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Whitepaper

Evaluating the Impact of Brexit on the Agreement Process

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The UK left the EU on 31 January 2020. While this development provided many with some relief from the state of complete uncertainty, a lot still remains in flux for many businesses as the UK and EU negotiate the details of their future relationship. The outcome of that negotiation likely will have a significant impact on how businesses operate after 1 January 2021, once the current transition period ends.

This paper explores the potential impact of Brexit on business agreements, particularly contractual relationships with third parties that serve as a framework for underlying day-to-day business operations. We examine how companies can draw on various digital tools to identify and adjust key business operational dynamics that may be impacted by Brexit.

What's happening with Brexit?

The UK formally left the EU on 31 January 2020. The accompanying EU-UK Withdrawal Agreement provided for a transition period which, for the most part, maintains the status quo for businesses until 31 December 2020.

Upon expiration, there are three possible directions for the UK-EU trading relationship on 1 January 2021:

- A limited EU-UK free trade agreement with no tariffs, but significant trade frictions
- No Deal and a default to World Trade Organisation terms, with tariffs and only basic trade access
- An extension of the 31 December 2020 deadline to allow more time for negotiation and a continuation of the transition period (although the UK is ruling this out)

The EU-UK Withdrawal Agreement runs for 535 pages setting out the terms of the UK's departure from the EU. This complex framework is further complicated by the Political Declaration, a 27-page document that sets the high-level framework for the future EU-UK trading relationship – leaving a lot of blanks to be filled in by a future EU-UK agreement.

It is already clear that businesses will need to continually adjust to significant friction, added complexity and many unknowns over time. It remains to be seen how significant and in which sectors these dynamics will be most impactful. Some of the areas where businesses could see significant changes are:

Regulations
The UK government wants to see regulatory divergence between the UK and the EU. This divergence can affect how products are made, how services are delivered and how businesses are regulated. That may change the cost of doing business in the future or impact the fundamental assumptions upon which businesses operate via bilateral contracts with customers, partners and suppliers.

Trade in goods
Both sides want an ambitious deal on goods – without tariffs or quotas, smoothing some of the burdens through things like customs cooperation. There will almost certainly be some new friction – customs declarations and rules of origin paperwork, new regulatory requirements, possible border delays or changes in tax regimes.

Trade in services
This is a notoriously difficult area to negotiate in trade agreements – especially with the limited time available – and only weak provisions in the WTO agreements to fall back on. Coupled with the limitations on the free movement of people from 1 January 2021, the limitation could have a big impact on companies with no presence in either the EU or the UK.

The impacts of Brexit on businesses and their contracts

Brexit can impact every aspect of doing business: where a company is located, how it operates across borders, how it sells goods/services to the rest of the world, duties/tariffs it incurs, the tax regimes that apply and the staff it employs. It can affect both the rights and obligations of a company and the fundamental contractual principles with customers, service providers and its supply chain. This magnitude of having to manage Brexit from a contractual standpoint should not be lost on the reader in light of the potential resource needs associated with drafting, negotiating, signing and postsigning management of contracts as well as evaluating and amending prior contracts that are impacted by Brexit.

To appreciate the magnitude of this potential endeavor, recent studies have helped size the contracting dynamics within a global corporation. The "Forrester State of Systems of Agreement," a 2019 commissioned study, conducted by Forrester Consulting on behalf of DocuSign, confirmed that two-thirds of respondents' departments at global corporations process up to 500 agreements per month. Fortune 2000 companies report responsibility for managing up to 40,000 active contracts at any time. International Association for Contract & Commercial Management (IACCM) estimated that the average processing and review cost for a low-complexity procurement contract was $6,900 for a company with more than $1 billion in annual revenue in North American and Europe. Cost of a mid-complexity contract was $21,300 and a high-complexity contract could be as high as several hundreds of thousands of dollars. The resources required to address the contractual dynamics impacted by Brexit are not insurmountable, but they are potentially significant.

Many companies outside the UK may attempt to rationalise that this issue does not impact them. However, Brexit doesn't only affect companies based in the UK. It will impact the contracting operations of any organisation and it's contracting operations, that trades with the UK; provides services to the UK or relies on goods manufactured or sourced from or though the UK as part of its global supply chain. Even where Brexit may have a limited direct effect, there may be indirect consequences. For example, service providers could be affected or goods delayed because of log jams at ports. Realistically, global supply chains and the global economy dynamics are the norm and Brexit inevitably will impact companies whether they are based in the UK or not.

It is crucial that companies enhance contract templates, examine contracts in current negotiation and reviews contracts that have already been executed to ensure that they:

Manage risk
Brexit may bring unforeseen or volatile costs through currency fluctuations, increased tariffs, disruption to usual supply chains or increased costs to maintain business as usual. Reviewing contracts allows an organisation to understand, plan for and eliminate those risks where possible.

Meet regulatory obligations
Updating contracts for Brexit can also help meet key regulatory obligations and allow a company to maintain business as usual. Including data transfer clauses, for example, removes reliance on regulatory decisions made by the EU and the UK and provides control over managing and transferring data.

Adjust for technical changes
The UK's departure from the EU means that the territorial application of a contract may change or that assumptions about how disputes are resolved can no longer be relied upon. Whilst often seen as technical changes, these legal variations can have a big impact on the operation and value of a contract.

Clauses impacted by Brexit

There is unfortunately no one-size-fits-all solution when reviewing contracts to identify, evaluate and mitigate the various risks of Brexit. What needs to be changed and what matters most will vary from business to business and contract to contract.

The list below highlights some key clauses that most businesses will need to consider when undertaking a Brexit impact contractual review:

Territory definitions & locations
References to the EU need to be updated to reflect that the UK formally left the EU on 1 February 2020, potentially affecting a range of contractual conditions such as location of offices, provision of service or territorial exclusivity clauses.

Currency & pricing
The volatility of currency exchange and the uncertainty of costs can be accounted for in how prices are calculated (or pegged).

GDPR
From 1 January 2021, the free flow of data between the EU and the UK may depend upon an adequacy decision of the authorities, which can be withdrawn at any time. Data transfer clauses in contracts can often provide a legal basis to continue to transfer key data across borders.

General regulations
Any clauses or pricing based on assumptions of regulatory alignment – whether the production of goods or the delivery of a service – should be adjusted for the potential implication and cost of meeting different EU and UK regulatory regimes given the UK government's ambition to encourage regulatory divergence.

Duties, tariffs & taxes
Contracts can help prepare for the possibility that, in the absence of a new UK-EU trade agreement, tariffs and duties could be imposed on goods crossing the border. Contractual clauses can also reflect the potential increased costs in the event that new taxes are imposed or the cash flow implications of paying VAT on goods at the time of import.

Material adverse change (MAC), termination & renewals
If a business anticipates that Brexit will seriously interfere with contracts, it can consider including a right to terminate or renegotiate terms in the event of particular Brexit-related occurrences.

Governing law, jurisdiction & dispute resolution
Organisations should review any clauses that state where challenges will be brought to ensure this serves their best interest.

Force majeure
While financial inconvenience or disruption caused by Brexit would be unlikely to amount to a force majeure event, if contractual obligations are rendered impossible as a result of Brexit, companies should review this clause to see if it can be relied on.

Operational efficiencies revisited

Companies will need to consider how to tackle a large volume of contracts that will need to be reviewed. Business relationships are defined by contracts – and assessing the impact of Brexit on a business starts with knowing what's in those contracts. Manually reviewing varied contracts spanning corporate shared drives and repositories is time consuming, expensive, prone to user error and open to subjective bias.

There are outsourcing providers that could manually review every contract and provide initial feedback as to which of the subset of contracts may require additional attention. That would require providing third parties with intimate access to contracts and relying upon a substantial number of individuals to coordinate and maintain quality control over their work product. In addition, organisations will need to build or refine internal operational processes to account for pushing new amendments to third parties whose contracts are impacted by Brexit. There are opportunities to send form documents to third parties with an optimistic hope that they will merely execute the amendments without requesting changes to the template. However, it's unavoidable that there will be a large spike in resources needed to tackle this impending Brexit challenge.

How can digital technology be part of a Brexit readiness solution?

Implementing a digital solution in advance of changes will help get ahead of this volume of potential work that may be required to amend contracts. To implement any solution will likely take multiple months, so organisations should start planning technology partners early. It's best to choose partners who set a high bar and offer an efficient, end-to-end Brexit readiness solution.

Technology vendors should prioritise the privacy and security of their customers' documents, meeting UK, European and international security standards, including strict security policies and practices that set the standard for world-class information security in digital transactions. Additionally, evaluate how well such solutions integrate with other systems for greater seamlessness.

An end-to-end agreement cloud solution should help any organisation prepare for Brexit by simplifying several common agreement workflow processes:

Identify risk areas across contracts by leveraging artificial intelligence
AI-driven analysis can provide greater visibility into contracts, regardless of where and how they're stored in an enterprise. Leading solutions create a central, searchable index of contracts, with built-in OCR to make even imaged contracts searchable. Then, they apply sophisticated machine learning to extract contract clauses and terms by concept, spotting issues and trends that text search would miss. This analysis can automatically identify a range of contract provisions that may be significantly impacted by Brexit.

With search-by-concept, side-by-side term comparison and visualised reporting dashboards, products such as DocuSign's Intelligent Insights can make it easy to gain a comprehensive understanding of contracts and drill down to those that need attention – all whilst minimising cost, maintaining consistency and reducing the time to start Brexit readiness programmes.

Generate and negotiate new and revised agreements easily

Once an organisation has identified the clauses and elements to be modified within its contracts, it will need to amend contract terms, which likely will include some degree of additional negotiation with the other party. Traditionally, "re-papering" agreements with a range of business partners and service providers is a painstaking, costly, resource-intensive and error-prone process. Contract lifecycle management solutions such as DocuSign CLM streamline this process by automating contract creation, negotiation and approval. These solutions help efficiently build contracts by utilising previously approved clause language and source data from an organisation's enterprise systems. It also helps shepherd contracts through complex negotiations and company-specific workflows to gain approval.

Get consent and sign new and revised agreements quickly and efficiently

When time is of the essence and risk abounds, contracts revised for Brexit readiness need to be executed in an efficient, reliable and straightforward manner.

Electronic signature solutions such as DocuSign eSignature provide reliable enforceability of revised agreements with time-stamped, tamper-evident and court-admissible audit trails. Plus, DocuSign eSignature's advanced workflow tools accelerate the execution workflow process. The bulk send feature allows any organisation to gather individual consent from a large number of users, while automated reminders and conditional routing keep complex approvals on track. By offering an open integration framework as well as over 350 ready-made integration solutions with applications like Salesforce, NetSuite, SAP and more, DocuSign eSignature helps any team build operationally efficient workflow processes to move fast in times of rapid change and great uncertainty.

Brexit likely will also impact standard terms and conditions, privacy policies and other policy language that will need to be updated. Partner and customer consent that has already been captured may need to be recollected. A clickwrap solution such as DocuSign Click provides an easily auditable mechanism to capture written consent to updated standard terms, all with a single click. Administrators can configure the clickwrap layout, enforcement methods and delivery process, as well as manage updates to existing agreements. Click captures date, time and other critical info in the audit trail, along with clear visibility into which user agreed to which version of a contract, such as the post-Brexit version of terms and conditions or privacy-related contracts that would be pushed to users for execution as post-Brexit privacy consents.

What to look for in a digital solution to support Brexit readiness

To support Brexit readiness efforts, consider solutions that review and analyse contracts for a range of global regulations and contractual commitments, align with internal operations and help amend agreements efficiently. End-to-end, integrated tools that address all the stages in the contract lifecycle can help eliminate roadblocks, optimise efforts and further automate aspects of operations. These efforts also should be coupled with a focus on security, privacy, availability and compliance with standards and regulations, so that organisations can conduct business with confidence.

What to look for in an agreement cloud solution

- End-to-end, integrated agreement cloud that can analyse, generate, negotiate, sign and manage contracts
- Connections to business systems to fulfill post-contract obligations and provide additional reporting
- E-signature solutions that are legally recognised throughout the world with a comprehensive digital audit trail
- Open APIs for easy integration with other business systems
- Contract lifecycle management with capabilities for generating a contract, managing the negotiation and approval workflow, documenting redlines and storing contracts
- AI-driven analysis of agreement terms and clauses across multiple document repositories within an organisation
- Pre-built machine learning algorithms to automatically extract contract provisions likely to be affected by Brexit
- Proven solutions with a well-established base of customers and user adoption across industries, regions and segments
- Robust data governance and adherence to global regulations and contractual commitments
- Strong security supported by a clear investment in robust security protocols to keep data safe
- Integration with systems and tools such as Salesforce, Workday, SAP, Oracle, Microsoft, Google and Box
- High availability, offering scalable, high-performance cloud infrastructure across the globe, architected for zero data loss during catastrophic events and including built-in redundancy
- Robust data privacy and management with established processes around data deletion, retention, residence and transfers
- Globally recognised certifications and attestations, including enterprise-wide ISO 27001:2013 certification, PCI-DSS, and SOC 1 Type 2 and SOC 2 Type 2 reports – ISO 27001:2013, SSAE 16, SOC 1 Type 2, SOC 2 Type 2

Conclusion

Brexit affects organisations from every sector and every geography, whether based in the UK or simply trading with the UK. Whilst a lot of uncertainty remains, – including the risk of a 'No Deal' cliff-edge at the end of the year – one thing is clear: even if a contractual relationship with a third party has already been secured, new complexities will be introduced that companies will need to navigate in current and future contractual relationships.

Businesses can take steps now to understand the risks that Brexit creates and manage those risks throughout their contracts. That may initially appear to be an enormous task with t tens of thousands of contracts potentially impacted. However, understanding how to evaluate potential solutions, appreciating options to accelerate reviews and knowing that systems are available to operationalise the management of these contracts, means there is no need to be hesitant in tackling this impending challenge.

About Fieldfisher

Fieldfisher is a proudly European firm with over 1,000 lawyers and professionals based in 25 offices spanning the continent and servicing clients across the world. Fieldfisher's Brexit Taskforce is an interdisciplinary group of experts made up of ex-government and EU lawyers, policy insiders and sector specialists. Andrew Hood [andrew.hood@fieldfisher.com] heads Fieldfisher's Brexit Taskforce.

About DocuSign

DocuSign helps organisations connect and automate how they prepare, sign, act on, and manage agreements. As part of the DocuSign Agreement Cloud, DocuSign offers eSignature: the world's #1 way to sign electronically on practically any device, from almost anywhere, at any time. Today, more than 500,000 customers and hundreds of millions of users in over 180 countries use DocuSign to accelerate the process of doing business and to simplify people's lives.

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