SQUIRE PATTON BOGGS

Brexit and Dispute Resolution

On Thursday 23 June 2016, 51.9% of the electorate of the UK voted to leave the European Union (EU).

That vote was just a vote. By itself, it does not alter the legal relationships of the UK, Europe and the rest of the world.

First of all, the formal process of termination must commence pursuant to Article 50 of the Treaty on European Union (TEU) with a termination notice from the UK government to be given in accordance with the constitutional requirements prevailing in the UK, which will start a two-year period (Sunset Period) of negotiation on the details of the withdrawal (Withdrawal Agreement). Such withdrawal notice will, with some likelihood, only be given by the UK government after it has obtained the approval therefore by the UK Parliament.

It is likely that alongside of the negotiation of the Withdrawal Agreement, the UK and the EU will negotiate one or more additional agreements in respect of the details of their future relationship (Future Relationship Agreements).

If the Sunset Period is not extended by unanimous agreement of all Member States of the EU and if no Withdrawal Agreement is entered into within such two years, then the UK will automatically cease to be a Member State of the EU (Unregulated Status).

At this point, there is no certainty as to when the UK government will issue the notice of termination of its EU membership. Therefore, there is no certainty as to when the Sunset Period will commence, meaning that the actual date of Brexit remains uncertain.

Accordingly, it is likely that until September 2018 at the earliest, there will continue to be uncertainty, not only in relation to the economic consequences of the Brexit but also in respect of the future regulation and legal rules for all sectors and industries.

The UK legal system has been subject to EU law for more than 40 years and, as a result, the steps which will need to be taken to "unstitch" UK law from EU law are unclear and complex and are not only driven by the negotiations between the UK and the EU, but also by simple domestic law rules and international treaties. Many questions concerning the future of this relationship, be they economic, financial, legal or social, remain unanswered.

Once Brexit has officially been implemented following the appropriate procedure described above, the European Court of Justice (ECJ) in Luxembourg will no longer have jurisdiction over the UK. Therefore, even if the UK Parliament were to allow that a significant portion of current EU law remain in force in the UK, the UK courts would not be bound by any of the ECJ's decisions. That being said, the general principles of English contract law such as interpretation and breach should remain untouched.

How will Brexit then affect dispute resolution? What uncertainties does it create? This memo examines the threats and uncertainties that Brexit may create on the parties' choice of governing law and jurisdiction, as well as its impact on the recognition and enforcement of British judgments in the EU and vice versa. This article also considers how Brexit may affect more specific legal areas such as cartel damages, financial services or intellectual property litigation, mediation and arbitration.

The Impact of Brexit on the Parties' Choice of Governing Law

Impact on Substantive UK Law

When it comes to choosing an applicable law for a cross-border transaction, English law has been rather attractive. A January 2016 survey conducted by the Singapore Academy of Law revealed that 48% of the 500 lawyers interviewed used English law for cross-border transactions.

Although the core of substantive contract law should remain intact, Brexit may create uncertainties as to the content of specific areas of English law that originated from EU directives, such as defective products liability, cosmetics and consumer protection in general. However, and in an effort to preserve trade between the UK and the EU, the UK is unlikely to implement major changes in this respect.

Parties' Freedom is Preserved

Parties to international transactions, including parties based in the EU, will remain free to choose English law as the governing law. The EU regulations on the applicable law to contractual obligations respect the parties' choice – article 3 of the Rome 1 Regulation on "Freedom of choice" provides that "contract shall be governed by the law chosen by the parties", even if it is not the law of a Member State of the EU. Since European judges are bound by this provision, the parties will remain free to choose English law to govern their contracts, and there is no reason to fear that European judges could disregard their choice. However, it should be noted that any choice of English law as the law governing a contract to which a person situated within the EU is a party means that the law of a so-called Third Country is chosen, because the UK would, after the Brexit, be a Third Country, which may have a number of resulting legal consequences and give rise to further requirements, in particular in the financial services industry and other regulated industries, in particular in the field of consumer contracts.

Jurisdiction Clauses

Prima facie, the traditional debate on forum shopping and the debate concerning the attractiveness or unattractiveness of British Courts as opposed to Continental Courts (French, German, Spanish, etc.) remains the same (i.e. comparative assessment of cost, predictability, quality of justice, speed, disclosure requirements, etc.).

Because European judges will have to respect the parties' choice of governing law and jurisdiction, English jurisdiction clauses should not need revising. However, once the UK has left the EU, it can be expected that execution of UK judgments in the EU will become more time consuming and costly so that international companies may prefer either arbitration or an exclusive jurisdiction in a EU Member State as an alternative to a dispute resolution venue in the UK.

Recognition and Enforcement of Judgments, Service of Proceedings Abroad

General

The EU currently offers facilitated procedures to ensure a British decision is enforceable within the EU territory. Following Brexit, executing and enforcing an EU judgment in the UK, and a British judgment in the EU, will likely require further steps to be taken.

The impact of a more complex procedure might be reduced if the UK adopted the 2007 Lugano Convention, which was signed by the EU, because such could provide a similar environment as the Brussels 1 regulation, namely that "a judgment given in a State bound by this Convention shall be recognized by the other States bound by this Convention without any special procedure being required." (Article 33, Lugano Convention)

However, it is at least arguable that the UK may have to accede to the European Free Trade Association, of which it was an original founder state prior to joining the EU, in order to be allowed to sign the Lugano Convention in its own right.

Alternatively, the 2005 Hague Convention on Choice of Court Agreements (ratified by the EU, Singapore and Mexico but only signed by the US) could also provide some predictability for the enforcement of British judgments in the EU.

However, compared to the current status quo each of these alternatives will increase the costs of enforcing a UK judgment in the EU.

Brexit and Delaying Tactics

Another issue raised by the inapplicability of the recast Brussels 1 in the UK is that of "torpedoes" and other delaying techniques in cross-border litigation. Article 29 of Brussels 1 Recast (which replaced article 27 of Brussels 1) tried to address this problem by allowing a judge of a member state chosen in an *exclusive jurisdiction* clause to proceed with the trial even though proceedings have already begun before another judge. Because Brussels 1 Recast will no longer be applicable in the UK after Brexit, the UK will no longer benefit from this protection.

Anti-suit injunctions, by which the competent judge or arbitrator forbids a party to bring the same claim before another judge or enjoins the party to stop the proceeding begun before another judge, were strictly forbidden by the ECJ. In fact, the ECJ decided in its 2004 *Turner* decision to forbid such injunctions because they violated the principle of mutual trust. As Brexit will drag the UK out of the scope of competence of the ECJ, British judges will no longer be bound by the ECJ's ban of anti-suit injunctions. Being able to use anti-suit injunctions in the UK may render English jurisdiction clauses at first sight rather appealing because a party found to contravene an anti-suit injunction will be held in contempt of court. However, it appears rather unlikely that any EU country would enforce in its territory a decision that directly contravenes the ECJ's point of view.

How to Sue Abroad – The Impact of Brexit on Service

EU Regulation No 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents) is currently applicable in the 28 Member States and provides in its Article 4(1) that "Judicial documents shall be transmitted directly and as soon as possible between the agencies designated pursuant to Article 2".

Once Brexit is effective, service of proceedings between the EU and the UK will very likely be delayed.

Specific Dispute Resolution Areas

Cartel Damages Litigation

Over the last years, European cartel damages litigation and its huge amounts in controversy has concentrated mainly in Germany, the Netherlands and the UK. These three countries offered a particularly attractive setting for plaintiffs who could, for example, sue all members of a price-fixing cartel in one single procedure at one single venue based upon joint and several liability of the cartel members. Plaintiffs in all three jurisdictions profited from a legal setting such that, after a fine by the EU Commission has become binding, the victims of the cartel were exempted from proving anticompetitive behaviour of the cartel members in the cartel damages lawsuit. Once the UK leaves the EU, this benefit will disappear for plaintiffs suing in the UK, so that it can be expected that after, Brexit European cartel damages litigation will concentrate in Germany and the Netherlands.

Financial Services

There is a genuine interest of the EU to see mandatory EU law applied in disputes related to the Internal Market by courts operating within its regulatory framework. In this regard, Article 46 (6) of the EU Regulation EU No 600/2014 of 15 May 2014 on markets in financial instruments provides that "Third-country firms providing services or performing activities in accordance with this Article shall, before providing any service or performing any activity in relation to a client established in the Union, offer to submit any disputes relating to those services or activities to the jurisdiction of a court or arbitral tribunal in a Member State".

Hence, jurisdiction and arbitration clauses providing for the jurisdiction of English courts or London as a seat of arbitration cannot be imposed upon the other party by the UK firm. In the absence of a choice, disputes are likely to be heard before the courts of Member States rather than the English courts and respective arbitration clauses should be drafted such that they comply with the requirement of an "arbitral tribunal in a Member State".

Intellectual Property

Although the UK strongly supported the project of Unified Patent Court (UPC) that should come into force next year, the country will not be part of it, unless it manages to conclude a bilateral agreement with the EU on the matter. This could have an impact on the attractiveness of English patent law, as it will have to face the competition of a unified European patent law and court. In practice, this means that claimants may have to bring their claims before both an English judge and the UPC.

Avoiding the Uncertainties of Litigation: A Growing Attraction of ADR?

The uncertainty around which rules are applicable to litigation could be a factor triggering a wider recourse to ADR for parties.

Today, the UK is still subject to EU laws, among them the EU Mediation Directive 2008/52/EC of 21 May 2008, which was partially implemented in the UK and resulted in a new rule 78.24 in the Civil Procedure Rules. This new rule allows mediation settlement enforcement orders to be granted by a court. In accordance with the EU Mediation Directive, mediation settlement agreements are recognized and enforced in one Member State if made in another Member State.

However, in view of an uncertain future, parties whose case is being heard before the courts today may be tempted to turn to mediation now instead of waiting for a court decision which may only be handed down after the two year Brexit period and which future status is therefore unknown.

This may also be beneficial to arbitration as London is already an attractive place for arbitration and Brexit is not seen by most of practitioners as a potential threat to this.

Arbitration and Brexit

Arbitration Will Become Even More Popular

The aforementioned uncertainties in respect of court litigation in the UK and enforcement of British judgments in the EU will likely lead to a renewed interest in arbitration because in times of uncertainty, arbitration is the safest bet.

Enforcement of Awards Remains Efficient

Enforcement of UK commercial arbitration decisions in the EU will not be affected by Brexit because this question falls under the scope of the 1958 New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Investment Treaty Arbitration

A time of upheaval and changes in the UK regulatory or legal system may also invite claims against the UK by investors under its bilateral and multilateral investment treaties, based, for example, on their expectations regarding the stability of the British regulatory system into which they invested.

Additional Information

Please check our Brexit Legal blog: http://www.brexitlegal.com

We are setting up a series of client briefings to discuss the consequences of Brexit in more detail and will communicate relevant dates and details shortly. In the meantime, if you have specific concerns arising from the Brexit vote or otherwise, please contact your usual Squire Patton Boggs contact or the contact below.

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