

Brexit threatens to have a significant impact on all UK businesses when they are importing and exporting goods and services from suppliers in the EU, as well as EU businesses when they are exporting goods and services to the UK. As such, all businesses (particularly manufacturers and retailers) need to consider the impact of Brexit both as a buyer of goods (whether as finished goods or components that are used to manufacture goods in the EU) and services from suppliers in the EU and when they are selling goods and services to customers in the EU.

Even if a deal is agreed by 31 December 2020, it is inevitable that all businesses (whether in the UK or the EU) will need to be able to manage differences in customs procedures from 1 January 2021, and tariffs may well apply to those goods that do not meet the rules of origin requirements. If the UK leaves the EU without a deal, all trade between the UK and the EU will move to the World Trade Organisation terms, which will mean that (a) tariffs are payable on all imports to the UK from the EU at the same rate as applies to imports from any other non-EU country with whom the UK has not negotiated a free trade deal; and (b) tariffs are payable on all exports from the UK to the EU as are payable on all imports from other countries that do not benefit from a free trade deal with the EU. This will make imports from the UK to the EU proportionately more expensive than other goods that are produced in the EU and on all imports from other countries that have agreed free trade deals with the EU.

Brexit will also affect trade between UK businesses and businesses that are based in any third country with whom the EU has a free trade agreement or other preferential trade relationship unless and until the UK and the country in question agree to continue any such arrangements. There are 40 such arrangements covering 70 countries. While some countries have agreed to roll these arrangements over post Brexit, the majority of the arrangements are still being negotiated.

Given the customs and tariff implications of all forms of Brexit, all businesses in the UK and the EU (or any other country with whom the EU has a free trade agreement) that trade with each other will need to consider the consequential impact of Brexit on all affected contracts. In so doing, the response of a business may be different depending upon its position on the supply chain, the criticality of the contract (in terms of both value and the subject matter of the contract), whether the business is seeking to work through the implications of Brexit on an existing contract, or whether the business is seeking to negotiate a new contract.

Most current contracts do not contain adequate provisions to deal with the potential adverse consequences of Brexit. In particular, most contracts have been written on the basis that the UK is a member of the EU with no tariffs, no customs checks, freedom of movement of people and regulatory alignment. All of that will change post Brexit, although some of the effects will be mitigated if the UK and the EU agree a Brexit deal. Here, even with a deal, there will be friction at the border because the UK and the EU are not seeking to negotiate a continuation of the Customs Union. Rather, the UK is asking for a basic “Canada-style” free trade agreement, which will mean that qualifying goods are exempt from tariffs.

Given that Brexit is happening on 31 December 2020, with or without a deal, there is now very little time to prepare. Therefore, to the extent not already considered, each business should consider how Brexit will affect each contract, whether the business is importing or exporting. In so doing, it may be necessary to change what the business needs to do to perform the contract, as well as the actual terms of the contract.

All businesses, whether as buyer or seller, need to consider the extent to which their contracts will protect them in relation to the following areas post Brexit.

Tariffs – The following points need to be considered in the event of a no-deal Brexit:

- i. Which party will be responsible for paying tariffs?
- ii. How are tariffs calculated?
- iii. Can anything be done to reduce any potential tariff costs?

In the event of a deal being agreed, businesses will need to check how whatever is agreed in relation to rules of origin affects the goods that are to be imported from the EU or exported to the UK. For example, there are concerns that content from Japan (with whom the UK has negotiated a new free trade agreement) will not be capable of being counted as UK content when goods that are assembled in the UK are exported to the EU. Hence, goods that are assembled in the UK may still be subject to tariffs when exported to the EU. In addition, some contracts may contain specific provisions, while other contracts may reference an Incoterm. However, in many cases, existing contract wording can be contradictory and/or will not have been thought through or amended with Brexit in mind.

Customs – The import of goods from the EU to the UK and the export of goods from the UK to the EU will require the correct completion of a myriad of customs procedures. The same will apply to trade with other countries with whom the EU's other free trade agreements are not rolling over. While these procedures may be easier if a business benefits from any of the available trusted trader schemes, it is quite likely that existing contracts between UK and EU businesses will not deal with who needs to do what and the liabilities that will arise out of non-compliance. In so doing, contracts with customers, suppliers and logistics service providers must all be considered.

Delay – As a result of Brexit, more checks will take place at the border. As a result, delays are likely to arise no matter how well a business has complied with the required customs formalities. All businesses need to consider the impact of delay. For example:

- Is time of the essence?
- Are liquidated damages payable?
- Do other liabilities arise?
- What termination rights arise?

Exchange rate variances – Post Brexit, the UK's exchange rate may be more volatile and/or may shift on a longer-term basis. As a result, businesses should consider whether they are contractually protected or at risk from exchange rate fluctuations.

Change relief – Does the contract contain provisions in relation to:

- Do any contracts contain any relief wording in the event of any material adverse change?
- Can any relief be sought via any general change control procedures?
- Can any relief be claimed via the *force majeure* provisions or via a claim of frustration?

Frameworks – Do suppliers have to accept all orders placed under contract or do suppliers have the right to reject such orders?

Tax – Consider the impact of changes in the VAT regime.

Staff – Does the ability of a party to perform under a contract depend upon its staff working in the UK (for EU suppliers) or the EU (for UK suppliers)? If so, consider the impact of the likely changes to the immigration rules and travel restrictions post Brexit in both a deal and no-deal scenario.

Data – It is unlikely that the EU will be willing to agree that the UK's data protection regime is equivalent to that of the EU until a detailed equivalence assessment is undertaken. This is not expected to happen quickly or easily. Hence, if a business in the UK processes personal data of EU citizens in the UK post Brexit, all relevant contracts will need to contain the EU model processing clauses.

Duration – How long does the contract continue post Brexit and/or can it be renegotiated at renewal or does it just roll over at the option of the buyer?

Standards and regulations are likely to diverge post a no-deal Brexit, either because UK standards and regulations change or because new EU standards and regulations are not implemented in the UK. In addition, in some cases, businesses will need to obtain specific regulatory approvals and/or comply with additional labelling requirements.

Contract terminology – Any references to EU bodies, laws and regulations will need to be changed.

Territorial rights – Do contracts that refer to the EU as being the territory still cover the UK post Brexit?

Liability and recoverable losses – Consider the ability of the business to recover (or its vulnerability to claims for) losses that are attributable to the effects of Brexit.

Audit – To what extent can a party exercise any audit and verification rights to validate any claims brought by the other party following Brexit?

Termination rights – Businesses should consider:

- To what extent are suppliers or customers able to cancel contracts for reasons related to Brexit?
- Is a business obligated to accept orders that it can no longer supply on an economic basis?
- To what extent can the business exercise termination of convenience rights?

Solvency risk – Consider the risk that suppliers or customers may be affected by solvency risks that are attributable to its costs of business increasing and/or the effect of delays on processes that are dependent on just-in-time deliveries and so on.

Enforcement of contracts – Any judgments obtained in any of the UK courts in relation to contracts that include provisions for the non-exclusive jurisdiction of any of the UK courts are unlikely to be enforceable in the EU post Brexit (unless the mutual recognition of judgments is included in any deal).

Variation rights – To what extent can a business seek to vary its contracts?

Should a business seek to agree new contracts that are drafted to cater for all of the issues that are likely to arise following Brexit?

Contact

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