Time to re-think how you're going to enforce your contracts

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IN RECENT weeks it has become apparent that part of the fall-out from the Brexit divorce between the United Kingdom and the European Union has been a hit to parties' ability to enforce contracts across the UK/European border. If UK businesses want to protect their interests and avoid additional cost and uncertainty, Brexit should trigger a review of what is being agreed in contracts regarding forum for dispute resolution. If you haven't already, I think it's time to seriously look at 'arbitration' (instead of court).

Some readers may have noted news stories in recent weeks about the European Commission's recommendation that the UK not be allowed to accede to (and effectively re-enter) the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. While that certainly sounds like a rather technical legal matter, it is actually an important part of the infrastructure for international trade with Europe and therefore an issue of real importance to UK businesses, particularly in the North-east.

Rather than explain the detail of Lugano, it suffices to say that the UK not being in Lugano will cause court judgments obtained here in the UK to be more difficult to enforce within the EU (and a handful of other Lugano states). That means uncertainty and an increase in legal process and costs. Far be it for me to complain about the additional requirement for lawyers, however this really is not good for business.

The result is that businesses who engage in cross-border trade should be thinking more about potentially agreeing to 'arbitration' as an alternative to court in their contracts.

Arbitration can be described as a private version of court. The parties agree to an arbitrator(s) deciding the claims rather than the public court system. Arbitration has long been a predominant method of dispute resolution for international trade due to the fact that arbitration is actually subject to a more all-encompassing and cohesive international framework than recognition of foreign court judgments.

Arbitral awards are therefore generally easier to enforce in countries right across the world than court judgements; which are subject to very piecemeal and often more onerous procedure. A notable example of this is the position as between the UK and the US where there is no automatic right of recognition and enforcement of UK court judgements, whereas arbitral awards are more readily enforceable.

In addition to more expedited and more certain enforcement of arbitral awards, arbitration also comes with the benefit of confidentiality and a flexibility that some court processes cannot match.

For those that may look at this and consider this to be a purely ancillary technical legal issue, I would remind them that it's all fine and well to make sure that the work is won and then executed perfectly, but if you have a customer who is unwilling to pay (or at least delaying to pay), the ability to actually enforce that hard-won contract is utterly crucial.

Arbitration may not be right for all contracts and projects as there are pros and cons, however perhaps Brexit will give business the push it needs to revisit this rather unsexy, yet important issue again. Profits are hard enough to earn, why make it more difficult.