Brexit, MiFID II, MiFIR and cross-border dispute resolution

Aug 19 2016 John Magnin and Sean Kelsey

The UK's vote to leave the EU has significant potential to change the landscape of cross-border dispute resolution in the financial services sector. Much will inevitably depend on the terms on which Brexit is eventually implemented. Under a number of hypothetical scenarios, it is at least possible that there will be no practical change at all. There is, though, considerable uncertainty as to what might happen.

This note addresses some of the possible consequences of Brexit for contractual dispute resolution clauses involving English law and English venues. It considers the recognition and enforcement in future of English court judgments by the courts of EU member states. And it considers the case for arbitration as an alternative to litigation, at least pending clarification of Brexit's impact in this area.

Most of the issues identified are of general application to commercial contracts of all kinds. Some are of specific relevance to the terms of agreements which will be covered by Markets in Financial Instruments Directive II (MiFID II) / Markets in Financial Instruments Regulation (MiFIR) as and when they come into effect (currently expected to be January 3, 2018).

English dispute resolution clauses

Investment management agreements, administration and custody agreements, as well as agreements for brokerage, marketing, distribution and placement commonly provide that any disputes or claims are to be governed by English law, and determined by English courts. Key industry model agreements, such as the International Swaps and Derivatives Association Master Agreement, and the International Capital Market Association Global Master Repurchase Agreement, provide either for the application of English law and the exclusive jurisdiction of the courts of England and Wales, or give parties an option to choose English law and courts.

At present, the English rules that govern the interpretation and enforcement of choice of law and jurisdiction agreements, and the recognition and enforcement of judgments of the English courts by the courts of other EU member states, are all a matter of EU law. It is not possible at the moment to predict how much longer that may remain the case, or indeed how the position may change in future, if it changes at all.

Choice of law

Whatever happens, it is unlikely that Brexit will materially affect a choice of English law to govern a contract and any disputes. This choice is likely to continue to be upheld by the courts both in England and in the EU. Parties' choice of law governing non-contractual obligations is a newer concept, but it is likely that party autonomy, in the shape of an express clause selecting governing law, will continue to be upheld in the courts of most relevant countries around the world.

Jurisdiction

As a matter of general principle, parties' agreements conferring jurisdiction in civil and commercial matters on the English courts are likely to continue to be respected both in England and in the EU. However, in the financial services sector, that position could be materially affected by the coming into effect of MiFIR and MiFID II.

Article 46 of MiFIR provides that firms outside the EU providing certain services to or performing certain activities for professional investors shall, before providing any such service or performing any such activity in relation to a client established in the EU, offer to submit any disputes relating to those services or activities to the jurisdiction of a court or arbitral tribunal in a member state.

In relation to retail clients (as well as certain professional clients), Article 39 of MiFID II provides that a member state may require a third-country entity to establish a branch in that member state, as a condition of providing investment services or performing investment activities. This, plus current rules in relation to consumer contracts, may complicate the position with respect to jurisdiction agreements.

After Brexit, financial services firms outside the EU will include those in the UK. It is possible that new arrangements, under MiFID II, in relation to passporting by UK entities of their services into EU Member States, either via a branch, or cross-border, will enable any UK entity to continue to operate within the EU, on the basis of an "equivalence" between the relevant UK and EU regulatory regimes. In those circumstances, it remains to be seen whether English courts will be an acceptable forum,

Related content

News by subject

- Enforcements
- Regulatory oversight
- Dispute resolution and litigation
- Browse all subjects

News by country

- United Kingdom
- View country guides

Related rulebooks

EU Regulations

- Article 14 Obligation for systematic internalisers to make public firm quotes in respect of shares, depositary receipts, ETFs, certificates and other similar financial instruments

EU Directives

- 2014/65/EU — Markets in Financial Instruments Directive (MiFID II) *(recast)*

Search

Go

Subject browser | Advanced

Most read articles

- Banks step up use of misconduct data to find root causes
- Deutsche whistleblower rebuffs $8.25 million SEC award, says executives should have been punished
- UK regulator requires FX firms and senior managers to use tough new global code
- BREAKINGVIEWS: SEC left red-faced over $35 billion pink-sheet debacle
- COLUMN: Payment systems — development of products and risks

Message boards

Show all messages

NEW Beneficial Owner
General Discussion
4 posts – 3 new (last post Aug 23, 2016)
in respect of Beneficial Ownership, the Money Laun...

NEW They have had this for a
General Discussion
1 post – 1 new (last post Aug 23, 2016)
http://www.bailii.org/ew/cases/EWHC/Admin/2011/258...

NEW This is a bit silly
General Discussion
6 posts – 1 new (last post Aug 22, 2016)
As a whistleblower, you have some rights but not t...

Add a post | More messages

Reference Library

- Practitioner's Guide for Broker-Dealers
- The MLRO Handbook
- The Compliance Handbook
- MiFID Survival Guide
- The Insurance Practitioner's Guide

under MiFIR or MiFID II, for the submission of cross-border disputes.

Enforcement

As matters currently stand, judgments of English courts are recognised and enforced anywhere in the EU as if they were judgments of the local courts. What happens post-Brexit will depend on such arrangements, if any, as may be agreed between the UK and the EU.

Unless the current regime is retained, or substantially replicated in some form, which could well happen, under a number of the foreseeable possible outcomes, at any rate, enforcement of English judgments within the EU will be a matter for specific local advice. But it may not, in all cases, be as straightforward as it is now. Certain fast-track means for the enforcement of money judgments under the existing EU regime could cease to be available.

Arbitration

So: no assumptions can be made henceforth on the enforceability, post-Brexit, of English judgments within the EU, or vice versa. Contractual provisions should be reviewed carefully in the light of this uncertainty, and thought given to such clauses as may be under negotiation, either now or in future. In particular, parties may wish to consider arbitration instead of agreeing to the jurisdiction of the English courts.

There is no reason to believe at present that the recognition and enforcement of international arbitration awards will be affected in any way by Brexit. Supervision of English-seated arbitration by the English courts — one of the attractions, for many, of arbitration in London — is also likely to be unaffected (save as a result of MiFID II and/or MiFIR).

Depending on how Brexit plays out, the English courts may in future feel able to resume granting anti-suit injunctions in respect of court proceedings in EU member states, in order to protect the integrity of agreements to arbitrate.

The effect of any such injunction in the courts of the relevant member state will continue to depend materially on local rules. Any resumption of the power of the English courts to injunct breakers of arbitration agreements however could lend a significant additional advantage to agreements to arbitrate in London.

Closing thoughts

The historic attractions of England as a place to resolve disputes are well known. A highly-predictable, precedent-based system of law; top-drawer, highly-experienced and ferociously independent judges; and a significant concentration of commercially-minded legal expertise have all kept London among the world's truly 'global' jurisdictions. None of these factors are affected by Brexit. It is an unfortunate consequence of the vote for the UK to leave the EU that parties must now 'wait and see' what happens with respect to litigation of cross-border dispute — seven though the answer, in the end, may be "not much".

The silver lining to that cloud of uncertainty is the continued, near-universal enforceability of arbitral awards, and the pre-eminence of London as a venue for international arbitration.

K&L GATES

John Magnin *is a partner and the litigation practice area leader in the London office of K&L Gates.* ***Sean Kelsey*** *is a senior associate in the dispute resolution and litigation department in the same office. The views expressed are their own.*

Comment on this article

Subject*

Name or pseudonym*

Message*

Submit Message

THOMSON REUTERS GRC | © 2011 THOMSON REUTERS. ALL RIGHTS RESERVED

CONTACT US DISCLAIMER TERMS & CONDITIONS PRIVACY STATEMENT ACCESSIBILITY RSS TWITTER GRC CONNECTS LINKEDIN

THOMSON REUTERS