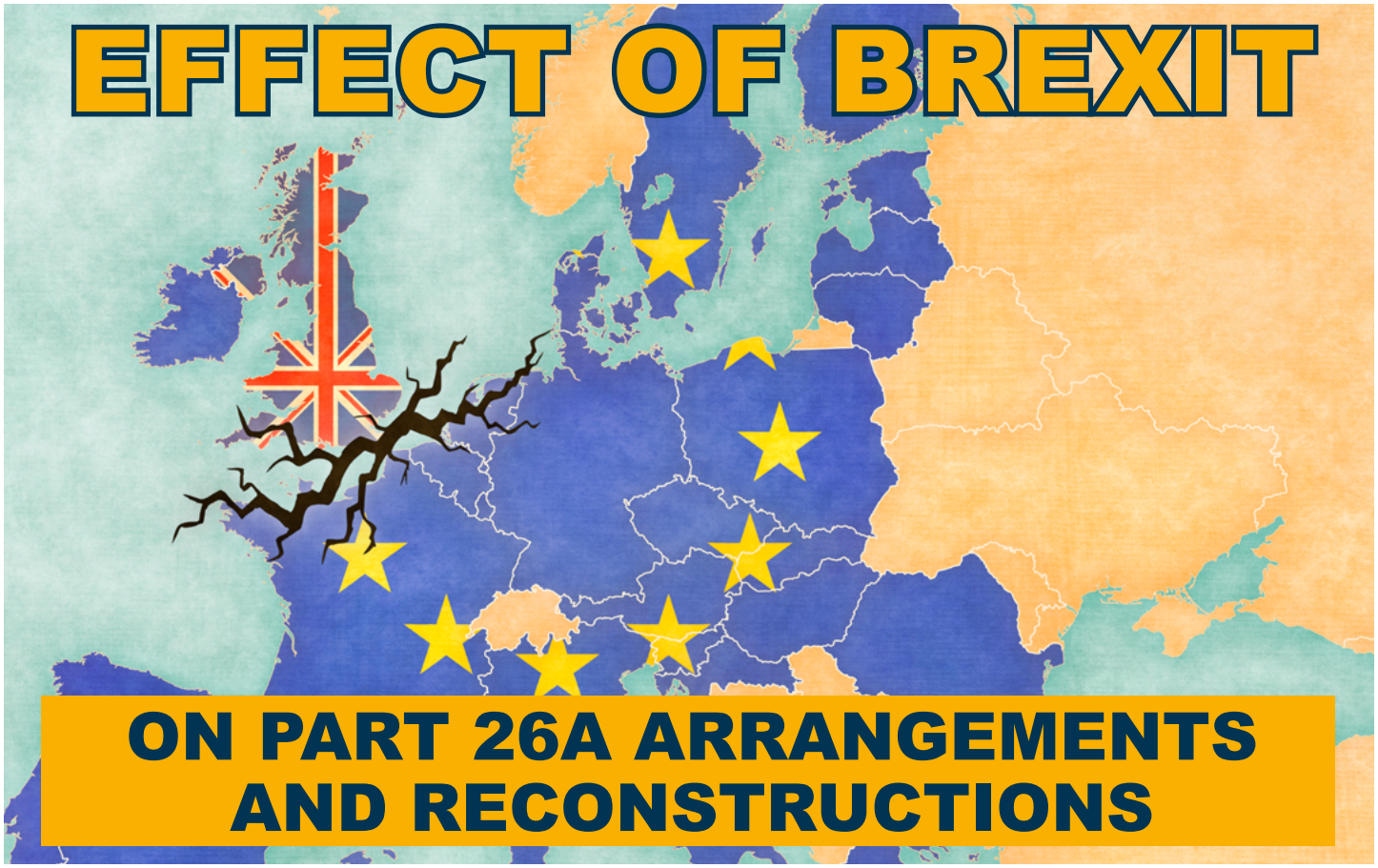
EFFECT OF BREXIT ON PART 26A ARRANGEMENTS AND RECONSTRUCTIONS



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1. It is one of the ironies of Brexit that the UK has effectively implemented many of the features of the 2019 EU Restructuring Directive, providing for restructuring plans with cross-class cram down and moratoria, before all of the remaining EU member states (although the Corporate Insolvency and Governance Act 2020 was avowedly not the implementation of EU law). Already and increasingly, a company in financial distress looking to restructure has a variety of fora within Europe within which to shop. The Restructuring Directive itself allows member states a relatively free hand as to the form that its implementation may take, leading to a wide range of similar but different restructuring solutions depending upon the jurisdiction chosen, to which the provisions of Part 26A of the Companies Act 2006 are but one addition.

2. Where the UK courts have most obviously departed from the EU has been in their readiness to accept jurisdiction in reconstructions that have limited connection to the UK. It is another irony that the jurisdictional basis (or perhaps, justification) for this departure has been the application of EU law and the Recast Judgments Regulation.

3. In several cases where the debtor has had marginal connection to the jurisdiction, the UK courts have accepted that the restructuring would be recognised and therefore effective in EU member states. After 1 January 2021, that conclusion does not necessarily follow.

4. The Recast Judgments Regulation no longer applies, and what is left is the more flexible (or, to the European critic, arbitrary) test of sufficient connection. The relegation of COMI to only one of many factors in the application of that test is antithetical to the EU ideal of uniformity and the primacy of the debtor's 'home' court. The reception of a UK Part 26A restructuring plan in this new environment has yet to be tested. A less-than-warm welcome might be anticipated in those jurisdictions where the debtor has its COMI and which have also implemented their own restructuring schemes. This will ultimately affect the international effectiveness of restructuring schemes and, in turn, the readiness of the UK courts to sanction them.

5. Question of international jurisdiction arise in three ways in relation to schemes and reconstructions:

   (1) Is the company liable to be wound up under the Insolvency Act 1986?

   (2) Does the English court have jurisdiction over the plan creditors (referred to as the test of "sufficient connection")?

   (3) Is there a reasonable prospect that scheme will be recognised and given effect in other relevant jurisdictions so as not to be capable of being undermined by action by dissenting creditors (referred to as the test of "international effectiveness")?

(1) Company liable to be wound up

6. Companies to which Parts 26 and 26A may apply are defined in sections 895(2)(b) and 901A(4)(b) as "any company liable to be wound up under the Insolvency Act 1986 or the Insolvency (Northern Ireland) Order 1989." Since the English court has jurisdiction to wind up any unregistered company under section 221 of the Insolvency Act 1986 this includes foreign companies. All that is required is that the entity in question falls within "the juridical concept of a company".

(2) Sufficiency of connection

7. Until 31 December 2020 the question of the Court's jurisdiction over plan creditors was determined in accordance with the Recast Judgments Regulation. The approach of the courts to Part 26 schemes was applied to Part 26A restructuring plans, it being accepted that both were "a civil or commercial matter" to which the Regulation applied. *Re Gategroup Guarantee Limited* [2021] EWHC 304 (Ch) marked a departure from that consensus in the case of Part 26A reconstructions, which were held to fall within the bankruptcy exception in the Lugano Convention. This is a distinction of diminishing significance, however, since the only relevant EU legislation to survive from 1 January 2021 is the attenuated form of the Recast Insolvency Regulation created by the Insolvency (Amendment) (EU Exit) Regulations 2019.

8. For any proceedings for approval of a Part 26 scheme commenced after 1 January 2021, the Recast Judgments Regulation no longer applies. Jurisdiction will be determined in cases where there is an exclusive jurisdiction agreement under the Hague Convention on Choice of Court Agreements 2005 and in all other cases in accordance with common law. For Part 26A reconstructions, the adapted Insolvency Regulation will apply (following the *Gategroup* decision) but that also allows for a sufficiency of connection test, as "grounds for jurisdiction to open such proceedings which are based on the laws of any part of the United Kingdom" under Article 1(1).

9. In cases where there is no exclusive jurisdiction agreement, the common law rules lack the uniformity and certainty previously offered by the Recast Judgments Regulation. It seems quite possible that this may result in a less exorbitant approach and a greater need to establish sufficiency of connection. If, for instance, a bare majority of trade creditors domiciled in England was "amply sufficient" to satisfy article 8 in the *Virgin Atlantic* case, the same might not be said in determining sufficiency of connection under the common law absent other connecting factors.

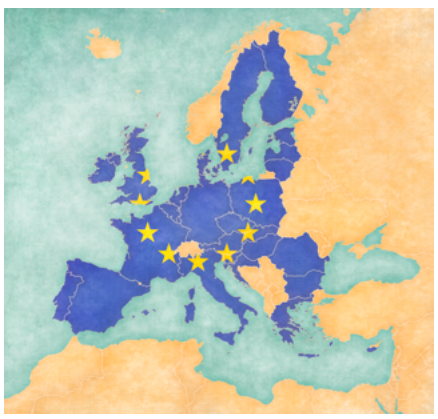
10. The 'rules' of the Recast Judgments Regulation might be said to have provided pegs on which to hang jurisdiction in marginal cases. It is likely that greater emphasis will now be placed upon the COMI of the company and the domicile of most of the scheme creditors. Concerns about international effectiveness are now likely to promote a more cautious application of the test of sufficiency of connection.

(3) International effectiveness

11. After 1 January 2021, the recognition of UK restructuring plans in the EU (and therefore their international effectiveness) is likely to prove more difficult. It is likely that the EU member states will compete as attractive venues for restructuring, and the Restructuring Directive certainly promotes that aim. Such EU schemes have the advantage of automatic recognition within the EU not afforded to UK restructuring plans.

12. With the increasing availability of alternative regimes in EU member states (having the same and in some cases more favourable essential features as the UK regime), it is more difficult to see cases of limited connection being recognised in member states and therefore being internationally effective. In this context, lock-up agreements effective in the jurisdictions where the company is incorporated and its assets located may have a more important role in securing recognition and in turn demonstrating effectiveness.

13. Schemes under Part 26 and 26A have been long been recognised as a form of forum shopping, albeit of the "good forum shopping" kind (*Re Codere Finance* [2015] EWHC 3778 (Ch)). The preparedness of the courts of EU member states to accept such forum shopping (even if considered by the UK courts to be of the "good" kind) is now open to serious doubt, particularly in the absence of a reciprocal framework requiring them to do so. This is an area where rapid development can be expected in the coming months.



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