

Hard Brexit – liability risk for EU carriers

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Introduction

On 29 March 2017 the United Kingdom submitted its [Article 50](#) withdrawal notification to the European Union. This gave the United Kingdom and the European Union until 29 March 2019 to negotiate a withdrawal agreement. Although the [European Court of Justice](#) ruled that the United Kingdom could revoke its Brexit application unilaterally, EU-based companies must be prepared for a 'hard' Brexit (ie, without any trade agreements) from 30 March 2019.

Following a hard Brexit:

- the United Kingdom's tariff-free trade status with EU members would be eliminated;
- custom declarations would be required; and
- tariffs would be imposed.

Ultimately, this would increase costs and import and export customs clearance delays between the United Kingdom and the European Union. It would also affect sales contracts between buyers and sellers, as well as the contract of carriage between senders, carriers and freight forwarders.

EU carrier liability

In general, EU carriers are liable under Article 17(1) of the Convention on the Contract for the International Carriage of Goods by Road (CMR) for damages caused by delay in delivery. According to Article 19 of the CMR, a 'delay in delivery' occurs when:

- the goods are not delivered within the agreed timeframe; or
- in the absence of an agreed timeframe, the duration of carriage exceeds the time that it would take a diligent carrier to deliver the goods.

In the event of a hard Brexit, it is questionable how diligent EU carriers and freight forwarders should prepare for the expected delays, which would increase their liability risk. It would be difficult for them to rely on the liability exemption under Article 17(2) of the CMR, which holds that a carrier's circumstances were unavoidable and unpreventable (given the high probability of customs clearance delays following a hard Brexit, such circumstances are likely to be considered expected and avoidable).

In case of delay in delivery, carriers may rely on the limitation of liability provided by Article 23(5) of the CMR with respect to freight charges; however, a claimant could argue that a carrier had been fully liable under Article 29 of the CMR, which covers financial losses incurred due to (for example) line stoppages and contractual penalties. According to Article 29, carriers cannot benefit from the limitation of liability for willful misconduct, which includes *dolus eventualis* (ie, conditional intent). Therefore, a claimant could argue that a carrier had known that a delay would occur and is thus fully liable for the damages caused. In this scenario, the carrier's only option would be to assert contributory negligence (ie, the sender or consignee must have been aware of the delays) and seek liability reduction.

Comment

A hard Brexit would increase liability risks for EU carriers and freight forwarders, and disputing parties would need to overcome a number of factual and legal hurdles.

Before undertaking cross-border transports, carriers are well advised to make clear agreements with senders in order to clarify that import and export customs clearance delays are expected for an

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unforeseeable duration. Further, carriers should request instructions from senders in accordance with Article 14 of the CMR to reduce their liability risk.

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