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BREXIT Briefing

Middle East and Islamic Finance Group – Capital Markets

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Brexit; Assessing the impact on Middle Eastern issuers accessing the UK and European Capital Markets

Many companies and other entities in the Middle East tap the UK and/or European debt and equity capital markets as part of achieving their corporate funding and broader strategic objectives. Whilst the precise legal and regulatory impact that the UK's recent decision to leave the European Union (EU), dubbed Brexit, will have on the corporate finance market will depend on a number of factors, most notably the terms of withdrawal that are negotiated with the EU and the consequential impact on applicable legislation, we will examine some preliminary matters to be borne in mind.

Regulatory regime and "Passporting"

Many issuers in the Middle East elect to list their debt or equity securities on European exchanges, particularly in London. Currently, the prospectus disclosure, listing and reporting regime is harmonised across the EU, by virtue of the Prospectus, Transparency and Market Abuse Directives, providing many advantages for issuers, most notably allowing for prospectuses to be "passported".

The prospectus "passporting" regime currently allows issuers to use their prospectus approved by the competent authority in one member state to offer equity or debt securities into another European Economic Area (EEA) member state or to list securities on a regulated market in another EEA member state (or vice versa). For example, a United Arab Emirates - based issuer that wanted an IPO and listing in London would currently be able to use its Financial Conduct Authority approved prospectus to offer securities in any other member state. As a result of Brexit, in the absence of any analogous mutual recognition system negotiated with the EU, such "passporting" would no longer be available. If no such mutual recognition arrangement is negotiated, different prospectus and listing requirements in the UK from those in the EU would make it difficult and costly for issuers to make public offers of equity and debt securities both in the UK and Europe.

However, the European Commission does have the power to approve a non-EEA prospectus if it meets international standards which are equivalent to EU requirements, and so could make a finding of "equivalence" with respect to any future UK prospectus, albeit this would depend on whether the UK Treasury left in place the existing UK implementing legislation which mirrors the EU regime. This may become problematic over time, however, in case the two sets of rules deviate.

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Prospectus disclosure and risk factors

Following Brexit, issuers may wish to consider Brexit related risk factor disclosure in their prospectuses to the extent that Brexit is likely to have a material impact on their business and/or the securities being offered.

Validity of documents

The majority of debt capital markets transactions in the Middle East are governed by English law. It is difficult to see how Brexit could impact the validity of an English law governed contract, whether by resulting in the contract becoming frustrated or otherwise. For an English law governed contract to be frustrated, it must become impossible or illegal to perform or require either party to perform something radically different to what was originally agreed as a result of an unforeseen event outside the parties' control. It seems unlikely therefore that the requirements for frustration would be satisfied by Brexit and Brexit is otherwise unlikely to cause any other such validity issues.

Default provisions in bond/sukuk terms and conditions

It is very unlikely that the terms and conditions of any debt financing transactions, including bonds and/or sukuk, would have specifically contemplated Brexit as being an event of default or dissolution event. Similarly, it is difficult to see how the usual events of default and/or dissolution events typically included in bond and/or sukuk terms and conditions would be triggered by Brexit.

Whether Brexit would, in and of itself, trigger a material adverse change provision in a subscription/underwriting agreement would depend on the drafting of the particular clause. However, such clauses usually apply during the offer period of a particular offering, and it seems highly unlikely that any such offerings would have been launched immediately before or after the referendum.

Choice of governing law and jurisdiction

As noted above, the majority of debt capital markets transactions in the Middle East are governed by English law, and often provide for any disputes to be submitted to the jurisdiction of the English courts.

On the matter of governing law, by virtue of the Rome I and Rome II Regulations, the courts of member states (other than Denmark) currently apply a harmonised set of rules to determine what law should apply to most commercial disputes, which generally provide that party autonomy is to be respected. Such Regulations continue to apply with direct affect in the UK for so long as the UK is a member state.

Going forward, in the event of the UK's withdrawal from the EU, the UK could either revert back to the conflict of laws rules which the Rome Regulations replaced or simply adopt the Rome Regulations into English law. It is, in our view, unlikely that the English courts would change their general approach to respecting a choice of English law given the English courts long held position of respecting contract party autonomy over choice of law. Member state courts are also likely to continue to uphold English governing law and English jurisdiction clauses, subject to the usual exceptions.

Similarly, the jurisdiction of member states courts in civil and commercial disputes and the enforcement and judgments is also currently harmonised and regulated by the Brussels Regulation. In the event of Brexit, the UK may well sign up to another regime in its own right which will have substantially the same affects and benefits as the Brussels Regulation; for example, the Hague Convention on Choice of Court Agreements to which the EU is already a party, or the Lugano Convention. As an alternative, the UK may seek to secure for itself individual arrangements with existing EU countries, to govern the mutual recognition and enforcement of judgments, but this of course remains to be seen.

What is more certain is the position on arbitration - Where there are arbitration clauses in place, Brexit should not affect English seated arbitral proceedings subject to the Arbitration Act 1996, nor should it have any impact on enforcement of arbitral awards under the New York Convention.

The timing for transactions

Given the volatility in financial markets following Brexit, issuers and their advisers will need to carefully consider the timing for launching securities offerings. For issuers looking to undertake an initial public offering in London or elsewhere in Europe, which will also be offered in the US, as is often the case, in 2016, they will continue to watch the markets closely to establish whether launching the transaction in the typical window of September to mid-November (assuming the IPO will be based on audited interim results) would be optimal.

Conclusion

It is important to note that until the UK's withdrawal from the EU is fully concluded, the UK will remain an EU member state and the status quo, as far as the legal and regulatory environment for European capital market transactions is concerned, will be largely maintained.