



Brexit and your contracts

How Brexit will affect your business with the EU

The Situation

On 29 March 2017 the Prime Minister issued a letter invoking Article 50 of the Treaty of the European Union. The letter officially notified the European Council that the UK will formally withdraw from the EU by April 2019.

What does it mean for me?

The UK's exit from the EU is likely to have an impact on your business's existing and future commercial contracts.

It is important that you perform an audit of your existing contracts in order to assess the effect that Brexit may have on your legal rights and obligations under these agreements. It is also important to begin future proofing your contractual arrangements against any potential impact that Brexit may have. Unfortunately, there is a genuine risk that Brexit could increase costs for your business.

Under the current European Customs Union agreement, goods produced in the EU that comply with minimum regulatory standards, can be sold freely across the EU.



The customs union and currencies

If, following Brexit, the UK is no longer part of the EU's customs union, then customs checks may be required for goods entering and leaving the EU, resulting in increased costs or delays. Tariffs could be applied to goods and services provided to and from the EU, affecting the profitability of your contracts in the future.

Currency fluctuations are another potential consequence of Brexit. These fluctuations will make financial forecasting in the short to medium term difficult for those paid in foreign currencies under any of their contracts.

When entering a new contract, or renegotiating an existing one, we recommend including a mechanism to account for the changing value of the contract following Brexit (because of tariffs). You should also think about adjusting the price, or switching currency, if the agreed contract currency crosses certain agreed thresholds.



Logistics, personnel, agents & distributors

You should begin to explore the potential impact that Brexit may have on the logistics of your business. Examine your business and ask:

- Do you currently source key components from suppliers within the EU?
- Will your pricing models stand up if tariffs are increased?
- Will delays from increased customs checks cause significant problems?
- Will your business rivals be based in the EU? Will they be at an advantage?

Logistics & personnel

Under current European law, EU citizens have the right to live, work, and study in the UK, and UK nationals have the same rights in EU countries. Post-Brexit, EU nationals may no longer have the right to work in the UK.

It is important that you review your supply chains and determine whether Brexit will impact your business model.

You should analyse how you currently staff your business. Do you employ EU nationals? There is a chance that visas will be required for EU nationals to work in the UK following Brexit. You should determine whether this will impact you.

You may have people working in your supply chain who will be affected by Brexit. If so, you should take steps now to alter your supply models so that you do not face unexpected financial or logistical problems post-Brexit.

Agents & distributors

Do you have a distribution network, or do you employ agents who act on your behalf in the EU?

Agency agreements may become easier and less costly to terminate post-Brexit, depending on what EU laws are kept by the UK. This could present opportunities for reorganising your supply chain and moving to a distribution network.

Distribution networks typically require less supervision than an agency relationship, and are cheaper to operate. In the past, competition laws relating to territorial exclusivity may have been a barrier to setting up a distribution network. Brexit may remove the requirement that UK competition law be the same as its EU counterpart, which might present opportunities for your business.

There may also be changes to employment law after Brexit. Will this affect your business? Will you have to review the employment contracts of your staff?

Intellectual property

Intellectual property rights take many forms, and include patents for inventions, trademarks, design registration and copyright.

Any impact that Brexit may have on intellectual property law is of great concern to many industries in Northern Ireland. The good news is that it is unlikely that UK intellectual property laws will differ significantly from those in Europe after Brexit. Europe and the UK have deep trading connections and most countries agree that harmonisation is beneficial.

Ensure you are properly prepared by identifying which of your intellectual property rights are likely to be affected. Find out if further applications or registrations will be required to achieve maximum protection over your rights.

Let's explore in a little more detail some of the areas of intellectual property law that may be impacted by Brexit, namely:

- trademarks
- data protection
- complying with two regulatory systems

Trademarks

Do you have any trademarks? It is important to remember that there is no legal obligation to register trademarks. If your trademark is unregistered, it doesn't mean that a competitor can use a similar trademark without infringing on your rights.

You should review your business and determine whether registration is possible for any of your existing intellectual property or key brands. After Brexit, the UK will most likely aim to provide the same level of trademark rights as the EU.



Data protection

If you currently move data freely around your European network, this is likely to become more difficult going forward. The General Data Protection Regulation (GDPR) came into force on the 25th of May, 2018. This imposes many additional requirements on data controllers and data processors, meaning that you must have clear data protection policies in place.

The Information Commissioner's Office (or ICO) is an independent authority that upholds information rights in the public interest. It promotes openness by public bodies and data privacy for individuals. The ICO's view is that the GDPR will remain vital for UK businesses operating across the EU. It is possible that many of the changes included in the GDPR will be enacted in the UK, irrespective of any future relationship with the EU.

It is important that you take steps now to assess where your company's data is held. Is it in the EU?

Complying with two regulatory systems

It is also important to be aware of regulatory changes that Brexit may bring, and ensure that you are aware of the additional hurdles these could pose to your business.

At present, EU regulatory law applies to all member states. Depending on how much EU law the UK decides to keep following Brexit, there is a risk that if you wish to trade between the UK and the EU, you may have to comply with two very different legal and regulatory systems.

This will be particularly significant if you are an online trader of consumer goods who wishes to deal with consumers in the EU after Brexit. You must ensure that you are aware of the relevant regulations in the post-Brexit UK market, as well as in the EU. You must ensure that you meet all the relevant regulatory requirements to avoid falling foul of potential sanctions.



Your existing contracts

How can your existing contracts be varied (or altered), and how might they be terminated if you cannot reach agreement with your partners?

A variation (sometimes called a variation instruction, variation order, or change order) is an alteration to a contract in the form of an addition, substitution, or omission from the original contract. Termination, in the context of contractual law, means ending a commercial agreement.

While contracts can be varied, or altered, by oral agreement, it is best practice and advisable to put any changes in writing. Your existing contracts may already include this requirement. It is important to understand that there is no “one size fits all” advice for contracts. Each agreement must be considered in its proper context and appropriate advice sought accordingly.

Invest NI has received numerous queries from clients who have asked whether their contracts may be “frustrated” by Brexit, or whether a contract’s force majeure provisions can be used to terminate due to Brexit. This is important, because individuals or organisations may try to avoid their payment obligations to you after Brexit by seeking to rely on frustration or force majeure.

Frustration arises when something happens after the date of a contract without the fault of either party that either transforms the obligations under the contract into something radically different or makes it physically or commercially impossible to fulfil the contract.

Frustration has, in the past, been interpreted very narrowly by the courts and so inconvenience, economic hardship or financial loss may not be sufficient grounds for challenge – though again context will be key.

If Brexit does make the performance of a contract impossible, illegal or removes the very purpose of it, then termination may be justified. However, the circumstances where this can be relied upon are likely to be relatively rare.

Force majeure is a common clause in contracts that frees both parties from liability or obligation if an extraordinary event prevents one or both parties from fulfilling their obligations. Events such as war, strikes, riots, crime, or an event described in legal terms as an ‘act of God’ (such as a hurricane, flood, or volcanic eruption) may result in a force majeure clause being invoked.

It is unlikely that either party will be able to rely on a standard force majeure clause to terminate a contract because of Brexit. Relief under force majeure is normally limited to obligations that are rendered impossible to perform.

The fact that you may suffer economic hardship will not normally be sufficient to claim relief—but this will depend on the exact wording of the clause. Material adverse change clauses, for example, could be wider and potentially be triggered by the financial hardship suffered in the lead-up to, or following Brexit.

Future-proof your business for Brexit

While we still do not know precisely what Brexit will entail, it is possible to reduce the potential impact by considering your existing agreements in the context of Brexit. You will need to determine your potential risk exposure and whether there are possibilities to adjust your contracts to reduce or remove any potential risks.

Future-proofing your contracts against Brexit is vital. You will need to provide for any potential commercial impact of Brexit, by making changes to tariffs, exchange rates, or customs procedures within your existing contracts, for instance. You will need to clarify whether references to the EU in your contracts will include the UK after Brexit. You will need to consider if there should be an express right to terminate a contract on Brexit.

Think about whether your most valuable contracts will be materially affected by Brexit. If they are, investigate whether any losses caused by Brexit can be offset by identifying and exploiting new commercial opportunities. You must also determine whether your business structure is optimised to work in Europe post-Brexit, and begin to take the necessary steps and advice to ensure that it is.

Invest NI can help with your Brexit-related queries.

Visit our website, investni.com
or call us on **0800 181 4422**

