



FACT SHEET: BREXIT - REVIEWING YOUR CONTRACTS; BREXIT CLAUSES

This fact sheet discusses how to review your existing contracts, as well as some additional contractual terms you may wish consider when preparing for Brexit.

REVIEWING YOUR CONTRACTS

As part of your preparations for Brexit, it is sensible to review your contracts with suppliers and customers to consider who bears various risks. Liability for these risks may have a significantly impact on the profitability or viability of your agreement.

As a matter of priority, you should ensure that have signed contracts in place with your key suppliers and customers.

You then should review each contract, if you haven't already done so, paying particular attention to the following key points:

- What is the term of the contract? When does the contract expire, or does it automatically renew?
- When can each party terminate, and in what circumstances?
- Does the contract refer to the 'EU' as the territory? If so, this may need to be amended to the UK, if that's the intention.
- What is the stipulated currency? There could be significant changes in the exchange rate, which may impact the value of the sums paid and received.
- Who pays the tariffs and who deals with customs clearance?
- Are there any data transfers from the EU to the UK? If so, the parties must comply with UK and EU data protection laws (Data Protection Act and GDPR).
- How will disputes be settled?

"BREXIT" CLAUSES

You may wish to consider including one or more clauses in your agreements to enable you to renegotiate, suspend or terminate your agreements with your suppliers if certain triggering events occur, related to Brexit. These clauses include:

- hardship clauses;
- price variation clauses; and
- supplier priority clauses.

These can be included in new contracts, or subsequently added into existing contracts (where the parties agree).

Hardship clauses

A hardship clause aims to manage a situation where one party to the contract suffers hardship which is caused by a pre-defined event.

For instance, Brexit may cause a change in prices, or a shortage in the availability of parts or materials. These events could make the agreement unprofitable or unreasonably burdensome for one of the parties.

When a hardship clause is triggered, it can allow the parties to re-negotiate, suspend or terminate the agreement.

Price variation clauses

A price variation clause allows for a pre-defined price variation to be made when triggered by a particular event. For example, this might be increase in the price of materials, import tariffs or exchange rate fluctuations.

Supplier priority clauses

A priority clause protects a party in the event that its supplier only has a limited amount of the product available. This type of clause requires the supplier to prioritise the other party to the agreement over its other customers.

Force majeure clauses



A force majeure clause allows the contractual parties to avoid liability for a failure or delay in performing their obligations due to events beyond of their control. It usually sets out what is, and what is not, considered a force majeure event. The list may cover natural disasters and shortages of raw materials.

While Brexit is likely to have an impact on your contractual relationship, it would be unusual to include 'Brexit' as a force majeure event. This is particularly relevant where a contract was entered into after 2016 or 2017, as the parties would be expected to have taken steps to manage their supply chain risks.

Frustration

Where the contract does not contain one of the above clauses, a party might try to claim that a contract has been 'frustrated' by Brexit. In other words, that it has become impossible for that party to perform the contract, and therefore it should be terminated.

However, the bar for successfully claiming 'frustration' is very high. Simply stating that a contract has become more expensive or difficult to perform will not be enough. Performance must be impossible, illegal or radically different.

The 'frustrating' event must also not have been in the parties' contemplation when the contract was signed. Therefore, any contract entered into from 2016 onwards is unlikely to be considered to be frustrated as a result of Brexit.

FURTHER INFORMATION

For further information on the issues, we would be pleased to assist you.

Please contact Anna Frankum, a Partner in our IP, IT & Commercial team:

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This factsheet is intended to provide a general summary of the law in this area rather than comprehensive guidance or legal advice. Legal advice should be sought in relation to specific circumstances. The law and practice in this note is stated as at 30 October 2019.

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