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BREXIT: GOVERNING LAW

IMPLICATIONS FOR CONTRACTING PARTIES AND DISPUTES

By Jonathan Wheeler, Gemma Anderson and Westley Walker

The process of Brexit will take many years, and the implications for our clients' business will unfold over time. Our MoFo Brexit Task Force is coordinating Brexit-related legal analysis across all of our offices, and working with clients on key concerns and issues, now and in the coming weeks and months. We will also be providing MoFo Brexit Briefings on a range of key issues. We are here to support you in any and every way that we can.

From a commercial contracting and disputes perspective, Brexit has the potential to impact four key areas: jurisdiction; recognition and enforcement of judgments; service; and governing law. This note focuses on the fourth of these areas – governing law. You can find our notes on the other three areas here:

- Brexit: Jurisdiction (30 June 2016)
- Brexit: Recognition and Enforcement of Judgments (30 June 2016)
- Brexit: Service - Implications for Contracting Parties and Disputes (30 June 2016)

As with other areas, it is difficult to predict what the exact impact of Brexit will be on these matters until we know what post-Brexit model the UK will choose to adopt. In the meantime, there will be an inevitable period of uncertainty. That said, there are some practical steps that parties entering into or renegotiating contracts can take now to seek to protect themselves from the impact of Brexit and the intervening uncertainty.

Will your choice of governing law be upheld post-Brexit?

The current regime

The governing law applicable to contractual and non-contractual/tortious obligations is currently governed by the *Rome I and Rome II Regulations* respectively, both of which provide that the courts will uphold the parties' choice of law.

Post-Brexit options

Post-Brexit, Rome I and Rome II will cease to apply. The UK/EU may agree to retain rules equivalent to those in Rome I and Rome II. If not, the English courts will likely apply the rules in place before Rome I and Rome II, as set out below.

Contractual obligations

The previous regime, *the Rome Convention* (enacted in the UK by the Contracts (Applicable Law) Act 1990), contains similar terms to those in Rome I, particularly with respect to recognition of the parties' choice of law. It is therefore unlikely that Brexit will impact parties' choice of governing law in relation to contractual claims.

Non-contractual/tortious obligations

The old rules on non-contractual obligations are contained in the *Private International Law (Miscellaneous Provisions) Act 1995*. A crucial difference with the existing regime under *Rome II* and this Act is that the Act does not give the parties an express right to choose the law applicable to non-contractual obligations. It instead provides that the applicable law will be based upon the law of the country in which the tort occurred, or the country in which the most significant event occurred.

What you should do now

Contracting parties should be aware that there is a risk that their choice of law with respect to non-contractual obligations may not be upheld by the English courts post-Brexit (if equivalent rules to those in Rome II are not agreed).

What about arbitration?

The EU rules on governing law under the Rome I and Rome II Regulations do not extend to arbitration.

Brexit is therefore unlikely to have any adverse impact on arbitration, which could make arbitration an attractive option for contracting parties seeking to obtain certainty, at least until the post-Brexit position becomes clearer.

Please do not hesitate to call with any question or concern that you may have. We're here to help.

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