

Briefing Note

Brexit and Commercial Agreements

Tomorrow belongs to those who plan for it today. The consequences of Brexit are unknown. However, we are recommending that our clients take as many preparatory steps as they can in order to be ready for the changes ahead. In particular, we are recommending that clients review their contracts with parties in the EU to see how Brexit might affect those contracts, and include a 'Brexit' Clause in any new contracts.

This Briefing Note does not specifically comment on the Government's recent White Paper on Brexit but rather the general issues potentially facing our clients.

1. Review your current contracts

Many of our clients will have commercial agreements with parties based in the EU or where goods or services are sourced in the EU. When the UK leaves the EU on 29 March 2019 (or perhaps the implications of Brexit will take effect at a different date) then this may have a fundamental impact on certain commercial agreements. We recommend that clients look through their commercial agreements to assess how Brexit might affect them.



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Some of the issues to look out for include:

- a) **Governing law clause:** what is the governing law of the contract? If it's the laws of England then there may be little concern. If it's the laws of an EU country then there may be implications that after Brexit it may be more costly and administratively difficult to enforce judgements in the EU. Equally, it can be expected that the harmonisation of laws which have been taking place while the UK was a member of the EU may stop, and over the years EU laws may slowly diverge from the laws of England.
- b) **Tariffs:** it is expected that tariffs or duties may be introduced on the import/export of goods between the UK and the EU after Brexit. If the contract does not provide for the allocation of these costs or a pricing adjustment then it may impact directly on profits and potentially make the contract commercially viable.
- c) **Customs checks:** if the UK is no longer a member of the customs union then it is expected that customs checks will be introduced. There may be additional costs, delays, and administration, involved which are not apportioned under the contract.
- d) **Exchange rates:** we have seen the fall of the value of the Pound against the Euro since the Referendum and this has had both positive and negative consequences. In general, exports are cheaper but imports are more expensive. If there is a negative movement in the exchange rate then it may be sensible to try to build this into the pricing of the contract.
- e) **Licences and consents:** will any additional licences or consents be required post-Brexit? Once the UK has left the EU you may need specific licences or consents in order to sell your goods or services in the EU. It is expected that the 'passport' used in certain sectors will be lost and that a licence will need to be obtained in the EU in order for certain businesses to carry on business in the EU.

Each of the issues mentioned above can add considerable costs to doing business with a partner in the EU and in fact make a contract unprofitable. If a contract becomes unprofitable then you may want to terminate it and consequently you will need to look at the termination provisions.

How to deal with the potential changes?

- a) **Existing contracts:** Contracts which have already been signed may be difficult to change as, in the absence of a clause allowing for changes to be made, it may require the consent of the parties. You could look at any force majeure, material adverse change, or financial hardship clauses, but if they don't specifically cover the situation then they may not apply. As a final resort you may need to look at terminating the contract and hopefully there is a short notice period.
- b) **New contracts and a 'Brexit Clause':** if you are currently looking at entering into a contract with a party in the EU then you may consider adding a 'Brexit Clause'. Although it is difficult to include all future eventualities a 'Brexit Clause' could cover the main identifiable threats including exchange rate volatility, tariffs, additional delays, additional licenses, and customs checks. The clause would provide for:

Review your existing contracts

Include a "Brexit Clause" in your new contracts

- **Renegotiation:** as a starting point a 'Brexit Clause' should allow for renegotiation of the contract, for example, as to delivery times if they are affected by customs checks, or pricing due to currency fluctuations or if there is an adverse impact on the business caused by increases in underlying prices.
- **Cost allocation:** if Brexit causes additional costs then who will pay them? It will be useful to have a provision which allows for either specific costs to be allocated or for there to be discussions between the parties as to who should bear the costs.
- **Price review:** this provision would allow for the revision of prices in the event that underlying costs are hit by Brexit.
- **Termination:** in the event that a contract becomes uneconomical then the parties could have the option to terminate it.

Conclusion

The exact ramifications of Brexit are unknown, however, that does not mean that you can't review your current contracts to see how flexible they are in relation to the likely impact of Brexit. In addition, if you are entering into new contracts which involve an EU party or you are sourcing goods or services from the EU then you may want to build in some flexibility to take account of Brexit. The worse situation will be if you don't do anything.

Contacts

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