Client Alert | Technology

"No deal" Brexit Plan of Action

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Authors: Steven Baker, Jenna Rennie, Tim Hickman

As the approach of Brexit draws inexorably closer, the continued lack of certainty around what any Brexit withdrawal deal will look like, or indeed whether a deal will be agreed at all, is causing increasing concern among the business community.

For the technology sector, and those working on technology-enabled projects, that concern is particularly strong. It spans from issues such as access to high calibre employees, to the impact of Brexit on the complex web of supply chains and existing and future contracts covering the EU and UK, and loss of access to the Digital Single Market.

One thing, which is certain, is that Brexit is likely to affect various aspects of an organisation's day-to-day business operations. The UK government has started issuing guidance as to what steps should be taken to manage the risk of a 'no deal' Brexit, in which no withdrawal deal is agreed, and the United Kingdom leaves the EU on 29 March 2019 with no transition arrangements in place. This article provides an overview of some of the key contractual and legal issues that your organisation may want to consider in order to manage the business risk created by the current uncertainty.

Contract considerations under English law

If this has not already been done, existing contracts should be reviewed to identify what impact Brexit may have on the ability of either party to perform its obligations under the contract, or whether Brexit will result in uncertainty as to the continuing scope or enforceability of the contract.

- **Breach of law or contract**: A key point to consider is whether the changed legal landscape will mean that, overnight, continued performance of your contractual obligations (without making adjustments to that performance) could breach EU law. For example, as we discuss further below, some UK-issued product certifications will no longer be valid, affecting the placing of products on the EU market, and there are various EU legislative instruments that require certain service providers to have headquarters, a presence, or be registered or licensed, in the EU before they are able to provide services in the EU.

- However, should you cease to perform your obligations because you are no longer compliant with EU law, then you may potentially be in breach of your contractual obligations. Even if you can adjust the way you perform the contract to operate in compliance with EU law, this adjustment may, in itself, result in a breach of certain contractual commitments you have made, for example because you are unable to meet a specified deadline.

Where a party's ability to perform its obligations will be affected, then it is important to determine what the contractual consequence of any difficulties in performing, or an inability to perform, may be. It is advisable to assess the enforceability of the contracts that your organisation has entered into in the event of a no-deal Brexit. There may be a need to re-negotiate part or all of a contractual arrangement, which we address further below. If performance under the contract is affected, and renegotiation is not possible, then consequences may be more abrupt. You should also be alert to the possibility that a counterparty may seek to use any inadvertent breach of obligations that may arise following Brexit, as a pretext for terminating a contract that is no longer of value to it in the post-Brexit landscape.

Possible means by which a contract could be rendered unenforceable, or brought to an end, include:

- **Illegality**: you should assess whether the impact of Brexit is likely to make the performance of the contract illegal. While this may not be likely in many cases, it is something that may arise in connection with certain sectors such as finance, or broadcasting. If the place of performance of a contract is the EU and, as a consequence of Brexit, your organisation is no longer authorised (or able to be authorised) to carry out the required activities in the EU then it is possible that the contract will be unenforceable for illegality. Further, in some cases where the contract can be performed in the UK but performance is intended to be, or is actually, performed in the EU (despite the lack of authorisation), the English courts may prevent enforcement of the contract.

- **Termination clause**: a contract may include an ability for one or both parties to terminate in specific circumstances. This may be at will, or if certain conditions are met. If the consequence of leaving the EU results in the performance of the contract being illegal, or in a more limited or no ability to perform the contract, then such clauses may be triggered. Each case will turn on its particular facts, and the terms of the clause. If a contract has been entered into since the public referendum resulting in the Brexit process, then there may be a specific Brexit-related termination right that could be applicable.

- **Force Majeure**: contracts commonly contain force majeure clauses. Force majeure clauses may apply if the performance of the contract becomes unlawful or impossible through specified force majeure events (although such lists are typically not exhaustive). The scope of the force majeure clause will depend on the drafting, but will normally require that the event is outside the reasonable control of the party. These clauses may result in the suspension of obligations under the contract while the event continues, or permit a method of performance to be adjusted so that performance can continue and only if that is not possible might the relevant transaction be terminated. Note that such clauses are unlikely to cover situations where a contract has become uneconomic, or more onerous, as a result of Brexit.

- **Material adverse change clause**: these are specific clauses that may be included in your contract. Whether they apply in a Brexit scenario will be highly fact specific, depending on the drafting of the clause in question, and the impact that Brexit has on the parties' ability to perform their contractual obligations.

- **Frustration**: this option does not rely on a term being included in your contract. Instead, a contract may be frustrated if a supervening event has occurred, without default of either party, that is not sufficiently provided for in the contract. This supervening event, in this case Brexit, must change the nature of the contractual rights or obligations (not just their expense or onerousness) from that which could reasonably have been contemplated at the time the contract was entered into. The change must be so significant that it would be unjust to hold the parties to the contract following the supervening event.[1] It may be difficult to argue that your contract has been frustrated due to Brexit, as many of the impacts are likely to have solutions, albeit costly and/or difficult to implement.

Even if your contract remains enforceable, and you or your counterparty do not want to use any of the contractual mechanisms that may be available to terminate it, there are likely to be matters within your contracts that need clarifying or addressing. Some agreements may expressly provide for renegotiation in certain circumstances, which may include Brexit. Where your agreement does not include express provision for renegotiation, you should still assess whether it is in your interest to seek to pro-actively agree a variation or amendment to remove uncertainty from the contract, or to reflect the altered context in which the contract is being performed. If you are considering renegotiating or varying existing contracts, it is important to be aware of the Supreme Court decision in *Rock Advertising Ltd v MWB Business Exchange Centres Ltd*[2]. In this decision the Supreme Court, overturning the Court of Appeal, held that where a contract contains a clause restricting variation of the agreement to those variations agreed in writing between the parties, an oral variation may not be effective, even where the other party is agreeable to that variation. You should therefore ensure that you carefully check, and observe, any formalities that may exist for varying your contracts.

Potential areas that you may need to re-visit in your contracts include:

- **Territorial Scope**: the territorial scope of rights under an agreement could become unclear following Brexit. Licences and distribution agreements are just some examples of contracts that may include a

1 See e.g. *Davis Contractors Ltd v Fareham U.D.C.* [1956] A.C. 696 and *National Carriers Ltd v Panalpina (Northern)* Ltd [1981] A.C. 675

2 *[2018] UKSC 24*

territorial provision referring to the EU. How such an agreement would continue to apply following Brexit would depend on the terms of the contract, and is likely be a matter of contractual interpretation. It may be in the interests of both parties to seek to proactively agree an amendment to this clause. Alternatively, one or other party may want to revisit the value of the contract given the UK may no longer be within scope.

- **Price/cost implications**: For many organisations operating within the technology space, one of the key impacts of Brexit is likely to be economic, particularly in relation to long-term contracts. If the UK ceases to be a member of the EU in a 'no deal' scenario, then businesses may face an immediate increase in costs in performing a contract, for example the introduction of tariffs, compliance with new customs arrangements, or changes to tax treatment. There may also be sudden changes to foreign exchange rates, and increased wage bills due to a struggle to attract or retain talent, a problem that some are predicting to be particularly acute in the technology sector. Organisations should consider whether there are any price-adjustment mechanisms in their contracts that could be used to address the changed cost requirements.

- **Data protection**: The handling of personal data is an issue for all companies. The UK government has indicated that protections equivalent to those set out in the EU's General Data Protection Regulation ("**GDPR**") will continue to apply in the UK following Brexit.[3] However in the event of a no-deal Brexit, data transfers from the EU to the UK will change overnight from being transfers within the EU to transfers from the EU to a third country. This means that transfers of personal data from the EU to the UK will need to have a lawful transfer mechanism in order to be permissible under EU law. In the short term, one transfer mechanism likely to be of assistance is the use of Standard Contractual Clauses. These are standard form agreements that are pre-approved by the EU as satisfying the EU's data protection requirements, and can be implemented between two or more parties comparatively easily. Other possible options include the use of binding corporate rules (although these typically take several years to obtain), or derogations such as explicit, informed, individual consent (although this can be impractical for many businesses). Currently, the UK has indicated that it will allow transfers from the UK to the EU, at least in the short-term. It has also indicated that UK based companies that transfer personal data to countries outside the EEA will be able to continue relying on EU adequacy decisions that were made prior to the exit date. The exception to this is in relation to transfers to the US under the EU/US Privacy Shield, where businesses will need to ensure that an organisation participating in the Privacy Shield has made a public commitment to apply the Privacy Shield to transfers of personal data from the UK, before transferring any personal data to them[4].

- A connected issue is that some contracts may include obligations to host data "in the EU". Where that data is currently hosted in the UK, steps should be taken to either agree an amendment to this obligation, or to make arrangements to move the data to a compliant location.

- **Liability**: It is also important to consider potential liability under your contracts. If Brexit results in your organisation being unable to fulfil its obligations under a contract, what is the extent of your liability in this situation? Have you assumed liability under the contract for any loss suffered by your counterparty because it is consequently unable to perform its contractual obligations with third parties? While you may not be able to renegotiate your contract to avoid or limit this liability, it can help you to identify the contracts that pose the highest risk to your company, so that you can prioritise accordingly.

- **Governing law, jurisdiction and enforcement**: Regardless of Brexit, it is good practice for all contracts to contain a clause identifying the governing law, and which court (or arbitration body) has jurisdiction. Currently, EU-wide legislation applies to provide a uniform framework for determining which EU country would have jurisdiction over any dispute, what laws would apply, and how service and enforcement can take place throughout the EU. In the event of a no-deal Brexit, these would no longer apply, potentially leading to considerable uncertainty. While this is a very complex area, key points to note at present are:

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3 *Data protection if there's no Brexit deal*, UK Government, published 13 September 2018 https://www.gov.uk/government/publications/data-protection-if-theres-no-brexit-deal/data-protection-if-theres-no-brexit-deal#after-march-2019-if-theres-no-deal

4 *Data protection if there's no Brexit deal,* Information Commissioner's Office, https://ico.org.uk/for-organisations/data-protection-and-brexit/data-protection-if-there-s-no-brexit-deal/the-gdpr/international-data-transfers/ last accessed 8 January 2019

- Where parties have agreed a choice of law, then this will continue to be upheld by both the English and EU courts.[5]

- Where parties have agreed that a court of an EU member state (not the UK) will have jurisdiction over a dispute, then this will continue to be upheld by EU member states following Brexit, because of the effect of Article 25 of the Brussels Regulation. This is regardless of whether the parties involved are domiciled in the EU. However, if parties have agreed that the English courts have jurisdiction, then this will no longer determine jurisdiction under the Brussels Regulation.

- On 28 December 2018 the government acceded to the Hague Convention on Choice of Court Agreements[6], which provides rules for the jurisdiction and enforcement of judgments where there is an exclusive jurisdiction clause in favour of a contracting state, *where those contracts are entered into after the Convention came into force in the contracting state*. The EU is already a signatory to this Convention, and the UK's accession was done in an attempt to ensure the Convention will continue to apply in the event of a no-deal (although there is a three day gap between when the UK exits the EU and the Convention comes into force, for reasons which are unclear). If the Convention applies, then choices of jurisdiction are likely to be upheld. However, it is currently not certain whether the Convention would apply to agreements entered into only after the Convention entered into force for the UK as a member in its own right, or also to those entered into following the entry into the force of the Convention for the EU (at which point the Convention was in force for the UK by virtue of its EU membership).

- Despite the uncertainty regarding how an exclusive jurisdiction clause would be applied, the prudent approach would be to ensure that you have entered into an exclusive jurisdiction clause. Agreeing a service address in the same jurisdiction would also potentially avoid later service difficulties and delays. If there is no exclusive jurisdiction clause contained in your contract, then it is possible that you could end up involved in proceedings in another EU member State in addition to any proceedings in the UK. It may also be harder to enforce a UK judgment in an EU member state.

- You may want to consider whether an agreement to settle disputes by arbitration is appropriate for the nature of your contracts. Arbitration agreements are unaffected by Brexit and the large number of jurisdictions in which English arbitration awards are enforceable[7] include all EU countries.

Broader Business Impacts

The broader business impacts of Brexit will depend on the sector and nature of your business. However, the loss of access to the Digital Single Market is likely to be particularly significant to technology companies, and may require your organisation to take additional steps to ensure compliance with laws and regulations within individual EU member states. The digital single market has brought benefits to organisations operating across national borders within the EU, particularly those providing internet sales, online financial services, broadcasters and on-demand platforms, where 'country of origin' principles incorporated into EU laws mean that, provided an organisation complies with the rules and regulations in its home state, it can provide services across the EU. There is no single 'digital single market' directive. Rather, the digital single market has been enabled by a series of EU legislation including the GDPR, E-Commerce Directive, Audio-visual and Media Services Directive, Network and Information Systems ("**NIS**") Directive and various Copyright related measures. Following the UK's change to 'third country' status, companies based in the UK who provide services to EU member states may need to register, appoint representatives or obtain licences in one or more EU countries (which in some cases may require establishing a local presence or EU representative), or may need to take additional steps to have UK licences recognised. There may also be implications for any service

5 Because of the effect of Rome I and Rome II Regulations, which the UK government has stated will be implemented into UK law, and which will continue to apply in the EU – see *Handling civil legal cases that involve EU countries if there's no Brexit deal*, UK government, published 13 September 2018 https://www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal

6 Although some questions have been raised as to the validity of this accession given the EU currently has competence over this area.

7 Under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)

provision that requires UK nationals to visit an EU member state in connection with providing services, with potential visa or work permit requirements.

Businesses trading in goods will need to ensure they have taken steps to ensure they can comply with customs procedures that will apply for goods moving between the EU and the UK, and that they have reviewed what steps they will need to take to ensure products continue to comply with any applicable EU rules. By way of illustration, many products, for example those with electromagnetic capability, toys, and radio equipment, are subject to "New Approach" product safety legislation, which may require a conformity assessment body to carry out testing before the product can be placed on the EU internal market. Where a UK body has carried out those tests, re-testing by an EU-based conformity assessment body, or the transfer of test files to an EU-based conformity assessment body, is likely to be required in order to continue to comply with EU legislation post-Brexit, at least in the short-term. Consideration should also be given to whether tariffs will now be applied to goods moving between the UK and the EU, although in this regard technology companies are fortunate in that, in general, international software sales should remain tariff free under WTO rules (whether cloud-based or physical).

There may also be implications for businesses trading with non-EU countries. This is because some trading relationships between the UK and third countries are governed by trade agreements entered into by the EU and a third country. The UK has indicated that it is seeking to agree bilateral agreements with these third countries that are identical, or substantially the same, as the EU trade agreements that they replace[8]. However, these may not be in force from the date of leaving the EU and, in practice, there are likely to be changes in how access to preferences is obtained.

Conclusion

Planning for Brexit in the face of current uncertainty is a difficult task for any organisation. The above is a selected snapshot of some of the potential issues that organisations may need to address, and organisations will need to factor in other risks and considerations depending on the specific nature of their business. However, as 29 March 2019 draws closer, it appears prudent for all organisations to undertake some form of review of their contractual arrangements and business operations, to ensure that they have taken what steps they can to limit any disruption that a 'no-deal' Brexit may cause.

White & Case LLP
5 Old Broad Street
London EC2N 1DW
United Kingdom

T +44 20 7532 1000

8 *Existing free trade agreements if there's no Brexit deal,* UK government, updated 19 December 2018 https://www.gov.uk/government/publications/existing-free-trade-agreements-if-theres-no-brexit-deal/existing-free-trade-agreements-if-theres-no-brexit-deal