THE POST-BREXIT DISPUTE RESOLUTION LANDSCAPE FOR BUSINESSES AND INVESTORS

The year that has passed since the end of the Brexit transition period has brought little of the certainty that had been promised to those doing business between the UK and the EU. This applies just as much to the question of resolving disputes as it does for conducting business over the new border in the first place.

Germany and the UK have long been strong bilateral trade partners. Cross-border legal disputes can and do arise in any industry and in any form of contractual relationship, from the sale of goods, to construction and engineering projects, to software, to financial instruments, and beyond. Now and in future, a British or German company bringing or defending a claim in the other country's courts will encounter cross-border processes requiring a higher level of investment in terms of formal requirements, administrative effort and time.

While litigating in the English or German courts is in general still a reliable choice for resolving such cross-border disputes, Brexit has now such litigation more expensive and burdensome. For instance:

- Issues at the outset, such as determining which court has jurisdiction and the service of claims, as well as the enforcement of judgments at the end, have become more difficult due to the termination of the EU framework that had previously harmonised these procedures and its replacement by an incomplete patchwork of treaties and bilateral arrangements and the plugging of its gaps by a return to the internal laws of the UK and EU member state whose nationals are involved;
- English claimants in German courts may well now be required to pay security for court costs simply on account of their foreign status, a pre-accession practice that had been outlawed under common EU membership.
- A well-drafted dispute resolution clause in a commercial contract therefore has greater monetary value than ever. It will determine who will interpret the contract in the event of a dispute, under what law, and in what forum.

Here are a few tips that companies can take into account to ensure that legal disputes are resolved more efficiently and cost-effectively:

- Companies should review current contracts and take care when negotiating new ones to ensure that the chosen dispute resolution mechanism is right for the underlying business relationship. A robust international dispute resolution strategy will likely place less emphasis on national courts and more emphasis on arbitration and alternative dispute resolution. In relationships involving multiple contracts and contract partners, dispute resolution provisions should be consistent throughout all of the relevant contracts to enable consolidation or at least concurrent procedures in a single forum where appropriate.

- Including procedures for non-binding mediation or expert determination can be powerful tools for clearing misunderstandings and breaking stalemates. At best they can lead to a quickly negotiated settlement, and they can often at the least narrow the range of disputed issues and de-emotionalise a continuing dispute, thereby not only saving costs and time but giving companies the chance to preserve the business relationship. Dispute boards can also serve as an efficient "real-time" way to reach a decision on a particular issue so that business partners can continue to work together, especially in long-term supply relationships and construction and engineering projects.

- Arbitration is a flexible form of binding dispute resolution that serves as an alternative to the courts and can provide a greater degree of predictability and procedural autonomy to all parties. For example, the parties can choose the decision-makers, the venue, the law, and the language best suited to their circumstances, along with many other aspects of the procedure. In contrast to court judgments, Brexit has had no effect at all on the enforcement of commercial arbitration awards between the UK, Germany and other EU member states, as this remains governed by the same international treaty that it has been since around the time the UK entered the EU. Arbitration institutions such as the International Chamber of Commerce (ICC) or the London Court of International

Arbitration (LCIA) offer administrative support and access to a pool of qualified arbitrators at a reasonable price.

Finally, Brexit has actually increased choice and certainty in one way, which is in the field of investment protection. One way states attract foreign direct investment is to offer state-level guarantees of certain standards of treatment that are enforceable by foreign investors directly against the "host" state itself by arbitration under international law. Those businesses making capital-intensive long-term foreign direct investments will often structure their holding of those investments in such a way as to gain the protection of a particular investment treaty. The Court of Justice of the EU has ruled in several recent decisions that arbitration of these provisions between an EU Member State and national of another EU Member State is incompatible with EU law and that therefore an arbitration agreement to this effect is invalid, although this position is still hotly disputed in international law tribunals. Brexit has brought with it the possibility for a would-be investor to resolve this difficulty by structuring an international investment through the UK in order to benefit from the investment protection guarantees and arbitration provisions in bilateral investment treaties between the UK and EU Member States, including those in the multilateral Energy Charter Treaty. This can provide an extra layer of security to investors by providing both enforceable guarantees and a neutral forum for the resolution of any disputes relating to their investment.

Robert Hunter,
Partner
Osborne Clarke

Duncan Gorst
Solicitor Advocate
Osborne Clarke