# BREXIT AND THE CHOICE OF ENGLISH LAW AND JURISDICTION IN FINANCIAL MARKET CONTRACTS

As a general rule, EU law provides for party autonomy in choice of law and choice of court under respectively the Rome I Regulation (Regulation EC/593/2008) and the recast Brussels Regulation (Regulation EU/1215/2012). However, in relation to certain activities in the financial sector choice of law and/or jurisdiction is constrained by EU market rules. These are described below.

The risk for the UK post Brexit is that both these rules and new rules to a similar effect will be used to limit the ability of UK based financial services businesses to sell into the EU, and, to the extent they do, to enable EU lawyers and legal systems dispute resolution services to benefit from related contract and dispute resolution work to the exclusion of UK lawyers and UK dispute resolution systems.

Note that current restrictions affect the USA and other legal systems outside the EU and the UK would lose its advantage over these systems.

## 1. MiFIR (Regulation EU/600/2014)

Article 46(6) - in Title VIII that deals with the provision of services and performance of activities by third country firms following an equivalence decision with or without a branch - provides:

> 6. Third-country firms providing services or performing activities in accordance with this Article shall, before providing any service or performing any activity in relation to a client established in the Union, offer to submit any disputes relating to those services or activities to the jurisdiction of a court or arbitral tribunal in a Member State.

This means that any UK firm exercising equivalence rights would have to offer dispute resolution within the EU, although it does appear that the client could choose to have a different jurisdiction provided it was clear that the client was making a free choice in this regard. In any event it does not prevent the use of English law and the choice of, for example, ICC arbitration in Paris, would allow the use of English lawyers in the process, though the choice of an EU Court (other than Irish) is likely in practice to exclude this.

## 2. AIFMD (Directive 2011/61/EU)

Article 37 dealing with authorisation of non-EU AIFMs intending to manage EU AIFs and/or market AIFs managed by them in the Union in accordance with Article 39 or 40:

> 13. Any disputes arising between the competent authorities of the Member State of reference of the AIFM and the AIFM shall be settled in accordance with the law of and subject to the jurisdiction of the Member State of reference.
>
> Any disputes between the AIFM or the AIF and EU investors of the relevant AIF shall be settled in accordance with the law of and subject to the jurisdiction of a Member State.

This means that where an AIF sold in the EU is managed by a UK fund manager, then effectively it must be written for EU investors under an EU and subject to the jurisdiction of an EU Court. In practice, this means that UK AIFS are unlikely to be sold into the EU, even to Ireland, unless an Irish law agreement can be used for the whole arrangement, or the laws are so similar that it is possible to use a choice of law option clause (ie English law where the investor at the time the dispute arises is habitually resident in the UK and Irish law where the investor is habitually resident in the EU – something found in some international trade agreements, but it does tend to give rise to litigation in itself.

It would be possible to specify English Court jurisdiction for UK investors and Irish Court jurisdiction for EU investors if there were a choice of Irish law or a choice of law option, though this would add a complication to dispute resolution to the extent Irish law diverged from English law. Whether it is possible to follow this approach using a civil law such as Luxembourg Law is more difficult due to the greater divergence in approach between common law and civil law approaches. It is likely therefore that if an EU AIF is sold into the UK, UK investors will be offered only the same dispute resolution as EU investors, assuming the UK maintains its liberal traditions on choice of law and court, in which the wishes of the parties are paramount and not dictated by law.

It is not clear the extent to which this will have retrospective effect on issues made before Brexit takes effect. This should be resolved in the leaving negotiations.

**3. ECB Eligibility Criteria for Collateral in Eurosystem Credit Operations**

- The ECB's guidance on eligibility is divided into two frameworks referred to as the "general framework" and the "temporary framework", which taken together set out the full eligibility criteria. The general framework is permanent and provides the default baseline criteria, however it can be overridden by the temporary framework. This allows the ECB to temporarily derogate as required from the general framework in response to the economic climate from time to time.

- Some of the key ECB eligibility criteria in relation to asset-backed securities include:

    A. underlying assets must be located in the EEA;

    B. underlying assets must be originated by an originator incorporated in the EEA;

    C. the acquisition of the underlying assets by the SPV must be in accordance with the laws of an EU Member State;

    D. underlying assets must be sold to the SPV by an originator incorporated in the EEA or an intermediary incorporated in the EEA;

    E. the issuer must be an SPV established in the EEA;

    F. the securities must be issued in the EEA; and

    G. the securities must be admitted to a regulated market within the meaning of the Prospectus Directive or another "acceptable market" (the ECB maintains a list of acceptable markets).

Any securitisation involving a non-EEA originator, issuer or any non-EEA assets would therefore not be eligible under the existing ECB criteria; however the ECB does retain the ability to alter this in the future under the temporary framework.

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