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Brexit: Key Issues for General Counsel

On June 23rd, the UK electorate voted to leave the European Union in an advisory referendum. We expect the UK Government to commence negotiations to withdraw and to establish a framework for the UK's new relationship with the EU and its other trading partners. Brexit is currently expected to be second half of 2018, at the earliest.

Even at this early stage, we recommend that management teams begin to assess and prioritize the risks and potential opportunities that Brexit introduces, including as a first step adopting a practical approach towards carrying out that assessment and doing so on an ongoing basis.

This client note sets out a number of questions and answers to highlight important near-term practical considerations arising from Brexit from the perspective of the General Counsel of a multinational company with meaningful business and operations in the UK and Continental Europe. Our previous client note, ***Brexit and Other Key Issues for CFOs and Corporate Treasurers*** addresses other considerations from the perspective of the financial management of such a company.

I hear suggestions that there will be a move away from choosing English law in commercial contracts and financing documents given that the UK will no longer be part of the European Union. Should I worry about agreements under English law?

We do not foresee meaningful changes in the status of English law or the enforceability of English court judgments as part of any Brexit implementation. Indeed, we believe English law will remain a strong and stable system for contractual arrangements concerning the UK, Europe and the world, and see no compelling reason to broadly eschew English law for these purposes or the English courts for resolving disputes.

Our confidence in this position is supported by the following:

- English law provides a comprehensive and stable interpretive regime for contracts and non-contractual relationships between parties and is an excellent legal system for capturing the intention of parties expressed in written agreements.
- Nothing about a Brexit implementation is likely to disturb English case law interpreting English laws and regulations (including English-law implementation of previous EU directives).
- English law does not depend on EU law for its continuing force or effect. In certain areas, English law reflects and implements European Union directives: for instance, the UK Companies Act reflects various EU Company Law Directives and the UK Transfer of Undertakings (Protection of Employment) Regulations 2006 adopt the principles of the EU Transfers of Undertakings Directive (previously known as the Acquired Rights Directive). In neither of these cases, nor many others that impact multinational businesses, does the

interpretation and enforceability of English law depend necessarily on the UK's continuing membership in the EU.

- As discussed in our previous client notes, we would expect English laws with an EU origin to be "grandfathered" initially upon Brexit, possibly with relatively modest changes to reflect the UK's status with respect to the rest of the EU.
- We do not expect Brexit to result in significantly different outcomes for the treatment of English jurisdiction clauses or the enforcement of English judgments, although "fast track" enforcement procedures within the EU may no longer be available. This may be achieved through the UK signing up to the Lugano Convention which currently regulates the determination of jurisdiction and recognition and enforcement of judgments between the courts of all EU Member States and Iceland, Norway and Switzerland, or by the negotiation of another similar arrangement with EU Members States individually or en bloc. Even absent any negotiated arrangement with the EU as part of Brexit implementation, there is no reason to believe that English judgments will be more difficult to enforce throughout the EU than, say, a New York judgment is at present. Alternatively, the UK might accede to the Hague Convention on Choice of Court Agreements, which would provide a mechanism for the allocation of jurisdiction where parties have agreed to exclusive jurisdiction for dispute resolution as well as for recognition and enforcement of judgments in the EU as well as Mexico and Singapore.
- We can imagine some ways in which Brexit could enhance the desirability of resolving disputes in the English courts. Litigants may be able, once again, to seek anti-suit injunctions from the English court to prevent counterparties from pursuing claims in the courts of other EU Member States, a practice constrained at present by the European Court of Justice.
- Arbitration in England is entirely unaffected by Brexit as the UK is a party in its own right to the New York and Washington Conventions which govern the enforcement of arbitral awards in approximately 150 countries.

What if the counterparties to my material legal arrangements in Europe insist on changing from English law to, say, German or French law? How exposed might I be?

We expect English and New York law to remain the "common denominator" for many types of commercial and financial contracts throughout the world, and as discussed above, do not foresee any rationale for avoiding the use of English law. Nevertheless, if desirable commercial terms are available and counterparties insist on avoiding English law, it is not unreasonable to entertain the use of other laws to take advantage of opportunities or maintain legal relationships with customers, suppliers, creditors and other relevant counterparties. In respect of certain categories of agreements, such as syndicated loan documentation, there is already well-established market-tested documentation available under the laws of a few EU Member States apart from the UK. In other cases, choosing a different law and jurisdiction may give rise to significant interpretive and even substantive differences. Each circumstance will call for a bespoke analysis to determine which commercial terms may be influenced by the choice of governing law and jurisdiction for dispute resolution. Outside counsel with experience in cross-border and multijurisdictional legal practice can assist companies in identifying and assessing key commercial and legal risks in changing to another legal regime.

Is legal privilege affected by Brexit?

We expect that, following Brexit, claims of legal professional privilege in respect of English law advice will generally be treated no differently from today. Equally, Brexit should not disturb the likelihood of asserting

successfully in English proceedings a claim of legal privilege in relation to domestic law advice given by a lawyer qualified in an EU Member State. Advice in respect of EU law only attracts privilege if it is given by an independent lawyer qualified in an EU Member State.

Now would be a good time for companies to review their procedures for protecting legal advice in relation to particularly sensitive areas, such as maintaining privilege logs for competition law advice. It will be important to ensure those procedures are assessed in light of Brexit and will continue to protect documents and other materials that may be vulnerable to disclosure in an EU competition investigation or other proceeding before an EU institution.

Do my in-house legal teams in Europe need to be reconfigured to provide English law or EU law advice? I've heard UK lawyers are registering in Ireland.

Though it remains to be seen how exactly the UK's exit from the EU will affect UK qualified lawyers' rights to practise in EU Member States, for the time being there is no change. We imagine the strong incentives for reciprocity among the UK and EU Member States will lead to a new system that preserves existing arrangements under the EU Establishment of Lawyers Directive ensuring both UK and European lawyers remain able to practice law across both the UK and EU Member States.

Public reports of lawyers in private practice registering in Ireland reflect principally a desire for lawyers in EU regulatory practices (such as EU competition law and EU financial services regulation) to ensure they remain entitled to practice in those areas and retain rights of audience in EU proceedings or with EU legislative bodies. The English and Irish bars operate reciprocal waiver arrangements and most English lawyers advising on EU law will likely opt for Irish bar registration for this purpose. In rare cases, in-house lawyers in these areas may consider such an approach for similar reasons.

Should I carry out a comprehensive document review now?

Broadly speaking, we do not suggest that an immediate comprehensive document review is appropriate for all multinational businesses. In our previous client note, ***Brexit and Other Key Issues for CFOs and Corporate Treasurers***, we do suggest, however, such a review may be appropriate in relation to certain financing documentation. It will be worthwhile for many companies to consider a review of other material contracts where they are likely to include provisions that may be triggered by or implicated by the Brexit decision. These may include:

- Non-competes and other restrictive covenants to the extent the geographic reach may be defined by reference to EU membership (or the wider European Economic Area (EEA) or European Free Trade Association (EFTA)).
- Arrangements for grants and subsidies from the European Union or other government or quasi-governmental institutions where continuing eligibility may depend on the UK's status in the EU/EEA or EFTA.
- IP licenses and sub-licenses where the licensed territories are defined by reference to the EU/EEA or EFTA. Franchising and distribution arrangements may also be worthwhile reviewing for similar definitional points.
- Joint ventures, alliances and cooperation agreements where there may be references to the EU/EEA or EFTA for defining the rights and obligations of the parties, governance arrangements (e.g. when reserved matters may be triggered) and resolution of deadlocks where dispute resolution procedures may be affected are worth stress-testing against possible Brexit scenarios.

- M&A contracts with long-tail liabilities or provisions that are likely to extend beyond a foreseeable Brexit implementation timetable. Particular attention should be paid to tax and environmental indemnities, escrow provisions, vendor financing, earn-outs and regulatory approval covenants.
- Contracts with counterparties in industries that are heavily regulated by EU laws, such as the financial industry or retail products. References to particular EU directives or regulations may need to be amended and grandfathering provisions added.
- It is beyond the scope of this note to address all possible areas where tax planning may be affected by Brexit. We recommend careful monitoring of important tax structuring and planning, particularly in relation to change of law risk, which may become particularly relevant in relation to tax matters and tax gross-up provisions in many commercial agreements.

Depending upon the context, contracts may require no amendment or modification. For instance, if the intent of the parties in drafting a definition to refer to countries being EU Member States was merely a convenient way to capture a particular geographic area or set of countries, it may be that no amendment is needed to ensure the contract will be interpreted in just that way. We imagine, however, that there will be many cases where the intent of the parties may be less than entirely clear and that, where material contractual relationships are at issue, there will be a limited number of cases where it will be advisable to negotiate amendments to relevant definitions and particular clauses to anticipate the UK no longer being a member of the European Union. For certain business sectors exposed to heavier regulation and greater potential exposure to the EU regulatory framework, a tailored review may be worthwhile. Relevant sectors will include financial services, environmental services, energy (particularly nuclear and renewables) and agriculture.

Any review should identify at least those material legal arrangements where further monitoring may be desirable as the detail around Brexit implementation becomes clearer.

What about my corporate structure for Europe and beyond? Should I be assessing the use of legal entities formed under English law?

Overall, we do not expect that the withdrawal of the UK from the EU per se would have much effect on English company law. Special cases may warrant review, such as the use of a European company (Societas Europaea) or plans to merge subsidiaries formed under English law into EEA legal entities. It is worth noting, however, that new proposals may be made as the political and economic situation develops further. Indeed, the incoming British Prime Minister has only this week suggested a number of policy initiatives which could have significant implications for English company law.

Though beyond the scope of this note, customs and trade regulation more generally are areas where a sensible review and contingency plan or reorganization will almost certainly need to await further clarity about the details for Brexit implementation.

What about securities law and regulation? Do I need to consider making additional public disclosures? If I have dual or secondary listings in the UK or other EU Member States, are there special issues to focus on?

In light of the economic and political impact of the Brexit vote, both on the UK and the EU, securities regulators will be focused on how companies evaluate and discuss the potential material impact on their business. Public companies should evaluate the potential fallout from the Brexit vote and consider if their risk factors and forward looking statements adequately address the circumstances to date. To the extent companies have not already

done so, it is advisable to consider including a general risk factor about the impact of the Brexit vote on economic conditions or more specific risks about how a potential withdrawal of the UK from the EU and any follow-on effects might impact business in the UK and the EU. Set forth below is a general risk factor that public companies can consider as a starting point, as well as examples of business specific risk factors:

> "*In a non-binding referendum on the United Kingdom's membership in the European Union in June 2016, a majority of those who voted approved the United Kingdom's withdrawal from the European Union. Any withdrawal by the United Kingdom from the European Union ("Brexit") would occur after, or possible concurrently with, a process of negotiation regarding the future terms of the United Kingdom's relationship with the European Union, which could result in the United Kingdom losing access to certain aspects of the single EU market and the global trade deals negotiated by the European Union on behalf of its members. The Brexit vote and the perceptions as to the impact of the withdrawal of the United Kingdom may adversely affect business activity, political stability and economic conditions in the United Kingdom, the Eurozone, the European Union and elsewhere. The economic outlook could be further adversely affected by (i) the risk that one or more other European Union countries could come under increasing pressure to leave the European Union, (ii) the risk of a greater demand for independence by Scottish nationalists or for unification in Ireland, or (iii) the risk that the euro as the single currency of the Eurozone could cease to exist. Any of these developments, or the perception that any of these developments are likely to occur, could have a material adverse effect on economic growth or business activity in the United Kingdom, the Eurozone, or the European Union, and could result in the relocation of businesses, cause business interruptions, lead to economic recession or depression, and impact the stability of the financial markets, availability of credit, political systems or financial institutions and the financial and monetary system. [Given that we conduct [a substantial portion] of our business in the European Union and the United Kingdom, any of these developments could have a material adverse effect on our business, financial position, liquidity and results of operations.]*
>
> *[New or modified trading arrangements between the United Kingdom and other countries may have a material adverse effect on our [export volumes][margins][and may cause us to relocate operations and incur the expenses of such relocations.]]*
>
> *[A decline in trade could also affect the attractiveness of the United Kingdom as a global investment centre and, as a result, could have a detrimental impact on the level of investment in companies with operations in the UK or which service the UK market, including our business, and ultimately on UK economic growth.]*
>
> *[The uncertainty concerning the timing and terms of the exit could also have a negative impact on the growth of the [UK][European Union] economy and cause greater volatility in the [pound sterling][euro][other EU currencies].]*
>
> *[Changes to UK border and immigration policy could likewise occur as a result of Brexit, affecting our ability to recruit and retain employees from outside the United Kingdom.]*"

In our earlier client note, we also set out our views on managing communications with equity analysts, possible issues for certain US corporate issuers wishing to access the UK or EU capital markets in the future and related corporate finance topics. See ***Brexit: Issues and Q&A for Businesses***.

What are the key tax topics I need to understand as Brexit happens?

Our earlier client publications ***Brexit: Issues and Q&A for Businesses*** and ***Brexit and Other Key Issues for CFOs and Corporate Treasurers*** address a number of areas relating to taxation that are worthwhile considering, particularly for structures which rely on EU-related exemptions.

What other topics should I be thinking about?

At this stage, many topics raise questions but there are few clear answers. The legal framework for the UK's relationship with the European Union is identical to the position on June 22nd before the results of the Brexit vote were known, and nothing announced to date has served to change that. There are other areas of general interest for general counsel that we have addressed in our previous client publications, including:

- Competition and Procurement Law
- Privacy and Data Protection
- Intellectual Property
- Human Rights Laws

You may also wish to refer to our prior Client Publication ***Brexit: Issues and Q&A for Businesses***.

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