Centre for International Governance Innovation

British Institute of International and Comparative Law

Brexit: The International Legal Implications | Paper No. 17 — March 2018

Cross-border Insolvencies after Brexit: Views from the United Kingdom and Continental Europe

Howard P. Morris, Gabriel Moss, Federico M. Mucciarelli and Christoph G. Paulus

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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 Authors

Howard P. Morris is head of the Business Restructuring & Insolvency Group at Morrison & Foerster in London. He has more than 20 years' experience in UK and international restructuring and insolvency work. He has acted for banks and other secured and unsecured creditors, committees of bondholders, trade creditors, debtors and acquirers of business and assets from insolvent companies. He has experience in international asset tracing and recovery, as well as a strong background in banking and finance. Howard's experience extends to matters involving the United Kingdom, the United States and a number of other jurisdictions, including continental Europe, Central Asia, Russia, Africa, the Middle East and offshore financial centres. He is a member of the Association of Business Recovery Professionals. Howard practised for a number of years at the bar before becoming a solicitor. He enjoyed a long career with Dentons, where he served two terms as chief executive and was most recently their global integration partner post-merger. He is an accredited Centre for Effective Dispute Resolution mediator, with a particular interest in mediating disputes arising from restructurings and insolvency proceedings.

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In the last few years, Gabriel has acted as leading counsel in 11 major UK Supreme Court, Privy Council, Court of Justice of the European Union and European Free Trade Association court cases involving insolvency, banking and commercial matters. He has been involved in most major insolvencies affecting the United Kingdom in recent years, including Lehman Brothers, Nortel, MF Global, Icelandic Banks, Irish Banks, Saad and Olympic Airlines. Gabriel has also been involved with major international restructurings, including the use of English schemes of arrangement, such as Bluebrook/IMO, British Vita Group, Deutsche Annington, PHS, Stemcor and Zodiac.

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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

BVI	British Virgin Islands
CBIR	Cross-Border Insolvency Regulations 2006
CJEU	Court of Justice of the European Union
COMI	centre of main interests
EEA	European Economic Area
EFTA	European Free Trade Association
EIR	European Insolvency Regulation
UNCITRAL	United Nations Commission on International Trade Law
EU27	remaining 27 member states of the European Union

Executive Summary

This paper addresses the main problems arising from the United Kingdom's decision to leave the European Union with regard to insolvency proceedings. The following issues will be discussed: the modes of recognition of foreign insolvency proceedings under British law and the likely effect of Brexit, the impact of Brexit on forum and law shopping, the reform proposal for British workout procedures and the use of British workout procedures by EU companies.

Introduction

On June 23, 2016, a small majority of voters engaged in a fit of collective madness and voted in a non-binding referendum to leave the European Union.[1] Despite the referendum being non-binding and purely advisory, the narrow margin of its result and a lack of ideas as to what was to replace EU membership, the UK government gave notice under article 50 of the Treaty on European Union[2] in March 2017. This will potentially lead to the United Kingdom's[3] exit from the European Union in March 2019. Because the remaining 27 member states of the European Union (EU27) exported far more into the United Kingdom than vice versa, the apparent thinking was that the United Kingdom would by agreement be allowed to "have its cake and eat it"[4] — in other words, have all the benefits of EU membership with none of its disadvantages and costs. This, of course, is politically unacceptable to the EU27, who now have the better bargaining position.

As a matter of fact, the United Kingdom's economy is heavily interconnected with the EU Single Market. Such entanglement, which reflects the development of the forces of production in Europe, implies that British firms are often active on the territory of the European Union and that other European companies and firms have activities on the British territory. It goes without saying that the insolvency of firms active across national borders involves interests of stakeholders (creditors, employees and suppliers) situated in

1 Between the death of Charlemagne in the ninth century and 1945, countries now in the European Union had taken part in more than 1,000 years of wars that killed many millions of people and devastated countries, cities and economies. Since the founding of the European Union, war between member states has become inconceivable. This can be contrasted with neighbours, such as the former Yugoslav states and the Ukraine. Joining the European Union has also made Western democracy (with some qualifications) permanent in countries that used to be fascistic (Spain, Portugal and Greece) and communist (former Eastern-bloc countries).

2 *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, [2007] OJ, C 306/01, art 50 (entered into force 1 December 2009).

3 Some self-governing law countries that are politically part of the United Kingdom, such as the Channel Islands and the Isle of Man, are already outside the European Union, but are not considered in this paper. On the other hand, Gibraltar is treated as part of the United Kingdom for EU purposes.

4 "*Ils veulent le beurre, l'argent du beurre et baiser la fermiere.*" Kalypso Nicolaidis, "Brexit Arithmetics" in John Armour & Horst Eidenmüller, eds, *Negotiating Brexit* (London, UK: Beck/Hart, 2017) at 90.

different member states. This situation makes it necessary to implement measures aimed at facilitating the mutual recognition and enforcement of insolvency procedures (and, possibly, in the future, the harmonizing of insolvency procedures at the EU level). Furthermore, over recent years, workout procedures, which aim at saving the firm and protecting stakeholders, have gained relevance in the insolvency practice of several member states; to some extent, such pre-insolvency workout proceedings are now included in the European Insolvency Regulation (EIR)[5] that entered into force in 2016.

This paper is based on talks that the authors gave at a conference held in 2017.[6] Its aim is to address the main problems arising from the United Kingdom's decision to leave the European Union, and it discusses a number of issues in this context: the modes of recognition of foreign insolvency proceedings under British law and the likely impact of Brexit, the impact of Brexit on forum and law shopping, the reform proposal for British workout procedures and the use of British workout procedures by EU companies.

The Impact of Brexit on Recognition/Judicial Assistance in Cross-border Insolvencies

Currently, there are four means of recognition or judicial assistance available in the United Kingdom for foreign insolvency proceedings: first, the EIR; second, section 426 of the Insolvency Act 1986[7] (which applies mostly to Commonwealth countries only, plus Hong Kong and Ireland); third, the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (Model Law),[8] enacted in the United Kingdom as the Cross-Border Insolvency Regulations 2006[9] (CBIR); and, fourth, English common law (in England and Wales).

The concept of "recognition," properly so called, is restricted to cases where the law of one country gives direct effect to the legal provisions of another country. For example, English law recognizes the appointment of a liquidator of a company in the country of its registration on the basis that the question of who is the authorized agent of a company is to be decided by the law of registration. A good statement of the narrow meaning of recognition can be found in the Court of Justice of the European Union (CJEU) decision in *Hoffmann v Krieg*[10]: "Recognition must have the result of conferring on judgments the authority and effectiveness accorded to them in the State in which they were given."[11] Recognition in this narrow sense can be contrasted with judicial assistance, which is the notion that the courts of one law country will use their own remedies to assist foreign proceedings or insolvency practitioners in or from another law country.

In the European Union, all member states are required to recognize/assist UK insolvency proceedings pursuant to the EIR, and some would recognize/assist in the absence of the EIR, pursuant to a local version of the UNCITRAL Model Law or domestic law.

The EIR

The EIR[12] lays down mandatory rules for the allocation of jurisdiction to open main and secondary proceedings between EU member states, mandatory choice of law rules and mandatory recognition and enforcement of insolvency proceedings. It applies to all EU member states, except Denmark, and applies only where the centre of main interests (COMI) of the debtor is in a member state. Jurisdiction

5 *Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings*, [2015] OJ, L 141/19, art 1(1) [*EIR*].

6 "Cross-border insolvencies post Brexit" (Conference hosted by BIICL, London, UK, 23 May 2017).

7 *Insolvency Act 1986* (UK), c 45.

8 UNCITRAL, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (New York, NY: United Nations, 2014) [*Model Law*], online: <www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>.

9 *Cross-Border Insolvency Regulations 2006*, SI 2006/1030 [*CBIR*].

10 C-145/86, [1988] ECR I-00645.

11 *Ibid* at 10.

12 See generally Gabriel Moss, Ian E Fletcher & Stuart Isaacs, *The EU Regulation on Insolvency Proceedings*, 3rd ed (Oxford, UK: Oxford University Press, 2016).

to open main proceedings is based on the presence of COMI, and jurisdiction to open local (territorial or secondary) proceedings is based on the presence of an establishment.

In addition, the CJEU has taken jurisdiction in relation to insolvency law avoidance actions against defendants worldwide,[13] although recognizing that there may be problems of enforcement outside the European Union.

The EIR is mandatory EU law and, therefore, takes precedence over the other modes of recognition/assistance in all cases where there is a conflict. However, article 85(3)(b) of the EIR (formerly article 44[3][b] of the original regulation[14]), by way of exception to the overriding nature of the regulation, gives priority in the United Kingdom above the regulation "to the extent that it is irreconcilable with the obligations arising in relation to bankruptcy and the winding up of insolvent companies from any arrangements with the Commonwealth"[15] existing at the time the original regulation entered into force. This rather oddly worded exception appears to be a reference to section 426 of the Insolvency Act 1986, but not every section-426 country was within the Commonwealth when the regulation came into effect. In particular, Ireland is within section 426, but not within the Commonwealth. Likewise, Hong Kong at the material date when the original regulation entered into force was within section 426, but outside the Commonwealth, having reverted to the People's Republic of China.

Section 426 of the Insolvency Act 1986

Section 426(4) creates judicial assistance between the UK insolvency courts and certain self-governing law countries that are politically part of the United Kingdom. The law countries specified in section 426(11) are the Channel Islands and the Isle of Man. Under section 426(11)(b), further countries were to be designated by statutory instrument.[16] These are mostly Commonwealth countries, with the exception of Hong Kong and the Republic of Ireland. The implicit theory in nominating all these law countries is that they provide reciprocal provisions mirroring section 426. That is not, in fact, correct, but assistance under section 426 is not conditional on reciprocity.

The use of the word "shall" in section 426 suggests that the granting of *some* assistance is mandatory, but that the type of assistance is discretionary. However, in *Hughes v Hannover*,[17] the court of appeal decided that there was no compulsion to give assistance and that the power to do so was discretionary. In that case, the granting of any assistance was refused. This decision is not altogether easy to reconcile with the subsequent case of *England v Smith*,[18] which stressed the need to give assistance under section 426, as long as it was a proper thing to do.

A necessary prerequisite for jurisdiction to give assistance under section 426 is the making of a request by the foreign court exercising insolvency jurisdiction. There does not seem to be any statutory basis in any section-426 country for sending the customary letter of request that fits into section 426, but it has been held in England that a court has inherent jurisdiction to send such a letter of request.[19]

By section 426(5), the UK courts have a discretion, in acceding to the request from the foreign court, as to whether to apply UK law or the law of the foreign court. The exercise of this discretion is informed by the following obscure sentence: "In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law."[20]

A remarkable effect of section 426 is that it can empower the English courts to do something under English law on a request from the foreign court that the English court could not have done

13 *Schmid v Hertel*, C-328/12, [2014] ECLI:EU:C:2014:6 [*Hertel*].

14 *Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings*, [2000] OJ, L 160/1 (no longer in force) [*Original Regulation*].

15 *EIR*, *supra* note 5, art 85(3)(b).

16 Currently, these are Anguilla, Australia, the Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Republic of Ireland, Montserrat, New Zealand, St Helena, Turks and Caicos Islands, Tuvalu, British Virgin Islands, Malaysia, South Africa and Brunei.

17 *Hughes v Hannover Ruckversicherungs-Aktiengesellschaf*, [1997] 1 BCLC 497 (CA), [1997] BCC 921 (CA).

18 *England v Smith (Re Southern Equities Corp)*, [2001] Ch 419 (CA).

19 *Panayiotou v Sony Music Entertainment (UK) Ltd*, [1994] Ch 142, [1994] 1 All ER 755 (Nicholls LJ).

20 *Insolvency Act 1986*, *supra* note 7, s 426(5).

simply under ordinary domestic insolvency law without a request. In the *Dallhold Estates*[21] case, the Australian court requested that the English court put an Australian company that owned an asset in the United Kingdom into administration. The English court assumed that under ordinary English law, it was not possible to make an administration order for a foreign company. Nevertheless, it made an administration order in respect of Dallhold using the powers given to the English court under section 426. In the *New Cap*[22] case, heard with *Rubin*,[23] one question was whether section 426 could be used to enforce an Australian insolvency judgment setting aside a voidable preference, against a Lloyd's syndicate in London. Although both at first instance and in the court of appeal, it was held that section 426 could be used in this way, the Supreme Court held that it could not.[24] Only the normal rules for the recognition of *in personam* judgments could apply in such a case. The Australian judgment was, in the end, only enforced because the syndicate had submitted to the Australian jurisdiction by lodging a proof in the liquidation and participating in creditors' meetings.

In the later Privy Council case of *Shell Pensioenfonds v Krys*,[25] just lodging a proof, even one that was, in fact, rejected, was held to be sufficient submission to the jurisdiction to enable an anti-suit injunction to be granted against a creditor taking proceedings in Holland to seize the assets in Ireland of a British Virgin Islands (BVI) company in liquidation. By lodging the proof, the defendant obtained a right to have his alleged claim considered for payment as a creditor. Having obtained this benefit, the defendant could not resist the burden of an equitable distribution of the debtor's assets under BVI law and the burden of not being able to disrupt such distribution.

The UNCITRAL Model Law and the UK CBIR

The Model Law, drafted under the auspices of UNCITRAL, is essentially based on a combination of two texts, namely the text of the failed draft convention on which the EIR is based and the now-repealed text of what used to be section 304 of the US Bankruptcy Code.[26] Section 304 permitted ancillary proceedings to be brought in the federal bankruptcy courts of the United States in order to assist foreign insolvency proceedings. Under section 304, the US federal courts applied foreign insolvency law avoidance provisions, such as voidable preferences, in order to assist the foreign insolvency proceeding. The Model Law was implemented in Great Britain[27] by the CBIR.

Differently from the US solution, in Great Britain, the implementation of the Model Law followed the text of article 7 of the Model Law and, thus, created an additional basis for assisting foreign insolvency proceedings, taking nothing away from any pre-existing modes of giving assistance, in particular assistance under common law.

By contrast, the US implementation replaced the former, very useful section 304, which applied to all foreign insolvency proceedings, and put in place something that narrowed the basis for assisting foreign insolvencies. By adopting the Model Law as, apparently, the sole basis for assistance, the US Congress appears unwittingly to have restricted assistance to foreign insolvency proceedings to those that took place in the place of COMI or in the place of an establishment. The COMI or establishment requirement was often difficult to satisfy in the case of offshore jurisdictions. Accordingly, at first, the US decisions under Chapter 15 refused to assist offshore liquidations even in uncontested cases and even where section 304 assistance would have been available. However, another line of US cases seems now to have provided a practical solution. These cases consider that the relevant date for judging where the COMI or establishment is located is not the date of opening of the foreign proceeding, but the date of filing the request for assistance in the United States, as long as any change was not a manipulation.[28]

Is this approach consistent with the approach under the EIR, under which the relevant time for judging COMI is the time of the request filed seeking an opening?[29] It has to be remembered that

21 *Re Dallhold Estates (UK) Pty Ltd*, [1992] BCLC 621 (Ch).

22 *New Cap Reinsurance Corp Ltd v Grant*, [2011] EWCA Civ 971 (Ch).

23 *Rubin v Eurofinance SA*, [2010] EWCA Civ 895, [2011] Ch 133.

24 *New Cap Reinsurance Corp Ltd v Grant*, [2012] UKSC 46.

25 *Shell Pensioenfonds v Krys*, [2014] UKPC 41 [*Shell Pensioenfonds*].

26 11 USC § 304.

27 The jurisdictions of England and Wales and Scotland.

28 *Re Fairfield Sentry Ltd*, 714 F (3d) 127 (2nd Cir 2013), 2013 US App Lexis 7608 [*Fairfield Sentry*].

29 *Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA*, C-396/09, [2011] 2011 I-09915, ECLI:EU:C:2011:671 [*Interedil*].

the EIR deals with jurisdiction *and* recognition/enforcement and uses the tests of COMI and establishment for the purposes of allocating jurisdiction, while the Model Law does not allocate jurisdiction to open insolvency proceedings, but only deals with so-called recognition (actually, judicial assistance). Thus, it is possible to have different approaches to the relevant time at which COMI and establishment are judged.

Great Britain (in other words, England and Wales and Scotland) implemented the Model Law fairly faithfully, but introduced special protections for secured creditors to protect them from the effects of the automatic stay following the so-called recognition. England and Wales remains a much more creditor-friendly jurisdiction than the United States.

Neither the British nor the American legislation of the Model Law requires reciprocity before assistance is given. Article 3 of Schedule 1 to the CBIR,[30] implementing the Model Law in Great Britain, makes it clear that the EIR prevails over the Model Law in case of a conflict. Article 7 of the CBIR, following the text of the UNCITRAL Model Law, provides that nothing in the CBIR limits the power of a court or insolvency office holder from providing additional assistance under other laws of Great Britain.[31] This would include section 426 (where applicable) and the common law.

Article 8 of the CBIR, on the subject of the approach to interpretation, also following the text of the Model Law, provides that regard is to be had to the international origin of the Model Law and the need to promote uniformity in its application.[32] Theoretically, therefore, the Model Law should be interpreted in the same way in every country that adopts it. In terms of the international origin, the terms such as "COMI" or "establishment," which were borrowed from the draft convention that became the EIR, should be interpreted in the same way as the interpretation laid down by the CJEU for the EIR.

30 *CBIR*, *supra* note 9, Schedule 1, art 3.

31 *Ibid*, art 7.

32 *Ibid*, art 8.

Under article 17 of the CBIR, the foreign proceeding "shall" be recognized.[33] The so-called recognition is recognition as a foreign main proceeding, if it is taking place in the location of COMI, or as a non-main proceeding, if it is taking place where there is an establishment. Thus, article 17 mirrors the system of main and secondary proceedings in the regulation.

In the spirit of the English maxim "justice delayed is justice denied," article 17(3) requires the application for the so-called recognition to be decided upon "at the earliest possible time."[34] Article 20 of the CBIR provides that upon recognition of a foreign main proceeding there is to be a stay, insofar as material, similar to the stay in winding up under the Insolvency Act 1986.[35] However, the English court has the usual powers to lift the stay.

There is an important variation in the standard Model Law in article 20 of the CBIR in that the taking of steps to enforce security over the debtor's property and in relation to similar rights is exempted from the automatic stay. This is perhaps the main difference between the original Model Law and the CBIR, reflecting the pro-secured-creditor nature of English and Scottish law.[36]

The article that perhaps caused the greatest controversy was article 21 of the CBIR. This lists a series of powers that the court can use at the request of the foreign representative to protect assets or to investigate the affairs of the company in the foreign proceedings. The list includes a power to entrust the administration or realization of all or part of the debtor's assets in Great Britain to the foreign representative.[37]

What has attracted controversy is the general introduction to the powers giving the court, at the request of the foreign representative, to "grant any appropriate relief."[38] Perhaps the most interesting question was whether these apparently very wide words included the

33 *Ibid*, art 17.

34 *Ibid*, art 17(3).

35 *Ibid*, art 20.

36 But note that Scottish domestic insolvency law has been "devolved" to the Scottish Parliament and, instead of the previous trend to convergence with English law, can now vary considerably from English law.

37 *CBIR*, *supra* note 9, Schedule 1, art 21.

38 *Ibid*.

ability to apply the foreign law, as in the case of section 426 of the Insolvency Act 1986.

The question of whether or not to enable the recognizing court to apply foreign law was debated by the working groups whose debates led to the formulation of the Model Law, and they decided against including any power to apply foreign law.

The inability to apply foreign law is consistent with the UK Supreme Court's decision in *Rubin*,[39] in holding that the apparently very wide words of article 21 do not permit the enforcement of foreign judgments. The question of recognition of foreign judgments, according to the UK Supreme Court, remains governed by the ordinary rules relating to *in personam* and *in rem* judgments to be found in *Dicey, Morris and Collins on the Conflict of Laws*.[40]

In relation to article 21 and the words "any appropriate relief,"[41] Justice Morgan held in the *Pan Ocean* case[42] that foreign law could not be applied. Justice Morgan refused to give effect to a bar on ipso facto clauses alleged to exist under South Korean law. Justice Morgan pointed to the negative indications regarding the idea of applying foreign law from the UK Supreme Court in *Rubin.* He did, however, give permission to appeal. The appeal has not been pursued.

Article 23 in the CBIR enables the foreign representative "upon recognition of a foreign proceeding"[43] to apply for avoidance orders relating to undervalues, voidable preferences and so on in Great Britain under British law. Article 23 also contains consequential adjustments to adapt the critical dates in the Insolvency Act 1986 to the critical dates in the foreign proceedings.

The CBIR does not prevent British proceedings being opened, notwithstanding the recognition of a foreign main proceeding. Articles 25 to 27, 29 and 30 of the CBIR provide for cooperation and communication between the courts of Great Britain and foreign courts or foreign representatives in order to coordinate proceedings. Where a British insolvency proceeding commences after the recognition of a foreign main proceeding, article 28 provides that the British proceedings will be restricted to assets located in Great Britain,[44] following the pattern of the original regulation,[45] set out in articles 3(2) and 27.

Article 31 of the CBIR parallels article 27 of the original regulation in that it provides for a presumption of insolvency, based on the recognition of a foreign main proceeding. However, the presumption in article 31 of the CBIR is a weaker provision, since it applies "in the absence of evidence to the contrary,"[46] whereas article 27 of the original regulation specifically states that the debtor's insolvency is not to be examined,[47] so that the presumption in the regulation is conclusive: *Bank Handlowy.*[48]

The hotchpot rule in article 20 of the original regulation finds a parallel in article 32 of the CBIR.

One of the early questions that arose in relation to the CBIR and the Model Law is whether the key concepts of COMI and establishment have the same meanings in the Model Law as they have in the EIR. In particular, some of the US case law on Chapter 15 of the US Bankruptcy Code seemed to develop a concept of COMI rather different from that put forward in Europe in the *Eurofood* case.

In the *Stanford* case,[49] in the UK Court of Appeal, some American fraudsters had set up a bank in Antigua as part of a pyramid, or in US terminology, a Ponzi scheme. Antiguan liquidators were appointed, as were Securities and Exchange Commission receivers in the United States.

One of several issues for the English courts was whether to recognize as main proceedings under the CBIR either the Antiguan or the US insolvency administrators. Antigua is not a section-426 country. The so-called recognition issue depended on whether the COMI of the bank was in Antigua, where its headquarters and apparent administration were, or in the

39 *Rubin v Eurofinance SA*, [2013] 1 AC 236 (SC) [*Rubin*].

40 CGJ Morsel, David McClean & Lord Collins of Mapesbury, eds, *Dicey, Morris and Collins on the Conflict of Laws,* 15th ed (London, UK: Sweet & Maxwell, 2012) at c 14 [*Dicey, Morris and Collins*].

41 *CBIR*, *supra* note 9, Schedule 1, art 21.

42 *Fibria Celulose S/A v Pan Ocean Co Ltd*, [2014] EWHC 2124.

43 *CBIR*, *supra* note 9, Schedule 1, art 23.

44 *Ibid*, art 28.

45 *Original Regulation*, *supra* note 14.

46 *CBIR*, *supra* note 9, Schedule 1, art 31.

47 *Original Regulation*, *supra* note 14, art 27.

48 *Bank Handlowy w Warszawie SA v Christianpol sp zoo*, C-116/11, ECLI:EU:C:2012:739.

49 *Re Stanford International Bank Ltd*, [2011] Ch 33 (CA) [*Re Stanford*].

United States, where the US fraudsters lived and from where they directed the frauds.

The UK court of appeal held that the COMI was in Antigua because the direction of the business from the United States was not ascertainable to creditors, following the emphasis on ascertainability in *Eurofood*.[50] The court of appeal took the view that COMI in the Model Law meant the same as COMI in the regulation.[51]

The most authoritative statement as to COMI under US Chapter 15 can now be found in the decision of the Second Circuit Court of Appeals in the *Fairfield Sentry* case.[52] This is the most highly respected US court, short of the Supreme Court. It adopts an approach based on the "head office functions" or "command and control" theories, without using such expressions. The test looks similar to that in *Interedil* in the CJEU.

The Common Law

An old example of common law judicial assistance lies in the doctrine of ancillary liquidation. Where, for example, there is a main liquidation in Australia and a further liquidation in England, in respect of a company that is registered in Australia, the English liquidation is in theory also a universal proceeding, but the case law since the nineteenth century says that the courts will assist the foreign proceeding by directing the English liquidator to act in a way that is ancillary to the main liquidation and, in particular, by directing the liquidator to transfer both assets and claims to the principal liquidation, net of secured and preferential claims. It is important to note that such a transfer avoids the application of normal English statutory rules of proving and distribution, but the old case law, in practice, was only applied to other English-law-based jurisdictions, which had similar rules of proof and distribution.

Common law judicial assistance was developed, mainly for English-law-based countries that had no legislative provisions on the subject, by internationalist-minded judges, in particular Lord Hoffmann.[53] The abolition of exchange controls in leading economies and the increasing internationalization of economies and markets required judge-led changes in the absence of international treaties and statutes affecting leading economies.

In the *Banque Indosuez* case,[54] there was a Chapter 11 bankruptcy, which under US law restrains realizations by secured creditors. A creditor claiming to be secured over certain assets in England sought an injunction in England in relation to those assets. This was a claim against property of the debtor in Chapter 11 proceedings and subject to a stay under US bankruptcy law.

Justice Hoffman said as follows:

> This court is not of course bound by the stay under United States law but will do its utmost to co-operate with the United States Bankruptcy Court and avoid any action which might disturb the orderly administration of Inc in Texas under ch 11. This court has jurisdiction to make interlocutory orders for the preservation of Inc's property in this country by way of assistance to the United States Bankruptcy Court but no such assistance has been requested here. So far as the evidence shows, these proceedings are the individual act of a single creditor and, if successful, would enable that creditor to secure some of Inc's assets outside the United States bankruptcy process.[55]

In exercising the discretion whether or not to grant injunctive relief, Justice Hoffman took into account the fact that the proceedings had not been permitted by the US bankruptcy court by way of exception to their stay.

50 *Eurofood IFSC Ltd*, C-341/04, [2006] ECR-I 1078, ECLI:EU:C:2006:281 [*Eurofood*].

51 A majority of the court of appeal appeared to reject the "head office functions" test, which had been developed by the domestic case law in England, France, Germany, Hungary and elsewhere. This appears to have been based on a misunderstanding that the head office functions test was not based on objective and ascertainable facts as required by the *Eurofood*, *ibid*, decision. The head office functions test on the basis of objective and ascertainable facts has since been adopted, using slightly different language, in the *Interedil* case, *supra* note 29.

52 *Fairfield Sentry*, *supra* note 28.

53 *Banque Indosuez SA v Ferromet Resources Inc*, [1993] BCLC 112 [*Banque Indosuez*]; *Re HIH Casualty and General Insurance Ltd, McMahon v McGrath*, [2008] 1 WLR 852 (HL) [*HIH Casualty*]; *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc*, [2007] 1 AC 508 (PC) (in effect, overruled by subsequent cases: see *Singularis Holdings Ltd v PWC*, [2015] AC 1675 (PC) [*Singularis*]).

54 *Banque Indosuez*, *supra* note 53.

55 *Ibid* at 117i–118b.

The *Banque Indosuez* case established two propositions. First, the Chapter 11 stay was not recognized by the English courts; in other words, the US statutory provision creating a mandatory worldwide stay would not be given direct effect in England. But, second, the English courts would provide judicial assistance to help the US bankruptcy proceedings and keep the assets subject to those proceedings intact and subject to the control of the US court. For the latter purpose, ordinary English law remedies such as injunctions could either be granted or refused. Note that granting an injunction is a statutory remedy.

While the result of common law judicial assistance looks similar to recognition in a narrow sense, there are fundamental differences. Recognition is automatic and subject to set rules. Judicial assistance is discretionary and is given on the basis of the principle of modified universalism.

In the *Rubin/New Cap* case,[56] Lord Collins describes common law judicial assistance as one of the four main methods for "assisting" insolvency proceedings in other jurisdictions. He gives examples of cases where common law judicial assistance has been granted: vesting of English assets in a foreign office holder, orders for examination in support of foreign proceedings and orders for the remittal of assets to a foreign liquidation.[57]

In *Singularis*, Lord Sumption accepted the application of the principle of modified universalism by way of common law judicial assistance, "subject to local law and local public policy."[58]

Lord Sumption proceeded to ask the obvious corollary question, namely, what the limits are of the application of the principle of modified universalism. In particular he referred to the issue of how far, in the absence of a relevant statutory power, it was appropriate to develop the common law so as to recognize an equivalent power. He said that this "does not admit of a single, universal answer. It depends on the nature of the power that the court is being asked to exercise."[59] The Privy Council confined itself to the particular form of assistance being sought in *Singularis*, namely, an order for production of information by an entity within the personal jurisdiction of the Bermuda court.

Lord Sumption identified the case of *Norwich Pharmacal*[60] as illustrating the capacity of the common law to develop a power in the court to compel the production of information when this is necessary to give effect to a recognized legal principle.[61] Lord Sumption considered that there was an analogous power of judicial assistance for foreign insolvency proceedings at common law.[62] The recognized legal principle which it gave effect to was the principle of modified universalism.[63] That, in turn, "is founded on the public interest in the ability of foreign courts exercising insolvency jurisdiction in the place of the company's incorporation to conduct an orderly winding up of its affairs on a worldwide basis, notwithstanding the territorial limits of their jurisdiction."[64]

Lord Sumption continued, "The basis of that public interest is not only comity, but a recognition that in a world of global business it is in the interest of every country that companies with transnational assets and operations should be capable of being wound up in an orderly fashion under the law of the place of their incorporation and on the basis that would be recognised as effective internationally."[65]

He then stated, rather helpfully, "The courts have repeatedly recognised not just a right but a duty to assist in whatever way they properly can."[66]

Lord Sumption, thus, appeared to be recognizing not merely a discretion to assist, but a positive duty to do so. He made the practical point that recognition by a domestic court of the status of the foreign liquidator would mean very little if it entitled the foreign liquidator to take possession

56 *Rubin*, *supra* note 39 at 25, 29.

57 *Ibid* at 31.

58 *Singularis*, *supra* note 53 at 19.

59 *Ibid*.

60 *Norwich Pharmacal Co v Customs & Excise Commissioners*, [1974] AC 133 [*Norwich Pharmacal*].

61 *Ibid* at 22–23.

62 *Ibid* at 23.

63 *Ibid*.

64 Note the reference to the place of incorporation. As Lord Hoffmann pointed out in *HIH Casualty*, *supra* note 53 at 31, this may now be out of date and courts should arguably look to the COMI instead.

65 *Norwich Pharmacal*, *supra* note 60 at 23.

66 *Ibid*.

of the company's assets "but left him with no effective means of identifying or locating them."[67]

Lord Sumption held that "[t]here is a power at common law to assist a foreign court of insolvency jurisdiction by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up."[68]

Lord Sumption, in the Privy Council *Shell Pensioenfonds v Krys*[69] case, applied the principle of modified universalism and common law principles to an "outgoing" case so as to prevent a creditor seizing assets outside the BVI of a BVI company in liquidation.

The judgment concerned another aspect of the Fairfield Sentry liquidation which was referred to above.[70] A substantial amount of money was lodged with the Irish branch of a Dutch bank. Prior to the opening of Fairfield's liquidation, the pension fund claimed to be a creditor and obtained a pre-action freezing order over the money in a Dublin bank account from a Dutch court. After the opening of the BVI liquidation, it submitted a proof, which was rejected by the liquidators. Nevertheless, the pension fund was held to have submitted to BVI jurisdiction, as had occurred in *Rubin*. Lord Sumption pointed, as did Lord Collins in *Rubin*, to the benefit/burden principle. The pension fund had the benefit of obtaining a right to have its claim considered, and it made no difference to the question of submission to the jurisdiction of the BVI court that the claim was rejected.[71]

On the basis of modified universalism, the Privy Council ruled that, in principle, any creditor subject to the jurisdiction who begins or continues foreign proceedings that will interfere with the statutory trusts over the assets of the company in insolvent liquidation will be subject to the grant of an injunction regardless of the residence or nationality of the creditor.[72] By contrast, there is no objection to invoking the merely adjudicatory jurisdiction of a foreign court as long as the litigation is not oppressive or vexatious.[73] Moreover, an injunction can be avoided if the creditor agrees to bring any assets realized in foreign proceedings into the insolvency.[74]

The Effect of Brexit on the above Regimes

The effect of Brexit on cross-border insolvencies depends on a number of potential variables.

The first variable is whether the United Kingdom will actually leave the European Union. Parliament will be able to vote on the terms of exit achieved by the negotiation. There is a possibility that the terms negotiated will not be accepted by Parliament, since the UK government only has a majority in the House of Commons with the help of the Democratic Unionist Party, a small sectarian Northern Irish party, that has special concerns relating to Ireland, and because of a risk posed by strongly pro-EU Conservative members of Parliament. The Conservatives also have no majority in the House of Lords, where the majority is strongly pro-European Union. There is also strong pressure for a second referendum on the actual terms of exit. These terms may be so unfavourable that a majority of people will prefer to stay in the European Union. Alternatively, there may be no deal at all if, for example, the UK government refuses to pay the substantial sums required by the EU27 for exit. Even government ministers have had to admit that leaving without a deal would be bad for the United Kingdom, and this could lead to a vote to stay in.

The second variable is whether the article 50 notice is irrevocable or not. The United Kingdom has assumed that it is irrevocable, but the legal position is unclear.

The third variable is whether there will be an interim deal or implementation period, pending the finalization of negotiations. Depending on whom one listens to, the existing situation, or something similar, could remain for a minimum of two years from March 2017 and possibly a number of years after that, as trade negotiations could take a number of further years, based on previous

67 *Ibid*.

68 *Ibid* at 25.

69 *Shell Pensioenfonds v Krys, supra* note 25.

70 *Fairfield Sentry, supra* note 28 and accompanying text.

71 *Ibid* at 31.

72 *Ibid* at 39.

73 *Ibid* at 40.

74 *Ibid*.

precedents, such as the EU deal with Canada.[75] Presumably, insolvency proceedings started under an EU or European Economic Area (EEA) law regime will continue to be governed by EU law even after exiting the European Union or the EEA.[76]

The fourth variable is whether, as well as leaving the European Union, the United Kingdom also leaves or rejoins the EEA. This is sometimes called the Norway option. It includes the further sub-issue of whether leaving the European Union automatically means that the United Kingdom leaves the EEA or not. According to a Clifford Chance analysis, the United Kingdom is an individual member of the EEA. The significance of the EEA is that the directives, although not the regulations, apply within the EEA to member states that are not part of the European Union, namely Norway, Liechtenstein and Iceland.

The fifth variable is whether, if the United Kingdom leaves the European Union and the EEA, the regulation and/or the directives are kept by means of treaty. The UK position paper seems to envisage this possibility, but UK-government policy seems to be against any role for the CJEU. It may be that a special solution can be found, such as the European Free Trade Association (EFTA) court, which applies to non-EU members of the EEA.

Assessment

Between 1995 and 2016, the United Kingdom, through the hard work of academics, judges and practitioners, had become the lead jurisdiction in all aspects of the EIR, and English has taken over entirely as the language in which the regulations are discussed throughout the European Union.[77] The vote to leave now threatens all the work, effort and success in relation to the regulations.

The repeal/withdrawal bill[78] promises, on the United Kingdom's leaving the European Union, to domesticate EU law and turn it into English law, capable of repeal or amendment as any other UK legislation. This would mean that the United Kingdom is bound, at least on day one, by the law contained in the regulations and the legislation implementing the directives. However, unless there is an agreement to the contrary, the EU27 and the further three countries of the EEA would not be bound, as far as the United Kingdom is concerned. This would be one-sided and would not make a great deal of sense. For example, if a French company entered French insolvency proceedings, England would be bound to recognize them in England as if the EIR applied, but there would be no reciprocity where an English company went into an English insolvency proceeding and sought recognition in France. The UK position paper suggests that relations should be based on reciprocity, so that in the absence of a treaty, the United Kingdom could expect an early repeal of the provisions of the regulation. The position on the directives may be more complicated, as the United Kingdom may wish to show "equivalence" in order to have access to the EU27 financial sectors.

The UK policy is to leave the Single Market (and, thus, the EEA) and the Customs Union. Therefore, unless and to the extent that treaties are agreed on, the United Kingdom may well repeal the provisions derived from the regulations and possibly those derived from the directives. To some extent, the United Kingdom can fall back on the UNCITRAL Model Law and the common law. These may help incoming cases, but, of course, do not assist outgoing ones, except in the few EU member states that have adopted the UNCITRAL Model Law or where there are other ways of getting recognition for English insolvency proceedings. In some cases, it may be possible to have parallel proceedings and coordination/cooperation. Schemes of arrangement may also continue to work and be recognized on the basis of conflicts rules.

If the United Kingdom leaves the European Union without a treaty keeping the EIR, it will be in the same position as any other non-EU country, except in the few cases where the Model Law or domestic law comes to the rescue, and (it is thought) where an English scheme of arrangement can be used under English company law.

75 The current government seems to be heading toward something like the Canada deal, rather than the EEA or Switzerland, whereas the opposition Labour Party appears to be sympathetic to a closer arrangement.

76 This is the sensible suggestion in the EU27 position paper.

77 The membership of the United Kingdom in the European Union and its designation of English as an official EU language have given Ireland and Malta the luxury of nominating Irish and Maltese as their official EU languages. If the United Kingdom leaves, Ireland and Malta will, in practice, probably have to request a change in EU rules to enable them to add English as an EU language in addition to Irish and Maltese.

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

Impact of Brexit on Forum and Law Shopping

The Notion of Forum Shopping

The withdrawal of the United Kingdom from the European Union is likely to have an impact on debtors' ability to move from one jurisdiction to another in a search for the most suitable procedure (forum shopping). One of the goals of the EIR is to avoid "incentives for the parties to transfer assets or judicial proceedings from one member state to another, seeking to obtain a more favourable legal position to the detriment of the general body of creditors."[79] Forum shopping, therefore, is the situation whereby a debtor relocates relevant factors from his or her original country into another, with the aim of shifting the competence to hear the insolvency case and applying insolvency rules of the new country. In order to shift this competence, a debtor should relocate its COMI from one jurisdiction to another.[80] It is to be noted that, under the EIR, forum shopping is to be avoided only if detrimental for "the general body of creditors."

The rationale is that creditors must know in advance which insolvency rules and proceedings will apply in the event of a debtor's default. Therefore, at least in theory, in order to allow potential creditors to predict with absolute certainty which insolvency regime will apply should their debtors become insolvent, the latter must not be able to shift the relevant connecting factors after debts are incurred. Such a prohibition, however, would be in breach of the EU freedom of establishment and would be highly unrealistic in a globalized economy. Thus, the question is rather to what extent debtors should be allowed to shift their COMI from one jurisdiction to another and how to prevent fictive or merely exploitative relocations. Several scholars, indeed, have argued that a change of insolvency regime might produce efficient outcomes when the new applicable law increases the value of the firm and the likelihood of its workout.[81]

Assessing when a debtor has actually shifted its COMI is, however, far from being an easy task and equally complex is assessing whether such a shift is detrimental for the general body of creditors. Until the United Kingdom eventually withdraws from the European Union, the answers to these questions are to be found by considering the EIR and by looking at the case law of the CJEU, while other sources of UK insolvency law (in particular the Insolvency Act 1986 and the conflict of law rules based on common law) only play an ancillary function. The COMI, in particular, is a fact-sensitive criterion, which could be uncertain in the eyes of creditors at the moment when debts were incurred. To increase the predictability of a company's COMI, the EIR presumes that it is situated in the place of a company's registered office,[82] with the consequence that, unless such presumption is rebutted, the country of incorporation governs both company law issues and the insolvency proceeding.[83] Additionally, the insolvency regime of the member state where a debtor's COMI is situated should apply.[84] Regarding individuals exercising a business or a professional activity, the EIR presumes that their COMI is where their "principal place of business" is situated, unless the contrary is proven.[85] By contrast, the COMI of over-indebted private persons and consumers is presumed to be in the country of their habitual residence, unless the contrary is proven.

Companies' Insolvency Tourism

Companies and other legal entities can be incorporated in a member state and have all their assets, businesses and/or headquarters in any other member state, and member states cannot bar companies incorporated in other member states from having their entire activities or their headquarters on their territories, providing,

79 *EIR*, *supra* note 5, recital 5. See Moss, Fletcher & Isaacs, *supra* note 12; Reinhard Bork & Renato Mangano, *European Cross-Border Insolvency Law* (New York, NY: Oxford University Press, 2016).

80 *EIR*, *supra* note 5, art 3(1).

81 See Horst Eidenmüller, "Free Choice in International Insolvency Law" (2005) 6 Eur Bus Org L Rev 241; Sefa M Franken, "Three Principles of Transnational Corporate Bankruptcy Law: A Review" (2005) 11 Eur LJ 232; Wolf-Georg Ringe, "Forum shopping under the EU insolvency regulation" (2008) 9 Eur Bus Org L Rev 579; Gerard McCormack, "Jurisdictional Competition and Forum Shopping in Insolvency Proceedings" (2009) 68 Cambridge LJ 191.

82 *EIR*, *supra* note 5, art 3(1).

83 *Ibid*, art 7(1).

84 *Ibid*.

85 *Ibid*, art 3(1)(1). See Moss, Fletcher & Isaacs, *supra* note 12 at 446–47.

however, that the state of incorporation allows this.[86] Regarding the relocation of a company's registered office, which normally leads to a change of applicable company law,[87] the case law of the CJEU has clarified that neither the country of arrival[88] nor the country of departure[89] can prohibit or unreasonably restrict these operations. In particular, freedom of establishment companies incorporated under the law of a member state can convert themselves into companies of another member state, regardless of whether any real establishment is transferred or not.

What is interesting, and quite ironic in light of the recent Brexit referendum, is that the United Kingdom has emerged as the winner of the regulatory competition among member states. In this regard, recent research conducted for the European Commission shows (with reference to private companies only) that the United Kingdom is by far the most popular target country for incorporating pseudo-foreign companies.[90] The main reason for the United Kingdom's position is its adoption of a clear-cut incorporation theory[91] under the conflict of law standpoint. If the attention is shifted to COMI relocations, the United Kingdom would also be expected to be a popular target country for insolvency tourism and forum shopping.

First of all, companies incorporated in another member state might decide to relocate their headquarters, assets or activities onto the British territory, while keeping their registered offices in the countries of origin. This decision leads to a relocation of a company's COMI only by rebutting the presumption of coincidence with the company's registered office. In the *Eurofood* decision, the CJEU addressed the question of whether the COMI of Eurofood, an Irish subsidiary of the Italian group Parmalat, was located in Ireland or in Italy. The decision is significant in that the CJEU dismissed the notion that a debtor's COMI is in the place of its central administration, where the internal head office functions are carried out on a regular basis[92] and made it more burdensome to overcome the presumption that a company's COMI coincides with its registered office.

The *Eurofood* ruling, however, was not related to situations of *conflit mobile*, in which a shift of connecting factor also shifts applicable law. The CJEU addressed these cases some years later, in the decision rendered in the case, *Interedil*,[93] in which it provided an answer to the question of what the factual elements are that courts should consider in assessing a company's COMI after a cross-border relocation of its registered office. An Italian company (Interedil Srl) transferred its registered office to London and was henceforth removed from the local register.[94] Almost two years later, an important creditor filed for insolvency in Italy; the local court assessed that Interedil still owned assets and a bank account in Italy and concluded that its COMI was still in Italy. On Interedil's appeal, the Italian Corte di Cassazione referred to the CJEU for a preliminary ruling aiming at clarifying, among other things, which factual elements could rebut the presumption that a debtor's COMI coincides with a company's registered office in a situation where this registered office has been shifted from one country to another before the filing for insolvency. According to the CJEU, in these cases, the presumption that a company's COMI coincides with the new registered office can be rebutted if "a comprehensive assessment of all the

86 *Centros Ltd v Erhvervsog Selskabsstyrelsen*, C-212/97, [1999] ECR I-1459, ECLI:EU:C:1999:126; Überseering *BV v Nordic Construction Company Baumanagement GmbH*, C-208/00, [2002] ECR I-9919, CLI:EU:C:2002:632; *Kamer van Koophandel en Fabrieken voor Amsterdam v Inspire Art*, C-167/01, [2003] ECR I-1095, ECLI:EU:C:2003:512.

87 See Federico M Mucciarelli, "The Function of Corporate Law and the Effects of Reincorporations in the U.S. and the EU" (2012) 20 Tulane J Intl & Comp L 421; Carsten Gerner-Beuerle, Federico M Mucciarelli, Mathias Siems & Edmund-Philipp Schuster, "Cross-border reincorporations in the European Union: the case for comprehensive harmonisation" (2017) J Corp L Stud 1, online: <www.tandfonline.com/doi/abs/10.1080/14735970.2017.1349428?journalCode=rcls20>.

88 *VALE* Építési *kft*, C-378/10, [2012] ECLI:EU:C:2012:440 at 39 [*VALE*].

89 *Cartesio Oktato es Szolgaltato bt*, C-210/06, [2008] I-09641, ECLI:EU:C:2008:723 (obiter dictum); *Polbud v Wykonawstwo sp zoo*, C-106/16, ECLI:EU:C:2017:804.

90 See Carsten Gerner-Beuerle, Federico M Mucciarelli, Mathias Siems & Edmund-Philipp Schuster, *Study on the law applicable to companies* (Luxembourg: Publications Office of the European Union, 2016), online: <https://publications.europa.eu/en/publication-detail/-/publication/259a1dae-1a8c-11e7-808e-01aa75ed71a1>.

91 According to the incorporation theory, companies are governed by the law of the country where they are incorporated or where their registered office is situated. See *Dicey, Morris and Collins*, *supra* note 40 at rule 173.

92 This solution was, however, followed by some British decisions. See e.g. *Re BRAC Rent-A-Car International Inc*, [2003] EWHC 128 (Ch); *Re Daisytek-ISA*, [2004] BPIR 30 (Ch); *Re MG Rover*, [2005] BWHC 874 (Ch); *Re Collins & Aikman Corp Group*, [2005] EWHC 1754 (Ch); *Re Lennox Holdings Ltd*, [2009] BCC 155 (Ch).

93 *Interedil*, *supra* note 29.

94 For a more detailed analysis of the facts (which are more complex than what they seem at first glance), see Federico Mucciarelli, "The Hidden Voyage of a Dying Italian Company: From the Mediterranean Sea to Albion" (2012) 9 Eur Co & Fin L Rev 571.

relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State."[95] The CJEU also held that if a company's headquarters actually coincides with its registered office in a way ascertainable by third parties, the presumption in that provision cannot be rebutted. The evidence to be provided to rebut the presumption is, however, still shrouded in uncertainties.

When a company incorporated in another member state shifts its headquarters or other physical elements onto the British territory, the question arises as to whether a British court would recognize that the presumption laid down in the EIR has been rebutted. In this regard, among other cases, two significant decisions can be mentioned.

In the first decision, a German company managed to convert into a British limited company, to whom all the assets and activities of the former were transferred.[96] Shortly thereafter, the company became insolvent and insolvency proceedings were simultaneously opened in Germany and in the United Kingdom. In that case, the British court recognized the COMI as being still in Germany, on the basis of quite evident factual elements that still linked the debtor's activity to that country. In particular, the insolvent company still had creditors and employees only in Germany, its bank account was still in Germany and, most importantly, all contracts were written in German.

The opposite conclusion was reached in the case, *Re Hellas Telecommunication*.[97] A Luxembourg company transferred its head office and its principal operating office to London before filing for insolvency. Judge Lewison considered the presumption of coincidence between registered office and COMI rebutted, on the basis that third parties could clearly ascertain that Hellas' COMI was in London. He maintained that creditors were aware that Hellas' head office functions were carried out in London for the following reasons: creditors "were notified of its change of address"; "an announcement was made by way of a press release that its activities were shifting to England"; Hellas has opened a bank account in London "and all payments are made into and from that bank account"; Hellas "has registered under the Companies Act in this country, although its registered office remains in Luxembourg and it may remain liable to pay tax in Luxembourg too"[98]; and "all negotiations between the company and its creditors have taken place in London."[99]

Eventually, the question of whether foreign EU companies can transfer their registered offices to the United Kingdom and convert into British companies should be addressed. Under the traditional UK conflicts of laws, neither domestic nor foreign companies can have a "domicile of choice." In the words of Judge Macnaughten, "the domicile of origin, or the domicile of birth, using with respect to a company a familiar metaphor, clings to it throughout its existence."[100] From the standpoint of English conflicts of laws rules, therefore, either a new company is incorporated in England or a company is registered in England as a foreign company having a place of business in England. Such an approach, however, when referred to inbound relocations of registered offices, is in breach of the freedom of establishment, as interpreted by the CJEU in *VALE*,[101] to the extent that it is applied to foreign companies incorporated in the EEA.[102] It is worth mentioning, however, that foreign companies can incorporate a shell company in England and merge into it under the Cross-Border Merger Directive.[103] Such a cross-border merger would lead to results quite similar to a cross-border conversion.

95 *Interedil*, *supra* note 29 at 53. This language will become part of the new recital 29 (see Insolvency Regulation Reform).

96 *Hans Brochier Holding Ltd v Exner*, [2006] EWHC 2594. In theory, German companies cannot convert into foreign entities. A strategy, however, exists to circumvent this prohibition: the German company converts into a partnership, a GmbH & Co KG, one of whose partners is a newly formed foreign corporation (a British company in the *Brochier* [*ibid*] case); thereafter, all German partners withdraw from the partnership with the result that all assets of the partnership accrue to the foreign shareholder under § 738 BGB (the German civil code).

97 *Re Hellas Telecommunication (Luxembourg) II SCA*, [2009] EWHC 3199 (Ch) [*Hellas*]; see Moss, Fletcher & Isaacs, *supra* note 12 at 56.

98 *Hellas*, *supra* note 97 at 4.

99 *Ibid* at 5.

100 *Gasque v Inland Revenue Commissioners*, [1940] 2 KB 80 at 84. See also *National Trust Co v Ebro Irrigation & Power Ltd*, [1954] DLR 326 (Ont H Ct J); *International Credit and Investment Co v Adham*, [1994] 1 BCLC 66 (Ch).

101 *VALE*, *supra* note 88.

102 Paul Davies & Sarah Worthington, *Gower: Principles of Modern Company Law*, 10th ed (Sweet and Maxwell, 2016) at 142.

103 *Directive 2005/56/CE, of 26 October 2005, on the cross-border mergers of limited liability companies,* [2005] OJ, L 310/1.

Individuals' Insolvency Tourism

Bankruptcy tourism of individuals is made more complex by the lack of any objective place or registration, such as companies' registered offices, and by the quite uncertain concepts of residence and place of business, which trigger the presumption of COMI under the EIR. Much more importantly, natural persons can relocate their activities or residences more easily than firms and companies; additionally, low-cost flights and fast transports throughout Europe (such as the Eurostar trains that connect London to Paris and Brussels) allow European citizens to dissociate their main residence from the place where they conduct their activities. Imagine that a professional is a resident on the Continent, for instance, in France or Germany, while conducting her professional activities mainly from London, where she, however, spends only three days a week, being able to work from home the other days of the week: where would her place of business be situated in case of default?

Individual bankruptcy tourism has been addressed by several decisions, yet two of them deserve to be analyzed more thoroughly. The seminal case, *Shierson v Vlieland-Boddy*, is to be addressed in the first place.[104] Shierson divorced his wife and then moved from the United Kingdom to Spain; after his divorce, he maintained a property in the United Kingdom, where he came regularly to visit his children. After Shierson's default, the question arose whether English courts had jurisdiction regarding the main insolvency proceeding. The registrar stated that "in order to give effect to the policy of the [EIR], the court must, in my judgment, have regard to the time at which the debt is incurred because that is the time at which the creditors need to assess the risks of insolvency." The registrar's opinion was coherently based upon creditors' request for predictability. This solution, however, is not compatible with the CJEU case law[105] and, therefore, the court of appeal reversed this decision.[106] The court of appeal, however, also maintained that historical facts could be considered in assessing a debtors' COMI. Indeed, Lord Justice Chadwick concluded that, although the COMI "is to be determined in the light of the facts as they are at the relevant time for determination...those facts include historical facts which have led to the position as it is at the time for determination [and that] it is important...to have regard to the need, if the centre of main interests is to be ascertainable by third parties, for an element of permanence."[107]

Therefore, in order to prove that the new administrative seat has become permanent and is, therefore, ascertainable by third parties, courts shall also consider historical facts, but only to the extent that these facts have produced the position existing at the relevant time (the date of filing).

The second decision that deserves to be mentioned was rendered in the case, *Irish Bank Resolution v Quinn*.[108] Quinn, a professional resident in the Republic of Ireland, went bankrupt and claimed that his business was based in Northern Ireland, not far from the border with the Republic of Ireland. A court of Northern Ireland issued a bankruptcy order, which the High Court of Justice in Northern Ireland, however, reversed, recognizing that Quinn's COMI was in the Republic of Ireland. The court raised the question as to the circumstances under which a new head office is deemed "sufficiently accessible" to creditors. The criterion that the location of the COMI must be ascertainable by third parties "would indicate something different from being actually notified. If not made public, it must be 'sufficiently accessible.'...It should be reasonably or sufficiently ascertainable or ascertainable by a reasonably diligent creditor."[109]

104 *Shierson v Vlieland-Boddy*, [2005] EWCA Civ 974 [*Shierson*].

105 The reference date to assess the COMI is the filing for insolvency: *Staubitz-Schreiber*, C-1/04, [2006] ECR I-00701.

106 The court of appeal denied competence to UK courts by stating that the relevant date to assess the COMI is the hearing date of the petition: *Shierson, supra* note 104 at 55. This part of the decision has been clearly overruled by the CJEU decisions in the cases *Staubitz-Schreiber*, *ibid*, and *Interedil, supra* note 29, which maintained that debtors' COMI are to be assessed at the date of the filing for insolvency: *O'Donnell v The Governor and Company of the Bank of Ireland*, [2012] EWHC 3749 (Ch) at para 36. See Gabriel Moss, "A very peculiar 'establishment'" (2006) 19:2 Insolvency Intelligence 20; David Petkovich, "The correct time to determine the debtor's COMI — case note and commentary on *Staubitz-Schreiber* and *Vlieland-Boddy*" (2006) 22 Insol L & Prac 76.

107 *Shierson, supra* note 104 at 55.

108 *Irish Bank Resolution Corp Ltd v Quinn*, [2015] IEHC 175, [2012] NICh 1, [2012] BCC 608.

109 *Ibid* at 28.

In the court's view, in order to make the new head office ascertainable by third parties, it is necessary "to make the COMI available on the internet or through telephone directories or trade directories or otherwise generally available in the member state in which he has established his centre of main interest would make it public."[110] In that specific case, however, Quinn did not publish his telephone number in a public directory or his web page; hence, this location was not sufficiently ascertainable by third parties. In turn, had Quinn made his place of business publicly available, through telephone directories or online, the court would probably have reached a different conclusion.

Brexit and Forum Shopping

What has been described so far is likely to become outdated as soon as the United Kingdom withdraws from the European Union. At the moment, the final result of the withdrawal negotiation is unpredictable. Several scenarios might be imagined, ranging from a "soft" Brexit at the one extreme, to a "hard" Brexit at the other. A soft Brexit scenario might mirror, for example, the special agreements between the European Union and the member states with certain third countries, such as Switzerland. Under the opposite, hard Brexit, scenario, however, things are much more clear: both freedom of establishment (being an essential element of the Single Market) and the EIR will not apply to the United Kingdom anymore. The United Kingdom would be considered a third country by EU member states, which will apply their own private international law rules vis-à-vis the United Kingdom with regard to both company law and insolvency regime.

UK companies' private international law is based upon the incorporation theory.[111] Hence, not much will change regarding foreign EU companies: a company incorporated in an EU member state and having its assets or its headquarters on the British territory will continue to be automatically recognized in the United Kingdom as a foreign entity governed by the law of the country of incorporation. The country of incorporation, however, could follow different private international law criteria toward extra-EU countries (such as the United Kingdom in a hard Brexit scenario), ranging from a pure incorporation theory at the one extreme to a pure real seat theory at the other. If the country of origin follows the incorporation theory, a relocation of headquarters, assets or activities onto the British territory is perfectly acceptable and does not lead to the company's liquidation. By contrast, countries that follow the "real seat theory" are more likely to consider a relocation of headquarters as a shift of the relevant connecting factor, which should lead to a change of applicable law or to the company's liquidation.

The second issue that needs to be briefly addressed is how the hierarchy of sources will change in a hard Brexit scenario regarding insolvency law. The EIR will not apply in the United Kingdom, with the consequence that insolvencies of debtors having a cross-border relevance will be assisted by the Insolvency Act 1986, the UNCITRAL Model Law[112] and the conflict of law rules based on common law. The Insolvency Act 1986 provides for a quasi-automatic recognition and enforcement of foreign insolvency proceedings only from a list of countries designated by the Secretary of State;[113] in practice, such designated countries are only Commonwealth countries, among which the only EU member state is Ireland.[114] Unless all EU member states will be designated by the Secretary of State, therefore, section 486 of the Insolvency Act 1986 would not be of much help in sorting out cross-border insolvencies connected with other EU member states. The Model Law, by contrast, seems to be a much more promising instrument to deal with cross-border insolvencies, mostly so because the UK provisions do not include a reciprocity clause, which would have paralyzed its application due to the limited implementation of the UNCITRAL Model Law in other member states.[115] The fundamental idea of the Model Law is that, similarly to the EIR, foreign main proceedings should be recognized and enforced, based upon the criterion of COMI. Differently from the EIR, in the Model Law, it

110 *Ibid*.

111 See Dan Prentice, "The Incorporation Theory — The United Kingdom" (2003) 14 Eur Bus L Rev 1.

112 *CBIR*, *supra* note 9, Schedule 1.

113 *Insolvency Act 1986*, *supra* note 7, s 486.

114 See *The Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986*, SI 1986/2123; *The Co-operation of Insolvency Courts (Designation of Relevant Countries) Order 1996*, SI 1996/253; *The Co-operation of Insolvency Courts (Designation of Relevant Country) Order 1998*, SI 1998/2766.

115 The UNCITRAL Model Law was implemented only in Greece, Slovenia, Romania, Poland and the United Kingdom.

is not mentioned that a debtor's COMI should be ascertainable by third parties; British courts, however, seem to follow this criterion also with regard to cases regulated by the Model Law.[116]

Insolvency Law Reforms in the United Kingdom and Brexit

Slipping Down the Ladder

To climb the World Bank's *Doing Business* league table,[117] the United Kingdom must move closer to the best practices and rubrics of the World Bank in each of the areas on which it is scored. The United Kingdom has slipped down the insolvency ranking since the scoring system changed, and, to climb again, the United Kingdom must change, or close the distance to the frontier of best practices, as the World Bank describes it. That is why the reforms proposed last spring by the Insolvency Service in its *Review of the Corporate Insolvency Framework*[118] were so redolent of Chapter 11; certain elements of Chapter 11 are baked into the World Bank's (and UNCITRAL's) vision of best practices for an insolvency system.

The United Kingdom could stick with its very fine system, but other parts of the world are reforming like fury and are seeking to seize the United Kingdom's crown as the centre for international restructurings. Most recently, the European Commission has started a massive, heaving effort to modernize EU members' insolvency laws in order to push the European Union up those same World Bank rankings.[119] There is a deeper reason for embracing or, at least, accepting change and one that goes to the very philosophical heart of why nations need efficient insolvency systems. There is a pressing need for the United Kingdom to bring its insolvency laws closer into line with the World Bank's vision, all the more so as the United Kingdom aims to remain a leading capital market and economy after Brexit.

Changing Scales

In its 2015 rankings, the World Bank changed its approach to its "resolving insolvency" analysis. That year, the United Kingdom fell from seventh place to thirteenth place, where it has languished since. In contrast, the United States leapt from fourteenth place to fourth place and, for 2016 and 2017, it has ranked fifth for resolving insolvency. Until the 2015 rankings, the World Bank's assessment for resolving insolvency was calculated on the time, cost and outcome for creditors. The United Kingdom did, and still does, very well on these measures. But the World Bank introduced a new measure to determine the strength of an insolvency framework. This new metric assesses the extent to which the best practices championed by the World Bank and UNCITRAL are represented in the country's insolvency regime. The World Bank and UNCITRAL have been working on this topic for years. The World Bank has produced its *Principles for Effective Insolvency and Creditor/Debtor Regimes*[120] and UNCITRAL its *Legislative Guide on Insolvency Law*.[121] These have been married together in a World Bank publication, "Creditor Rights and Insolvency Standard."[122]

So, while the United Kingdom has scored nearly top marks since the 2015 table for the outcome of insolvency (sale as a going concern, as opposed to a piecemeal sale), on the commencement of proceedings, the management of the debtor's assets, the cost to the estate and the recovery rate, the United Kingdom scores much lower than the United States on the new measures of reorganization proceedings and creditor participation.

116 *Re Stanford*, *supra* note 49.

117 World Bank, *Doing Business: Measuring Business Regulations*, online: <www.doingbusiness.org>.

118 *A Review of the Corporate Insolvency Framework* (London, UK: The Insolvency Service, 2016) [*Corporate Insolvency Framework*], online: <www.gov.uk/government/uploads/system/uploads/attachment_data/file/525523/A_Review_of_the_Corporate_Insolvency_Framework.pdf>.

119 EC, Commission, *Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Regulation (EC) No 1346/2000 on insolvency proceedings*, COM (2012) 744, online: <http://ec.europa.eu/justice/civil/files/insolvency-regulation_en.pdf>.

120 World Bank, *Principles for Effective Insolvency and Creditor and Debtor Regimes* (2015), online: <www.worldbank.org/en/topic/financialsector/brief/the-world-bank-principles-for-effective-insolvency-and-creditor-rights>.

121 UNCITRAL, *Legislative Guide on Insolvency Law* (New York, NY: United Nations, 2005), online: <www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf>.

122 World Bank, *Creditor Rights and Insolvency Standard* (2005), online: <http://siteresources.worldbank.org/GILD/ConferenceMaterial/20774191/ICR_Standard_21_Dec_2005_Eng.pdf>.

The World Bank uses a descriptor of overall performance called "distance to frontier," meaning the distance to the "best performance across all economies in the Doing Business sample since 2005." The United Kingdom's resolving insolvency, distance to frontier, with the new measures, fell from 95.33 to 82.04, while the United States (and other countries) went ahead of the United Kingdom. The United States went from a distance to frontier score of 87.72 to 89.20. Using a scale of zero to 100, the distance to frontier measure shows how, over time, one can see how close an economy approaches best regulatory practice, where 100 means it is at the frontier.[123]

A big "so what?" is a perfectly natural response. In the United Kingdom, insolvency takes, on average, one year, as opposed to one and a half years in the United States; the cost to the estate is two percent less in the United Kingdom than in the United States and the return to creditors is 8.2 cents to the dollar higher. The British insolvency system, while not perfect, seems to be excellent if only the number of companies that flock to the United Kingdom from around the globe to restructure are considered. The obvious point here is that companies from abroad come to the United Kingdom to use the scheme of arrangement, which has nothing to do with the insolvency laws, and take advantage of the concentration of high-quality professional expertise of great integrity and a legal and judicial system that is held in the highest esteem worldwide. In other words, the attraction of the United Kingdom to foreign debtors and creditors does not lie in the administration procedure.

Chapter 11 in Disguise

In May 2016, the Insolvency Service put out consultation proposals for the reform of UK insolvency law. Of the four central proposals below, the government is pressing ahead with three: a moratorium procedure, with management remaining in control as debtor in possession; an extension of the essential suppliers regime, enabling debtors to specify contracts that then cannot be terminated by reason of the debtor's financial distress; a new plan of reorganization that goes further than any current UK procedure, including the scheme of arrangement, by permitting the cramming down of a whole class of creditors who do not support the plan; and super-priority rescue finance or debtor-in-possession lending. The fourth proposal, as was the case when it was previously canvassed in 2009, is not going forward.

There is, undoubtedly, something Chapter 11-ish about the proposals. In his foreword to the Insolvency Services' *Review of the Corporate Insolvency Framework*, Sajid Javid, the then secretary of state at the former Department for Business, Innovation and Skills, said, "To remain at the forefront of insolvency best practice we also need to ask what a 'good' regime looks like in 2016. An increasing international focus on company rescue has helped to shift the perceptions of what constitutes best practice; the UK needs to reflect this if our businesses, investors and creditors are to remain confident that the best outcomes can be achieved when things go wrong."[124]

In November 2016, the European Commission came forward with a new draft insolvency directive[125] that will require EU members to create, in their national laws, an insolvency framework meeting minimum standards. The framework is uncannily like that envisaged by the World Bank, UNCITRAL and the Insolvency Service.

There is a deeper reason for accepting, and actually welcoming, the Insolvency Service's proposals. The insolvency system, the law, the professionals who operate and police the system, and the courts that oversee and adjudicate the procedures and disputes are all part of the essential economic plumbing for an economy. The purpose of the European Commission's ambitious insolvency harmonization plan, something never attempted before, is to be an important part of creating Europe's single capital market. The "Five Presidents Report" of June 2015[126] lists "insolvency law among the most important bottlenecks preventing the integration of capital markets in the euro and beyond."[127]

123 The World Bank, "Distance to Frontier", online: <www.doingbusiness.org/data/distance-to-frontier>.

124 *Corporate Insolvency Framework*, *supra* note 118 at 5.

125 EC, Commission, *Proposal for a Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU*, COM(2016) 723 final - 2016/0359 (COD).

126 EC, Commission, *The Five Presidents' Report: Completing Europe's Economic and Monetary Union* (2015), online: <http://ec.europa.eu/priorities/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en>.

127 *Ibid* at ?.

If the system does not work efficiently and predictably, investors will choose some other place in which to invest. In deciding the attributes of the system — the emphasis and bias of the insolvency system toward the debtor or the creditor — there is no right or wrong answer other than the pragmatic one of what best promotes successful economic activity. The United Kingdom's insolvency regime is a product of the UK social and economic culture and, since the Cork Report,[128] has held a conscious and deliberate aim of fostering a rescue culture.

Capital providers are most at home, and find it easiest to price insolvency risk, when the insolvency regime is not only efficient, but also familiar. The capital markets are more international now than ever before, and money scours the world for investment opportunities. The hedge fund industry is a huge provider of capital for corporate restructurings, and the simple truth is that it, and a vast majority of the big sources of capital, are either US-based or have a strong US character[129]; it is the US restructuring and insolvency regime with which the hedge fund industry is most familiar. It is unlikely that an investor in a new deal will be attracted because the applicable insolvency regime is familiar, but an unfamiliar system can certainly deter an investor from putting up money or doing so at a keen price. Furthermore, in a world where enterprises have larger and far more complex capital structures than in the past, investors in all those different instruments and layers of debt want a system that gives them a voice in the restructuring. Our current administration procedure responds well to a secured creditor, but bondholders, unsecured lenders of different rankings, simply do not have the representation that they do in a Chapter 11 designed to accommodate an atomized constituency of creditors.

With so many countries reforming their insolvency laws to attract business and to smooth and enable the flow of capital, the United Kingdom, with Brexit imminent, and a fight on its hands to retain its position as a key capital market and centre for restructuring, must be at the forefront of reform to attract investors.

Insolvencies Post-Brexit: A Continental Perspective

The Impact of the CJEU

A few words should also be said about the future role of the courts, particularly the European ones (the CJEU and the EFTA court). It seems to have been one of the central issues of the Brexiteers to escape the dependency on the CJEU and to stop being affected by its decisions. That, however, might turn out to be a futile hope, as the EU27 are likely to play an essential role in the United Kingdom's future economic agenda. They are all governed by EU law, which is under the ultimate control and interpretation of the CJEU. As *The Economist*[130] has rightly pointed out, ask a company like Google or Microsoft whether they are ever affected by the CJEU. The answer in the positive[131] is also to be given when and if the United Kingdom should consider joining the EEA and thereby gain a seat in the EFTA court. As interesting as this court might be,[132] and as independent as it appears to be, de facto, there is a close interrelationship between those two European courts on the Kirchberg in Luxembourg. Accordingly, when and if the affectedness cannot be escaped from and is, anyway, reduced already to any indirect affect, the United Kingdom should — and certainly will — find a compromise to live and cope with this European power instrument.

128 UK, *Report of the Review Committee on Insolvency Law and Practice*, Cmnd 8558 (1982).

129 The United States remains the largest centre of investment, with US-based funds managing around 70 percent of global assets at the end of 2011, per TheCityUK, "Hedge Funds: March 2012" (2012). TheCityUK, "UK Fund Management: An Attractive Proposition for International Funds" (2014), online: <www.thecityuk.com/research/uk-fund-management-an-attractive-proposition-for-international-funds/>, reveals that UK assets under management reached a record £6.8 trillion at the end of 2014.

130 "Britain cannot escape the long arm of European law" *The Economist* (26 August 2017), online: <www.economist.com/news/britain/21727039-though-government-may-pretend-otherwise-european-court-justice-will-have-role-after>.

131 *Cf* The Institute for Government, "Dispute Resolution after Brexit" (6 October 2017), online: <www.instituteforgovernment.org.uk/publications/dispute-resolution-after-brexit>.

132 Strongly advocating in favour of this option, Carl Baudenbacher, "After Brexit: is the EEA an option for the United Kingdom?" (2016) 4 Eur Law Rep 134.

Restructurings and Insolvencies in the United Kingdom and on the Continent post-Brexit

As to restructuring and insolvency after March 29, 2019 (if no transitional deal is achieved), two scenarios need to be taken into account: the first is outbound, and the second inbound.

As to the previous one, the issue at stake is what the consequences are of a proceeding commenced in an EU member state, for instance, in Germany, with a debtor having assets or interests located in the United Kingdom. When and if the EIR should be adopted by the UK Parliament as a national piece of legislation, automatic recognition of the German proceeding would be guaranteed; assets, for instance, that are located in the United Kingdom and are subject to a right *in rem*, would be exempted from the reach of German insolvency law, pursuant to article 8 of the EIR. As a consequence of the CJEU judgment in the *Hertel* case,[133] the United Kingdom would be qualified as a third state that can be subject to the outward reach of the insolvency laws of the EU27; but the British courts, under these circumstances, will have to thoroughly think through whether or not they should incorporate this decision into their reasoning.

In the opposite case, when and if there is a restructuring or insolvency proceeding in the United Kingdom, there will be no recognition automatism in the member states of the European Union, as the United Kingdom will no longer be one of them. This distortion — ongoing automatic recognition of EU proceedings in the United Kingdom but no automatism at all in the opposite case — is inescapable, despite its evident imbalance; it is hard to imagine that such a solution will be practised for a long time. It is rather to be assumed that the English courts will search for — and find — a justification for applying some sort of control, and be it in the way as the UNCITRAL Model Law foresees it with its distinction between main proceeding and non-main proceeding.

Turning to the German outbound cases, the EIR is applicable only to the degree of the abovementioned *Hertel* case. The United Kingdom will be a third country, accordingly, which implies that an avoidance action against an English national will be permitted before a German court; it remains to be seen, however, whether English courts will recognize a respective German judgment when an exequatur is requested for the purpose of enforcement.[134] Any argument by an English court, though, based on the assumption that the EIR violates the public order, article 33 of the EIR should be barred due to the ongoing validity of this law as a national statute.

The biggest concern as of today, though, is the fate of the scheme of arrangement and its continuing use for EU companies. It is understood by the prevailing opinion to be a non-insolvency instrument, so that the EIR and its requirement of a COMI plays no role. Part of the scheme's attractivity in the other member states was and still is the automatic recognizability of a scheme. There are two options for recognition: the procedural side of the scheme qualifies as a judgment pursuant to article 36 of the Brussels I Regulation[135]; additionally, in several member states, a scheme qualifies as a contractual instrument, so that it is to be recognized under the Rome I Regulation[136] as well.[137] Brexit brings with it that the United Kingdom's use of automatic recognition ends in the United Kingdom as well — at least with regard to the Brussels I Regulation; with regard to the Rome I Regulation, things are different, since it implies applicability beyond the territory of the member states (see article 2 of the Rome I Regulation.)[138]

It is to be feared, however, that recognizability of a scheme will be debated on a different level. That is where a reference to the above-mentioned comparison with a divorce rather than a clinical cut-off comes into play. Many practitioners have observed the growing prominence of the scheme grudgingly from the beginning on; there is a strong resentment that this binding effect of the creditors'

133 *Hertel, supra* note 13; see also Christof Paulus, "The ECJ's Understanding of the Universality Principle" (2014) 27 Insolvency Intelligence 70.

134 It is a nice corollary that the CJEU followed in its decision precisely the vote of the British Advocate General Eleanor V. E. Sharpston.

135 *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 351/1, art 36.

136 *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 177/6 [*Rome I*].

137 Christof Paulus, "Das englische Scheme of Arrangement – ein neues Angebot auf dem europäischen Markt für außergerichtliche Restrukturierungen" (2011) Zeitschrift für Wirtschaftsecht 1077.

138 *Rome I, supra* note 135, art 2.

majority vote outside of a formal insolvency proceeding is not entirely admissible under constitutional aspects. But some bad feelings seem to remain. Accordingly, a not unlikely development might be that practitioners in the European Union will give in to questioning a scheme's assessment of being non-insolvency. When reading the new article 1 of the EIR with its definition of the proceedings covered by this law, there are ways to come to the conclusion that a scheme is, as a matter of fact, an insolvency proceeding.

To the degree that this is a likely scenario, English scholarship might possibly be well advised to search for alternative ways to ensure a scheme's ongoing attraction on the Continent. To the degree that recognition is an issue, the obvious choice would be the New York Convention,[139] to which more than 150 states are members and which implies automatic recognition of arbitral awards. Because this legal consequence is exactly what the United Kingdom is looking for, the question needs to be discussed whether the term "court" in sections 895 and following of the English Companies Act[140] can be interpreted in a way that an arbitration panel or an arbiter is encompassed from the term "court." What might look on first sight somewhat strange is upon closer inspection not too far-fetched: after all, in the context of sections 315 and following of the German civil code (BGB), the court is entrusted with the task to judge under certain circumstances the fairness of a party's determination of contractual duties and to replace that determination when and if the court deems it to be unfair. Here, German scholarship and practice agrees that an arbitration panel can be interpreted as being a court in the meaning of this section.[141]

Just one remark deserves to be added. One of the great advantages of English scheme procedures is the highly developed expertise of English lawyers, accountants and financial experts over a long period of being involved in successful schemes, together with the deep knowledge and enthusiastic support of English judges. These benefits are not currently available in the EU27 or in new centres looking for business, such as Singapore. If continental companies seeking restructuring no longer felt that they could benefit from English schemes, this would be a "lose-lose" situation for both the United Kingdom and the EU27.

Conclusion

Whatever the outcome of the Brexit negotiations might be, it is possible that the United Kingdom will lose at least part of its attraction as a restructuring and insolvency hub for the remaining member states of the European Union. And it is not unlikely that this gap will be filled one way or the other: the first option might be that the United States will try to step in with its Chapter 11 proceeding. Additionally, given the global nature of the modern economy, an alternative (or an additional) competitor might arise in Singapore. The other way of filling the Brexit gap could be a European instrument: the most recent development of a preventive restructuring framework has at least the potential (as of now) to develop into something like a pan-European scheme of arrangement.

The common sense of all this might be that the United Kingdom and the EU27 (or, at least, the 26 remaining member states, excluding Denmark) will reproduce the EIR by treaty. While this is obviously common sense, there are significant problems. Firstly, the UK prime minister has said that she does not want to accept the jurisdiction of the CJEU, and it is difficult to see how the EIR can work without that. There is also a political problem in that the European Union is anxious to prevent other countries following the United Kingdom out of the European Union, and, therefore, the United Kingdom must be seen to be getting a worse deal than it had as an EU member. Depriving the United Kingdom of the benefits of recognition and enforcement under the EIR would be damaging to the United Kingdom. Countries remaining in the European Union would be seen to keep an advantage that the United Kingdom had lost by leaving. Of course, the United Kingdom could retaliate by legislating to refuse recognition to EU restructuring and insolvency proceedings.

There is now a very serious risk that the United Kingdom will lose all the benefits of the regulations and the directives. Current UK policy is to leave the

139 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 38, Can TS 1986 No 43 (entered into force 7 June 1959).

140 *Companies Act 2006* (UK), c 46.

141 Cf Markus Würdinger in *Münchener Kommentar zum Bürgerlichen Gesetzbuch*, 7th ed (Beck, 2016) at section 319, marginal no 26 with references to decisions of the German Supreme Court.

Single Market (and, thus, the EEA) and the Customs Union. Therefore, unless the Brexit negotiations lead successfully to new treaties, the United Kingdom may well repeal the provisions derived from the regulations and possibly those derived from the directives. To some extent, the United Kingdom can fall back on the UNCITRAL Model Law and common law. These may help incoming cases, but, of course, do not assist outgoing ones, except in the few EU member states that have adopted the UNCITRAL Model Law, or where there are other ways of getting recognition for English insolvency proceedings. In some cases, it may be possible to have parallel proceedings and coordination/cooperation. Schemes of arrangement may also continue to work and be recognized on the basis of conflicts rules.

Prior to the original regulation, there was no satisfactory way of getting English insolvency proceedings recognized and enforced in continental Europe, and the United Kingdom may now be on the road to abandoning 14 years of progress and reverting to the completely unsatisfactory position before 2002.

Authors' Note

Although this paper is based on common discussions, the authors should mention that Gabriel Moss drafted the "Impact of Brexit on Recognition/Judicial Assistance in Cross-border Insolvencies" section, Federico Mucciarelli drafted the "Impact of Brexit on Forum and Law Shopping" section, Howard Morris drafted the "Insolvency Law Reforms in the United Kingdom and Brexit" section and Christoph Paulus drafted the "Insolvencies Post-Brexit: A Continental Perspective" section.

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BIICL has significant expertise both in conducting complex legal research, and in communicating it to a wider audience. Its research is grounded in strong conceptual foundations with an applied focus, which seeks to provide practical solutions, examples of good practice and recommendations for future policy changes and legal actions. Much of the research crosses over into other disciplines and areas of policy, which requires it to be accessible to non-lawyers. This includes, for example, drafting concise and user-friendly briefing papers and reports for target audiences with varying levels of experience of the law.

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