A year on from the referendum vote, the UK government has published the EU (Withdrawal) Bill and negotiations over the terms of exit have begun with the EU. What can be gleaned from these developments and should parties continue to choose English governing law and the jurisdiction of the English courts in their commercial agreements? Here are three key points to consider.

1. A future Brexit won't affect key reasons for choosing English law and jurisdiction

The significant benefits that have traditionally encouraged parties to make their commercial contracts subject to English governing law and the jurisdiction of the English courts are, and will remain, largely unaffected by Brexit. These include: the certainty and commercial focus of English law, the flexibility of the common law system and its ability to adapt to business and other changes, plus the reputation of the English courts and the independence and commercial expertise of the judiciary.

2. EU courts will continue to uphold a choice of English governing law, post Brexit

The Rome I and Rome II Regulations deal (respectively) with the law applicable to contractual and non-contractual obligations. Subject to some specific exclusions, EU courts (other than in Denmark) uphold the parties' choice of law regardless of whether the stipulated governing law is that of an EU member state or not. In other words, even when the UK exits the EU, the remaining EU courts should respect a choice of English law in the majority of cases, unless one of the existing exclusions applies. And it must surely be safe to assume that UK legislation will provide for the courts of the individual UK jurisdictions to uphold a choice of English law. The EU (Withdrawal) Bill proposes to incorporate EU law applicable to the UK as it then currently stands into domestic law at the date of exit, subject to any amendment deemed necessary. There seems no good policy reason not to incorporate Rome I and II in full into domestic law.

3. The UK can replace the current regime for the validity of jurisdiction clauses and reciprocal enforcement of judgments with a suitable
alternative

The Recast Brussels Regulation currently comprises the main set of rules concerning which EU member state courts have jurisdiction to deal with disputes in civil and commercial matters. Except where limited exceptions apply, EU courts respect an express choice made by contracting parties that the courts of another member state should have jurisdiction. The Recast Brussels Regulation also provides a system of reciprocal recognition and enforcement of judgments within the EU.

The EU (Withdrawal) Bill will not help in this context as it cannot unilaterally preserve the reciprocity that is essential to the regime under the Recast Brussels Regulation. The UK might seek an arrangement with the remaining EU members replicating the Recast Brussels Regulation. However, this would run counter to the government's (current) insistence that the jurisdiction of the Court of Justice of the European Union (CJEU) will end in the UK after Brexit. But there are alternatives. The UK could accede to one of the predecessor conventions such as the Lugano Convention (with similar though not identical provisions). This only requires parties to "have regard" to the case law of the CJEU. Another option could be for the UK to ratify the Hague Convention on Choice of Court Agreements. This would provide a regime as between the UK and remaining EU states for the validity and effectiveness of (exclusive only) jurisdiction agreements and the reciprocal enforcement of resulting judgments made by courts given jurisdiction under relevant clauses. The UK could sign up to the Hague Convention without needing the consent of the remaining 27 EU member states.

Practical steps to take now

Parties should not ignore the important benefits of choosing English law and jurisdiction unless the potential uncertainties in this area represent an unacceptable level of risk in the specific circumstances of their contract. An example could be a contract with no real connection with the UK – though only in the unlikely event there is a period with no replacement arrangements in place for validity of jurisdiction clauses and reciprocal enforcement of resulting judgments. Then, the English courts would apply forum non conveniens grounds to decide in which forum the case could most suitably be tried. But a party can mitigate even this risk, for instance by choosing an exclusive English jurisdiction clause and including a forum non conveniens waiver in the contract. Contact us if you would like us to review your contract and how these issues may impact on it.

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