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BREXIT AND THE SOLE PRACTITIONER

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Our Expertise as Lawyers pre and post Brexit

It is vitally important that lawyers, and clients, are able to be as proactive as possible in preparing for Brexit. Leaving things too late may result in, at best, playing catch up with the rest of the field. At worst, it may cause irreparable damage to the business of both the firm, and of the clients. In any event, Brexit is an opportunity for the country and therefore, for us as lawyers.

At its heart, Brexit is a negotiation over the future legal arrangements between sovereign nations. In that respect, we lawyers are in a privileged position. As expert negotiators, lawyers are able to look at these upcoming discussions, not only with an analytic eye but also with the benefit of legal experience. As such, a lawyer is able to put themselves in the shoes of each party (in this case a country) and ask the question; what is it that each country wants as an acceptable outcome to the discussions?

Lawyers are also in a prime position to use their expertise of negotiations to outline possible outcomes of Brexit, particularly in relation to what the future relationship between the EU and the UK might look like, but also in relation to the UK's possible future relationship with other nations. Over the next few months and years, lawyers should be promoting themselves as experts, ready to assist their clients in explaining and helping them understand the complexities of the Brexit negotiations, how this may affect commercial enterprises and what the likely long term outcome for the business environment might be. Will there be more or less regulation? Will EU law continue to apply to business clients and their industry sectors, and if so for what period of time? What can clients do to involve themselves in the political negotiations and have their voices heard? Lawyers are therefore central to helping businesses navigate through Brexit.

This article will focus on various ways in which lawyers, even at this early stage, may prepare themselves and their clients for Brexit.

The Political Position

Whilst this is not the article in which to undertake a detailed analysis of the UK's present negotiating strategy, it is worthwhile to briefly consider some of the challenges which the UK must take into consideration before, and during, Brexit negotiations.

Scottish Independence

The results had barely been compiled before fresh calls were made for a second Scottish referendum on the issue of Scottish independence. The Rt. Hon. Alex Salmond MP, the former Scottish First Minister, went on record in September 2016 stating that he expected a rerun of the Scottish Independence Referendum in "roughly two years' time."¹ Indeed, the current Scottish First Minister, Nicola Sturgeon, is currently putting forward proposals for a second referendum.² With 62% of Scottish voters voting to remain in the EU, the SNP have advanced the argument that Scotland ought not to leave the EU with the rest of the UK. This is an issue which lawyers practicing across the UK's legal jurisdictions will need to keep a close eye on; what additional powers, if any, might the Scottish Parliament claim or be given post Brexit, and how might these possible additional powers affect commercial businesses operating north and south of the border?

Parliament or Executive?

The UK Government's position is that it can invoke Article 50 as an act of royal prerogative, and that there is no legal obligation to consult Parliament on triggering Article 50. Lord Keen of Elie QC, the Advocate General for Scotland, stated in the House of Lords that the Executive has certain prerogative powers that it exercises in international legal matters, including the making and unmaking of treaties.

Mischcon de Reya have commenced legal proceedings on this matter arguing that Parliament should be the ultimate arbiter on invoking Article 50.³ Any judgment (whatever it is) may be appealed. The government may also decide that, even if the Article 50 process can legally be

¹ telegraph.co.uk, (2016). "Alex Salmond: Nicola Sturgeon will hold second independence referendum in autumn 2018" [Online] Available at: <http://www.telegraph.co.uk/news/2016/09/16/alex-salmond-nicola-sturgeon-will-hold-second-independence-refer/> [Accessed 27 October 2016]

² bbc.co.uk, (2016). "SNP's Nicola Sturgeon announces new independence referendum bill" [Online] Available at: <http://www.bbc.co.uk/news/uk-scotland-scotland-politics-37634338> [Accessed 27 October 2016]

³ bbc.co.uk, (2016). "October court date for Brexit challenge" [Online] Available at: <http://www.bbc.co.uk/news/uk-politics-36834743> [Accessed 27 October 2016]

commenced by the executive alone, it ought nevertheless to be debated in Parliament first. This appears to be the view of the House of Lords Constitution Committee.⁴ Any of the above could serve to delay the commencement of the process. It is therefore imperative that clients are updated on the process. Lawyers can provide an accurate timeline of events as they unfold, further assisting clients in understanding the likely outcome of Brexit processes, and helping to give businesses the certainty they need when considering medium to long term investment strategies.

Lack of EU Will?

As this is the first time that a nation has decided to leave the EU, the terms agreed with the UK might set the bar for future negotiations between the EU and other nations, or indeed between the EU and existing member states which might threaten to leave the EU. Set the bar too low, and the calls for other member states to leave may grow louder. Once the door has been opened, as lawyers, we know that in negotiations it is much easier to push further, and there would be a real risk that the pressure to make further concessions if subsequent states leave the EU (both from those states, and from the UK, should it take the chance to “renegotiate”) may become strong, very quickly.

The EU might choose to prevent this potential domino effect by simply digging its heels in and refusing to negotiate, leaving the two-year timer to run down and set an example for the rest of the member states. The point for lawyers is to understand this potential scenario and advise clients accordingly on how it might impact in their industry sectors.

Further, as lawyers, if we were confronted with a situation where:

1. your clients could not agree what they wanted to get out of a negotiation;
2. the other side has strong reasons not to co-operate in a negotiation;
3. you have little to offer the other side;
4. your clients are under a strict time pressure to reach an agreement, once negotiations have begun; and

⁴ House of Lords Constitution Committee, (2016). “*4th Report – The invoking of Article 50*” [Online] Available at: <http://www.publications.parliament.uk/pa/ld201617/ldselect/ldconst/44/4402.htm> [Accessed 27 October 2016]

5. your clients have no fall-back position or other party to go to and/or deal with,

our inclination would usually be to advise the client to postpone entering into any negotiation until most, preferably all, of those factors had been resolved, one way or another.

However, Theresa May has already said that Art 50 will be triggered by no later than end of March 2017.

Naturally, it is important to keep up to speed with the political position outlined above, as the closer the issues come to being resolved in the UK's favour, the stronger the UK's negotiating position will be. On top of that, it is worth bearing the following in mind.

EU Unity

The assumption that has hitherto not really been challenged, is that the UK will attempt to broker a deal with the EU, and that the EU will continue as is for the foreseeable future. However, this is by no means guaranteed. In the build-up to the referendum, some studies found that 61% opposed the EU in France, and 71% opposed the EU in Greece. The average throughout the EU member states was an opposition of 47%.⁵ Whilst this is by no means a sign that the EU is on the brink of collapse, there is nevertheless a strong undercurrent of opposition to the EU, and it would not be surprising if referenda are called in a number of other EU member states over the coming years.

The anti-EU sentiment on the continent ought to be observed with interest by lawyers in the UK, and may provide unique opportunities for UK lawyers in the future, should anti-EU sentiment remain strong and/or referenda be called. The experiences that UK lawyers will gain through Brexit may be invaluable in the future, and could be put to the benefit of overseas clients who might come to rely on UK legal services, which are already a valuable UK export. With that in mind, it is worthwhile for UK lawyers to continue to develop links with lawyers and businesses in other European countries over the coming months and years.

Worldwide Trade

There is a tendency of articles such as this to focus on the EU and how the UK's relationship may pan out in the future. However, it would be wrong to lose sight of the potential opportunities that

⁵ independent.co.uk, (2016). "Euro scepticism on the rise across Europe as analysis finds increasing opposition to the EU in France, Germany and Spain" [Online] Available at: <http://www.independent.co.uk/news/world/europe/euro-scepticism-on-the-rise-across-europe-as-analysis-finds-increasing-opposition-to-the-eu-in-france-a7069766.html> [Accessed 27 October 2016]

may open up to the UK, and specifically to UK lawyers, in terms of negotiating deals with non-EU states. It is to be hoped that the UK will enter into free trade deals with other states either instead of, or in addition to, any deal that is struck with the EU. Indeed, the newly created Department of International Trade, headed by a Secretary of State, has already commenced this work.

Much will depend on the type of deals that the UK is able to strike with other states, but the experience that UK lawyers have developed in their dealings with EU law may stand them in good stead to provide advice to businesses and lawyers in those countries, particularly in relation to the way in which the trade deals may work, and how conflicts of law points may be resolved. Again, developing links with other lawyers when trade deals are in the making may bear fruit in the future, and be a welcome contribution to the UK's export balance sheet.

Ireland

One of the major fears for the economy arising out of Brexit is the concern that businesses will relocate to another EU member state, in order to retain the European 'passporting' rights that come with being based in the EU. Various businesses and banks, such as the US's Citigroup and Switzerland's Credit Suisse have already relocated a range of operations to Ireland, with the potential to move further operations there in due course, and it is possible that other large non-EU banks and businesses, which currently have a base in London, may follow.⁶ Should this happen, and other such organisations follow, there is a clear risk that an amount of transactional work may leave the UK.

One way for lawyers to prepare for this possibility would be to apply for admission to the Irish Law Society. As Ireland is a common law jurisdiction, there is no obligation for common lawyers to pass a transfer test, and such lawyers need only apply for a Certificate of Admission to the Roll of Solicitors. This offers a distinct advantage over applying for admission to other Law Societies on the continent.

UK lawyers, with experience of these markets and businesses developed whilst these entities have been based in London, may have a distinct advantage over many of their Irish counterparts, which could be a fertile source of both primary work (through instructions from the businesses and banks themselves) and secondary work (through advising local lawyers).

⁶ ft.com, (2016). "*A disorderly Brexit may bring business to Ireland*" [Online] Available at: www.ft.com/content/dd141dcc-a407-11e5-873f-68411a84f346 [Accessed 27 October 2016]

Advising Clients

There may be a common misconception within industry that the vote to leave the EU has an immediate binding legal effect, and that EU law is suddenly going to stop applying in the UK. This is plainly not the case, and it is worthwhile reminding clients of this fact. This means that clients will continue to be bound by EU law until such a point as the UK has formally withdrawn from the EU. Indeed, Mrs May has announced that the Government is working on a new Act of Parliament, known as the Great Repeal Bill.

This bill will overturn the 1972 European Communities Act that established the supremacy of EU law over Britain's own legislation. The Prime Minister will include the bill in the next Queen's Speech but it will not take effect until Britain actually leaves the EU.

On the day of Brexit, EU laws will be enshrined in British law but the British Parliament can then change, amend or get rid of unwanted EU laws.

With over 40 years of legislation and regulation, particularly in areas of law such as employment law, consumer law, and regulatory law, the task of unpicking EU law from UK law is one that will take time. Clients will need the assurance and advice of lawyers about this process, allowing business clients to plan accordingly for each step of the Brexit procedure.

Plan for Various Scenarios

Lawyers ought to advise clients to make contingency plans early. This may not be as difficult as at first blush. The government has already published a briefing paper which sets out the impact that Brexit may have on various areas of law, and the type of deals that the UK may try to broker with the EU.⁷ This is a blueprint that may also be used when negotiating with non-EU nations.

This, and other similar documents, provides an excellent framework for outlining with the client a plan for how they may profitably structure their business in various different circumstances. If a client is given the various options at this early stage, then once the Article 50 process has begun they will be able to act quicker by implementing one of the "plans" devised earlier (or a modified version), rather than having to start the process from scratch.

⁷ Commons Library, (2016). "Brexit: impact across policy areas" [Online] Available at: <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7213> [Accessed 27 October 2016]

Whether it is advisable for the client to take any of the proposed steps at this stage, however, will necessarily depend on the individual client, and factors such as the size of their operations, financial clout, and business plan.

However, it may be a sensible step for lawyers to advise their clients, whether they are commercial enterprises or individuals, that they should conduct a due diligence exercise of all their interests to see which may possibly be affected by Brexit and to offer to help them with that exercise. Further, in terms of the acquisition of any business or asset the appropriate questions should be asked as how Brexit may affect the proposed target.

By way of example, the following are factors that may need to be considered in particular circumstances. It is not an exclusive list.

Immigration and Employment

- Consider how you may assist your employees. Foreign employees currently situated in the UK may be concerned about whether they, and their families, will be able to remain in the UK post-Brexit. Consider speaking with your employees and advising them as to the early steps that they may be able to take in order to protect their position, including:
 - Dual nationality. It is unlikely that any post-Brexit arrangement would result in people who hold UK nationality being required to move abroad, and vice versa. Providing information on the requirements of applying for dual nationality would enable your employees to decide for themselves, and helping them with their application (whether by providing references, support, or assistance in filling out the forms) may help to put their minds at ease.
 - Children. There may be circumstances where an employee's child may hold dual nationality, but the employee themselves is ineligible. It is not yet clear whether an employee would be entitled to stay in the UK on the basis of their child's UK nationality. In the USA, for example, they may not be so entitled. Employees ought to be made aware of this potential difficulty, and be kept updated with how it progresses.
 - Permanent residence. As above, providing information on how to apply for permanent residence in the UK, and providing such assistance as you consider appropriate in preparing the application, may help to set your employees' minds at ease. Even if your employee does not yet qualify for permanent residence,

providing the above information would enable them to know where they stand, which will help them to plan the steps that they will take to prepare for Brexit.

- Keep your employees updated. At present, there is no certainty as to how Brexit will play out, or as to the agreements that may be reached between the UK and EU. However, as the UK begins to negotiate with the EU and other nations, the position will become clearer. It is important to make sure that your employees are kept updated with the situation as it develops. Consider ways in which employees who are likely to be affected, or who are concerned, may be given updates on the evolving position, such as email circulars, bulletin boards, or conferences.
- Consider how you may prepare yourselves for Brexit. Employees who are particularly concerned may take the step of “jumping before they are pushed”. Often, this can heighten the concern that others feel, and a trickle of departures can quickly lead to a flood. If you are concerned that some of your employees may leave, it is worthwhile to make sure that a contingency plan is in place. For example, consider the following:
 - How many employees could the company lose and continue to trade profitably? How does this differ in the short, medium, and long term?
 - Are replacements likely to demand a higher wage than those that leave?
 - How quickly could an opening be advertised and filled? If the risk of employees leaving is high, it may be worthwhile preparing stock advertisements for the positions that may come available, in order to speed the process up.
- It is also important to keep updated with the UK’s dealings with other nations. It may well be that free trade deals are agreed with other countries, and that there may be a swift influx of workers from those countries looking to gain a foothold in the UK employment market. Consider how you may advertise and promote your company in those countries. By setting in place a strategy at this early stage, you may be able to steal a march on competitors in these new markets.

Banking and Pensions

- It is important to consider how the impact of Brexit may have on interest rates. Economic uncertainty does little to instil confidence in the banking world, and usually has a detrimental effect on interest rates, the stock market, and the value of government bonds. All of these can have a negative impact on the value of savings, and of pensions. This is

likely to be a fertile source of concern for your employees. Consider how you may provide assistance for your employees. It may be appropriate to provide a supply of leaflets from different banks and pension providers in the office, to enable employees to gain key information without having to visit the banks. It may also be possible to ask bankers or accountants to attend your place of employment to give a talk on the various options.

- The same applies with regard to employers. Consider whether it would be beneficial to speak with a financial advisor about how the company's affairs ought to be structured in order to best protect its position.

Tax

- UK tax laws are heavily bound up with EU law at present, and this will continue to be the case until the UK withdraws from the EU. Nevertheless, the situation should be closely monitored before that point is reached. In particular:
 - The UK may well enter into free trade deals with other states, which may result in various tax agreements being reached. Whether such agreements may be of benefit to a company or individual will of course depend on the particular circumstances.
 - It is worth considering a contingency plan at this early stage for the tax implications of the UK being unable to access the EU single market post-Brexit. There has been widespread discussion over the various different types of relationships that the UK may have with the EU. Planning how you would act in each potential situation (particularly the scenario where tariffs and customs duties are imposed on UK goods) will put you in a much better position to react once agreements begin to take shape.
 - It has been predicated by some economists that Brexit may have a significant impact on foreign investment in the UK. One way in which efforts may be made to maintain investment into the UK could be to implement a more favourable tax regime for individuals and businesses investing in the UK. This may have knock on implications for domestic businesses and investors as well, and is a situation that ought to be monitored.

Conclusion

Brexit heralds change for politics, for businesses, and for lawyers. Advising clients, and working out how to ensure that your practice remains successful is a challenge but it is also one of potentially huge opportunity and one that lawyers, of all professionals, are uniquely well equipped to meet.

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