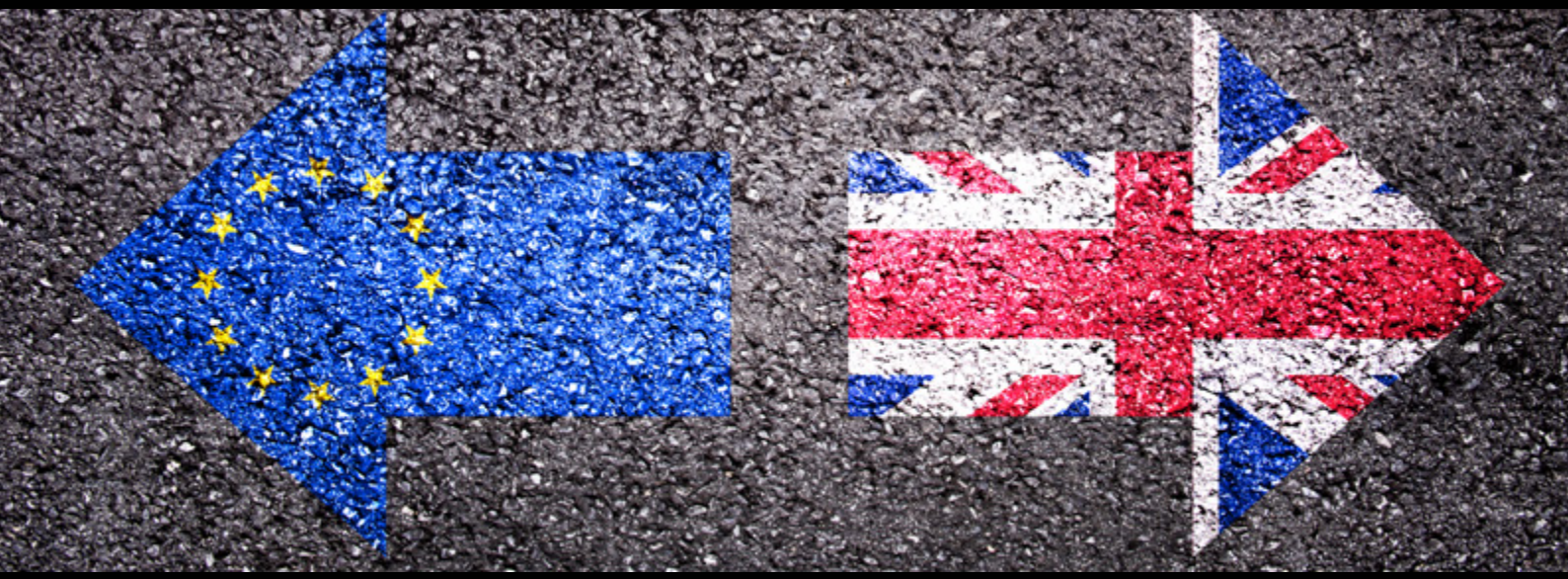

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Brexit:

from a disputes perspective

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The dust is yet to settle on the UK's decision to leave the EU but already certain key topics for consideration over the forth-coming months are beginning to emerge. Many of these will be of interest to foreign companies with a presence in the EU or who trade with the EU. For example, earlier this year, the UK's business minister[1] stated that 61% of UK manufacturing businesses that employ over 500 are now owned by foreign companies. In addition, it is claimed that more companies locate their European headquarters in the UK than anywhere else in Europe.[2] This is for a number of related reasons chief amongst which is the fact that the UK has been seen as a gateway to the EU as well as a way of ensuring general compliance via a common regulatory framework in areas such as insurance, banking and life sciences.

However, the UK's decision to leave the EU has created concern as to whether it may at some point be necessary for EU engaged businesses to relocate to another EU Member State such as has been discussed in the case of some banks and insurers moving to Ireland in order to maintain EU operations in a unified regulatory environment.

Access to EU markets is obviously a key consideration – both in terms of operations as well as the distribution and supply of products and services – but this applies equally in terms of access to the UK from the EU. According to recent statistics[3], the UK imports more in goods and services from the EU (GBP290 billion) than it exports (GBP220 billion) – a trade deficit of approximately GBP70 billion. Nevertheless, the UK figure still represents almost half (44%) of all UK exports in goods and services and therefore, even though it is estimated that non-EU world demand will continue to grow and further dominate the balance in trade, the UK's relationship with the EU remains important.

As for how this may be affected by Brexit, the prevailing view is that it is too early to assess the potential long term effects of the UK's decision to leave the EU. Aspiring party leaders are either still jostling for position or, in the case of the new government, still finding its feet. The political and trade negotiations are yet to begin and time will in any event be needed to gauge the response of global business markets to the resulting trade agreements. While the immediate aftermath of the vote might have seen the markets in turmoil, property funds halting redemptions and sterling plunge, a degree of stability has already returned and some economic forecasters are predicting a recovery in the UK's position. In so far as the validity and application of all existing EU laws and regulations is concerned, the result of the referendum has had no immediate legal impact. Nevertheless, once the Brexit legislative machinery is triggered, the prospect of prolonged uncertain political times across both the UK and EU is likely to create a fertile environment for further market volatility. How the various political powers within the EU respond to these challenges remains to be seen but there is a concern that events could lead to a more protectionist approach.

There are therefore a number of considerations and potential risks that foreign companies may want to keep in mind when debating what if any steps may need to be taken in the future – these include issues concerning the possible imposition of trade tariffs and restrictions, competition, state aid, intellectual property, transport as well as environmental, banking, insurance and other related regulatory issues. There is also no doubt that the reality of Brexit will lead to a quite different economic and commercial environment within both the UK and the EU causing parties to revisit their contractual arrangements and, potentially, assess whether those that become unprofitable, can be 'exited' or terminated on the grounds of Brexit. From a disputes perspective, Brexit therefore raises a number of overlapping issues of potential relevance to foreign parties, in particular those with EU based operations and offices – these include, in summary form:

1. Exiting an agreement

In each case, the ability to terminate a contract will turn upon the wording of the particular contract in question; either the terms of the contract will entitle a party to terminate on notice or they will not. Where the contract terms do not assist, there may be scope to apply provisions dealing with market disruption, material adverse change, change of law or *force majeure* events. Alternatively, it may be possible to argue that the contract has (or will) become frustrated or illegal, for example, where its performance depends upon the continued application of EU law.

2. Jurisdiction and 'torpedo actions'

The Recast Brussels Regulation (1215/2012) currently applies to questions of which EU court should have jurisdiction over a particular dispute. (It also provides for mutual recognition and enforcement of EU Member State judgments.) Where there is an exclusive jurisdiction clause in favour of one EU Member State's court, that court will determine whether it has jurisdiction to hear a dispute while any proceedings issued in other EU Member States concerning the same matter must in the meantime be stayed. However, where there is no agreement on exclusive jurisdiction, the court that is first seized of the matter will determine whether it has jurisdiction (thereby sometimes triggering 'a race to court').

After Brexit, the Recast Brussels Regulation will no longer apply in the UK and questions of jurisdiction will depend on the type of arrangement negotiated by the UK. For example, the UK could seek to negotiate an agreement that the current Brussels regime continues to apply or, it could either: (i) let the Recast Brussels Regulation fall away relying instead on the original 1968 Brussels Convention (as amended)[4]; or (ii) accede to the Lugano Convention from 2007[5]. Neither option is ideal in that although both the Brussels and Lugano Conventions are largely similar to the Recast Brussels Regulation, importantly, they do not afford precedence to parties' agreements on exclusive jurisdiction and so the matter will again be determined by the court first seized. This opens up the possibility that we will see a return to what are called 'torpedo actions' – i.e. parallel court proceedings commenced primarily in order to create delay. The risk of such actions became less of an issue with the introduction of the Recast Brussels Regulation. However, with Brexit, we could see a re-emergence of parties commencing strategic (torpedo style) proceedings in slow jurisdictions without there being any real expectation of maintaining jurisdiction.

1. Full Fact Charity figures for 2015
2. Baroness Neville-Rolfe
3. Government Trade & Industry website
4. Reverting to the original 1968 Brussels Convention without an associated agreement with the existing EU Member States would present certain practical complications including that currently the original Convention only remains applicable to Aruba and French overseas territories (having otherwise been superseded by the Brussels Regulations). As such, while it is entirely possible that an English court may be persuaded to apply the original Convention when faced with a request to enforce a judgment handed down by an EU Member State's court, it is not so clear that, for example, a French court would be persuaded to adopt the same approach, particularly as the Convention was designed to facilitate the enforcement of judgments between the member states. In addition, 13 EU Member States only joined the EU from 2004 onwards and therefore were never parties to the original Convention.
5. The UK is currently only a party to the Lugano Convention through its membership of the EU and would therefore have to apply to become a party to the Convention in its own right – a potentially challenging process in that it would require the agreement of the other EU member states.

If this happens, we may also see a return to parties applying for anti-suit injunctions from the English courts aimed at stopping such torpedo actions. Previously, the English courts' use of anti-suit injunctions to halt tactical legal proceedings of this type was negated by the ECJ's (European Court of Justice) decisions in *Turner -v- Grovit*[6] and *West Tankers*[7] and the application of the EU's regime on issues of jurisdiction. However, with Brexit, the path may be cleared for the English courts to revisit the use of such remedies.

A further alternative is that the UK could seek to ratify the 2005 Hague Convention on Choice of Court Agreements. This does give effect to exclusive jurisdiction agreements[8] and came into effect in the EU (excluding Denmark) and Mexico in 2015. Singapore ratified the Hague Convention on 2 June 2016 (to have effect from 1 October 2016 onwards) and it is thought that the US, a signatory, may follow suit in the not too distant future.

3. Contractual choice of law

The parties' choice of law is currently catered for by the Rome I and Rome II Regulations (dealing with contractual and non-contractual issues) such that Member States must respect parties' choices of law. This will continue in the EU after Brexit to the extent that even where English law is chosen that choice must be respected by EU Member States. However, complications could arise in the case of non-contractual obligations or situations where no contract exists. Depending on whether the UK decides to put in place legislation similar in content to the Rome Regulations (but with the English courts replacing the ECJ on questions of interpretation) or whether it drafts something entirely new or reverts to pre-EU UK legislation, there may well be issues both with: (i) a divergence in approaches taken over time by the ECJ and the English courts; as well as (ii) uncertainty in EU related tort cases where one system applies the law of the place where the events giving rise to the tort occurred (the EU) while the other applies the law of the place where the harm was suffered (the UK). The latter approach is arguably to be welcomed as it would result in the law of the place having *the* closest factual connection to the tort governing the claim.

4.Enforcement

The recognition and enforcement of UK judgments will, as with questions of jurisdiction, turn upon whatever new arrangement (if any) is agreed between the UK and the EU. Leaving to one side the uncertainty surrounding the practical relevance of the original Brussels Convention, if the UK accedes to either the Lugano or Hague Conventions, or negotiates a series of individual treaties, recognition and enforcement should not present an issue. However, until that happens or if it does not happen (and the UK does not enter any new agreement) then the post-Brexit enforcement of English court judgments will no longer be an automatic process in the EU but will vary according to the law of the enforcing state in each case. This will take time and potentially significantly more than with the current system. The same will apply in reverse in the UK where the application of common law rules will result in a slower more costly exercise whereby a successful litigant may need to sue on the foreign judgment in the same way as one would with a claim for a debt. This is already the position with respect to judgments obtained in, for example, the US and China and it can be conducted quickly by way of the courts' summary procedures. However, in addition to allegations of fraud, there are procedural challenges which may be raised and the potential for a lengthier process than seen at present with the EU regime.

5. Service of proceedings

While currently unnecessary to do so, when the UK leaves the EU and subject to whether it enters into the Lugano Convention, it will become necessary for parties to apply to court for permission to serve proceedings on their counterparty in any EU Member State. The associated EU service regulations will no longer apply and so the process of serving an opponent will become slower and more expensive.

Consequently, parties that are currently negotiating contracts with an EU based partner and who want to provide for English jurisdiction are advised to ensure that their counterparty is required to appoint a process agent in the UK.

6.Arbitration

It is not expected that arbitration in London will be affected significantly in the short term. Arbitration is already specifically excluded from the existing EU legislative regime. It is governed instead by the Arbitration Act 1996 and has benefitted greatly from the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The UK's departure from the EU will therefore not have any impact in this regard and English arbitral awards will remain enforceable under the New York Convention in precisely the same way as they are now. When parties choose to arbitrate in London, they tend to do so because of their familiarity with and confidence in the legal system, its predictability and reliability, the plentiful availability of experts and practitioners, as well as the generally pro-arbitration stance of the English courts and the commercial *nous* of its judges.

In fact, what could happen is that the attraction of London as a seat for international arbitration could grow stronger if, as discussed above, there are difficulties with the enforcement of judgements caused by the UK deciding against acceding to the Lugano or Hague Conventions. The New York Convention already gives arbitration an advantage in this regard but it may become even more pronounced if the UK does not put in place a suitable arrangement to make-up for the loss of the existing Recast Brussels Regulation. It may also be the case that if jurisdiction battles again become features of the legal landscape, parties may welcome having the option of obtaining an anti-suit injunction to restrain foreign proceedings commenced in contravention of an agreement to arbitrate. If the English courts are able to do this, it may well increase the popularity of England as a seat and venue for arbitration in contrast to the remaining EU Member States.

Conclusion

While the UK government will need to determine which EU originated legislation should be retained or revoked, London's popularity as an avenue for arbitration is unlikely to see much material change. However, the continuing use of London's courts by international parties is likely to depend very much upon the nature of the post-Brexit arrangements that are agreed.

So far as foreign companies are concerned, clearly, most would prefer a position of stability rather than a collection of unknowns. Contingency plans should be considered in the event that some counterparties may seek to try and take advantage of the changed circumstances to renegotiate or exit existing agreements.

To finish on a brighter note, with sterling continuing to fall, the UK has already become a cheaper place in which to resolve disputes...

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6 *Turner v Grovit* [2004] ECR I-03565 (27 April 2004)
7 *Allianz SpA v West Tankers Inc* [2009] 1 All E.R. (Comm) 435
8 But only exclusive jurisdiction agreements and is therefore not comprehensive

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