**Comparison of UK and US restructuring regimes as reorganisation tools for foreign debtors**

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1. **Introduction**

Sophisticated systems and substantive advantages offered by different restructuring regimes can attract debtors to restructure under foreign restructuring systems instead of their home jurisdiction. Beneficial features that may attract debtors to utilise foreign restructuring regimes include: debtor-in-possession restructuring models, cram-down mechanisms for creditors, world-wide stay on enforcement actions, efficient and sophisticated judicial systems.

In the last few decades, the United States of America (US) and the United Kingdom (UK) have emerged as attractive restructuring venues for debtors around the world.[[1]](#footnote-1) The flexible eligibility requirements for foreign debtors coupled with attractive features and sophisticated systems have attracted debtors to these two venues.

This paper compares the jurisdictional thresholds and eligibility requirements for foreign debtors seeking to undergo a restructuring in the US and UK with the objective of comparing the ease of access to these regimes for foreign debtors. It also discusses the enforceability of US and UK court rulings in other jurisdictions.

Part 2 of the paper briefly describes the key reorganisation procedures available in the US and UK. Part 3 of this paper explores the legal requirements that need to be fulfilled to allow a foreign debtor to access the US and UK restructuring systems. This is achieved through a detailed discussion of the legal rules and case laws relevant to establishing jurisdiction over the restructuring of a foreign debtor. Part 4 of the paper discusses the enforceability of US and UK court rulings in other jurisdictions. Part 5 concludes.

The scope of this paper is focused on analysing utilisation of reorganisation procedures (and not liquidation proceedings) in the US and UK by foreign corporate debtors (and not individuals). It is also limited to exploring legal issues in cases where foreign debtors are seeking to primarily restructure under the UK or US regimes and does not discuss the US or UK regime for recognition of foreign insolvency proceedings of a debtor.

1. **Restructuring Mechanisms in the US and UK**
	1. **Chapter 11 proceedings in the US**

US’ restructuring regime is provided under Chapter 11 of the US Bankruptcy Code. Chapter 11 provides debtors with a mechanism to conduct a restructuring while remaining in control of the business and negotiating a restructuring plan which binds all of its creditors and shareholders. Key beneficial features of Chapter 11 proceedings which make it an attractive restructuring avenue for debtors include: a debtor-in-possession model, worldwide stay protecting assets against creditor actions, ability to cram-down dissenting creditors and ability to obtain new financing with a super-priority.[[2]](#footnote-2)

* 1. **Reorganisation procedures in the UK**

Key restructuring mechanisms under UK’s restructuring regimes are: administration[[3]](#footnote-3), company voluntary arrangements[[4]](#footnote-4) (CVAs), schemes of arrangement[[5]](#footnote-5) (SOAs) and the recently introduced restructuring plan (RP)[[6]](#footnote-6). Administration and CVAs are provided under UK’s Insolvency Act 1986 (IA 1986) while, SOAs and restructuring plan, are covered under UK’s Companies Act 2006 (CA 2006).

Prior to Brexit (i.e., UK’s departure from the European Union (EU)), UK’s jurisdiction to open administration and CVAs was also governed by EU’s Recast Insolvency Regulation (EU) 2015/848 (RIR) recasting Regulation 1346/2000, which grants the jurisdiction to open ‘main’ insolvency proceedings[[7]](#footnote-7) to the EU State where the debtor has its centre of main interest[[8]](#footnote-8) (COMI), which can then enjoy the benefit of automatic recognition in other EU member States (other than Denmark).[[9]](#footnote-9)

Post Brexit, UK is no longer governed by the RIR and RIR ceased to insolvency proceedings opened after 31 December 2020.[[10]](#footnote-10) However, UK retained certain aspects of the RIR as a part of its domestic law under the Insolvency (Amendment) (EU Exit) Regulations 2019 which is commonly referred to as the ‘Retained Insolvency Regulation’. Under the Retained Insolvency Regulation, (1) debtors with COMI in the UK or (2) debtors with COMI in an EU member state and an ‘establishment’[[11]](#footnote-11) in the UK, can undergo administration and CVAs.[[12]](#footnote-12)

Unlike administration and CVAs, utilisation of SOAs and RPs by foreign debtors requires a lower threshold of a “sufficient connection” to be met, even when it does not have its COMI or any assets in the UK.[[13]](#footnote-13) Even prior to Brexit, SOAs and restructuring plans were not listed as insolvency processes covered by the RIR. Many foreign debtors rely on the SOAs which have been a popular restructuring avenue for foreign companies.[[14]](#footnote-14) RPs have also found takers in foreign debtors.[[15]](#footnote-15)

1. **Legal rules and case laws relevant to eligibility of foreign debtors**
	1. **US**
2. **Section 109(a) of the US Bankruptcy Code**

The eligibility requirements for a debtor wishing to undergo US bankruptcy proceedings is laid down in section 109(a) of the US Bankruptcy Code which provides that any person “*that resides or has a domicile, a place of business, or property in the United States*”[[16]](#footnote-16) may be eligible to undergo Chapter 11 proceedings in the US.

Therefore, a foreign debtor with a place of business[[17]](#footnote-17) or property in the US as on the date of the bankruptcy petition[[18]](#footnote-18), may be eligible to make a bankruptcy filing under Chapter 11. It becomes important to understand what qualifies as presence of “property” for the purposes of Section 109(a).

1. **What qualifies as “property”?**

Generally speaking, the threshold for establishing presence of property is quite low and a minimal amount of property in the US may be sufficient to meet this requirement.[[19]](#footnote-19) In *In re McTague*, the court noted that the language of section 109 did not require an enquiry into the quantum of property.[[20]](#footnote-20) Famously, the court remarked that ‘*having a dollar, a dime or a peppercorn*’ may be sufficient to satisfy section 109 requirements.[[21]](#footnote-21) Therefore, the quantity or minimum value[[22]](#footnote-22) of property is not of significance as long as presence of some property can be established.

In previous cases, existence of bank accounts[[23]](#footnote-23) with minimal amounts of money[[24]](#footnote-24), unearned retainer deposits for the debtors’ legal counsel[[25]](#footnote-25) has met the requirement of section 109(a). As aptly put by the court, in *In re Aerovias Nacionales de Colombia S.A. Avianca[[26]](#footnote-26)*, which quoted Collier on Bankruptcy, "*there is virtually no formal barrier to a foreign entity commencing a case under title 11 in the United States*”.[[27]](#footnote-27)

1. **Potential reasons for dismissal**

While the threshold for being eligible to file in the US is quite low, a bankruptcy petition filed by a foreign debtor may still be dismissed under section 305 and 1112 of the US Bankruptcy Code. Section 305 states that a bankruptcy petition may be dismissed if such dismissal is in the best interest of creditors and the debtor[[28]](#footnote-28) while section 1112 allows dismissal of a bankruptcy petition for ‘cause’[[29]](#footnote-29)

Under section 1112(b), a bankruptcy petition may be dismissed for ‘cause’ unless the petitioner can show good faith, which may be established by examining whether the bankruptcy petition had a valid reorganizational purpose, and whether it was filed merely for tactical litigation advantage.[[30]](#footnote-30) In *In re Integrated Telecom Express, Inc*,the court dismissed the debtor’s bankruptcy filing as it was “*not in financial distress, its Chapter 11 petition was not filed in good faith as it could not — and did not — preserve any value for Integrated's creditors that would have been lost outside of bankruptcy*”.[[31]](#footnote-31)

One example of a case where bankruptcy petition of a foreign debtor was dismissed is *In re Yukos Oil Co.[[32]](#footnote-32)*. Yukos’ primary assets and operations were in Russia. After the Russian government tried to enforce certain tax claims against Yukos, it filed for Chapter 11 proceedings to prevent seizure of its assets in Russia. The court dismissed the case on several grounds including: most of its operations were in Russia and its limited ability to reorganise without the Russian government’s co-operation. The court also noted that the importance of the company to the Russian economy favoured allowing resolution in a forum where the Russian government will participate.[[33]](#footnote-33)

* 1. **UK**
1. **Eligibility requirements for SOAs and RPs**
2. **Relevant Legal Provisions**

Anycompany that is liable to be wound-up under IA 1986 can undergo a SOA or an RP in the UK.[[34]](#footnote-34) Section 221 of the IA 1986allows UK courts to wind up unregistered foreign companies. However, the jurisdiction to allow a foreign debtor to undergo SOAs or RPs is confined by the “sufficient connection” test established by UK courts through case laws.

1. **‘Sufficient connection’ and international effectiveness for SOAs and restructuring plans:**

A foreign debtor seeking to undergo a scheme in the UK would need to establish that it has a sufficient connection[[35]](#footnote-35) with the UK, and that the scheme would be recognized and given effect to in relevant jurisdictions.[[36]](#footnote-36) The same principles would apply to a foreign debtor seeking to utilise an RP.[[37]](#footnote-37) The ‘sufficient connection’ test may be satisfied even if the debtor does not have its COMI or an establishment in the UK.[[38]](#footnote-38) Debt governed by English law along with a jurisdiction clause in favour of UK courts may be sufficient to satisfy the ‘sufficient connection’ test.[[39]](#footnote-39) In certain cases, the change to the governing law was made shortly before the filing of scheme.[[40]](#footnote-40)

In the case *Re Rodenstock GmbH*[[41]](#footnote-41)*,* a German-incorporated company with its COMI in Germany applied to undergo a scheme of arrangement in the UK. It did not have any assets or establishment in the UK but English law governed debt with a clause granting jurisdiction to UK courts was enough to meet the “sufficient connection” test. A similar position was taken in the *Re Primacom Holding GmbH[[42]](#footnote-42)* case.

Additionally, the UK court will also need to be convinced that the scheme would have international effectiveness i.e., it would be effective in jurisdictions where creditors may take actions or the debtor’s home jurisdiction.[[43]](#footnote-43) Expert opinion stating that the scheme would be recognised in the debtor’s jurisdiction is usually provided to meet this condition.[[44]](#footnote-44)

1. **‘COMI’ shift**

In the past, there have been cases where debtors have shifted their COMI to the UK to undergo administration and CVA procedures.[[45]](#footnote-45) In the matter of *Hellas Telecommunications (Luxembourg) II SCA*, the debtor shifted its COMI from Luxembourg to the UK and some of the factors that were by the court while considering whether the COMI has shifted to the UK were: place where creditor negotiations took place, opening of a new head office in the UK and notifying creditors of the change, a press release announcing the shift of its activities transfer.[[46]](#footnote-46) Therefore, steps to shift COMI to the UK may include: shifting of the head office, registration as a foreign company, owning property in the UK, conduct of business from the UK or carrying out negotiations for the restructuring in the UK.[[47]](#footnote-47)

1. **Enforcement of US or UK court rulings elsewhere**
	1. **General Framework for recognition and enforcement of insolvency proceedings and judgments**

Generally speaking, recognition and enforcement of insolvency proceedings and insolvency related judgments of one nation in other jurisdictions will depend on:

1. private international law of the concerned jurisdiction;
2. Other cross-border frameworks such as:
3. to the extent that a jurisdiction has adopted UNCITRAL’s Model Law on Cross-Border Insolvency (UMLCBI), then it will have provisions for recognition of foreign insolvency proceedings;
4. international conventions or treaties[[48]](#footnote-48) dealing with recognition and enforcement of judgments given in other jurisdictions;
5. existence of any bilateral treaty between the two jurisdictions which covers recognition of insolvency proceedings or enforcement of insolvency related judgments;
6. judicial co-operation or signing of cross-border protocols between the two jurisdictions[[49]](#footnote-49).

While UMLCBI deals with recognition of foreign insolvency proceedings and providing assistance to foreign representatives, there has been uncertainty[[50]](#footnote-50) regarding a court’s ability to enforce rulings (such as judgments relating to avoidance actions) given in the course of such foreign insolvency proceedings as a part of the recognition process.[[51]](#footnote-51) Moreover, international conventions such as the Convention of 30 June 2005 on Choice of Court Agreements does not apply to “insolvency, composition and analogous matters”.[[52]](#footnote-52) In response, in 2018, UNCITRAL adopted a Model Law on Recognition and Enforcement of Insolvency-Related Judgements (UMLIRJ) to provide States a harmonised and simple framework for recognition and enforcement of insolvency-related judgments.

In addition to the above, specific considerations associated with recognition and enforcement of US and UK court rulings, such as issues arising in enforcement of the worldwide automatic stay in Chapter 11 proceedings and impact of Brexit on recognition of UK insolvency proceedings are discussed below.

* 1. **US**

The US Bankruptcy Code applies extra-territorially insofar as the bankruptcy estate of the debtor is concerned.[[53]](#footnote-53) This is derived from Section 541 of the US Bankruptcy Code, which provides that the bankruptcy estate includes all property “*wherever located and by whomever held*”. Consequently, the automatic stay under section 362 which bars any action against the debtor and its property also applies on a worldwide basis.[[54]](#footnote-54) However, whether or not the US court’s judgment will be enforced in other jurisdictions may ultimately depend on assistance from the relevant foreign court.[[55]](#footnote-55)

Importantly, creditors or parties with a US presence or assets in the US may also find it prudent to comply with the US court order as non-compliance may expose them to consequences in case of contempt proceedings. Being a financial centre it may be possible to bind creditors[[56]](#footnote-56)

In the case, *In re Nakash[[57]](#footnote-57)*, the US court held that an involuntary bankruptcy petition initiated by an Israeli receiver in Israel while a US bankruptcy proceeding was ongoing violated the automatic stay.[[58]](#footnote-58)

In the case, *In Re Cenargo[[59]](#footnote-59)*, a British based company filed Chapter 11 proceedings. One of its major creditors started insolvency proceedings in the UK and the US court found that taking action in the UK violated the automatic stay under the US Bankruptcy Code. However, action could not be taken against the creditor as it did not have any assets in the US.[[60]](#footnote-60)

* 1. **UK**

Before Brexit, UK court judgments opening insolvency proceedings covered by the RIR would get automatic recognition in other EU member States and could be enforced in accordance with Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (EU Judgments Regulation).[[61]](#footnote-61)

While schemes and restructuring plans were not covered under the RIR, they could arguably benefit from the provisions of EU Judgments Regulation which provides that a judgment given in a member state should be given automatic recognition in other EU member states[[62]](#footnote-62). However, this was not always straightforward[[63]](#footnote-63) and there was debate about whether schemes would be covered under EJR.[[64]](#footnote-64)

However, these regulations and benefits of automatic recognition are no longer available to UK insolvency proceedings. Going forward, recognition and enforcement of UK court’s insolvency related judgments may depend on the private international law of the relevant jurisdiction as discussed in Part 4.1. Generally speaking, alteration of rights under an English law governed document using an English scheme or restructuring plan should be recognized.[[65]](#footnote-65)

Another potential mechanism for recognition may be found in Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (‘Rome I’). Article 3(1) of Rome I provides that a contract should be governed by the law chosen by the parties and such law would govern the “*various ways of extinguishing obligations*”[[66]](#footnote-66) However, “*questions governed by the law of companies*” are excluded from the scope of the regulations.[[67]](#footnote-67) This has led to doubts over whether SOAs are covered by the regulation but it has been argued that the exclusion was intended to cover corporate governance issues.[[68]](#footnote-68) In the past, academic experts have submitted an opinion that SOAs would be capable of being enforced in Germany under Rome I.[[69]](#footnote-69)

1. **Conclusion**

Both the US and the UK (in relation to SOAs and RPs) impose very flexible eligibility requirements for utilisation of their restructuring regimes by foreign debtors. The “property” requirement under s109(a) of the US and the “sufficient connection” test in the UK are fairly easy to establish. The sophisticated and predictable nature of these regimes coupled with attractive features encourages foreign debtors to utilise them. Moreover, the US regime’s worldwide stay which has teeth so long as the creditors involved have a US presence may be particularly helpful for foreign debtors.

Arguably, insofar as recognition and enforcement of insolvency proceedings and judgments is concerned, the UK regime has suffered a setback after losing the advantage of EU regulations post Brexit. However, a recent example[[70]](#footnote-70) suggests foreign debtors are likely to continue relying on UK restructuring regimes. This may be especially be important in cases where the Gibbs rule[[71]](#footnote-71) (i.e., a debt can only be discharged in accordance with the governing law of the debt) is relevant.[[72]](#footnote-72) Therefore, debtors may need to utilise the UK restructuring regime to effectively discharge their English-law governed debt. Moreover, recognition of UK insolvency proceedings and judgments may also be aided as more states adopt the UMLCBI and UMLIRJ in the future.

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**Author statement**

Urmika Tripathi

DECLARATION OF HONOUR:

I declare that the paper, titled “***Comparison of UK and US restructuring regimes as reorganisation tools for foreign debtors*’**” is my own work, that it has been prepared independently and that all references to, or quotations from, the work of others are fully and correctly cited.

(Signed) Urmika Tripathi

Date: 9 July 2023

Place: Mumbai, India

1. **Moore, Susan, “Desirable Destinations and Debt Restructuring: Optimising the Outcome”, at <<** <https://internationalbanker.com/finance/desirable-destinations-and-debt-restructuring-optimising-the-outcome/>**>>, accessed on 5 July 2023. Recently, jurisdictions such as Singapore and Netherlands have also introduced changes to their insolvency law to provide attractive restructuring mechanisms for debtors. Singapore passed the Insolvency, Restructuring and Dissolution Act 2018 introducing changes to its insolvency regime to make it more attractive for debtor-led restructurings. For more details, see** **Chew, Kei-Jin, “Singapore’s efforts to become an international hub for debt restructuring”, at <<** <https://www.nortonrosefulbright.com/en/knowledge/publications/8e5a46f4/singapores-efforts-to-become-an-international-hub-for-debt-restructuring>**>>, accessed on 8 July 2023. Netherlands introduced a new Dutch scheme of arrangement. For more details, see Berkenbosch, Jasper and**

**Pepels, Sid, “The Dutch Scheme is in Force: European Restructuring Practice on the Move!”, INSOL Europe – Inside Story (January 2021), at <<**<https://www.insol-europe.org/download/documents/1941>**>>, accessed on 8 July 2023.**  [↑](#footnote-ref-1)
2. McCormack, Gerard, “Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies”, 63(4) The International and Comparative Law Quarterly 2014, p815, 827. [↑](#footnote-ref-2)
3. Administration is a reorganisation procedure under which a company which is or is likely to become unable to pay its debt can reorganise or realise its assets for payment to creditors. A qualified insolvency professional is appointed as an administrator who takes over control of the debtor and achieve the objective of: (a) rescuing the company as a going concern, (b) achieve a better result for the creditors as a whole than would be likely if the company would be wound-up, and (c) realise the debtor’s property to make payments to its secured and preferential creditors. [↑](#footnote-ref-3)
4. CVAs involve a binding arrangement between the debtor and its unsecured creditors. Secured creditors are not bound by CVAs unless they provide their consent. It requires (a) the approval of at least 75% (by value) of the voting creditors and (b) it has not been rejected by more than 50% of ‘unconnected’ creditors. [↑](#footnote-ref-4)
5. A scheme of arrangement involves a compromise or arrangement between the debtor and its creditors and involves the court at two stages: (a) first, the court convenes the creditor meetings; (b) once the creditors have approved the scheme, it is submitted to the court for its sanction. A scheme requires approval by majority in number and 75% in value of each class of creditors. [↑](#footnote-ref-5)
6. A restructuring plan was introduced in 2020 and is similar to a scheme but differs in two key aspects: (a) it requires existence of some financial difficulty (i.e., the company must have encountered or should be likely to encounter financial difficulty which may affect its ability to conduct business as a going concern) and (b) permits cross-class cramdown of creditors provided certain conditions are met. The plan needs approval of 75% (in value) of each class of creditors. [↑](#footnote-ref-6)
7. Main insolvency proceedings have universal scope and are aimed at encompassing all of the debtor's assets. See RIR, Recital 23. [↑](#footnote-ref-7)
8. The place of the registered office of the debtor is presumed to its COMI. However, this presumption can be rebutted if the company's central administration is located in a jurisdiction other than its registered office, and where it is established that the debtor’s centre of management and supervision and of management of its interests is in another jurisdiction in a manner that is ascertainable by third parties. See Regulation (EU) 2015/848, Recital 30. [↑](#footnote-ref-8)
9. Regulation (EU) 2015/848, Article 19 and 32. [↑](#footnote-ref-9)
10. Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Article 67(3)(c). [↑](#footnote-ref-10)
11. Article 2(10) of RIR defines ‘establishment’ as “*any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets*”. [↑](#footnote-ref-11)
12. Insolvency (Amendment) (EU Exit) Regulations 2019, Schedule, Part 1, para 2(1A) and (1B). [↑](#footnote-ref-12)
13. Dengler, Jente, “Debt restructuring in the UK and Spain: Is the grass still greener on the other side?”, p17 at << <https://www.iiiglobal.org/file.cfm/12/docs/2019_gold_jente_dengler.pdf>>>, accessed on 7 July 2023. [↑](#footnote-ref-13)
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15. Examples include the Hong Kong Airlines and Smile Telecoms. [↑](#footnote-ref-15)
16. US Bankruptcy Code, title 11, s109(a). [↑](#footnote-ref-16)
17. The provision does not require the debtor to have a ‘principal’ place of business in the US, having ‘a’ place of business is sufficient to meet this requirement. See In re Paper I Partners, L.P. 283 B.R. 661 (Bankr. S.D.N.Y. 2002). [↑](#footnote-ref-17)
18. In re Northshore Mainland Servs., Inc., 537 B.R. 192 (Bankr. D. Del. 2015), In Matter of Axona Int'l Credit & Commerce Ltd., 88 B.R. 597 (Bankr. S.D.N.Y. 1988). [↑](#footnote-ref-18)
19. In re Aerovias Nacionales de Colombia S.A. Avianca 303 B.R. 1 (Bankr. S.D.N.Y. 2003). [↑](#footnote-ref-19)
20. 198 B.R. 428 (Bankr. W.D.N.Y. 1996). [↑](#footnote-ref-20)
21. *Ibid* at 432. [↑](#footnote-ref-21)
22. In re Paper I Partners, L.P. 283 B.R. 661 (Bankr. S.D.N.Y. 2002). [↑](#footnote-ref-22)
23. In re Northshore Mainland Servs., Inc., 537 B.R. 192 (Bankr. D. Del. 2015), Bank of America, N.T. S.A. v. World of English 23 B.R. 1015 (Bankr. N.D. Ga. 1982). [↑](#footnote-ref-23)
24. In re Global Ocean Carriers Limited, et al., 251 B.R. 31 (Bankr. D. Del. Jul. 5, 2000). [↑](#footnote-ref-24)
25. In re Global Ocean Carriers Limited, et al., 251 B.R. 31 (Bankr. D. Del. Jul. 5, 2000) and In re JPA No. 111 Co., Ltd., No. 21-12075 (DSJ) (Bankr. S.D.N.Y. Feb. 1, 2022). [↑](#footnote-ref-25)
26. 303 B.R. 1 (Bankr. S.D.N.Y. 2003). [↑](#footnote-ref-26)
27. L. King, Collier on Bankruptcy, ¶ 109.02 [3] (15th ed. rev. 2003). [↑](#footnote-ref-27)
28. In re Selectron Management Corp. Case No. 10-75320-dte (Bankr. E.D.N.Y. Sep. 27, 2010) noted that abstention under section 305 has been held to be an “extraordinary remedy”. Factors considered by the court in this regard are: “*(1) the economy and efficiency of administration; (2) whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court; (3) whether federal proceedings are necessary to reach a just and equitable solution; (4) whether there is an alternative means of achieving an equitable distribution of assets; (5) whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case; (6) whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and (7) the purpose for which bankruptcy jurisdiction has been sought.*For example of dismissal under section 305 see *In re Northshore Mainland Servs.*, Inc. [↑](#footnote-ref-28)
29. Section 1112(b)(4) provides an inclusive list of what may qualify as ‘cause’. [↑](#footnote-ref-29)
30. In re SGL Carbon Corp. 200 F.3d 154 (3d Cir. 1999). [↑](#footnote-ref-30)
31. In Re Integrated Telecom Express, Inc. 384 F.3d 108 (2004) [↑](#footnote-ref-31)
32. 321 B.R. 396 (Bankr. S.D. Tex. 2005). [↑](#footnote-ref-32)
33. *Ibid*. [↑](#footnote-ref-33)
34. Companies Act 2006, ss 895(2)(b) and 901A(4)(b). [↑](#footnote-ref-34)
35. Re Drax Holdings [2004] 1 WLR 1049. [↑](#footnote-ref-35)
36. *Re* Rodenstock GmbH[2011] EWHC 1104, supra note 13 at p19-20. [↑](#footnote-ref-36)
37. Norton Rose Fulbright, “Impact of Brexit on insolvency”, at << <https://www.nortonrosefulbright.com/en/knowledge/publications/fc0fb698/impact-of-brexit-on-insolvency>>>, accessed on 9 July 2023. For example, see In Re Hong Kong Airlines Ltd [2022] EWHC 3210 (Ch.). [↑](#footnote-ref-37)
38. *supra* note 13 at p21. [↑](#footnote-ref-38)
39. Re Rodenstock GmbH[2011] EWHC 1104, Re Drax Holdings [2004] 1 WLR 1049, Re Vietnam Shipbuilding Industry Groups [2013] EWHC 2476 (Ch.). [↑](#footnote-ref-39)
40. Re Apcoa Parking Holdings Gmbh [2014] EWHC 3849 (Ch), Algeco Scotsman PIK S.A. [2017] EWHC 2236 (Ch). In the *Apcoa Parking* case, the court noted that in certain cases where such change in governing law is made, the court should be wary if the new choice of law appears completely alien to the parties’ previous arrangement or if the change in law did not have a purpose other than to benefit those in favour at the expense of the dissentors. [↑](#footnote-ref-40)
41. [2011] EWHC 1104. [↑](#footnote-ref-41)
42. [2012] EWHC 164 (Ch) where despite not having a COMI, establishment or any creditors in the UK, the court established ‘sufficient connection’ on the basis of the governing law of the debt. [↑](#footnote-ref-42)
43. *Re Rodenstock GmbH* [2011] EWHC 1104. [↑](#footnote-ref-43)
44. Re Van Gansewinkel Groep BV & Ors [2015] EWHC 2151 (Ch). [↑](#footnote-ref-44)
45. Examples include Schefenacker AG and Deutsche Nickel & EU Coin Group where the COMI of the companies was shifted from Germany to the UK to allow them to undergo an administration and CVAs. For more details see, Allen & Overy, “Schefenacker AG – A "cross-border fusion of original minds" (FT Innovative Lawyers Report 2008)”, at <<https://www.allenovery.com/en-gb/global/expertise/practices/restructuring/recent\_deals/schefenackeragacrossborderfusionoforiginalmindsftinnovativelawyersreport2008>>, accessed on 9 July 2023 and Quantuma International, “An Administration followed by a Creditors Voluntary Arrangement exit route for two related holding companies of a German industrial group.”, at <<<https://www.quantumainternational.com/insights/deutsche-nickel-eu-coin-group>>>, accessed on 9 July 2023. [↑](#footnote-ref-45)
46. In the matter of Hellas Telecommunications (Luxembourg) II SCA [2009] EWHC 3199 (Ch). [↑](#footnote-ref-46)
47. Squire Patton Boggs, “Restructuring Plans: Restructuring Foreign Companies in England”, at <<https://www.squirepattonboggs.com/-/media/files/insights/publications/2021/12/restructuring-foreign-companies-in-england-using-a-restructuring-plan/restructuring-foreign-companies-in-england-using-a-restructuring-plan.pdf>>, accessed on 9 July 2023. [↑](#footnote-ref-47)
48. Examples include Convention of 30 June 2005 on Choice of Court Agreements. Importantly, this convention does not apply to insolvency matters. However, there are questions over whether SOAs which are not technically insolvency procedures may be covered by this Convention. [↑](#footnote-ref-48)
49. An example of such co-operation was seen in the Maxwell Communications Corporation plc cross-border insolvency case where UK and US insolvency representatives entered into an agreement which was approved by both their courts to co-ordinate the insolvency proceedings in the two jurisdictions. [↑](#footnote-ref-49)
50. See Rubin & Anor. v. Eurofinance SA [2012] UKSC 46. [↑](#footnote-ref-50)
51. Guide to Enactment of the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments, para 2. [↑](#footnote-ref-51)
52. Convention of 30 June 2005 on Choice of Court Agreements, Article 2(e). [↑](#footnote-ref-52)
53. In re Simon 153 F.3d 991 (9th Cir. 1998). [↑](#footnote-ref-53)
54. In re McLean Industries 74 B.R. 589 (Bankr. S.D.N.Y. 1987). Also see 28 U.S. Code § 1334(e) read with 28 U.S.C. § 157(a) which grants jurisdiction to the bankruptcy court over all of the debtor’s property wherever located. [↑](#footnote-ref-54)
55. See In re Gucci 309 B.R. 679 (S.D.N.Y. 2004) where the court noted that since violation of the stay related to a property in Rome, the position of the Italian courts on the US decision would ultimately decide the fate of the property. [↑](#footnote-ref-55)
56. Couwenberg, O., & Lubben, S. J. (supra note 14) at p741. [↑](#footnote-ref-56)
57. Nakash v. Zur, 190 B.R. 763, 766 (Bankr. S.D.N.Y. 1996). [↑](#footnote-ref-57)
58. However, it did not rule on the issue of sanctions and damages against the Receiver and left those issues for another time. [↑](#footnote-ref-58)
59. In re Cenargo International, PLC, 294 B.R. 571 (Bankr. S.D.N.Y. 2003). [↑](#footnote-ref-59)
60. LM LoPucki, “Courting Failure: How Competition for Big Cases Is Corrupting the Bankruptcy Courts”, p191 (University of Michigan Press 2005) [↑](#footnote-ref-60)
61. Regulation (EU) 2015/848, Article 19 and 32. [↑](#footnote-ref-61)
62. EU Judgments Regulation, Article 36. [↑](#footnote-ref-62)
63. In the Matter Of Dtek Energy B.V [2021] EWHC 1551 (Ch), the court noted that “*There was always uncertainty as to how schemes of arrangement fitted into the framework of the Judgments Regulation. So, for the purposes of testing whether the Judgments Regulation presented a jurisdictional bar to the English Court exercising jurisdiction over EU domiciled scheme members or creditors it was assumed to apply (and an appropriate gateway identified). But for the purposes of testing international effectiveness it was not assumed to apply, and the English Courts looked for expert evidence which demonstrated alternative bases*.” [↑](#footnote-ref-63)
64. Payne, Jennifer, “Cross-border Schemes of Arrangement and Forum Shopping” 14 European Business Organization Law Review 2013, pp 577-580. [↑](#footnote-ref-64)
65. In the Matter Of Dtek Energy B.V [2021] EWHC 1551 (Ch), the court noted the “*generally accepted principle of private international law that a variation or discharge of contractual rights in accordance with the governing law of the contract will usually be given effect.*” [↑](#footnote-ref-65)
66. Rome I, Article 12. [↑](#footnote-ref-66)
67. Rome I, Article 1(2)(f). [↑](#footnote-ref-67)
68. *supra* note 64 at p583. [↑](#footnote-ref-68)
69. Re Rodenstock GmbH[2011] EWHC 1104 and Re Primacom Holding GmbH [2012] EWHC 164 (Ch) [↑](#footnote-ref-69)
70. In a recent example, a German real estate group, Adler opted to undergo a UK restructuring plan. For more details, see Ashurst, “London as a European restructuring forum reigns supreme”, at <<<https://www.ashurst.com/en/insights/london-as-a-european-restructuring-forum-reigns-supreme/>>>, accessed on 9 July 2023. [↑](#footnote-ref-70)
71. Antony Gibbs Sons V. La Société Industrielle Et Commerciale Des Métaux, 25 Q.B.D. 399 [↑](#footnote-ref-71)
72. Shah, Devi and Wood, Alexandra, “The impact of Brexit on UK/European cross border schemes and restructuring plans”, at << <https://www.mayerbrown.com/en/perspectives-events/publications/2021/01/the-impact-of-brexit-on-ukeuropean-cross-border-schemes-and-restructuring-plans>>>, accessed on 9 July 2023. [↑](#footnote-ref-72)