Centre for International
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British Institute of
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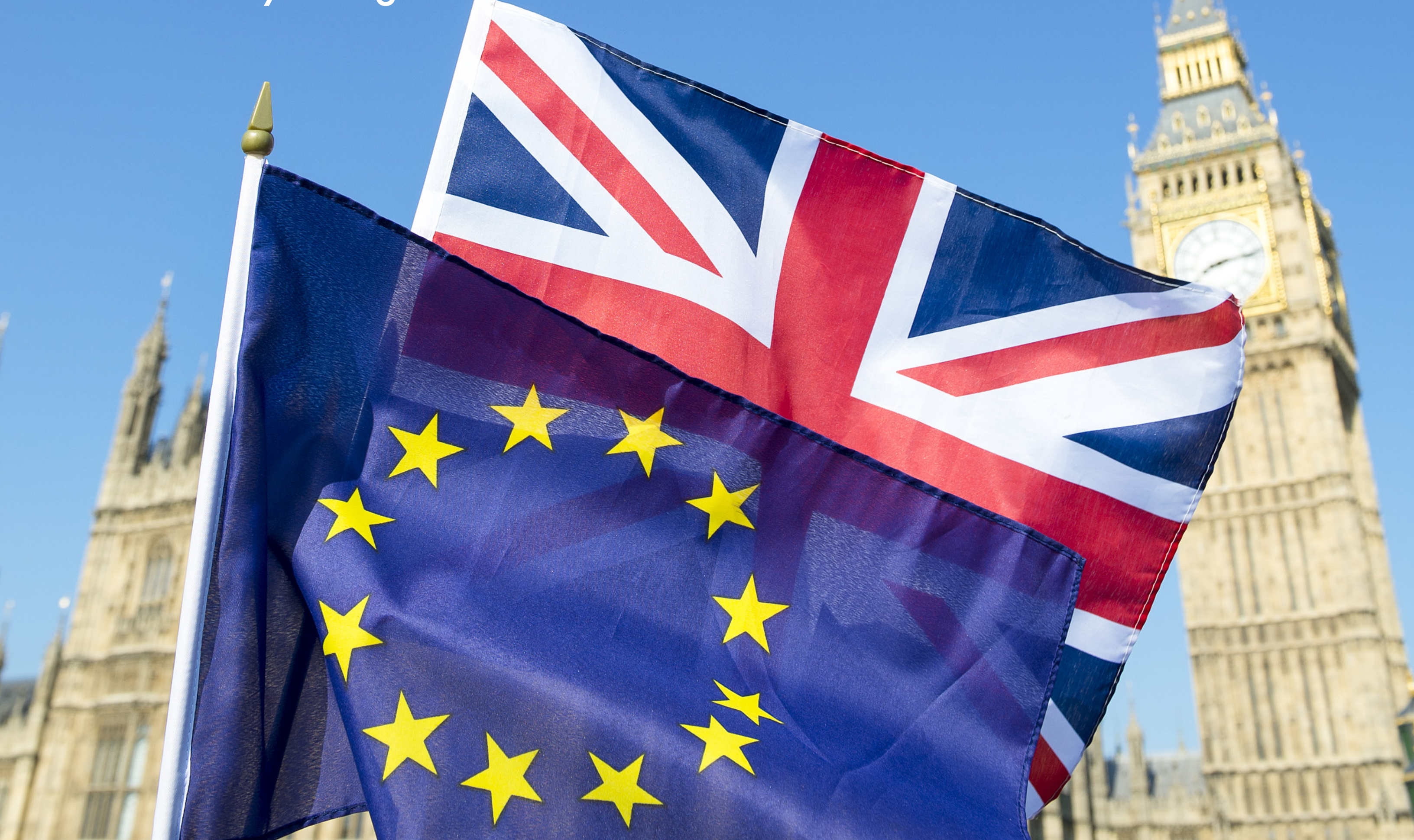
Brexit: The International Legal Implications | Paper No. 11 — February 2018

Failing Financial Institutions: How Will Brexit Impact Cross-border Cooperation in Recovery, Reconstruction and Insolvency Processes?

Dorothy Livingston



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CIGI Masthead

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About the Series

Brexit: The International Legal Implications is a series examining the political, economic, social and legal storm that was unleashed by the United Kingdom's June 2016 referendum vote and the government's response to it. After decades of strengthening European integration and independence, the giving of notice under article 50 of the Treaty on European Union forces the UK government and the European Union to address the complex challenge of unravelling the many threads that bind them, and to chart a new course of separation and autonomy. A consequence of European integration is that aspects of UK foreign affairs have become largely the purview of Brussels, but Brexit necessitates a deep understanding of its international law implications on both sides of the English Channel, in order to chart the stormy seas of negotiating and advancing beyond separation. The paper series features international law practitioners and academics from the United Kingdom, Canada, the United States and Europe, explaining the challenges that need to be addressed in the diverse fields of trade, financial services, insolvency, intellectual property, environment and human rights.

The project leaders are Oonagh E. Fitzgerald, director of the International Law Research Program at the Centre for International Governance Innovation (CIGI); and Eva Lein, a professor at the University of Lausanne and senior research fellow at the British Institute of International and Comparative Law (BIICL). The series will be published as a book entitled *Complexity's Embrace: The International Law Implications of Brexit* in spring 2018.

About the Author

Dorothy Livingston specializes in EU law and regulation. She was a partner at Herbert Smith LLP from 1980 to 2008, initially in the Finance Division and then in the Competition Regulation and Trade Department, where she is now a consultant of the enlarged firm, Herbert Smith Freehills LLP (HSF). Dorothy is one of the leaders of HSF's Brexit working group and has built up considerable expertise on the process of the United Kingdom leaving the European Union and what might follow, and on the possible consequences for business. Dorothy has spoken and written extensively on this subject, as well as on financial law and competition law. She has a unique combination of experience with her extensive background in financial and banking law and experience in EU law.

Dorothy is the chairman of the Financial Law Committee of the City of London Law Society (CLLS) and represents the CLLS on the Treasury Banking Liaison Panel appointed to consider important subsidiary legislation and the code of practice under the Banking Act 2009 related to the special resolution regime for failing banks. She is also a member of the CLLS Competition Law Committee and has commented on Brexit issues in this field.

About the International Law Research Program

The International Law Research Program (ILRP) at CIGI is an integrated multidisciplinary research program that provides leading academics, government and private sector legal experts, as well as students from Canada and abroad, with the opportunity to contribute to advancements in international law.

The ILRP strives to be the world's leading international law research program, with recognized impact on how international law is brought to bear on significant global issues. The program's mission is to connect knowledge, policy and practice to build the international law framework — the globalized rule of law — to support international governance of the future. Its founding belief is that better international governance, including a strengthened international law framework, can improve the lives of people everywhere, increase prosperity, ensure global sustainability, address inequality, safeguard human rights and promote a more secure world.

The ILRP focuses on the areas of international law that are most important to global innovation, prosperity and sustainability: international economic law, international intellectual property law and international environmental law. In its research, the ILRP is attentive to the emerging interactions among international and transnational law, Indigenous law and constitutional law.

Acronyms and Abbreviations

BCBS	Basel Committee on Banking Supervision
BRRD	Bank Resolution and Recovery Directive
CIWUD	Credit Institutions Winding Up Directive
CJEU	Court of Justice of the European Union
DEEU	Department for Exiting the European Union
EBA	European Banking Authority
ECA	European Communities Act
EEA	European Economic Area
EFTA	European Free Trade Agreement
ERC	European resolution college
EUIR	EU Insolvency Regulation
FSB	Financial Stability Board
G20	Group of Twenty
GATS	General Agreement on Trade in Services
PRA	Prudential Regulation Authority
TEU	Treaty on European Union
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organization

Executive Summary

This paper addresses the issues for international recognition of reconstruction and insolvency proceedings affecting international banks raised by the United Kingdom's decision to leave the European Union, and considers what the United Kingdom and the European Union and its member states could do to address the potential loss of recognition and cooperation, as well as possible wider international initiatives. The relation of this issue to the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS) is also considered.

Introduction

This paper is directed at some important issues of cross-border recognition and assistance related to processes affecting financial institutions arising from the United Kingdom's decision to leave the European Union, commonly known as Brexit. Topics covered in this paper include:

- the effects of Brexit on these issues in the United Kingdom and the European Union;
- consideration of whether Brexit represents a setback in efforts to create a robust approach to cross-border failure of systemically important financial institutions; and
- how Brexit will affect the recognition of recovery, reconstruction and insolvency proceedings with a cross-border element affecting financial institutions.

The paper goes on to discuss the options open to the United Kingdom and the European Union in the context of the Basel Accords issued by the Basel Committee on Banking Supervision (BCBS)[1] and the work of the Financial Stability Board (FSB),[2] which are aimed at increasing the stability of international financial systems. These international bodies, as well as the European Union and the United Kingdom, recognize the importance of the smooth operation of cross-border processes to financial stability in case of the failure of a systemically important financial institution.

The paper also considers whether the GATS[3] has any bearing on the issues.

Finally, the paper explores how far the courts can address any political and regulatory failures to preserve the existing levels of mutual recognition as between the United Kingdom and EU member states.

Inevitably, in the complex legislative and regulatory environment for financial services (much of it strengthened with new legislation following the 2007–2009 financial crisis), there is a good deal of scene setting to be done if we are to make sense of the key issues.

Principal Legislation and International Instruments

EU Legislation

The main pieces of EU legislation are directives. These require the EU member states to change their laws to meet the requirements of the directive and, in some circumstances, to refrain from action otherwise open to them. They are not directly effective (except in limited circumstances) in any member state and require national law to be changed to meet their requirements.

For the purpose of this paper, it has not been necessary to look at national implementation,

1 Banking supervision accords are issued by the BCBS, a body made up of representatives of central banks and regulatory authorities of Group of Twenty (G20) countries (and other countries with major financial services centres such as Hong Kong, Luxembourg and Singapore). The committee is not underpinned by an international treaty and, although it is highly respected, it has no powers of enforcement. The European Union and the represented states among its members, including the United Kingdom, are highly supportive and follow its recommendations, including under the Bank Resolution and Recovery Directive (BRRD) discussed below.

2 The FSB is a body supported by the G20 states that plays an important part in coordinating at an international level the work of national financial authorities and international standard-setting bodies and promoting the implementation of effective policies in the interests of global financial stability. The FSB may also issue non-binding recommendations. It is currently chaired by Mark Carney, governor of the Bank of England.

3 *General Agreement on Trade in Services*, 15 April 1994, 1869 UNTS 183, 33 ILM 1167 (entered into force 1 January 1995) [*GATS*].

except in the United Kingdom, where further legislative measures are needed to prevent much of the implementing law from falling away when the United Kingdom leaves the European Union at the end of March 2019 (subject to agreement otherwise and to the application of transitional measures, which may apply EU law in the United Kingdom for a period after March 2019). The extent to which EU law, or UK law in the same terms, continues to apply is a policy matter, and the eventual outcome of the EU-UK negotiations under article 50 of the Treaty on European Union (TEU) will determine the matter.

The BRRD[4] sets out the European Union's rules for the management of banks (known in EU law as credit institutions) and investment firms in financial difficulties. These rules may lead to a business in difficulty being recapitalized as a going concern, or to the transfer of its viable contracts and deposits to a "bridge bank," or directly to a solvent financial institution. A bridge bank is a newly established institution under the control of the resolution authorities in the relevant EU member state that will carry on the viable business of the failing bank, pending finding a purchaser for this business or the return of the bridge bank to independence as a fully capitalized entity wholly or partly owned by creditors of the failed bank whose claims have been "bailed in." These creditors principally will be holders of bonds issued by the failed institution. Where a viable business is transferred to a third party or bridge bank, the failing institution itself will become subject to an insolvency process and, ultimately, cease to exist as a legal entity.

As an EU directive, the BRRD requires EU member states to adjust their laws so as to meet its minimum requirements, which include requiring each of them to create certain structures (principally, the appointment of resolution authorities), as well as to put in place powers for the management of bank resolution and recovery. There are requirements and restrictions on the operation of the powers by member state resolution authorities and rules on the recognition of processes carried out in other member states. In its current form, the BRRD is fully or nearly fully implemented into UK law[5] and the law of most other EU member states. There are legislative proposals in Brussels to amend the BRRD, but it is not clear whether they will take effect before the United Kingdom leaves the European Union at the end of March 2019.

In addition, there are two principal older EU directives: the Credit Institutions Winding Up Directive (CIWUD) and Solvency II, concerned respectively with the insolvency of credit institutions and insurance companies.[6] These are fully implemented in the United Kingdom and in most other member states. An important feature of these directives is the recognition of insolvency processes carried out in other member states. A credit institution subjected to a resolution process in accordance with the BRRD, if it does not itself survive the process as a continuing legal entity with a viable business, will be wound up under a process that accords with CIWUD. The general EU Insolvency Regulation (EUIR)[7] does not apply to institutions subject to these directives.

This paper will concentrate on the issues of recognition and conflict of laws arising under these three directives as a result of Brexit. It will not consider operational aspects of the directives, except where necessary to illustrate these issues.

International Instruments

The effect of the Agreement on the European Economic Area (EEA)[8] is that the EU legislation referred to above is all legislation with EEA relevance and the provisions referred to should,

4 *Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms*, [2014] OJ, L173 [*BRRD*].

5 This is achieved by the Banking Act 2009, as amended, and legislation under two statutory instruments under the European Communities Act 1972 and some rules of the Prudential Regulation Authority (PRA), which is controlled by the Bank of England.

6 *Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions*, [2001] OJ, L 125, commonly known as CIWUD; *Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance*, [2009] OJ, L 335, Title IV [*Solvency II*]. The latter directive lays down a general framework for the regulation of insurance companies, including insolvency processes, while CIWUD is concerned only with the winding up of credit institutions, as other aspects of regulation are being dealt with in other EU laws.

7 *Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings*, [2015] OJ, L 141 (the recast EUIR from 26 June 2017), replacing *Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings*, [2000] OJ, L 160.

8 *Agreement on the European Economic Area*, 2 May 1992, [1994] OJ, L1 (entered into force 1 January 1994). Chapter 3 removes restrictions on the supply of services and chapter 4 removes restrictions on the movement of capital.

assuming implementation in Iceland, Liechtenstein and Norway, have the effect of treating those states, broadly speaking, in the same way as EU member states vis-à-vis EU countries and third countries. Those countries should apply the same approach as EU member states to the recognition of third-country processes.

The United Kingdom and some EU member states (Greece, Poland and Romania) have adapted their insolvency laws to the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency, but the United Kingdom, at least, has chosen to exclude financial institutions from the application of this adaptation, so this has no immediate relevance to the issue of post-Brexit recognition of EU insolvency proceedings affecting banks and insurance companies.[9]

The Basel Accords issued by the BCBS are not specifically concerned with the issue of recognition of resolution and insolvency regimes. The accords concentrate on credit risk (Basel I) and capital adequacy (Basel II, as amended, and Basel III, issued since the financial crisis). Implementation in the European Union of the Basel capital adequacy standards is in part through the BRRD, and the subject of prudent regulation of banks is seen as closely linked to the question of effective resolution, should that be necessary.

The FSB has gone further than the BCBS in examining issues related to resolution, and in 2014, published an international standard for resolution regimes that are part of a set of policy measures arising from the November 2011 G20 summit meeting.[10] Chapters 7 to 9 of this *Key Attributes* document deal with the legal framework conditions, international crisis management groups and institution-specific, cross-border cooperation agreements. Chapter 7 encourages cooperation both between resolution authorities and legal mechanisms in different states. Paragraphs 7.5 and 7.6 are most pertinent:

> 7.5 Jurisdictions should provide for transparent and expedited processes to give effect to foreign resolution measures, either by way of a mutual recognition process or by taking measures under the domestic resolution regime that support and are consistent with the resolution measures taken by the foreign home resolution authority. Such recognition or support measures would enable a foreign home resolution authority to gain rapid control over the firm (branch or shares in a subsidiary) or its assets that are located in the host jurisdiction, as appropriate, in cases where the firm is being resolved under the law of the foreign home jurisdiction. Recognition or support of foreign measures should be provisional on the equitable treatment of creditors in the foreign resolution proceeding.[11]
>
> 7.6 The resolution authority should have the capacity in law, subject to adequate confidentiality requirements and protections for sensitive data, to share information, including recovery and resolution plans (RRPs), pertaining to the group as a whole or to individual subsidiaries or branches, with relevant foreign authorities (for example, members of a CMG), where sharing is necessary for recovery and resolution planning or for implementing a coordinated resolution.[12]

The FSB *Key Attributes* document has not yet, however, led to any more formal international structure for the recognition of resolution or insolvency processes affecting financial institutions.[13]

9 See *Insolvency Act 1986* (UK) as supplemented by the *Cross-Border Insolvency Regulations 2006*, SI 2006/1030, Schedule 1 at para 2 (g)–(l).

10 FSB, *Key Attributes of Effective Resolution Regimes for Financial Institutions* (15 October 2014), online: <www.fsb.org/what-we-do/policy-development/effective-resolution-regimes-and-policies/key-attributes-of-effective-resolution-regimes-for-financial-institutions/>.

11 *Ibid* at para 7.5.

12 *Ibid* at para 7.6.

13 See Matthias Lehmann, "BRRD, the SRM-Regulation and Private International Law: How to Make Cross-Border Resolution Effective" (Paper delivered at the European Banking Institute's inaugural workshop, Frankfurt, Germany, 27-28 January 2016) for a wide-ranging review of the issues.

Principal Provisions on Recognition and Conflict of Laws

BRRD: Recognition

The BRRD provides for cooperation both within the European Union and with third countries. Recital 102 states the general principle:

> Cooperation should take place both with regard to subsidiaries of Union or third-country groups and with regard to branches of Union or third-country institutions. Subsidiaries of third-country groups are enterprises established in the Union and therefore are fully subject to Union law, including the resolution tools laid down in this Directive. It is necessary, however, that Member States retain the right to act in relation to branches of institutions having their head office in third countries, when the recognition and application of third-country resolution proceedings relating to a branch would endanger financial stability in the Union or when Union depositors would not receive equal treatment with third-country depositors. In those circumstances, and in the other circumstances as laid down in this Directive, Member States should have the right, after consulting the national resolution authorities, to refuse recognition of third-country resolution proceedings with regard to Union branches of third-country institutions.[14]

Relations within the European Union in relation to resolution proceedings are dealt with by the amendment to CIWUD in article 117 (discussed below) and by provisions dealing with relations with third countries in articles 93 to 98. These articles lay down minimum powers that member states must have under their respective national laws in relation to foreign resolution processes and in relation to the resolution of branches of third-country entities established on their territory. They also deal with supervisory cooperation, such as sharing confidential information. These articles go on to provide for procedures that will shape whether a member state will recognize and assist third-country processes or be free to apply its own domestic processes instead.

Broadly speaking, this part of the BRRD (article 94) provides that, in the absence of a relevant international agreement between the European Union and a third country or, where there is neither an EU international agreement or a relevant bilateral agreement between a member state and the third country, that recognition of third-country resolution proceedings in relation to an institution (or its parent company) with branches or subsidiaries in the European Union regarded as significant by two or more member states, or having assets, rights or liabilities located in two or more member states, shall be decided by the relevant European resolution college (ERC) to be established under article 89. An ERC is an institution or group-specific body to be established by the regulators from the affected countries and chaired by the resolution authority of the member state where the consolidating supervisor[15] is located. In some circumstances, this function can be delegated to a similar body established under article 88. If an ERC decides to afford recognition, national resolution authorities should "seek the enforcement of the recognised third-country resolution proceedings in accordance with their national law."[16]

In the absence of an ERC or equivalent body and/or a recognition agreement, each member state can take its own decision whether to recognize and enforce foreign proceedings, but its decision must "give due consideration to the interests of each individual Member State where a third-country institution or parent undertaking operates, and in particular to the potential impact of the recognition and enforcement of the third-country resolution proceedings on the other parts of the group and the financial stability in those Member States."[17]

In circumstances set out in article 95, including national concerns about financial stability or fiscal implications, fair treatment of creditors or conflict with national law, a

14 *BRRD, supra* note 4, recital 102.

15 For the purpose of *Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms*, [2013] OJ, L 176.

16 *BRRD, supra* note 4, art 94(2)

17 *Ibid*, art 94(3).

member state resolution authority can take a decision not to recognize foreign processes: this decision overrides the article 94 process.

In the absence of an international agreement, the European Banking Authority (EBA) can also conclude non-binding framework agreements with third-country authorities responsible for institutions operating in the European Union or their parent.[18] This type of agreement would principally be concerned with information sharing and coordination of public communications. Bilateral agreements are also possible. Information sharing must meet standards set out in article 98, including meeting EU data protection standards and equivalent standards of professional secrecy.

There are indications that a member state resolution authority may (indeed, should), even if not legally bound to give recognition, decide to give ad hoc recognition to a third-country process: for example, in the limitation in article 96 on using national processes in relation to a branch of a third-country institution, unless one of the circumstances in article 95 applies or there are no third-country processes in place.[19] Article 68 allows third-country resolution proceedings to be recognized as a "crisis measure" when they are recognized under article 94 "or otherwise where a resolution authority so decides."[20]

BRRD: Conflicts

Article 45 *et seq*. deal with the identification of own funds and eligible liabilities, that is, broadly speaking, equity, together with debt liabilities that can be treated as regulatory capital because the holders are bound by law or agreement to accept that their debt is subject to bail-in (i.e., conversion to equity or write-off) in the event of a bank ceasing to have adequate capital.[21] This section of the BRRD reflects parts of the Basel Accords.

There is concern that, if a debt is created under a contract governed by a foreign law, that legal system (whose courts may well have jurisdiction over any dispute) may not recognize the bail-in provisions of EU law. Article 55 of the BRRD, therefore, requires EU banks to include in foreign law contracts creating a liability on their part a contractual term on the recognition of bail-in. Article 45(5) allows resolution authorities to require institutions to demonstrate the effectiveness of such an agreement (or that the bail-in arrangements will, in any event, be recognized under the relevant third-country law) before the debt can be accepted for regulatory capital purposes.

It has been recognized for some time that the drafting and scope of article 55 is both uncertain and impractically wide, so that it is extremely difficult for institutions to comply. In part, this is because article 55 requires banks, at the time of a new contract, to have regard to tests set out in article 44(2) that were designed to be applied at the time of an actual failure and containing elements that can only be determined at that time. This is due partly to article 55 including every type of liability in this obligation. The provision does not recognize the impracticality of expecting certain third-country institutions (for example, a clearing system or exchange) to jeopardize their own stability by entering into such an obligation. Current efforts at the EU level to change and clarify the provision have not yet produced a draft that is a clear improvement, but it is to be expected that this will have been achieved to a greater or lesser extent before Brexit and will be reflected in UK implementation. This is not the place to discuss the details of this issue, but in any event, the requirements of article 55 can be expected to continue to apply in respect of major foreign law fundraising, such as bond issues or other large borrowing programs, regardless of whether the issuing EU institution wishes to treat them as regulatory capital.

Once the United Kingdom leaves the European Union, EU-headquartered banks raising funds through English law loan agreements, English law debt instruments (and possibly certain other agreements) may consider seeking such clauses in English law contracts. This would not be required by any EU bank whose home member state resolution authority had determined that the liabilities or instruments can be subject to the write-down and conversion powers involved in bail-in in accordance with the BRRD as a result of national law in the United Kingdom or of a binding agreement with the United Kingdom made either by that member state or the European Union.

18 *Ibid,* art 97.

19 *Ibid,* arts 95–96

20 *Ibid*, art 68.

21 *BRRD, supra* note 4, art 45. The technical definition in article 2.1(71) is "liabilities and capital instruments that do not qualify as Common Equity Tier 1, Additional Tier 1 or Tier 2 instruments of an institution or entity referred to in point (b), (c) or (d) of Article 1(1) that are not excluded from the scope of the bail-in tool by virtue of Article 44(2)."

CIWUD: Recognition

CIWUD lays down a code for reorganization and winding up of credit institutions within the European Union and cooperation between member states in that process. This extends to processes under the BRRD, including those involving parent companies.[22] It assigns exclusive jurisdiction to the authorities of the home member state with regard to reorganization measures, including in relation to branches in other member states (article 3). The same article specifies that the law of that member state shall apply, except as otherwise provided in CIWUD and for recognition throughout the European Union. Articles 9 and 10 achieve the same in relation to a winding up.

Article 10 follows the EUIR (which does not apply to credit institutions or insurance companies) in specifying the law applicable to various aspects of the winding up. Articles 20 to 27 and 30 to 31 deal with the application of a different law from that of the home member state in certain circumstances or for particular types of contract or legal right. In particular, article 21 follows the insolvency regulation in preserving the rights *in rem* of creditors in the member state where assets are situated. According to recital 21 and article 19, branches of third-country institutions are to be dealt with by the member state where they are established. Unlike in the BRRD, there are no specific provisions regarding third-country proceedings, recognition of which seems to be left to the national law of each member state.

Solvency II

Title IV of Solvency II deals with the reorganization and winding up of insurance and reinsurance companies in very similar terms to the way that CIWUD deals with the same issues for banks, except for provisions concerning the priority of insurance claims over other claims.[23] All the remarks made above in relation to CIWUD apply also in this context, except that there is no equivalent of BRRD article 117 extending the rules in Solvency II to reorganizations and windings-up involving parent companies.

22 *BRRD*, *supra* note 4, art 117.

23 *Solvency II*, *supra* note 6, art 275.

UK Implementation of EU Law

The United Kingdom implements EU legislation such as directives, which are not directly effective, by statutory instruments relying on powers in section 2(2) of the European Communities Act 1972 (ECA 1972)[24] and may make other adjustments to comply with EU law in the same way. It may, however, in some cases use primary legislation or powers under existing UK legislation to achieve the same effect. In some cases, existing UK law may satisfy implementation requirements in whole or in part. To that extent, there may be no specific implementation in the form of UK legislation subsequent to the relevant EU legislation being passed.

The United Kingdom implemented CIWUD primarily by the Credit Institutions (Reorganisation and Winding Up) Regulations 2004.[25]

As the winding-up provisions of Insolvency II reflect earlier EU legislation, and there have also been developments in national law, the provisions related to the winding up of insurance companies are scattered among the Insolvency Act 1986, the Financial Services and Markets Act 2000, as amended, the Insurers (Winding Up) Rules 2001, the Insurers (Reorganisation and Winding Up) Regulations 2004, and the Financial Services and Markets Act 2000 (Administration Orders Relating to Insurers) Order 2010. The 2004 regulations, made under ECA section 2(2), represent the primary piece of legislation implementing EU law.[26]

The BRRD is implemented in part by the Bank Resolution and Recovery Order 2014 and the Bank Resolution and Recovery Order 2016.[27] In addition, PRA rules deal with the supervision

24 *European Communities Act 1972* (UK), c 68, s 2(2) [*ECA 1972*].

25 *Credit Institutions (Reorganisation and Winding Up) Regulations 2004*, SI 2004/1045, made under ECA 1972, s 2.

26 *Insurers (Reorganisation and Winding Up) Regulations 2004*, SI 2004/353.

27 *Bank Resolution and Recovery Order 2014*, SI 2014/3329, and the *Bank Recovery and Resolution Order 2016*, SI 2016/1239, were both made primarily under the power given by section 2 of the ECA 1972 to implement EU legislation in the United Kingdom.

of compliance with article 55.[28] The legislative position in the United Kingdom is, however, a prime example of the situation where earlier UK legislation, in this case the Banking Act 2009 and statutory instruments made under it, already fulfill many of the implementation requirements of the BRRD. Indeed, many of the concepts in the BRRD are derived from the Banking Act 2009.

Leaving the European Union

Following the referendum in June 2016, the United Kingdom served notice under article 50 of the TEU to leave the European Union. The two-year notice period expires at the end of March 2019, unless extended by agreement. At the time of writing, extension seems highly unlikely, but it seems possible that there will be an implementation or transitional phase (possibly lasting about two years after Brexit) leading up to a new trading relationship. This may result in the United Kingdom being treated during the transition similarly to an EEA state, such as Norway, for the purposes of the legislation discussed in this article, or may otherwise smooth the effects of leaving the European Union, although there is no indication of what might be included in a “half-way house” transition, except that it may not include submitting to the jurisdiction of the Court of Justice of the European Union (CJEU) with regard to the interpretation and application of some or all EU and EU-derived law.

If treated similarly to an EEA state, such as Norway, during transition the United Kingdom could be essentially in the same position as it is currently in relation to any failure of a financial institution to which any of this legislation applies. If, however, the United Kingdom leaves the European Union without agreement of a new relationship that preserves mutual recognition of cross-border resolution and insolvency processes, then it will fall fully into third-country treatment regarding these matters, as well as being a third country for the purposes of BRRD article 55.

This paper will consider the position on the basis that would arise if the United Kingdom leaves the European Union without relevant transitional provisions (or transitional provisions treating the United Kingdom like an EEA state expire without any relevant agreement). This gives a starting point for discussions. At this point, the United Kingdom will cease to be a member state (or to be treated as an EEA state) for the purposes of this directive, and although the UK implementing laws may remain in force, the United Kingdom will no longer be automatically entitled to the recognition of its processes in EU and EEA states or the regulatory cooperation from EU and member state authorities afforded pursuant to the directive. This will involve the loss of extremely useful rights for the United Kingdom in the event of the insolvency of a financial institution headquartered in the United Kingdom with branches or subsidiaries elsewhere in the European Union/EEA. There would be a risk of parallel resolution or insolvency proceedings in one or more continuing EU member state where the UK institution had a branch or subsidiary. Equally, the United Kingdom might be able to open parallel proceedings in the case of the failure of an EU or EEA institution with branches or subsidiaries in the United Kingdom, where it previously might not have been free to do so.

This would be a backward step, having regard to the commitment of the G20 to effective cross-border resolution, and represent a falling away from the standards for cross-border insolvency espoused by the FSB. It would introduce, at least, inefficiencies and the risk of unequal treatment of creditors according to where their debts are dealt with. At worst, it could cause the failure of a systemically important institution that would have been saved if a single resolution authority could have dealt with its resolution or restructuring, significantly affecting financial stability because of its contagious effects.

It is to be expected that both the United Kingdom and the European Union, having regard to the fact that many of its continuing member states are G20 countries or participate in the BASEL and FSB processes, will seek to avoid that outcome, although, of course, politics may get in the way.

28 See Bank of England, *“The contractual recognition of bail-in: amendments to Prudential Regulation Authority rules”*, Policy Statement 17/16, Consultation Paper 8/16 (29 June 2016), online: <www.bankofengland.co.uk/prudential-regulation/publication/2016/the-contractual-recognition-of-bail-in-amendments-to-pra-rules>.

The UK Approach

Retention of EU Law

The UK government has taken a general decision with regard to EU law that is entirely consistent with its position as a member of the G20. It has decided to bring forward legislation, the European Union (Withdrawal) Bill (Withdrawal Bill),[29] which provides for EU law implemented in the United Kingdom up to "exit day" to be incorporated into the laws of the United Kingdom (this is known as "EU-derived domestic legislation") and for the incorporation of directly applicable EU legislation (such as regulations) into domestic legislation. Together with retained general principles of EU law and retained domestic and EU case law, these are described as "retained EU law."

At the time of writing, the Withdrawal Bill is at an early stage of passage through Parliament, and may be subject to significant change. Applying its provisions to the legislation that implements the relevant parts of the BRRD, CIWUD and Solvency II is thus something of a crystal-ball-gazing exercise, although it seems likely that the conceptual structure of the Withdrawal Bill, which incorporates EU law applicable in the United Kingdom before it leaves the European Union into domestic law after it leaves, will survive and become law.

EU-derived domestic legislation includes enactments made under ECA section 2(2), such as the 2004 statutory instruments that largely implement CIWUD and Title IV of Solvency II, and the 2014 and 2016 instruments that implement the BRRD.[30] It also includes legislation not made under the ECA passed, made or operating:

(a) for the purpose of implementing any EU obligation of the United Kingdom, or enabling any such obligation to be implemented, or enabling any rights enjoyed or to be enjoyed by the United Kingdom under or by virtue of the Treaties to be exercised; or

(b) for the purpose of dealing with matters arising out of or related to any such obligation or rights or the coming into force, or the operation from time to time, of [Treaty provisions, directly effective EU legislation and decisions, as made directly applicable in the UK by ECA s 2(1)].[31]

In addition, the term includes enactments relating to legislation made under ECA section 2(2), anything falling within (a) and (b), above, to direct EU legislation preserved by clause 3(1) of the bill, and to EU legislation and decisions preserved by clause 4(1) of the bill and any other UK enactment "relating otherwise to the EU or the EEA."[32]

This means that, for example, insofar as the BRRD implementation by the Bank Resolution and Recovery Order 2016 is made both under powers in ECA section 2(2) and in the Small Business, Enterprise and Employment Act 2015 was for a purpose mentioned above or related otherwise to the European Union or the EEA, it may still be EU-derived domestic legislation.[33]

However, the position of older UK legislation, including parts of the Banking Act 2009 itself, that have been accepted as good implementation of the BRRD is unclear: the better view, having regard to the treatment of EU directives discussed below, would be that they are to be treated as purely domestic UK legislation, unless actually amended by one of the implementing orders.

Interpretation

EU-derived domestic legislation forms part of retained EU law and is subject to special rules of interpretation set out in clause 6 of the bill, which effectively, so long as the legislation is not modified by later UK legislation, allows for the application of CJEU decisions taken before exit day and the application of retained general principles of EU law as at that date. Later CJEU decisions are not binding at all, but may be considered. As currently drafted, clause 6 itself and related provisions scattered throughout the bill and its schedules provide for so many actual and potential disapplications of historic EU law

29 Bill 5, *European Union (Withdrawal) Bill* [HC], 2017–2019 sess, 2017 (1st reading 13 July 2017) [*Withdrawal Bill*].

30 *ECA 1972, supra* note 24, s 2(2)(a).

31 *Ibid*, s 2(2)(b) applying *ECA 1972*, s 2(2)(a), (b).

32 *Ibid*, s 2(2)(c), (d).

33 The order refers to the *Small Business, Enterprise and Employment Act 2015*, c 26, s 28, 30. These sections relate to ministerial reviews of existing regulatory provision, and section 30(3) allows for the review to take account, *inter alia*, of how an EU obligation binding on the United Kingdom is implemented in other member states. The author does not express a concluded view on whether the 2016 order will be regarded wholly as EU-derived domestic legislation, but this is certainly a possible conclusion.

that it is doubtful whether the UK courts will be able to follow their present approach to ECA section 2(2) statutory instruments, which would involve having regard to not just CJEU decisions, but a more purposive approach to interpretation, taking account of the underlying directive so as to ensure consistent application. This is potentially an area of unnecessary legal uncertainty.

Position of Directives

Legal uncertainty is exacerbated by the failure of the Withdrawal Bill to give any status to the EU directives from which most EU-derived domestic legislation is derived. They are not direct EU legislation and their effect on EU-derived domestic legislation is severely limited because clause 4(2)(b) specifically excludes from the saving under clause 4(1) (and thus from the cross-reference into clause 4(1) in clause 2(2) of the bill): "any rights, powers, liabilities, obligations, restrictions, remedies or procedures in so far as they...arise under an EU directive...and are not of a kind recognised by the European Court [CJEU] or any court or tribunal in the United Kingdom in a case decided before exit day (whether or not it is an essential part of the decision in the case)." The effect of this would seem to be that directives are of no relevance in relation to retained EU law that is EU-derived, except insofar as their provisions are the subject of pre-exit judicial decisions of the CJEU or the UK courts.

If the courts take this exclusion to extend to issues of interpretation, the answer to the question whether the implementing statutory instruments relating to the BRRD, CIWUD or Title IV of Solvency II have, as a matter of UK law, to be interpreted consistently with the underlying directives would be something of a lottery, depending on whether the court regards any pre-exit case as determining this point. Will the courts have regard to cases of general principle, notably *Von Colson*[34] and *Marleasing*[35] that state the principle that a national court must interpret its implementing law (including earlier law treated as implementation) in the light of the wording and purpose of the underlying directive, or look only at cases with a bearing on the particular piece of implementing law at issue?

34 Case 14/83, *Von Colson and Kamann* [1984] ECR 1984-01891.

35 Case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR 1990 1-04135

Given the United Kingdom's stated intention that "as a general rule, the same rules and laws will apply on the day after exit as on the day before,"[36] clause 4(2)(b) appears to introduce yet another layer of unnecessary legal uncertainty and to throw into question similar words in the February 2017 white paper, "The United Kingdom's exit from and new partnership with the European Union,"[37] as well as assurances that there will be legal certainty and continuity post-Brexit.

Legislative Outcome

It remains to be seen if the committee stages of the Withdrawal Bill will address these issues of legal uncertainty, in particular whether they will reinstate recognition of directives as part of the EU *acquis*, which should have a place in retained EU law after the United Kingdom leaves the European Union, and whether they will simplify the scheme for the application of CJEU decisions and the rules of interpretation for retained EU law. In the event that the bill were to pass into UK law in its present form, the courts will need to use their discretions to seek to maintain consistency of approach and limit unnecessary divergence of UK and EU law. In addition, it may be more difficult to obtain mutual recognition, while the extent to which the same laws will be interpreted in the same way in the United Kingdom as in the European Union remains unclear.

Amendment of Retained EU Legislation

It is evident that some retained legislation including EU-derived domestic law, such as the statutory instruments implementing the BRRD, CIWUD and Title IV of Solvency II, may require amendment to work effectively after Brexit. For example, they may refer to a role for the European Commission or the EBA. These roles may need to be assigned to a UK authority, such as the PRA or the Financial Conduct Authority.

36 UK, Department for Exiting the European Union (DEEU), *European Union (Withdrawal) Bill Explanatory Notes* (London, UK: House of Commons, 2017) at para 10 [DEEU, "*Explanatory Notes*"], online: <https://publications.parliament.uk/pa/bills/cbill/2017-2019/0005/en/18005en.pdf>. This echoes paragraph 11 of the February 2017 white paper.

37 UK, DEEU, *The United Kingdom's exit from and new partnership with the European Union* (February 2017), online: <www.gov.uk/government/publications/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union-white-paper/the-united-kingdoms-exit-from-and-new-partnership-with-the-european-union--2>.

The bill provides various methods for amendment by statutory instrument, some of which require a positive resolution of both Houses of Parliament, while others only require a negative procedure, whereby the legislation comes into effect unless voted down in Parliament within 40 days of it being made. These amendments may be applied to acts of Parliament, such as the Banking Act 2009, as well as to statutory instruments. The main process for dealing with deficiencies in the legislation, clause 7, is time limited to two years beginning with exit day, but clause 17, which deals with consequential, transitional, transitory and saving provisions does not appear to be so limited.[38] This aspect of the Withdrawal Bill is expected to be heavily debated in Parliament and further restrictions on these legislative powers seem possible, either by government concession or as a result of losing a vote in Parliament.

Objectively, the statutory instruments implementing the BRRD, CIWUD and Title IV of Solvency II seem unlikely to need substantive amendment. There is value in retaining a clear commitment to recognize and give effect to EU resolution and insolvency proceedings in the United Kingdom, although it has been suggested that amending powers could be used to remove recognition provisions if the European Union refuses to accord reciprocity.[39] Given the United Kingdom's commitment as a G20 country to the BASEL process and to the FSB standards, as well as its aim to be a leading modern international trading nation, it is to be hoped that the United Kingdom would not take this course, although it may have a case for allowing itself the protections of BRRD article 95 in relation to EU-headquartered institutions in the absence of EU reciprocity. Subject to considerations arising from the WTO GATS agreement discussed below, it would be questionable whether such a course was in accord with general principles of comity discussed below.

As regards BRRD article 55, as long as the United Kingdom will continue to recognize bail-in processes in the European Union, it ought to be possible to satisfy the EU regulators that they need not require EU-headquartered banks to add specific recognition clauses to their English law agreements, but ultimately, this will depend on the views of EU authorities at the EU or national level or, in the event of dispute, the decision of the CJEU.

The EU Approach

The EU approach is dictated by its general approach to the article 50 negotiations. Essentially that position is that on leaving the European Union, the United Kingdom ceases to be an EU or EEA state and therefore is a third country for the purposes of all EU legislation. Where there is a possibility of agreeing to mutual recognition or independently recognizing the equivalence of processes of third countries, neither the EU institutions or member states, where they have competency, should consider equivalence or recognition arrangements of a formal nature until after the United Kingdom has left the European Union.

There was, until December 2017, an unwillingness to discuss even the framework of any aspect of the future EU-UK relationship before there was agreement on the United Kingdom's financial contribution to the European Union, the treatment of EU citizens and the position on the Irish border. Progress has been made on these topics, and the next round of negotiations may give some indication whether the EU authorities will be prepared to continue recognition of UK resolution or insolvency processes after Brexit, given that they are currently accepted as compliant with EU law and are recognized throughout the European Union.

In the absence of a transition period, in which the United Kingdom is effectively treated as an EU member state even though it has left the European Union, there is a clear risk of a hiatus in which the European Union and its continuing member states would not recognize UK resolution or insolvency processes. The one exception would be if the general law of any particular member state might recognize UK resolution or insolvency processes. This would not assist in the cross-border resolution or winding up of a UK institution, unless its only EU operations were in member states that gave national recognition to the UK processes.

This situation could continue for a considerable time if there were no political will to resolve it, but it would not prevent a resolution college or an individual member state from providing

38 *Withdrawal Bill*, *supra* note 29, cls 7, 17.

39 DEEU, "*Explanatory Notes*", *supra* note 36 at para 111.

recognition in an individual case. However, automatic recognition of UK resolution processes throughout the European Union would be lost.

Having regard to the commitments of many EU member states as members of the G20 and supporters of the FSB standards, it is to be hoped that politics will not get in the way of the European Union preserving its recognition of UK processes by reaching appropriate agreement on mutual recognition. This could happen in the context of an agreement on trade in services, or on the recognition of regulatory structures in the field of financial services. It could also occur by both the European Union and the United Kingdom adhering to a new international agreement related to resolution and insolvency processes to stand alongside the Hague Convention on Choice of Court (to which all parties should adhere after Brexit) and/or an agreement between the United Kingdom and the EU countries equivalent to the Brussels Regulation on civil proceedings.[40] Unwillingness to reach agreement in this area does not seem consistent with the international commitments of G20 EU states.

Negotiation with Third Countries

It is also the general position of the European Union that the United Kingdom cannot negotiate any agreements with third countries until after it leaves the European Union. This would apply in the area of trade policy generally, but it is to be noted[41] that under the BRRD, member states have considerable autonomy in deciding whether to recognize individual third-country proceedings and in making agreements with any third country, so long as there is no EU-wide agreement with that third country. It is also worth noting that article 33 of the European Banking Authority Regulation[42] preserves the right of member states to adopt bilateral or multilateral arrangements with third countries in the field of bank regulation. Insofar as these are trade-related matters, this appears to be a specific derogation, which may remove any inhibition to the UK proceeding with third-country negotiations in this field before Brexit.

The Way Forward: The GATS Dimension

As indicated above, there are many contexts in which a long-term provision for mutual recognition of resolution and insolvency provisions could be made, ranging from a new trade agreement that incorporated aspects of EU law, to an agreement limited to mutual recognition of resolution and insolvency provisions.

UK/EU Agreement

The obvious precedent for a trade agreement is the EEA Agreement, the services provisions of which apply, *inter alia*, to all EU financial services regulatory legislation, including the BRRD, CIWUD and Solvency II, but the question of decision making on interpretation and application may prove more of a stumbling block in the present climate than at the time of the EEA Agreement, when the European Union was prepared to recognize the role of an independent European Free Trade Agreement (EFTA) court. In the event that a free trade agreement was achieved between the United Kingdom and the European Union covering a wide range of services, using this as a vehicle to preserve the status quo related to the resolution and winding up of financial institutions would be entirely in accord with the requirements of GATS in relation to free trade agreements.[43]

Alternative arrangements are more limited agreements on mutual recognition of either financial regulation (including resolution and insolvency measures) or on the mutual recognition of resolution and insolvency measures in all contexts (that is, an agreement mirroring the general insolvency regulation, as well as the provisions for EU/EEA-wide recognition in the BRRD, CIWUD and Solvency II).

In considering alternative arrangements, the terms of the GATS specific to financial services need to be considered, in particular the provision on recognition:[44]

(a) A Member may recognize prudential measures of any other country in determining how

40 The Brussels Regulation may be replicated in whole or in part by the United Kingdom adhering to the Lugano Convention or making an ad hoc agreement with the EU member states with all the features of the Recast Brussels Regulation.

41 See *BRRD*, *supra* note 4, s 3 at paras 3.1–3.7.

42 *Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority)*, [2010] OJ, L 331.

43 *GATS*, *supra* note 3, art v.

44 *GATS Schedule*, Annex on Financial Services at para 3 [*GATS Schedule*].

the Member's measures relating to financial services shall be applied. Such recognition, which may be achieved through harmonization or otherwise, may be based upon an agreement or arrangement with the country concerned or may be accorded autonomously.

(b) A Member that is a party to such an agreement or arrangement referred to in subparagraph (a), whether future or existing, shall afford adequate opportunity for other interested Members to negotiate their accession to such agreements or arrangements, or to negotiate comparable ones with it, under circumstances in which there would be equivalent regulation, oversight, implementation of such regulation, and, if appropriate, procedures concerning the sharing of information between the parties to the agreement or arrangement. Where a Member accords recognition autonomously, it shall afford adequate opportunity for any other Member to demonstrate that such circumstances exist.

Thus, provided both the United Kingdom and the European Union, or (where they retain competency) the EU member states, are prepared to contemplate entering into similar arrangements with other WTO members, they may make an agreement between them covering mutual recognition across the full range of financial services regulation, which would include the BRRD, CIWUD and Solvency II provisions under discussion.

Finally, the parties might simply make an agreement on the recognition of each other's resolution and insolvency provisions. This would be a private international law treaty, similar in nature to the Lugano Convention (dealing with choice of court as between the EU and EFTA states) and the Rome and Brussels Conventions that preceded the European Union's Rome I and II Regulations on applicable law[45] and the Brussels Regulation on choice of court.[46] This would arguably be outside the purview of the GATS altogether, as are UNCITRAL and other international body-sponsored international agreements in this field. In particular, if it were open to additional members (as, for example, the Lugano Convention is) it would seem in any event not to go against GATS rules.

Unilateral Recognition

It should be noted that the GATS rule on the recognition of financial services regulation quoted above also covers the "autonomous" or unilateral recognition of another GATS member's regulatory regime. It is arguable that in making the recognition provisions of the BRRD, CIWUD and Solvency II part of UK law through the Withdrawal Bill, the United Kingdom is affording autonomous recognition to the European Union and EU member state regulation and should comply with the rule that it should afford adequate opportunity for any other GATS member to demonstrate that its own legal position in relation to resolution and insolvency would warrant the United Kingdom giving similar recognition to its resolution and insolvency processes in relation to some or all financial institutions.

As a policy matter, this GATS rule would seem to be in line with the United Kingdom's general attitude to the rest of the world in relation to insolvency, etc., as evidenced by its adoption of the UNCITRAL Model Law in relation to third-country insolvency proceedings relating to trading companies.[47]

There is one issue that would cause concern. Both before and after Brexit, the United Kingdom would be able to apply the provisions of BRRD article 95[48] to refuse recognition to third-country insolvency proceedings. After Brexit, EU countries (in the absence of reciprocal agreement) will be able to assert the right to apply those provisions against the recognition of UK processes, but the United Kingdom would not be able to use article 95 against EU processes. If any EU country has particularly protectionist processes or introduces them at a time when there is no reciprocal recognition arrangement in place, would the United Kingdom be justified in adapting its law so as to be able to refuse recognition and assistance? This issue would also arise in CIWUD and chapter IV of Solvency II, although these have not articulated the European Union's position on third-country processes.

45 *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)*, [2008] OJ, L 177 and *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)*, [2007] OJ, L 199, respectively.

46 *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*, [2012] OJ, L 351 [*Recast Brussels Regulation*].

47 See "International Instruments", above, for more discussion.

48 See "BRRD Recognition", above, for more discussion.

To take an example, BRRD article 95 would allow the United Kingdom to take independent proceedings in relation to a failing institution headquartered in a third country if "creditors, including in particular depositors located or payable in a Member State, would not receive the same treatment as third-country creditors and depositors with similar legal rights under the third-country home resolution proceedings."[49] If, however, an EU member state adopted a provision that denied third-country nationals (including UK nationals) access to a deposit protection scheme in an EU member state, the United Kingdom would not be free to take action against assets in its jurisdiction of a failing institution headquartered in that member state, unless it modified its own retained EU law implementing the BRRD to some extent. Would it be justified in doing so? There is nothing in the GATS that would prevent it from doing so. Indeed, the GATS provides:[50] "Notwithstanding any other provisions of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement."

It may be argued the United Kingdom should apply article 95 to the EU member states in any event and add similar language to its implementation of CIWUD and chapter IV of Solvency II, if there is no agreement covering reciprocal arrangements at the time of Brexit and no transitional arrangement preserving the status quo. Article 95 is, of course, merely a qualification of recognition, and this would not remove the benefits of the detailed implementation of measures for the recognition of EU processes where none of the qualifying factors apply.

49 *Ibid*, art 95.

50 *GATS Schedule*, *supra* note 44 at para 2(a).

The Courts: Can Comity Help at All?

The notion of comity in international law has a long history. Its origins lie in Dutch jurisprudence[51] and were taken up in the United Kingdom,[52] the United States and other common law jurisdictions widely and have been extensively applied in the context of insolvency processes.[53] The notion of comity has been expressed as follows:[54] "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."

The concept and application of comity has, however, found considerably less favour in the major civil law jurisdictions — and most of the continuing EU member states are civil law jurisdictions.[55] They are more inclined to look at rules, in their own or EU law, or specific international agreements to tell them what foreign processes they should or should not accept, and many have vestiges of preference for the interests

51 Ulrich Huber developed the idea of *comitas gentium* ("civility of nations"), leading to respect for and application of applicable foreign law, in the absence of prejudice in the place where that law is applied, so far as they do not cause prejudice to the powers or rights of such government or of their subjects.

52 Lord Mansfield is generally credited with developing the doctrine and setting its limits in English law, in particular in the *Case of James Sommersett* (1772), in which he refused to recognize the rights of an American slave owner in respect of his slave, on grounds that slavery was abhorrent to English public policy.

53 Most recently in *In re: Lehman Brothers Holdings Inc.*, 553 BR 476; *Belmont Park Investments PTY Limited v BNY Corporate Trustee Services Limited and Lehman Brothers Special Financing Inc*, [2011] UKSC 38; *Lehman Brothers Special Financing Inc v BNY Corporate Trustee Services Limited*, 422 BR 407 (Bankr SDNY 2010) when the English and US courts reached opposite conclusions on their similar provisions of insolvency law to uphold and overrule respectively a "flip clause" in an English law trust deed, which operated on an insolvency event of default, the US court considering that it would be contrary to the policies or prejudicial to the interests of the United States.

54 Justice Gray in the US Supreme Court case *Hilton v Guyot*, 159 US 113 (1895).

55 See the in-depth review in Joel R Paul, "Comity in International Law" (1991) 32 Harv Intl LJ 1; also touched upon in Joel R Paul, "Transformation of International Comity" (2008) 71 Law & Contemp Probs 19.

of their own nationals when faced with a request to give effect to a foreign law or decision.[56] The CJEU would look to practice in the majority of member states if it had to consider what the approach of the EU courts would be and, as with legal professional privilege, it may be that the CJEU would give a disappointing and narrow answer from a common law perspective: declining to state a presumption of recognition in the absence of a policy restricting recognition, or simply referring the matter to national rules of each member state to be applied on a case-by-case basis.

On the other hand, comity would support UK recognition of EU processes and might be a tool the English courts could use to make sense of the confusing interpretation rules for retained EU law proposed by the Withdrawal Bill, respecting and taking note of EU processes and EU and member state decisions so far as possible.

Conclusion

We are driven to the conclusion that Brexit represents a setback in international efforts to improve recognition of cross-border resolution and insolvency processes. While the European Union and the United Kingdom have the tools to preserve the status quo between them if they so choose, the need for wider international effort is clear, whether it be extension of the UNCITRAL model law or a more specialist convention to underpin the FSB key attributes recommendations.

56 Overcome to a considerable extent by the EU rules in the Rome Regulations and within the European Union by the rules in the Brussels Regulation.

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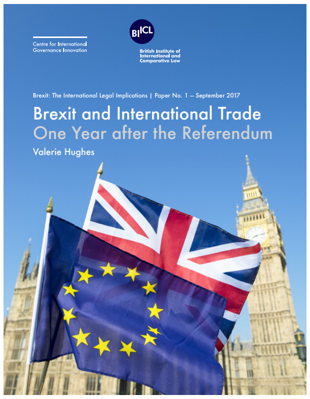

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