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## **Brexit, eight points businesses should consider for commercial contracts - Browne Jacobson**

As has been frequently observed in the aftermath of the referendum, we are in unprecedented territory constitutionally, politically, and economically. The issues on the table are so profound and numerous that predicting what the business and legislative landscape of a post-Brexit UK will look like is difficult at this stage. For the time being, nothing changes legally, the UK remains a member of the EU and subject to EU law, but, without question, the business environment has been transformed, and legislative change is on its way.

What is clear at this stage is that businesses operating in the UK need to adapt quickly to the new environment of radical uncertainty. Received assessments of risk may no longer apply and current models of commercial contracting need to be re-evaluated to ensure that they remain fit for purpose. In this context it is prudent to keep your commercial arrangements under review to ensure that they are as flexible as possible, and that appropriate contingencies and mitigations are built in insofar as possible in order to address the possible negative impacts of Brexit.

Here are some practical suggestions as to some immediate steps businesses might take in relation to their general commercial contracts.

### **1. Review your commercial contracts**

It is important for businesses operating the UK to consider their existing agreements and contractual templates and identify any areas of material risk in the light of the Brexit vote.

The results of such an exercise may include the identification of categories of existing contracts that require renegotiation (and an assessment of what is possible legally/commercially on that front) and the amendment of commercial contract templates to provide for the risks of the new business environment we find ourselves in.

Potential high risk arrangements that it would be sensible to review include international contracts entailing currency exposure, pan-European licensing arrangements, material financing arrangements, long term international supply or service arrangements, contracts predicated on access to the single market (for example, in financial services, the ability to passport within the EU) etc.

Some of the basic issues that such a review should take into account are set out in the following paragraphs.

### **2. Currency risk**

Exchange rate volatility appears to be a feature of the new economic landscape, at least in the short run. The risk of further sharp depreciation in the value of the pound appears to be significant. Such depreciation would result in material pricing increases in GBP for domestic businesses where such pricing is denominated in or calculated by reference to a foreign currency.

Businesses should consider whether their existing commercial agreements, and contractual templates, adequately provide for such exchange rate risks. Aside from the financial instruments that may be used to hedge such risks, there are numerous ways to allocate currency risk under a commercial contract. The position that is reached will largely depend upon the bargaining position of the parties. Potential approaches range from eliminating such risk for the domestic party by fixing all pricing in GBP, which is unlikely to be palatable to the counterparty, to providing that if the exchange rate falls outside a specified band then a party is granted the option to terminate the contract or impose some form of change in relation to it.

### **3. Risk of legislative change**

The potential for material legislative change in relation to organisations doing business in the UK needs to be recognised. In the current environment, the allocation of responsibility for the cost of adhering to such legislative changes in commercial arrangements needs to be carefully considered. A supplier may wish to provide for the possibility of adjusting pricing in the event that a cross border contract becomes more costly to perform as a result of changes in applicable law and regulation (for example if tariffs were imposed increasing the cost of performance). Similarly, a customer may wish to protect itself from legislative changes that impact the business case for the transaction it has entered into. Commonly, the allocation of risk in relation to such changes in circumstances is covered off in the change control provisions of an agreement and any associated pricing principles. These provisions will need to be given careful consideration going forward.

### **4. Drafting points**

UK law governed contracts now need to be drafted in a way that recognises that directly applicable EU legislation may cease to apply and certain domestic legislation derived from EU law may be repealed. As previously observed, the legal landscape in the short run remains the same. However, longer term agreements need to be future-proofed insofar as possible to recognise the potential for this kind of change. Such future-proofing may be addressed in contractual interpretation provisions, as well as in clauses and definitions where specific reference to EU legislation is made. Current contracts will need to be kept under review and change notes agreed where provisions reflecting specific EU legislation become obsolete.

Templates and existing agreements with territorial elements, such as IP licences and agency and franchising arrangements, will need to be reviewed to ensure that their scope remains appropriate in the light of Brexit. To give a basic example, if the territorial scope has been given as the EU, it is not clear whether this would cover the UK post-Brexit. Similar issues would arise in relation to references to the UK in the event that e.g. Scotland withdraws from the union.

### **5. Termination/force majeure**

In relation to future transactions, it may be appropriate to include an express termination provision linked to specific impacts of Brexit, or the exit of a particular country or region from the United Kingdom, depending upon the subject matter of the agreement. Specific termination triggers may also be included in relation to the impact of legislative change or changes in the commercial profile of the agreement e.g. due to currency fluctuations/cost of performance etc. Where appropriate,

force majeure clauses may be drafted to expressly recognise that issues connected with Brexit may constitute a force majeure event and allow relief from obligations under the contract or termination.

The termination and force majeure provisions of existing long term contracts are likely to come under significant scrutiny in the coming months and years, as their performance or commercial rationale is challenged by Brexit, and parties seek to renegotiate or terminate.

Assuming there is no express Brexit-related termination right in such contracts, we anticipate that parties will look to assess whether the particular circumstances of Brexit give rise to (i) a termination right within the meaning of the contract (ii) a force majeure event allowing relief from performance, and/or (iii) a common law right to discharge on the basis that the agreement is frustrated. This will depend upon the wording and circumstances of the contract and will need to be assessed on a case by case basis. Specific Brexit provisions are relatively uncommon, but other express termination rights may be argued to apply such as rights to terminate upon a material adverse change.

## **6. Solvency**

With the likely impact on the domestic and international economy, businesses need to consider more closely than ever issues around the solvency of their counterparties to material contracts. Due diligence on new counterparties to material contracts should be robust. Intercompany guarantees should be considered where appropriate, along with the usual termination rights for insolvency events.

## **7. Assignment and transfer**

It is likely that groups will be restructured as a result of Brexit and contracts will need to be assigned or novated between international affiliates as organisations adapt to the new environment. Where this is likely in respect of your own organisation, as much flexibility as possible should be sought in relation to assignment/novation of key contracts and licences.

## **8. Dispute resolution**

Current EU law provides the basis for the jurisdiction, governing law, and enforcement of all contractual and non-contractual disputes between parties within the EU. The arrangements in connection with this will inevitably change to some degree, which will depend upon the nature of the deal that is ultimately done between the UK and EU. From a drafting perspective, as usual, businesses should ensure their cross-border contracts are clear in their attribution of governing law and jurisdiction. Since the enforcement of arbitral awards within the EU should not be affected by Brexit, but the enforcement of UK court judgments may be, parties may find it preferable to agree to arbitration of disputes relating to their commercial contracts pending confirmation of how the new arrangements between the UK and EU will work.

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