

BREXIT: IMPLICATIONS ON U.S. BUSINESS ENTERPRISES

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I. INTRODUCTION

Throughout its history, Europe has experienced many trials and tribulations that include the rise and fall of the Roman Empire, the Thirty Years War, World War I & II, and the Cold War.¹ These hardships led to the execution of treaties and organizations, such as the North Atlantic Treaty Organization (NATO) and the Organization for European Economic Cooperation, at an attempt to rehabilitate European government, politics, and economy.² Perhaps the boldest organization, created to reform and integrate European politics, is the European Union (EU).³ The EU started with six member states, and is presently comprised of twenty-eight member states.⁴

Since its inception, no member country has left the EU⁵; therefore, Brexit will set the previously non-existing precedent for a country withdrawing from the organization.⁶ The United Kingdom (UK) joined the precursor to the modern EU in 1973, the European Economic Community (ECC)⁷, and since then, the UK has been one of the most “Eurosceptic”⁸ members and chose to “opt out” of several major elements of European integration, such as the Euro currency and the passport-free Schengen Zone.⁹

The vote to withdraw from the EU is not binding on the UK Parliament, and it does not immediately remove the UK out of the EU.¹⁰ However, the UK maintained a firm position that it “would have a democratic duty to give effect to the electorate’s decision.”¹¹ This truth leaves uncertainty in how EU withdrawal may affect the UK’s economy

1. See *An Overview of European History*, HISTORY WORLD, http://history-world.org/an_overview_of_european_history.htm (last visited Jan. 25, 2018).

2. See *id.*

3. See KAREN DAVIES, *UNDERSTANDING EUROPEAN UNION LAW* 5, 13 (Routledge, 6th ed. 2015). (explaining that EU was created in 1992 under the Treaty on European Union (The Maastricht Treaty)).

4. See *id.* at 8.

5. See Chris Tognotti, *Has Any Country Left the EU Before? Brexit Has Shaken the Continent*, BUSTLE, (June 24, 2016), <https://www.bustle.com/articles/168909-has-any-country-left-the-eu-before-brexit-has-shaken-the-continent>.

6. See Derek E. Mix, *United Kingdom Votes to Leave the European Union*, CRS INSIGHT, (June 24, 2016), <https://fas.org/sgp/crs/row/IN10513.pdf>.

7. See DAVIES, *supra* note 3, at 10.

8. Euroscepticism is a hostile political movement geared towards European political integration. See GLYN MORGAN, *THE IDEA OF A EUROPEAN SUPERSTATE: PUBLIC JUSTIFICATION AND EUROPEAN INTEGRATION* 56 (2005).

9. Mix, *supra* note 6. The Schengen Agreement, created to achieve free movement of persons, abolishes checkpoints at common borders. See DAVIES, *supra* note 3, at xxix.

10. See Mix, *supra* note 6.

11. FOREIGN AND COMMONWEALTH AFFAIRS, *THE PROCESS FOR WITHDRAWING FROM THE EUROPEAN UNION*, 2016, Cm. 9216, at 7 (UK).

and legal framework.¹² Economists speculate that Brexit¹³ could lead to economic consequences in the UK, such as inflation and currency depreciation, and could effect United States' (U.S.) and global economies.¹⁴

Multinational corporations headquartered in the UK also share this economic and legal uncertainty.¹⁵ During President Obama's visit to the UK in April 2016, the Obama Administration expressed its concerns about Brexit's potentially negative impact and advised the UK to remain in the EU.¹⁶ UK's departure from the EU also included political uncertainties such as a reduction of American influence in Europe, a weakening of the EU's position on free trade, and security and defense issues.¹⁷ These economic, legal, and political uncertainties are significant domestic issues because the UK, as the fifth largest economy in the world, is a major trade and investment partner of the U.S., and a post-Brexit recession in the UK economy will likely impact the U.S. economy as well.¹⁸ These effects are just the *broad* implications of Brexit on U.S. and global businesses; therefore, they do not fully encompass the impact on UK and EU business relations.¹⁹

The UK's decision to disassociate from the EU leaves businesses with legal uncertainties as they navigate the intricacies of their new relationships and strive to understand the legal implications of this unilateral change. However, there is speculation that certain industries, such as the energy sector, would not have to radically change their legal policies.²⁰

This comment will focus on the legal implications that Brexit may have on U.S. businesses and what steps those businesses may take to protect themselves against the negative impact from Brexit. Parts II & III discuss a brief overview of the formation and structure of the EU, the

12. *See id.*

13. "Brexit", a combination of the words "Britain" and "exit," is a nickname for UK's from the EU after the June 23 referendum. Amanda Taub, *Brexit, Explained: 7 Questions About What It Means and Why It Matters*, N.Y. TIMES, (June 20, 2016), http://www.nytimes.com/2016/06/21/world/europe/brexit-britain-eu-explained.html?_r=0.

14. *See Mix, supra* note 5.

15. *See id.*

16. *Id.*; *see* Colleen McCain Nelson and Jenny Gross, *Obama Urges U.K. to Remain in EU*, WALL ST. J., <http://www.wsj.com/articles/during-london-visit-obama-urges-u-k-voters-to-stay-in-eu-1461318148> (last updated Apr. 25, 2016).

17. *See Mix, supra* note 5.

18. *Id.*

19. *See generally* James K. Jackson & Shayerah Ilias Akhtar, *Possible Economic Impact of Brexit*, CRS INSIGHT (June 28, 2016), <https://fas.org/sgp/crs/row/IN10517.pdf> (explaining that post-Brexit investment trends and the fact that the UK would no longer benefit from EU trade agreements could negatively impact the UK economy).

20. *See* Christopher Clement-Davies, *The "Brexit" Debate and the Energy Sector; Embracing Freedom or a Reckless Leap in the Dark?*, 3 INT'L ENERGY L. REV. 73, 73.(2016) (explaining that under certain conditions, the energy sector's legal framework would not need substantial change).

unfolding of the British referendum, the reasons behind Brexit and an insight into the never-before-seen withdrawal process. Part IV discusses the possible legal implications of Brexit, including, but not limited to changes in trading terms with the UK, the future of contractual disputes, opting in for arbitration clauses, the free movement of European citizens throughout the EU member states and its implications on U.S. businesses dependent upon foreign employees.

II. BACKGROUND

A. *The Formation and Structure of the EU*

After World War II, Europe spiraled down to a state of great turmoil.²¹ The Western and Eastern parts of Europe recognized the need for continental cooperation in order to overcome the post-war effects.²² It was not long before these nations started to come together to sort out their economic, political, and industrial troubles.²³

The formation of the EU started as an attempt to bring economic and political cooperation within the former members of the Allied and Axis powers of World War II.²⁴ Thus, France and Germany led the creation of the European Coal and Steel Community (ECSC) and the European Atomic Energy Community (EURATOM).²⁵ Over time additional members joined, expanding economic cooperation between the communities, and created other mutually beneficial communities such as the European Economic Community, Single European Act, and finally the Treaty on European Union.²⁶ Each of these treaties and organizations will be discussed below, detailing the history of the economic and political integration of the EU.

1. The European Coal and Steel Community

The original European Community, AKA the ECSC, was enacted through the Treaty of Paris of 1951.²⁷ French economists proposed this idea to soothe the relationship between France and Germany post-World War II.²⁸ Reference to the Treaty's Preamble infers that primary focus of the ECSC was to ensure peace, stability, and European unity.²⁹ France, Germany, Italy, Belgium, Luxembourg and the Netherlands were

21. See *An Overview of European History*, *supra* note 1.

22. See *id.*

23. See DAVIES, *supra* note 3, at 10.

24. See *id.* at 9.

25. *Id.* at 8-9.

26. See *id.* at 10-11, 13.

27. *Id.* at 8.

28. See *id.*

29. See DAVIES, *supra* note 3, at 9.

the six original ECSC member countries.³⁰ Meanwhile, then-presiding UK Prime Minister, Sir Anthony Eden, asserted that the UK had no need to join the ECSC because it was “well able to stand on its own two feet.”³¹ Four institutions, including the High Authority³², the Assembly³³, the Council³⁴, and the Court³⁵, which are now collectively called the EU institutions, were formed to run the ECSC.³⁶

3. European Atomic Energy Community

The same six member states that made up the ECSC created the EURATOM at the Treaty of Rome of 1957.³⁷ EURATOM's primary objectives were promoting the use of atomic energy for peaceful purposes and standard safety practices.³⁸

4. The European Economic Community

The Treaty of Rome also established the third community, the European Economic Community (EEC).³⁹ The EEC differed from the ECSC and EURATOM in its approach for economic integration.⁴⁰ Rather than focusing on the integration of specific industries such as steel and atomic energy, as the ECSC and EURATOM did, the EEC used a holistic approach and endeavored to integrate all aspects of the economies of its member states.⁴¹ Thus, this holistic approach limited decision making to specific, agreed areas only, such as the creation of a common market.⁴²

a. The Development of the European Economic Community

The ECSC, EURATOM, and EEC make up the European Communities.⁴³ Hence, the term “European Communities” refers to all three communities, ECSC, EURATOM, and EEC, but should never be

30. *Id.* at 8.

31. *Id.*

32. The “High Authority” is the name originally given to European Commission. *Id.* at xxviii.

33. The Assembly has presently become known as the European Parliament (EP). *Id.* at xxiii.

34. The Council, otherwise known as “the Council of Ministers”, creates the member states source for writing laws, sets political agendas, coordinates their national policies, and resolves conflicts amongst themselves and other institutions. *Id.* at xxiv.

35. The Court of Justice of the EU “provides the judicial safeguards necessary to ensure” proper compliance with the Treaties and the Union’s acts. DAVIES, *supra* note 3, at xxv, 8.

36. *See id.* at 8.

37. *See id.* at 9. The Assembly and the European Court of Justice are among the four institutions charge of running the ECSC. *See id.*

38. *See id.*

39. *See id.* at 10.

40. DAVIES, *supra* note 3, at 10.

41. *See id.*

42. *See id.*

43. *Id.*

confused with the independent institution “European Community.”⁴⁴ In 1993, the Treaty on European Union renamed the EEC to European Community (EC).⁴⁵ The first amendment to the Treaties of Paris and Rome came into effect in 1967, and is known as the Merger Treaty of 1965.⁴⁶ The Merger Treaty combined the three communities and created a common Council of Ministers and a Commission.⁴⁷ The Luxembourg Accords of 1966 followed and established unanimous voting for *only* important matters.⁴⁸ This formation is significant because it gave member states veto rights in certain matters.⁴⁹

b. The Single European Act

In 1987, the Single European Act (SEA) made a significant change to the original EEC Treaty.⁵⁰ In order to achieve economic integration, the SEA set December 31, 1992 as the date the “single market was to be completed.”⁵¹ The single market,⁵² now referred to exclusively as the “internal market”, was an economic integration strategy striving to transform the EEC from a mere customs union to a complete integration of the member state economies.⁵³ Because the implementation of the internal market required extensive legislative cooperation, qualified majority voting (QMV)⁵⁴ replaced unanimous voting.⁵⁵ To ensure the success of the internal market, the Commission’s influence and power was increased during the completion of the internal market and a new legislative procedure, known as “co-operation”, provided the EP the right to veto over accession of new member states.⁵⁶

c. The Treaty on European Union

The TEU of 1992, also called the Maastricht Treaty, was created for two important purposes (1) to ensure the internal market’s success and (2) to create the EU.⁵⁷ The TEU made several changes, which included renaming the EEC to European Community (EC); transitioning the EC to

44. *Id.*

45. *Id.*

46. DAVIES, *supra* note 3, at 11.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. DAVIES, *supra* note 3, at 11.

53. *See id.*

54. QMV is a voting procedure in which each Council member’s vote is weighed based on the population of their represented member state. *Id.* at 12.

55. *See id.* at 11 (noting that every citizen of each member state is both a national and an EU citizen).

56. *See id.* at 12.

57. *See id.* at 13.

a holistic approach, specifically in regards to the European Monetary Union (EMU); granting new legislative powers to the EP; creation of the European Ombudsman⁵⁸ to investigate maladministration; identifying the bounds of European citizenship; and creating the European Union and its three pillar structure.⁵⁹

The Treaty of Amsterdam of 1997 prepared the EU for enlargement, improved procedures, and made the EU more accessible to the ordinary citizen by prioritizing workers' and citizens' rights and removing barriers to the free movement of EU citizens.⁶⁰ The EU also signed other treaties that included the Treaty of Nice of 2000 and the Treaty of Lisbon of 2009.⁶¹ The Treaty of Nice extended QMV in the Council of Ministers to facilitate enlargement in the EU.⁶² The Treaty of Lisbon endeavored to complete the extension of QMV to enhance the efficiency and democratic legitimacy of the EU and improve institutional consistency.⁶³ Thus, the EU gained legal personality⁶⁴ and new provisions were written regarding membership of and withdrawal from the EU.⁶⁵

B. *Enlargement: UK's Application for Membership*

After two failed attempts the UK, together with Ireland and Denmark, finally joined the EU in January of 1973.⁶⁶ However, the EU allowed the UK to opt-out of the third stage of the Economic and Monetary Union (EMU) and allowed the UK to keep its British pound currency.⁶⁷ The UK would not approve the TEU unless this EMU opt-out clause was included in the membership agreement, along with other

58. EU citizens may apply to the European Ombudsman if they are victims of an act of maladministration by the institutions or bodies. DAVIES, *supra* note 3, at xxix.

59. The TEU created a three-pillared structure, originally comprising the following: (1) Pillar I, made up of the ECSC, EURATOM, and the EC (the European Communities); (2) Pillar II, focusing no foreign policy and security matters; and (3) Pillar III, relating to co-operation on justice and home affairs. *Id.* at 14-15.

60. *Id.* at 16.

61. *Id.* at 17, 19.

62. The extension of QMV in Council, together with a change of procedure, in that any decision needed to receive a specified number of votes (the threshold) together with the approval of a majority of Member States; a re-weighing of the votes in favor of the larger EU countries; increased use of the co-decision procedure, allowing the EP additional legislative authority. *Id.* at 17.

63. *See id.* at 19.

64. *See* Consolidated Version of the Treaty on European Union, art. 47, Oct. 26, 2012, 2012 O.J. (C 326/13) [hereinafter TEU].

65. *Id.* at art. 49-50.

66. *Id.* at art. 50; In 1967, Britain made its first application to join. However, General De Gaulle, then President of France, expressed his opposition towards British membership, suggesting that the UK should continue its associations with the Commonwealth and the US. A second UK bid to join in 1967 also failed. DAVIES, *supra* note 3, at 21.

67. *United Kingdom: EMU opt-out clause*, EUR-LEX (June 30, 2006), <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:125060&from=EN>.

provisions giving the UK unique, unexclusive participation.⁶⁸ These provisions evidence the UK's past Eurosceptic views towards total political, social, and, especially, economic integration. Recent Eurosceptic views are illustrated by Prime Minister David Cameron's renegotiation deal on the UK's EU membership.⁶⁹ Nevertheless, these same Eurosceptic views are thought to have played a vital role in the UK's decision to withdrawal from the EU.⁷⁰

C. *The British Referendum*

On June 24, 2016, a small majority (51.9%) of British voted to leave the European Union.⁷¹ British citizens were divided into two campaign organizations respectively named "Britain Stronger in Europe" and "Vote Leave."⁷² Consequently, Britain's economy suffered when the British pound fell to a thirty-one year low against the U.S. Dollar, and over two trillion dollars were wiped off shares globally.⁷³ Following this economic downfall, the British Prime Minister, David Cameron, resigned, and this signaled immediate political ramifications due to the political uncertainty, even by leaders of the leave camp⁷⁴, of how Brexit would unfold.⁷⁵ Meanwhile, leaders of other EU member states urged Britain to invoke Article 50 of the Lisbon Treaty so that exit negotiations could ensue on the UK's hopes of leaving the EU sooner rather than later.⁷⁶

In many ways, Brexit is not a surprising political act. Evidence suggests that, since its introduction into the EU in 1973, the British public represents the most consistently Eurosceptic electorate in the

68. The UK's monetary policies are not affected by the TEU (maintained under national law). The European System of Central Banks (ESCB) and its regulations also do not apply to the UK. *See id.*

69. *See* Paul Craig, *Explaining the EU deal: the UK and the Eurozone*, THE UK'S INDEPENDENT FACTCHECKING CHARITY, (Feb. 22, 2016), <https://fullfact.org/europe/explaining-eu-deal-uk-and-eurozone/>.

70. *See generally* Sara B. Hobolt, *The Brexit vote: a divided nation, a divided continent*, 23 EUR. J. PUB. POL'Y 1259, 1259-77 (2016) (discussing the divisions between the "winners and losers of globalization as a key driver of the vote to Brexit").

71. *Id.* at 1259.

72. *Id.* at 1262. The two campaigns struggled in a battle of "economy versus immigration". The dilemma at issue was to vote to either: remain in the EU to avoid the economic risk of Brexit ("A leap in the dark") or leave to regain control of British borders, British legislation, and restrict immigration ("Take back control"). *Id.*

73. *Id.*

74. The Leave camp is a division of voters who opted for Brexit and, therefore, Britain's withdrawal from the EU. *Id.*

75. *See* Hobolt, *supra* note 70, at 1259. (describing potential political ramifications resulting from Brexit, including the fear of the break-up of the United Kingdom).

76. *See* TEU, *supra* note 64, at art. 50 ("Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements"); *see also* Hobolt, *supra* note 70, at 1259.

EU.⁷⁷ Moreover, the leading figures in Britain's governing Conservative Party were not shy about their opposition to the EU.⁷⁸ Some studies showed that the leave campaign was motivated by anti-immigration and anti-Euro integration feelings.⁷⁹ There is some evidence that suggests that individuals with lower education levels and individuals with a lower socioeconomic status largely voted to leave the EU.⁸⁰ Conversely, young graduates in urban areas of the UK who embrace diversity voted to stay.⁸¹ The British Referendum was the result of decades of internal division and conflict within the British Conservative Party.⁸² However, the Brexit referendum of 2016 was the second membership referendum in an existing member state.⁸³ Leave voters typically argued for: immigration control, lack of trust in the Prime Minister and government, the cost of EU membership, lack of information, and security implications.⁸⁴ In contrast, the remain voters argued for the economic risk of Brexit, economic stability in the EU, and economic benefits from the EU.⁸⁵

Albert O. Hirschman's categories of "voice" and "exit" may aid in understanding the underlying motives of Brexit and European integration.⁸⁶ The exit option advocates leaving the broken state, the UK, while the voice option promotes citizens' protest against and for their country in the hope of changing and improving the nation.⁸⁷ However, it has been argued that the exit option is inconsistent with the political goals of Brexit because withdrawing from the EU, while remaining in the internal market, will continue to subject the UK to EU regulation and leave the UK powerless to reform and participation in any future legislation.⁸⁸

77. See Hobolt, *supra* note 70, at 1259-1260.

78. See *id.* at 1260.

79. See *id.* at 1260.

80. See *id.* (describing the division between the working-class, who feel left behind because of globalization and mass immigration, and the educated, who welcome such developments. Furthermore, this trend may have caused increasing support for Eurosceptic parties on the radical right and left across Europe).

81. See *id.*

82. See *id.* at 1261.

83. See Hobolt, *supra* note 70, at 1264. The first referendum was the British EEC referendum in 1975 where 67% of voters chose to remain. *Id.*

84. *Id.* at 1263 (laying out the main referendum arguments in Table 1).

85. See *id.* at 1262-63. A young well-educated and diverse professional in urban area likely favored more open borders, immigration, and international co-operation. In contrast, the average older, working class, less-educated British citizen likely opposed integration and openness. *Id.* at 1265.

86. See generally ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS AND STATES (1970).

87. See Elias Deutscher, *Editorial: exit*, 9 EUR. J. LEGAL STUD. 1, 1 (2016).

88. See *id.* at 2-3. (opining that the UK chose the exit option because of the perceived loss of influence the UK has on the EU).

The pressing focus of the Brexit debate was not austerity, but rather the free movement of people and the social rights of EU workers and citizens.⁸⁹ Yet, the principal idea of Brexit is the upright rejection of the free movement of people and social rights.⁹⁰ Therefore, the exit option appeared to be attractive due to Britain's belief that it could remain part of the internal market without the free movement of people and social rights.⁹¹ Britain relied on a mistaken fact because the internal market's goal for social and economic integration leaves no room for nationalism.⁹² A country cannot have one without the other because being part of the internal market requires the free movement of people and social rights.⁹³ Ultimately, the UK chose to leave the EU, and now must face the aftermath and uncertainty of Brexit.⁹⁴ The withdrawal process involves four phases, which include negotiations between the UK, EU, and the rest of the world.⁹⁵

III. WITHDRAWAL

The outcome of the referendum does not mean that the UK withdraws from the EU immediately; therefore, there are no immediate legal implications.⁹⁶ The legal implications come into fruition once the UK's withdrawal from the EU is complete.⁹⁷ On January 24, 2017, the Supreme Court of the United Kingdom ruled that the UK government must hold a vote in parliament before notice to withdraw from the EU is sent to the European Council.⁹⁸ The Supreme Court judges reasoned that an act of parliament was required to start the withdrawal process because of the unforeseeable legal consequences.⁹⁹ Therefore, UK Prime

89. See *id.* at 4.

90. See *id.* at 4.

91. See *id.*

92. See *id.*

93. See Deutscher, *supra* note 87, at 6.

94. See Swati Dhingra and Thomas Sampson, *Life after BREXIT: What are the UK's options outside the European Union?*, LONDON SCH. OF ECON. AND POLITICAL SCI., (Feb. 2016), <http://cep.lse.ac.uk/pubs/download/brexit01.pdf>.

95. European Commission, *Negotiations with the United Kingdom*, European Council (Apr. 29, 2017) https://ec.europa.eu/commission/sites/beta-political/files/presentation_president_task_force_edited_v5.pdf.

96. See Mix, *supra* note 6; see also Dr. Georg M. Berrisch *et al*, *Brexit—Implications and Next Steps*, BAKER BOTTS, (June 28, 2016), <http://www.bakerbotts.com/ideas/publications/2016/06/brexit>.

97. See Berrisch, *supra* note 96.

98. Angela Dewant and Richard Allen Greene, *Brexit Ruling: UK Supreme Court Gives Parliament Article 50 Vote*, CNN (Jan 24, 2017), <http://www.cnn.com/2017/01/24/europe/brexit-article-50-supreme-court-ruling/>.

99. See *id.* ("To proceed otherwise would be a breach of settled constitutional principles stretching back many centuries . . .").

Minister, Theresa May, does not have sufficient authority to unilaterally begin the withdrawal process.¹⁰⁰

Because the withdrawal process has not been started, all EU regulations remain in force in the UK as well as all domestic legislation in the UK that does not conflict with EU policy.¹⁰¹ Pursuant to article 50 of the TEU, the withdrawal process begins only when a member state notifies the European Council of its intention to withdraw from the EU.¹⁰² However, any decision to withdraw must be in accordance with the UK's constitutional requirements and cannot be done unilaterally.¹⁰³ According to some experts, once the UK formally gives notification of its intention to leave the EU, the withdrawal process will consist of the four phases below:

- (1) Negotiations between the UK and the EU (consisting of the remaining 27 member states (EU27)) on the terms of withdrawal;
- (2) Negotiations between the UK and the EU27 on the future relationship between the UK and the EU27;
- (3) Internal UK legislation and regulation on areas currently governed by EU law; and
- (4) Negotiations between the UK and the rest of the world, in particular the approximately 50 countries with which the EU currently has free trade agreements.¹⁰⁴

Article 50 of the TEU gives a two-year time period for the withdrawal process to be completed so it is uncertain whether the UK will be able to accomplish this in time.¹⁰⁵

A. Phase One

EU law will remain applicable in the UK during the negotiation process until an agreement can be reached, or if a two-year period

100. See *id.*

101. See Berrisch, *supra* note 96.

102. See *id.*; see also TEU, *supra* note 64, at art. 50.

103. See Berrisch, *supra* note 96. The debate has been settled. The legal process for withdrawal from the EU rests with the representatives of the people under the UK Constitution. *Id.*; see also *Article 50 process on Brexit faces legal challenge to ensure parliamentary involvement*, MISHCHON DE REYA (July 3, 2016) https://www.mishcon.com/news/firm_news/article_50_process_on_brexit_faces_legal_challenge_to_ensure_parliamentary_involvement_07_2016; see also Jens Rinze, *Brexit: EU and UK Constitutional Requirements*, BREXIT LEGAL (Aug. 16, 2016) <http://www.brexitlegal.com/2016/08/brexit-eu-and-uk-constitutional-requirements/>.

104. Berrisch, *supra* note 96.

105. *Id.*

lapses in the negotiation process, whichever is earlier.¹⁰⁶ If both sides cannot reach a withdrawal agreement, the UK's membership is revoked and EU law will no longer apply to the UK, unless all of the EU27 agrees to extend the deadline.¹⁰⁷

B. Phase Two

Imagining what a post-Brexit relationship between the UK and the EU27 would look like is not possible.¹⁰⁸ On the one hand, the leave camp wants to escape EU legislation and restrict immigration.¹⁰⁹ On the other hand, it would also prefer full access to the internal market; however, this is an incompatible outcome.¹¹⁰ The leave camp is unlikely to achieve this result because the EU27 will unlikely allow it and because the internal market's social and integration policies conflict with Brexit's ideology.¹¹¹ Past agreements with countries such as Norway, Switzerland, and Turkey show the EU's reluctance to accept such arrangements.¹¹² These agreements show a direct correlation between the amount of access to the internal market and the amount of obligations and regulations imposed on the non-member state.¹¹³ The obligations include the free movement of people, and ultimately contribute to the EU budget.¹¹⁴ While the leave camp voted to withdraw from the EU, due to nationalism and sovereignty, the basis for these principles leaves the UK's negotiations uncertain.¹¹⁵ Below are three models that the UK may follow, regarding phase two, if a complete Brexit comes into fruition. Each will be explained briefly with an analysis of what impact it will have on U.S. business enterprises (a summary may be read above in footnote 108).

106. *Id.* (explaining that the EU requires approval by a QMV of the EU27 Member States after obtaining the consent of the EP).

107. *See id.*

108. *See id.*

109. *See id.*

110. Berrisch, *supra* note 96.

111. *See id.*

112. *See id.* Norway rejected EU membership and instead became a member of the European Economic Area (EEA) and European Free Trade Area "EFTA"; Switzerland rejected EU and EEA membership, but is a member of the EFTA; Turkey has a customs union with the EU and enjoys only limited access to the internal market; Canada is one of the numerous countries with which the EU has concluded a free trade agreement, which typically removes tariffs in trade of goods. *Id.*

113. *See id.*

114. *See id.*

115. Berrisch, *supra* note 96; *but see* NEIL MACCORMICK, *QUESTIONING SOVEREIGNTY 191* (Oxford Univ. Press, 2002) (suggesting that a framework of political and economic order across many state and national cultures, along with the guarantee of the free movement of people, goods, and services, does not necessarily weaken the idea of territorial sovereignty).

1. The Norwegian Model

Norway joined the European Economic Area (EEA) and the European Free Trade Area (EFTA).¹¹⁶ The EEA promotes free trade and the movement of goods via the internal market, but it would require the UK to pay into the EU and it would relinquish any say in laws and regulations because it would be giving up voting rights in the European Council and EP.¹¹⁷ Moreover, joining the EEA would mean the UK would have to accept the free movement of people, which would conflict with pro-Brexit motives.¹¹⁸

2. The Swiss Model

The second option is the Swiss model, negotiation and completion of bilateral trade agreements.¹¹⁹ Switzerland's model is similar to the Norwegian model in that the UK would retain certain economic ties with the EU, but with little say in negotiations and laws.¹²⁰ Here the UK would have to sign bilateral trade agreements with every other country individually.¹²¹ This model may work perfectly for Switzerland because of the size of its economy. While Switzerland's GDP is around \$700 billion, the UK's larger and more extensive economy has a GDP just shy of \$3 trillion.¹²²

3. The World Trade Organization (WTO) Model: Go at it Alone

The third model is the WTO. In this case, the UK goes at it alone. Here the UK will have full control over economic regulations and immigration, the pro-Brexit stance, but it will have to relinquish trade agreements with 63 other countries it is entitled to via the EU's Free Trade Agreement.¹²³ The UK government will most likely want to respect the wishes of its people and go the WTO route.¹²⁴

116. Dag Holter & George Baur, *EEA Agreement*, EFTA, <http://www.efta.int/eea/eea-agreement> (last visited Feb. 13, 2018).

117. *Brexit*, INVESTOPEDIA, <http://www.investopedia.com/terms/b/brexit.asp> (last visited Jan. 5, 2017)[hereinafter INVESTOPEDIA].

118. *Id.*

119. *See Berrish, supra* note 96.

120. *See* INVESTOPEDIA, *supra* note 117.

121. *See id.*

122. *Id.*

123. *Id.* If the UK withdrawals from the EU, it will no longer be part of these trade agreements. *See generally Trade*, EUROPEAN COMMISSION, <http://ec.europa.eu/trade/policy/countries-and-regions/agreements/> (last visited Feb. 11, 2017).

124. These models will be compared and analyzed in Part IV of the comment.

C. Phase Three

In the third phase, the UK may have to implement internal legislation that is currently structured and controlled by EU regulations in order to transition into a sole-managing country.¹²⁵ As an EU member the UK adopted laws in order to implement numerous EU directives to remain in compliance. Therefore, determining where national legislation is required or missing, in order to supplement the EU directives, will be a huge burden and time-consuming task.¹²⁶ For example, current UK law that is compliant with EU law may need to be amended to have the pro-Brexit vision of control.¹²⁷ Moreover, UK legislation may need to adopt EU legislation for trade and treaty purposes with the approximate 50 individual countries.¹²⁸

D. Phase Four

The EU currently has trade and other agreements in place with approximately fifty countries.¹²⁹ Because the UK may have to renegotiate their trade agreements with the U.S., the U.S. government and companies will likely want to retain their strong and mutually beneficial relationship with the EU.¹³⁰ In fact, if successful, the U.S. and EU will create one of the world's largest trade and investment zones, the Transatlantic Trade Investment Partnership, which indicates the Obama Administration's determination of keeping the EU as a key U.S. trading partner.¹³¹

Nonetheless, if the UK withdraws from the EU, these agreements will terminate and, until the UK negotiates new trade agreements, its relationships with other countries post-Brexit will be governed only by the rules of the WTO, and will likely have a negative impact on the UK's trade and financial markets.¹³² Although the UK is an individual member of the WTO, the European Commission represents the UK in the WTO and the EU establishes the terms of trade.¹³³ Thus, the UK would remain

125. See Berrisch, *supra* note 96. (listing areas that are currently regulated by EU regulations, which include passenger rights, data protection, customs law, and trade defense).

126. See *id.*

127. See *id.*

128. *Id.*

129. *Id.*

130. See Douglas J. Cumming & Shaker A. Zahra, *International Business and Entrepreneurship Implications of Brexit*, *BRIT. J. MGMT.*, 688, 688 (2016)

131. See *id.* at 3.

132. See Berrisch, *supra* note 96; see Jackson, *supra* note 19 (asserting that the Brexit vote immediately affected international financial markets through changes in exchange rates and shifts in capital flows, which affected the value of the British pound and UK business investment).

133. See Jackson, *supra* note 19, at 4.

a WTO member without member benefits unless it renegotiates its position and independence from the EU.¹³⁴

Yet, some see positive changes that U.S. companies may benefit greatly from if the UK leaves the EU.¹³⁵ For example, the UK will now have the autonomy to directly negotiate beneficial conditions for both domestic and U.S. companies.¹³⁶ Moreover, due to the anticipated removal of current barriers to entry, such as tariffs and regulations, business costs will likely decrease, thus simplifying and accelerating the present free flow of commerce.¹³⁷ U.S. companies may see the decreasing value of the pound as an opportunity for international expansion and growth in areas such as exports.¹³⁸

On the other hand, business across the globe could also be hindered as a result of the decreased value of the pound relative to the U.S. dollar.¹³⁹ Experts contemplate that "A weaker British pound and euro will likely hurt the bottom line of U.S. export companies doing business with customers in the United Kingdom and European Union, as the cost for American products and services would increase, tempering demand."¹⁴⁰ The decline in demand will presumably have the most negative impact on newer, more vulnerable businesses in the U.S. that currently conduct business in or export to UK markets.¹⁴¹ Furthermore, U.S. multinationals may experience a delayed entry into the UK markets subsequent to the potential reduction in demand.¹⁴²

Consequently, the legal, social, and economic implications of Brexit on areas such as trade and financial markets are impossible to predict at this time and any speculation of Brexit's impact is merely an educated guess based upon historical patterns and other trade agreements.¹⁴³ These answers depend on the enactment of new legislation in the UK, in addition to the annulment and/or reimplementation of prior domestic legislation involving EU law and policy.¹⁴⁴ Nevertheless, notice to withdraw from the EU gives rise to the concern of the immediate impact on the financial markets and trade with the United States and the rest of the world.¹⁴⁵

134. *See id.* (explaining that there is currently no set process on how a country renegotiates its terms of trade with the WTO).

135. *See id.* at 5.

136. *See* Cumming, *supra* note 130, at 688.

137. *See id.*

138. *See id.*

139. *See id.*

140. *Id.*

141. *See id.*

142. *See* Cumming, *supra* note 130, at 688.

143. *See* Berrisch, *supra* note 96.

144. *See id.*

145. *See id.*

IV. MAJOR IMPLICATIONS ON U.S. BUSINESSES

A. *Implications on Financial Markets and International Trade*

Brexit shocked the world and financial markets responded accordingly as foreign banks immediately reevaluated their presence in the UK—for fear they might lose their passport status that enables banks to freely operate throughout the UK—which, in turn, called into question London’s position as the largest global financial center in the world.¹⁴⁶ Boasting the second largest economy in the EU after Germany, the UK depends heavily on international trade which was notably easier by the reduced trade barriers permitted under the EU’s internal market.¹⁴⁷ The concerns following Brexit drove investment funds toward the U.S., which in turn increased the value of the U.S. dollar.¹⁴⁸ Because of these uncertainties, the Federal Reserve decided to postpone raising U.S. prime interest rates.¹⁴⁹

For U.S. businesses that do not currently trade with or have investments in the UK, the impact of the Brexit vote will remain uncertain until its effect on global market volatility can be determined.¹⁵⁰ Future trade and investment in the UK and EU may dwindle because U.S. businesses may be reluctant to set up operations in the UK to trade with other EU members.¹⁵¹ As stated previously, trading between the U.S. and UK will depend upon the terms of any applicable trade agreement.¹⁵² While the U.S. is currently negotiating a new trade agreement, the Trans-Atlantic Trade and Investment Partnership (TTIP), with the EU, the UK might be excluded from this arrangement upon leaving the EU.¹⁵³ In October 2015, U.S. Trade Representative Michael Froman said that there was no guarantee that Washington would seek a separate U.S.-UK trade agreement if the UK

146. See Jackson, *supra* note 19.

147. See *id.* (naming the UK as the second largest EU economy, after Germany).

148. See *id.* (“A higher-valued dollar and capital inflows make U.S. exports more expensive, lower import prices, interest rates, and consumer prices, and increase imports. Emerging economies are wary of a stronger dollar, fearing its potential negative contagion effect on their economies by drawing away much-needed capital.”).

149. See *id.* (quoting Federal Chairman Janet Yellen who indicated, “[I]t [Brexit] is a decision that could have consequences for economic and financial conditions in global financial markets. If it does so, it could have consequences in turn for the U.S. economic outlook that would be a factor in deciding on the appropriate path of policy.”).

150. See David Gent, *Brexit Implications for US Businesses*, BIRD & BIRD, (Dec. 4, 2017), <https://www.twobirds.com/en/news/articles/2016/global/brexit-implications-for-us-businesses>.

151. See *id.*

152. See *id.*

153. See Jackson, *supra* note 19.

leaves the EU and warned that British firms could face Chinese-style tariffs.¹⁵⁴

As with other EU regulations and laws, leaving the EU does not immediately affect the trade agreement the UK currently has with other countries.¹⁵⁵ The UK could benefit by creating advantageous trade agreements through the implementation of tariffs at a rate below the existing current EU rates, but this is unlikely if the UK ceases to have access to the EU's internal market and other preferential trade agreements currently in place in the EU.¹⁵⁶ The status of the U.S.-EU TTIP negotiations may also be impacted.¹⁵⁷ The purpose of the TTIP is to: (1) strengthen the overall relationship between U.S.-EU (including transatlantic economic relations); (2) create progression on rule-based barriers that decrease the competitiveness of the U.S.-EU economies; and (3) present common approaches for the development of rules in future multilateral trade negotiations in the WTO.¹⁵⁸ If Brexit is successful, the UK could lose its influence in the trade negotiations of the WTO, and may lead to a policymaking advantage for U.S. businesses.

The TTIP could potentially replace trade agreements with the EU because it supports U.S. exports, employment, and economic growth.¹⁵⁹ U.S. business exports might be harmed due to Brexit, but the TTIP may help to balance the economic impact of Brexit.¹⁶⁰ Moreover, U.S. Congress may reevaluate TTIP's potential impact on the multilateral trading system because of the fiscal challenges it poses.¹⁶¹ Furthermore, U.S. Congress also realized that these trade agreements with the TTIP "could facilitate further liberalization", and potentially resolve issues in the WTO.¹⁶² IF TTIP allows third party access, allowing other countries to join TTIP in the future, this may allow "the weaving of overlapping free trade agreements by the United States and EU with other countries."¹⁶³

This could very well benefit both the UK and U.S. businesses if the UK officially leaves the EU and joins the TTIP as a future member. U.S. enterprises should expect to share the same benefits with the UK, as it

154. See Gent, *supra* note 150.

155. See Jackson, *supra* note 19 ("Brexit would return authority to the UK to set its own external tariffs and broader trade policy, an authority currently with the EU.").

156. See *id.*

157. See *id.*; see generally SHAYERAH ILIAS AKHTAR & VIVIAN C. JONES, CONG. RESEARCH SERV., R43387, TRANSATLANTIC TRADE AND INVESTMENT PARTNERSHIP (TTIP) NEGOTIATIONS (2014) (explaining that TTIP aims to enhance market access through the elimination of barriers to trade and investment in goods, services, and agriculture).

158. See AKHTAR, *supra* note 157.

159. See *id.* at 41.

160. See Jackson, *supra* note 19.

161. See AKHTAR, *supra* note 157, at 41.

162. *Id.*

163. *Id.*

will with the EU, if the UK joins as a future member. The TTIP could become the largest trading agreement in the world and escalate globalization by increasing economic growth and jobs.¹⁶⁴ Therefore, if Brexit comes into fruition, we may see potential lobbying from U.S. businesses to influence Congress on the possibility that the UK could become a future member of the TTIP agreement.

There are a few trading agreement alternatives for the UK, but the UK's negotiating power is dwindling as they lose the EU's full economic weight.¹⁶⁵ Some experts predict that if the UK formally exits the EU, its power to negotiate preferential access to the internal market, as well as some modified participation rights in EU governance, will increase through an arrangement similar to that of the relationship between Norway and the EU.¹⁶⁶ If the UK is not allowed to join TTIP, U.S. businesses may have to rely on the UK securing preferential access to the internal market so that there is no more enlargement of economic harm, such as U.S. exports to the UK. Therefore, with the possibility of preferential access granted to the UK, the best negotiating model for UK and U.S. businesses is the Norwegian Model.

However, if the UK is not be able to secure preferential access to the internal market using the Norwegian Model, its commercial relationship with Europe would essentially be governed by the rules of the WTO.¹⁶⁷ It is unlikely that the UK would follow the Swiss model because its economy is much larger than that of Switzerland and because negotiating and signing bilateral treaties with countries can be a long and tedious process.¹⁶⁸ Thus, if the Norwegian model is unobtainable, then the UK will implement the WTO model to avoid the tedious and costly process of negotiating individual bilateral treaties.

This would likely trigger U.S. businesses to lobby for third party access to the TTIP in order to protect their interests in the UK. A member of the WTO may have some access to the internal market, but it does not encompass the "four freedoms" of the EU Single Market: free movement of goods, free movement of capital, freedom to establish and provide services, and free movement of persons.¹⁶⁹ The WTO model's limited access to the internal market raises contractual concerns for U.S.

164. See *id.* at 43.

165. See Jackson, *supra* note 19 (discussing some of the agreements the UK might renegotiate, which includes entities and agreements such as the WTO, key partners such as South Korea, the Comprehensive Economic and Trade Agreement (CETA) with Canada, the Trade in Services Agreement (TiSA), and the TTIP with the U.S.).

166. See Andrew Lang, *The Consequences of Brexit: Some Complications from International Law*, LSE LAW POLY BRIEFING SERIES, 3, June 2014, 1, 2, http://eprints.lse.ac.uk/64046/1/Policy%20briefing%203_2014.pdf.

167. See *id.*

168. See INVESTOPEDIA, *supra* note 117.

169. See *id.*

businesses. These concerns include the future of arbitration provisions and whether UK or EU law will remain applicable for existing contracts.

B. Contractual and Arbitration Implications

As set out in the Rome I Regulation, the British courts determine which national law applies to contractual matters.¹⁷⁰ Therefore, if Britain leaves the EU, contractual disputes in English courts should be resolved relatively the same as English common law does not depart significantly from Rome I Regulations.¹⁷¹ However, non-contractual liability may not share the same fate because the English common law does not compliment Rome II Regulations.¹⁷²

However, Brexit could affect the current contractual disputes between U.S. and UK enterprises, which are controlled by English common law, and also lead to an “untangling” of UK legislation subject to EU laws and regulations.¹⁷³ Brexit may also affect contractual disputes regarding jurisdictional issues between U.S. subsidiaries headquartered in the UK and a party headquartered in another EU member state.¹⁷⁴

1. Choice of Law in Contractual Claims

Contracts that lack choice of law provisions, will be analyzed by both English and EU courts according to their differing legal tests and to the applicable law.¹⁷⁵ Thus, it is prudent for U.S. businesses to negotiate on a favorable law that will specify how the interpretation and performance of their contractual obligations will be executed.¹⁷⁶ However, if Rome I Regulations cease to exist in the UK, it will likely

170. The Rome I Regulation determines the choice of law for both civil and commercial contractual matters between EU member states. Rome I works in accordance with Rome II regulations (non-contractual obligations). See *Contractual obligations in the EU – determining which national law applies*, EUR-LEX (Jan. 1 2016), <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV%3Ajl0006>; Andrew Sheftel, *Impact of Brexit on contracts*, NORTON ROSE FULBRIGHT, (July 2016) <http://www.nortonrosefulbright.com/files/impact-of-a-brex-it-on-contracts-137551.pdf>.

171. See Sheftel, *supra* note 170 (For instance, a contractual agreement with a choice of law provision will most likely continue to be upheld).

172. See *id.*

173. See Gent, *supra* note 150 (explaining that EU law governs many procedural aspects, including the choice of forum, recognition and enforcement of judgments, service of legal process, and choice of law provisions. Britain’s influences in these matters depend on how well Brexit negotiations go).

174. See *id.*

175. See Mohammad Salahudine Abdel Wahab, *Brexit’s Chilling Effect on Choice of Law and Arbitration in the United Kingdom: Practical Reflections Between Aggravation and Alleviation*, KLUWER ARBITRATION 465 (2018) <http://www.kluwerarbitration.com/CommonUI/document.aspx?id=kli-joia-33si04>.

176. See *id.*

apply the Rome Convention which essentially has the same choice of law rules.¹⁷⁷

The Rome Convention has a “most closely connected law” test and application.¹⁷⁸ Hence, EU courts, which apply the Rome I Regulation, will generally continue to honor non-EU law.¹⁷⁹ Conversely, so long as there is no illegality or defect, English courts will likely continue to uphold the parties’ choice of law in contractual disputes.¹⁸⁰ U.S. businesses can use this to their advantage and begin renegotiations on existing contracts to insert choice of law provisions favoring English law or another EU member state law if they so wish. Thus, if English law or any other national law was chosen by the parties to a contract to be the applicable law, Brexit will not interfere with the application of the law.¹⁸¹

2. Existing Contracts

In context of existing contracts between U.S. and UK entities, the question may arise whether these could be terminated as a result of Brexit. However, termination of a contract would depend on its express terms of termination, such as any material adverse change or force majeure clauses.¹⁸² Moreover, the question of what constitutes a material adverse change, such as political destabilization or market downturns, may vary.¹⁸³ Contracts that contain territorial applications; such as, U.S. enterprise distribution agreements, joint venture agreements, and franchises and license agreements, will also be particularly relevant because such provisions will give rise to a great deal of uncertainty.¹⁸⁴

U.S. enterprises will gamble their contractual rights away if they rely on material adverse change or force majeure clauses because it is uncertain how the EU or English courts will apply them.¹⁸⁵ Each case will come down to a question of interpretation of the relevant facts for each particular clause. Another approach for U.S. businesses is to seek protection under the doctrine of frustration claiming the impossibility of performance.¹⁸⁶ However, the answer will once more depend on the

177. *See id.*

178. *Id.* (stating that the Rome Convention favors practicality and flexibility over predictability).

179. *Id.*

180. *See Wahab, supra* note 175, at 465–466.

181. *See id.* at 465. (explaining that there is still the issue and uncertainty of how the scope of a law will be applied).

182. *See Gent, supra* note 150.

183. *See Sheftel, supra* note 170.

184. *See id.* (noting that whether the UK falls under the scope and jurisdiction of a territorial clause will depend on the interpretation and application of the agreement).

185. *See id.*

186. *See id.*

facts of the particular case.¹⁸⁷ Relying on a material adverse change clause, a force majeure clause, or the doctrine of frustration will continue to be a gamble for U.S. enterprise because there is no clear answer as to how these contractual defenses will be interpreted.¹⁸⁸

Nevertheless, for existing contracts, it would both prudent and advantageous for U.S. businesses to insert express provisions into agreements now.¹⁸⁹ Moreover, inserting an express right to termination in the event of Brexit or other political or financial turmoil will remove uncertainty and allow U.S. enterprises to dictate the outcome of contractual disputes.¹⁹⁰ In the future, U.S. businesses may consider other alternative provisions in new contracts, such as arbitration clauses.¹⁹¹

3. New Contracts

For new contracts, U.S. businesses may seek to opt in for arbitration clauses governed by the New York Convention so they may avoid any possible adverse effects of Brexit.¹⁹² Prior to Brexit London, as a renowned financial center, was a popular choice as the seat for resolution of international disputes in arbitration.¹⁹³ But the social and economic implications of Brexit may affect arbitration in London giving rise to a new prominent forum for international arbitration.¹⁹⁴

However, before Brexit occurred, some experts believed that Brexit would not ultimately lead to the dethroning of London as the prominent seat for international arbitration.¹⁹⁵ These experts highlighted London's merits that included: (1) the excellent judiciary; (2) the arbitration bar; (3) the English Arbitration Act; and (4) the legal infrastructure.¹⁹⁶ This is a rather optimistic approach to the future of London as a popular forum for arbitration.¹⁹⁷ Yet other commentators agree with this view and give other reasons as to why London will remain a world-class leader in arbitration.¹⁹⁸ It has been suggested that

187. *See id.*

188. *See id.*

189. Sheftel, *supra* note 170.

190. *See id.*

191. *See Gent, supra* note 150.

192. *See id.*

193. Johannes Koepf and Maxi Scherer, *Consequences of "Brexit" on International Dispute Resolution: special Issue of Journal of International Arbitration*, KLUWER ARBITRATION BLOG (Oct. 21, 2016) <http://kluwarbitrationblog.com/2016/10/21/consequences-brexit-international-dispute-resolution-special-issue-journal-international-arbitration/>.

194. *See id.*

195. *See id.*

196. *Id.*

197. *See id.* (noting that most experts with this view resided in the UK, and may, therefore, be biased).

198. *See Wahab, supra* note 175, at 472-473.

London's sophisticated financial center, commercial friendly attitude, independent judges, and wealth of case law will leave London as a well-established forum for arbitration.¹⁹⁹ Moreover, English Arbitration Act of 1996, the key arbitration legislation, will remain in force and be nullified from Brexit's social and financial implications.²⁰⁰

Other commentators suggested Brexit's social and economic implications undermine London's reputation as the prominent seat within Europe.²⁰¹ These commentators recognized the number of arbitration cases seated in London has not grown since Brexit took the spotlight and became a great debate.²⁰² This conclusion may be drawn based on the growing competition from other fora, in the EU as well as globally, that have been pursuing the lucrative international dispute resolution market for years.²⁰³ France and Switzerland lead the market in Europe.²⁰⁴ Nevertheless, it is likely that U.S. businesses will continue to use London as the primary seat of arbitration because of the overwhelming factors it has in its favor; namely, the English Arbitration Act and a wealth of case law.²⁰⁵

Whether in the realm of existing contracts or the formation of new contracts, the EU guarantees that judgment obtained in one member state can be recognized and enforced in any member state.²⁰⁶ A party to a contractual dispute may obtain enforcement of a judgment by going to the enforcement authorities in another member state where the defendant debtor has assets.²⁰⁷ Thus, if a party obtains a favorable judgment, applies and obtains a European Enforcement Order (EEO), and is able to locate and find another member state where the defendant debtor has assets, U.S. businesses may not need to rely on arbitration clauses to resolve disputes.

However, this process may not bring the same amount of certainty as an arbitration clause mandating arbitration in London. U.S. businesses may be better off opting in for arbitration in London because of its familiarity with the UK's common law system, English Arbitration Act, and judicial independence. Another major concern that U.S. businesses may have is employment implications arising from Brexit.

199. See *id.* at 472-474.

200. *Id.* at 473.

201. See generally Michael McIlwrath, *An Unamicable Separation: Brexit Consequences for London as a Premier Seat of International Dispute Resolution in Europe*, KLUWER ARBITRATION 451 (2016) [HTTP://WWW.KLUWERARBITRATION.COM/COMMONUI/DOCUMENT.ASPX?ID=KLI-JOIA-33SI03](http://www.kluwerarbitration.com/CommonUI/Document.aspx?id=KLI-JOIA-33SI03).

202. *Id.* at 456.

203. See *id.* at 452.

204. *Id.* (Table 1 shows the numbers the ICC reported for 2015).

205. See *id.* at 461; see Wahab, *supra* note 175, at 473.

206. See *Mutual Recognition and Enforcement of Judgments*, EUROPEAN COMM'N, https://ec.europa.eu/info/law/cross-border-cases/judicial-cooperation/types-judicial-cooperation/mutual-recognition-judgments_en (last visited January 26, 2018).

207. See *id.*

Many U.S. businesses depend on foreign employment within the EU, and Brexit may complicate things if the UK longer provides the free movement of persons from the EU27.²⁰⁸

C. *Employment Implications*

The leave camp's protest against incoming immigration from member states was a prominent issue in the Brexit referendum.²⁰⁹ The Lindsey oil refinery dispute in Lincolnshire of 2009 saw a clash of ideals regarding the EU fundamental right for free movement of people.²¹⁰ UK trade unions protested that the subcontractor was "explicitly refusing to consider applications for work from domestic labor" because foreign labor could be obtained at a cheaper price.²¹¹ Hence, Brexit is intricately connected to the idea of "building a wall" and protecting its borders against "foreigners" while having autonomy over the movement of people from other member states.²¹² Based on current industry standards "foreign workers" may be defined as, non-British EU citizens, which U.S. companies are depending on as a labor force.²¹³ What can U.S. business enterprises due to have a constant supply of labor and avoid the employment implications of Brexit?

As with any other post-Brexit implication, the answer depends on the policies, legislation, and negotiations that the UK is able to secure with the EU and the rest of the world. U.S. companies with subsidiaries or operations in the EU, which employ citizens from other the UK and other EU member states, will be concerned about any change to the freedom of movement of EU nationals.²¹⁴ However, U.S. companies may want to consider an audit of the workforce located in the UK and other member states to help identify individuals who may be impacted on the basis of citizenship or permanent residence and directly inform those employees of possible relocation alternatives.²¹⁵ "Plans for recruitment

208. See *Gent*, *supra* note 150.

209. See *id.*; see also *Brexit 'Leave' Camp May Have Broken Spending Rules, Observer Says, Politics*, BLOOMBERG, (March 25, 2018, 7:22 AM), <https://www.bloomberg.com/news/articles/2018-03-25/-vote-leave-may-have-violated-2016-spending-rule-observer-says>.

210. Charles Woolfson, *Free Movement of Labour and Brexit: Reclaiming National Sovereignty or a Victory for Xenophobia?*, 23 INT'L UNION RIGHTS, no. 4, 20, 22 (2016)(Gr. Brit.)("Unofficial strikes by union members began to spread across the UK in protest against a decision by an Italian firm, Irem, to use its employees (Portuguese and Italian) for construction work.").

211. *Id.* at 22 ("Construction engineering workers across the UK refinery sector came out on strike holding up banners on picket lines demanding that the then Labor Prime Minister, Gordon Brown, honor his ill-judged populist pledge to ensure 'British jobs for British workers.'").

212. *Id.* at 20 ("This entails ending the European Union's mandatory requirement for all member states to accept 'free movement of persons' with the right to live and work in any member state.").

213. See generally *Gent*, *supra* note 150.

214. See *id.*

215. See *id.*

and secondment of staff may also be impacted”; thus, U.S. businesses may need to plan ahead in order to avoid any labor supply complications in the UK and EU.²¹⁶ This gives U.S. businesses yet another incentive to lobby for third party access to the TTIP, should a trade agreement come into fruition, in order to protect their interests in the UK.

V. CONCLUSION

The one word that perfectly describes the UK’s current situation and its potential implications of Brexit, it is “uncertainty.” There are many variables and facts to consider when evaluating the implications of Brexit, however, the most predictable outcome is that the UK will choose to be completely independent from the EU. The UK has been one of the most Eurosceptic countries in the EU, given that it was skeptical from the beginning of the EU policies promoting complete economic and political integration. Moreover, the historical relationship between the UK and the EU, including the UK opting out of the EU currency, EMU, and its acquisition into the EU, supports the theory that UK legislation may ultimately choose to respect the voice of the leave camp.

It is unlikely that the UK will be able to secure preferential internal market access because this would entail the UK paying into the EU, relinquishing any say in newly implemented laws and regulations, and accepting the free movement of people. The UK’s trading agreements will likely be governed by the WTO. Consequently, for any Brexit implications involving the financial market and trade, U.S. business enterprises will likely lobby and encourage U.S. legislature to push for a completion of the TTIP and to allow for third party access into the agreement. Because the TTIP is viewed as a low-cost economic stimulus for supporting U.S. exports, employment, and economic growth, the TTIP may help to balance out some of the economic impacts of Brexit.

Contractual issues may be seen in existing contracts and newly formed contracts. Many issues for newly formed contracts can be avoided if U.S. businesses simply insert an express arbitration clause, which is governed by the New York Convention. It is likely that U.S. businesses will continue to use London as the seat of arbitration because of the familiarity with the UK’s common law system. However, for existing contracts, there are far too many uncertainties and variables making it unwise for U.S. businesses to rely on any material adverse clauses, such as force majeure or the doctrine of frustration, for the right to terminate. Therefore, U.S. businesses should consider providing an express right to terminate in the event of a complete Brexit as well as setting out the routes by which termination can be achieved. For any employment implications, U.S. companies with subsidiaries or

216. *See id.*

operations in the EU, which employ citizens from the UK and/or from other EU member states, may want to consider a complete audit of their workforce. The audit should identify any individual who may be affected by Brexit, including those applying for citizenship or residency in the EU, and any future recruitment and secondment of staff.

Securing preferential internal market access to the EU will be the ideal situation for the UK and U.S. business enterprises. However, the leave campaign ultimately voted for Brexit to restrict immigration and to have complete control of the British economy; thus, joining the EEA, like Norway did, seems like a farfetched idea for UK supporters of the EU and U.S. business enterprises. Securing third party access to the TTIP, should the TTIP come into fruition, will be the best scenario for U.S. companies because it will avoid many of the negative economic and trade impacts of Brexit, including a harmful U.S. export impact. Nevertheless, the TTIP, just like Brexit, also poses questions of uncertainty because of the newly elected U.S. President, Donald Trump, is likely to cancel, or at least delay, any trans-Atlantic free trade deals.²¹⁷

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217. Raheem Kassam, *EU Accepts TTIP Deal Dead Due to Trump Presidency*, BREITBART (November 11, 2016), <http://www.breitbart.com/london/2016/11/11/eu-accepts-ttip-deal-dead-due-trump-presidency/>. ("Speaking on Friday Nov. 11, 2016, EU Trade Commissioner Cecilia Malmstrom said it would make no sense to expect further talks on the issue [TTIP deal], which had already stalled due to European demands over US product standards and a demand for access to US public sector contracts, otherwise protected by the Buy American Act").