

SCOTTISH INDEPENDENCE: CONTRACTS AND OTHER OBLIGATIONS

22 April 2021 | UK

Legal Briefings - By **Jannis Bille, Julie Farley, Sarah Hawes and Maura McIntosh**

WHAT WILL BE THE EFFECT ON OUR CONTRACTS?

As with the prospects for and then the reality of Brexit, the [prospect of an independent Scotland](#) raises questions for business about contracts and other obligations. This briefing outlines a number of relevant implications of independence and the relevant considerations for affected parties. Scotland already has its own legal system, meaning broadly that independence will have a relatively limited impact on existing legal rights and obligations, not least because an independent Scotland would be expected to adopt all laws that currently apply to it unless specifically amended or repealed (this would mirror the Republic of Ireland's approach in 1922, and the UK's approach in respect to EU law in the context of Brexit).

Parties to contracts subject to Scottish law or with assets subject to Scottish jurisdiction (whether express or not) will nevertheless need to consider the impact of independence on their contractual rights and obligations. For example, the Scottish Government could pass laws redenominating contractual payment obligations in contracts governed by Scottish law which would force creditors to accept a new Scottish currency in place of the pound sterling (for more detail on currency implications see [Scottish independence and currency: choices, issues and implications](#)).

TERMINATION

Whether a particular contract could be terminated as a result of independence would of course depend on the terms of the relevant contract, including any material adverse change or force majeure provision, or any right (express or implied) to terminate on notice, as well as the doctrine of frustration. For example, while Scottish independence alone may not give rise to a direct event of default or to a termination event, independence may lead to other trigger events, such as a change in the tax regime affecting the contract (for example a change in the rate of withholding tax payable), which may entitle unilateral early termination.

The categories of events which are commonly included in the definition of a force majeure event and which might occur in connection with Scottish independence include; acts of government, restriction, suspension or withdrawal of any licenses, and changes in the law or changes to regulations. However, it is not enough to have an event falling within the definition of a force majeure event for the clause to come into play. The clause will only be triggered if the event prevents, hinders, or delays a party from performing its obligations. A force majeure clause could for example be triggered if the Scottish Government was to revoke certain licences following independence, preventing a party from carrying out its licensed business and thus preventing performance of the underlying contract.

A material adverse change clause differs from a force majeure provision in its underlying principles and provides a different legal avenue to pursue for contractual parties (these are usually found in loan agreements and SPAs). Depending on the drafting of the clause this may give rise to renegotiation of the entire contract or just a certain provision, and may even result in an immediate full or partial termination of the contract.

With regard to both force majeure and material adverse change provisions, it will ultimately depend on the terms of the relevant contract, when it was entered into and whether the referendum was foreseeable at the time, as to what impact these have on contracts. While most general provisions are unlikely to be triggered by any of the stages of the independence process, contracting parties may seek to include in new contracts a specific force majeure or material adverse change provision dealing with the effects of Scottish independence. In any event, the relevant language should be tailored as precisely as possible to the specific risk the parties are aiming to address, to ensure that the relevant clause works in practice.

INTERPRETATION

Independence could also impact contractual interpretation, particularly surrounding geographical terminology, most notably the definition of UK, and language in relation to applicable law. Specifically, this would focus around the question of whether references to the UK included an independent Scotland, i.e. does the contract mean that the relevant territory is the UK at the time of execution, or the UK from time-to-time. Parties should therefore consider, where the territorial boundaries are of importance, whether existing contracts should be amended to clarify the intention of the parties, and to ensure that any new contracts address this in advance by clearly defining any possible points of contention.

Similarly, how will a contract be interpreted if, at the time of contracting, UK law formed part of Scottish law but the time of performance is after independence? For example, after independence there is likely to be both the Companies Act applying to the continuing UK as well as an equivalent Scottish Companies Act. In many cases it is likely that a choice of Scottish law will be interpreted to mean Scottish law as it stands from time to time, including such variations as may arise from independence. However, where some key provision of UK law is essential to the operation of a particular contract, in particular where performance of the contract is in the continuing UK, the court may interpret the choice of Scottish law to include the relevant UK law at the time of contracting, so as to give commercial effect to the contract.

In addition, independence is likely to give rise to further complexity surrounding the interplay of EU law and UK retained EU law, as Scotland would in due course have its own separate version of the relevant instruments. Therefore, by way of example, a reference to the Market Abuse Regulation would need to be clarified as to whether it refers to EU MAR, UK MAR or Scottish MAR, or two or more of them, and parties would need to monitor how the three different instruments diverge over time.

ENFORCEMENT

Following its departure from the EU, on 1 January 2021 the UK joined the 2005 Hague Convention on Choice of Court Agreements in its own right. This provides for (inter alia) the enforcement in EU member states (and certain other countries) of UK judgments given pursuant to an exclusive jurisdiction clause. The UK's membership of the Lugano Convention ceased on 31 December 2020, when the Brexit transition period ended, and it is not currently clear whether the UK will obtain the required approval from the current membership to re-join in its own right.

In the case of independence, the extent to which Scottish judgments continued to be enforceable in other jurisdictions would depend, in part, on whether Scotland acceded to the Hague and/or Lugano Conventions as an independent contracting state. Accession to Hague (unlike access to Lugano) does not require the consent of the current contracting parties. There would also be a question as to whether Scotland could take the benefit of bilateral enforcement treaties that are in place between the UK and certain foreign countries, such as Canada and Australia. For judgments which fall outside these conventions and treaties, the question of enforcement would depend on local laws in the relevant foreign countries.

CHOICE OF LAW & JURISDICTION

Where a contract expressly states that it is governed by English law (or by any other non-Scottish law) the recognition of that choice of law in Scotland depends on the conflict of laws rules which the court hearing the case will apply. Under the current rules applied by UK courts, which is the relevant retained EU regulation (**UK Rome I**), a choice of law is generally given effect, whether it is the law of England or Scotland or a foreign country. After independence, the continuing UK courts would continue to apply UK Rome I vis-à-vis a choice of Scottish law and, assuming this aspect of the UK *acquis* is adopted by Scotland, Scottish courts would apply the same principles regardless of what law is chosen.

In that case, as currently, where a Scottish court had jurisdiction over dispute concerning a contract governed by some other law, UK Rome I means that the choice of law would be subject to the application of overriding mandatory principles of Scottish law. The Scottish court could also refuse to apply a provision of the governing law if it would be manifestly incompatible with Scottish public policy. This is however likely to be rare.

The rules relating to the jurisdiction of the Scottish courts would depend, in part, on whether Scotland accedes to the Hague Choice of Court Convention 2005 and/or the 2007 Lugano Convention as an independent contracting state. As discussed above, accession to Hague does not require the consent of the current contracting parties, but accession to Lugano does require consent (and the question of whether or not the UK will be able to obtain consent for its own accession is currently uncertain). Otherwise it seems likely that the Scottish courts would continue to apply their current rules of jurisdiction, though it is not clear whether the current rules allocating jurisdiction as between Scotland and England/Northern Ireland would be adopted in a post-independence scenario.

[More on Scottish Independence](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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