THE LAWYER

Brexit Briefings

Expert advice on how to stay on top of the new European landscape

Leader

What's next? Planning for the legal world after Brexit

The only certainty in the post-Referendum uncertainty is that firms need to be ready and flexible for the changes and challenges ahead

On the morning of June 24th this year everything changed. Despite many predictions to the contrary, the people of Britain voted decisively to leave the European Union, and the political and economic landscape will never be the same again. Whether you voted leave or remain, whether you were aghast or euphoric, the only certainty was uncertainty. What will happen to the United Kingdom's trade arrangements? What is the status of the City in a post-Brexit world? And after those big questions come a host of other, more knotty issues. What happens to passporting in financial services? What are the implications for employment law? What about data protection and intellectual property? How do you reshape your commercial contracts?

In order to help readers navigate these choppy waters, *The Lawyer* has teamed up with Thomson Reuters and a series of top law firms and chambers to assess the extent of the challenges. Some of our contributors provide a view from the Continent: we have briefings from key jurisdictions of Germany, Spain, Switzerland, Ireland and Luxembourg.

Brexit negotiations will dominate the political and business agenda for the next two years. Lawyers, whether from private practice or those working in-house, will be crucial to helping businesses tackle any challenges that come their way.

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Sponsor statement

Shaping the post-Brexit world

The UK's final farewell to the EU may be years away but lawyers in city firms and global businesses must plan for changes now to play a vital role in the post-Brexit world, says Lucinda Case

While nobody knows for certain what will happen now the UK has decided to leave the EU, contingency plans and Brexit strategies are already being deployed and as a lawyer, you know you will play a vital role when it comes to mitigating Brexit-related risk.

Once the UK government triggers Article 50 under the Lisbon Treaty, the two-year period for the negotiation for exit from the EU can start, providing a crucial window for lawyers to take stock, re-organise and plan ahead as much as possible, in order to transition to and prepare for a new business environment.

Just as Prime Minister Theresa May is creating a Department for Brexit, so too law firms and businesses are acting decisively with Brexit steering groups, taking the lead on vital questions. If you're an in-house lawyer and you don't have such a group, it's time to create one; if you do, ensure you're on it.

For private practice lawyers, a period of tremendous change will see clients ask more of you than ever before and you must be well prepared and proactive in order to deliver.

Managing through change

The UK's exit from the EU presents an unprecedented opportunity for you to demonstrate your perspective and expertise and to take a leading role in shaping the post-Brexit world. Lawyers should be asking themselves the following questions:

- Do I have the up-to-date know-how resources to guide my external or business clients through the regulatory consequences, and to help with their efforts to influence the shape of the new trading model?
- Do I have the flexibility to meet short-term spikes in specific practice areas?

> "Just as Theresa May is creating a Department for Brexit, so too law firms are acting decisively with Brexit steering groups"
> *Lucinda Case*

- If I'm working in a law firm, while the market is in flux, can I innovate on pricing in order to maintain a competitive edge?
- Is my corporate legal department equipped with the tools to keep track of legal spend that risks jumping up, as it seeks specialist advice on the impact of Brexit on the legal areas relevant to the business?

Whether you work in a firm or legal department, to navigate the post-Brexit world successfully, you will want to be equipped with the very best in legal know-how, tools and online resources. Too often, speculation is just 'noise' and reliable answers will be hard to find. As a trusted source of news and information to professional markets around the world, Thomson Reuters remains well placed to help you and your clients navigate the uncertainty that lies ahead.

On the opposite page we've collected a summary of how we can help you stay on top of the changing environment.

Lucinda Case, VP, customer segments & strategy, Legal UK & Ireland, Thomson Reuters

Short-term legislative implications of Brexit

The UK's statute book is about to get a lot more complicated, warns Daniel Greenberg

Whichever of the various possible routes towards Brexit is taken over the next couple of years, it will inevitably add to the already overwhelming complexity of the statute book and make it even more challenging for business and consumer interests to keep track of new and pending legislative changes.

For a variety of reasons, simple repeal of large quantities of EU-based legislation was never an option. Instead, we can expect a complicated mixture of legislative changes. These will include the incremental dismantling of a range of legislation which was wholly or partly implementing EU obligations, sometimes without any express reference to the EU; probably with transitional or permanent savings designed to implement Brexit negotiations on regulatory compatibility as the price of trading freedoms. And we can also expect an expanded range of domestic policy-based legislation in newly freed-up areas, partly within Westminster but even more significantly within the devolved legislatures.

Daniel Greenberg is general editor of Insight and Annotated Statutes on Westlaw UK, a barrister specialising in legislation, as well as in-house parliamentary counsel at BLP and a lecturer on statutory interpretation and legislative drafting at the University of London

Daniel Greenberg, general editor, Insight and Annotated Statutes on Thomson Reuters Westlaw

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THE LAWYER

BRIEFING: *Brexit*

Asset management

Brexit: what now for alternative fund managers?

The UK's vote to leave the EU raises the question of whether its alternative funds can retain passport rights giving them access to continental markets

By Gregg Beechey (top), partner and Zac Mellor-Clark, associate, Fried Frank

The UK referendum of 23 June and resulting vote to leave the EU will have historic implications for both the UK and the EU as a whole. In this article we explore issues for alternative fund managers doing business in Europe.

At this stage it is difficult to be definitive, because while the vote to leave was decisive, the nature of the UK's future relationship with the EU remains to be determined (and negotiated).

The least disruptive option for Brexit would be for the UK to retain its membership of the European Economic Area (EEA) – the so-called 'Norwegian model'. Although no longer a member of the EU, as an EEA member, the UK would continue to benefit from access to the EU's single market. UK-authorised firms would continue to qualify for a 'passport' – a feature of most EU financial services legislation that generally allows a firm authorised in one member state to provide services across the EU, either on a cross-border basis or by establishing local branches.

However, EEA membership would mean compliance with EU rules and free-movement requirements, and a continuing obligation to contribute to EU finances – all while having lost the seat at the EU rule-making table. This must be a relatively unlikely outcome, given the rhetoric that imbued the referendum campaign.

Other Brexit options, including the so-called 'Swiss model', would involve a complete withdrawal from the EEA. Brexit advocates argue that the UK would then be free to write its own laws and benefit from a negotiated trade relationship with the EU. Proponents have argued that this will provide the UK with an opportunity to become a more attractive place to do business.

Losing the passport

While this is at least superficially appealing, one must consider the cost of losing the passport for UK firms, or UK subsidiaries of global businesses, looking to deal with investors in the EU.

It seems politically unlikely that the UK would be able to negotiate unique passporting rights under EU financial services legislation. Generally, these banking, investment services and insurance directives do not contemplate providing passports for non-EEA members or 'third countries'.

While the forthcoming second Markets in Financial Instruments Directive (MiFID 2) has detailed provisions on access for so-called third countries, these do not amount to a passport.

Fortunately for alternative fund managers, the key European directive that governs their market (the AIFMD) does contemplate providing a passport for managers in third countries that can demonstrate equivalence.

The UK would presumably not qualify for such a third-country passport until it was outside the EU. However, following Brexit, the UK should be able to demonstrate equivalence to the European Securities and Markets Authority, provided the UK retains existing AIFMD implementing legislation. UK alternative fund managers operating in Europe may therefore find their compliance obligations materially unchanged.

The dual track approach

Alternatively, the UK might use the opportunity to adopt a 'dual track' approach, similar to that taken by the Channel Islands, under which funds seeking access to a third-country passport are subject to AIFMD-equivalent regulation, while funds seeking only domestic or international (non-EU) access are subject to a lighter-touch regime.

However, there are some open questions about the ability of managers operating under the third-country passport to undertake deals in the EU, since such transactions would be outside the scope of the passport and potentially subject to a different directive (MiFID), which would need to be addressed.

In conclusion, whichever form the UK's future relationship with the EU takes, it seems that third-country passporting provisions in the AIFMD may take some of the sting out of Brexit for UK alternative fund managers operating in Europe – a slightly ironic outcome given the unpopularity of AIFMD in certain circles within the industry.

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THE LAWYER

BRIEFING: *Brexit*

Banking and finance

UK firms face challenge of accessing EU after Brexit

UK financial services firms risk losing their passport to trade freely in Europe following Brexit, but UK regulation is likely to evolve in tandem with EU law

By Robert Purves (top) and David Simpson, barristers, 3 Verulam Buildings

Brexit will present major challenges if UK financial services firms lose passporting rights under EU Single Market Directives. Passporting means that a European Economic Area-regulated firm need only notify its Home State regulator of its intention to exercise its EU Treaty freedoms, before expanding its operations into host states across the EEA.

UK firms have been at the forefront of passporting into European markets, either by providing cross-border services or by establishing branches in other EEA Member States. At the same time, many European financial services firms have exercised their rights to passport into the UK.

Subject to any transitional arrangements, existing passport rights will lapse as soon as EU law ceases to apply. Any comprehensive Brexit settlement will therefore need to include a trade deal setting out to what extent and on what basis UK-regulated financial services firms will continue to access the EEA single market.

If the UK is unwilling to accept the free movement of EEA goods, services, capital and (critically) persons into the UK, then it seems very unlikely that current passporting rights will survive unchanged.

In the meantime, UK financial services firms must weigh up whether and how to rearrange their operations to retain access to the EU markets they serve.

No automatic right to provide cross-border services

UK investment firms may hope that following Brexit they will enjoy the right under the Markets in Financial Instruments Directive II to provide cross-border services to certain sophisticated clients without establishing EEA branches.

However, such right will not be automatic. It will depend upon the post-Brexit UK regulatory environment for investment firms being equivalent to EU rules. Meanwhile, for European investment firms passporting into the UK, the only sure way to maintain access to that market will be to establish subsidiaries in the UK after Brexit in the expectation that their status will be protected.

UK insurers may be able to rely on provisions of the Solvency II Directive that permit insurers from non-EEA countries to establish "third country branches" in EEA states. However, such branches are subject to onerous capital and supervisory arrangements and do not themselves have passporting rights into other EEA member states.

UK banks may be able to establish non-EEA branches in EEA member states following Brexit. However, the conditions for establishment are likely to include not only equivalent supervisory and prudential standards as those under the Capital Requirements Directive, but also reciprocal rights of access to the UK market for host states' own banks. Meanwhile, European banks and insurers with branches in the UK will again face the choice between establishing a UK subsidiary and transferring their branch business to it, or simply waiting to see what the post-Brexit settlement looks like.

In considering possible reorganisations of their business in response to Brexit, banks and insurers should bear in mind that the High Court has the power under Part VII of FSMA to sanction transfers of insurance business carried on in any EEA Member State by UK authorised insurers as well as transfers of banking business of UK deposit takers in any EEA Member State and of UK banking business of non-UK deposit takers.

Recent transfers have included the transfer of the UK branch business of Bank of Cyprus to a new UK subsidiary and the transfer of the insurance business of Japanese insurer Mitsui from EEA branches of its UK subsidiary to a corresponding set of branches exercising passporting rights deriving from its new German subsidiary.

UK likely to follow EEA regulation

More generally, whatever the detail of the UK's post-Brexit settlement with the EU, the content of UK financial regulation is likely to remain substantially similar to that of EEA financial regulation. This follows not only from the need to maintain equivalence with the EEA regime, but also from two other factors.

First, substantial parts of the EU financial regulatory architecture derive from international agreement rather than bespoke EU policy-making. Second, the shape of the EEA regulatory regime has (as exemplified by Solvency II) been heavily influenced by UK thinking.

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THE LAWYER

BRIEFING: *Brexit*

Commercial contracts

The impact of Brexit on contracts

In the wake of the referendum, firms need to plan for uncertainty. What first steps should you take now?

By Tom Bridgford (top) and Peter McCormack, partners at Eversheds LLP

David Davis, the Secretary of State for Exiting the European Union, has signalled he intends to serve notice under Article 50 of the Treaty on European Union and begin Brexit negotiations in early 2017. Once notice is given, the UK will leave the EU on the earlier of a withdrawal agreement taking effect or two years from the date of the notice.

On this basis, we can assume that the earliest the UK could complete its withdrawal from the EU is December 2018, although agreeing a new trading relationship with the EU is likely to take longer.

Legislative impact

Until the UK completes its withdrawal from the EU, it remains a member state, accepts supremacy of EU law and is governed by EU rules. Unless the UK amends or repeals legislation stemming from the EU in potential breach of its treaty obligations before Brexit, it seems unlikely that there will be any great change in the legislation underpinning commercial contracting prior to Brexit.

Upon Brexit, EU laws which are directly applicable without further UK legislation or which are implemented by secondary legislation under the European Communities Act 1972 will fall away, unless re-enacted by Parliament. EU laws enacted into UK law through primary legislation will continue to apply until Parliament amends or repeals them.

Deciding which EU laws will continue to apply in the UK will take many years and the UK's attitude to new EU laws will depend on the withdrawal negotiations. Over time, UK and EU law will diverge. More uncertain is to what extent business will face tariffs and quotas on EU exports and imports, potentially increasing the cost and time of performance or their ability to freely provide services across the EU.

Market risk

Market or commercial conditions are an issue for business now. Sterling has fallen. Fixed price arrangements with no currency fluctuation provisions will be most affected. Financial market and exchange rate volatility may in turn result in higher risk premia in credit and equity markets and consequential impact on investor confidence.

What should you be doing now?

There are three steps prudent businesses can take now in relation to their commercial contracts:

• Review your business activities to understand how Brexit and the possible future UK/EU trade structures impact them;
• stress-test existing contracts to understand how Brexit-related impacts are dealt with to determine your current level of Brexit risk; and
• consider how existing and future contracts could better protect against those risks.

What to look out for

Brexit is unlikely to be expressly dealt with in many contracts. However, there are many contractual risk-allocation mechanisms which could be relevant.

Consider areas such as:

- Do price adjustment mechanisms give you the right to adjust prices to reflect the application of tariffs or exchange rate fluctuations?
- Is a right to terminate triggered and could that be used (by either party) as leverage to negotiate amendments to reallocate Brexit-related risks between the parties?
- It is unlikely that the referendum result or market uncertainty would qualify as force majeure, but widely drafted clauses could be triggered by a change in law affecting or delaying performance.
- Whether contracts contain change in law or material adverse change provisions which could be triggered by Brexit impacts and what the consequences of that would be.
- How will references in a contract to the EU be dealt with post-Brexit (or even references to the UK, should Scotland or Northern Ireland leave the UK)?
- The current harmonised EU dispute resolution regime means parties often opt for litigation rather than arbitration when contracting with an EU entity. We do not know whether, post-Brexit, the UK will remain part of this regime and so alternative dispute resolution procedures may be more appropriate.

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BRIEFING: *Brexit*

Employment

Employment law expected to stay largely unchanged

Any changes to UK employment law are likely to be at the margins, with the most immediate challenge for employers being the status of EU migrants

By Colin Leckey, partner – employment, immigration and reward team, Lewis Silkin

Back in the distant days when David Cameron embarked on his ultimately futile "renegotiation" of the UK's EU membership, employment law was regularly touted as an area ripe for liberalisation if only we could be freed from Brussels' grip. A need to keep the trade unions onside in the Remain campaign meant that came to naught, but now we are heading for the exit door, could things change?

What might be up for grabs?

A significant number of the UK's employment laws derive from EU legislation. A non-exhaustive list includes:

- Prohibitions on discriminating because of sex, race, age, disability, religion or belief and sexual orientation.
- TUPE, which protects employee rights upon the transfer of an undertaking.
- Collective redundancies legislation.
- Working time laws.
- Agency workers regulations.
- Parental leave and protection of pregnant workers.
- Data protection.

But how likely are things to change?

Any Brexit article, on any topic, must include the phrase "it all depends". If the UK ends up joining the European Economic Area or EFTA, the Swiss and Norwegian experience teaches us that it is likely the UK will be required to remain signed up to all of the above.

Assuming a future UK government ends up with more freedom than this, how radical can we expect any changes to be? The likely answer is: not very. There are a number of reasons to think little will change:

- The UK already "goldplates" a number of European employment laws. A prime example is TUPE: the UK is unusual in having extended TUPE to outsourcings, insourcings and change of service provider scenarios with its "service provision change" regime. There is no obvious reason why leaving the EU should suddenly prompt a retreat. Similarly, UK maternity, paternity and shared parental leave rights go well beyond EU minimums.
- The UK got there first in a number of key areas. It had legislation on equal pay, and prohibitions on discriminating on the grounds of sex, race and disability, long before the rest of the EU.
- Further liberalisation is likely to be politically difficult. While politics changes at a bewildering pace, it is hard to see any future government gaining popularity by, say, reducing employees' entitlement to paid holiday, scrapping discrimination protections, or decreasing parental leave rights.
- There is little employer demand for some changes. Although the cap on weekly working time has long been a bogeyman of the EU debate, for most employers it is of little practical import, and litigation about this is vanishingly rare. The same is true of collective redundancy law.
- In some areas, conformity is likely to remain vital to stay competitive. Data protection laws are a prime example.

In conclusion, any changes are likely to be at the margins: they may include caps on the level of compensation that can be awarded for discrimination, and greater flexibility to change terms and conditions following a TUPE transfer, and in the hiring of agency workers.

What matters most right now?

For employers, the most immediate challenge arising from the referendum is the status of EU migrants. While legally nothing has changed yet, and may not for some time, many EU migrant workers have understandably been left destabilised by the political uncertainty, which may continue for some time, and employers are right to fear a "brain drain".

Employers are well advised to work with such staff to help them understand questions such as whether they are eligible for permanent residence, and whether they would get work permits under the current system. The same also applies to UK staff posted elsewhere in the EU, and given the sharp drop in the value of sterling, employers should also reassess the cost of engaging staff in different locations and consider whether adjustments are needed.

It is unlikely to be lawful under race discrimination legislation to decide not to hire an EU national because of uncertainty about their future immigration status, but this is inevitably something employers will start to consider, particularly if any Article 50 notice period comes close to expiry without any sign of a deal being reached.

In the face of the sharp rise in reports of racist attacks following the referendum result, employers should also consider reminding staff about existing anti-harassment and bullying policies, and what they can do to seek redress if faced with harassment from colleagues and from customers or the general public as they go about their work.

THE LAWYER

BRIEFING: *Brexit*

Intellectual property

UK will remain big feature of Europe's IP landscape

The UK has played a major role in shaping EU intellectual property law and this close relationship looks likely to continue even following Brexit

By Rachel Fetches, partner, HGF Law

EU membership has had a significant influence on the development of UK IP law and even after a UK exit that influence is likely to continue.

Harmonised legislation, judgments by the Court of Justice of the European Union (CJEU), pan-EU IP rights and parallel litigation mean that there has been close cooperation within the European IP community. This has made it easier for businesses to commercialise and enforce IP rights.

In terms of CJEU referrals from national courts clarifying IP law provisions, only the German courts have asked more questions than the English ones. The influence of English common law principles has been felt in both the development of EU IP case law and legislation such as the Enforcement Directive.

Some CJEU's responses have perplexed English judges (and practitioners), particularly with regard to trade mark law, where some CJEU judgments on unfair competition or AdWords have not been received with unqualified judicial approval. But regardless of philosophical disagreements, CJEU decisions have been applied by the UK Courts.

No change, for now

Despite the UK's vote to exit the EU, for the foreseeable future, there will be no change to existing IP rights or practice. The filing, prosecution and enforcement of UK registered and unregistered IP rights (including copyright) will not be affected by a UK exit.

EU IP rights remain in force

EU trade marks (EUTM) and registered community designs (RCD) remain valid and in force. Following the UK's exit, it will still be possible to obtain RCDs and EUTMs covering the remaining 27 EU countries but a separate UK filing will be required. For existing EUTMs and RCDs, transitional provisions are expected to be agreed that will convert the UK part into UK rights with the same priority and filing dates. For now, EU IP rights can still be enforced in the UK through UK courts, but following Brexit, it is unlikely that the UK Court will retain jurisdiction to grant pan-EU injunctions on EUTMs and RCDs.

No change for European patents

European patents (EPs) are a bundle of national rights granted centrally by the European Patent Office (EPO), which is not an EU institution and so will not be affected by the Brexit vote.

The EPO's post-grant opposition procedure will remain the same, as will the parallel jurisdiction of the national courts over the validity and infringement of the national EPs. While the CJEU has no jurisdiction over EPs, judgments on issues such as standard essential patents and Fair, Reasonable and Non-Discriminatory (FRAND) licensing, and the scope and duration of Supplementary Protection Certificates (SPCs), will continue to be of interest.

For SPCs, the status and recognition of marketing authorisations granted within the EU will need to be considered and provisions put in place to secure this valuable protection in the UK.

Unified Patent Court's fate in the balance

Following the Brexit vote, the fate of the unitary patent (UP) and Unified Patent Court (UPC) hangs in the balance. The President of the EPO has urged the UK to ratify the agreement to allow for a May 2017 launch. Legally, all is in place for the UK to ratify this but politically, ratification is a difficult proposition for the new prime minister, as it requires recognising the primacy of EU law.

Despite the uncertainty, preparations have continued, with no extension of the deadline for applications for UPC judges. However, the reportedly low proportion of applications from UK nationals suggests that there are doubts about UK participation.

If the system goes ahead without the UK, the UPC London section would need to be moved, which requires an amendment of the UPC Agreement. Other countries might use any amendment negotiations to re-open contentious issues relating to the system. The remaining countries will also need to consider the attractiveness of the system without the involvement of one of the major patent jurisdictions or its Patent Court judges.

What next?

Over time, we may see divergence in some areas, such as trade mark law, but no doubt judgments from the UK's specialised IP judges will continue to be valued by other courts. Even with a UK exit from the EU, it is hoped that close cooperation within the European IP community will continue.

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THE LAWYER

BRIEFING: *Brexit*

Privacy

Keep calm and carry on: data protection after Brexit

Brexit will have little immediate impact on UK data protection law, but the key question is to what extent the UK will adhere to new EU regulation due in 2018

By (from top) Emilio Cividanes, partner, Stuart Ingis, partner and Kelly DeMarchis, counsel, Venable

Brexit is likely to cause years of uncertainty about data protection for companies based in the UK and their business partners outside the UK. In the short term, there will be little to no impact on the European Union compliance landscape. However, in the mid-to long-term, with the implementation of the EU's General Data Protection Regulation (GDPR) scheduled for 2018, the UK will have to evolve its own data protection laws, while UK and non-EU companies will need to keep the GDPR at the top of their minds.

Short term: the next 12 months

In the wake of Brexit, the greatest amount of certainty exists in the short term, with the legal framework staying the same for the immediate future. Once the UK begins the process of formally departing from the EU, data protection will be one of the hundreds of issues on the table during the two-year negotiation period.

Some clues to the UK's contemplated approach have begun to come to light. On July 8th, the UK's Information Commissioner's Office (ICO) publicly pointed companies toward existing guidance on how to implement the GDPR, stating that the GDPR will be relevant for companies in the UK, especially those that operate internationally. Companies were urged to familiarise themselves with new concepts from the GDPR, such as breach notification.

Mid-term: the UK's future choices

The GDPR is scheduled to take effect in May 2018. The timing of the UK's exit means that it will be subject to the law, at the very least, during the anticipated gap of several months between implementation of the GDPR and the UK's formal exit from the EU, once scheduled.

After departure, it is not yet clear which path the UK will choose. The UK can remain part of the European Economic Area (EEA) agreement, which would allow it to remain part of the EU single market and comply with specific EU rules and restrictions. EEA compliance would require the UK to accept the GDPR. The UK may also consider adopting Switzerland's approach, by joining the European Free Trade Association (EFTA). Membership of the EFTA permits access to the EU single market but allows maintenance of independent data protection laws which, if rigorous, have been recognised by the European Commission as adequate.

Finally, the UK may opt to create its own regime away from the EU and seek an adequacy determination. The ICO has called the future "uncertain", but stresses that GDPR-driven priorities remain relevant.

One concrete example of the potential impact of this choice relates to the newly approved EU-US Privacy Shield. Companies that choose to rely on the programme for data transfers from the UK to the US may find that another solution is required if the UK's chosen data protection scheme does not recognise the programme, or requires a different, UK-specific compliance mechanism.

Long term: the GDPR and future UK regime

If your company anticipates that Brexit will have an impact on data protection compliance or data transfer solutions established on existing UK law, it may need to re-examine or reconfigure its approach based on future developments.

- Continue to monitor evolving UK data protection laws. Regardless of where the UK ends up, companies established in the UK or doing business there will not fully escape the GDPR, which is extra-territorial in its scope and likely to reach UK-based companies operating in the broader EU market.

In light of potential forthcoming changes, companies based outside, but that receive personal information from, the UK should keep abreast of the effectiveness of whatever mechanism they are relying on (including the Privacy Shield) to transfer personal information outside the country and EU.

- The GDPR remains important to the UK data protection landscape. As more companies begin to evaluate potential liability under the GDPR, the first step often is to assess their international data flows, a process many companies are starting now. Companies should pay special attention to data flows to and from the UK.

THE LAWYER

BRIEFING: *Brexit*

Trade

Five possible outcomes for EU-UK trade relations

The alternatives to EU membership and their implications for the trading relationship between the country and the remaining member states

By Nikolay Mizulin (top), government and global trade partner, and Edouard Gergondet, government and global trade associate, Mayer Brown

On 23 June the UK voted to leave the EU. While this unprecedented decision will be consequential from an economic and legal point of view the precise impact it will have on trade between the EU and the UK is profoundly uncertain.

Intense negotiations are therefore expected to take place once the UK formally notifies its intention to leave the EU under Article 50 of the Treaty on the Function of the European Union, but what scenarios can be foreseen regarding the EU-UK trade relationship following Brexit?

Five possible outcomes

Five theoretical outcomes can be identified so far:

- First, the UK may withdraw from the EU but maintain its membership of the European Economic Area (EEA). The UK would then have access to the single market, although goods from the country would need to go through the whole customs-clearance process and establish their preferential UK origin in order to enter the EU market duty-free.

Moreover, the UK would still be compelled to implement the relevant acquis communautaire pertaining to the single market. The country would, in addition, be able to benefit from the free trade agreements (FTAs) concluded by EEA members, although it would need to abide by the rules set forth therein.

From a customs perspective the UK would recover its independence and the ability to adopt its own rules, including its own tariff nomenclature.

- Second, the UK could become a member of the European Free Trade Agreement (EFTA). In doing so, the country's position would differ from that in the EEA with regard to the absence of free movement of people and free trade in services, as well as potential greater regulatory divergence since the UK would not be obliged to adopt the relevant acquis communautaire.
- Third, the EU and the UK could negotiate a customs union similar to that the union has with Turkey.

Under this scenario the free circulation of goods between the EU and the UK would be guaranteed once goods are customs-cleared in any of the customs territory. The UK would likely need to implement most EU regulatory requirements in exchange.

Furthermore, the UK would continue to apply the EU's Common Customs Tariff and tariff nomenclature and most, if not all, of the union's customs legislation.

In parallel, the UK would be free to enter into its own FTAs with third countries independently of the EU – which, however, may create additional complications.

- Fourth, the UK may negotiate a FTA with the EU similar to those the union already has in place with South Korea and Canada.

Depending on the scope of the negotiations, the situation would either be similar to that of being part of the EEA or being part of EFTA. In general, concluding a FTA would allow the UK to maintain its independence in terms of customs legislation while benefiting from the free circulation of goods, provided they go through the customs clearance process and benefit from 'preferential origin'.

The extent of regulatory convergence would, however, largely depend on the content of the negotiations and cannot be predicted at this stage.

- Finally, the UK could withdraw from the EU without any specific trade agreement. In such a case the country would regain absolute sovereignty over its external trade, including in respect of its customs legislation, FTA policy, regulatory standards and so on.

Nevertheless, goods from the UK would be subject to the EU's tariff nomenclature upon importation into the EU and the UK would be compelled to negotiate new FTAs on its own.

In that scenario, if the UK remains a member of the World Trade Organisation (WTO), the sole provisions governing trade between the EU and the UK would be those of the WTO agreements.

In that respect, WTO director-general Roberto Azevêdo has declared that the UK would likely need to undertake the negotiation process with all WTO members again to adjust its schedule of concessions, rather than adopt and make the EU's schedule its own.

While the UK will most likely remain a member of the WTO, how this process plays out will need to be closely monitored.

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THE LAWYER

BRIEFING: *Brexit*

Germany

Post-referendum realities and opportunities ahead

Business connections between the UK and Germany are now in limbo but there are specific areas that companies can immediately review and plan ahead

By Peter Scherer, partner, GSK Stockmann + Kollegen

Brexit-related uncertainties are likely to last until (at least) the end of the two-year deadline for a withdrawal agreement under Article 50 of the EU Treaty. In the meantime, businesses in the UK are well advised to quickly think about their current and future opportunities and to equally quickly start implementing the steps resulting from such analysis. From a German perspective, a myriad of aspects are to be considered by such UK companies, including the following:

● **Financial regulation:** the safeguarding of rights to act cross-border into the EU/EEA through an entity nationally licensed within the EU, which then can use the EU passporting system via cross-border business or EU/EEA branches, is relevant for banks, financial services institutions (including brokers/dealers), insurance companies, etc.

● **M&A:** where deals have been put on hold not only because of general uncertainty but because of currency dangers with the purchase price or because of problems with GBP-accounting London banks, companies could consider either switching to another currency or forex hedging, or involve banks with no such problems, such as those in Germany.

● **Company law:** English company law structures (both Ltd and LLP) used by German entities as well as European law structures (namely SEs or EEIGs) used by British entities are in danger and will require restructuring.

● **Tax:** the inapplicability of certain EU directives (e.g. the Merger Directive, Parent-Subsidiary Directive, Interest and Royalties Directive) and the status as a non-EU country will have an impact on direct taxes (especially for restructurings and relocations) and VAT (no 'intra-community supplies'). The possible comeback of customs will have an influence on indirect taxes.

● **Labour law:** should people be moved to and/or employed in Germany, visa and work permit requirements will have to be considered as well as 'individual employment contract'-related legal requirements and social security/insurance issues, plus German employee participation rights.

● **Real estate:** increasing demand for investments in German real estate, both commercial and retail, will result in higher price tags. This will be particularly true for Frankfurt as one of the major relocation cities profiting from the Brexit. Time could be of essence.

● **Capital markets:** what has been said above about EU passporting is equally true in regard to UK issuers of capital markets instruments publicly offering or listing them in the EU/EEA. Generally it remains to be seen with which degree of verve the EU Capital Markets Union, until now very much pushed by retired EU commissioner Lord Hill, will continue to be progressed.

● **Investment funds:** what has been said above about EU passporting generally also applies to UK fund managers and their funds (UCITS and AIF). Should the UK keep the AIFMD requirements in place, the introduction of the marketing passport for non-EU AIFM within the EU, expected in 2017, might become crucial for the UK funds industry as it might allow the marketing of UK funds to (semi-)professional investors in the EU. If not, UK fund managers would have to relocate to an EU member state or to establish subsidiaries there.

● **IP:** IP rights that apply throughout the EU (e.g. EU trademarks) might no longer apply to the UK. Therefore, companies should consider at an early stage to what extent IP portfolios should be backed up by, for example, respective national filings in the UK.

● **Data protection:** data transfers from the EU to the UK might become more difficult, as they would have to be qualified as a transfer to a third country outside the EU/EEA (as in case of the US). Significant legal and bureaucratic boundaries might be the result. If no UK/EU data protection agreement similar to the EU/USA Privacy Shield agreement is in place, companies might have to establish so-called Binding Corporate Rules.

● **Dispute resolution:** British judgements might no longer be automatically recognised and enforced by EU courts. As a result, arbitration clauses are already becoming more and more attractive, as recognition and enforcement of arbitral awards will not be affected by the Brexit.

THE LAWYER

BRIEFING: *Brexit*

Iberia

A tale of two cities: Madrid is ready to replace London

Madrid's bid to lure financial big-hitters if the City finds itself on death row after negotiations with Europe are concluded could sow discord on the Continent

By Rafael González-Gallarza, partner, Garrigues

The Brexit referendum was preceded by verbal clashes, with neither camp being meticulous about spelling out the truth. With the result in, the practical consequences remain unclear and the ground is ripe for more half-truths and wild bets.

However, while the Continent remained rather passive before the vote, Europe is now joining in the mix of speculation and wishful thinking, and discussions rage as to which European city will replace London as a financial centre now Brexit has supposedly consigned the City to economic death row. Lawyers are wading into the fray as many of the arguments are pseudo-legal in nature.

Madrid is putting itself forward as a substitute for the City: the Spanish financial system has been thoroughly cleaned up, two Spanish banks are major world players, the economy is growing at 3.5 per cent a year and anti-establishment forces were defeated in the recent general elections. Madrid is also a vast and vibrant city with even more underdeveloped areas (such as the Chamartín project, in walking distance of the financial centre). Cristina Cifuentes, head of the Madrid regional government has pushed the bid and appears to be backed by the Spanish government and Madrid mayor Manuela Carmena.

Branches of non-European financial institutions, international banks, clearing houses and all other institutions headquartered in London are invited to settle in the heart of Iberia. A modern tale of two cities will see the new Darnays and Cartons moving from London not to Paris and the excesses of the revolutionary 'terreur' but to Madrid, where the wheels of finance would continue to turn.

Some pertinent questions

But Sydney Carton was a lawyer and he would pose pertinent questions before emigrating to the plains of Spain.

His first questions could centre on Brexit itself, irrespective of the proposed destination. Should I wait to see what the UK's status will be post-Brexit? Will I be stultified if I relocate and the UK strikes a deal with the EU on satisfactory terms for the City?

The first lesson to be drawn from Brexit and the ensuing turmoil is that one should not take decisions that are both uncertain and irreversible: a perpetual option, if in doubt, should not be struck. The lesson still stands: do not exit London until you can reasonably predict what your fortunes will be under the new UK-EU accord.

The UK may re-accept the Single Rulebook, UK judgements may continue to be recognised in Europe and UK institutions may be able to keep their European passports. The UK may become a mere rule-taker, but when you run a business rather than a government, why care?

But were the City to conclude that the march to the Continent is necessary, does Madrid make sense as a venue?

We do not know for sure yet. The choice should not really rest on financial regulations or the passport rules since, by definition, they apply equally in all contending venues. It is what has not been harmonised and the non-statutory infrastructure that will mark the difference.

Take contract law: France has just ordered a root-and-branch reform of the Civil Code. But read new section 1112-1 – would you, as a vendor or lender, like to be under the (vague) public policy duty to provide pre-contractual information to the other party?

Spain has no such duty but it is true that the last great modernisation of the Spanish Code was in 1974 and, for instance, still enshrines the mysterious concept of 'cause', while the French have just got rid of it.

On insolvency, European substantive harmonisation is in the works but is still some way off. In the meantime, you have to decide if the French 'sauvegarde' is better or worse than the Spanish 'homologación', and there is no unequivocal answer to this question.

Spanish labour laws are now much more flexible and allow for company-specific collective bargaining agreements, while the French government is still struggling to do the same with the reform presented in March 2016.

Corporate income tax rates remain non-harmonised. We do not expect any of the larger European countries to fiercely compete for the lowest rate. Personal income tax rates also vary greatly: the marginal rate in Madrid is 43.5 per cent, while it appears to be effectively higher than 45 per cent in France.

The Spanish judicial system has improved and statistics place it around the European average in terms of waiting times for final judgements.

To conclude, if the Madrid bid turns into a feud with Paris or Frankfurt Brexit, after dividing the British, will go on to cast the 'apple of discord' into the eurozone. We have to remain on the alert: this is just the beginning.

THE LAWYER

BRIEFING: *Brexit*

Ireland

UK firms look to Ireland as uncertainty takes hold

Irish corporate law firm William Fry has seen a rush of inquiries from UK law firms and regulated financial service providers since the Brexit vote happened

By (from top) Shane Kelleher, head of financial regulation; John Larkin, head of insurance; and Tara O'Reilly, head of asset management and investment funds, William Fry

The UK's historic vote to leave the EU resulted in William Fry activating months of Brexit contingency planning.

"The UK is an important friend and ally of Ireland within the EU and has championed a similar agenda to Ireland in relation to business" said Bryan Bourke, William Fry's managing partner.

"William Fry was fully prepared for a Brexit vote and we mailed 50,000 contacts on the effects of Brexit on each business sector within hours of the result being announced."

Despite the short time since the referendum, William Fry is already experiencing a pronounced spike in inquiries from UK law firms and UK regulated financial service providers that are fine-tuning or activating Brexit contingency plans.

Regulatory authorisations

"In a period of protracted uncertainty over UK exit arrangements, some regulated entities are opting to create their own certainty by being first in the queue for regulatory authorisations in Ireland," said Shane Kelleher, head of William Fry's financial regulation group and chair of the firm's Brexit group.

Ireland's 12.5% corporation tax rate, pro-business environment and the similarity of Ireland's common law system and employment laws to those of the UK are key draws for UK regulated financial service providers in their Brexit planning.

"UK firms are telling us that they see Ireland as a logical choice because of the cluster of international (re)insurance companies that have an existing footprint in the country," said John Larkin, William Fry's head of insurance.

"Ireland is seeing the most queries from segments of the financial services sector where we are already widely acknowledged to have strength and depth, such as the funds industry," said Tara O'Reilly, William Fry's head of asset management and investment funds.

Global technology hub

Kelleher added: "Ireland is already a global technology hub and we are seeing many more fintech companies looking at setting up here as a result of Brexit, including payment institutions and e-money firms."

William Fry is particularly focused on providing support and information to its established contacts in UK law firms who are helping clients implement their Brexit plans.

"We are having Brexit calls and meetings with our London contacts and we are adding value by providing valuable practical insights on how similar firms have approached key issues, such as the level of staffing of an Irish operation and outsourcing arrangements with the existing UK operation," said Eavan Saunders, a corporate partner at William Fry.

Apart from the potential inflow of regulated financial services providers to Ireland, the broader impacts of Brexit on Ireland risk being negative, with much depending on the exit arrangements that are ultimately negotiated between the UK and the EU.

"The risk of imposition of customs procedures and duties and VAT on imports and exports between the UK and Ireland is a major concern given the level of trade between the UK and Ireland and that Brexit would make the Northern Irish border the only land border between the UK and the EU," said Ted McGrath, head of William Fry's financial services tax team.

"Ireland and the UK have operated a common travel area since the 1920s allowing free movement between the two countries, and maintaining this is another key priority for Ireland," said Sheila Tormey, partner in William Fry's EU and competition team.

Intellectual property

Another area of concern to William Fry's clients is intellectual property and data protection. "There is a risk that issues would arise concerning transfer of data between the EU and the UK," said Leo Moore, partner in William Fry's technology group. "It may be necessary to put legal agreements in place to ensure that the UK has an adequate data protection regime."

Carol Plunkett, partner in William Fry's contentious IP team, said: "There is also a risk of loss of intellectual property rights in the UK where they are based on EU law and that firms will have to apply for separate protection of IP rights in the UK."

Bourke added: "Brexit has added greatly to the risks and issues challenging our Irish and UK clients, including our friends and colleagues in UK law firms.

"We see our role as helping our Irish and UK clients to navigate their way safely through this uncertainty by identifying risks and offering practical solutions."

THE LAWYER

BRIEFING: *Brexit*

Italy

Cross-border litigation in contractual matters

Several EU regulations presently govern cross-border litigation and the consequences of Brexit could be particularly complex in this field

By Prof. Avv. Stefania Bariatti, counsel, Chiomenti Studio Legale

One of the fields that could be affected substantially by Brexit is cross-border litigation, where several EU regulations are in force. As far as contractual disputes are concerned, the distribution of jurisdiction among the Member States is governed by Regulation No 1215/2012 (Brussels I Recast), while the applicable law is designated through Regulation No 593/2008 (Rome I).

Should the UK exit the EU without entering any agreement in this field these regulations will cease to apply in the UK while they will continue to apply in the other Member States.

The UK and the EU, however, may enter into a withdrawal agreement that addresses the future of the relationships between the parties in this area in various ways, depending on the instrument at stake.

Rome I Regulation

As far as Italy is concerned the consequences of Brexit on the application of the Rome I Regulation are rather limited. Indeed, the Regulation has universal application (Art 2), ie the law designated by its provisions applies whether or not it is the law of a Member State. Thus the law of the parts of the UK will be applied by Italian courts. For example, the choice in favour of English law as per Art 3 will be respected; English law will apply when the connecting factors used by other provisions point to England.

A few issues require further analysis with regard to strategies in the transitional period with a long-term view.

First, the UK will qualify as non-EU Member State for purposes of Article 3(4) of the Rome I Regulation. This means that in an Italian court the choice of parties in favour of English law will not prejudice the application of provisions of EU law that cannot be derogated from by agreement, as implemented in Italy.

Second, in insolvency proceedings opened in Italy, contracts and relationships governed by English law will not enjoy the 'safe harbour' established by Art 13 Regulation No 1346/2000 on insolvency proceedings (EIR), to be superseded in 2017 by Regulation No 2015/848. More generally, rights and relationships located in England and/or subject to English law will not be an exception to the effects of the opening of insolvency proceedings in Italy as determined by Italian law. This consequence is particularly important in cases of rights in rem and securities over assets in the UK.

Third, if parties have agreed that the law applicable to the contract also governs non-contractual obligations, such a choice may not be enforceable in an English court in the future under the common law.

It is doubtful whether the 1980 Rome Convention on the law applicable to contractual obligations – the predecessor of the Rome I Regulation – will revive after Brexit. Neither the UK not the EU have any interest in proposing this solution.

Brussels I Regulation

As far as jurisdiction is concerned several options are possible: the UK and the EU may (a) enter into a bilateral agreement extending to the former (i) the Brussels I Recast Regulation (the 'Danish solution') or (ii) the 2007 Lugano Convention (like Switzerland, Norway and Iceland), (b) enter into an agreement with the same content as the Regulation, or (c) not stipulate any agreement. It is unlikely that an agreement with provisions that differ from the two major standards in force will be stipulated.

In the case of (c) the 1964 convention between Italy and the UK may be revived and apply to some disputes. This, however, does not provide rules on jurisdiction – only on recognition and enforcement of judgments. But recognition and enforcement of UK judgments will have to follow domestic procedural rules and will not enjoy a preferential fast-track.

With respect to jurisdiction, depending upon the subject-matter of the dispute, Italian courts will be competent vis-à-vis defendants domiciled in the UK on the basis (i) of some provisions of Brussels I Recast and (ii) of its national rules. Moreover, in the case of lis pendens Italian courts will enjoy discretionary power over giving priority to proceedings pending in the UK. If England is the chosen forum the provision of Brussels I Recast that gives priority to proceedings opened in the chosen court will not apply.

One issue deserves immediate attention in a long-term strategy when negotiating contracts. In case no Brussels I/Lugano-type convention is entered into between the UK and the EU the choice of English law as the law governing the contract will attract disputes relating to it within the jurisdiction of English courts according to common law. To avoid this consequence a clear agreement in favour of Italian courts should be included, the validity of which should also be assessed in respect of English law.

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THE LAWYER

BRIEFING: *Brexit*

Private equity

Luxembourg stands ready to welcome PE with the RAIF

An enhanced alternative to the Anglo-Saxon limited partnership for funds could make Luxembourg a big part of the private equity solution after Brexit

By Keith O'Donnell, managing partner, Atoz Tax Advisers

The post-Brexit play is unfolding at breakneck speed in the UK political arena. Mrs May has formed her cabinet and everyone is waiting for the inevitable Article 50 to be invoked.

However, not all eyes are on the UK. One of the topics generating media interest has been the position of European countries that may become a destination for UK firms relocating some or all of their headquarters. A few places have received serious attention in the financial sector, among them Amsterdam, Dublin, Frankfurt, Luxembourg and Paris. But what exactly can Luxembourg, nestled squarely between Belgium, France and Germany, bring to the table? The answer lies in its position as a serious player in the global financial sector, host to Europe's leading fund centre which is second only to the US on the world stage.

In this short article we explore one reason why Luxembourg stands out as an investment platform for UK private equity (PE) firms: the recent introduction of a new investment vehicle called the reserved alternative investment fund, or RAIF.

The go-to location for AIFs

Three decades ago Luxembourg's ambition was to become world's leading UCITS ('Undertakings for Collective Investment in Transferable Securities') centre and, with 75 per cent of UCITS funds distributed internationally now based in Luxembourg, this has been accomplished. Its aspiration now is to become the go-to location for alternative investment funds (AIFs). The recent introduction of new investment regimes is only the beginning.

In 2013 the Grand-Duchy created a new legal form: the special limited partnership (SLP). The success of the SLP was immediate, the 500-plus entities set up since then being proof of this. On 14 July 2016 Luxembourg's parliament approved the law introducing the RAIF. The advantages of the SLP legal form combined with the RAIF regime are compelling for private equity.

The SLP is attractive to PE investors for its tax-neutrality. When used as non-regulated investment vehicle the SLP is exempt from corporate income tax, ensuring the repatriation of profits with no or limited leakage. Similar to the Anglo-Saxon limited partnership (ELP), the SLP lacks legal personality and is tax-transparent. Also, the SLP offers more flexibility in determining partners' rights than the ELP. When used as a RAIF, the SLP keeps similar advantages, but in a regulated vehicle.

The RAIF's tax regime is determined by its investment objective. When investing in all asset classes, the regime follows that of the regulated Luxembourg specialised investment fund. If however, it invests exclusively in risk capital the RAIF's legal form and taxation may be aligned on that of the Luxembourg SICAR, a private equity investment company, allowing better access to double tax treaties and EU Directives. In both cases investors receive distributions without incurring withholding tax in Luxembourg. The RAIF will certainly foster simplified funding structures.

The RAIF is not subject to approval by the Luxembourg financial sector supervisor (the CSSF), which significantly reduces its time-to-market. That's not to say investors are less protected. The RAIF must be an alternative investment fund within the EU Directive and it must appoint an external authorised manager, a custodian and an auditor. With a passport, the RAIF can be managed and distributed throughout the EU. If Brexit negotiations leave the UK outside the European Economic Area the RAIF will be able to maintain its EU character and tax benefits, notably being able to assist EU investors in CFC inquiries from their EU tax authorities.

While the SLP responds to a demand for a tax-transparent and operationally flexible vehicle the RAIF satisfies fund managers' appetite for a tax-efficient and more versatile investment fund. A RAIF set up as a SLP will offer the best of both worlds, providing all the benefits usually associated with the ELP.

Support along the fund value chain

Luxembourg has gained its reputation as the world's second-largest funds domicile not only because of the €3,000bn in net assets under management, but also thanks to strong organisational support along the fund value chain. Management companies, custodians, auditors, advisers and the regulatory authorities all employ a highly skilled, remarkably experienced, English-speaking and international workforce.

Now offering an enhanced alternative to the English LP for the set-up, management and distribution of AIFs, Luxembourg is ready, willing and able to be a part of the Brexit solution for private equity.

THE LAWYER

BRIEFING: *Brexit*

Jurisdiction

Why the UK may consider taking the Swiss approach

With question marks over the UK as a place of jurisdiction, one option would be to replace the present arrangements with the Lugano Convention

By Daniel Hayek (top), partner, and Mark Meili, associate, Prager Dreifuss

The Brussels Regulation

The Brussels Regulation (1215/2012) determines which EU member state court has jurisdiction in a dispute and ensures that judgements will be recognised and enforced without the need for separate proceedings in EU member states. Once the UK formally exits the EU the Brussels Regulation will cease to apply for the UK. It is not clear what approach the UK will follow to replace the Brussels Regulation. What does this mean for litigants?

Jurisdiction clauses

If the UK does not comprehensively replace the Brussels Regulation the recognition and enforceability of English judgements in Europe may depend on the national laws of the country where recognition and enforcement is being sought. As a result, the process of recognising and enforcing English judgements in European countries may take longer, cost more and be more difficult. In particular, local law advice may be required and create additional costs for litigants. This may discourage parties from litigating in the UK.

As long as uncertainties with replacing the Brussels Regulation remain contractual parties may consider revising and renegotiating existing jurisdiction clauses conferring jurisdiction on UK courts. Contractual parties may even argue that Brexit constitutes a force majeure event or a material adverse change and that jurisdiction clauses in favour of the UK are void.

For new contracts, jurisdiction clauses need to be drafted deliberately and the consequences of Brexit on international litigation need to be incorporated. To ensure the recognition and enforcement of judgements in the EU parties may consider replacing UK jurisdiction clauses with clauses in favour of other countries with well-reputed jurisdictions or with arbitration clauses.

Alternatives to the Brussels Convention

The UK is still party to the Brussels Convention (72/454/EWG) that was in force in the country in 2001 and currently only applies to Aruba and French overseas territories. The Brussels Convention will re-emerge because of Brexit.

However, since it is outdated and would only apply between the UK, the pre-2004 members of the EU and its various overseas territories, the UK will undoubtedly want to replace the Brussels Convention with a more up-to-date international agreement.

The UK could seek to accede to the Hague Convention on exclusive choice of court agreements, which applies to contracts containing exclusive jurisdiction clauses. Since many agreements (eg financial ones) are non-exclusive, the Hague Convention would not comprehensively replace the Brussels Regulation.

A more likely option for the UK is to replace the Brussels Regulation with the Lugano Convention (LugC). Current parties to the LugC are the EU, Norway, Denmark, Iceland and Switzerland.

Switzerland initiated the establishment of the original LugC to connect with the successful European civil procedure governed by the Brussels Convention. The LugC significantly facilitates jurisdiction disputes within Europe, in particular for countries outside the EU and the European Economic Area (EEA) such as Switzerland. The LugC differs from the Brussels Regulation in that it does not contain a rule to prevent torpedo actions. Apart from this the LugC is almost identical to the Brussels Regulation and may further converge, with future amendments of the LugC.

Thus, the LugC may be a considerable option for the UK. The UK will need the consent of all parties to the LugC (including the EU) to join the LugC, if it does not rejoin the European Free Trade Association (EFTA) at the same time.

Conclusion

Contractual parties are generally advised to include jurisdiction clauses to reduce uncertainty. However, Brexit has shown that political changes may cause uncertainty for jurisdiction clauses in favour of the UK.

Norway, Denmark, Iceland and Switzerland, being outside the EU's internal civil procedural system, have had positive experiences with the LugC. The LugC may also be the solution for the UK to mitigate international litigation risks associated with Brexit. For the time being, contractual parties need to be aware of the impact of Brexit on the UK as place of jurisdiction.

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THE LAWYER

BRIEFING: *Brexit*

Financial services

Time waits for no financial services institution

Financial service firms cannot wait for the outcome of the leave negotiations before putting their restructuring plans into effect

By Guy Wilkes, financial services regulatory & enforcement partner, Mayer Brown

After the initial excitement and panic following the referendum result lawyers were quick to reassure their clients that nothing had changed overnight. The Financial Conduct Authority (FCA) similarly sought to reassure people that it was business as usual, pointing out that regulation will remain applicable until any changes are made and that will be a matter for Government and Parliament.

Firms must continue to abide by their obligations under UK law, including those derived from EU law, and continue with implementation plans for legislation that is still to come into effect.

It is likely that several months will elapse before Article 50 is invoked, triggering a two-year window in which to negotiate an exit from the EU at the end of which the UK will cease to be a member. Nevertheless, many financial services firms do not have the luxury of waiting for even the triggering of Article 50, let alone the outcome of negotiations to determine the UK's ultimate relationship with the EU.

Passporting

The key issue for financial services firms in the UK is the continued availability of passporting rights to provide services throughout the EU. Alternatives to the passport include the possibility of the UK retaining some access to the single market through negotiation or being granted equivalence. However, even that may depend upon the kindness of strangers and it remains a real possibility that the UK will lose its rights of privileged access to the single market and revert to third-country status.

Large financial services firms operate risk management frameworks. The risk of Brexit has now crystallised (to use risk jargon) and the risk of there being a sub-optimal outcome to EU exit negotiations is real (probably 'High' – to use the same jargon).

The only way of effectively managing the worst-case risk is for firms to explore ways of restructuring so they can continue to operate in a world where the UK is outside the single market and potentially not able to benefit from third-country equivalence.

Sector by sector

Each financial services sector is different. For example, Brexit is unlikely to have a significant effect on the reinsurance industry — Lloyd's has released a statement in which it says that only 4 per cent of its global gross written premium is at risk with the UK outside the EU single market. However, the impact on banking and investment activities is likely to be more acute since there is greater reliance on passported rights.

Each firm is different. Some firms have corporate structures with a subsidiary presence in other European Economic Area (EEA) countries and may already be in a position to simultaneously conduct EU business with minimal disruption. Others may need to set up a completely new business in another EEA state, and a smaller number that passport into the UK will need to look at how they can access our market in future. For most large groups, the reality will be a mixture of solutions reflecting their diverse businesses.

Implementing such plans is resource-intensive and cannot be undertaken overnight. Premises may need to be secured, competent staff hired and authorisations obtained from overworked regulators. Contracts may need to be novated and new arrangements entered into with suppliers and counterparties. Data protection considerations may require relocating customer data or entering into new agreements with customers.

For some firms even a two-year lead time may be optimistic. Additionally, until firms have concrete plans in place to operate in the new EU some of their counterparties may be reluctant to do long-term business, preferring the certainty of established Continental firms or firms present in third countries that already benefit from equivalence.

The indications are that some firms need to plan and act now for both logistical and commercial reasons. Even if the UK Government is successful in maintaining access to the single market, for some firms it will be too late – they will already have been forced to act.

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