

Client Alert

Corporate Practice Group

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The Common Law Touch

The status of English law for international business post-Brexit

The UK referendum result in June 2016, which saw the majority of the electorate vote to leave the European Union (EU), has presented many questions about the future legal implications of a Brexit. While individual legislative and regulatory matters will be addressed in due course, the core ethos of English common law and its benefits remain largely unaffected by Brexit.

Common law vs civil law

English law is one of the oldest and most respected legal systems in the world. English law follows the common law tradition, which essentially means that judges, sitting in English courts, actually make law by applying the principles of similar decisions to the facts before them.

Civil law systems are, by contrast, exclusively codified, with the law originating from a series of legal codes drafted by legislators and legal scholars. The role of the judge is purely to establish the facts of the case and apply the relevant provisions contained in the applicable code.

English law has been the preferred choice of law for many parties to cross border contracts worldwide. The reason for this is that the pillars of English contract law are derived principally from common law and, in the main, have remained insulated from the proliferation of EU law.

Brexit should therefore have little impact on contracting parties' decisions to choose English law to govern their commercial relationships or the established benefits of the English legal system, which include:

- **Commercial certainty:** A strong emphasis of English common law is to give effect to the contractual bargain reached between the parties and there is therefore limited scope for terms to be implied or for public policy or other considerations to override what has been agreed between the parties. This approach is bolstered by the fact that in determining the contractual bargain reached, the English courts take a commercial approach, often because of the professional background of English judges.

For more information, contact:

Ilan Kotkis
+ 44 20 7551 7572
ikotkis@kslaw.com

William Charnley
+ 44 20 7551 7534
wcharnley@kslaw.com

Garry Pegg
+44 20 7551 7562
gpegg@kslaw.com

King & Spalding
London
125 Old Broad Street
London EC2N 1AR
Tel: +44 20 7551 7500
Fax: +44 20 7551 7575

www.kslaw.com

- **Doctrine of precedent:** English courts are bound by the prior decisions of superior courts. This ensures that different courts treat similar cases alike and affords parties commercial and legal certainty.
- **Flexibility:** English law is generally uncodified, which allows it to respond on an ongoing basis to changes in market practice, patterns of dealing and custom and to new and innovative deal structures.
- **Market standard:** English law is often favoured by parties who have little or no connection to the UK because it is an acceptable or even market-standard choice in the sectors or markets in which their businesses operate. The need for parties to investigate the applicable law at the time of contracting is therefore reduced.

Most legal commentators are of the view that it is highly unlikely that Brexit will have any substantive impact on the enforceability of English governing law clauses, whether in the English courts or elsewhere.

Governing law is one of the areas which presents little uncertainty in the wake of the EU referendum result. English law will continue to present a comparatively secure, stable and certain choice of law for commercial contracts and we do not expect that the recognition of the freedom to choose governing law will change materially upon the withdrawal of the UK from the EU.

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