

September 2016

BREXIT AND DISPUTE RESOLUTION

3. The EU Perspective



Introduction

The purpose of this note is to highlight some of the disputes related issues which EU businesses and their advisers need to be thinking about now, in light of the UK referendum result, despite the uncertainty as to how matters will ultimately pan out.

Clearly, there are any number of hypothetical scenarios with potential implications for cross-border disputes. However, we do not propose to try to second guess the shape of any new settlement between the UK and the EU.

Rather, we are focusing on immediate practical steps which EU businesses may wish to consider taking, including in the context of reviewing current contractual relationships or negotiating new ones.

Nothing changes till it changes

Until there is a Brexit, EU Regulations (such as those relating to choice of law, jurisdiction, service of proceedings and reciprocal enforcement of judgments) of course continue to apply in the UK, as do EU Directives implemented by domestic legislation and CJEU case law.

Referendum triggered disputes

Parties may seek to use the UK referendum result and/or the prospect of a 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).

Dispute resolution clauses

The enforcement of arbitration awards would be unaffected by any new settlement between the UK and 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 jurisdiction) where the flexibility of a non-exclusive English jurisdiction provision would make sense.

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 a Brussels Recast equivalent or the Lugano Convention, or, failing that, the Hague Convention on Choice of Court Agreements. These all, broadly speaking, 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.

Mutual recognition and enforcement of judgments

It is conceivable that, following a Brexit, reciprocal recognition and enforcement of judgments will no longer be available between the UK and the remaining EU member states. However, Brussels Recast is a helpful regime for all commercial parties, which it should therefore be in the interests of both the UK and the remaining member states to preserve in some form.

Service of proceedings

If the Service Regulation ceases to apply on a Brexit, and no equivalent provision is agreed, service of proceedings by an English claimant on an EU defendant will become more complicated, and vice versa.

If you are entering into a contract now with an English counterparty, you may therefore wish to consider providing for the appointment of an agent for service in England.

Finance disputes

Credit downgrades, currency and rate fluctuations, and equity market volatility may give rise to payment obligations under derivative contracts.

- ▶ Make sure that the relevant notices are valid (for example, do not just email notices with respect to trades under ISDA 1992 documents)
- ▶ Be prepared for scrutiny of fulfilment of conditions precedent and subsequent, representations and warranties, financial covenants, defaults and cross defaults, and of the point of sale of those derivatives and any advice given and/or representations made.

A large number of investment and other financial decisions were made in the lead up to the UK referendum vote. Scrutiny may well be given to advice received (or not) and the extent to which it factored in the potential implications of a Leave vote.

- ▶ You may wish to audit your pre-referendum investments to ascertain the quality of advice given and received.

The recent reduction in the Bank of England base rate (and any subsequent reduction) may prompt further mis-selling claims against financial institutions emanating from the sale of interest rate hedging products.

Trade marks

If the UK leaves the EU, it is possible that there will ultimately be a mechanism for converting an EUTM into a UK trade mark, but it may be a while before we know for certain.

- ▶ Given the current uncertainty, if you are currently developing a brand, or preparing for a new product launch, for the UK market, consider registering a UK trade mark as well as an EUTM.
- ▶ For key brands, if you currently only have the protection of an EUTM, consider applying for separate UKTMs now.

Designs

A Registered Community Design (RCD) protects a design across the EU. Both the UK and EU have laws to protect designs which have not been registered. However, the UK unregistered design right protects a narrower class of designs than Community unregistered design right.

- ▶ If your designs are or may be marketed in the UK, consider seeking a UK Registered Design for any designs that are currently only protected by an RCD (provided that those designs have been available for less than 12 months).
- ▶ Seek advice on whether new designs could be protected as a UK Registered Design and/or whether existing designs are still within the 12 month period for registration.

Taking action against infringers

Currently, rights owners can take advantage of the EU-wide regime for enforcing their rights against infringers and the same remedies are available across the EU, including in the UK. Most importantly, businesses can seek an injunction to stop infringement in other EU member states. As with so many other things, we simply cannot predict whether this regime will still be available after the UK leaves the EU.

- ▶ Businesses considering taking action against infringers in the UK may wish to expedite it.

Some relevant English law concepts

- ▶ **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 the UK's 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 a Brexit 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.

How we can help

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:



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