Spring 2021
R3, the Association of Business Recovery Professionals | **www.r3.org.uk/recovery**

RECOVERY

BREXIT

What do you think?

Readers' views are welcome. Have an opinion about a burning issue? Want to comment on articles or RECOVERY itself? Please contact me on **recovery@r3.org.uk**.

From the editor

My last column was written in the middle of lockdown two and this column is written while we remain in lockdown three. Like the majority of sequels, lockdowns have only got worse with each one!

However, in an effort to keep Covid-19 out of the news for a week or so, the government managed to avoid a 'no-deal' scenario by delivering a Christmas present to us all in the form of the Brexit deal on Christmas Eve last year. Unsurprisingly, therefore, this edition focuses on Brexit and the implications for our industry.

For some reason, the Irish border, trade agreements and fishing rights were given priority over recognition of English insolvency proceedings in the EU. We are therefore currently in somewhat of a limbo in respect of insolvency proceedings begun from the start of this year that require recognition.

We have two articles exploring the current position from Stefan Ramel and Howard Morris and Jai Mudhar, starting on pages 18 and 22 respectively. In addition, on page 24, Morgan Bowen looks at the current position on registering UK judgments in the EU. Chris Laughton provides us with an insolvency practitioner's view of the practical difficulties post-Brexit from page 26 and Adam Plainer highlights the positives of the Brexit brave new world starting on page 28.

Linked to Brexit, Paul Davies looks at restructuring in the retail sector on page 32 and our sector-focused article gives the views of Peter Davies and Paul Zalkin on the aviation industry on page 36.

Struggling to keep up with the bewildering number of cases on invalid administration appointments? You are not alone! Rachael Earle talks us through the latest cases and emerging trends in the legal update on page 10. On a topic that I can personally testify to the pitfalls of, Cory Bebb and Beverley Bell explain the commercial vehicle operator licensing regime on page 34.

This month, our regular contribution from INSOL Europe focuses on its Young Members Group and their experiences through the pandemic (page 40) and Simeon Gilchrist examines fraud in connection with the government financial support schemes on page 41.

As is customary at this time of year, we summarise the JIEB results (congratulations to those listed) and this edition's interview is of the IPA's CEO, Michelle Thorp, conducted by Colin Haig (page 45).

Let us hope that our European neighbours give us a helping hand in an ever-shrinking business world, where we need their co-operation and assistance to do our jobs and get the best result for creditors in their respective countries. You may call me a dreamer, but I am not the only one…

NEIL SMYTH is a partner at Mills & Reeve and is the editor of *RECOVERY*.

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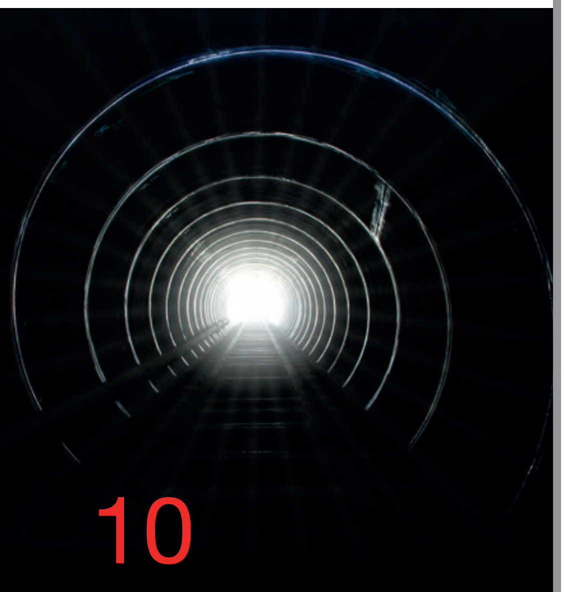

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President's column

R3 president **Colin Haig** looks at R3's plans for – and achievements so far in – 2021.

Last year went quickly and, if the opening months of 2021 are anything to go by, this one will as well. I don't think anyone would deny 2020 was challenging for R3, but we've risen to the challenges and evolved in a way that sets us up well, I believe, for the future.

Evolving our training offering

We began 2021 with the launch of the new R3 Training Academy, our training offering that provides online and on-demand training, which builds on the successful R3 training courses that have been a key part of many people's professional education over the last 30 years (and once we can hold in-person sessions again they'll be delivered face to face).

We launched the Academy at the start of January with a Virtual Training Festival, which was attended by more than 350 people from across the profession. Since the launch, we've had a number of enquiries about courses and certifications.

Building on past successes

Last summer's programme of webinars has provided a hugely useful framework and springboard for our new 'Magnificent Seven' webinar series, covering areas such as business rescue, tackling fraud and energy supplier insolvencies. They are available to R3 members for free. I was one of the presenters on the first of these on February 3 2021 and was really pleased with the number of people who attended and the level of engagement throughout.

Speaking of well attended and highly engaged events, November's hugely successful virtual SPG Forum has provided the framework for this year's virtual Annual Conference in May, and the Joint Fraud Conference that we ran with the Fraud Advisory Panel and INSOL Europe.

> **"I don't think anyone would deny 2020 was challenging for R3, but we've risen to the challenges and evolved in a way that sets us up well, I believe, for the future."**

Promoting the profession

The economic turmoil wrought by the Covid-19 pandemic has put our profession under the brightest spotlight since the 2008 recession, and R3 has been at the forefront of briefing journalists, stakeholders and parliamentarians about the profession and its work.

We gave the profession a voice as the two largest pieces of legislation affecting it for 20 years, the Corporate Insolvency and Governance Act and the return of Crown preference, completed their parliamentary journey. We also briefed a range of national, local and trade journalists about new legislation, insolvency processes and what the government support schemes meant for businesses and individuals throughout the year.

> **"We gave the profession a voice as the two largest pieces of legislation affecting it for 20 years, the Corporate Insolvency and Governance Act and the return of Crown preference, completed their parliamentary journey."**

As a result, we've been a regular commentator in a wide range of stories about insolvency and restructuring, held (virtual) meetings with MPs and peers, been mentioned in debates in Parliament and, I hope, successfully explained the profession's role in rescuing jobs and businesses and in supporting the economy during this difficult time.

The spotlight on the profession is only going to get brighter this year – journalists and parliamentarians will be watching us in a way they haven't for a long time.

R3 will continue to fight insolvency and restructuring's corner, but the profession itself will need to band together and support each other as those outside the profession challenge and scrutinise – for whatever reason – what we do and why we do it.

Helping the UK get back to business

Our Back to Business UK campaign is also something I've been hugely proud to be involved in over the last year. Working with

> **"Our Back to Business UK campaign is also something I've been hugely proud to be involved in over the last year."**

colleagues that include Alison Goldthorp, Paul Zalkin and Mark Phillips QC, as well as my old BDO compatriot Mark Shaw, we've been able to partner with organisations such as the IoD, the FSB, and the CICM to provide webinars for their central and regional branches about the benefits of engaging with the profession as early as possible.

Given the challenges businesses face, this activity will be crucial, I believe, in helping directors and business owners understand why they should seek our advice while they still have time to manoeuvre rather than leaving it until it's too late and options are limited.

Help us help you

As I mentioned, one of the downsides of lockdown has been I haven't been able meet as many of you as I would have liked. Our virtual events have been well attended, but they aren't quite the same as having a chat at an in-person event – or between sessions at a conference.

These conversations are particularly useful to those of us on R3's executive committee – they mean we know what you think about what we're doing, and where we can improve.

Obviously, we're likely to be virtual for a little while longer, so I'd encourage anyone with any views or suggestions about what R3 could do, what we could do more of or what we could do better to email **president@r3.org.uk**.

We're in a very different world to this time last year, folks, so your input and ideas are even more welcome than they have been previously. □

COLIN HAIG is the president of R3 and head of restructuring at Azets.

MARSH

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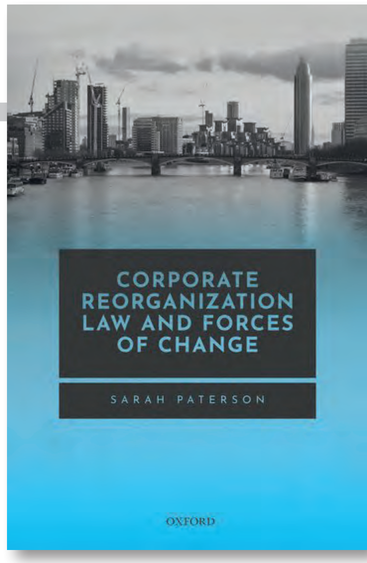

Corporate Reorganisation Law and Forces of Change

Edition First **Author** Sarah Paterson **Publisher** Oxford University Press
ISBN 978 0 19886 036 5 **Price** £80

A lot of practitioners have views, often strong, on the topics that Sarah Paterson's newly published book *Corporate Reorganisation Law and Forces of Change* examines. The book aims to fill the gap between 'how the concepts that are engaged in the corporate reorganisation law debate connect with the real world of corporate reorganisation'. We created laws to solve a set or problems and we have to use them to solve different problems with different stakeholders involved. Understand this and we can better reform the law. As practitioners isn't this a *cri de coeur*? The tools we've been given don't do the job as well as we would like.

Paterson's approach is comparative, between corporate reorganisation law in the US and the UK. In the US there is an active, if not febrile, debate about reforming Chapter 11 driven by a comprehensive report of the American Bankruptcy Institute on its inadequacies and the very different position taken by the Loan Syndications and Trading Association. In the UK we have introduced changes that shift our law towards a much more Chapter 11-ish character so that we can do better in the annual World Bank rankings, a trend that's reflected in Europe, Singapore and beyond.

From the beginning of the book the author makes sure the reader keeps in mind the fundamental, ideological tug-of-war in the legislature, the courts and the academy between the 'economists' and the 'progressives'. The economists see the purpose of the law as to stop a frantic struggle between creditors to seize assets from a failing company and then to ensure the allocation of the debtor's resources to the highest and best use. The progressives are all for intervention to stop the race for assets but then favour the weakly adjusting creditors and are much more conscious of the economic and social felicity of saving a company rather than devouring its assets in a Darwinian survival of the fittest.

One of Paterson's most interesting points is that there are archetypes in the reorganisation world. Traditionally one thinks of the unsecured creditor, far down the priority of repayment waterfall, as ill-informed and inadequately resourced to protect its interests. While once this may have been true, and is still accurate when one considers some trade creditors, it is a mental picture that doesn't fit with a specialist hedge fund buying into distressed, unsecured bond debt.

Paterson describes the rise of leverage, the growth in debt trading, the extent of secured credit and the appearance of specialist investors in distressed debt. These changes are facts on the ground with which practitioners have to wrestle, courts reconcile and academics rationalise. The laws we have made to solve reorganisation problems have to be mobilised and adapted to meet the needs of a world not pictured just a few decades ago. A friend of mine, a lawyer, Mike Lacey, has described the challenge for lawyers as not to think outside the box but inside the box. What clients don't want is for their advisers to take them on an expensive adventure to invent new law. The goal has to be to use the laws and techniques we know and that work to find solutions.

In the US, Paterson observes, the s363 sale and the exchange offer have become means of achieving things a Chapter 11 can't do or can't achieve as cheaply and for which in its design there wasn't perceived to be the need. In this way the highly leveraged capital structure of a debtor can be flexed or changed. Some may accuse the author of a nationalistic chauvinism but the charge doesn't stand scrutiny because of her meticulous research and fully fleshed argument. She recognises the comparative success of the English scheme of arrangement as a low-cost means to de-lever a highly borrowed company.

The book also considers other changes that were not envisaged by the drafters of Chapter 11 or English reorganisation laws and which are even more recent; insider dealing, transparency and false markets. These are factors that weigh heavily on the freedom of investors and their ability to participate in reorganisation negotiations while also being free to buy and sell interests in the debtor. And Paterson presciently recognises in the book that our reorganisation regimes will need to cope with the economic consequences of the current pandemic.

> **"The laws we have made to solve reorganisation problems have to be mobilised and adapted to meet the needs of a world not pictured just a few decades ago."**

The reader, whether progressive- or economist-minded, is going to reach the ineluctable view that developed economies need corporate reorganisation mechanisms responding to grownup stakeholders in complex capital structures, strongly adjusting, sophisticated investors and the need is for the mechanism to work before the financial contagion reaches the operating companies. This isn't a text book; it's a book for people who work in and with the restructuring world. Because it is a book, it is able to fill out the arguments that Paterson has discussed in previous articles and talks and allows her to deploy the evidence that support and make her arguments. It is an important contribution to a discussion we need to continue as we consider how we can use the legal tools to deal with the problems business and the economy now face.

HOWARD MORRIS is head of restructuring at Morrison & Foerster LLP.

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Rescue Recovery Renewal

24 March - Power to the People! Insolvency of Electricity & Gas Suppliers

Our panel of experts will be taking a look at a number of well publicised failures of energy suppliers over the last few years and, together with Matt Higgins and Michael Bate of OFGEM, will consider what is driving this, the role of OFGEM, and what the regulatory and practical issues are that an IP may face in dealing with these businesses.

20 April - Getting Creative Together in Tackling Fraud

Grant English, HMRC Fraud Investigation Service will be joined by Steve Illes, Anthony Batty & Co to discuss how an effective working partnership maximises opportunities to tackle tax fraud and achieve realisations for creditors. They will outline how an effective public private partnership helped to recover c£2m of assets at no premium cost to the liquidation estate. Grant will also outline the work and objectives of the R3/HMRC Tax Fraud Forum.

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6 July - CVAs - Current Use and Their Evolution

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Is it all Doom and Gloom for the Distressed Education Sector?

Aviation Insolvencies

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RECOVERY

Correction

On the cover of *RECOVERY* Winter 2020 we included a timeline of past R3 presidents from 1990–2020. Due to a technical issue while uploading images for publication, Gordon Stewart (R3 president 1996–1997) was unintentionally omitted from this timeline. We immediately updated the digital edition online once we realised the error, but were unable to do so ahead of press for the paper edition. *RECOVERY* would like to apologise to both Gordon and the readers for this error and any unintended offence caused.

Void or defective appointments: is there a light at the end of the tunnel?

Rachael Earle reviews the case law and judgments that have plagued IPs for more than a decade and offers a tiny hope for future consistency.

After nearly 15 years of contradictory first instance decisions, a consistent line of authority does appear to be emerging that confirms a failure to comply with a procedural requirement in schedule B1 renders the administrators' appointment defective and not void. However, this issue is likely to continue to plague insolvency practitioners and their advisers until it is considered by the Court of Appeal

The problem with the requirements in respect of out-of-court appointments, as set out in schedule B1, is that they do not specify the consequence of a failure to comply and this has led to uncertainty.

In *Re Tokenhouse* [2020] EWHC 003171 (Ch), ICC Judge Jones was concerned with a failure to comply with paragraph 26(1) of schedule B1. He noted that:

> *[31] '… the underlying problem is the tension between: (i) the normal meaning of the words used within those provisions strongly suggesting that non-compliance with their out-of-court procedural requirements should prevent an appointment being effective; and (ii) the fact that this may have a disproportionate result when compared with the prejudice caused by breach and, even more importantly, may adversely affect a company's ability to achieve the purposes it would have been likely to achieve had the appointment been valid.'*

and that

> *'[35] the tension has resulted in … "conflict of judicial opinion" in cases which have considered (in the context of the application of principles of statutory interpretation) whether there was power to make an appointment or if an appointment was made and, to the extent that there was an appointment: (i) whether the provisions requiring notice provide for the consequences of breach; or, if not, (ii) the plain meaning overrides any contrary purpose arguments; or (iii) insofar as purpose is relevant, whether non-compliance with the notification requirement(s) must be a fundamental breach because the absence of notice cannot be cured and, certainly in the case of a charge holder, the rights lost cannot be revived; or (iv) whether the breach is not fundamental taking into consideration it is procedural and/or the overriding purpose of achieving the aims of an administration.'*

> **"The reasoning of Norris J in *Re Euromaster Limited* was approved in the case of *Re Melodius Corporation* [2015] EWHC 621 (Ch)."**

This has caused the editors of *Sealy and Milman* (23rd Ed) to note in the commentary to paragraph 26 that:

'The question whether the failure to comply with the notice requirements of para 26 inevitably invalidates the appointment of the administrator has been much debated in recent cases at first instance, and remains the subject of controversy. Only a ruling of a higher court can resolve the current impasse.'

HHJ Davis-White QC, sitting as a judge of the High Court, in *Re ARG Mansfield Limited* [2020] EWHC 1133 (Ch) completed a detailed review of the conflicting authorities on the consequences of a failure to comply with the requirements of schedule B1 at paragraphs [57] to [88] of his judgment.

Editor recovery@r3.org.uk

The problem with the requirements in respect of out-of-court appointments is that they do not specify the consequence of a failure to comply and this has led to uncertainty.

Case law and appointments

The key, recent cases on the issue can be summarised as follows:

In *Re Ceart Risk Services Limited* [2012] EWHC 1178 (Ch), Arnold J was concerned with a provision of the Financial Services and Markets Act 2000, which prohibits appointment under paragraph 22 over a regulated company without the consent of the FCA. Arnold J was referred to and considered the conflicting authorities on the consequences of a failure to comply with paragraph 26(2) of schedule B1 (*Hill* v. *Stokes plc* [2010] EWHC 3726 (Ch), *Re Virtualpurple Professional Services Ltd* [2011] EWHC 3847 (Ch) and *Re MG Global Overseas Finance Ltd* [2012] EWHC 1091 (Ch) on the one hand, compared to *Minmar (929) Ltd* v. *Khalatschi* [2011] EWHC 1159 (Ch) and *National Westminster Bank plc* v. *Msaada Group* [2011] EWHC 3423 (Ch), [2012] BCC 226 on the other).

The Soneji approach

Arnold J followed the approach to statutory interpretation in *R* v. *Soneji* [2005] UKHL 49 and identified the first step as being to identify the purpose of the requirement to obtain consent and the next step as being to identify the consequences of non-compliance and to consider whether Parliament intended the outcome to be total invalidity (the Soneji approach). Here, Arnold J contrasted the fact that non-compliance would not have serious consequences if post-appointment consent could be obtained with the problems that invalidity could cause to the detriment of creditors' interests. His decision was that Parliament intended that the defect resulting from the breach could be cured if a notice of consent was subsequently obtained.

Although this decision concerned provisions in the FSMA, the essential reasoning of Arnold J is of general application to the construction of schedule B1.

In *Re Eco Link Resources Limited (in CVL)* [2012] BCC 731, HHJ Cooke was concerned with a second floating charge holder's failure to give notice to a prior charge holder as required by paragraph 15 of schedule B1. HHJ Cooke followed Arnold J's decision in *Re Ceart Risk Services Limited* and applied the Soneji approach. However, in doing so, he concluded that Parliament must have intended a breach of paragraph 15 to mean that an appointment will be invalid; that was because, in his view, the statutory requirement was a pre-condition of appointment failure to comply with, which did render the appointment by the second charge holder invalid from the beginning.

In *Re Assured Logistics Solutions Limited* [2011] EWHC 3029 (Ch), HHJ Purle QC was concerned with the validity of an appointment where there was no charge holder falling within paragraph 26(1) but notice had not been given to the company as apparently required by paragraph 26(2). If notice was required to be given, he considered that a failure to do so was not so fundamental as to require the purported appointment to be a nullity.

In *Re BXL Services* [2012] EWHC 1877, HHJ Purple QC had to deal again with question of the effect of a failure to give notice of an intention to appoint to prescribed persons under paragraph 26(2) where there was no person to whom notice had to be given under paragraph 26(1). He concluded that if there was a requirement to give notice, the failure to do so was not such as to result in the appointment being invalid.

Re Euromaster Limited

In *Re Euromaster Limited* [2012] EWHC 2356 (Ch), Norris J was concerned with an appointment made 11 business days after filing the notice of intention to appoint when paragraph 28(2) provides that an administrator 'may not' be appointed under paragraph 22 after the period of ten business days, beginning with the date the notice is filed under paragraph 27(1). Norris J applied the Soneji approach to statutory interpretation and concluded (in summary) that:

(1) considerable weight should be given to the consideration that the object of introducing out-of-court appointments was to streamline the process of business rescue;
(2) it is highly undesirable to have a multiplicity of circumstances in which the appointment of an administrator is automatically invalidated (as he also indicated in *Re Virtualpurple*);
(3) schedule B1 contains a mixture of provisions, some of which are naturally read as defining the circumstances in which the appointment arises and some of which are naturally read as prescribing procedural requirements that must be fulfilled before the appointment is properly made. This distinction is reflected in the terms of schedule B1 itself as regards appointments by directors. Paragraphs 22–25 inclusive specify when it is that the directors of the company have the power to appoint administrators; paragraphs 26–32 set out the procedural requirements for the exercise of the power; the structure of the schedule suggests, albeit not strongly, that the court should treat non-compliance with the requirements set out in paragraph 28 as leading to an irregularity rather than nullity.

The reasoning of Norris J in *Re Euromaster Limited* was approved in the case of *Re Melodius Corporation* [2015] EWHC 621 (Ch) by Sir Terence Etherton when Chancellor.

Continuing cases

In *Re Eiffel Tower Steelworks* [2015] EWHC 511 (Ch), Andrew Hochhauser QC was concerned with the validity of an appointment in circumstances where notice had not been given to the company under paragraph 26(2). He concluded that if there was a requirement to give notice, failure to do so did not result in the administration being declared a nullity; it was simply a remediable defect. In doing so he followed 'the approach of Norris J at [18](b) in *Virtualpurple*, Arnold J at [14] of *Re Ceart Risk Services*, HHJ Purple QC in both *Re Assured* at [33]–[38] and *Re BXL Services* [11]–[14].

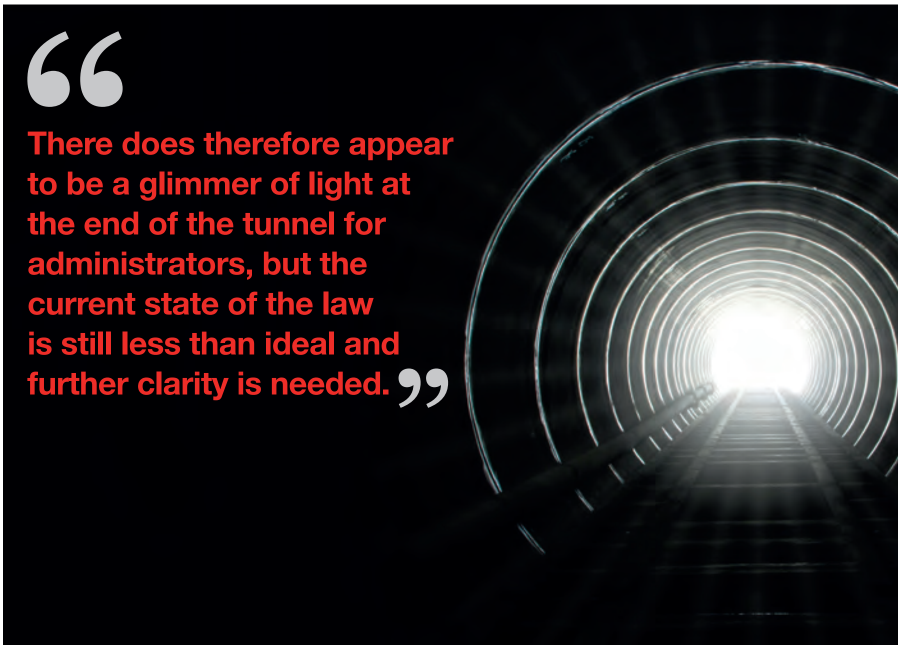
In *Re Spaces London Bridge Limited* [2018] EWHC 3099 (Ch), Nugee J was concerned with the requirement in r3.23 of the Insolvency (England and Wales) Rules 2016 (IR2016) that a notice of appointment filed with the court must specify the date and time of the appointment of administrator. He held that there had in fact been no breach of the statutory provisions and the appointment was valid. However, Nugee J went onto consider (if he was wrong on that) whether r12.64 of the IR 2016 would rescue the position. He referred to *Re Euromaster Limited* and approved the 'well known distinction between matters which merely go to irregularity and matters that go to fundamental validity'.

In *Re ARG (Mansfield) Limited* [2020] EWHC 1133 (Ch), HHJ Davis-White QC adopted the Soneji approach but, in doing so, he disagreed with Arnold J's decision in *Re Ceart Risk Services Limited* and found that

Arnold J identified the first step as being to identify the purpose of the requirement to obtain consent and the next step as being to identify the consequences of non-compliance and to consider whether Parliament intended the outcome to be total invalidity.

a failure to obtain the FCA's consent under s362A Financial Services and Markets Act 2000 was a fundamental flaw that invalidated the appointment.

In *Re Arlington Infrastructure Limited* [2020] EWHC 3123 (Ch), Andrew Sutcliffe QC sitting as judge of the High Court was concerned with a situation whereby junior creditors did not obtain prior written consent of senior creditors pursuant to a deed of priority before appointing administrators. The qualifying floating charges were therefore not enforceable by the junior creditors at the relevant time and the appointments did not comply with paragraph 16 of schedule B1. Sutcliffe relied on the distinction drawn by Norris J in *Re Euromaster Limited* between the provisions of schedule B1, which go to the power to appoint and those which prescribe merely procedure requirements that must be fulfilled before the appointment is properly made. He held that this was not a case where there had been a failure of procedure, but rather there had been a fundamental defect (if the senior creditors consent was now sought it would not be provided) and the appointment was a nullity.



Conflict to consistency

Accordingly, despite the conflicting authorities in this area, a consistent line does appear to be emerging:

(1) The Soneji approach has been consistently followed by the court when considering the construction of schedule B1.

(2) The purposive approach adopted by Arnold J in *Re Ceart Risk Services Limited*, that Parliament should be taken to have intended that failure to comply with a procedural requirement constitutes a defect in the appointment that is capable in appropriate cases of being cured subsequently, has been consistently followed (*Re Assured Logistics Solutions Limited* [2011] EWHC 3029 (Ch), *Re BXL Services* [2012] EWHC 1877 and *Re Eiffel Tower Steelworks* [2015] EWHC 511 (Ch)).

(3) The distinction drawn between provisions which define the circumstances in which the appointment arises and those which prescribe merely procedural requirements by Norris J in *Re Euromaster Limited* has been consistently approved (*Re Melodius Corporation* [2015] EWHC 621 (Ch), *Re Spaces London Bridge Limited* [2018] EWHC 3099 (Ch) and *Re Arlington Infrastructure Limited* [2020] EWHC 3123 (Ch)).

This approach is consistent with the persuasive and recent decision of ICC Judge Jones in *Re Tokenhouse VB Limited* [2020] EWHC 003171 (Ch) on the specific issue of a failure to comply with paragraph 26(1). ICC Judge Jones conducted a thorough review of the conflicting authorities and, applying the Soneji approach, he concluded that a breach of paragraph 26(1) was a breach of a procedural requirement that renders the appointment defective but not void.

The judgment of ICC Judge Jones was then followed by Deputy ICC Judge Frith in *Re NMUL Realisations Limited* [2021] EWHC 94 (Ch). In that case, Deputy ICC Judge Frith was concerned with the validity of an appointment in circumstances where there had been a failure to give notice to the holder of prior security pursuant to paragraph 15 and, having reviewed the authorities, he concluded that: '*just as ICC Judge Jones concluded in Tokenhouse that the failure to comply with paragraph 26 was not a fundamental defect but an irregularity giving rise to a formal defect that can be remedied by an order of the court under the provisions of r12.64 of the rules so I find that a failure to give notice under paragraph 15 can be dealt with in the same way.*' Deputy ICC Judge Frith did not therefore follow *Eco Link Resources Limited*, which he considered to have been superseded by *Re Euromaster Limited*.

There does therefore appear to be a glimmer of light at the end of the tunnel for administrators, but the current state of the law is still less than ideal and further clarity is needed, particularly in relation to which provisions are, when properly construed, merely procedural requirements.

ICC Judge Jones emphasised in his judgment that 'any future case which needs resolution of the conflict should be listed at High Court Judge level.'

Future cases and the need for appeal

The author of this article is acting in a case which is due to be heard before a High Court judge in early spring and which requires the court to determine whether a breach of paragraph 26(1) renders the appointment void or defective (so watch this space). It is hoped that a High Court Judge would adopt the reasoning of ICC Judge Jones in *Re Tokenhouse* because:

(1) The consequences for breach should be proportionate. If the appointment is defective because the charge holder has not been given notice, the charge holder can still apply to court to cure the defect and replace the office-holders with their own choice. If, on the other hand, the appointment is rendered automatically void, this may have serious consequences for the acts already taken (those acts may potentially have to be unwound, which is difficult when, for example, assets have been sold).

(2) The overriding consideration must be the importance of there being an administration in the first place.

(3) It would remove the need for parties to resort to applications for retrospective appointments 'in the event that the appointment is invalid' (see for example *Re Elgin Legal Limited* [2016] EWHC 2523 (Ch) and *Petit v. Bradford Bulls (Northern) Limited* [2016] EWHC 3557 (Ch)).

(4) The court's judgment will be consistent with the approach taken in most of the recent High Court authorities and in particular the decision of Norris J in *Re Euromaster Ltd*.

However, although further guidance from the High Court is obviously welcome, this issue is likely to continue to plague IPs and their advisers unless and until it is considered by the Court of Appeal. ◻

RACHAEL EARLE
is a barrister at Wilberforce Chambers.

Legal Q&A

James Hyne and **Melania Constable** answer your Brexit-related insolvency queries.

Q I have been asked to act as the liquidator of a company whose registered office is in France, but clearly has its COMI in England. Where do I stand post-Brexit?

A Boris' Brexit deal was reached on 24 December but it did not provide for the continued recognition or cooperation in respect of collective restructuring and insolvency proceedings. As a result, the Insolvency (Amendment) (EU Exit) Regulations 2019 (exit regulations) deal with the position on recognition, and came into force at the end of the transition period (specifically at 11.00 pm on 31 December 2020).

The exit regulations provide that the UK will cease to be within the scope of the Recast European Insolvency Regulation (recast regulation), although it transposes certain parts of the recast regulation into UK domestic law. The exit regulations allow an EU member state debtor company to be placed into insolvency proceedings in the UK if the debtor has either (a) its COMI in the UK; or (b) its COMI is in an EU member state and has an establishment in the UK.

Therefore, in the example above, a company incorporated in France with a COMI or establishment in the UK can still be wound up in England. In addition, if insolvency proceedings were first commenced in France on or after 31 December 2020, the English courts would continue to recognise the EU member state insolvency proceedings provided it meets the tests laid out in the exit regulations that it has its COMI or establishment in the UK. The English courts may also recognise proceedings under the Cross-Border Insolvency Regulations 2006 (CBIR).

However, any such proceedings will not necessarily benefit from automatic recognition in the EU as the exit regulations have no effect in the EU. This may have detrimental consequences, such as creditors within EU member states seeking to enforce against assets in the EU as the (English law) moratorium on legal proceedings will not have cross-border effect on the basis that protections in the recast regulation (which provides that the laws of the member state where insolvency proceedings are commenced shall prevail) no longer apply to the UK.

Q I am an office-holder appointed over a UK-registered company with an establishment in the EU. How do I obtain recognition in the EU?

A While the UK (as part of its domestic law) will continue to recognise EU member state insolvency proceedings, UK insolvency proceedings opened after 31 December 2020 will no longer be automatically recognised by EU member states, as the UK will no longer be treated as an EU member state for the purposes of the recast regulation. This lack of reciprocity in recognition will inevitably make things more complex, time consuming and costly for UK IPs who deal with EU cross-border insolvencies.

The recast regulation will continue to apply to EU member states. From the standpoint of the EU member states, Brexit has only had the effect of removing the UK as a member state under that regulation. Accordingly, after 31 December 2020, the UK will cease to be within the scope of the recast regulation, and EU member states will not be bound to recognise main or secondary proceedings opened in the UK on the ground of a debtor's COMI or establishment. Recognition under the UNCITRAL Model Law on Cross-Border Insolvency (model law) will have limited application, as only four EU member states have so far adopted the model law into their domestic law (namely Greece, Poland, Romania and Slovenia) and it is not automatic even in these countries; an application in those countries' courts will still have to be made.

Therefore, the position for obtaining outbound recognition will vary depending on the jurisdiction and domestic law involved. Broadly speaking, it appears the likely process will fall into three potential categories:

Model law: an application can be made for recognition under the domestic law of those EU member states that have adopted the model law into their domestic law (currently only four).

COMI in the UK: some EU member states are only likely to give effect to residual aspects of a UK insolvency where the relevant EU member state's national court determines that the debtor's COMI is in the UK.

As an aside, there may be inconsistencies as to how the COMI is determined as between the UK and EU member states. If the EU court determines that the debtor's COMI is in the jurisdiction of an EU member state (as opposed to the UK), then it will be obliged to apply the provisions of the recast regulation, and the EU insolvency commenced in that jurisdiction would be recognised across the EU but the UK insolvency proceedings would not.

It will not matter to the EU member states that an English court rules that a debtor's COMI is in the UK. If this contradicts with the ruling in an EU court, then the EU court's determination will prevail and be binding across the EU member states as provided for under the recast regulation.

Reciprocal recognition: some countries are only likely to give effect to residual aspects of a UK insolvency where the court proceeding by which the insolvency was commenced is itself recognised.

In general terms, for 'outbound' recognitions, court proceedings will likely be required as well as local legal advice in the relevant jurisdictions where the debtor's assets are located. Unless and until such time as more EU member states adopt the model law, there is likely to be a significant imbalance to the application for recognition and enforcement of UK insolvencies across the EU member states. ◻

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Recent case summaries

The latest insolvency update from **Nicola Allsop**.

CORPORATE INSOLVENCY

***Macclesfield Town Football Club Limited (in liquidation)* [2020] EWHC 3605 (Ch)**

An application for a validation order pursuant to s127 of the Insolvency Act 1986 came before Chief ICC Judge Briggs in *Macclesfield Town Football Club Limited (in liquidation)* [2020] EWHC 3605 (Ch). The Club had granted, further to an agreement for a loan facility of up to £180,000:

(1) a debenture to HNW Lending Limited (HNW) dated 21 June 2019 (the debenture) registered at Companies House on 25 June 2019; and

(2) a legal charge to HNW dated 21 June 2019 (the legal charge) relating to Macclesfield's football ground, Moss Rose.

It was accepted that these transactions involved dispositions of the Club's property and were, therefore, void in light of a winding-up petition having been presented by HMRC on 31 January 2019. It is worth noting that HMRC did not, initially at least, pursue the winding-up petition. Had HMRC's petition been dismissed and a further petition not presented until after the impugned transactions, then the transactions would have been unaffected by s127. However, upon HMRC deciding not to pursue the petition, a supporting creditor applied to prosecute it and the court made an order for substitution. This meant that the original petition (and presentation date) was preserved. It seems that a third substitution was made in favour of HMRC on 8 May 2020.

The loan was not repaid and when the Club entered liquidation on 16 September 2020, the debenture and legal charge remained registered.

Had HMRC's petition been dismissed and a further petition not presented until after the impugned transactions, then the transactions would have been unaffected by s127.

By application made on 16 October 2020, HNW sought a retrospective validation order in respect of the debenture and legal charge.

The court noted that, although its discretion was at large, there were certain principles arising from a number of cases as to how the discretion ought to be exercised. Those principles can be summarised as follows:

(1) The basic principle of *pari passu* distribution among creditors should be respected.

(2) A payment due to a particular supplier may be sanctioned where it is necessary to ensure future supply and the continuance of trading is considered to be in the best interests of creditors.

(3) Transactions that do not diminish or dissipate the company's net assets, such as post-petition transactions for full value or transactions that have preserved assets, will normally be validated.

(4) Where parties are unaware that a petition has been presented, the disposition was in good faith and in the ordinary course of business, that is a powerful factor in support of the transaction being validated but is not sufficient by itself; it must also be shown that the transaction was one which was likely to be for the benefit of creditors generally.

(5) When considering a post-petition payment to obtain delivery of goods purchased pre-petition, the court will not look simply to the particular goods but also to the ability of the company to obtain further supplies and thereby continue the business and earn revenue.

(6) In addition to the validation of a particular disposition or contract, the court can authorise the general continuance of trading.

The key point

The interesting point in *Re Macclesfield Town Football Club* was whether, in an application for retrospective validation of a transaction, the court should assess if a validation order would have been made if the court had been asked the question at the time of the transaction or whether it should look at the matter with the benefit of hindsight.

The chief ICC judge adopted the hindsight principle, although he sought 'not to be coloured too much by the particular outcome.' This allowed a flexible approach and led to the validation of the transactions because they 'had the potential to benefit the general body of creditors and enabled [the Club] to trade on terms that [the director] would not seek to take advantage of the loans in an insolvency'.

The decision suggests that the correct approach to retrospective validation is to apply the hindsight principle flexibly.

In validating the transaction, the court placed reliance on the fact that when the transactions were entered into, the Club and HNW genuinely believed that the Club could trade out of its insolvent position. The court had previously made validation orders that allowed the Club to continue to trade. It was not an incorrect decision to continue to trade when the transactions were entered into and the transactions had been entered into in good faith in the genuine belief that they would assist the Club to continue to trade and increase the value of its assets. The benefit of hindsight allowed to court to see what transpired, there being a few events outside of the Club's control that led to compulsory liquidation. Among them was the outbreak of Covid-19, which brought with it restrictions imposed on crowds gathering at sporting events, significantly reducing the Club's income.

Conclusion

The decision suggests that the correct approach to retrospective validation is to apply the hindsight principle flexibly. What is noteworthy is that the transactions were validated notwithstanding: firstly, the lack of evidence as to the benefit to the general body of creditors and secondly, the fact that the applicant creditor was aware of the winding-up petition when it entered into the impugned transactions with the company.

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RECOVERY

Brexit

This edition of *RECOVERY* explores the various legal and technical changes that have occurred as a result of the United Kingdom's departure from the European Union. In the following articles, lawyers and IPs offer their insights into how to navigate the various cross-border facets of insolvency post-December 2020.

Contents

Post-Brexit insolvency and restructuring law: a *tour d'horizon*

Stefan Ramel takes a look at insolvency law and regulation both past and present to identify how one might open insolvency proceedings in the brave new post-Brexit world.

As the dust begins to settle on the UK's turbulent exit from the European Union, many businesses and industries are understandably anxious to discover the impact that the various agreements that the UK and the EU signed in the run up to 11.00 pm (UK time) on 31 December 2020 will have on them. It is not difficult to formulate a lengthy list of questions (ranging from the broad brush to the very detailed) that a stakeholder in the insolvency sphere is likely to have.

It is unfortunately much harder to supply detailed answers to all such questions, and of course this article does not set out to do that, not least in view of the number and complexity of the international treaties and domestic legislation that implement Brexit. It is possible, however, to identify some major consequences of the end of the 'transition period' on insolvency law and practice, and this article does set out to achieve that, as well as supplying some pointers on the issue of jurisdiction to open insolvency proceedings.

The past

A good place to start is Friday 31 May 2002, the day on which Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings came into force. The original European Insolvency Regulation (EIR) created a level playing field across the European Union (save for Denmark) in relation to the identification of the court(s) that could open insolvency proceedings against an entity (jurisdiction), the law that would apply to the proceedings (law), and the recognition, extent and manner in which an office-holder's powers could be deployed in another EU member state (including the level of expected cooperation between office-holders in separate European countries appointed in respect of the same debtor). Critically, insolvency proceedings opened in one EU member state were automatically recognised in all others.

On 4 April 2006, the Cross-Border Insolvency Regulations 2006 (CBIR) came into force. They gave force of law to the UNCITRAL Model Law on Cross-Border Insolvency (model law) as adopted by UNCITRAL on 30 May 1997. The effect of the model law is to create a gateway enabling foreign insolvency office-holders to apply to the courts of England and Wales for, firstly, recognition of their insolvency process, and then, secondly, for substantive relief in aid of their process. The model law is therefore an 'inward-looking' instrument. Moreover, unlike the original EIR, it does not rely upon reciprocity.

The final sources of law that are available in cross-border cases are s426 of the Insolvency Act 1986 (although its territorial scope of application is limited – in effect, the Channel Islands, the Isle of Man, and various other designated territories and countries), which enables courts in the relevant territories to send letters of request to courts in the UK seeking assistance in respect of their insolvency proceedings, and the common law – also mostly an inward-looking instrument. The precise limits of the common law's ability to supply assistance in a cross-border insolvency case are not altogether easy to state, although again, the common law will produce its effect principally in the UK.

> **Insolvency or restructuring proceedings initiated in England and Wales will no longer benefit from automatic recognition in all other EU member states and will no longer automatically produce the same effects.**

The present

Brexit has not had any direct impact on the model law, s426 of the Insolvency Act 1986 or the common law on cross-border insolvency; the options that each of those instruments presents in a cross-border insolvency context therefore continue to be available. By contrast, Brexit has had a near terminal impact on the EIR and on Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, referred to as the Recast European Insolvency Regulation (recast regulation). The recast regulation applied to insolvency proceedings opened after 26 June 2017 and made a number of improvements to the original regulation (for example, by way of the introduction of group coordination proceedings).

As a result of article 67(3)(c) of the UK-EU withdrawal agreement, the recast regulation continues to apply in the UK and in EU member states in relation to insolvency proceedings (as well as actions deriving directly from them and closely linked with those proceedings) provided that the main proceedings were opened

> Brexit has had a near terminal impact on the EIR and on Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

before the end of the 'transition period' (ie before 11.00 pm (UK time) on 31 December 2020). Moreover, by article 127 of the UK-EU withdrawal agreement, the EIR (and, in fact, the recast regulation) also continued to apply during the transition period.[1]

The EU–UK Trade and Cooperation Agreement, which was signed on 30 December 2020 as the last few hours of the transition period ticked down, does not make any material references to insolvency, or insolvency law. In other words, the UK and the EU did not reach any agreement on the continued application of the EIR or the recast regulation. For all intents and purposes, those instruments ceased to apply from 11.00 pm (UK time) on 31 December 2020.

As a consequence, insolvency or restructuring proceedings initiated in England and Wales will no longer benefit from automatic recognition in all other EU member states and will no longer automatically produce the same effects (eg a moratorium on creditor proceedings) in EU member states as they do in England and Wales. Similarly, insolvency office-holders appointed in UK proceedings will not, as a matter of right, be able to exercise their powers in another EU member state, and nor will the law of England and Wales necessarily be held to govern all aspects of the insolvency proceedings.

The corollary of all the above is that it will theoretically be possible to have rival or competing insolvency proceedings against the same debtor: one in the UK, and another in another EU member state, with two rival office-holders seeking to realise the debtor's assets, and each office-holder then paying dividends to the debtor's creditors in 'their' jurisdiction. Of course, simply because those are theoretical possibilities does not mean that they will necessarily come to pass and, indeed, it can be hoped that after nearly 20 years of close cooperation (including through pan-European organisations such as INSOL Europe), practitioners (and courts) in other EU member states will take a pragmatic view and seek to act in the best interests of all the relevant stakeholders in each individual set of proceedings.

However, it is not necessarily as easy to adopt such an optimistic outlook if the focus is switched from cooperation between office-holders in the UK and another EU member state to seeking to forcibly realise a debtor's assets in another EU member state where the bankrupt or the corporate entity's directors or shareholders are refusing to cooperate. In that sort of scenario, it will be necessary for the UK IP to be able to insist on their strict legal rights. In those circumstances, and save in the case of a few, select European countries (see the next few paragraphs), it will be necessary to enforce a judgment, or even take proceedings in the relevant EU member state, according to that member state's own domestic procedural and substantive law. Similarly, protective registrations in land or company registries in EU member states are likely to be more complex to achieve than they were prior to Brexit.

In those scenarios, early assistance from a local lawyer (with the inevitable increase in time and cost that always accompanies a lawyer's involvement) will be critical.[2] It is unlikely that identifying a suitably qualified local lawyer will be problematic, not least in view of the fact that many UK law firms have established relationships with law firms in other EU member states. Plainly, though, the British insolvency office-holder will have to factor in additional time and costs in their budgeting and planning, not to mention the uncertainty of having to depend on another country's court processes.

A model for cooperation?

A select few European countries have, like Great Britain, chosen to implement the UNCITRAL Model Law on Cross-Border Insolvency (Greece, Poland, Romania, and Slovenia). In relation to those countries, the model law will provide a much more streamlined and predictable process to achieve recognition, and then substantive relief in those countries. Even then, however, it will still be necessary to retain local lawyers to navigate the relevant court process. Moreover, the Republic of Ireland is a designated country or territory for the purposes of s426 of the Insolvency Act 1986.

Because the CBIR (and indeed s426) remain in force in Great Britain, the courts of England and Wales retain the possibility of rendering assistance to incoming requests from office-holders or courts in EU member states. In a sense, and save in relation to Greece, Poland, Romania and Slovenia, office-holders in EU member states find themselves in a better position in relation to obtaining cooperation and assistance in England and Wales than their British counterparts do in seeking to achieve the same in EU member states. In the case of EU member states (with the exception of Greece, Poland, Slovenia and Romania), the effect of Brexit is as if the clock had been turned back to early May 2002.

Although it was not possible for the UK and the EU to agree a replacement regime for the recast regulation before the end of the transition period, it is of course possible (and to be hoped) that such a regime will be negotiated in the coming months and years, which will likely mitigate some of the consequences of Brexit on insolvency alluded to in this article.

Jurisdiction

The two principal statutes that have amended the law of England and Wales in the light of and following Brexit are the European Union (Withdrawal) Act 2018 and the European Union (Withdrawal Agreement) Act 2020. For the purposes of insolvency and restructuring, there is a further legislative instrument, which is the Insolvency (Amendment) (EU exit) regulations 2019 (SI 2019/146), as already amended on two occasions. The EU exit regulations apply from the end of the transition period, ie from 11.00 pm UK time on 31 December 2020.

In very broad summary, the effect of those acts, and the EU exit regulations are that, going forward and after 'exit day', a heavily modified version of the recast regulation is kept in UK law as 'retained EU law', which will apply to insolvency proceedings that are commenced against an entity after the end of the transition period (in relation to 'main proceedings' opened before the end of the transition period, the recast regulation continues to apply). Furthermore, significant, forward-looking changes are made to the Insolvency Act 1986 and the Insolvency (England and Wales) Rules 2016.

Jurisdiction: CVAs

In relation specifically to jurisdiction, the amendments to the Insolvency Act 1986 introduce the following changes. In relation to company voluntary arrangements, the scope of s1 is amended so that a 'company' is defined to include (in addition to companies registered in England and Wales or Scotland) a company incorporated in an EEA state (ie the EU member states and Iceland, Liechtenstein, and Norway), or a company not incorporated in an EEA state, but which has its COMI in an EU member state (except Denmark) or in the UK.

Paragraph 111 of schedule B1, which defines a company for the purposes of the administration regime, makes similar changes (see paragraph 111(1A)). The effect of those changes (and the amendments to the retained recast regulation) is to increase the scope of a British court's jurisdiction since the requirement for a company that has its COMI in another EU member state to also have an establishment in England and Wales no longer applies. To take a concrete example, a company for the purposes of both the CVA and administration regimes will include a company that has its COMI in an EU member state.

Jurisdiction: liquidation

As regards liquidation, the position is now as follows. The reference in s117(7)

> "Early assistance from a local lawyer (with the inevitable increase in time and cost that always accompanies a lawyer's involvement) will be critical."

to the court's jurisdiction being subject to article 3 of the recast regulation has been removed by the changes made by the EU exit regulations. It follows that, even if a company registered in England and Wales has a COMI in another EU member state, the company still counts as a 'company' for the purposes of s117 and can therefore be wound up by the courts of England and Wales. In relation to the converse situation, a company registered in an EU member state, the courts of England and Wales would have jurisdiction to wind it up in accordance with s221 of the Insolvency Act 1986, which applies to unregistered companies and which has not been amended as a result of Brexit. An unregistered company is defined in s220 as being: 'any association and any company, with the exception of a company registered under the Companies Act 2006 in any part of the United Kingdom'. Of course, the court's jurisdiction is not at large, and is constrained by factors such as a sufficient connection, the possibility that a winding-up order will benefit the person petitioning for it, and a person with an interest in a distribution is within the jurisdiction of the courts of England and Wales (*Stocznia Gdanska SA* v. *Latreefers Inc* [2001] 2 B.C.L.C. 116).

Jurisdiction: bankruptcy

In relation to bankruptcy, s265 of the Insolvency Act 1986, which identifies the jurisdictional criteria that must be met in order for a bankruptcy petition to be presented, has also been amended by the EU exit regulations. The section now envisages three alternative bases for jurisdiction. Firstly, that the individual's COMI is in England and Wales. Next, the individual's COMI is in an EU member state (other than Denmark) and has an establishment in England and Wales. The third and final basis is described as being that the 'test in subsection (2) is met'; that test contains the familiar criteria of domicile, residence, ordinary residence, and place of business, as well as some other factors. It would appear to follow from the fact that the bases are alternative that an English court would have jurisdiction to make a bankruptcy order against an individual even if that individual's COMI is in an EU member state (provided, of course, that the subsection 2 test is met), although it will remain to be seen how the same will interact with s265(1)(ab). However, by contrast with the position in relation to CVA and in administrations, the court's jurisdiction is a little narrower, since for the purposes of bankruptcy, s265(1)(ab) links COMI in another EU member state to an establishment in England and Wales.

Conclusion

It is much too early to assess what long-term impact Brexit will have on restructuring and insolvency in England and Wales. In the short term, the inevitable consequences will include additional legal complexity in cross-border insolvency cases (at least until a body of case law that analyses the new, post-Brexit insolvency provisions begins to emerge, or an agreement is reached between the EU and the UK), as well as additional costs and delays. As this article will have demonstrated, however, there are also welcome extensions to the jurisdiction of the courts of England and Wales. If nothing else, there are interesting times ahead in the cross-border insolvency and restructuring world.

[1] Curiously, the UK-EU withdrawal agreement does not contain any transitional provisions in relation to the EIR.
[2] See my cross-border Q&A with French lawyer Georges-Louis Harang: *The post-Brexit cross-border world; a Franco-English comparison* starting on page 27 of *RECOVERY* Winter 2018.

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Brexit: the insurance impact for IPs

Adam Loveitt explores the changes that Brexit has brought to insurance and explains the implications for IPs.

Following the trade deal agreed between the UK and EU, the impact on financial services remains largely unresolved. The insurance industry has been planning for Brexit for some time and its response has been based on the correct assumption that passporting rights would not be maintained.

Passporting allowed UK regulated firms to sell their services into the EU without the need for additional regulatory approvals or hurdles. As anticipated, passporting rights ended on 31 December 2020.

For UK insurers and intermediaries this change has no impact on their ability to service their UK customers. It is very much a case of 'business as usual'.

If a UK-based insurer or intermediary wishes to undertake business in the EU, it must be regulated in an EU state and comply with each individual state's regulatory requirements. Many insurers and intermediaries have established entities in the EU to enable them to continue trading. However, complexity has been added post 1 January 2021.

How does this impact insolvency practitioners?

UK IPs will see no difference in the way that they arrange insurance cover for cases they have been appointed on. As long as the assets vest in a UK-domiciled entity these should be insured in the UK.

If an IP needs to insure the assets or liabilities of a non-UK entity, a solution compliant with local requirements must be put in place. The position is still evolving and will continue to do so over the coming months.

If the UK entity has assets abroad, these can also be insured via a UK-based insurer/intermediary.

What has changed?

While arranging insurance cover may be unchanged, Brexit has resulted in the following changes:

Insuring the assets of a non-UK entity – previously, these could be insured in the UK via a UK-regulated intermediary. The position now varies depending on the country in which the entity is domiciled. For example, a company domiciled in the Republic of Ireland must use an intermediary regulated in the EEA. This requirement extends to all intermediaries involved in the chain of placement. The position varies by territory, as do requirements on local taxes.

Motor Insurance – green cards – any vehicles being driven in the EU will need a green card, which is an international certificate of insurance. This is a paper document and electronic copies will not be accepted. If an IP has vehicles under their control that will be used in the EU, they should apply for a green card well in advance of the journey.

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Travel insurance – EHIC/GHIC – The European Health Insurance Card (EHIC) is being replaced by the Global Health Insurance Card (GHIC). EHICs were never a replacement for travel insurance but did provide free access to state-provided healthcare in the EU. Existing EHICs will remain valid until their expiry. The GHIC will operate on a similar basis but does not cover travel in Norway, Iceland, Liechtenstein or Switzerland. The recommendation remains that comprehensive travel insurance is arranged for any trips outside the UK.

Lloyd's of London – Lloyd's of London changed the way it underwrites risks in the EU in 2019. From 2019, policies are underwritten by an insurance company regulated in Belgium, Lloyd's Insurance Company S.A (Lloyd's Brussels). In addition, in December 2020, historic policies covering risks in the EU were transferred from the corporation of Lloyd's to Lloyd's Brussels. This has no impact on the cover provided to any entity previously insured by Lloyd's, but any outstanding claims will be dealt with and paid by Lloyd's Brussels.

Motor insurance database (MID) – the MID is a central database that holds information on every insured vehicle in the UK. While the database was set up to comply with an EU directive, it will continue to operate post-Brexit. Information was freely shared between other member countries. The position has changed since 31 December 2020 and negotiations with EU member countries on reciprocal arrangements are ongoing. Accidents abroad or which occur in the UK involving foreign registered vehicles are likely to be more complex to deal with, especially if the third-party vehicle is uninsured.

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Brexit: beyond all recognition?

Howard Morris and **Jai Mudhar** write that the EU may not recognise everything, but the UK hasn't gone anywhere.

On 31 December 2020 at 11.00 pm, the transition period ended and the fate of the UK's restructuring and insolvency regime changed. The UK is no longer in the direct sphere of influence of the European Insolvency Regulation (EIR) or the European Judgments Regulation (judgments regulation). This, combined with the absence of provisions relating to cooperation on insolvency law matters under the EU-UK Trade and Cooperation Agreement, leaves the position for seeking recognition and assistance in relation to UK restructuring and insolvency processes across the member states unclear and uncertain.

Inbound recognition (EU–UK)

The EIR provides for automatic mutual recognition and enforcement of insolvency proceedings across member states (except Denmark).

Absent the EIR, an insolvency proceeding initiated in a member state will not benefit from automatic recognition in the UK. Foreign practitioners will need to apply to the English courts for recognition and assistance. The main avenue for recognition will likely be under the Cross-Border Insolvency Regulations 2006 (CBIR), which implement the UNCITRAL Model Law on Cross-Border Insolvency (model law). On application by a foreign IP, the English courts may grant recognition,

> **To obtain recognition, IPs will have to seek it under the domestic laws of each relevant member state, on a country-by-country basis – a task that may be arduous in terms of time and cost.**

assistance and procedural relief under the CBIR. Where recognition is granted under the CBIR, it is granted unilaterally, as the recognition of a foreign proceeding does not depend on that foreign country having also adopted the model law.

The common law principle of *comity* may also provide for recognition and relief. Additionally, with respect to the Republic of Ireland, the Irish court may make an application to the English court for assistance under s426 of the Insolvency Act 1986.[1] The English court may then exercise a discretion to grant assistance.

Outbound recognition of insolvency proceedings (UK–EU)

Without the EIR, any insolvency proceeding commenced with respect to a company whose centre of main interest (COMI) is in the UK after 31 December 2020 will not be automatically recognised or enforced in the member states, as either a main or secondary proceeding. Accordingly, administrations, company voluntary arrangements and liquidations will not automatically be recognised. To obtain recognition, IPs will have to seek it under the domestic laws of each relevant member state, on a country-by-country basis – a task that may be arduous in terms of time and cost.

When assessing recognition and enforcement of insolvency proceedings, the member states (excluding Denmark) will determine the COMI of a debtor by application of the rules relating to COMI under the EIR. If the national court of a member state decides that the COMI of the debtor is not in the UK, the member state may refuse to give regard to the UK court's own determination that the COMI of the debtor is in the UK. Any question falling outside the scope of the EIR will be determined by the relevant member state's domestic law.

Four member states have actually implemented the model law, namely, Greece, Poland, Romania and Slovenia. Where there are no disputes as to the jurisdiction of the debtor's COMI, IPs may obtain recognition and assistance for UK insolvency proceedings in those countries by application to the court of the member

> Without the judgments regulation, the recognition of schemes of arrangement will be determined by the domestic law of each member state.

state, as their domestic laws give effect to the model law. However, the recognition of, and assistance available to, UK insolvency proceedings in the 23 member states that have not adopted the model law is unclear. There is a lack of uniformity of the domestic laws under which recognition will have to be sought in those member states.

Recognition of schemes of arrangement in the EU

The judgments regulation provides for the automatic recognition of 'civil and commercial' court judgments across member states. English courts have used the judgments regulation as the basis for EU recognition of schemes of arrangement. Without the judgments regulation, the recognition of schemes of arrangement will be determined by the domestic law of each member state. Where recognition of a scheme of arrangement is obtained in one member state, the scheme of arrangement will not then be automatically recognised across the member states.

The absence of the judgments regulation may be alleviated by the:

i. Rome I Regulation. Where a party makes a choice as to the law governing its contractual arrangement, the chosen law will govern the way in which obligations under the agreement may be extinguished. Where English law is chosen this will continue to be recognised across the EU, and the rule in Gibbs will apply. Gibbs provides that English law debt may not be discharged or compromised by a foreign insolvency proceeding, unless the creditor submits to that proceeding.[2]

ii. Hague Convention.[3] Where an agreement (eg a debt document) designates the English courts as having exclusive jurisdiction, the signatories of the Hague Convention, which includes the EU, must recognise and enforce the judgments of the chosen jurisdiction. The Hague Convention excludes, among others, 'insolvency' matters, but may provide an avenue for recognition of judgments relating to schemes of arrangement.

iii. UK's accession to the Lugano Convention 2007. The UK applied to join the Lugano Convention in April 2020. The Lugano Convention would allow the UK and EU to benefit from the mutual recognition and enforcement of judgments. The UK's accession to the Lugano Convention requires unanimous support by the existing signatories, which has not yet been obtained.[4] The Lugano Convention excludes insolvency matters from its scope, but would provide an avenue for recognition of judgments relating to schemes of arrangement.

Recognition of restructuring plans in the EU

A new restructuring plan was introduced under part 26A of the Companies Act 2006 by the Corporate Insolvency Governance Act 2020. In a recent decision, the High Court held that a restructuring plan is an insolvency proceeding that would be covered by the EIR, unlike a scheme of arrangement, which is not treated as an insolvency proceeding, and so falls outside of the scope of the Lugano Convention (due to the bankruptcy exclusion) and, by extension, the judgments regulation and Hague Convention.[5] Accordingly, unless this decision is overturned, to obtain recognition for a restructuring plan in a member state, a debtor will need to rely on the Rome I Regulation, model law (if implemented by the relevant member state where recognition is sought) or the member state's domestic approach to recognition. There is no doubt that this is a blow to the attractiveness of the new restructuring plan and its novel features, most notably the cross-class cram down mechanism.

The bottom line

The loss of the EIR and the judgments regulation has, undeniably, caused some challenges and changed the landscape of cross-border restructurings and insolvencies. Due to the loss of automatic recognition of UK restructuring and insolvency processes, it is likely that the number of parallel proceedings in jurisdictions across the member states will increase. This will bring added complexity and cost, not least due to the lack of uniformity of domestic laws across the member states, which has the potential to create different outcomes in different jurisdictions. It should be noted that these challenges are not entirely new, as IPs have been tackling cross-border insolvency situations in non-EU jurisdictions. The continued recognition of schemes of arrangement and restructuring plans under the Rome I Regulation provides some welcome certainty. Further confidence would follow with (i) an increased adoption of the model law across the member states, and (ii) with respect to schemes of arrangement, the UK's accession to the Lugano Convention.

The EU member states are gradually reforming their domestic laws to comply with the EU Restructuring Directive, which may increase certain jurisdictions' popularity for restructurings. It is likely, however, that the UK will remain a popular hub for restructurings and insolvencies, not least due to the predictability and flexibility of the tools available and the extensive experience of the English judiciary. The restructuring industry may be disappointed by the recent decision of the High Court on the new restructuring plan's status. However, the decision undoubtedly serves to reinforce the judiciary's reputation for interpreting and applying the law and disregarding political or national economic interests, a characteristic that attracts parties to use the jurisdiction of the English Courts. □

> It is likely, however, that the UK will remain a popular hub for restructurings and insolvencies, not least due to the predictability and flexibility of the tools available and the extensive experience of the English judiciary.

[1] S426 of the Insolvency Act 1986 provides that where the UK court has jurisdiction in relation to insolvency law, the UK court shall assist other courts having the corresponding jurisdiction in any other part of the UK or in any relevant country or territory. This includes, among other countries, the Republic of Ireland.
[2] *Antony Gibbs & Sons* v. *La Société Industrielle et Commerciale des Metaux* (1890) LR 25 QBD 399.
[3] 2005 Hague Convention on Choice of Court Agreements.
[4] Switzerland, Norway and Iceland have indicated their support for the UK's accession; however, the EU and Denmark have yet to indicate support.
[5] *Re Gategroup Guarantee Limited* [2021] EWHC 304 (Ch).

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Cross-border judgment calls

Morgan Bowen explains insolvency office-holders' ability to enforce judgments post-Brexit.

So Brexit has finally happened! This article assesses its consequences for English insolvency office-holders seeking to enforce English judgments in the EU post-Brexit.

Two different types of judgment need to be distinguished:

(1) Firstly, enforcement of judgments deriving from insolvency proceedings or closely linked with them. These would include judgments on anti-avoidance clawback claims (preference, transactions at undervalue etc)[1] and judgments requiring disclosure of documents pursuant to insolvency office-holder disclosure powers (eg pursuant to s236 of the Insolvency Act 1986) (category 1 judgments);

(2) Secondly, enforcement of judgments given in favour of the insolvent debtor on ordinary civil claims that are not linked to the insolvency proceedings (eg a contractual claim for damages or a company claim for breach of fiduciary duty against a director) (category 2 judgments)[2].

Pre-Brexit position

Pre-Brexit, both the Recast European Insolvency Regulation (recast regulation) and the European Judgments Regulation (judgments regulation) applied. The two regulations dovetail with each other so that where one applies the other does not apply.

Category 1 judgments are accorded recognition and are enforceable in the rest of the EU pursuant to the recast regulation. Category 2 judgments, even if obtained by insolvency office-holders, fall within the judgments regulation and are accorded recognition and are enforceable in the rest of the EU pursuant to that regulation[3].

Post-Brexit position

The EU-UK Trade and Cooperation Agreement, reached on 24 December 2020, does not provide for any cooperation on insolvency law or for the recognition and enforcement of civil judgments more broadly.

Accordingly, subject to transitional arrangements (considered below), post-Brexit, the recast regulation and the judgments regulation no longer apply. It is a no-deal Brexit at least as far as insolvency is concerned!

There are, however, international conventions and arrangements outside the EU that may come to an English office-holder's assistance.

The UNCITRAL Model Law on Cross-border Insolvency (model law). This is a creature of the UN – a model law that states can choose to adopt to provide assistance to foreign insolvency office-holders. The UK has enacted this into domestic law with some amendments as part of the Cross-Border Insolvency Regulations 2006. Unfortunately, only four EU states have enacted it, these being Greece, Poland, Romania and Slovenia. Furthermore, unlike the recast regulation, it requires an application to court for recognition, is more limited in scope in its effect once recognition is granted and does not appear to enable the enforcement of category 1 judgments.

> **Whether or not the category 1 judgment is capable of enforcement will depend on each member state's own domestic conflict of laws rules on the recognition of foreign judgments.**

As regards the Republic of Ireland only, the English insolvency office-holder will be able to avail themselves of the Irish equivalent of s426 of the Insolvency Act 1986[4]. However, assuming the Irish courts apply these cooperation mechanisms in the same way as English courts, this mechanism will not be able to be used to enforce category 1 judgments.

The UK has applied to join the Lugano Convention 2007. The convention is similar in scope and effect to the judgments regulation[5]. Like the judgments regulation, however, it includes an identically worded insolvency carve out such that category 1 judgments fall outside its scope. *Most importantly* the UK's admission to the convention requires unanimity from the existing signatories and the EU has not yet confirmed the UK's admission.

The UK (together with the EU and a small number of other countries) is now a signatory in its own right to the Hague Convention on Choice of Court Agreements 2005. Under this agreement all signatories are required to respect the parties' choice of court and enforce other signatory states' judgments on a contract containing a symmetrical exclusive jurisdiction clause, ie one that requires *all* parties to a contract to agree to take proceedings in a specified jurisdiction. Like the judgments regulation and the Lugano Convention, the Hague Convention includes an insolvency carve out, albeit this carve out is slightly differently worded,

> As regards the Republic of Ireland only, the English insolvency office-holder will be able to avail themselves of the Irish equivalent of s426 of the Insolvency Act 1986

perhaps offering a little scope to argue that the carve out is not coterminous with the judgments regulation/Lugano Convention case law. By the terms of its instrument of accession, the UK government has sought to apply the Hague Convention to contracts agreed on or after 1 October 2015 (when the EU acceded to the convention) but the European Commission appears to be of the view that, with respect to the UK, it can only apply to contracts agreed on or after 1 January 2021, ie after Brexit.

Category 1 judgments

Category 1 judgments fall outside the Lugano Convention and likely the Hague Convention.

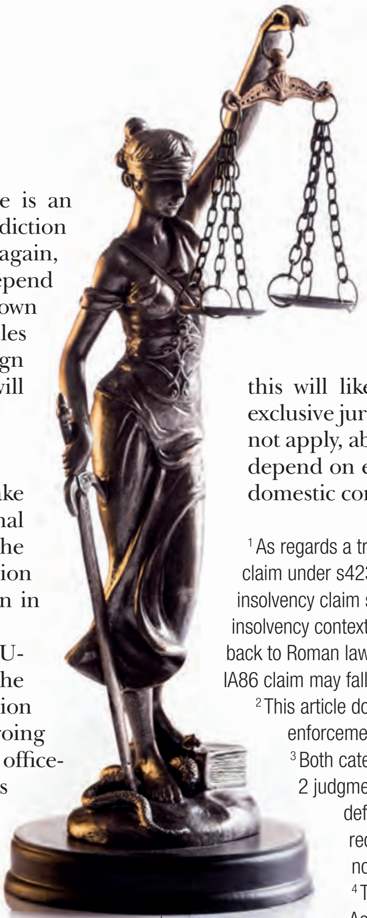
Furthermore, assuming Greece, Poland, Romania and Slovenia take a similar view on the model law as the UK, and the Republic of Ireland takes a similar view to the UK on their reciprocal insolvency cooperation mechanisms, these mechanisms will not be able to be used to enforce category 1 judgments.

Instead, in each case, whether or not the category 1 judgment is capable of enforcement will depend on each member state's own domestic conflict of laws rules on the recognition of foreign judgments. Clearly an office-holder who considers that they may need to enforce in the local jurisdiction will need to take local advice on the ability to enforce in advance of bringing the English proceedings so that the office-holder lowers the risk of finding themselves in a position where considerable costs have been incurred in obtaining an English judgment that is incapable of enforcement.

Category 2 judgments

Category 2 judgments fall within the scope of the Lugano Convention. Should the EU permit the UK to accede to the Lugano Convention a similar (though not identical) regime to the judgments regulation should apply, enabling category 2 judgments to be enforced relatively easily throughout the EU.

In the interim, English office-holders may seek to rely on the Hague Convention but this will likely not be available for a breach of fiduciary duty claim and even in the case of a contract claim it likely will not be available where there is an asymmetric exclusive jurisdiction clause. In such cases, again, ability to enforce will depend on each member state's own domestic conflict of laws rules on the recognition of foreign judgments and local advice will likely be required[6].



Transitional provisions

Office-holders should take note that there are transitional arrangements preserving the effect of the recast regulation and the judgments regulation in certain limited cases.

By article 67(3)(c) of the EU-UK Withdrawal Agreement, the effect of the recast regulation both for EU office-holders going into the UK and for UK office-holders going into the EU is preserved for:

(1) insolvency proceedings that are main proceedings and that were opened before 31 December 2020;
(2) secondary proceedings where main proceedings in an EU member state were opened under the recast regulation before 31 December 2020; and
(3) any proceedings deriving from those proceedings (eg clawback claims)[7].

The judgments regulation will continue to apply where the UK or foreign court was seised of proceedings on or before 31 December 2020.

> Office-holders should take note that there are transitional arrangements preserving the effect of the recast regulation and the judgments regulation in certain limited cases.

Summary

Subject to transitional provisions, the recast regulation and the judgments regulation no longer apply.

Category 1 judgments fall outside the Lugano Convention and likely the Hague Convention. Whether or not the category 1 judgment is capable of enforcement will depend on each member state's own domestic conflict of laws rules on the recognition of foreign judgments.

Category 2 judgments fall within the scope of the Lugano Convention but the UK's accession to this convention depends on EU agreement. In the interim, English office-holders may seek to rely on the Hague Convention but this will likely require a symmetric exclusive jurisdiction clause. If it does not apply, ability to enforce will again depend on each member state's own domestic conflict of laws rules. ◻

[1] As regards a transaction defrauding creditors claim under s423, IA86, it is likely not an insolvency claim since it applies outside an insolvency context and its roots can be traced back to Roman law. Any judgment on a s423, IA86 claim may fall within category 2 therefore.

[2] This article does not deal with the enforcement of schemes of arrangement.

[3] Both category 1 judgments and category 2 judgments are subject to narrowly defined exceptions wherein recognition and enforcement is not mandated, eg public policy.

[4] This section of the Insolvency Act requires the English courts with jurisdiction in relation to insolvency law to assist courts having the corresponding jurisdiction in the Reupblic of Ireland and certain Commonwealth states. No other European state is subject to this enhanced cooperation regime.

[5] Though not quite as watertight as the judgments regulation – it does not repel the Italian torpedo quite as effectively (ie the tactic whereby a party with a weaker case attempts to stymie proceedings by issuing in a country with an unhurried legal system, thereby preventing other countries' courts seising the proceedings).

[6] The office-holder may also be able to rely on specific reciprocal judgment enforcement treaties agreed between the UK and individual EU member states but the author is not aware of any such that widen the scope for enforcement beyond domestic conflict of laws rules, their being concerned instead largely with providing a simpler process for enforcement than under the common law.

[7] It is somewhat less clear whether these transitional provisions apply to insolvency proceedings issued under the original insolvency regulation (1346/2000). The original insolvency regulation applies to insolvencies commenced before 26 June 2017. It is at least arguable that the effect of the original insolvency regulation is preserved for cases opened under this earlier regulation by dint of the EU-UK Withdrawal Agreement's preservation of the recast regulation and the recast regulation's preservation of the original insolvency regulation under its own transitional provisions.

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Cross-border insolvency and the Brexit problem

Chris Laughton looks at the post-Brexit framework for insolvency, COMI and establishment proceedings, and the ever more relevant need for local cooperation in the EU.

The UK's Corporate Insolvency and Governance Act 2020 was in effect the first implementation in Europe of the EU's Restructuring Directive. In that sense our insolvency regime is aligned with European best practice. But the legal ties have been severed. For insolvency services it was a no-deal Brexit. There is no agreement between the UK and the EU governing cross-border insolvency.

UK restructuring and insolvency professionals have always been ready to use their tools constructively. Think of BRAC Rent-A-Car International Inc, a Delaware company made the subject of an English administration order in 2003 by virtue of the European Insolvency Regulation (EIR), and MG Rover, where the English administrators gave undertakings recognising the French law priority rights of employee creditors and thereby avoided a French refusal of recognition under the EIR in 2005. Constructive innovation continues with the Swiss-owned Gategroup Guarantee Ltd, an assetless English company set up to vary the rights of the holders of bonds issued by a group company in Luxembourg, which is intended to be achieved by means of a restructuring plan, the convening of whose meetings was approved by Zacaroli J on 11 February 2021.

This article looks at the framework within which we must now employ our skills in the European cross-border arena and at the practicalities of so doing.

A skeletal EIR

For many IPs a first thought on encountering European issues in recent years has been to reach for the EIR in either its original or its recast form. But in post-Brexit UK the EIR is (almost) no more. I say almost because the UK government decided to import some of it into UK law[1], not least to retain its fundamental concepts of COMI and establishment as additional bases on which UK courts could found insolvency jurisdiction. Some might say we kept the best bits, or at least the good bits we could keep unilaterally.

There is also a saving in the withdrawal agreement. Where main proceedings under the EIR had been opened before the end of the Brexit transition period on 31 December 2020, the EIR continues to apply to the main proceedings and to any secondary proceedings that had been or might be opened. In other words, your old cross-border cases carry on.

> **"For insolvency services it was a no-deal Brexit. There is no agreement between the UK and the EU governing cross-border insolvency."**

COMI proceedings and establishment proceedings in England & Wales

One of the consequential amendments (there are many) as a result of importing only specific parts of the EIR is the replacement in r1.2(2) Insolvency (England and Wales) Rules 2016 of several definitions, including 'main proceedings', 'secondary proceedings', 'territorial proceedings' (which disappear) and 'non-EU proceedings' (the latter, I remind you, being insolvency proceedings that are not main, secondary or territorial proceedings).

Instead we now have (i) 'COMI proceedings', which are insolvency proceedings in England and Wales to which the EU regulation applies where the centre of the debtor's main interests is in the United Kingdom; (ii) 'establishment proceedings', which are insolvency proceedings in England and Wales to which the EU regulation applies where the debtor has an establishment in the United Kingdom; and (iii) 'proceedings to which the EU regulation as it has effect in the law of the United Kingdom does not apply'.

To interpret the new definitions, remember that in English law the 'EU regulation' now means those few parts of the EIR that were imported into English law. I think that 'proceedings to which the EU regulation as it has effect in the law of the United Kingdom does not apply' means insolvency proceedings where the debtor's COMI is not in the UK and the debtor does not have an establishment in the UK. The debtor might be a UK-registered company with no COMI or establishment here, a foreign company with a sufficient connection to the UK (but no COMI or establishment here), which is being wound up here, or a company registered in an EEA state (but with no COMI or establishment here) that is being put into administration. The editor and I welcome your views!

Why is this important? Because everywhere we used to have to set out whether proceedings were main or secondary (or territorial or non-EU), and sometimes explain why, we now have to set out whether, and explain why, they are COMI or establishment proceedings or 'proceedings to which the EU regulation as it has effect in the law of the United Kingdom does not apply'.

How to practise European cross-border insolvency

Twenty years ago I decided to expand my practice beyond bank-led IBRs and administrative receiverships. I knew that Europe offered some different challenges. In one case a French judge had commended my English colleague for addressing the court in French and being represented by a local lawyer; the judge went on to say, 'The only people this court dislikes more than Englishmen are Parisian lawyers'! Another case had led me to contrast the creditor-friendly UK regime with employee-friendly France and the shareholder-friendly reality of a then young Czech Republic.

So, I went along to an INSOL Europe conference in Malta and learned that even though most European IPs train first as lawyers rather than accountants, they have more in common with UK IPs than some of our audit or tax colleagues. Another key lesson was that it's often best to let professionals in another jurisdiction do things their way: their laws, systems and culture can be markedly different, but they will achieve similar results. If you want help overseas, explain what you want to achieve rather than what you think needs to be done to achieve it.

'Communication' and 'cooperation' became watchwords in cross-border insolvency as practitioners identified how best to achieve results in jurisdictions other than their own. And we all know that it's easier to deal with someone you know. For me this meant building relationships with people in different countries. Which countries and how many people depend on the practice you have and the practice you want to build, but there is no better way to build those relationships than to spend time with people (even if, in 2020–21, that's virtually).

There are many forums and organisations to facilitate cross-border engagement, but for insolvency practice in Europe (not just the EU) INSOL Europe fits the bill, in my experience. Yes, I would say that as one of its past presidents, but that's because it worked for me to have dozens of trusted professional friends in many different European countries. Sometimes they're just there when I need help in their country, and sometimes they come to me when they need help here. That is only going to increase now the UK can no longer rely on the EIR to facilitate cross-border insolvency work. Trusted professional friends who know the local laws, practice and culture in other countries are all the more valuable.

In addition to providing a set of common rules on jurisdiction, some of which we've now added to our own, the EIR provided for recognition of insolvency proceedings throughout the EU. Now, neither the UK nor the EU automatically recognise the other's insolvency proceedings. In the UK recognition is subject to the Cross-Border Insolvency Regulations 2006 (CBIR), which require the foreign representative to apply to the UK courts for recognition. In the EU recognition is determined by the individual member state in question.

Jurisdiction

Aside from any provisions related to the EIR, UK courts have jurisdiction to wind up UK-registered companies, to wind up foreign companies as unregistered companies and to put UK-registered companies and companies registered in EEA states (EU and Iceland, Liechtenstein and Norway) into administration. The EIR as retained in UK law gives the UK courts additional jurisdiction to open insolvency proceedings where the debtor's COMI is in the UK or where the debtor's COMI is in an EU member state and the debtor has an establishment in the UK.

Whereas previously the EIR prevented the UK courts from opening insolvency proceedings where the debtor's COMI was in another member state, that restriction has fallen away. Parallel competing proceedings might now ensue!

Recognition

Jurisdiction is all very well, but jurisdiction alone may yield little in a cross-border matter without recognition. I have already touched lightly on the principles of recognition, but for further consideration you should read Jai Mudhar and Howard Morris's article on page 22, which also addresses recognition of Companies Act schemes and restructuring plans.

I will, however, briefly summarise the types of approach a few EU member states

> "Remember that in English law the 'EU regulation' now means those few parts of the EIR that were imported into English law."

have to the recognition of foreign (eg UK) insolvency proceedings. Please remember, though, that the detail of how to obtain recognition in each jurisdiction is different, even when their overall approach is similar.

Belgium, France and Italy offer some form of automatic recognition, but require an exequatur (a document granting official recognition by the state in question of a foreign officeholder) for you to deal with assets or exercise other powers.

Germany and The Netherlands offer automatic recognition (NL has more limitations) and no exequatur is required.

Ireland and Spain require an application to their courts for recognition of foreign insolvency proceedings.

Greece, Poland, Romania and Slovenia have implemented the UNCITRAL Model Law on Cross-Border Insolvency (model law). The UK has done so too in the form of the CBIR (as has the USA with Chapter 15 of the US Bankruptcy Code) so, subject to local details, the route to recognition in these four European jurisdictions should have some familiarity.

In practice, always seek local assistance – see sidebar.

Inbound proceedings and the CBIR

Space prevents me from going into detail about the use by foreign office-holders of the CBIR, but my strong recommendation to any such office-holder is to have a UK IP on their team when it comes to exercising in the UK any powers the UK courts might grant.

Note that it is only the four EU jurisdictions listed above that have adopted the model law. Twenty-three others have not.

Conclusion

More so than ever post-Brexit, having a local IP on board is crucial when you're dealing with UK–EU cross-border insolvency. □

[1] See The Insolvency (Amendment) (EU Exit) Regulations 2019.

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Brexit: a drag but not a disaster for restructuring and insolvency

Adam Plainer and **Chris Horrocks** write that the reliability and accessibility of the English courts and the country's insolvency and restructuring provisions have not gone away post-Brexit.

Brexit does not appear to have abated the appetite for using UK restructuring tools in UK/European cross-border restructurings.

The loss of automatic recognition of UK insolvency procedures and judgments across the EU, combined with the proliferation of alternative restructuring mechanisms that have emerged across the EU in recent years, had been expected to lead to companies turning their backs on the UK to launch cross-border restructurings into Europe.

However, the current indications are that this has not been the case. There are various factors that have both mitigated the downsides caused by Brexit and preserved the UK's leading position as a prime location from which to conduct cross-border European restructurings.

Prevalence of choice of English law

English law continues to be a preferred choice of governing law in financing documents, with its well-developed jurisprudence and a legal system that is respectful and protective of creditors in a rescue process. This is significant because of the old English common law principle known as 'the rule in Gibbs', which provides that English law debt may only be discharged under English law.

The rule in Gibbs had previously been overridden by the recast insolvency regulation,[1] which enabled debts governed by English law to be compromised in proceedings in other EU member states (with such proceedings being automatically recognised by the English courts). Post-Brexit, European companies with English law debts must weigh up launching a restructuring process from the EU, with the benefit of greater harmonisation among the remaining EU member states, against using an English law restructuring tool and relying on the mechanisms outlined below to obtain recognition in Europe.

Accessibility and reliability of UK courts

The continuing strong position of the UK as an international centre for restructuring work is bolstered by the strength of its judicial system. UK courts have a hard-won reputation for being accessible at short notice and accommodating to changes in timetables resulting from fast-moving negotiations. Moreover, the reliability of the UK courts, with their tried and tested procedures and commercial approach, provide confidence and certainty for all stakeholders.

These attributes mean that the UK courts continue to be favoured as the choice of forum for many restructuring and insolvency proceedings (particularly in the context of implementing an English scheme of arrangement (scheme) or the new restructuring plan (plan), each of which can be completed in a matter of weeks). While certain European jurisdictions have introduced innovative new measures to compete with the UK's restructuring tools (such as the new Dutch scheme of arrangement), the court systems that must be used for implementation can be less flexible and reliable than their English counterparts, and thereby provide a less certain platform from which to launch complex restructurings.

Adaptable and well-established restructuring tools

Notwithstanding the impact of Brexit, UK restructuring tools still provide great flexibility to implement a wide range of restructuring options (from 'amend and extends' to full corporate equity and debt reorganisations). This is clearly demonstrated by the continuing popularity of the tried and tested scheme, which has been used with great success for many years to restructure the debts of both English and foreign corporations.

The options have been further enhanced by the new plan, which was introduced to the UK's restructuring toolkit last year by the Corporate Insolvency and Governance Act 2020. While plans are closely modelled on schemes (allowing judges to draw on the strong line of precedents emanating from previous decisions by the English courts in respect of schemes), there are significant differences designed to allow companies to be more efficiently restructured. These enhancements include the ability to compromise operational as well as financial creditors, a change in approach for English restructuring law. Plans also introduce 'cross-class cram down' (drawing inspiration from US Chapter 11 proceedings) whereby a plan can be confirmed by the court, in certain circumstances, even if one or more classes of creditors do not vote in favour (whereas in schemes each class of creditors must approve the scheme).

Crucially, the well-established principles that the English courts apply to schemes, and which they are already applying to plans, mean that all stakeholders involved in a restructuring benefit from a certain amount of predictability that is often not present when assessing novel alternative procedures in other jurisdictions.

The flexible tools available combined with reasonable certainty as to outcome means the English restructuring and insolvency framework has withstood the test of time and all the indications are that it will continue to adapt and innovate to retain its attractiveness as a forum for cross-border restructurings post-Brexit.

Availability of alternative methods to recognise English judgments and insolvency procedures

On December 24, 2020, the EU and the UK agreed the EU-UK Trade and Cooperation Agreement (the TCA) establishing the broad relationship between them after the end of the Brexit transition period on December 31, 2020.

The TCA did not provide for any reciprocal automatic recognition and cooperation between the UK and the EU in relation to cross-border restructuring and insolvency proceedings. Specifically, from 1 January 2021, the UK no longer benefits from either (a) the Brussels Regulation[2] to facilitate the recognition and enforcement of court judgments across the EU or (b) the recast regulation to facilitate recognition of its insolvency procedures across the EU.

However, ready alternatives have been identified to enable English court judgments and English insolvency procedures to be recognised in EU member states and we set out the key ones below.

Rome I

Rome I[3] continues to apply across EU member states post-Brexit in the same way. It provides that the contracting parties' choice of governing law should govern their contractual relations. Accordingly, where English law is the governing law of a contract this should be recognised by courts across the EU (which should encompass schemes implementing amendments to such contract).

Local Laws

(i) Four EU member states (Poland, Slovenia, Greece, and Romania) have adopted the model law,[4] which provides a framework for recognition of insolvency proceedings and cooperation between participating jurisdictions.

(ii) For EU member states that have not enacted the model law, where EU law or another convention does not facilitate recognition, private international laws will be applied locally to gain recognition and enforcement of UK orders. Many EU jurisdictions have well established procedures allowing for recognition of foreign judgments and insolvency proceedings.

Lugano Convention

The Lugano Convention[5] provides a framework for the recognition and enforcement of judgments. As of 1 January 2021 the UK is no longer a party to the Lugano Convention (previously it had been a party by virtue of its membership of the EU). The UK has applied to accede to the Lugano Convention in its own right but the necessary approval of the existing parties, including the EU, is still pending (and this was not addressed in the TCA). If the UK's application to the Lugano Convention is accepted, this will provide a basis for recognition of judgments akin to that enjoyed by the UK pre-Brexit under the Brussels Regulation.

> **"UK courts have a hard-won reputation for being accessible at short notice and accommodating to changes in timetables resulting from fast-moving negotiations."**

Hague Convention

Where parties have stipulated an *exclusive* choice of jurisdiction in their contracts, the Hague Convention[6] requires that such choice of jurisdiction is respected. Accordingly, in circumstances where the English courts have been designated in an exclusive jurisdiction agreement within the meaning of the Hague Convention, a judgment by the English court must be recognised and enforced in the EU in accordance with the provisions of the Convention.

The combination of EU law (in particular Rome I) and private international law is providing routes to both the recognition and enforcement of English judgments (including those arising from schemes) and the recognition of English insolvency procedures.

In a significant recent judgment,[7] the English court decided that plans constitute an insolvency proceeding falling outside the scope of the Lugano Convention (which excludes from the civil and commercial matters anything falling within the applicable bankruptcy exception). This is widely anticipated to complicate the use of plans in Europe. However, in *Gategroup*, the judge confirmed that the expert evidence adduced in support of the application suggests that the plan being proposed will be recognised in Luxembourg and Switzerland, notwithstanding its classification as an insolvency proceeding.

Conclusion

Brexit means that, going forwards from 1 January 2021, the UK has lost the benefit of important mechanisms that were previously being used to facilitate the recognition of UK restructuring processes across the EU. However, it is apparent that alternative mechanisms are available, and are being successfully used, to implement cross-border transactions using UK restructuring tools.

Brexit has not altered the continuing preference for English law in financing contracts in Europe, preserving the influence of UK restructuring tools to compromise English debts. Furthermore, while the English judicial system continues to offer tried and tested methods that enable companies to compromise their debts in a manner generally accepted by creditors, it is challenging for the new procedures introduced in other jurisdictions to provide an equally reliable alternative. □

[1] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), the Recast Insolvency Regulation.
[2] Regulation (EU) 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, the recast Brussels Regulation.
[3] Regulation 593/2008 on the law applicable to contractual obligations, Rome I.
[4] 1997 UNCITRAL Model Law on Cross-Border Insolvency, enacted in 2005.
[5] The Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial matters signed in Lugano on 30 October 2007.
[6] The Convention of 30 June 2005 on Choice of Court Agreements
[7] *Gategroup Guarantee Ltd, Re* [2021] EWHC 304 (Ch).

ADAM PLAINER is global co-chair of the financial restructuring group at Dechert LLP.

CHRIS HORROCKS is an associate at Dechert LLP.

Litigation funding in 2021

Mark Beaumont reviews the changes in litigation funding since the Jackson Reforms and calls for discussion on the currently available litigation insurance products.

Annecto Legal recently turned eight years old, having been born in the run-up to the first wave of the Jackson Reforms around litigation funding. Sally Dunscombe and I established the business to assist IPs and solicitors in navigating a rapidly changing landscape. The expectations at that time included widespread use of damages-based agreements (DBAs) as well as a revolution in after-the-event (ATE) legal expenses insurance and litigation funding.

What have we seen in almost a decade?

Well, DBAs have not had the take-up that was predicted, and that can largely be pinned on a combination of poorly drafted regulations, a general aversion to change in the legal sector and a lack of appetite for them among IP clients. I still think there is a gap in the market for a more joined-up approach between law firms and IPs to utilise the DBA model to mutual advantage, but at this time there has only been limited progress. Much like the alternative business structure model for law firms, it remains an opportunity waiting to be fully grasped. I am open for discussions on this front if any forward-thinking practitioners in either space wish to make contact.

In 2013 there was an expectation that ATE insurers would quickly adapt to the post-Jackson world of non-recoverability by developing hybrid products and competing more directly with litigation funders. The progress on this front has been mixed: some insurers have launched disbursement funding and other finance options, and there has been a move towards work in progress insurance to support conditional fee agreements and DBAs. We have also seen a large rise in the use of ATE insurance, sometimes in conjunction with deeds of indemnity, to meet security for costs requirements. Managing risk with insurance is often a sensible and cost-effective method that can be used either instead of or alongside third-party funding. This method can reduce funding costs significantly and can be particularly useful on lower value disputes that might not suit more common financing options.

> **“Managing risk with insurance is often a sensible and cost-effective method that can be used either instead of or alongside third-party funding.”**

> **“The main drivers of change in the market appear to be litigation funders.”**

The take up of these insurance products is still relatively low, which I suspect comes down to some degree to a lack of knowledge among solicitors and IPs. It seems that funders have been much more aggressive in their marketing than the insurers have generally been, although I am sure there are other reasons, and I would be happy to hear the reader’s thoughts on this front.

Change in the market

The main drivers of change in the market appear to be litigation funders. Funders have marketed hard to IPs and solicitors, and the result is that they are often approached directly to review cases and quote. There are dozens of funders in the market and approaches vary considerably from taking outright assignment through to providing low levels of disbursement funding and everything in between. I am not sure how well these different approaches are understood, as it seems that many IPs are of the view that there is only one model of funding for insolvency (or even only one provider!).

One of the pleasures of the last eight years has been expanding the understanding of funding and insurance options in the market through articles, conferences, training sessions and discussions around individual cases. If you are interested in the different options available around funding and insurance, do make contact as we are happy to talk through scenarios either on specific cases or in more general terms: in most instances, there are at least a couple of different options that can work.

> **“There is clearly still a lot of scope in the insolvency sector for greater efficiency and more effective utilisation of appropriate solutions.”**

As we go forward, it would be nice to see even more IPs and solicitors give greater consideration to the most appropriate type of retainer, the right mix of adverse costs protection and own costs insurance, and the form of funding best suited to a particular project. I hope to see more variety in how cases are pursued. Given the wide array of funding and insurance options in the market, spread across scores of providers, there is clearly still a lot of scope in the insolvency sector for greater efficiency and more effective utilisation of appropriate solutions. This could allow for more cases to be pursued and greater recoveries and returns to creditors. ◻

MARK BEAUMONT is co-founder of Annecto Legal Ltd, a national broker of after-the-event (ATE) legal expenses insurance and a wide range of funding for insolvency litigation and arbitration claims. Annecto is happy to assist with smaller claims, as well as mid-market, large-scale and complex cases. Contact Annecto Legal on 0800 612 6587 or Mark Beaumont directly on **mark.beaumont@annectolegal.co.uk** or 07730 217 643.

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Career progress

Neil Taylor speaks to **Stacey Phipps** about her studies for 2020 for the Joint Board's exam.

The JIEB comes with a hefty reputation. How did the 'real thing' match against its legend?

I think we all know someone who had a bad experience with the JIEB exams. I have an ex-colleague whose paper the board lost and I know someone else who failed, but was expected to pass. Everyone speaks about the low pass rate and the lack of life during long study months, the 'impossible' exam questions and the intense time pressure in the exam room.

I learned on my courses to break down the facts and statistics of each question, which is when you start to believe that passing is possible. You find your technique, stick to it and do what you need to do to pass. It is all about keeping both eyes on the main prize – delivering the best possible answer in the allocated time.

All that being said, the exam itself was pretty awful. The angle of the questions was different to those set previously. The numbers were just… odd. Where were the issues/antecedent transactions questions? When I sat my mock exams, I felt I'd done enough to pass (and I had). For the 'main event' I genuinely have no clue how I have done.

Thankfully, my tutor's voice came into my head and saved me on one question. I sat trying to figure out what the question was trying to tell me. I'd gone through my planning time and into my writing time with *nothing* planned or written. I was lost and starting to panic. In crept 'the voice' asking me what 'staples' I could write. The question asked for insolvency options, so I started with 's123 insolvency' and just like that a plan formed in my head. I went from having nothing to write, to lots. I just followed my 'flight plan' and moved onto the next question.

> **"Getting your plan, knowing what you're doing and the time when you need to stop and move onto the next question is very calming. For me, it was essential."**

STACEY PHIPPS is an insolvency manager at the Insolvency Company, Taunton.

> **"The long hours and hard yards are worth it. It comes down to just you and the examiner. It is a fight, but it is a fight worth winning."**

What was the most helpful thing you found when studying for the JIEB exams ... and the least helpful?

For me, structure was everything. I needed to know exactly what I was doing and when.

Following a detailed study planner was key. It gave me a security blanket. I watched the suggested webinars, read the pages it told me to and did the exam questions that were recommended for every stage of study. When I needed to, I gave my tutor a call; he added the structure I desperately needed and I was back on track.

Structure was also key for the exam. Spending 15 minutes in the exam planning how you'll approach it is pretty scary, especially considering how time pressured the exam is. However, getting your plan, knowing what you're doing and the time when you need to stop and move onto the next question is very calming. For me, it was essential.

What was it like to study for a major exam in the face of Covid-19?

The pandemic was rough. I love a structured plan and Covid-19 ruined all of that. My main problem was childcare; my son didn't attend nursery for 20 weeks. I was working during the days and studying every evening and weekend while trying to juggle a pre-schooler who was potty training. Everything takes longer when you're constantly interrupted.

I think another major problem was being stuck in the same place, constantly. You'd sit at your desk (dining room table) for eight hours working, then go back to the same place for the evening and weekend to study.

Another issue was feeling like you were the only person struggling. Social media was full of people being bored, jokes about still watching Netflix, stories of people learning new skills with their free time, or tales of catching a tan in the garden. For JIEB students there was none of that. Not only were most of us seeing an increase in workload due to the pandemic, but we were also juggling our 12–15 hours a week of study.

However, the JIEB exams could well be the last you ever take and maintaining a positive focus on the end result keeps you both sane and motivated. Covid-19 is huge, but it will go away. An insolvency licence is forever.

The long hours and hard yards are worth it. It comes down to just you and the examiner. It is a fight, but it is a fight worth winning. □

> **"You find your technique, stick to it and do what you need to do to pass. It is all about keeping both eyes on the main prize – delivering the best possible answer in the allocated time."**

NEIL TAYLOR is managing director of NTI.

Joint Insolvency Examination – November 2020

Corporate insolvency pass list

The pass lists are being published in this way because a pass in either the personal or corporate exam will enable a candidate to apply to their RPB for a partial licence in that particular specialism following changes brought in by the Deregulation Act 2015.

Only students who gave consent to appear on this list are shown below.

JIEB 2020 high achievers

Joint first place in corporate insolvency
(awarded to the candidate with the highest mark in the corporate paper)
Joe Burnett, Sophie Lodite

First place in personal insolvency
(awarded to the candidate with the highest mark in the personal paper)
Anonymous

Combined top scorer
(awarded to the student achieving the highest combined marks in one sitting)
Sophie Lodite

B
Birchall S, Ormskirk
Bunn S, Wolverhampton
Burnett J, London

C
Cooper J, Glasgow
Crookham T, London

D
Daniels W, Bristol

F
Fellows M, London
Fryer P, London

G
Glanvill S, Leicester
Goodall R, Cheadle

H
Haden O, Bromsgrove
Hallam L, Hitchin
Halliday R, London

J
Jones C, Chorley

L
Leeser R, London
Lodite S, Bristol

M
Maker T, London
Meldrum D, Glasgow
Moynagh R, Armagh

N
Nelson R, Leeds

O
Oliver E, Matlock

P
Phipps S, Taunton
Pritchard R, Cheadle

R
Rees G, Leighton Buzzard

S
Sartin S, Loughton
Scallon R, Ashton-Under-Lyne
Scullion M, Ballymoney
Starkey A, Wakefield
Steer J, Leeds

W
Webb S, Bristol
Whitchurch M, Bristol
Wilson N, Oldham

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Joint Insolvency Examination – November 2020

Personal insolvency pass list

The pass lists are being published in this way because a pass in either the personal or corporate exam will enable a candidate to apply to their RPB for a partial licence in that particular specialism following changes brought in by the Deregulation Act 2015.

Only students who gave consent to appear on this list are shown below.

A

Allen J, Preston

B

Bellamy-Adams S, Wellingborough
Bridge D, Bristol
Burnett J, London
Burr M, Manchester

C

Carrier G, Southend-On-Sea
Cochrane J, Northampton
Cox C, York
Crookham T, London

H

Hallam L, Hitchin
Halliday R, London
Hanson E, Oldham
Hargreaves P, Doncaster

J

Jones C, Chorley
Jordan N, Nottingham

K

Kansagra S, London
Klare Kirk J, Dunfermline

L

Leeser R, London
Lodite S, Bristol

M

Maker T, London
McLachlan K, Livingston
Moynagh R, Armagh

N

Norton J, Pevensey

P

Patel P, Carshalton
Phipps S, Taunton
Pritchard R, Cheadle

S

Sartin S, Loughton
Shepherd S, Kidderminster
Steer J, Leeds

W

Wilson N, Oldham

Analysis of November 2020 results

Papers sat	Papers passed			
	2	1	0	Total
2	16	16	11	43
1	–	20	59	79
Total	16	36	70	122

Life is all about **choice**

Steve Achurch
on the vital choices to be made when training and developing people in our sector

There is a huge amount you can offer if you run a services business, but surely the most important is to present clients and prospects with a genuine choice.

At NTI our dedicated client team is enjoying a very busy start to a new year that has been more welcome than most in recent history. But one thing we have noticed is that more of those calling and emailing us to talk about exam training, CPD and document packs are comparing what we can offer them with what they can buy elsewhere.

GENUINE CHOICE
Our new website, launched toward the end of 2020, has dedicated pages directly comparing us with the other main provider of study courses which extends way beyond price (as we have a guarantee that NTI will never be beaten on the amount students and their sponsors pay for training). Surely, even more important than that is the sheer amount of teaching webcasts we offer (literally hundreds), the fact that we are a passionate dyed-in-the-wool face-to-face training provider, the exclusive NTI app on which students can access materials, tests, webcasts, an interactive personal study plan and everything they will ever need at the touch of a button and our ground-breaking Learning Mentor support.

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NTI's CII courses, a student can literally start their training on any day of the year and receive full support that works with their study choices. With both JIEB and CPI, students will be lectured each and every month to underpin always-available webcasts - face-to-face training that is crucial in a one-dimensional world of Zoom, Microsoft Teams, etc.

This element of choice extends to NTI's extensive CPD offering. We spoke to Richard Bloomfield, Head of CPD at NTI: ***"We surveyed our clients at the end of 2020 and learnt that more than 50% of responders struggle to fulfil their CPD obligations. Of those, 40% must pay for their own CPD, which has added to the challenge of not just completing their hours, but to do so with quality, useful and relevant content.***

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This returns to the theme of offering people a genuine choice and enabling them to make their decisions fit their lives.

PARTNERSHIP WITH IPS
Speaking of choice, those firms who want document packs that are thoroughly IPS-tested by the only provider of packs with an IPS licence can now decide to choose NTI.

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We offer users the choice of precise, concise, practical and totally IPS 'oven-ready'. But don't take our word for it, ask for a 'test drive' to discover how NTI's packs can make your business more efficient and your administrators instantly more effective."

After 2020, a seemingly endless year of no choice, make this year the one where you and your colleagues choose what is best for your business.

Brexit year one: retail dominates our diaries

Paul Davies looks at the impact of Brexit on retail, landlords and supply chains, which has been creating new work for turnaround professionals.

Deal or no deal, those of us in the restructuring and turnaround community didn't have any expectation of an easy time post-Brexit. We expected that the advantageous benefits of EU membership would be lost once the UK exited the EU, but we didn't anticipate a global pandemic to exacerbate the issues that we and the businesses we serve were likely to face.

Of course, one of the big losses to the restructuring regime now that the UK is out of the EU is that English insolvency proceedings will no longer benefit from automatic recognition across the EU. Until Brexit, the UK has arguably been the most attractive legal environment for some of the largest and most complex restructurings. The rubber stamp of an English court has long been sought to implement a debt restructuring and many have felt safe when facility agreements and other contracts have been governed by English law. In fact, since 2016 more than half of the UK schemes of arrangement and new restructuring plans (schemes) agreed by English courts were for companies headquartered elsewhere. But while other EU countries have recently introduced new tools to boost their attractiveness as a jurisdiction for restructurings, I don't think all is lost for the UK. English law remains world class and with judges who know schemes inside and out, I think that many companies and their advisers will want to stick with the familiar, even if it means some additional costs and time to have UK court decisions recognised elsewhere.

> "There is much to do at the coal face and many of us in the turnaround industry are just getting to grips with an issue that is affecting thousands of businesses."

But while this change is now the subject of much discussion among lawyers and IPs, there is much to do at the coal face and many of us in the turnaround industry are just getting to grips with an issue that is affecting thousands of businesses. I'm talking about Brexit's impact on supply chains.

Covid-19 and Brexit hit retail hard

It's hard to express just how much disruption businesses faced in 2020. But alongside the travel, aviation and hospitality sectors, retail was one of the hardest hit. Barely a week went by in 2020 without news of another high profile CVA or a retailer downsizing their number of stores and making largescale redundancies. But looking back at 2020, while the high street was, and continues to be, impacted by the multiple lockdowns, retail sales as a whole did not dramatically decline. When accounting for bricks and mortar and ecommerce sales together, in the whole year trade was only down by 0.3%. Much of this was due to the explosion of ecommerce with many retailers working hard to move sales online.

Those retailers that weren't able to keep up with the move online lost out while giants

> Many retailers are struggling to obtain the correct documents from their suppliers, which is adding days, and in some cases weeks, to their lead times.

such as Amazon and ASOS saw their UK sales increase by 51% and 23% respectively in 2020. Now, just as some retailers are barely hanging on, the extra red tape and costs of importing goods into the UK and exporting to Europe have been a blow.

Brexit and supply chains

Like many of my colleagues in the restructuring industry, we are working with a lot of retailers right now and all of them are experiencing supply chain issues. They have huge amounts of items out of stock and don't have any idea when their stock will arrive from the EU. This is despite the preparations that most undertook last year to try to prevent any delays to deliveries. Retailers spent months mapping out their legal and physical supply chains, obtaining EORI numbers, finding the right commodity codes, choosing customs agents to help them with customs declarations and preparing to pay VAT and duty, all with the aim of avoiding a disruption to their businesses come 31 December. But there is real frustration among retailers that there has been very little support from the government.

One of the biggest challenges businesses are coming up against is the new rule requiring proof of origin, which means that the provenance of all goods must be documented. Retailers have been struggling to supply an audit trail for all the goods that go into their products where, for example, a shirt may have been made in Portugal with fabric from Morocco and buttons from China. While they themselves may be prepared to provide the information, many are struggling to obtain the correct documents from their suppliers, which is adding days, and in some cases weeks, to their lead times.

Some of the larger retailers have been able to sidestep the problems by restructuring. ASOS, for example, has spent the last two years preparing, opening a European distribution centre and restructuring its supply chain. Due to this preparation, ASOS recently announced that it expects its Brexit tariff costs to amount to £15m in 2021, which is substantially less than they could have been. As a business, ASOS has said it has chosen to absorb this cost rather than pass it on to its customers but for most smaller retailers this is not an option. Nor could they have spent the time and money that ASOS has to prepare.

While no business would have wished for the disruption that Covid-19 brought with it, one small positive to have come from it is that it actually forced many businesses to forge better relationships with their suppliers. This in turn has better prepared them for dealing with Brexit. When Covid-19 disrupted supply chains in the spring of last year, some retailers found that their existing suppliers were not sufficiently cooperative to help them prepare for the disruption and sourced new suppliers who better understood their needs. Now, many businesses have stronger supply chains and better communication with their suppliers.

Lack of inventory funding

Another of the key problems I know that turnaround professionals are trying to support their retail clients with is cash flow. To make up for the extra costs of importing goods, many retailers are having to put their prices up. But with many retailers now strapped for cash, some can't even get their hands on the goods in the first place. Ordinarily, they might turn to inventory funding to plug the gap in their finances but, due to the restoration of Crown preference that took effect in December, there is little inventory funding available. Banks have always disliked lending against inventory and those lenders that have historically only lent 25–30% of the book value cost of inventory, but now this is reduced by any amount due to HMRC. To make matters worse, many businesses have delayed payment to HMRC due to Covid-19 so the amounts owed are quite high. The effect has been that few inventory loans are available, making it even more difficult for retailers to buy new stock.

Knock-on effect

While it is the retailers themselves that have been the focus of most turnaround and restructuring processes until now, the knock-on effects are increasingly being seen. Commercial landlords have spent much of the last year with tenants either not paying rent or looking for reduced rent. I've spoken with several landlords who are now worried about the impact that this is having on them and their banking facilities. In the past, landlords have often gone down the route of using winding-up petitions to either get paid or force tenants out but, aside from the fact that winding-up petitions are currently blocked, who would replace their tenants? Even before Covid-19, countless retailers were looking to reduce their floor space and increase their online sales. To retain tenants in this environment I think we're going to see a big shift in 2021 with more and more landlords giving in to turnover-based rents. We've already seen a few cases of this with New Look launching a CVA in August that included moving more than 400 of its UK stores to a turnover-based rent model. The Crown Estate, which owns Regent Street and some of St James, has also offered some of its smaller and independent retailers the option to switch to turnover-based rents. For retailers, turnover-based rent make sense, giving them greater control over property costs and eliminating upward-only rent review provisions. Many landlords, however, are hoping this will be a short-term measure until the sector recovers. Unfortunately for them, I think they will be disappointed, and that turnover-based rent and flexible leases will become the new normal.

> There's not much we can't handle, particularly given our breadth of experience and that we can draw on support from colleagues.

Working together

As we're already seeing, 2021 is likely to be another brutal year for British businesses. And, while nothing can match the shock of Covid-19, its aftermath coupled with the new challenges brought about by Brexit will be hard to weather. While we've already seen some major disruption to supply chains, I think it could be another 3–6 months before we start to see the real problems that arise from Brexit. It goes without saying that the turnaround and restructuring community is made up of some of the most dynamic and experienced professionals in the UK. We are used to working with all stakeholders, even those who prefer to use ransom positions and litigation as negotiating tools when trying to reach agreement. And there's not much we can't handle, particularly given our breadth of experience and that we can draw on support from colleagues. The Turnaround Management Association has always championed collaboration and has been working hard throughout the pandemic to keep sharing information with our members and to keep facilitating connections. It is needed now more than ever. ◻

PAUL DAVIES is a partner at James Cowper Kreston and President of the Turnaround Management Association UK.

Smooth operators always follow the licensing

Cory Bebb and **Beverley Bell** explain the commercial vehicle operator licensing regime for IPs dealing with businesses utilising vehicles for trade or hire.

Operator licensing is a regulatory regime whose main purposes are to promote road safety and fair competition and, in certain cases, to protect the environment with regard to the commercial use of goods and passenger vehicles. Licensing is administered by the Traffic Commissioners (TCs) under the Goods Vehicles (Licensing of Operators) Act 1995 and the Public Passenger Vehicles Act 1981. Operating a qualifying vehicle without a licence is a criminal offence. The licence will authorise the holder to use a maximum number of vehicles and, if applicable, trailers. If the business operating the vehicles is a company, that company must hold the licence; however, in certain cases, subsidiaries may be specifically authorised to operate vehicles under the holding company's licence.

The licence (and licensing regime) is relevant in the context of being able to trade an insolvent business before any formal insolvency process, and to trade following and during a formal insolvency process or during the sale/purchase of an insolvent business that requires such a licence to operate.

The financial standing requirement

An essential requirement of the operator licensing regime is satisfying the TCs that the applicant has adequate financial resources to keep the vehicle(s) fit and serviceable, and that the operator has adequate resources to start up and run the business properly. This involves a review of working capital and is referred to as the 'financial standing requirement'. This is a continuing requirement and is different for businesses that carry goods for others, passengers for hire or reward (under a standard licence), and those that carry their own goods or only operate two minibuses (under a restricted licence).

The amounts required are set by the Department for Transport every year and are published in the 'Senior Traffic Commissioner's Statutory Document No 2 – Finance'. The amount required for standard licences from January 2021 is £8,000 for the first vehicle and £4,500 for each subsequent vehicle. The figure is determined by the number of vehicles authorised, even if fewer are operated on the road.

The licence is issued and held 'for life' unless the holder operates outside of its terms, surrenders it or fails to pay the required renewal fees on time. There is a five-yearly check to confirm the information held by the Office of the Traffic Commissioner (OTC) is correct, and that the operator still has access to the required finances.

Directors' Duties

Under s22 of the Act, the operator licence holder must inform the TC of any event that might affect the financial standing requirement within 28 days, and a contravention of this condition by the licence-holder is an offence punishable by fine – also jeopardising the licence.

Directors should therefore notify the TC of a company insolvency. The consequences of failure by a director are wide ranging and include: breach of duty to the company; criminal offence; director disqualification; and loss of repute in any future application for a new licence by an entity with which that director is associated (eg a pre-pack).

When a company hits financial difficulty and the notification requirement is triggered, early and proactive engagement with the OTC is essential. The staff are always keen to help where practitioners are trying to save jobs and sell a business that has failed due to circumstances beyond its control. They are not so keen to help when there is a bad history of trading while insolvent and a long record of failed companies by the same directors/shareholders.

Any practitioner advising a company or its directors in such circumstances must ensure their client is reminded of or made aware of this requirement.

Effect of insolvency on the licence

In bankruptcy and liquidation, under s26(1) of the 1995 Act, the TC may direct that a licence be revoked, suspended or curtailed if the licence-holder (being an individual) has been made bankrupt or had a debt relief order made in respect of them. The same may be applied to a company if it has gone into liquidation, other than voluntary liquidation for the purpose of reconstruction. In practice, the TC will revoke a licence upon becoming aware of a terminal insolvency event. The 1995 Act provides that the TC must offer the operator the chance to attend a public inquiry before such an order is made. This safeguard is there to protect the operator as well as to ensure the TC fulfils its role in a transparent manner. The public inquiry is a tribunal hearing and so specialist legal advice should be taken if attending such a hearing.

Operators should also notify the OTC if an IVA or CVA occurs as this will have a material impact on the financial standing requirement.

Where a company goes into administration, s27(1) of the 1995 Act states that the TC *must* revoke the licence if the licence-holder no longer satisfies the requirement of appropriate financial standing. Again, the TC must offer the operator the chance to attend a public inquiry before such an order is made or they can send written representations instead of attending the inquiry.

Practical implications during insolvency

An operator licence cannot be transferred to a third party. Any buyer of an insolvent business that includes the ongoing use of any qualifying vehicles must apply for their own licence or apply to increase their own existing one. It must authorise all vehicles to be operated.

A buyer cannot use qualifying vehicles covered by another party's licence. An administrator cannot allow a buyer to use vehicles belonging to or sold by the insolvent company pending the buyer obtaining its own licence or variation of an existing licence. When considering offers for such a business, the office-holder will want to be satisfied the buyer can legally take on the vehicles to avoid any last-minute problems on a sale.

While the licence will not automatically lapse on administration, continuing with it during the administration process without engagement with the TC has serious and far-reaching implications for the directors as set out above, and for the administrator as the office-holder responsible for the company.

Pre-emptive steps can be taken by the insolvent business to avoid regulatory action by the TC against either the directors or the administrator where it is proposed to trade a business following administration, either with a view to a sale or winding-down of the business in an orderly manner.

Early engagement with the OTC is essential, if possible when the practitioner is first retained to advise the insolvent company if the directors have not already done so.

Directors must therefore notify the OTC as soon as administration becomes a 'distinct possibility'.

> **"The operator licence holder must inform the TC of any event that might affect the financial standing requirement within 28 days."**

Regulation 31 applications

Regulation 31 of the Goods Vehicles (Licensing of Operators) Regulations 1995 enables the licence to continue in the event of bankruptcy, liquidation, administration or receivership of the licence-holder when the TC *may* direct that a person carrying on the trade or business of the licence-holder is to be treated as the holder for no longer than 12 months, or 18 months in special circumstances. This allows the office-holder to carry on the business while a buyer is found or to enable the business to be wound up in an orderly fashion.

An application can be made under regulation 31 by the office-holder to the TC, but only once in office and not before. In theory, the TC will already be alive to the possibility of an application if the directors have complied with their duties. Regrettably, many directors do not tell the TC when the company is in financial difficulties – either because they don't realise they have to or because they don't want to draw attention to their circumstances. Consequently, often the OTC hears about an administration or liquidation after the office-holder is in place. To make matters worse, many office-holders are either not aware of the regulation 31 process or they apply too late when the business has already failed.

Where the office-holder is aware, they should waste no time in contacting the OTC by email indicating that a regulation 31 application is imminent. The OTC staff are well trained in dealing with these and respond very quickly, assisting the office-holder and indicating what information is required. The writers' recent experience is that the OTC will consider a draft pre-appointment application and give an indicative decision. Likewise, the TC will issue a decision on the application very quickly.

While they will look at each case on its own facts, the TC will need to know *why* the application is being made (ie why do the vehicles need to stay on the road and for what time period?) as well as the *previous history* of the company and the *reasons* for the company *failure*. In line with their fair competition role, they need to ensure they are allowing a legitimate business that has suffered through circumstances beyond its control to be sold or wound up and jobs either saved or redundancies made. They also need to ensure they are not allowing directors with a long history of failed companies to set up yet another company that will also be doomed to fail – so they will pierce the corporate veil and see who is purchasing the business. In the event of a string of previous failures the application is more likely to fail. The decision to grant is entirely a matter within the discretion of the TC. They can and do act quickly – occasionally in a matter of hours and generally in a matter of days. The order will be made for a set time to enable the sale or closure of the business.

The application is made via a form and the office-holder gives an undertaking that the operator licence regime will be followed. The TC will generally require the transport manager (the suitably qualified person in the business) to remain employed while the vehicles are operating so they can be assured they and the drivers are safe.

In summary, always keep in touch with the OTC – tell them what is happening and what you want to achieve and they will do all they can to help. If in doubt take specialist transport law advice – there are some pitfalls and it is best to avoid these as time will always be of the essence in these cases.

CORY BEBB is a partner in the corporate recovery and insolvency team at JMW Solicitors LLP.

BEVERLEY BELL CBE is a director at Beverley Bell Consulting Ltd and former Senior Traffic Commissioner for Great Britain.

Airlines and the crosswinds of Covid-19

The aviation sector is no longer flying high thanks to the impact of Covid-19. **Peter Davies** and **Paul Zalkin** offer their views on the financial crosswinds for the industry.

A small but high-profile number of insolvencies within the aviation industry over the last several years has led the general public, including members of the insolvency profession, to believe that the sector has been limping along on a broken wing. However, Peter Davies, founder of the Airline Management Group – an organisation that implements change and turnaround at the board level in the industry, views those cases as a sign of poor management. He maintains that, at the start of 2020, with a relatively buoyant global economy and new aircraft rolling onto tarmacs at airports, the sector was looking forward to good passenger numbers and new routes. Then Covid-19 struck.

'The situation pre- and post-Covid-19 are very much chalk and cheese,' says Peter.

'Certainly, there were many airlines that were not doing very well prior to Covid-19, but that was more to do with poor management, rather than the marketplace.

One of the problems in our industry, like any industry, is that the management tends to blame the competition and everyone else apart from themselves. Whenever I've been involved with airline turnarounds, the standing management tend to bury their heads in the sand over the problems and then add cement, which exacerbates the situation. So, I think a lot of airline bankruptcies are self-inflicted and needn't have happened.'

Paul Zalkin, a managing director within restructuring and insolvency at Quantuma, agrees:

'If you look at the airlines that failed pre-pandemic, for those that did fail it was often due to management and because of huge balance sheet and structural inefficiency. Balance sheets were massively over-leveraged and often that was because there was a private equity-type model operating the airline. Balance sheets that are healthy outside of the pandemic will be overleveraged for very different reasons today and while there will, of course, be problems ahead, they will be of a different type with different solutions.'

The impact of the pandemic

Commercial flights were down by more than 40% in 2020 compared to the year before, according to Flight Radar. Peter estimates that only 30% of the aircraft that were flying last year are still flying today. A grounded plane still requires maintenance and regular running if it is intended for use in the near future and pilots are required to either log hours or undertake simulator training if they are to immediately resume service when the world restarts. The Civil Aviation Authority (CAA) places a legal responsibility on airlines to be solvent to maintain all of the above – a tall order when passenger fares are not forthcoming.

'Some carriers have taken their planes to the desert where the climatic conditions are more acceptable. Many are still parked in Newquay or Bournemouth,' said Peter. 'All airlines will have sat down with a relevant CAA and gone through a process to make sure the CAA is satisfied, as is the original equipment manufacturer (OEM), that those aircraft as assets are maintained in good condition. An aircraft deteriorates very quickly and there is a whole regulatory process that one needs to have gone through – and that costs money.'

In response to the pandemic, carriers have been making changes to the types of aircraft used for long-haul flights in order to reduce costs. British Airways for example had originally intended to extend the life of its 747s, which had relatively low fuel rates outweighing the cost of the plane. However, as the pandemic has progressed

it has needed to switch to even cheaper 787s or 350s where possible. What would be practical to continue pre-Covid has now become a daily battle to preserve what little remains of the bottom line.

'Today is a completely different situation from airline insolvencies of the past,' adds Peter. 'You've got many management teams who won't have the experience of how to handle the pandemic. The fundamental problem is that, inevitably, they've taken decisions to shore up their short-term liquidity. The concern is that they have essentially mortgaged the future. If they haven't got government money, or taxpayers' money, which they may have to pay back, then the bells will chime when we start getting back to increased traffic.

As very cash-orientated businesses, airlines will start chasing capacity again and prices may well be under threat. A huge number of vouchers will need to be used up for air travel for which the cash has already been paid. You can see the situation from an accountant's point of view: that although there will be a lot more passengers coming through thanks to overcoming the pandemic and the vaccines, there will be great strains on the balance sheet from a cash flow perspective, because the cash has expired, they're mortgaged to the hilt and now they've got to spend money on flying aeroplanes around.'

Managing the balance sheet

'If you look at the balance sheets of companies like Ryanair or Wizz you find that there's some clever financial structuring that's enabled them to create an asset strategy or balance sheet strategy, using their finances to the advantage of making sure they have a low cost per available seat kilometre,' explains Peter. 'This is an intellectual approach to managing an airline, as long as you manage your balance sheet or cash flow statement on P&L. They have clever instrumentation in terms of how they structured their balance sheet, whereas other airlines that have simply come in and borrowed money or have high lease rates may find that the situation catches up with them.'

Those strains on the balance sheet mean that the airlines that were struggling to manage pre-pandemic, whether due to management or other factors, are being hit even harder by the impact of Covid-19. Those that had already been micromanaging profit and loss pre-pandemic, meanwhile, may be in a better situation when the promised 'normal' returns.

Calling in a restructuring professional

Unlike other businesses that have been hard hit by the impact of the pandemic, airlines have not been offered industry-wide support packages. It's entirely possible that the government believes the latest round of legislation will provide support in the form of restructuring professionals.

'The government's approach, and that of the Insolvency Services at a top level, is that you have all of the tools in your toolkit that you could possibly need in order to deliver restructurings,' says Paul. 'Our new restructuring tool, which was interestingly first deployed with Virgin Atlantic, is an example of this. We have the restructuring plans, administrations, CVAs, and schemes of arrangements. So, the policymakers in government could well say "The reason that we're not pumping loads and loads of money into the airline industry, even though it is of strategic national importance – other than underwriting CBILs, BBILS, CLBILS and so on – is that the market will sort this out." Part of the market "sorting it out" is to allow the restructuring industry to deploy the tools it has.

> **Certainly, there were many airlines that were not doing very well prior to Covid-19, but that was more to do with poor management, rather than the marketplace.**

I think it almost is inevitable that we will see more formal restructuring because there are those airlines who – in order to get back on track – will require the skills set of restructuring professionals to work alongside operational professionals. The huge gaping hole at the moment is the practical one. There is not an international consensus, and right now I can't even think of an international consensus being developed, on how we are going to get passengers back in the air safely and with confidence.'

Paul draws a comparison with the period following 9/11, a time in which the US implemented extra security checks on all flights, checks that were quickly picked up by countries around the world. Covid-19 has not (yet) received the same treatment. The major tech companies, such as Google and Apple, made inferences at the start of the pandemic that testing and tracing could be something that the tech sector could solve, but that hasn't yet happened.

The caveats of restructuring

Finance professionals and consultants will always be involved in ensuring the smooth running of a business, but when it comes to making an effective turnaround there is always a need to work together and priorities can sometimes clash.

'The consultancies have been absolutely superb in terms of accelerating the intellectual deep dives, and being able to extract the data and provide analysis of that data, but converting that into an implementable plan can become quite difficult and often expensive. It often requires pragmatic skills to find a way to do it,' says Peter.

'Airlines are absolutely fantastic at running airlines in the ordinary course of events, but this is not the ordinary course of events,' says Paul. 'As turnaround and restructuring professionals, however, we're often more used to managing the key creditors – those who are the ones who are going to tip a business over – and are able to have conversations about rescue. We have an instinct for where the bear traps are going to be.'

Knock-on impact for the industry

Peter is concerned about the long-term impact, not only on airlines, but on the surrounding infrastructure.

'We don't know how the airports are going to survive but we don't know how they can restore their balance sheets,' adds Peter. 'You can move an aircraft around the world [to find cheaper storage or maintenance], whereas you can't move concrete. If memory serves, Heathrow earns more money from rentals per square footage than it does from aeronautical charges and there is a current lack of throughput. This has an exceptionally long tail, both in terms of headcount and financial consequences for the whole industry.'

As the country begins to reopen and floods of emails offering discount holidays reach the public's inboxes, Peter and Paul predict there will be a spike in business for the airlines over the northern hemisphere summer. When that spike ends, a huge number of aircraft will still have seats to fill and the 'war to fill capacity' will start afresh. It may be that more than one airline will need the help of a restructuring professional in order to make a bumpy landing. ☐

As told to Matt Jukes.

PETER DAVIES is founder of the Airline Management Group.

PAUL ZALKIN is a managing director within restructuring and insolvency at Quantuma.

Young Members Group goes with the flow during uncertainty

Clarissa Nitsch and **Robert Peldán** share their experiences as co-chairs of the INSOL Europe Young Members Group during the Covid-19 pandemic.

When we agreed to write a piece for R3 in November 2020, we had hoped that we would be close to getting back to a normal life. A life that would have meant we would travel again, see our friends abroad, mingle at conferences and participate in lively discussions with a microphone in hand while sitting next to old and new friends..

Now, a couple of months later, reality has hit us hard and we have to write yet another piece about this crisis that keeps us all controlled.

Introduction to the group

We took up the torch as co-chairs of the Young Members Group of INSOL Europe from our friends Georges-Louis Harang and Anne Bach in October 2020, and we brought a bag full of ideas with us. We were looking forward to taking on new and exciting tasks.

The Young Members Group (YMG), is designed to motivate young insolvency practitioners to get out of their comfort zones and participate in conferences as speakers, lead discussions or just to get used to being active at an event where one probably doesn't know anybody yet. The idea is to build a forum where the young members have the chance to develop the skills that are so important for our profession: growing a network, making contacts in other countries, sharing and discussing views, and finding opportunities to work together. We have visibility and host an open platform for contributions from young members involved in all of the activities of INSOL Europe. We want to encourage young practitioners to become members and benefit from our activities.

Global meet and greet

We do not function without our international connections. They are the air we breathe, the water we drink and our lives! To foster these connections, each year the YMG holds a joint seminar with the insolvency commission of the International Association of Young Lawyers. In 2019, we were on the beautiful island of Mallorca and had a three-day seminar on a great variety of insolvency-related topics. The year after, everything was lined up for a winter seminar in Chamonix. We had packed our

"We do not function without our international connections. They are the air we breathe, the water we drink and our lives!"

ski boots to hit the slopes and were ready to talk about insolvency. The first Covid-19-restrictions gave us little option but to cancel the event, and we decided to move it to Stockholm in June this year.

As we write this article, we are likely to be forced to again postpone the seminar. The same applies to the YMG drinks reception that, in our opinion, is a highlight of the Annual Congress every year. The reception is always organised by us alongside a local member that knows the best places to go in their hometown. It is a less formal occasion, and often rounds off the conference for both the young and more seasoned members of INSOL Europe. The drinks are always followed up by lively discussion at a dinner table in a laid-back restaurant.

Moving online

Well, in-person cancellations are the way of things right now, so why not make the best of it? We use the time we save while not running to an airport or to a meeting – we get online and keep our network growing. Together with Anne Bach and Georges-Louis Harang we hosted an online 'Covid Coffee Break' in Summer 2020 (watch it here: **www.insol-europe.org/publications/web-series**) and held a virtual wine tasting event in October 2020. Many of our members participated and had the chance to exchange their thoughts on what their practice looks like right now.

We'll continue to work hard to offer some interesting opportunities for online networking activities, not forgetting professional development, to keep the flow going and at least meet online.

We will host another online networking session at the end of the upcoming INSOL Europe Spring Conference with the topic 'Don't Worry, Restructure!' (details at: **www.insol-europe.org/events**) and over the summer there will be more interesting and cool opportunities for members – and those who are interested in becoming a member – to grow their network and have a technical exchange. We love what we are doing as co-chairs no matter if we have to do it online, so please 'Zoom in' when you see an event or just get in touch directly with us. We look forward to meeting you!

CLARISSA NITSCH is co-chair of the Young Members Group and co-opted member of the Council. She is an attorney at law at Binder Grösswang, Vienna (Austria).

ROBERT PELDÁN is co-chair of the Young Members Group and partner and head of restructuring at Borenius, Helsinki (Finland).

New fraud on the block

Simeon Gilchrist examines fraud involving furlough and other support schemes, and offers resources and advice for office-holders.

The last year has seen the world living through unprecedented times. Who would have guessed that I would writing you this update from the comfort of my living room, having not been into the office for nearly 12 months?

The government's business support schemes have been very successful, with insolvencies estimated to be 40% down on last year. The coronavirus job retention scheme (CJRS) has, and continues to, provide vital support – by November 2020 claims under CJRS had been made by 1.2 million employers and involved 9.6 million jobs.

Furthermore, £1.4m in individual 'bounce back' loans have been granted, totalling £40bn. It has been suggested that many of these claims have been made *fraudulently* and, with the temporary measures under the Corporate Insolvency and Governance Act 2020 (CIGA) due to expire 31 March 2021 and the CJRS extension coming to an end later in 2021, it is likely that many insolvency professionals may come across new types of fraud in the coming months and years (further extensions have been applied since this article was first written).

Identify and recover

HMRC has set up a dedicated team to identify and recover funds where the CJRS and other support payments were made when they weren't properly due.

Where an insolvency process is involved, HMRC will be looking to work with the office-holder to maximise recoveries of funds paid out. Indications to look out for include:

- overclaims for employee wages;
- failure to pay monies to employees;
- claims made for employees that don't exist;
- claims for staff who continued to work;
- fictitious transactions; and
- 'Phoenixism'.

HMRC will be looking to use their own powers first, before they ask an IP to do lots of work. HMRC has the power, where such claims are identified, to apply a tax charge equal to 100% of the claim and, where such claims have been made deliberately, HMRC can also impose a penalty of up to 100% of the tax charge. Any queries should be sent to **cppcinsolvency@hmrc.gov.uk**

Key role of office-holders

Where HMRC are aware that an office-holder has been appointed in a case in which they are undertaking further investigation work, they will automatically send out details of any claims that have been identified that may be erroneous. Furthermore, HMRC have set up a referral route with the Insolvency Service with regards to director disqualification.

Office-holders should also ensure that they make the Insolvency Service aware where any such claims have been identified as part of the director reporting process. For example, if 'furlough monies' were inappropriately used and not paid to employees but used to reduce a director's loan account, then this should be submitted as a single report online via the secure portal (The Director Conduct Reporting Service) within three months of the relevant date.

In instances where CJRS monies are concerned, then any known inappropriate use should also be highlighted to HMRC.

> **"It is likely that many insolvency professionals may come across new types of fraud in the coming months and years."**

Further guidance can be found at the following link: **www.gov.uk/government/organisations/hm-revenue-customs/contact/report-fraud-to-hmrc**

Additionally, a specific connection has been set up for reporting fraudulent claims and use of CJRS fund. This can be found at the following link (CJRS claims are going to be made public to try to limit/reduce fraud): **www.gov.uk/guidance/claim-for-wage-costs-through-the-coronavirus-job-retention-scheme**

Director's loan accounts

Any director's loans should also be highlighted to the Redundancy Payments Service. Should the director make a claim for statutory payments from the National Insurance Fund, the amount owing to the director's loan account will be offset against any statutory entitlements as per rules 14.24 and 14.25 of the Insolvency (England and Wales) Rules 2016.

Return of CJRS monies

In a normal trading situation, if a company is unable to transfer the funds to the respective employees for some reason, the CJRS monies must be returned. HMRC recognises that the situation when there is a formal insolvency is different and the outcome will depend upon the facts in the particular case.

HMRC has a dedicated contact for queries on CJRS which can be found at the following link: **www.gov.uk/government/organisations/hm-revenue-customs/contact/get-help-with-the-coronavirus-job-retention-scheme**

Rise of insolvencies

As the government support schemes come to an end it is likely that insolvencies will increase. R3 has launched a Back to Business UK campaign to raise directors' awareness of the forthcoming cliff edge – we can't say it often enough: get advice early!

On the face of it, the easy option may be to pursue a pre-pack sale of a business rather than exploring options to rescue the company as a whole, propose a voluntary arrangement or explore a restructuring plan. However, with the government keen to avoid a 'cliff-edge' of insolvencies, it was announced on 24 February 2021 that it plans to strengthen legislation in relation to pre-pack sales by requiring an independent opinion on a sale in administration to a connected person. Will the 'easy option' no longer be an option? Only time will tell.

It is worth noting that rescuing a company is often actually the best option for its creditors. A company that continues trading is more likely to be able to repay its debts and creditors will not be required to crystallise a loss. Granted, however, there will be cases where business rescue is not possible.

If directors are to be encouraged to propose a voluntary arrangement or restructuring plan, it will be necessary for HMRC to take a more commercial view to rescue proposals. We will be waiting to see how this transpires and we will want to hear from you on how the return to HMRC preferential status impacts on the options available to directors and on the returns for creditors. Please do feed this back to the team at R3. ◻

SIMEON GILCHRIST is R3's SPG committee chair, and restructuring and insolvency partner at Edwin Coe LLP.

A sprint finish – and start

The last few months of 2020 and the first few of 2021 have continued to be busy for R3's Press, Policy and Public Affairs Team.

As scrutiny of the profession increases, we've been briefing journalists, parliamentarians and stakeholders on a number of issues ranging from government support through to HMRC's role in insolvency cases, responding to government consultations around proposed legislation and working with a range of business bodies to help promote the profession and its work.

Liaising with Westminster

Since the last issue of *RECOVERY*, we have continued to meet a number of parliamentarians. During these meetings, we've discussed issues that include CVAs, the Corporate Insolvency and Governance Act 2020 (CIGA) and the role of HMRC as a preferential creditor and what it means for insolvencies.

We've also continued to brief MPs and peers about the profession and its work and the potential consequences of policy proposals on insolvency and restructuring more generally.

As a result of one of these rounds of briefings, R3 was mentioned a number of times in a House of Lords debate on the proposed extension of the temporary CIGA Covid-19 support measures, with peers echoing our call for HMRC to take a more proactive and supportive role in insolvencies following the change to its creditor status, to help support business rescue as and when the support measures are wound down.

The future of Companies House

In December, three linked consultations on the operations of Companies House were published, which looked at: implementing the ban on corporate directors; the powers of the registrar; and improving the quality and value of financial information on the UK companies register.

As part of our response to these, we stressed the government needed to recognise the role of the insolvency profession as an extensive user of Companies House, and the need for IPs to able to access the proposed 'back office' information to be collected by the organisation in future.

This is a point we'll continue to stress in our campaigns on this issue, as we have since these reforms were proposed in 2019.

We've also highlighted the need for Companies House to establish a workable process for electronic filing. The government has consulted on proposals to introduce an all-digital approach in this area and, while there are significant potential benefits to such an approach, we're mindful of the issues members raised around Companies House's electronic filing process in the summer of last year. These issues demonstrate that a careful approach to developing this reform further is needed.

Educating directors, stakeholders and individuals

As part of our Back to Business UK campaign, we've arranged webinars with a range of organisations to educate businesses about the profession and the benefits of seeking early advice.

Members have spoken at webinars organised in partnership with the Institute of Directors (IoD), Chartered Institute of Credit Management and the Federation of Small Businesses, as well as IoD South West and Wales, IoD Midlands, Hampshire Chamber of Commerce and the London Chamber of Commerce.

These webinars have been very well received, and we're very grateful to those members who took the time to speak at them and educate company directors about the profession and the benefits of early engagement.

We've also developed (in partnership with R3's Technical team) and launched a guide for individuals about managing their debts, which we hope will educate people about personal debt solutions and encourage them to start conversations about managing their financial situation sooner rather than later.

Towards the end of 2020, we held two policy roundtables: one on the longer-term future of insolvency and restructuring in the UK, bringing together senior members from across the profession, and the other on the future of the personal insolvency framework, with the key personal debt stakeholder bodies in attendance. Both events provided both R3 and attendees with some fascinating thoughts and insights and will help to inform R3's work in these areas in the months ahead.

Additionally, we've met with a number of organisations that include the British Property Federation (BPF), ABTA and UK Finance to discuss a range of insolvency and restructuring issues and explore joint working opportunities.

R3 in the media

Media interest in the profession and its work remained high in the run up to Christmas – something that continues to be the case in 2021.

Our comments on the England and Wales insolvency statistics continue to be featured in the local, national and trade media (including outlets such as *Accountancy Age*, *The Sun* and *The Times*), and we've continued to brief journalists on trends, policies and processes as the pandemic continues to affect the economy.

R3 spokespeople have briefed journalists from a range of outlets that include *The Times*, *Sunday Times*, The *Evening Standard*, *Daily Telegraph*, *FT*, *Bloomberg TV* and the *New Statesmen* – and more of these are expected as the pandemic continues.

On the horizon

Later this year, we'll launch our *Value of the Profession* report, based on the survey we issued last year, which highlights the scale of the economic contribution the profession makes. Thank you again to everyone who completed it.

We also intend to hold roundtables on fraud and other policy issues, and carry out further research on trends in insolvency.

With these, a range of government consultations to respond to, and day-to-day media and parliamentary engagement to manage, 2021 is going to be just as busy as last year. □

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An interview with... Michelle Thorp, CEO of the Insolvency Practitioners Association

The CEO of the IPA talks to *RECOVERY* about major changes over the past two years and how its staff and members are coping with the impact of Brexit and Covid-19.

Q What surprised you most about the profession when you took the helm at the IPA?

A I've worked on projects in all sorts of different spheres so I'm used to getting stuck into a new area of expertise quickly and learning the ropes. Insolvency is the most complicated, complex and technically deep field that I've ever worked in – the number and amount of qualifications, skills and expertise you need to be a great insolvency practitioner really blew me away. You have to study hard for so long and it's amazing how much work is taken on and how committed IPs are to their profession. There are people who have been active members, presidents or committee members of more than one body simultaneously and they give up their time, often voluntarily, to make the profession that much better. I think that is amazing and I'm not sure why it's not more of a well-known and attractive profession.

Q Since about 2018 there has been massive change at the IPA. It has changed beyond recognition. Could you tell us a little bit about some of the changes and why they were needed in the first place?

A If you look at the theory on regulation, it often says that regulation or legislation is always just a step behind developments in a profession. In order for us to keep up we have to move as the profession moves and the profession is always dynamic and changing; therefore we need to be quicker.

I believe that we should work with the profession to raise standards collectively. We've done so much in the past couple of years – there's been an enormous amount of work from our team and our members. We collapsed our committees from about 14, when I joined, to 5 with a couple of subcommittees underneath. Importantly, we collapsed the Regulation Committee because we didn't want people to have to go from one committee to another because each committee could only do some interventions. We refreshed our membership, added in new training requirements and gave the committees new powers to be able to help IPs understand what was being asked of them. We also introduced risk profiling. We've developed a new inspection regime based on the risk profile, so rather than getting a visit arbitrarily every three years, you get a visit every six years and at appropriate points in between.

We introduced new KPIs and complaints handling so that we progress complaints that much quicker. I believe in having an ethos of continuous improvement, so we'll always be improving and modernising as the profession changes. Of course, we've also had enhanced powers on anti-money laundering. We've been asked by the Financial Conduct Authority (FCA) to

Michelle Thorp biography

- Michelle Thorp joined the Civil Service Fast Stream upon leaving university and worked in a number of different departments on everything from criminal policy to judicial remuneration.
- She took a brief break from government in 2006 to join Deloitte working on corporate finance in Moscow, Russia, before once again returning to the Civil Service.
- Michelle took on roles relating to international criminal justice, eventually specialising in bigger and more complex projects in the public sector related to transformation and backed by digital and technological change.
- She took up the role of chief executive officer of the Insolvency Practitioners Association in August 2018.

> "There have been so many people who've been affected by the Covid-19 pandemic and, unfortunately, that means a large number of people are going to find themselves in need of financial help for the first time."

really make sure that we are as much an anti-money laundering organisation as we are an insolvency regulator. And that's a big psychological shift.

Q I just did my money laundering training this morning, so it's gaining momentum all the time. Perhaps one of the other notable changes gaining momentum is the volume provider regulation scheme. That didn't exist as an entity prior to quite recently. Can you tell us a little bit about why the scheme was necessary and how it has evolved and adapted?

A The legislative framework was never set up for businesses to operate in the way that firms that offer IVAs in large volumes operate – it's based very much on the individual IP. We've been asking for new powers and we knew we couldn't go with a 'one-size-fits-all' approach. Fortunately, when I arrived, the scheme members and volume IVA providers had also recognised that something needed to change. We were able to work with them on the new scheme and I genuinely believe it is unparalleled in our part of the financial services world.

We go in for up to four visits a year and can do targeted visits on particular issues. We also do monthly data returns so that it's basically continuous monitoring. We have also massively increased our ability to listen to advice calls to check on allegations of misconduct or mis-selling. Last year we listened to ten times as many calls as the year before, and this year we will be listening to up to 1% of all IVAs or around 3,000 in total. We were the first body to require our members to only work with introducers who are regulated, which is a really big step.

I think we still need to go further with introducers, but that's the FCA's job. We're just about to fund a study into failure on personal insolvency debt products and solutions, because there's no point looking at failure on IVAs alone; you have to look at debt management plans across the board.

Sadly, in some areas we've needed to intervene on a regulatory basis but we've taken those steps where we've had to. We are producing a benchmark report very soon, which will have all the data from last year and I do encourage people to have a look at it, because when people hear about the volume scheme they tend to think 'Well, how different can it be?', but it truly is a massive change.

> **"In order for us to keep up we have to move as the profession moves and the profession is always dynamic and changing."**

Q As government support starts to come to an ordered conclusion, do you expect increased scrutiny in this area? Probably driven by, I would have thought, an increase in the number of people who require a personal insolvency process of one sort or another as a result of Covid-19?

A Certainly. There have been so many people who've been affected by the Covid-19 pandemic and, unfortunately, that means a large number of people are going to find themselves in need of financial help for the first time. I think there will be increased scrutiny across the entire insolvency profession. IPs should really pay special attention to the new ethics code and the public interest test. They should be not only asking if it is acceptable within the bounds of the law, but also does it look acceptable in the way the public would typically perceive the way that you've acted to be within their interests and in terms of creditors.

> **"The legislative framework was never set up for businesses to operate in the way that firms that offer IVAs in large volumes operate."**

Q It has been a very odd year, hasn't it? But I think we have also seen the best of the professional way in which our organisations are treating each other. There's a level of respect, honesty and civility that is better than I've ever seen.

A We've seen some really great examples amongst members who've stepped up for communities or to support their clients, offering deference or free advice where they're allowed. I agree that we have seen the best from people.

Q How has the IPA adapted to the lockdown recommendations regarding members, CPD exams, inspections, that sort of thing? Have you had to adjust the regulatory model for Covid-19, would you say?

A We are aware that regulatory obligations don't lapse during Covid-19. We took our inspection

> **"We led an initiative that led to some changes in the IVA protocol to enable providers to offer more space to their clients and to help them manage through the crisis."**

regime online, our CPD requirements were also moved online, and we offered forbearance and changed some of the rules – we took really active steps in the early days to help stimulate the need for personal insolvency response. As the government was so focused on corporate insolvency, we wanted to make sure that there was something for the personal space as well. We led an initiative that led to some changes in the IVA protocol to enable providers to offer more space to their clients and to help them manage through the crisis. We held all our roadshows online and they were really well attended.

Q And, finally, the wild-card, mystery question. If you had a magic wand, and there's one thing that you could change about the last, let's say 18 months, what would you change?

A Well, obviously, I should say 'I wish Covid-19 hadn't happened'. And I wish that all the angst and all the fear and all the illness and sadly, loss of life didn't happen. But you can't; there is no magic wand. There have been amazing things from people that you wouldn't want to lose. I think about the teachers taking school dinners to pupils and everything that Marcus Rashford achieved. I think about how my team has shown true commitment every day. They've been dealing with all this stuff, but they'll always turn up to do the best for members and for the regulatory environment. If we could keep the good things without the trauma, that's what I'd like to change. □

COLIN HAIG
is the president of R3 and head of restructuring at Azets.

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