

## Commercial

**Brexit Update – Commercial Contracts**

While the date the UK will leave the European Union is fast approaching, the manner in which Brexit will take place is still unclear. Regardless of the uncertainty which continues to surround Brexit, there are issues businesses should be aware of and practical steps which can be taken now to prepare.

In the first instance, you should undertake an audit of your existing contracts and review your strategy regarding future contracts so that you can flag any potential issues as early as possible. Particular attention should be paid to the following:

**1. Contracts you may wish to terminate.**

Depending on the form Brexit takes, it may have implications in relation to the profitability of existing contracts. Issues to watch out for include contracts which could be affected by the imposition of tariffs, changes in exchange rates, variations in regulatory regimes and restrictions on the free movement of people.

You should flag which contracts, if any, you may wish to terminate following Brexit and consider if they can be terminated. Whether existing contracts can be terminated will depend on their terms but, unless the contract contains applicable express termination provisions, the issue is slightly more complicated. It has been suggested that standard terms such as force majeure clauses may provide relief to businesses which find themselves a party to problematic contracts post-Brexit. However, it may be that Brexit would not constitute an event of force majeure. The doctrine of frustration may provide an exit route if it is impossible to perform the contract due to an unforeseen event, but whether this will apply will depend on the particular circumstances.

**2. Existing contracts which will remain in force post-Brexit.**

Existing contracts should be reviewed to determine whether any references to the EU will include the UK following Brexit. This issue may arise, for example, in relation to the definition of the territorial scope of the contract, a reference to “EU law”, or a restriction on transferring personal data outside the EEA. The starting point will be the express terms of the contract, but if the language is not clear then additional factors can be taken into account including the purpose of the clause and the contract.

Contracts should be reviewed so that potentially problematic terms can be identified. You may wish to consider negotiating an amendment to the relevant provisions so as to avoid any ambiguity post-Brexit.

**3. Future contracts which will remain in force post-Brexit.**

At present, an EU Regulation known as the Recast Brussels Regulation allows the enforcement of judgments in the EU where contracts contain a jurisdiction clause which references an EU member state. It is possible that following Brexit the Regulation will cease to apply and, if so, there may be implications in terms of enforcing English judgments and relying on English jurisdiction clauses in the EU. If this may affect any pending or ongoing litigation then you should seek legal advice about how best to proceed. To future-proof new contracts, you may wish to consider including an alternative dispute resolution clause so that arbitration can be used as an alternative to litigation.

Other factors you may wish to consider when drafting future contracts include the inclusion of Brexit clauses, an express right to terminate the contract on Brexit and clear definitions of the EU and EU law.

**Undertaking an assessment and being aware of potential issues may help your business avoid costly consequences. If you require expert guidance or legal support to help your business prepare effectively for Brexit, get in touch with 3HR Corporate Solicitors.**

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