Mutual recognition and enforcement of insolvencies in the EU post-Brexit

By Christopher Loxton

As is known all too well, 31 December 2020 marked the end of the transitional period, agreed as part of the 2019 Withdrawal Agreement, in which the effect of EU membership continued to apply in and to the UK. As the 2020 EU-UK Trade and Cooperation Agreement made no provision for continued recognition of, or co-operation in, insolvency and restructuring proceedings across the EU, The Insolvency (Amendment) (EU Exit) Regulations 2019 came into force and repealed the vast majority of relevant EU law.

The EU Insolvency Regulation ('the EUIR')[1] continues to apply to "main"[2] proceedings opened in an EU member state or the UK on or before 11pm on 31 December 2020, and any related "secondary" proceedings[3]. However, from 1 January 2021, the law of the UK and that of individual EU member states apply to new insolvency proceedings for the purposes of recognition and enforcement cross-border.

The Recast Brussels Regulation (No.1215/2012) also no longer applies between the UK and EU meaning the enforcement of civil judgments, including in relation to UK schemes of arrangement (which are not considered 'insolvency proceedings') as they are not – in the strict sense – insolvency proceedings and are therefore more akin to general civil proceedings.

The change brought about by Brexit represents a seismic change in the way that insolvency proceedings with cross-border assets and interests between the UK and EU are dealt with. For proceedings commenced after 1 January, gone are the EUIR's provisions for automatic recognition of UK insolvency proceedings and enforcement safeguards in EU member states. Crucially, the

[1] No.2015/848.
[2] Defined as proceedings in the courts of the state in which the debtor's main interests lie.
[3] As defined in Chapter II of Reg.2015/848.

English law moratorium preventing the commencement of new civil proceedings against a debtor will no longer be given automatic effect in EU member states meaning a greater risk of parallel proceedings.

This article sets out in outline how insolvency and restructuring proceedings are likely to be treated as between EU countries and the UK, first for officeholders seeking recognition and/or enforcement of EU proceedings in the UK, and second for officeholders seeking the same in respect of UK proceedings in EU member states.

Recognition and enforcement of EU proceedings in the UK

Perhaps bizarrely, the EUIR has been retained in UK law in substantially amended form[4]; the only provisions preserved being the jurisdiction of the UK courts to open insolvency proceedings in relation to debtors who have their centre of main interests ("COMI")[5] in the UK. Of course such provisions existed in UK law absent the Retained EUIR, however, the position is confirmed post-Brexit that insolvency proceedings may still be opened in the jurisdiction where the debtor has its COMI in the UK although, as stated above, those proceedings will no longer benefit from any automatic recognition in the EU.

The principal legislation now governing insolvency issues between EU and Great Britain[6] is the Cross-Border Insolvency Regulations 2006 ('the 2006 Regs')[7], introduced by section 14 of the Insolvency Act 2000 to give effect to the Model Law adopted in 1997 by the United Nations Commission on International Trade Law ("UNCITRAL")[8].

Regulation 2 of the 2006 Regulations provides that the Model Law shall have the force of law in Great Britain in the form set out in Schedule 1, and provides that in interpreting the Model Law the courts can have regard to other documents including the Guide to Enactment and Interpretation of the Model Law published by UNCITRAL.

The Model Law sets out the procedure where assistance is sought from a British court:

(a) by a foreign court or a representative in connection with foreign proceedings;
(b) by a foreign state in connection with proceedings conducted under British insolvency law;
(c) where there are concurrent British and foreign proceedings concerning the same debtor; and/or
(d) where foreign creditors or other interested persons have an interest in commencing or participating in British insolvency proceedings.[9]

Where a foreign insolvency proceeding is recognised in the UK as a "main proceeding", UK civil proceedings against the debtor are stayed and the foreign insolvency practitioner may be entrusted with the administration or realisation of all or part of the debtor's estate which is located in the UK. A variety of powers then exist under the Insolvency Act 1986 for UK courts to assist a foreign court which has jurisdiction over the main proceeding. The provisions on fraudulent and wrongful trading (ss.212-4) and the setting aside of

[4] Pursuant to the UK Insolvency (Amendment) (EU Exit) Regulations 2019.
[5] A corporation's COMI is presumed to be its place of incorporation, unless the contrary is proven: Art.3(1), EUIR.
[6] Northern Ireland has its own, very similar, legislation in the form of the Cross-Border Insolvency Regulations (Northern Ireland) 2007/115.
[7] SI 2006/1030.
[8] UNCITRAL is a subsidiary body of the UN General Assembly responsible for helping to facilitate international trade and investment.
[9] 2006 Regulations, Schedule 1, Chapter I, Article 1.

transactions at an undervalue (s.238) can be applied against foreign parties on request from a foreign court. Foreign insolvency practitioners can also require the examination of a foreign director of an English company under s.133 and the production of documents located abroad under s.236.

One drawback for foreign debtors, however, is the English common law principle known as the "Gibbs principle"[10] which provides that only an English court may discharge debt arising under English law, even if that debt has first been discharged in a foreign insolvency proceeding. Recent judgments of the English courts have gone further to hold that the Model Law in the 2006 Regulations offers only procedural relief such that judgments entered against parties who do not submit to the foreign jurisdiction are invalid[11], and that any relief granted to foreign representatives seeking enforcement under the Model Law must first be correspondingly permitted as a matter of substantive English law[12]. This principle previously lacked significance in relation to UK–EU insolvencies due to the EUIR, which required the UK to recognise the substantive effect of EU insolvency proceedings. In the absence of the EUIR post-Brexit, the application of the Gibbs principle to EU proceedings will undoubtedly mean an increase in time and costs.

Debtors with proceedings in the Republic of Ireland[13] may be able to side-step the Gibbs principle by relying on s.426 of the Insolvency Act 1986 which provides that a UK court asked for assistance from an Irish court has the power, upon specific request from the Irish court, to apply either the relevant UK insolvency law or Irish insolvency law to matters falling within the UK court's jurisdiction. Examples of the use of s.426 powers are UK courts making administration orders over foreign companies and applying company voluntary arrangements to foreign companies (despite such a procedure not existing in the foreign jurisdiction).

Recognition and enforcement of UK proceedings in the EU

The immediate impact of the loss of automatic recognition which existed under the EUIR is that UK officeholders will need to have UK proceedings recognised in individual EU member states and/or open simultaneous local insolvency proceedings in those states.

Given that only four EU member states have adopted the UNCITRAL Model Law into their domestic laws (Greece, Poland, Romania and Slovenia[14]), procedures for UK officeholders to deal with assets in the jurisdictions of other EU member states will be dependent on each country's own approach to recognition and enforcement of foreign insolvency proceedings. The disapplication of the EUIR has thus undoubtedly made it harder for UK proceedings to gain recognition in EU member states and for UK officeholders to deal with assets located within the EU.

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[10] *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* [1890] QB 399, at 399-400 (Eng.)

[11] *Rubin v Eurofinance S.A*. [2012] UKSC 46.

[12] See the first instance and Court of Appeal judgments in *Bakshiyeva (Representative of the OJSC International Bank of Azerbaijan) v Sberbank of Russion & Ors* [2018] EWHC 59 (Ch) and [2018] EWCA Civ 2802).

[13] For the purpose of section 426, the relevant countries/territories are currently: Anguilla, Australia, the Bahamas, Bermuda, Botswana, Brunei, Canada, Cayman Islands, the Channel Islands (Jersey, Guernsey, Alderney, Sark, and Herm), Falkland Islands, Gibraltar, Hong Kong, Isle of Man, Malaysia, Montserrat, New Zealand, the Republic of Ireland, South Africa, Saint Helena, Turks and Caicos Islands, Tuvalu and the British Virgin Islands.

[14] No other EU member state has indicated an intention to enact the Model Law at the time of writing.

guidance on 24 March 2021[15] on how UK proceedings might be recognised under the national law of each EU member state. In many EU jurisdictions, such as France and Italy, recognition will likely require a lengthy judicial recognition process, involving greater risks of parallel proceedings (with increased costs) and unequal treatment of differing creditor groups.

In relation to proceedings which are not considered to be formal UK insolvency proceedings[16], such as schemes of arrangement under the Companies Act 2006, it is important to note that pre-Brexit they fell outside the scope of the EUIR such that recognition and enforcement of such mechanisms in EU member states was dealt with by the Brussels Regime on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. The Brussels Regime no longer applies to schemes of arrangement post-Brexit (from 1 January 2021 onwards) so local avenues of recognition have to be taken to give effect to English schemes in EU member states.

In *Re Gategroup Guarantee Limited* [2021] EWHC 304 (Ch), Zacaroli J recently held that a restructuring plan[17] in respect of the well-known airline catering company was an insolvency proceeding within the definition found in the EUIR, meaning recognition and enforcement of such plans will be subject to the local laws of the applicable EU member states in the same way as UK administration, company voluntary arrangements, and liquidations.

The UK has acceded to the Hague Convention on Choice of Court Agreements, which generally requires any judgment granted by the court specified in an exclusive jurisdiction clause to be recognised and enforced in other contracting states. Beyond this, recognition and enforcement of UK judgments are governed by the national rules of the individual member state in which recognition and enforcement is sought.

Conclusion

The loss of a single, uniform regime for the coordination of insolvencies between the UK and EU member states has undoubtedly left UK officeholders facing a panoply of different rules and regulations when seeking recognition and/or enforcement of UK proceedings in the EU. There is thus likely to be a significant period of "bedding-in" during which recognition procedures in EU members states are tested and the most effective routes determined.

Whether there will be an increase in the appointment of joint liquidators remains to be seen. It is often a useful tool in cross-border insolvency proceedings when assets are located in a number of jurisdictions, though such appointments can lead to conflicting duties based on the respective laws in each jurisdiction and therefore in the short to medium term this option appears unlikely.

Given the UK market's wealth of experience of non-EU cross-border insolvencies, practitioners are well placed to meet the challenges presented by Brexit, despite the inevitable increase in costs and parallel proceedings such changes bring.

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15 https://www.gov.uk/government/publications/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states

16 Those being administration, company voluntary arrangements and liquidation.

17 Introduced by the new Part 26A of the Companies Act 2006.

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