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Contending with Brexit Uncertainties – Governing Law Clauses

by **Jennifer McGuire**

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There has been plenty of discussion about the impact of Brexit on contracts but not so much on its specific drafting implications.

Without knowing at this stage exactly what Brexit entails, it is difficult to set out precise terms in a contract to deal with its effects.

But life and business continues, and parties to contracts are developing ways to anticipate Brexit and provide themselves with the certainty they require to run their business.

In our recent experience we are seeing that parties to contracts are seeking to reduce the risks associated with Brexit by providing alternative approaches within a choice of forum clause, such as we have set out in a sample clause below.

Governing Law Clauses

Contracts should specify the applicable law and the relevant jurisdiction or forum for disputes. These provisions typically go together and designate the procedure that will apply if a dispute arises that ends up before the courts.

Choice of law

The governing law should:

- be relevant to the contract and the parties to the contract;
- be a law which the parties received advice on during the course of the drafting and negotiation of the contract and with which they have some familiarity and understanding;
- be enforceable;
- be that of a relatively stable country with a legal system that is predictable, which is known for and experienced in commercial proceedings and which allows access to a mature legal services market; and
- facilitates the language of the contract and can be applied correctly by the chosen forum.

Jurisdiction or Forum

There may be many forum options to choose from, but it is crucial that the option chosen can provide an enforceable decision resolving the dispute. The venue should be reasonably accessible to the parties involved without creating significant additional costs and complexities such as translators and unfamiliar

litigation systems.

Choice of English Law

A choice of English law in a contract will refer to a different body of law following Brexit, than English law as it exists before Brexit. In addition to any EU legislation that is repealed and new legislation to be implemented as a result of Brexit, English law after Brexit will no longer be subject to EU law and is likely to diverge over time from EU law. Concerned parties should make appropriate provision in their contracts that take this into account.

However, the choice of English law in relation to contractual matters is likely to remain enforceable, both in EU member states under the Rome I Regulation, and in England under English common law. This is less clear in relation to non-contractual matters presently dealt with under the Rome II Regulation.

Choice of Forum and Sample Brexit Clause

Given the level of uncertainty about what Brexit may entail, there is some concern that judgments of UK courts may not be as easily enforceable in international courts after Brexit. The following is an example of forum selection language addressing the potential impact of Brexit:

Each party irrevocably agrees to submit to the exclusive jurisdiction of the courts of England and Wales in relation to any claim or matter arising under or in connection with this agreement or relating to any non-contractual obligations arising from or in connection with this agreement provided that if a judgment of the courts of England and Wales would not be enforceable in a member state of the European Union to the same extent as a judgment of a court of a member state of the European Union pursuant to Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), as amended or replaced, the parties agree to submit to the exclusive jurisdiction of the courts of Ireland in relation to such claims and matters.

This example above is not intended to be definitive, but it is a useful illustration of the approach that some may wish to take in light of Brexit.

An alternative approach to forum selection that some may take is to refer all disputes to binding arbitration specifying their preferred arbitral body and set of rules in the usual manner. Notwithstanding Brexit, arbitral awards given in the UK are enforceable in many countries under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the UNCITRAL Model Law.

Conclusion

While Brexit will doubtless impact on contracts in many ways, new contracts being entered into can seek to reduce the risk by making provision for Brexit in their terms. The choice of forum is just one of a wide range of clauses in contracts that should be reviewed in light of Brexit.

If you have any questions in relation to any of the above please contact [Jennifer McGuire](#), Partner or [James Byrne](#), Associate Solicitor.

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