KEY POINTS

- Despite the announcement of a new free trade agreement between the EU and UK, we are effectively in a "no deal" scenario when it comes to the recognition of insolvency proceedings and, more generally, civil judgments, between the EU and the UK. The reciprocal, automatic recognition frameworks are no more. Debtors and insolvency practitioners must now navigate through a patchwork of international treaties, European legislation, domestic legislation and common law to assess whether inbound/outbound recognition is forthcoming and, if it is, what that "recognition" really looks like in practice.
- The lack of an automatic recognition regime will likely increase the cost, complexity and time taken to complete cross-border restructurings and insolvencies. However, it should not be equated with a loss of recognition per se. There may be more pathways to navigate but the analysis is not, by any means, insurmountable. Over time, as debtors become more familiar with the post-Brexit legal landscape, a clear and well-trodden path to obtaining recognition will likely emerge.

Authors Philip Wells and Lucy Aconley

How to get recognised: cross-border recognition of insolvency and restructuring proceedings post-Brexit

This article summarises the post-Brexit position regarding inbound and outbound recognition of insolvency and restructuring proceedings between the UK and the EU.

INTRODUCTION AND BACKGROUND

On 24 December 2020, and after years of tense and prolonged negotiations, the EU and the UK formally announced the "EU-UK Trade and Cooperation Agreement", which was implemented in the UK via the European Union (Future Relationship) Act 2020. While the new free trade agreement denotes a new economic and social partnership between the EU and the UK, it is far less comprehensive than the prior arrangements and is silent on many important issues. One critical item missing for those in the insolvency and restructuring market is the absence of any agreement on the recognition of insolvency proceedings and, more generally, civil judgments.

For years, the reciprocal, automatic recognition regimes between the EU and the UK, set out in the EU Insolvency Regulation 2015 (EIR) and Regulation (EU) No 1215/2012 (Brussels Recast Regulation), had provided relatively straightforward answers to a set of complex cross-border recognition questions. The regimes had streamlined the implementation of cross-border restructurings and avoided the need to conduct parallel proceedings or to undertake what (in certain situations) could be complex, costly and time-consuming recognition processes.

With the avenue of automatic recognition now closed, a debtor will have to navigate through a patchwork of international treaties, European legislation, domestic legislation and common law to assess whether their chosen insolvency or restructuring process will be recognised in the EU or UK (as applicable), and, if so, the scope of the recognition afforded.

It is important to stress that the loss of automatic recognition should not be equated to a loss of recognition per se. This article attempts to summarise the pathways pursuant to which English insolvency proceedings (and schemes of arrangement and restructuring plans) may be recognised in the EU (and vice versa), and the scope of recognition afforded at the end of each path.

At the outset, it is important to draw a distinction between formal insolvency proceedings (such as company voluntary arrangements or administrations under the Insolvency Act 1986) and restructuring tools (such as a scheme of arrangement or a restructuring plan under the Companies Act 2006). While both formal insolvency proceedings and restructuring tools have now lost automatic recognition in the EU, the applicable legislation and the potential pathways to obtain recognition post-Brexit are different and this article will highlight those differences.

This article focusses on cross-border *recognition* post-Brexit. There are many other aspects of the UK insolvency framework that have now changed following Brexit, including the jurisdictional tests for commencing UK insolvency proceedings in relation to UK and EU/EEA incorporated companies and the applicable law in any such proceedings. It is not possible to deal with all these matters in one article. We focus on recognition in the context of an "ordinary" company, rather than a financial institution, insurance company, etc, in respect of which different rules may apply and certain of the pathways to recognition highlighted in this article may not be available. Finally, this article does not consider the rules applicable to "in-flight proceedings" (ie those commenced before 11pm on 31 December 2020).

FORMAL INSOLVENCY PROCEEDINGS

Life without the EIR

Pre-Brexit, the legal landscape in relation to matters of recognition across the EU was relatively straightforward. Recognition of insolvency proceedings was governed by the EIR and before that Council Regulation (EC) No 1346/2000. While there were a number of conditions and caveats (such as the choice of law provisions found in Arts 8-18 of EIR), the overriding principle enshrined in the EIR was that the location of the

debtor's centre of main interests (COMI) or establishments determined where proceedings should be brought and which law should apply. Furthermore, the rest of the EU automatically recognised the effects of, and any judgments handed down in the course of, insolvency proceedings commenced in accordance with the EIR. Inbound and outbound recognition of insolvency proceedings was on the same terms across the EU; a level playing field if you like. The key principle underpinning this EU-wide framework was reciprocity. As soon as the UK exited the EU, this reciprocity was broken.

The European Union (Withdrawal Agreement) Act 2020 retained (or "on-shored") vast swathes of European legislation on an "as is" basis but it also provided parliament with the power to correct "deficiencies" so that the UK statute book (including any "on-shored" European legislation) would continue to work as intended. The lack of reciprocity under the "on-shored" EIR was a "deficiency" that needed correcting. The Insolvency (Amendment) (EU Exit) Regulations 2019 (as amended) repealed the majority of the operative provisions (including the automatic recognition regime) of the EIR. Therefore, while the EIR has been retained in UK law, it is but a shell of its former self – retained in name, but not in substance. Consequently, the relatively straightforward and predictable framework provided by the EIR has disappeared and, instead of turning to a codified piece of law, those wanting to determine whether a UK insolvency proceeding will be recognised in the EU (and vice versa) must now look to a variety of other sources.

Outbound recognition of English insolvency proceedings

There are two main methods pursuant to which an English insolvency proceeding could seek recognition in an EU member state. These are:

- if adopted by an EU member state, via the domestic legislation adopting the UNCITRAL Model Law on Cross-Border Insolvency (Model Law); or
- through the rules of private international law applicable in the relevant EU member state.

The Model Law

Crucially, the Model Law is a voluntary framework and only applies in the states who adopt it (which they do via domestic legislation). At the time of writing only four EU member states (Greece, Poland, Romania and Slovenia) have adopted the Model Law, meaning it is likely to be of limited assistance when seeking recognition of a UK insolvency proceeding in the EU. Furthermore, the Model Law is not a "like for like" replacement for the EIR in those EU member states that have adopted, or will in the future adopt, it. Key differences include:

- Recognition is not automatic. The Model Law creates a procedure to apply (via a court) for a recognition order, and possibly specific, discretionary relief.
- Recognition is not the same as recognition under the EIR. We highlight below the scope of recognition, and relief available, under the UK's adoption of the Model Law; as will be seen, broadly speaking, it can be characterised as "light-touch" recognition compared to what was afforded under the EIR. It will be for the adopting EU member state to define the scope of recognition available under its adopting legislation.

Private international law

Given the limited adoption of the Model Law in EU member states, the question of recognition of English insolvency proceedings will be heavily dependent on the domestic law of a particular EU member state. Unfortunately, such an assessment must be undertaken on a state-by-state basis, meaning that for those debtors with a nexus to multiple EU member states, the analysis must be repeated multiple times and the outcomes (ie the level of recognition) may well differ quite substantially between member states. While some EU member states do have helpful insolvency recognition provisions hardwired into their domestic legislation (see for example German international insolvency law (s 343 InsO)), whether a debtor can avail themselves of recognition will be heavily fact dependent and issues such as where the debtor has its COMI will likely continue to be highly relevant.

Inbound recognition of EU member state insolvency proceedings

Debtors who have a strong EU nexus but nevertheless retain a connection to the UK will want to ensure that any EU insolvency proceeding is recognised in England. Below are the methods by which an insolvency proceeding commenced in an EU member state may be recognised in England.

The Model Law

The UK implemented the Model Law via the Cross-Border Insolvency Regulations 2006 (SI 2006/1030) (CBIR). A debtor or a foreign representative appointed in foreign insolvency proceedings may make an application to the English court pursuant to the CBIR for "recognition" of those proceedings. As noted above, recognition under the CBIR is not automatic and is a limited substitute compared to the recognition previously enjoyed under the EIR. "Recognition" under the CBIR has the following key elements:

- the commencement of the foreign proceedings and, where relevant, the appointment of the foreign representative is recognised purely as a matter of fact;
- the foreign representative has standing to make an application to the English court under the clawback provisions under the Insolvency Act 1986;
- for foreign main proceedings only (ie opened where the debtor has its COMI), recognition results in an automatic stay on certain enforcement actions against the debtor, equivalent to the stay applicable in English liquidation proceedings; and
- if requested by the foreign representative, discretionary relief is available; such relief has its limits, it is supposed to be procedural in nature and cannot involve the application of a rule of foreign law or be used to recognise and enforce a foreign judgment (*Rubin v Eurofinance* [2012] UKSC 46).

The scope of the discretionary relief requested by foreign representatives, and that granted by the English court, will be an area to watch given the anticipated increase of CBIR recognition applications following the loss of the automatic regime under the EIR. Broadly speaking, the English court must be satisfied that the relief requested is "necessary" and that affected creditors are "adequately protected". Whilst one might think the English court is unlikely to grant relief in the form of a moratorium on secured creditors enforcing their security over assets situated in the UK, this was precisely the

relief granted in the recent *Thai Airways* CBIR recognition application (unreported).

Following the judgment in *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802, the English court will not grant discretionary relief that has the effect of displacing, or circumventing, the common law rule in *Gibbs* (derived from *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399). Readers will be familiar with this common law rule but, in very broad terms, it requires an English law process to compromise an English law governed debt obligation. *Gibbs* may be old law, but it remains good law, for now.

The Private International Law (Implementation of Agreements) Act 2020 received royal assent on 14 December 2020, providing the Secretary of State with the power to make regulations adopting, among other things, the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (New Model Law). Whether, and in what form, the UK will adopt the New Model Law remains to be seen. We understand the UK government will seek market views and a consultation on the UK's adoption of the New Model Law is expected to be issued before April 2021. A key concern for the market will be if, and to what extent, any adoption of the New Model Law could have the (intended or unintended) consequence of overriding the rule in *Gibbs*.

Section 426 of the Insolvency Act 1986

Section 426 enables the UK courts to provide assistance to the courts of "relevant countries and territories" upon request. The scope of the assistance available under s 426 can be very wide, much wider than under the CBIR. The English court can apply English insolvency law or the law of the requesting court; but, like the CBIR, s 426 cannot be used to recognise and enforce foreign judgments. The list of "relevant countries" is principally a list of current or former Commonwealth nations. Unfortunately, the Republic of Ireland is the only country that is both an EU member state and a relevant country for s 426 purposes, thereby making s 426 of very limited use in the context of inbound recognition of EU insolvency proceedings.

Common law recognition and assistance

English common law has always provided a pathway to obtaining recognition of, or providing assistance to, foreign insolvency proceedings commenced (or recognised) in the place of incorporation; readers will be familiar with the concept of "modified universalism" which forms part of the common law. Cases such as *Rubin v Eurofinance* [2012] UKSC 46 and *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36 have somewhat clipped the wings of this concept. The assistance available under the common law is subject to the substantive law and public policy of England and the English court cannot grant relief or provide assistance that goes further than the powers available to the foreign officeholder in its "home" jurisdiction.

In our view, recognition under the CBIR is likely to be the pathway of choice for EU insolvency proceedings in the future and the development of case law on the CBIR, and the possible adoption of the New Model Law, is an area to watch.

RESTRUCTURING TOOLS

For decades, the jewel in the UK restructuring crown has been the scheme of arrangement. In June 2020, the UK added to its toolbox when the restructuring plan came onto the statute book. Arguably one of the most significant changes to the UK insolvency landscape in a generation, the restructuring plan is, intentionally, heavily modelled on the very successful scheme of arrangement. However, crucially, the restructuring plan can implement a cross-class cram-down (across and up) whereas, the scheme cannot. Both the scheme and restructuring plan are a creature of corporate law and found in the Companies Act 2006. Neither use COMI to determine jurisdiction. Instead, the lower jurisdictional bar of a "sufficient connection" to the UK is required which can be satisfied by English law governed documentation. Despite this low jurisdictional threshold, a court will not sanction a scheme/restructuring plan in vain; it will need to be satisfied the scheme/plan will be recognised and have effect in those jurisdictions where the debtor has a significant connection. Hence, the issue of recognition is of significant importance to the continued success and popularity of these tools, and the UK's position in the competitive international restructuring market.

How were schemes and restructuring plans recognised pre-Brexit?

The EIR did not apply to schemes (or restructuring plans). The UK, intentionally, did not list the scheme as an insolvency proceeding in the annexes to the EIR. Therefore, the main pathways to obtain recognition of a scheme or restructuring plan in the EU were:

- the Brussels Recast Regulation, on the basis that the English court order sanctioning a scheme or plan is a judgment within its scope. The Brussels Recast Regulation regulates the recognition of civil judgments across the EU and while the sanctioning of a scheme is a slightly uneasy fit for the regulation, it was accepted by Trower J in *Re Lecta Paper UK Ltd* [2020] EWHC 382 (Ch) that a scheme should be recognised on that basis (and one would expect that analysis to apply equally to restructuring plans);
- Regulation (EC) No 593/2008 (Rome 1) if the scheme or plan involves a compromise of contracts governed by English law. Rome 1 concerns the law applicable to contractual obligations and, at a high level and subject to certain caveats, states that the choice of governing law by the parties to a contract should be respected. This means that, where an underlying debt obligation is governed by English law, the courts of the EU member states should recognise a scheme or restructuring plan that compromises that obligation; or
- rules of private international law.

Recognition of schemes and restructuring plans post-Brexit

In the course of writing this article the decision in *Gategroup Guarantee Ltd, Re* [2021] EWHC 304 (Ch) was published and this decision may affect the ability to use one or more of the pathways described below in relation to recognition of a restructuring plan.

Brussels Recast Regulation

The Brussels Recast Regulation relied on reciprocity among EU member states; as with

Biog box
Philip Wells and Lucy Aconley are lawyers and part of the Global Restructuring Group at Allen & Overy LLP. Email: philip.wells@allenovery.com and lucy.aconley@allenovery.com

the EIR, post-Brexit, this reciprocity was broken. Pursuant to the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, the Brussels Recast Regulation has not been on-shored into UK domestic law, therefore it is no longer a pathway to recognition of a scheme or restructuring plan sanction order.

Rome 1

Rome 1 continues to apply post-Brexit, meaning EU member states will still apply Rome 1 in respect of English law governed contracts. Therefore, the outbound recognition of schemes and restructuring plans under Rome 1 should largely be unaffected by Brexit. Equally, the UK has on-shored Rome 1 (Retained Rome 1), thereby continuing to allow for inbound recognition of an equivalent EU restructuring process.

Hague Convention

The Hague Convention concerns the effectiveness of exclusive choice of court agreements and the recognition of judgments handed down pursuant to such clauses. In short, the convention states that where an exclusive jurisdiction clause applies, only the selected court has jurisdiction to hear disputes concerning that contract and any judgments handed down pursuant to such clauses must be recognised in other contracting states.

The EU is a contracting party to the Hague Convention, meaning the convention applies to all EU member states (including, prior to its exit, the UK). The UK has since re-acceded to the convention in its own right.

While the Hague Convention is a helpful recognition tool, it has limitations. For example:

- most jurisdiction clauses in English law loan agreements are asymmetric. While the judiciary in England has shown a potential willingness to consider asymmetric jurisdiction clauses as exclusive jurisdiction clauses in other contexts (*Etihad Airways PJSC v Prof Dr Lucas Flöther* [2019] EWHC 3107 (Comm)), it is doubtful the EU courts would take the same approach. Following the more established EU approach means the majority of English law governed loan agreements will fall outside the scope of the Hague Convention; and
- it is unclear from when the Hague Convention applies to the UK. The UK's view is that the convention applies to agreements entered into after 1 October 2015 (when the EU acceded on its behalf). The EU considers the correct date is 1 January 2021 (when the UK acceded in its own right), meaning any agreement dated prior to 1 January 2021 is outside scope, thereby diminishing the usefulness of the convention as a pathway to recognition for pre-existing agreements.

Private international law

If neither Rome 1 nor the Hague Convention can be used to obtain recognition, the question becomes one of private international law. This would necessitate a state-by-state assessment of the relevant EU member states in which the debtor has a nexus. This route is sub-optimal given the need to assess each state individually.

Lugano

The UK has submitted an accession instrument to the Lugano Convention. This convention would largely replicate the regime under the Brussels Recast Regulation. Unfortunately, unlike the Hague Convention, accession to the Lugano Convention requires the consent of all contracting states (being the EU (other than Denmark), Denmark, Iceland, Switzerland and Norway). At the time of writing, the EU has not consented, however a response is expected on or before April 2021. Lugano would definitely go a long way to plugging the gap left by the Brussels Recast Regulation. It is the best hope (and most likely option) to re-establish a mutual recognition framework in the short-term.

Restructuring tools: inbound recognition of EU member state procedures

Just as with insolvency proceedings, debtors who use an EU restructuring procedure to implement a restructuring will (if they have a UK nexus) want to ensure that procedure is recognised in the UK.

Historically, most EU member states did not have a process equivalent to the scheme. It was therefore more common for EU restructurings to be implemented either: (i) consensually; or (ii) via a formal insolvency proceeding, with the latter enjoying automatic recognition under the EIR. However, that has changed following the implementation of Directive (EU) 2019/1023, which requires EU member states to create a suitable preventive restructuring framework. Now some EU member states (notably The Netherlands and Germany) have established processes akin to the English scheme and restructuring plan and soon the UK will need to consider inbound recognition of those processes.

The potential methods of recognition for such a process would be broadly the same as those available for outbound recognition, namely: (i) Retained Rome 1; (ii) the Hague Convention; and (iii) private international law. As mentioned above, the rule in *Gibbs* will likely frustrate any EU process attempting to compromise an English law governed obligation. If the EU process would not be recognised, a parallel process in the UK may be required to provide certainty of implementation for stakeholders.

CONCLUSION

Without automatic recognition, parties must once again navigate through various treaties, pieces of legislation and common law rules to assess whether recognition is possible. This creates additional and unwelcome hurdles and will likely frustrate debtors and insolvency practitioners. Nevertheless, there are multiple pathways to navigate the recognition issue and it is by no means insurmountable, although practitioners will need to be more agile and perhaps more creative. Old tools, such as the CBIR, will be given new life and significance and potential new tools, like the New Model Law, may make things even more interesting in the future. It will of course take time to adapt to the new post-Brexit world; however, as debtors and insolvency practitioners become more familiar with the new legal landscape, the possible pathway(s) to obtain recognition will undoubtedly become clearer. ■

Further Reading:

- The nation state strikes back: cross-border insolvency in England in the wake of *Singularis*, Brexit and COVID-19 (2020) 9 JIBFL 602.
- Reciprocity after Brexit (2017) 2 JIBFL 69.
- Lexispsl: Banking & Finance: Practice Note: Brexit – Impact on recast regulation on insolvency.