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Adieu Sans Frontières: Cross-Border Insolvency Post-Brexit

Chaired by Chief Insolvency and Companies Court Judge Briggs
Jeremy Richmond QC
Nicola Allsop
Emily Saunderson

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‘great for international commercial disputes’
‘the set is strong throughout’

(Legal 500, 2020)

LONDON INTERNATIONAL SHIPPING WEEK

TOP RANKED Chambers UK Bar 2021
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The LEGAL 500 UNITED KINGDOM TOP TIER SET 2022
The LEGAL 500 ASIA PACIFIC TOP TIER SET 2021
The LEGAL 500 UK AWARDS 2020 WINNER
The LEGAL 500 UK AWARDS 2019 WINNER

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"He is one of the rising stars at the bar. He has a superb grip of technical issues and is a go-to counsel."

(Legal 500 UK, 2021)

Jeremy Richmond QC

Called: 2000 Silk: 2020

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Areas of Expertise

Chancery Commercial	Energy	Banking
Insolvency	Fraud	Professional Negligence
Commercial Dispute Resolution	International Arbitration	Insurance

Jeremy specialises in commercial and modern chancery law. He is ranked as a leading barrister for Commercial Litigation and Insolvency in The Legal 500 and has been described in Chambers and Partners as a *"superb advocate"* whose *"expertise in chancery, commercial and banking matters is a useful complement to his insolvency skills"*.

Jeremy's practice spans a broad range of commercial chancery and insolvency matters. It encompasses company law (including directors misfeasance), shareholder and joint venture disputes, banking law, sale of goods (both international and domestic), fraud (with an emphasis on asset recovery) and all aspects of general commercial law. He also has a specialisation in cross-border insolvency issues particularly in relation to the shipping, commodities, insurance and aviation sectors. Jeremy has advised and / or appeared for key parties in OW Bunker, Hanjin Shipping, STX Pan Ocean, Alpha Insurance and Arik Airlines. He regularly appears in the Chancery Division as well as in the Commercial and Circuit Commercial Courts. Jeremy often works in conjunction with Counsel from other jurisdictions and with experts.

Many of his cases involve a cross-over between 'modern' chancery and commercial litigation.

Jeremy was admitted to the New York Bar in 1996 and has worked as a New York lawyer for blue chip law firms in Manhattan and then the City.

What the directories say

"A great combo of a hard hitter and a deep thinker. Ideal choice for clients who face a real fight." (Legal 500, 2022)

"Extremely commercial, great tactically and someone who consistently adds value." (Chambers UK, 2021)

"He is one of the rising stars at the bar. He has a superb grip of technical issues and is a go-to counsel." (Legal 500, 2021)

"Very impressive junior silk who is user friendly and really gets stuck in." (Legal 500, 2021)

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"Very impressive junior silk who is user friendly and really gets stuck in." (Legal 500, 2021)

"He is excellent - tactically astute, client-friendly and knowledgeable." (Legal 500, 2020)

"A very clever and determined opponent." (Legal 500, 2019)

"An exceptional junior to work with." (Legal 500, 2019)

"He gives excellent commercial, pragmatic advice and has a winning client manner..." (Chambers UK, 2018)

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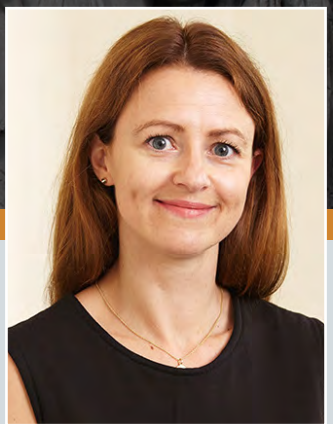

"Very hands-on and user-friendly, she is a real team player and integrates very well."
(Legal 500 UK, 2020)

Nicola Allsop

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Areas of Expertise

Fraud	Insolvency	Offshore
Commercial Dispute Resolution	International Arbitration	
Banking	Company	

Nicola specialises in civil fraud, insolvency, company law (particularly shareholder disputes) and banking litigation.

Nicola's practice has a strong international element; she was called to the Bar of the BVI in 2012, in the Cayman Islands in 2016 (limited admission) and many of her cases raise cross-border and jurisdictional issues. Nicola has a wealth of trial experience both as sole counsel and as part of a team. Notable cases include the Weavering litigation which occupied her throughout most of 2016 and concerned a claim against the Fund's Cayman auditors arising out of a large-scale fraud perpetrated by the Fund's founder Magnus Peterson; a 10-week fraud trial Sita v Serruys; a series of matters arising out of the collapse of the Arch Cru Fund; and a long-running shareholder dispute involving the Barclay Brothers and the affairs of Coroin Limited, the owner of Claridges, the Berkeley and the Connaught.

Nicola is recommended as a leading Junior for Banking & Finance, Commercial Litigation and Insolvency in the Legal 500 UK Bar.

What the directories say

"Fantastic with clients and with an excellent manner, she keeps clients reassured in all conferences and responds quickly to all queries clients have. All work is done quickly and diligently and with complete competence." (Legal 500, 2022)

"Very pleasant and approachable and very popular with clients. Thorough and with a good attention to detail but still sees the big picture." (Legal 500, 2022)

"Very personable, easy to instruct, down to earth, gets on with clients well and is very responsive." (Legal 500, 2021)

"Well-respected in the market." (Legal 500, 2021)

"Very hands-on and user-friendly, she is a real team player and integrates very well." (Legal 500, 2020)

"A decisive and thorough advocate who often has the ear of the court." (Legal 500, 2019)

Insolvency

Nicola's practice encompasses all aspects of corporate and personal insolvency from voluntary arrangements to liquidations, administrations and bankruptcies.

She advises and represents office-holders, individuals, directors, and insolvent companies. Her insolvency work covers domestic and international cases and she has been retained in a number of high profile liquidations during her career.

Nicola is particularly adept at dealing with complex cases spanning multiple disciplines thanks to her expertise in civil fraud, company law and property law.

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"She is brilliant; she is an intellectual powerhouse who is able to build arguments well, both on paper and in person."
(Chambers UK, 2021)

Emily Saunderson

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Areas of Expertise

Commercial Dispute Resolution
Fraud
Banking
Insolvency

Emily is a commercial litigator with a particular specialism in commercial fraud, and banking and finance.

Emily is a commercial litigator with a particular specialism in commercial fraud, banking and finance and insolvency. She has broad experience in obtaining urgent injunctive relief including freezing orders, search orders, asset preservation orders and delivery up orders. Emily's banking and finance practice has an emphasis on financial derivatives instruments, and standard form contracts including the ISDA Master Agreement.

Emily is ranked in the latest edition of Chambers & Partners in commercial dispute resolution and she is recommended as a leading junior in banking and finance and financial services by the Legal 500. Latest comments include: "Has a razor-sharp mind and a prodigious work ethic. Her ability to review, analyse and interrogate vast quantities of information is remarkable."

She has experience in cases involving contractual interpretation and rectification; dishonest assistance; fraud; bribery; fraudulent trading; rights of set-off; contractual estoppel; rights under contracts of indemnity; and guarantees.

Emily has broad experience advising and acting for both liquidators and creditors across a variety of matters ranging from asset recovery and actions against directors to applications to restrain the presentation and/or advertisement of winding up petitions, and obtaining validation orders.

Before embarking on a career in law, Emily was a financial journalist covering the global derivatives markets. She brings a strong understanding and useful insider's perspective on financial markets to her legal practice.

What the directories say

"A pleasure to work with. She is capable of distilling complex facts into concise and effective legal arguments and is a skilled oral advocate. She is very user friendly and a real team player. Very on top of the law." (Legal 500, 2022)

"A very strong technical lawyer who has a clear sense of the commercial practicalities of a case." (Chambers UK, 2021)

"She is brilliant; she is an intellectual powerhouse who is able to build arguments well, both on paper and in person." (Chambers UK, 2021)

"Technically very strong but also has a real commercial common sense in terms of the long term best interests of the clients." (Legal 500, 2021)

"Has a core of steel and her work ethic is impressive." (Legal 500, 2021)

"Has a razor-sharp mind and a prodigious work ethic. Her ability to review, analyse and interrogate vast quantities of information is remarkable." (Chambers UK, 2020)

"She's very hard-working and down to earth." (Chambers UK, 2020)


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12th October 2021
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Overview
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The EU Insolvency Regulation pre-Brexit
The effect of Brexit
Why does this matter?
Insolvencies proceedings opened before 31.12.20

EU Regulation Pre-Brexit

- Regulation (EU) 2015/848 on Insolvency Proceedings (Recast Insolvency Regulation)
- Applies automatically to all EU Members States, except Denmark, for insolvencies commencing on or after 26.6.17
- If the COMI of a debtor is in a Member State, proceedings in that State are the **main proceedings** and they are recognised throughout the EU as such: Articles 3(1) and 19
- Where the debtor's COMI is in a Member State, the courts of another Member State may open proceedings only if the debtor has an establishment in that Member State. The effect of those proceedings is restricted to the assets of the debtor in that Member State: Article 3(2). These are **secondary proceedings**

EU Regulation

Article 7(1):

"*Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened …*"

Article 7(2)(e) and (f):

"*The law of the State of the opening of proceedings shall determine: … (d) the conditions under which set-off may be invoked; (e) the effects of insolvency proceedings on current contracts to which the debtor is a party; (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of pending lawsuits.*"

EU Regulation

- **Article 19**: any judgment opening insolvency proceedings in a Member State with jurisdiction is recognised automatically in all other Member States
- **Article 20**: the judgment opening insolvency proceedings has the same effects in any Member State as under the law of the State where proceedings were opened
- **Article 21**: an insolvency practitioner appointed by the court in one Member State may exercise all the powers conferred on it by the law of that State, subject to some qualifications

The Effect of Brexit

- The European Communities Act 1972 was repealed at 11pm on 31.12.20 ("exit day"): European Union (Withdrawal) Act 2018, ss.1, 20 (as amended)
- Directly effective EU legislation was incorporated into English law by section 3 of European Union (Withdrawal) Act 2018
- But, from 31.12.20, the Insolvency (Amendment) (EU Exit) Regulations 2019 (as amended) amended significantly the Recast Insolvency Regulation

The Effect of Brexit

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Amendments to the Recast Insolvency Regulation further to the Insolvency (Amendment) (EU Exit) Regs 2019:

- Article 1: jurisdiction under the Reg to open proceedings is in addition to any other grounds that apply in the UK
- New Article 1A: there is jurisdiction to open insolvency proceedings (as set out in Article 1B) where:
  - the debtor's **COMI** is in the UK
  - COMI is in a Member State and there is an **establishment** in the UK
- Articles 6- 83 have gone: no automatic and reciprocal recognition between the UK and EU for proceedings opened after 31.12.20

Interpretation

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EU Withdrawal Act 2018:

- s.6(1): courts not bound by principles or decisions of the European Court on or after 11pm on 31.12.20
- s.6(3): questions as to meaning or effect of retained EU law are to be decided in accordance with retained case law and principles
- S6(4): the Supreme Court is not bound by any retained EU case law
- For guidance on the approach to be adopted: *Lipton v BA City Flyer* [2021] EWCA Civ 454, [52]-[84], especially [83]

Opening Proceedings

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- **COMI**: the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties: Art 3(1) Recast Insolvency Regulation
- **Establishment**: any place of operations where a debtor carries out or has carried out in the three months prior to the request to open insolvency proceedings, a non-transitory economic activity with human means and assets: Art 2(1) Recast Insolvency Regulation
- **Section 221 IA**: power to wind up unregistered companies; need to show, among other matters, a sufficient connection with England and Wales

What is the problem?

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- No mandatory rules on choice of law, jurisdiction, recognition and enforcement between the UK and EU
- How do you get an EU insolvency recognised / enforced here? (in-bound recognition)
- How do you get an English insolvency recognised / enforced in the EU? (out-bound recognition)
- Useful guidance on out-bound recognition from the UK Government website: "*Cross-border Insolvencies: Recognition and Enforcement in EU Member States*" (www.gov.uk)

"In-Flight" Proceedings

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- Art 4(2) of the Insolvency (Amendment) (EU Exit) Regs 2019: the amendments do not apply to proceedings within Art 67(3)(c) of the Withdrawal Agreement
- Art 67(3)(c) of the Withdrawal Agreement: the Recast Insolvency Reg applies to proceedings under Art 6(1) of that Reg, provided that the main proceedings were opened before the end of the transition period (31.12.20)
- Art 6(1) of the Recast Insolvency Reg: the courts of the MS where proceedings opened have jurisdiction for any action deriving directly from and closely linked with them

Overview

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- Procedural (cf. EIR - no allocation of jurisdiction to opening insolvency proceedings, no choice of law rules, no express provisions on enforcement and recognition of judgments re EU insolvency proceedings)
- Unlike the EIR no automatic recognition of foreign insolvency proceedings. Recognition must be sought under CBIR, Article 15
- BUT as for recognition there is no need for reciprocity as between GB and the country where insolvency proceedings are based (of EU Member States only Greece, Poland, Romania and Slovenia are signatories to the UNCITRAL Model Law on Cross-Border Insolvency on which CBIR is based)

Recognition Application: the basics

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- May be made without notice
- Proceeding must be a "a collective judicial or administrative proceeding in a foreign State including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to the control or supervision by a foreign court, for the purposes of reorganisation or liquidation:" Sch. 1, Article 15.1, CBIR
- Application must be made by the foreign representative ("a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding:" Sch. 1, Article 15.1., CBIR.
- Broadly speaking, recognition granted as of right: Sch.1, Article 17.1, CBIR
- Duty of full and frank disclosure: **Re OGX Petroleo E Gas SA** [2016] Bus LR 121 ; **In re Dalnyaya** [2018] Bus LR 789.

Effect of recognition of foreign main proceedings

- Stay any action against or execution in respect of assets of the debtor over which the E&W Court has jurisdiction (Article 20, Sch.1, CBIR) – as if notional winding-up order made under the Insolvency Act 1986
- In cases of foreign insolvency proceedings akin to GB administrations, the Court will be amenable to granting an extended order giving the debtor the same protection as a GB company in administration (e.g. a stay on the execution of security against the debtor assets in GB w/o permission of the Court or the consent of the foreign representative)
- Court may further grant the debtor other "*appropriate relief*:" Art.21, Sch.1, CBIR

"Appropriate relief"

- Art. 21(1)(a): "staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under [Art. 20(1)(a)]"
- Art. 21(1)(b): "staying execution against the debtor's assets to the extent not stayed under [Art. 20(1)(b)]"
- Art.21(1)(g): "…any additional relief that may be available to a British insolvency officer holder under the law of GB…"

The rule(s) in Gibbs

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- The "rule" in Gibbs: **Antony Gibbs & Sons v. La Societe Industrielle et Commerciale des Metaux** (1890) LR 25 QBD 399 (Court of Appeal authority)
  - a debt governed by English law not discharged or compromised by foreign insolvency proceedings
  - a debt under the insolvency law of a foreign country only treated as a discharge in E&W if discharged under the law applicable to the contract
  - if the creditor submits to the foreign insolvency proceedings, the "rule" in Gibbs does not apply

Power to apply foreign law to English law claim

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- **Fibria Celulose S/A v. Pan Ocean Co Ltd** [2014] EWHC 2124 (Ch)
  - Long term C/P (choice of law: E&W / Pan Ocean's COMI was Korea)
  - Contained a termination on notice or "*ipso facto*" clause upon insolvency of counter-party
  - Pan Ocean enters into insolvency proceedings in Korea, subsequently recognised in E&W
  - Ipso facto clauses generally enforceable in E&W but not in Korea
  - Foreign representative sought to argue that under CBIR, Art.21(1)(a) and (g), Korean law should apply so Fibria could not serve notice of termination under the C/P – sought to restrain service of notice

Round one to creditors

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- Art.21(1)(a) did not extend to service of a notice of termination
- Art.21(1)(g):
  - Relief is procedural in nature
  - It did not extend so as to effect substantive rights
  - Fine line between "procedural" and "substantive:" but here the application clearly sought to effect Fibria's substantive rights
  - The Judge considered himself bound in any event by the "rule" in Gibbs – the foreign insolvency recognised in E&W could not deprive Fibria of its substantive contractual right

Power to enforce a judgment or decision in the foreign insolvency proceedings?

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- **Bakhshiyeva v. Sherbank of Russia** [2018] EWHC 59 (Ch)
  - Restructuring proceedings in Azerbaijan
  - The restructuring plan to discharge all debt owed to the insolvent party in exchange for new debt irrespective of whether creditor voted against or abstained from the plan
  - Proceedings recognised in E&W
  - Foreign representative argued that under Art.21(a) and (b), CBIR, the Court had the procedural power to grant a permanent stay against the claim of two creditors holding debts instruments governed by English law but which had not participated in the restructuring plan

Round two to creditors

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- The Judge held:
  - There was no material distinction between the exercise of a right to terminate (per **Pan Ocean**) and a general right of enforcement
  - No jurisdiction therefore under Art.21(a) or (b) to grant a permanent injunction
  - Even if there was a jurisdiction, it could not be exercised so as to contravene the "rule" in Gibbs
  - The judge left open the question of whether a moratorium could extend beyond the duration of the foreign proceedings

Court of Appeal [2018] EWCA Civ 2802

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- The Court of Appeal handed down judgment on 18 December 2018
- Nothing in Art.21 to suggest that there was a procedural power to circumvent the rule in Gibbs
- Once the foreign proceedings had ended, the foreign representative no longer held office so strong implication there is no scope under CBIR for further orders OR for earlier relief to be maintained in England

Takeaways

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- Significantly less powers for insolvency office holder in EU insolvency proceedings but CBIR still of some use to such office holders
- Of limited relevance to GB insolvency officeholders given the limited uptake in EU Member States of the UNCITRAL Model Law on Cross-Border Insolvency on which CBIR is based
- Future attempts to use CBIR to enforce substantive insolvency decisions or judgment in EU insolvency proceedings will probably fail in the absence of GB legislation, unless there is a submission to the jurisdiction in the EU insolvency proceedings
- One to watch: UNCITRAL Model Law on Insolvency Related Judgments, 2 July 2018

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Section 426 and Common Law Recognition

Nicola Allsop

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Section 426 IA 1986

- "*(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.*
- *(5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction. In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law*."

S. 426 cont.

- A court in the Channel Islands, Isle of Man or any country or territory designated by the Secretary of State can apply to the UK courts for assistance in insolvency proceedings.
- By a series of statutory instruments, various countries have been so "designated", including Anguilla, Australia, the Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, the Republic of Ireland, Montserrat, New Zealand, St Helena, Turks and Caicos Islands, Tuvalu and the Virgin Islands, Malaysia and South Africa.
- The UK court has a wide discretion: it can apply UK insolvency law or the relevant foreign insolvency law (section 426(5), IA 1986).

S. 426 cont.

- Reciprocity not essential
- Assistance under section 426 can include:
  - An order for an injunction.
  - A declaration recognising the rights of a foreign insolvency representative (*Hughes v Hannover-Ruckversicherungs AG* [1997]).
  - The making of an administration order (*Re Dallhold Estates (UK) Pty Ltd* [1992]).

Limits of s.426

- Limits of section 426:
  - Does not apply (by analogy or otherwise) to a country that is not specifically designated: *Re SwissAir Schweizerische Luftverkehr-Aktiengesellschaft* [2010].
  - The Court cannot extend the list of designated countries: *in Re Phoenix Kapitaldienst GmbH* [2012].
  - It will not be used to enforce a foreign judgment: *New Cap* [2012]

Common law

- "Universalism" *vs* "modified universalism" and the principle of assistance.
- English courts will generally:
  - Recognise the winding up or dissolution of a company carried out under the laws of its country of incorporation: *Lazard Brothers and Company v Midland Bank Limite*d [1933].
  - Remit asset realisations made in subordinate insolvency proceedings in England and Wales to principal foreign liquidators, where those foreign liquidators will distribute such assets to creditors on a pari passu basis: *In the matter of Swissair Schweizerische Luftverkehraktiengessellschaft* [2009].

Reigning in universalism? *Rubin*; *New Cap* and *Singularis*

- The application of the "Dicey Rule". English court will recognise and enforce a foreign money judgment in personam if the defendant:
  - (1) was present in the foreign country when proceedings were instituted;
  - (2) claimed or counterclaimed in the proceedings;
  - (3) voluntarily appeared in the proceedings;
  - (4) previously agreed to submit to the jurisdiction.

Rubin v Eurofinance; *Re New Cap*

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- The "Dicey Rule" applies to a judgment given in the context of an avoidance action in insolvency proceedings: *Rubin v Eurofinance*; *New Cap Reinsurance v Grant* (SC) [2012]
- The decision to recognise the judgment in *Rubin* would be set aside because the defendants had not appeared in the US proceedings.
- The judgment in *New Cap* would be recognised and enforced because the defendants had submitted to the jurisdiction of the Australian court by filing proofs of debt and participating in creditors' meetings.

Singularis Holdings Ltd v PwC [2014]

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- Recognised a common law power to assist a foreign insolvency court by ordering the production of information which is necessary for the administration of a foreign winding up, but:
  - Only available to assist officers of a foreign court of insolvency jurisdiction.
  - Does not enable officeholders to do something which they could not do under the law under which they were appointed.
  - Information is necessary for performance of functions.
  - Order consistent with substantive law and public policy of assisting state.
  - Applicant prepared to pay third party's reasonable costs of compliance.

Re Bedzhamov [2021]

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- Russian T.I.B. applied for order recognising her appointment.
- B's appearances in the Russian bankruptcy proceedings amounted to a submission to the jurisdiction of the Russian court and provided the jurisdictional basis for recognition by the English court of B's Russian bankruptcy at common law.
- It was open to B to resist recognition of the Russian bankruptcy on grounds of fraud, breach of natural justice and public policy. It would not be a bar to recognition of a foreign insolvency that one of the debts would be unenforceable in England because it was a foreign revenue debt, or that one of the debts had been obtained by fraud.
- The effect of granting recognition was to treat B's moveable property in England as vested in the trustee, but recognition of the foreign bankruptcy did not vest immovable property in England in the trustee.

Outgoing recognition

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- Question of local law
- Useful government guidance here:
- https://www.gov.uk/government/publications/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states
- “This guide seeks to provide insolvency officeholders with some basic information regarding the applicable frameworks in the different EU member states, as a starting point towards seeking recognition for UK insolvency proceedings and dealing with assets in the EU…”

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