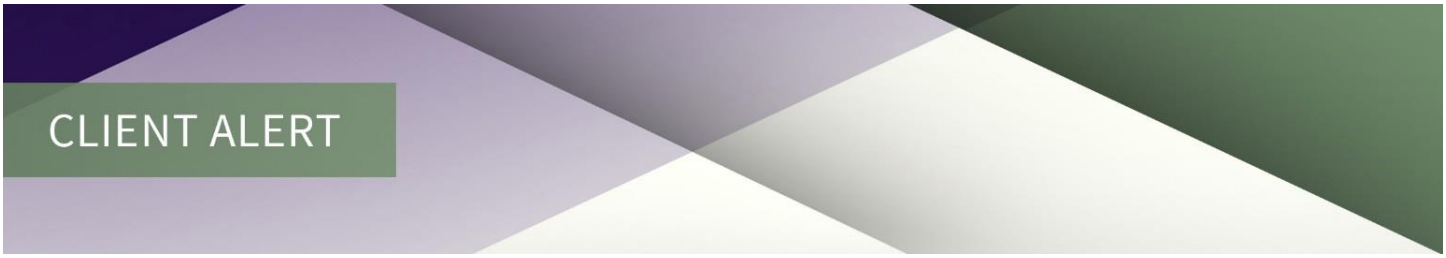

Brexit: Deal or No Deal? Implications for Restructuring and Insolvency

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AUTHORS

Graham Lane | Iben Madsen

Introduction

The UK is due to exit the European Union ("**EU**") on March 29, 2019 at 11pm UK time (i.e. midnight Brussels time) ("**Exit Day**"). At present, the terms of the UK's departure remain unclear. In this alert, we consider the impact of Brexit on EU/UK recognition and enforcement of insolvency proceedings in two distinct scenarios: (1) where the UK enters a "transitional period" under the terms of the current EU/UK withdrawal agreement; and (2) where there is a "hard/no deal Brexit". By "hard/no deal Brexit" we mean the scenario where, for whatever reason, the UK leaves the EU without any formal arrangement in place regarding future relations with the EU, including any agreement as to transitional arrangements for the UK's departure.

In June this year the UK enacted the European Union (Withdrawal) Act 2018 ("**UK Withdrawal Act**"), which contains key provisions affecting insolvency law on and after Exit Day. The UK Withdrawal Act preserves EU-derived UK insolvency legislation as well as direct EU insolvency legislation as part of UK law after Exit Day, subject to the terms of any negotiated withdrawal agreement between the UK and the EU and the framework of their future relationship.

As at the date of this alert, the terms of the UK's negotiated arrangements with the EU are contained in the draft withdrawal agreement ("**EU/UK Withdrawal Agreement**"),[1] which was approved by the EU Council on November 25, 2018, but which remains subject to ratification by the UK Parliament in a "meaningful vote" scheduled for December 11, 2018.

[1] https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement_0.pdf.

For a general overview of the EU/UK Withdrawal Agreement and its implications, please refer to our client alert dated November 20, 2018.[2]

Current application of EU insolvency legislation in the UK

- The EU Recast Insolvency Regulation 2015/848 ("**EU Insolvency Regulation**") determines in which EU Member State (excluding Denmark) insolvency proceedings for corporates and individuals may be opened and provides for mandatory, automatic recognition of those proceedings throughout the EU (again, excluding Denmark) and enforcement of judgments in insolvency proceedings.

- Regulation (EU) 1215/2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ("**Brussels Regulation**") provides rules to decide in which jurisdiction a non-insolvency related cross-border case should be heard, and for the recognition and enforcement of judgments in such cases between EU Member States.

- Regulation (EC) 593/2008 on the Law Applicable to Contractual Obligations ("**Rome I**") enables contracting parties to choose the law that will govern their contract and any variations to their contractual obligations, and determines the law applicable to a contract in the absence of such express choice.

- EU-wide recognition of insolvencies in respect of insurance undertakings and credit institutions are subject to specific EU directives that have been enacted in the UK under the Insurers (Reorganisation and Winding Up) Regulations 2003 and the Credit Institutions (Reorganisation and Winding Up) Regulations 2004 (together, the "**Credit and Insurers Regulations**").

Transitional arrangements under the EU/UK Withdrawal Agreement

If the EU/UK Withdrawal Agreement is ratified in its current form by the UK Parliament, the current regime for cross-border recognition of UK and EU insolvencies will remain unchanged during the transition period. The EU/UK Withdrawal Agreement provides that EU legislation will continue to apply in the UK until the end of a transition period, currently stated to expire on December 31, 2020 (but subject to extension). In particular:

- The EU Insolvency Regulation will continue to apply to all insolvency proceedings opened in any EU Member State (excluding Denmark) and the UK prior to the end of the transition period. Reciprocal recognition of insolvency proceedings will continue to apply until the end of the transition period.

- The Brussels Regulation will continue to apply as follows: (i) the jurisdiction provisions will apply in respect of legal proceedings instituted before the end of the transition period, (ii) jurisdiction clauses in contracts entered into prior to

[2] https://communications.willkie.com/82/516/uploads-(icalendars-pdf-documents)/publication-of-the-draft-uk-eu-withdrawal-agreement.pdf.

the end of the transition period will continue to apply in accordance with the terms of the Brussels Regulation, and (iii) the rules regarding reciprocal recognition and enforcement of judgments will continue to apply in respect of any judgments handed down before the end of the transition period.

- Rome I will continue to apply in the UK in respect of contracts concluded prior to the end of the transition period. In addition, the law applicable to a contract (as determined by Rome I) is not limited to the law of EU Member States. Rome I will therefore continue to be applied by EU Member States to contracts with an English choice of law, both during and after the transition period.

- The Credit and Insurers Regulations were enacted into UK domestic law several years ago and so will also remain in force during the transition period, with the benefit of reciprocal recognition in the EU.

During the transition period the Court of Justice of the European Union will continue to be the binding authority on matters relating to the EU Insolvency Regulation, the Brussels Regulation and Rome I.

How cross-border recognition of UK and EU insolvencies are dealt with after the transition period depends on the outcome of the negotiations between the UK and the EU on the final deal governing their future relationship.

No deal: what will happen to EU/UK insolvency recognition if there is a hard Brexit?

If the EU/UK Withdrawal Agreement is rejected by the UK Parliament, the UK could find itself leaving the EU with no long-term or transitional arrangements with the EU following Exit Day. In this scenario, courts throughout the EU would have no obligation to recognise UK proceedings or judgments under existing EU regulations, as the UK will not be an EU Member State following Exit Day.

Given this loss of reciprocity of recognition in the EU, the UK Government has announced[3] that it would (amongst other things):

- repeal the majority of the EU Insolvency Regulation,[4] retaining only those rules that provide for the UK courts to have jurisdiction where a company or individual is based in the UK, and making it possible to open UK insolvency proceedings under any of the tests set out in domestic UK law, regardless of whether (or where) the debtor is located in the EU and irrespective of the tests for jurisdiction set out in the EU Insolvency Regulation; and

[3] https://www.gov.uk/government/publications/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal/handling-civil-legal-cases-that-involve-eu-countries-if-theres-no-brexit-deal.

[4] This repeal will be effected by the Insolvency (Amendment) (EU Exit) Regulations 2018.

- repeal the Brussels Regulation, ending recognition and enforcement by the UK of non-insolvency related cross-border cases relating to EU Member States, and revert to existing UK domestic common law and statutory rules regarding jurisdiction, recognition and enforcement of such cases.

However, Rome I would be retained by the UK even in a no deal scenario, because it generally does not rely on reciprocity to operate.

The practical effect would be that, unless and until a bespoke agreement is made between the UK and the 27 EU Member States, UK insolvency practitioners would need to apply under each EU Member State's domestic law for UK insolvency proceedings and judgments to be recognised there. The obvious risk is that the domestic legal systems of those EU countries may not grant such recognition. Local-law advice in the relevant EU Member States where recognition is sought would need to be taken, making cross-border insolvencies more time consuming and expensive. There would also be a risk of parallel proceedings in multiple jurisdictions.

UK insolvency proceedings could perhaps be recognised more readily in the four EU Member States[5] that have currently enacted domestic legislation giving effect to the UNCITRAL Model Law on recognition of insolvency proceedings ("**Model Law**"), which is a non-EU based law entitling a UK insolvency officeholder to apply to court for recognition (provided certain conditions set out in the Model Law are met) regardless of Brexit.

Importantly for ongoing recognition of EU insolvency proceedings in the UK, the UK has also enacted domestic legislation giving effect to the Model Law, in the form of the Cross-Border Insolvency Regulations 2006 ("**CBIR**"). The UK Government has made no suggestion that it will repeal the CBIR. This means that, notwithstanding the UK's repeal of the EU Insolvency Regulation, UK recognition of insolvency proceedings opened in an EU Member State will be available under the CBIR.[6] However, as the law currently stands, enforcement in the UK of judgments issued in such foreign proceedings will not necessarily be possible, unless the relevant parties have submitted to the jurisdiction of the foreign court, for example, by filing a proof of debt in the foreign insolvency or participating in the foreign proceedings. A long-standing rule of English law, known as the "Rule in Gibbs", also presently states that English law-governed obligations cannot be varied or discharged by foreign proceedings.[7] Pending further developments in the law (which are anticipated), the Rule in Gibbs will remain a significant impediment in situations where a restructuring implemented under foreign law attempts to modify or extinguish English law-governed debt.

5 Greece, Poland, Romania and Slovenia.

6 Unless the UK Parliament took the extraordinary (and unlikely) step of amending the CBIR to carve-out EU Member States.

7 *Anthony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399.

What would be the impact of no deal on UK schemes of arrangement?

The position is more uncertain for schemes of arrangement under the Companies Act 2006. Schemes (a popular UK pre-insolvency restructuring tool for both UK and foreign companies) are generally considered not to be subject to the EU Insolvency Regulation. Whether the Brussels Regulation applies to schemes has never been directly answered by the English courts, but in practice English courts have assumed that, if the Brussels Regulation does apply, it grants recognition to schemes throughout the EU (provided that the jurisdictional tests under it are met in respect of the scheme). English courts also usually consider the fallback option of recognition of the scheme under the domestic private international law of the relevant EU Member State.

"No deal" would result in the loss of recognition of UK schemes in the EU under the Brussels Regulation, although recognition of schemes could continue to be established via domestic private international law rules in EU Member States on a case by case basis.

The UK Government has indicated that the UK could seek to re-join the Lugano Convention 2007 ("**Lugano Convention**") following Exit Day. The Lugano Convention deals with jurisdiction and recognition and enforcement of judgments in civil and commercial matters between EU Member States, Switzerland, Norway and Iceland and is not dissimilar to the Brussels Regulation. It may afford an alternative route to recognition for schemes, but at present whether (and when) it will be available as an option remains uncertain.

Rome I, on the other hand, will continue to apply in a no deal scenario. Rome I has not been relied upon consistently to obtain recognition of UK schemes in the EU, because the grounds are more limited than the Brussels Regulation. However, where the underlying contractual obligations that are subject to a scheme are governed by a UK law (e.g. English law), it has previously been considered possible that a UK scheme would be recognised in an EU Member State under Rome I, because the relevant court would apply English law to the question of whether the scheme was effective to vary the underlying contractual rights.[8] Rome I is unlikely to assist, however, in instances where the underlying contractual obligations are not governed by the laws of one of the constituent countries of the UK.

The UK Government has also indicated that in a "no deal" scenario, it would make arrangements for the UK to participate in the 2005 Hague Convention on Choice of Court Agreements ("**Hague Convention**") in its own right (the UK currently participates in its capacity as an EU Member State, along with the rest of the EU, Mexico, Singapore and Montenegro).[9]

8 *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch).

9 Draft statutory instrument published by the UK Government entitled: "The Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018".

The Hague Convention governs contracts with exclusive jurisdiction clauses and provides for recognition and enforcement of judgments based on such clauses as between the states that are party to the Hague Convention. It is more limited than the Brussels Regulation, because it only relates to contracts with exclusive jurisdiction clauses, and following Brexit, it would only apply to contracts entered into on or after 1 April 2019. The Hague Convention is therefore likely to be of limited assistance in recognising schemes in the near- to medium-term.

Impact of no deal on credit institutions and insurers

Automatic recognition for insolvencies of UK credit institutions and insurers in the remaining EU Member States will cease on Exit Day. It will then be up to the UK to decide whether to repeal, amend or retain the Credit and Insurers Regulations.

Concluding thoughts

If there is a "no deal" Brexit (or no deal at the end of a transition period), resolving cross-border insolvencies and restructurings between UK and the rest of Europe will become more challenging and expensive. There is also a problematic asymmetry, as it is likely that recognition of EU insolvency proceedings will be easier to achieve in the UK due to its well-developed domestic legislation and the CBIR, than it will be to achieve recognition of UK insolvency proceedings in many EU Member States. However, the UK Government will want to ensure that the UK maintains its position as a leading jurisdiction for cross-border restructurings, so our hope and expectation is that – whatever the final outcome – a sensible agreement between the UK and the EU on post-Brexit recognition can be reached.

If you have any questions regarding this client alert, please contact the following attorneys or the attorney with whom you regularly work.

Graham Lane
44 203 580 4706
glane@willkie.com

Iben Madsen
44 203 580 4735
imadsen@willkie.com