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BREXIT: The consequences

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Thursday 11 April: The UK's withdrawal date from the European Union has been postponed to 31 October 2019, with the possibility of withdrawal at an earlier date in the event of an agreement.

The United Kingdom and the European Union therefore have until that date to find an exit agreement. A draft agreement already exists but has not been approved by the UK government[1].

However, this postponement is conditional on the election of British European Parliamentarians:
In the event that the UK does not elect MEPs, BREXIT should take place on 1 June 2019.

Several situations are possible:
- a further extension after 31 October,
- the UK's retraction,
- an agreement between the EU and the UK,
- an exit from the UK without a deal, the "Hard Brexit", which, although unwanted, always seems like a probability that must be anticipated.

[1] 2019 Agreement/C 66 I/01 available via the link:
https://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=OJ:C:2019:066I:FULL&from=EN

A hard Brexit would have significant geopolitical and economic consequences.
For example, there will be *'additional red tape, particularly at the customs level. 180,000 British companies will have to make declarations to customs for the first time. The additional administration needed to carry out this task is expected to cost British traders around '4 billion euros a* year'[2]. The French Customs Administration anticipates 1.2 to 2 million new transfers of imports and exports and has launched a recruitment process aimed at recruiting between 700 and 750 new customs officers by 2020.

The creation of customs tariffs is likely to curb trade between the UK and EU member states.

On the legal front, many changes are to be expected but they can be anticipated as of now.

In practical terms, the UK would become a third-party state to the EU. European legislation will no longer apply to it. However, a significant part of European legislation has been implemented into national law and will therefore continue to apply.

The important thing is to identify the legislative areas that will be impacted by BREXIT.
Contracts will therefore need to be reviewed to verify the possible impact of legal changes on their implementation or their very existence.

1. EU legislation

European law is mainly composed of Directives which require an implementation law to be applicable in member states, and regulations that are immediately applicable.

1.1 European Directives

When the United Kingdom leaves Europe, these directives will remain indirectly applicable since they have been incorporated into English law.

For example, the Commercial Agents Directive [3], which gave Member States the choice between the payment, in the event of a breach of contract, of a lump sum to the agent or compensation for the damage suffered.
The United Kingdom had passed an implementation law in 1993 and opted for the payment of a lump sum equal to one year's commission.
France, for its part, had opted for the system of damage suffered by the agent and the case law established the amount to two years' commissions, calculated on the average of the last three years.

[2] Source: « Brexit and customs publication » by Peter Wilding.

[3] Council Directive of 18 December 1986 on the coordination of Member States' rights relating to self-employed commercial agents (86/653/EEC)

The fact that certain Directives remain applicable can lead to difficulties in some areas. For example, VAT regulation in the EU is national and is based on the 2006/112/EC Directive of 28 November 2006. Clear rules must therefore be defined to avoid double taxation.

1.2 European regulations

On the other hand, European Regulations, which are in essence directly applied, will no longer be applicable, such as the one relating to the law applicable to the contractual obligations of 17 June 2008 referred to as "Rome I"[4]. Thus, for distribution contracts, in the absence of a choice of applicable law mentioned in the contract, the European Regulation which provides for the distributor's [5] law will no longer apply.

It will be necessary to refer to the Hague Convention (if the United Kingdom abides by it as a result of BREXIT) which provides for similar provisions, i.e. the law of the distributor.[6]
However, if the distributor is in France, the European Regulation may apply, unless English law has been chosen by the parties.

Other examples:
- **judgments** in France and the United Kingdom will no longer be immediately applied[7] (under the European Regulation Brussels I bis No 1215/2012 of 12 December 2012 relating to jurisdiction, recognition and enforcement of civil and commercial decisions). They will therefore require an "exequatur" procedure, where the judge of the place where the decision will be enforced will need to verify that the foreign judge was competent, that the judgment is compliant with French international public order (including defence rights) and that there was no fraudulent evasion of the law.[8]

The British government could ratify the Lugano Convention on the recognition of foreign decisions, which would remove the exequatur[9] procedure.

[4] The withdrawal agreement provides for the application of European regulations, including Regulation 593/2008, to contracts concluded before the end of the transition period (see Article 66).

[5] Article 4 of Regulation No 593/2008 of 17/06/2008

[6] British Government plans to ratify Hague Convention of 30 June 2005 on the Election of:
https://www.hcch.net/fr/instruments/conventions/status-table/notifications/?csid=1318&disp=resdn

[7] http://www.lexplicite.fr/brexit-incertitudes-reconnaissance-et-execution-ue-jugements-royaume-uni/

[8] These three conditions were established by the “Cornelissen” decision delivered by the 1st Civil Chamber of the Court of Cassation on 20 February 2007, No 05-14.082

[9] Article 33.1 of the Lugano Convention provides, among other things, that decisions rendered in a state bound by this Convention are recognised in other states bound by this Convention, without the need for any procedure.

Luke Harrison[10], solicitor, believes that there will be above all "significant *difficulties in the recognition of insolvency judgments, since European Regulation 2015/848 of the EU Parliament and Council of 20 May 2015 on insolvency proceedings will no longer be applicable in the United Kingdom.*
States will be able to apply the UNCITRAL's model law on international trade arbitration but adopted by only 80 *countries.*"[11]

The secondment of employees[12]: The employment contract will not change but the social status will be that of the country of the place of employment, i.e. social contributions will have to be paid in that country while, thanks to the European Regulation No. 883/2004 of 29 April 2004 relating to the coordination of social security systems, the seconded employee could retain his registration in the social security of his country of origin. This will no longer be possible.

1.3 Rules with a territorial scope

BREXIT will also have an impact on all provisions that have a territorial scope, and which distinguish between EU member states and third states.

For example, when it comes to intellectual property, trademarks and designs can be protected at European level. On the day of BREXIT, theoretically, these European-wide protections will no longer be applicable on UK territory. Uncertainties also remain over the exhaustion of rights on products from the UK exported to the EU. The withdrawal agreement provides for the maintenance of the protection in the United Kingdom of rights registered or granted at European level[13] and the maintenance of the exhaustion of rights both in the EU and in the United Kingdom[14].

[10] Luke Harrison, associate at Debenhams Ottaway

[11] Source: http://www.uncitral.org/uncitral/fr/uncitral_texts/arbitration/1985Model_arbitration_status.html

[12] Be careful not to confuse detachment with expatriation. The secondment procedure allows the private sector employee to go and work abroad on behalf of his French employer. This status allows him to continue to benefit from the French social security system. In the event of an expatriation, the private sector employee may or may not fall under French labour law.

[13] See Article 54.1 of the withdrawal agreement on the maintaining of the protection of rights: the holder of a European Union trademark or EC design that has been registered or granted before the end of the transition period becomes, without reconsideration, the holder of a comparable, registered and enforceable intellectual property right in the United Kingdom under UK law.

[14] See Article 61 of the withdrawal agreement on the exhaustion of rights: " *Intellectual property rights that have been exhausted both in the EU and in the UK before the end of the transition period under the conditions provided for by EU law shall remain exhausted both in the EU and in the UK* ».

Another example is that European managers of companies based in France and the United Kingdom did not need a residence permit or a specific card to carry out their mandate. In the absence of a specific provision, if a foreign manager of a French company resides in France, he will initially need a residence permit.
In addition, certain activities are reserved for companies whose managers have French nationality or that of a member state of the European Union or a state party to the agreement on the European Economic Area (decree 2013-700 of 30/07/2013 article 75.II).

In practice, transitional solutions will have to be found. States have already begun to implement contingency measures. In France, several ordinances have been issued, notably in the field of transport.

The current draft agreement, if approved by the British Parliament, provides for a transition period until 31 December 2020, during which the British will continue to apply European rules and benefit from them.

2. Contracts

Can a contract be called into question because of BREXIT?
In other words, could the consequences of BREXIT be considered events of force majeure, "MAC" or "frustration"?

Force majeure is an unpredictable and unpreventable element that allows the parties to terminate or suspend the contract. It will all depend on the drafting of the force majeure clause and the context in which the contract was drafted.

The MAC (Major Adverse Change) **clauses** allow a party to opt out of an acquisition or loan contract in the event of an unanticipated adverse change in the situation of the target company or borrower. They are usually included in acquisition contracts and loan transactions.

The doctrine of "frustration" renders the contract null and void and frees the parties from their obligations when something happens after the formation of the contract that makes it impossible to perform or transforms the obligation in a radically different way. Frustration has already been acknowledged in the following circumstances:
- destruction of the purpose of the contract,
- government interference,
- a particular event, which is the sole reason for the contract, did not take place,
- in the case of an *intuitu personae* contract, the party dies or has become incompetent.

Opinions differ as to whether the consequences of BREXIT can be used by one of the parties to terminate the contract. The judge will have the power to decide the matter. The European Medicines Agency (EMA) is currently in dispute with Canary Wharf Properties over the application of the doctrine

of frustration.[15] The High Court of Justice in London dismissed the EMA on the basis that BREXIT could not be considered as an element for the application of this doctrine. The EMA is expected to appeal this decision[16].
However, this confirms the opinion of Peter Wilding[17], solicitor, for whom it is very unlikely that the contract could be terminated, as the parties have had sufficient time to prepare for the impact of BREXIT and renegotiate the contracts.

In order to avoid finding ourselves in a complex situation, BREXIT must be taken into account in the drafting of future contracts, for example by referring to it when drafting the recitals, explaining in particular the context in which parties have contracted.

It is also recommended to insert a "BREXIT" clause to provide for the various possible situations in the event of a withdrawal agreement or a "no deal".
Similarly, it is recommended to be vigilant about the clauses of jurisdiction and applicable law.
It should be noted that the Commercial Court and the Paris Court of Appeal have created chambers specific to international trade.
France thus strengthens its attractiveness in the resolution of international disputes and hopes to increase the number of cases handled, by betting on a decline in interest of the players in the British courts.

[15]For a summary of the case: https://bfmbusiness.bfmtv.com/monde/brexit-le-couteux-demenagement-de-l-agence-europeenne-du-medicament-1636755.html

[16] https://agenceurope.eu/fr/bulletin/article/12211/19

[17] Peter Wilding is a lawyer specialising in European law, inventor of the word Brexit!
For more information: https://www.fbcmb.co.uk/find-a-lawyer/article/8019/peter-wilding