The Business of Brexit

Implications for the commercial contract process

Virtual Round Table Series
Member Collaboration 2018

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Implications for the commercial contract process

The United Kingdom is due to leave the European Union (EU) on March 29th 2019, officially dissolving its membership after 25 years. During that time the EU has expanded considerably in complexity and geographical scope, heavily influencing the legal systems, economies and day-to-day activities of its member states.

Opposition to EU influence is evident in all member countries, but has been particularly influential in the UK. Arguments for and against the EU have raged back and forth across the UK Parliament for years, encompassing issues such as immigration, public services and the economy; but, in June 2016, a referendum on membership was granted to the UK people.

A decision was made to leave the union and a two-year transitional period was entered into, during which time negotiations on Britain's future relationship with the EU would be undertaken.

As we draw towards the end of that period, an agreement has still not been made and the negotiations continue with little sign of resolution. This has implications for almost every aspect of public and private life, but none more than trade and commerce, particularly the ongoing relationships between businesses operating across UK/European borders.

A crucial part of that relationship is the commercial contract, which governs everything from pricing to regulatory compliance; data protection to insolvency and dispute resolution.

Taking pricing as an example, an end to free trade between the UK and Europe is a distinct possibility if a deal is not reached. In the case of a 'hard' Brexit, new tariffs and taxes would be introduced on goods and services sold across the border. Existing contracts would need to be renegotiated to take account of the impact this would have on pricing, while new contracts would need to include clauses designed around this new variable.

In another possible development, non-compliance with European regulations might mean that certain UK products could no longer be sold in the EU – a good example of this would be the 'passporting' of some financial services. If a contract could no longer be fulfilled because of this, a dispute would arise and both parties would need to investigate whether existing Force Majeure clauses or Material Adverse Change clauses were sufficient to dissolve the contract without recourse to litigation or alternative dispute resolution (ADR).

If a dispute was unavoidable, the parties might not be able to rely on decisions handed down by the European Court of Justice (ECJ), since the UK may no longer be under its influence. As a result, choice of law clauses would be required, or a reliance on supra-national bodies such as the New York Convention for arbitral awards.

The key word here is uncertainty. Until the future relationship between the UK and Europe is known, all eventualities are possible, which makes the development of effective commercial contracts difficult. The following discussion calls on the contract expertise of 11 IR Global members, who give their views on the pertinent problems that commercial entities should be considering in the shadow of Brexit. They use their considerable experience drawn from jurisdictions across Europe and the USA to advise businesses on the full range of implications, and how to make their new and existing contracts Brexit-proof, regardless of the eventual outcome in 2019.

The View from IR

Thomas Wheeler

Founder

Our Virtual Series publications bring together a number of the network's members to discuss a different practice area-related topic. The participants share their expertise and offer a unique perspective from the jurisdiction they operate in.

This initiative highlights the emphasis we place on collaboration within the IR Global community and the need for effective knowledge sharing.

Each discussion features just one representative per jurisdiction, with the subject matter chosen by the steering committee of the relevant working group. The goal is to provide insight into challenges and opportunities identified by specialist practitioners.

We firmly believe the power of a global network comes from sharing ideas and expertise, enabling our members to better serve their clients' international needs.

SPAIN

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Sönke is partner responsible for the departments of competition law and commerce, intellectual and industrial property law, as well as economic international law at Grupo Gispert. He has more than 20 years of experience advising companies from the national and the international market.

Sönke was a partner of a leading law firm in the German-Spanish market in which he led the practice of Intellectual and Industrial Property, Competition and Information Technologies. He is Rechtsanwalt (German lawyer), graduated and member of the Bar Association of Hamburg and lawyer of the Barcelona's Bar Association.

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Dr. Lauri Railas, has a multi-dimensional experience from both private and public sectors including international organizations. He is the founder of Railas Attorneys which offers legal advice in international business law across areas such as contract law, international trade and transport, insurance and civil liability, IT, privacy, EU law, competition, public procurement, litigation and arbitration.

Dr. Railas holds a title of Docent at the University of Helsinki and has taught in several universities in Finland and abroad. He is a regular contributor of conferences organised by international organisations in a number of countries and holds training sessions especially in international trade law in local chambers of commerce and companies.

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Teresa N. Taylor is a partner at Akrivis Law Group, PLLC, in Washington, D.C. and Executive Partner of the firm's New York office.

Ms. Taylor defends individuals and corporations before federal courts, the Department of Justice, and other federal agencies involving alleged civil and criminal violations of U.S. sanctions, trade, and customs laws. She regularly represents clients before regulatory agencies, such as the Bureau of Industry and Security, concerning regulations stemming from the International Emergency Economic Powers Act (IEEPA), Trading With the Enemy Act (TWEA), USA Patriot Act, and other similar trade, sanctions, and customs regulations.

Ms. Taylor successfully represented Plaintiff, Epsilon Electronics, at the trial and appellate levels against the U.S. Department of the Treasury and the Office of Foreign Assets Control (OFAC), and her appellate briefs and oral argument before the U.S. District Court of Appeals for the District of Columbia resulted in effectively a groundbreaking reversal of the maximum egregious penalty imposed by OFAC against her client. Epsilon Elecs., Inc. v. U.S. Dep't of the Treasury, 857 F.3d 913, 920 (D.C. Cir. 2017)

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Anders Hedetoft is a partner at Holst, Advokater in Denmark. He holds a Master of Law from Copenhagen University and attended the Executive Board Programme at INSEAD in 2016.

He has in-depth experience and expertise in international contract drafting and in the handling of all corporate matters relating to the operation of an undertaking. He is widely experienced in national as well as cross-border M&A transactions and provides advice on the strategic, commercial and legal aspects relating to M&As.

Anders assist companies doing business around the world, ensuring compliance with the complex, numerous and constantly changing rules that affect their businesses and assist in litigation and dispute resolution before the ordinary Danish courts and arbitration tribunals.

Holst, Advokater is a full-service law firm encompassing the legal competencies required by large as well as small clients. At Holst, Advokater we meet and cater for our clients' individual needs and commercial interests.

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Paola Mariani is Partner in Pesce & Associati Law Firm in Milano and Professor of International Law and EU Law at Bocconi University.

She has more than twenty years' experience in providing assistance to companies based in Europe, especially in the German speaking countries (Germany, Austria and Switzerland), and outside operating cross border in Italy. She is also involved in assisting the Italian branches of multi-national groups for corporate operations and supporting executives to ensure the implementation of group policies in the Italian and EU legal framework.

She also has significant experience in providing legal assistance in customs and trade-related issues. Mrs. Mariani combines an effective legal professional experience with an academic career - expertise that enables her to bridge theory and practice in order to assess legal conflicts in business practice..

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Urs is managing partner at AQUAN Rechtsanwälte, forming the business after 15 years of legal practice in Düsseldorf.

He has more than a decade of experience working on complex M&A transactions, and, due to his dual qualification as a German lawyer (Rechtsanwalt) and English Solicitor, he is specialised in cross-border deals. He also has considerable expertise of company and group restructurings, and their tax consequences as well as in insolvency matters.

Among his domestic and international clients are family-owned businesses, private equity firms, and family offices. He also advises foreign companies on inbound investments into Germany. He became a Certified M&A advisor in Chicago in 2016.

Urs is married and the father of two children. In his spare time, he likes to cook, surf and scuba dive. He plays golf when time allows it, and also visits the opera. Urs is an active member of the WWF (World Wide Fund for Nature).

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William is a partner in RSM Malta specialising in business advisory and risk management services. He has extensive experience in servicing local and international clients across a wide range of industry sectors, and an all-round grasp and knowledge of commercial affairs in Malta. He is routinely involved in raising finance for clients, advising on corporate structures, corporate finance and on the preparation of business plans and business valuations, mergers and acquisitions, investment appraisals and feasibility studies. He is also the partner responsible for risk management services where he manages assignments relating to risk management and internal audit.

William is a Certified Public Accountant and a registered auditor. He is the current President of the Malta Institute of Accountants. William is a member of the Accountancy Europe SMP Forum and a member of the IFAC (International Federation of Accountants) Small and Medium Practices (SMP) Committee.

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Robert is a partner and Head of the corporate and commercial team, with over 20 years' legal experience.

He has particular expertise in corporate and commercial transactions in the technology, motorsport and brand distribution industries. He has also served as a non-executive director, providing advice on legal issues.

Prior to joining Blaser Mills Law, Robert worked at a number of leading UK law firms, before latterly establishing Cain Law, a niche corporate and commercial firm based in Silverstone. During his career, Robert has formed strong foundations with heavy-weight City and global law firms.

Robert has previously given talks on a vast number of subjects in several locations around the world, including to Californian State Bar at their annual convention in Monterey and at the Professional Motorsport World Exhibition in Cologne.

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His specialist practice areas include corporate and commercial law, corporate finance, banking and financial market law, mergers and acquisitions, litigation and arbitration and mediation.

He has contributed to a number of publications, including the Basel Commentary on the Swiss Code of Civil Procedure, Basel 2013, and the IBA e-book of Mediation Techniques, London 2010 (Patricia Barclay, ed.), Confidentiality in Mediation - the Civil Law Tradition.

Other contributions include the titles Cash Management under Swiss Law, French Association of Cash Managers (AFTE) 2003, and A Technical Guide on Centralized Cash Management in Europe, published by the European Association of Corporate Treasurers (EACT) (Co-Author), Paris September 2004.

He is a member of the Zurich Bar Association, the Swiss Bar Association and the Swiss Arbitration Association (ASA). He speaks German, English and French.

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John Wolfs, is a thoroughbred entrepreneur and founder of Wolfs Advocaten. He worked as an attorney for almost 25 years for leading firms in Washington DC and Rotterdam, before founding Wolfs Advocaten in Maastricht 14 years ago.

The strategic geographical situation of the city of Maastricht as well as his Maastricht roots, brought him back to the city.

John is well known for his creativity, specialist (sector) knowledge and the top quality service he provides. He is direct, proactive, construc¬tive and able to analyse situations quickly. He is also pragmatic. John Wolfs often lectures in the field of (international) transport and customs law, (international) commercial law and insur¬ance law.

In his private time, John enjoys playing squash and running. He has completed marathons in New York, San Francisco and Amsterdam.

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Nico Ooyevaar has practiced international trade and customs law since 1980. First as a lawyer for Dutch customs based at Amsterdam Airport, then in private practice at KPMG's Dutch tax law firm, where he founded KPMG's Global Trade and Customs Practice. Since 2006 he has been lead partner and principal lawyer of McMan & Co, a niche firm of specialised trade and customs lawyers and advisors, in its Dutch office at Amsterdam Airport, less than 300 metres from his first office.

His practice includes all phases of trade and customs law, including EU indirect taxes levied at import or export, like excises duties and Value Added Tax. His work ranges from counselling and import planning, to representation of clients before government agencies in the Netherlands and other EU member states, including the European Commission, as well as international organisations like the World Customs Organi-zation and the World Trade Organization.

Nico also regularly represents clients before the Dutch courts and the Court of Justice of the EU in Luxembourg.

How will Brexit affect the legal framework governing commercial contracts between UK and European parties in your opinion?

England – Robert Cain (RC) I think we need to be conscious of critical time lines here. One of those is the end of the transitional period, because, up until then, we will see the UK complying with EU laws such as the Rome I and II Regulations*.

That said, there is always a strong convergence anyway between European countries, and I don't see a massive movement away from how the applicable law is already used in contracts between the UK and other member states of the EU. Equally, I would expect there to be similar issues surrounding the ultimate enforcement of decisions about jurisdiction and applicable law that already arise within the current framework.

The problem we could face, which will be trickier, involves the ultimate status of a decision of the European Court of Justice (ECJ), because the Supreme Court of England and Wales will not consider itself bound by a decision of the ECJ.

Contracts between UK and the EU parties may move to an interesting place, similar to the US, where we often resort to the New York Convention on arbitral awards. This affects more than just Rome I and Rome II, so I can see an element of arbitration and alternative dispute resolution (ADR) creeping in - more than it does now if it is seen to reduce the potential cost and avoid the issues we already have within the union, around choosing the appropriate law for the contract.

I do see trouble around the ECJ's ongoing power.

Germany – Urs Breitsprecher (UB) I am not quite so sure that Brexit will be as smooth as Robert says, because I have already experienced situations where European judgments are not enforced in the UK, and I think this will be more so after Brexit, since Rome I and Rome II won't apply. I think we will have significant problems enforcing judgments, so I would try to have some arbitration clauses in contracts between UK and EU parties. All EU member countries are party to the New York Convention, so this will be enforceable. It is then a question of what law will be applicable if referenced to European standards.

I see a hard Brexit coming and so I am worried that we don't know what EU laws the British will adopt and which they will leave.

Switzerland – Peter Ruggle (PR) I advise two related exercises. The first involves reviewing existing client contracts, or at least those that may still apply beyond Brexit. Secondly, businesses should amend their standard terms of business and their approach to future bespoke contracts, to ensure that their company is as protected as it can be from the variances of potential Brexit outcomes.

Spain – Sönke Lund (SL) I agree with Urs and I think we have to differentiate carefully between the Rome I and Rome II regulations on one side and Brussels regulations on the other. It should be quite easy for existing or future contracts to be made though, because the parties involved will be free to choose applicable law.

As a result, I don't believe that there will be too many significant changes, but on the other hand I agree that we will have problems with the Brussels regulations where enforcement is concerned.

This could be interesting from the Swiss perspective concerning whether we come into the Lugano convention, and how this could work. We have a lot of issues here and arbitration clauses may go some way towards solving them.

Finland – Lauri Railas (LR) When it comes to the applicable law, Rome I and Rome II apply irrespective of whether the law concerned is that of a country of the European Union or an outside legal framework such as the United Kingdom.

The starting point is that the court applies its own conflict rules, so if the case is tried in a member state of the European Union, it will apply the Rome I and II regulations. That obviously facilitates the parties choosing the law applicable and the choice can be an implied one.

On the contrary, when it comes to the Brussels regulations, it will no longer apply to the UK and so there will be no free movement of judgments anymore between the UK and the other member states of the EU.

This is the starting point, and the jurisdiction of the European court may be relevant if the commercial dispute and the contract deals with issues governed by EU law, and there is a preliminary ruling from the ECJ. If the case is tried inside a member state of the EU it wouldn't cause a problem.

Arbitration makes things easier, but you might need to specify mandatory laws envisaged in choice of law regulations, or the equivalent British legal rules will apply.

Italy – Paola Mariani (PM) I do agree with Robert that, from the point of view of applicable law, it's quite easy because Rome 1 and 2 regulations contain universal application provisions: they apply whatever the applicable law and even in future cross-border contracts involving the UK. If the UK government maintain the commitment to retain legislation in line with Rome I and II, Brexit should not entail big changes. In the long run though, there may be the problem of authority for the European Court of

Sönke Lund pictured at the 2017 IR Annual Conference in Berlin

Justice case law on Rome I and II Regulations. We cannot be sure that the UK courts will follow this jurisdiction, so fragmentation and uncertainty will follow when the same legal provisions are subject to different and divergent interpretations.

There is also a big issue with Brussels I and II regulations no longer applying, and there could be a problem not only in having accepted and shared rules to determine a competent court to hear a foreign litigation, but also, and especially, enforcing UK judgments in EU jurisdictions and vice versa.

Arbitration is not always an alternative, especially when dealing with small and medium-sized enterprises, since cross-border agreements are not just an issue for larger companies.

Malta – William Spiteri Bailey (WSB) Malta has quite close ties with the UK, however there are so many different types of contracts that they must be looked at in detail to establish if and what needs to be changed or updated in line with the Brexit rules. There are a number of international arrangements that will have to be re-negotiated. Malta has a lot of legislation similar to the UK; that should make it easier to develop contracts between parties from the two countries, but we will still need to see how this will develop.

Netherlands – John Wolfs & Nico Ooyevaar (JW, NO) In some areas there might be an extra layer of complexity in the near future regarding trade between the Netherlands and the UK. The UK will look to construct a new legal playing field on issues such as the choice of governing law of commercial contracts and international private law considerations, such as recognition of the enforcement of foreign

judgments in the UK and any applicable foreign law. The EEX-Regulation, which regulates the mutual recognition of judgments by EU member states, will no longer apply between the UK and the EU.

This uncertainty across Europe influences the choice of law companies should include in their commercial contracts. Given this, it is advisable for EU members to choose English law less frequently, and specify EU law instead. This is the case temporarily at least, until it is clear what the changes are after Brexit. The same applies for the choice of a competent court.

Dutch courts are a popular forum in Europe, due to the relatively low legal costs and the relatively short duration of the procedure. This is largely because expensive and time-consuming disclosure processes, which are more common in English courts, do not exist in Dutch proceedings (unless parties agree otherwise). Furthermore, when losing a case, the orders to pay costs to the winning party, are relatively low. Another, not entirely unimportant factor, is that Dutch courts are generally willing to accept jurisdiction.

For existing contracts, it is advisable to assess whether it is possible to make a change to the legal framework conditions. When drafting a new agreement, parties can choose to include a forum clause in their agreements. Dutch law makes it possible to include such a forum choice for (commercial) contracts and, where necessary, change the existing ones.

U.S – Teresa Taylor (TT) Brexit will likely affect the legal framework governing commercial contracts in two significant ways.

Firstly, EU companies may re-evaluate having the UK as their preferred dispute resolution jurisdiction; and secondly, companies will have to bear the risk and costs associated with parallel regulatory and legal systems.

The UK has long been the preferred seat of arbitration and litigation for global and European commercial contracts, and the UK government is eager to conclude an agreement with the EU to maintain this status. The ideal agreement will provide a post-Brexit, cross-border civil judicial cooperation framework that replicates, to the greatest extent possible, current secondary EU legislation on commercial matters.

However, seeking an agreement and coming to an agreement are very different tasks. Although the UK will continue to be a party to international treaties that cover cross-border litigation, such as The Hague Convention, once the UK withdraws from the EU and rejects the jurisdiction of the European Court of Justice, its move away from EU standards will likely impact its attractiveness K as the hub for dispute resolution.

Before Brexit, companies did not need to worry about whether UK law was 100 per cent compatible with EU law, now they must. This also means companies will need to implement compliance mechanisms, including new contract provisions, in order to adequately manage the parallel legal systems. For example, companies engaging in international trade will need to update their trade compliance programs to account for changes in applicable law. Compliance with trade sanctions and related laws and regulations, such as anti-money laundering and anti-corruption will become far more complex for the global trade community.

While it remains unclear which UK commercial laws will change, it is clear that withdrawing from the EU will provide the UK with much greater freedom and a strong incentive to draft its own laws, without the need to follow EU directives. Regardless of how far the UK moves away from EU standards the UK will no longer be subject to the European Commission's jurisdiction. Consequently, in addition to needing to evaluate whether UK law is compatible with EU law and with commercial contracts, companies choosing to operate within UK jurisdiction will also subject themselves to dual regulatory frameworks and trade controls.

Denmark – Anders Hedetoft (AH) Britain is scheduled to leave the European Union on Friday 29 March 2019 at 00:00 CET. The future UK/EU relationship will not be formalized, until Britain has left. Consequently, there will be a gap between the British withdrawal and the entry into force of the future framework (the so called 'cliff edge').

A transition period, in which the European legal frameworks will still be in force, will probably run until 31 December 2020. However, Brexit still creates a huge amount of uncertainty. We are yet to see how the UK government will deal with the several thousand pieces of EU legislation, including regulations and directives, that have become part of the UK. We don't know which laws will be preserved and which repealed.

Britain leaving the EU is an unprecedented situation, since no nation state has ever held a referendum and then left the EU. Greenland, which is a part of the Danish kingdom (the Danish Commonwealth) left the Union in 1985, after the Greenlandic government, the Danish government and the European Commission went through a series of difficult negotiations, particularly with regard to fisheries. In Britain's case however, the economy is many times larger and more complex, and the responsibilities and membership of the EU have ballooned over the past 30 years.

As pointed out by my colleagues, one of the big issues is choosing the correct law and venue for commercial contracts. English law has often been chosen, due to the more literal interpretation of a contract. (In Denmark the interpretation by courts tends to be more pragmatic.)

This may change when Britain is no longer part of the Brussels I regulation, under which the EU member states are obliged to recognize, and execute court rulings from other member states. Despite Denmark's opt-outs from certain European Union policies, it is still party to Brussels regulations by a parallel agreement.

SESSION TWO - CONTRACT PREPARATION

How will Brexit affect existing contracts or the preparation of new contracts between commercial entities in the UK and Europe in your opinion? Any examples?

U.S – TT One way that Brexit will affect existing contracts or the preparation of new contracts between commercial entities is its impact on the value of the commercial relationship.

Brexit will affect commercial contracts in the EU through any or all of the following: increased trade barriers; reduced freedom of travel; currency fluctuations; changes to EU territory; rise of parallel regulatory regimes; and variations in substantive law. Thus, it would be prudent to audit existing contracts that have a connection with the UK or the EU in order to re-evaluate the deal and reassess the parties' bargaining power. Doing so will help commercial entities determine whether contracts will need to be amended, renegotiated or terminated.

For example, the governing law, venue, and jurisdiction provisions in any EU or UK related commercial contract must be clarified and remain suitable to the parties. Any reference to 'English law' may need to be updated, to either refer specifically to UK law or EU law, post-Brexit. Likewise, any contracts, like distributorship or franchise agreements, with territoriality clauses may need to redefine the scope of any territoriality provisions.

Amendments to existing contracts may be required to account for higher costs associated with cross-border transactions, such as tariffs or varying legal requirements, like customs declarations. Depending on Brexit's impact on the commercial viability of a contract, parties that cannot renegotiate contracts may find that early termination is best and should prepare accordingly. If the contractual relationship will resume, then parties may choose to renegotiate their contractual rights and obligations by reallocating anticipated costs and risks among them or sharing them equally.

For new contracts, commercial entities should aim to anticipate all possible implications of Brexit on the commercial relationship. As noted above, this will involve re-evaluating the value of the deal and ensuring it remains viable and in the best interest of the parties. Depending on the type of contract, parties should consider adding clauses to protect against: perceived changes in currency value, future imposition of tariffs or duties, customs regulations, other non-tariff barriers to trade, substantive changes in the law, and material changes to contract terms post-Brexit.

Germany – UB As a typical German, I'm not really optimistic because there's a great repeal bill in the UK which will reduce EU law, and I don't know which parts will remain in domestic UK law.

It all depends on the political side. If there's a hard Brexit there will be political pressure in Britain to push even further away from the EU, so the best thing we can hope for on contracts is that Brexit will trigger Force Majeure or Material Adverse Change clauses. I'm not so sure though, because if I look at German or English case law, the courts are really very restricted in how they can use the Force Majeure clause. Is a change of law in a member state really a Force Majeure? I'm not too sure.

In Marks & Spencer Plc v BNP Paribas Securities Service Trust Company (jersey) Ltd [2015] the UK Supreme Court held that a court should only intervene where a term has been considered so obvious that it went without saying.

The territorial scope of contracts is one of the major points for me on this topic. This is especially true for license agreements and the different treatments you put on the territory of the European Union. That is no longer true for England, Wales, Scotland or Northern Ireland. Clients have to make sure that such licensing clauses in contracts are renegotiated for the UK and added into new contracts.

This is the same for copyright laws. My firm AQUAN just applied for protection of its copyright in the UK. We did it like we do in Switzerland, with a separate registration for our copyright.

Another big thing is GDPR. I hope that the UK will stay in the framework of European data protection and everything will be fine. If not, the UK will no longer be a safe harbour, and we will see a lot of problems for M&A transactions.

Tariffs and taxes have always existed, but for a long time there weren't tariffs and taxes between the UK and Germany. It's not yet clear who should bear the tariffs and taxes, and we don't know what will happens and how long it will take. I have recently heard that the British and French governments are hiring a lot of people, because of potential problems with tariffs and business contracts. There is still no solution for the Irish-Northern-Irish border.

The exchange rate is another concern and some US firms are already refusing to sign contracts in Sterling because it's not stable enough anymore.

Insolvency also has problems, because we have European insolvency law which won't apply anymore after Brexit. I am not really hopeful that the Force Majeure or Material Adverse Change clause will

apply, so we can might see some frustration there.

My advice is that if a business has the chance to renegotiate, they should do it and put in a special termination clause in case of Brexit.

Malta – WSB At the moment we're seeing a number of insurance companies that are showing interest in Malta because, being based in the UK, they may not be able to trade within the EU.

Regarding changes to tariffs and taxes, there are more than 750 international trade agreements that need to be re-negotiated with the UK, with 295 of them on trade, 202 of them on regulations and more around customs, fisheries, transport and nuclear energy.

All of this re-negotiation will affect our own plans and they are still being negotiated at the moment.

So actually, it's very difficult to know where ultimately we will end up. These arrangements need to be re-negotiated as quickly as possible, before we know when and how to prepare new contracts.

UK – RC The current transitional period is allowing professionals and businesses to gradually get a feeling for what they need to put in place. There are not many that are rushing to change their contractual arrangements because of the uncertainty around the actual eventual deal that is done.

IIn the UK, we have just completed a huge amount of work putting in place measures to comply with General Data Protection Regulations (GDPR), so we're not seeing the business community acting in a way that's inconsistent with European membership. Certainly not among any of our clients.

Force Majeure has become relevant to all sizes of business because of Brexit. We have asked a lot of our clients to make sure their Force Majeure provisions are updated, because of potential bottlenecks in delivery of goods. It will be important for clients to look carefully at the Force Majeure provisions and make sure they know what happens in the event of delayed delivery. That's just a small, but very relevant, example, particularly if you're delivering a container full of microchips, which could be worth upwards of GBP2 or 3 million per container.

With regard to territorial scope, if the UK is leaving the EU, then we must look carefully at distribution agreements. Clients have been caught out here before when new countries have joined the EU. It has expanded from 11 member states to 27 and businesses can find that they have granted distribution rights to a far wider territory than they originally thought.

As far as licenses and registrations are concerned, there will be divergence once we move past the transitional period, because there will be different levels of certification for goods and services. I suspect we will see UK businesses continuing to comply with the requirements of the European Union simply because it makes economic and commercial sense to do so.

Finally, we've been putting in huge amounts of work for all of our clients to ensure compliance with GDPR, and, in fact, a lot with U.S. clients, who are equally keen to comply with GDPR because they have so much data flow between different nations.

I believe the legal framework will remain in place and we'll come back to the same issues about how its enforced. I suspect we'll see a sensible practical route through and contracts will not change greatly. I expect to see UK entities agreeing to comply with the GDPR laws.

Italy – PM I am happy that Robert's vision from the UK is positive, but, just like my colleague in Germany, I'm not so optimistic because I think that there we have more than one problem.

First of all, I'm not so sure that we will have the transition period, because we don't know if the withdrawal agreement is going to be finalised.

Obviously, we hope that we will have an agreement between the EU and UK and a transitional period, because March 2019 is very close, but, if not, the changes to tariffs and taxes will have a very large effect on the circulation of goods in general, especially foods and suchlike. The problem is not just new taxes and new customs duties, but the operation of border controls, because we know there is nothing in place at present and everything can circulate freely in the Union. People and businesses in the UK and in the EU don't know how the controls at the border will work and how costly in terms of money and time will be. I really hope there will be an agreement and not a hard Brexit scenario, since that will be a really difficult situation to deal with.

Licensing is also a very big issue, because we know that we have some sectors, for example the financial sector and pharma industry, where a system of licences is crucial. Now, EU regulatory agencies control these licences and grant the access to the 28 EU member states market.

Even if the UK continues unilaterally to follow the European rules, UK companies will need to be allowed to operate in the EU market and the lack of an agreement is going to badly affect the trade of services. There are many services that cannot be provided in the EU by service providers established in UK without a license and authorisation recognised by the European Union.

Spain – SL I agree with Paola and Urs on the first point, since I believe that with the Force Majeure and MAC clauses, there won't be any guarantee that the provisions that allowed for termination will stand during Brexit. We have the frustration of contract doctrine, as mentioned, and we all know that the interpretation of that doctrine is different in each member state.

in terms of territories of contracts, when there's a provisional distribution agreement for joint ventures or franchises or licenses in the EU, it currently includes the UK within the scope. The best thing from my point of view would be if the parties involved reviewed the contracts and clarified that, but, in my experience, that often brings the problem of one party using that opportunity to renegotiate the whole contract.

It's like a game of Tetris, because everything changes if a small piece is moved.

The biggest issue we have, in relation to IP rights, is EU regulation and the directives that are in place. We need to see how they will actually apply in the UK, and it's an issue for patents and trademarks and so on. We have to distinguish between patents in Europe and the UK and there is also the problem of the community trademark and the registered community design. This is all unclear from my point of view.

With regard to trade secrets, data protection and data safety, we have the GDPR issue and whether the UK can be considered as a safe harbour. I believe that, from the GDPR point of view, there won't be any major issues and I agree with Robert that UK companies will do the right thing here and comply with GDPR in terms of data protection and data flow.

With competition and state aid, we have to consider that there won't be any changes in the applicable law, but in the enforcement of the law there will be major changes. One key difference will be that the commission will have no power to carry out on-site investigations anymore.

Finland – LR I very much agree with the previous speakers, that the Force Majeure and material adverse change clause cannot easily be resolved in the context of Brexit. We should remember that the United Kingdom is not a part of the Vienna Convention for the International Sale of Goods.

In that convention, we have a definition of Force Majeure, and I think that many other bodies, including the International Chamber of Commerce have this. They have special criteria, that says Force Majeure relates to events beyond the control of the parties - unprecedented events that you cannot overcome by any measure. I think this probably excludes Brexit.

Regarding changes to tariffs and taxation, these matters are divided between the parties by trade terms, most notably that the seller is to pay all the delivery duties if they have changed, and the buyer must pay any increased duties or taxes on importation.

With regard to payment terms, I don't think this aspect will change very much because Sterling is not the same as the Euro. We have these fluctuations already and companies have learned to cope with them.

I agree that UK companies will take care of their obligations in respect of GDPR, and so the UK should be a safe harbour, but it obviously depends on the national legislation. I would assume that the UK government has no intention of causing data protection issues.

One issue that is not listed here, is the UK government's plan to comply with European standards on service provision. The UK is heavily dependent on its service industry, and there would no longer be a freedom to provide services in this sense.

Denmark – AH The possibility of new tariffs, country rules of origin certificates, product standard checks and other customs procedures introduce uncertainty into some contracts. This should be dealt with contractually as it is straightforward to anticipate some changes in this area.

When Britain is no longer a member of the EU, article 34 and 35 TFEU (prohibiting quantitative restrictions on imports and exports) will no longer apply and restrictions may be imposed. Goods will need to pass a special authorisation procedure, which may cause delay and increased costs. It could also mean that import/export of certain goods are prohibited.

As an example, if a British manufacturer has agreed to deliver a product to Denmark, restrictions on imports to Denmark could mean part of the British product is banned.

This may mean that the contract is impossible to perform (force majeure). However, if the prohibition only affects a component which may be substituted with a Danish component, it would still be possible for the British manufacturer to perform the contract, even though it may be way more expensive for him to do so.

New contracts should therefore include 'Brexit-reservations' and, more specifically, set out the effect of such anticipated hardships.

Regarding corporate reorganisation, a commercial contract might need the flexibility to meet the needs of any future reorganisation by one of the parties, to ensure that certain functions stay within the EU. The contract may therefore include the ability to transfer the contract as a whole to an affiliate.

Switzerland – PR I think I can agree there are some uncertainties and we will see what really happens. I think the British government has to set up some rules regarding all these things to make it easier to enter into new contracts or to settle disputes.

My advice is to think ahead, by ensuring that all new contracts are drafted to best anticipate the changes that Brexit will bring. Doing this will ensure companies are in a stronger position to limit their exposure to uncertainty.

In addition to amending standard contract terms and/or standard boilerplate templates to anticipate Brexit issues, companies need to upskill those employees who are involved in negotiating contracts, by increasing their awareness of potential pitfalls.

The main considerations should be, applicable law where the contract doesn't expressly state it already, or where it states English law. Jurisdiction and enforcement of contracts are also important, as is sufficient flexibility in the contract to address the various possible scenarios.

Netherlands – JW If a commercial entity in the Netherlands wishes to vary, amend or terminate an agreement without the consent of the other party, the freedom to do so is restricted under Dutch law. If regulations regarding trade with the UK change (like higher tariffs) to the disadvantage of entities located in the Netherlands, there are two legal reasons to allow unilateral amendment of the agreement. The first one is the inclusion of such a provision in the

John Wolfs pictured at the 2017 IR 'On the Road' conference in Singapore

contract itself, the second one is to invoke Dutch legislation.

The last option is under the terms of article 6:258 BW (Dutch Civil Code), if it cannot reasonably be expected that a contracting party should comply with the original terms of the contract due to a change of circumstances after the conclusion of the agreement.

To achieve a successful appeal around unforeseen circumstances in the Netherlands, it is necessary that the circumstances were not possible to foresee at the time of the conclusion of the agreement. Secondly, the changed circumstances must be so significant in their nature, that it would be unreasonable or even unjust to expect the affected party to continue performing the agreement.

Examples of Dutch case law show us that the consequences of government measures, such as a change in the law, or unpredictable market developments, can constitute circumstances on the basis of which it is not reasonably to assume that a party will comply with a trade contract.

Depending on the consequences for the specific trade relationship, it is possible that Brexit would qualify as an unforeseen circumstance preventing the fulfilment of an agreement. Whether this is the case, will have to be decided on a case by-case basis.

When drafting new agreements, we recommend the inclusion of a specific Brexit clause, making it possible to terminate or renegotiate the contract. Brexit clauses are not fundamentally different from other 'change' clauses, but are more specific to Brexit-related circumstances. It is of key importance that parties define and agree on which trigger is specific enough, and also predetermine future events (e.g. changes in exchange rates or deterioration in the economic prospects of a business).

A potential trigger for a Brexit clause, could be a specific change in the law, or the imposition by government of specific costs, tariffs or a loss of 'passporting' benefits which are currently available under EU rules.

Some specific aspects of Brexit (such as regulatory change or imposition of tariffs), which have the power to stop certain services within the EU, could constitute a Force Majeure.

SESSION THREE - CLIENT ACTION

What should a business do right now to prepare for Brexit and ensure their commercial process is watertight?

Netherlands – NO The best approach for business to prepare for Brexit is to expect the worst and hope for the best. In this case the worst means a hard Brexit. But what does that mean?

A clean break between the UK and the EU means that all current EU rules and regulations no longer apply to the UK and that the UK from then on is 'a third country.'

For businesses in the Netherlands trading with the UK, this means that the UK will be in the same position as any other country outside the EU. For traders in the Netherlands the effects are that goods will have to be exported from the Netherlands to the UK. This changes not only the formalities for customs and VAT and, if applicable, excised goods, but also other measures that only affect export of goods to a destination outside the EU. Goods may be subject to import duties and, if the EU and the UK do not come to terms on a free trade agreement, make them more expensive.

Likewise, UK businesses will have to take into account that the goods will either have to be imported and subjected to duty, or temporarily stored in a bonded facility. This is particularly important for UK businesses using distribution facilities in the Netherlands. Transport companies should expect less swift cross-border passing and therefore higher costs. A change clause is crucial for them.

If the goods are dutiable, trading partners will have to decide who will be the importer into the UK or the Netherlands and adapt their contract accordingly. Use of the Incoterm DDP means that the seller is responsible for import duty and taxes, which may lead to customs and VAT registration formalities and additional administrative costs. This Incoterm should be avoided in contracts unless parties are truly aware of the consequences and explicitly accept them.

Fortunately, the Netherlands maintains a favourable system of collecting VAT regarding to the import. UK companies will be able to use the postponed accounting system for import VAT which removes the need to finance the VAT at import. Whether the UK will introduce a similar system remains to be seen.

England – RC The first thing I say to clients, is that they should be undertaking an audit of their contracts. One of the most important points to deal with, is to record which contracts extend beyond the transitional period, since they are the highest risk at this point in time and the ones that may need to be renegotiated.

I advise them to look at their IT applications with regard to security, and also to consider how Brexit might impact their trademark or patent strategy and the licensing of intellectual property rights.

The key areas to look at in a contract would be Force Majeure, territory, applicable law and price adjustment. They should compile a spreadsheet of their contracts to identify areas of risk and then tick them off when they are believed to be Brexit-proof.

This is bearing in mind, of course, that I don't think anybody feels entirely comfortable that their contracts will be Brexit-proof, other than allowing them to be terminated easily, if that's the only way to deal with it.

Germany – UB I think clients should consider two situations. One situation is where they have existing contracts and should look into loopholes under the Brexit and try to consider renegotiation. They should always try to find common ground with counterparts and look at the commercial impact of Brexit. if they have a new contract, they should always consider the worst case scenario, in order to be well prepared.

Clients should also look at tariffs and exchange rates, including customs procedures, considering who should bear what tariff exchange rate, with reference to EU laws and territory. They should also put in arbitration clauses, because they can then be sure that this will be enforceable in the future.

No one knows what will happen, but there will be changes because of Brexit. We can all hope for a soft Brexit, but be prepared for a hard Brexit without any rules. It is important to be prepared and keep in contact with counterparts in Europe or in the UK, starting negotiations around what will happen.

Italy – PM I suggest to my clients to be ready to change, because I think that now it's difficult to predict the outcome of Brexit, especially for trade issues.

We have to wait until later in the year to see if there will be an agreement on future relations between the EU and the UK and, you know, the situation could be completely different by then. If, for example, the UK stays in a form of the Single Market similar to the Norwegian solution, the business environment will not change. On the contrary, in case of a no deal solution, every business relationship will need to be revised.

So, it's difficult now to make changes, but it's important to be prepared to change the business and any contract according to the situation. And, of course, also

important to be ready for the worst situation, which is a Brexit without rules.

Spain – SL We don't know yet what really will happen, whether we will have a hard Brexit, a soft Brexit or whatever kind of Brexit.

I agree with Paola though, that we have to advise our clients that they have to be ready for a change. This is a very soft Brexit approach of course, but it must be stated clearly in existing contracts and future contracts.

We must express provisions on jurisdiction and provisions on applicable law which refer to the contractual statute and to the non-contractual statute. If this is done, then clients at least have a kind of umbrella in terms of all the clauses which may affect the relationship between parties in the case a future exit of Britain.

Of course the commercial aspect is also very important. We can discuss the legal aspect, but we don't know what will happen on the commercial side.

So that will be very important for clients, as will a provision to perhaps agree on an express termination clause which is not only the general form of a MAC clause, but something more specific.

Denmark – AH Nothing concrete has been decided on the future relationship between Britain and the 27 remaining member states. However, there is still a lot businesses should do to prepare themselves for Brexit.

This includes, keeping a close watch on the negotiations between Britain and the remaining EU member states, while trying to identify and anticipate the possible implications of Brexit on their company, their commercial relationships and their contracts.

They should also team up with a specialist adviser and get a service check on their current standard contracts, as a revision on some of the terms may already be needed.

They should also identify key or high risk contracts and consider renegotiation or even termination where workable.

Contracts which were entered into before Britain's decision to leave the EU and fulfilled before the end of the transition period, would not be affected. Long-term contracts which were entered into before Britain's decision to leave the EU, and are to be fulfilled after the transition period has ended, may be affected and clients must therefore consider renegotiation or termination of such contracts.

Finland – LR Well must look at what the contract concerns, and what kind of legal regime it follows. In this context it may not be possible to renegotiate, unless there are some provisions already included to that effect.

Obviously there is a common interest for both parties to resolve a contractual issue, since nobody benefits from unfair trade relationships. Also in the long run, the parties will probably be able to re-negotiate that contract, if it doesn't meet the mutual interest.

My thinking arises from the fact that, in the Scandinavian countries, we have a strong emphasis on the duty of loyalty, that is to say, a doctrine of good faith and fair dealing. Unfortunately, the UK does not adhere to that principle, as it is replaced by other techniques.

Malta – WSB We do need to see what contracts are in place and the timeline of those contracts, for instance when they end and their content. It may be also relevant to look into the areas which are clear and unclear and that possibly need to be changed. At that point we should be ready to adapt and change depending on the outcome of Brexit, it's more of a waiting game right now, preparing but waiting for the outcome of Brexit.

Switzerland – PR My advice to clients is to create a checklist of one's agreed position on key contractual points, which can then be shared with all those entering into or agreeing arrangements with third parties on behalf of the business.

U.S – TT In addition to anticipating all the possible implications of Brexit on their business and re-evaluating the value of current and future contracts in light of those implications, businesses should actively engage in risk assessment, monitoring and mitigation efforts tailored to their particular business.

To do so, companies should develop or enhance internal mechanisms to enable them to maintain a heightened but practical focus on the post-Brexit impact to their business. This may include re-working an existing international trade compliance program and auditing framework. The compliance program and auditing framework should remain flexible in light of the uncertainties post-Brexit, but effective to ensure that the company is empowered to act when the need arises. Internal auditing should assess the impact of Brexit on capital, credit and loan, cash flow, business costs, current contracts, and potential business opportunities.

International trade compliance programs should aim to familiarise personnel with the changes in EU and UK law. Companies should implement a responsive, user-friendly compliance process to prevent violations of applicable laws, and proactively show a commitment to compliance.

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