# Recognition of Restructuring and Insolvency Proceedings

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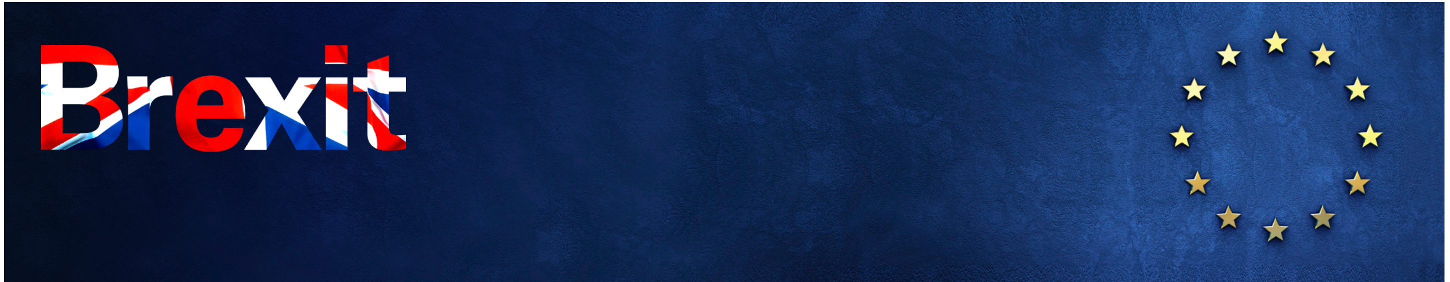


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Although the Trade and Cooperation Agreement (TCA) arrived in time to prevent a wholesale "no deal Brexit," issues of cross-border cooperation and recognition in relation to insolvency and restructuring proceedings were not included in the agreement. As a result, The Insolvency (Amendment) (EU Exit) Regulations 2019, which were designed to cater to a "no deal Brexit," took effect at 11 p.m. on 31 December 2020 and repealed the vast majority of EU law relevant to this sphere.

## Takeaways

- There is no longer a single, uniform regime for the coordination of restructurings between the UK and EU member states.
- Inbound (EU to UK) applications from EU member states will benefit from significant procedural relief under the Model Law, but the Gibbs Principle, which prevents English law-governed debt obligations from being discharged by foreign insolvency proceedings without consent, may pose a problem in cases where debtors are seeking to discharge or amend English law-governed debt through foreign proceedings.
- Outbound (UK to EU) applications will require a more detailed, case-by-case analysis of the rules of private international law in the relevant jurisdictions in which recognition is sought.
- There is likely to be a bedding-in period during which recognition procedures in the main EU jurisdictions will be tested and the most effective routes to recognition will be determined. In the meantime, restructurings involving companies with assets and operations in the EU and UK will involve considerable uncertainty.
- In the near term, UK schemes and restructuring plans appear more capable of coping with this period of uncertainty than other English restructuring tools due to the likelihood that their effect will be more readily recognised pursuant to rules of private international law.
- In general, the UK is likely to remain a popular jurisdiction for restructuring and insolvency due to its depth of expertise in dealing with financially distressed companies.

## Background

Prior to 1 January 2021, the principal legislation that applied to cross-border restructuring and insolvency cases involving the UK and other EU member states was (1) the Recast Insolvency Regulation and (2) the Recast Brussels Regulation (together, the EU Regulations).

The Recast Insolvency Regulation provides a common set of rules for EU member states in relation to: (1) the determination of the proper jurisdiction for a debtor's insolvency proceedings, (2) the substantive law to be applied to the proceedings, and (3) the automatic recognition of proceedings. The Recast Brussels Regulation regulates the enforcement of civil judgments (excluding insolvency proceedings) handed down


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in other EU member states and has historically been considered potentially relevant to UK schemes of arrangement as they are not — in the strict sense — insolvency proceedings and are arguably more akin to general civil proceedings.

Now, EU member states are essentially in the same position regarding restructurings in the UK as most other jurisdictions, including the US. However, debtors who are going through a restructuring in either the UK or the EU may need to consider recognition issues more carefully. The remainder of this article provides a brief overview of the principal ways in which this is likely to affect both outbound recognition applications from the UK and inbound applications from EU member states.

## Inbound Restructuring and Insolvency (EU to UK)

One significant change is that insolvency proceedings commenced and orders made in EU member states are no longer automatically recognised in the UK. The UNCITRAL Model Law on Cross-Border Insolvency (1997) (Model Law) has been enacted into UK law via the Cross-Border Insolvency Regulations 2006 (CBIR), meaning that debtors in EU member states will still be able to look to a developed legislative framework to obtain recognition of insolvency proceedings and other relief in UK courts (including an automatic stay in cases where the foreign proceedings constitute a "foreign main proceeding"). EU-based debtors are expected to make frequent use of the CBIR going forward.

However, a recent trend of English authorities' rulings has highlighted a significant limitation of the CBIR from the perspective of a foreign debtor seeking relief (*i.e.*, the first instance and Court of Appeal judgments in *Bakshiyeva (Representative of the OJSC International Bank of Azerbaijan) v Sberbank of Russia & Ors* [2018] EWHC 59 (Ch) and [2018] EWCA Civ 2802). A principle of English common law known as the Gibbs Principle provides that a debt can only be validly discharged pursuant to the law that governs it. This rule previously lacked any real significance in relation to UK-EU insolvencies due to the Recast Insolvency Regulation, which required the UK to recognise the substantive effect of certain EU insolvency proceedings. The CBIR, however, are narrower in scope, and the English courts have held that they only allow a debtor procedural relief and assistance. Debtors with proceedings in the Republic of Ireland may be able to side-step this issue by relying on Section 426 of the Insolvency Act 1986, which does permit more substantive relief, though this strategy only will be available in a small number of cases as none of the other 26 EU member states are "relevant countries" under the statutory provision.

## Outbound Restructuring and Insolvency (UK to EU)

Unlike inbound recognition applications, outbound applications from the UK will not enjoy much assistance from the Model Law, as only four EU member states have adopted it (Greece, Poland, Romania and Slovenia). As a result, the loss of the Recast Insolvency Regulation may make it harder for UK-based debtors to gain recognition and deal with assets located within the EU, as much will depend on the private international rules in the particular member state where recognition is sought. In Germany, for example, recognition may be granted in cases where the debtor has its "centre of main interests" in the UK. In certain other EU jurisdictions, such as France and Italy, recognition will likely require a more lengthy judicial recognition process, involving a greater scope of parallel proceedings with increased costs to the insolvency estate and a heightened risk of unequal treatment of different groups of creditors. None of the aforementioned EU member states has yet indicated an intention to enact the Model Law.

However, it is important to draw a distinction between formal UK insolvency proceedings (such as administration, company voluntary arrangements and liquidation under the Insolvency Act 1986) and two other restructuring mechanisms under the Companies Act 2006: (1) the scheme of arrangement under Part 26 and (2) the relatively new restructuring plan under Part 26A.

### The Scheme of Arrangement and Restructuring Plan

While the point was never formally settled, many practitioners considered schemes to be recognised across the EU as civil judgments under the Recast Brussels Regulation and, accordingly, the same view would be taken in relation to a restructuring plan. The approach that will be taken to the recognition of schemes and restructuring plans going forward is therefore likely to follow the same pattern as the approach to civil judgments generally, meaning that recognition may be sought on one or more of the following grounds:

- existing rules of private international law in each member state where recognition is sought;
- the Rome I Regulation;
- the 2005 Hague Convention; and
- the Lugano Convention 2007.

Although practitioners generally agree that none of the above routes to recognition provide the same degree of certainty as the Recast Brussels Regulation, UK practitioners are generally optimistic that there will still be an effective means of securing recognition of schemes and restructuring plans across the EU, particularly where the underlying debt is governed by English law or where the debtor's centre of main interests is in the UK. (For a more detailed discussion of each of the above potential routes to recognition, see "Civil Disputes: New Gaps, Old Solutions.")

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## Conclusion

As a result of Brexit, debtors with a presence both in the UK and the EU face a challenging patchwork of different rules and regulations. In time, the impact of this should diminish as recognition procedures in EU jurisdictions are tested and the most effective routes to recognition are determined. However, it seems likely that — at least in the near term — restructurings involving companies with assets and operations in the EU and the UK may take longer, incur higher costs and be more likely to involve parallel proceedings. The depth of restructuring expertise in the UK market and the flexibility of its restructuring tools should put the UK in good standing to meet this challenge and retain its position as a centre for cross-border restructurings.