

Brexit: Deal or No Deal?

7 March 2019

UK legislation to deal with the impact of a “no deal” Brexit in the restructuring and insolvency market was enacted at the end of January. The prospect of Brexit is evolving rapidly – almost daily – amid opposition to the negotiated deal and calls for a second referendum. In this *Alert*, we consider the potential practical implications for the cross-border European restructuring and insolvency landscape of a “no deal” Brexit, in the context of recent developments.

A negotiated Brexit would involve a transition period, currently anticipated to end on 31 December 2020. The [draft Withdrawal Agreement](#), as negotiated between the UK and the EU and published in November 2018, confirms that the EU Insolvency Regulation and the EU Judgments Regulation (important for cross-border recognition of schemes of arrangement) would continue to apply to insolvency proceedings/judgments commenced before the end of the transition period. This means it would be “business as usual” for European cross-border restructurings and insolvencies until the end of 2020. Recognition for later proceedings is left open for negotiation (during the transition period), and is much more uncertain. At the time of writing, it remains highly uncertain whether the UK Parliament will approve the draft Withdrawal Agreement or any revised agreement.

Accordingly, the UK and the EU continue to step up preparations for a “no deal” Brexit.

This publication is an update to our September [Alert](#) to take account of recent developments.

Key takeaways for a “no deal” Brexit

- UK insolvency proceedings would not automatically be recognised in other EU countries.

- English schemes of arrangement may not be recognised in other EU countries.
- A UK insolvency officeholder would have to seek recognition in the relevant EU member state(s) under domestic law. The ease and likelihood of recognition would vary significantly from state to state; in most cases, this would be more difficult if the debtor's centre of main interests ("COMI") were located outside the UK.
- The EU Insolvency Regulation would be largely repealed in the UK.
- UK courts may recognise EU insolvency procedures via the Cross-Border Insolvency Regulations 2006 (the "CBIR").
- But, such recognition would require a court application and – critically – would be unlikely to recognise the compromise of dissenting creditors' English law-governed claims (unless such creditors were present in the foreign jurisdiction or had submitted to the foreign proceedings).
- EU restrictions on opening UK proceedings in respect of EU companies would be lifted.
- US recognition of UK proceedings (and vice versa) would remain unchanged.
- Losing the ability to deal with insolvencies via a single process, with automatic recognition across the EU, would make it more complex, lengthy and expensive to resolve cross-border mandates, with the prospect of parallel proceedings.
- This would jeopardise the prospect of rescue and reduce returns for stakeholders.

Bracing for the potential impact of a “no deal” Brexit

The UK and the EU are stepping up preparations for a possible "no deal" Brexit.

The UK is currently scheduled to leave the EU on 29 March 2019. On 30 January 2019, the Insolvency (Amendment) (EU Exit) Regulations 2019 (the "[Insolvency Brexit Regulations](#)") were made. Their primary purpose is to modify UK domestic legislation, and the retained elements of the EU Insolvency Regulation, so that UK insolvency law will operate effectively after exit day. The explanatory memorandum to the Insolvency Brexit Regulations provides that the Regulations would apply in the event of “no deal”. We understand that, if a deal is reached, the Regulations would be repealed. The Insolvency Brexit Regulations are effective in part from 31 January 2019 for some Northern Ireland provisions and fully from exit day.

The premise underlying the Insolvency Brexit Regulations is that it would be inappropriate for the UK unilaterally to retain the EU Insolvency Regulation, which is predicated on reciprocity. Accordingly, limitations on access to UK courts based on a debtor's COMI, or the presence of an establishment, will be lifted.

The Insolvency Brexit Regulations provide:

- the majority of the EU Insolvency Regulation (and its predecessor) – which covers the jurisdictional rules, applicable law and recognition of cross-border insolvency proceedings – would be repealed in all parts of the UK;
- the UK would retain the EU rules that provide for the UK courts to have jurisdiction where a company or individual is based in the UK, and the law would ensure that insolvency proceedings could continue to be opened in those circumstances;
- post-Brexit, it will be possible to open insolvency proceedings if:
 - the debtor's COMI is in the UK;
 - the debtor's COMI is in the EU and the debtor has an "establishment" in the UK; or
 - if any of the tests set out in our domestic law is met (i.e., the EU Insolvency Regulation would no longer operate to restrict the opening of proceedings under other UK jurisdictional tests – so it will be possible to open insolvency proceedings under any of the tests set out in domestic UK law where the debtor is based elsewhere in Europe); and
- post-Brexit, eligibility for administration proceedings and company voluntary arrangements will expand to include a company incorporated in a European Economic Area ("EEA") state (irrespective of COMI or establishments), in addition to (and as currently):
 - a company registered in England and Wales or Scotland; and
 - a company not incorporated in an EEA state but with its COMI in a member state (other than Denmark) or in the UK.

However, this remains subject to the difficult question of whether such UK proceedings would receive the requisite recognition in other EU jurisdictions, as explored below.

The scenarios below demonstrate the potential practical implications of the Insolvency Brexit Regulations. Of course, these are only brief, illustrative summaries regarding a highly complex and uncertain area of law; they are not a substitute for definitive advice.

There are important transitional provisions in the Insolvency Brexit Regulations, which are beyond the scope of this alert.

“Inbound” recognition of European processes in the UK

In a nutshell: UK courts would continue to recognise European insolvency proceedings, though only upon application and with greater discretion as to the relief to be granted to the foreign insolvency officeholder.¹ As the law presently stands, the UK courts would not recognise a purported compromise or release of English law debt pursuant to foreign proceedings.²

SCENARIO 1

A distressed French company has its COMI in France. Certain of its debt is governed by English law. The company opens French accelerated financial safeguard proceedings to amend and extend its existing financing arrangements.

Currently: The French insolvency proceedings would automatically be recognised in the UK under the EU Insolvency Regulation. This includes the amendment of the English law debt.³

In a “hard Brexit” scenario: The French proceedings should be recognised via a court application under the CBIR, which implement the UNCITRAL Model Law on Cross-Border Insolvency.

In a potential application by an appointed foreign representative for recognition of the French proceedings under the CBIR:

- the French proceedings would benefit from a limited stay on proceedings against the debtor or its assets;⁴ and
- the English court might grant additional appropriate (discretionary) relief.

However, creditors with debt governed by English law would not be bound by the purported compromise under the French proceedings, unless: they were present in France at the time the French proceedings were initiated; were a claimant or counterclaimant in those proceedings; or, voluntarily submitted to the French court’s jurisdiction by appearing voluntarily or by agreement.

Compromise of French law-governed claims within the French proceedings would likely be recognised by an English court.⁵

“Outbound” recognition of UK processes in Europe

In a nutshell: EU countries would be under no obligation to automatically recognise UK insolvency proceedings. Insolvency officeholders will need to apply for recognition in other relevant EU countries. There is a significant risk that UK insolvency proceedings and schemes of arrangement would not be recognised; recognition would depend upon European conflict of law rules. Only a small minority of EU countries have implemented the UNCITRAL Model Law on Cross-Border Insolvency.⁶

SCENARIO 2

An English company, with its COMI in England, sells its business and assets to a creditor-owned Newco via (English) pre-pack administration. Certain of its direct subsidiaries and other assets are located in Germany.

Currently: The administration would automatically be recognised in Germany (including the transfer of the company's German subsidiaries and other assets to Newco).

In a "hard Brexit" scenario: The English administration would not automatically be recognised in Germany via the EU Insolvency Regulation. Encouragingly, however, the proceedings ought to be recognised automatically under German conflict of law rules,⁷ based on the fact that the company's COMI is in the UK.⁸ (If the company's COMI were outside the UK, the pre-pack would not be recognised in Germany.) There would remain a risk of parallel proceedings being opened in Germany, in respect of assets located in Germany; this contrasts with the current position under the EU Insolvency Regulation.⁹

The prospect of recognition of the pre-pack would be far less certain if recognition were sought in certain other EU jurisdictions. In certain circumstances, some EU countries may not recognise the UK insolvency proceedings; for example, if that would prevent creditors from taking action against the assets held in that country. Recognition would be more likely in those countries that have implemented the UNCITRAL Model Law on Cross-Border Insolvency and those countries with domestic provisions influenced by the Model Law, such as Germany.

This raises a prospective imbalance between UK "inbound" recognition of EU proceedings and EU recognition of UK "outbound" proceedings. The prospects of successfully obtaining recognition for a UK insolvency proceeding in an EU country would need to be carefully considered in each case. In most cases, this will be more difficult if the debtor's COMI is located outside the UK, as mentioned above.

SCENARIO 3

A Dutch company, with its COMI in the Netherlands, pursues an English scheme of arrangement to amend and extend its English law-governed facility agreement.

Currently: The scheme would likely be recognised in the Netherlands, pursuant to the EU Judgments Regulation (also known as the Brussels Ia Regulation),¹⁰ Dutch domestic private international law or (possibly) the Rome I Regulation.

In a “hard Brexit” scenario: It is likely – but far from certain – that the scheme would be recognised in the Netherlands, based on the Brussels Convention,¹¹ Dutch domestic private international law and/or (arguably) the Rome I Regulation. If the facility agreement provides for the exclusive jurisdiction of the English courts, then recognition might also be afforded under the Hague Convention on Choice of Court Agreements.¹²

SCENARIO 4

An English company pursues an English scheme of arrangement to effect a debt-for-equity swap in respect of its New York law governed high-yield notes.

Currently: The scheme would likely be afforded recognition in the US pursuant to an application under Chapter 15 of the Bankruptcy Code. This includes recognition of the compromise of the New York law-governed notes.

In a “hard Brexit” scenario: The scheme and its effects would be recognised in the same way as at present. Happily, even a hard Brexit looks unlikely to make a difference from the perspective of US cross-border insolvency.

1. The English court will generally grant the relief that would be available to an English insolvency practitioner. ↩

2. This position may change: (a) if the UK implements the new UNCITRAL Model Law on recognition and enforcement of insolvency-related judgments as expected; and (b) depending on the outcome of a major appeal anticipated before the Supreme Court. ↩

3. Strictly, this point is not beyond doubt, but is considered the better interpretation. ↩

4. As the company’s COMI is in France, the French proceedings would constitute “main proceedings” under the CBIR and therefore be eligible for more extensive relief than that available for “non-main” proceedings (for which relief is discretionary). ↩

5. This is partly based on the Rome I Regulation (on the law applicable to contractual obligations), which applies to non-member states and which the UK government intends to retain even in a “no deal” scenario, as it does not rely on reciprocity to operate.↔
6. Namely Greece, Poland, Romania and Slovenia, in addition to the UK.↔
7. Specifically, pursuant to section 343(1) of the *Insolvenzordnung*. ↔
8. German courts would, however, have discretion to scrutinise whether the rules of the pre-pack administration comply with German public policy; this contrasts with the position under the EU Insolvency Regulation.↔
9. A creditor could ask the German court to commence territorial insolvency proceedings (*Partikularinsolvenzverfahren*) in respect of assets located in Germany if the creditor is able to demonstrate a legitimate interest, e.g., if the English proceedings provide for a significantly worse outcome for that creditor than the German proceedings. This applies even if the company does not have a branch in Germany.↔
10. The Brussels Ia Regulation would be repealed in a “hard Brexit” scenario (subject to certain savings provisions). At the time of writing, the relevant Regulations dealing with the Brussels regime – the Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019 – remain in draft form.↔
11. The Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters remains in place; both the UK and the Netherlands are contracting parties.↔
12. To which the UK will accede with effect from 1 April 2019, shortly after exit day, unless a deal is reached. ↔

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Suggested Reading

- [06 March 2019 Press Release Kirkland Advises STX Beef on Acquisition of Kane Beef](#)
- [1 March 2019 Award Benchmark Litigation U.S. Awards 2019](#)
- [14 February 2019 Award Chambers Global: The World's Leading Business Lawyers 2019](#)

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