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ARTICLE

Gategroup: What's the Fuss About?

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Synopsis

This article summarises the findings of the High Court in *Re gategroup Guarantee Limited* [2021] EWHC 304 (Ch) ('*Re gategroup Guarantee Limited*') and provides a view of its effects on the cross-border application of the Restructuring Plan (defined below) and the use of co-obligor structures in restructurings.

The restructuring plan

The UK restructuring plan was introduced by the Corporate Insolvency and Governance Act 2020 as a new Part 26A of the Companies Act 2006 (the 'Restructuring Plan') and is substantially modelled on the existing UK scheme of arrangement under Part 26 of the Companies Act 2006 (the 'Scheme'). Restructuring Plans primarily differ from Schemes in the following respects:

- A company may use Restructuring Plans where: (i) it has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business; and (ii) a compromise or arrangement is proposed between the company and its creditors and/or members (or any class of them) to eliminate, reduce or prevent, or mitigate the effect of such financial difficulties. Schemes may be utilised irrespective of the financial condition of the company.
- Restructuring Plans benefit from a provision derived from the US plan of reorganisation under Chapter 11 of the US Bankruptcy Code, the cross-class cram down. This allows the court the discretion to sanction a Restructuring Plan even where one or more classes of creditors dissent if: (i) it is satisfied that none of the members of the dissenting class would be any worse off than they would be in the event of the relevant alternative; and (ii) the compromise or arrangement has been agreed by a number representing 75% in value of a class of creditors, who would receive a payment, or have a genuine economic interest in the company, in the event of the relevant alternative.
- A Restructuring Plan requires the consent of a number representing 75% in value of the creditors (or class of creditors) or members (or class of members), as the case may be, present and voting at the convening hearing. As opposed to the requirements under a Scheme, there is no additional requirement for the consent of a majority in number of creditors or members to be obtained.

Until the High Court's decision in *Re gategroup Guarantee Limited*, English courts have generally pulled from the vast body of English common law governing Schemes in their interpretation of the Restructuring Plan because of the substantive similarity between these two sibling restructuring tools.

Gategroup: interplay between the Lugano Convention and the restructuring plan

In *Re gategroup Guarantee Limited*, Mr Justice Zacaroli of the High Court considered the interplay between (a) the convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters signed on 30 October 2017 in Lugano (the 'Lugano Convention') and (b) the Restructuring Plan. To summarise, it was held that the Restructuring Plan fell outside of the scope of the Lugano Convention on application of the Bankruptcy Exclusion (defined below) and thus English courts had jurisdiction to sanction the proposed compromise or arrangement, despite underlying bond documentation being governed by Swiss law and subject to the exclusive jurisdiction of the Swiss courts. This marks a deviation from the approach of UK courts with regard to Schemes, which have historically been treated as falling within the scope of Regulation (EU) No 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') and thereby the Lugano Convention.

Background: applicable European legislation

Recast Brussels Regulation and Lugano Convention:

The Recast Brussels Regulation provides rules for determining the jurisdiction of a dispute and for the

reciprocal recognition and enforcement of judgments between member states of the European Union. It ultimately provides that a defendant should be sued in its country of domicile. However, the Recast Brussels Regulation does not apply to 'bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings' (the 'Bankruptcy Exclusion').

The Lugano Convention is an extension of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the 'Brussels Regulation'), which pre-dates the Recast Brussels Regulation, and includes the same Bankruptcy Exclusion. The Lugano Convention serves to regulate the recognition and enforcement of judgments within and between members of the European Union and members of the European Free Trade Association. Following Brexit, the UK has applied to accede to the Lugano Convention and is awaiting unanimous approval (which is further elaborated on below).

Recast Insolvency Regulation:

Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (the 'Recast Insolvency Regulation') provides rules that seek to improve the efficiency and effectiveness of insolvency proceedings having cross-border effects. For the purposes of this article, we shall focus on provisions setting out the scope of the Recast Insolvency Regulation, which Mr Justice Zacaroli of the High Court considered in *Re gategroup Guarantee Limited* to determine whether the Restructuring Plan falls within the Bankruptcy Exclusion of the Recast Brussels Regulation (and by extension, the Lugano Convention).

Gategroup: the case

Gategroup, the Swiss airline catering services provider, has outstanding an English law senior facilities agreement (the 'SFA') and Swiss law senior secured bonds (the 'Bonds'). With the onset of COVID-19 and passenger aircrafts being grounded for large parts of the last 12 months, Gategroup struggled financially. This led to the company launching a Restructuring Plan to, among other things, extend the maturities of the debt under the SFA and the Bonds by 5 years (the 'Gategroup Plan').

Despite the Bonds being issued by Gategroup Finance (Luxembourg) SA (the 'Issuer'), the Gategroup Plan was proposed by a special purpose vehicle incorporated in England, Gategroup Guarantee Limited (the 'SPV'). As initiating an insolvency procedure would constitute a default by the Issuer under the Bonds, the SPV was incorporated outside of the group, a solution that has been used regularly in Schemes. Gategroup also moved the centre of main interests ('COMI') of the Issuer to England. Whilst this shift was somewhat artificial, the High Court endorsed the COMI shift given the lack of realistic alternatives for the group.

As the Bonds were governed by Swiss law and subject to the exclusive jurisdiction of the Swiss courts, the main question that fell before the High Court was whether the English courts had jurisdiction to sanction the Gategroup Plan on application of the Lugano Convention. Even though the UK left the European Union on 31 December 2020 and is no longer subject to the Lugano Convention (pending future accession), the Gategroup Plan was launched prior to such departure on 30 December 2020 and so the Lugano Convention continued to apply in this case.

In his judgment, Mr Justice Zacaroli considered whether Restructuring Plans are 'civil and commercial matters' and thus within the scope of the Lugano Convention, or whether the Bankruptcy Exclusion applied. For context, if the High Court had determined that Restructuring Plans fall within the scope of the Lugano Convention, it likely would have been held that the proposed compromise or arrangement should be subject to the jurisdiction of the Swiss courts.

Mr Justice Zacaroli rejected the argument that because Schemes fall within the scope of the Lugano Convention, so too do Restructuring Plans. For example, in response to an argument advanced by a bondholder that the Restructuring Plan is materially indistinguishable from a Scheme, he cited the so-called 'threshold conditions' for companies to utilise Restructuring Plans (as mentioned at the outset of this article): i.e. that (i) the company has encountered, or is likely to encounter, financial difficulties that are affecting, or will or may affect, its ability to carry on business; and (ii) a compromise or arrangement is proposed between the company and its creditors and/or members (or any class of them) to eliminate, reduce or prevent, or mitigate the effect of such financial difficulties (the 'Threshold Conditions'). As previously stated, Schemes may be utilised irrespective of the financial condition of the company.

In determining whether the Restructuring Plan falls within the Bankruptcy Exclusion of the Lugano Convention, Mr Justice Zacaroli gave consideration to the European dovetailing principle, which provides that there should be no gap or overlap between the Recast Brussels Regulation and the Recast Insolvency Regulation. Applying this, if the Restructuring Plan fell within the scope of the Recast Insolvency Regulation, it would satisfy the Bankruptcy Exclusion under the Recast Brussels Regulation (and by extension, the Lugano Convention) as there can be no gap or overlap between the two. Accordingly, the scope of the Recast Insolvency Regulation was cited and the elements set out as follows:

1. The proceedings must be collective proceedings (i.e. concerning all or a significant part of a debtor's creditors);
2. They must be based on laws relating to insolvency and have as their purpose rescue, adjustment of debt, reorganisation or liquidation; and
3. They must encompass at least one of the following:
   - the debtor is partially or totally divested of its assets;
   - the assets and affairs of the debtor are subject to control or supervision by a court; or
   - a temporary stay is imposed, by a court or by operation of law, on individual enforcement proceedings to enable negotiations to take place between the debtor and its creditors.

In short, Mr Justice Zacaroli held that:

1. The Restructuring Plan satisfies the requirement for a collective proceeding;
2. The presence of the Threshold Conditions means that Part 26A of the Companies Act (which governs Restructuring Plans) is a law relating to insolvency; and
3. The 'supervision of the court may nevertheless be said to be over the debtor's affairs and assets in the sense that… the plan devised by the debtor can only come into effect if the court considers it appropriate to convene meetings of creditors and subsequently to approve it'.

Accordingly, he was satisfied that the Restructuring Plan fell within the scope of the Recast Insolvency Regulation and thus the Bankruptcy Exclusion applied for the purposes of the Recast Brussels Regulation (and by extension, the Lugano Convention).

Stepping back from his determination of the elements set out above, Mr Justice Zacaroli further considered that the Restructuring Plan contains materially similar features to the Dutch Act on Court Confirmation of Extrajudicial Restructuring Plans 2020 (the Dutch law equivalent of a Scheme), which is to be included within Annex A of the Recast Insolvency Regulation and thus within its scope.

Following this, it was held by the High Court that it had jurisdiction to sanction the Gategroup Plan, setting a precedent for the English courts that the Lugano Convention does not apply to the Restructuring Plan.

Co-obligor structure

The Gategroup Plan utilised a co-obligor structure to avoid tripping an event of default under the Bonds, a tactic that has often been used in Schemes. The co-obligor structure consisted of incorporating the SPV, which provided an indemnity (via deed poll) to the senior lenders and bondholders. The court approved the use of the co-obligor structure predominantly because of the lack of realistic alternatives to effect the Gategroup Plan, yet noted that the use of such a structure could be 'wholly objectionable… where it unfairly overrode legitimate interests of creditors pursuant to the contracts governing their relationship with the primary obligor companies or under the system of law, including relevant principles of insolvency law, which applies to the relationship between them'. Accordingly, further thought must be given prior to the use of co-obligor structures in both Restructuring Plans and Schemes going forwards.

Concluding remarks

The judgment handed down by Mr Justice Zacaroli is a significant departure from the English court's treatment of Schemes. This has thrown into question the future use of the Restructuring Plan for restructurings with a cross-border element. As it currently stands, it will not be possible (absent any departure from the ruling of the High Court in *Re gategroup Guarantee Limited*) to rely on the Lugano Convention for the recognition of a Restructuring Plan in a member state of the European Union, even if the UK is permitted to accede. The case is likely to be similar in respect of the Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (i.e. the Hague Judgments Convention), which provides that it shall not apply to 'insolvency, composition, resolution of financial institutions, and analogous matters'.

As a result, alternative routes of recognition will need to be explored, such as the application of private international law (i.e. local laws of the applicable member states of the European Union) or pursuant to Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (i.e. Rome I) where underlying contractual obligations subject to a Restructuring Plan are governed by the laws of jurisdictions within the UK, such as the laws of England and Wales. Reassuringly, in *Re gategroup Guarantee Limited*, Gategroup provided evidence from experts in Swiss law and Luxembourg law, who gave the opinion that the Restructuring Plan would be recognised and enforced in both jurisdictions, notwithstanding their conclusions that the Restructuring Plan falls within the Bankruptcy Exclusion of the Lugano Convention.

It had been widely thought that the Restructuring Plan would become the favoured restructuring tool in the UK, but findings of the High Court in *Re gategroup Guarantee Limited* might change that. Whilst the true impact of this ruling is yet to be seen, the significance is clear.

The aftermath

On 11 February 2021, following the convening hearing held on 3 and 4 February 2021, the High Court ordered separate meetings of the senior lenders and bondholders to take place on 19 March 2021 to consider, and if thought fit, approve the Gategroup Plan.

On 19 March 2021, it was announced that the senior lenders and bondholders each voted to approve the Gategroup Plan by the requisite majority (i.e. at least 75% by value of the creditors present and voting at the relevant meeting) at their respective meetings:

- 100% by value of the senior lenders present and voting at the senior lender meeting voted in favour of the Gategroup Plan; and
- 99.98% by value of bondholders present and voting at the bondholder meeting voted in favour of the Gategroup Plan.

Following this, the High Court sanctioned the Gategroup Plan at a hearing on 26 March 2021 and Gategroup subsequently announced the satisfaction of all conditions to the effectiveness of the Gategroup Plan on 30 April and that completion of the underlying transaction (involving a recapitalisation of the business and amendment of the terms of Gategroup's financial indebtedness) had occurred.

Thus, Gategroup's restructuring process has completed with Xavier Rossinyol, Gategroup's CEO, commenting that Gategroup is 'on track to a successful future and positioned to emerge even stronger.'

The UK's accession to the Lugano Convention

Following Brexit, the Lugano Convention no longer applies to the UK. However, given that (i) the UK is seeking to secure a pathway regarding the recognition and enforcement of judgments in civil and commercial matters in member states of the European Union and (ii) the Lugano Convention is wider in scope than the Convention of 30 June 2005 on Choice of Court Agreements (i.e. the Hague Choice of Courts Convention) which the UK acceded to in its own right on 1 January 2021, it lodged an application with the Depositary of the Lugano Convention (i.e. the Swiss Federal Council) to accede to the Lugano Convention in its own right on 8 April 2020. For context, if the UK's application is unsuccessful, Schemes will likely no longer benefit from automatic recognition in member states of the European Union.

On 4 May 2021, the European Commission released a communication to the European Parliament and European Council regarding its assessment on the UK's application to accede to the Lugano Convention. Although three existing non-EU members of the Lugano Convention (i.e. Iceland, Norway and Switzerland) had all expressed support for the UK's accession, the European Commission considered that the European Union should not give its consent. In its reasoning, the European Commission noted that the UK is 'a third country without a special link to the internal market' (i.e. the UK does not form part of the European Free Trade Association or the European Economic Area) and thus there is no reason for the European Union to 'depart from its general approach' in relation to third countries, which is to 'promote cooperation within the framework of the multilateral Hague Conventions'.

To further elaborate on its reasoning, the European Commission highlighted that the Lugano Convention 'supports the EU's relationship with third countries that have a particularly close regulatory integration with the EU' and is a 'flanking measure of the internal market and relates to the EU-EFTA/EEA context'. In fact, no third countries 'other than EFTA/EEA countries' are party to the Lugano Convention, with only Poland having joined as a third party on its path towards accession to the European Union. However, the European Commission made clear that it considers the UK to be a third country with an 'ordinary' free trade agreement that does not include 'any fundamental freedoms and policies of the internal market'. As such, in its concluding remarks and in accordance with the general approach of the European Union, the European Commission suggested that the 'the Hague Conventions should provide the framework for future cooperation between the European Union and the United Kingdom in the field of civil judicial cooperation'.

Notwithstanding the European Commission's recommendation, the outcome of the UK's application for accession to the Lugano Convention will be determined by the European Council in due course.

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