BREXIT: GOVERNING LAW, JURISDICTION AND ARBITRATION CLAUSES

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Brexit/Commercial Disputes Alert

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On Thursday 23 June 2016, in a referendum on the UK's continued membership of the EU, a majority of those polled voted to leave. As we commented in our note dated 24 June, the result *"is expected to lead to a high degree of uncertainty and disruption".* That uncertainty is likely to be felt on a number of fronts, and is unlikely to be confined to the UK, or even Europe.

It is difficult to predict with any confidence, even over the short term, what the political, economic and social consequences of Brexit will be. Its legal consequences are inextricably linked with these and other factors. Again, only time will tell. Of one thing we can be sure: businesses should anticipate, plan for, and seek to manage the resolution of commercial disputes.

This note addresses possible consequences of Brexit for contractual dispute resolution clauses involving English law and English venues, as well as enforcement of court judgments and arbitral awards. As we initially remarked in our note on *"Dispute Resolution Implications"* on 3 June 2016, much will depend on the terms of any future relationship between the UK and the EU, insofar as cross-border disputes are concerned.

In certain key respects, there is a reasonable degree of predictability: (i) a choice of English law, and/or the English courts is just as likely to be upheld after Brexit as it was before (save, potentially, in relation to markets or participants subject to certain EU regulation); (ii) there is no reason to believe that the recognition and enforcement of international arbitration awards rendered in London or elsewhere, and/or pursuant to English or other law, will be affected by Brexit. A number of UK-based arbitral organisations have been prompt in their reassurances that London will continue to operate as normal as a leading global hub for the arbitration of cross-border disputes; and (iii) a selection of arbitration, in London or elsewhere, will offer opportunities to craft individually tailored dispute resolution clauses which aim to replicate the pragmatic commerciality traditionally offered by English courts.

CHOICE OF LAW

It is unlikely that Brexit will materially affect agreements to the effect that the meaning, interpretation and performance of contractual obligations are governed by English or other law. Such agreements are likely to continue to be upheld by the courts both in England and in the EU.

Parties will need to think through the consequences with their advisors if their contract does not have a choice of governing law clause. In those circumstances, English courts and EU courts may operate different tests for determining which law applies to a contract.

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Parties should consider whether any rules which succeed the existing ones in England recognise their choice of law to govern non-contractual obligations in the way the existing ones do.
EU law has always had very limited impact on the English law of contract or tort, especially in a commercial context. Regardless of Brexit, these always were, and will remain a matter mainly of domestic policy and judicial determination.

However, at present, the *acquis communautaire* - that is to say the body of EU law comprised in its public international legal instruments (treaties), its legislation (Regulations, Directives), and decisions of the European Court of Justice - is part and parcel of English law. It remains to be seen how much of the law of England originating in the EU remains in force in England post-Brexit. Nor can one say to what extent cases previously decided in England, before Brexit, in accordance with European law, will continue to be followed by English courts, after Brexit.

JURISDICTION

As with choice of law agreements, parties' agreements conferring jurisdiction in civil and commercial matters on the English courts are likely to continue to be respected both in England and in the EU (except, potentially, where EU regulation limits or prohibits 'third state' jurisdiction clauses).

However, absent such an agreement, things may change. Under the Brussels Regulation, for example, an English party to an agreement with an EU party may have certain rights to be sued in England, and certain obligations to sue the EU party in that party's home courts. That will no longer be the case after Brexit, unless the UK and EU agree otherwise, or, to some extent, the UK participates in the separate but similar arrangements under the Lugano Convention (or perhaps the old Brussels Convention), or the Hague Convention on choice of court agreements.

Parties may be advised to state expressly in future whether they have agreed that their selection of the jurisdiction of the English courts is exclusive or non-exclusive, as the current default position within the EU (that all agreements as to jurisdiction will be treated as exclusive unless expressly agreed otherwise) may no longer apply in England post-Brexit.

English courts which are currently seised of disputes, in accordance with EU jurisdictional rules in force at the time proceedings were commenced, would appear unlikely to consider themselves no longer seised, or to consider another court to be seised instead, once Brexit takes effect.

One possible outcome in implementing Brexit would be to end (or perhaps, conceivably, partially end) the primacy of the Court of Justice of the European Union ("CJEU") as, in effect, the highest court in the English jurisdiction. That does not necessarily dispose of the issue of how, if that happens, English courts, in resolving disputes upon which the *acquis communautaire* has, or has had a bearing, are to resolve any questions about its application (if any) in future. Presumably the Supreme Court of England and Wales would be expected to substitute. This may save a substantial layer of time and expense, but only in relation to that rather small proportion of English commercial cases that are ever referred to the CJEU.

'ENFORCEMENT'

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The 'passporting' of judgments within the EU was widely regarded as a key achievement of the single European market.

It could be of considerable significance, if the current regime is swept aside. What happens post-Brexit will depend on such arrangements, if any, as may be agreed between the UK and the EU.

If English courts are forced to fall back on the common law rules, they will 'enforce' judgments from within the EU in some circumstances - although a judgment creditor will be required to 'sue on the judgment', rather than enforce it as the equivalent of a judgment of the English court.

Enforcement of English judgments within the EU will be a matter for specific local advice. But it will not be as straightforward as it is now.

Certain fast-track means for the enforcement of money judgments under the existing EU regime could cease to be available.

Thus no assumptions can be made henceforth on the enforceability of English judgments across the EU, or vice versa. Contractual provisions should be reviewed carefully in light of this uncertainty.

ARBITRATION

Parties may wish to consider arbitration as their chosen dispute resolution forum, rather than court litigation, as Brexit will not affect application throughout the UK (or the EU) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which governs such matters. Participants in sectors such as banking and financial services, traditionally more inclined to resolve disputes by means of litigation, may in future revisit their assessment of the perceived advantages and disadvantages of the arbitral option.

The historic attractions of England as a place to resolve disputes are well known. A precedent-based system of law, top quality, commercially-orientated, highly-experienced judiciary, and a significant concentration of commercially-minded legal expertise have all kept London among the world's truly 'global' jurisdictions. There remain plenty of potential opportunities to craft individually-tailored arbitration agreements that reproduce a number of the features which have made London such an attractive venue in which to resolve commercial disputes.

FURTHER POINTS: POWERS OF THE ENGLISH COURT

Depending on how Brexit plays out, the English courts may in future feel able to (i) resume granting anti-suit injunctions in respect of court proceedings in EU member states, in order to protect the integrity of agreements to arbitrate or litigate in England (the effect of any such injunction in the courts of the relevant member state depending materially on local rules); and/or (ii) stay their own proceedings in cases where the defendant is domiciled in England, and, under the current EU-wide regime, required to be sued here.

We will continue to update on all these, and related matters, as events unfold.

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