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Addressing Post-Brexit Limitations of Cross-Border Recognition of Restructuring and Insolvency Proceedings in Europe

Kate Stephenson, Partner, European Restructuring, Kirkland & Ellis International LLP, London, UK

Synopsis

This article considers the practical implications for the cross-border European restructuring/insolvency landscape post-Brexit, in cases involving the UK.¹

The loss of automatic recognition of UK proceedings across the EU, and *vice versa*, may make it more complex, lengthy and expensive to resolve cross-border mandates, raising the prospect that parallel proceedings may be necessary if certainty is required.

However, all is not lost: various potential routes to recognition remain; certain practical steps may assist the prospect of recognition; and ‘watertight’ recognition may not be necessary in all cases.

Post-Brexit recognition – introduction

The post-Brexit free trade deal announced on Christmas Eve made no provision for restructuring/insolvency law – effectively, a ‘hard Brexit’ for our industry. Following the end of the Brexit implementation period at 11pm on 31 December 2020 (‘Brexit Implementation’):

- (a) the European Insolvency Regulation² (the ‘EIR’), which provides for reciprocal recognition of insolvency proceedings across European member states (excluding Denmark), has largely been repealed in the UK (although certain parts remain, subject to amendments);³
- (b) the Judgments Regulation,⁴ important when considering jurisdiction/recognition for schemes of

arrangement and the new restructuring plan, has been revoked in the UK;⁵

- (c) for proceedings commenced before Brexit Implementation, the pre-Brexit regime will continue to apply.⁶

For new proceedings commenced after Brexit Implementation, the UK is now considered a ‘third country’ by the remaining 27 EU Member States (the ‘EU27’). The prospects of successfully obtaining recognition for a UK proceeding in a relevant EU Member State, or *vice versa*, will need to be carefully considered in each case and may vary significantly between Member States.

‘Inbound’ recognition of EU proceedings in England

The Insolvency Brexit Regulations repeal the majority of the EIR as a matter of English law. The premise underlying the Insolvency Brexit Regulations is that it would have been inappropriate for the UK unilaterally to retain the EIR, which is predicated upon reciprocity.

(a) Recognition of insolvency/restructuring proceedings

EU insolvency proceedings opened post-Brexit Implementation are therefore no longer recognised automatically in the UK under the EIR. They may instead be recognised under other, more limited, sources of recognition though generally only upon application (not

Notes

- 1 Different regimes apply in respect of banks and certain other financial institutions, which are beyond the scope of this article.
- 2 Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceeding.
- 3 Pursuant to The Insolvency (Amendment) (EU Exit) Regulations 2019 and The Insolvency (Amendment) (EU Exit) (No. 2) Regulations 2019 (together, the ‘Insolvency Brexit Regulations’); further amended by The Insolvency (Amendment) (EU Exit) Regulations 2020.
- 4 Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
- 5 Pursuant to The Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019, which also revoke the Brussels Convention, the Lugano Convention (though see further below) and certain other frameworks
- 6 Under Article 67(3)(c) of the ‘Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community’, the UK will be treated as a Member State in respect of main insolvency proceedings opened before Brexit Implementation. Similarly, under Article 67(1) of that agreement, the provisions of the Judgments Regulation regarding jurisdiction – which are important for cross-border recognition of schemes of arrangement and the new restructuring plan – apply in respect of legal proceedings instituted before Brexit Implementation (and in respect of proceedings or actions related to such proceedings).

automatically) and with greater discretion as to the relief to be granted to the foreign insolvency officeholder.⁷

Alternative sources of recognition include:

- (i) the Cross-Border Insolvency Regulations 2006 (the 'CBIR'), which implement the UNCITRAL Model Law on Cross-Border Insolvency in the UK. There is an important variation from the standard Model Law in Article 20(3) of the CBIR, in that the taking of steps to enforce security over the debtor's property is exempted from the automatic stay arising upon recognition of a foreign main proceeding. This reflects the traditionally pro-secured creditor nature of English law and is akin to the 'rights in rem' exception in Article 8 of the EIR;⁸
- (ii) section 426 of the Insolvency Act 1986, which applies only to designated countries, of which the only EU Member State is the Republic of Ireland; or
- (iii) common law principles.⁹

None of the above requires reciprocity.

Recognition of the new or forthcoming European restructuring procedures, introduced further to the Preventive Restructuring Framework Directive,¹⁰ remains to be tested. The English court has held that solvent proceedings cannot be recognised under the CBIR,¹¹ though it should suffice if insolvency is one of the grounds on which the proceeding can be commenced, even if insolvency cannot actually be demonstrated.¹²

However, there is a critical distinction in English law between recognition of proceedings and recognition of the substantive compromise effected pursuant to those proceedings, e.g. pursuant to a court order approving the restructuring, thereby compromising stakeholders' pre-restructuring rights/claims.

(b) Recognition of substantive compromise under insolvency/restructuring proceedings

These issues are highly complex; the following is a high-level summary. English recognition of the substantive compromise under insolvency/restructuring

proceedings principally depends on the governing law of the compromised debt (or shareholder rights):

- (i) **If governed by English law – 'Rule in Gibbs':** the English court will only recognise/enforce the compromise in respect of stakeholders subject to the foreign proceedings.

This derives from the 'rule in *Gibbs*',¹³ that a contract can only be discharged or compromised in accordance with its governing law.

The English court cannot recognise or give effect to a foreign insolvency-related judgment under common law principles unless the party against whom the order was made was subject to the relevant foreign proceedings (as a matter of English private international law).¹⁴

When is a stakeholder considered subject to the foreign proceedings? For English law purposes, stakeholders will be subject to the foreign proceedings if they:

- (A) were present in the foreign jurisdiction when the proceedings commenced;
- (B) made a claim or counterclaim in the proceedings;
- (C) submitted to jurisdiction by voluntarily appearing in the proceedings; or
- (D) agreed to submit to the jurisdiction.

This includes submitting a proof of debt or voting in the proceedings.

- (ii) **If governed by the law of the foreign proceedings:** the English court will recognise/enforce the compromise (this is the corollary of the 'rule in *Gibbs*').
- (iii) **If governed by another law:** the English court will consider whether the compromise would be recognised in the relevant jurisdiction.

The English court may nonetheless be able to 'recognise' a foreign plan by granting a stay of actions against the debtor(s)' assets. Such stay may arise anyway, as a result of recognition of the foreign insolvency proceedings under the CBIR. But such stay cannot be

Notes

7 The English court will generally grant the relief that would be available to an English insolvency practitioner. This potentially now includes greater relief in respect of certain *ipso facto* clauses, further to the new section 233B of the Insolvency Act 1986, introduced by the Corporate Insolvency and Governance Act 2020.

8 However, the court may order a wider stay on the enforcement of security under Article 21 as a matter of discretion, as in the case of *Re Thai Airways International Public Company Limited* (2020) (as yet unreported).

9 There are also statutory regimes under the Administration of Justice Act 1920 and the Foreign Judgments (Reciprocal Enforcement) Act 1933, which apply to particular countries which have made equivalent provision in their own law to ensure recognition and enforcement on a reciprocal basis – but which only apply to money judgments.

10 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

11 *Re Sturgeon Central Asia Balanced Fund Ltd* [2020] EWHC 123 (Ch).

12 *Re Agrokor DD* [2017] EWHC 2781 (Ch).

13 *Antony Gibbs & sons v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399.

14 *Rubin v Eurofinance SA and others* [2012] UKSC 46.

permanent; it cannot last longer than the proceeding itself.¹⁵

In consequence: a parallel English process may be required to compromise English law debt/interests.

(c) *The new UNCITRAL Model Law*

The new UNCITRAL Model Law on Recognition and Enforcement of Insolvency-related Judgments could provide a mechanism for recognition of foreign insolvency-related judgments – including confirmation of restructuring plans – in the UK. The new Model Law was adopted by UNCITRAL in July 2018; it has yet to be implemented into national law by any jurisdiction.

It is understood the UK Government intends to issue a consultation within the next few months as to whether to implement the new Model Law.¹⁶

Recognition of the substantive compromise effected by a foreign plan of reorganisation should be possible under the new Model Law, thereby overruling the ‘rule in *Gibbs*’. However, the new Model Law includes broad grounds on which recognition of a foreign judgment may be refused (i.e. as a matter of the court’s discretion) – including where affected stakeholders have not submitted or consented to the jurisdiction of the foreign court.¹⁷

‘Outbound’ recognition of English insolvency proceedings in the EU

As noted, the UK is no longer a ‘Member State’ for the purposes of the EU27’s interpretation of the EIR, and the EIR has largely been repealed in the UK. Accordingly, the EU27 are under no obligation to automatically recognise UK insolvency proceedings.

EIR-derived limitations on eligibility for English insolvency proceedings have been lifted, given the EIR no longer operates to restrict the opening of English proceedings. For example, eligibility for administration and company voluntary arrangements now extends to all companies incorporated in an EEA state (irrespective of their centre of main interests (‘COMI’) or establishments), in addition to (and as previously):

- (a) companies registered under the Companies Act 2006 in England and Wales or Scotland; and
- (b) companies not incorporated in an EEA state but with their COMI in a Member State (other than Denmark) or in the UK.¹⁸

However, debtors and their stakeholders will need to consider the prospect of recognition in each relevant EU country – e.g. jurisdiction of incorporation of the principal debtor(s) and key guarantor(s), location of key assets, and governing law of claims to be compromised in the proceedings. Insolvency officeholders may need to apply for recognition in other relevant EU countries, in order to have UK proceedings recognised. There is a risk that UK insolvency proceedings will not be recognised, especially if the debtor’s COMI is not in the UK or if recognition would prevent creditors from taking action against the assets held in the relevant EU jurisdiction.

Recognition will depend upon conflict of law rules in each Member State, the particular circumstances of the case and the approach taken by the court asked to consider the matter (especially in early cases). However, by way of high-level overview:

- (a) a small minority of EU countries have implemented the UNCITRAL Model Law on Cross-Border Insolvency – namely Greece, Poland, Romania and Slovenia, in addition to the UK – which provides for recognition of foreign insolvency proceedings upon application. The scope of relief differs according to whether or not the proceedings are commenced in the jurisdiction of the debtor’s COMI;
- (b) other private international laws may also assist – e.g. Germany has domestic provisions influenced by the UNCITRAL Model Law on Cross-Border Insolvency. These vary widely from jurisdiction to jurisdiction; and
- (c) the Rome I Regulation¹⁹ may assist where the proceedings compromise claims governed by the same law as that of the proceedings²⁰ (as, in essence, the EU27 recognise that an English law governed contract can be varied/discharged via an English law process). Unlike the EIR, the Rome I Regulation is not predicated on reciprocity; it continues in force in the UK post-Brexit Implementation.²¹

Notes

15 *Bakhshiyeva v Sberbank and others* [2018] EWCA Civ 2802.

16 The Private International Law (Implementation of Agreements) Act 2020 permits the Government to implement the new Model Law by way of statutory instrument, following consultation: section 2(13) and paragraph 2 of Schedule 6.

17 Article 14(g). See further I. West, ‘UNCITRAL Cross-Border Insolvency Model Laws: And Then There Were Two...’, (2019) *International Corporate Rescue*, Volume 16, Issue 2.

18 See paragraphs 17 and 44(b) of Part 2 of the Schedule to The Insolvency (Amendment) (EU Exit) Regulations 2019.

19 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations

20 The Rome I Regulation excludes ‘questions governed by the law of companies ... such as ... the winding-up of companies ...’ (Article 1(2)(f)), but does not exclude bankruptcy/insolvency proceedings more broadly.

21 ‘Onshored’ in the UK pursuant to The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019.

The consequences of recognition via these alternative bases may differ from the traditional consequences of recognition under the EIR. For example, the EIR contains exceptions to the general rule (in Article 7) that the law of the Member State of the opening of proceedings (*lex fori concursus*) should determine all the effects of the insolvency proceedings, both procedural and substantive. Such exceptions include the treatment of:

- (a) third parties' rights *in rem*, i.e. including security rights, which are normally determined according to the law of the Member State in which the relevant property is situated (*lex situs*) and unaffected by the opening of insolvency proceedings: Article 8; and
- (b) set-off, as creditors remain entitled to demand set-off where permitted under the law applicable to the insolvent debtor's claim (even if not permitted under the *lex concursus*): Article 9.

The extent to which such exceptions apply in post-Brexit cases involving the UK may vary.

'Outbound' recognition of English schemes/restructuring plans in the EU

The Judgments Regulation has historically constituted an important basis for recognition of English schemes (and, latterly, restructuring plans) in the EU. However, the UK is no longer a 'Member State' for the purposes of the EU27's interpretation of the Judgments Regulation, which has also been repealed in the UK.

Accordingly:

- (a) there is no longer any debate as to whether the jurisdiction rules in the Judgments Regulation apply to English schemes of arrangement or restructuring plans – leaving the 'sufficient connection' test as the clear jurisdictional test; and
- (b) recognition will vary jurisdiction by jurisdiction and case by case, 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.

Even within the same jurisdiction, some commentators' views as to recognition differ, especially as to whether schemes and plans would be viewed as a judgment, a contractual compromise, or an insolvency proceeding.

The regimes shown in Table 1 (next page) may assist, in addition to principles of private international law in the relevant jurisdiction.

It remains to be tested whether the carve-outs for bankruptcy/insolvency proceedings under the Lugano Convention²² and the Hague Convention²³ operate to restrict recognition of English schemes or restructuring plans. (Likewise, it has never definitively been determined whether or not schemes, or the new UK restructuring plan, fall within the jurisdiction rules of the Judgments Regulation.²⁴) The forthcoming addition of the new German and Dutch restructuring plan procedures to Annex A of the EIR might influence European national courts to consider the UK restructuring plan as more akin to an insolvency proceeding, given broad similarities between the procedures (notwithstanding it forms part of the Companies Act, does not involve a moratorium on creditor action and does not require that the company be, or be likely to become, unable to pay its debts as they fall due). Again, this remains to be tested.

Risk assessment and mitigation

The lack of automatic recognition may make UK-EU27 cross-border cases more challenging, but not insuperable. Recognition in every relevant EU jurisdiction may not be necessary – stakeholders may wish to focus on key jurisdictions only and focus on the actual risks of a potential challenge and any potential mitigating actions.

The 'decision tree' in Figure 1 offers a high-level suggested starting point for evaluating potential recognition of English schemes and restructuring plans in the EU27, where proceedings commenced post-Brexit Implementation. It includes the possibility of contractually amending governing law and jurisdiction clauses targeted to maximise the likelihood of recognition. Needless to say, disclaimers must apply: post-Brexit recognition is highly complex and as yet untested.

In the context of English schemes and restructuring plans, notably the English court does not need *certainty* as to the likelihood of recognition in order to sanction the scheme or plan. A notable recent expression of this test – albeit outside the context of international recognition – is 'whether the court order sanctioning the scheme would serve no discernible purpose at all ... the court generally only requires some credible evidence to the effect that it will not be acting in vain'.²⁵ It is hoped opinions from local counsel will substantially clear this low hurdle, even if they cannot assure the English court of any certainty, especially in early cases.

Notes

22 Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2007.

23 Convention of 30 June 2005 on Choice of Court Agreements.

24 Given the carve-out in Article 1(2)(b) for 'bankruptcy, ... judicial arrangements, compositions and analogous proceedings'.

25 *Re Sunbird Business Services Ltd* [2020] EWHC 3459 (Ch) at [89], per Snowden J.

Table 1.

	Lugano Convention	Hague Convention	Rome I Regulation
Nature	Broadly similar to Judgments Regulation – facilitates mutual recognition and enforcement of judgments in the EU27 (including Denmark), Iceland, Norway and Switzerland	Regime for enforcement of exclusive jurisdiction agreements and recognition/enforcement of judgments resulting from proceedings based on such agreements – across the EU27 (including Denmark) and certain other contracting states e.g. Singapore	In essence, provides that contract shall be governed by the law chosen by the parties and therefore e.g. an English law governed contract can only be varied/discharged via an English law process. Denmark is party to Rome Convention ¹ (similar)
Scope	Does not apply to 'bankruptcy, ... judicial arrangements, compositions and analogous proceedings' Potentially helpful for recognition of schemes/restructuring plans, where e.g. relevant debt is subject to an English jurisdiction clause, or one or more creditors are UK-domiciled The court first seised of a dispute takes priority, until it refuses jurisdiction – therefore lengthy delays may arise if a party commences proceedings in another jurisdiction ²	Does not apply to 'insolvency, composition and analogous matters' Recognition regime engaged only where the agreement contains an exclusive jurisdiction clause , i.e. an agreement to litigate in the courts of a single, specified jurisdiction. Does not apply to agreements with an asymmetric exclusive jurisdiction clause, i.e. one which confers on one party only the right to invoke the exclusive jurisdiction of the courts of a particular jurisdiction. ³ Typically, finance documents contain an asymmetric jurisdiction clause Also, some concern that the Convention will only give effect to jurisdiction clauses in contracts entered into after the date of Brexit Implementation – though the UK instrument of accession makes clear the UK considers the date of 'entry into force' for the UK should remain 1 October 2015 (the date on which the UK became bound by virtue of its EU membership)	Assists with recognition of e.g. schemes of arrangement and restructuring plans where the relevant debt is governed by English law , to the extent the relevant EU Member State considers the scheme/plan to be part of contract law/resolving a question of contractual obligations Recognition perhaps more uncertain where the relevant EU Member State considers the scheme/plan differently
Status	UK was party through membership of the EU; this fell away upon Brexit Implementation UK has applied to accede to the Lugano Convention in its own right. However, accession to the Lugano Convention requires consent of the other contracting parties and this has not yet been granted by the EU27. Additional UK implementing legislation will then be required to complete the process ⁴ and a three-month 'bedding in' period applies ⁵	UK was party through membership of the EU; this fell away upon Brexit Implementation The Hague Convention is open for accession by all states and does not require the consent of any other contracting party. UK has acceded to the Hague Convention in its own right (instrument of accession deposited 28 September 2020; effective upon Brexit Implementation)	Principles under Rome I are not confined to European Member States; retained in UK post-Brexit Implementation (as not predicated on reciprocity)

Notes

- 1 80/934/EEC: Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980.
- 2 Unlike the Judgments Regulation, the Lugano Convention does not include an 'anti-torpedo' provision to prevent this tactic.
- 3 Explanatory Report on the Hague Convention, paragraph 106. The English Court of Appeal recently held that the Hague Convention should 'probably' be interpreted as not applying to asymmetric jurisdiction clauses, though it was unnecessary to decide the point: *Etiihad Airways PJSC v Flöther* [2020] EWCA Civ 1707 at [85]-[88].
- 4 The Private International Law (Implementation of Agreements) Act 2020 permits the UK Government to implement any international agreement relating to private international law – including the Lugano Convention – by way of statutory instrument (section 2(1); paragraph 3 of Schedule 6). The Secretary of State is first required to consult such persons as he considers appropriate (paragraph 2 of Schedule 6), though it is submitted that the Secretary of State might consider it unnecessary to conduct a formal consultation on this issue given the UK was party to the Lugano Convention prior to Brexit Implementation.
- 5 Article 72(4) of the Lugano Convention.

The future of the UK as a European restructuring hub

Clearly, new European procedures introduced pursuant to the Preventive Restructuring Framework Directive – including the new German and Dutch procedures, effective 1 January 2021, with other jurisdictions to follow – increase the chances that European companies will first ‘shop locally’ for restructuring implementation procedures.

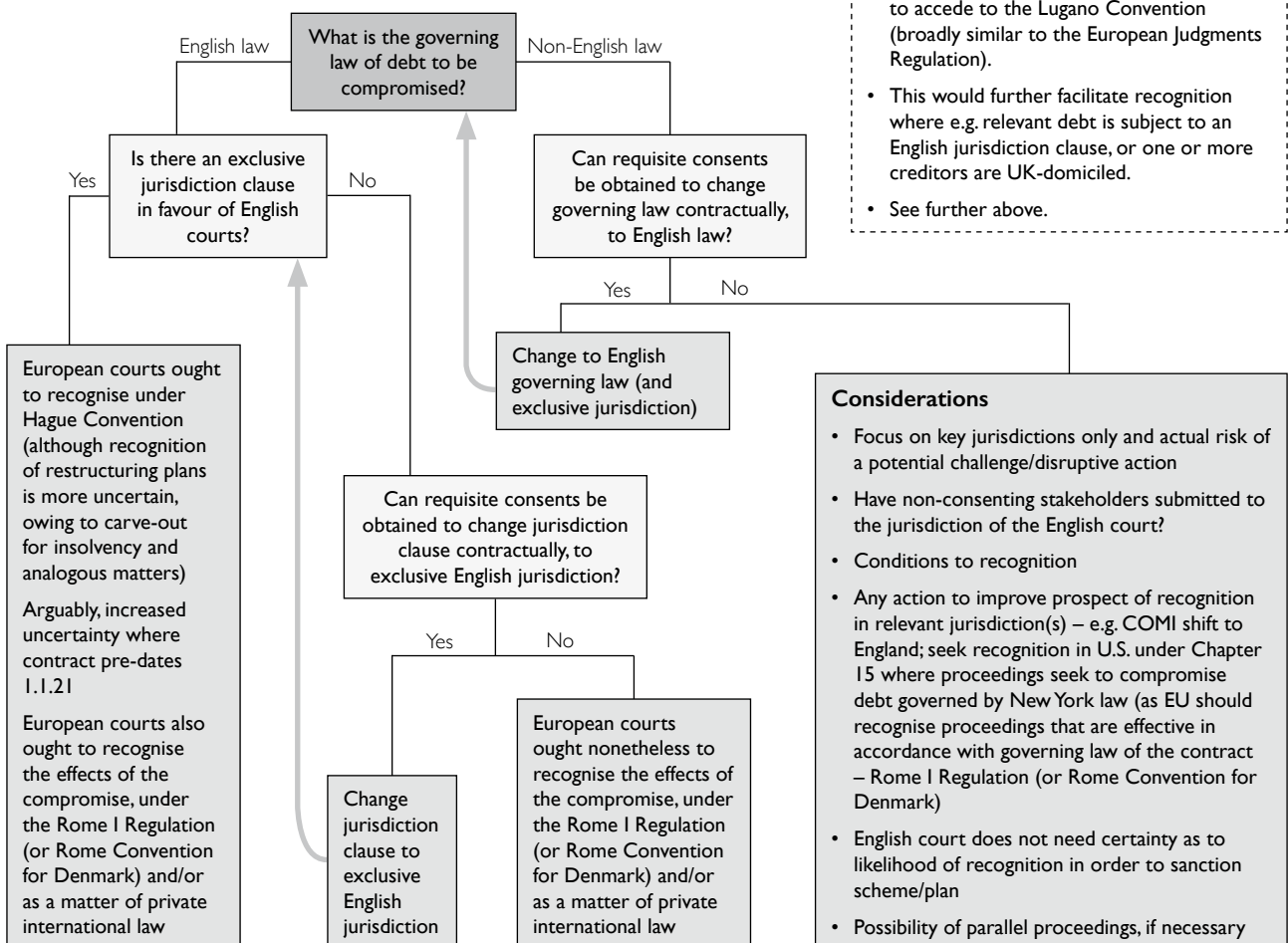
Although those procedures represent exciting, ground-breaking reforms, the UK can remain deservedly proud of its judicial, professional and financial infrastructure, for often-cited reasons such as: ready access to the esteemed English courts; a highly experienced and commercial judiciary; a flexible regime that

is tried-and-tested, offering predictability and reassurance to stakeholders; recent reforms to remain competitive on the international restructuring landscape (including the new restructuring plan, already tried-and-tested, including in relation to cross-class cram-down²⁶); and highly-developed market expertise of accountants and financial experts, as well as lawyers. And, as explored above, where a restructuring seeks to compromise English law debt or rights (and not all stakeholders are subject to the foreign proceedings), a parallel English law process may well be necessary, unless and until the UK implements the new UNCITRAL Model Law.

The UK must remain a leading European restructuring hub post-Brexit – even if we must now contemplate sharing that crown.

Figure 1. Action plan for post-Brexit recognition of English schemes/restructuring plans

This decision tree offers a high-level overview of recognition of English schemes and restructuring plans in the EU27, where proceedings commenced post-Brexit Implementation.



Notes

26 *Re DeepOcean 1 UK Ltd and others* [2021]; restructuring plans sanctioned on 13 January 2021; judgment has yet to be handed down.

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