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**KEEP CALM
AND
CARRY ON:**
HOW DISPUTES, DATA PRIVACY
AND EMPLOYMENT ISSUES
POST-BREXIT WILL AFFECT
AMERICAN BUSINESSES

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INTRODUCTION





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TOPICS FOR DISCUSSION

- I. How Brexit impacts employers**
- II. Data privacy in a post-GDPR/post-Brexit world**
- III. Choice of law and jurisdiction – how might Brexit affect international disputes?**

HOW BREXIT IMPACTS EMPLOYERS



HOW BREXIT IMPACTS EMPLOYERS

- **What will change on “Brexit Day” in March 2019?**
 - Most UK employment laws are part of domestic legislation
 - European Union (Withdrawal) Bill will preserve existing EU employment laws





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HOW BREXIT IMPACTS EMPLOYERS

- **What might change in the longer term?**
 - Repeal of statutes and regulations?
 - Agency Worker Regulations
 - TUPE – Transfer of Undertakings (Protection of Employment) Regulations
 - Discrimination and family leave
 - Interpretation of case law
 - E.g., holiday pay cases



HOW BREXIT IMPACTS EMPLOYERS

MANAGING A FLEXIBLE POST-BREXIT WORKFORCE

- **Reductions in force**
 - No at-will employment
 - Statutory notice entitlement
 - Unfair dismissal protection
 - Consultation
 - Genuine consultation before a final decision is made
 - More onerous obligations if 20 or more affected employees



HOW BREXIT IMPACTS EMPLOYERS

MANAGING A FLEXIBLE POST-BREXIT WORKFORCE

- **Transfers**

- TUPE transfers of employees in asset sales, acquisitions and corporate reorganisations
- Expats

- **Hiring**

- Use UK-form employment contracts
- Employees, independent contractors and workers?
- Immigration status



DATA PRIVACY IN A POST-GDPR/ POST-BREXIT WORLD



- **EU General Data Protection Regulation (GDPR)**
 - Replaced Data Protection Directive as of **May 25, 2018**
 - “**Personal Data**” is any information relating to an identified or identifiable natural person
 - Requires that Member States protect its peoples’ fundamental rights to data privacy and prohibits the transfer of personal data to any country outside the EU that does not “ensure an adequate level of protection.” [Article 45]
 - Only the laws of 11 countries provide this “adequate level of protection”
 - The U.S. is not one of the 11 (but EU-U.S. Privacy Shield intended to allow transfers)

- **Article 3**

- “(1) ... processing of personal data in the context of the activities of an establishment of a controller or a processor in the Union, regardless of whether the processing takes place in the Union or not.”

- “(2) ... processing of personal data of data subjects who are in the Union by a controller or processor not established in the Union, where the processing activities are related to: (a) the ***offering of goods or services***, irrespective of whether a payment of the data subject is required, to such data subjects in the Union; or (b) the ***monitoring of their behaviour*** as far as their behaviour takes place within the Union.”

- “(3) ... processing of personal data by a controller not established in the Union, but in a place where Member State law applies by virtue of public international law.”

When the regulation applies

Your company is a small, tertiary education company operating online with an establishment based outside the EU. It **targets mainly Spanish and Portuguese language universities in the EU**. It offers free advice on a number of university courses and students require a username and a password to access your online material. Your company provides the said username and password once the students fill out an enrolment form

When the regulation does not apply

Your company is service provider based outside the EU. It provides services to customers outside the EU. Its clients can use its services when they travel to other countries, including within the EU. **Provided your company doesn't specifically target its services at individuals in the EU, it is not subject to the rules of the GDPR**

<https://ec.europa.eu/info/law/law-topic/data-protection/reform/rules-business-and-organisations/>

GDPR

EFFECT OF BREXIT...

“We will be members of the EU in 2018 and therefore it would be expected and quite normal for us to opt into the GDPR and then look later at how best we might be able to help British business with data protection while maintaining high levels of protection for members of the public.”

– Information Commissioner,
Elizabeth Denham (2016)





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GDPR

EFFECT OF BREXIT...

“[T]he free flow of data is also critical for both sides in any modern trading relationship too. The U.K. has exceptionally high standards of data protection. And we want to secure an agreement with the EU that provides the stability and confidence for EU and U.K. individuals and businesses to achieve our aims in maintaining and developing the U.K.'s strong trading and economic links with the EU.”



– Prime Minister, *Theresa May (2018)*

Binding Agreement between EU-U.K. vs. “Adequacy Decision”

- Adequacy Decision
 - U.K. still a “third country” such that data will be considered exported outside of EU
 - U.K.-EU Privacy Shield?
- Binding Agreement
 - U.K. ICO would remain part of “One Stop Shop” (e.g., one investigation, one fine for breaches)

GDPR

KEY REQUIREMENTS AND FINES

- “Transparency” notices
- Specific clauses in data processing agreements
- Clarifies “right to be forgotten”
- Record of processing activities/data portability
- Data Protection Officer
- Increased fines for non-compliance
 - €10 million, or 2% of the worldwide annual revenue of the prior financial year, whichever is higher
 - €20 million, or 4% of the worldwide annual revenue of the prior financial year, whichever is higher



CHOICE OF LAW AND JURISDICTION



What are the potential effects of Brexit for international disputes?

- Choice of law clauses
- Choice of jurisdiction
- What about arbitration?
- A quick word about investment treaties

DISPUTE RESOLUTION POST-BREXIT

CHOICE OF LAW

- **Including a choice of law clause is already best practice**
- **The reasons for choosing English law will still apply post-Brexit**
 - English contract law is not dependent on EU law
 - Factors favouring English law do not derive from EU membership:
 - Predictability
 - Objective approach to contractual interpretation
 - Ability of English law to address complex commercial and financing structures and concepts
 - Availability of trusts
 - Familiarity of the law with market practices and commercial requirements
- **Choice of law clauses will be upheld after Brexit**
 - The current EU regime will continue to apply during the Transitional Period
 - After Transitional Period, EU Member States will apply the Rome Regulations, which uphold choice of law clauses
 - English common law upholds choice of law clauses

DISPUTE RESOLUTION POST-BREXIT

JURISDICTION CLAUSES

- **Including a jurisdiction selection clause is already best practice**
- **Precise position post-Brexit is uncertain:**
 - EU regime covers jurisdiction and enforcement of judgments (Recast Brussels Regulation), taking of evidence, and service of process
 - It would be difficult politically for the UK to be party to the same regime going forward
 - Other options:
 - Lugarno Convention
 - Hague Convention
- **Even with no international agreements:**
 - EU Member States should uphold exclusive jurisdiction clauses
 - English courts will uphold exclusive jurisdiction clauses under common law
 - Potential risk of delay from abusive proceedings in breach of exclusive jurisdiction clause (the “Italian torpedo”)
- **Enforcement may take slightly longer, but not significantly**
- **Mitigation strategies:**
 - Include provision for appointing an agent for service of process (should be done anyway)
 - Arbitration may be a better choice

DISPUTE RESOLUTION POST-BREXIT

EFFECT ON ARBITRATION

- **Arbitration has significant advantages over litigation irrespective of EU membership:**
 - Confidentiality (at least in England)
 - Enforcement through the New York Convention
 - Party autonomy
 - Neutrality
- **English-seated arbitration is unaffected by Brexit:**
 - The Brussels regime does not apply to arbitration in any event
 - No overarching EU arbitration law – left to national laws
 - Court support for arbitration depends on national courts – English courts are strong supporters
 - The UK is a signatory to the New York Convention in its own name
- **Growth of arbitration continues:**
 - Addressing complaints of finance-sector users regarding early disposition of claims
 - Seeing more and more arbitration in relatively new sectors: intellectual property, private equity, finance, even climate change
 - London is an important arbitration hub, as is Paris and, to a lesser degree, Switzerland and Stockholm. None of these depend on EU membership.

DISPUTE RESOLUTION POST-BREXIT

INVESTMENT TREATY ARBITRATION POST-BREXIT

- **The EU has been trying to change investment treaty arbitration for a number of years:**
 - The ECJ has held that BITs between Member States are contrary to EU law
 - EU has been pushing for a different form of dispute resolution in its Free Trade Agreements
- **The UK still has a network of treaties with EU Member States**
 - Opportunity for UK investors to benefit from these protections
- **Will the UK follow the EU's line in future trade deals or investment agreements?**



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Devika leverages her background and experience to assist clients in obtaining, protecting, licensing, and enforcing intellectual property rights, with a particular emphasis on technology law in the context of mergers, acquisitions, investments, project development and day-to-day business transactions. She counsels clients in fields such as energy, sports, aviation, software and hardware on digital media, open source software, cybersecurity, and other technology matters. She also has experience with a wide-array of transactions, including commercialization agreements, license agreements, reseller arrangements, collaboration agreements, joint ventures, software development agreements, and patent clearances.

Devika has also been designated a Certified Information Privacy Professional (CIPP/US) by the International Association of Privacy Professionals (IAPP) and serves as the Chair of the Firm's Cybersecurity & Data Privacy Task Force.



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Martin's principal area of practice is U.S., English, and international labor and employment law. He has extensive experience dealing with employment aspects of domestic and international business transactions, including mergers, acquisitions, and joint ventures.

He also counsels clients on day-to-day HR and personnel issues, and has represented clients in litigation before U.S. state and federal courts, administrative agencies, English Employment Tribunals, and the English High Court on a wide range of employment matters. Martin also advises clients on employment issues arising out of federal government contracts (including affirmative action and EEO compliance), record retention policies, and international data privacy and transfer laws. After six years in V&E's Houston office, Martin is now based in London. He is licensed as an attorney in Texas and as a Solicitor of the Senior Courts of England and Wales.



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Alexander has broad experience in investment arbitration and international commercial arbitration, under a wide range of arbitral seats and governing laws. Alexander is familiar with all major institutional rules, and has particular experience under the ICSID, ICC, LCIA, SCC and UNCITRAL Rules. He has also been involved in numerous claims in the English High Court. Alexander is admitted in England as a Solicitor Advocate. Alexander's practice covers a wide variety of sectors, particularly energy, infrastructure, construction, and telecommunications, and he advises on dispute resolution clauses, public international law, international investment law and nationality planning, and issues arising out of EU sanctions.

In 2011, Alexander was seconded to the London Court of International Arbitration where he administered arbitrations as part of the counsel team.



THANK YOU

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