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FOKUS Sanierung

• ZInsO FOKUS – Außergerichtliche Sanierung und Restrukturierung

Der neue IDW S 11 vs. BGH – kleiner Unterschied, große Wirkung! (S. 677)
von Sebastian Philipp und Christian Säuberlich

Krise auf Krise in der Automobilzulieferindustrie: Auswirkungen auf die wirtschaftliche Verfassung und das Insolvenzgeschehen (S. 679)
von Dr. Andreas Fröhlich und Silvan Drasch, Baker Tilly München

ESG-Ansatz für Sanierungskonzepte (S. 686)
von Alexander Müller, Senior Partner Roland Berger, München

• ZInsO FOKUS – Präventiver Restrukturierungsrahmen

Vererbte Unternehmen und bestandsgefährdende Erbfallschulden als Bewährungsproben des StaRUG (S. 688)
von Professor Dr. Wolfgang Marotzke, Tübingen

• ZInsO FOKUS – Sanierung in der Insolvenz

How to get Recognised: Cross-border Recognition of Insolvency and Restructuring Proceedings Post-BREXIT (S. 698)
Philip Wells and Lucy Aconley

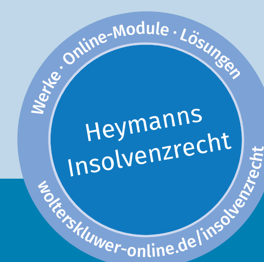
• ZInsO FOKUS – Statistiken, Berichte

Entwurf einer Checkliste für Restrukturierungspläne gem. § 16 des Unternehmensstabilisierungs- und -restrukturierungsgesetzes (StaRUG) (S. 704)

Stellungnahme zum Entwurf einer „Checkliste für Restrukturierungspläne" gem. § 16 StaRUG gem. Schreiben des BMJV v. 31.1.2022, Az. RA6 – 3760/20-3-R3 21/2022 (S. 714)
BAK*inso;* Bundesarbeitskreis Insolvenz- und Restrukturierungsgerichte e.V.; Zusammenschluss von Insolvenzrichter*innen, Restrukturierungsrichter*innen und Insolvenzrechtspfleger*innen

Stellungnahme zum Entwurf einer „Checkliste für Restrukturierungspläne nach § 16 StaRUG" gemäß Schreiben des BMJV vom 31.1.2022, Az. RA6 – 3760/20-3-R3 21/2022 (S. 715)
Gesellschaft für Restrukturierung – TMA Deutschland e.V. – an international Affiliate of the Turnaround Management Association

Schriftleitung: Andreas Ziegenhagen



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zu ersparen. Dass zu den Konstellationen, die der Erblasser aus unternehmerischer Verantwortung tunlichst vermeiden sollte, i.Ü. nicht nur das Nebeneinander (§§ 2032 ff. BGB), sondern auch das sich mit den Begriffen Vor- und Nacherbfolge (§§ 2100 ff. BGB) verbindende Nacheinander mehrerer Erben gehört, versteht sich nahezu von selbst.

C. Fazit

Die Fortführung eines geerbten Unternehmens kann durch erbfallbedingte Verbindlichkeiten aus Pflichtteilsrechten, Vermächtnissen und Auflagen und, wenn auch in geringerem Maße,[87] durch die den Erben treffende Erbschaftsteuerlast massiv gefährdet werden.[88] Derartige Erbfallschulden sind der reduzierenden Umgestaltung durch einen Restrukturierungsplan (§§ 2 ff. StaRUG) grds. zugänglich.[89] Voraussetzung ist jedoch eine drohende Zahlungsunfähigkeit nicht nur des Nachlasses oder des Eigenvermögens des Erben, sondern eine drohende Zahlungsunfähigkeit des Erben in seiner Eigenschaft als Inhaber seines sowohl den Nachlass als auch sein Eigenvermögen umfassenden Gesamtvermögens.[90]

Aus praktischen Gründen stößt eine Anwendung des StaRUG an Grenzen, wenn die Person, der der Erblasser die Fortführung seines Unternehmens anvertrauen möchte, nicht alleiniger Erbe ist, sondern sich mit Miterben arrangieren und ggf. auseinandersetzen muss.[91] Allerdings bestehen in solchen Fällen i.d.R. weder Pflichtteilsansprüche noch Vermächtnisse, die den Fortbestand eines nachlasszugehörigen Unternehmens gefährden könnten.

Zu Komplikationen kann es auch kommen, wenn und solange (§ 1981 Abs. 2 Satz 2 BGB, § 319 InsO) die Möglichkeit einer gläubigerinitiierten Nachlassverwaltung (§§ 1981 ff. BGB), eines gläubigerinitiierten Nachlassinsolvenzverfahrens (§§ 317 Abs. 1, 319 f. InsO) oder einer zeitnahen Nacherbfolge (§§ 2100 BGB) besteht.[92]

Ein spezielles Nachlass-Restrukturierungsverfahren ist dem StaRUG fremd.[93] In Ansehung der dem Nachlassinsolvenzverfahren durch §§ 1975 ff., 1989 BGB zugewiesenen Bedeutung für die Beschränkung der Erbenhaftung auf den Nachlass und der dem Nachlassinsolvenzverfahren durch § 2060 Nr. 3 BGB zuerkannten Bedeutung für die Verwandlung der gesamtschuldnerischen (§ 2058 BGB) Miterbenhaftung in eine teilschuldnerische steht das StaRUG-Verfahren einem Nachlassinsolvenzverfahren nicht gleich.[94]

Dies alles ändert jedoch nichts an der abschließenden Feststellung, dass grds. auch der Fortbestand eines *geerbten* Unternehmens mithilfe des StaRUG gesichert werden kann[95] und als zweckdienliches Mittel auch ein planbasierter Rückschnitt bestandsgefährdender Pflichtteilsansprüche, Vermächtnisse, Auflagen und Erbschaftsteuerforderungen in Betracht kommt.[96]

87 Das gilt ganz besonders für Pflichtteilsansprüche; s.o. B. I. 2. d).

88 S.o. B. I. 2. f).

89 S.o. B. I. 2. d) (Pflichtteilsansprüche), B. I. 2. e) (Vermächtnisse und Auflagen), B. I. 2. f) (Erbschaftsteuer).

90 S.o. B. I. 2. b) dd).

91 S.o. B. II.

92 S.o. B. I. 1.

93 S.o. B. I. 2. a).

94 S.o. B. I. 2. c). Zudem ist eine Anwendung der §§ 1975 ff., 1989, 2060 Nr. 3 BGB selbst im Fall eines auf den Nachlass beschränkten *Insolvenzverfahrens* ausgeschlossen, soweit die erbrechtliche Haftung des Rechtsnachfolgers im konkreten Fall durch eine handelsrechtliche (§ 27 HGB) überlagert und dieser Fall nicht durch einen Insolvenzplan einer erbrechtsanalogen Anwendung zugeführt wird. Auch dazu s.o. B. I. 2. c) und die ergänzenden Hinw. in Fn. 39 f.

95 S.o. A. II.

96 S.o. B. I. 2. d), e), f).

ZInsO FOKUS – Sanierung in der Insolvenz

How to get Recognised: Cross-border Recognition of Insolvency and Restructuring Proceedings Post-BREXIT

Philip Wells and Lucy Aconley*

This article summarises the post-BREXIT position regarding inbound and outbound recognition of insolvency and restructuring proceedings between the UK and the EU. This article was originally published in the March 2021 edition of the Butterworths Journal of International Banking and Financial Law and has been updated (as at February 2022) for publication in the Zeitschrift für das gesamte Insolvenzrecht.

KEY POINTS

- *In December 2020, the EU and UK announced the EU-UK Trade and Cooperation Agreement. However, despite its ambitious aims, the agreement did not contain any provisions regarding recognition of insolvency proceedings and, more generally, civil judgments between the EU and the UK. As such, since the end of the transition period (i.e. from*

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1.1.2021), we have been effectively in a „no deal" scenario when it comes to the recognition of insolvency proceedings and civil judgments. The pre-BREXIT reciprocal, automatic recognition frameworks ceased to apply. As a result, debtors and insolvency practitioners are forced to navigate through a patchwork of international treaties, European legislation, domestic legislation and common law to assess whether inbound/outbound recognition is available and, if it is, what that „recognition" really looks like in practice.

- *The lack of an automatic recognition regime, to some degree, has increased the cost and complexity (with potential consequential impact on the time taken) to complete cross-border restructurings and insolvencies. However, this should not be equated with a loss of recognition per se. Since the post-BREXIT transition period ended, debtors (whether in the UK or EU) have found ways to (i) successfully obtain recognition where required or (ii) implement alternative structures to consummate their restructurings.*
- *The market has already adapted and, 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. This is not to say, however, that there will not be bumps along the road. Recognition is not what it was under the pre-BREXIT European framework and it will take time for the UK (and indeed the wider European) market to reach a settled and clear position.*

I. Introduction and Background

On 30.12.2020, and after years of tense and prolonged negotiations, the European Union (the *EU*) and the United Kingdom (the *UK*) signed 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 (the *EIR*) and Regulation (EU) No 1215/2012 (the *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, debtors 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. Insolvency and restructuring proceedings continue to be recognised post-BREXIT between the EU and the UK (albeit through different, and sometimes more complex, means). 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. In addition, this article aims to highlight some of the recent developments that may indicate how the market will adapt over time to the loss of the comprehensive European framework.

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, arguably, 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 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. Unless expressly stated, 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 (and while of ever decreasing relevance over time), this article does not consider the rules applicable to „in-flight proceedings" (i.e. those commenced before 11:00 p.m. on 31.12.2020).

II. Formal Insolvency Proceedings

1. 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 the Council Regulation (EC) No 1346/2000. While there were a number of conditions and caveats (such as the choice of law provisions found in Articles 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 com-

menced 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 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.

2. Outbound recognition of English Insolvency Proceedings

There are two main methods pursuant to which an English insolvency proceeding could be recognised in an EU Member State. These are:

(i) if adopted by an EU Member State, via the domestic legislation adopting the UNCITRAL Model Law on Cross-Border Insolvency (the *Model Law*); or

(ii) through the rules of private international law applicable in the relevant EU Member State.

a) 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:

(i) Recognition is not automatic. The Model Law creates a procedure to apply (via a court) for a recognition order, and possibly specific, discretionary relief.

(ii) 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.

b) 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 (i.e. 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 [Sec. 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. While not the subject of this article, it is worth noting that the restructuring market may need to give more thought to the potential impact of the „real seat theory“ in future cross-border restructurings and insolvencies now that UK incorporated companies no longer benefit from freedom of establishment within the EU in the same way as they did pre-BREXIT. As readers will be familiar, under the „real seat theory“ it is the location of company's administrative seat (effectively their centre of main interests) that determines what law governs that entity from a corporate law perspective. For example, if an English incorporated company has its COMI in an EU Member State that adopts the „real seat theory“ (such as Germany) rather than the „incorporation theory“, that jurisdiction may no longer recognise the English company's corporate form and may instead treat or classify the company under its own laws; an action that could frustrate restructuring efforts and the related recognition analysis.

3. 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.

a) The Model Law

The UK implemented the Model Law via the Cross-Border Insolvency Regulations 2006 (SI 2006/1030) (the *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:

(i) the commencement of the foreign proceedings and, where relevant, the appointment of the foreign representative is recognised purely as a matter of fact;

(ii) the foreign representative has standing to make an application to the English court under the clawback provisions under the Insolvency Act 1986;

(iii) for foreign main proceedings only (i.e. 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

(iv) if requested by the foreign representative, discretionary relief is available; such relief has its limits, 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 in the future as CBIR recognition applications increase 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).

It is too early to tell if the CBIR (and the discretionary relief available under it) will emerge as an adequate substitute for the European framework to which the UK used to be a party. Since the end of the transition period, the majority of the applications were in respect of companies or individuals subject to processes or proceedings from outside of the EU (including proceedings in Hong Kong, Ukraine, Singapore and the UAE). The only reported CBIR decision in 2021 concerning a company incorporated in an EU Member State was *Re Greensill Bank AG [2021] EWHC 966*, in which the High Court recognised the German insolvency proceedings concerning Greensill Bank AG. The case is of particular interest given that, prior to the end of the transition period, Greensill Bank AG would have fallen outside the scope of the CBIR on the basis that it constituted an „EEA credit institution" and therefore would have been subject to the Credit Institutions (Reorganisation and Winding Up) Regulations 2004. Over time, we would expect further cases to help define the parameters of recognition under the CBIR (including its limitations).

It is also important to remember that, as confirmed in the judgment in *Re OJSC International Bank of Azerbaijan [2018] EWCA Civ 2802* and the recent Scottish case of *Chang v Cosco Shipping (Qidong) Offshore Ltd [2021] CSOH 94*, the English (or Scottish) 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 may 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 14.12.2020, 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 (the *New Model Law*). Whether, and in what form, the UK will adopt the New Model Law remains to be seen. The UK government indicated that it would seek market views and issue a consultation on the UK's adoption of the New Model Law during 2021, however, no such consultation occurred. As and when the consultation occurs (the timing for which is unknown at present), 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*.

b) 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 section 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, section 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 section 426 purposes, thereby making section 426 of very limited use in the context of inbound recognition of EU insolvency proceedings.

c) 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 English 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. As confirmed by the Court of Appeal in the recent case of *Kireeva v Bedzhamov [2022] EWCA Civ 35*, common law assistance is not necessarily as comprehensive as what could otherwise be obtained under the CBIR (which, as noted above, is itself not as a comprehensive as the recognition available under the European framework). Therefore, common law recognition and assistance would likely only be used when the other recognition routes mentioned above are unavailable.

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 post-BREXIT case law on the CBIR, and the possible adoption of the New Model Law, are areas worth watching.

III. 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.

From an English law perspective, the scheme has never been considered an insolvency proceeding. Instead, the scheme is seen as a creature of corporate law and is found in the Companies Act 2006. Given the similarities between the scheme and restructuring plan, the expectation was that a restructuring plan would also be classified as a corporate or contractual tool rather than a formal insolvency proceeding. This assumption, however, was thrown into doubt when the court decided in *Re Gategroup Guarantee Limited [2021] EWHC 304 (Ch)* that a restructuring plan falls within the bankruptcy exemption of the Lugano Convention. The decision to classify a restructuring plan as a bankruptcy proceeding for the purpose of Lugano allowed the debtor to successfully use the process to compromise certain Swiss-law governed bonds (notwithstanding the exclusive jurisdiction clause in favour of the Swiss courts). The decision was fact specific and related only to the interpretation of the bankruptcy exemption of Lugano, a treaty that, for the reasons discussed below, is no longer applicable to the UK. Given there is uncertainty as to whether *Gategroup* represents a general proposition or merely a specific and distinguishable common law authority, in this article we have continued to view the restructuring plan as a restructuring tool. If it were to be deemed an insolvency proceeding instead, then the methods of recognition set out above would likely apply. Additionally, whether the English courts consider a restructuring plan to be an insolvency proceeding is only part of the puzzle. From a recognition perspective, how the country in which recognition is sought views the restructuring plan will be far more important.

For completeness, it should be noted that neither the scheme nor the restructuring plan 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.

As a related matter, the UK Government recently consulted on the introduction of a new regime for corporate re-domiciliation into the UK, pursuant to which foreign incorporated entities could re-domicile as an English company. If such a regime were introduced (although any such introduction is expected to be some way in the future), it is possible that it could be utilised as a precursor step to implementing an English insolvency or restructuring proceeding in order to improve the chances of recognition of such proceedings in those jurisdictions that use place of incorporation (as opposed to location of a company's „real seat“ or centre of main interests) as a basis for recognition.

1. 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. This is in contrast to the array of new restructuring tools that are appearing throughout Europe as a result of Directive (EU) 2019/1023, a number of which are listed in the annexes to the EIR. As a result of the scheme/restructuring plan not appearing in the annexes to the EIR, the main pathways to obtain recognition of a scheme or restructuring plan in the EU were:

(i) 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);

(ii) 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

(iii) rules of private international law.

2. Recognition of schemes and restructuring plans post-BREXIT

Recognition of a scheme or restructuring plan, and the pathway to obtain recognition, will be fact specific. Saying that, it is standard market practice and often a judicial requirement that where a scheme or restructuring plan has a material connection to another jurisdiction (for example, because the majority of the company's assets are located in that jurisdiction) an expert opinion is obtained confirming that the scheme or plan would be recognised, and given effect, to in that particular jurisdiction. For example, in 2021 alone, we are aware of

opinions confirming that an English restructuring plan would be recognised in the Netherlands, Luxembourg, Italy, Spain and Portugal (in addition to a large number of non-EU Member States). As the number of restructuring plans increase over time so too will the collection of expert opinions obtained by the market to help establish and evidence recognition.

The current legal landscape for recognition of an English scheme of arrangement or restructuring plan in an EU Member State is as follows:

a) Brussels Recast Regulation

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

b) 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.[1] Equally, the UK has on-shored Rome 1 (the *Retained Rome 1*), thereby continuing to allow for inbound recognition of an equivalent EU restructuring process.

c) Hague Choice of Court Convention

The Hague Choice of Court 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 Hague 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:

(i) 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;

(ii) 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 1.10.2015 (when the EU acceded on its behalf). The EU considers the correct date is 1.1. 2021 (when the UK acceded in its own right), meaning any agreement dated prior to 1.1.2021 is outside its scope, thereby diminishing the usefulness of the convention as a pathway to recognition for pre-existing agreements; and

(iii) following the decision in *Gategroup*, there is the possibility a restructuring plan (and maybe even a scheme) could fall within the bankruptcy/insolvency exemptions of the Hague Convention (given their similarity to the equivalent exemption in Lugano that was the subject of the *Gategroup* decision) and, accordingly, not be eligible for recognition.

There is a sister to the Hague Convention, known as the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the *Hague Judgment Convention*). This convention, which was concluded in 2019, does not require an exclusive jurisdiction clause to be present in the underlying agreement; however, it has a number of limitations. For example, the Hague Judgment Convention contains the same bankruptcy exemption present in the Hague Convention. However, the most significant (and immediate) practical issue is that the convention is not yet in force and, at the time of writing, it is unclear whether (and, if so, when) the EU and UK would accede to it. Given this, any recognition under this sister convention is likely a long time off.

d) 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.

e) Lugano

In April 2020 the UK submitted an accession instrument to the Lugano Convention. The convention would have largely replicated 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). Despite positive responses from certain contracting states, the European Commission has stated that the EU should not consent to the proposed accession by the UK and have informed Switzerland (the depositary of the convention) accordingly, thereby vetoing the accession.

1 For completeness, Rome 1 contains a similar exemption to that discussed above and below in relation to the Lugano Convention and the Hague Convention; however, the Rome I exemption is limited to the "winding-up of companies or other bodies" and is therefore much narrower in scope compared to the exemptions found in the Hague Convention and Lugano.

Notwithstanding the fact that Lugano is an international treaty, the EU seems to be of the view that only states that are closely aligned with the EU and its single market should benefit from it. As such, it seems unlikely that the EU will permit the UK to accede to Lugano in the near-term.

3. 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 certain EU Member States (including, at the time of writing, Germany, the Netherlands, Italy, Lithuania, Cyprus, Hungary and Austria) have established processes akin to the English scheme or restructuring plan. Accordingly, soon the UK will need to consider inbound recognition of those processes. If recognition cannot be obtained, an alternative approach would be to implement parallel or subsequent proceedings in the UK, as was the case in the 2021 restructuring of Obrascón Huarte Lain, S.A. (a leading Spanish construction group) who used an English scheme of arrangement and Spanish homologación judicial in tandem to implement their restructuring.

The methods of recognition for such a process would be broadly the same as those available for outbound recognition, namely (i) Rome 1 (as retained pursuant to the 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. For example, if an entity incorporated in Germany (with its COMI in Germany) sought to use a StaRUG to compromise all its German law governed and English law governed debt obligations, the compromise of the English-law governed obligations via the StaRUG would not be effective (at least from an English law perspective) due to the rule in *Gibbs*. As a result, the company would have to use either (i) an English process instead of the StaRUG (provided such English process would be recognised in Germany) or (ii) the StaRUG and a parallel or subsequent process in England in respect of the English law governed obligations.

IV. 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, are slowly getting new life and significance and potential new tools, like the New Model Law and the Hague Judgment Convention, may make things even more interesting in the future (if they are adopted). It will of course take time to adapt to the new post-BREXIT world (and the global pandemic has not helped matters); however, as debtors and insolvency practitioners become more familiar with the new legal landscape and new cases are ruled upon, the possible pathway(s) to obtain recognition will undoubtedly become clearer.

ZInsO FOKUS – Statistiken, Berichte

Entwurf einer Checkliste für Restrukturierungspläne gem. § 16 des Unternehmensstabilisierungs- und -restrukturierungsgesetzes (StaRUG)

(Stand: 27.1.2022)

Hinweise zur Zielsetzung und Verwendung dieser Checkliste sowie zu Aufbau und Gliederung des Restrukturierungsplans.

Deckblatt und ggfs. eine Zusammenfassung des Plans

Darstellender Teil

- ☐ **Schuldnerbezogene Angaben**
  - ☐ Firma/Name, Geburtsdatum, Adresse
  - ☐ Unternehmensgegenstand
  - ☐ Registergericht, Registernummer
  - ☐ Vertretungsberechtigung
- ☐ **Verfahrensbezogene Angaben**
  - ☐ Restrukturierungsgericht, Aktenzeichen
  - ☐ Ggfs. Angaben zum Restrukturierungsbeauftragten (Name und Anschrift)
  - ☐ Ggfs. Angaben zu Verfahrenshilfen