BREXIT AND ARBITRATION: CAN ENGLISH LAW REMAIN EXCLUSIVE?

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A recent Reuters' survey found 35 per cent of businesses have already changed their contracts so that issues are heard in courts elsewhere. Of those, 51 per cent have chosen for disputes to be heard in EU jurisdictions. All businesses surveyed conducted business internationally.

Following the publication of the White Paper on 12 July 2018, we consider the future jurisdiction of the European Court of Justice (ECJ) under the Chequers plan and contemplate just how real the risk of businesses taking legal disputes elsewhere is.

> "Is the UK's long-standing reputation as a global legal centre genuinely under threat?"

Finding common ground on the future relationship between the UK and the EU is now a priority. Meanwhile, businesses are preparing for a range of scenarios, including a 'hard Brexit' - a scenario where the UK leaves the EU without a deal and without entering an implementation period. Should this occur, an area of concern to UK based international and pan-European businesses is whether to consider moving away from their traditional adherence to exclusivity of English law and jurisdiction within their contractual provisions.

Kennedys

Before turning the arrangements proposed in the White Paper, it is important to first understand what the normal arrangements are for the cross-border settlement of disputes between parties to an international treaty.

The current position is that the rules as to jurisdiction are governed by the Recast Brussels Regulation (which applied to the EU with effect from January 2015) and the rules as to applicable law - which are governed by the Rome I and Rome II Regulations (respectively effective from 2008 and 2009).

The broad principle of both the Brussels Regime and Rome 1 Regulation is to allow the parties to a contract to agree which court should govern any dispute and which law should be applied in determining that dispute.

THE CHEQUERS WHITE PAPER

The White Paper sets out a future trading relationship with the EU. It covers the entire arc of existing and potential interface between the EU and UK, laying the foundation for the future. Divided into four key sections, the White Paper traverses commerce, security, co-operative developmental endeavours and the necessary institutional apparatus.

Specifically, in relation to the control of our UK laws, ECJ rulings will no longer apply to the UK courts but the UK would still pay "due regard" to those rulings. Cases will still be referred to the ECJ as the interpreter of EU rules, but "cannot resolve disputes between the two". The government also proposes a "joint institutional" framework be established to interpret UK-EU agreements.

STICK OR TWIST?

It remains unclear how this relationship will work in practice. Indeed, the Reuters' survey found that 39 per cent of businesses surveyed say they intend to review contracts in the absence of clarity over the future legal regime by March 2019.

Are those businesses right in their views? Are those who have made changes to contracts overreacting?

Commercial parties choose the English courts for good reason and despite the changes that will follow Brexit, those reasons will remain. England has a world-class legal system, which has a pre-eminent reputation in terms of experience, expertise and integrity. Further, the UK has a highly qualified and independent apolitical judiciary whose capability and intelligence is forged, honed and proven on the coalface in the crucible of combative litigation.

The requirements for clear mutual benefit and in the context of Brexit are clear: (i) commonality of rules to determine which law and which jurisdiction apply (ii) an agreed mechanism for interpreting the rules which is not invasive of sovereignty and (iii) reciprocal automatic recognition and enforcement of judgments. Arguably, this is exactly what the White Paper identifies and provides for.

DISPUTE RESOLUTION – FINDING A SOLUTION

As heralded in the White Paper's stirring introduction to the proposed Institutional arrangements:

> "These arrangements should reflect that the UK will no longer be a member of the EU. The EU institutions, namely the Court of Justice of the European Union (CJEU), will no longer have the power to make laws for the UK and the principles of direct effect and the supremacy of EU law will no longer apply in the UK."

Presently, interpretation of governing rules is the preserve of the ECJ. Whilst one of the UK's 'red-lines' is to end the jurisdiction of the ECJ in the UK courts, we believe the practical reality of the (political) desire to regain sovereignty will in fact result in 'business as usual'.

The UK proposes an association agreement overseen by a joint institutional framework. The framework would have a 'governing body' (a political forum) to set the direction for the future relationship, and a joint committee to manage the technical aspects of implementation, including taking into account changes in EU and UK legislation.

This framework would also include means for resolving disputes. This would take place through the joint committee and, if necessary through an independent arbitration panel. The EU has already indicated that such a mechanism - in which an

arbitration tribunal hears cases but can refer them to the ECJ if they hang on questions of EU law, is a plausible solution for the future UK-EU partnership.

For the ECJ to maintain a role in determining EU law-related issues is in reality a pragmatic delegation of tasks to facilitate business as usual.

Interpretation is not making laws; laws are made by the executive and the legislature. Delegation is not a surrender of jurisdiction or sovereignty.

COMMENT

Both the UK and the EU need to secure their new relationship and quickly. Such clarity is required for legal certainty: businesses from John O'Groats to Gavdos cannot plan based on political agreements reached late in the day.

Whilst the White Paper appears to have taken mutual recognition off the negotiating table in terms of access to EU insurance markets, we remain confident that mutuality is firmly in the EU's interests when it comes to choice of law. Given the UK's de facto deep integration within the Euro eco-system, there is a clear need to maintain the commercial arteries for the benefit of all EU and UK citizens.

We have every reason to believe that business common sense will ultimately prevail over narrow political posturing, bringing Anglo-Euro relations to a fresh and vibrant understanding. Accordingly there is no sensible reason why post-Brexit, the UK and the EU cannot agree to continue to be reciprocally bound by the Recast Brussels Regulation and the Rome Regulations.

> "It seems to us that whatever the outcome of Brexit – be it crash or soft landing - the jurisdictional situation is likely to remain the same for the foreseeable future (or perhaps indefinitely), and the applicable laws will also broadly stay the same."

FURTHER INFORMATION

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KEY CONTACTS

Ian Mendelsohn
Senior Associate
t +44 161 817 2839
ian.mendelsohn@kennedyslaw.com

John Colvin
Senior Associate
t +44 161 817 2812
john.colvin@kennedyslaw.com

Deborah Newberry
Head of Corporate and Public Affairs
t +44 20 7667 9508
deborah.newberry@kennedyslaw.com