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Impact of Brexit

Carry on contracting

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Following its announcement on 24 June 2016, the potential ramifications of Brexit have been listed in various articles, memos and papers in exhausting detail. There is endless material listing the commercial impact of Brexit, yet it is clear that the full impact of Brexit remains unknown. In the midst of all the chaos, what are the best steps a business can take to future proof its interests against the potential effects of Brexit?

From a commercial perspective, contractual flexibility is likely to be the best way to weather Brexit. With the right level of flexibility, no matter the outcome, businesses will be prepared and able to adapt to the changing landscape. In this article, Fieldfisher has identified key contractual provisions into which businesses should consider building in contractual flexibility for just this reason

Changes in Law Clause

At the time of writing, no-one knows how the UK will withdraw from the EU. This flux and uncertainty is likely to have an impact on complex services contracts, which often require suppliers to comply with all "Laws" or "Applicable Laws" and apportion the risk for changes in law between the supplier and customer. Without a full understanding of how applicable law may change in the future, businesses will be unable to evaluate potential exposure to this type of risk, or take steps to mitigate it. So, what can you do to strengthen your position?

Take care to understand the implications of your current contractual position. If you are a customer or a supplier, you should check the definition of "Applicable Law" or "Laws" (or similarly defined terms), along with the general interpretation provision, in your contracts. You should specifically consider – do the definitions or the general interpretation provisions in the contract refer to "amendments", "extensions" or "re-enactments" of applicable law? Is the definition of applicable law flexible enough to anticipate changes in the law "from time to time", or is does the contract currently reflect a static snapshot of the law as then in force?

You should also check the definition of a "Change in Law" (or similar) within your contracts, to make sure that this definition suitably encompasses all possible changes in applicable law that may occur as a result of Brexit.

Once pre-armed with this information, you should re-evaluate your likely risk profile. As a supplier, you should bear in mind that some contracts will require you to bear the risk, or the cost, of changes in law if those changes should have been on your radar. Suppliers may therefore be able to argue that the implementation of Brexit is so uncertain that it would be unfair to expect them to plan for, mitigate, or bear the cost for Brexit-induced changes in law. On the other hand, as a customer you should consider the extent to which these changes may impact the value of your contracts and should ensure that either this risk is effectively priced in, or that you have stable grounds to argue that your supplier should be liable for any increased costs.

Force Majeure Clause

Depending on when you entered into your contract and how widely drafted your force majeure clause is, Brexit (or the impacts of Brexit) may fall into the category of a "Force Majeure" event (i.e. an event which is unforeseeable and/or out of the control of the contracting parties and which will have an impact on the ability of either party to fulfil their obligations under the contract), if either you or the party are unable to fulfil your contractual obligations as a result. So, what are the main considerations when drafting a force majeure clause?

Is it likely that a particular Brexit scenario will prevent you from fulfilling your contractual obligations? As a supplier or a customers, you should consider the full range of possible Brexit-scenarios and how such scenarios may impact on your ability to fulfil your obligations under a proposed contract. The definition of "Force Majeure" or a "Force Majeure Event" should be carefully considered and drafted within the context of your particular contract.

Do you want a specific Brexit scenario to fall into the category of a "Force Majeure Event"? You may actually want a certain Brexit-scenario or outcome to constitute a force majeure, depending on your particular contract. To evaluate this, you will need to consider (i) the type of services provided under your contract; (ii) the location of services to be provided; and (iii) (if you are a supplier) the make-up of your workforce (for example, Brexit may result in a curtailment of the freedom of movement of people and prevent you from complying with your obligations).

Draft the Force Majeure clause carefully to avoid unwanted cost or inconvenience. As a supplier, you should ensure you have an appropriate force majeure clause to allow you to terminate the contract without cost or avoid incurring additional costs if a specific Brexit-scenario has an unwanted impact on your ability to comply with your obligations. If you are a customer you should consider if there is a risk that your supplier may be entitled to terminate the contract by virtue of Brexit and ensure that your contract is priced accordingly. By way of example, the Crown Commercial Services Model Services Agreement ("**CCS Model Services Agreement**") contains a definition of force majeure which expressly refers to "acts of government". This wording is particularly wide and could therefore capture any number of Brexit-related government acts. Whether or not you want the clause to be as wide as this is will hinge on the facts and should be bottomed out during negotiation.

Exchange Rate Risk and Currency of Payment

The uncertainty of Brexit and subsequent fate of the UK has resulted in a fluctuating British currency. This fluctuation may have an impact on both the value of contracts entered into in Sterling and contracts entered into with currencies linked to Sterling (and any related exchange rates). What can you do to mitigate this risk?

Consider the potential volatility of the currency used in your contracts. Businesses should consider the currency of payment used within the contract in light of the current background of volatility in Sterling, as well as the possible volatility in other currencies (such as the Euro), which may be subject to a Brexit "contagion". Specifically, you should make sure that exchange rate risks are addressed if the supplier's resource costs are incurred in one currency and the customer pays in another currency, particularly if either of those currencies is Sterling or Euros.

Key Personnel Clause

Brexit will have an impact on the free movement of people but the exact scope of that impact remains unclear. This could have several knock-on effects from a contractual perspective. Businesses may no longer be permitted to employ certain individuals, which may cause issues if a particular individual is identified as "Key Personnel" for the purposes of that contract. If you are a supplier, this may be problematic and may place you at risk of breach. In addition to this, many complex service contracts restrict the supplier's ability to make changes to key personnel. How should you build in sufficient contractual flexibility to deal with this?

Evaluate the contract workforce profile and consider the likely risk. As a supplier, you should consider whether or not your workforce and appointed key personnel could be affected by the 'settled status' arrangements and the restrictions on the free movement of persons that will come into effect post-Brexit. If this risk is high, this should be addressed in the contract. You should also carve out the right to make changes to key personnel if it seems like this will be necessary. As a customer, you should consider whether or not any restriction on free movement of people may have a detrimental impact on the services provided to you under your contract, and ensure that you price such risk into your contract accordingly.

TUPE Clause

The Transfer of Undertakings (Protection of Employment) Regulations 2006 ("**TUPE**") ensures that employees are automatically transferred between businesses when they are bought or sold, and determine the responsibilities for providing a service change. TUPE also places obligations on companies to inform and consult transferring employees. TUPE may be repealed or amended post-Brexit. Such reform, in the long-term, could be favourable for your business, as TUPE obligations are often regarded as onerous; however no-one knows what such reform might actually look like. Bearing this in mind, in the meantime how should you draft your contract to protect your position?

Allocate risk and value the contract accordingly. Until there is more certainty, any TUPE schedule in a commercial transaction should factor in the possibility of a changed regime and both customers and suppliers should ensure that the allocation of TUPE risk is adequately managed, taking into account the value of the particular contract.

Privacy and Data Protection Clause

The UK currently draws its data protection law regime from EU legislation, which is governed by the General Data Protection Regulation ("**GDPR**", which came into effect in the EU on 25 May 2018). Post-Brexit data protection laws (including the new GDPR) are to be "saved". But some aspects, such as the ability to transfer data between UK and EU-27 entities or alternative data transfer arrangements remain uncertain.

The GDPR is extraterritorial. This means that the GDPR will apply to every business - whether in the EU or not - that offers goods and services to EU citizens or that monitors EU citizens' behaviour. UK businesses selling into the EU will still therefore be subject to GDPR requirements, as will wider international businesses operating across the UK and the EU. Brexit will not change this.

Transfer of data may depend on views of the European Commission. In the event of a hard Brexit (i.e. there is no transition period whilst UK-EU trade negotiations are ongoing), the continuation of transfer of personal data between UK and EU relies on the European Commission deeming the UK to have "adequate levels of data protection". The Commission can only formally make this assessment once UK is a "third country", so the Commission decision may not be in place immediately after Brexit. It may be prudent to anticipate, when negotiating a contract, the possibility of legal obstacles to the transfer of personal data between UK and EU.

In the absence of a formal adequacy decision from the EU Commission (which would legally permit routine transfers of personal information to the UK), the legality of such transfers would become much more complicated. Contracts should therefore be drafted to future-proof data protection clauses against this type of complication (for example, by ensuring that there is an obligation for any UK processor or controller to enter into Model Clauses with an EU controller prior to the transfer of personal data to the UK).

Carefully consider your data protection clauses. Once the GDPR is in force, both controllers and processors will be directly liable for data protection law obligations. As a result, contracts should be drafted bearing in mind both the provisions of the GDPR to ensure that each party is aware of its obligations and that any risk for non-compliance with data protection law is apportioned appropriately.

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Term and Termination Clause

Brexit will have an impact on the following types of contract: (i) contracts entered into following Brexit; (ii) contracts entered into in anticipation of Brexit; and (iii) contracts entered into prior to the referendum, which nevertheless have a sufficiently long term to remain binding following Brexit.
While the types of contracts set out in (i) and (ii) above can be negotiated and ultimately entered into once the parties have considered how to handle the likely (or actual) impacts of Brexit, contracts in (iii) will have been executed prior to any consideration of Brexit. As a result, contracts in (iii) may not have been future-proofed against any resulting impact or effect resulting from Brexit. What can you do to reduce these risks?

Evaluate the risks and consider early termination if necessary. You should ensure that you evaluate the impact of Brexit on (i) your prospective contracts and (ii) those existing contracts which are likely to span a period both pre- and post- Brexit. Further, when acting as a supplier or a customer, you should ensure that any risks which are likely to occur as a result of Brexit are well documented within the contract, for example, within the contract risk register. Consider whether there are any provisions within your contracts which will determine how such the cost of such risks will be borne - one example can be seen in the CCS Model Services Agreement, which provides for "Forecast Contingency Costs". Finally, if such risks cannot be borne, you should consider whether or not there is a case for shorter term agreements, or early termination.

Break Clause/ Review Clause

As discussed above, Brexit may have a significant impact on the risk profile or cost of commercial contracts and as a result you should consider whether Brexit may necessitate an early termination of your contracts. However, what steps should you take to add this flexibility to your agreement?

Consider including a break clause in your contracts to allow for early termination relating to Brexit-related events. Alongside this, you could consider including a review clause, to entitle you to review and amend specific provisions of your contract (and change control mechanisms), if particular (and specified) Brexit-related circumstances arise.

Assignment/Novation

As discussed, the impact of Brexit may alter the way in which the UK remains compliant with EU-derived law. In light of these uncertainties, you should consider your company group structure to ensure that your group as a whole will not suffer a detrimental impact because a certain contract has been entered into with a specific entity. How can you take steps to avoid this potential risk?
Consider including rights to assign/novate your contract to a group entity. As a supplier or a customer, you should consider whether you should have the right to assign or novate contracts to another company within your own group in order to avoid such risks. As a customer, you can mitigate against any risk so incurred by only permitting your supplier to assign or novate your contract on the condition that a suitable parent company guarantee is put in place on assignment or novation. As a supplier, a transfer of your obligations to another group company may only occur by means of novation (as the burden of an agreement cannot be assigned), and this will require customer consent. You should therefore consider implementing suitable mechanisms to obtain upfront consent from the customer permitting future novations in specific circumstances.

Governing Law and Jurisdiction

What does your contract say about where challenges will be brought? The Brussels (Recast) Regulation that currently determines which court can hear a dispute, and the recognition of the judgements of foreign courts, will no longer apply to the UK, nor will the 2007 Lugano Convention - although the UK has indicated that it would like to accede to the Lugano Convention, which would offer continued mutual recognition of judgments. If this cannot be agreed, it is likely that the UK would have to rely instead on the older Brussels Convention 1968 arrangements, which would at least offer a basis for upholding an exclusive UK jurisdiction clause and to allow EU enforcement of a UK judgment. The Convention has, however, not been signed by all 27 remaining EU Member States. You may want to consider introducing a process agent clause to deal with service to EU parties. Alternatively, arbitration may offer more certainty as awards remain enforceable under the New York Convention, regardless of Brexit.

Consult a legal professional to identify the likely position if the UK chooses not to enact these Regulations post-Brexit. While it is likely that an express choice of law clause agreed by informed contracting parties will be respected by the courts, the position is less clear-cut with respect to non-contractual obligations in the absence of the fall-back positions set out under the Regulations.

Beyond Brexit – Frexit? Nexit?

The prospect of other Member States withdrawing from the EU is receding, but it is possible that Brexit is only the beginning. If other Member States decide to negotiate their own withdrawal the same issues identified above may apply to any contracts entered into which involve parties based in those Member States and across the EU. How can you mitigate against this risk in your contract?

Don't enter into contracts blindly. The likelihood of further withdrawals from the EU currently appears unlikely; however, when entering into contracts with entities from different EU Member States, you should consider the current political atmosphere. You should evaluate whether or not the issues and solutions identified in this article should also be applied to your contract negotiations prior to entering into the agreement.

Conclusions

During this period of uncertainty, achieving an appropriate level of contractual flexibility is paramount. While this will take some consideration, there are several themes you should recognise and adopt to ensure that you can make Brexit work for you.

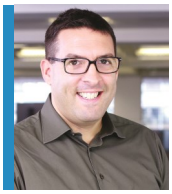
Review your contract terms carefully. Consider whether there are any references to EU law (for example, the Acquired Rights Directive), or even to UK law implementing EU Directives (for example, TUPE) and the issues which may arise if these legal principles cease to be binding post-Brexit. Note that pre-existing law arising from judgments from the Court of Justice of the EU and their status in the UK law post-Brexit remains unsettled (especially where it issues judgments post-Brexit on EU laws that remain in effect within the UK) also cease to be binding in the UK following Brexit. Examples of this are the Halifax Abuse Principle (cited within the CCS Model Services Agreement), or the current "right to be forgotten" which can be enforced by data subjects against internet service.

Consider flexibility. Many aspects of Brexit remain uncertain both as to impact and timing. Who should bear the additional cost of compliance? Whether you want to keep a contract flexible in recognition of the uncertainty, or to tie counter-parties down to clear commitments that will survive in all cases, will depend on your circumstances. But the robustness of existing contracts, and the appropriate framework for future contracts, needs to be assessed (and in some cases re-assessed as Brexit progresses) in order to ensure that disruption is kept to a minimum, and foreseeable problems are duly anticipated and provided for in the contract terms.

Ultimately, price in these uncertainties, or ensure that your contract is flexible enough to permit early termination if necessary. You should ensure that these risks are reflected in the terms and price of your contracts, and/or that your contracts are flexible enough to permit termination following Brexit if required.

Finally, consider your use of the concept of the EU. If there are any references within your contracts to the EU as a description (for example, within territorial licencing arrangements and distribution agreements), consider the merits of listing the relevant territories, rather than using this (seemingly unstable) collective term.

Contacts



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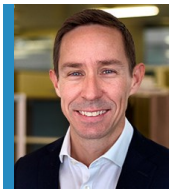

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