March 29, 2021

# *Gategroup*: implications for the recognition of English restructuring processes in the EU

**Attorneys**
Matthew Czyzyk
Natalie Blanc
Natalie Raine

In June 2020, the Corporate Insolvency and Governance Act (the "CIGA") introduced a new procedure to the restructuring toolkit in England & Wales, the Part 26A restructuring plan (the "Plan", see further detail on CIGA in our article here). The Plan is similar to the well-tested English law scheme of arrangement (the "Scheme"), and the English courts have so far relied on the wealth of Scheme case law to guide them in deciding whether to sanction a Plan. In the recent *Gategroup* judgment, however, Mr Justice Zacaroli has signalled a divergence of Scheme and Plan case law on the issue of whether a Plan is an insolvency proceeding, and this has significant implications for the recognition of Plan judgments in the various member states of the European Union ("EU").

*What was the Gategroup Plan?*

Gategroup is an international airline catering services provider whose financial position has been severely adversely affected by the Covid-19 pandemic. Gategroup's key debt consists of (1) an English law senior facilities agreement due October 2021 comprising a €415m revolving credit facility and a €250m term loan facility; (2) CHF 350m Swiss bonds due February 2022; and (3) a CHF 200m English law interim liquidity facility due May 2021 (the "Financing Arrangements"). To support the Group while business pressures from the Covid-19 pandemic are ongoing, Gategroup's shareholders agreed to provide new liquidity to the Group *provided that* the Group's creditors pushed out the maturity date of each of its three Financing Arrangements by an additional five years. The Gategroup Plan was sanctioned by the English court on 26 March 2021.

*Plans are insolvency proceedings*

Gategroup's bonds are governed by Swiss law and subject to the exclusive jurisdiction of the Swiss courts. The key issue for the English court was whether it had jurisdiction over the bonds. As Gategroup filed its claim form *before* the end of the Brexit transition period on 31 December 2020, the Lugano Convention still applied and, depending on the English court's interpretation, could have prohibited Swiss bonds from being compromised under the Plan. Gategroup's view was that the English court had jurisdiction because the Lugano Convention does not apply to bankruptcy proceedings. The English court agreed. Mr Justice Zacaroli found that, in contrast to a Scheme, a Plan is an insolvency tool because it requires a company to be in financial difficulty in order to use the process.

To unpack the importance of this decision, we must consider *why* recognition is important. In order to approve a Scheme or a Plan, the English court must be comfortable that the Scheme or Plan is capable of achieving its goals and, specifically, that the court's judgment will be recognised in key foreign jurisdictions and will be binding on local creditors. In determining whether to sanction Schemes prior to Brexit, judges in the English courts have relied on an EU regulation that allowed *civil judgments* to benefit from automatic EU-wide recognition. The same basis for automatic recognition would not have applied to a Scheme if it were considered an insolvency process.

Post-Brexit, recognition of Schemes and Plans is more uncertain. The exit agreement between the EU and the UK did not address recognition of judgments. The UK is, however, seeking to accede to the Lugano Convention. If successful, this would give Schemes the same automatic-recognition benefit that they had previously enjoyed. It had been widely assumed prior to the Gategroup decision that Plans would similarly benefit from automatic recognition.

*What is the impact of Gategroup?*

Cross-border recognition of a Plan now looks to be much more difficult. Assuming that the decision in Gategroup is upheld in future Plan judgments, the Plan must now be considered as an insolvency tool. In consequence, the Lugano Convention and the Hague Convention (which operates on similar principles to Lugano and to which the UK is already a

party) will not apply to Plans. Instead, companies will have to rely on alternate bases for recognition, including Rome I or the private international law of the relevant jurisdiction (including the UNCITRAL Model Law on Cross-Border Insolvency in those jurisdictions where it has been adopted). Companies may also have to adopt more expensive and time-consuming alternatives such as applying individually for recognition in key relevant foreign jurisdictions, or carrying out parallel processes in such jurisdictions. Despite these challenges, the extensive restructuring experience of the English courts and the English advisory community is unparalleled in Europe, and so we expect that the Scheme and the Plan will remain popular with businesses seeking to restructure.