



March 2019

The impact of Brexit on your contracts: a timely reminder

The United Kingdom's impending departure from the European Union, in whatever form it eventually takes, has the potential to affect all of your company's contracts with UK counterparts, big and small. The uncertainty as to the legal and regulatory landscape looks set to continue. Longer-lasting contracts, which at the best of times will have to cater for the unknown, are in particular need of "Brexit-proofing". Every company should take steps to ensure that its existing and future contracts will not become liabilities in the more uncertain medium-to long-term.

What will be affected?

It goes without saying that the ultimate form of Brexit has the potential to have an impact on all trade between Ireland and the United Kingdom. In addition, it should be noted that your Irish or EU-based suppliers may themselves be dependent on trade with UK-based counterparties which could be affected post-Brexit. It would be prudent to analyse the supply chains of your suppliers and customers, as well as the supply chains prevalent in your industry generally, in order to identify any areas of concern and mitigate any post-Brexit fallout.

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Existing Contracts

We suggest the following course of action as a first step in mitigating the Brexit risks relating to your company's existing contracts:

- ▣ **Regulation**: if your industry is regulated at a European level, or adheres to the rules regarding the sale and supply of products in the EU generally, keep abreast of any developments with regard to continuing regulatory equivalence of the UK under EU law and vice versa, as well as the continuing freedom of movement between the UK and the EU;
- ▣ **Supply chain**: assess whether the same suppliers or supply chains can be used in light of the changing regulatory landscape, or whether the legal terms governing the relationship need to be changed;
- ▣ **Commercial terms**: assess whether there is a risk that Brexit may alter the fundamental economics underpinning the commercial terms of the contract and whether it is necessary to change those terms; and
- ▣ **Future changes**: the UK's departure from the EU may be a gradual process. Continue to assess your company's contractual arrangements in light of further Brexit-related developments.

Of course, it will not be possible to unilaterally make any changes to your existing contracts. However, Brexit risk cuts both ways and many trading partners are just as eager to mitigate it.

Future Contracts

We would suggest that specific clauses be included in commercial contracts to mitigate and allocate Brexit risk, such as the following:

- ▣ **Change of law clause**: some companies may wish to protect themselves by allowing the parties to terminate the contract or change its terms in the event that a change in law or regulation as a result of Brexit makes performance of the contract illegal or prohibitively expensive.
- ▣ **Other changes to the cost base**: some contracts may allow the parties to terminate the contract or change its commercial terms in the event that exchange rate volatility, changing tax rates or the introduction of tariffs as a result of Brexit exceed certain defined parameters. Alternatively, some contracts may allocate these costs between the parties in advance.
- ▣ **Governing law clause**: in some industries in particular, companies may prefer for reasons of continuity to have a document governed by Irish rather than English law or to explicitly state that the relevant European legislation will continue to apply.

- ▣ **Force majeure clause**: this is a standard clause in most commercial agreements to the effect that the parties do not have to perform a contract if certain specified events which are outside of their control (e.g. war, riot, inclement weather conditions) make it impossible to do so. However an event which makes a contract less profitable or more expensive to perform is not generally considered to be an event of force majeure. Companies, particularly those operating in regulated industries, may wish to specifically include certain forms or consequences of Brexit which affect their ability to perform a contract in a force majeure clause.
- ▣ **Change control clause**: many agreements, especially those of longer duration, include a clause which sets out a procedure for agreeing amendments to certain terms and escalating any issues that cannot be resolved to senior management or mediators. If companies find that it is not possible to predict how Brexit will affect a particular arrangement, they may wish to include a procedure for re-negotiating particular terms in the event that specified Brexit-related events occur.
- ▣ **Termination clause**: many contracts will set out how the parties may bring it to an end. Some companies may wish to negotiate termination with short notice periods or include specific Brexit-related termination rights, so that they can engage other suppliers in the event that Brexit-related changes render the relationship impractical or uneconomical.
- ▣ **Exclusivity clause**: for similar reasons, companies may wish to resist exclusivity clauses or require them to include exceptions for specific Brexit-related events.
- ▣ **Standard terms and conditions**: if you trade on the basis of standard terms and conditions, you may wish to update these to include the points raised above.

Conclusion

These are broad trends and each clause will be specific in its remit and may be negotiated in detail. Any clauses that attempt to mitigate Brexit risk by providing for future amendment of a contract should clearly delineate what terms may be revised and in what specific circumstances this may be done. Otherwise, your trading partners could use them as an opportunity to improve the commercial terms or terminate a contract for convenience.

Should you have any queries in relation to Brexit risk in commercial contracts or corporate transactions, please contact the authors or your usual contact in the Dillon Eustace Corporate Department for further information.

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