

August 2016

BREXIT AND DISPUTE RESOLUTION

1. Contract Terms



Introduction

The purpose of this note is not to second guess the shape of any new settlement with the EU, nor to extrapolate the potential implications for litigators of any number of hypothetical scenarios (we are leaving that to the pundits and the academics).

There are, however, disputes related issues which businesses need to be thinking about now, despite the uncertainty as to how things will ultimately pan out. This note looks at the immediate implications for contract terms, from a disputes perspective, whether in the context of reviewing your current contracts or negotiating new ones.

Nothing changes till it changes

Unless, and until, there is a Brexit, EU Regulations (such as those relating to choice of law, jurisdiction, service of proceedings and reciprocal enforcement of judgments) continue to apply. The same, of course, applies to EU Directives implemented by domestic legislation and CJEU case law.

Referendum triggered disputes

Parties may seek to use the referendum result and/or the prospect of Brexit as a way of re-negotiating or avoiding their contractual obligations, relying on, for example, force majeure, material adverse change/event clauses or the doctrine of frustration (see box at end).

- ▶ Consider whether your business is at risk of a counterparty seeking to change or terminate a contract for such reasons
- ▶ Consider whether you could reasonably rely on any such arguments to renegotiate or terminate

Governing law

Is English law still appropriate? Questions have been raised as to what would constitute English law in a post-Brexit world, but unless there are compelling reasons to select another governing law, this is unlikely to require amendment.

- ▶ Keep under review as negotiations progress, with particular reference to extent to which English law does or does not preserve EU law provisions (e.g. Commercial Agents Directive)

Exclusive jurisdiction of English courts

Clauses providing for the exclusive jurisdiction of the English courts are unlikely in practice to be affected by a Brexit, on the assumption that the UK is likely to continue to participate in one of the pan-European jurisdictional regimes under the Brussels Recast Regulation or Lugano Convention, or failing that, the Hague Convention on Choice of Court Agreements. These all require exclusive jurisdiction clauses agreed by parties to be honoured.

However, depending on what regime, if any, the UK signs up to, such protection would not apply to non-exclusive English jurisdiction clauses (see further at Dispute Resolution Clauses, below).

- ▶ When contracting with a party in an EEA state, ensure that English jurisdiction clauses are expressed to be exclusive, rather than non-exclusive (unless there is good reason for the latter).

Enforcement

It is conceivable, though perhaps unlikely, that – following a Brexit – reciprocal recognition and enforcement of judgments will no longer be available as between the UK and the remaining EU member states. However, Brussels Recast is a helpful regime which it should be in the interests of both the UK and the remaining member states to preserve in some form. In the meantime:

- ▶ If you have a judgment of the English Court which needs to be enforced in the EU, enforcement should be progressed sooner rather than later.
- ▶ Consider accelerating any litigation or potential litigation against an EU based defendant, with a view to obtaining judgment and enforcing it prior to any exit from the EU (expediting the litigation also has obvious leverage implications for settlement)

Service of proceedings

If the Service Regulation ceases to apply on a Brexit, and no equivalent provision is agreed, service of proceedings on a defendant outside the jurisdiction will become (even) more complicated.

- ▶ If you are entering into a contract now, you may wish to negotiate the appointment of an agent for service in England.

Dispute resolution clauses

The enforcement of arbitration awards would be unaffected by any new settlement with the EU – the New York Convention would continue to apply. Likewise, a London seated arbitration is likely to remain the venue of choice for most commercial parties.

In the absence of an arbitration provision, an agreement to submit to the exclusive jurisdiction of the English courts should still entitle you to prevent a party in any member state issuing proceedings there.

There may nonetheless be circumstances (e.g. rapid enforcement in a user friendly non-English jurisdiction) where the flexibility of a non-exclusive English jurisdiction provision would make sense.

- ▶ Carefully consider and robustly negotiate the dispute resolution provisions in new (and, to the extent feasible, current) contracts.
- ▶ Arbitration may be your first choice in the absence of other countervailing factors
- ▶ Failing that, and if you do not need the flexibility of non-exclusive English jurisdiction, try to secure exclusive jurisdiction of the English courts

Standard form contracts

You may wish to keep standard form contracts under review as the UK's negotiations progress. Key disputes related provisions to consider:

- ▶ Definitions (e.g. "the EU" to define territorial scope)
- ▶ Governing law
- ▶ Jurisdiction
- ▶ Dispute resolution
- ▶ Service
- ▶ 'Brexit clauses'
- ▶ MAC and force majeure

- ▶ **Brexit clauses:** Some pre-referendum contracts, particularly in relation to commercial real estate, included clauses giving buyers the right to walk away in the event of a Leave vote. An equivalent provision dealing with any exit from the EU may require consideration.
- ▶ **Force majeure:** Arguably, and depending on the provisions and commercial context of the contract in question, a Brexit could constitute a force majeure event, triggering a right to terminate.
- ▶ **Frustration:** If a UK exit from the EU would render performance of the contract impossible or would defeat its common commercial purpose, the doctrine of frustration may come into play, releasing the parties from complying with their contractual obligations.
- ▶ **Material adverse change:** A material adverse change or MAC clause typically permits a party to walk away from a contract in the event of such a change taking place. There has been some suggestion that the outcome of the EU referendum could constitute a MAC, depending on the wording of the provision and what was known to the parties at the time of the contract. However, in most circumstances this is probably going to be a difficult argument to sustain. Whether an exit from the EU would constitute a MAC may be a different matter. Much would depend on what that exit looked like and of course what was in the contemplation of the parties at the time of the contract.

If you have any questions on the above or for further advice, please get in touch with your usual disputes lawyer at Addleshaw Goddard or contact:



Michael Barnett
Divisional Managing Partner
Dispute Resolution

020 7544 5302
 07738 140450
michael.barnett@addleshawgoddard.com

addleshawgoddard.com

Doha, Dubai, Hong Kong, Leeds, London, Manchester, Muscat, Singapore and Tokyo*

*a formal alliance with Hashidate Law Office

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