BREXIT: A DISPUTES PERSPECTIVE

Much has been written about the issues the UK will face as a country following the vote to leave the EU. However, little guidance has been given to corporations on how to address these issues in the context of their business, either in negotiating new contracts, or how they may impact upon current disputes.

We envisage there being an increase in the number of disputes, as parties seek to re-position themselves by, for example, terminating current contracts and re-negotiating on the basis of force majeure or frustration.

In this article, we seek to highlight the key points you should consider when entering into a new contract, and the issues to have in mind on your current and future disputes. We see four main issues on Brexit:

1. Choice of governing law.
2. Choice of jurisdiction.
3. Service of proceedings.
4. Enforcement of judgments.

Potential Brexit options

The consequences of the UK leaving the EU will turn on the arrangements governing the future UK/EU relationship. Potential options include:

- The UK agreeing parallel systems with the EU member states, therefore retaining the status quo.
- Adoption of the Norwegian Model (Norway became a signatory to the Lugano Convention[1] and enjoys the benefit of similar enforcement regimes to those in the EU).
- Adoption of the WTO Model – reliance solely on rights and obligations under World Trade Organisation rules.

The law as at the date of Brexit

This will depend on the extent to which the UK government decides that existing EU legislation should no longer form part of English law once the UK has left the EU.

It should also be remembered that in a number of cases EU legislation has been enacted as part of our legislation and so will not be automatically affected on Brexit e.g. the EU Data Protection Directive, which forms part of our Data Protection Act 1998.

It may decide to adopt the model used by a number of former British colonies on independence and if so, the law will not change retrospectively. This would mean that existing EU Regulations, and implemented Directives, would remain in force unless and until replaced.

1. Choice of governing law

For the following reasons, we do not believe that Brexit will have a significant impact on England as a contractual choice of law, therefore parties should continue to consider this a safe governing law, and are advised to carefully consider whether to use a 'Brexit Clause' (a clause that operates only in the event that the UK leaves the EU). These are complex to draft and are often difficult to enforce.

1. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2007:339:TOC

The current EU laws applicable to contractual and non-contractual obligations are enshrined in Rome I[2] (contractual claims) and Rome II[3] (tortious claims e.g. negligence) Regulations, which provide that the courts will uphold the parties' choice of law clause.

Contractual claims: Unless rules similar to Rome I and II are agreed between the UK/ EU, the English courts are likely to apply the rules in place before Rome I, namely the Rome Convention, which has similar terms to those in Rome I, particularly with respect to the parties' choice of law, and was enacted in the UK by the Contracts (Applicable Law) Act 1990. It is therefore unlikely that Brexit will impact upon choice of law clauses.

Tortious claims: Again, on Brexit, the UK/EU may decide to agree to keep a system of rules based on Rome II. If not, it is possible that the English courts will then apply the rules in place pre-Rome II, e.g. under the Private International Law (Miscellaneous Provisions) Act 1995 (which still applies to tort actions commenced prior to Rome II coming into force on 11 January 2009). A crucial difference is that this Act does not give the parties an express right to choose the law applicable to non-contractual relations, and instead provides that the applicable law will be based upon the law of the country in which the tort occurred, or the country in which the most significant event occurred.

2. Choice of jurisdiction

We do not consider that Brexit will result in parties moving away from English jurisdiction, unless enforcement and service are issues (see further below). Parties will wish to consider the wording of their current jurisdiction clauses, and in particular whether the contract refers to EU legislation, concepts, or makes mention of territorial scope in say a distribution agreement.

Choice of jurisdiction is currently governed by the Recast Brussels Regulation[4], which gives party autonomy to the choice of jurisdiction, with the exception of arbitration, insolvency, insurance, consumer, and employment matters.

Post-Brexit

As part of any Brexit negotiations, the UK/EU may agree to continue the Recast Brussels regime, which in any event provides for the courts to decline jurisdiction in favour of *non-member state* courts in certain circumstances. In addition, or in the alternative, the UK may decide to join:

- The Lugano Convention, which operates a similar recognition and enforcement regime to the Recast Brussels, but as between member states and members of the European Free Trade Association (EFTA) such as Switzerland, Iceland, and Norway.
- The Hague Convention on Choice of Court Agreements 2005 (Hague Convention), which is applied to jurisdiction and enforcement where the parties have agreed an exclusive jurisdiction clause. It came into force between the member states (excluding Denmark) and Mexico on 1 October 2015, and is expected to attract other signatories. The UK would need to sign this Convention independently of the EU.

  Under the Hague Convention, a non-money judgment, for example a final injunction, can be enforced. However, interim protective measures are not covered, and so interim injunctions or freezing orders cannot be enforced. This contrasts with the position under the Recast Brussels, which does cover these interim measures. There is no requirement for the court to be first seised and so if the Hague Convention applied there would be no need to race to issue proceedings, and avoid a 'torpedo' action.

2. Regulation 593/2008 on the law applicable to contractual obligations
3 Regulation 864/2007 on the law applicable to non-contractual obligations
4 http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0001:0032:EN:PDF

> **“in relation to existing litigation, parties may wish to obtain a judgment as soon as possible to take advantage of the automatic recognition and enforcement mechanism currently applicable under the Recast Brussels Regulation.”**

If no convention applies, the English courts will revert to forum conveniens principles, and consider the extent of any relationship with this jurisdiction, and whether the proceedings were first to be issued (but this point will not by itself be conclusive, and so the ‘torpedo’ may not be an issue in practice).

In addition, if Recast Brussels no longer applies, parties subject to an arbitration agreement with an English seat will be able to be protect their arbitration proceedings using an anti-suit injunction, not permitted under Recast Brussels.

3. Service of litigation proceedings

In the absence of any agreement for reciprocal service, or the UK becoming a signatory (in its own right) to the 2007 Lugano Convention, it is likely that it would become necessary for claimants to apply for permission to serve English court proceedings within the EU. A practical work around to avoid the lengthy delay that would result, is for an agent for service of process clause to be included in contracts.

4. Enforcement of judgments

Unless there is an agreement to continue the reciprocal enforcement and recognition of judgments, which is likely, enforcement of judgments between UK/member states will no longer be automatic. The party seeking to enforce will need to sue on the judgment.

Post-Brexit

On Brexit, unless there is agreement to continue reciprocal arrangements, or agree a similar regime – which may well be the case, as it would be in the interests of the member states to keep reciprocity for enforcement in the UK of judgments secured in their courts - the English courts will revert to the previous common law position and require determination of the substance of the dispute. Similarly, member states are likely to require a re-determination of the case, or may interpret enforceability of the judgment under their own national laws, which is likely to lead to uncertainly and inconsistency.

There is also uncertainty about the extent to which relief granted by the English courts would be recognised by the courts of member states particularly in relation to claims for declarations, specific performance, and injunctions.

Therefore, in relation to existing litigation, parties may wish to obtain a judgment as soon as possible to take advantage of the automatic recognition and enforcement mechanism currently applicable under the Recast Brussels Regulation.

HFW perspective

For the reasons discussed above, we do not envisage a need for parties to reconsider using English choice of law or jurisdiction clauses. English law remains a safe and responsible choice for both contractual and non-contractual disputes. Parties should however be alive to the need to review and possibly revise their contracts where either reference to EU legislation, or geographical area is made.

Where enforcement is a concern, parties may wish to obtain a judgment and enforce as soon as possible whilst the Recast Brussels Regulation still applies.

We have not mentioned arbitration, this is because it will fall outside of the issues Brexit may create, especially in relation to enforcement due to the UK’s membership of the New York Convention 1958, which will continue to apply to the other 155 signatories, including the EU member states.

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