

Brexit and your **existing** business contracts: being alert to suppliers seeking to avoid their contractual obligations

“In light of the upcoming date of 31 January 2020, we write to you to inform you that we are continuing to monitor and review information regarding the impact of Brexit on our business and industry. We assure you that we are analysing such information to ensure that we are prepared as best as possible for any ‘no deal’ scenario and to identify possible areas of change and potential solutions for our clients. However, there remains significant uncertainty as to the potential resulting impact. We would also like to take this opportunity to confirm that we reserve our rights to review at any time all goods and services provided to you, including the associated prices and charges, during this uncertain time.”

Look familiar?

Have you received something similar from a supplier?

What does this mean, and why have you been sent it?

Given the possibility of a ‘no deal’ Brexit, there are three main reasons a supplier would look to send its customers a statement such as that above:

1. to attempt to unilaterally vary its contractual terms of business (“**Contractual Variation Aim**”);
2. to put customers on notice in order to attempt to avoid full accountability of potential later losses and call on a customer’s duty to mitigate its losses if a dispute came before the English courts (“**On Notice Aim**”); and/or
3. to start to construct a backdrop against which a supplier may look to apply Brexit to a force majeure clause (“**Force Majeure Aim**”).

The effect of the three aims above depends on the specific terms of business between you and your supplier, as well as established case law.

Contractual Variation Aim

Covering off business risk and re-balancing responsibilities in response to such risks is a fundamental purpose of entering into a contract. But, what happens if a supplier is not granted rights within its contracts with customers to “review at any time goods and services [...], including the associated prices and charges”? Can the supplier unilaterally vary its contractual terms with customers by sending out this statement by email?

In the vast majority of circumstances, parties to a contract must abide by the requirements set out in a variation clause in order to amend the terms of a contract. As such, if a variation clause dictates that parties are only permitted to amend a contractual term in writing and, each party is to sign the amendment to demonstrate its consent, then this is what must be done in order to effectively amend the contract.

But, what if you continue to purchase goods and services acknowledging the above statement as incorporated as a term of your contract? Have you consented to the amendment?

Further, if the statement does not amount to an effective contractual amendment, could there be an argument of anticipatory breach. Is the supplier expressing its intention to not fulfil its contractual obligations in the event of a 'no deal' Brexit?

Also, any attempt by a supplier to use the above statement to avoid its obligations under the EU General Data Protection Regulations 2018 ("GDPR") will not be successful. On the day the UK exits the European Union, the European Union (Withdrawal) Act 2018 will convert the GDPR into UK law.

On Notice Aim

A key component at the stage of assessing damages at court is whether 'reasonable' steps were taken by the claiming party to minimise its loss. However, there is no duty to mitigate loss prior to a breach occurring. Further, in such uncertain circumstances such as the impact of Brexit, what actions would be held to be 'reasonable'? If the supplier breaches its contract with you, are you expected to spread the risk by seeking out secondary suppliers? Is your contract with your supplier on an exclusive basis, which prevents you from freely doing so?

Force Majeure Aim

A force majeure provision in a contract can vary greatly in content from long lists of non-exclusive events to broad drafting along the lines of "a delay or failure arising from events, circumstances or causes beyond such party's reasonable control". In the most recent of contracts, there may even be a direct reference to Brexit.

Whilst the broadest provisions may assist with using the resulting consequences of Brexit as a force majeure event, how will you demonstrate that it is legally or physically impossible to perform your contractual obligations, and not simply unprofitable or more difficult to do so?

So you have received something similar

If you are in receipt of a statement similar to that set out above, it is important as a first step to identify the relevant contractual terms in place with your supplier. This is relevant to both written and unwritten contracts.

But irrespective of whether or not you have received something, it is important to evaluate, re-evaluate, and evaluate again your position and plan ahead as we edge closer to Brexit so that you retain as much control as possible of your business during times of such uncertainty.

We are advising a number of our clients who are evaluating their contracts in light of Brexit. For an exploratory discussion, please contact Stephen Sidkin.



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