



Contract and other obligations

SEPTEMBER 2019

As parties assess changes in the legal, economic and regulatory landscape caused by the UK exit and the costs and other implications on their contractual relationships, they may consider the scope for avoiding contractual obligations. Businesses will wish to consider carefully the contractual mechanisms on which they (or their counter-parties) may seek to rely in this context.

A key question is whether a particular contract can be terminated as a result of a UK exit from Europe, particularly as the changed commercial landscape may prompt contracting parties to reassess their current contract arrangements and look for ways to exit those contracts which are no longer required or profitable. Any right of termination, of course, depends on the terms of the relevant contract, including any material adverse change and force majeure provisions and any right (express or implied) to terminate on notice as well as the doctrine of frustration. Most general provisions are unlikely to be triggered by any of the stages of the Brexit process. Contracting parties may seek to include a specific provision in new contracts dealing with the effects of the UK's exit from the EU.

A related issue is interpretation of pre-existing contracts. For example, how will an obligation to comply with a specific piece of EU legislation be interpreted after the exit or during any transition period? How will the use of 'European Union' as a defined term in contracts be interpreted - will it be found to include the UK or not? Similarly, how will a contract be interpreted if, at the time of contracting, EU law formed part of English law but the time of performance is after the UK's exit or during any transition period? These are essentially questions of contractual interpretation. In most cases it is likely that a choice of English law will be interpreted to mean English law as it stands from time to time, subject to any variations, including such variations as may arise from Brexit. However, where some key provision of EU law is essential to the operation of a particular contract, in particular where performance of the contract is in the continuing EU, the court may give effect to the relevant EU law so as to give commercial

**The section is part of our
Brexit Legal Guide
September 2019.**

Brexit sources of information relating to contract:

No Deal

- If the [Withdrawal Agreement](#) endorsed by the EU Council on 25 November 2018 or the [Political Declaration](#), or some version of both, are not approved by 31 October 2019 and there is no change to the exit date, the UK will cease to be a member state on that date without any transitional period
- The body of EU law in force at that time will be imported into UK law (with necessary amendments) under the [European Union \(Withdrawal\) Act 2018](#) and UK legislation made to implement EU law will be retained, with suitable amendments - this is called 'retained EU law'

effect to the contract. English courts are likely to take a sensible view and to favour commercial interpretations.

In relation to new contracts, English law has always been a very popular choice for parties doing business worldwide and the UK's exit from the EU should not generally have any effect on the willingness of contracting parties to choose English law as the governing law of the contract. Appropriate drafting in new contracts can avoid the issues described above in relation to existing contracts. English domestic commercial law has its own well-developed and respected rules which have largely been unaffected by EU intervention and the benefits of using English law are in no way connected to the UK's membership of the EU.

Finally in the contract area, the validity and effectiveness of any contractual choice of law is very unlikely to be affected by Brexit. In other words, a choice of English law (or Scots law or any other law) in a contract will continue to be effective, whether in England, Scotland or in the remaining EU member states. This would follow from the continued operation within the EU of the Rome I Regulation, governing choice of law in contracts, which in effect enforces any choice of law made by contracting parties, whatever

law they have chosen. Under Section 3 of the Withdrawal Act, the Regulation will form part of domestic law after Brexit. In any event, the pre-regulation rules in England are to very similar effect and would give rise to the same result ie any expressly chosen governing law will generally be enforced.

Outside the contract area, commercial [disputes](#) sometimes involve allegations of liability arising in tort or delict, or claims for unjust enrichment and the like. Such [disputes](#) can give rise to considerable uncertainty and risk in international cases because it may be difficult to predict which law to apply. EU legislation (the Rome II Regulation) presently allows commercial parties to select in advance, by contract, the law to govern not only their contractual but also their non-contractual rights and liabilities. That was not the position under the English common law, however. The [Withdrawal Act](#) provides for Rome II (as directly applicable EU legislation) to form part of domestic law after Brexit.

(See also accompanying section: [Disputes](#) in relation to jurisdiction and enforcement of judgments.)

"The UK's exit should not generally have any effect on the willingness of contracting parties to choose English law as the governing law of the contract."

ANNA PERTOLDI

- A lot of the secondary legislation to adjust retained EU law for the post- Brexit world has already been made, see the accompanying section: [The UK's new legal order post-Brexit](#)
- The Government has published a series of 100+ practical no-deal notes with advice for companies, including one on contractual disputes (see accompany section: [Disputes](#))

Deal/transitional period

- If approved by the UK Parliament, the Withdrawal Agreement, or some version of it, will set out arrangements for the UK's withdrawal from the EU - when the UK will cease to be a member state
- A transition period will follow the date of the UK's EU exit up till at least the end of 2020, possibly the end of 2021 or 2022
- During transition, EU law will continue to apply in and to the UK and the UK will continue to trade as part of the Single Market
- The Withdrawal Agreement will be accompanied by the Political Declaration on the future relationship between the UK and the EU. This will comment on the future trading relationship between the EU and the UK

Key contacts



Robert Moore
Partner
T +44 20 7466 2918
robert.moore@hsf.com



Julie Farley
Professional support lawyer
T +44 20 7466 2109
julie.farley@hsf.com



Anna Pertoldi
Partner
T +44 20 7466 2399
anna.pertoldi@hsf.com



Sarah Hawes
Head of corporate knowledge
T +44 20 7466 2953
sarah.hawes@hsf.com