



Brexit Alert for Legal Counsel Possible implications for banking and finance

Introduction

Belgian companies may currently be wondering whether Brexit will impact their **corporate finance activities**. Although there is considerable uncertainty as to how and when Brexit might actually occur, and therefore how it will impact these activities, this Brexit Alert considers some of the potential implications if no agreement is reached and whether you should consider making any changes to your finance practice.

Key Topics

Governing Law

The freedom of contract and the ability to emphasise the importance of parties' commercial bargains has long made English law popular as a governing law for finance documentation. The benefits of the English regime will in fact remain unaffected by Brexit.

Furthermore, there is no reason to doubt that UK courts will continue to give effect to parties' choice of law, whether they choose the law of an EU Member State or that of a third country. This analysis is partly based on the Rome I Regulation, which will remain in force within the EU27, and partly on the fact that English courts have long upheld parties' express choice of law, even before Rome I's predecessor came into force.

Therefore, parties can - and should - continue to choose the law most appropriate to their contemplated transaction.

Enforcement

Due to their recognised expertise, commerciality and relative speed in dispute resolution, English courts have been a popular choice with companies for a very long time. This will also likely remain unaffected by Brexit.

Nonetheless, some consideration may need to be given to the enforceability of an English court judgment in the EU27 and vice versa. Currently, this is achieved under the Brussels I Regulation. It is however entirely possible that this regulation would no longer apply to English judgments after a possible hard Brexit. Alternative arrangements have also been made by the UK, as it recently formalised its accession to the Hague Convention.

Therefore, we believe it best to follow usual practice while still anticipating particular circumstances of a transaction, in light of the above.

Licensing

Some Belgian companies might have financing agreements in place where one of the regulated parties relies on a UK license. Due to Brexit, a right to passport that license to Belgium may eventually disappear.

The loss of passporting rights may trigger discussions on increased cost clauses included in existing agreements. Additionally, and because licence requirements are governed by domestic law, some parties may need to look at illegality provisions when they are not able to fund or maintain participation in certain loans.

It may prove prudent for Belgian companies to verify the status of their finance counterparties, as well as the ability to have relevant rights and/or obligations under existing documentation transferred to an appropriately licensed affiliate or branch.

Withholding tax

Given the importance of taxation in deciding how to structure your finance needs, the impact of Brexit on tax exemptions should be analysed carefully.

Despite such exemptions remaining generally unaffected by Brexit, since they are in practice a function of domestic law or tax treaties, questions may arise due to some domestic law exemptions having EU cross-references.

To prevent borrower risk and cash leakage in your finance operations, we advise you to ensure that your taxation structure remains unaffected. Gross-up clauses may also be a potential compromise.

Libor

Regardless of whether your company finances itself through UK parties, Brexit may have an impact on a range of financial products that rely on the London Interbank Offered Rate.

This benchmark would become a third-country benchmark under the EU Benchmark Regulation (BMR) and, as such, its administrator would be required to seek authorisation from a competent local financial markets supervisor before European supervised entities are able to rely on it.

Since the proposed Brexit and BMR's transitional regimes largely overlap with Libor's planned replacement by 2021, we believe commercial terms will remain largely unaffected.

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