

P.R.I.M.E. Finance

Panel of Recognized International Market Experts in Finance

BREXIT: Contractual Continuity – Change of Circumstances



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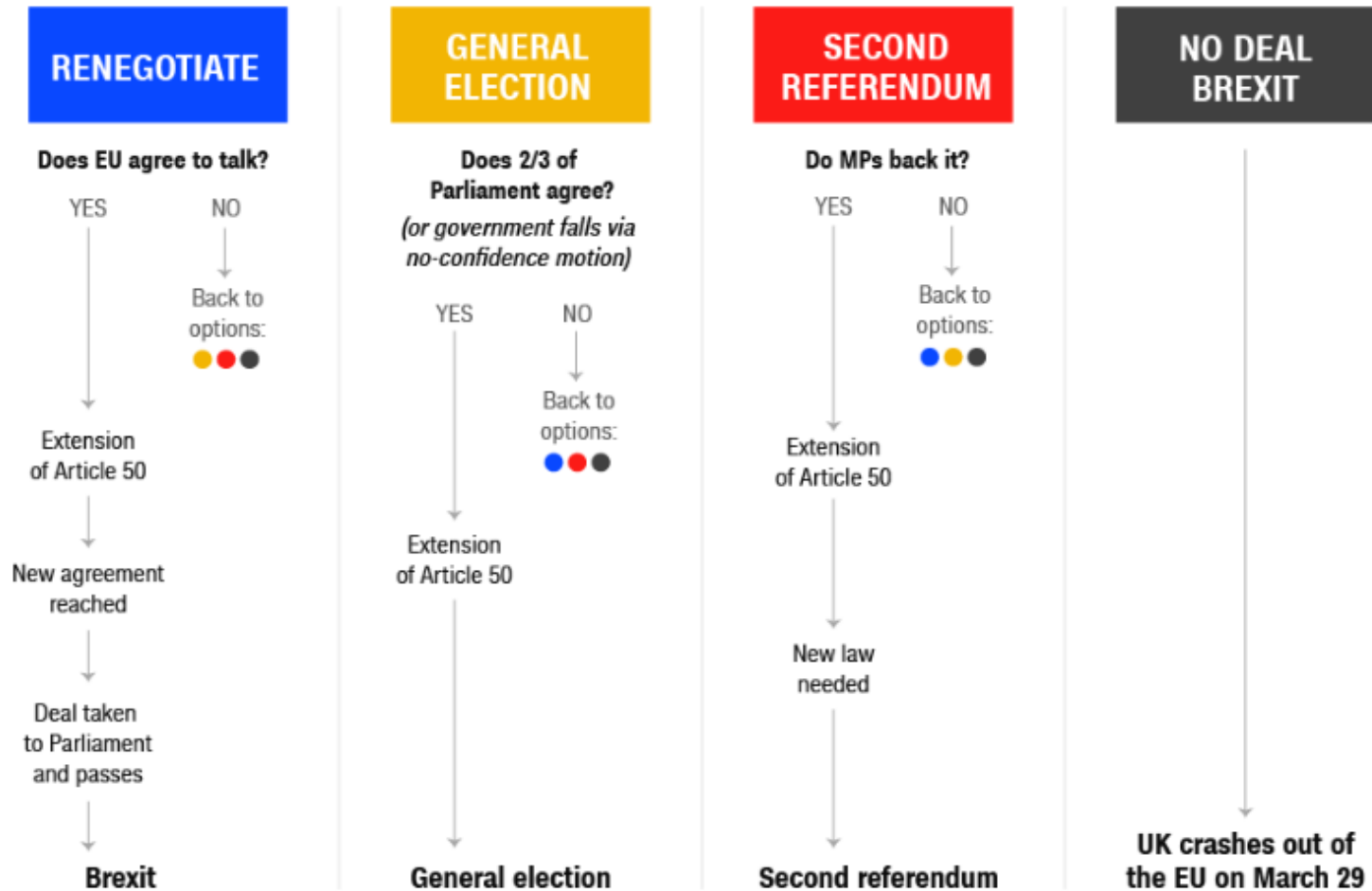


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Theresa May's Main Options



Brexit as an Exceptional Change of Circumstance

Prior Notes:

1. **Only** a *no-deal* hard-Brexit has the potential to bring the *change of circumstances* legal regimes into play
2. The referendum of 23 June 2016 (and the subsequent invocation of Article 50) *per se*, **is clearly not** sufficient to refer to the issue.
3. This issue is **not** restricted to contracts subject to UK law.



The Origins – The words of Seneca and Cicero *echo* down the ages ...

- “ *if you are to hold me for the fulfilment of my promise, all the **circumstances must remain the same** as they were when I promised” (Seneca 1953:278-279)*
- “ *thus there are many things which in and of themselves seem morally right, but which under certain circumstances prove to be not morally right: to keep a promise, to abide by an agreement, to restore a trust, may, with a change of expediency, **cease to be morally right**” (Cicero 1951:372-373)*



The Statutory Recognition

Germany – the *basis of the contract* §313 (BGB 2002) if it “has significantly changed since the contract was entered” considering the “contractual distribution of risk”

France – the theory of *imprevision* - Article 1195 (2016)
“unforeseeable change of circumstances” (...)
“render[ing] performance, excessively onerous ...”

Italy – Article 1467 (1942) – “excessively onerous” and “extraordinary and unpredictable events” if not “part of the normal risk of the contract”



The Statutory Recognition

Portugal – Article 437 (1966) – “if the circumstances which formed the basis of the parties decision to contract” (...) “have undergone an abnormal change of circumstances” the injured party is entitled to termination or to a modification of contract “if enforcement seriously undermines the principles of good-faith and is not within the risks of the contract”

England

“When the party by his own contract creates a duty (...) upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, **because he may have provided against it by his contract**” (Chitty 2015: 1672-1673)



BREXIT - Impossibility or Change in Circumstances

Impossibility – Partial or total repeal of the European legislation **undermines the legality** of contracts in force:

Extreme scenario - *force majeure* (FR), supervening impossibility (GER, IT and PT) or Frustration/supervening illegality (England)

Change of Circumstances – Besides analysing the extension of the BREXIT solution (and only the *hardest* type is likely to qualify):

- (a) precise facts of the case are key, [and how they]
- (b) impact on the performance of the obligations by the parties (and associated additional costs)

The changes must be: **abnormal, unexpected, unforeseen** by the parties **not covered by the risks of the contract**, making it **excessively onerous**.



BREXIT – How has Change of Circumstances been called into play? The existing “doors”...

Change of Circumstances, as a mandatory provision (i) can affect contracts governed by English law and (ii) as a reflection of the Good-Faith Principle can affect enforcement of UK court decisions in the EU.



The first “door” is a narrow, limited to the same EU jurisdiction parties through Article 3 (3) of the Rome Convention on the law applicable to contractual Obligations – which considers breaches of mandatory provisions of the common jurisdiction.



 Santander

However, in 2016/2017, UK Courts did not allow Article 3 (3) of the Rome Convention to apply (the Santander vs Portuguese Transport Companies case), where:

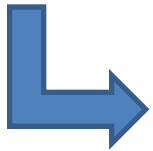
- All contractual elements were connected with Portugal (parties, agreement execution and performance)
- Choice of English law and English courts
- All transactions under ISDA documentation (1992 MA)



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BREXIT – The other “door”, the Enforcement of English Court decisions.

Good-faith Doctrine may also affect contracts governed by English law through the recognition of English Court decisions in another EU State:



Wider “door”, open to any EU counterparty if the enforcement of the English court decision is carried out in its jurisdiction, under Article 34 of the Brussels Regulation, if such decision or its consequences clearly breach rules deemed part of the international public policy of such EU jurisdiction.



Article 34 (1) *“A Judgment shall not be recognized [...] (1) if such recognition is manifestly contrary to public policy in the Member State in which recognition is sought.”*

Brussels I Regulation (44/2001)



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BREXIT – How will this enforcement “door” be affected Post-Brexit?

ENFORCEMENT ISSUES AFTER BREXIT ...

- 28 June 2017: EU set out in a position paper to the EU27 its desire that the Recast Brussels Regulation should continue to apply to judgments entered before the UK leaves the EU.
- The paper was silent on the position after that date.
- 22 August 2017, the UK Government published a position paper entitled, "Providing a cross-border civil judicial cooperation framework".



1. UK expressed desire for close and comprehensive civil judicial cooperation on a reciprocal basis, with a post-Brexit regime that closely models the current EU regime.
2. With respect to enforcing judgments, it proposes that the existing EU rules should continue to apply to judicial decisions given before the withdrawal date, and to judicial decisions given after the withdrawal date in proceedings which were instituted before that date.



Solution to be adopted still unknown



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BREXIT - Conclusions

1. Depending on its exact terms (or absence thereof) BREXIT can conceptually be interpreted by Civil Code based legal systems as an *exceptional change of circumstances*
2. In case of total repeal, it could **apply to contracts not subject to English law**, significantly affected by BREXIT.
3. Change of circumstances is unlikely to affect English law governed agreements (since English Courts have denied it in the past to EU contracting parties under Rome Convention's Article 3.3)
4. As an expression of the good-faith principle, local enforcement may face opposition (even) under Recast Brussels Regulation. That is the standard that should be negotiated to limit enforcement risks in the EU.
5. The UK's exit negotiations must not fail, or at least, as a Portuguese scholar puts it (*Barreto Meneses Cordeiro*), not “*colossal(y) fail (...)* leading to a shutdown in trading relations and a climate of hostility unprecedented in the past 75 years.”

