



C/M/S/

Law . Tax

Brexit – Consequences for Creditors’ Enforcement Options

January 2021



Contents

Introduction	2
Summary of considerations	3
Options post-Brexit	4
Checklist for finance documents	5
Reference lists	6
Your CMS contacts	7

Introduction

The UK left the European Union (EU) on 31 January 2020, but it is only now, after the transition period (which ended on 31 December 2020) that creditors start grappling with the effect of Brexit on distressed situations. What are the consequences of Brexit on enforcement options for creditors? What strategies may other stakeholders pursue in light of the new interaction of the UK and European restructuring and insolvency regimes? As the EU legislation relevant to restructuring and insolvency pre-Brexit, being the EU Recast Insolvency Regulation (EIR) and the Brussels I (Recast) Regulation, have ceased to apply to the UK from the end of the transition period (except in limited circumstances), the landscape looks very different from 1 January 2021.

We have sought to summarise in this note the key changes for creditors post-Brexit from a restructuring and insolvency perspective, focusing on their options in enforcement situations. As part of this, we have included on the next pages:

Options post-Brexit – a diagram to show the impact of Brexit on both UK and EU restructuring and insolvency processes.

Checklist for finance documents – a quick reference guide to the types of issues to look out for in finance documentation post-Brexit.

Reference lists – including the EU Member States, EEA States and Model Law Adopters.

For further detail, please also refer to the guidance issued by The Insolvency Service on 15 January 2021 entitled [Cross-border Insolvencies: Recognition and Enforcement in EU Member States from 1 January 2021](#).

This document is for general guidance only and does not constitute definitive advice. It is based on the law as at 25 January 2021.



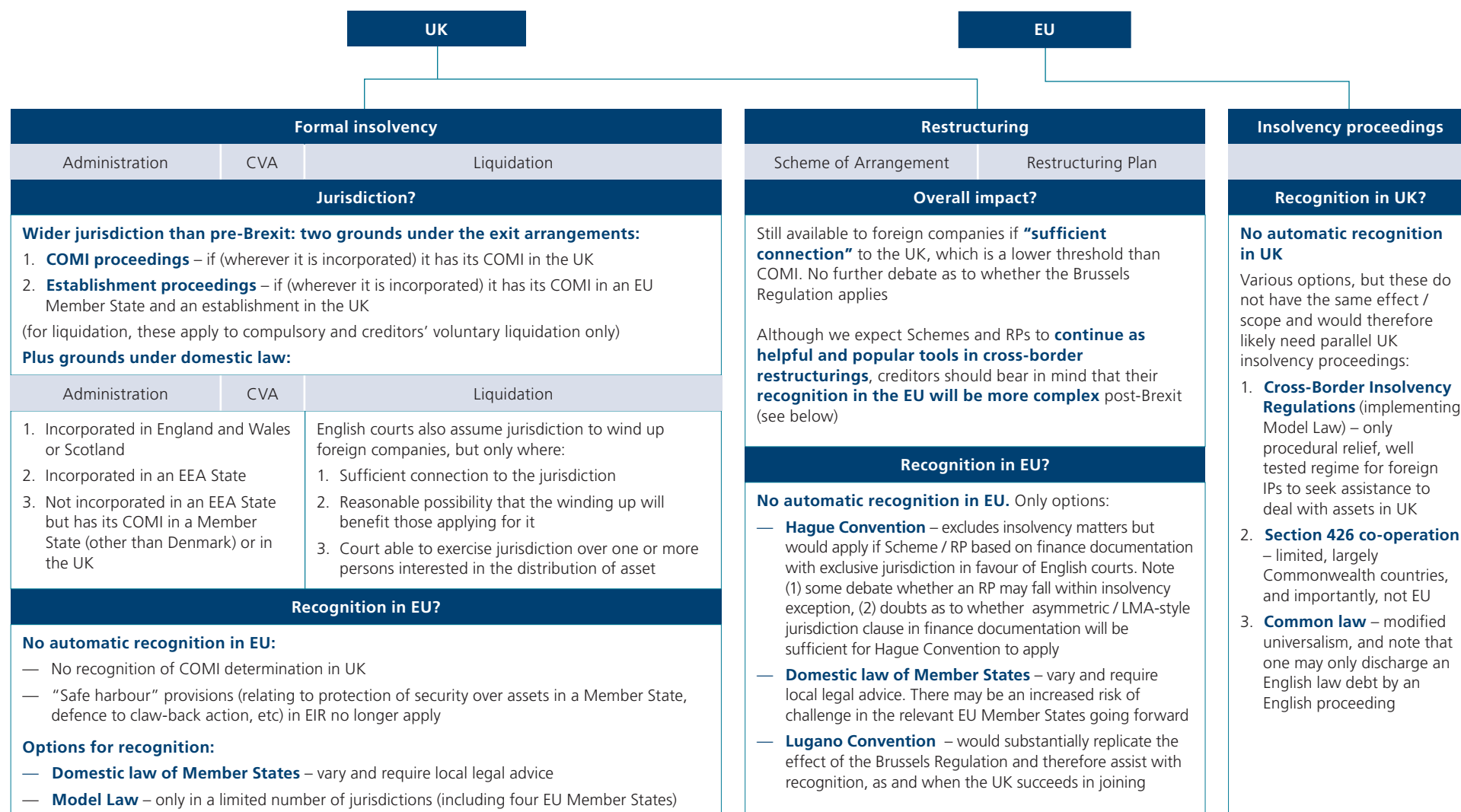
Summary of considerations

The effect of Brexit on restructuring and insolvency is to make cross-border restructuring more complicated, slower and potentially more expensive. This can be seen in a number of different areas:

- **UK insolvency procedures:** the UK courts now have jurisdiction in a wide range of new cases. For example, a Luxembourg entity with its COMI in Luxembourg and no establishment in the UK can now be placed in administration in the UK. However, these new proceedings will not enjoy automatic recognition in the EU. Local law advice will have to be sought on recognition in the relevant jurisdictions.
- **UK restructuring tools:** although we expect Schemes of Arrangement and Restructuring Plans (RP) to continue as helpful and popular tools in cross-border restructurings, creditors should bear in mind that their recognition in the EU will be more complex post-Brexit.
- **EU insolvency proceedings:** as these won't have automatic recognition in the UK, it may be necessary to apply for recognition under the Cross-Border Insolvency Regulations (CBIR) or commence concurrent UK proceedings.
- **Enforcement of judgments:** English judgments won't be as easily enforceable in EU jurisdictions as they were pre-Brexit, unless the finance documentation has exclusive jurisdiction clauses. Otherwise, enforceability will depend on local laws.
- **Finance documentation:** creditors should be mindful of a number of changes which will be necessary to finance documents post-Brexit.

We expect that there will be a **period of uncertainty** while some of these issues are resolved. We will continue to keep this under review and are happy to discuss any further implications.

Options post-Brexit



Checklist for finance documents



Jurisdiction?

As English judgments will no longer be enforceable in all EU Member States automatically, you will need to consider:

- Is it likely that a judgment on the contract will need to be enforced in an EU Member State? If so, in which Member State(s)?
- Does the contract have:
 - an exclusive jurisdiction clause – 2005 Hague Convention will apply, so that EU courts are obliged to recognise English judgment (note insolvency exception);
 - an asymmetric / one-sided exclusive jurisdiction clause (typical in LMA-style documentation) – doubt as to whether the 2005 Hague Convention applies.
- If plan to enforce outside of 2005 Hague Convention, take local advice as to ability, timing and cost implications, consider whether foreign law security involved and whether arbitration may be an option.
- The position will be improved should the UK succeed in joining the 2007 Lugano Convention.



Governing law?

Remember:

- EU courts (except Denmark) recognise choice of English law for both contractual and non-contractual obligations.
- Danish courts recognise choice of English law for contractual obligations only.
- The UK recognises the choice of any foreign law for both contractual and non-contractual obligations.



EU references?

Take a look at:

- References to the “European Union”, “EU” and “EEA” – does the UK need including separately?
- References to EU legislation and the need for UK legislative references.
- Definitions such as “Audit Laws”, “IFRS” and “VAT”.
- Representations concerning Centre of Main Interests and Establishments.



Bail-in?

You will need to:

- Include bail-in provisions in all finance documents governed by English law, if an EEA financial institution is or may become a party.
- Consider with local lawyers the inclusion of bail-in provisions in finance documents governed by the laws of EEA and non-EEA states (other than the UK) in which a UK financial institution may have a liability.

Reference lists

EU Member States					
Austria	Belgium	Bulgaria	Croatia	Cyprus	Czechia
Denmark*	Estonia	Finland	France	Germany	Greece
Hungary	Ireland	Italy	Latvia	Lithuania	Luxembourg
Malta	Netherlands	Poland	Portugal	Romania	Slovakia
Slovenia	Spain	Sweden			

EEA States		
All EU Member States along with:		
Iceland	Liechtenstein	Norway

Model Law Adopters					
EU Adopters:					
Greece	Poland	Romania	Slovenia		

Non-EU Adopters:					
Australia	Bahrain	Benin	Brazil	BVI	Burkina Faso
Cameroon	Canada	Central African Republic	Chad	Chile	Colombia
Comoros	Congo	Côte d'Ivoire	Democratic Republic of the Congo	Dominican Republic	Dubai International Financial Centre
Equatorial Guinea	Gabon	Gibraltar	Guinea	Guinea-Bissau	Israel
Japan	Kenya	Malawi	Mali	Mauritius	Mexico
Montenegro	Myanmar	New Zealand	Niger	Panama	Philippines
Republic of Korea	Senegal	Serbia	Seychelles	Singapore	South Africa
Togo	Uganda	United Kingdom	USA	Vanuatu	Zimbabwe

*Subject to certain opt-outs, including with regards to area of freedom, security and justice.



Your CMS contacts



Martin Brown
Partner, London
T +44 20 7367 2590
E martin.brown@cms-cmno.com



Glen Flannery
Partner, London
T +44 20 7524 6867
E glen.flannery@cms-cmno.com



Emma Riddle
Partner, London
T +44 20 7367 2563
E emma.riddle@cms-cmno.com



Peter Wiltshire
Partner, London
T +44 20 7367 2896
E peter.wiltshire@cms-cmno.com



Sian Aitken
Partner, Edinburgh
T +44 131 200 7385
E sian.aitken@cms-cmno.com



Julian Turner
Consultant, London
T +44 20 7067 3552
E julian.turner@cms-cmno.com



Timea Scholey
Senior Associate, London
T +44 20 7367 2519
E timea.scholey@cms-cmno.com



Kelly Rothwell
Senior Associate, London
T +44 20 7367 3857
E kelly.rothwell@cms-cmno.com



Law . Tax

Your free online legal information service.

A subscription service for legal articles
on a variety of topics delivered by email.
cms-lawnow.com

.....
CMS Cameron McKenna Nabarro Olswang LLP
Cannon Place
78 Cannon Street
London EC4N 6AF

T +44 (0)20 7367 3000
F +44 (0)20 7367 2000

The information held in this publication is for general purposes and guidance only and does not purport to constitute legal or professional advice.

CMS Cameron McKenna Nabarro Olswang LLP is a limited liability partnership registered in England and Wales with registration number OC310335. It is a body corporate which uses the word “partner” to refer to a member, or an employee or consultant with equivalent standing and qualifications. It is authorised and regulated by the Solicitors Regulation Authority of England and Wales with SRA number 423370 and by the Law Society of Scotland with registered number 47313. It is able to provide international legal services to clients utilising, where appropriate, the services of its associated international offices. The associated international offices of CMS Cameron McKenna Nabarro Olswang LLP are separate and distinct from it. A list of members and their professional qualifications is open to inspection at the registered office, Cannon Place, 78 Cannon Street, London EC4N 6AF. Members are either solicitors or registered foreign lawyers. VAT registration number: 974 899 925. Further information about the firm can be found at cms.law

© CMS Cameron McKenna Nabarro Olswang LLP

CMS Cameron McKenna Nabarro Olswang LLP is a member of CMS Legal Services EEIG (CMS EEIG), a European Economic Interest Grouping that coordinates an organisation of independent law firms. CMS EEIG provides no client services. Such services are solely provided by CMS EEIG’s member firms in their respective jurisdictions. CMS EEIG and each of its member firms are separate and legally distinct entities, and no such entity has any authority to bind any other. CMS EEIG and each member firm are liable only for their own acts or omissions and not those of each other. The brand name “CMS” and the term “firm” are used to refer to some or all of the member firms or their offices. Further information can be found at cms.law