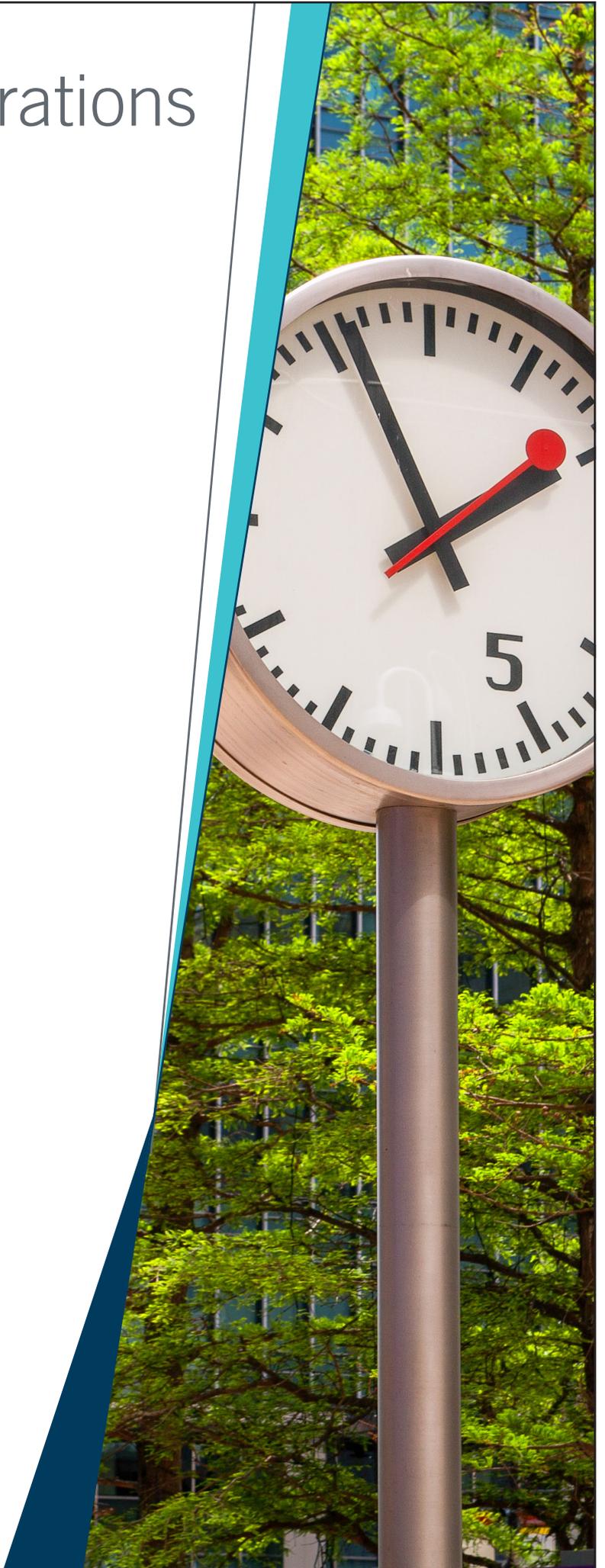


Brexit considerations

FOR BUSINESS CONTRACTS

Dechert
LLP



With Brexit slated for 11.00 p.m. 29 March 2019, it is time to ensure that your house is in order contractually. By ensuring that your business contracts are in the best possible shape and understanding the potential developments ahead of time, you can stay in control.

How to Brexit-proof your contracts:

We advise two related exercises: (i) review your existing contracts – at least those that may still apply beyond Brexit; and (ii) amend your standard terms of business and your approach to future bespoke contracts, to ensure that your company is as protected as it can be from the variances of potential Brexit outcomes.

Step 1: Review your existing contracts

Some contracts, such as one-off transactions to be completed this year, may not be impacted at all by Brexit; but contracts that are intended to endure beyond Brexit will need to take it into account, together with the changes that may come with it. But how they do so will depend on the business sector, the nature of the contract (whether it is a consumer contract, distribution agreement, etc.) and the objectives of the parties.

Use our top 10 considerations below as a starting point to help assess your existing contracts for vulnerability in the face of Brexit. You can then either **flag** those contracts which may have issues so that you can act quickly as events develop and/or laws change or seek to **amend** those contracts which won't or may not work as intended post-Brexit.

Step 2: Make your new contracts as Brexit-proof as possible

Think ahead. By ensuring that all new contracts are drafted so as to best anticipate the changes that Brexit will bring, you will be in a stronger position to limit your exposure to the uncertainty. If you decide on your core approach now you will be in a stronger position to focus later on any unexpected aspects of Brexit.

In addition to amending your standard contract terms and/or standard boilerplate templates to anticipate Brexit issues, you need to upskill those in your business who are involved in negotiating contracts by increasing their awareness of potential pitfalls. Create a checklist of your company'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. Our top 10 considerations make a great starting point.

Our Top 10 Brexit Contract Considerations

Boilerplate provisions

Applicable law: where the contract doesn't state whose law applies

1

Do your contracts state which country's law applies to them? If not, the applicable law is generally determined by EU rules set out in the "Rome I Regulation". On Brexit, the UK will incorporate Rome I into domestic law, so the same principles will apply. For new contracts it would be advisable to state explicitly which law is to govern the contract; Rome I enshrines the recognition of governing law clauses. English law remains a good commercial choice.

Applicable law: where contract stipulates English Law

2 Where a contract provides that it is subject to “English law”, at present this would include directly effective EU law (some of which implies terms into certain contracts). The UK’s EU (Withdrawal) Act 2018 “saves” most substantive EU law at least for the short term. Brexit is therefore unlikely to make significantly change the English laws on contractual interpretation; the main impacts will be on substantive provisions that assume the UK’s membership of the EU.

Additionally, UK judges will no longer be bound by future European Court decisions, so where EU law does impact on contractual interpretation, the UK approach may diverge over time from that of the EU.

Jurisdiction and enforcement of contracts

3 What does your contract say about where challenges will be brought? The Brussels (Recast) Regulation that currently determines which court can hear a dispute, and the recognition of the judgements of foreign courts, will no longer apply to the UK, nor will the 2007 Lugano Convention — although the UK has indicated that it would like to accede to the Lugano Convention, which would offer continued mutual recognition of judgments. If this cannot be agreed, it is likely that the UK would have to rely instead on the older Brussels Convention 1968 arrangements, which would at least offer a basis for upholding an exclusive UK jurisdiction clause and to allow EU enforcement of a UK judgment. The Convention has, however, not been signed by all 27 remaining EU Member States. You may want to consider introducing a process agent clause to deal with service to EU parties. Alternatively, arbitration may offer more certainty as awards remain enforceable under the New York Convention, regardless of Brexit.

Pricing, Default and Material Adverse Change

4 Many contracts contain a Material Adverse Change (MAC) clause. For existing contracts, the MAC clause is unlikely to have been drafted with Brexit in mind. Whether any future aspect of Brexit (e.g., exit without a deal) could constitute an Event of Default, will depend on the formulation of the provision.

For future contracts, you may wish to consider an adjustment to the usual MAC clause, or to include a bespoke Brexit clause. Such a clause could anticipate the emerging negotiations between the UK and the EU, placing breaks in contracts should an unforeseen or undesirable change in the legal framework be agreed.

Have you considered your price clauses in light of increased volatility? Do your contracts have flexible provisions or fixed pricing? If Brexit leads to a situation in which the cost of your business is increased substantially, a change control mechanism will help where a MAC clause may not be able to. Price clauses should also seek regular review of fixed exchange-rates.

Substantive provisions

The availability of free movement within the EU?

5 Do your contracts require you (or assume that it is possible for you) to move staff, goods or capital between the UK and the remainder of the EU? Does your contract envisage the provision of cross-border services? If so, we advise that you consider who should be responsible for obtaining any necessary visas, permits or licences, and whether any increase of customs duties or procedures may affect the ability to perform, or the profitability of, the contract. Would restrictions on the freedom of movement of workers cause a shortage of labour or increase the costs of labour? Identify which party is responsible for addressing and resolving any problems that may arise.

Does your business trade with the EU?

6 The UK's current stated intention is to leave the single market and customs union, either on Brexit or (possibly) at the end of a subsequent transition period. The impact of leaving these structures will depend on whether the UK stays in the single market and customs union right up until the entry into force of a new “deep and special relationship” or for a shorter period, and on the terms of any future arrangement. Equally important is whether your business relies on EU trade agreements with third countries, which may not be automatically rolled over to the UK. As trade on WTO rules remains a possibility, you should consider what the burdens of this would be under existing arrangements, and adjust new contract proposals to ensure that this possibility is anticipated.

Does your contract assume the UK is an EU member state?

7 We advise that you review your contracts for all references to the EU (checking for any cases where the text assumes that this includes the UK) and less obvious places where the contract assumes that UK is an EU member state (rights or obligations that arise from specific EU laws that currently apply to the UK but may not be “saved”). Amendments may be needed to improve contractual certainty where the post-Brexit position is not clear and needs to be agreed. Where possible, you might clarify references to the EU by expressly stating whether they would include the UK after Brexit. Non-competes, distribution and licensing agreements are particularly sensitive to the use of the term “EU” and the geographical area covered in the context of territorial restrictions.

Does your contract assume EU-wide IP protections?

8 Does your contract rely on any IP rights/protections? The EU has proposed that “unitary” rights (including Geographic Indicators) already established prior to the date of Brexit should continue to apply in both the UK and EU; the UK has yet to indicate its position. Much IP law is harmonised across the EU, so the substantive frameworks will be “saved” in the UK by the EU (Withdrawal) Act. But this does not mean that it will be unchanged – for example, outside of the EU, the UK will no longer apply EU-wide exhaustion of rights (unless this is explicitly agreed with EU). Other non-contractual steps may also assist: e.g., for trade marks, applying for a UK domestic registration as a precaution may be advisable.

Data protection

9 Data protection laws (including the new GDPR) are to be “saved”. But some aspects, such as the ability to transfer data between UK and EU-27 entities or alternative data transfer arrangements remain uncertain. The continuation of transfer of personal data between UK and EU relies on the European Commission deeming UK to have “adequate levels of data protection” – the Commission can only make this assessment once UK is a “third country”, so the Commission decision may not be in place immediately after Brexit. It may be prudent to anticipate, when negotiating a contract, the possibility of legal obstacles to the transfer of personal data between UK and EU.

Is your contract sufficiently flexible to address various scenarios?

10 Many aspects of Brexit remain uncertain both as to impact and timing. Who should bear the additional cost of compliance? Whether you want to keep a contract flexible in recognition of the uncertainty, or to tie counter-parties down to clear commitments that will survive in all cases, will depend on your circumstances. But the robustness of existing contracts, and the appropriate framework for future contracts, needs to be assessed (and in some cases re-assessed as Brexit progresses) in order to ensure that disruption is kept to a minimum, and foreseeable problems are duly anticipated and provided for in the contract terms.

How Dechert can help

We have already helped industry bodies, companies and governments to develop their positions; to define clear priorities, red lines and concrete bespoke proposals; to translate this into an advocacy strategy that best fits their needs; and to plan for the different potential outcomes to be faced on 30 March 2019.

Our team's previous experience, not only in the UK government and European institutions, but in the products and advocacy we have undertaken since the Brexit vote, offers clear benefits for Dechert's clients and has ensured that many are now in a strong position whatever shape the Brexit negotiations will take in the future. When necessary the team can also call upon both local and internationally-based sectoral experts across Dechert to identify potential steps during the forthcoming negotiations that may help to minimize any risks associated with Brexit while also maximizing opportunities for clients.

Three particular areas we recommend:

- Conduct rigorous gap-analysis: based on an understanding of the likely Brexit options, identifying in detail the issues that businesses will face, where further research is required and where key risks and opportunities lie.
- Define priorities and red lines: the objectives should be ambitious while taking account of political realities, based on rigorous analysis and hard data that will stand up to scrutiny.
- Design and implement an effective engagement strategy: develop policy papers and detailed draft treaty language for use with decision-makers in the UK and EU governments and institutions.

Recognition for Dechert's Brexit work

- Dechert is 'the go-to firm' in this space, offering 'cutting-edge and innovative advice' on Brexit-related issues.
- Dechert stands out for 'its deep understanding of the inner workings of government and the Brexit negotiating teams on the UK and EU sides'. THE LEGAL 500 (UK), 2017

More from Dechert

For further information on Brexit, please visit the Dechert Brexit Resource Centre at: dechert.com/brexit

To measure your business' exposure to the main risks of Brexit, Dechert's Brexit Impact Analysis is a free online tool that provides your business with a tailored printable overview highlighting the priority issues for your business, as an aid to your Brexit planning. **Get your report today at: <https://extranet.dechert.com/brexit>**

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