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Cross-border restructuring after COVID and Brexit

Lauren Kreamer
Radcliffe Chambers

1. An overview of cross-border restructurings

2. Position pre-Brexit

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1) Cross-border restructurings after COVID

Cross-border restructuring – an overview

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- A reorganisation of a company’s liabilities
- Typically (though not always) where the company is in financial difficulty
- By agreement between the company and its creditors (or some of them)
- Where the company has interests or assets in more than one jurisdiction
- Can include statutory procedures (like the restructuring tool), refinancing of existing debts, debt for equity, closing parts of the business, and any other arrangement agreed to by creditors

On the rise?

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- Globally, corporate debt issuance reached a record $5.4 trillion in 2020
- The European Union added more than €400 billion in debt in the first half of 2020
- Compared with €289 billion for the whole of the previous year
- And around $10 trillion of fiscal aid for G20 countries
- Which support packages are coming to an end
- In a survey carried out by McKinsey of 114 European restructuring experts:
  - 92% expect to see an increase in restructuring activity over the next twelve months
  - Leisure, transportation and retail most likely to restructure
  - Just over half of respondents said insolvency would be among the three most likely restructuring solutions

2) Pre-Brexit

Recognition – what is it and why does it matter?

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- Ensuring that a restructuring or insolvency process is recognised and therefore effective in other jurisdictions
- Including recognition of any judgments handed down in the court of that process
- A court giving effect, in its own jurisdiction, to a foreign law, the order of a foreign court, or the foreign legal status of a foreign insolvency office holder
- Most large restructurings have a cross-border element
- And insolvency regimes of different jurisdictions vary wildly
- It is no good starting a restructuring process in one jurisdiction, only for a creditor to commence insolvency proceedings in another

Pre-Brexit

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- Recognition was automatic and therefore much more straightforward
- Example: Nortel involved the UK administrations of 19 Nortel network companies with operations in 16 EU countries
- Reciprocal recognition regime contained in the EU Insolvency Regulation 2015 (“**EIR**”) and Regulation (EU) No 1215/2012 (“**Brussels Recast Regulation**”)
- Avoided parallel proceedings
- And (importantly) answered any issues as to recognition, which is often not straightforward and therefore expensive and time-consuming to resolve
- Guiding principle: COMI

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3) Post-Brexit

What has happened to the EIR/Brussels Recast?

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- In short, they are gone for us for any insolvencies or proceedings which commenced after the end of the transition period, i.e., 31 December 2020
- So post-Brexit position will be relevant for
- The Insolvency (Amendment) (EU Exit) Regulations 2019 repealed the majority of the operative provisions of the EIR
- That included repealing the regime for automatic recognition
- Such that the EIR does not serve the function it did it that (or almost any other) regard

Recognition now

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- United National Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency ("**Model Law**") if adopted by an EU member state
- But only four member states have adopted it (Greece, Poland, Romania, Slovenia)
- As have we and and a number of other countries including the US, Australia, Canada, New Zealand and Singapore
- Given effect to here by the Cross-Border Insolvency Regulations 2006
- But recognition is not automatic and can be defined differently by the country adopting it

Recognition now

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- Or private international law
    - No common or standardised position
    - Country-by-country
    - So a return to a non-unified and therefore time-consuming and costly process
- No Lugano

- So for the EU, it’s member state by member state
- Insolvency Service has produced an outline guide: 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

4) The future

What next?

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- In most EU states (i.e., the ones which have not adopted the Model Law), parallel proceedings may be necessary
  - So more expensive, time-consuming and complicated
  - Less likely to matter in large-scale restructurings, but will become a more important consideration when SMEs are considering restructuring possibilities
- Moving COMI (to a member state) in order to benefit from the EIR and Brussels Recast, and the protections they give
- Filling the void: new restructuring plans and schemes
  - Netherlands and Germany

The less drastic view...

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- Perhaps not much change!
- The restructuring tool is very popular for implementation of cross-border restructurings, and the cram down provisions are not seen in other countries’ equivalent tools
- Our financial and legal expertise will continue to be valued
- And we have shown ourselves to be adaptable in this regard
- Though the decision in *Gategroup* will almost certainly have an effect

5) Some tips

Planning points

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- Find out what the short-term and long-term goals are (beyond ”not going bust”)
- Work out where the company or group has assets and where restructuring proceedings can be commenced
- And where its COMI is
- “Forum shopping”
- Can the restructuring be frustrated by insolvency proceedings being commenced elsewhere?
- If so (and if not!) - have a Plan B
- Take foreign legal advice where necessary
- Emphasise to the client the importance of thoroughness and preparedness

Radcliffe Chambers

Radcliffe Chambers
11 New Square
Lincoln's Inn
London WC2A 3QB

T: 020 7831 0081
F: 020 7405 2560
DX: 319 London
clerks@radcliffechambers.com

www.radcliffechambers.com