



BREXIT: NOTES ON THE EU REFERENDUM RESULT

COMMERCIAL ISSUES

On the Monday after the Referendum vote, I was asked to draft my first Brexit clause for a substantial long term services contract between a European and UK company that was being negotiated. So, although we have not yet left the EU, the potential legal implications of our likely withdrawal are already being felt.

As we do not know what agreement might be reached with the EU it is difficult to be too specific on how business and society will be affected. But for starters, here are some possible issues that clients may want to consider when reviewing or negotiating their contracts:

- **Customs duties and tariffs:** If these are introduced on trade between the UK and other EU countries, be sure to have some wording that says how they will affect the payment terms under the contract.
- **Personnel:** If your contract involves sending a team of engineers to the UK from Europe (or vice versa), what happens if new visa requirements are introduced that make this difficult to achieve? And if you already employ citizens from other EU states, how might their status be affected if there is a change in immigration law?
- **Currency:** Any contract involving pricing that has a currency risk should consider wording to deal with that risk. But if the impact of Brexit sees a continuing fall in the value of sterling (already down by around 10% against the USD), an escape clause or renegotiation provision could be essential.
- **Standards:** If EU quality standards diverge from those in the UK, how might this affect manufactured products or the supply of services and whose standards will apply under your contract?
- **Trade Marks:** Anyone who has registered an EU trade mark has protection throughout the 28 member states. If we leave, will that EU mark still give protection in the UK?

A **material adverse circumstances clause** can be a helpful device to deal with issues that might arise in future but are not identified when the contract is signed. But the difficulty with such a clause is in specifying what happens if a particular event occurs.



An obligation to discuss and try to resolve the problem by good faith negotiation is the type of wording sometimes used, but it does not remove the uncertainty. So, where you can, you need to have wording that says what will happen if a situation arises – e.g. if new taxes are introduced on the supply of goods to Europe, these will be added to the price and payable by the customer.

THE CONSTITUTIONAL POSITION AND THE WITHDRAWAL PROCESS

On 23 June 51.9% of those who took part in the Referendum voted that they wish to leave the EU. Approximately 72% of the electorate voted – in other words 37% of the adult population of the UK said they want to leave the EU and only those in England and Wales had a majority in favour of leaving. Interestingly, the percentage wanting to remain in Scotland and Northern Ireland was higher than that for leaving in England & Wales (and in Gibraltar the remain vote was 95%). The Referendum Act does not say what happens next.

Article 50 of the Lisbon Treaty says that any Member State may decide to withdraw from the Union ‘in accordance with its own constitutional requirements’. It then has to give notice of its intention to withdraw to the European Council. As the UK does not have a written constitution and Parliament is where our decisions are made, it is for Parliament to decide whether and when to give that notice to the EU. However some think the Government can give the notice without the need for a vote of the House of Commons. Since the referendum result does not itself have the force of law and this is perhaps the biggest decision the UK has to make, it would be strange for the Government of the day (especially a different Government from the one that took office at the last General Election) to make the decision without the approval of Parliament.

Article 50 then says that, once the notice is given, the EU will ‘*negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union*’. The UK will then withdraw from the EU on the date the withdrawal agreement comes into effect or, failing that, two years after the notification, unless an extension of that two year period is agreed. The agreement needs to be approved on behalf of the Union by the Council, acting by a qualified majority, after obtaining the consent of the European Parliament.

Until the withdrawal is final, the UK remains a member of the EU and bound by its laws, but not able to take part in discussions on its withdrawal.

Giles Dixon, July 2016