



Countdown to Brexit Series

What should you be doing now?

The eighth in our series of Countdown to Brexit -
Dispelling the dispute resolution myths of a no-deal
Brexit

WALKER
MORRIS



The lack of clarity concerning Brexit negotiations understandably continues to be a cause for concern in many respects, including for lawyers and their clients. Commercial parties historically trusting of the integrity and global recognition of English law and jurisdiction may be concerned that a possible no deal could impact this being the jurisdiction of choice for resolving (often complex) international disputes.

In this briefing, Commercial Dispute Resolution experts Malcolm Simpson and Tim Pickworth attempt to dispel certain myths surrounding no deal from a dispute resolution perspective, and clarify what challenges may be faced by parties litigating across borders or negotiating commercial contracts. Malcolm and Tim explain why English jurisdiction and governing law and / or London-seated arbitration will remain attractive to well-advised contracting parties whatever the outcome of Brexit.

The myths of no deal

If we leave the EU without a deal, various existing judicial co-operation arrangements will abruptly end on 'exit day'. As a result, legitimate concerns have arisen in a number of areas, including in relation to:

- the service of English proceedings on parties domiciled in remaining EU member states
- the nationality of the courts that will hear cross border disputes and the process of establishing this (jurisdiction)
- the law that will apply to cross border disputes (governing law)
- the enforceability of English judgments within the EU (recognition and enforcement).

While no deal would in some respects change the legal landscape post-Brexit, the challenges posed are in no way insurmountable to parties who are properly advised when negotiating contracts and/or litigating disputes.



The reality of no deal and how to face it

Service of English proceedings. Currently, if the English court has jurisdiction over a claim, the European regime provides for proceedings to be served on defendants outside the jurisdiction without obtaining the court's permission. In the event of no deal, parties could serve proceedings through a designated central authority, which will transmit and receive requests for service. This and various other routes are available under a Convention to which the UK is a contracting party in its own right¹. While the parties would still be able to serve proceedings, there are concerns that this process is likely to be less efficient and may increase cost compared with the current position.

One alternative in anticipation of this issue is for parties expressly to authorise service by way of a process agent located at an address in England and Wales, to avoid any issues associated with service out of the jurisdiction.

¹ Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters

Jurisdiction

There has been some suggestion that English jurisdiction clauses will face new challenges in the courts of EU member states. That could include, in particular, challenges to establish the jurisdiction of those EU states.

The reality is that the starting point will remain that a clearly drafted exclusive jurisdiction clause, together with any resulting judgment consistent with that clause, will still in the vast majority of situations be valid and enforceable across the EU. This is because of a Convention to which the UK will accede in its own right¹, albeit it is important to note that this assurance is limited to exclusive jurisdiction clauses only, as opposed to non-exclusive or asymmetric jurisdiction clauses². Recognition and enforcement of non-exclusive or asymmetric jurisdiction clauses will become an issue of local law and practice, and it is not unreasonable to expect an increase in jurisdictional challenges in respect of those provisions. As a practical measure, it may well be worth considering in advance whether the jurisdiction provisions in commercially critical agreements are susceptible to challenges in this way.

Applying English common law, and in cases where the Hague Convention applies, English courts will generally uphold jurisdiction agreements and enforce resulting judgments.

Where the Hague Convention does not apply, however, or where parties to the proceedings in question are EU domiciled, a no-deal Brexit could mean that the English courts would not have power to stay proceedings in their favour notwithstanding an exclusive jurisdiction clause to that effect, unless the English proceedings had been commenced before any related EU proceedings. For further information and advice on this issue (and the possible resulting 'race' to be the first to issue proceedings to gain a jurisdictional advantage), please see our [recent briefing](#).

Governing law

Brexit-related legislation has been put in place to ensure that current rules for determining which laws govern parties' contractual and non-contractual disputes will continue to function effectively in the UK post-Brexit. The position will remain more or less the same. Governing law clauses will largely continue to be upheld by both English courts and EU member state courts. Where the parties have chosen English law to govern their agreements and any disputes arising from them, EU member state courts should still respect this choice.



¹ Hague Convention on Choice of Court Agreements 2005

² Non-exclusive jurisdiction clauses enable either party to bring proceedings against the other, either in the courts of the chosen country, or in the courts of any other country which has jurisdiction over the dispute under its own jurisdictional rules. Alternatively, asymmetric jurisdiction clauses are drafted for the benefit of one party only, for example, it is possible to conclude a jurisdiction clause which permits party A to sue party B in any competent jurisdiction, but restricts party B to bringing proceedings in only one jurisdiction.

Recognition and enforcement of judgments

As it stands, judgments from the court of one EU member state are automatically recognised and enforceable in the courts of any other EU member state. Without a deal, enforceability would become an issue of local law.

However, as mentioned above, in the majority of cases an exclusive jurisdiction clause is likely to protect the enforceability of any resulting judgment. Where an agreement does not contain an exclusive jurisdiction clause, parties will need to take local law advice.

With or without EU

In addition to the usual credentials of English law and its courts, which are not the focus of this note, London's popularity as an established and well-respected arbitration seat is also likely to be undiminished. The judiciary is very supportive of arbitration (and indeed of alternative dispute resolution options generally), and of course the UK's highly skilled and experienced legal counsel and arbitration community will remain. Crucially, the issues of recognition and enforcement mentioned above do not arise in relation to arbitral awards, since the UK is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is unaffected by Brexit. If Brexit is to have any impact at all on London-seated arbitration, it should only be to increase its attractiveness to commercial contracting parties

How Walker Morris can help

Although the challenges raised by a no deal Brexit can appear daunting, Walker Morris has experience of advising businesses on the issues raised in this briefing and can help you navigate the new legal landscape with confidence. If you have any queries or require any assistance in relation to the management of the risks of a no deal, or if you would like advice on the possibilities of resolving a dispute via the UK courts or arbitration, please do not hesitate to contact Malcolm or Tim, who will be very happy to help.



Contact



Malcolm Simpson, Partner
Commercial Dispute Resolution
+44 (0)113 283 4064
malcolm.simpson@walkermorris.co.uk



Tim Pickworth, Director
Commercial Dispute Resolution
+44 (0)113 399 1819
tim.pickworth@walkermorris.co.uk

