



## What does Brexit mean for...

### Contract and termination disputes

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#### Overview

Market uncertainty generated by the UK's EU referendum result and the lead up to its formal departure from the EU has implications for contracts which may have been entered into on the basis that the UK is, and will remain, a member of the EU. The Government has now published the European Union (Withdrawal) Bill, known as the Repeal Bill ("the Bill"). This briefing contains our updated thinking, given the additional information now available, on how Brexit might affect contract and termination disputes.

#### What will change?

The aim of the Bill is to repeal the European Communities Act 1972 and convert European Union law as it stands at the moment of exit, into UK law. This means that unless and until repealed or amended by Parliament, EU generated law will continue to apply in the UK.

#### Should I be worried?

There are concerns that the UK cannot simply adopt EU legislation back into UK law in its current form. For example, some EU generated law refers to EU regulatory authorities or processes, which, absent agreement to the contrary, will not be available to the UK once it leaves the EU. The Bill will also re-write legislation that is not designed to be used or enforced by a non-EU member state. Absent an agreement with the EU, this makes it doubtful that the CJEU and the individual member states' courts will endorse full reciprocity with the UK.

Some degree of amendment will be necessary in the immediate term to avoid a situation where UK enactments of the European regime are legally unworkable. The Bill sets out details of proposed delegated powers to make amendments to correct the statute book to make EU legislation workable after Brexit, using secondary legislation which does not require full Parliamentary approval. The powers exclude matters of policy change. The difficulty will be balancing speed with sufficient scrutiny of such secondary legislation.

The risk of regulatory divergence is dealt with in the Bill. CJEU law will be given the same precedent status in our courts as decisions of our own Supreme Court. Whilst the Supreme Court will become the final arbiter on questions of interpretation on EU legislation for the UK. The Supreme Court will take a sparing approach to departing from CJEU case law. Parliament will also be free to change the law, and therefore overturn case law, where it decides it is right to do so.

The nature of the UK's future relationship with the EU remains far from clear and that future relationship will have significant implications for the UK's trading relationship with third party countries, such as the USA and China. That, combined with the legal uncertainty detailed above means that the potential exists for a myriad of terms in contracts across different sectors to be directly or indirectly impacted. This note considers how these changes affect contractual certainty.

## Key contractual provisions to consider

**Force majeure** – many commercial contracts contain a force majeure clause. The purpose is generally to offer a party relief from failures to perform or delay in performing its obligations where it is prevented from doing so by circumstances beyond its control. Their scope varies significantly but some provisions, such as those tied to acts of Government, may allow a party to suspend or delay performance if Brexit results in a particular consequence. Crucially, such clauses usually only provide relief to the extent the force majeure event actually hinders, delays or prevents performance and only for the duration of the event, but the wording of the actual clause will decide when relief is triggered and for how long. In other words, they will not provide blanket-relief for non-performance nor will they usually be triggered simply because performance has become significantly more expensive. Relief will often be tied to a duty to take steps to mitigate the impact of the force majeure.

**Hardship/adverse change clauses** – some contracts, especially long-term projects, include clauses addressing hardship, material adverse changes or specific change events. These may become relevant following Brexit and allow a party to trigger a right to renegotiate, adjust or even terminate their contract.

**Frustration** – where the terms of a contract provide no assistance, in extremely limited circumstances the doctrine of frustration may do so. This doctrine provides that a frustrating event may discharge a contract altogether where it is so fundamental that it 'strikes at the root of the contract', rendering performance impossible (such as for illegality) or so radically different from what the parties had contemplated.

Importantly, in the context of Brexit, frustration will not assist a party whose performance simply becomes significantly more onerous or expensive. For contracts which have yet to be signed, the doctrine will not apply if the frustrating event (Brexit or an event connected to it) is not entirely beyond the contemplation of the parties when they enter into the contract. Taken together, the occasions when the consequences arising from Brexit will give rise to a genuine frustrating event which discharges a contract are likely to be extremely rare.

## Eversheds Sutherland's expert prediction

The referendum result and negotiations following the UK's Article 50 notification are unlikely to provide a basis for suspending or terminating obligations under most commercial contracts. In the absence of specific contractual rights triggered by these events or by market volatility, such as adverse exchange rates, a party wishing to delay or avoid its obligations because of a change in the economic outlook or regulatory environment will instead have to consider if there are alternative grounds which justify an early end to its contract or which provide a commercial basis for re-negotiation. Close monitoring of the counterparty's performance of its obligations and/or any break rights or notice periods could prove crucial. A party should review its position carefully before attempting to trigger any right of termination. Failure to do so could

expose the party to a significant claim in damages. Parties should remember that internal communications (including emails and texts) could form important evidence in the event of a subsequent dispute connected to an attempted termination. Emails and texts may be disclosable to the counterparty no matter how harmful or embarrassing (unless protected by legal privilege). Care should therefore always be taken during any preparatory steps prior to termination.

The period of uncertainty during the UK's Brexit negotiations will see an increase in the number of organisations undertaking a careful review of their contracts for a basis on which to delay or renegotiate their obligations, or terminate those contracts altogether. When Brexit occurs, in whatever form that eventually takes, it is possible that this will give parties grounds to trigger force majeure, hardship or change in law provisions in their contracts or projects, allowing for suspension or alteration of their obligations. We expect to see an increase in the number of contractual and termination based disputes.

Parties should undertake a full **Brexit risk analysis** of existing contracts to ensure that they are 'Brexit-proof' before they find themselves in a potential dispute. Forward planning will put a party in the best position to manage or avoid the risks of disputes which may arise as a result of contractual uncertainty and termination.

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