

KEY POINTS

- Drafting for Brexit in finance documents after IP completion day entails consideration of various matters but the extent of the changes required in a particular finance document is unlikely to be seismic.
- A key question is what to do with EU legislative references.
- Where an EU legislative reference needs to change to the UK version, the UK version could be cited using its full title and referencing the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020).
- As for jurisdiction clauses, transaction specifics may mean an exclusive jurisdiction clause is not necessary.

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Drafting for Brexit in finance documents

At 11pm GMT on 31 January 2020, the UK ceased to be a member of the EU and a transition period came into effect. For the duration of the transition period, EU law has continued to apply to the UK and the UK has continued to be treated as if it were still an EU member state. While this has delayed the effect of Brexit, the end is nigh as the transition period comes to an end at 11pm on 31 December 2020 (IP completion day) and the UK becomes a third country under EU law. At the end of the transition period, a body of retained EU law will be created in the UK which is based on the EU law that applied to the UK prior to that date. This raises the question of how to draft for Brexit in finance documents after IP completion day and what documentary changes are necessary to address the UK's departure from the EU and the creation of retained EU law. In this Spotlight article, we consider EU legislative references, construction clauses, bail-in clauses and jurisdiction clauses.

BACKGROUND: RETAINED EU LAW

Sections 2 to 4 of the European Union (Withdrawal) Act 2018 (as amended by the European Union (Withdrawal Agreement) Act 2020 (EUWAA)) (EUWA) create a body of retained EU law based on the EU law that applied to the UK at the end of the transition period. In particular, s 2 preserves UK law that implements EU law (eg UK Statutory Instruments implementing EU Directives) and s 3 onshores directly applicable EU law (eg EU Regulations) into UK law. Without retained EU law, there would be a gaping hole in UK law. For example, at the end of the transition period, EU Regulations would cease to apply in the UK and UK Statutory Instruments implementing EU Directives would lapse.

To ensure that retained EU law functions properly from a UK law perspective, s 8 of the EUWA provides that it can be amended by Statutory Instrument. Over 700 Statutory Instruments have so far been made for this purpose.

EU LEGISLATIVE REFERENCES

The first question which arises is what to do with EU legislative references in finance documents. Finance documents may

refer to EU Regulations (eg the Blocking Regulation) and EU Directives (eg the Bank Recovery and Resolution Directive (BRRD)), although references to EU Directives may be less common as, in many cases, the UK implementing legislation will instead be referred to (eg the Financial Collateral Arrangements (No 2) Regulations).

Each EU legislative reference in a finance document should be considered in light of the onshoring under ss 2 to 4 of the EUWA and a decision taken as to whether the reference should:

- remain the same;
- be updated to refer instead to the UK version of the EU legislation (or the UK law which has implemented an EU Directive); or
- be updated to refer to both the EU legislation and the UK law version of the EU legislation.

Which option is appropriate will depend on the context in which the EU legislative reference is used and what its purpose is. For example, if the parties are required to comply with a particular EU law, where the parties are UK parties, the reference may need to change to the UK version of that EU law. Where the parties are UK and EU parties,

the reference may need to be to both the EU law and the UK version of it. Each reference should be checked separately in case they need to be treated differently.

REFERENCING RETAINED EU LAW IN FINANCE DOCUMENTS

Where an EU legislative reference needs to change to the UK version, the next question which arises is how to refer to it in the relevant finance document. For an EU Directive, this is likely to be a case of working out the UK law which has implemented the directive and referring to that. For example, a reference to the BRRD may become a reference to the Banking Act 2009.

For an EU Regulation, the effect of s 3 of the EUWA is to make the EU Regulation part of UK law without the need for further action. It therefore becomes a question of nomenclature of the onshored EU Regulation, where a naming convention may be helpful for ensuring a consistent approach across finance documents, as well as making it clear that the EU Regulation referred to is the onshored version.

To this end, we set out a suggested naming convention below, examples of which are in the text box. A corresponding approach could also be taken with other retained EU law, eg EU tertiary legislation.

The UK version of an EU Regulation could be cited:

- using its full title; and
- referencing the EUWA.

Use of the full title clearly identifies the relevant EU Regulation and the reference to the EUWA conveys that the EU Regulation is retained EU law. The reference to the EUWA also assumes that there is a general construction clause in the relevant document pursuant to which

the EUWA will be construed as including the amendments to it pursuant to the EUWAA.

AMENDMENTS TO RETAINED EU LAW AND CONSTRUCTION CLAUSES

A further question which arises is how to deal with amendments to retained EU law, eg pursuant to s 8 of the EUWA. If an onshored EU Regulation is cited as suggested above, the general reference to the EUWA in the citation would mean that any amendments to the onshored EU Regulation pursuant to s 8 are captured.

For any other amendments, it is a case of first considering whether the relevant finance document has a construction clause which addresses amendments to legislation generally. Many finance documents, including the LMA recommended forms,

have a construction clause providing that a provision of law is a reference to that provision as amended or re-enacted from time to time. Such a clause would address any amendments to retained EU law after IP completion day.

When contemplating construction clauses, it is important to consider what is appropriate for the legislative references in the particular document: should they be read as including any amendment or re-enactment of them through the life of the document or should they be read as including any amendments or re-enactments up to the date of the document only? This will frame how the construction clause is drafted. For example, “from time to time” may need to be replaced with “before the date of the agreement” or specific provision may need to be made in the case of some legislative references.

REFERENCES TO THE EU, THE EEA OR MEMBER STATES

Some contract provisions also contain references to the EU, the EEA or member states in terms that, in the past, would have covered the UK. These provisions may also need to be amended to add a reference to the UK, where that is the intention of the parties.

BAIL-IN CLAUSES

At the end of the transition period, the UK will become a third country for the purposes of Art 55 of the BRRD. This means that for an EEA entity subject to Art 55, a bail-in clause will be required in relevant English law contracts to which it is a party. Likewise, at the end of the transition period, although the UK will no longer be subject to Art 55, the UK’s retained EU law bail-in regime will require a bail-in clause in relevant EEA law governed or other third country law governed contracts to which a UK entity subject to the UK bail-in legislation is a party.

In view of this, it is already general market practice to include bail-in clauses in English law governed finance documents to prepare for this eventuality (at least where EEA entities subject to Art 55 of the BRRD may be a party to the transaction).

JURISDICTION CLAUSES

At the end of the transition period, both the Recast Brussels I Regulation and the Lugano Convention will cease to apply in the UK. This means that there will no longer be automatic recognition of English jurisdiction and judgments in member states (or, in the case of the Lugano Convention, Norway, Switzerland and Iceland).

The UK has deposited an Instrument of Accession to the Hague Convention (Convention), acceding to the Convention in its own right at the end of the transition period. The Convention provides for exclusive jurisdiction clauses in favour of the states which are party to the Convention (which includes all member states) to be upheld and for judgments given by the chosen courts to be enforceable in the other states party to the Convention.

Once the Convention enters into force in the UK, it will apply to agreements entered

Example of a reference to the UK version of an EU Regulation	Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories <i>as it forms part of domestic law of the United Kingdom by virtue of the European Union (Withdrawal) Act 2018</i>
Example of a reference to the UK version of an EU Regulation where “English law” is referred to instead of “domestic law”	Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse <i>as it forms part of English law by virtue of the European Union (Withdrawal) Act 2018</i>
Example of a reference to the UK version of an EU Regulation where related legislation is referred to	Regulation No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories <i>and any regulatory or implementing technical standards and other delegated or implementing acts adopted under that Regulation as they form part of domestic law of the United Kingdom by virtue of the European Union (Withdrawal) Act 2018</i>
Example of a reference to both the EU Regulation and the UK version where they are defined	<p>“EU EMIR” means Regulation No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories</p> <p>“UK EMIR” means Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories <i>as it forms part of domestic law of the United Kingdom by virtue of the European Union (Withdrawal) Act 2018</i></p>

Biog box

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Spotlight

into on or after that date which contain an exclusive jurisdiction clause. The UK argues that the Convention will apply to agreements entered into after 1 October 2015, when the Convention came into force in the UK by virtue of the UK's membership of the EU. However, the EU considers that the Convention will only apply to agreements concluded on or after the date the Convention enters into force in the UK as a party to the Convention in its own right.

While current market practice is generally to continue using a typical asymmetric jurisdiction clause in finance documents, consideration should be given to adopting an exclusive jurisdiction clause in documents upon the UK's accession to the Convention. This will largely be a case of balancing the benefits of the Convention with the flexibility afforded by an asymmetric jurisdiction clause. For many member states, their general means for enforcing a third country judgment (eg a New York judgment) may

be sufficient to enforce English judgments, thus obviating the need for an exclusive jurisdiction clause. If there is insufficient certainty over whether an English judgment is enforceable in a particular member state or concerns around the timeframe for enforcement, alternative dispute resolution methods (eg arbitration) could also be considered.

The UK has also deposited an application to accede to the Lugano Convention, which will have to be approved by Norway, Switzerland, Iceland, Denmark and the EU. If the UK does accede to the Lugano Convention, this should mean in effect the continuation of the Brussels I regime as the Convention mirrors the Brussels I Regulation. However, approval from the EU remains outstanding.

CONCLUSION

Drafting for Brexit in finance documents after IP completion day entails consideration of various matters but the

extent of the changes required in a particular finance document is unlikely to be seismic. There may be relatively few references to EU legislation or to the EU, the EEA or member states which need to be updated. Bail-in clauses are already being added to many finance documents as boilerplate and the transaction specifics may mean an exclusive jurisdiction clause is not necessary. What is key in each case is being alive to the issues and appraising finance documents accordingly. ■

Further Reading:

- Exclusive jurisdiction agreements post-transition (2020) 10 JIBFL 709.
- The tide goes out: the shape of UK financial services legislation post-Brexit Part 4 (2020) 4 JIBFL 219.
- LexisPSL: Brexit: Banking & Finance – overview.

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