IRELAND FOR LAW

Structured Finance

Structured Finance and Ireland

Ireland is the leading European jurisdiction to establish structured finance and securitisation structures. Irish securitisation special purpose companies ("SPVs") play an integral role in the operation of the international financial services industry. Irish SPVs are also used by a growing number of industry sectors in Ireland, including aircraft leasing, insurance, reinsurance, Irish regulated funds and by Irish banks for securitisation refinancing.

For 30 years Ireland has been developing the infrastructure and expertise that offers a wellestablished environment for the global structured finance industry. There are more than 2,800 Irish SPVs with €890+ billion in assets, representing over 23% of the European structured finance market measured by assets. It has been estimated that there are 3,650+ people involved in the structuring and servicing of SPVs and their debt securities in Ireland.

Ireland's connection with EU structured finance transactions typically is centred around the choice of an Irish SPVs as the investment holding vehicle. However, there are two other ways in which Ireland frequently has a key role. First, Euronext Dublin is the leading listing venue for asset backed securities in the EU, such that it is expected that any significant structured finance transaction will list on the Dublin market. Secondly, some of the most successful structured credit investment management teams investing in EU loans and bonds over the past 20 years are located in Ireland. Their presence in Ireland along with the popularity of Irish SPVs and Euronext Dublin adds significantly to Ireland's credibility within the structured finance market and mean it is likely that Ireland already performs at least one key role in the majority of EU structured finance transactions.

Why choose Irish Law and Irish lawyers for Structured Finance?

EU structured finance transactions are some of the most heavily regulated transaction types in all of financial services. The source of almost all of that regulation is EU legislation which governs securitisations, prospectuses, distribution channels, derivatives hedging, collateral enforceability, regulatory reporting, investor reporting, trading transparency, investor due diligence requirements, market conduct and bank capital requirements. Selecting an EU law to govern the transaction documents and having those documents drafted by EU qualified lawyers, makes it more straightforward to ensure compliance with relevant EU regulations. Similarly, should litigation arise in respect to the transactions an EU court would naturally be best placed to interpret and apply such regulations in the context of the relevant transaction.

Currently most EU structured finance transaction documents are governed by English law. The documents used tend to be lengthy and reflect well-settled terms carefully allocating legal and commercial risks and responsibilities between the various investors and services providers. There would be considerable industry resistance to any proposal to deviate from those well-settled positions. Fortunately, switching the governing law of the documentation to Irish law requires relatively few changes to the documents due to the similarity of Irish contract law and English contract law as well as the shared language and common law tradition. The ability to take English law governed precedent documents and convert them to Irish law with very few necessary changes is a prominent differentiator for Irish law compared to all other EU governing laws.

Derivatives are a common feature of structured finance transactions to hedge risks in relation to currency and interest rate movements. To offer derivatives markets EU governing law options, in 2018 the International Swaps and Derivatives Association Inc. (ISDA) published Irish law and French law versions of its industry standard legal documentation. The ability to use Irish law governed ISDA documentation is a key support to facilitate the entirety of a structured finance transaction being governed by Irish law, prepared by Irish qualified lawyers and, on occasion, litigated on entirely in the Irish courts. The ability to use Irish law governed derivatives documentation is another prominent differentiator for Irish law compared to all other EU governing laws other than French law.

One of the reasons why structured finance transaction documents are governed mostly by English law is the perception that the English common law system, together with its extensive body of case law, offers an unrivalled level of legal certainty. Most market standard terms in finance contracts have already been interpreted and enforced by the English courts in a wide variety of circumstances which reduces legal uncertainty. Fortunately, the routine practice of the Irish Commercial Court (and on appeal the higher courts in Ireland) of considering case law from the English courts and other common law courts when interpreting standard contractual provisions in financing agreements should offer reassurance that legal certainty under Irish law is not materially different to legal certainty under English law. The ready willingness of Irish courts to consider case law from the English courts and from other common law courts is another prominent differentiator for Irish law compared to all other EU governing laws.

How will BREXIT impact on structured finance?

EU structured finance transactions were already very heavily regulated before BREXIT. PostBREXIT, when EU structured finance transactions are governed by English law and seek to ensure compliance with both EU regulation and the new UK law replacement regime, an extra layer of complexity and compliance cost is added. It is likely that relevant EU and UK

regulations will begin to diverse at some point, whereupon the complexity and cost of complying with both regimes is likely to come under scrutiny. That scrutiny should represent an opportunity to make the case for increased use of Irish law governed documentation.

In these early days of the post-BREXIT environment, it is evident already that in some cases English lawyers leading the drafting on EU structured finance transactions are unwilling to offer definitive advise on EU law aspects of the transactions. While various workarounds are being explored by several UK law firms, the long-term viability of those workarounds is uncertain. That uncertainty should represent another opportunity to make the case for increased use of Irish law governed documentation.