



No-deal Brexit: Impact on dispute resolution

1 September 2019

By: Jean-Pierre Douglas-Henry | Paul Hardy

While a range of outcomes, including a departure under the terms of the current Withdrawal Agreement, remains possible, it is important for businesses to plan for a no-deal Brexit, in which the UK leaves the EU without a withdrawal agreement or other deal. Here we look at the potential impact of a no-deal Brexit on dispute resolution.

Current EU framework

Currently the UK is part of a harmonised EU legal system that includes cross-border frameworks dealing with jurisdiction, governing law and enforcement.

Implications of no deal

In the event of no deal:

Governing law

- EU Member State courts will continue to recognise choice of law clauses, irrespective of where the contracting parties are domiciled, under the Rome I and II Regulations.
- English courts will continue to recognise choice of law clauses, irrespective of where the contracting parties are domiciled, under national legislation implementing the Rome I and II Regulations.

Choice of courts and enforcement

- The principal EU instrument on cross-border civil and commercial disputes is the recast Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels Regulation). The Brussels Regulation currently determines which court has jurisdiction over a dispute and provides for "mutual recognition" and enforcement of court decisions between EU Member States.
- In the event of no deal, the UK will no longer participate in the Brussels Regulation. This means that choice of court clauses in favour of the English courts, and English court decisions will no longer be recognised in the EU as they are now. Instead, either the Hague Convention will apply or the courts of Member States will apply their own laws and local law advice will be required.
- The 2005 Hague Convention entered into force on 1 October 2015 and has been ratified by the EU, Mexico, Montenegro and Singapore. It applies to choice of court agreements made after its entry into force in the state of the chosen court. The UK will accede to the Hague Convention on the date of Brexit. The Convention establishes a parallel regime for the recognition of exclusive jurisdiction clauses (but not asymmetric or non-exclusive clauses) and the enforcement of judgments arising from that exclusive jurisdiction. Although lacking the mutual recognition inherent in the Brussels Regulation, the 2005 Hague Convention is nonetheless an important alternative regime. Whilst it is little used at present, in the event of a no-deal Brexit, this will change. It will become the principal instrument governing

cross-border jurisdiction disputes for contracts between UK and EU-domiciled parties containing a choice of court clause which satisfies the above criteria.

Force Majeure clauses

- Brexit itself will probably not trigger a force majeure mechanism. The potential is rather for any particular consequence arising out of the Brexit process to fall within the scope of the definition. Financial hardship due to shifting currency exchange rates or labour costs is unlikely to be classified as a force majeure event; force majeure will not usually fix a bad bargain. However, where a party's ability to fulfil its obligations is affected because of, say, new regulatory/licensing controls or visa issues for staff, then force majeure may be arguable.

Action

- **Review your jurisdiction clauses** in key contracts to understand:
 - whether the Brussels I Recast regime will continue to apply to them; or
 - whether the 2005 Hague Convention will apply; or
 - whether, in the alternative, national rules will apply.
- There are good reasons to continue choosing the law and courts of England and Wales, but **ensure** that all contract renewals contain a **well-drafted choice of governing law and jurisdiction clause**.
- **Review your force majeure clauses** for the potential impact of no deal on your contractual obligations, particularly in the supply chain. Issues to consider include how tightly force majeure events are defined, and whether performance of the contract has to be delayed or prevented to invoke a force majeure event.

For further help with the impact of no deal on your contracts, please contact the authors or your usual DLA Piper contact.

AUTHORS



Jean-Pierre Douglas-Henry

Partner

London | T: +44 (0)20 7349 0296 [UK Switchboard]

JP.DouglasHenry@dlapiper.com



Paul Hardy

Partner

London | T: +44 (0)20 7349 0296 [UK Switchboard]

Paul.Hardy@dlapiper.com