

Brexit Essentials

Contracts through a Brexit lens

Summer 2019

The UK's exit from the EU and its economic repercussions may have implications for a range of general commercial and other types of contract. This briefing suggests questions to consider when reviewing material contracts through a Brexit lens. These questions will also be relevant when negotiating new contracts extending

Do territorial references make sense?	Will territorial references to "EU" or to "Member States" be interpreted to include the UK after the UK leaves the EU? Are any definitions intended to cover the EU27 or does the UK need to be mentioned separately?
Is it necessary to clarify references to EU legislation?	Do the parties intend, after Brexit, that any references in the contract to EU legislation are to the EU version from time to time, or to its on-shored UK equivalent? Should references to EU legislation be to the legislation as at the date of the agreement (or Brexit day) or to those EU rules as subsequently amended or modified? It cannot be assumed that references to EU laws will automatically be taken to refer to their UK equivalent. Check relevant definitions e.g. of applicable law as well as interpretation provisions.
Does the contract reference EU supervisory authorities?	Will any EU regulator referred to in the contract have jurisdiction in the UK post-Brexit? Is it necessary to refer to a UK regulator instead of (or in addition to) the EU regulator where the contract crosses the Brexit date or services are supplied in UK and EU? "Successor and assigns" language may not operate effectively where a regulator exists but a (new) parallel body is set up. Definitions of "applicable regulators" or "deeming" provisions that operate to adjust references to EU regulators to post-Brexit equivalents might be appropriate instead of references to individual regulators in some contexts.
Consider "Brexit hardship"	Might the contract become more costly to perform or maintain post-Brexit? In what way? Does the contract include hardship provisions if the contract becomes unduly onerous to one party? Are potential cost increases, for example, arising out of wages, tax, tariffs, exchange rate movements or new customs procedures compensated for by any price adjustment mechanism or indemnity? Could exchange rate movements or other increased costs result in breach of contract as a result of any monetary limits in the contract? Could any rights to counterparties' exclusivity or minimum revenue commitments be affected? Should steps be taken to prevent the contract potentially becoming uneconomical following Brexit?
Might any termination/ winding down rights become operable?	Does the contract include termination rights that could become operable as a result of Brexit? Does the contract include any provisions specifically referencing Brexit or its repercussions? Is there a MAC clause and could it be broad enough to be triggered by Brexit? Is the contract terminable at will? Can the contract be wound down if it is uneconomical? Should such provisions be included?

What about force majeure?	Could Brexit trigger force majeure provisions? Force majeure provisions are not normally triggered by contracts merely becoming more onerous or uneconomical. Are there any circumstances that would warrant a different analysis? Should express references to Brexit related scenarios be added?
What about frustration?	Could Brexit render performance of the contract illegal or impossible such that it is frustrated (either pursuant to contractual illegality/impossibility provisions or under the general law)? Could obligations be rendered impossible to perform by Brexit e.g. due to EU product certification or licencing requirements or EU presence as a pre-requisite to providing products or services into the EU? What about export control requirements?
What are the implications of delayed performance?	Could performance be delayed e.g. due to changed customs processes across the supply chain or restrictions on free movement? Where time is of the essence in the contract could delays result in a breach of contract?
What about data flows?	Post Brexit UK will become a “third country” for GDPR purposes; certain international personal data flows may be restricted. Safeguarding arrangements may be needed to prevent the interruption of data flows where personal data is transferred to or received from the EU or other third countries. Does the contract include EU standard clauses or have other workarounds been put in place?
Will the dispute resolution provisions operate as intended?	Does the contract confer jurisdiction on the English courts? After Brexit, clauses conferring jurisdiction on the English courts will cease to be enforceable under the EU-wide Brussels regime, and instead, will be recognised according to local rules before the relevant EU27 court. Consider whether the contract is likely to be enforced before an EU27 court and if necessary, take local advice on whether/how the English courts’ jurisdiction will be recognised in the absence of the Brussels regime. The UK has indicated its intention to accede to the Hague Convention on a no deal Brexit, which will protect exclusive jurisdiction clauses in contracts entered into after exit day before the EU27 courts.
What about the enforcement of judgments?	After Brexit, judgments of an English court will cease to be enforceable under the EU-wide Brussels regime, and instead, will be enforceable according to local rules before the relevant EU27 court. Consider whether the contract is likely to be enforced before an EU27 court and if necessary, take local advice on the process for enforcing judgments in the absence of the Brussels regime. The UK has indicated its intention to accede to the Hague Convention on a no deal Brexit, which provides a process for enforcing judgments before the EU27 courts arising out of exclusive jurisdiction clauses in contracts entered into after exit day.

OUR BREXIT ADVISORY PRACTICE

Slaughter and May is equipped to help you across the full spectrum of legal issues triggered by Brexit.

Our team has advised and continues to advise clients in a range of sectors on issues arising out of the UK's departure from the EU. These include the effects of Brexit on M&A, financing transactions and other types of investment activity, its likely impact on the regulatory environment and on the cost of cross-border trade.

We are also able to assist with contingency planning, lobbying efforts and the formulation and implementation of restructuring options.

KEY CONTACTS

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