

Brexit Outcomes

Legal Consequences for
the Wine Industry,
Simon Chalkley

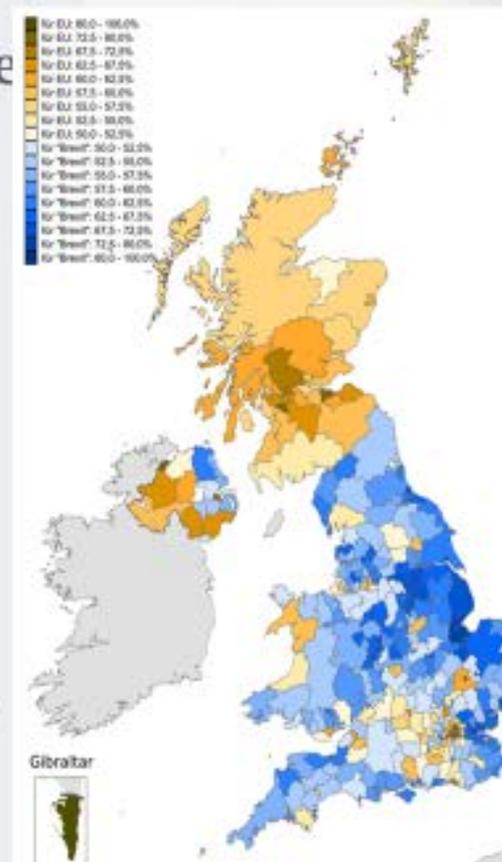
Road Map





For those whose lives are not consumed by Brexit...

- ▶ Withdrawal Agreement
- ▶ Rejected by Parliament
- ▶ Includes a transition period ending on 31/12/2020
 - ▶ Governs UK-EU relationship during that period
 - ▶ Most EU laws apply to UK for transition period
 - ▶ Including customs union and single market
 - ▶ EU jurisdiction continues to apply
- ▶ If no-deal, there is no transition period / 'cliff edge'
 - ▶ EU law no longer flows into UK legal system on exit day
 - ▶ EU (Withdrawal) Act 2018 (UK)
 - ▶ Body of 'retained EU law' created





▶ Hardship

- ▶ A range of consequences (changes in exchange rates; tariffs; VAT; Customs checks; Parallel Regulation; labour/immigration; supply chain reorganisation) may result in hardship
- ▶ Limited relief offered by English common law to those who made a bad bargain or are adversely impacted by Brexit.
- ▶ In the absence of express provision, unlikely the parties will have relief from a resulting loss or difficulty in performance of a contract

▶ Force Majeure

- ▶ no defined meaning under English law
- ▶ Matter of express terms and interpretation
- ▶ Economic hardship alone not normally sufficient
- ▶ Impossibility: debatable / Brexit foreseeable (since 2016, at least)

▶ Frustration

- ▶ ‘radically different obligations’ / ‘physical or commercial impossibility’

▶ **EU References in Contracts:**

- ▶ Territory (agency, distribution, licensing)
 - ▶ Express terms of the Contract:
 - ▶ ‘from time to time’ vs. ‘as at the date’
- ▶ Legislation

▶ **Governing Law**

- ▶ Contract law will be largely unaffected by Brexit
- ▶ BAU for choice of English law
- ▶ Should be no issue in choice of law being respected under Rome 1 Regulation (593/2008/EC) by remaining MS for most part. Government intends to retain substance of this Regulation in UK law.



▶ Jurisdiction

- ▶ If UK leaves without a deal, UK courts:
 - ▶ will apply existing jurisdiction rules under Brussels Regulation to pending cases
 - ▶ will continue to apply existing recognition and enforcement of judgments where courts have registered a court settlement/instrument before exit day but want to enforce after it
 - ▶ Post exit cases - unlikely to refuse to accept jurisdiction where parties have chosen English law under common law principles or refuse to recognise foreign judgements merely because of Brexit.
- ▶ For cases in an EU member state:
 - ▶ Matter of EU private international law;
 - ▶ Commission guidance: pending cases, still apply EU rules on jurisdiction as applied before
 - ▶ Judgments which have not yet been enforced by withdrawal date can still be enforced by the EU27
 - ▶ Otherwise, EU rules not applicable and matter for MS national laws. So question-mark over approach to enforcement and mutual recognition of UK judgments



- ▶ In the case of exclusive jurisdiction clauses applying English courts, UK has applied to accede to Hague Convention with effect from exit
 - ▶ Should mean that post exit EU MS would respect exclusive jurisdiction clause in favour of English courts for new agreements concluded thereafter
 - ▶ Questionmark over whether EU MS courts would respect the choice of exclusive jurisdiction under agreements strict between 1/10/2015 when recast Brussels Regulation took effect and exit (since Brussels has precedence over Hague). UK courts will give effect to Hague

- ▶ **Arbitration?**



► Competition law

- No change, short term at least, if WA is signed. BAU
- And in any case, UK companies doing business in the EU will be subject to EU laws.
- UK national competition laws are broad mirror of EU regime.
- Enforcement will transfer to the UK Competition & Markets Authority either on exit day or at the end of the transition period



Brands and Designs

- ▶ If Transitional Period applies under the Withdrawal Agreement
- ▶ Status quo maintained to end Dec 2020, then:
 - ▶ EUTMs/RCDs cease to have effect in UK
 - ▶ equivalent national protection for EUTMs and RCDs in UK
 - ▶ Retaining priority and seniority and renewal dates of corresponding EU rights
 - ▶ Holders of unregistered CDR and database rights arising before transition period end are accorded equivalent UK right; same term of protection as EU right
 - ▶ But need to pay again for unfinished applications; 9 month grace period to apply for equivalent UK rights (same filing, priority and (for TMs) seniority dates)



Brands and Designs / If Transitional Deal – the Withdrawal Agreement (contd.)

- ▶ If an EUTM or RCD declared invalid or revoked in proceedings started before exit day, the corresponding UK right will also be invalid/revoked on same date unless the grounds upon which invalidity or revocation do not apply in the UK
- ▶ Comparable UKTM arising from an EUTM will not be liable to revocation for non-use just because the EUTM had not been put to genuine use in the UK before the end of the transition period
- ▶ Marks with a reputation: equivalent UKTM will have benefit of reputation acquired by the corresponding EUTM up to the end of the transition period. Thereafter, reputation will only be based on UK use
- ▶ IR's: arrangements with WIPO to be made to ensure EU designations of IR (TMs and RDs) continue to be protected in the UK



Brands and Designs: If NO DEAL

- ▶ EUTMs/RCDs cease to have effect in UK at exit day
- ▶ UK legislation to achieve similar effect to the withdrawal deal
 - ▶ E.g. UK ‘comparable EU TMs’ and ‘continuing Community design rights’
 - ▶ No deal Regulations:
<http://www.legislation.gov.uk/ukxi/2019/269/contents/made> and
<https://www.legislation.gov.uk/ukxi/2019/638/contents/made>
 - ▶ UK to create a supplementary UDR to mirror characteristics of CUDR for designs first disclosed in the UK after exit day



IP

GIs

▶ If Transitional Deal – the Withdrawal Agreement

- ▶ Holders of GIs (including DOs/traditional terms for wine) at the end of the transition period will continue to be entitled to use it in the UK without re-examination, unless its protection is derived from an international agreement to which the EU is a party.
- ▶ If a GI loses its protection in the EU after transition period, UK rights are also lost.



▶ If NO DEAL:

- ▶ Draft agt with EFTA states (Nov '18): follows WA arrangement. Intend to proceed with no deal or WA
- ▶ 4 new GI schemes including one for wine. Broadly mirror the EU regime. All GIs registered before exit by UK producers automatically acquire new GI status
- ▶ UK to establish its own GI scheme after exit (see below - The Food and Drink, Veterinary Medicines and Residues (Amendment etc.) (EU Exit) Regulations 2019 (www.legislation.gov.uk/uksi/2019/865/made)
- ▶ No longer required to recognise EU GI status / EU producers need to apply
- ▶ UK producers holding EU GIs submit new 'third country' applications after exit to the EU



- ▶ Patents
 - ▶ <http://www.legislation.gov.uk/ukxi/2019/801/made>
 - ▶ Unitary Patent
- ▶ Plant Variety Rights
- ▶ Trade Secrets/Confidentiality
 - ▶ TS Directive (2016/244/EU) implemented into UK law
 - ▶ Brexit will not directly affect law of confidentiality in the UK
- ▶ Copyright and EU Database Right
(<http://www.legislation.gov.uk/ukxi/2019/605/contents/made>) (Intellectual Property (Copyright and Related Rights) (Amendment) (EU Exit) Regulations 2019/605)
- ▶ .eu domains for UK holders



► Enforcement

- Customs (new UK law to mirror EU regime): Customs (Enforcement of Intellectual Property Rights) (Amendment) (EU Exit) Regulations 2019/514 (<http://www.legislation.gov.uk/ukxi/2019/514/contents/made>)
- After exit,
 - UK court will not be able to grant injunction covering entirety of pan-EU rights
 - UK will recognise a pan-EU injunction issued before exit day
 - Not clear if a pan-EU injunction granted by a UK court before exit will be recognised and enforced in EU
 - UK defendants will have less control over where they get sued under EU unitary rights

▶ Under the WA

- ▶ Under the WA, it will remain possible to import goods into any EU and EFTA member state if they have already been placed on the market in the UK before the end of the transition period, and vice versa

▶ If NO DEAL

- ▶ UK Government intends to continue to recognise EEA regional exhaustion from exit day
- ▶ Will not impact importation into the UK from the EEA
- ▶ BUT, depending on the EU position, it will no longer be possible to parallel import goods from the UK to the EEA without infringing IP rights
- ▶ Longer term unclear if UK will adopt national, regional or international exhaustion

▶ Product Liability and Safety

- ▶ UK government has addressed amendments to existing EU-derived laws, designed to ensure that substantive law related to product safety at exit day (whether no-deal or after WA transition period) continues to apply.
- ▶ There are important ramifications for UK/EU parties in the supply chain.
 - ▶ UK Distributors and importers of wine into the UK from elsewhere in the EU will be liable for PL claims as if they were the manufacturer – **The Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019, s.6/Sch.3** (amending s.2 Consumer Protection Act 1987)
 - ▶ Similarly an EU distributor of a UK product may now become the importer for the purposes of EU product liability laws.
 - ▶ Importers and distributors should look at their contractual indemnification protection in their supply/distribution contracts as well as their insurance.

- ▶ **Labelling** (e.g EU organic certifications)
- ▶ **E-Commerce**
 - ▶ Loss of service provider ‘country of origin’ principle for UK online sellers
 - ▶ GeoBlocking – EU regulation will cease to apply to the UK on exit day. Limited ability to discriminate in price/conditions between UK and EU customers.

Brexit. The gift that keeps on giving

Thank you for listening

