ALLEN & OVERY

Brexit – legal consequences for commercial parties

Key immediate implications of the UK's vote to leave the EU

24 June 2016

Overview

Yesterday the UK voted to leave the European Union, the first step in a process that is likely to lead to the biggest demerger in history: the world's fifth largest economy (the **UK**) leaving the world's largest economic grouping (the **EU**).

At this point, it is difficult to predict how or when the exit will be effected. What is clear, however, is that Brexit, in whatever form it might ultimately take, will have an impact on the legal rights and obligations of commercial parties in all sectors. It is also clear that the uncertainty caused by the "leave" vote will be problematic for many parties, both in the immediate aftermath of the vote and as the details of the UK's exit are being ironed out.

In this article we highlight the key immediate issues that parties are likely to face and the steps that our clients may wish to consider taking in the next few weeks.

The article is a summary of the matters discussed on Allen & Overy's post-vote client call, which took place at 1pm this afternoon. A recording of the call is available here.

Executive summary

EU law continues to apply until the UK formally exits from the EU. The key unknown is which post-Brexit model will be negotiated.

From a legal perspective the message is 'business as usual' for the moment, although the market volatility resulting from the vote may trigger consequences under the terms of existing contracts.

Immediate issues and next steps

Exit process – clear in theory, perhaps less so in practice

Commercial parties and their advisors undoubtedly face significant difficulties analysing the immediate fallout from yesterday's vote.

On the one hand, there is what the law tells us (which is fairly straightforward and well-rehearsed). On the other, there is what might actually happen in the next days and weeks (which rests in part on fragile political alliances, personalities and the reaction of the markets). There are three key legal points to flag:

- First, there are significant uncertainties about how the outcome of the vote might be implemented. The vote is only advisory and the question posed to the electorate was binary – "in" or "out" – so there is no mandate from voters as to the form that the UK's relationship with the EU should take on Brexit itself. It is unclear at present what negotiating stance the Government will take. Will it seek a Norwegian style relationship with the EU? Or a Canadian style free trade arrangement? Or something else altogether?
- Second, there is currently no clarity as to when the formal negotiation period for the UK's exit will start. Under the terms of the relevant EU Treaty, the UK Government must give notice to the European Council of its intention to exit the EU. However, neither the EU Treaties nor the UK legislation governing the referendum specify the timing for delivery of that notice. This would be a political decision. David Cameron, the UK Prime Minister, has resigned and said that the notice will be served by the new Prime Minister, who he expects will be in place by October 2016. The timing of service of the notice is important because if no agreement is reached within two years from such service (and no extension is agreed unanimously between the UK and the 27 remaining Member States), the EU Treaties provide that the UK would automatically cease to be part of the EU, without any new arrangement in place. In light of this, we may see the Government seeking to initiate scoping discussions about the terms of any withdrawal arrangements prior to formal service of the notice. Indeed, Michael Gove, a pro-Brexit UK Cabinet Minister, has suggested this morning that such discussions should start as soon as possible. The European establishment may, however, be unwilling to engage in meaningful negotiations before service of the notice, not least to avoid setting a precedent by making the process seem too straightforward.
- Finally, the UK remains bound by European law until it formally exits the EU. That said, it is possible that the UK could seek to withdraw from the EU in breach of the Treaties, perhaps citing the supremacy of Parliament. This would be a highly controversial move. We may also see attempts to pass emergency legislation disapplying certain EU laws or curtailing the authority of the Court of Justice of the EU prior to a formal exit. This possibilty is discussed further below.

For further detail on exit mechanisms, see our specialist paper, available here.

Brexit legislation – various options, but none is straightforward

The possibility of passing emergency legislation prior to the UK's formal exit from the EU is something that has already been suggested by some in the Brexit camp. The passage of such legislation would face practical difficulties, however, not least because it would need to be passed by a Parliament which is currently pro-EU. It would also be an alarming measure for commercial parties. It would put the UK in breach of its international treaty obligations (assuming there is no agreement with the other Member States and no public policy or similar derogation from those obligations which the UK could rely upon). And it would also create additional uncertainty, which is likely to be very problematic for commercial parties.

Assuming an orderly transition from EU membership to life as a non-Member State, how would that be documented as a matter of UK law? Much has been said about the mountain of EU law entrenched in the UK's legal system. How will Parliament go about unpicking this?

The first point to note is that, until there is agreement on the post-Brexit model, it will be unclear what legislation needs to be unpicked. If the Norwegian model were followed, limited unpicking would be required; it would be a partial separation rather than a full scale divorce. Much of EU law would therefore still be applicable, although some gaps would need to be filled (eg in relation to agriculture). A full scale divorce, however, for example a relationship based solely on trading under World Trade Organisation rules, would be a much bigger task.

Once there is clarity as to what needs to change, there are various ways to effect that change. One possibility could be a single Brexit Act, which would repeal the European Communities Act and provide (as a transitional arrangement) that European laws will remain part of English law save where specified eg in a schedule to the Act. It is important not to be deceived by the apparent simplicity of this solution, however. There are some EU laws that cannot be transposed wholesale in English law. For example, EU laws predicated on reciprocity could not simply be adopted as a matter of UK law – eg the EU rules on the allocation of jurisdiction and the reciprocal enforcement of judgments.

Similarly, legislation which contemplates regulatory oversight/enforcement at a European level would need to be adapted and laws referring to other EU concepts would need amendment.

The approach of the English courts to interpretation of legislation may also change, as may the status of English case law applying EU law.

The approach taken will also need to be different for different types of legislation. See the box below for further detail.

European Directives: these will have been implemented in the UK by UK legislation. That legislation will not fall away automatically on Brexit (although it may need amendment if, for example, it refers to European institutions or if the UK wants to take a different approach post-Brexit). Much of the UK's employment law is in this category.

European Regulations: these become part of English law automatically when they enter into force at a European level, so there is no UK implementing legislation. These laws would therefore fall away on Brexit unless the UK decides to introduce national legislation in the same/similar terms.

"Softer" EU law (decisions of the Court of Justice, decisions of the English courts construing EU law consistently with EU law, guidance from EU institutions): the English courts will no longer be bound by decisions of the Court of Justice on Brexit; nor will they be required to give primacy to EU law when applying English law. This means that the precedent value of existing decisions is likely to be diminished.

It is also possible that new EU legislation that requires implementation in the UK in the run up to Brexit may be put on hold, which may create uncertainty for commercial parties.

However, all of this should not lead parties to move away from a choice of English law in commercial contracts – English contract law is largely unaffected by EU law. This is discussed in more detail below.

It is also worth highlighting that Brexit will not lead to a bonfire of regulation. All developed nations are highly regulated (whether EU Member States or not) and there

is no reason to think that Brexit would lead to a wholesale relaxation of the UK regulatory regime (although that's not to say there will be no change at all).

Commercial parties are likely to want the UK Government to prioritise negotiating a trading relationship, both with the EU and potentially also with non-Member States which are currently party to a free trade agreement with the EU that may fall away on Brexit.

Focus areas for all corporates are likely to be reassessment, reassurance and engagement with government

How should corporates react now and what pointers do we at A&O have for you? Primarily, we are saying that now is the time to wait and assess rather than to take immediate actions. There is a very long way to go. Right now, the key thing is to re-affirm your analysis of risks and benefits to your organisation – if that has been a "just in case" exercise, then it will be important to focus immediately and satisfy yourself with its conclusions in this swiftly changing environment.

If you conclude your corporate best interests require the UK Government or the EU to act in particular ways, you need to consider strongly your options for lobbying - whether in London or Brussels, or elsewhere. Should you lobby alone, or should you do it as part of a larger group, such as an industry lobby group. You will need to ensure you're compliant with any applicable rules in the UK, in Europe and beyond. There are other issues that you may wish to consider, in particular if you are paying someone to lobby a government minister on your behalf. Some clients have also raised antitrust concerns about cooperating with competitors to get their voices heard; and we have produced a two page guidance note on how to do that and stay within competition law. That is available today on our website, here. If in doubt, call us.

Looking more broadly, it looks like we may be approaching the end of a period where international businesses have benefitted from increasing harmonisation across Europe in a wide range of areas. Dual regulation is likely to become the new norm. In relation to data protection, for example, the opportunities to realise the benefits of the upcoming harmonisation of European data protection laws will be significantly diminished. In relation to competition and environmental law, businesses operating in the UK and EU are likely to face a dual compliance and enforcement burden post Brexit.

In the short term, there have been suggestions that politically it might be considered expedient for the UK Government to ignore state aid rules prior to any formal exit. That is speculative, but if it becomes a reality, affected corporates should consider carefully any implications for them and take advice.

It goes without saying that corporate sponsors of salary-related pension schemes will be aware that their scheme may be adversely impacted by market volatility. Trustees will also be looking closely at how economic and trading factors will play out for their scheme sponsor, and may seek greater security or additional funding to cover downside risk. It's important to be aware of any terms in current funding arrangements which are designed to protect the scheme if the corporate group is adversely affected – for example, funding triggers based on corporate credit ratings.

Tax is one area where the impact of Brexit is perhaps expected to be more limited. This is for two reasons. The first is that historically Member States have jealousy defended their fiscal sovereignty. There are obvious exceptions to this: value added tax and the customs union. Generally, however, the impact of EU directives and regulations on tax law has been limited. The second is that global tax harmonisation and regulation is being driven by the G20 and the OECD rather than the EU.

We could see more withholding taxes on cash moving between the UK and the EU. While we would expect that withholding taxes should generally be manageable because of the UK's wide double tax treaty network, this will not always be the case. We would advise you to think about how this might affect the specific structure of your organisation sooner rather than later to give you time to reorganise before exit.

In summary, initiate your "Day 1" plan, plan for the new norm of transitional uncertainty, reassure your employees and other stakeholders and make sure your voice is heard.

For further detail on contingency planning for corporates, see our specialist paper, available here.

For financial institutions, action may be required to mitigate the regulatory implications

The precise impact of Brexit itself for the financial services industry will largely depend on the post-Brexit model, but there are a number of points that are worth considering now.

EU legislation – existing law and new initiatives

One key question is whether firms will be subject to the requirements of the new market abuse regime and whether they will need to make the changes required by MiFID II.

As discussed, the UK will, at least in theory, remain bound by EU law until it formally withdraws from the EU. Existing EU law and initiatives such as MiFID II that come into effect during that period should therefore apply (as relevant) to in-scope firms. The FCA has made an express statement to this effect this morning – "*Firms must continue to abide by their obligations under UK law, including those derived from EU law and continue with implementation plans for legislation that is still to come into effect*."

It should also be remembered that many financial services laws derive from converging international law principles, or in some cases UK thought leadership, so we do not expect dramatic changes in substance. Equivalence principles will also be crucial to the UK's discussions with the EU as a means to achieve third country access to the EU.

Contingency planning

It is likely that the UK's regulators will be asking firms to share their Brexit contingency plans and impact analysis. There are a number of factors that play into the options that firms will need to consider – these will mainly be driven by firm specific business models (ie how those models allow access to Europe and/or the UK), geographical positioning and perceived areas of growth for the future.

Whilst the terms of the UK's future relationship with the EU will not be known in the short (or possibly medium) term, it would seem sensible to make certain assumptions as regards the likely outcome of the Government's negotiations and to develop plans according to those assumptions.

In our view, those assumptions could include the following:

- The UK government will continue to promote London as a centre for financial services and to permit EU banks and market infrastructure providers to continue their UK activities with as little disruption as possible; and
- The EU will not permit the UK to cherry-pick freedoms – and, accordingly, UK firms' 'outward' passporting rights to the EEA and EEA firms' 'inward' passporting rights may lapse two years after the UK Government triggers the exit period.

Firms can build assumptions such as these into their contingency plans in order to identify what choices may be available to enable continued access to the EEA and UK market (as appropriate). These may include relying on cross-border licensing regimes, obtaining local licences, incorporating a new subsidiary or considering a corporate reorganisation in order to allow the firm to operate in the UK and the EEA via a single balance sheet. Whilst equivalent third country access regimes under MiFID II and similar will be important elements of any plan, uncertainty as to their availability and timing may make it difficult to use them as the core basis of a contingency plan. All options will require detailed legal and regulatory analysis on a case-by-case basis and the level of work required should not be underestimated.

Capital and business efficiencies will drive many strategic planning decisions. The cost of running multiple fully-capitalised operating subsidiaries in Europe would be very inefficient, but options are limited and other commercial and practical factors will also come into play. There may well be a need for significant business transfers into EU vehicles, whether using EU cross-border merger tools (before they cease to be available), or other means. Any such strategic decisions will need to be carefully thought out, but implementation of a material business transfer will also have a significant lead-time to achieve readiness before the UK's actual departure from the EU.

If you would like to read more about the potential implications for financial services regulation, please click here.

For loan market participants, the contractual impact is likely to be limited

For typical loan facilities, including corporate lending and leveraged finance deals, the "leave" vote itself will have no immediate effect on the vast majority of existing deals. However, economic upheaval caused by the vote could have contractual consequences.

It is very unlikely (although not impossible) that the vote (rather than Brexit itself) will trigger a Material Adverse Change (**MAC**) event of default, in loan agreements. Any such triggers would be unusual and fact-specific and a lender would need to be extremely sure of its ground before it relied on a MAC clause to drawstop or accelerate a facility.

In relation to margin lending, as the stock markets have fallen sharply, any equity-based margin loan may require margin calls. We would expect this to be covered by existing documents and by existing processes within banks.

Other than that, any impact on a credit facility is likely to arise from a deterioration in the borrower's business, which should be caught by normal controls in the documents, such as financial covenants.

For banks with an underwriting in place, who may be wondering whether the MAC clause in a mandate letter will allow termination of the underwriting, this will (as always) depend on the exact wording of the clause. It is likely to be very difficult to call a business MAC. It will be even harder for a lender to rely on a general MAC or a market MAC if it knew about the referendum when signing the underwrite. It will be important for lenders to tread carefully and take advice on the specific wording of a MAC before relying it, to avoid being in breach.

What we might see though is market flex clauses being invoked to increase pricing as necessary if the markets are jittery – again, whether this can be done very much depends on the specific wording.

Once agreement is reached on the ongoing relationship which the UK will have with the remainder of the EU, this could trigger MACs for some UK-based businesses if they no longer have unrestricted access to the EU market or the ability to move people around. This would be more likely where a MAC has a forward looking element (eg a reference to "prospects"). Again, however, this will be highly fact-specific, and the same general risks about calling a MAC would apply.

Finally on existing deals, once the UK actually leaves the EU, this could affect various mechanical clauses in documents, including tax provisions, increased costs clauses etc depending on the form the post-Brexit legal regime takes. We do not recommend trying to pre-empt any such developments by amending documents, not least because these issues may be dealt with by statute once the exit is agreed. There is a risk that anything parties put into a document now will prevent the application of any helpful statutory solution and leave the deal stranded or off-market.

Obviously the market for new deals will be (and is already being) affected by the vote. Banks might wish to reassess the business case for any UK borrower which trades outside the UK, or which otherwise relies on EU membership. We have heard a few suggestions being discussed, such as shorter tenors (so that a refinancing is forced before the two year Article 50 notice period expires), increased pricing (perhaps with a further increase to apply automatically if the UK does not negotiate favourable exit terms – whatever "favourable" means), and more conservative covenants (to make sure the business battens down the hatches and prepares for a post-Brexit world rather than taking risks). Banks are much more likely to require borrowers to implement currency hedging to protect against the likely volatility of Sterling during the exit negotiations.

Unsurprisingly, we expect there will be reduced appetite for underwriting new deals, at least in the short term until the market settles down.

Further detail on the impact of Brexit on debt and equity financing is available here.

We will keep our clients up to date with market developments, but please get in touch if you would like to know what we're seeing on deals. Allen & Overy covers more loan transactions than any other law firm, so we have a great overview of the market and whatever is going on, we will be seeing it.

For capital markets participants, the key immediate impact is likely to stem from market volatility

Debt capital markets

The key point from a debt capital markets perspective (covered bonds and securitisations as well as more traditional bonds) is that, as with loan financings, the

vote itself is unlikely to have a significant immediate legal impact. Over time, however, it is possible that continued currency and market volatility may impact on issuer and counterparty credit strength and ratings or, in the case of asset backed securitisations, on underlying asset performance, and existing transactions should be analysed for any consequences that may flow from this, such as potential defaults, interest rate step-ups or a requirement to post collateral or replace a particular counterparty.

As few, if any, existing transactions will specifically contemplate Brexit, we recommend a review of the terms of relevant documents to analyse how they would respond to Brexit and the events leading up to it. Inevitably, much will depend on the specific circumstances and drafting, but it is unlikely that the vote for Brexit will by itself trigger any of the events of default in standard bond terms and conditions or a standard force majeure clause in bond documentation. It is also unlikely that Brexit or the events leading up to it would frustrate or affect the enforceability of the documents.

Structured transactions, which are based on English common law principles (including UK securitisations and structured covered bond transactions), should continue to work as they have done to date and there should be no material concerns related to legal certainty.

The position from a regulatory perspective is less clear across the debt capital markets, since this depends largely on the exit mechanism which is ultimately adopted. For example, under one potential post-Brexit model, it is possible that the UK would lose its ability to participate in the mutual recognition regime between EEA countries which permits 'passporting' of prospectuses. This would impact the financial services market. Similarly, certain exit models may affect the regulatory treatment of UK securitisations and/or covered bond transactions, thereby potentially having an impact on incentives to issue and/or invest in these instruments. In general, in the longer term, the availability or cost of finance across the debt capital markets could be affected by the post-Brexit regulatory landscape.

For new issues, we suggest that the inclusion of a Brexit-related risk factor in prospectuses should be considered on a case-by-case basis. Such a risk factor will be particulary appropriate if an issuer's business or a transaction structure is likely to be adversely affected by Brexit. In keeping with recent practice, such disclosure will necessarily be high level at present, given the current lack of clarity as to the post-Brexit legal regime. Specific Brexit-related contractual provisions seem unlikely to be needed at this stage in the context of new transactions and, as mentioned above in the context of loans, there is a risk that the inclusion of any such provisions may give rise to unintended consequences.

More generally, for some issuers, uncertainty around Brexit and the resulting financial market volatility may impact the availability or cost of some types of finance, particularly in the debt capital markets, although the extent of whether this happens in practice remains to be seen.

Where Brexit and events leading up to it are more likely to have an impact is around the timing of new bond transactions and general business confidence in entering into such transactions. With our market leading debt capital markets practice and depth of expertise, we are well placed to assist with the challenges ahead.

For further details of the potential capital markets implications, see our specialist papers on securitisations here and covered bonds here.

Derivatives

The terms of existing derivatives deals will not be significantly impacted by the "leave" vote, although movements in underlying markets might result in margin calls, actions may be required to mitigate rating downgrades and defaults could ensue. Product-specific provisions such as the "increased cost of hedging" provisions in equity derivatives may also become applicable.

However, standard illegality and force majeure termination events should not be triggered by the "leave" vote. It is highly unlikely that the vote will make performance unlawful, impossible or impracticable.

English governing law and jurisdiction clauses will also continue to be effective. The reasons for choosing English law to govern financial contracts such as ISDAs and GMRAs will not change.

We are receiving many queries from clients about whether changes should be made to documentation. The bottom line is that, until the terms and timing of the UK's exit from the EU are clearer, there is not a great deal that can be done from a documentation perspective. Indeed, as noted above, any changes could conflict with

any legislation designed to ensure continuity of contracts.

However, when the terms of the UK's exit become clearer it may make sense to undertake limited due diligence, particularly on non-standard contracts, to check for unexpected consequences.

The financial services regulatory implications have been discussed above. Given the size and importance of the UK derivatives markets to the UK economy, it is hoped that the UK Government will take whatever steps it can to ensure its continued success. We will be working with clients, industry bodies and governments to try to ensure that the existing protections for derivatives and collateral arrangements continue and that cross-border trading and infrastructure are not adversely affected.

We will keep clients up to date with market developments. If you have any questions on what we are seeing on deals or on regulatory initiatives please do get in touch. Allen & Overy has the world's largest derivatives team so we have a good overview of what is going on in the market.

For further details of potential implications for the derivatives markets, see our specialist paper on derivatives here.

For employers, reassurance will be key pending clarity on the post-Brexit model

You will be pleased to know that there are no immediate actions that need to be taken by employers in respect of employment issues in light of the "leave" vote.

However, your employees are likely to be nervous about where the vote leaves them particularly if they are currently working under an overseas assignment arrangement – will they be required to return to their home country, if so how long will they have to sort out their affairs in the host country (will children be able to finish the academic year in their school for example), will there be a job for them to return to in their home country?

Your employees may also be wondering what the Company's plans are in terms of continuing to do business in the UK or Europe – will you be scaling back operations and if so what impact will there be on jobs? Indeed we are already seeing press stories this morning saying firms are considering moving roles out of the UK.

In the short term we would suggest you do what you can to alleviate employee concern, whether that be through engaging with those on overseas assignments individually, or through a collective announcement to the whole workforce. We have already been advising a number of clients on FAQ documents for employees to try to head-off inevitable questions, even if the answers at this stage are only "we do not know, but we have no immediate plans…"

Behind the scenes we suggest, that if you have not done so already, you look at where your employees are currently based. Do you have people overseas who may in time need to be repatriated? Will there be be jobs for them to come back to? How will you fill their positions – is there sufficient local talent? The Brexit camp have talked about an early immigration control bill to restrict EU nationals entering the UK. Although we have no detail on what this could look like, it is unlikley to affect those already in the UK. In light of this, is it worth bringing workers into the UK now or taking steps to secure their immigration status or citizenship rights pending immigration changes once the two year period for the UK to negotiate its exit has passed?

We do not envisage there will be any short or even medium changes to employment law in the UK. At least for the next two years, employment law that is derived from European law will remain in place; so there will be no changes to the working time regime for example. Therefore, there is no need to review and revise your employment contracts or Staff Handbooks. This may well change in the longer term and it will be interesting to see how the UK courts are influenced by new EU decisions over the next two years (albeit this is an issue extending beyond labour law matters as Philip has already discussed).

Employee representation may, however, raise some interesting issues in the short term. If you have an European Works Council (**EWC**) arrangement, whether UK-based or not, check your agreement to identify how a Brexit will affect employee representative thresholds, whether structural change provisions are triggered and whether any restructuring or other proposals that you are considering in response to a Brexit will trigger a duty to inform and consult the EWC.

It is inevitable that you will be receiving employee queries in the coming days and weeks if you haven't already done so. Please do call us to assist you with these, we have significant experience of advising on

employee mobility and employee relations issues and we would be very happy to work with you to stem the impact the vote may have on your workforce.

A more detailed discussion of the potential implications for employers is available here.

IP: an end to UK in the United Patents Court

From an IP perspective, the most immediate impact our clients will face is the huge uncertainty that now hangs over the Unified Patent Court (**UPC**) system and the Unitary Patent. This EU harmonisation project has been many years in development and businesses have been developing strategies to be well placed to take advantage of the opportunities offered when the new Court opens its doors for business in 2017. The UPC system had offered the tantalising prospect of a "one stop shop" for patent enforcement across 25 participating Member States.

Yesterday's vote means an end to the UK's involvement in the project although it seems likely the UPC will continue without us. The UK has been an enthusiastic and vocal supporter of this new system and London was set to house a prestigious Central Division of the new UPC Court. Future Unitary Patents will not now cover the UK and UPC judgments will not extend to UK patents.

Of course, the UK will continue to participate in the European Patent Convention (which is not part of EU law) and to involve itself in the system for the application and grant of European patents at the European Patent Office. Your existing European Patents are unaffected. But these patents will only be litigated before the UK national court and not before the UPC.

Over the longer term, the UK's non participation in the UPC (assuming it goes ahead) may weaken the attraction of UK courts as a venue to resolve big ticket patent disputes.

For community wide rights such as EU trade marks or designs these will, once Brexit happens, no longer have force in the UK but we expect that owners will get the right (perhaps an automated one) to parallel UK national rights with the same priority dates.

On Brexit, the UK will have to decide whether and how to provide for parallel trade. It will be a matter of legislative choice whether to provide for EEA or international exhaustion of rights. Also at risk are harmonisation measures achieved in other (IP) areas eg the Biotechnology Directive, the IP Enforcement Directive and EU regime of Supplementary Protection Certificates though much will depend on the Brexit model adopted.

The life sciences sector, like other regulated sectors, may find it faces a more fragmented regulatory framework. More immediately, the European home of the European Medicines Agency at Canary Wharf looks to be under a shadow. Whilst much depends on any agreed exit model, the UK's leading role in this sector in Europe may be vulnerable unless a special agreement is reached on the EMA.

Please get in touch if we can help with your IP strategies. For more detail on the implications from an IP perspective, see our specialist papers, available here and here.

Disputes will arise, particularly if we see significant market disruption

As indicated above, the immediate legal impact of the vote is likely to stem more from the market disruption that the vote causes than anything that is specific to Brexit itself.

This means that many of the contentious issues that are likely to arise will be similar to those that we have seen in other financial crises.

Whilst termination rights are unlikely to arise for many parties, for the reasons discussed above, there may be some parties who may find themselves having to consider contentious issues such as whether a failure to meet a margin call or a decline in the creditworthiness of a party gives rise to a termination right under a contract.

There are a host of issues that parties should consider when assessing whether to assert a breach or terminate. In particular:

- It will be important to assess carefully whether there is in fact a legal basis to stop performing or formally terminate a contract. That can be a complex analysis, but there are potentially significant negative consequences to getting it wrong, not least the fact that the party terminating may find that it is itself in breach of contract.
- If a decision to exercise a right to terminate or assert a breach is taken, it is important to consider whether there are particular

contractual requirements as to how to exercise that right – eg whether it is necessary to serve notice and, if so, whether there are particular requirements as to the form or content of that notice or as to where it should be served. The English courts construe notice clauses strictly, so it is important to get this right.

- Parties that wish to buy some time before deciding whether to terminate may want to reserve their rights, to reduce the risk that they will be found to have affirmed the agreement and so given up the right to terminate. Parties doing this would then need to act consistently with that position – a reservation of rights will not be effective if a party takes steps that in fact amount to an affirmation. And it is also worth remembering that parties cannot rely on a reservation of rights indefinitely.

Aside from the contentious contractual issues, we may also see litigation arising in the short term in relation to what might broadly be described as constitutional issues, eg if we see the Government passing emergency legislation that is not compliant with the UK's obligations under the EU Treaties, or conceivably if issues arise as to the way in which the referendum was conducted. Whilst commercial parties may not be directly involved in this litigation, the uncertainty created by such legal challenges may have an adverse impact.

Finally, it is worth underlining again the fact that the vote for Brexit should not make English law a less attractive proposition for commercial parties negotiating new agreements. English contract law is largely unaffected by EU law and a choice of English law as the governing law of a contract should still be upheld both by the English courts and the courts of the EU Member States, even after Brexit. So there is no reason to stop including English governing law clauses when negotiating new contracts.

The same is broadly true in relation to English jurisdiction clauses. English jurisdiction clauses should continue to be respected in the EU and although Brexit could mean that the simplified European regime for enforcing English judgments in other Member States will fall away, in most Member States (including Germany, France, Italy and Spain) it should still be possible to enforce an English judgment post-Brexit, albeit it may be a bit more time consuming and costly to do so in some cases.

For a more detailed discussion of the potential impact on governing law and dispute resolution provisions, both at the drafting stage and when disputes arise, see our specialist papers, available here and here.

How we can help you

We have considered the potential impact of Brexit for our clients in detail and conducted an analysis of the potential strategies for mitigating Brexit-related risk in the financial services sector and other sectors.

Our full set of 19 specialist papers on the potential consequences of Brexit for commercial parties is available on our dedicated Brexit microsite, available here.

We will continue to monitor the progress of the negotiations between the UK and the rest of the EU and have in place a team of experts who stand ready to advise our clients on the likely consequences for their businesses across the full range of sectors and disciplines.

If you have any queries in relation to Brexit or its possible implications, please email our Brexit team at A&OBrexitqueries@allenovery.com or your usual Allen & Overy contact.

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Our Brexit specialists

Anti-Trust

Antonio Bavasso
Partner Co-Head Antitrust
Corporate - London

Contact

Tel +44 20 3088 2428
antonio.bavasso@allenovery.com

Michael Reynolds
Partner – Management - Management – Brussels

Contact

Tel +32 2 780 29 50
michael.reynolds@allenovery.com

Banking

David Campbell
Partner
Banking - London

Contact

Tel +44 20 3088 4758
david.campbell@allenovery.com

Damian Carolan
Partner
Banking - Regulatory - London

Contact

Tel +44 20 3088 2495
damian.carolan@allenovery.com

Etay Katz
Partner
Banking - Regulatory - London

Contact

Tel +44 20 3088 3823
etay.katz@allenovery.com

Jennifer Marshall
Partner
Banking - Restructuring - London

Contact

Tel +44 20 3088 4743
jennifer.marshall@allenovery.com

Philip Wood CBE, (QC) Hon
Special Global Counsel – Banking - London

Contact

Tel +44 20 3088 2552
philip.wood@allenovery.com

Michael Green
Counsel
Banking - London

Contact

Tel +44 20 3088 2451
michael.green@allenovery.com

Oonagh Harrison
Senior Regulatory PSL
Banking - London

Contact

Tel +44 20 3088 3255
oonagh.harrison@allenovery.com

Corporate

Neil Bowden
Partner
Corporate - Pensions - London

Contact

Tel +44 20 3088 3431
neil.bowden@allenovery.com

Richard Cranfield
Partner
Corporate - London

Contact

Tel +44 20 3088 3200
richard.cranfield@allenovery.com

Jeremy Parr
Partner
Corporate - London

Contact

Tel +44 20 3088 3383
jeremy.parr@allenovery.com

Capital Markets

Angela Clist
Partner
ICM - Securitisation - London

Contact

Tel +44 20 3088 2437
angela.clist@allenovery.com

Matthew Hartley
Partner
ICM - General Securities - London

Contact

Tel +44 20 3088 2824
matthew.hartley@allenovery.com

Morgan Krone
Partner
ICM - Corporate Trustee - London

Contact

Tel +44 20 3088 2410
morgan.krone@allenovery.com

Salim Nathoo
Partner
ICM - Securitisation - London

Contact

Tel +44 20 3088 2838
salim.nathoo@allenovery.com

Daniel Shurman
Partner
ICM - Derivatives & Structure Fin - London

Contact

Tel +44 20 3088 2855
daniel.shurman@allenovery.com

Amanda Thomas
Partner
ICM - London

Contact

Tel +44 20 3088 2821
amanda.thomas@allenovery.com

Richard Tredgett
Partner
ICM - Derivatives & Structure Fin - London

Contact

Tel +44 20 3088 2467
richard.tredgett@allenovery.com

Paul Allan
Senior Associate
ICM - Derivatives & Structure Fin - London

Contact

Tel +44 203 088 2811
paul.allan@allenovery.com

Tim Beech
Senior Associate
ICM - Corporate Trustee - London

Contact

Tel +44 20 3088 2281
tim.beech@allenovery.com

Danielle Kendall
Senior PSL
ICM - London

Contact

Tel +44 20 3088 3991
danielle.kendall@allenovery.com

Emma Lancelott
Senior PSL
ICM - London

Contact

Tel +44 20 3088 2982
emma.lancelott@allenovery.com

Nicole Rhodes
PSL Counsel
ICM - Securitisation

Contact

Tel +44 20 3088 4408
nicole.rhodes@allenovery.com

Litigation

Nicola Dagg
Partner
Litigation - Intellectual Property - London

Contact

Tel +44 20 3088 3871
nicola.dagg@allenovery.com

Marc Florent
Partner
Litigation - Banking Fin & Reg - London

Contact

Tel +44 20 3088 3705
marc.florent@allenovery.com

Sarah Henchoz
Partner
Litigation Employment - London

Contact

Tel +44 20 3088 4810
sarah.henchoz@allenovery.com

Tim House
Partner
Litigation - Banking Fin & Reg - London

Contact

Tel +44 20 3088 3775
tim.house@allenovery.com

Karen Birch
Counsel
Litigation - London

Contact

Tel +44 20 3088 3737
karen.birch@allenovery.com

Sarah Garvey
Counsel
Litigation - London

Contact

Tel +44 20 3088 3710
sarah.garvey@allenovery.com

Real Estate

Imogen Moss
Partner
Real Estate - London

Contact

Tel +44 20 3088 4924
imogen.moss@allenovery.com

Aemelia Allen
Senior PSL
Real Estate - London

Contact

Tel +44 20 3088 3683
aemelia.allen@allenovery.com

David Williams
Consultant
Real Estate - London

Contact

Tel +44 20 3088 4806
david.williams@allenovery.com

Taxation

Vimal Tilakapala
Partner
Taxation - London

Contact

Tel +44 20 3088 3611
vimal.tilakapala@allenovery.com

Charles Yorke
Partner
Taxation - London

Contact

Tel +44 20 3088 4925
charles.yorke@allenovery.com