GSK Update

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The Impact of the "Brexit" on Cross-Border Dispute Resolution

Executive Summary

> The UK´s decision to leave the European Union will have an influence on Cross-Border Dispute Resolution and will in particular affect London´s importance as the stronghold of arbitration in Europe.

> After the "Brexit", clients negotiating contracts with UK based contracting partners will be well advised to agree on EU-based instead of British jurisdiction in order to benefit from the EU laws regarding the recognition and enforcement of judgments in civil and commercial matters and judicial assistance in document delivery and taking of evidence. The harmonized EU regulations covering these matters will most probably – with the materialization of the "Brexit" – no longer be applicable to UK jurisdictions and therefore the choice of e.g. London jurisdiction could lead to cost- and time-consuming and even parallel proceedings and contradictory judgements.

> With regard to these various uncertainties arising from the "Brexit", arbitration-clauses are a highly recommendable alternative to choice of national litigation. The recognition and enforcement of arbitration awards is governed by the New York Convention on International Commercial Arbitration which remains applicable to British arbitral awards. Nevertheless, London as a number one litigation forum and the choice of English law will certainly decline which at least the financial, insurance and maritime sector traditionally used to opt for due to its expertise.

The actual "Brexit" is not intended to be finalized before 2018 as within a notice period of two years the UK and the remaining EU-member states will need to seek to negotiate a framework for a new relationship ("Exit Convention"). Also, it remains to be seen, how Scotland, Northern Ireland and Gibraltar will deal with the situation as those parts of the UK in the majority have not voted for leaving the EU and there already have been indications on seeking future independence from England and Wales.

Nevertheless, the different impacts on Cross-border Disputes must be taken into account from now on in order to be prepared for the changes that are about to occur as in the long term at least England and Wales will be considered as third states and therefore no longer profit from the harmonizing common rules of EU law.

In the following, we want to point out the most important aspects which have to be considered for Cross-Border Disputes after the "Brexit". Possible scenarios which the UK and the remaining member states might agree upon will be evaluated and we will highlight how the "Brexit" will change dispute resolution the financial sector. Finally, we will examine the impact which the found results will have on arbitration in general and within the UK:

1. Choice of Law

Firstly, the "Brexit" will have an impact on choosing the applicable law in "European" business contracts in the future. In essence, with the "Brexit", Europe is losing its common law members.

The national laws of the remaining members of the EU are all based on civil law. The harmonizing framework of the Rome I regulation on the law applicable to contractual obligations and the Rome II regulation on the law applicable to non-

contractual obligations will no longer be applicable and therefore English conflict of law rules will apply to legal relationships. Already existing clauses determining English law stay valid as parties are free to choose non-European law according to the Rome I and II regulation. The uncertainty concerning the impact of new rules and regulations which will most probably be set in connection with the exit of the UK and/or the application of English conflict of law rules will reduce the popularity of the choice of English law for cross-border business contracts.

In the future, it must be carefully assessed whether it is advisable to opt for English law in contracts as such an agreement leads to a national law which is no longer part of the European law family and will therefore lack the advantages of the harmonized European law.

2. Choice of Jurisdiction

After the actual "Brexit", the Brussels regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia-regulation/regulation (EU) No. 1215/2012) will no longer be applicable for the UK. This leads even to a risk of parallel proceedings in different countries and contradictory judgments.

A likely consequence will probably be a revival of the so called "Torpedo tactic" which is used by certain parties in a situation where – despite a choice of law rule – one party which is expecting a claim files a claim itself with a court of another jurisdiction in order to reach the dismissal of the opponents claim due to pendency. The Brussels Ia regulation which is strengthening the effect of choice of law rules as it states that in case of a choice of law rule the chosen court decides about its competence, might not be applicable any more for UK-courts. This can in fact lead back to cost and time intensive and endlessly stretched court proceedings.

Another aspect about the future non-applicability of EU law and therefore the Brussels regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia-regulation/regulation (EU) No. 1215/2012) is that the European Court of Justice prohibition of so called "anti-suit injunctions" will be void for UK-courts and it is likely that this instrument will be used much more often in the future. In concrete this means that a British court will be able again to rule about the competence of another court.

As a consequence of the latter aspects and the risks involved, the choice of UK jurisdiction will become less attractive than it used to be within the past centuries notwithstanding its expertise in certain sectors. Contracting parties might be well-advised on choosing a European jurisdiction which is bound by the Brussels Ia regulation.

3. Enforceability of British Judgements within the EU, worldwide and vice versa

The choice of British courts will only remain reasonable for contracting parties, if British judgements stay recognized as legally binding and enforceable in EU-countries. Therefore, the UK and the remaining EU would have to agree upon the enforceability of European judgements in the UK and vice versa. Otherwise, future enforcement of British judgements will require exequatur procedure of judgments which in turn requires the reciprocal acceptance of the enforcement of judgements. The disadvantages of this lack of automatism are self-explanatory. In response, companies should be advised to choose and agree with UK contract partners on arbitration clauses in order to secure future enforcement.

4. Delivery of Documents and Evidence

Another aspect, which will have to be considered after EU law is no longer applicable to British courts, is that regulations on cooperation between courts of two member states concerning the delivery of documents and taking of evidence are no longer applicable to British courts. For EU member states, the EU regulation on the service in the member states of judicial and extra-judicial documents (regulation (EG) No. 1393/2007)

foresees the acceleration and facilitation of the delivery of documents from one state to the other. The regulation on cooperation between the courts of two member states in taking of evidence (regulation (EG) 1206/2001) enables the civil court of a member state to seek assistance in taking evidence at the court of another member state.

5. Possible future agreements between the remaining EU and the UK

The actual future impact of the "Brexit" on cross border legislation depends on the agreement which the remaining EU will reach with the UK within the period of two years which is foreseen by Article 50 of the EU Treaty. Without a specific regime between the member states and the UK concerning the above matters, the recognition and enforcement of judgements will depend on outdated bilateral agreements or – in case of a lack of such agreement – the various provisions of EU member states regarding handling the jurisdiction of other countries.

One possible scenario is that the UK becomes part of the European Free Trade Association (EFTA) and thereby part of the Lugano Convention (2007) which contains similar provisions to the Brussels regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels Ia-regulation/regulation (EU) No. 1215/2012), containing rules regarding the jurisdiction and enforceability of judgements between the EU member states and EFTA countries. Nevertheless, it has to be taken into account that the EFTA countries did not agree on a convention concerning the choice of governing law. Therefore, British conflict of law rules will apply, even if the UK joins the EFTA.

Alternatively, the UK could negotiate bilateral contracts with other countries or enter itself into the Hague Convention on the Choice of Court Agreements (2005) which also contains uniform rules on jurisdiction and on recognition and enforcement of foreign judgments in civil or commercial matters.

Anyway, it is very likely that the final agreement will be stretched by the EU Commission as it has other highly important issues to deal with and especially this tactic could be used in order to discourage other countries to keep them from imitating the UK example. Therefore, a time of uncertainties regarding the enlisted matters is inevitable and will most likely influence the attractiveness of the choice of British law and jurisdiction.

6. Impact on the Financial market and international Trade

The impact of the "Brexit" on International Arbitration and Cross Border Disputes will also be influenced by the effect the "Brexit" has on the financial market and international trade itself. The diverse uncertainties will hit the financial metropolis London hard as it will no longer benefit from the Euro-Zone and after the "Brexit" intercontinental cities like Frankfurt as location of the European Central Bank and Luxembourg might soon take over concerning the trade of the Euro in terms of currency as well as securities. With the loss of the so called "European Passport", businesses will require a special license to be run within the UK. Thereby subsidiary companies based in London will lose their so called "Hub"-function and those "Hubs" will be translocated to European capitals.

Furthermore, the UK will now have to renegotiate all of its international trade agreements and as a now single state will definitely have a weakened negotiating position than it used to have as part of the EU. For example, US President Obama recently announced that in case of the "Brexit", the UK will have to wait "at the end of the line" until independently settling the transatlantic trade and investment partnership (TTIP).

Especially, the remaining EU member states will – at least regarding commercial matters – will likely prefer courts to apply EU law and operate within the EU framework whereas the UK will be dealt with as a third state.

One example of a direct consequence of this change can be seen within the regulations on markets in financial instruments (MiFIR). Article 46 § 6 of the MiFIR states that third-country firms offering professional investment services, before providing service within the European Union, shall *"offer to submit any dispute relating to those services or activities to the jurisdiction of a court or arbitral tribunal in a Member state".* Therefore, an agreement on London as the place of jurisdiction might no longer be valid within two years.

7. Impact on Arbitration in general and within the UK

As a consequence of the previous explanations, arbitration-clauses are a highly recommendable alternative to the choice of international jurisdiction in order to insure security and foreseeability. The above enlisted impacts of the "Brexit" on the choice of jurisdiction and applicable law as well as the enforceability of judgements do not apply to arbitration as the recognition and enforcement of arbitration awards is not governed by European law but by the New York Convention on International Commercial Arbitration. This should be borne in mind negotiating with a British contracting party within the future.

Even though this also applies to UK courts of arbitration and their arbitral awards will remain enforceable, it is most likely that the described loss of influence and attractiveness of the UK financial market will also have an impact on the desirability of London as a litigation forum. In the past, the financial sector relied traditionally on English law and London courts. Arbitration clauses were rarely included in contracts of the financial sector. However, in 2012 the Finance Arbitration Rules of the Panel of Recognised International Market Experts in Finance (P.R.I.M.E.) have been launched. The P.R.I.M.E. Arbitration Court in The Hague was established to help resolve and to assist judicial systems in the resolution of disputes concerning complex financial transactions.

In the future, we will see more arbitration in contracts of the financial sector, but London as a number one arbitration forum for the financial sector will most certainly decline. Other arbitration institutions will become more popular as other EU member states also offer modern and qualified arbitration services.

8. Conclusion

After the "Brexit" the UK will no longer automatically benefit from the main aim of European regulations which is to simplify and accelerate civil court proceedings among member states. This will lead to a loss of unity and foreseeability until the long term regulations between the UK and the remaining EU member states are finalized which in fact will probably take years.

The corresponding uncertainty regarding the contractual choice of law and jurisdiction rules has to be kept in mind by every business for its future contract design and will lead to a reduction of the choice of English law and jurisdiction. Also, in order to reach the highest level of certainty and foreseeability, the contractual choice of arbitration is recommended and should in fact become more popular. Due to the expected loss of influence of London as the European business-"hub", the focus regarding litigation forums will most likely change from London to other continental European capitals.

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