

"BREXIT BITES": DISPUTE RESOLUTION IMPLICATIONS

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This is the tenth in our series of "BrexIt Bites" which focuses on Dispute Resolution

If the UK exits the EU, there could be implications for any dispute resolution process involving English law and English courts. Much will depend on the terms of the UK's exit. Naturally, there has been considerable focus on how judgments of English courts will be enforced by their EU counterparts, and *vice versa*. But any "Brexit" could potentially impact other aspects of the dispute resolution process, too.

CHOICE OF LAW

One area unlikely to be affected, however, is parties' agreements as to the governing law of their contracts in civil and commercial matters. Such choices are likely to continue to be upheld by the English courts. And under the Rome I and Rome II Regulations, a choice of English law will continue to be upheld by EU courts. However parties will need to consider carefully with their advisors if their contract does not have a choice of governing law clause. In those circumstances, different rules may apply in England and the EU.

JURISDICTION

Again, parties' agreements on jurisdiction in civil and commercial matters are likely to continue to be respected both in England and in the EU. And again, absent such an agreement, things may change. Under the Brussels Regulation, for example, an English party to an agreement with an EU party may have certain rights to be sued in England, and certain obligations to sue the EU party in that party's home courts. That would no longer be the case after Brexit, unless the UK and EU agree otherwise, or, to some extent, the UK participates in the separate but similar arrangements under the Lugano Convention (or perhaps even the old Brussels Convention), or the Hague Convention on choice of courts agreements.

SUING IN ENGLAND

If contracts do not have a service of process clause, commencing proceedings before English courts against EU parties after Brexit may involve obtaining the English court's permission to serve those proceedings. Requirements for effecting good service need not necessarily change, assuming English rules remain the same, although the Service Regulation regime will no longer be available, and parties serving in the EU will be substantially dependent on the advice of local lawyers as to the requirements for lawful service.

INTERLOCUTORY AND SUBSTANTIVE PROCEEDINGS

In the absence of key elements of the current regime, English courts may resume issuing anti-suit injunctions in restraint of proceedings brought before EU courts in breach of a jurisdiction agreement. The notorious 'Italian

'torpedo' would be stopped in its tracks. Conversely, if the UK were to end up as party to the Lugano Convention, the limited defences against such torpedos under the Brussels Regulation would not be available.

English rules currently prevent orders granting security for costs against parties in the EU, but may not post-Brexit.

There may be questions as to the application of case law of the Court of Justice of the EU (CJEU), post-Brexit. There should be none, however, regarding the possibility of referring a question to the CJEU for determination. This will end.

'ENFORCEMENT'

The 'passporting' of judgments within the EU is widely regarded as a key achievement of the single European market. What happens post-Brexit would again depend on such arrangements, if any, as may be agreed between the UK and the EU. If English courts are forced to fall back on the common law rules, they will 'enforce' judgments from within the EU in some circumstances - although a judgment creditor will in fact be required to 'sue on the judgment' (that is, issue fresh proceedings), rather than enforce it as the equivalent of a judgment of the English court, as at present.

Enforcement of English judgments within the EU will be a matter for local advice. But very broadly speaking, it will not be as straightforward as it is now.

To preserve for themselves the potential advantages of enforcing in accordance with rules widely-respected around the world, parties may wish to consider arbitration as their chosen dispute resolution forum, rather than court litigation.

OTHER POINTS

Disputes involving consumers, employment, insurance, and certain matters relating to real estate, and the formation of companies, to name a few, are all governed by specific EU regimes at present. These are all yet further areas in which we will have to wait and see.

Particularly in relation to contracts of insurance, UK holders of policies written in other Member States should bear in mind that Brexit may mean they can no longer presume that they will be entitled in certain circumstances to sue their insurer (and be sued by it) in their home courts.

For information about our Brexit Task Force please, [click here](#).

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