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BREXIT 2019
EXPERT GUIDE

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Mitigating Risk: Are your commercial contracts Brexit ready?

By Victoria Hobbs & Louise Lanzkron

At the time of writing, it is still unclear when the UK will leave the EU. This political uncertainty has left businesses, which trade with the UK and the EU, unable to plan for their future with any confidence. Negotiating commercial agreements during times of political uncertainty can give rise to new challenges and it is important to understand what these are and how to mitigate the risks that may be associated with them.

In this article, we consider some of the standard 'boilerplate' clauses usually found in any contract and how Brexit may affect their operation due to the legal changes it will give rise to. We outline the most common risks Brexit may pose when negotiating future contracts or re-negotiating existing ones and how to minimise those risks where possible. Please note that the nature of the risk will depend on the type of contract involved and whether or not the UK leaves the EU with or without a negotiated deal. As always, we suggest you take specific legal advice on the transaction you are entering into.

Standard clauses and Brexit

Brexit is affecting the negotiation and drafting of commercial contracts in a number of ways. Standard provisions to reconsider may include clauses dealing with territory, payment provisions, movement of people and intellectual property rights. For example, do any of your existing agreements have the EU as their defined territorial scope? Whether the UK remains within the EU, and for what period of time, depends on whether the UK parliament ratifies the existing withdrawal agreement negotiated between the UK government and the EU, or whether the UK leaves without a negotiated deal. Payment provisions may be subject to currency fluctuations, and therefore it could be worth considering whether financial amounts should be paid in a third currency, such as the $US. Goods may also become subject to tariff charges where previously they had enjoyed free movement, who will bear the costs of such additional charges?

Boilerplate Provisions

Boilerplate clauses are usually placed at the end of a contract and often the parties do not take time to read them properly assuming they are 'standard' and not particularly important. However, if poorly drafted, these clauses can have a very significant effect on both the outcome of any subsequent dispute and also on the process and costs incurred in seeking to resolve the same. They should be carefully considered and adapted to ensure they are relevant and appropriate. We examine a few of these clauses in more detail below.

Force Majeure

When negotiating future contracts, parties should consider the drafting of a *force majeure* clause. A *force majeure* clause generally operates to halt one or both parties from performance of a particular contractual obligation following the occurrence of certain events that are beyond a party's control. The clause will only be triggered if the event prevents, hinders, or delays a party performing its obligations and the event must be the sole cause of the failure to perform the obligation. It is possible to draft a clause so that it triggers on Brexit, however, English case law has clarified that economic hardship is not a sufficient trigger, so any drafting needs to ensure that the trigger will point to some other event.

Governing Law

The law governing the contract should be expressly stipulated to avoid wasting time and money on initial determination, or potential satellite litigation, concerning the question of which "default" governing law applies. The clause goes to the heart of the validity and interpretation of all of the other terms contained within the contract. Being clear on your choice of governing law provides certainty and clarity (as far as is possible) to the terms that have been agreed. English law is widely adopted as a suitable law to govern international contractual arrangements and this will not change on Brexit as the courts of remaining EU member states will have to recognise the validity of English governing law clauses. Further, the UK parliament has approved legislation incorporating the rules in this area into UK law on 'exit day', the day the UK leaves the EU. As a result, there is no need to change from English governing law to the governing law of a different EU Member State.

Jurisdiction and Enforcement

A poorly drafted jurisdiction clause (i.e. a clause which stipulates which courts will decide any disputes) can also create unnecessary and costly satellite litigation. In addition, failing to select an appropriate jurisdiction can open the door for parties to seek to start proceedings anywhere in the world, at which point you could be at the mercy of unpredictable local courts and their own rules of private international law.

Following Brexit, *exclusive* jurisdiction clauses in favour of the English courts should be upheld by both the English courts and the courts of EU Member States because the UK will accede to the Hague Convention on Choice of Court Agreements 2005 (the "Hague Convention"). In situations where parties do not have an *exclusive* jurisdiction clause in their contract they will need to rely on the national law of the relevant EU member state or jurisdiction within the UK.

Specifying the "wrong" jurisdiction in a contract may lead to problems with enforcing a court judgment if you are the successful party. Parties should consider where their counterparty's assets are located. If they are in an EU Member State an *exclusive* jurisdiction clause in favour of the English courts will mean that, as a result of the UK's accession to the Hague Convention, the party should be able to enforce a judgment of an English court in the courts of an EU Member State and vice a versa. This will not be the case in situations where the parties do not have the benefit of an *exclusive* jurisdiction clause.

Notice provisions

If your counter-party is based in another jurisdiction you may want to tailor the notice provisions to nominate a process server in England to enable you to serve English court proceedings on them. This is particularly important as following Brexit the current rules on service will no longer apply and therefore, by nominating an agent to accept service for both parties any litigation procedure will proceed more quickly and smoothly and will be less costly.

Dispute Resolution

Considering any potential issues from the outset can help to prevent a commercial relationship from souring later down the line. It can be prudent for parties to put in place dispute resolution structures tailored to the specific nature of the commercial arrangement, which may help to lessen the effects of any future disagreement, ensuring that a commercial partnership continues and both sides benefit from the relationship.

Depending on whether you are more likely to sue than be sued you may wish to consider arbitration as a preferred dispute resolution mechanism because arbitration will not be affected by Brexit, provided that your dispute is suitable for resolution using this process.

Are your commercial contracts Brexit ready – a contractual audit

Whilst the date of Brexit is still unknown, it is prudent to minimise any potential threats to your business that Brexit may produce. One way to do this is to carry out an audit of your existing contracts to identify those that will be affected by Brexit; for better or worse.

If the audit highlights areas of concern, now may be the time to open discussions with your counter-party to try and reduce any potential risks that the contract as a whole or individual clauses may raise. Likewise, existing standard form contracts used in your business (such as terms and conditions of sale) may also require re-consideration to ensure that future contracts are Brexit ready.