

PREPARING FOR AN IMMINENT BREXIT: POTENTIAL DISPUTES UNDER COMMERCIAL CONTRACTS

Brexit is now imminent, and with it will come the potential for problems under existing contracts. Companies must explore in advance the risks they face, what their options are, and what choices they should make.

We have been discussing with clients for many months, even years, the due diligence that is needed on their contracts in preparation for Brexit, the key contractual provisions, and the possible strategies for dealing with the issues that emerged. Those discussions have, however, taken place against a background of Brexit seeming a long time away, and with no certainty as to what form Brexit would take to guide the choice of remedial steps.

The uncertainty over Brexit has not abated, but Brexit is now barely eight weeks away. The date of Brexit could still be put back (though the Government appears resolutely opposed to this) or there could be a transitional period (though the House of Commons voted resoundingly against the Withdrawal Agreement that provided for this, and the EU has said that changes that might result in the Agreement's approval will not be made), but companies nonetheless need to plan for Brexit as best they can. The law as it stands is clear: failing any intervening action, Brexit will occur at 11pm on Friday 29 March 2019 and it will be a hard Brexit. Businesses must therefore plan for that possibility, even if they hope that a deal, or at least delay, will emerge before that date. Directors are obliged to use reasonable skill, care and diligence to ensure that their companies are prepared for the challenges that Brexit might bring.

Due diligence remains important, but the passage of time means that other issues now also come to the fore, particularly for those contracts which straddle Brexit, but which have not been adjusted to cope with the strains that Brexit might impose.

What rights and obligations will the company have if performance is affected by Brexit? This applies to contracts both for the supply of goods and services to the company and by the company – counterparties will be addressing these matters too. And even if, for example, a UK company buys goods from a UK supplier, the contract may still be affected by Brexit if the ultimate source of those goods or component parts is the EU. Similar concerns will arise between EU counterparties, where the goods or their components originate in the UK.

The contractual provisions that are relevant will depend upon the nature of the contract and the potential impact of Brexit on performance of the parties'

Key issues

- The default position is that Brexit will occur on 29 March 2019 and that it will be hard
- Despite the continuing uncertainties, companies must plan as best they can for Brexit
- That includes looking at the contracts under which they supply and are supplied with goods and services
- How does the contract address potential problems? What steps need to be taken? How can a dispute best be managed?

obligations. Contracts for the supply of services – whether financial, technological or something else – will pose different issues from contracts involving goods. For example, goods may be held up at the Channel ports; services may be affected by illegality if a licence to perform a service ceases to be valid and cannot be renewed; but force majeure, exclusion and termination clauses may be relevant to any type of contract.

We set out overleaf some of the issues that could arise on Brexit and what contractual clauses will be relevant as a matter of English law. No one knows exactly what Brexit will bring, but most companies we talk to have been preparing for the various possibilities. As Brexit and the risk of disputes with counterparties near, careful consideration is required in order to optimise, or at least to avoid prejudicing, your company's position.

If you are unsure and would like advice, please get in touch with your usual contact at Clifford Chance or any of the individuals named below.

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Potential Brexit issues

- **Price** Could there be a tariff? If so, who is obliged to pay it? This might be covered expressly or by a general clause dealing with tax. It could be affected by the delivery location: if delivery is to your factory gate, the costs of getting the product there might lie on the supplier; but if delivery is at the supplier's factory gate, the costs of cross-border movement might lie on you.
- **Delays** What is the time for delivery, and what are the consequences of delay? Is time of the essence such that a delay in delivery will allow the immediate termination of the contract?
- **Certifications** Does an item have to be certified as meeting an official standard? Who is responsible for obtaining the certification? Is an existing certification still valid? What happens if the certification is not valid or cannot be obtained? Is an export or import licence required and, if so, who is obliged to obtain it?
- **Legality** Is performance legal in the place where performance is required (eg has one party's "passport" or licence lapsed because of Brexit)? Can relevant data be transferred? Does the contract allow the place of performance (eg the bank account to which payments must be made) to be changed to a location where it is legal?
- **Force majeure** Is there a force majeure clause, a material adverse change clause or another similar clause that could apply and that would affect the parties' obligations? Does it merely postpone the obligation or does it absolve a party from its obligations altogether?
- **Exclusion of liability** Does the contract exclude or limit liability in the event of breach? Will the company be able to recover (or be obliged to pay) for all the consequences of breach?
- **Termination** When does the contract allow termination? What notices are required, and what is payable as a result of termination?
- **Frustration** Ultimately, is the impact of Brexit so severe that the contract is frustrated, ie events occur that could not reasonably have been contemplated at the time the contract was entered into and so significantly change the nature of the outstanding obligations (not just the cost) that the parties cannot be held to their obligations? Frustration has a very high bar, but the consequence of a frustrating event is automatically to terminate a contract.
- **Managing problems** Reviewing a contract with these issues in mind will give an indication as to where problems might arise for either or both parties. This could be either because the contract is clear and unfavourable to one party, or because it is unclear and susceptible to more than one interpretation.

Once a potential problem is identified, it will be necessary to consider how it should be dealt with and when. For example, is it feasible despite the shortage of time to try to renegotiate and, if so, on what terms? Alternatively, would it be preferable for one or both parties to terminate, either using a contractual right to do so (if applicable), or on grounds of contractual breach or even frustration. The law in relation to termination is complex and full of potential pitfalls – do the grounds for termination apply in this situation, has the correct notice been served within the correct time, is the conduct relied on as a breach a sufficiently serious breach to warrant termination, is the terminating party itself also in breach?

If real problems do arise, avoid prejudicing the underlying position when trying to sort them out. So, for example, attempts to resolve any issues should (until final resolution) be made without prejudice to the underlying rights. Even discussions as to contractual changes should be without prejudice if the contract might, before amendment, provide what you want in any event, but does an attempt to negotiate in practice admit doubt about how the contract should work? Even if the right decision is to wait and see how a counterparty reacts after Brexit, consideration should be given to what your alternatives are and how your company would respond.