



No-deal Brexit: Impact on long-term commercial contracts

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While a range of outcomes, including a departure under the terms of the current Withdrawal Agreement, remains possible, it is important for businesses to plan for a no-deal Brexit, in which the UK leaves the EU without a withdrawal agreement or other deal. Here we look at the potential impact of a no-deal Brexit on long-term commercial contracts.

From the uncertainty over what will happen it may appear that there are too many risks to consider. Our key advice is to understand what contracts you have and how they might be impacted by the different scenarios. We have seen businesses gathering information on their key contracts, and in particular those that are impacted by cross-border trade. They are gathering information on matters such as:

- What happens if there is a change in law - does the contract allow either party to vary/insist on the price?
- Is the price fixed or can it be adjusted to take account of currency or inflationary pressures?
- What does the force majeure clause say (if there is one?) - can a supplier be excused from performance if goods are held at the border?
- Should I include a clause to facilitate discussions between the parties if the contract is not viable - having a litigation claim is one matter but long-term objectives means it is probably better to ensure both parties are treated fairly.
- Which staff are used to fulfil a contract? Will they still be available? Does the contract seek to stop staff changes?
- Which law/courts regulate the contract - what will happen if the mutual recognition currently enjoyed within Europe is lost? Is it better to consider arbitration (but there may be other reasons which count against this, such as the potential cost of an arbitration decision)?

Businesses should as a matter of priority audit their contracts to assess these and a number of other issues (more details of which are set out below). Our dedicated commercial contracts team is very experienced in spotting these issues and helping clients work through them to make practical decisions.

We are able to deploy artificial intelligence software to electronically read multiple contracts and work alongside our lawyers to pick out and advise on key issues. This can be done for a select few major contracts or can be spread further depending on the level of concern. Our pan-global team has strength and depth and allows us to support you on decisions with advice from around the world so that all angles are considered.

Further detail on some of the key issues is set out below:

- **Change of law risk:** In practice, the UK's legal environment may not alter dramatically immediately after Brexit; the end of the transition period which follows Brexit may be the more significant date. However, the

potential for change must be factored into current negotiations, with some contracts higher risk than others. Risk can be borne by one party or shared in a more collaborative way. Established contractual mechanisms can deal with either scenario.

- **Currency risk and tariffs:** Exchange rate risk is topical but not new. The possibility of new tariffs, country rules of origin certificates, product standard checks and other customs procedures introduce uncertainty into some relationships but is contractually straightforward to anticipate.
- **Commercial viability:** In some circumstances, Brexit could make a particular contract economically unviable for one party. Parties can agree in advance that, should this happen, certain contractual obligations/rights will be triggered. These could range from a mere obligation to meet and discuss, to repricing or even the ability to terminate.
- **Corporate reorganisation:** the contract might need the flexibility to accommodate any future reorganisation of one party to ensure that certain functions stay within the EU. Options include the ability to transfer the contract as a whole (say, to an affiliate) and flexibility around customer geographies and volumes of supply.
- **Data:** The General Data Protection Regulation was introduced in May 2018. Post-Brexit, the UK's regulator and prime minister are seeking equivalent UK laws to provide the legal "adequacy" needed to support the transfer of data to the UK from the EU. Any business which processes data about individuals in the context of selling goods or services to citizens in member states will need to comply with the GDPR irrespective of the UK's legal position.
- **Staff transfer:** Many outsourcings are based on the understanding that TUPE will apply to transfer staff in the event of a business change. If the UK remains in the EEA the scope for change is limited. Full exit from the EU, no EEA membership and no trade agreements, would technically allow amendment/repeal of TUPE but is considered unlikely. A sensible approach is to assume that staff transfer mechanisms will continue but nevertheless consider the possibility that TUPE may not apply in future years. It may become common to see contractual obligations designed to effect staff transfer and apportion redundancy costs in this eventuality.
- **Force majeure and frustration:** The potential for successful legal arguments founded in "force majeure" (contract relief and/or termination because of unforeseen events) or "frustration" (termination because of impossibility of performance) is overstated by some commentators. However going forward, it is sensible to review precisely what constitutes a force majeure event. Cautious parties could expressly carve out any Brexit related circumstances.
- **Cross border enforcement of judgments:** Post-Brexit it may become more difficult to enforce an English court judgment in the EU (and vice versa). However, it is hoped that some form of UK/EU harmonised system will be agreed to cover enforcement, jurisdiction and governing law. Without this, the courts of member states will apply their own laws when determining questions of enforcement although the Hague Convention may assist matters of jurisdiction and the EU's Rome I and Rome II will remain in force, converted into domestic law in the UK. This risk is only of concern for contracts where cross-border enforcement might be needed. Choosing arbitration, rather than court proceedings, negates this risk (though is not appropriate in every case). For more information see Brexit: Impact on Dispute Resolution.

For more detailed analysis of the issues, please contact the authors or your usual DLA Piper contact.

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