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# Brexit Briefing: Impact on Contracts and Choice of Law

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## Brexit Briefing: Impact on Contracts and Choice of Law

### Executive Summary

- Review your existing contracts to determine whether Brexit could make these contracts difficult to perform or less profitable
- In new contracts, consider using 'Brexit clauses' to future-proof new contracts
- Once the new relationship between the UK and the EU becomes clearer, seek specialist advice for contracts regulated by EU-level regulation
- Brexit should not impact your choice of English governing law
- How Brexit will impact the enforcement of English judgments in the EU will depend on the UK/EU relationship; in the meantime, consider using arbitration

### Overview

Brexit may affect the operation of your existing contracts and the terms on which you may choose to contract in the future.

This article discusses:

- some practical steps you can take in relation to existing contracts and points to consider if Brexit makes a contract more difficult to perform;
- how you can try to 'future-proof' new contracts for Brexit;
- how contractual references to the 'EU' and 'EU law' are likely to be impacted by Brexit; and
- the likely effect of Brexit on contracts that are subject to English law or the English courts.

Definitive advice will ultimately depend on the nature of the UK's relationship with the EU post-Brexit, whether as a member of the EEA (like Norway), with a negotiated bilateral agreement with the EU (like Switzerland) or (at the other end of the spectrum) based on the WTO Model.



## 1. What steps can you take now?

We are currently in 'wait and see' mode regarding the detailed *legal* ramifications of Brexit.

One step you can take now, however, is to conduct an assessment of your existing *contract profile* and *contract counterparty profile* (e.g. determine whether you have a lot of EU distribution agreements, or material contracts involving areas of law that rely heavily on EU level legislation, such as business to consumer contracts, or multiple supply contracts with EU counterparties that may need to be enforced in the future).

The next practical step is to identify any particularly high value, high risk, long-term or otherwise strategically important contracts, thinking in particular about the business issues that could make that contract less profitable or loss-making or more difficult to perform for either party (e.g. due to increased trade barriers, exchange rate exposure, customs checks, restrictions on the freedom of movement of people, etc.) post-Brexit.

## 2. What if an existing contract becomes unprofitable or more difficult to perform?

It is unlikely that your existing contracts will allow you to renegotiate or terminate a contract that has become more difficult to perform as a result of Brexit in the absence of express provisions to this effect (e.g. if a contract was entered into when Brexit was contemplated).

It is also unlikely that a standard 'force majeure' clause (typically included in contracts to allow parties to suspend or terminate their obligations under a contract as a result of circumstances out of their control, e.g. due to the occurrence of a natural disaster or an act of terrorism or war) could be interpreted to be triggered by Brexit. They are normally limited to obligations rendered impossible to perform and (for more recent contracts) will not usually encompass events which could reasonably have been foreseen.

Where a serious event occurs which is unexpected and not addressed in a force majeure clause and is beyond the control of the parties to the contract, a contract may become 'frustrated', thereby freeing the parties from their obligations under it. However, 'frustration' is very difficult to establish and this concept would be expected to apply only if Brexit is deemed to radically alter the essence of the obligations under a contract, not merely because Brexit results in inconvenience or financial difficulties, and therefore it is unlikely to provide you with a way out of such contracts.



### 3. How can you 'future-proof' new contracts?

For new contracts (or those which are coming up for renewal before the end of the two year negotiating window once Article 50 is triggered), you should consider how to deal with future difficulties in performing your contracts in light of Brexit. One solution might be to include a specific 'Brexit clause' (e.g. giving you the right to renegotiate or terminate), which would be triggered by a specific Brexit-related event. Of course, some of your counterparties may seek to do the same.

Similarly, if a contract is particularly exposed to exchange rate volatility (e.g. as to pricing or invoicing) you should consider including clauses to re-price or switch currency, renegotiate the terms of the contract or even terminate it.

### 4. Will contracts covering 'the EU' include the UK after Brexit?

Many contracts (such as distribution agreements, joint venture agreements, franchise and licence agreements) contain territorial provisions. For existing contracts, for example, whether references to 'the EU' will include the UK after Brexit depends on the specific drafting and wider commercial context of the contract. You could 'future-proof' against this uncertainty by expressly stating whether (or not) the UK is intended to be included within the territory after Brexit.

### 5. How will contract obligations derived from EU laws apply after Brexit?

The UK Government has recently announced its intention to repeal the European Communities Act 1972, with immediate effect on Brexit. This means that all *directly applicable* EU legislation (i.e. EU Regulations and Treaties, which become instantly applicable in EU Member States once they have been passed in Brussels) will cease to have effect in the UK on that date. However, the Government's current intention is simultaneously to bring that legislation onto the UK's statute book, in order to avoid any immediate legal 'black holes'. There are no current plans to repeal existing UK legislation which previously implemented numerous EU Directives into UK law.

This is intended as a 'stop gap'. The Government's stated intention is that all UK legislation of EU-origin will eventually be reviewed and a policy decision taken as to whether to retain, modify or repeal it. The practical result is that the substance of English law is unlikely to change significantly in the immediate (or even medium-term) aftermath of Brexit.

Whether express references to 'EU law' in existing contracts will be interpreted to include (or exclude) successor UK legislation under the 'Great Repeal Bill' is likely to depend on the specific drafting and the wider commercial context of the contract. For new contracts, it is possible to deal with the position expressly, although it is unclear for now what the successor legislation will look like.



A more practical consideration will be the extent to which UK and EU laws will gradually diverge over time, which will potentially give rise to dual compliance regimes (e.g. in order to gain access to the EU market). Many sectors are currently subject to a significant degree of specific regulation originating from the EU (e.g. financial services, pharmaceuticals, food and drink, product liability, consumer law, agency, distribution, e-commerce and outsourcing/franchising). If any of your key contracts are in these sectors, we recommend you take specialist advice once the landscape becomes clearer.

## 6. How can parties start to anticipate these issues now?

Key practical points to consider in relation to new and existing contracts include:

- Who bears the risk under the contract of compliance with relevant 'laws'? Does the contract contain any 'modification of law' provisions or express references to 'successor legislation'?
- How will the cost and effort of complying with parallel regulatory regimes be allocated between the parties? Will there be any price re-negotiation or termination provisions?

## 7. How will Brexit affect contracts that are subject to English law?

Currently, the Rome I and II EU Regulations give contract parties freedom to choose the law that will govern their contractual obligations (this does not have to be the law of an EU Member State).

Post-Brexit, the EU courts will remain subject to the EU Regulations and will therefore be obliged to respect the parties' choice of governing law (including choice of English law). Equally, we expect that the English courts will continue to respect parties' choice of governing law (e.g. in relation to EU jurisdictions), regardless of the precise nature of the UK's future relationship with the EU.

## 8. Are parties less likely to choose English law in the future?

We do not anticipate that parties who would otherwise have chosen English law to govern their contractual relationships pre-Brexit will be less likely to do so post-Brexit. This is partly based on our experience in the run-up to, and in the aftermath of, the UK referendum and also because English *contract law* is largely independent of EU influence and likely will remain a universally respected legal system, with emphasis on upholding parties' commercial bargains.



## 9. Is enforcement of an English judgment in the EU likely to be a concern for you?

Currently, EU courts are obliged to respect parties' choice of jurisdiction in which to have disputes heard, and to give effect to judgments given elsewhere in the EU, under the recast Brussels EU Regulation.

Whether an English judgment is likely to *need* to be enforced in the EU after Brexit (enforcement of English judgments outside the EU will not be affected by Brexit) may not be relevant. For example, if the defendant's assets are located in the UK or outside the EU, it may be more important to have the claim heard by a court with which you are more familiar.

If enforcement within the EU is likely to be relevant post-Brexit, it is possible that arbitration may be a suitable alternative form of dispute resolution (e.g. the New York Convention renders arbitration awards enforceable in all current EU Member States). Alternatively, it may be appropriate to consider giving the courts of an EU Member State jurisdiction to hear disputes under the contract.

A practical 'workaround' for existing contracts might be to expedite any anticipated enforcement process before the end of the two-year negotiating window once Article 50 is officially triggered.

Ultimately, the post-Brexit position will depend on the model eventually chosen for the UK/EU relationship. For example, it is possible that the UK could become a party to the Lugano Convention (currently in force between the EU, Switzerland, Norway and Iceland) or the Hague Convention on Choice of Court Agreements (currently in force between the EU and Mexico), which would likely signal little change in this area in practice.

As a practical matter, it will continue to be important to include an agent for service clause in any contract over which the English courts have jurisdiction, where any of the counterparties are based abroad (*i.e.* appointing an individual or company in the UK to accept documents, including court documents, on behalf of the overseas counterparty concerned).

### Checklist of Immediate Key Action Points

- ✓ Review existing contracts to assess contract profile (e.g. determine whether you have a lot of EU distribution agreements or material contracts involving areas of law that rely heavily on EU level legislation)
- ✓ Identify any high value, high risk, long-term or otherwise strategically important contracts
- ✓ If an existing contract has become difficult, or you anticipate that it may become difficult to perform as a result of Brexit, does the contract contain any specific wording that may allow you to renegotiate or terminate?



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