KIRKLAND & ELLIS

Kirkland Alert

One Year On: Has Brexit Been as 'Hard' as Imagined?

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At a Glance

We assess the practical impact of Brexit on the restructuring & insolvency market to date, reflecting on pre-Brexit uncertainties to the first year of post-Brexit reality, including:

a. UK attempts to re-accede to the Lugano Convention;
b. the English court's controversial decision in *gategroup*;
c. English courts' pragmatic approach to international effectiveness when considering schemes of arrangement and restructuring plans;
d. post-Brexit cases under the Cross-Border Insolvency Regulations 2006;
e. the use of 'subsequent' proceedings in *OHL*'s restructuring; and
f. a practical issue regarding English companies with their centre of main interests in Germany.

We conclude with predictions of future developments in this field.

Pre-Brexit Uncertainties

The prospect of Brexit hung over the restructuring & insolvency market for a considerable period;[1] it is now about a year since the UK formally left the European Union.[2] Despite entry into a free trade agreement[3] and earlier hopes that co-operation on insolvency would continue post-Brexit,[4] it was effectively a 'No Deal Brexit' for the restructuring & insolvency market.

Upon Brexit, the Recast European Insolvency Regulation ("EIR"), which provided for reciprocal recognition of insolvency proceedings across the EU, was largely repealed in the UK.[5] The premise was that it would have been inappropriate for the UK unilaterally to retain the EIR, which is predicated on reciprocity. Eligibility for and recognition of insolvency proceedings changed substantially, as summarised in Annex 1.

Losing the ability to deal with insolvencies via a single process, with automatic recognition across the EU, appeared to risk making it more complex, lengthy and expensive to resolve cross-border mandates, with the prospect of parallel proceedings and uncertain outcomes.

Negative sentiment was perhaps compounded because Brexit occurred as the UK's dominance as the hub for European cross-border restructurings appeared at risk, given the requirement for EU Member States to introduce restructuring procedures into their national law;[6] see further below.

There was some hope that the impact of Brexit would be lessened if the UK were permitted to accede to the Lugano Convention or if the EU (or major individual Member States) were to adopt legislation based on the UNCITRAL Model Law on Cross-Border Insolvency; see further below.

Post-Brexit Reality

2021 has been a year of adjustment to the new post-Brexit reality. Despite certain setbacks (explored below), the English restructuring & insolvency market remains strong: courts have taken a pragmatic approach to recognition and major distressed European groups continue to favour the UK's tried-and-tested restructuring implementation tools.

Re-accession to Lugano Convention — Now Unlikely

The Lugano Convention clarifies which national courts can deal with certain cross-border legal cases; it largely replicates the mutual recognition framework under the Judgments Regulation. The UK automatically left the Lugano Convention upon Brexit but sought re-accession, which requires the consent of all contracting states.

The EU now appears unlikely to consent to the UK's re-accession.[7] In essence, it appears the UK will not be permitted to re-join the Lugano Convention in its own right because the regime is a 'flanking measure' for the EU's economic relations with the EFTA/EEA countries, which have a particularly close regulatory integration with the EU, and the regime is based on a high level of mutual trust; it is not aimed at third countries without a special link to the EU's internal market. (A key element of the Brexit deal is that the UK is no longer part of the EU's single market.)

According to the European Commission, EU-UK relationships concerning private international law should instead be based on the regime under the Hague Conventions, namely the 2005 Hague Choice of Court Convention;[8] and the 2019 Hague Judgments Convention. However, these have major limitations, outlined in Annex 2.

Gategroup — Restructuring Plan Falls Within Bankruptcy Exclusion

The English court held in *gategroup*[9] that the new UK restructuring plan procedure[10] falls within the bankruptcy exclusion in the Lugano Convention, following a detailed analysis of the nature of restructuring plan proceedings. This finding was helpful for *gategroup*'s restructuring in order for the English court to have jurisdiction notwithstanding an exclusive jurisdiction clause in Swiss-law governed bonds.[11]

However, the decision in *gategroup* effectively means that — even if the EU *were* to consent to the UK's re-accession to the Lugano Convention — UK restructuring plans would not be capable of recognition under that Convention. It also casts doubt on the prospects of recognition under the 2005 Hague Choice of Court Convention and the 2019 Hague Judgments Convention, which contain similar carve-outs; see further Annex 2.

There is also some risk that insolvent schemes of arrangement might be held to fall within these bankruptcy carve-outs.[12]

English Courts' Pragmatic Approach to International Effectiveness

DTEK's scheme of arrangement[13] was the first challenge as to the prospects of international recognition of a scheme (or restructuring plan) post-Brexit.

DTEK's expert evidence opined that EU Member States would give effect to the scheme of the English law bank debt by virtue of the Rome I Regulation[14] and Dutch private international law, among other potential avenues for recognition. A challenging creditor, Gazprombank, argued that the court could not be satisfied as to the international effectiveness of that scheme in the EU (or in Singapore), such that any grant of sanction would be an act in vain and the court should therefore refuse sanction.

The English court cannot decide between rival expert reports; instead, the question is whether there is a reasonable prospect of the scheme having substantial effect in key jurisdictions.

The court in *DTEK* held that it would decline sanction on international effectiveness concerns only if there was "no reasonable prospect of the scheme having substantial effect", such that sanction would be in vain. This provides welcome comfort that the English court does not require certainty of international recognition when deciding whether to sanction schemes or restructuring plans.

In a helpful, pragmatic approach, the court confirmed that it will also take account of the degree of creditor support: a scheme or plan with very solid support among relevant creditors (>95% in DTEK's case) will be substantially effective.[15]

Similarly, in *OHL*'s scheme of arrangement,[16] the English court sanctioned the scheme based on:

a. Spanish expert evidence that, because the scheme debt was governed by English law, the scheme was likely to be recognised in Spain under the Rome I Regulation or the *exequatur* procedure;[17] and
b. the fact that an overwhelming majority of the scheme creditors had voted in favour of the scheme, providing good evidence that the scheme would achieve a substantial effect.

Clearly, obtaining English court approval for a scheme (or restructuring plan) is only half the battle: the real issue arises if a dissenting stakeholder seeks to pursue remedies and/or challenge the effectiveness of the scheme/restructuring plan elsewhere. This has yet to occur, so far as the authors are aware.

Recognition Under the Cross-Border Insolvency Regulations 2006

The English courts continue to recognise foreign proceedings under the Cross-Border Insolvency Regulations 2006 ("CBIR"), which implement the UNCITRAL Model Law on Cross-Border Insolvency in the UK. There have been very few reported cases involving debtors seeking recognition of EU proceedings in the UK since Brexit.[18] This may seem surprising following the loss of the automatic recognition regime under the EIR, but is perhaps understandable in light of extensive government support programmes and temporary insolvency-related measures to support distressed businesses in light of the Covid-19 pandemic, contributing to a reduction in insolvency rates in many jurisdictions.

In a notable example of a post-Brexit application under the CBIR from an EU entity, *Greensill Bank AG,*[19] the English court granted recognition of German insolvency proceedings. An interesting twist in this case was that, pre-Brexit, the company's proceedings would not have been eligible for recognition under the CBIR, as the company was an 'EEA credit institution'.[20]

However, the 'rule in *Gibbs*'[21] continues to mean that a foreign insolvency proceeding will only effect the discharge of English (or Scottish[22]) law debt if the relevant creditor is 'subject' to the foreign proceeding — for example, by voting in the proceedings or presence in the foreign jurisdiction, such that the creditor is taken to have accepted that their contractual rights will be governed by the law of the foreign proceeding. This rule continues to divide opinion. An anticipated UK Government consultation on whether to adopt the new UNCITRAL Model Law on Insolvency-Related Judgments — which would alter the effect of the 'rule in *Gibbs*' — has yet to transpire. Reform appears unlikely to top the legislative agenda in the near term, given more pressing concerns.

Accordingly, foreign restructurings involving UK law debt or shareholder rights may require parallel UK proceedings if not all affected parties are 'subject' to the foreign proceedings (as a matter of UK private international law) — especially if a challenge appears plausible or stakeholders require 'cast-iron' certainty.

OHL — Use of 'Subsequent Proceedings'

The restructuring of OHL, the Spanish infrastructure group, offers an instructive example of the use of dual proceedings — in this case, in succession rather than in parallel. The Spanish borrower of English law debt first implemented an English

scheme of arrangement; see above for the English court's consideration of the issue of international effectiveness in OHL's case.

In order to avoid the uncertainty of the untested Spanish *exequatur* recognition procedure, the company then executed a Spanish law governed standalone restructuring framework agreement — effectively a shorter-form version of the restructuring documentation implemented pursuant to the English scheme — and sought *homologación judicial* in Spain. The English scheme was sanctioned mid-April and *homologación* obtained early October.

This route successfully obtained 'indirect recognition' of the English scheme in Spain, without resorting to the *exequatur* procedure; the Spanish court's blessing effectively protects against the risk of clawback actions or equitable subordination which might otherwise have arisen.

This route may be more difficult to replicate if the restructuring seeks to bind a dissenting class and/or is actively opposed.

Practical Issue: English Companies with Centre of Main Interests in Germany — Loss of Legal Capacity and Limited Liability?

Post-Brexit, there is legal uncertainty as to whether English companies with their administrative seat/centre of main interests ("COMI") in Germany are recognised as having legal capacity and/or limited liability in Germany. (This issue only arises if the English company has its administrative seat/COMI in Germany.)

Pre-Brexit, English companies enjoyed freedom of establishment[23] and German courts applied the so-called "incorporation theory", such that English companies were recognised as having legal capacity and limited liability in accordance with the applicable law of their jurisdiction of incorporation.[24] Post-Brexit, however, English companies no longer enjoy freedom of establishment and accordingly there is nothing to compel German courts to apply the incorporation theory; they can instead apply the "real seat theory" which has traditionally been applied to companies incorporated in non-Member States. The real seat theory requires recognition of foreign companies only in accordance with German law, instead of the law of the jurisdiction of incorporation.

This effectively means that an English company may no longer be recognised as such, but would instead be treated or re-classified as a general commercial partnership[25] or civil law partnership,[26] whose partners are subject to direct and unlimited liability. An additional layer of complexity arises if the English company has only one shareholder. As German law does not recognise partnerships with just one shareholder, the legal consequence is that the assets and liabilities are accredited[27] to the sole shareholder who becomes the legal successor in title.

This raises a plethora of further legal questions. For example, what happens if an English company with only one shareholder (and with its administrative seat/COMI in Germany) purported to enter into a contract post-Brexit: did it have legal capacity and did the directors have authority to bind the company in instances where the company's assets and liabilities were already accredited to its shareholder?

We have already seen this cause practical structuring difficulties in a post-Brexit restructuring context. Solutions will need to be addressed on a case-by-case basis.

The Future

In the short term, it appears unlikely that:

a. the EU will permit the UK's re-accession to the Lugano Convention;
b. the EU will adopt the UNCITRAL Model Law on Cross-Border Insolvency[28] or the UNCITRAL Model Law on Insolvency-Related Judgments; or
c. the 2019 Hague Judgments Convention will become effective in the EU or the UK.

With emotions over Brexit still raw and ongoing disputes over fishing rights and the Northern Ireland protocol, it appears European Member States have little impetus to facilitate recognition of English restructuring & insolvency proceedings. This is especially so in light of perceptions of UK protectionism stemming from the 'rule in *Gibbs*' — although as the English Court of Appeal has noted,[29] charges of parochialism appear unfair given the acceptance in *Gibbs* that questions of discharge of a contractual liability are governed by the proper law of the contract, **whether or not that law is English law**.

Further, the European Commission recently announced that, by Q3 2022, it will make a formal proposal to harmonise targeted aspects of the corporate insolvency framework

and procedures.[30] This indicates the priority is harmonisation *within* the EU rather than questions of recognition involving 'third countries'.

European Member States will continue to implement new restructuring procedures under the Preventive Restructuring Frameworks Directive; the extended deadline for national implementation is July 2022. The procedures recently implemented in Germany, the Netherlands and France (among others) will continue to bed in. Such new procedures may be more likely to benefit from recognition in other Member States than English procedures, though this remains uncertain.[31]

This raises the prospect of EU debtors first 'shopping locally' for restructuring implementation tools and — perhaps — progressively reducing reliance on English tools by which numerous EU groups have successfully restructured over the last decade. However, we anticipate that major cross-border groups will continue to pursue tried-and-tested English restructuring implementation tools where suitable, given desires for efficiency and certainty of outcome[32] and the volume of finance documents governed by English law (given the impact of the 'rule in *Gibbs*'; even post-Brexit, market participants continue to select English law to govern a very significant proportion of new finance documents).

The English courts appear set to continue their pragmatic approach to sanctioning schemes of arrangement and restructuring plans unless there is "no reasonable prospect of the scheme having substantial effect" and especially where there is very substantial support for the scheme or plan.

The acid test for recognition occurs if a dissenting stakeholder seeks to pursue remedies and/or challenge the effectiveness of the restructuring elsewhere. This has yet to occur in a post-Brexit context, so far as the authors are aware. We may see such a challenge in the next year or so; the outcome will ultimately be determined on a jurisdiction- and fact-specific basis. Accordingly, residual uncertainty remains — but the post-Brexit restructuring & insolvency landscape appears brighter than it did a year ago.

Annex 1: Summary of eligibility for, and recognition of, restructuring and insolvency proceedings post-Brexit

Proceedings	Eligibility	Recognition

UK insolvency proceedings	Eligibility expanded, as EU-law-driven limitations on jurisdiction (based on centre of main interests ("COMI") or the presence of an establishment) were lifted **This opened the possibility of UK insolvency proceedings in respect of a European company without the need for a COMI shift**	• UK insolvency proceedings **no longer automatically recognised** in the remaining EU Member States ("the EU27") (whether or not the debtor's COMI is in the UK), because the UK is no longer a 'Member State' for the purposes of the EIR • Instead, recognition is determined under conflict of law rules of each relevant jurisdiction • In most cases, this will be **easier if the debtor's COMI is in the UK** and more difficult if it is located elsewhere
Scheme of arrangement and new restructuring plan	Eligibility remained unchanged — i.e., the 'sufficient connection' test remained, and **COMI shifts continue to constitute a strong basis for sufficient connection**	**EU recognition is uncertain and depends on:** • the facts — including the governing law / jurisdiction clauses of the debt to be compromised, and whether the procedure seeks to affect non-consenting shareholders in an EU company; and • the relevant jurisdiction(s) — as different Member States take different views as to the basis of recognition, including

		whether or not the location of COMI is relevant
EU insolvency and restructuring proceedings	Eligibility is broadly unchanged, except that EU-law-driven limitations on jurisdiction for the EU27 to open proceedings no longer apply vis-à-vis the UK; **this opens the possibility of insolvency proceedings in Europe even where a company's COMI is in the UK** (subject to applicable tests for opening proceedings in the relevant Member State)	**No automatic recognition** of EU proceedings in the UK (whether or not COMI is in the relevant Member State); **recognition is based on other, more limited, sources of recognition**, e.g., CBIR (which requires a court application) However, where EU proceedings seek to compromise English law debt, an English court will only recognise / enforce the compromise in respect of stakeholders subject to the foreign proceedings (owing to the 'rule in *Gibbs*')

Annex 2: Limitations of recognition and enforcement under the 2005 Hague Choice of Court Convention and the 2019 Hague Judgments Convention

1. Both the 2005 Hague Choice of Court Convention and the 2019 Hague Judgments Convention include a carve-out for insolvency, composition and analogous matters.[33] It remains to be determined whether other jurisdictions would recognise English schemes of arrangement or restructuring plans under

these Conventions; this is especially difficult in light of the English court's decision in *gategroup* (see above).

2. The 2005 Hague Choice of Court Convention only applies when the parties have entered into an exclusive choice of court clause. It does not assist where an asymmetric or non-exclusive clause has been chosen, as is common in finance documents.
3. In contrast, the 2019 Hague Judgments Convention does not require an exclusive jurisdiction clause. However, significant limitations arise (in addition to the insolvency carve-out mentioned above):

    a. *Adoption*: Neither the EU nor the UK has adopted this Convention. Although the European Commission has proposed its adoption,[34] accession requires the consent of the European Parliament. Further, the Convention has yet to enter into force[35] and the UK has not announced plans to adopt it.

    b. *Effective date*: Even once in force, this Convention will only apply where proceedings were commenced when the Convention was in force for both the state of origin and the state of enforcement. Accordingly, it will take considerable time for this Convention to impact the market.

    c. *Effect of Convention*: A judgment is eligible for recognition and enforcement only if the defendant had a particular connection to the state in which the judgment was issued.[36] Proceedings for the recognition of a judgment (such as *exequatur* proceedings in France and Spain) remain in place and governed by the law of the state of recognition[37] — adding a potentially significant practical barrier. Recognition and enforcement can be refused on broader grounds under this Convention[38] than under the Lugano Convention.[39]

Annex 3: Glossary

- **2005 Hague Choice of Court Convention** – an international convention providing a framework of rules relating to agreements with an exclusive jurisdiction clause in favour of a contracting state and the recognition and enforcement of judgments rendered pursuant to such clauses. The EU is party and, since 1 January 2021, the UK is party in its own right. Carves out insolvency / analogous matters. See further Annex 2.

- **2019 Hague Judgments Convention** – an international convention providing a framework of rules relating to the recognition and enforcement of foreign judgments in civil or commercial matters. This Convention is not yet in force; the European Commission has proposed that the EU adopt this Convention; the UK has not announced plans to adopt it. Carves out insolvency / analogous matters. See further Annex 2.
- **Cross-Border Insolvency Regulations 2006** – UK legislation implementing the UNCITRAL Model Law on Cross-Border Insolvency in the UK (with certain amendments), providing the basis for recognition of foreign insolvency proceedings in the UK, upon a court application. However, such recognition is procedural rather than substantive and its effects are limited by the 'rule in *Gibbs*'.
- **European Insolvency Regulation** – an EU Regulation determining the proper jurisdiction for a debtor's insolvency proceedings and the applicable law for those proceedings, and providing for automatic reciprocal recognition of such proceedings across the EU. This Regulation was largely repealed in the UK upon Brexit.
- **Judgments Regulation** – an EU Regulation determining the reciprocal recognition and enforcement of judgments in civil and commercial matters between EU Member States; historically important in the context of recognition of schemes of arrangement. Also known as the Brussels Regulation. This Regulation was largely repealed in the UK upon Brexit.
- **Lugano Convention** – an international convention largely replicating the mutual recognition framework under the Judgments Regulation, as between EU Member States and Switzerland, Iceland and Norway. The UK automatically left the Lugano Convention upon Brexit but is seeking re-accession, which requires the unanimous consent of all contracting states. EU consent appears unlikely to be forthcoming; see further above.
- **Preventive Restructuring Frameworks Directive** – an EU Directive requiring Member States to introduce measures permitting debtors in financial difficulties to restructure effectively at an early stage – including the possibility of binding a dissenting class. Transposition into Member States' respective national law is ongoing. Post-Brexit, the UK is not bound to implement this Directive.
- **Rome I Regulation** – an EU Regulation determining applicable law in contractual matters. This Regulation does not rely on reciprocity; the UK continues to apply the rules set out in this Regulation post-Brexit and EU Member States will continue to uphold English choice of law clauses (subject to certain specific exceptions). Post-Brexit, potentially helpful for ongoing recognition of English proceedings in the EU where debt to be restructured is governed by English law.

- **'Rule in *Gibbs*'** – the English law rule that questions of discharge of a contractual liability are governed by the proper law of the contract. This rule is subject to certain exceptions where parties are subject to foreign proceedings which discharge the contract, such as where the relevant party has submitted to those proceedings (e.g. by voting) or was present in the relevant jurisdiction when the proceedings were commenced.

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1. For example, in 2017, the English court agreed with Nortel's administrators that it would not be prudent to extend the administrations beyond the (then-anticipated) withdrawal date, given uncertainties as to how the EIR would apply after that date: *Re Nortel Networks UK Ltd and Ors* [2017] EWHC 3299 (Ch) at [30-34].↩

2. The Brexit transition period ended at 11pm on 31 December 2020; references to "Brexit" in this article refer to that date.↩

3. The EU-UK Trade and Co-operation Agreement, signed 30 December 2020.↩

4. See for example the UK Government's Framework for the UK-EU partnership - Civil judicial cooperation, June 2018.↩

5. Certain parts remain, subject to amendments.↩

6. Under Directive 2019/1023 on preventive restructuring frameworks, etc. (the "Preventive Restructuring Frameworks Directive"), which requires Member States to introduce measures permitting debtors in financial difficulties to restructure effectively at an early stage. Such measures were required to be introduced into national laws by July 2021, subject to a possible one-year extension, which the majority of Member States have requested. Germany, the Netherlands and France are among the handful of Member States that have implemented the Preventive Restructuring Frameworks Directive to date.↩

7. Certain other contracting states — namely Switzerland, Iceland and Norway — have so consented. The EU (representing all EU Member States except Denmark) and Denmark (acting on its own behalf) have not so consented. In May, the European Commission announced its conclusion that the EU should not so consent: Communication from the European Commission to the European Parliament and the Council — Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention, 4 May 2021. In November, a briefing paper from the European Parliament's Research Service provided a more detailed analysis: European Parliament Briefing on The United Kingdom's possible re-joining of the 2007 Lugano Convention, 18 November 2021.↩

8. To which the EU is party and, since 1 January 2021, the UK is party in its own right; accession does not require the consent of other contracting states.↩

9. *Re gategroup Guarantee Limited* [2021] EWHC 304 (Ch).↩

10. Under Part 26A Companies Act 2006.↩

11. See further our *Alert*.↩

12. See further our *Alert*.↩

13. *Re DTEK Energy B.V. & anr* [2021] EWHC 1456 (Ch) (convening); [2021] EWHC 1551 (Ch) (sanction). See further our *Alert*.↩

14. Article 12(1)(d) of the Rome regulation on the law applicable to contractual obligations (EC) No 593/2008, which provides that the law applicable to a contract (here, English law) shall govern the various ways of extinguishing obligations. At the end of the Brexit transition period, the Rome I Regulation was retained (with certain amendments) by UK statutory instrument: The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (UK Exit) Regulations 2019 (SI 2019/834).↩

15. This followed a similar approach in *KCA Deutag*'s scheme of arrangement shortly pre-Brexit, in which Snowden J (as he then was) took comfort from the overwhelming vote in favour of the scheme and the related lock-up agreement which bound creditor parties contractually to support the scheme and not to do anything to undermine it. *Re KCA Deutag UK Finance plc* [2020] EWHC 2977 (Ch) (sanction) at [33]: "It is very difficult to see how such creditors who contractually agreed to support the Scheme and/or who voted in favour could possibly be allowed to take action contrary to the Scheme in any foreign jurisdiction, and the number and financial interests of those who did not vote in favour is comparatively very small indeed. That alone is sufficient to demonstrate to me that the Scheme is likely to have a substantial international effect and that I would not be acting in vain if I were to sanction it."↩

16. *Re Obrascón Huarte Laín S.A.* [2021] EWHC 1431 (Ch) (sanction).↩

17. Article 41 of Spanish Law 29/2015.↩

18. Notable non-EU cases post-Brexit include *Re NMC Healthcare Ltd (in administration)* [2021] EWHC 1806 (Ch) (Abu Dhabi Global Market); *Re PJSC Bank Finance and Credit (in liquidation)* [2021] EWHC 1100 (Ukraine); *Re Chen Yung Ngai Kenneth* [2021] EWHC 3346 (Ch) (Hong Kong); and *Chang Chin Fen v Cosco Shipping (Qidong) Offshore Ltd* [2021] CSOH 94, in which the Scottish court declined to grant recognition of Prosafe's Singapore moratorium proceeding.↩

19. *Re Greensill Bank AG* [2021] EWHC 966 (Ch).↩

20. Pre-Brexit, such recognition would instead have been determined under the Credit Institutions (Reorganisation and Winding Up) Regulations 2004 (the "2004 Regulations"). Article 1(2)(h) of the CBIR still purports to exclude EEA credit institutions from its scope, but does so by reference to a definition (in the 2004 Regulations) which was effectively revoked upon Brexit (subject to transitional arrangements). Accordingly, the court held, EEA credit institutions are no longer excluded from the CBIR. This construction ensures that EEA credit institutions are in no worse position than non-EEA credit institutions, which are entitled to apply for recognition under the CBIR.↩

21. *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399.↩

22. For a recent unsuccessful application, see *Chang Chin Fen v Cosco Shipping (Qidong) Offshore Ltd* [2021] CSOH 94.↩

23. Under Articles 49 and 54 of the Treaty on the Functioning of the European Union.↩

24. Owing to the European Court of Justice's judgment in *Überseering BV v Nordic Construction Company Baumanagement GmbH* (ECLI:EU:C:2002:632).↩

25. *Offene Handelsgesellschaft*.↩

26. *Gesellschaft bürgerlichen Rechts*.↩

27. *Anwachsung*.↩

28. The only EU Member States to have adopted the Model Law are Poland, Slovenia, Greece and Romania. There is some debate as to whether adoption of the Model Law falls within the EU's legislative competence.↩

29. *Re OJSC International Bank of Azerbaijan* [2018] EWCA Civ 2802 at [30].↩

30. Communication from the Commission to the European Parliament, the Council and others, 'Capital Markets Union — Delivering one year after the Action Plan', 25 November 2021, at paragraph 3.4.↩

31. Certain procedures may be added to Annex A to the EIR so as to benefit from the automatic recognition regime. Alternatively, such proceedings could potentially be recognised under the Judgments Regulation (although there is a specific exclusion for bankruptcy, judicial arrangements and analogous proceedings), the Rome I Regulation, or under domestic private international law.↩

32. For example: a Dutch subsidiary of India's Jain Irrigation Systems successfully pursued an English scheme (and not a Dutch WHOA). The relevant debt was originally governed by New York law but was amended to English law and the scheme company shifted its centre of main interests to England for the purposes of the scheme. *Re Jain International Trading BV* [2021] EWHC 1812 (Ch) (convening); sanction judgment awaited.↩

33. Article 2(2)(e) of the 2005 Hague Choice of Court Convention; Article 2(1)(e) of the 2019 Hague Judgments Convention.↩

34. European Commission, Proposal for a Council Decision on the accession by the European Union to the Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, 16 July 2021.↩

35. In order to come into force, at least two states need to accede to/ratify it; no state has yet done so although four states — Costa Rica, Israel, Ukraine and Uruguay — have signed it. ↩

36. Article 5(1) of the 2019 Hague Judgments Convention.↩

37. *Ibid*., article 13.↩

38. *Ibid.*, article 7.↩

39. Articles 34 and 35 of the Lugano Convention.↩

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