

# Contracts and Brexit - an overview

**If your company is entering into new contracts or re-negotiating existing ones, now is a good time to consider the potential implications of Brexit. We can provide expert, clear advice on the issues raised in this fact sheet.**

If a company is entering into contracts now which will run on after Britain leaves the EU, or which might be affected by a Brexit-related event, then directors should consider at this stage whether the contract should expressly deal with Brexit. Failure to do so may mean that a company is tied into a contract which, post Brexit, it is no longer able to perform or which is no longer of any commercial benefit to the company.

## Should my commercial contracts expressly cover Brexit?

The risk associated with not providing for a Brexit provision in any new contract, or renegotiating such a clause in any existing contract, is that a company will still have to continue to perform the contract in full. This will be the case even if, as a result of a Brexit-related event, doing so is no longer commercially attractive to the company or it can no longer continue to fulfil the contract. The company could find itself in breach of contract or facing termination for default and an action for damages.

The option of doing nothing and not including a Brexit clause may be suitable in some circumstances, such as:

- short term contracts where parties can revise the terms to address the impact of Brexit once it happens;
- contracts which the parties know will not be affected by Brexit;
- contracts which include a right to terminate on short notice (without penalty);
- contracts where the risks of doing nothing are not as great as the risks which would come from introducing a "Brexit clause".

## What would be the point of including a Brexit clause?

A Brexit clause could trigger some change in the parties' rights and obligations as a result of a defined event. The problem is that the actual impact of Brexit is still uncertain, meaning that it is unlikely that the contract could be drafted to cover every eventuality. The two types of clause which could be used are:

- **Specific event/specific consequence clause** - the contract provides that if a specific Brexit-related event occurs (e.g. currency exchange rates fluctuate) a specified consequence will follow (e.g. the price of products is adjusted);
- **Trigger/renegotiation/termination clause** - if a trigger occurs (e.g. the imposition of tariffs) then the affected party can request renegotiation and if no deal is reached the affected party can terminate.

## Can any existing clauses in my commercial contracts help me?

There are some standard provisions that are likely to be included in a commercial contract which could help if a Brexit-related event affects the contract adversely:

- **Force majeure clause** - this clause (dealing with the happening of events outside the control of the parties) is often included in a commercial contract. The term 'force majeure' has no meaning in English law and this will always therefore be a question for the courts. However, the current view is that, unless there is an express reference to 'Brexit' in the definition of 'force majeure', such a clause is unlikely to help as:
  - an event is only 'outside the control' of a party if the party has taken all reasonable steps to avoid its effect. Given that it may be the case that Brexit was a possibility when the contract was entered into, it could be argued that the parties could and should have planned for its effects. You could address this by drafting the clause so that a Brexit-related event amounts to a force majeure without requiring it to be outside of the parties' control;
  - a force majeure event is not normally concerned with a change of economic or market circumstances affecting the profitability of a contract or the ease with which the parties' obligations can be performed;
  - force majeure clauses are most often intended to deal with temporary situations and consequently offer the option of terminating a contract should the force majeure event continue for more than a certain length of time. This would not be the case with Brexit.
- **Material adverse change clause** - these types of clauses are not standard practice in a contract and tend to be included in lending transactions or corporate acquisition agreements. Whether the effects of Brexit could trigger a 'material adverse change' clause would depend on the drafting of the clause.
- **Compliance with law clause** - many contracts state expressly that the parties must comply with applicable law. Companies should check their draft contracts to see whether the law is defined as at 'the date of the agreement' or as it may be 'amended from time to time'. Where a party is obliged to comply with the law 'from time to time' this is likely to include Brexit, but it will still be a matter of interpretation whether such a clause would oblige a party to absorb the costs associated with a Brexit-related change in law. Long form agreements, such as outsourcing agreements, often deal specifically with what will happen where there is a change in the law.
- **Hardship clause** - a long term agreement may contain clauses which deal with which party should bear the burden

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of increases in costs of supply or exchange rate fluctuations etc. Whether such a clause would be invoked if a Brexit-related event occurred would depend on how the clause is drafted.

- **Change control clause** - long term agreements, particularly outsourcing agreements contain clauses setting out a procedure to follow when either party wishes to change the contract. Such a clause may be of assistance if for example the way the contract is performed needs changing to reflect a Brexit-related change in law.
- **Termination rights** - one type of Brexit clause introduces a right to terminate if the parties cannot agree on how to deal with the effects of Brexit. If a contract's termination clause gives a party a right to terminate on relatively short notice, then such a Brexit clause would not be necessary.

*Disclaimer: please note that this fact sheet is for guidance only and is not intended to replace legal advice.*

### Contact

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