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The UK electorate has voted to leave the EU - a decision that has many implications for commercial contracts. Like other supervening events, it is unlikely that Brexit was contemplated by the parties when negotiating and documenting many current commercial deals.

Yet this potential new political landscape, which will bring inevitable (but currently unknown) changes in underlying law, and commercial positioning between contractual parties could, in certain circumstances, affect the intended obligations, bargain, or even call into question the entire purpose of the contract itself.

In this section we examine the likely touch-points for commercial contracts and recommend simple steps which commercial entities should take to prepare.

Following the decision to withdraw from the EU, the Article 50 notice mechanism of the Treaty of the European Union will create a period of at least two years of uncertainty as the notice period slowly expires. During that time a huge amount of negotiation will occur to agree and details the terms of withdrawal; particularly as they relate to trade between Britain and the EU going forward. Many commentators believe that finalizing these terms within the two years is ambitious.

So how to prepare for such uncertainty? As with any divestment, companies need to undertake proactive due diligence on their commercial landscape. Starting with identification of their [most] key contracts (those most important to the business and with a significant time yet to run) companies should develop an analysis template covering some or all of the following:-

Change in law

Many contracts refer, to a greater or lesser extent (depending on value and complexity) to a raft of EU legislation. It is normal for both TUPE (domestic law) and ARD (its EU source legislation) to be referenced in an outsourcing. Most technology and commercial contracts involve data; recently we have seen seismic changes in the field of data protection with the agreement of the new GDPR, further complicated by the new Privacy Shield replacement of the now defunct Safe Harbor structure for EU - US data transfers. Other regulations are sector dependant, be that aviation, financial services (such as MiFID and the PSD), pharmaceuticals or procurement in the public sector.

Analysis of the clauses dealing with law, compliance with law and changes to law will be essential. Not only that, companies should re-examine their precedents to understand how any emerging new picture will affect their commercial relationships. Suppliers may, for example, wish to become more familiar with the civil law concepts of 'hardship' in France, Germany and Spain and seek to emulate the structure whereby a change in the underlying cost of providing the contracted service may, in certain circumstances, allow them to force their customer to negotiate a change.

Complying with new law comes at a cost. There is potential for a fair degree of change in terms of what laws are applicable and potential backlash from the UK to simplify red tape; conversely, the government might seek to ensure relative stability and some harmonization with EU even where this is no longer mandatory. Either way, particularly during any period of uncertainly, the costs of compliance with law will be under the spotlight in future commercial negotiations as counterparties seek to agree who has responsibility for monitoring compliance and who needs to pick up the costs to ensure the service, goods or solution is compliant with any new regime.

Jurisdiction

All commercial contracts should specify the applicable law to their interpretation, and also the venue for disputes (which may be specified to be on an exclusive or non-exclusive basis). Various international treaties sit underneath these contractual arrangements. The Rome I Regulation (2008) establishes the applicable law for contract terms, Rome 2 deals with non-contractual obligations and the Brussels Regulation (in its latest incarnation as the 2012

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Brussels Regulation (recast)) deals with questions of jurisdiction and recognition and enforcement of judgments. There will be uncertainty as to the application of these regulations in the event of a Brexit. Where a commercial contract specifies the laws of England and Wales and the jurisdiction of the English courts it is to be hoped that (if clearly drafted) the clauses should require no interpretation by a court and therefore be upheld and binding on the parties but parallel proceedings commenced in other jurisdictions may become more likely. It is also unclear what conflict of laws rules will be applied if Britain moves outside the EU regime. It will be interesting to see how the courts interpret 'English law' once the connection to European-derived law is broken. Arbitration may become more attractive where the enforcement of court judgments is a concern.

Additionally, whilst there seems no reason for Britain to seek to use Brexit to change its position in terms of global trade, there will no doubt be debate as to the continuing applicability of the UN Convention on Contracts for International Trade (established by UNCITRAL) and the various agreements established by the WTO.

Payment terms

The core value and bargain underpinning a commercial contract may be impacted by foreign exchange and currency Issues. If the contract value and invoicing provisions are pegged to the Euro or the Pound and the services themselves involve global delivery from different countries, then one can imagine wild swings in the currency markets following Brexit. In the same way as we saw with Grexit, parties may wish to include clauses to re-price or switch currency if the currency applicable to the contract crosses certain thresholds. In certain circumstances this could be anticipated as a trigger for termination. In addition, where contracts are people-heavy in terms of delivery, changes to the free movement of people could impact a party's ability to staff certain locations. This in turn could impact visa applications, import/export tariffs and taken together could change the underlying economics of the contract.

Performance, frustration and force majeure

Could Brexit fundamentally frustrate the purpose of a contract? If so, could it render performance impossible and cause the contract to be set aside? That seems unlikely save in the most grave and clear cut circumstances. The doctrine of frustration has been consistently applied narrowly by the courts and is certainly not triggered by a contract becoming considerably more difficult and/or expensive to fulfil. It is not outwith contemplation however that one or more of the consequences of Brexit could be caught by the drafting of a 'normal' force majeure clause, particularly if it is drafted to as to include reference to acts of government or regulatory body. Contracts will need to be checked for the definition and effect of a force majeure event (and any contractual requirement for the affected party to try and work around them) as in some cases this can be a trigger for termination.

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