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# Preparing for Brexit

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# Preparing for Brexit

- The EU – some basic concepts
- Seven steps to prepare for Brexit
- Brexit and contracts – some thoughts



# The EU – some basic concepts

- The ‘two pillars’ of Brexit
- Trade deals and rules of origin
- Why no deal planning makes sense



# The 'two pillars' of Brexit

- Leaving the **Single Market**
  - Regulatory alignment and the removal of 'non-tariff barriers'
- Leaving the **Customs Union**
  - The Common External Tariff
  - No bilateral free trade agreements
  - FTAs and the EU

# The 'two pillars' of Brexit

- What about WTO rules?
  - What are WTO rules?
  - The 'most favoured nation' principle
  - Most favoured nation principle and UK FTAs

# UK FTAs

1. Tunisia
2. Lebanon
3. South Korea
4. Central America
5. Andean Countries
6. Norway and Iceland
7. Caribbean countries
8. Pacific Islands
9. Lichtenstein
10. Israel
11. Palestinian Authority
12. Switzerland
13. The Faroe Islands
14. Eastern and Southern Africa
15. Chile

# Free trade agreements and the UK

- Can't we just agree a free trade agreement?
  - What is a free trade agreement?
  - Why do we need to be in the Customs Union when we can have an FTA?
- Some problems with FTAs:
  - Different FTAs, different rules
  - Trans-shipment and rules of origin
  - Rolling on our EU based deals
  - Diagonal cumulation of origin



# Why prepare for no deal?

- Not a waste of time
- Your customers' expectations
- An opportunity





# Seven steps to preparing for Brexit



1. Set up a steering group
2. Conduct a business audit
3. Complete a legal risk analysis
4. Use the results
5. Do due diligence
6. Identify external help
7. Open discussions

# Step 1 – Set up a steering group

- Draw on expertise from across your business
- Clear remit / terms of reference
- Conducts following tasks
  - create strategy – guiding principles
  - commission business audit
  - turn assessment into action plan
  - report to board on implementation
  - monitor effectiveness



# Step 2 - Conduct a business audit



- Conduct a review of your business to see where it is exposed to no deal-related risk
- Review your supply chain – both upstream and downstream – to assess direct and indirect impact of no deal
- Different for every business
- Take a broad view – macro economic factors and politics are as likely to impact you as changes to the law and relationships with your suppliers and customers

# Business audit - tariffs

- New tariff regime
- Imposition of the Common External Tariff on day 1
- Reduction in level of import tariffs
- Trade asymmetry between the UK and EU



# Business audit - customs

- Customs procedures new for many businesses
- Make sure that you have an EORI number
- Consider:
  - Transitional Simplified Procedures
  - Inward processing relief
  - Outward processing relief
  - Temporary admission
- Tariff accumulation
- Who bears the costs?

# Business audit - logistics

- Hauliers will need to ensure that drivers have:
  - the correct international driving permits
  - at least six months left on their passports
  - a Certificate of Professional Competence
- Hauliers may need:
  - European Conference of Ministers of Transport permit
  - Bilateral road haulage permit
  - Trailer registrations
- Profit margins and costs

# Business audit - regulated goods



- Regulated manufacturing will suffer increased non-tariff barriers to trade
- Approvals in UK not valid in the EU
- Compliance with two approval regimes
- Current UK 'Notified Bodies' will not be recognised by EU
- Need to move product registrations to EU, or duplicate them

# Business audit - people

- EU settlement scheme
- Cultural shift in attitude to EU migrants
- Communication plan
- Buddy scheme





# Business audit - data



- UK treated as third country in respect of data
- No adequacy decision from EU to safeguard the free flow of data
- 18 months is the quickest period in which an adequacy decision has been reached
- Standard contractual clauses

# Step 3 - legal risk analysis

- Complete a legal risk analysis
- Industry specific legislation and regimes
- Need to review your contracts to see where you are exposed to risk
- IPR and technical notices

# Step 4 - Use the results



- ID alternative suppliers and supply routes
- Stockpiling and cashflow
- Warehousing
- Delays to supply and contractual issues
- Shortening supply chains
- Applying for Transitional Simplified Procedures
- Addressing IP and data issues

# Step 5 - Due diligence

- Do due diligence on your suppliers. Are they prepared?
- Ask difficult questions and expect to be asked difficult questions.
- Prepare a questionnaire



# Step 6 – Identify external help

- Lawyers
  - Accountants
  - Freight forwarders
  - Customs brokers
  - Chambers of Commerce
  - CBI
  - Trade bodies
- 
- A background image showing a group of business professionals in a meeting. One person is holding a tablet, another is pointing at a chart on a clipboard, and there are various documents and charts on the table. The image is semi-transparent and serves as a background for the text.

# Step 7 - Open discussions

- Brexit statement
- Suppliers
- Customers
- Employees
- Networks



# Brexit and contracts – legal risk analysis

- Why review your contracts?
  - Exchange rates
  - Import tariffs
  - Border delays
  - Parallel regulation
  - No freedom of movement
  - No freedom to provide services
  - Changes in laws



# Legal risk analysis – examining your contracts

- Contract law – creature of UK courts and statute eg UCTA 1977, SGA 1979
- Impact of Brexit as a result of contract terms
- Current contracts
- Future contracts



# Can you just do nothing?

- Termination rights: short no-fault termination
- Remaining term
- Contract or position under it is not affected by Brexit
- What if Brexit imposes additional costs or burdens?

A close-up photograph of a fountain pen with a gold nib writing on a document. The pen is positioned over a line labeled 'Signature'. In the background, a large, red, semi-transparent stamp with the word 'TERMINATED' is visible, suggesting a legal or contractual context. The document is slightly out of focus, emphasizing the pen and the signature line.

Signature

# Can the common law help?

- Interpretation
  - Words given their natural meaning
  - Implied terms
  - Economic hardship
  - What about frustration?



# Can the common law help?

- Frustration
  - Treat contract as discharged
  - High test, including performance which is “impossible, illegal or radically different”
  - Brexit: in contemplation of the parties (post June 2016)
  - Brexit: will it meet the test?



# Clauses which might help

- Force majeure
- Compliance with laws
- Change control
- Hardship clause
- Termination

# Force majeure

- Allows suspension / non-performance where events occur outside reasonable control
- War, strikes, civil unrest, 'acts of god' etc
- Foreseeability is an issue
- Change in economic / market conditions not enough
- Temporary application – would Brexit apply?
- Are the prescribed consequences helpful?

# Compliance with laws

- Party may be required to comply with laws
  - Laws at the time of the contract or laws from time to time?
  - Presumption a law should apply as re-enacted / modified?
  - European Union (Withdrawal) Act 2018 so query immediate changes...
- 

# Change control

- Contract sets out process
- Restrictions on forcing changes to terms
- Consequence if fail to agree a change: status quo or termination?
- Might not want contract to be terminated?
- A means of opening discussions?
- Question of interpretation



# Hardship clause

- Clause dealing with impact of specified factors
  - cost of supply / raw materials
  - change in interest rate / exchange rate
- Usually factors are those identified when contract is made
- What are the triggers?
- What are the consequences?
  - prescribed change vs obligation to negotiate
  - what if changes cannot be agreed?



# Termination

- Termination without cause
- Material breach
- Insolvency
- Negotiating tool?
- Do you want to terminate? Think commercially.



# Problem clauses

- References to “EU” or “member states of the EU”
  - sales territory
  - Trademarks
- Risk – UK ceases to fall within territorial definition.
- Member states from time to time?
- Compliance with EU law clauses
  - Still appropriate?
  - Where will judgments be enforceable?



# Existing terms don't help?

- Can you renegotiate?
  - Beware variation
  - Do your homework
- Stockpile: raw materials/  
inventory
- Alternative delivery routes
- Bring supply in-house
- Look at limitations on liability



# Brexit clause (1)

- A clause which triggers a change in rights or obligations as a result of a specified event
- Main triggers: see earlier slide on financial hardship
- Adverse effect: the trigger must result in an adverse effect
- Metrics – objective measure
- Duration of trigger event



# Brexit clause (2)

- Causation: was Brexit the cause?
  - Fall in the value of sterling?
  - Fall in the value of sterling caused by Brexit?
  - What if Brexit is the indirect cause? Not the sole cause? What if the result occurs pre-Brexit?
- Defining Brexit – do you want to do this?
- When can this be used – only post-Brexit?
- What if the trigger event means windfall profit for a party?

# Brexit clause (3)

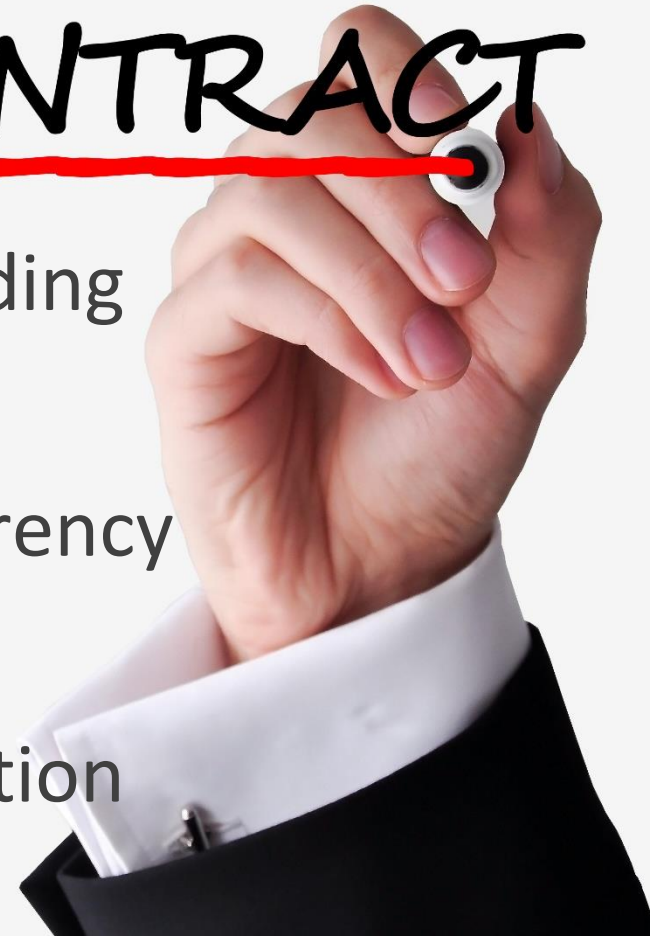
- Possible outcomes:
  - Renegotiation
  - Prescribed outcome eg price rise
  - Termination



# Renegotiation

## reNEGOTIATE CONTRACT

- Agreements to agree – not binding
- Binding process
- Information rights and transparency
- Intended outcome
- Failure – status quo or termination



# Prescribed outcome

- Revised lead-in times / delivery routes
- Varied specification
  - Who picks up the cost?
- Price increase
  - Objective metrics useful





# Termination

- Which party?
- Time limit for exercise
- Process
- Notice period
- Consequences of termination
  - Existing orders?
  - Return of documents?
  - Final payments?



# Some final thoughts

- Assignment of contracts?
- Specifying certain staff?
- No waiver clauses
- Understand your rights and duties...
- ...but take the commercial approach

# Contact us



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