Have you Brexit-proofed your contracts?

10th October 2019
Agenda

1. **How** could Brexit affect the ability of businesses to perform their contractual obligations?

2. **Which** contractual provisions will help establish how risk will be attributed?

3. **What** contractual provisions can help “Brexit-proof” contracts?

4. Questions and Answers
Introduction

Unlikely to have an impact on contract law

Significant impact on contractual obligations and cost of performance
Commercial Issues
**Customs Clearance**
- Who is responsible?
- Delays at customs – impact on service levels?
- Incoterms?

**Tariffs**
- Who pays tariffs?
- Additional / increased tariffs after Brexit?
- Incoterms?

**Currency**
- Applicable currency?
- Risk in change in exchange rates?
- Fixed pricing or mechanism to vary?
Supply Chain
- Will suppliers/subcontractors be affected?
- How robust are subcontracts?
- Can costs be passed down the chain?

Business Change
- What is the business’ overall plan for Brexit?
- Relocation/reallocation of operations?
- Contract changes or costs implications?

Data Protection
- Data transfers? EU/EEA? International?
- Standard contractual clauses?
- Adequacy decision?
Resource
- Risk of labour shortages? Immigration?
- Delays/difficulty in meeting service levels?
- Increase in labour costs?

Licensing / Standards
- Business and/or personnel?
- Licences, schemes, approval arrangements, recognition, benefits, access to funding?

Interpretation
- References to “EU Law”?
- “Territory”?
- How will EU be defined post-Brexit?
Existing Provisions
Term

- Will the contract still be in force on 31st October 2019 / 31st January 2020?

- Could the contract be extended (unilaterally)?
Termination

• Termination due to Brexit / events caused by Brexit?

• Termination for convenience?

• What period of notice?

• Prospect of termination can lead to negotiation.
Flexibility

- Termination on short notice?
- Long term supply / service?
- Minimum purchase commitments vs. “at will” arrangement?
Force Majeure

• “Circumstances beyond a party’s reasonable control”.

• Change in economic conditions affecting profitability or ease of performance is not enough.

• Explicit reference to Brexit or certain events arising from Brexit.
Hardship

• Who bears the burden of increases in costs of supply etc.?

• Triggers?

• Changes via an agreed mechanism or negotiation?
Compliance with Laws

- Express obligation?
- “As at time of contract” or “as amended from time to time”?
- Change in law provisions?
Do Incoterms apply to your contract? Who is responsible for import / export?

- **Ex Works** – Customer: both
- **FCA, FOB, CIF (etc.)** – Supplier: export, Customer: import
- **DDP** – Supplier: both
Position at Law
Frustration

An event which transforms contractual obligations into something radically different or makes it physically / commercially **impossible** to fulfil the contract.

**Narrow interpretation** – foreseeable? Merely inconvenient or more costly?

**Unlikely to assist** except in relation to the knock-on effects of Brexit.
Interpretation / Implied Terms

Courts are reluctant to imply terms.

Interpretation should have regard to common sense but will not depart from the meaning of the contract.

Was/should Brexit have been in the minds of the parties at the time the contract was entered into?
Options
Option 1: Do Nothing

• Still under a duty to comply with obligations

• Could lead to breach, termination for default and an action for damages

• However:
  • Brexit may not affect obligations / cost of performance
  • contract already caters for Brexit
  • risks of inserting a Brexit clause (etc.) may be greater
  • short term contract
  • right to terminate for convenience on short notice
Option 2: Brexit Clause

- Triggers a change in the contract as a result of a specific event occurring

- Where specific Brexit risks are known, a Brexit clause may state that when such risks arise there will be a specific consequence ("Specified Event Brexit Clause")

- Where Brexit risks are unknown, a Brexit clause may prompt the parties to negotiate changes and, if an agreement cannot be reached, terminate ("Renegotiation Brexit Clause")
## Specified Event Brexit Clause

<table>
<thead>
<tr>
<th>1. Trigger</th>
<th>2. Outcome</th>
<th>3. Risk</th>
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| A specific event occurs due to Brexit, for example:  
  • Fluctuation in exchange rate  
  • Imposition of additional duties  
  • Increase in cost of performance  
  • Increase in tariffs  
  • Delays due to customs clearance | Specific outcome depending on nature of trigger, most likely:  
  • Price adjustment based on an agreed mechanism  
  • One party bears the cost of that trigger | Brexit affects the contract in a different way to that which is anticipated, for which there is no provision |
# Renegotiation Brexit Clause

<table>
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</thead>
<tbody>
<tr>
<td>Brexit occurs</td>
<td>Affected party requests changes</td>
<td>Unaffected party has to accept less favourable terms or termination</td>
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<tr>
<td>However, the parties may wish to specify:</td>
<td>Parties negotiate changes to the contract</td>
<td>Trigger could be too broad/narrow</td>
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<tr>
<td>• what type of Brexit (e.g. “no deal”)</td>
<td>If changes cannot be agreed within a set timescale, the affected party may terminate the contract</td>
<td>Uncertainty as to whether the contract will continue</td>
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What steps can you take to prepare for Brexit?

• Audit your contracts

• Identify, assess and quantify the risks posed to your business by Brexit (or the consequences of Brexit)

• Consider whether you need to insert Brexit clauses or make other variations to your contracts

• Monitor any changes to laws and/or regulations caused by Brexit
Any Questions?

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