Cooley

Five Ways to Sidestep the Impact of #Brexit on Business Disputes

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Part of the value in any business-to-business contract comes from knowing with a reasonable degree of certainty that each party's rights can be enforced and that a breaching party will be required to perform its obligations or to pay compensation. The ability to ascertain which laws apply to a dispute and which courts are entitled to determine its outcome and to enforce a judgment is therefore of paramount importance.

EU law sets out default positions on governing law, jurisdiction and enforcement of judgments that apply to contractual arrangements across the EU. In doing so it provides contracting parties with much-needed certainty even when they may not have directed their minds to such seemingly esoteric issues in the rush to conclude a transaction.

While it remains to be seen what the UK's trading relationship with Europe and the rest of the world will look like in several years' time, one of the big uncertainties of **#Brexit** is what happens if these rules cease to apply mid-way through the life of a contract and the parties cannot agree a way forward? This is especially important for outsourcing and services agreements whose terms will extend into 2019 and beyond, as doubts over a party's ability to enforce a strategically important agreement can only weaken their negotiating position when disputes inevitably arise. A solution must be found at the earliest opportunity.

The following five points should be considered by companies seeking to minimize the risk to their business of a negative outcome to #Brexit negotiations.

- **Agree in advance which law(s) shall govern disputes.** Typically this is achieved by inserting a Governing Law clause into an agreement and specifying which disputes shall be subject to which law(s). Governing Law clauses can be as complex or as straightforward as the circumstances require, ranging from having different laws apply to different parts of the agreement, to having one law apply to all disputes, including disputes over the existence of a binding agreement and the validity of the choice of law clause. Where parties are from different jurisdictions and neither wants to be governed by the other party's domestic law, it is common to use the laws of a third country, particularly where that third country is recognised for its commercial law.
- **Agree in advance which court(s) shall have jurisdiction to determine disputes.** Jurisdiction clauses can be used to confer on particular courts the ability to determine disputes either on an exclusive or on a non-exclusive basis, depending on how the clause is worded. Factors to consider when choosing which court(s) shall determine contractual disputes include: the location of the courts and the ease with which parties can bring evidence and witnesses to trial; the court's procedural requirements; the language of proceedings; and the remedies available, both pending and following trial. As with governing law, a third country's courts may be chosen where those courts have a strong reputation for dispute resolution and where neither party wants to allow the other side any "home advantage".
- **Choose to arbitrate.** Arbitration is similar to litigation in that the parties present their case in an adversarial process that is determined by an objective third party. It differs from litigation in that the parties have greater flexibility in where and how proceedings are conducted and can even choose the individual(s) who will determine their dispute. In addition, arbitral awards are enforceable internationally; disputes are usually resolved more quickly than in litigation; and the determination is usually kept confidential. An arbitration clause can provide for arbitration to be mandatory for all or only some of their disputes, and can set out the process to be followed in the event that arbitration is commenced.
- **Consider other forms of dispute resolution.** Disputes arising out of agreements involving intellectual property (such as licensing or franchising agreements) can give rise to claims of intellectual property infringement as well as breach of contract.

Where the alleged infringement or breach relates to an act that has occurred online, parties are not limited to litigation or arbitration: a variety of low-cost procedures exist for the takedown of infringing content from websites as well as for the recovery of domain names (some of which are **described in more detail**);

- **Resolve disputes via negotiation and mediation, rather than in litigation.** Not all disputes need to be resolved in a courtroom or by binding determination. Where parties want to continue working together, and where the severity of the alleged breach permits it, it is often quicker, cheaper and more productive for parties to work through their differences face-to-face in private. Such negotiations can proceed with or without legal representatives being present, and can be facilitated by those specially trained in dispute resolution. It is good practice, at a minimum, for business-critical agreements to require senior managers to discuss any disputes before either party can commence proceedings.

While it is true that prevention is usually better than cure, some disputes simply cannot be avoided. The steps outlined above are inexpensive means of preparing businesses for such an eventuality. They have the added advantage that they will not be affected by the outcome of #Brexit negotiations, whether that outcome involves disapplication of EU law and a loss of access to the single market, or no perceptible change to the status quo.