK Supreme Court. Thus, the UK Supreme Court must give effect to directly applicable EU law and interpret domestic law consistently with EU law so far as is possible. EU law is drafted in terms of broad principle in the form of a civil code rather than in the tradition of English legislation.

Ultimately, any ambiguity or uncertainty over the interpretation of EU law will be settled by the ECJ (although not before it has been addressed in the national courts). The ECJ does not have a system of binding precedent and the court adopts a purposive approach to the interpretation of EU law. This purposive approach has been adopted by the English courts when interpreting national legislation in areas covered by EU law.

On 29th March 2017 the UK served notice of its intention to leave the EU under Article 50 of the Treaty on European Union ('Brexit'). Article 50 enables 'any Member State to withdraw from the EU in accordance with its own constitutional requirements'.

The Article 50 process

The date of serving the Article 50 notice triggered a two year period provided for concluding a withdrawal agreement. The current status is uncertain as the Parliament has been unable to reach agreement on a withdrawal plan. The initial deadlines have been extended several times allowing the UK Government to continue negotiation and attempt to create a plan that can be supported domestically. On May 24, 2019, Mrs. Theresa May announced that she would resign as Prime Minister due to an inability to deliver an agreed Brexit plan. This will result in a new Prime Minister from the Conservative Party who will continue to try and shape an acceptable Brexit plan, but if that is impossible, preside over the UK leaving the EU without an agreed plan.

European Union (Withdrawal) Bill

The European Union (Withdrawal) Bill is a major piece of constitutional legislation which is intended to end the supremacy of EU law in the UK. On June 26th 2018 the Bill received Royal Assent and so is now the European Union (Withdrawal) Act 2018. The Bill repeals the application of all EU legislation and the primacy of judgments of the ECJ in the UK on questions arising out of the interpretation of EU law including the EU treaties.

The Bill retains the whole body of EU law applying to the UK at the time it leaves the EU, to the extent it has not already been implemented domestically. At some point after Brexit, each EU-inspired measure remaining in force as UK law will be reviewed; a decision will then be taken as to whether to retain, amend or repeal it.

The UK and EU have reached a political agreement that there will be an implementation period between 29th March 2019 and 31st December 2020. During that period, EU law and regulation will apply in and to the UK.

Negotiating new international trade agreements

On leaving the EU, the UK is likely to cease to benefit from the existing EU international trade agreements with third countries and will be excluded from those under negotiation. Thus, the UK will need to negotiate its own international trade agreements (hitherto, for the most part, the responsibility of the EU).

The effect of Brexit on commercial contracts: the suspension or termination of existing obligations

Brexit could have significant commercial implications for businesses in the UK, such as the imposition of tariffs, restrictions on the freedom of movement of people or changes in exchange rates. These events could lead to a contract becoming loss-making or more difficult to perform.

Force majeure clauses

Many commercial contracts contain a force majeure clause. The purpose is generally to offer a party relief from failure to perform or delay in performing its obligations where it is prevented from doing so by circumstances beyond its control. Such clauses usually only provide relief to the extent the force majeure event actually hinders, delays or prevents performance and only for the duration of the event. They will not usually provide relief for non-performance nor will they usually be triggered simply because performance has become significantly more expensive.

Economic hardship: hardship/material adverse change clauses

Many commercial contracts, particularly those used in long-term projects, include clauses addressing hardship, material adverse changes or specific change events. These may become relevant following Brexit and allow a party to trigger a right to renegotiate, adjust or terminate the contract.

Frustration

Where the terms of a contract provide no assistance, in extremely limited circumstances the doctrine of frustration may do so. This doctrine provides that a frustrating event may discharge a contract altogether where it is so fundamental that it 'strikes at the root of the contract', rendering performance impossible (such as for illegality) or radically different from what the parties had contemplated.

In the context of Brexit, frustration will not assist a party whose performance simply becomes significantly more onerous or expensive. The doctrine will not apply if the frustrating event (Brexit or an event connected to it) is not beyond the contemplation of the parties when they entered into the contract.

Future-proofing contracts and the consequences of termination

In the absence of specific contractual rights triggered by the commercial implications of Brexit or by market volatility, a party wishing to delay or avoid its obligations because of a change in the economic outlook or regulatory environment will have to consider whether there are alternative grounds which justify an early end to its contract or which provide a commercial basis for re-negotiation.

If existing provisions (such as a material adverse change clause) cannot be relied on, express provisions to address specific Brexit-related impacts should be included to anticipate their effect on the commercial viability of the contract. Examples include provisions to protect against movements in exchange rates, or restrictions on the freedom of movement of people, or customs checks which cause delay or to pass on cost increases from the imposition of tariffs.

Consideration should also be given to whether, in such circumstances, a right to renegotiate is appropriate. If renegotiation fails, should there be a right to terminate immediately or after a certain period of time? Should there be an obligation on either party to compensate the other on termination?

Conversely, the parties may choose to state expressly that Brexit does not give a right to terminate. They may prefer to provide for a 'contract continuity' clause to ensure that Brexit will have no effect on the continuation of the contract.

A note on international principles of contract law

The globalisation of major programmes highlights the increasing importance of cross-border contracts and the potential for cross-border disputes, which can be complex, time-consuming and costly. There is no such thing as international contract law: laws vary between states and the variation in legal regimes can have a big impact on cross-border contractual disputes.

But there are international principles of contract law and some attempts at the 'internationalisation' of the rules of contract law have been made.

The rules which govern cross-border disputes between private parties, that is, the governing law of the contract, questions of jurisdiction and the recognition and enforcement of foreign judgments by national courts are the province of private international law or 'conflicts of laws'.

The choice of law to govern and decide the parties' obligations under the contract and the choice of location where disputes will be heard – jurisdiction – can prove to be significant. As can the choice of tribunal to decide disputes: do the parties want to submit disputes to international arbitration or a national court?

Arbitration, a form of alternative dispute resolution, is a means of resolving disputes outside the national court system. The parties refer the dispute to the arbitration of one or more persons (the 'arbitration tribunal'), and agree to be bound by its decision. There are two forms of international arbitration: 'ad hoc' and 'institutional'.

Equally important are the methods of enforcement of the arbitration award or the court judgment (if the parties have decided that a national court should decide the dispute).

Choice of law

The variation in the rules of national legal systems can extend to, for example, the types of loss which are recoverable for breach of contract, the recognition and enforceability of exclusion and limitation clauses and the circumstances in which a contract can be terminated. The variation in the procedural rules of national legal systems can extend to, for example, the disclosure obligations before and during the dispute process: the content and amount of and the mechanisms for disclosure of documents.

The rules of evidence will depend on whether the legal system is 'inquisitorial' (where the court is actively involved in investigating the facts of the case) or 'adversarial' (where the rôle of the court is primarily that of an impartial referee between the parties). The rules governing the award of costs may be unfamiliar to the parties and the speed and cost of proceedings will depend on their location. Equally, the location of the proceedings can affect the enforceability of judgments obtained in a foreign jurisdiction.

Choice of law within the European Union:

The 'Rome I' Regulation on the law applicable to obligations arising out of contracts.

The 'Rome II' Regulation on the law applicable to non-contractual obligations (for example, personal injury claims).

The purpose of these two Regulations is to harmonise the rules that determine which law applies to contractual and non-contractual disputes within the EU and ensure that the national

courts of the EU apply the same law to those disputes. The choice of law rules will only apply where the parties fail to make their own choice of law by including a clear governing law clause in their contracts.

Rome I Regulation 2009: contractual obligations

If the contract does not specify which law governs its provisions, Rome I provides that the governing law will usually be that of the Member State where the party responsible for performing the contract 'has its habitual residence'.

But certain mandatory 'social-legal' rules of the Member State where the dispute is being heard will override the governing law chosen by the parties. These are rules which are important to the political, social and economic organization of the member state, for example, consumer protection laws.

Rome II Regulation 2009: non-contractual obligations

If the parties do not agree which law governs a non-contractual dispute, Rome II provides that the governing law will usually be the law of the Member State in which the damage occurred (wherever the event which caused the damage occurred).

Where the governing law of a contractual or non-contractual dispute is not the law of the Member State in which the dispute is being heard, the court will have to hear expert evidence as to how damages are calculated under that governing law.

Rome II Regulation 2009: pre-contractual negotiations

If the parties have not agreed which law governs their pre-contractual negotiations, Rome II provides that the governing law will be the law that applies to the contract itself, whether or not the contract was actually concluded.

So the parties' choice of governing law for their contractual obligations will also govern those non-contractual obligations which arise during negotiations, unless the parties agree otherwise.

The validity and effectiveness of any contractual choice of law is very unlikely to be affected by Brexit. Rome I governing choice of law will continue to operate within the EU and, in all likelihood, will be adopted into UK law.

Equally, the provisions of Rome II as regards non-contractual disputes, while not the position under the English common law, will, in all likelihood, be adopted into UK law.

Jurisdiction within the European Union

The Brussels Regulation 2001 (recast in 2015) provides rules to govern the jurisdiction of national courts within the EU, the purpose of which is to provide predictability in the recognition and enforcement of judgments in civil and commercial matters.

If the parties have agreed which Member State is to have jurisdiction to hear the dispute, the Regulation recognises and gives supremacy to that agreement.

It is usual for the parties' chosen governing law of the contract to coincide with the law of the jurisdiction in which disputes will be heard. This avoids the court having to apply a foreign law.

If the parties have not agreed on jurisdiction, the courts of the Member State in which the defendant is domiciled or has its principal place of business will usually have jurisdiction regardless of the defendant's nationality. The Regulation expressly excludes from its provisions certain matters, for example, arbitration, bankruptcy and insolvency.

If the Regulation ceases to apply to the UK, the UK will become a third country for the purposes of the Regulation. This could result in greater complexity and increased inconsistency as regards whether other Member States' courts will respect an exclusive jurisdiction clause in favour of the English courts. Again, in all likelihood, the UK will legislate to bring UK law on recognition of judgments as close as possible to the Regulation.

Furthermore, if the Regulation ceases to apply to the UK, enforcement of judgments of the English courts in other Member States will be subject to national procedural laws and national substantive tests, which may afford less favourable treatment to English judgments.

International arbitration

Increasingly, international arbitration is the dispute mechanism of choice for parties to cross-border disputes. Arbitration awards can be easier to enforce in other jurisdictions than the judgments of national courts. The international enforcement of court judgments is often governed by treaties between individual states: the variations between jurisdictions means that the enforcement of court judgments can be less predictable than the enforcement of arbitration awards.

'Ad hoc' international arbitration

By using an 'ad hoc' arbitration clause, the parties can agree the form of arbitration which will govern any disputes between them. They can choose to apply the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) whose aim is to produce a universally acceptable 'ad hoc' arbitration system. The UNCITRAL Rules may appeal to those who regard as insufficiently neutral certain tribunals, for example, the International Chamber of Commerce ('ICC') International Court of Arbitration in Paris.

Institutional arbitration

Institutional arbitration is administered by the rules and procedures of the tribunal chosen by the parties, for example, the International Centre for Dispute Resolution (New York), the London Court of International Arbitration, the Arbitration Institute of the Stockholm Chamber of Commerce and the China International Economic and Trade Arbitration Commission (Beijing).

International arbitration: conflicts of law

The parties may choose the law to govern the dispute, the law to govern the arbitration and its procedures and the law to govern the arbitration agreement, its scope, effect, construction and validity. Where there is no agreement, the arbitration tribunal generally has a wide discretion to determine which system of law should apply.

Whether an award can be challenged or set aside is generally governed by the law of the place of arbitration (the law governing the award). So the parties should make an express choice of law if they wish to avoid the law of the place of arbitration as regards these issues.

Enforcement of arbitration awards

The recognition and enforcement of the award will depend on the law of the place where enforcement is sought. It is important to know, therefore, whether the arbitration award will be enforceable where the defendant has assets.

The New York Convention of 1958

The Convention requires Contracting States to recognise and enforce awards made in other states.

Article I provides for ".. the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought ..".

Application of the Convention depends on the 'geography of the award': where the award is made (not the citizenship of the parties) is the relevant criterion. National rules relating to the recognition and enforcement of foreign awards which are more favourable than those set out in the Convention may be applied which may make an arbitration award easier to enforce in some states.

In the jurisdictions of states which are not party to the Convention, enforcement by national courts will be necessary.

A choice of arbitration to be held in London or in any EU Member State will not be affected by Brexit, since recognition and enforcement of arbitral awards is governed by the Convention rather than EU law.

Enforcement of court judgments

There is no unifying global convention for the enforcement of court judgments: national courts will apply their own conflicts of laws rules to decide which law governs the enforcement of the judgment. Nevertheless, court proceedings can be a quicker and cheaper alternative to arbitration; this will depend on the jurisdiction. In cases where the evidence is strongly weighted in favour of one party, litigation may be preferable as it may provide the possibility of obtaining summary judgment (a procedure allowing judgment to be obtained quickly), unlike arbitration.

The 'internationalisation' of the rules of contract law

The International Institute for the Unification of Private Law (UNIDROIT)

The remit of UNIDROIT is to modernise, harmonise and co-ordinate private law. Its non-binding Principles of International Commercial Contracts 2016 contain rules which can be adopted by parties in cross-border contracts on subjects such as the formation of contracts, the authority of agents, third party rights, damages and termination.

The International Chamber of Commerce INCOTERMS 2010

These are internationally recognised standardised trade terms and rules governing costs, risks and practical arrangements for the international sale of goods, the aim of which is to remove uncertainties arising from differing interpretations of those terms in different countries. They must be expressly incorporated into the contract by the parties. They do not describe matters specific to the contract, for example, warranties, liabilities or passing of title.

The Vienna Convention on Contracts for the International Sale of Goods 1988 (CISG)
The Vienna Convention rules are more substantive than INCOTERMS because they do address the content of the parties' contractual rights and obligations under contracts for the international sale of goods. They address, for example, the seller's obligations as regards the quality of the goods, the buyer's obligations to take delivery, the buyer's and seller's remedies for breach of contract and the passing of risk in the goods.

The 2005 Hague Convention on Choice of Court Agreements (the '2005 Hague Convention')

The EU has submitted to the global regime on jurisdiction and enforcement contained in the 2005 Hague Convention. Like every other EU Member State, except Denmark until 1st September 2018, the UK is currently subject to the 2005 Hague Convention by virtue of its membership of the EU.

The 2005 Hague Convention should guarantee that exclusive jurisdiction clauses in favour of UK courts will continue to be respected in the EU in most civil or commercial disputes of an international nature, and that UK judgments can be enforced in the EU with relative ease, whatever the outcome of the negotiations with the EU. The UK intends to participate in the Hague Convention post-Brexit.

Both the Brussels Regulation rules and the Hague Convention rules are limited to disputes in civil and commercial matters, with a number of specific exceptions.