Brexit: beyond all recognition?

Howard Morris and **Jai Mudhar** write that the EU may not recognise everything, but the UK hasn't gone anywhere.

On 31 December 2020 at 11.00 pm, the transition period ended and the fate of the UK's restructuring and insolvency regime changed. The UK is no longer in the direct sphere of influence of the European Insolvency Regulation (EIR) or the European Judgments Regulation (judgments regulation). This, combined with the absence of provisions relating to cooperation on insolvency law matters under the EU-UK Trade and Cooperation Agreement, leaves the position for seeking recognition and assistance in relation to UK restructuring and insolvency processes across the member states unclear and uncertain.

Inbound recognition (EU–UK)

The EIR provides for automatic mutual recognition and enforcement of insolvency proceedings across member states (except Denmark).

Absent the EIR, an insolvency proceeding initiated in a member state will not benefit from automatic recognition in the UK. Foreign practitioners will need to apply to the English courts for recognition and assistance. The main avenue for recognition will likely be under the Cross-Border Insolvency Regulations 2006 (CBIR), which implement the UNCITRAL Model Law on Cross-Border Insolvency (model law). On application by a foreign IP, the English courts may grant recognition, assistance and procedural relief under the CBIR. Where recognition is granted under the CBIR, it is granted unilaterally, as the recognition of a foreign proceeding does not depend on that foreign country having also adopted the model law.

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The common law principle of *comity* may also provide for recognition and relief. Additionally, with respect to the Republic of Ireland, the Irish court may make an application to the English court for assistance under s426 of the Insolvency Act 1986.[1] The English court may then exercise a discretion to grant assistance.

Outbound recognition of insolvency proceedings (UK–EU)

Without the EIR, any insolvency proceeding commenced with respect to a company whose centre of main interest (COMI) is in the UK after 31 December 2020 will not be automatically recognised or enforced in the member states, as either a main or secondary proceeding. Accordingly, administrations, company voluntary arrangements and liquidations will not automatically be recognised. To obtain recognition, IPs will have to seek it under the domestic laws of each relevant member state, on a country-by-country basis – a task that may be arduous in terms of time and cost.

When assessing recognition and enforcement of insolvency proceedings, the member states (excluding Denmark) will determine the COMI of a debtor by application of the rules relating to COMI under the EIR. If the national court of a member state decides that the COMI of the debtor is not in the UK, the member state may refuse to give regard to the UK court's own determination that the COMI of the debtor is in the UK. Any question falling outside the scope of the EIR will be determined by the relevant member state's domestic law.

Four member states have actually implemented the model law, namely, Greece, Poland, Romania and Slovenia. Where there are no disputes as to the jurisdiction of the debtor's COMI, IPs may obtain recognition and assistance for UK insolvency proceedings in those countries by application to the court of the member

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state, as their domestic laws give effect to the model law. However, the recognition of, and assistance available to, UK insolvency proceedings in the 23 member states that have not adopted the model law is unclear. There is a lack of uniformity of the domestic laws under which recognition will have to be sought in those member states.

Recognition of schemes of arrangement in the EU

The judgments regulation provides for the automatic recognition of 'civil and commercial' court judgments across member states. English courts have used the judgments regulation as the basis for EU recognition of schemes of arrangement. Without the judgments regulation, the recognition of schemes of arrangement will be determined by the domestic law of each member state. Where recognition of a scheme of arrangement is obtained in one member state, the scheme of arrangement will not then be automatically recognised across the member states.

The absence of the judgments regulation may be alleviated by the:

i. Rome I Regulation. Where a party makes a choice as to the law governing its contractual arrangement, the chosen law will govern the way in which obligations under the agreement may be extinguished. Where English law is chosen this will continue to be recognised across the EU, and the rule in Gibbs will apply. Gibbs provides that English law debt may not be discharged or compromised by a foreign insolvency proceeding, unless the creditor submits to that proceeding.[2]
ii. Hague Convention.[3] Where an agreement (eg a debt document) designates the English courts as having exclusive jurisdiction, the signatories of the Hague Convention, which includes the EU, must recognise and enforce the judgments of the chosen jurisdiction. The Hague Convention excludes, among others, 'insolvency' matters, but may provide an avenue for recognition of judgments relating to schemes of arrangement.
iii. UK's accession to the Lugano Convention 2007. The UK applied to join the Lugano Convention in April 2020. The Lugano Convention would allow the UK and EU to benefit from the mutual recognition and enforcement of judgments. The UK's accession to the Lugano Convention requires unanimous support by the existing signatories, which has not yet been obtained.[4] The Lugano Convention excludes insolvency matters from its scope, but would provide an avenue for recognition of judgments relating to schemes of arrangement.

Recognition of restructuring plans in the EU

A new restructuring plan was introduced under part 26A of the Companies Act 2006 by the Corporate Insolvency Governance Act 2020. In a recent decision, the High Court held that a restructuring plan is an insolvency proceeding that would be covered by the EIR, unlike a scheme of arrangement, which is not treated as an insolvency proceeding, and so falls outside of the scope of the Lugano Convention (due to the bankruptcy exclusion) and, by extension, the judgments regulation and Hague Convention.[5] Accordingly, unless this decision is overturned, to obtain recognition for a restructuring plan in a member state, a debtor will need to rely on the Rome I Regulation, model law (if implemented by the relevant member state where recognition is sought) or the member state's domestic approach to recognition. There is no doubt that this is a blow to the attractiveness of the new restructuring plan and its novel features, most notably the cross-class cram down mechanism.

The bottom line

The loss of the EIR and the judgments regulation has, undeniably, caused some challenges and changed the landscape of cross-border restructurings and insolvencies. Due to the loss of automatic recognition of UK restructuring and insolvency processes, it is likely that the number of parallel proceedings in jurisdictions across the member states will increase. This will bring added complexity and cost, not least due to the lack of uniformity of domestic laws across the member states, which has the potential to create different outcomes in different jurisdictions. It should be noted that these challenges are not entirely new, as IPs have been tackling cross-border insolvency situations in non-EU jurisdictions. The continued recognition of schemes of arrangement and restructuring plans under the Rome I Regulation provides some welcome certainty. Further confidence would follow with (i) an increased adoption of the model law across the member states, and (ii) with respect to schemes of arrangement, the UK's accession to the Lugano Convention.

The EU member states are gradually reforming their domestic laws to comply with the EU Restructuring Directive, which may increase certain jurisdictions' popularity for restructurings. It is likely, however, that the UK will remain a popular hub for restructurings and insolvencies, not least due to the predictability and flexibility of the tools available and the extensive experience of the English judiciary. The restructuring industry may be disappointed by the recent decision of the High Court on the new restructuring plan's status. However, the decision undoubtedly serves to reinforce the judiciary's reputation for interpreting and applying the law and disregarding political or national economic interests, a characteristic that attracts parties to use the jurisdiction of the English Courts. □

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[1] S426 of the Insolvency Act 1986 provides that where the UK court has jurisdiction in relation to insolvency law, the UK court shall assist other courts having the corresponding jurisdiction in any other part of the UK or in any relevant country or territory. This includes, among other countries, the Republic of Ireland.
[2] *Antony Gibbs & Sons* v. *La Société Industrielle et Commerciale des Metaux* (1890) LR 25 QBD 399.
[3] 2005 Hague Convention on Choice of Court Agreements.
[4] Switzerland, Norway and Iceland have indicated their support for the UK's accession; however, the EU and Denmark have yet to indicate support.
[5] *Re Gategroup Guarantee Limited* [2021] EWHC 304 (Ch).

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