

Brexit

A dispute resolution perspective

Following the UK's 23 June vote to leave the European Union, there should be no immediate impact on ongoing proceedings or on dispute resolution provisions contained in existing contracts. It is, however, worth considering carefully the terms (including dispute resolution provisions) of new contracts and related documents.

Over the medium term (i.e. the next 1 – 4 years), it will likely become clear what, if any, substantive legal and procedural changes may take place as a result of a Brexit. Any such changes will depend principally on the UK's future relationship with the EU, but the key areas of possible impact are outlined below.

Immediate considerations

Possible Brexit-related disputes

Parties may seek to rely on "material adverse effect" (**MAE**) or "market-out" clauses to avoid contractual obligations. The applicability of such provisions will be a matter of contractual interpretation on a case-by-case basis, however: (i) uncertainty about the ultimate effect of ongoing events means that calling a MAE is likely to be a very aggressive move which parties may wish to avoid (unless, for example, a counterparty's business depends very heavily on the EU); and (ii) there has not yet been market disruption/a liquidity crisis of the type which took place in 2008. Given the limited exercise of market disruption provisions then, a widespread exercise of such provisions now presently seems unlikely.

New dispute resolution provisions

Parties should think carefully about the impact of a Brexit on dispute resolution provisions in new cross-border contracts. For the reasons outlined below, arbitration agreements are likely to provide the greatest long-term certainty, although, certainly in the case of English law-governed contracts, parties should have confidence in clearly drafted (and ideally expressly exclusive) jurisdiction agreements in favour of the English courts, especially if process agent or alternative (contractual) service provisions are also included.

Representations and warranties/opinion letters

These need to be carefully considered in light of Brexit.

Continued recourse to the Court of Justice of the European Union (CJEU)

As a matter of EU law, EU law will continue to apply to the UK until such time as it actually withdraws from the EU (not likely to take place for a number of years). It is possible that the UK government will seek to repeal (or otherwise cease to apply) certain aspects of EU law before then, which may lead to conflict between the UK and EU legal systems, but this is presently uncertain.

Longer-term contractual considerations

Free movement of goods/people

Cross-border contracts may be subject to frustration/force majeure arguments if the UK imposes restrictions on free movement such that contractual obligations become impossible (and/or illegal) to perform.

Contractual interpretation

Most current contracts with UK-based counterparties (or counterparties with operations in the UK) have been concluded on the basis that the EU includes the UK. This may lead to disputes, for example in relation to: (i) geographical/territorial restrictions; (ii) cross-border prices (including tariffs/customs issues); and (iii) tax.

Potential loss of European Union law

General considerations

Vested rights

The international law doctrine of vested rights means that, even if not expressly addressed by the UK/EU withdrawal agreement, British businesses and citizens exercising their rights in other EU jurisdictions should continue to be able to do so (including, for example, British citizens exercising their right to live in other EU jurisdictions).

Existing EU law causes of action

EU law-based causes of action which have accrued as at the time of a Brexit (for example, claims against the UK for breaches of EU law) should continue to be enforceable post-Brexit. However, if the UK government takes steps to limit

the exercise of such rights, it may be difficult for claimants to enforce their rights (in the absence of UK parties' right of recourse to the CJEU).

Subordination of domestic law

It is possible that certain aspects of EU law (e.g. in relation to the internal market) will continue to apply to the UK, but this will depend on the agreement negotiated between the UK and the EU.

Effect on jurisdiction agreements

The Recast Brussels Regulation would cease to apply to the UK following a Brexit, meaning that there will be no agreement between the UK and EU member states as to the enforceability of jurisdiction agreements and the reciprocal enforcement of judgments. The UK is likely to seek equivalent arrangements as part of Brexit negotiations, which may include the UK joining existing conventions such as the 2007 Lugano Convention and/or the 2005 Hague Convention on Choice of Court Agreements.

In any event, English conflicts of law rules will almost certainly continue to apply to cross-border cases heard in the English courts. It follows that the English courts are extremely likely to continue respecting jurisdiction agreements in their favour.

Effect on governing law agreements

Rome I and Rome II Regulations

Most of the reasons parties choose English law to govern their agreements are wholly unconnected with the EU (in particular, English law will continue to offer certainty, stability, neutrality and commerciality). It is expected to remain an extremely prevalent choice of law for international commercial relationships. The English courts are extremely likely to continue to respect express governing law agreements.

Longer term

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Effect on cross-border enforcement

Existing judgments

Parties who presently hold English court judgments which

need to be enforced elsewhere in the EU (or vice versa) should take steps to enforce them as soon as possible.

Future judgments

In future, unless an alternative to the Recast Brussels Regulation is agreed, the enforcement of judgments between the UK and EU may be more burdensome, and will rely on domestic rules in each relevant jurisdiction.

Commercial arbitration

London is the world's most widely-selected seat for international arbitrations¹. Neither: (i) existing London (/UK)-seated arbitrations; or (ii) the popularity of London as an arbitral seat are expected to be materially affected by a Brexit.

The UK will continue to benefit from the key features which make it a popular arbitration-friendly jurisdiction, including notably:

- The UK will remain a party to the **New York Convention**. This is unrelated to EU membership.
- **Neutrality** and **impartiality** of the judicial system.
- Tried and tested **national arbitration law** (including the Arbitration Act 1996). English arbitration law is not derived from EU law or principles.
- An **arbitration-friendly** judiciary, with a track record for enforcing arbitration agreements and arbitral awards.
- The **English language**, time zone and geographical location.

Trade issues

Transatlantic Trade and Investment Partnership

Following the UK's vote to leave, the French government has confirmed that it will block TTIP in its current form. It therefore looks likely that the conclusion of TTIP will be (at the very least) delayed by several years.

Other trade agreements

Post-Brexit, the UK will be able to sign free trade agreements with third countries. It is likely to want to commence negotiating such agreements as soon as possible. Prime target countries are likely to include the US, India and China (in addition, naturally, to the agreement of a new settlement with the EU).

Bilateral Investment Treaties

The UK has signed 106 BITs, including 11 with EU member states (Bulgaria, Croatia, Czech Republic, Estonia, Hungary,

Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia). UK investors with investments in these states therefore presently enjoy a greater degree of comfort than investors in other EU states. The UK may seek to negotiate further BITs alongside/instead of free trade agreements with third countries.

¹ Queen Mary International Arbitration Survey, 2015

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