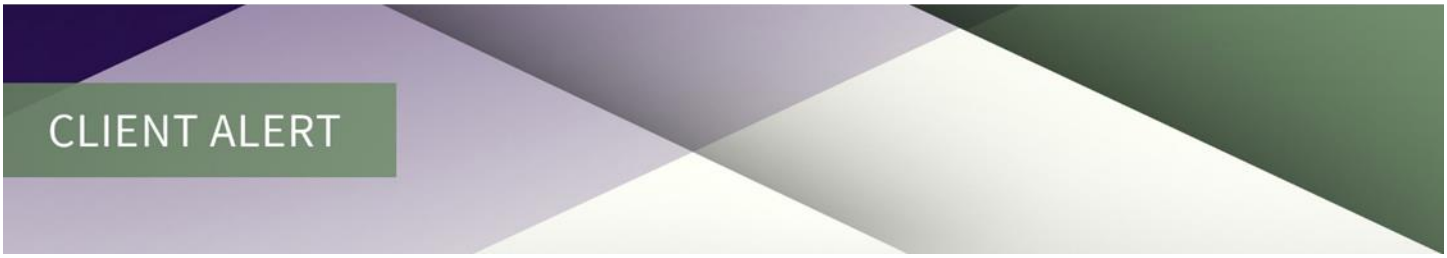

Will EU Still Recognise Me? Insolvency Recognition Between the UK and EU Post-Brexit

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Introduction

At 11pm (UK time) on 31 December 2020 ("**Brexit Day**") the UK's transition period for leaving the EU ended and 'Brexit' became a reality. The deal brokered between the EU and UK is formalised in the EU-UK Trade and Cooperation Agreement (the "**TCA**")[1], the trade deal which encapsulates the future relationship between the UK and the EU post-Brexit.

In this client alert, we consider the likely impact of the TCA and related EU and UK legislation on the future recognition and enforcement of EU-UK cross-border insolvency proceedings.

So Long, Farewell, Auf Wiedersehen, Good Bye…

The TCA concludes the uncertainty of the UK-EU trade relationship post-Brexit. Nevertheless, there remains plenty of unfinished business for the EU and the UK to grapple with over the coming years. While the 1,246 page TCA governs a diverse range of areas including tariff and quota-free trade in goods and fishing rights, it ignores civil judicial cooperation, including mutual recognition of EU and UK insolvency laws and non-insolvency court judgments. In other words, there is no deal in respect of cross-border restructuring and insolvency.

[1] Available here.

The Transition Period

From 11pm (UK time) on 31 January 2020 until Brexit Day, EU law continued to apply in full to the UK, and the UK was treated as if it remained a Member State (the "**Transition Period**").[2] This meant that UK and EU insolvency proceedings continued to be automatically mutually recognised and enforceable under the EU Insolvency Regulation[3] and non-insolvency civil judgments of UK and EU national courts continued to be largely automatically mutually recognised and enforceable under the EU Judgments Regulation.[4]

Further, UK courts have traditionally accepted (on a non-conclusive basis) that the EU Judgments Regulation provided a basis for the recognition of schemes of arrangement ("**Schemes**") and restructuring plans ("**Restructuring Plans**") (corporate restructuring procedures not covered by the EU Insolvency Regulation) relating to companies incorporated in Member States.

By way of reminder, under the EU Insolvency Regulation, the national courts of the Member State in which a company's centre of main interests ("**COMI**") is located have exclusive jurisdiction to open 'main' insolvency proceedings in respect of that company.[5] The courts of other Member States must automatically recognise insolvency proceedings opened in that state, and then only have jurisdiction to open insolvency proceedings in relation to that company if it has an 'establishment' in that Member State and the effects of such proceedings (known as 'secondary proceedings') are restricted to the assets situated in that Member State.[6]

After Brexit Day – Recognition of UK Insolvency Proceedings in the EU

The first principal insolvency-related consequence of the TCA is that Member States will no longer automatically recognise and enforce UK insolvency proceedings as main or secondary proceedings under the EU Insolvency Regulation. This means that UK insolvency practitioners need to investigate recognition under the domestic laws of the relevant Member State on a country-by-country basis, which (depending on the circumstances) may require significant additional analysis. Clearly, the lack of uniformity among domestic laws of Member States as regards cross-border

2 As provided for in the Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01 (as amended), enacted into law by the UK Withdrawal Act 2018 (as amended by the European (Withdrawal Agreement) Act 2020).

3 Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings. Annex A to the EU Insolvency Regulation lists various UK insolvency proceedings that benefit from automatic recognition. These include administration, company voluntary arrangements, individual voluntary arrangements (for individuals), compulsory liquidation, creditors' voluntary winding-up and members' voluntary liquidations.

4 Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

5 EU Insolvency Regulation, Article 3 (1).

6 EU Insolvency Regulation, Article 3 (2).

insolvency recognition has the potential to create different outcomes in different jurisdictions. Depending on the nature of the proposed restructuring, this might make a deal difficult to implement, or unacceptably susceptible to the risk of challenge in Member States.

Things could get even more complicated if the national court of a Member State determines that the COMI of a debtor undergoing a UK insolvency process is within a Member State, because in that case the Member State would apply the EU Insolvency Regulation and may refuse to give regard to UK court rulings. To mitigate this risk in cases where recognition of a UK insolvency in the EU is required, parallel local proceedings could be opened in a Member State, albeit with additional time and cost implications.

The UNCITRAL Model Law on Cross-Border Insolvency (the "**Model Law**") is a possible alternative route for obtaining recognition via domestic laws in the UK and certain Member States. It provides for a domestic court to recognise and grant relief in support of a foreign, e.g. a UK, insolvency proceeding (which may include Schemes or Restructuring Plans), based on the COMI principle. Recognition under the Model Law results in a stay on proceedings against the foreign debtor. The United States has adopted the Model Law in chapter 15 of the US Bankruptcy Code (in an enhanced form) and this is the route by which Schemes and Restructuring Plans have been recognised and enforced by US courts. However, only four Member States (Greece, Poland, Romania and Slovenia) have enacted the Model Law into their domestic legislation and recognition requires a court application (it is not automatic like the EU Insolvency Regulation). Unless or until there is a wider uptake of the Model Law among Member States, it does not provide a widespread alternative means of recognition.

After Brexit Day – Recognition of UK Schemes and Restructuring Plans in the EU

The impact of Brexit Day on UK Schemes and Restructuring Plans under Parts 26 and 26A, respectively, of the Companies Act 2006, may be more limited, particularly where they seek to compromise English law-governed debt. Both processes are available to companies capable of demonstrating a "sufficient connection" to the UK (e.g. English law-governed debt or other ties to the jurisdiction) but neither process benefitted from automatic recognition under the EU Insolvency Regulation.

From Brexit Day, non-insolvency UK court judgments, such as those issued to sanction Schemes and Restructuring Plans, ceased to benefit from any largely automatic recognition in the EU under the EU Judgments Regulation (traditionally relied on by English courts as providing a basis for EU recognition). Instead, recognition will be determined by the domestic law of the relevant Member State(s). However, the impact of this may be mitigated by the following potential routes to recognition:

- Rome I Regulation[7] – if the relevant debt documents are governed by English law, that choice of law will continue to be recognised throughout the EU, and consequently, so will the compromise of English law debt under any Scheme/Restructuring Plan, because Rome I applies to all contracting states, not just the EU;

- Hague Convention 2005[8] – to the extent the relevant debt documents contain an exclusive jurisdiction clause in favour of the English courts and provided that Schemes/Restructuring Plans fall outside the Convention's insolvency exclusion provision; and/or

- Lugano Convention 2007[9] – if and when implemented into UK law following any consent granted by current signatories to the UK's pending application to join the Convention, to the extent the relevant debt documents contain an exclusive jurisdiction clause in favour of the English courts.

Given the prevalence of English law-governed finance documents in European cross-border transactions (particularly LMA-based bank debt), we expect the Rome I Regulation, which provides for the choice of law of a contract to govern "*the various ways of extinguishing obligations*",[10] to provide the most useful route for continued recognition and enforcement of Schemes and Restructuring Plans within the EU.[11]

After Brexit Day – Recognition of EU Insolvency Proceedings in the UK

The second principal insolvency-related consequence of the TCA is that the UK will no longer automatically recognise and enforce Member State insolvency proceedings under the EU Insolvency Regulation. However, from the perspective of the EU, things may be more straightforward. Although the UK has repealed the mutual recognition provisions under the EU

7 Regulation (EC) No. 593/2008 of the European parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

8 The Convention of 30 June 2005 on Choice of Court Agreements. Up until Brexit Day, the UK was a 'contracting state' by virtue of its membership of the EU; the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements) (EU Exit) Regulations 2018 became effective on Brexit Day and make the UK a 'contracting party' in its own right.

9 The Lugano Convention deals with jurisdiction, recognition and the enforcement of judgments in civil and commercial matters between Member States, Switzerland, Norway and Iceland. The UK applied to join the Lugano Convention as a 'contracting party' in its own right on 8 April 2020. However, the unanimous consent of all contracting parties is required for the UK to accede; Switzerland, Norway and Iceland have already indicated their support for the UK's accession, but the EU and Denmark have not yet done so.

10 Rome I Regulation, Article 12.1(d).

11 However, it remains to be seen whether there are any issues with recognition and enforcement under the Rome I Regulation in circumstances where the governing law has been changed to English for the express purpose of establishing a "sufficient connection" with the UK (as has often been done in Schemes/Restructuring Plans involving high yield bonds originally governed by New York law).

Insolvency Regulation and the EU Judgments Regulation from its domestic law,[12] the UK has also previously enacted the Model Law into domestic legislation in the form of the Cross-Border Insolvency Regulations 2006 ("**CBIR**"). The CBIR allows English courts to grant recognition of and assistance to EU insolvencies upon the application of an EU office-holder, but it should be noted that recognition under the CBIR does not provide for the enforcement of judgments of foreign courts.

It should also be noted that the English common law rule in *Gibbs*[13] will continue to mean that, unless the relevant creditor has submitted to the jurisdiction of the foreign court (e.g. by actively participating in the foreign insolvency proceeding), any debt governed by English law cannot be varied/compromised by a foreign insolvency proceeding. The prevalence of English law-governed finance documents and the effect of this rule will therefore likely continue to attract many EU incorporated companies with English law-governed debt to restructure in England.

Concluding Thoughts

The sudden removal of the traditional paths to recognition and enforcement that have been used for EU-UK cross-border restructurings and insolvencies for almost two decades pose a number of challenges for practitioners and stakeholders involved in European cross-border restructurings, but none of these challenges are insurmountable. Parallel local insolvency proceedings could be used in the UK or a Member State as a hook for recognition, and there is hope for continued recognition of Schemes and Restructuring Plans under Rome I (and/or the Hague Convention 2005 and/or, once the UK has acceded, the Lugano Convention 2007). Matters would be improved further if the remaining Member States adopt the Model Law more widely and if the UK is accepted as a member of the Lugano Convention.

Contemporaneously with the enactment of the TCA in the UK, several Member States are in the process of upgrading their domestic restructuring regimes to emulate aspects of the US chapter 11 regime, including Germany[14] and The Netherlands.[15] These reforms have come about as a result of Member States implementing the EU Directive on Preventive Restructuring Frameworks[16] and will increase the menu of European restructuring options. Nevertheless, many of the features of the English legal system which have historically made the UK an attractive venue for restructurings (e.g. an experienced judiciary, predictability and flexibility of procedures, and speed of access to the courts)

12 Pursuant to the Insolvency (Amendment) (EU Exit) Regulations 2019 and the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, respectively.

13 *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Metaux* (1890) LR 25 QBD 399.

14 The German Federal Ministry of Justice published draft legislation on 18 September 2020 which included the introduction of the German restructuring plan; this legislation became effective on 1 January 2021.

15 On 6 October 2020, the Dutch senate adopted the legislative proposal for the introduction of a new "Dutch scheme" (*Wet Homologatie Onderhandsakkoord*, commonly abbreviated to "WHOA"), which is expected to enter into effect in early 2021.

16 Directive 2019/1023of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.

will remain post-Brexit Day. The UK has shown itself to be a flexible and resilient jurisdiction when it comes to dealing with a variety of challenges and we see no reason for it to lose that status just yet.

If you have any questions regarding this client alert, please contact the following attorneys or the Willkie attorney with whom you regularly work.

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