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Brexit for business

BREXIT

The United Kingdom continues to be a member of the EU as well as the Common Market and the Customs Union. This situation will persist at least until the end of March 2019, i.e. the end of the two year negotiation period stipulated by Article 50 of the Treaty of Lisbon which governs the withdrawal of a member state from the Union. As such, therefore, no changes to the legal and regulatory environment have taken place yet for UK businesses and foreign businesses trading in and with the UK. Just as it is currently unclear what form Brexit will take (soft or hard or, perhaps more likely, a degree of hardness in between), it is also unclear what changes to the legal environment will occur.

Nonetheless, businesses are understandably concerned about the future and increasingly approach us for advice. The following is a brief overview of key points and questions that we have come across in advising on matters of current significance in the context of Brexit:

Brexit clauses in new contracts

As a result of the uncertainty that Brexit will bring it may be sensible for proposed contracts to contemplate a short period (possibly six months), following Brexit, during which parties will have the ability to terminate "for convenience" if the arrangements are not proceeding as planned. Alternatively, parties may elect to convert proposed long-term contracts into short-term ones that terminate shortly after Brexit, so that the operational aspects of Brexit can be fully considered without the concern of long-term commitments. A further option would be to introduce flexibility into contracts relating to pricing (proposed annual price reviews could, for example, become quarterly) after Brexit. Our view is that general clauses that provide for termination rights, or a duty to renegotiate in good faith if the contract is impacted by Brexit, would be difficult to enforce under English law.

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Termination of existing contracts

We have been repeatedly confronted with the question as to whether Brexit could be a trigger for contract parties to terminate existing contracts, particularly under force majeure clauses. Our view is that Brexit would not ordinarily be considered to be an event of force majeure. One might, however, be able to argue, in relation to certain contracts that are already in place, that the arrangements contemplated by the contract relied on the principle that the UK would have free and open access to the EU market. If that is the case then a party seeking to exit that contract may be able to argue that the doctrine of frustration applies. This doctrine provides that a contract is frustrated and may be terminated if something unforeseen has occurred which makes it impossible to fulfil it. In those circumstances, the parties are no longer obliged to perform their respective obligations under the contract. Whether or not that is the case will obviously depend on the particular circumstances.

Geographic scope of contracts

For existing contracts, signed before Brexit was contemplated, the starting point when considering the territory of a contract is that it should be interpreted as it would have been on the date that it came into effect. In the absence of any contrary indication (such as, for example, the contract referring to the EU "from time to time"), if the territory in the contract covered the EU then, despite Brexit, the UK would remain "in" as far as the contract was concerned. As we do not yet know what trade deal will be in place upon Brexit, it is possible that free movement of goods and services rules will continue to apply, in which case many contracts will be unaffected. For contracts not yet in existence, it should be relatively straightforward to specify what the territory upon which the contract is based should include – references to the "EU" should simply be avoided, and it should be spelt out, whether the UK is included or not. The intention of the parties should be made clear.

Jurisdiction in case of disputes

The UK Government acknowledges that the comprehensive judicial co-operation with the EU member states is a matter of highest priority in the Brexit negotiations. Although at present it is not known whether this will be achieved by reverting to existing conventions and treaties or by creating a new agreement with the EU, the clear objective of the negotiations is to ensure continued reciprocal recognition of judicial decisions in civil and commercial matters. The clear expectation is that, whatever the precise measures ultimately to be adopted, they will closely reflect the principles of the existing EU framework and there will be no substantial changes to the existing rules regarding jurisdiction and enforcement of foreign judgments.

Changes to product standards or licensing requirements

Brexit is likely to mean that the UK will have its own standards and licensing regime which will in some cases differ from the rest of Europe. In many cases these changes will lead to increased and unexpected costs. When parties to a contract are considering who should bear any additional costs they should first look at the intent and effect of the contract itself. Most contracts are very clear in relation to costs and it should hence be possible to establish by whom costs should be borne. If the drafting is unclear then the court's interpretation of the contract may be the parties' last resort. If new contracts are being prepared then we would suggest that the parties deal with (and allocate) known and expected costs in as much detail as possible and use a "sweeper" type clause to allocate any additional costs between the parties.

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Exchange rate risk

One could argue that the only actual major impact of the Brexit vote to date has been on the value of Sterling, as it has substantially devalued against the Euro and the Dollar. Exchange rate fluctuations present an obvious element of uncertainty and commercial risk to businesses. There are two major ways for businesses to protect themselves: firstly, by insuring against exchange rate changes through the use of currency hedging in all its forms and secondly by including currency clauses in future contracts. The content of such clauses will be determined by the specific commercial (and geographic) circumstances of the contract parties and can range from pricing adjustment to rights of termination. As already noted, clauses providing for an obligation to renegotiate contract terms are ineffectual under English law, as they are unlikely to be enforceable. They represent mere statements of intent of the parties.

Data protection

From 25 May 2018, EU Regulation 2016/679 will come into force. The regulation is commonly known as the General Data Protection Regulation (GDPR) and is intended to offer a harmonised approach to data processing across the EU. Many of the principles of the Data Protection Act 1998 are reflected in the GDPR but UK businesses cannot ignore the requirements of the GDPR (not least because of the increased level of fines – up to the greater of €20 million or 4% of global turnover). We know that on 25 May 2018 the UK will still be an EU member and therefore on that date UK businesses will need to be compliant with the GDPR. And when the UK is no longer part of the EU, the likelihood is that the rules will not change significantly because the UK is likely to want to remain as a country whose data protection laws are recognised as sufficient by the EU, so that personal data can continue to be transferred between the UK and Europe without additional formality. In addition, if UK businesses market to EU-based customers then the GDPR will directly apply to them, even if they have no physical presence within the EU.

Further information?

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