Brexit, Cognitive Biases and the Jurisdictional Conundrum

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In our post last month, we discussed the potential impact of Brexit on the choice of law to govern a contract and the law applicable to non-contractual claims. We also discussed that parties and party counsels should consider revisiting their choice of law strategies, but that in doing so, they should be conscious of the 'cognitive threats' that may cloud rational decisions and produce unwelcome results.[fn] For a deeper analysis of the topic, see Gustavo Moser, *Rethinking Choice of Law in Cross-Border Sales*, Eleven Publishing International, 2018.[/fn]

In this post, we consider whether cognitive biases can influence the choice of jurisdiction and how Brexit fits into the discussions about these considerations.

1. **What is Choice of Jurisdiction and Why Does it Matter**?

When a cross-border dispute is anticipated, questions that often arise are: where should I bring a legal action? What are the risks and costs involved if a court declines jurisdiction? What is the fate of the contract in case of parallel proceedings? And what happens if the courts do not enforce a choice of forum agreement? These questions and many more refer to the conflict of jurisdiction rules that are regulated by Civil Procedure Codes, Acts and Regulations.

There are a number of reasons for which parties initiate proceedings in the courts of a given State. For example, the differences in procedure and rules of evidence, the triad 'efficacy-speed-cost' of judicial proceedings (or lack thereof), familiarity with a given system, the language to be used, the court's reputation, the strength of the profession and institutions, ease of enforcement of judgment, and differences in conflict of law rules.

The above (non-exhaustive) considerations are of paramount concern since the law of the forum will impose upon the parties a legal framework that provides for certain rules to be followed. This may or may not limit party autonomy in a contractual dispute.

2. **Cognitive biases**

We discussed in our earlier post that we are not immune to 'threats' posed by cognitive biases, which

can lull us into a false sense of rationality of our decision-making processes. This can mean that individuals often fail to foresee and consider all available options. These cognitive biases, or 'hidden forces', routinely influence and colour our decisions and, regrettably, can lead us to decisions which are not in our best interest.

With all this in mind, and with Brexit looming over us, it is time for a dispassionate and risk management analysis of the choice of jurisdiction using Kanheman's System 2. This includes the support of more tangible characteristics associated with a choice of jurisdiction: ways to finance and secure the transaction; differences in conflict of law rules; cost of learning an unknown or less familiar court system; difficulties of enforcing a resulting decision in unfriendly or hostile jurisdictions; in addition to potential procedural pitfalls, such as the evidentiary phase, deadlines, confusing or unclear payment mechanics, and recalcitrant debtors.

3. **Brexit and the Jurisdictional Conundrum**

Decisions of law and jurisdiction often intersect and, given the Brexit uncertainties, stakeholders should inevitably look for prospective options to enforce their contractual arrangements and also be mindful of the legal framework available for non-contractual claims.

Current status

The European Union agreed on the UK Government's draft EU withdrawal agreement (***the Draft***) on 25 November 2018. The UK Parliament is expected to hold the vote on the Draft by 21 January 2019.

As it currently stands, the Draft establishes a transition period that will last for 21 months from March 2019 to the end of December 2020. During this time, Rome I will continue to apply to contractual obligations, and Rome II will apply to non-contractual obligations, albeit with a modification placed on the timing of the event that gives rise to the damage (in contrast to Rome II which prescribes that the applicable law is the law of the place of the damage regardless of the place in which the event giving rise to the damage occurred). The Draft also states that the current judicial cooperation between the UK and EU Member States in civil and commercial matters (Brussels Recast Regulation) will remain in operation and enforceable in the UK until the end of the transition period. The same applies to service of documents, witness evidence, and other enforcement cooperation on uncontested claims and small claims (Articles 66-68).

Prospects

Hague Convention on Choice of Court Agreements

Whilst there is uncertainty as to how cross-border matters will be conducted after 2020, the UK Government has issued an Explanatory Memorandum on the (re)accession of the UK to The Hague Convention on Choice of Court Agreements (***2005 Hague Convention***) after Brexit.

The Memorandum points out that once the UK leaves the EU and, in the absence of a future agreement in the area, the Brussels Recast Regulation will not longer bind the UK. The Memorandum further states that the UK intends to become an independent contracting party to the 2005 Hague Convention and will apply the Convention's rules with all other contracting parties including the EU

Member States. While there may be some transitional wrinkles, it is a welcome alternative to the issue of enforceability of a judgment in the EU Member States.

Hague Judgments Convention

A further Hague Convention on the recognition and enforcement of foreign judgments in civil an commercial matters (***the Judgments Project***) is still being negotiated, but a draft has been produced and a Diplomatic Session is likely to be convened for mid-2019. The Judgments Project aims to establish uniform rules on the recognition and enforcement of judgments, by the use of a simple, efficient and predictable structure, thereby facilitating the enforcement process and reducing the related costs in cross-border transactions.

Arbitration

The Draft suggests that little impact is likely to take effect until the end of the transition period, *i.e.* end of December 2020. Parties may, however, wish to iron out uncertainties and facilitate agreements by inserting an arbitration clause in their contracts, bearing in mind that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (***1958 NY Convention***) will be unaffected by Brexit.

4. **Conclusion**

With Brexit on its way (at least, at the time of writing this post), it is an opportune moment to review business strategies widely, but by wearing the 'glasses' of the coherent, deliberative and effortful System 2. This means executing rational and coherent decisions. Although the speed of System 2 decisions may not reconcile with the time demands of Brexit, decisions of this nature will have a profound impact on future agreements. For this reason, this author submits that parties should rely on System 2 in their decision-making processes around choice of jurisdiction, where the mind is rule-based, analytic and controlled and where reason dominates.

The author therefore proposes that parties adopt appropriate safeguards for risk management. While there is a plethora of ways to read and interpret warning signs from the market, parties may wish to consider the use of checklists (subject to a party's position in the contract chain), itemising tangible elements which could enhance the level of rationality of the choice of jurisdiction. For example: what is the fundamental objective(s) attached to my jurisdiction clause or an absence thereof? Do I seek/envisage enforcement in the EU Member States? Would a potential injunction across EU Member States be necessary and/or beneficial? Is a particular relief likely to be sought given my legal/business area, type of agreement, or risks assumed in the agreement? Would enforcement be a major concern or, rather, a tactical move that the party can only sue or be sued in a court in which I place more confidence? All other conditions permitting, would an arbitration clause be a viable choice?