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Post-Brexit financial disputes in Sweden

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ANDREAS MALMBERG

Introduction

Swedish companies are occasionally parties to financial contracts governed by English law – typically, as borrowers or guarantors under a cross-border financing arrangement or by the use of the International Swaps and Derivatives Association (ISDA) Master Agreement for their derivatives transactions.[(1)]

The English courts have historically been a popular forum for cross-border financial disputes or derivatives disputes. However, due to Brexit, the automatic recognition of English court judgments in the European Union, which was a process associated with the United Kingdom's EU membership, no longer applies. As a result, the enforceability of English judgments in Sweden has become uncertain, which, in turn, has increased the risk of more complex, time-consuming and costly court proceedings for the parties involved.

Choice of law clauses in financial contracts

The Rome I Regulation enables Swedish parties to choose the law that should apply to their contractual obligations,[(2)] such as with regard to loan agreements or derivatives transactions. This is the case even if the law chosen is the law of a jurisdiction that is not a member state of the European Union. Thus, where English law is chosen to govern a financial contract, any dispute in relation to that contract shall be resolved according to English law, even if the dispute is settled by the Swedish courts.

Jurisdiction clauses in financial contracts

Clauses on the recognition of foreign court judgments in financial contracts are covered by other international agreements (eg, the Brussels (Recast) Regulation[(3)] and the Lugano Convention[(4)]). However, these agreements are not universal: Swedish courts need not recognise court judgments given in jurisdictions that are neither an EU member state nor a Lugano Convention contracting state. Following Brexit, the United Kingdom has acceded to the Hague 2005 Convention in its own right.[(5)] However, this applies to "exclusive jurisdiction clauses", which designate the courts of one contracting state to the exclusion of the jurisdiction of any other courts. This differs from "asymmetric jurisdiction clauses", which require one party (typically a creditor) to bring proceedings in one jurisdiction only, while the other party (typically a debtor) may bring proceedings in other jurisdictions. As such, it is widely considered that asymmetric clauses are likely to fall outside the scope of the Hague 2005 Convention.

Against this background, should an English court rule against a Swedish party in a dispute relating to a financial contract that has an asymmetric jurisdiction clause – for example, regarding the right to accelerate a loan, early termination of a swap or the size of a claim – there is a risk that such judgment could not be enforced in Sweden unless it has been confirmed by a Swedish court.

Arbitration proceedings in financial disputes

Financial disputes are sometimes resolved via arbitration, and there is a broader trend towards greater acceptance of arbitration in the financial markets. As a response, ISDA and the Loan Markets Association have incorporated optional arbitration clauses in their standard documentation. Because Sweden has acceded to the New York Convention (without reservations),[(6)] where a dispute involving a financial contract with a Swedish party is resolved via arbitration carried out by an arbitral tribunal, this will generally be recognised and enforceable in Sweden.

Comment

Prior to Brexit, an English court judgment would be directly enforceable in Sweden without a retrial on its merits. Now, however, the recognition and enforceability of such judgments in Sweden is not as certain.

In view of the current situation, when entering with a Swedish party into a financial contract that is governed by English law, the jurisdiction clause should be carefully considered by the contracting parties. While English courts should be preferred for disputes in relation to such agreements, the Hague 2005 Convention is currently the sole reciprocal enforcement legislation in force between Sweden and the United Kingdom. Therefore, to ensure that judgments related to such agreements are directly enforceable in Sweden, thus avoiding the risk of costly, time-consuming and perhaps inaccurate retrials, the jurisdiction clauses therein should exclusively refer to the courts or arbitral tribunals of England.

For further information on this topic please contact Andreas Malmberg at Wigge & Partners by telephone (+46(0)72 062 60 86) or email (andreas.malmberg@wiggepartners.se). The Wigge & Partners website can be accessed at www.wiggepartners.se.

Endnotes

(1) According to the ISDA, "virtually all" ISDA Master Agreements entered into by counterparties based within the EU or the European Economic Area are governed by English law. For more information, see here.

(2) Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual

obligations.

(3) Regulation (EU) No. 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

(4) The 2007 Lugano Convention on the Recognition of Judgments in Civil and Commercial Matters.

(5) The current contracting states currently include the EU member states, Israel, Mexico, Montenegro, Singapore and the United Kingdom.

(6) The Convention on the Recognition and Enforcement of Foreign Arbitral Awards.