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English Law Remains Sensible For Commercial Contracts

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Like you all, we travel a fair amount for business. Over the last months, we have become aware that some colleagues are spreading inaccurate "facts" about choice of law and seat in contracts. Many people (guided by people who should know better) have told us “With Brexit looming, surely we should now be looking to other governing laws and/or seats for our contracts?” Put simply, there is no reason to take such steps.

Whatever form Brexit takes, it will make no difference to the English laws which govern commercial contracts. Neither will it make any difference to the arbitrations about what those contracts mean, and the awards which result from those arbitrations.

The principles of English law that govern commercial contracts are independent from EU law. After Brexit (should it occur), a commercial contract governed by English law will be interpreted in exactly the same manner as it would have been at any time in the preceding century. In the context of arbitration, English law will continue to offer commercial parties all the same advantages as before — advantages which have led to English law being the law which international parties most often choose to govern their transactions.

Advantages of Choosing English Law as the Governing Law

Let us remind ourselves of why parties choose English law in the first place. What are the advantages of English law for complex and high-value contracts?

English law is known for offering certainty and predictability.

What you see is what you get. English law adopts a straightforward, objective approach to contractual interpretation. The ordinary meaning of the words used in the written contract usually carries the day. Bargains objectively struck between commercial parties are upheld. Where English law applies, there is no need to embark on an investigation of the "true" subjective intent of the parties. There is comparatively little room for implied terms, doctrines of good faith or notions of deliberate breach or fault-based remedies tilting the balance unexpectedly in favor of one or the other party. English law offers genuine freedom of contract. In contrast, in civil law systems, codified principles are imported into commercial agreements. In a civil law background, one therefore needs to have greater awareness of the legislation that applies to any particular industry.

To illustrate this point anecdotally, we know of an arbitration concerning a shipbuilding contract for an expensive drilling vessel. The contract gives the buyer an option to terminate in certain specific circumstances. The buyer duly served notice of termination. The contract is governed by Greek law. This means that the buyer must prove both that the conditions for termination were (objectively) met, and also that the notice was served "in good faith." This second point is a requirement that Greek law reads into the contract. Some of the buyer’s directors are now having to give evidence as to their personal state of mind when the company served the notice. This is an unintended consequence of their choice of law.

It is worth emphasizing that English law does not have a general implied duty of good faith.

This is an advantage. Consider the position under French law, where the principle of good faith applies to both performance of the contract but also to the preceding negotiations leading to the agreement. Experience

suggests that those drafting contracts prefer them to be applied according to their terms, confining arguments to the meaning of the language, not to a subsequent assessment of the fairness of the transaction. Of course, those who wish to provide for a duty of good faith in the performance of their contracts can do so expressly under English law.

English law provides for reasoned and principled awards of damages.

It strives to compensate parties based on principles that business people understand and agree with. English law does not award unparticularized "lump sums," nor does it allow punitive awards for breach of contract.

It is adaptable.

The English law of contract is predominantly based on judicial precedent, and can therefore adapt and evolve more readily. Over time, English law has grown and kept pace with modern business practices and technology, ably dealing with complicated financial structures and technically complex issues, as are common in the energy, engineering and construction industries (sectors where English law is often favored).

There is a self-perpetuating effect.

The prevalence of English law has worked to its advantage. Because more complex contracts are subject to English law, English judges and arbitrators are resolving more such disputes. Jurisprudence develops and matures as a result of this. While decisions on contractual interpretation are limited to the agreement under scrutiny, it still helps to have recourse to a body of law throwing light on recurring issues, and to have commentary on the standard forms that often provide the foundation for the parties' contracts. Newer aspirants to the kind of preeminence that English law enjoys have simply not yet reached the same maturity. Common law remains the basis of a significant proportion of the world's jurisdictions. As the de facto market leader, English law has become increasingly familiar even to those from other legal backgrounds. This familiarity has a downside: we recommend that you always make sure that the lawyer advising you on English law is properly qualified to do so.

There is a sophisticated legal infrastructure in London.

This allows parties to access a thriving legal services market, with a large choice of specialist lawyers to advise and represent them, as well as numerous experienced arbitrators to determine their disputes. This contrasts with the situation in more "closed-shop" jurisdictions, which are dominated by a small number of providers, who could be overwhelmed by even a small increase in their caseload.

Advantages of Choosing London as the Seat for Arbitration Proceedings

The reasons why London is currently the leading arbitral seat will also continue to be valid in the post-Brexit landscape (if it happens, and whatever it looks like).

London's status as a legal hub will not change after Brexit.

Many experienced and skilled counsel, and reliable and impartial decision-makers, are based in London. They are not going anywhere. English judges and arbitrators alike are widely considered to be impartial and independent, and deservedly so. A truly unbiased and experienced tribunal is a fundamental requirement in any formal process of dispute resolution.

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Such experience has real practical benefits for the parties.

London-seated tribunals, and the arbitral institutions that administer London arbitrations, allow the parties to take full advantage of the procedural flexibility that arbitration ought to offer. As a contrast to this, we recently learnt of an arbitration conducted under the auspices of a well-known arbitral institution, where that institution declined to depart from its default procedural rules for the appointment of the tribunal, even though the parties had agreed otherwise to suit their needs. This should not happen. Party autonomy, and the freedom to agree procedural matters, is a fundamental principle of arbitration. Such missteps are more common than they should be.

Arbitration laws will remain largely unaffected.

The Arbitration Act 1996 and English law as it applies to commercial arbitrations and arbitration agreements provide for party autonomy and strongly support the arbitral process. This is another area of English law that is largely unaffected by EU legislation.

The English Courts apply the Arbitration Act 1996 consistently with an excellent track record of supporting the arbitral process.

No missteps or "dubious decisions" jeopardizing arbitrations seated in England usually emanate from the Rolls Building. English judges who hear arbitration-related matters know the subject matter well, based on decades of experience in commercial practice. They give effect to arbitration agreements and assist the parties and tribunals where this is really required and appropriate. They deal robustly with challenges to awards, routinely dismissing allegations by a losing party that the arbitral process was affected by a "serious procedural irregularity."

Conclusion

Facts are important, and Brexit should make no difference to the selection of English law and London arbitral seat which you might make for your contracts. English law remains as sound and sensible a choice as ever. We are happy to discuss this more fully, if that might help.

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