



BREXIT: REDUCING THE RISK IN COMMERCIAL CONTRACTS

The UK's withdrawal from the European Union will have a significant impact on commercial contracts between UK and EU businesses. UK businesses should now be looking at how best to 'Brexit-proof' their contracts. We are seeing an increasing demand for advice in this area.

There is still uncertainty around the eventual post-Brexit landscape, and this is likely to continue for some time. How then should businesses proceed? This briefing looks at likely issues in current and future contracts, and offers guidance on how best to address them.

Brexit is most likely to affect commercial contracts in the following ways:

1. Performance - whether actual ability to perform under the contract, or making performance less desirable

Issues

- Port delays - delays at ports as a result of the potential re-introduction of customs checks for goods travelling between the UK and the EU could make it difficult for a UK supplier to meet delivery terms that it may have committed to under a supply contract with an EU based customer.

- Imposition or change to a trade tariff - an EU-based supplier to a UK manufacturer which had committed to paying all costs associated with the supply to the manufacturer could be faced with a significant increase in costs as a result of the re-introduction of tariffs on goods travelling between the EU and the UK. This could make performance of the contract unprofitable for the supplier.
- Currency fluctuations/an end to free movement of workers - these could have a major impact on the performance of contracts between parties in the UK/EU, and may render the contracts commercially unviable.
- A requirement for or loss of a licence or consent
- A change in law

Guidance

- Do not rely on existing contractual provisions – such as force majeure and material adverse change (MAC) clauses – or the English common law doctrine of frustration to resolve any difficulty that may arise in the performance of a contract following an event connected with Brexit, as they are unlikely to work.

- Consider whether a Brexit clause, which triggers certain rights and obligations in the event of defined events, should be included in existing and new contracts. A Brexit clause could, for example, provide a right to renegotiate a contract if a trigger event occurs which may cause an adverse impact and to terminate the contract if amendments cannot be agreed. The potential effect of Brexit will vary significantly depending on the subject matter of the contract, so this needs to be reflected in the individual contracts.

2. Interpretation of contractual terms

Issues

- Contractual interpretation will change post-Brexit. References to, for example, the 'territory of the European Union' or the application of a specific term of EU law which has been superseded by UK legislation, may create the potential for disputes.
- Law and Jurisdiction clauses may not be recognised by the EU courts post-Brexit.

Guidance

- Review and where possible amend the terms of relevant existing contracts, and ensure that future contracts are carefully drafted so that disputes over such references can be avoided.
- Consider the dispute resolution clauses in contracts between UK/EU member state parties, or where enforcement is likely to be against assets based in the EU. If litigation is preferred consider making the choice of jurisdiction, if England and Wales, exclusive to give greater certainty (in the event that the UK does not continue to benefit from the Recast Brussels Regulation, or similar). Ultimately, however, Brexit will not impact on enforcement of arbitration awards, and so arbitration may be preferred.

HFW Perspective

Given the levels of uncertainty around the post-Brexit landscape, doing nothing is really not an option, as parties may be forced to terminate, or carry out their obligations in the face of unanticipated events that render the contract commercially unattractive, leading to claims for breach of contract, or termination for default.

Businesses should be reviewing current contracts and future proofing those being negotiated – we recommend consideration is given to:

- Using a Brexit clause.
- Reviewing and revising dispute resolution clauses.

HFW offers a **contract review service**, please contact [Anthony Woolich](#) for further details.

Our full range of Brexit resources can be found on our dedicated **Brexit webpage**.

For more information, please contact:



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