

BREXIT: IMPLICATIONS FOR DISPUTE RESOLUTION AND GOVERNING LAW

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Legal Briefings - By **Hannah Ambrose, Professional Support Consultant** and **Vanessa Naish, Professional Support Consultant**

As we go to press, there is considerable uncertainty as to the UK's future relationship with Europe. Commercial parties across the world are trying to understand the potential impact on their businesses. Times of commercial, economic and/or structural change are inclined to lead to disputes, as parties consider whether their contractual relationships continue to be financially viable or re-evaluate their business in the light of changing circumstances. Further, those entering into significant transactions in the coming days and months must consider whether their default choices of governing law and dispute resolution mechanism continue to be the best option. Vanessa Naish and Hannah Ambrose take a practical look at the effect on dispute resolution choices, both now and in the future.

THE IMMEDIATE IMPACT OF THE REFERENDUM ON CONTRACTS

At this time, the outcome of the UK's referendum on membership of the European Union is known but no notice of the UK's intention to leave the EU has been given under Art. 50 of the Treaty on the European Union. Indeed, there is considerable debate about how such notice can be delivered, both in terms of UK constitutional law and under EU law. Delivery of the notice will formally start the process for negotiation of the UK's exit, and for determining the fundamental question of the nature of its on-going relationship with Europe. For more information on the process and potential alternative structures, please visit our [Brexit hub](#).

It is important to remember that, until the negotiation is finalised, nothing has changed. The UK remains a member of the EU with the same duties and responsibilities as all the other Member States. Significantly, the UK remains bound by directly applicable EU law (including the EU Treaties and EU Regulations). Unless and until they are repealed, the UK statutes that implement EU Directives will remain in force.

Whilst commercial parties will no doubt be assessing their business plans and structures, neither the referendum outcome, nor the service by the UK of notice to leave the EU, are likely to impact on existing rights and obligations under most contracts. Until the terms of the UK's exit are finalised, the regulatory environment in which parties are performing contractual obligations will also not change.

CAN I STILL CHOOSE ENGLISH LAW TO GOVERN MY CONTRACTUAL RELATIONSHIPS?

(i) English contract law remains a sensible, commercial choice

English law has long been a popular choice of substantive law in international contracts – in many cases, English law is chosen despite there being no nexus between the parties or the place of contractual performance, and England.

“IT IS IMPORTANT TO REMEMBER THAT, UNTIL THE NEGOTIATION IS FINALISED, NOTHING HAS CHANGED”

During the period of negotiation between the UK and the rest of the EU Member States (rEU), the UK will need to determine the extent to which EU law will be incorporated into the law of the UK. It will be up to the UK to consider whether to retain parts of UK law which implement EU Directives. Further, the UK will need to develop and pass domestic UK law to fill in any gaps left when directly applicable EU law no longer applies. Even if this takes the form of adopting many EU Regulations into national law without significant amendment, undoubtedly the task of disentangling the UK's legal fabric from that of the EU will be a complex one and it will take a number of years to be completed.

However, for many commercial parties, English law is chosen due to the stable application of a well-developed body of English contract law principles. These attributes are unlikely to be affected by Brexit. With the exception of consumer contracts, English contract law has developed largely independently of the UK's membership of the EU. It is predominantly unaffected by the EU *acquis communautaire*. The question of whether English law remains a sensible choice of substantive law will therefore be subject to the same considerations as it was before the referendum. For most parties, the answer to this will still be that English law is a sensible, commercial choice for international transactions.

(ii) A choice of English law should still be upheld across Europe

The ability of parties to choose a law to govern their obligations is determined by EU Member State Courts by reference to two directly effective EU Regulations: Rome I (in respect of contractual obligations) and Rome II (in respect of non-contractual obligations) (together the Rome Regulations). Under the Rome Regulations, Member State Courts respect the express choice of the law of an EU Member State or a third country law in the overwhelming majority of circumstances.

As noted above, the UK remains a member of the EU and, as with all directly applicable EU law, the Rome Regulations will continue to be applied by the English courts until the UK has actually left the EU.

“....IT IS LIKELY THAT ENGLISH JURISDICTION CLAUSES AND ENGLISH COURT JUDGMENTS WOULD CONTINUE TO BE RECOGNISED AND ENFORCED ACROSS MUCH, IF NOT ALL, OF EUROPE”

After this time, EU Member State Courts would continue to apply Rome I and Rome II, and so would continue to recognise and uphold the parties' express choice of law, including English law.

Where Rome I (or the Rome Convention) does not apply, the English courts apply English common law in relation to the parties' choice of governing law. This will also be the case after the UK exits the EU unless the UK decides to retain similar arrangements to the Rome Regulations, whether as a result of agreement with the rEU or of its own volition. The common law supports the concept of party autonomy in relation to choice of law, so that a choice of law governing contractual obligations will be valid so long as it is reasonably certain. The approach of the English courts is untested as regards choice of law in relation to non-contractual obligations, but it is likely that the same approach would be followed.

DISPUTE RESOLUTION CHOICES

(i) Arbitration seated in London or elsewhere

A choice to resolve a dispute by arbitration seated in London (or indeed, seated in any of the other EU Member States) is not affected by the outcome of the referendum and will not be affected by the UK exiting the EU. Arbitration is expressly excluded from the recast Brussels Regulation (which contains the EU regime for jurisdiction, recognition and enforcement).

The UK and all the other EU Member States are parties to the New York Convention 1958. The reciprocal obligations under the New York Convention (in short, to recognise arbitration agreements and to recognise and enforce foreign arbitral awards) are entirely independent of EU membership. Arbitral awards issued by London-seated tribunals are enforceable in any of the 156 states party to the New York Convention, and awards issued by a tribunal seated in any of the other EU Member States will still be enforceable in the UK.

As noted above, until the UK's exit negotiation is finalised, the UK remains bound by EU law, including the recast Brussels Regulation. Unless and until the recast Brussels Regulation is no longer binding on the UK, it remains questionable as to whether the English court can grant an anti-suit injunction in respect of proceedings brought in another EU Member State Court to protect an arbitration agreement. Such relief may be available after the UK leaves the EU unless the UK adopts a law which restricts the use of anti-suit injunctions in relation to proceedings in EU Member State Courts, whether as a result of agreement with the rEU which has the effect of extending the recast Brussels Regulation to the UK, or of its own volition. It is perhaps unlikely that the UK would take the latter approach, given that, unrestricted by the recast Brussels Regulation, the English court has granted anti-suit relief to protect an arbitration agreement in respect of proceedings brought or threatened in a non-Member State Court.

(ii) English court jurisdiction and recognition and enforcement of judgments

Whilst the recast Brussels Regulation governs the relationship between the UK and the rEU with respect to jurisdiction agreements and reciprocal recognition and enforcement of judgments, the impact of a choice of English court jurisdiction will not change. In short, a choice of English court jurisdiction will be upheld throughout the EU, subject to a limited number of exceptions. Moreover, an English court judgment may be recognised and enforced throughout the EU.

After the UK exits the EU, recognition of a choice of English court jurisdiction and recognition and enforcement of English court judgments across the EU may be facilitated by an agreement between the UK and the rEU to replicate the existing rules on jurisdiction and reciprocal recognition and enforcement. There are a number of ways this could be achieved: there could be amendment to the Brussels Regulation; a specific international agreement between the EU and the UK could be reached (as the EU entered into with Denmark, which has a general "opt-out" from EU law in this area); or the UK could join other conventions, such as the Lugano Convention, which allow for similar reciprocal enforcement. Alternatively, the same outcome could be achieved in part by the UK joining the Hague Convention on Choice of Court Agreements (to which the UK is currently bound by virtue of its EU membership), although the Hague Convention does not apply to unilateral jurisdiction clauses (clauses in which one party must bring proceedings in one jurisdiction but the other has a choice of jurisdictions in which to bring proceedings).

“A CHOICE TO RESOLVE A DISPUTE BY ARBITRATION SEATED IN LONDON (OR INDEED, SEATED IN ANY OF THE OTHER EU MEMBER STATES) IS NOT AFFECTED BY THE OUTCOME OF THE REFERENDUM AND WILL NOT BE AFFECTED BY THE UK EXITING THE EU”

It is likely that any arrangement for exit will seek to ensure that there are provisions in place allowing for mutual recognition of jurisdiction agreements and judgments. In the unlikely absence of any such agreement, the recognition and enforcement of English jurisdiction clauses across the EU would be subject to the application by the courts of the rEU of those parts of the recast Brussels Regulation that apply to third states (ie, states outside the EU).

Further, the domestic law in many of the EU Member States makes provision for recognition of jurisdiction agreements and recognition and enforcement of foreign judgments. On this basis, it is likely that English jurisdiction clauses and English court judgments would continue to be recognised and enforced across much, if not all, of Europe.

BREXIT-PROOFING AND DISPUTE RESOLUTION CHOICES

While the end result of any negotiations will likely ensure that a choice of English court jurisdiction is upheld and English judgments are recognised and enforced across Europe, during this period of uncertainty with regard to arrangements for reciprocal recognition and enforcement of jurisdiction clauses and judgments, some commercial parties entering into medium to long term transactions are choosing to include “Brexit-proof” dispute resolution agreements.

Parties are including a “conditional” dispute resolution clause. Under such a clause, the parties agree that the English courts will have jurisdiction unless and until the UK leaves the EU or one of the parties is no longer domiciled within an EU Member State in which case disputes will be resolved by arbitration in London. Alternatively, the clause may provide that a different court will have jurisdiction where the enforcement of the primary choice of court or enforcement of a judgment issued by that court may be affected by any changes to EU membership. Indeed, such clauses are also seen as offering some reassurance in the event that any other country exits the EU.

Alternatively parties could choose to arbitrate their dispute with a London seat given the certainty of the position on arbitration.

For more analysis on the impact of Brexit, please visit our [Brexit hub](#).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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