**Impact of Brexit on Contract Law**

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Einstein wrote that “as far as the laws of mathematics refer to reality, they are not certain; and as far as they are certain, they do not refer to reality.” Perhaps his words can also apply to the current laws of politics. With no clear outline for the UK’s new relationship with the European Union (EU), the future closeness (or not) of the United Kingdom’s to-be-forged relationship with the EU remains an unknown for now. Consequently any impact analysis is, for now, about possibilities and risks rather than certainties.

That said, it is likely that contract law will be less affected than other areas of the law. Whereas the laws of intellectual property, data privacy and competition law, for example, pivot around European legislation, substantive contract law in Britain has evolved through case law. Thus, the meaning and interpretation of offer, acceptance, consideration and intention, for example, have all evolved through judicial decisions rather than through European legislation.

Nonetheless it is clear that Brexit could cause a significant impact on contract law. With the uncertainty about our future relationship with the EU, we cannot know what approach will be taken to existing legislation. To take one commercial example, will the consumer protections enshrined in the newly enacted Consumer Rights Act 2015 be watered down in any way? According to the Office of National Statistics, in 2014 the EU accounted for 44.6% of UK exports of goods and services[[1]](#endnote-1). If consumer legislation in the UK is changed, either directly or by judicial interpretation, consumer-facing businesses selling into Europe will face complying with two sets of legislation and operating a two-tiered system, with the additional administrative and legal burden that would require.

Of course, the impact of Brexit is an expansive topic. This article will therefore focus on three issues:

* Will Brexit influence a contract which specifies English law as the governing law?
* Will Brexit affect jurisdiction clauses in contracts, currently governed by Rome I and Rome II?
* Could Brexit allow the early termination of contracts, for example through the activation of force majeure or material adverse change clauses, or through activating the doctrine of frustration?

**Brexit and Choice of Law**

A choice of law clause states which law will apply to a contract. For example, a contract for the provision of software services by a French business to a German business could specify that in the event of a dispute, English law would apply. Choice of laws clauses are needed because, as Chitty explains, “a contract may be connected with several territorial jurisdictions because the parties to it reside in different countries, or because the contract is made in one country but is to be performed in a different country or concerns subject matter which is situated in a different country, or for other reasons.”[[2]](#endnote-2)

Frequently the choice of governing law is stipulated in a contract. However, if no choice of law is stated, the Rome I and Rome II Regulations (the Regulations) apply, dealing, respectively, with contractual and non-contractual obligations[[3]](#endnote-3). Through the Regulations, Member State courts are required to respect party autonomy on choice of law. This means that they uphold a governing law clause specifying the choice of law (say, English law) subject only to certain limited exceptions, and they do so regardless of whether a party is located in the EU or whether the chosen law is the law of a Member State.

What might change?

Following Brexit, Rome I and Rome II will cease to have effect in English courts. Commentators’ opinions differ regarding their replacement. Sarah Garvey and Karen Birch consider it “almost inconceivable” that the English courts would change their general approach to respecting a choice of law[[4]](#endnote-4). Sarah Speller considers the issue more complex, noting that even if the UK does reproduce Rome I and II within domestic legislation, the English courts would be the “final arbiter” on interpretation rather than the Court of Justice which “may lead to a divergence in interpretation over time”. Speller posits the suggestion that “the Government could decide to draft something entirely new” [[5]](#endnote-5).

Whether parties will be less likely to stipulate English law as the governing law for their contract in a cross-border commercial contract remains to be seen. English law is currently a popular choice of law for parties to such contracts worldwide[[6]](#endnote-6). Harvey and Birch outline various reasons for this[[7]](#endnote-7). English law is comparatively stable and offers comparative commercial certainty. It generally gives effect to the contractual bargain agreed: see for example the English courts’ decision to enforce strictly the commercial terms of the bargain rather than a “good faith” requirement: rejecting the judgment of *Yam Seng Pte Ltd v International Trade Corp Ltd* [[8]](#endnote-8). The common law system allows flexibility and evolution, as judge-made decisions can potentially reflect economic technological and social changes. Additionally, a choice of English law facilitates contracting in the English language and allows parties to access a mature legal services market.

All of that said, should European and English law diverge following Brexit, will those advantages be eroded? With such divergence, whether English law will continue to be adopted as enthusiastically in cross-border contracts remains to be seen. To expect no impact would seem optimistic.

**Brexit and Jurisdiction**

Jurisdiction clauses usually sit with governing law clauses in a contract. A jurisdiction clause specifies that any disputes arising under that contract should be determined by a particular national court. Jurisdiction clauses are commonly included in cross-border contracts and currently English jurisdiction is a popular choice. For example, a contract for the supply of bananas from Costa Rica to Germany might feasibly specify that if a dispute arises it would be heard by English Courts.

Choice of court is crucial in a cross-border commercial dispute, impacting the length and therefore cost of proceedings as well as the reliability and enforceability of any resulting judgment[[9]](#endnote-9). Rules governing jurisdiction and enforcement of judgments are set out in the Recast Brussels Regulation EU 1215/2015 (the Recast)[[10]](#endnote-10). Essentially, these rules provide that party autonomy in commercial contracts is largely respected; and that Member State courts must recognise and enforce commercial judgments given in other Member States, subject to limited exceptions. The Court of Justice of the EU oversees the application of these rules.

The rules on jurisdiction have been seen as one of the success stories of legal harmonisation, providing certainty and allowing the parties to a commercial contract to build the risk and costs of potential litigation into their deal[[11]](#endnote-11).

What might change?

It is theoretically possible that the UK and EU will agree that the Recast will continue to apply on Brexit. That said, as Harvey and Birch note, “it is unlikely that the status quo on jurisdiction and enforcement will remain entirely unchanged”[[12]](#endnote-12).

One of the reasons for this Birch and Harvey highlight is that the Recast regime is based on a reciprocal system. But it would not be possible for the UK to act unilaterally on Brexit to adopt legislation that has the same effect as the Recast. Whilst the UK could impose obligations on its ***own*** courts to give effect to jurisdiction agreements in favour of courts within the Member States, and for its ***own*** courts to recognise and enforce judgments given in other Member States, the same obligations could not be imposed on ***other*** courts without the agreement of those courts[[13]](#endnote-13).

Would other Member States sign up to enforce the judgments of the English courts voluntarily? Arguably “agreeing to a reciprocal regime on jurisdiction and enforcement post-Brexit” would be “way down” the Member States’ list of priorities[[14]](#endnote-14).

The alternatives to the Recast for the UK are complex and cannot be explained fully here. If the “status quo” is changed, the UK might rely on the Lugano Convention or the Hague Convention on Choice of Court Agreements 2005 (entered into by the EU, other than Denmark, and Mexico).

**Brexit and early termination of contract**

The third focus of this article is whether Brexit may be used to terminate a contract early.

Clearly if a contract is terminable on notice, one of the parties may seek to terminate it at any time. So, if one party enters into an agreement for, say, the purchase of fabric on a weekly basis for three years, but with a three month notice period which can be activated at any time, the party effectively only has the security of a three month contract. Consequently, one of the parties could choose to leave if they felt that, say, the contract was no longer economically viable (following the introduction of trade tariffs, for example).

However if a contract is not terminable on notice, could it be terminated by Brexit? Possibly, depending on the wording of the relevant contract’s **material adverse change** clause or **force majeure** clause. If such a clause is drafted to allow termination in the event of significant regulatory change, for example, then the clause could take effect.

Some have queried whether a contract which becomes more expensive as a consequence of Brexit has been **frustrated[[15]](#endnote-15)**. Essentially, a frustrating event is one which makes a contract impossible to perform, and which leads to a radical change in the obligations of the parties. It may be hard to remember the pronunciation of *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93. However the case itself is memorable, involving as it does a mixture of House of Lords judgment, peanuts and the Suez Crisis. In this case, the defendant agreed to ship Sudanese peanuts to Hamburg for a certain price. However it was 1956, and before the contract had been performed (and the peanuts delivered) the Suez Canal was closed as a consequence of the Suez Crisis.

The defendant (contracted to deliver the peanuts) argued that the contract was frustrated by the new difficulty of transportation/delivery. The defendant ***was*** able to transport the peanuts within the contractually agreed time - but this would mean going via the Cape of Good Hope, which would have taken four times as long and so increased the cost of transport considerably.

The House of Lords held that the decision that the contract should be performed, first made by an arbitrator, was valid and should be upheld: the contract was not frustrated.

In the light of this judgment, it seems improbable that a contract will be frustrated because as a result of Brexit.

**Conclusions**

It is clear from the above analysis that the impact of Brexit on contract law cannot be properly assessed until the post-Brexit dust settles and there is greater certainty regarding the UK’s future relationship with the EU. At the moment, it is difficult for legal commentators to consider more than risks and possibilities.

As noted, the impact of Brexit on substantive contract law may be less onerous than on other areas of law. However, legislation such as Rome I and Rome II and the Recast Convention will no longer apply in their current form. It is likely that English governing law will continue to be chosen for use in cross-border contracts after this point, for its advantages of commerciality and flexibility: whether it will continue to be as popular a choice for cross-border contracts remains to be seen. However with jurisdiction and enforcement, the picture is less rosy, with the potential difficulty of requiring Member States to agree to enforce English judgments when they will not be legally required to do so.

There is much work needed to dis-integrate the United Kingdom from the EU. Legal commentators will need to become comfortable with watching and waiting for the future relationship of the UK with the EU to emerge from the negotiations, before the true impact of Brexit on contract law can be seen.

[2324 words]

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1. <http://webarchive.nationalarchives.gov.uk/20160105160709/http://www.ons.gov.uk/ons/rel/international-transactions/outward-foreign-affiliates-statistics/how-important-is-the-european-union-to-uk-trade-and-investment-/sty-eu.html> Accessed 11 July 2016 [↑](#endnote-ref-1)
2. *Chitty on Contracts*, Vol. 1 (28th Ed., 1999) 31-001 [↑](#endnote-ref-2)
3. Rome I Regulation (Regulation (EC) No [593/2008](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32008R0593:EN:NOT) of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations) Rome II Regulation (Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations [↑](#endnote-ref-3)
4. Birch, K., and Garvey, S., “Brexit – legal consequences for commercial parties: English governing law clauses – should commercial parties change their approach?” Specialist paper No 1 February 2016 p3 [↑](#endnote-ref-4)
5. Speller, S., “Brexit: what might it mean for contracts and disputes?” <http://www.olswang.com/articles/2016/05/brexit-what-might-it-mean-for-contracts-and-disputes/> 19 May 2016 Accessed 10 July 2016 [↑](#endnote-ref-5)
6. See for example the Singapore Academy of Law’s January 2016 survey of 500 lawyers working on cross-border transactions in which English Law was the most popular choice of governing law, with 48% of respondents identifying it as their preferred choice - as quote by Birch and Garvey (n5) [↑](#endnote-ref-6)
7. n5 p3 [↑](#endnote-ref-7)
8. See discussion of the cases of *Yam Seng Pte Ltd v International Trade Corp Ltd* [2013] EWHC 111 (QB)*, Hamsard 3147 Ltd (t/a Mini Mode Childrenswear) v Boots UK Ltd* [2013] EWHC 3251 (Pat)

   and *TSG Building Services Plc v South Anglia Housing Ltd* [2013] EWHC 1151 (TCC); [2013] B.L.R 484

   in Woods, J ,“Updating Yam Seng Pte Ltd v International Trade Corp [2013]: is there an implied duty of “good faith” in commercial contracts?” *Student Law Review* Autumn 2014 73 [↑](#endnote-ref-8)
9. Goldman, L. “My Way and the Highway: the Law and Economics of Choice of Forum Clauses in Consumer Form Contracts”, NorthWestern University Law Review 1991-1992 86 No. 3 [↑](#endnote-ref-9)
10. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [↑](#endnote-ref-10)
11. n10, p700 [↑](#endnote-ref-11)
12. Garvey, S., and Birch, K., “Brexit – legal consequences for commercial parties. English jurisdiction clauses – should commercial parties change their approach?” Specialist Paper No. 2 February 2016

    <http://www.allenovery.com/SiteCollectionDocuments/AO_03_Brexit_Specialist_paper_Jurisdiction_clauses.pdf> Accessed 11 July 2016 [↑](#endnote-ref-12)
13. Ibid [↑](#endnote-ref-13)
14. Ibid [↑](#endnote-ref-14)
15. O’Connor, M., “Brexit: Implications for commercial contracts” DLA Piper publications 24 June 2016 <https://www.dlapiper.com/en/us/insights/publications/2016/05/brexit-implications-for-commercial-contracts/> Accessed 15 July 2016 [↑](#endnote-ref-15)