BrexitBitesize

Blake Morgan's bitesize guide to Brexit

Reassuring your workforce

Now that we have left the EU, what can employers and HR professionals do to reassure their staff who are EU nationals?

Also in this issue:

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Contents

The UK's exit from the EU presents challenges and opportunities to both domestic and international businesses.

Over recent months we have been advising our clients on how they navigate these challenges and capitalise on the advantages that will arise as we gain more autonomy.

From ensuring you remain GDPR compliant to reassuring your workforce, there are a number of actions you need to take to secure the best possible outcome for your organisation now that we have left the EU. We have covered some of these considerations in our Brexit Bitesize magazine.

While there are uncertain times ahead, one thing is certain: UK business is just as ambitious as before. Our Brexit experts are here to help guide you and your business to success. Our private client team are also on hand to answer any questions you have on how this may affect you and your family as well as on how to protect your assets.

If you have any queries about what Brexit means for you and your business, email our Brexit helpline brexit@blakemorgan.co.uk and our legal experts will be happy to answer your questions.

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Reassuring your workforce

EU nationals living and working in the UK are increasingly anxious about what the future holds. Now that we have left the EU, what can employers and HR professionals do to reassure their staff who are EU nationals?

by Lisa Parsons
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The starting point is to be aware of the provisions of the EU Settlement Scheme. Back in July 2018, the Home Office published guidance – The EU Settlement Scheme: employer toolkit – to help employers, industry groups and community groups in the UK to give EU nationals practical advice on how to apply for settled status. This includes a range of leaflets covering such issues as an introduction to the Scheme, application guidance and communicating to EU citizen employees.

The Scheme is aimed at those EU nationals who are already in the UK and who wish to remain now that we have left the EU. It enables EU nationals and their family members to obtain the appropriate immigration status to continue to live, work and study in the UK and to continue to be eligible for public services, such as healthcare, schools and public funds. Note that Irish citizens do not need to make an application but can choose to do so.

According to the Government, the Scheme is designed to make it straightforward for EU citizens and their family members to stay in the UK.

The Scheme introduced two types of status: settled and pre-settled. Settled status is to be granted if the applicant has been resident in the UK for a continuous period of five years. Anyone who has not been resident in the UK for the full five years will be able to apply for pre-settled status to secure their right to remain in the UK and will be eligible for settled status once they have been resident for five years.

The application deadline is XXXXX

According to the Government, the Scheme is designed to make it straightforward for EU citizens and their family members to stay in the UK. The application, which is free, comprises three key steps: proof of identity, evidence of living in the UK and a declaration about any criminal convictions (only serious or persistent criminality will affect an application). The application process is meant to be very user friendly, with a short online application and phone app introduced for scanning applicants' passports and faces.

Now we have left the EU, you should be proactively supporting your EU national staff and should consider the following:

- HR teams should be fully aware of the application process so that they are able to help staff with any queries about how to apply for settled status. For instance, explaining what documents can be used as proof of identity (a valid passport or national identity card) or proof of residence (a national insurance number, employer letter or bank statements, for example).
- HR teams could also make enquiries to find out which of their EU national staff have not yet made their application and the reasons why. Perhaps the individuals are unaware of the resources available to help them and they can then be told about the details of the step-by-step process set out in the Government guidance for settled and pre-settled status for EU citizens and their families. Perhaps the member of staff is concerned about language difficulties in making the application? HR can reassure them that guidance is available in 26 European languages.
- HR teams can also reassure staff that a wide range of support is available. This includes a dedicated Settlement Resolution Centre with a telephone helpline and more than 300 Assisted Digital locations supporting those with limited computer access or skills. In addition, there is a network of 57 organisations, funded by the Home Office, helping vulnerable people such as those who have mental health problems. These organisations can be found simply by entering the postcode of the home/work address.
- HR teams should review their internal communications and intranet to publicise the assistance they can provide regarding the Scheme and ensure that awareness about it is maintained. They could, for example, run workshops about the Scheme and publicise the Government guidance on their intranet.
- HR teams could offer drop-in sessions to provide assistance on a one-to-one basis to talk through an individual's plans or help to collate the relevant paperwork.
- HR teams should of course continue to publicise the application deadline of XXXXX (even though the Benn Act prohibits no deal) so that EU nationals are fully aware of the need to make their application under the Scheme in plenty of time.

All of these steps will hopefully reassure your staff. The potential risk in failing to reassure such staff is that they may decide to leave their employment (and the UK), which could exacerbate any skills shortage and problems in finding new talent.

For expert legal advice, please speak to a member of our employment or immigration law team or email our Brexit helpline brexit@blakemorgan.co.uk

Commercial contracts

Now we have left the EU, businesses will need to review their contractual rights and obligations to see whether there has been a significant impact upon the express terms set out in their commercial contracts.

by Penny Rinta-Suksi
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As you would expect, the most significant impact will be to cross-border contracts. However, your rights and obligations under domestic contracts where you or your contracting parties or customers rely on free movement of goods and services across the EU in your supply chain may also be affected.

The following may help mitigate the impact of, and risks arising from, the UK's departure from the EU, and help identify steps that can be taken to thrive in the post-Brexit landscape.

Existing commercial contracts

Consider these practical steps:

- Commercial contract audit. Conduct an internal audit of your existing commercial contracts. Consider which contracts are the most important to your business and which contracts are the most susceptible to change (for example, contracts entered into with entities in other EU Member States or reliant on frictionless trade within the supply chain).
- **Review the terms.** Once the relevant key contracts are identified, conduct a review of their terms, with a particular focus on:
  - prescribed action – does the contract expressly refer to Brexit? If so, now we have left the EU, what actions should be taken to comply with the contract terms?
  - currency – in what currency are payments to be made and are prices fixed in one currency? Which party bears the risk of Forex fluctuations?
  - 'material adverse change' and force majeure clauses – these release a defaulting party from liability for any delays or defaults caused by the relevant event. These are unlikely to be triggered unless they specifically refer to the UK's departure from the EU;
  - price adjustment – does the contract provide a mechanism for you or the other party to implement a price adjustment? It is likely that both parties may now have to contend with new cost and compliance burdens (for example, Forex fluctuations and import tariffs imposed on the movement of goods from the EU). Robust price adjustment provisions may allow you to pass some of your increased costs onto your counterparty. However, depending on how they are drafted, the price adjustment provisions may allow your counterparty to freely increase the price payable by you;
  - territory – is the territorial scope of the contract defined by reference to the EU? If so, does this still include the UK?
  - export/import licences – which party is responsible? Can the costs be shared between the parties? and
  - legislation – what legislation governs the contract, its inception and enforcement, and will that legislation continue to be applicable?
- **Analyse the risks and opportunities.** Having reviewed the relevant terms in your key contracts, analyse whether there is a risk to your contractual position or an opportunity (for example, to use Brexit as a trigger to terminate a loss-leading contract).
- **Engage with the other party.** Likewise, if you have concerns that a key contracting party may be adversely affected by the UK's departure from the EU, it is advisable that you discuss the steps they are taking to ensure performance of the contract remains unaffected.

Future commercial contracts

If you are in the process of negotiating new commercial contracts, you should consider whether any contractual terms should be included to 'Brexitproof' your future relationship. In short, you should ensure that any areas of uncertainty highlighted above are carefully considered. Our clients are taking different approaches to the outcome of this exercise – some leaving such matters to be defined at the time, and others looking for specific let-outs and options to re-price or terminate without fault. Negotiation of such matters requires subtlety and care, as one person's solution can be another person's risk. Balancing such considerations is a fine art.

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Protecting your intellectual property rights

by Jill Bainbridge
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Copyright

The UK is a member of a number of international treaties and agreements protecting copyright. These will be largely unaffected by the UK's exit from the EU: the majority of UK copyright works will still be protected around the world, including in the EU post-Brexit, and works originating in the EU (but not from the UK) will still be protected in the UK.

However, there will be changes to certain cross-border copyright mechanisms. For example, the existing EU Portability Regulation, which allows consumers to access online content services (for example, Netflix) when they are travelling, will cease to apply. Thus, UK consumers travelling to the EU may find they can no longer access such services whilst abroad.

Designs

Whilst UK registered and unregistered designs remain unchanged, the same cannot be said for Registered Community Designs (RCDs) and Unregistered Community Designs (UCDs).

The owners of RCDs will now be granted a new equivalent UK right at no cost and "with minimal administrative burden". The RCD itself will continue to protect the owner in the remaining 27 Member States of the EU. The RCD, and resulting equivalent UK right, will thereafter be treated entirely separately for the purposes of renewal, validity, etc.

Businesses with pending RCD applications have nine months in which to file an equivalent UK application based on the RCD and in accordance with the UK's standard fee structure.

The owners of RCDs will now be granted a new equivalent UK right at no cost and "with minimal administrative burden".

UCDs provide businesses with automatic protection for certain designs (including clothing designs and patterns). Businesses will no longer be afforded UCDs for new designs and, instead, will need to fall back on UK unregistered designs. However, UK unregistered designs are not the same as UCDs. Accordingly, the UK Government has confirmed that where certain types of right are not permitted to be protected as UK unregistered designs under existing legislation, new schemes will be established to ensure that UCDs are protected in the UK.

Patents

Patents have been largely unaffected by Brexit. The European Patent Convention is not related to the EU, European patents will continue to cover the EU, and European patent attorneys based in the UK will continue to be able to represent applicants before the European Patent Office (EPO).

Trade marks

The most significant impact on IP will be in relation to trade marks. The owners of existing, registered, EU trade marks (EUTMs) will be granted a new equivalent UK right. It will be an automatic process, but with an opt-out for any rights holders that may not want a UK registration, and will not involve any cost on the part of the rights holder.

The resulting UK registration will, thereafter, be subject to renewal in the UK, can form the basis for proceedings in the UK, can be challenged for invalidity/non-use in the UK and can be assigned and licensed independent from the EUTM from which it originated.

Perhaps the biggest impact will be felt by the holders of EUTM applications that are currently pending. Such applicants will not be automatically granted an equivalent UK application and, instead, will have a period of nine months to file an equivalent UK application, which will benefit from the same filing/priority/seniority date as the EUTM from which it originated. Importantly, however, the holder will need to pay for this new UK application.

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Upon Brexit UK courts will no longer have jurisdiction over infringements occurring outside of the UK and thus will not be able to grant relief in respect of infringements outside of the UK.

International Registrations (IRs), designating the EU, will essentially be dealt with in the same way as EUTMs, i.e., owners of such IRs will automatically be granted an equivalent UK right. Alternatively, if the IRs are pending, there will be a nine-month period within which to file an equivalent UK application.

Enforcement

Previously, the owners of EU intellectual property rights (for example, EU trade marks, RCDs and/or copyright) could seek to enforce their rights by bringing proceedings in one Member State but obtain pan-EU relief. So, for example, the owner of an EU trade mark could bring infringement proceedings in a UK court seeking an injunction preventing the defendant from using an infringing mark anywhere in the EU.

However, now that the UK has left the EU, UK courts no longer have jurisdiction over infringements occurring outside the UK and thus will not be able to grant relief in respect of infringements outside the UK. Equally, owners of both EU and UK intellectual property rights will now need to bring separate proceedings in both the UK and an EU Member State if they seek relief across the EU and in the UK.

Representation

Now that the UK has left the EU, UK-based representatives will no longer be able to directly represent clients before the European Union Intellectual Property Office (EUIPO). This means that they will no longer be able to file, or renew, EU trade marks or RCDs. However, Blake Morgan can continue to advise clients in respect of the entirety of their portfolios and we have a solution in place whereby we will work with our trusted agents within the EU to deal with the filings and formal representation requirements, thus ensuring consistency and continuity for you.

Action

We will continue to keep our clients updated on IP and trade mark issues. However, the following are points to consider in order to ensure you and your products or services are in the best possible position:

- Review where you use your trade marks. If you only use your EUTM in the UK, consider extending use into the other 27 Member States or otherwise surrendering the EUTM and maintaining only the UK mark;
- If you only have a UK mark but use the mark in the other 27 Member States,consider filing an application for an EUTM;
- If you have licences / security interests recorded against an EUTM or RCD, consider whether you should record comparable interests against the UK mark/design;
- Review any co-existence, distribution, licence or similar, agreements, and consider whether those agreements that define the EU as the territory need to be clarified to ensure that they continue to apply to the UK; and
- Review any co-existence, settlement, or similar, agreements to ensure that the automatic granting of a UK mark is not going to put you in breach of contract.

In the meantime, if you have any burning Brexit questions, email brexit@blakemorgan.co.uk

Construction projects

Practical planning for Brexit

by Edward McMullen
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While change brings both challenges and opportunities, there is no doubt that leaving the EU will be disruptive to construction projects.

The very nature of the construction sector – discrete projects giving rise to varying workloads, as well as (generally) low profitability – means that it has been difficult for the sector to plan for Brexit in any meaningful way.

The following suggestions can help create a culture of open communication and better position your projects to withstand the fallout from Brexit and succeed in whatever world lies beyond.

Current construction projects

Consider these practical issues with your construction team:

- What proportion of the labour force is sourced from the EU?
- 'What materials are being sourced from the EU?
- How might programming be affected by these issues?
- Can materials and/or labour supply chains be changed in any way to improve the position?
- Is the project likely to be hit by adverse currency fluctuations or tariff changes?
- Assess the finances of those in the supply chain. How might they be affected by, say, delay? Can you improve the speed of payment down the chain to reduce the chances of a supplier getting into cash flow difficulties?
- If you have not done so already, start 'what if' discussions with others involved – especially between client and main contractor. Brainstorm possible scenarios together. For example, could the logistics warnings outlined in the government's Operation Yellowhammer paper affect your project? How? What might you all do about it?
- What does the relevant contract say about Brexit, if anything? Note that force majeure clauses are unlikely to help unless they (or other clauses) specifically refer to the effect of leaving the EU.

Future projects

In the longer term, strategies for future projects can be considered in order to minimise Brexit-related disruption. For example:

- Sourcing materials etc. from within the UK;
- Allowing time (or float) in the programme for possible logistical delays;
- Allowing in a contract for the possibility of renegotiating its terms if there is an unforeseen change in the law (care will be needed in the drafting of this);
- Considering switching to suppliers with more financial strength, just in case;
- Looking for solutions that require less labour (or maybe less skilled labour) in case of a workforce shortage;
- For frameworks – making changes if the supply chain capacity looks likely to reduce; and
- Taking measures to hedge against currency/tariff fluctuation.

In short, it is too early to say exactly how the UK's exit from the EU will affect the construction industry. However, planning collaboratively to ride out worst-case scenarios may be better than a 'wait and see' approach. Much can be done to strengthen the positions both of clients (public sector or otherwise) and construction sector businesses for the months (and years) ahead.

For more information, email brexit@blakemorgan.co.uk

Family law changes following Brexit

by Christine Plews
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Family law is one of the areas of UK domestic law that has been greatly affected by the UK's membership of the European Union for the past 40 years.

Therefore, now that we have left the EU, some adjustments will need to be made by both the practitioners in this area of law and our clients. Many of Blake Morgan's clients have connections with one or more European countries and Brexit may affect their divorce, maintenance and recognition of orders relating to their children.

Currently, there is reciprocity in that the EU Member States all recognise each other's orders. Often, clients can have a choice of jurisdiction because they have connections with one or more European countries. In order to avoid people choosing the jurisdiction most favourable to their circumstances, a 'first in time' rule was applied. Therefore, despite very strong connections with another EU country, if the divorce proceedings were issued in England and Wales, no proceedings could be brought in a competing EU Member State. If they were, the proceedings would be stayed or halted.

Now that the UK is no longer part of the European Union, the same rules will apply to EU cases as apply to the rest of the world. This means that the English Court will only stay its proceedings if there is another more appropriate forum. There will have to be a Court hearing to establish which is the most appropriate forum and being first in time will not be conclusive. In order to avoid having such a hearing, the UK (possibly excluding Scotland) may continue to treat cases in the same way but with more emphasis on the domicile of the parties.

A further change will be the recognition of UK divorces in the rest of Europe. UK divorces may not automatically be recognised in all the Member States and this may be a particular issue in Ireland. There was previously co-operation between the EU Member States over maintenance so that there were not competing maintenance claims in the different EU Member States. Recognition of maintenance judgments and enforcing UK orders in the EU (and vice versa) is likely to change. It is unclear whether orders will be automatically respected, and this may become a factor for consideration in a dispute over the most convenient place for the divorce proceedings. Obviously, the enforcement of judgments will become more difficult if there is no automatic recognition of UK orders.

Many people will have heard of the Hague Convention in respect of the abduction of children. Previously, European law, adopted by the British courts, dealt with other aspects of children's living arrangements. It is now likely that the other aspects of the Hague Convention will broadly replace European law in respect of jurisdiction and parental responsibility.

It may be that the UK will recognise orders from the EU relating to areas such as domestic violence injunctions, but not vice versa.

What is more certain is that, from a legal perspective, there is a high likelihood of a transitional period so that existing rules would remain in place and the European Court would continue to have jurisdiction over family proceedings involving the UK for a further period.

While exact details are still being finalised, it is likely that England and Wales will voluntarily continue to adopt the existing rules, until they have been considered, altered or replaced. However, there is no certainty as to how the EU Member States will recognise the orders made.

A major difficulty for clients is the uncertainty over what rules will apply to existing agreements, judgments and proceedings. It is thought likely (but it is not certain) that current rules will continue to apply to a) existing judgments, b) proceedings that are under way and any judgments arising from these proceedings and c) jurisdiction clauses in maintenance agreements, together with proceedings and judgments arising from these agreements.

Special consideration will have to be given to Scotland as it may not adopt the same judicial criteria, which means that the rules in Scotland could be different to those in the rest of the UK.

If there is reciprocity between the EU and England and Wales then, whatever law is applied by England and Wales, post-Brexit, will be recognised in the EU Member States and many of the difficulties set out above will fall away.

Blake Morgan's private client team specialists act for high-net-worth individuals; entrepreneurs and business owners; farms and estates; and families that require advice on succession and tax, residential property or sensitive family issues spanning divorce, mediation and mental capacity issues. All the family teams at Blake Morgan are keeping abreast of the developments as they occur and will be available to advise clients on how best to protect themselves and their family.

Data protection after Brexit

by Jon Belcher
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Businesses could fall foul of data protection laws now that we have left the EU without a deal.

Most UK businesses are already familiar with the General Data Protection Regulation (GDPR), which is a European law that came into force in May 2018. Now that we have left the EU without a deal, the GDPR will cease to apply to most UK organisations and is now replaced with a very similar UK law, known as the 'UK GDPR'.

The GDPR contains restrictions on transferring personal data to third countries outside the European Economic Area, while there are no restrictions on data flows between countries within the EU. Companies found to be in breach of the GDPR can face fines of up to 4% of annual turnover, or €20 million, whichever is greater.

This could pose a significant problem for organisations that transfer personal data internationally, for example by using cloud services, external hosting or outsourced data-processing providers. The UK is now deemed a 'third country' post-Brexit, so data flows from the EU to the UK are therefore subject to the tight restrictions contained in the GDPR.

One way of overcoming this problem would be for the European Commission to declare that the UK has adequate data protection laws. The UK government hopes that the UK will be granted an 'adequacy decision' in recognition of the fact that we have equivalent laws. Such a decision would enable data to flow unrestricted between the EU and the UK. However, an adequacy decision could take years and will be too late for businesses relying on uninterrupted flow of personal data between the EU and the UK now.

The UK is now deemed a 'third country' post-Brexit, so data flows from the EU to the UK are therefore subject to the tight restrictions contained in the GDPR.

This means that all companies in the UK need urgently to consider their data flows. Where does their data come from? Where is it held? Where is it sent to or accessible from? If personal data is received from or sent to locations outside the UK, companies need to take action now.

Our advice is to check current contracts and, where necessary, put in place revised arrangements to ensure that there will be no disruption to such data flows.

There could be profound effects for organisations operating in or selling into multiple jurisdictions in Europe. The GDPR applies to organisations outside the EU that offer goods or services to – or monitor the behaviour of – individuals within the EU.

This means some UK companies will need to comply with the GDPR and the new UK GDPR. If your organisation is in this situation, you should seek specialist advice on the steps you should be taking to ensure compliance.

For more information on how to ensure your business remains legally compliant, speak to a member of our data protection team or email brexit@blakemorgan.co.uk

Cross-border litigation in a post-Brexit world

Uncertainty and change can trigger disputes. Brexit has been fraught with both.

by Susie Dryden
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It is possible that there will be an increase in disputes as a result of the UK's departure from the EU. Financial uncertainty is anticipated and this leads to counterparties looking at ways to avoid their contractual obligations. Similarly, supply chains created on the basis of the traditional EU structure will be disrupted by Brexit and consequential changes in trading terms. Contractual provisions that reference the EU or EU regulations and enforcement mechanisms will be subject to scrutiny and may no longer be enforceable. It is therefore advisable to take a proactive approach and review existing contracts to establish whether any provisions or practicalities in fulfilling contractual obligations will be affected by the UK leaving the EU.

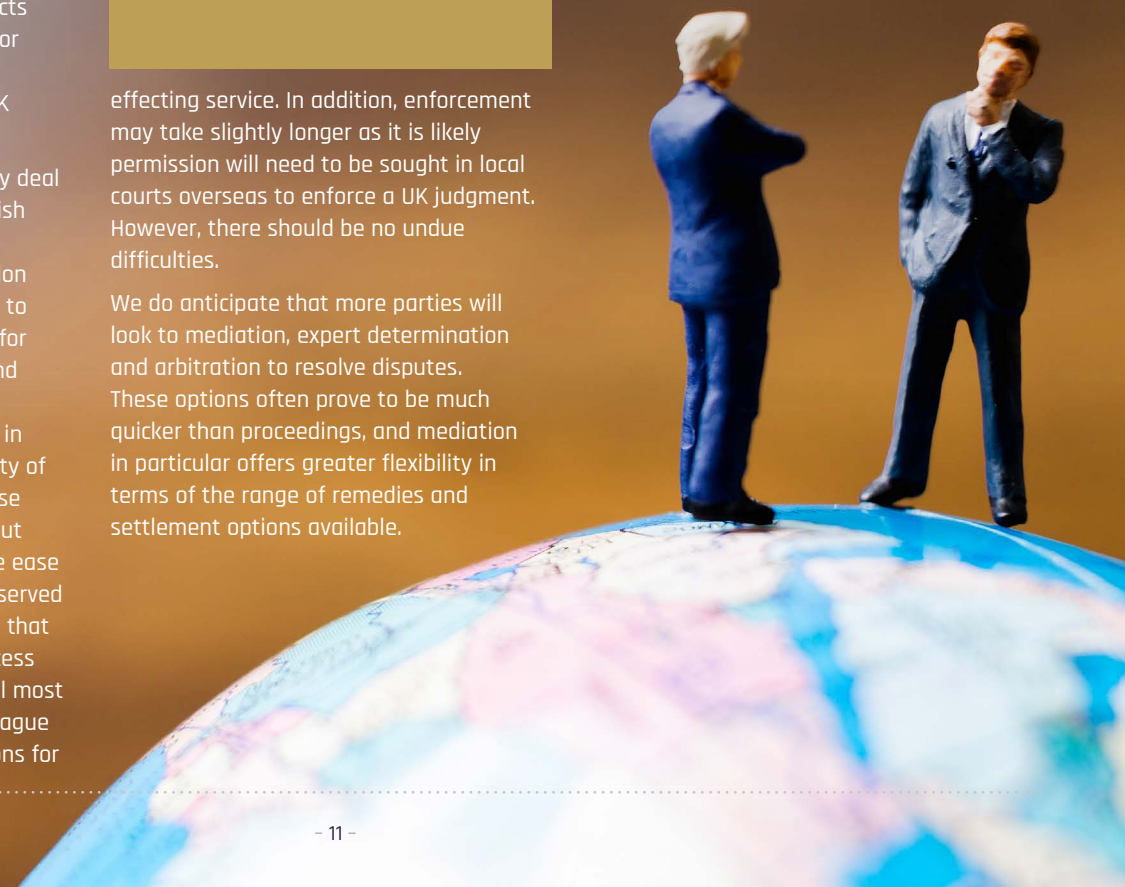
Our dispute resolution team routinely deal with cross-border disputes. The English courts and English law have always been popular choices for the resolution of international disputes due largely to the reputation of the English courts for consistency, quality, transparency and technical knowledge. The absence of punitive damages awards and juries in civil cases, coupled with the possibility of costs recovery, are also popular. These attractions will remain post-Brexit, but concerns have been raised about the ease with which proceedings can now be served or judgments enforced. The reality is that these elements of the litigation process have changed slightly as reliance will most probably need to be placed on the Hague Convention rather than EU Regulations for effecting service. In addition, enforcement may take slightly longer as it is likely permission will need to be sought in local courts overseas to enforce a UK judgment. However, there should be no undue difficulties.

We do anticipate that more parties will look to mediation, expert determination and arbitration to resolve disputes.

We do anticipate that more parties will look to mediation, expert determination and arbitration to resolve disputes. These options often prove to be much quicker than proceedings, and mediation in particular offers greater flexibility in terms of the range of remedies and settlement options available.

With arbitration and expert determination, you also have the added benefit of being able to select the expert(s) or arbitrator(s). If the dispute resolution clause provides for a panel of experts or arbitrators, parties can mix panellists from different jurisdictional backgrounds.

If you are involved in a cross-border dispute, speak to our litigation experts or email brexit@blakemorgan.co.uk for advice.



Blake Morgan Brexit Helpline

Email your queries to **brexit@blakemorgan.co.uk** and a member of our team will be in touch.

Contact us

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Our legal experts at Blake Morgan understand that this is an uncertain time for you and your business. We are ready to advice on the risks, challenges and opportunities now that we have left the EU. Our lawyers take a commercial approach to finding relevant, realistic solutions to your legal issues to get the best possible outcome for you both now and in the future.

From keeping your data safe to managing your workforce or resolving cross border disputes, as a full service law firm we can advise on the impact of Brexit across your organisation. You may also have questions on personal investments or family matters.

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