

International Insolvency Institute — 17 June 2019

# **SPITTING IN THE WIND**

POST BREXIT RECOGNITION OF  
UK INSOLVENCY PROCEEDINGS IN THE EU

**Mark Phillips QC**

South Square, London

**Professor Marta Flores**

Universidad Autónoma, Madrid

**Robert Van Galen**

NautaDutilh, Amsterdam

## OVERVIEW

- **CONTEXT**
- **UK INSOLVENCY PROCEEDINGS**
  - Recognition in Spain
  - Recognition in the Netherlands
- **UK SCHEMES OF ARRANGEMENT**
  - Recognition in Spain
  - Recognition in the Netherlands

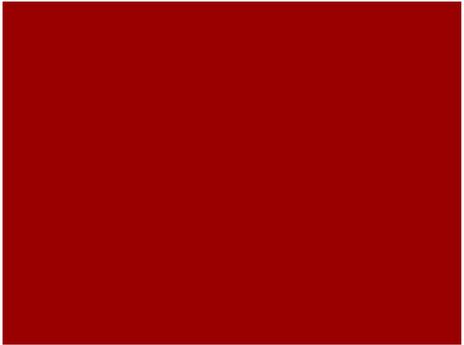
# CONTEXT

- “Project EU 23”
- UK becomes a Third Country
- Turning the clock back?
- EU (Withdrawal) Act 2018
- Insolvency (Amendment) (EU Exit) Regulations 2018
- UK jurisdiction: COMI, establishment, registration, sufficient connection

# The recognition of UK proceedings in Spain post-Brexit

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- Prof. Marta Flores
- Universidad Autónoma de Madrid



**Group A**

Administration

Winding-up

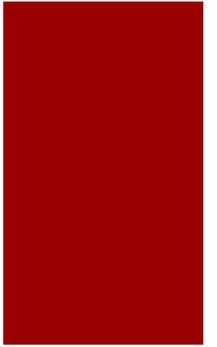
Voluntary Agreements

Bankruptcy

**Group B**

Schemes of arrangement

# Group A (administration, winding-up, voluntary agreements, bankruptcy)



## Now

- Included in Annex A of the Recast EIR

## Post-Brexit requirements

- Collective proceedings
- Based on insolvency of the debtor
- Controlled/supervised by Court
- Final judgement
- Jurisdiction :
  - COMI
  - Establishment
  - "A reasonably related connection of an equivalent nature"





Brexit panel

International Insolvency Institute

Robert van Galen, Barcelona, 17 June 2019

● *NautaDutilh*

International Law Firm | Amsterdam · Brussels · London · Luxembourg · New York · Rotterdam

# Recognition of foreign judgments under Dutch law in the absence of a treaty

No statutory provisions

Landmark cases:

Supreme Court 26-09-2014, ECLI:NL:HR:2014:2838, **Gazprombank/Bensadon**  
Generally applicable to foreign judgments

Supreme Court 18-01-2019 ECLI:NL:HR: 2019:54, **Yukos II**  
Gazprombank criteria are applicable to foreign bankruptcy judgments

Note: Recognition does not require a judgment!

# Supreme Court 26-09-2014, Gazprombank/Bensadon

- (i) the jurisdiction of the court which rendered the decision is based on a ground which is generally acceptable under international standards;
- (ii) the foreign judgment is the result of proceedings which meet the requirements of a fair trial with sufficient safeguards;
- (iii) recognition of the foreign judgment does not violate Dutch public order;
- (iv) the foreign judgment is not irreconcilable with a decision rendered between the same parties by a Dutch court or with a prior judgment of a foreign court rendered between the same parties in a dispute that concerns the same topic and is based on the same cause, provided that prior judgment is susceptible to recognition in the Netherlands

# However limitations on effect of foreign bankruptcies based on territoriality doctrine

Supreme Court 13-09-2013, ECLI:NL:HR:2013:BZ5668, **Yukos I**

An individual creditor can enforce its claim against Dutch assets of the debtor, if it makes an attachment prior to these assets having been sold by the insolvency representative (no automatic stay for individual enforcement actions)

Supreme Court 31-05-1996, ECLI:NL:HR:1996:ZC2091, **De Vleeschmeesters**

The right of a creditor to take recourse against the Dutch assets of its debtor is not limited by a foreign plan or discharge

I would not be surprised if the Supreme Court would drop this doctrine

# Recognition of UK bankruptcies, liquidations, administrations, cva's

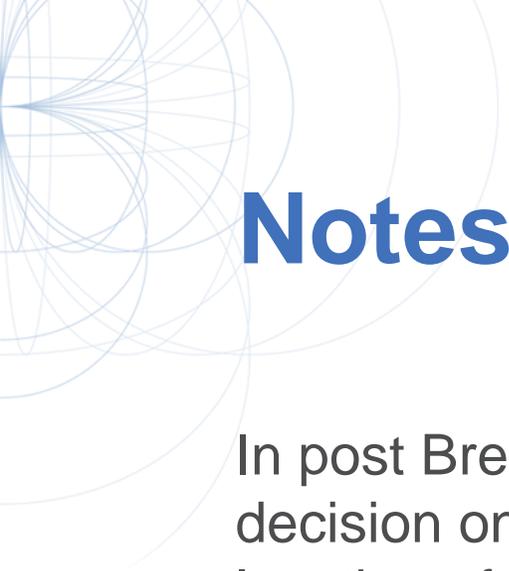
If COMI is in the UK, "international standards" requirement is met

If COMI is not in the UK, it is questionable whether recognition beyond territorial proceedings will take place

Fair trial and public policy criteria probably less relevant

UK trustee/liquidator/administrator may exercise its powers in the Netherlands

However possible limitation based on territoriality principle



# Notes (1/2)

In post Brexit situation Dutch courts will no longer be held to comply with UK decision on jurisdiction, but will make their own independent appraisal of the location of the COMI (like under the UNCITRAL Model Law/Chapter 15)

## Notes (2/2)

The present system of recognition has two draw backs:

- "Automatic recognition" entails that the courts will have to determine ex post whether actions of the foreign insolvency representative are valid. No *Partikularverfahren*
- Possible limitations by territoriality principle

The Netherlands should adopt the UNCITRAL Model Law

# Spain:

## Group B (schemes of arrangement)

### Now

- Brussels I Recast →
- Rome I →
- Spanish Insolvency Act
- Spanish Act on International Cooperation regarding Civil Matters

### Post-Brexit

- N/A
- No changes (provided that debt is governed by English law & no cramdown under the scheme)
- Only COMI/establishment/other?



# The Netherlands: Recognition of schemes of arrangement

Deemed insolvency proceedings? UK courts have struggled with this question, but never asked the ECJ. Proceedings serve to impair creditors' claims while company is insolvent

If insolvency proceedings, probably  
COMI requirement or  
forum clause

Rome Regulation?

But heed the territoriality principle