What Brexit means for disputes in brief

England as an arbitral seat should be unaffected. There is likely to be some limited disruptive effect on international litigation (though that may not necessarily be detrimental), but the impact will depend on what new treaties can be put in place in respect of jurisdiction and enforcement of judgments. There may be some parties seeking to terminate or renegotiate contracts.

Parties may try to terminate or renegotiate contracts

The fact of the Brexit vote will not ordinarily entitle a party to terminate a contract; the Article 50 process has yet to begin and consequently actual Brexit is some way off. However, a changed commercial environment such as that presented by the Brexit vote may prompt parties to seek to terminate or renegotiate contracts.

If there is a clause in the contract specifically allowing termination in these circumstances, then it would be straightforward to terminate it, but otherwise it will be difficult to terminate early. This may prompt a party to look to the letter of the contract and seek to rely on a breach (by, for example, taking issue with a method of performance that is different from that provided for in the contract but which has nevertheless been previously tolerated). Whether it would be entitled to do so would depend on various factors.

Unless a specified event, it is unlikely that Brexit would trigger any "force majeure" clause. It is also unlikely for the vast majority of contracts that Brexit would be a frustrating event releasing parties from their contractual obligations, even though performance may no longer be commercially viable. Any claim that Brexit justified termination in and of itself would have to establish that Brexit strikes at the root of the contract and be entirely beyond what was contemplated by the parties when they entered into it, and it must render further performance impossible, illegal or make it radically different from what had been contemplated at the time of the contract.

It would be sensible for businesses to review their key contracts in light of the Brexit vote, with the benefit of legal advice as appropriate. As a starting point to any negotiation, a party needs to know where they stand contractually, then they can take steps to protect themselves, even if that is to confirm in writing an agreement to the current method of performance which may be at odds with the contract.

It may affect English exclusive jurisdiction clauses

There may be a greater risk of parallel proceedings in UK and EU countries. Once Brexit occurs, EU countries will not have to recognise exclusive jurisdiction clauses naming England, because under the Recast Brussels Regulation they only have to recognise such clauses if they name EU countries. There are a couple of options for the UK. It could sign up to the same treaty as Norway, Switzerland and Iceland (the 2007 Lugano Convention), which would mean that EU countries would at least have to recognise English exclusive jurisdiction clauses where one of the parties is domiciled in a contracting state. The UK could also sign up to the Hague Convention on the Choice of Court Agreements and, as the EU is already a signatory to this, EU countries would have to uphold English exclusive jurisdiction clauses.

It may become harder to enforce English judgments in the EU and vice versa

This is because the current system of enforcement between EU countries under the Judgments Regulation and other EU legislation is relatively quick and simple, and also includes interim orders such as freezing injunctions. On Brexit, the question whether a judgment is enforceable would depend on the laws of the country in which you wished to enforce.

Again, if the UK was to sign up to the Lugano Convention it would benefit from a very similar system of enforcement and so there would be little practical change. Similarly, if the UK signed up to the Hague Convention on Choice of Court Agreements, an English court judgment in a case where a contract had an English jurisdiction clause would be recognised and enforceable in EU countries, although this would not include interim Court orders.

Alternatively, the UK and the EU could also just agree a new bi-lateral treaty for mutual registration of judgments, as lots of other countries have with us. It would be in the EU's interests to do so to aid enforcement of EU judgements in the UK.

It may become more difficult to sue EU-domiciled parties in England

The current system for serving English proceedings on EU-domiciled parties is quicker and easier than it otherwise would be because the EU Service Regulation means service is largely an administrative exercise and there is no need for a formal request to be made through diplomatic channels. It also means that you do not have to apply to the English courts for permission to serve English proceedings in an EU member state.

On Brexit the UK could use the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters to serve proceedings in EU countries instead, although the process is not quite as quick and simple as the EU Service Regulation.

Arbitration will be unaffected

This is because arbitration in England is not governed by EU legislation but by the English Arbitration Act 1996. Further, enforcement is governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

If you have any questions on these or any other issues relating to disputes and Brexit, do please contact Richard King, Partner and Head of Dispute Resolution, who will be happy to discuss.

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