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## Brexit: the impact on contracts

What can businesses do to ensure that their commercial contracts are "Brexit-proof"? Despite the continued uncertainty over the nature of the UK's future relationship with the EU, there are steps that you can take now.

### What will change?

Overall, the EU has had a fairly limited impact on English contract law. But Brexit is likely to have a major impact on a range of issues with the potential to affect the parties' commercial bargain, such as tariffs on goods, exchange rates, VAT and changes to the framework of law relating to the parties' activities under the contract. The table below outlines some of the key issues to consider. Not all contracts will be equally affected – but in higher risk cases, businesses may wish to consider whether the contract should be renegotiated and/or whether practical steps can be taken to reduce Brexit-related risk. If you have any specific concerns about the impact of Brexit on your contracts, you should seek legal advice.

*"English contract law may not be much affected by Brexit – but the legal and commercial background to many contracts will be."*

Contractual provision	Possible Brexit impacts	What can/should you be doing now?
<b>CONTRACT PRICING</b> <ul style="list-style-type: none"><li>Fees and charges</li><li>Price adjustments</li><li>VAT</li></ul>	<ul style="list-style-type: none"><li>Imposition of import quotas and tariffs.</li><li>Currency value and exchange rate fluctuations.</li><li>Inflationary pressures on raw materials.</li><li>Increased costs of export and distribution.</li><li>Changes in tax law, particularly handling of VAT.</li></ul>	<ul style="list-style-type: none"><li>Use flexible pricing models where possible.</li><li>For fixed pricing, clearly set out:<ul style="list-style-type: none"><li>assumptions on which the charges are based; and</li><li>the period for which the charges will apply.</li></ul></li><li>Require the parties to renegotiate if pricing assumptions cease to apply.</li><li>Include mandatory change control mechanisms to allow contract pricing to be varied as a result of changes in law (see further below).</li></ul>

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Contractual provision	Possible Brexit impacts	What can/should you be doing now?
<b>COMPLIANCE OBLIGATIONS</b> <ul style="list-style-type: none"><li>• Compliance with laws</li><li>• Duty to maintain required consents, licences, and authorisations</li></ul>	<ul style="list-style-type: none"><li>• Repeal of laws which implement EU legislation and the introduction of new legislation on the same subject matter.</li><li>• EU regulations and Treaty provisions ceasing to have direct effect in the UK and the introduction of new legislation on the same subject matter.</li></ul>	<ul style="list-style-type: none"><li>• Draft 'Applicable Laws' definitions carefully.</li><li>• Where referring to competent or regulatory authorities (e.g. governmental bodies, regulators, courts etc), consider if this will capture EU bodies which may cease to be relevant and/or will fail to capture bodies likely to take over responsibility for the same matters post-Brexit.</li></ul>
<b>CHANGE CONTROL/ VARIATION PROCEDURES</b> <ul style="list-style-type: none"><li>• Mandatory changes</li><li>• Voluntary/consensual changes</li></ul>	<ul style="list-style-type: none"><li>• Current contractual obligations ceasing to be lawful/enforceable.</li><li>• Increased costs of compliance with contractual obligations as a result of changes in law following Brexit.</li></ul>	<ul style="list-style-type: none"><li>• Include change procedures to enable:<ul style="list-style-type: none"><li>○ mandatory changes to be made to ensure ongoing compliance with laws; and</li><li>○ pricing adjustments to allow the costs of implementing and complying with any change to be passed through (in full or pro rata with other customers affected).</li></ul></li></ul>
<b>RELIEF EVENTS</b> <ul style="list-style-type: none"><li>• Frustration</li><li>• Force majeure events</li><li>• Material Adverse Change or 'MAC' clauses</li></ul>	<p>As a general rule, it is unlikely that:</p> <ul style="list-style-type: none"><li>• 'standard' force majeure definitions will capture Brexit unless this is expressly stated; and</li><li>• arguments that a contract has been frustrated as a result of Brexit will succeed.</li></ul> <p>That said, Brexit could be a trigger for:</p> <ul style="list-style-type: none"><li>• MAC clauses and more broadly worded force majeure clauses; and</li><li>• frustration on grounds of illegality (e.g. where performance is based on "passporting" rights which may cease on Brexit).</li></ul>	<ul style="list-style-type: none"><li>• Consider whether Brexit (or any of the circumstances around it) needs to be included in the force majeure definition – or should be expressly excluded.</li><li>• If inclusion of Brexit wording in force majeure provisions is too contentious, it may be possible to address your concerns through mandatory change provisions (see above) and/or a MAC clause.</li><li>• Consider whether arguments based on frustration could succeed and whether the contract should be amended to forestall such claims.</li></ul>
<b>TERMINATION / SUSPENSION EVENTS</b> <ul style="list-style-type: none"><li>• Cost of performance</li><li>• Step-in clauses</li></ul>	<ul style="list-style-type: none"><li>• Unpredictable market conditions and volatility.</li><li>• Tougher economic outlook.</li><li>• Increased risk of insolvency for some businesses.</li></ul>	<ul style="list-style-type: none"><li>• Draft the insolvency termination triggers carefully to allow you to take pre-emptive action if necessary.</li><li>• Seek step-in rights if you have concerns about a counterparty's ability to perform.</li><li>• Link termination/suspension rights to performance indicators, e.g. service levels/KPIs.</li></ul>

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## Contractual provision

### DATA PROTECTION CLAUSES

- Compliance with data protection laws
- Duty not to transfer personal data outside the EEA

## Possible Brexit impacts

- The UK may cease to be a member of the EEA post-Brexit.
- The EU General Data Protection Regulation (the "GDPR") will become law in EU member states in May 2018. Whilst it may cease to apply in the UK post-Brexit, the UK may decide to adopt a very similar approach with a view to maintaining regulatory equivalence.
- In any event, UK-based data controllers and processors offering goods and services to EU data subjects will still be required to comply.

## What can/should you be doing now?

- Data protection clauses will need to be kept under review and amended in light of the UK's approach to the GDPR.
- Change control provisions (as above) are likely to be important in dealing with changes in data protection law.
- Further steps may be needed to allow handling of personal data from the EEA to continue after Brexit e.g. putting in place contracts containing EU-approved model clauses (assuming the UK is outside the EEA).

### GOVERNING LAW AND DISPUTE RESOLUTION

- Contract governed by English law
- Dispute resolution mechanisms

- English law will remain attractive to govern international commercial transactions.
- English courts will remain an attractive forum for resolving international disputes. English court judgments may become less readily enforceable in EU member states than is currently the case (although this will depend on the precise terms of any Brexit deal).
- It may become more difficult to serve English legal proceedings on EU counterparties.

- If the risk of English court judgments becoming less readily enforceable in EU member states is a material concern, consider the viability of options such as giving non-exclusive jurisdiction to the English courts or using arbitration.
- Include agent for service provisions in transactions with EU counterparties.

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*Chambers UK*

***"Legal advice is always commercial, relevant and timely. The team understands not only the legal risks but have a strong understanding of the credit risks and business model. This sets them apart from many other firms."***

*IFLR, 2015*

## FOR FURTHER INFORMATION, PLEASE CONTACT

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