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EXECUTIVE SUMMARY

Major legal changes and new legislation, as expected after Brexit, can affect the performance of long-term contracts. Yet, English contract law provides limited assistance to contracting parties faced with new laws that affect their contracts. As a result, policy-makers and legislators need to identify the implications of new laws for existing long-term contracts, and consider introducing provisions specifying the date from which new laws take effect. Moreover, contracting parties need to understand the impact of these legal changes on their existing contracts, and legal advisers should advise clients to include enhanced force majeure clauses in their contracts.

Is My Long-Term Contract Brexit-Proof?

Dealing with changes to the legal context of a contract

Professor Christian
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Long-term commercial contracts are common, but as with any long-term relationship, the relevant context when the contract was concluded will change over time. This context includes the legal regime affecting the contract. Changes in the legal regime affect the performance of a long-term contract, and this is especially relevant given the UK's withdrawal from the European Union (Brexit).

When a legal regime changes, parties to a long-term contract need to understand the impact of that change and the options available to them for adapting or ending their contract.

English law does not offer much scope for intervening in existing contracts where their performance is affected by a changing context.

Thus, both the contracting parties and policy-makers need to appreciate how major changes in the legal regime affect existing long-term contracts.

Impact of new legislation on existing contracts

In many instances, new legislation will state that it will only apply to contracts concluded after the new law has come into effect.

However, this does not always happen, particularly when the law is not aimed specifically at contracts but nevertheless impacts on their performance.

English law presumes that new legislation does not apply retrospectively. In the case of long-term contracts, this means that any performance before the legal change is governed by existing legislation, but any performance which has yet to happen will fall under the new law (see Diagram 1).

Therefore, existing rights under a contract that are yet to be exercised will be governed by the new law. Rights which have already been exercised ('vested rights') are presumed to be unaffected by the legal change.

However, this presumption may be overturned if applying the change retrospectively would be fair. This could happen if a change in government policy undermines a vested right in defined circumstances (see Example 1).

Example 1: Loss of entitlement to money



**Trinity One
(Leeds) Ltd**

v



**The Council of
the City of York**

The Council of the City of York had a right to receive a sum of money as a result of a developer's failure to make social housing available.

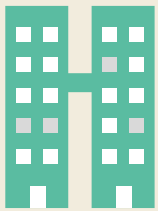
Yet, this right was affected by a change in government policy stating that the obligation to provide affordable housing would be removed should the development become economically unviable ([2018] EWCA Civ 1883).

Contract brought to an end by frustration

English law provides a way out of a contract through its doctrine of ‘frustration’. This operates on two conditions.

- First, if an event occurs after the conclusion of the contract, where this event is beyond the control of either party to the contract.
- Second, where the effect of the event is that continued performance of the contract would be something ‘radically different’.

Example 2: Brexit and the EMA



Canary Wharf

v



European Medicines Agency

The EMA had taken out a 25-year lease on purpose-built premises. The extensively negotiated lease did not contain a break-clause for early termination. Following its relocation to Amsterdam as a result of Brexit, the EMA argued that the lease had been frustrated by Brexit.

The court rejected the EMA’s position because it would neither be illegal for the EMA to lease property outside the EU, nor had a ‘common purpose’ of Canary Wharf and the EMA been undermined by Brexit.

Moreover, the lease had made provision for sub-leasing by the EMA in the eventuality that it had to vacate the premises before the lease expired, thus putting the financial risk on the EMA ([2019] EWHC 335).

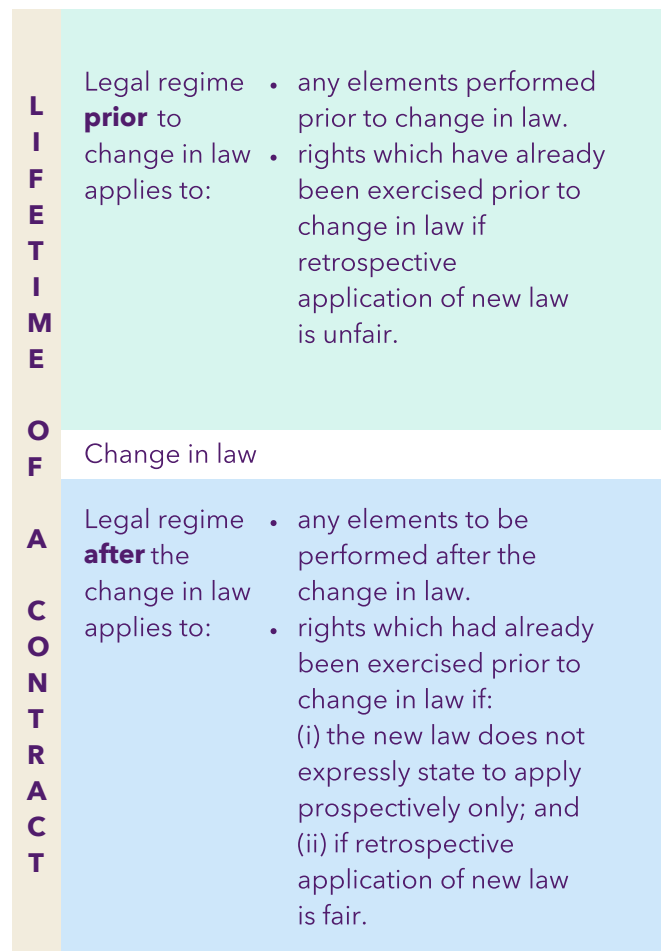
Meeting these two conditions is a high threshold (see Example 2). Crucially, the fact that performing a contract has become significantly more expensive would not suffice. However, if it becomes impossible to continue performance, or if performing the contract would be illegal, then the contract would be frustrated.

Forward planning

Parties can manage the impact of legal change through renegotiation, termination, or force majeure clauses.

Such clauses will, however, be interpreted strictly. Prior to the 2016 referendum, these clauses would not have covered Brexit, but since then, new versions of these clauses have emerged, including specific ‘Brexit clauses’.

Diagram 1: The impact of new legislation on the lifetime of a long-term contract



POLICY RECOMMENDATIONS

1

Parties can manage the impact of legal change through renegotiation, termination, or force majeure clauses. Such clauses will, however, be interpreted strictly. Prior to the 2016 referendum, these clauses would not have covered Brexit, but since then, new versions of these clauses have emerged, including specific 'Brexit clauses'.

2

In responding to Brexit, contracting parties and their legal advisers need to consider the effect of this change, the implications for their contract, and which steps can be taken to adapt the contract (particularly in the absence of relevant terms).

3

The current non-interventionist stance of English contract law regarding unforeseen changes beyond the parties' control could be reconsidered, potentially through a statutory provision triggering re-negotiation of the contract when there is a significant change in context.



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Bisping, C. and Twigg-Flesner, C. (2019) 'Preparing for withdrawal from the European Union in the United Kingdom' in Kramme, M, Baldus, C and Schmidt-Kessel, M (eds) *Brexit: Privat- und wirtschaftsrechtliche Folgen*, Nomos, 2nd edition.

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