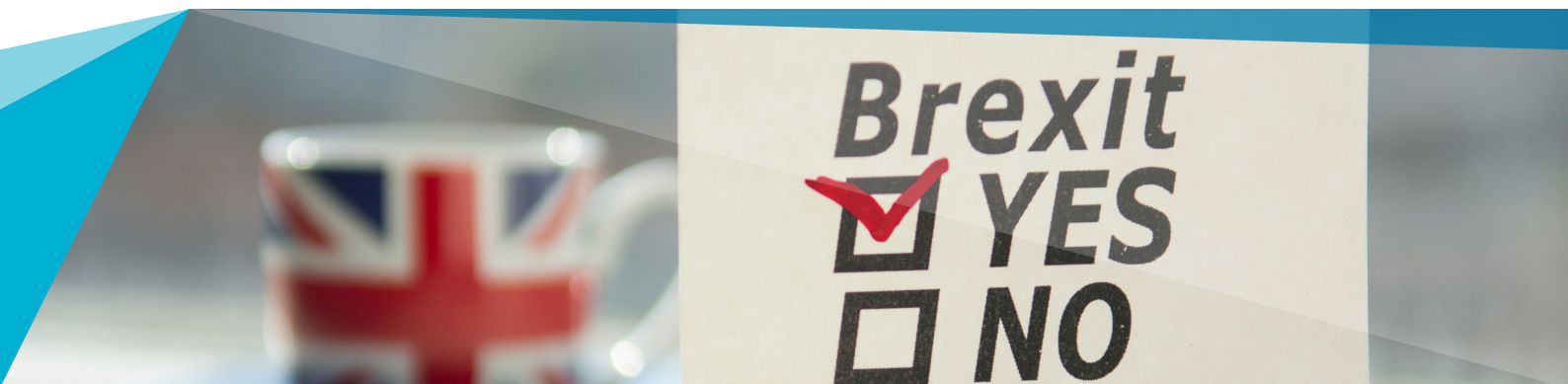


HOW COULD BREXIT AFFECT THE RISK AND INSURANCE NEEDS OF UK LAW FIRMS AND SOLICITORS?¹



It is still difficult to determine what the full impact of the UK leaving the European Union (EU) will be; however, there are questions UK law firms and solicitors should be considering now in order to be prepared for the outcome of future negotiations.

While the expertise of law firms means they are well placed to face Brexit-driven challenges, they will still need to consider how the UK's exit from the EU could affect their risk and insurance needs.

WILL SOLICITORS' RISK TRANSFER STRATEGIES NEED TO CHANGE?

From an insurance perspective, some commentators have considered how the current and future dependency on "freedom of services" passporting rights throughout the EU will affect insurance solutions for businesses. Passporting rights are essentially a series of interconnected pieces of legislation that allow financial institutions to operate across borders in the EU with few restrictions.

Many insurers have at least one European office other than in the UK and are likely to use those offices and entities to keep EU passporting rights. This could mean more business is transacted through those EU offices, and, if permitted, local "fronting" by an EU entity and reinsurance to a UK-based entity could mean there is little change. Lloyd's, for example, has set up a project group looking at three alternative models. The conclusions from this might include moving some business out of London in order to maintain its licensing footprint. While the insurance industry may have to change, this is not likely to be a source of material risk for law firms as insurance buyers.

Julia Graham, technical director of Airmic, commented:

"For those firms with captive insurance companies, early reports are that things will be "business as usual". Guernsey, for example, is not a member of the EU and is not seeking any change in its relationship with the EU, according to senior captive managers domiciled there.

"The timescale for exit would appear to suggest that firms will have time to adapt to the resulting regulatory landscape, but firms need to be thinking now about the potential implications of Brexit and considering alternative scenarios."

HOW COULD FUTURE NEGOTIATIONS CHANGE LEGAL WORK DEMAND?

UK law is likely to alter substantially following negotiations. The impact on legal work levels will differ across firms, depending on their international and EU client base. However, all UK law firms could be affected by the following:

LITIGATION:

If the enforcement of UK judgments across the EU is not maintained, then litigation by EU companies in the UK courts is likely to decrease.

Litigation where the parties are non-UK EU entities is estimated to be around 25% of all London Commercial court work². If the scenario arose where a UK judgment would no longer be enforceable in the EU, this kind of litigation seems likely to be undertaken elsewhere. Arbitration (enforceable in many countries under different legislation than the EU treaties on recognition of judgments) may become more popular than litigation, therefore minimising the impact.

International firms with multiple offices are likely to be resilient to this change. In the longer term, the UK is likely to continue to be a popular choice for dispute resolution due to its reputation for high-quality impartial judges and procedural reliability.

It does appear possible that a remaining EU member state could attract litigation work away from the UK Courts if the enforcement regime is weakened by UK judgments not being automatically registrable in EU Courts. Competition is also increasing as a result of the new Netherlands Commercial Court, opening in 2018.

For firms with significant international litigation caseloads, especially those currently using London courts, consideration of, and investment in, alternative litigation centres outside the UK may therefore be warranted, especially those routinely dealing with intra-European disputes.

Litigation beginning imminently and lasting over the next few years could conclude in an environment where the judgment is not automatically capable of being registered in other EU states, and this also needs to be taken into consideration.

COMMERCIAL CONTRACT ADVICE:

While the application of law and technical aspects of contracts are likely to require individual review, some routine/boilerplate issues may need to be reviewed from a risk perspective:

- **Forum and governing law:** Many international commercial contracts specify the UK as the governing law and forum for disputes. As we are entering a period of uncertainty, where UK judgments might not be easily enforceable in the EU, firms may need to consider what justification there is for any particular choice of forum.
- **Specified dispute resolution methods:** Given the locations of the contracting parties, some have suggested³ that arbitration (as mentioned above), enforceable under treaties that do not depend on EU membership, may appear attractive for EU clients.
- **Currency risk:** One question that has arisen since the vote is whether legal advice should be given on currency hedging. The UK's exit from the EU could contribute to increased currency risk for euros or pounds, and this could be accelerated if taxes or tariffs are imposed. There have already been claims against solicitors alleging that the risk of currency movement was not addressed, especially where the contract currency is not the normal currency of the paying party.

COULD NEGLIGENCE RISK INCREASE?

As new laws come into play, arrangements are not always initially understood correctly, as a *New Law Journal* article explains⁴. Historically, changes in the law have been a source of negligence claims, but this heightened risk is usually mitigated by training and education in the practice area. Nonetheless, budgets and available time for training can struggle to reach the top of a firm's agenda in times of growth or recession. Keeping this in mind, firms should:

- **Be ready to increase training and education:** Firms will need to put considerable effort into training and education on changes to the law. This is likely to be very significant in some practice areas.
- **Consider changes to the Continuing Competence regime:** Firms may want to ensure they can demonstrate that Brexit-related learning and development needs were identified and increased levels of specific training, and/or allocation of time in practice meetings was given, to address possible impact and changes.

DO DATA POLICIES NEED TO CHANGE?

Data protection rights are likely to undergo changes before the UK exits the EU. From time to time, firms' approaches will require review in any event. Those firms with a large number of remaining EU citizen clients could:

- **Review data locations and assess the crossover of EU citizen data in the UK (and vice versa):** Locations where documentation is stored might usefully be analysed now in order to plan to avoid unplanned situations where continuing EU citizens' data becomes held outside the EU, when the UK eventually leaves.
- **Be prepared for a non-UK regulator on information and data issues:** Depending on the model adopted, different outcomes are possible, but law firms may find their approach to data protection of EU citizens is subject to European regulators' oversight, in addition to the Information Commissioners Office (ICO).
- **Be ready for the possibility of a tougher regime on data breaches in respect of EU citizens:** In relation to EDPB (European Data Protection Board, which will come into being on 25th May 2018) activities, the ICO's voice would appear to be increasingly redundant in the aftermath of the Brexit vote⁵. This could give way to stricter regulations moving forward, and a harder line could be adopted for breaches in the legal profession in view of past warnings from the ICO.

PREPARING FOR A CHANGING RISK LANDSCAPE

While the implications of the UK's exit from the EU are difficult to foresee, given the significant impact it is likely to have, we believe law firms and solicitors should take the above points into consideration now, in order to be prepared for changes to come. Julia Graham of Airmic suggests that it is important for law firms to establish a cross-functional Brexit management team, which should:

- Establish a risk radar: Track Brexit and key client-related developments from trusted sources.
- Stay agile: Develop an early warning system and seize new opportunities.
- Consider resources and assets: Respond to changing circumstances.
- Build relationships and networks: Let risk information flow across the firm to prevent "risk blindness".
- Review and adapt: Make changes and improvements to strategy, tactics, processes, and capabilities.
- Focus on communications: Develop and adjust communications plans internally and externally.

Law firms should closely follow future developments and be prepared to adapt to a changing environment following the triggering of Article 50. Marsh will continue to work with law firms and insurers to further understand the full risk and insurance implications of Brexit, and will issue supplementary guidance as the situation evolves.

¹ This note is intended to be relevant to a broad range of law firms. However, given the complex topic, and constraints on space, some of the issues we deal with here may be more relevant to some firms than others. We hope you find this useful and always welcome any feedback. We would be happy to discuss details in more depth if required.

² Kiole, Adam. 'International and European Litigation post-Brexit: enforcement of judgments', available at <https://www.blenheim.nl/blogs/1242/litigation-post-brexit-enforcement-judgments>, accessed on 20 February 2017.

³ Douglas-Harry, Jean-Pierre, et al. 'Brexit: Impact on English dispute resolution', available at <https://www.dlapiper.com/en/uk/insights/publications/2016/08/brexit-impact-on-english-dispute-resolution/>, accessed 20 February 2017.

⁴ Frank Maher, 'Brexit: a risky business' in *New Law Journal*, available at <https://www.newlawjournal.co.uk/content/brexit-risky-business>, accessed on 20 February 2017.

⁵ Bird & Bird, 'Brexit: what are the legal implications', available at <https://www.twobirds.com/en/news/articles/2016/uk/brexit-data-protection-and-cyber-security-law-implications>, accessed on 20 February 2017.

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