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Brexit: What You Need To Know

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Following the outcome of the recent referendum in the United Kingdom (the UK) and the subsequent continued political and economic turmoil, we await the full implications of Brexit and what this will really mean for businesses. However, this is likely to take some time given that Article 50 of the Treaty of Lisbon (Article 50) will not be triggered until Autumn 2016 (if, some commentators write, at all) hailing up to two years of complex negotiation between the UK and the European Union (the EU). Whilst the current position and lack of certainty is proving uncomfortable, it may well give rise to opportunity in the future. It is therefore essential that businesses take this time to consider both their current position as well as their future plans. Set out below are a number of points to consider in the coming months:

CORPORATE

By James Channo

Our clients have historically engaged in mergers and acquisitions (M&A) activity as a means of creating value for shareholders by capitalising on synergies, securing access to new markets and increasing market share in those jurisdictions where they are already operating. The UK has traditionally been a dynamic market from which to carry out such activity due to its reliable regulatory framework, consistent application of law and professional advisers well versed in domestic and international mergers and acquisitions. However, M&A activity is confidence driven. It is no secret that there was a noticeable slowdown in M&A activity prior to the referendum as businesses waited for the results on June 23. Since the 'leave vote' there are now understandably concerns regarding the future of the UK economy and level of corporate activity pre and post the implementation of Brexit.

Prior to Brexit, London was arguably the European hub for these transactions. In the absence of favourable trade agreements between the UK and the EU, it has been voiced that corporates looking to access European markets will not see London as the obvious city to set up headquarters. London's relevance in terms of the centre from which to carry out European M&A may deplenish, potentially making way for another city in the EU to claim that title. Are we really going to see a large number of financial institutions and businesses exit London completely in favour of Frankfurt or Paris (for example) as a result of Brexit? It would seem that businesses will first need to understand whether one option is better or worse than the other and, for that to happen, the dust needs to settle.

So what is the issue that is concerning businesses at the moment with Brexit? Current EU legislation provides for a fairly uniform regulatory environment such as merger regulation, employment rights on business acquisitions and, of course, the prospectus rules and the exemptions that apply to the same when corporates seek to raise capital across a number of member states. In addition, a number of authorised financial firms can carry out services across the EU as a result of the regulatory framework offered by the EU – otherwise known as 'passporting'. Following Brexit, and in the absence of any other arrangement with the EU, such activity for institutions based in London will no longer be available. For a period of time, there is also going to be a lack of clarity as to which EU regulations will continue to apply in the UK and for how long.

There are a number of other countries, such as Norway, that have successfully managed their relationship with the EU through trade agreements. Such negotiations for the UK may, of course, be more sensitive and potentially harder to achieve given it is approaching the relationship as a past member which has decided it no longer wishes to participate.

There is no doubt that financial institutions will be figuring out how best to access the single market. The other issue that boards of directors across the UK will be considering is – what will the EU look like two years from now? What if other countries decide they also want to exit the EU? For a number of businesses life will go on in the UK given its historically stable framework and market, the large number of funds and institutions based here, access to the London Stock Exchange and the opportunities that will emerge with other countries outside the EU. Currently the British pound is weak against the U.S. dollar making UK based businesses attractive as targets although much thought will be given to the geographies from which the revenue is generated. A weak British pound will also assist UK based manufacturers and exporters to flourish and encouraging others to start competing in this market.

The UK government will need to play its part to ensure the UK remains an attractive place from which to carry out business.

REAL ESTATE

By Rebecca Watkins

To an extent Real Estate law has largely remained unchanged by EU legislation over the years. Therefore, looking forward, the implications of Brexit are more likely to be commercial than legal. When reviewing real estate investment, the following may be worth considering:

- With a relatively low transaction volume in commercial real estate there will be issues for investors in obtaining accurate valuations of property portfolios with some institutional investors already moving to weekly valuation strategies in an attempt to put realistic valuations on funds as people look to buy and sell. Due diligence in respect of this will become paramount in assessing investment opportunities.
- As banks, financial institutions and large multinationals consider their position in the UK and the potential relocation to other EU financial centres to ensure business continuity (see 'Passporting' below) the increased supply of office and industrial space could have a detrimental effect on both rental yields and investments values.
- Needless to say, potential changes in other areas of law, such as the free movement of workers (read our previous QuickStudy on The Impact of Brexit on UK Employment Law), goods and services, and environmental law, may also have an impact on investor confidence and will need to be considered carefully as Brexit negotiations progress.

It is yet to be seen whether the continued uncertainty will encourage or deter foreign investors. Whilst the above is focused on the potential negative impact of Brexit, the weakening British pound may in fact attract foreign investment whilst UK investors, who may well be further affected by any changes in UK lending rates, weather the storm.

LITIGATION

By Nicole Fry

As the intertwined laws of the UK and the EU are unravelled in the exit negotiations, changes to litigation seem inevitable.

- **Contracts:** At the moment the changes are unknown and in particular we do not know if any changes will be retrospective. As such, companies should be thinking about how they can protect themselves and keep up to date with any interim and final changes made.

  It would also be advisable for companies to carry out a review of the contracts currently in place, particularly considering:

  - jurisdiction clauses
  - whether a force majeure clause might be triggered
  - whether there is any potential for the contract to be frustrated or terminated
  - whether there is any clause that deals with the changes in law

  All of these issues may give rise to disputes, which had not previously been considered. Short-term contracts are less likely to be affected, due to the two year period of negotiations once Article 50 has been triggered.

  In any new contracts, parties should consider the contracts carefully, for example whether or not they wish to include in their force majeure clauses express exclusions of the UK leaving the EU or whether the contract can/cannot be terminated upon the UK leaving the EU.

- **Choice of Law:** Currently the Rome I (593/2008/EC) (contractual claims) and Rome II (864/2007/EC) (tortious claims) EU Regulations provide that the courts will uphold the parties' choice of law clause. If rules similar to Rome I are not agreed, we may revert to the rules in place before Rome I, namely the Rome Convention, enacted in the UK by the Contracts (Applicable Law) Act 1990, which has terms similar to Rome I, so it is unlikely that Brexit will have much of an impact here. Unless rules similar to Rome II are put in place, it is possible that the English courts will apply the rules in place pre-Rome II, for example under the Private International Law (Miscellaneous Provisions) Act 1995. Unlike Rome II, this Act does not give the parties an express right to choose the law applicable to non-contractual relations and instead provides that the applicable law will be based upon the law of the country in which the tort occurred, or the country in which the most significant event occurred.
- **Jurisdiction:** The Recast Brussels Regulation (1215/2012/EU) currently sets out which courts of the EU member states should have jurisdiction in civil and commercial disputes. Following Brexit, the UK and the EU may agree something similar. In addition, or alternatively the UK may join the Lugano Convention (currently between member states and members of the European Free Trade Association, such as Switzerland, Iceland and Norway) and/or the Hague Convention on Choice of Court Agreements 2005. If no convention applies, the English courts may revert to forum conveniens principles, under which they consider the extent of any relationship with this jurisdiction, and whether the proceedings were first to be issued.
- **Service:** Currently if proceedings are brought in England and Wales against someone in the EU, permission is not generally required under the Service Regulation (1393/2007/EC). After Brexit serving court documents outside of England and Wales may become more complicated, where no agreements for reciprocal service are in place. Parties may wish to consider appointing an agent for service, to attempt to make service of court documents more straight forward.
- **Enforcement:** The recognition and enforcement of judgments in other member states may become more complicated and vice versa for EU judgments to be recognised in England. The Recast Brussels Regulation currently makes this process fairly straight forward.
- **EU Law and the European Court of Justice (ECJ):** It is unknown at this point what will happen in relation to the EU law, particularly that which has direct effect (without the need for domestic implementation). One example is the EC Council Regulation 261/2004, relating to airline delay, cancellation and assistance claims – it is unknown whether airlines who fly in and out of the UK will voluntarily continue to adhere with the Regulation or will the UK adopt a domestic law to implement it.

  It is also unknown how ECJ precedents will be interpreted. Currently, the ECJ has sovereignty over the UK courts on points of European Law. Individuals seeking to appeal decisions made in the UK on points of EU law, will no longer appeal to the ECJ. It is unknown how the UK courts will deal with ECJ precedents and the English case law interpreting these points, the UK courts might feel able to depart from ECJ authorities and re-interpret the law.
- **Alternative Dispute Resolution (ADR):** Recent changes designed to encourage the use of alternative dispute resolution (ADR) and online dispute resolution (ODR) may well be affected, for example businesses in the UK, since the beginning of this year, are required to include a link to the ODR platform on their website, run by the European Commission. (Read our previous QuickStudy on ADR/ODR Regulations and Regulation 261 Claims).

INTELLECTUAL PROPERTY

By Ben Hitchens

Until the UK formally leaves the EU following the triggering of Article 50, there will be no immediate change to the intellectual property (IP) regime currently governing the UK. Although the full extent of the impact on European-wide rights is currently uncertain, the following points attempt to provide some insight into the future of IP rights in the UK:

- Patents administered through the European Patent Office will not be affected by the Brexit vote, as this system operates independently of the EU. The introduction of the Unified Patent Court is, however, likely to be delayed, as London was intended to host one of the proposed courts.
- European trademarks (EUTMs) are currently enforceable across each of the 28 member states. The most likely scenario following the UK's formal divorce from the EU is that existing EUTMs will almost certainly cease to apply in the UK. It is also likely that the UK government will permit owners of EUTMs to re-file their EUTM rights in the UK as national UK trademark registrations whilst retaining the original filing date of the EUTM. Evidently, given that an EUTM can be sustained by use in just one member state, the newly-formed UK right may become instantly vulnerable to non-use proceedings. To counter this risk, we expect transitional provisions to provide for a grace period, during which time trademarks that have not been put to use in the territory can subsequently be introduced. Although there is no need for immediate action, to avoid any uncertainty arising from transitional provisions and/or the legal effect of EUTMs, the most sensible interim approach would be to re-file any EUTMs in the UK. Going forward, concurrent applications in the EU and UK will most likely be necessary to ensure protection is not compromised. The same considerations are likely to apply to European Registered Designs.

- As a result of the potential changes to trademark law, grey goods and counterfeits are likely to be much easier to combat. Once the UK leaves the EU, a proprietor of UK trademark rights will be able to prevent the importation of genuine-branded goods into the UK from the EU, provided those goods have not already been placed on the market in the UK. Similarly, once the UK leaves the EU's custom union, counterfeits that are able to flow freely within the EU itself should be detected at the UK border. Brand owners in particular may therefore benefit economically from Britain's schism with Europe.
- We do not foresee any immediate impact on the law of copyright. Copyright will continue to operate pursuant to English common law, as developed by the European Directive and the Court of Justice of the European Union. Inevitably, however, over time the interpretation of the English courts is likely to diverge with the approach taken by the EU. The longer term impact is therefore unknown.

(Read our previous QuickStudy on The UK and the EU – Brexit Impact on the IP Regime).

EMPLOYMENT

By Bob Mecrate-Butcher

Brexit has the potential to have a significant impact on UK employment law with many significant elements of UK employment law deriving from European Directives. For example, the Transfer of Undertakings (Protection of Employment) Regulations (TUPE), which apply on acquisitions of businesses and outsourcings, derive from the Acquired Rights Directive; obligations to collectively consult in advance of multiple redundancies, derive from the Collective Redundancies Directive; and many elements of discrimination legislation, as well as the Working Time Regulations, also derive from EU Directives.

In practice, however, it seems unlikely that there will be a wholesale repeal of all UK employment legislation deriving from EU Directives as many elements of this legislation provide significant and relatively uncontentious employment rights which it would be politically difficult to remove.

What is likely is that much of the existing legislation will be retained in its current form, but that UK legislators will take the opportunity to amend or remove particular parts of legislation perceived to be most burdensome to business. For example, some elements of TUPE and the Working Time Regulations, as well as the Agency Workers Regulations.

It is also important to note that a number of key elements of UK employment law, for example, the right not to be unfairly dismissed and to a redundancy payment, do not derive from EU Directives and, therefore, should not be impacted by Brexit. (Read our previous QuickStudy on The Impact of Brexit on UK Employment Law).

INSOLVENCY / RESTRUCTURING

By David Grant and Marc Abrahams

Some important areas of the UK insolvency law regime are impacted by the harmonisation and applicability of EU treaties, regulations, directives and court decisions: both directly (e.g., recognition of cross-border proceedings, interpretation of where an entity has its centre of main interest (COMI) and indirectly (e.g., TUPE, use of schemes of arrangement). This, of course, especially applies to multi-jurisdictional insolvencies.

The vacuum in the law caused by Brexit will need to be filled. As the most obvious example, the clear framework in place for dealing with cross border proceedings will no longer apply and there will be no automatic recognition of proceedings between the EU and UK (and vice versa). This will be more of an issue for the UK than the EU and it will also affect countries outside the EU (for example, the United States) whereby often a COMI shift to the UK is sought to take advantage of UK insolvency law and the automatic access to the rest of the EU. These shifts in COMI will now likely move elsewhere.

The hope must be that amid the uncertainty, those negotiating the exit would look to keep much of the current system in place. The current advantages of recognition and cooperation in cross-border insolvency (as well as other areas such as employment law) clearly assist and increase value for creditors – amongst other matters it will now be much harder for UK insolvency practitioners to realise EU assets – whilst also being clear for practitioners and other stakeholders, such as employees through TUPE.

One immediate impact of Brexit to the domestic insolvency market will be the inevitable delay of the proposed new insolvency regime whilst the full impact of Brexit is considered and other pressing matters are dealt with by the UK government.

On a positive note, Brexit should not have such a bearing on the insolvency of domestic entities/individuals who did not trade or have assets in the EU given the fact that the bulk of UK insolvency law is not derived from EU law. Indeed, freed from the shackles of EU competition rules, the UK government may have more flexibility in being able to assist distressed companies and industries in the UK financially and otherwise.

Finally, the turmoil in the financial markets and impact on trade will no doubt increase the level of insolvencies in the UK. Whilst this may bring new opportunities, the chief beneficiaries of this are likely to be the insolvency practitioners and the insolvency industry in general.

DATA PROTECTION

By Alan D. Meneghetti and Philippa Townley

Despite the potential Brexit, the long awaited General Data Protection Regulation (GDPR) which is due to come into force on May 25, 2018 remains relevant to the UK, as the UK is highly likely to still be a member state of the EU at the date on which the Regulation comes into force. Even if the UK chooses not to retain the GDPR (whether in whole or in part) once it leaves the EU, as the UK data protection regulator (the Information Commissioner's Office, or ICO) has stated: "if the UK wants to trade with the Single Market on equal terms we would have to prove 'adequacy' – in other words UK data protection standards would have to be equivalent to the EU's General Data Protection Regulation framework starting in 2018".

UK businesses, therefore, should not be deterred from implementing steps in preparation for the new data protection regime; indeed, businesses should be encouraged to take these steps sooner rather than later. (Read our previous QuickStudy on The Potential Impact of a BREXIT on the UK's data protection regime)

FINANCIAL SERVICES

By Alan D. Meneghetti and Philippa Townley

The loss of the ability to undertake business on a passport basis could be one of the most significant impacts on the financial services industry in the UK. The UK's current EU membership allows a range of authorised businesses, such as banks, insurance companies and asset managers to operate on a cross-border basis while regulated by the Prudential Regulation Authority (PRA), the UK financial regulator, without the need for further authorisation from local regulators or the need to maintain localised funds in other EU jurisdictions. Any change to this system will, of course, be the subject of the withdrawal negotiations. There will be opportunities for growth as businesses look to expand their operations in the EU and one awaits the outcome of discussions as to how the financial services industry regulated by the PRA will operate in the UK and EU should the UK invoke Article 50 and withdraw from the EU. (Read our previous Insurance & Reinsurance Blogs on What impact will Brexit have on the passporting rights of UK-based financial services? and Brexit and the Re/Insurance Industry).

CARDS AND PAYMENTS

By Robert Courtneidge and Charlie Clarence-Smith

The payments industry is by and large a forward-looking and innovative sector. As such, whilst the temptation may be to focus on the negative implications of Brexit, not least the threat of jeopardising London's status as the preferred location for global companies to conduct European business and the possible relocation of payment service providers in order to allow them to conduct business in other European countries, there are also a number of potential opportunities that may now become available:

- **Money Remittance companies:** With remittance companies partly earning revenue based on the difference between the exchange rate applied to the sender and the exchange rate applied at payout, the unpredictability of currencies, such as the US dollar, British pound and the Euro, could allow companies to obtain an additional margin to compensate for the volatility and risk.
- **Interchange fee rates:** Under the current regime, the European Multilateral Interchange Fee Regulation caps interchange fees, a charge enforced by an issuing payment service provider to an acquiring payment service provider, to 0.2% for debit cards and 0.3% for credit cards. A split from the EU could see the UK gain control over its own interchange fee caps, which, in turn, could see revenue collected by various payment providers on transactions affected. However, it should be noted that, this would be a benefit for the issuing entities rather than the consumer.
- **Cross-border payments:** A weaker British pound may increase international volume for UK-based payment companies with cross-border operations.
- **Lower barriers of entry into UK:** With countries benefitting from a fall in the value of the British pound, and therefore cheaper British products and services, the UK should find itself more competitive with an increase in exports outside the EU.
- **Opening up of global markets:** Like Norway and Switzerland, the UK will be able to set up special trade agreements with European and non-European countries without the shackles currently enforced upon it by the European Parliament. This, in turn, should increase the markets available to payments and fintech businesses based in the UK at present. However, it will be essential that any such agreement does not significantly increase the complexity of importing and exporting of goods in order to ensure a level playing field on which to compete across Europe.

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