

The Consequences of Brexit on UK business

This is a brief abstract of 'Brexit and the Consequences for Commercial and Financial Relations between the EU and the UK'

<https://poseidon01.ssrn.com/delivery.php?ID=370115027092010118124095021065085094103033031041027010022025005096092126026113123067057030039061008116026027090113030065112093049074003041085023125114073074028071004083020026116030107071094075103075115026096019107076010092091107094020026068105086020&EXT=pdf> . The article examines the most dramatic changes to UK businesses in the contexts of the different terms of withdrawal agreement reached once article 50 is triggered.

The four most likely outcomes of Brexit are as follows;

1. **The UK joins the European Economic Area** – allowing the UK to negotiate its own trade deals with other countries, whilst the four fundamental freedoms (goods, services, persons and capital) continue to apply to the UK. The UK would gain unfettered access to the Internal Market, but would be bound by some EU legislation. The UK could join the EEA under special conditions, striving to be an 'EEA minus' state – this would alleviate concerns about migration. Lichtenstein is an EEA state which has an upper limit of migration of 1.75%, so this is not unheard of.
2. **The UK negotiates a bilateral free trade agreement with the EU** – This would be like the Swiss model or the Canadian CETA Agreement. UK financial services would have to fully comply with EU rules for this to work.
3. **Third Country-Status** – The UK and EU may not immediately reach any agreement on their future commercial relations post-Brexit. If this is the case, the UK would have the same status as any third country (Third country – country outside the EU) in relation to the EU, and so would the EU member states in relation to the UK. Imports and Exports would fall under WTO (World Trade Organisation) law, namely GATT (General Agreement on Tariffs and Trade) and GATS (General Agreement on Trade in Services). Because the UK was a member of the EC at the time GATS was concluded, no specific GATS commitments exist between the UK and EU member states. These would therefore have to be negotiated. Even if this is the case, British Firms would be subject to EU rules when trading within the EU, and this could amount to full compliance with EU law.
4. **A Bespoke Relationship** – Theresa May has made it clear that she wants to depart from previous models. The need for the EU and the UK to maintain mutually beneficial trading relations could inspire negotiations in the direction of a tailor-made compromise. This will still fall under one of the three categories – EEA, bilateral agreement, or no agreement at all.

Impact on Contract Law

- Losing the UK's status as an EU member state could impact on existing contracts in two ways – by **changing the selection of applicable law** or **having consequence on the level of substantive contract law**.
- **Conflict of law:** Brexit will seriously affect the legal certainty of contractual relations. **Courts determine the law applicable to contracts through the Rome I Regulation**. This regulation was created to harmonise conflict rules for contracts. Post-Brexit, this will cease to apply in British courts. There is however, the **Rome Convention** which has very similar content, and it is uncertain whether this will be relevant post Brexit. The Convention does apply outside of the EU, but it may have been terminated once the Regulation was created. **Insurance contracts** are not mentioned at all in the Rome Convention, so losing the Regulation would have a **substantial effect on the insurance market**.
- **Substantive Contract Law:** The fact that the UK is no longer an EU member state could be sufficient ground to terminate a contract. This would be under the **doctrine of frustration** – where a **supervening event either renders the performance of an obligation impossible or deprives it of all interest to both parties**. These contracts could be saved by *force-majeure* clauses, but this depends on their precise wording. **Brexit will force businesses with international agreements to reconsider the validity of international contracts – particularly smaller businesses with less resources.**

Impact on Torts and other Non-Contractual Obligations

- Non-Contractual obligations currently supervised by **Rome II Regulation**. This area encompasses unjust enrichment, negotiorum gestio, precontractual liability and more. The Regulation provides conflict rules for these institutions. The nature of the regulation is that other member states will still follow these conflict rules in relation to the UK, but once the UK leaves the EU, they will no longer bind UK courts. **There is no other law in place to replace it.** The UK will be free to follow its previous private international law, operating under '*Lex loci delicti commissi*' – the principle that the law applying in foreign conflict will be the law of the place the tort was committed. The UK could simply create domestic law following the Rome II regulation entirely or create a bespoke treaty between the EU of the same effect to avoid issues of uncertainty. **Brexit will abandon the Rome II Regulation – the UK can implement the provisions of this regulation in domestic law or an individual treaty, guided by ECJ case law and achieve the harmonious determination of applicable law in international disputes concerning tort and non-contractual obligations.**

Impact on Corporate Law

- **Companies incorporated under English Law:** Many continental laws treat EU and third-country corporations differently. EU's fundamental freedom of establishment obliges companies organised per the law of another Member States to be recognised and treated as companies under domestic law, irrespective of where they are based. The principal issue of Brexit will therefore be on **companies organised under English law, based outside of England. Brexit will strip these companies of freedom of establishment under the TFEU – meaning that they will be governed by the law of the country in which they are based.** The changes to their legal regime will be significant – the company must follow entirely different laws and could even be considered legally non-existent. This is *not the UK's problem* – English Organised companies, based in foreign countries, do not contribute to the UK's economy through Tax – but the ramifications of Brexit on these companies could be huge.
- **Insolvency Proceedings** – UK Courts, Lawyers and insolvency administrators profit greatly by restructuring companies from other EU Member States. **The European Insolvency Regulation** grants the UK this jurisdiction. 'Economic Tourism' and an increase in spending on the UK's insolvency sector could all be lost following Brexit, should the UK lose its right to practice in this way under the Regulation. **The Brussels Convention** will continue to apply, but this is less attractive and gives UK businesses less jurisdiction, and therefore business.

Impact on Financial Law

- **Passporting** – Financial services law is characterised by licensing requirements. Lots of business cannot be carried out without a license granted by a financial authorities' member states. Without these licenses, financial services firms are subject to a prohibition to private services in the EU. The European passport allows licenses granted in Member States to extend to all EU and EEA member states. With this passport, financial firms may act across borders, or set up a branch in the host Member State. **Unless the UK seeks status as a member of the EEA, UK firms will lose cross-border business because of losing their European Passport.**

Impact on International litigation

- **The Brussels Ia Regulation** provides a highly effective mechanism for cross-border litigation. It **provides rules on jurisdiction and pending legal action (*Lis pendens*) in civil and commercial matters, and guarantees the recognition and enforcement of judgements in this area.** Post-brexit, this **will no longer apply.** The result of

losing this regulation is **renewed conflicts over jurisdiction, parallel proceedings and difficulties in the transnational enforcement of judgments**. **The Brussels Convention (1968)** will still apply Post-Brexit, and can guarantee some of The Regulations functions. The main issues remaining after losing The Regulation will be – the geographical scope of the Convention is narrower than the Regulation (only 13 member states are party to the Convention), The Convention’s regime offers far less protection than the Regulation (it lacks jurisdiction for contractual disputes and more), and finally, the UK will lose most of the case law developed since the Regulation came into force, as it will not apply to The Convention.

- **Brexit will also complicate judicial cooperation with Switzerland, Norway and Iceland** – The **Lugano Convention 2007** was signed between **these three states and the EU**, and once Brexit happens, this will no longer be in force in the UK. It will therefore be difficult to enforce British judgments in Switzerland, Norway and Iceland, and vice versa.

Conclusion

The future coherence of EU – UK commercial relations depends on three aspects:

- a) the status of the UK,
- b) the level of autonomy which the UK government and its people wants to exercise once it can deviate from EU law, and
- c) the outcome of bilateral negotiations which will start once the British government has issued the notice foreseen in Article 50 TEU.