

Brexit:

The Legal Implications for Business



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On 23 June 2016, the United Kingdom voted to become the first full member state ever to leave the European Union, signalling the eventual unwinding of a political and financial association dating back to 1973.

In this briefing we tackle one of the biggest and most uncertain of all Brexit topics: what will happen to our laws after we leave?

Timescale and process

At present, of course, nothing has changed. To leave the EU, the UK will have to invoke Article 50 of the Treaty on European Union, leading to a maximum two-year period in which the terms of the UK's departure can be negotiated. What that departure will look like depends on the UK's aims and the extent of the EU's willingness to accommodate them. There are many possible outcomes, ranging from the "Norwegian model", under which the UK accepts the free movement of goods, services, capital and workers in return for access to the single market, to a full exit, under which the UK sits outside any current European agreement.



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Index

1.	Contract Law	5
2.	Corporate Law	8
3.	Intellectual Property	10
4.	Employment Law	13
5.	Immigration Law	15
6.	Dispute Resolution	17
7.	Taxation	19
8.	Real Estate	21
9.	Conclusion	23



Contract Law

In many respects, contract law is likely to be unaffected by Brexit: our domestic statutes, case law and principles of equity have continued to govern contractual relationships during our time as an EU member. English law is perhaps the most popular choice of law worldwide in cross-border contracts for a number of reasons – for example, its stability and flexibility, and the prevalence of the English language – that are unlikely to be affected by Brexit. (The EU itself, of course, may cease to use English as its main language.)

However, contracting parties should consider the following:

Territory

Many contracts contain a definition of “Territory”; in many such cases, this is defined as being the EU. What will this mean following Brexit? Courts may construe this to mean the EU as constituted from time to time, or they could take a more practical approach and examine the commercial intentions of the parties. In any event, businesses should be thinking now about definitions that could change in meaning following Brexit, and consider whether amendments to standard precedents or existing contracts are necessary.

Choice of law and jurisdiction

Where the parties specify, for example, that the laws of England and Wales will apply and that the English and Welsh courts will be the venue for disputes, it is likely that Brexit will have little impact. Where the parties do not specify a jurisdiction, the Rome I Regulation currently applies in the EU to determine which country’s laws govern the contract. It remains to be seen what the position will be following Brexit, although English law may continue to recognise the current position under Rome I.

There is then the question of what “English law” means in a contract. Currently it includes applicable EU law; following Brexit, there will be inevitable questions about what is covered under the definition, which could lead to a different position for the parties from the one originally envisaged.

Agency

At present, commercial agents (who form contracts on behalf of a principal) receive a great deal of protection under EU law. Those rights are currently under review by the European Commission and may alter, but in their existing form they could potentially be seen by the UK as over-protective and therefore open to being repealed.

Termination due to Brexit?

One of the biggest questions to consider is whether Brexit could activate a force majeure or material adverse change clause, or even be considered an event that frustrates the contract (thereby bringing it to an end). Whether it could do so is likely to depend on the nature and purpose of the contract, but businesses should consider adding a new clause

dealing with Brexit to standard contracts. The substance of the clause will depend on whether a right to terminate is desired or not.

Businesses involved in cross-border contracts should also consider a clause dealing with price rises following Brexit (caused, for example, by a loss of protection from tariffs in the event of a departure from the free trade area). Case law suggests that it would not be easy to claim frustration simply because the contract is costlier to perform and therefore less valuable: this should, therefore, be dealt with specifically.



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Corporate Law

M&A

The laws relating to mergers and acquisitions may not be greatly affected in the short term. For private companies, EU law has comparatively little effect on domestic M&A activity. For public companies, the UK Takeover Code, governing public companies, is a respected framework which, despite giving effect to EU law, in many respects is not greatly influenced by the EU.

Currently, EU member states benefit from a single system of cross-border merger control; when the UK leaves the EU, it may remain subject to this (if, for example, it adopts the Norwegian model and stays in the EEA), or it may have to negotiate agreements with individual member states.

The level of change to UK domestic M&A laws will ultimately be decided by the extent to which the UK wants to adapt (and, in practice, that may mean relax) them to attract non-EU investment. However, its ability to do so could depend on the deal it strikes with the EU on departure.

Competition

Competition law is "effects-based", meaning that it applies to the place where business is done, not the country in which the business is domiciled. Therefore, UK businesses trading in the EU would remain subject to EU competition law after Brexit. Our own national competition laws could conceivably change, although the UK currently tends to exceed EU requirements, and so any relaxation would require a change in philosophy by UK legislators.

State aid

State aid is banned in the EU, to avoid distorting competition. Depending on the outcome of negotiations, it could be permitted in the UK, but once again the need to trade with EU member states will have to be considered, and those states are likely to resist any move by the UK that would, in effect, give UK companies an advantage over competitors from the EU.

Market abuse

The new Market Abuse Regulation (MAR) comes into force on 3 July 2016, implementing the EU Regulation on Market Abuse. Although MAR differs in part from the UK's previous regime, the regulation of market abuse itself is ingrained in English law and so any post-Brexit changes are perhaps unlikely to be vast in scope.



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Intellectual Property

In the UK we currently have national IP rights (such as UK trade marks and patents) and pan-EU IP rights (such as EU Trade Marks, Registered Designs, and Unified Patents). Following Brexit, we expect that national IP rights will see little change. European Patents, which derive from the European Patent Convention (which is independent of the EU), would also not be affected. However, there will inevitably be some changes to EU IP rights.

Trade marks

UK trade marks derive from national laws. European Trade Marks (EUTMs – formerly Community Trade Marks or CTMs) will, however, no longer cover the UK after Brexit. Those requiring EUTMs will therefore also need to obtain separate UK trade marks to cover the UK. Recent case law suggests that where a business trades primarily in the UK and not elsewhere in the EU, an EUTM would be hard to sustain validly in any case, and so it is already advisable for such businesses to register a UK trade mark.

It is expected that existing EUTMs could be converted, re-registered or in some way recognised in the UK, avoiding the need for new UK registration. We will have to wait to discover the actual mechanism for this. Businesses should review their existing EU trade mark portfolios, and consider applying now for a UK trade mark registration to ensure protection in light of the uncertainties.

The text of the UK Trade Marks Act 1994 follows the corresponding European directive closely, and there is little talk of changing it. UK and EU interpretation of trade mark laws are broadly harmonised; in time divergence will likely increase, but this is expected to develop organically, primarily through case law.

Patents

National and European Patents will not be affected by Brexit, although there will need to be some transitional arrangements for associated rights governed by EU regulations. The EU regulations could be transposed as UK legislation, which would be one of the least disruptive options. Reciprocal protection in the EU, however, would need to be negotiated.

Brexit is likely to delay commencement of the Unified Patent (UP), which will be a single pan-EU patent valid in all EU member states. This is because the UK was to be a key part of the Unified Patent Court, which, following Brexit, is likely to be untenable. There is therefore considerable uncertainty surrounding UP.

Businesses can still rely on the well-established GB and European Patent systems to protect them in the UK. In relation to European Patents, businesses should consider opting out of the UP system, which is to apply automatically to European Patents unless opted out.

Designs

UK national design registrations and unregistered design rights are unaffected by Brexit.

EU Design Registrations would no longer cover the UK after exit. However, as with trade marks, a system of conversion, re-registration or extension may be introduced for existing EU Design Registrations.

Copyright

Copyrights are national rights and currently benefit from international copyright treaties independent of the EU. Brexit should therefore not affect copyright protection in the UK.

IP licences and contracts

Contracts or licences that are limited by geographical territory, or based on EU IP rights, will need to be reviewed and possibly renegotiated. Particular attention should be paid to the nature and territorial scope of the IP covered, and the territory covered by the contract (see the "Contract" section on page 6). The parties will want to ensure that the rights granted are still relevant to the product, services and territory covered by the contract after Brexit. In some cases, this will provide an opportunity for renegotiation, which may work for or against a party, depending on its circumstances.

Data protection

Although data protection is another area of uncertainty, it seems at least likely that the UK, post-Brexit, would continue to apply EU data protection laws. The reason for uncertainty is that currently EU data protection law is in the process of being harmonised, with the General Data Protection Regulation set to come into force in 2018, potentially around the time of the UK's exit.

While the format and outcome of exit negotiations remain to be seen, it is safe to say that, on the one hand, the UK has a history of protecting data and is unlikely to relax its stance greatly, and on the other hand that parliament will be aware that UK businesses would find it hard to thrive in Europe unless it adopts measures of data protection that satisfy the member states in which they trade.



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Employment Law

This was one of the big topics during the referendum campaign, with workers' rights and, conversely, red tape being invoked by both camps. In reality, many of our employment laws derive from domestic legislation and so should be unaffected. Similarly, a large part of the employer-employee relationship is governed by contractual principles, and so again may not change. Therefore, we would not expect that the laws on unfair dismissal, restraint of trade, giving notice, regulating unions or settling claims will alter markedly simply because of Brexit (although, of course, they may be altered for other reasons).

Our discrimination laws now derive from EU legislation, but many of them first came on to domestic statute books as long ago as the 1970s. In any event, it is hard to imagine that there would be an appetite to repeal laws protecting sex, race, age, disability or other types of discrimination. What we may see is a capping of compensatory damages in discrimination cases; currently they are uncapped as a result of EU law.

Another point to note is that many of the UK's EU-derived laws are not merely adopted by the UK but actually enhanced: for example, we give 5.6 weeks' holiday rather than four, and in the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) we go further than the originating EU directive by covering service provision changes.

The extent of changes could depend on the party in power at the time. However, we would suggest that the following is likely in the medium term:

- any EU legislation that we currently "gold plate" (i.e. enhance) is likely to be broadly unaffected;
- any legislation that responds to commonly held values is also unlikely to change: for that reason discrimination and family-friendly laws will probably stay;
- unpopular legislation could be addressed: the maximum 48-hour working week, the procedure on collective redundancies for 20 or more people, the extension of holiday pay to cover periods of sickness and the rules giving agency workers quasi-employment rights after 12 weeks could find themselves being amended or repealed.



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The background is a collage of various currency notes. On the left, there is a close-up of a light-colored note with the word 'BARRI' printed in black and red ink. On the right, there are several other notes, including a red one with a large black number '1' and a white one with a large black number '11'. The notes are slightly blurred and overlapping, creating a textured, layered effect.

Immigration Law

There are around three million EU migrants in the UK at present. Of course, nothing will change yet, and free movement will continue at least until we leave the EU. The question at that point is: what comes next?

At the date of this briefing, the EU considers free movement of workers to be inextricably linked with free movement of goods, services and capital. Whether an alternative deal could be agreed therefore remains to be seen, but given the UK's need to trade with the EU, it seems likely that some form of free movement arrangement will be needed.

In respect of those EU nationals already in the UK, we do not know whether they will be allowed to stay temporarily, permanently or at all, or whether any arrangement reached would apply only to those who were in the UK before the referendum or to those who were in the UK on the date of exit from the EU.

Following Brexit, those coming to the UK to work or study would need to comply with UK immigration law, and this may involve the need to gain clearance in the same way as non-EU nationals.



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Dispute Resolution

Right at the start of the UK's relationship with what is now the EU, Lord Denning said: *"The Treaty is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back."*

The reality for dispute resolution is that, in spite of the ebbing of that tide, the courts will apply and interpret existing laws, and until those laws are changed they will be binding. While the Supreme Court will become the ultimate court of appeal for most matters, the courts consider themselves bound by precedent and, unless directed otherwise by parliament, will respect the rulings of the European Court of Justice. In fact, the ECJ may even continue to have some form of role in respect of the UK, depending on the outcome of negotiations. It should also be noted that the European Court of Human Rights is a non-EU court, and so (unless and until the government legislates otherwise) would retain its role of overseeing fundamental rights.

Currently the UK benefits from the "Recast" regulations, which apply common jurisdictional rules and provide that a judgment in one participating state will be enforceable in any other. Should the UK join the EEA or EFTA, this protection should continue – otherwise, UK judgments could become less effective elsewhere in Europe, putting the UK's privileged status as a favoured venue for dispute resolution into question.

On the above basis, it seems reasonable to assume that the UK will make a concerted attempt to maintain the status quo.

UK arbitration would be unaffected by Brexit, since international enforcement of awards does not derive from the EU. Our prediction, therefore, is that change to dispute resolution laws will be slow and limited, at least initially.

Outside any changes to the law, it is the environment of uncertainty, and the possibility of parties trying to use Brexit as a mechanism for avoiding their contractual obligations, that may cause an increase in levels of litigation. Courts will have to decide how Brexit is to be interpreted in contractual disputes, which could make for a flurry of interesting cases.



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Taxation

On the basis that most EU tax legislation that has been enacted in the UK is now standard practice, the effects of Brexit should be slight in the short term. We could amend (or even abolish) VAT after exit, but given the Treasury's reliance on it, this seems unlikely. Similarly, we already exceed minimum EU levels of taxation on energy, tobacco and alcohol, and so change is again perhaps unlikely.

Change might occur in relation to Customs Duty, which at the moment is a common tax applicable to the transfer of goods into the EU. After Brexit the UK will, as an exporter to the EU, be liable to pay EU Customs Duty, unless it negotiates a trade deal by which it remains unpayable. The UK may also have to consider changing its own Customs Duty.

Businesses that currently operate in both the UK and other EU states will have to review group structures following Brexit to ensure that they are still appropriate from a tax perspective, since the UK will (unless a different deal is struck) no longer be part of the EU withholding tax regime.

Given the possibility for a relaxation of state aid rules, there could be a change to our tax laws if aid were to be provided through tax breaks, but this will depend on the deal agreed with the EU. The Norwegian model would not allow this. Similarly, any change to EU-derived laws relating to group companies (such as those governing transfer pricing and group relief) would depend on the deal struck.

It appears, at this stage, that the UK's decision to leave is unlikely to have a major impact on the areas of trusts, inheritance and personal taxation, given that they are largely regulated by UK law, with little EU influence. Northern Ireland, Scotland, and England and Wales are considered separate entities from one another when it comes to the succession of a person's estate, and again this position is largely unaffected by EU law. The EU Succession Regulation came into force in August 2015, with the aim of harmonising the approach to succession across the EU by allowing individuals to choose the laws of one jurisdiction, which would then apply to the administration of their worldwide estates. However, the UK opted out of the Regulation, and so it is unclear what impact the new rules would have on UK citizens in any event.

Brexit could of course have other implications for UK nationals owning assets in other EU states, but the legal implications are not yet clear.



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An abstract graphic composed of a dense network of white lines on a blue background. The lines form a complex, three-dimensional wireframe structure that resembles a building's skeletal frame or a data network. The structure is composed of numerous rectangular and square shapes, some of which are slightly offset from each other, creating a sense of depth and perspective. The lines are thin and white, contrasting sharply with the blue background. The overall effect is one of modernity, technology, and architectural complexity.

Real Estate

Real estate is one of the areas where UK domestic law is least intertwined with European law: as such, the implications in the immediate aftermath of Brexit are likely to relate more to market conditions than to legal changes, which will probably be minimal.

The biggest commercial issue for the property sector in the aftermath of the Brexit vote is likely to be the level of uncertainty, which could lead to a softening of the market. This appears to have been felt already in the prime London market prior to the referendum, but the effect may well spread wider as buyers adopt a wait-and-see position. Transaction activity in all areas will potentially be subdued, at least for an initial period, while the implications of the result are analysed and the way forward established.

One possible upside for the UK property market might be a decrease in the strength of the pound relative to other currencies; reports are already suggesting this is offering foreign investors sufficient incentive to step in where domestic buyers are pulling out. The effect of this would be most keenly felt in London, in particular in the prime residential sector. Balancing this, however, is the possibility that a restriction on immigration could cause a longer-term shortage in the workforce, which could affect the construction industry.

The long-term effects on the UK, and on London in particular, as a destination for foreign investment are inevitably unknown, but confidence remains high that the UK market will continue to present an attractive option.



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Conclusion | Business as usual

There will be changes: that is inevitable. However, changes to our laws are inevitable in any event – it is the very nature of law – and businesses continue trading and tend to adapt to the new landscape.

While there are actions for businesses to take now, some of which we have highlighted in this briefing, the short-term effects on UK legislation may well not be seismic. Businesses, by their very existence, will have a role in shaping negotiations, since the government will have to ensure that the economic outlook is not worsened by the deal reached and the new laws enacted. Overall, opportunities for businesses to get to grips with the changing legal and commercial environment, and to thrive, are likely to make the next few years an interesting time and not merely an uncertain one.



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