INSOL INTERNATIONAL

THE RESTRUCTURING OF CORPORATE GROUPS

A GLOBAL ANALYSIS OF SUBSTANTIVE, PROCEDURAL AND SYNTHETIC GROUP PROCEDURES

INSOL INTERNATIONAL

International Association of Restructuring,
Insolvency & Bankruptcy Professionals

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ISBN: 978-1-907764-31-8

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Published in May 2022.

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PRESIDENT'S INTRODUCTION

Rapid technological and digital change and innovation have enabled business to be conducted across borders, very often making use of complex corporate group structures with various group entities, assets and creditors located in different jurisdictions across the world.

In this business and economic setting, there has never been a greater need for a consistent, predictable and uniform international framework for recognition, coordination and enforcement in relation to cross-border restructuring processes for group enterprises.

This has become a key focus point for the United Nations Commission on International Trade Law (UNCITRAL) through the activities of its Working Group V (Insolvency). In July 2019, UNCITRAL released the Model Law on Enterprise Group Insolvency (MLEGI), designed to address the specific needs of cross-border restructuring and insolvency processes impacting multiple group members, as distinct from the Model Law on Cross-Border Insolvency (MLCBI) which only deals with the insolvency context of a single debtor. The MLEGI draws upon some of the features identified in the European Insolvency Regulation Recast, and is also intended to operate in conjunction with Part 3 of the UNCITRAL Legislative Guide on Insolvency Law dealing exclusively with the treatment of enterprise groups in insolvency.

The adoption and implementation of the MLEGI – along with the further uptake of the MLCBI – will be priority areas for UNCITRAL, INSOL International, the World Bank and other international insolvency regulatory and policy bodies in the years ahead.

However, in the interim – and given that no jurisdiction has yet adopted and implemented the MLEGI – it is important to understand and analyse the various approaches taken by different countries to corporate group restructuring involving entities, assets and creditors across borders. It is also important to consider the potential for cooperation through novel means such as synthetic restructuring, taking after the cross-border undertakings offered by the joint English administrators in the landmark case of *Re Collins & Aikman Europe SA* [2006] EWHC 1343.

This new publication from INSOL International – *The Restructuring of Corporate Groups: A Global Analysis of Substantive, Procedural and Synthetic Group Procedures* – does precisely that. It consists of 18 country contributions, as well as a chapter looking specifically at how Brexit will shape corporate group restructuring recognition and cooperation in the United Kingdom and the European Union in future years. Each chapter identifies the potential for substantive, procedural and synthetic restructuring processes and draws attention to key cases, legislative provisions and international treaties. There is also a focus on future policy development that may shape the potential for coordinated proceedings and cooperation.

This book is an invaluable contribution to law reform and regulatory and policy development in relation to the implementation of a harmonised, consistent approach to cross-border restructuring processes in a manner that enhances efficiency, reduces costs and increases the prospect of viable enterprises being able to undergo successful corporate and business restructuring in the interests of debtors and creditors alike. Importantly, those outcomes also provide a broader benefit to financial stability and economic growth at this critical juncture in our global history.

I express my sincere thank you to each of our contributors for their time, expertise, commitment and patience in completing this project over a number of years, as well as to our team of INSOL International technical and administrative staff for their efforts in bringing the project to fruition.

I hope you enjoy reading this publication and will find it useful in your future pursuits.

Scott Atkins
President & INSOL Fellow
INSOL International
May 2022

FOREWORD

This book is a special INSOL International publication which explores and evaluates the legal, economic and practical benefits of substantive and procedural consolidation of corporate group restructuring processes in 17 jurisdictions across the globe.

In countries where consolidated group restructuring proceedings are not yet available, the book also explores whether the use of so-called "synthetic" consolidated group proceedings would be admissible under local legislation and could result in similar benefits to actual consolidation for all stakeholders involved. Synthetic, in this sense, is a term used to describe measures put in place to obtain the same or a similar result without following the normal procedure.

In addition to the 18 country contributions, Professor Dr Stephan Madaus from the Martin Luther University Halle-Wittenberg has analysed, in a separate chapter, the impact that the United Kingdom's departure from the European Union (EU) as a result of Brexit may have on established practices concerning the restructuring of international corporate groups, and the future of the United Kingdom as a European hub for global group proceedings.

Empirical studies have shown that, when a company is part of a group, there is a reduced prospect of the company becoming bankrupt in the first place (primarily on the basis of the reallocation of resources and risks across companies in the group, and the increase of debt-bearing capacity and the reduced cost of debt through the provision of intra-group debt guarantees) compared to where entities exist on a standalone basis.[1]

Those same studies show that, if one or more companies in a group do in fact become bankrupt, then the ability to use consolidated group restructuring or bankruptcy procedures can also significantly reduce costs (as compared to using insolvency processes for each individual entity) and therefore increase the potential return to creditors.

In that context, consolidated group restructurings can offer significant economic benefits. In cases where substantive and / or procedural consolidation options are limited, synthetic processes can achieve similar outcomes.

In fact, those very outcomes were achieved on a synthetic basis in the *Collins & Aikman* case, a main proceeding in the United Kingdom that was led by one primary administrator without opening secondary proceedings in the different EU Member States, after making a commitment that creditors in the other EU Member States would be paid dividends in a priority according to their local insolvency laws. The *Collins & Aikman* case resulted in a higher return for all the creditors in the different EU Member States, as compared to what restructuring on the individual legal entity basis would have achieved.

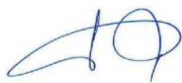
[1] N Dewaelheyns and Prof C Van Hulle, "Corporate Failure Prediction Modelling: Distorted by Business Groups' Internal Capital Markets?" (2006) *Journal of Business, Finance and Accounting*.

The *ratio legis* to this book was also meant to collect materials to support the proposal on consolidated group proceedings made by INSOL Europe on the Revision on the European Insolvency Regulation (EIR) in May 2012.[2] There, the idea was put forward that, regarding groups of companies, the centre of main interests (COMI) of the ultimate parent company ought to be deemed to be the COMI of the subsidiaries. The advantage would have been that, in the event of group insolvency, the court of the COMI would be able to safeguard the coordination of the main insolvency proceedings with respect to all the group companies and, secondly, the latter would in turn safeguard the application of the EIR then (the EIR Recast now) whenever the ultimate group COMI was located outside the EU.

My aspiration with this book is to provide an objective analysis of the current practices in different countries globally in relation to consolidated group restructuring and to make critical comments as to whether, even in the absence of legal options for substantive and procedural consolidated restructuring, synthetic legal group restructuring proceedings could be effectively used to achieve a more beneficial result than general coordination and cooperation procedures used in particular cases.

It is hoped that this book will be a valuable tool for practitioners, academics and the judiciary across the world and that the conclusions reached may serve as the basis for future law reform locally, regionally and globally.

This project would not have been possible without the help and support of many others. The initial acknowledgement must however go to the Technical Research Committee of INSOL International and Dr Sonali Abeyratne, Dr Kai Luck and Ms Waheeda Lafir in particular for all their assistance throughout the completion of the project, Ms Marie Selwood for the English language revision, and of course to all the chapter contributors to the book globally for their time, expertise and commitment. My final thanks go to Mr Neil Cooper, my mentor for over 30 years, who provided me with valuable insights in relation to the *Collins & Aikman* case and taught me to think out of the box and to always try and provide practical solutions to the benefit of all the stakeholders concerned in an insolvency or restructuring proceeding.



Nora Wouters
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May 2022

[2] R Van Galen, M Andre, D Fritz, V Gladel, F Van Koppen, D Marks QC and N Wouters, "Revision of the European Insolvency Regulation", Proposal INSOL Europe, 2012, 92-93.

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BREXIT: IMPLICATIONS FOR GROUP RESTRUCTURING AND INSOLVENCY PROCEEDINGS

1. Introduction

For more than 20 years, insolvency proceedings of transnational corporate groups with subsidiaries in Europe have anchored in London. In prominent cases, such as *Nortel Networks*,[1] subsidiaries in Europe, the Middle East and Asia (EMEA) found themselves centred in London. This practice has been built on the premise that proceedings in an English court, in particular, administrators appointed and decisions issued by such a court, are routinely recognised and implemented in those jurisdictions where assets, factories and workforces of the subsidiaries are situated.

Brexit is a challenge to this premise. The United Kingdom (UK) left the European Union (EU) at midnight on 31 January 2020. With the expiration of a transitional period on 31 December 2020, EU rules are no longer applied in English courts unless they were specifically incorporated into English law.

Even more importantly, the UK is no longer a Member State of the EU whenever EU law is applied in the EU. English courts therefore find themselves outside the territorial scope of EU regulations relevant for the handling of distressed corporate groups. Neither the provisions of the European Insolvency Regulation (EIR)[2] nor those of the Judgment Regulation (JR)[3] may serve to authorise English courts to open procedures or issue decisions anymore. At the same time, the EU-UK Trade Agreement[4] contains no legal instrument that may serve as a replacement by covering cross-border effects of civil or commercial procedures in (almost) all EU Member States. With the dawn of 2021, European legal practice suffered a sectoral "hard Brexit".

It remains to be seen whether this cessation of key legal instruments is capable of changing established practices in the restructuring and insolvency cases of international corporate groups. There are several reasons to suggest that London will remain the key EMEA hub for preventive group *restructurings*, but less for group *insolvency* cases.

2. Preventive restructuring of group financing

In recent years, financially troubled corporate groups from all over the world have routinely used the means of English schemes of arrangement, regulated in Part 26 of the UK Companies Act 2006, to restructure their debt (outlined in detail in the UK chapter of this book). The rise of the scheme can be traced back to three key elements, which are mostly still available in 2021. These elements are outlined below.

2.1 A welcoming and experienced bench

The High Court in London has convened hearings and confirmed schemes based on a welcoming construction of jurisdictional rules. As schemes are not listed in Annex A of the EIR, foreign companies find no need to establish an English centre of main interests (COMI). Instead, the courts have applied the "sufficient connection" test to foreign companies and have routinely found such a connection in English choice of law and jurisdiction clauses, even if these were amended only recently in order to establish such a connection for the purpose of a debt restructuring (as discussed in

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[1] *Re Nortel Networks SA & Ors* [2009] EWHC 206 (Ch).
[2] Council Regulation (EC) No 1346/*2000* of 29 May *2000* on insolvency proceedings.
[3] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
[4] EU-UK Trade and Cooperation Agreement of 30 December 2020.

the UK chapter of this book, with reference to cases such as *Re Codere Finance (UK) Ltd*[5] and *Re Apcoa Parking Holdings GmbH*).[6]

The broad interpretation of grounds for international jurisdiction by English courts is carried by the belief of the judges that the forum choice they enable is "good forum shopping". In cases where the use of an English scheme of arrangement is the only option to preserve a company (and the group it belongs to) from bankruptcy because similar instruments are not available in the law and practice of their original jurisdiction, the use of a scheme may achieve the best possible outcome, not just for the debtor and its group but also for creditors (noted in the UK chapter of this book).

It is fair to assume that this attitude will not be jolted by the mere fact that many countries, in particular in the EU when implementing the preventive framework of the EU Restructuring Directive 2019,[7] have adopted preventive debt restructuring mechanisms to assist local companies in financial distress. Indeed, the fact that foreign companies appear before English courts seems to prove that the law available at home is still either insufficiently drafted or inefficiently applied in practice, which in turn identifies a case of good forum shopping.

The underlying wish of stakeholders to use an English scheme rather than relying (solely) on local court assistance can be traced back to three peculiarities: the English language, English law-governed debt, and the expertise of English judges in both.

The English language is the language of international finance and law today. When seeking court assistance and offered a forum choice, stakeholders would naturally tend to favour a bench where proceedings are conducted in English, and judges are expected to naturally understand financial documents. This bias has effectively limited the circle of countries, which currently compete with the UK and United States (US) courts as international restructuring hubs, to countries with an English or Commonwealth heritage and a specialised commercial court (Ireland, Singapore, Australia). In contrast, recent attempts to establish English-speaking chambers in courts in Paris or Amsterdam have not yet shown much success.

English courts further benefit from the fact that many loan agreements used in connection with the finance of foreign companies and groups consist of Loan Market Association standard forms, which include English choice of law and jurisdiction clauses. As such clauses provide jurisdiction for schemes (on the basis of there being a sufficient connection), it seems natural to consider using a scheme in case of financial distress. English courts would even *require* foreign stakeholders to restructure English law-governed debt if the debt modification would need to be effective in the UK (the rule in *Gibbs*).[8] Parties would need to amend the choice of law clause to even avoid using a scheme.

Finally, and probably most importantly, English courts combine the advantages of language skills and choice of law clauses in financial documents with evident experience in restructuring practice, from where they commonly go to the bench. English judges in scheme proceedings can be expected to not only understand, but

[5] [2015] EWHC 3778 (Ch).
[6] [2014] EWHC 3849 (Ch).
[7] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019.
[8] See the original decision *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* [1890] 25 QBD 399, which was restated in *Bakhshiyeva v Sberbank of Russia & Ors* [2018] EWHC 59 (Ch); confirmed on appeal in *Re OJSC International Bank of Azerbaijan* [2019] Bus LR 1130.

also feel "at home" in financial documents and resulting complex debt structures. Based on such experience, they show a business-friendly bias when asked to accept new developments in scheme practice.

2.2 Third-party releases and intra-group guarantees

The second key element favouring the use of a scheme of arrangement when restructuring the debts of a corporate group is the availability of a broad third-party release. Group financing agreements are routinely secured by guarantees of group companies other than the principal debtor entity. Modifying claims against the debtor achieves little relief for the group unless the modification extends to creditor claims against the guarantors.

English courts have always expressed a favourable view of such extensions. In the eyes of the court, the release of contractual rights against related parties should be available where it is necessary "to give effect to the arrangement proposed for the disposition of the debts and liabilities of the company to its own creditors".[9] The release of third parties does not require any jurisdictional connection to the UK under this "necessity doctrine". In one case, it was even found irrelevant whether the scheme was used by the principal debtor or the guarantor when a guarantor scheme contained a release of the principal (foreign) debtor.[10]

The flexible approach of English courts enables corporate groups to address their financial troubles with a "single point of entry" (SPOE) approach in an English courtroom. Parallel procedures for guarantor entities are not even needed as long as the scheme of one group entity is able to also release all others, regardless of their COMI or place of incorporation.

The SPOE approach is not available in such a comfortable way in most jurisdictions. Germany may be the only other country where a release of rights against other group entities, even if foreign, has been available since 2021 based on the consent of the released group entity and the adequate protection of secured creditors.[11] The new Dutch Scheme would require a jurisdiction test to be met for the released group entity.[12] Remarkably, such releases are not available as such under Chapter 11 of the US Bankruptcy Code, although the recognition of schemes containing releases seems possible under Chapter 15.[13]

2.3 Schemes and "super schemes"

The third key element, and the only one adversely affected by the "hard Brexit" with regard to EU Member States, is recognition. English courts have always conditioned the availability of a scheme for foreign companies upon the fact that the relevant foreign courts would recognise the scheme (see the UK chapter of this book, referring

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[9] *Re Lehman Brothers International (Europe) (No 2)* [2010] Bus LR 489, [65]; confirmed in *Re Noble Group Ltd* [2019] BCC 349 [24]; *Gategroup Guarantee Ltd*, [2021] EWHC 304 (Ch); even extended beyond related parties in *In re Lecta Paper UK Ltd* [2020] EWHC 382 (Ch).
[10] *Re Swissport Fuelling Ltd* [2020] EWHC 1499 (Ch).
[11] Both a Corporate Stabilisation and Restructuring Act (StaRUG) restructuring plan and an insolvency plan may contain such a release; see s 2(4) of the StaRUG and s 217(2) of the German Insolvency Code (*Insolvenzordnung*) (InsO).
[12] This test would require a sufficient connection: see s 72 of the Dutch Bankruptcy Code.
[13] *In re Avanti Communications Group plc*, 582 BR 603 (Bankr SDNY 2018); *In re Agrokor dd*, 591 BR 163 (Bankr SDNY 2018). Recognition was refused, however, in *In re Vitro, SAB de CV*, 473 BR 117 (Bankr ND Tex 2012).

to the decision of Snowden J in *Re Van Gansewinkel Groep BV*),[14] either by recognising the judgment confirming the scheme or by accepting the substantive effects of the scheme as a means of debt modification under English law.

For companies from EU Member States, the recognition of the English judgment can neither follow from an application of the EIR[15] nor the JR[16] anymore. As for companies outside the EU, a judgment recognition needs to look at autonomous legal instruments found in applicable conventions (e.g. the Lugano Convention once the UK accedes, or the Hague Convention on Choice of Law Agreements), bilateral treaties or domestic rules on recognition in the host jurisdiction.

The relevant instruments commonly differ in scope between rules for the recognition of insolvency proceedings (and related judgments) and rules for the recognition of judgments in civil or commercial matters. The threshold found in these rules often differs significantly. The recognition of foreign insolvency proceedings is often facilitated by some form of a COMI-based jurisdiction test where local laws have adopted the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency (Model Law) or follow an even more universalist approach (as, for instance, Germany). The recognition of a civil or commercial judgment may depend on higher thresholds including, for instance, the proof of reciprocity. In other jurisdictions, rules may facilitate the recognition, especially because they provide no relevance to the debtor's COMI (see, for example, the Lugano Convention).[17]Overall, the landscape is colourful, and recognitions may depend on the peculiarities in the target jurisdiction.

The attraction of English schemes has never suffered from these complexities. Judgments sanctioning them were recognised in the EU as commercial judgments under the JR,[18] while US courts applied the rules for recognising foreign insolvency proceedings in Chapter 15 of the US Bankruptcy Code.[19] While the definition of insolvency proceedings and thus the scope of the respective recognition regime may significantly differ among jurisdictions, a judgment recognition has often been achieved.

Today's English restructuring practice is well aware of these complexities and has seized the opportunity to further enhance its restructuring toolbox with the "restructuring plan" – introduced in 2020 in a new Part 26A of the Companies Act 2006.

This new "super scheme" adds a cross-class cram down to the traditional means and procedure of a UK scheme under the condition that the debtor "has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business as a going concern."[20]

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[14] [2015] EWHC 2151 (Ch).
[15] EIR, art 32.
[16] JR, art 36.
[17] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 339, 21.12.2007, 3-41.
[18] See for example the German Federal Supreme Civil Court (BGH) applying the JR and its grounds to refuse recognition in BGH, 15.2.2012 – IV ZR 194/09, NZI 2012, 425 (*Equitable Life*).
[19] *In re Ocean Rig UDW Inc*, 570 BR 687 (Bankr SDNY 2017); *In re Avanti Communications Group plc*, 582 BR 603 (Bankr SDNY 2018).
[20] Companies Act, s 901A(2).

This condition has led the High Court to conclude that the restructuring plan is structurally different to a scheme as it only applies to financially troubled companies and thus triggers the exception under the Lugano Convention for insolvency proceedings.[21] The judgment seems to open the door for financially distressed foreign companies to strategically cherry-pick a scheme or a restructuring plan with a view to the different cross-border regimes associated with them while offering (mainly) the same means. Where jurisdiction or recognition requirements in a case are better served by the cross-border insolvency framework, a restructuring plan should be used, while a scheme would be the preferred choice where jurisdiction should be independent of COMI, or other insolvency law-related troubles ought to be avoided (such as safeguards for lenders under the Cape Town Convention).[22]

English courts now seem determined to offer a choice of "schemes": one to target jurisdictions based on rules for the recognition of civil judgments and one to target jurisdictions based on cross-border insolvency frameworks. Both are able to implement a debt restructuring based on a SPOE approach in well-established procedural forms.

Finally, it should be recalled that both a scheme and a "super scheme" can effect a debt restructuring across borders independent of any recognition of the judgment confirming the scheme. As far as the restructured debt is governed by English law, any modification of the debt by means of English law, including a modification by way of any type of a scheme, would be respected globally under general principles of private international law and national rules reflecting them (see, for example, the Rome I Regulation for EU Member States). As long as lenders prefer English law to govern their loans or, at least, the restructuring of those loans, schemes are effective based on their substantive content.

Overall, the English preventive SPOE restructuring approach offered by experienced professionals remains an attractive option for companies in most EU Member States, especially corporate groups. Path dependency and English law-governed debt create an additional bias favouring the UK. At the same time, the hard Brexit causes stakeholders to closely reconsider the legal basis for international jurisdiction and recognition of English judgments. While details here are currently uncertain and country-specific, the newly offered selection between schemes and restructuring plans might assist stakeholders in finding a fitting option. However, this option will then have to compete with a number of new preventive restructuring options in the EU, some of them even in the home jurisdiction of a corporate group. A scheme strategy might eventually be outflanked when, taken together, the advantages of a restructuring at home or in neighbouring EU courts outweighs the troubles of "shopping" for a scheme restructuring across the Channel. It remains to be seen how new scheme-like options in the EU, in particular in Dutch or German law, are exercised and valued in practice.

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[21] *In the matter of Gategroup Guarantee Ltd* [2021] EWHC 304 (Ch).

[22] *In the matter of MAB Leasing Ltd* [2021] EWHC 379 (Ch). It remains to be seen whether the scheme will actually be able to circumvent the treaty's safeguards, in particular since the scheme is held to be an "insolvency proceeding" in the eyes of US courts when granting recognition under chapter 15 of the US Bankruptcy Code; see D L Lawton, S B Wolf and Bracewell, *The Thing About Schemes in the Scheme of Things: Recognition of Schemes of Arrangement Under Chapter 15 of the US Bankruptcy Code*, INSOL International Technical Series, Issue No 38, March 2018. The High Court in Malaysia denied such a petition, see *Re AirAsia X Berhad*, in the High Court of Malaya in Kuala Lumpur, in the Federal Territory, Malaysia (Commercial Division), originating summons no WA-24NCC-467-10/2020; judgment handed down 19 February 2021, [281]-[282].

2.4 Conclusion

From a global perspective, Brexit has not changed anything. Even from the EU perspective, the English restructuring instruments remain both attractive and available. English case law continues to develop the means available in a scheme of arrangement and a new restructuring plan and enables them to effect restructuring strategies, in particular for corporate groups, which are hardly available elsewhere. At the same time, the advantage of the English language and an experienced bench (informed by skilled professionals) could provide an advantage for the UK as a restructuring hub at least in the European area, if not globally, provided that recognition is available.

3. Parallel insolvency cases and synthetic proceedings

In the event of the bankruptcy of a corporate group, insolvency proceedings are commenced on an entity-by-entity approach. Transnational groups are thereby divided into multiple insolvency proceedings. Often the number of proceedings equals the number of insolvent entities. The task of maintaining the functions of the group – with a view to the synergies and value obtained by running the business as a group – falls into the hands of multiple courts and administrators. As it is difficult, if not impossible, to consolidate assets or proceedings across borders, a "multiple point of entry approach" is required. Coordination and cooperation between the administrators and courts in different jurisdictions replace the control mechanisms within the corporate group with a significant degree of imperfection.

3.1 Concentrating main proceedings for group entities

The common way of avoiding insolvency proceedings in multiple jurisdictions with the resultant loss of centralised control has been a coordinated and quick filing for insolvency proceedings in one jurisdiction for all group entities (of a region).

The success of such a strategy depends on the willingness of the local courts to accept international jurisdiction for all group entities. Under the EIR, English courts were notorious for allocating a group entity's COMI in England if needed. They followed a mind-of-management approach until the Court of Justice of the European Union (CJEU) rejected such an interpretation of the COMI requirement in article 3(1) of the EIR in the *Eurofood* decision,[23] which only resulted in English courts finding the COMI in England based on a more comprehensive review of all relevant criteria, including where *creditors* saw the COMI of the group entities.[24]

Brexit released the English courts from CJEU case law for determining COMI. *Eurofood* restrictions therefore no longer apply. Even more, the Insolvency Brexit Regulations extend the court's jurisdiction to any foreign company with a sufficient connection to the UK (as discussed in the UK chapter of this book). It is understood that English courts will continue to welcome the concentration of group insolvency proceedings as separate main proceedings under English insolvency law for group entities incorporated in the EU and the European Economic Area, but also in other regions in proximity within the EMEA if practical.

[23] *Eurofood IFSC Ltd,* C-341/04, 2 May 2006, ECLI:EU:C:2006:281.
[24] *Thomas & another v Frogmore Real Estate Partners & others* [2017] EWHC 25 (Ch).

3.2 Recognition of English main proceedings abroad

The new post-Brexit freedom for English courts in handling jurisdiction comes at a significant cost in the area of recognition. With the UK considered a third state in the eyes of the remaining EU Member States, automatic recognition of English proceedings and administrators based on the EIR is denied. This is critical as the mechanics of the EIR have always allowed a court which is willing to accept jurisdiction rather broadly for foreign EU group entities to bind all other EU Member States' courts, provided that the proceedings are opened there first[25] and the opening decision is confirmed if appealed.[26] Effectively (with the notable exception of the *NIKI* case in Berlin),[27] these mechanics enabled EU courts to concentrate proceedings in the court where the EU holding company is located whenever motions to open proceedings for all group entities across Europe were first filed there. This mechanism is now lost for English courts due to Brexit.

It is difficult to assess what this means for the UK as a place to concentrate the EU / EMEA arm of global insolvencies as we saw them in *Nortel Networks*. A legal instrument mirroring the effects available pursuant to the EIR is not in sight. Recognition of insolvency proceedings in the UK would need to be achieved in each EU Member State based on local laws. Yet the rules in these states differ in many ways. Some countries may not even feature a cross-border insolvency regime outside the EIR (such as the Baltic States). Few have modelled any rules that do exist on the Model Law (which has only been adopted by Greece, Poland, Romania and Slovenia, as well as Israel, Serbia and Montenegro in the broader area). Others provide rather specific frameworks, such as Germany.[28] All of them will condition recognition on a second assessment of the debtor's COMI or a similar jurisdiction test based on local law. Any broad approach to jurisdiction concerning foreign companies finds its limits here.

On the other hand, the advantages of a common language, professional institutions and courts willing to cooperate, mentioned for schemes above, remain relevant and could suffice for attracting group proceedings. Further, the advantages of the EIR mechanics have always been compromised by the availability of territorial secondary proceedings pursuant to article 3(2) of the EIR – which commonly resulted in parallel proceedings in England and in the places where group entities operate. The need to coordinate centralised (main) with local (non-main) proceedings has always characterised transnational group insolvency cases unless the commencement of the latter was prevented.

Overall, the situation is difficult to assess and may turn out to be rather case-sensitive. Whenever group entities have their COMI in EU (and non-EU) jurisdictions with a predictable legal framework for recognition and a sense for accepting a centralising COMI assessment in the UK, Brexit may not change much, and the proceedings may well be concentrated in an English court. However, if recognition is not achievable in key jurisdictions, parallel (main) proceedings will be needed and should be concentrated in an EU Member State offering similar welcoming and professional institutions. Ireland or the Netherlands come to mind, and possibly also Germany.

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[25] EIR, art 19.

[26] EIR, art 5.

[27] See LG Berlin, 8.1.2018 – 84 T 2/18, ZIP 2018, 140.

[28] S Madaus, A Wilke and P Knauth, "Bringing Non-EU Insolvencies to Germany: Really so Different from the UNCITRAL Model Law on Cross-Border Insolvency?" (2020) 17(1) *International Corporate Rescue* 21.

3.3 Preventing the uncoordinated commencement of parallel proceedings

Faced with the prospect that there is no legal instrument which could prevent the commencement of parallel proceedings in COMI jurisdictions of group entities, insolvency practice might reconsider an informal approach that was created in the early 2000s with a view to minimise the damaging effect of such additional procedures: the undertaking.

Similar to the situation post-Brexit, English administrators of the 2000s found themselves able to be appointed as "joint administrator" for all EU group entities by an English court based on a pragmatic assessment of the entities' COMI, but the opening of main proceedings in the UK did not prevent the opening of secondary proceedings in the countries where the subsidiaries were incorporated and, sometimes, most of the group's assets were located.

Secondary proceedings under local law secured preferred creditor status to certain classes of local creditors (such as employees and tax authorities) and enabled local creditors to become formally involved in the administration of the group's affairs, for example by forming a creditors' committee. Hence, such proceedings were commonly commenced. From a UK perspective, however, the involvement of (potentially several) secondary proceedings jeopardised the very group-level control that had otherwise been preserved by filing all group cases in the UK. Any group-wide solution, such as a going-concern sale or a reorganisation of the group, would be difficult, if not impossible, to achieve once such additional territorial proceedings were commenced.

With no legal remedy at hand to prevent the opening of secondary proceedings, English insolvency administrators aimed to comfort local creditors in a way that would see them abstaining from initiating secondary proceedings. To achieve this, the administrators in the cases of *MG Rover*[29] and *Collins & Aikman*[30] promised local creditors, often employees, that the administrators would make payments in the UK main proceedings "equal to what [the local creditors] would have received in secondary proceedings commenced" at home.[31] As it turned out, local creditors put their trust in these assurances and, instead of initiating competing secondary proceedings, supported the group-oriented strategy of the joint administrators, who were able to achieve very favourable going-concern sales of the group. With the realised cash available, the administrators needed court permission for a distribution, which, as promised, would not only be guided by English insolvency law, but also by statutory priorities pursuant to foreign insolvency laws. English courts found the rules of the Insolvency Act 1986 sufficiently flexible to grant permission to a distribution as promised.[32]

With the practice of "virtual" or "synthetic" secondary proceedings put in place in the UK, English courts have been well-prepared to act as the EU hub for global group insolvencies. In the case of *Nortel Networks*, the strategy was complemented with letters of request sent by the English court to all potential foreign courts of secondary proceedings asking them to "put in place arrangements under which the joint administrators will be given notice of any request or application for the opening of

[29] *Re MG Rover Belux SA/NV,* 29.3.2006 (unreported in UK), reported in NZI 2006, 416 (Germany).

[30] *Collins & Aikman Europe SA Collins & Ors, Re Insolvency Act 1986* [2006] EWHC 1343 (Ch).

[31] See *MG Rover.* See also *Collins & Aikman,* 8.

[32] See *Collins & Aikman,* 27-29. See also *MG Rover*.

secondary insolvency proceedings in respect of any of the companies in administration".

The mere fact that the UK is a third state in the eyes of EU Member States' courts post-Brexit does not seem significant with regards to the practice of virtual proceedings. The ability of the English administrators to offer assurance to foreign creditors and give effect to this promise in a legal distribution has not changed, as it derives from English law. The promise given has never been legally binding or enforceable in the country of potential secondary proceedings. Its effects have always relied on the conviction of relevant local creditor classes that they would fare better in a centralised main procedure compared to a situation with a local secondary proceeding.

The inability to apply EU law might even work in favour of English courts as the assurance of the English administrator and its sanctioning by the courts would certainly not be affected by the conditions laid down in article 36 of the EIR. In a failed attempt to provide all courts in EU Member States with the power to sanction a distribution according to an undertaking in line with UK best practice, a bureaucratic obstacle appeared in article 36 of the EIR,[33] which made such assurances effectively impossible. The open question of whether article 36 of the EIR hinders any other form of assurance[34] has lost relevance for English courts now that the EIR is not applied anymore in the EU with regard to English insolvency proceedings.

The wish to be timeously notified and heard about the motion to open secondary proceedings by courts in the EU cannot rely on duties to cooperate among EU Member States' courts[35] anymore. English administrators need to follow a country-by-country analysis and hope to find bilateral agreements or national insolvency laws by which English proceedings are recognised and cooperation with English courts is authorised.[36]

While the practice of undertakings seems facilitated by Brexit, it must be remembered that such assurances are only a means to an end. The purpose of any undertaking is the wish to secure a group-wide solution implemented by the joint administrators in the (English) main proceedings. This requires the power of those proceedings and its administrators to transfer rights of the debtors located in foreign jurisdictions (such as assets and shares in subsidiaries) in the first place. Any re-invention of virtual secondary proceedings would be preconditioned on the fact that English main proceedings are even able to provide for such a pan-European administrative power, which in turn takes us back to the issue of recognition (discussed above).

Assurances are only relevant under the condition that English insolvency proceedings are recognised in countries of group entities as main proceedings and, thereby, are afforded assistance by authorising the English administrator to access local assets and register the transfer of shares in local companies. Where such recognition is either not available at all or, based on a divergent assessment of the entity's COMI in a recognition procedure, only available as a foreign non-main proceeding, the English

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[33] While the initial proposal in the Commission's draft (art 18(1) sentences 3 and 4; COM(2012) 744 final, 25) was based on the English practice, the final version in art 36 of the EIR requires the undertaking to be legally binding and enforceable based on the acceptance of local creditors similar to a plan acceptance.

[34] For a discussion (in German), see Madaus, Die Zusicherung nach Art. 36 EuInsVO – Das Ende virtueller Sekundärinsolvenzverfahren?, Kayser/Smid/Riedemann (eds) Festschrift für Klaus Pannen, 2017, 223, 236-239.

[35] These are set out in EIR, art 42.

[36] In Germany, for instance, relevant provisions are found in ss 343 and 348(2) of the InsO.

administrator would not be able to act in relation to local assets. In such cases, any group-wide, value-maximising strategy would better anchor main proceedings in a EU Member State, ideally one with an insolvency regime flexible enough to imitate the English practice of a group COMI and virtual secondary proceedings. It remains to be seen whether the Netherlands, Malta or Ireland step up in this respect. German practice does not seem to be a likely candidate at present.

3.4 Conclusion

The future of the UK as the European hub for global group insolvency proceedings seems to solely depend on the issue of recognition as a foreign main proceeding in EU Member States and other European countries. Where such recognition is available, commonly based on an independent reassessment of the jurisdiction of English courts, the group-wide effects of a joint administration may well be secured by assurances of the English administrators (virtual secondary proceedings). Otherwise, entities of the group will find themselves placed in competing main proceedings with EU-wide effect only granted to the one in an EU Member State based on the EIR. Any parallel proceedings relevant for a group-wide strategy would need to be coordinated, but could not be concentrated in the UK. It remains to be seen whether court practice in an EU Member State will provide for more concentrated solutions in the tradition of English courts.

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