Contract and other obligations

As parties assess changes in the legal, economic and regulatory landscape caused by the UK’s exit and the costs and other implications on their contractual relationships, they may consider the scope for avoiding contractual obligations. Businesses will wish to consider carefully the contractual mechanisms on which they (or their counter-parties) may seek to rely in this context.

A key question is whether a particular contract can be terminated as a result of the UK’s exit from Europe and/or the EU Single Market, particularly as the changed commercial landscape may prompt contracting parties to reassess their current contract arrangements and look for ways to exit those contracts which are no longer required or profitable. Any right of termination, of course, depends on the terms of the relevant contract, including any material adverse change and force majeure provisions, any right (express or implied) to terminate on notice and the doctrine of frustration. Most general provisions are unlikely to be triggered by any of the stages of the Brexit process. Contracting parties may seek to include a specific provision in new contracts dealing with the effects of the UK’s exit from the EU and/or the EU Single Market.

A related issue is interpretation of pre-existing contracts. For example, how will an obligation to comply with a specific piece of EU legislation be interpreted after the end of the transition period? How will the use of “European Union” as a defined term in contracts be interpreted – will it be found to include the UK or not? Similarly, how will a contract be interpreted if, at the time of contracting, EU law formed part of English law but the time of performance is after the UK’s exit and transition period? These are essentially questions of contractual interpretation. In most cases it is likely that a choice of English law will be interpreted to mean English law as it stands from time to time, subject to any variations, including such variations as may arise from Brexit. However, where some key provision of EU law is essential to the operation of a particular contract, in particular where performance of the contract is in the continuing EU, the court may give effect to the relevant EU law so as to give commercial effect to the contract. English
courts are likely to take a sensible view and to favour commercial interpretations.

In relation to new contracts, English law has always been a very popular choice for parties doing business worldwide and the UK’s exit from the EU should not generally have any effect on the willingness of contracting parties to choose English law as the governing law of the contract. Appropriate drafting in new contracts can avoid the issues described above in relation to existing contracts. English domestic commercial law has its own well-developed and respected rules which have largely been unaffected by EU intervention and the benefits of using English law are in no way connected to the UK’s membership of the EU.

Finally in the contract area, the validity and effectiveness of any contractual choice of law is very unlikely to be affected by Brexit. In other words, a choice of English law (or Scots law or any other law) in a contract will continue to be effective, whether in England, Scotland or in the EU Member States. This would follow from the continued operation within the EU of the Rome I Regulation, governing choice of law in contracts, which in effect enforces any choice of law made by contracting parties, whatever law they have chosen. Under Section 3 of the Withdrawal Act, Rome I will form part of domestic law after the end of the transition period. In any event, the pre-regulation rules in England are to very similar effect and would give rise to the same result, ie any expressly chosen governing law will generally be enforced.

Outside the contract area, commercial disputes sometimes involve allegations of liability arising in tort or delict, or claims for unjust enrichment and the like. Such disputes can give rise to considerable uncertainty and risk in international cases because it may be difficult to predict which law to apply. EU legislation (the Rome II Regulation) allows commercial parties to select in advance, by contract, the law to govern not only their contractual, but also their non-contractual rights and liabilities. That was not the position under the English common law, however. The Withdrawal Act provides for Rome II (as directly applicable EU legislation) to form part of domestic law after the end of the transition period.

(See also accompanying section: Disputes in relation to jurisdiction and enforcement of judgments.)

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ANNA PERTOLDI