Feature

KEY POINTS

- Brexit has encouraged banks and financial institutions to reflect on the continued suitability of their dispute resolution choices.
- The effectiveness of a choice of English law to govern transactions should remain unaffected by Brexit.
- After Brexit, the Brussels Regime on jurisdiction and enforcement will no longer apply. It is likely to be replicated in some form but there is currently uncertainty as to what will replace it. Banks and financial institutions are therefore reflecting on whether arbitration provides a suitable alternative.
- The reciprocal enforcement regime for arbitral awards provided in the New York Convention is unaffected by Brexit. An award made in the UK can be enforced in each of the EU member states and vice versa.
- However, there are a number of other relevant considerations for banks and financial institutions who wish to choose arbitration, including concerning interest, summary determination, multiple related contracts, the choice of arbitrator and the suitability of arbitration procedure for complex financial markets disputes.

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Dispute resolution choices for banks and financial institutions in a post-Brexit world: opting for arbitration?

This article explores the enforcement of English judgments in the EU post-Brexit, and the particular aspects of international arbitration that banks and finance parties should consider when making their dispute resolution choices.

With certain limited exceptions (eg project finance in emerging markets), the banking sector has historically been less inclined than other sectors to embrace international arbitration. Banks and financial institutions from across the globe, and particularly in Europe, have for many years preferred to enforce their English law-governed agreements, and resolve their disputes, in the courts of England. The pairing has stood the banks in good stead. They have been able to rely upon a solid body of law, both in terms of general contract law principles and, particularly since the 2008 financial crisis, on the interpretation of complex financial products, applied by the courts with rigour and predictability.

For the majority of banks and financial institutions, there has been no "push" factor away from the English courts and towards arbitration. However, the spectre of Brexit has encouraged many institutions – both within the UK and in other EU member states – to review their whole legal *modus operandi*. Dispute resolution clauses have been included in the long checklist of items to be considered.

In this context, many banks and financial institutions have inevitably sought to weigh up the risks and benefits of including an arbitration clause in their transactions. This article explores the enforcement of English judgments in the EU post-Brexit, and the particular aspects of international arbitration that banks and finance parties should consider when making their dispute resolution choices.

BRIEF RECAP: WHAT IS INTERNATIONAL ARBITRATION?

Arbitration is a system of dispute resolution whereby parties agree that their disputes will be resolved by an independent and impartial tribunal, to the exclusion of the substantive jurisdiction of the courts of national legal systems. Arbitration shares many features of court litigation – in particular, it is an adversarial process which results in a decision (recorded in an arbitral award) which is final and binding. The arbitration process is private and often awards can be confidential. Arbitral awards can be recognised and enforced in courts around the world under the hugely successful New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention), to which there are now 160 contracting parties. Significantly, outside the EU (and outside the scope of the EU's Brussels Regulation), there is currently no comparably effective regime for reciprocal enforcement of court judgments.

NO "PUSH FACTOR"? DISINTEREST OF BANKS AND FINANCIAL INSTITUTIONS IN INTERNATIONAL ARBITRATION

Despite the exponential growth in recent years of international arbitration for resolving cross-border disputes in other sectors, the financial sector has been slow to follow. Banks and financial institutions, at least in Europe, have generally been comfortable with their traditional dispute resolution choices – often English governing law and exclusive English court jurisdiction.

The English courts and English law are a very popular choice for parties doing business worldwide for many reasons, including:

- the independence and expertise of the judiciary and the efficiency of the English court process;
- the willingness to consider the commercial purpose of a contract;
- decisions are largely reached on complex financial instruments by reference to

the practice of, and implications for, the financial market; and
- procedural benefits such as the availability of judgment in default or summary judgment.

The English courts have developed a solid body of legal principles which they apply with a high degree of predictability. Parties can assess the legal effect of contractual terms in advance – a considerable contrast to a non-precedential system – and English law generally gives effect to parties' contractual bargain and admits limited scope for implied terms or influence by public policy changes.

Indeed, as almost all core principles of English contract law derive from English common law (and not EU law), the advantages of English law will remain after Brexit, whatever form it may take. Current indications are that banks and financial institutions with EU-related transactions wish to retain their choice of English law after Brexit if possible, rather than choosing an EU member state law to govern their transactions.

The validity and effectiveness of any contractual choice of law is very unlikely to be affected by Brexit. In other words, a choice of English law (or any other law) in a contract will continue to be effective, whether in England or in the EU member states. This follows from the continued operation within the EU of the Rome I Regulation, governing choice of law in contracts, which in effect enforces any choice of law made by contracting parties, whatever law they have chosen. The Rome II Regulation, which allows commercial parties to select in advance by contract, the law to govern their non-contractual rights and liabilities, will also continue to apply in the EU after Brexit. If there is a transition period, Rome I will apply in the UK to contracts concluded before the end of transition and Rome II will apply in respect of events giving rise to damage where events occurred before the end of transition. Whether there is no deal or whether there is a deal, the choice of law rules in Rome I and Rome II will be incorporated into English domestic law with appropriate amendments after Brexit.

BREXIT: CLOSER CONSIDERATION OF ARBITRATION AS A DISPUTE RESOLUTION POSSIBILITY

Across the EU, English court judgments have been recognised and enforced on a predictable basis under the so-called "Brussels Regime" (principally the recast Brussels Regulation (EU) 1215/2012). The Brussels Regime will no longer apply after Brexit. In the case of a no deal Brexit, the Regime will cease to apply immediately after exit, so from 1 November 2019 (as things currently stand). If there is a deal, then the current rules will cease to apply after the end of a transition period. Assuming that the Draft Withdrawal Agreement applies, this would be in 2021. This has therefore prompted reconsideration by banks and financial institutions of their jurisdiction clauses.

The UK government has previously indicated that it would seek to reach an agreement with the EU that allows for close and comprehensive cross-border cooperation on a reciprocal basis. It has also indicated that it will seek to participate in the 2007 Lugano Convention, which would apply as between the UK and Norway, Switzerland and Iceland (and the EU, if no other agreement is reached). Both depend on agreement with the EU. Neither would be in place in the event of a no deal Brexit. In the event of a deal, while there can and should be optimism that appropriate agreement can be reached during the transition period, there is of course no certainty.

The UK's future accession to the Hague Convention on Choice of Court Agreements (30 June 2005) in its own right (it is currently a party by virtue of its EU membership) will provide a mutual recognition and enforcement mechanism between the UK and EU member states if nothing else is put in place, but it is limited to exclusive jurisdiction clauses. Further, there is some uncertainty around whether EU member state courts will apply the Hague Convention only to English exclusive jurisdiction clauses agreed after Brexit. The Hague Convention will also not apply in some other circumstances, including to jurisdiction disputes in the court of an EU-domiciled defendant where there is no English party (or other Hague Convention non-EU party) involved (Art 26(6) of the Hague Convention).

Without any replacement for the Brussels Regime, and outside the Hague Convention regime, each EU member state court will apply its own national rules when asked to enforce an English court judgment. In many cases, these will allow enforcement, albeit with potentially increased cost or delay. So far as jurisdiction is concerned, if English proceedings are commenced first, an EU member state court will have a discretion under the rules in the Brussels Regime to stay its proceedings. These are rules which apply to any proceedings commenced in a non-EU member state court. It is unclear, however, whether an EU member state court would have power to stay its proceedings where its proceedings are first in time and the English proceedings are second in time.

All of the uncertainty created by Brexit, as to enforcement in particular, has led banks and financial institutions to consider whether arbitration provides an answer.

ENFORCEMENT OF LONDON-SEATED ARBITRAL AWARDS IN EUROPEAN MEMBER STATE COURTS POST-BREXIT

The reciprocal enforcement regime of the New York Convention is rightly presented as one of the key advantages of arbitration. The New York Convention obliges the courts of contracting parties to:
- stay proceedings brought before them if there is a valid and binding arbitration agreement; and
- recognise and enforce foreign arbitral awards with very limited exceptions.

All the EU member states are contracting parties to the New York Convention and the UK is also a contracting party independently of its membership of the EU. The New York Convention contains very limited grounds on which recognition and enforcement of an award can be refused. Enforcement of UK-seated arbitral awards and arbitration agreements in EU member states, and EU member state-seated arbitral awards and

arbitration agreements in the UK, will be unaffected by Brexit.

Parties can choose a "safe" seat of arbitration – a seat in a jurisdiction with a well-drafted and clear legislative framework for arbitration, an impartial and well-regarded judiciary and a strong track record in supporting arbitration and enforcing arbitral awards. London meets this criteria, as do several other cities in EU member states.

ARBITRATION: FACTORS FOR FURTHER CONSIDERATION FOR BANKS AND FINANCIAL INSTITUTIONS

Whilst the ease of enforcement of arbitral awards across the EU is an inducement for banks and financial institutions to choose arbitration, particularly whilst uncertainty remains concerning the reciprocal recognition of English court judgments, there are further considerations for banks and financial institutions less familiar with the arbitration process.

Many international arbitral institutions provide a basic model clause which will generally be sufficient to create a binding obligation to arbitrate. However, there are a number of matters which warrant particular consideration by banks and financial institutions when negotiating an arbitration agreement.

Early dismissal of claims or defences, or points of fact or law

One of the attractions of the English courts has been the ability to obtain summary or default judgment. Financial institutions value these procedures for their efficiency in the context, for example, of simple debt claims or when enforcing an on-demand guarantee. Neither summary determinations nor awards in default of appearance have traditionally been found in arbitration proceedings. In circumstances in which parties have contracted out of the jurisdiction of the courts by agreeing to arbitration, such procedures raise questions over access to justice and due process rights. In many jurisdictions, determining disputes summarily, or making an award in default of the respondent's appearance without hearing, and adjudicating on, the claimant's substantive case, would likely be both beyond the tribunal's express powers and inconsistent with the tribunal's duty to give each party a reasonable opportunity to put its case and deal with the case put to it.

However, arbitration is a creature of contract, and is underpinned by the principle of party autonomy.

> "Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been endorsed not only in national laws, but also by international arbitral institutions worldwide, as well as by international instruments such as the New York Convention and the [UNCITRAL] Model Law." *Redfern & Hunter on International Arbitration*, 6th ed (pub. OUP) at para 6.07

In most jurisdictions, therefore, the parties can agree to give the tribunal the power to dispose of a claim or defence, or a matter of fact or law, on a summary basis and can set out the basis on which it may do so (for example, where an argument is manifestly without merit, or has no reasonable prospects of success). A clause which provided that the tribunal could "hear and determine at any stage of the arbitration any issue asserted by any party to be dispositive of any claim or counterclaim, in whole or part, in accordance with such procedure as the arbitrators may deem appropriate, and the arbitrators may render an award on such issue", was found by the English court to be broad enough to accommodate the allegedly summary procedure which the tribunal employed (*Travis Coal Restructuring Holdings LLC v Essar Global Fund Limited* [2014] EWHC 2510 (Comm)).

Indeed, some well-known international arbitration institutions have introduced early dismissal or early determination provisions into their rules of arbitration, which are regularly incorporated by reference by parties into their arbitration agreement (see, for example, Rule 29 of the SIAC Rules 2016 and Art 43.1 of the HKIAC Administered Arbitration Rules 2018). The ICC also confirmed that the tribunal's powers under the ICC Rules were broad enough to accommodate summary determination. The introduction of such provisions is anticipated to promote cultural change and encourage arbitrators to take advantage of such powers where they have them.

Of course, the availability of summary determination in either forum – court or arbitration – should not be over-stated. As highlighted in the ISDA Arbitration Guide 2018, the applicant must overcome a very high hurdle to demonstrate that the claim should be dismissed summarily.

Interest

Calculation of pre- and post-award interest can have a significant impact on the quantum outcome of a dispute. Under the English Arbitration Act 1996 (AA 1996), which applies to any arbitration seated in England, the parties are free to agree on the powers of the tribunal to award interest. However, in the absence of any such agreement the default provisions provide that "the tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case – (a) on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award; (b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the award was made, in respect of any period up to the date of payment" (AA 1996, s 49(3)). A similar discretion exists for post-award interest.

Parties therefore need to consider whether this broad discretion is appropriate in their transaction and, if not, provide in the arbitration agreement for the parameters within which the tribunal is empowered to order pre- and/or post-award interest.

Multiple parties and multiple contracts

It is regularly the case that finance transactions involve multiple related agreements between a number of parties. The same factual matrix can give rise to

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disputes under more than one of these agreements, involving different parties. It is key for finance parties to note that an arbitral tribunal does not have the same case management powers as the English court when it comes to consolidating related arbitration proceedings and joining parties. This can be addressed by way of a carefully drafted arbitration agreement under which the parties all agree that a tribunal has the power to consolidate disputes under related agreements and to join all parties to those related agreements to an existing arbitration.

A connected consideration is whether all documents in a transaction should include arbitration provisions. For example, in an acquisition finance transaction, disputes under agreements within the security package may be more efficiently resolved and enforced in the local courts, rather than through arbitration, notwithstanding the risk of parallel proceedings.

Arbitrating disputes: decision-makers and procedures

It is usually the case in international arbitration that parties can have some influence over the composition of the tribunal – many arbitration agreements provide that each side to a dispute can nominate an arbitrator. This enables a bank with a simple debt claim to appoint a black-letter lawyer who is likely to enforce the borrower's obligations, whereas a bank which has a claim under an ISDA can nominate an arbitrator with financial markets experience, who is both familiar with the terms of the ISDA Master Agreements, and the practical effect of their operation. Indeed, at least one arbitral institution – P.R.I.M.E. Finance – has been set up with the purpose of identifying a pool of arbitrators and experts with expertise in financial markets transactions, including those with derivatives market experience, central bankers and former judges. Outside the specialist auspices of P.R.I.M.E. Finance, other international arbitration institutions can readily identify suitably qualified and experienced arbitrators.

As noted above, arbitration is a contentious procedure with similar characteristics to litigation in the English courts – the parties make submissions and witness and expert evidence is filed to assist the tribunal in reaching its determination. However, arbitration is generally understood to strike a balance between common law and civil law approaches to dispute resolution. As such, parties familiar with litigation in the English courts may be surprised at some of its traditional features. In particular, a typical arbitration involves an emphasis on written arguments and the hearing features only short opening and closing legal submissions. This clearly contrasts with the approach to complex financial disputes in the English courts, in which the parties may be expected to spend days, if not weeks, outlining their factual and legal cases to the judge.

Notably, consistent with the principle of party autonomy described above, parties can agree a procedure which suits the nature of their dispute. Therefore, to the extent that parties consider that the complexities of their transaction warrant longer oral submissions, it is within their power to agree this. Where no agreement is forthcoming, it will be a matter for the tribunal to decide based on the relevant submissions of the respective parties.

It is also possible for the parties to address in their arbitration agreement other significant aspects of their dispute resolution procedure, such as interim relief (from both the tribunal and the courts of the seat), in a way which suits the transaction in question and the nature of the disputes most likely to arise.

CONCLUSION

International arbitration offers banks and financial institutions the certainty of a "tried and tested" reciprocal enforcement regime across the UK and the EU (and beyond). It can offer other advantages – including privacy, finality and the potential to choose an independent and impartial arbitrator with the characteristics and expertise suitable to the dispute in question. However, there are a number of additional factors which banks and financial institutions should consider to ensure that the arbitration process to which they agree suits their needs. As indicated in the Report of the ICC Task Force on Financial Institutions and International Arbitration, which examined a wide range of banking and financial activities, including derivatives, international financing, advisory matters and asset management, one size may not fit all. ■

Further Reading:

- Arbitrating multi-party and multi-contract disputes (2018) 10 JIBFL 616.
- Arbitration and financial institutions: an overview (2018) 4 JIBFL 236.
- LexisPSL: Banking & Finance: Governing law, jurisdiction and arbitration clauses in finance documents.