Finance and insolvency

The UK is now in a transition period following its exit from the EU and this will last until the end of 2020. During the transition period, the existing regime continues to apply in relation to submission to jurisdiction and enforcement of judgments in both UK and EU courts. Cross-border insolvency arrangements continue to apply as between the UK and EU, and UK authorised firms continue to have free access to EU markets. At the end of the transition period, however, unless new arrangements are made in respect of these matters, they will all cease to apply. Here, we look at the key changes for finance, across loans, derivatives, and securitisation, and insolvency which will affect our transactions after the end of the transition period.

Contractual considerations

The two most often-posed questions in relation to financing contracts relate to (i) the choice of English law as the governing law of the transaction, and (ii) the ease with which an English judgment could be enforced in an EU jurisdiction, against, for example, an obligor or assets in that jurisdiction.

- Choice of English law: the UK’s exit from the EU should not have any effect on the willingness of contracting parties to choose English law as the governing law of the transaction, and (ii) the ease with which an English judgment could be enforced in an EU jurisdiction, against, for example, an obligor or assets in that jurisdiction.

- Jurisdiction and enforcement of English judgments: the loss of reciprocity in relation to submission to jurisdiction and the enforcement of English judgments in the EU may mean that dispute resolution options warrant further consideration when structuring and documenting a transaction, depending on the EU jurisdictions involved. See the accompanying section: Disputes.

- We expect that, where proceedings are commenced during the transition period, EU courts will continue to enforce English judgments in most circumstances and will also respect English jurisdiction clauses, with some exceptions. The Withdrawal Agreement provides that the rules on
jurisdiction and enforcement of judgments under the recast Brussels Regulation will continue to apply as between the UK and the EU where proceedings are commenced before the end of the transition period, so before the end of 2020 (unless the transition period is extended).

- The UK will also continue to apply the Lugano Convention where the dispute concerns EFTA countries (Iceland, Norway or Switzerland) and proceedings are commenced before the end of 2020. The UK has applied to become an independent party to this Convention at the end of transition and has the public support of the EFTA parties for the admission of the UK. It is not, however, clear whether the EU will agree on behalf of its Member States (other than Denmark which is an independent party) and if it does not, this would effectively block the continued application of the Convention in the UK or its new application as between the UK and EU Member States. If, however, the EU agrees the application, then the position as between the UK and the EU Member States will be similar to that under the Brussels Regulation before it was recast, but very much more comprehensive than any other arrangement currently available after the end of transition. See accompanying section Disputes.

- The UK intends to accede to the Hague Convention on Choice of Court Agreements 2005 in its own right on the day after the transition period ends. It has introduced legislation to confirm its independent adherence to this Hague Convention in English law: the Private International Law (Implementation of Agreements) Bill 2019–2021. In the event that the Lugano Convention does not apply, adherence to Hague will assist the recognition of exclusive jurisdiction clauses in favour of the English courts and the enforcement of resulting English judgments in the EU. It will also apply as between the UK and non-EU Hague parties (currently Singapore, Mexico and Montenegro). Hague compliant exclusive jurisdiction clauses are now being used increasingly in derivatives transactions, but are not (yet) used often in syndicated loans based on the Loan Market Association recommended forms of documents. The UK will recognise qualifying jurisdiction clauses in favour of other adherents to Hague from the date of their respective adherence, but other parties are only bound to recognise UK jurisdiction clauses postdating its adherence. There is uncertainty whether this relates back to the UK’s adherence as a Member State of the EU from 2015 or applies only from the date of the UK’s independent adherence. Guidance issued by the European Commission in April 2019 suggests it is taking the view that exclusive English jurisdiction agreements are within the Hague Convention only if they are entered into after the UK independently accedes to Hague, although this is not of course binding on domestic or EU courts that will decide this question in future. It is also possible to make or reaffirm a choice of jurisdiction in Hague-compliant form after the date of the UK’s adherence, in which case this point should not be an obstacle to enforcement of any later judgment.

- If no agreement or convention applies to a particular agreement, then each country will apply its own domestic rules to questions of jurisdiction and enforcement. When it comes to the English courts, that means in most cases the common law rules, and the upshot is that the court will generally respect an exclusive jurisdiction clause in favour of another country and will generally enforce money judgments given by other countries, subject to limited exceptions.

- So far as enforcement of English judgments is concerned, most (but not necessarily all) EU countries will enforce foreign judgments even without a specific reciprocal regime, although the type of judgment enforced may be more limited and the procedures involved more time-consuming and costly. There may also be some question marks (save to the extent that the Lugano Convention or the Hague Convention applies) about whether EU Member State courts would give effect to an English jurisdiction clause in these circumstances, particularly where proceedings were started in the EU Member State before they were started in England and that Member State has an alternative basis for taking jurisdiction.

- Arbitration with a seat in London or in the EU and resulting arbitral awards will not be affected. Arbitration is not regulated by EU law, and the UK and the EU Member States individually are signatory to the New York Convention of 1958. England has a well-drafted and clear piece of modern arbitration legislation, an impartial and well-regarded judiciary and a strong track record in supporting arbitration and enforcing arbitral awards and should remain an attractive seat for the conduct of arbitrations. Although arbitration clauses have not been much used in financial contracts, they are receiving more consideration. It is always possible for the parties to agree to arbitration at a later date, even if this was not their original chosen method of dispute resolution.

published by the parties show major differences of approach which are yet to be bridged.

- The effect of these arrangements is that:
  - Passporting rights between the UK and the EEA for banking and investment firms and financial products will continue during the transition period
  - Directly applicable EU legislation, such as the Capital Requirements Regulation (EU 2013/575), Markets in Financial Instruments Regulation (EU 2014/600) and European Market Infrastructure Regulation (EU 2012/648), will continue to apply in the UK until the end of that period
  - There will not be any immediate Brexit-driven changes to financial services laws (eg, the Financial Services and Markets Act 2000 (“FSMA“) or the FCA and PRA rules
  - The UK and EU stated their commitment to finalise equivalence assessments by June 2020: as feared, this has not happened and these assessments seem to have become a bargaining chip in ongoing discussions on the future relationship
  - Implementation of changes to the rules on recognition and enforcement of judgments will be delayed until the end of the transition period
  - Contingency measures implemented by the UK Government and regulators (including the TPR and the FSCR) in case of no deal, are expected to be activated at the end of the transition period, as it is clear that any new deal will not contain any relevant measures on financial services.

- For further detail on the structural changes affecting banks and financial institutions, see the accompanying sections: Banking and investment firms and Insurance.
Changes to the regulatory landscape?

During the transition period, EU law will continue to apply in the UK and passporting between the UK and EEA will continue, so for this year, the effects of the UK leaving the EU will be postponed again. However, rather than agreeing specific provisions on financial services, it is clear that both sides will use unilateral equivalence declarations to regulate their relations in the field of financial services. The position on financial services at the end of transition remains much as it would have been, if the UK had left the EU without any agreement at all. Banks and financial institutions have been preparing on this basis for some time. While the Withdrawal Agreement states that the parties will seek to make their equivalence determinations by June 2020, the interruptions to negotiations caused by the coronavirus pandemic, as well as wider disagreements on the future relationship, mean that this target has not been achieved. For detailed analysis of this in relation to the financial services industry, see the accompanying section: Banking and investment firms. In this section we will focus on financing arrangements specifically.

Many of the effects of any changes in the regulatory landscape arising at the end of the transition period in the absence of a deal can be mitigated by changes in how the provision of services is structured within a bank or other relevant organisation. These changes have in many cases been provided for in some cases implemented, given the long run-up to the UK leaving the EU.

The UK is adapting its temporary permissions and transitional provisions relating to financial services, which were developed with a no-deal Brexit in mind, to allow firms to carry on their business into the UK with minimal disruption, and these are likely to be implemented at the end of the transition period. We anticipate that at least in the longer term, however, the UK’s regulatory approach will be to treat EEA Member States and EEA firms consistently with other third countries and firms, although specific equivalence decisions may improve market access for EU institutions into UK markets and vice-versa.

Derivatives

The consequences of economic volatility, in terms of fluctuations in exposures and asset valuations, and possible effect on counterparty creditworthiness, also impact the derivatives market. These have been most pronounced in times of uncertainty as various deadlines have approached, and this is likely to continue in the run-up to the end of the year.

The issues we considered above in relation to financing documentation will also arise under derivative trading documentation. One question which particularly arises in this area is whether a UK exit will make the performance of derivative contracts entered into from a UK entity or branch with an EU entity prior to the end of the transition period, and in particular certain activities forming part of the contract or related to it which might require further authorisation after the end of the transition period, illegal or unlawful if performed by an unlicensed UK firm or branch. This is the “continuity” issue, which potentially impacts other products as well, such as loans and insurance. Much lobbying of EU institutions, regulators and legislators has been taking place in relation to this issue and has borne some fruit, at least in the UK, France and Germany, where the legislators are aiming to address a number of the concerns voiced in

At the end of transition – will there be elements of no deal?

- At the end of the transition period, if a new trading relationship is not in place, there could be something very like a no-deal exit. As the UK and the EU intend to deal with access to markets for financial businesses through equivalence declarations, the effect for these businesses will in any event be similar to the position if there were to be a no-deal. In early June, the Bank of England commenced discussions with UK banks to ensure that they will be fully prepared for this.

- It is likely that elements of the future relationship will be agreed in some form but, because the UK Government has ruled out extending the transition period, this may not extend to all areas. The UK and the EU have set out their respective proposals for new treaties, which show some wide differences in expectation. However, there will be no clarity as to what will happen until towards the end of 2020 and the adage “plan for the worst, hope for the best” continues to apply. See the accompanying section: Leaving the EU: The process and preparations.

- The body of EU law in force at the end of 2020 will be imported into UK law (with necessary amendments) under the European Union (Withdrawal) Act 2018 and the UK legislation made to implement EU law will be retained, with suitable amendments – this will be called “retained EU law”. See the accompanying section: The UK’s new legal order post-Brexit: A new class of UK law.

- A lot of the UK secondary legislation to make such amendments has already been made, but this continues to be refined, particularly in the area of financial services, and further adjustments may be required by the terms agreed for the future relationship. The UK has started to publish notices dealing with the end of transition.
the market. However, this has not been a complete solution, and affected financial services firms have been transferring business units, portfolios and clients to EU jurisdictions to ensure business continuity after the end of the transition period, if no other agreement is reached. At this stage, much of this re-organisational work is complete, although we understand some firms are continuing to arrange for those plans to be implemented in the run up to the end of the year.

The other prime area of concern for this market is the impact of a Brexit on derivatives regulation, in particular the European Market Infrastructure Regulation (“EMIR”). Certain market infrastructure problems identified as cliff edge issues are addressed by the EU legislators: in particular, regulatory technical standards have been published which (i) permit temporary continued access to UK infrastructure for EU counterparties and (ii) provide limited exemptions from the EMIR margining and clearing obligations upon a novation, which is key for financial institutions and their counterparties where portfolios of trades are being transferred to other group entities to address a sudden loss of passporting rights. These measures have been put on temporary suspension during the transition period, and may be re-introduced if full equivalence arrangements are not in place at the end of the transition period. While temporary arrangements are likely to have a fixed end-date, it should be remembered that full equivalence declarations are kept under review and can be withdrawn at short notice: for example, if the regulatory landscape in the “equivalent” jurisdiction changes, and these equivalence declarations are vulnerable to the wider political discussions and negotiations.

As things stand, the UK will on-shore EMIR (and other relevant derivatives legislation, such as SFTR) at the end of the transition period. The relevant statutory instruments which incorporate those pieces of legislation into UK law were largely issued during 2019, and are now suspended during the transition period. One key question is what approach the UK will take to EU “in-flight” financial services legislation which is not operative at the end of the transition period and so will not be automatically transferred onto the UK statute book. Some of these concerns have subsided, as certain key aspects of in-flight legislation will take effect during the transition period (such as changes to the EMIR reporting obligation, which will take effect in summer 2020) (which, despite heavy lobbying by the market, was not postponed due to the COVID pandemic) However, it is likely the issue will arise again as the end of the transition period approaches, as further aspects of EMIR Refit and other in-flight EU legislation come into view. Equally, there has been discussion on financial stability issues, such as continued access for UK and EU CCPs for EU and UK clearing members respectively; depending on whether full equivalence declarations have been made, again this seems likely to be addressed in the UK at the end of the transition period through a regime providing for temporary recognition of EU CCPs and in the EU through a similar temporary regime. One issue which continues to trouble the market in this area is the treatment of UK and EU trading exchanges, and the lack of mutual EU/UK recognition thereof, as this raises issues with compliance with trading/clearing obligations as well as treatment of exchange-traded portfolios.

**Lending**

The regulation of lending is dealt with under the Capital Requirements Directive, which leaves the regulation of cross-border services provided by non-EU banks (which will include UK banks at the end of the transition period, in the absence of any agreement otherwise) to the national law of each Member State. There are a number of services which a lender may provide as part of its lending activities, such as letter of credit or bank guarantee issuance; performance of facility agency, security agency and other agency roles; and provision of bank accounts. Further, lending itself can be broken down into the provision of several services, both in the initial marketing phase and in actually making funds available.

These services are not all regulated in all individual EU countries or in the UK: for example, lending to most businesses is not regulated in the UK. The analysis in relation to exactly what activity is regulated in which jurisdiction is complex, jurisdiction- and fact-specific, and relies on a myriad of exemptions and carve-outs. Because these issues are regulatory rather than strictly legal, judgment calls and differences in regulatory approach can add to the uncertainty and complexity.

Analysis of the regulatory position of each relevant entity is the first step to be undertaken. Once that is established, the lending arrangements can be structured to mitigate the risk of the loss of passport at the end of the transition period. This may be by building in additional flexibility to adapt the lending platform to lend out of a different facility office or group entity, tranching facilities being lent to different borrowers in the same group of companies, and increasing the level of oversight and control over the accession of future borrowing entities. The same concerns may also arise in the context of the shorter form commitment documents such as

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- On 26 May 2020, the EU also began to publish notices for businesses concerning preparations for the end of transition in a wide range of areas. Of those available to date, financial institutions should be aware of the changes on recognition of electronic signatures in the EU. The overview communication on preparation for the end of transition published on 9 July indicates that, for financial stability reasons, the EU is contemplating a temporary equivalence decision relating to UK central clearing counterparties (“CCPs”).
mandate letters, particularly where they span the end of the transition period. Borrowers and lenders will wish to consider the impact of regulatory disruption on illegality and force majeure clauses in market documentation.

Securitisation

Securitisation structures may include a number of elements in common with banking and capital markets transactions, so the issues discussed in the accompanying section Capital Markets will be relevant. In addition, securitisation is a regulated product in the EU, so the securitisation market in the UK and EU will experience a number of specific adjustments to the extent there are no specific arrangements in place.

The EU Securitisation Regulation (“EU SR”) is directly applicable across the EU to securitisations established on or after 1 January 2019. The EU SR will continue to apply in the UK during the transition period, and is expected to be incorporated into English law at the end of the transition period, with amendments implemented by the relevant delegated legislation (“UK SR”).

The EU SR will not prevent non-EU securitisations from being sold in Europe (or vice-versa), provided that any distribution of securities complies with relevant securities law. However, regulated investors in the EU and the UK will not be able to take positions in securitisation transactions which do not comply with the requirements in the EU SR (in the case of the EU-regulated investors) and the UK SR (in the case of the UK-regulated investors). At this stage, the EU SR and UK SR are relatively consistent, subject to certain key differences (outlined below). However, if the EU SR and UK SR diverge over time, UK securitisations which are sold to EU regulated investors (and EU securitisations which are sold to UK regulated investors) will become subject to a dual compliance burden. This area of legislation is still under development, with a number of items of delegated legislation expected, but not yet finalised. In respect of those technical standards which are required to be implemented under the EU SR, but have not become law by the end of the transition period, the UK legislature may choose to adopt equivalent measures to those which are ultimately adopted in the EU to keep the UK regime consistent.

Even in the absence of regulatory divergence over time, the EU SR and UK SR will differ in certain respects. Due to the lighter disclosure regime for private transactions, and also to differences in market practice as between the public and private markets, the differences in the two SR regimes will be felt more by public transactions.

One particularly material difference concerns the “simple, transparent and standardised” (“STS”) framework created by the EU SR. STS securitisations are eligible for more favourable treatment for capital and liquidity purposes in the hands of regulated banks, investment firms and insurance undertakings, and the STS label is seen as a “best practice” standard. Public ABS transactions are generally marketed as STS compliant, if they can fulfil the relevant criteria. The EU SR (published since the beginning of the Brexit process) adopted a jurisdictional requirement in relation to STS status: transactions where any of the originator, sponsor or SPV are established outside the EU will not be able to achieve STS status. The UK SR is set to adopt a similar albeit slightly more flexible version of this position: for standalone transactions, the issuer needs not be established in the UK (but the sponsor and originator must be), and for ABCP transactions only the sponsor must be established in the UK. These concessions are welcome, but nevertheless the general result is that after the end of the transition period, securitisation transactions with an originator, sponsor or issuer in the UK will not be able to achieve the “STS” label for the purposes of EU investors, and many EU securitisation transactions will not be able to achieve the STS label for the purpose of UK investors. Originators and investors should also be aware that the EU STS framework does not provide for any grandfathering of UK securitisation transactions which were notified as STS prior to the end of the transition period, so unless a negotiated solution is found, these transactions will cease to be treated as STS in the hands of EU investors at that point. This may have less impact than originally feared, given that the investor base for UK transactions is often principally composed of UK institutional investors, and vice versa. However, this is likely to become a matter of necessity rather than choice; a disappointment for the implementation of the legislation, which cited as one of its main aims the promotion of a deeper and more liquid market in STS securitisation bonds. Neither the EU SR, nor the UK SR includes any provision for equivalence.

Transactions which have both an EU and a UK investor base will also need to consider other more procedural inconsistencies and jurisdictional requirements as between the two regimes. For example, a securitisation which needs to comply with reporting requirements under both the EU SR and the UK SR may need to upload the specified disclosure materials to a securitisation repository authorised and established in the EU, and also to a securitisation repository authorised and established in the UK. It would be prudent to identify when planning a new
Transaction (or where amendments may cause a transaction to cease to be grandfathered) whether only one or both of the regulatory regimes will be relevant.

Parties to UK securitisation transactions should also be aware that asset backed securities involving a non-EEA originator, a non-EEA issuer or any non-EEA assets are not eligible for placement as collateral with the European Central Bank. There are certain other geographical limitations which may also be relevant, including, for example, the law of the contract of sale of the collateral assets. At this stage, the Bank of England has maintained a more flexible approach, so EEA securitisations can be used as collateral for the Bank of England liquidity purposes (subject to satisfaction of the existing criteria and restrictions). However, each central bank has the ability to review and adjust its criteria over time.

**Transaction finality and the realisation of security**

There are elements of EU financial services laws which impinge on insolvencies, such as settlement finality and financial collateral legislation.

**Settlement finality**

If no agreement is reached, at the end of the transition period, UK payment and securities settlement systems will lose the protections from the impact of insolvency proceedings on the finality of settlement and on the enforcement of collateral afforded to such systems in EU Member States under the **Settlement Finality Directive** to the extent these protections rely on reciprocity between the UK and the EU. However, the UK legislation which stands to apply at the end of the transition period if no specific agreement is reached on this issue, contemplates that central banks outside the UK and systems which are not governed by UK law would be able to fall under the UK regulations and retain these protections in the UK, subject to being appropriately designated by the Bank of England.

**Financial collateral**

The Financial Collateral Regulations (which stem from the EU **Financial Collateral Directive**) are now well entrenched in domestic law in the UK and will continue, largely unamended. Equally, the application of the Financial Collateral Directive to collateral in the remaining EU Member States should continue after the end of the transition period, even if that collateral has been posted by a UK institution. However, there remains some uncertainty in relation to the interaction of the **Recast Insolvency Regulation** (which is discussed in more detail below) with the financial collateral regime implemented in the EU; it is possible that the protection afforded to UK collateral in EU insolvency proceedings after the end of the transition period could be narrower than it would have been, had the UK remained subject to the recast Insolvency Regulation, again unless an alternative agreement is reached.

**Protected insolvency actions**

There are also circumstances where acts subject to the law of an EU Member State, and not capable of being challenged under the law of that Member State, may currently be excluded from challenge in the insolvency of a counterparty in another Member State. These protections as applicable to English law governed financial arrangements (and to restructurings of secured English law facilities with EU-incorporated obligors) fall away at the end of the transition period, if no agreement is reached.

**Security over assets**

In terms of more standard credit support arrangements, there should be no effect on English law security over existing assets located in the UK or English law guarantees. However, the position may be more complicated where assets or rights to be secured arise as a result of, or are very closely entwined with, EU or EU Member State law. For example, certain intellectual property rights arise under EU law (for further details, see the accompanying section **Intellectual Property**), and security over those rights is perfected by registration at an EU level.

**Restructurings and insolvency processes**

Following the end of the transition period, issues will arise in relation to restructuring tools such as schemes of arrangement and in relation to insolvency processes. There are also special EU insolvency rules for financial institutions, which will be affected.

**Schemes of arrangement**

Schemes of arrangement have been used in the UK in recent years to restructure the financial indebtedness of a significant number of overseas companies, including those incorporated in continuing EU Member States. While not technically an insolvency process, the function of these schemes is very similar. In order for the English court to accept jurisdiction to sanction a scheme of arrangement proposed by a foreign company, it must be satisfied that there is a sufficient connection with England, and that the scheme will be recognised in the relevant foreign jurisdiction. It has not yet been necessary for the English courts to determine whether the EU Recast Brussels Regulation has the effect
of limiting its jurisdiction to sanction a scheme proposed by a foreign company. Once the Recast Brussels Regulation no longer applies to the UK (at the end of the transition period) and assuming there is no equivalent reciprocal arrangement in place, the debate as to whether it curtails the jurisdiction of the English courts falls away. However, the English courts will still need to be satisfied that any order made will have effect in the relevant jurisdiction (enforcement of judgments is discussed in more detail in the Disputes section). If the EU Recast Brussels Regulation is no longer an available avenue, which would be the case at the end of transition period in the absence of an equivalent reciprocal agreement being reached, recognition would have to be established based on national rules of private international law. Ultimately, non-UK companies with English law liabilities seeking to establish scheme jurisdiction in the UK based on a centre of main interests shift may become more open to challenge in their EU state of incorporation, increasing the risk of a competing process in the EU.

Debtor in possession insolvency

This process applies in many EU countries as the basis for reconstruction failing businesses. The UK to date has used administration (where an insolvency practitioner takes over the running of the failing business) and this often leads to a reconstruction which saves the underlying business, but leaves the company concerned in insolvent liquidation.

The UK has now decided, in response to the coronavirus pandemic, to revive proposals (consulted on in 2016) for a debtor in possession reconstruction process referred to as a “moratorium” as part of its insolvency laws. This will sit alongside both the scheme of arrangement and the administration processes, but with potentially different outcomes, which is discussed in more detail here. The Corporate Insolvency and Governance Act 2020 commenced into effect on 26 June 2020: while the UK is still in transition, it is unlikely that it will have even short term recognition in EU Member States as a change would be required to the EU Recast Insolvency Regulation to make it a recognised process.

Other insolvency processes

In relation to insolvency proceedings, the EU Recast Insolvency Regulation aims to establish procedural rules on jurisdiction and applicable law and to aid the mutual recognition of cross-border insolvency proceedings commenced in a Member State where the debtor has its centre of main interests; it does not further seek to harmonise substantive insolvency law. It has direct effect in all Member States other than Denmark. The Recast Insolvency Regulation will continue to apply to insolvency proceedings where the main proceedings were opened before the end of the transition period. If there is no equivalent agreement reached, at the end of the transition period there will no longer be automatic recognition of UK insolvency proceedings in the EU Member States pursuant to the Recast Insolvency Regulation. The UK will unilaterally recognise EU Member State insolvency processes under a modified version of the Recast Insolvency Regulation incorporated into UK law under the Insolvency (Amendment) (EU Exit) Regulations 2019.

The UK has already adopted the UNCITRAL Model Law on Cross-Border Insolvency, which has been adopted in jurisdictions such as Australia, the US and some EU Member States (Greece, Poland, Romania and Slovenia). However, most EU Member States have not adopted it. In these countries, the UK insolvency office holder would be left to rely on local cross-border insolvency rules in the jurisdiction where recognition is sought, some of which are very outdated. It may be that, following a UK exit, other EU Member States will adopt the model law, but this is a matter for them. Absent that, or other steps being taken in the EU, there is, at worst, a risk of competing insolvency proceedings taking place; at best, some scope for delays and uncertainty.

Through its adoption of the Model Law, the UK does provide for recognition of foreign insolvency proceedings (regardless of whether the foreign company is in a jurisdiction which has itself adopted the Model Law), albeit on a more limited basis than under the Recast Insolvency Regulation, so the position for EU insolvencies in the UK is likely to be better than for UK insolvencies in the EU.
Insolvency processes affecting banks and insurance companies

The Model Law is not applicable in the event of the insolvency of a bank or insurance company and proposed amendments to the 2004 Regulations mean that EEA banks and insurance companies will be treated in the same way as third country banks, with consequent different treatment of contracts in the event of a UK insolvency of an EU Bank or its UK branch from that applicable to the equivalent contracts of an insolvent UK bank. It is to be hoped this discrepancy will be addressed by further legislation.

The regime for cross-border resolution of banks (the EU Bank Recovery and Resolution Directive ("BRRD")) will also continue to apply during the transition period. The UK Government is also consulting on its implementation of changes to the BRRD required by 28 December 2020 ("BRRD II"). However, if no equivalent reciprocal agreement is reached between the UK and the EU, the UK legislation which has been published indicates that after the end of the transition period, there will be a reduction in the cooperation between the UK and the EU. EU financial institutions will be treated by the UK in the same way as other third country financial institutions and the specific regime for recognising EU resolutions will be repealed. While there is a process for the recognition of third country resolutions which will apply to EU resolutions, its application is at the discretion of the Treasury and the Bank of England, and the inter relation with UK insolvency law is more uncertain than where EU law applies. It is hoped that the Bank of England will enter into bilateral and multilateral cooperation arrangements with other authorities in the EU and this sort of arrangement between the EU or individual EU Member States is contemplated in the BRRD.

When it comes to insolvency, however, special EU financial market protections will largely cease to apply in the UK at the end of transition. This increases the risk of UK insolvencies of EU financial institutions, where the UK would previously have recognised the insolvency process commenced in the institution’s home Member State. This situation currently applies to third country financial institutions operating in the UK, but the size of the EU presence in the London market increases the inconveniences of this situation. Nevertheless, in some cases general law should reach the same result. Further, certain aspects of EU resolution such as bail-in may no longer automatically be respected in the UK insolvency of an EU financial institution or vice-versa. The failure of an EU-incorporated financial institution with significant UK assets would therefore have a greater effect on the UK markets, if there is no agreement reached, and may be more difficult to manage. While these points should be addressed, given the commitments of the EU and the UK to the G20 and Financial Standards Board recommendations on cross border insolvency of financial institutions, this does not appear to be a priority. In the EU, the position in relation to the insolvency of UK banks in those circumstances is equally unclear, and it is likely to vary according to the national insolvency law of the relevant EU Member State.

"Other than the bank’s choice of facility office, the UK’s exit should not have a significant effect on English law governed syndicated lending arrangements."

WILL NEVIN