INSOL International

The Implications of Brexit for the Restructuring and Insolvency Industry

A Collection of Essays

INSOL International™

International Association of Restructuring, Insolvency & Bankruptcy Professionals

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President’s Introduction

It is my pleasure to be able to write this short introductory note to a most interesting collection of essays dealing with Brexit. The cover of the INSOL World (third quarter 2017) publication pictures a clever graphic reflecting the removal from the jigsaw puzzle of one of the stars of the European logo, revealing a Union Jack shining through from below. To what extent will the influence of that famed flag be affected by Brexit?

The collection of essays in this publication deals with the effects of Brexit not only domestically but also in some of the European Union Member States and, indeed, internationally. To use a phrase coined in the Canadian contribution authored by Paul Casey *et al*, it remains to be seen whether the “waves of Brexit" will, once they reach the Canadian shores, be “tiny ripples” or a tsunami.

What is fascinating is that while there seems to substantial agreement on what the effect of Brexit will be on the insolvency and restructuring industry in the UK, there appears to be a divergence of views (especially in Europe) as to what the impact of Brexit will be in other jurisdictions.

As an interesting addition, the essays also deal with some “lessons from history" which usefully inform the present Brexit experience.

My thanks and those of INSOL international go to the respected academics and practitioners who have authored the essays and to the project leader, David Burdette, for undertaking the onerous task of compiling, collating, reviewing and editing what is indeed a most interesting, timely and relevant project.

Adam

Adam Harris
President, INSOL International

Foreword

While I am sure there were many noteworthy things that happened on 23 June 2016, the one event that will forever be remembered as a turning point in the history of the United Kingdom and the European Union, was the decision by the British electorate to leave the EU. Ever since that historic day, hardly a moment has gone by without some mention in the media of "Brexit", the phrase coined to describe the United Kingdom's departure from the EU. Whatever your own opinions regarding Brexit may be, political or otherwise, there can be no doubt that it will have some form of impact on the restructuring and insolvency industry – not only in the UK, but also in the EU and other parts of the world.

In this Collection of Essays, INSOL International brings you a variety of opinions and viewpoints as to what the implications of Brexit on the restructuring and insolvency industry might be. As centrepiece to the collection, we have an essay dealing with the implications of Brexit on the restructuring and insolvency industry in the UK, seen from a UK perspective.

The centrepiece essay by Gerard McCormack and Hamish Anderson was provided to commentators from other parts of the world to provide context for the views we gathered from Europe, The United States, Canada and East Asia and the Pacific Rim. We also thought that there may be some lessons to be learned from history, so we have included brief essays on the dissolution of Czechoslovakia and the re-unification of Germany.

As you will no doubt determine for yourselves, the essays make for interesting reading. While no one can at this stage predict with any degree of certainty what will come out of the UK's departure from the EU, there at least seems to be substantial agreement, as far as restructuring and insolvency goes, as to what the immediate effects will be. There also seems to be substantial consensus in Europe that stakeholders on both sides of the Channel are keen to find a way to continue to engage with the UK as an important jurisdiction for restructuring and insolvency. In other parts of the world it seems to be a case of as one door closes, another opens. Perhaps, as some authors have intimated in their essays, the UK may find itself having access to new markets, no longer shackled by the EU regulations that may have prevented cross-border recognition in the first place. No doubt lawyers, famed for negotiating their way around turbulent waters, will find a way to continue to make the UK an important jurisdiction for restructuring and insolvency in future.

This collection of essays was assembled in a relatively short space of time and I would like to thank each and every one of the contributors whose names appear in this publication, for the time and effort they have invested in this project. I would also like to thank Samantha Bewick and Richard Heis (both of KPMG) for their input and guidance in putting together this collection.

Finally, I must emphasise that the views expressed in this collection of essays are the personal views of the authors themselves and are not to be taken as representing the views of the institutions they represent or work for. The views in this collection are also not be taken as representing the views of INSOL International, or any of its affiliates or representatives.

I hope that you enjoy reading the content of this collection as much as I enjoyed putting it together. It is my sincere wish that this publication will stimulate debate amongst the INSOL membership regarding the wider implications of Brexit for the restructuring and insolvency industry.

David Burdette
Project Leader
September 2017

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The Re-Unification of Germany	Prof. Christoph G. Paulus *Humboldt-Universität zu Berlin, Germany*
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The Implications of Brexit for the Restructuring and Insolvency Industry

View from the United Kingdom

The Implications of Brexit for the Restructuring and Insolvency Industry in the United Kingdom[*]

Gerard McCormack[**]

and

Hamish Anderson[***]

INTRODUCTION

The UK Prime Minister, Theresa May, has famously said that "Brexit means Brexit" but the precise implications of this pronouncement are as yet uncertain. Certainly, this is the case in the cross-border insolvency and corporate restructuring fields. Essentially, the effect of Brexit depends on:

- the outcome of negotiations under Article 50 of the Treaty on European Union for Britain's withdrawal from the European Union (EU);
- the terms of the so-called "Great Repeal" Bill that will repeal the European Communities Act 1972, which gave effect to the UK's membership of the European Economic Community (EEC) and which later became the EU, as well as incorporating certain aspects of EU law into domestic UK law;[1]
- the terms of any replacement arrangements between the UK and the EU (the remaining 27 EU Member States).

This essay addresses the likely scenarios for cross-border insolvency and corporate restructuring in a post-Brexit world from a UK perspective. It consists of six sections and a conclusion. The first section reviews the current cross-border insolvency landscape and the influence of European law in this area. The second does the same for corporate restructuring law, particularly in the form of schemes of arrangement under the Companies Act 2006. The third section focuses on the issue of how the current law deals with foreign insolvency proceedings insofar as they purport to discharge or modify English law governed obligations. The fourth section considers the effect of a "hard" Brexit on the existing corporate restructuring and insolvency landscape in the UK. A "hard" Brexit in this area is understood to mean leaving the EU and the European Insolvency Regulation (EIR) regime without there being any replacement agreement in place to mirror the effect of the EIR. The section expressly concludes that the absence of any alternative or replacement regime would be detrimental to both the UK and the EU. The fifth section considers what the UK and the EU might each do unilaterally to fill the gap. The sixth and final section considers the terms of a possible alternative or replacement regime between the UK and the EU 27.

[*] The views expressed in this essay are the personal views of the authors, which are not to be taken as representing the views of INSOL International or any of its affiliates or representatives.

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[1] On the "Great Repeal Bill", see further the House of Commons Library Briefing Paper, "Legislating for Brexit" (21 November 2016) at www.researchbriefings.files.parliament.uk/documents/CBP-7793/CBP-7793.pdf at pp. 7-8.

CROSS-BORDER INSOLVENCY LANDSCAPE – PRE-BREXIT

The UK has three main statutory vehicles for international / cross-border cooperation in insolvency matters – the EU Regulation on Insolvency Proceedings (supplemented by sector specific instruments), the UNCITRAL Model Law and section 426 of the Insolvency Act 1986. Additionally, there is the common law to the extent that it has not been superseded in relation to particular matters. The common law had been in a state of arrested development, but in recent years there has been a series of decisions from both the House of Lords / UK Supreme Court and Privy Council on cross-border insolvency at common law and, in particular, on the limits of common law judicial assistance in respect of foreign insolvency proceedings.

But the most significant change over the past 20 or so years has come with the promulgation and coming into force of the European Insolvency Regulation (EIR) – Regulation 1346/2000. The provisions of this regulation have been amended somewhat or "recast" with the recast Regulation – Regulation 2015/848 – applying to proceedings opened on or after 26 June 2017. The Regulation only applies, however, where a debtor that is the focus of the insolvency proceedings has its centre of main interests (COMI) in the European Union. If the debtor has its COMI outside the European Union, then the EIR does not apply.

European Insolvency Regulation (EIR)[2]

The EIR is directly applicable law and constrains the jurisdiction of the UK courts (and other national courts) to open insolvency proceedings in respect of a debtor. The EIR establishes uniform rules on both jurisdiction to open insolvency proceedings and the choice of which law applies in respect of those proceedings. "Main" insolvency proceedings may be opened where the debtor has its centre of main interests (or COMI) and secondary proceedings may be opened where the debtor has an "establishment".

The EIR implements a philosophy of modified or mitigated universalism. In theory, main insolvency proceedings apply to all the debtor's assets irrespective of location, though the possibility of opening secondary proceedings in a State where the debtor has an establishment qualifies the universal scope of the main insolvency proceedings. Secondary proceedings operate in respect of assets located in the State where the debtor has an establishment. As well as establishing express jurisdictional rules, the EIR also has conflicts of law rules with the law of the State that opens insolvency proceedings, whether main or secondary, applying generally to those proceedings, with certain exceptions.

The EIR establishes a mutual recognition mandate based on the principle of mutual trust and cooperation between different States and judicial authorities. Insolvency proceedings opened in one Member State – as well as judgments handed down in the course of insolvency proceedings - should automatically be recognised in other Member States subject only to a limited public policy exception. If a party is dissatisfied with the decision to open insolvency proceedings in a particular State, then it should appeal the decision to a higher judicial authority in that State, rather than moving off to another Member State and seeking to open rival proceedings there. If a party attempts this tactic, then the courts in the second Member State has to defer to the courts in the first Member State.

The underlying motivation behind the EIR appears to be one of fostering and deepening market integration. The European Union is based around the idea of a single market and this suggests that there should be a single insolvency law applying to that single market. The EIR however, falls short in that regard. Essentially it is a conflict of laws instrument with rules

[2] The substantive changes made by the recast Regulation are not directly relevant to the issue considered in this essay and references to the "EIR" and the "Regulation" are therefore intended as references to either or both versions, as appropriate.

on jurisdiction and choice of law, though there are also some substantive law provisions providing for minimum levels of treatment for foreign creditors. The EIR tries to remove frictions between national insolvency laws and the preamble sets out its mission. It speaks of the activities of undertakings having more and more cross-border effects and the insolvency of such undertakings affecting the proper functioning of the internal market, with a corresponding need for coordination measures at a European level. It also speaks of trying to stamp out forum shopping - the movement of assets or legal proceedings from one jurisdiction to another to take advantage of a more favourable legal position. The enactment of the EIR may have done more, however, to enhance rather than reduce forum shopping. In its mutual recognition mandate, it creates incentives for parties to move assets to another country with a view to having the case resolved under the better designed or more advantageous insolvency law of the second State.

German and Irish individual debtors have moved their COMI to the UK to take advantage of shorter bankruptcy discharge periods and corporates have also moved their COMI, largely, it seems, to take advantage of better restructuring opportunities in other countries, most notably the UK. London has become the insolvency and debt restructuring capital of Europe. Certainly, there is evidence from the cases that certain ostensibly European companies have moved operations to the UK immediately prior to a formal insolvency process so as to claim a UK COMI and the consequent application of UK law. *Re Hellas Telecommunications (Luxembourg) II SCA*[3] is a case in point where a Luxembourg holding company shifted its COMI to England. The main asset of the holding company was a shareholding in a Greek operating company, which carried on business as one of the main telecom companies in Greece.

More recently, it seems that more corporate restructurings in respect of "European" companies have been done by means of schemes of arrangement under the UK Companies Act and the courts have also distinguished between "good" and "bad" forum shopping. For instance, Newey J has said in *Re Codere Finance (UK) Ltd*[4] at paragraph 18:

> "Plainly forum shopping can be undesirable. That can potentially be so, for example, where a debtor seeks to move his COMI with a view to taking advantage of a more favourable bankruptcy regime and so escaping his debts. In cases such as the present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping."

It is to be observed that the EIR is an inward facing measure; it seeks to regulate issues as between the Member States but it does not purport to provide a framework for the resolution of cross-border insolvency issues where proceedings are opened outside the European Union, which require recognition or assistance within one or more Member States. This is, of course, a highly material consideration in the context of Brexit.

Cross-Border Insolvency Regulations (CBIR)

The Cross-Border Insolvency Regulations (CBIR)[5] implement the United Nations Commission on International Trade Law (UNCITRAL) 1997 Model Law on Cross-Border Insolvency in the UK. The Model Law has also been implemented in other major common law jurisdictions such as the US, Canada, Australia and New Zealand, as well as in some other major economies such as Japan and Korea, but not by China or Russia. It has been

[3] [2009] EWHC 3199 (Ch).
[4] [2015] EWHC 3778 (Ch).
[5] 2006 SI 2006/1030.

adopted by four EU Member States apart from the UK - Greece, Poland, Romania and Slovenia – but it has not been implemented directly in any of the EU founder members, though it may have had an indirect influence on the law in Germany and the Netherlands. The Model Law is international "soft" law which countries have implemented in somewhat different ways.

Under the Model Law there is provision for the recognition of foreign insolvency proceedings and for the extension of co-operation to foreign courts and foreign insolvency representatives. This principle of recognition and co-operation applies both in respect of traditional liquidation-type procedures and restructuring proceedings. The foreign proceedings may be either "main" or "non-main" and these proceedings are defined in substantially the same way as "main" and "secondary" proceedings under the EIR.[6] If foreign main proceedings are recognised, generally there is a "stay" or moratorium on proceedings against the debtor or its assets. Execution proceedings against the debtor's assets are also barred and the debtor's right to dispose of assets is suspended.[7] The court granting recognition may also authorise additional "appropriate" relief as a matter of discretion.[8] In relation to foreign non-main proceedings, the recognising court may in the exercise of a discretion grant the types of relief that could have been granted in relation to foreign main proceedings. There are no quasi-automatic consequences of recognition.

In contrast to the EIR, the Model Law is an outward facing measure which is principally concerned with the response of the enacting jurisdiction to insolvency proceedings commenced elsewhere in the world. Adoption of the Model Law is not however merely an expression of comity, because the enactment of insolvency laws making proper provision for such matters is seen to be part of the process of making a jurisdiction "business friendly" and thereby stimulating external investment.

Section 426 Insolvency Act

Section 426 of the Insolvency Act 1986 empowers a UK court having jurisdiction in relation to insolvency law, to give effect to a request for assistance from a foreign court or tribunal in a designated country that has the corresponding jurisdiction.

Section 426 may be used in preference to the CBIR in a particular case; the major advantage being that it allows the application of foreign insolvency law whereas this does not seem to be possible under the CBIR. The UK court, in responding to a request for assistance, may apply either:

- its general equitable and statutory jurisdiction;
- UK insolvency law; or
- the insolvency law of the requesting court.

Section 426 contains some major limitations, however. Firstly, the statutory duty of assistance applies only as between courts and therefore the UK court must have received a request from a foreign court before it can act. Secondly, the duty to provide assistance only operates in respect of requests from designated countries and the list of countries that have been designated is confined to "friendly" common law countries with historic links to the UK – a sort of "cricket-playing club". The list excludes the US and all EU Member States with the exception of Ireland.

[6] Article 2. (The definition of an "establishment" is slightly different.)

[7] Article 20.

[8] Article 21.

Although the list of designated jurisdictions was founded on expectations of reciprocity, the section 426 jurisdiction is a free-standing, outward facing, measure.

Common Law

In recent years, the courts in England, both at first instance and at appellate level, have given extensive consideration to the common law principles governing judicial assistance in insolvency matters and the recognition of foreign insolvency judgments. The cases have originated largely, but not exclusively, from offshore jurisdictions such as Isle of Man, Cayman Islands and the British Virgin Islands (BVI).

Initially, the flow of the tide was strongly in the direction of a more expansive interpretation of the relevant principles, but this tide has now ebbed and the courts have rowed back. The more expansive view is associated with Lord Hoffmann who, in *Re HIH Casualty and General Insurance Ltd*,[9] referred to the principle of modified universalism as the "golden thread" running through English cross-border insolvency law since the 18th century. The universality or otherwise of insolvency proceedings was discussed by the Privy Council in *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors (of Navigator Holdings Plc*[10] where Lord Hoffmann said (at paragraph 16):

> "The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated."

From the *Cambridge Gas* case it seemed that, at common law, the courts had a wide discretion to provide assistance to a foreign insolvency proceeding by doing whatever was considered to be just and appropriate in all the circumstances of the particular case, to the extent they could do so in a domestic insolvency.

Lord Collins has come to be associated with a more restrictive view of the limits of common law judicial power and in *Singularis Holdings v PricewaterhouseCoopers*[11] the Privy Council, including Lord Collins, held that it did not have a common law power to assist foreign liquidators by exercising powers analogous to those that would have been exercisable in a domestic insolvency, but which did not apply to a cross-border insolvency. Lord Collins said (at paragraph 108) that the notion of legislation by analogy was wholly inconsistent with established principles governing the relationship between the judiciary and the legislature. It was therefore profoundly unconstitutional.

Two further points warrant mention in connection with the common law jurisdiction:

- The judicial retreat concerning the extent to which the courts can act in aid of foreign proceedings will have limited practical implications in the UK[12] so long as the CBIR remain in force.
- The presently restrained approach to judicial innovation is likely to continue. As Lord Neuberger PSC acknowledged in *Singularis*,[13] the courts "have not been conspicuously successful" in developing the jurisprudence of cross-border

[9] [2008] I WLR 852 at para. 30.
[10] [2007] 1 AC 508.
[11] [2014] UKPC 36.
[12] As opposed to other jurisdictions where decisions of the UK Supreme Court / Privy Council are followed and which have not enacted the Model Law.
[13] At [154].

> insolvency. He concluded that major developments should be a matter for the legislature and not the courts.[14]

CROSS-BORDER RESTRUCTURING LANDSCAPE – PRE-BREXIT

In recent years, many corporate restructurings in respect of EU registered companies have been accomplished by means of schemes of arrangement under the UK Companies Act. Snowden J in *Re Van Gansewinkel Groep BV*[15] commented as follows at paragraphs 4-5:

> "In recent years schemes of arrangement have been increasingly used to restructure the financial obligations of overseas companies that do not have their COMI or an establishment or any significant assets in England…. The use of schemes of arrangement in this way has been prompted by an understandable desire to save the companies in question from formal insolvency proceedings which would be destructive of value for creditors and lead to substantial loss of jobs. The inherent flexibility of a scheme of arrangement has proved particularly valuable in such cases where the existing financing agreements do not contain provisions permitting voluntary modification of their terms by an achievable majority of creditors, or in cases of pan-European groups of companies where co-ordination of rescue procedures or formal insolvency proceedings across more than one country would prove impossible or very difficult to achieve without substantial difficulty, delay and expense."

The law on schemes of arrangement is contained in Part 26 of the Companies Act 2006 and has been developed substantially by judicial interpretation. The scheme involves an arrangement between a company and its creditors and / or members with some element of "give and take" on both sides and the sanctioning of a scheme is a three-stage procedure. First, there is an application to the court to convene relevant meetings of creditors or members of a company. Secondly, the relevant class meetings are held and the scheme must be approved by 75% in value and a majority in number of creditors within each class. Thirdly, the scheme comes before the court for approval and it must be satisfied that the scheme proposed is a reasonable one such that a reasonable member of the class concerned and acting in respect of its own interests could have voted for it. The court is not a rubber stamp but, on the other hand, it need not be satisfied that the scheme proposed is the only fair one.

It has been held by the Court of Justice in the European Union (CJEU) in *Ulf Kazimierz Radziejewski*[16] that the EIR applies only to those proceedings listed in Annex A to the Regulation. Schemes of arrangement are not only not listed under the EIR, they are also not necessarily a collective procedure or an insolvency procedure. They may only involve a few creditors rather than creditors or bondholders as a whole and, moreover, they may be used as a takeover mechanism in respect of solvent companies. The fact that schemes of arrangement are not listed, means that they are not entitled to the benefits of automatic EU-wide recognition under the EIR but, on the other hand, the jurisdiction of the UK courts to sanction a scheme is not subject to the constraints of the EIR; i.e. the relevant company need not have its COMI or even an "establishment" within the UK. Under Part 26 Companies Act 2006 the courts have jurisdiction to sanction a scheme in respect of a company that is "liable to be wound up" under the Companies Act. In *Re Rodenstock GmbH*[17] Briggs J held that the Insolvency Regulation had not narrowed the court's jurisdiction in relation to schemes. It was improbable on a purposive interpretation of the Regulation that any such narrowing of the jurisdiction was intended.

[14] At [161]. Lord Neuberger amplified his thinking on this subject in his keynote speech on 19 June 2017 to the International Insolvency Institute Annual Conference 2017, London.

[15] [2015] EWHC 2151.

[16] Case C-461/11 ECLI:EU:C:2012:704.

[17] [2011] EWHC 1104 (Ch) at para. 52.

Section 221 of the Act confers jurisdiction on the courts to wind up a foreign registered company in a broad range of circumstances, but there has been a judicial concern that the jurisdiction conferred by the section is potentially "exorbitant" in that it may interfere with the disposition by foreign sovereign powers of matters within their own territories. Briggs J in *Re Rodenstock GmbH* referred to the jurisdiction in this way and also spoke of the practical purpose of ensuring that the court only made orders where some useful purpose would be served (at paragraph 21).

A "sufficient connection" test has been used as the overriding criterion for determining whether the court should exercise its discretion to make a winding-up order in respect of a foreign company and the same "sufficient connection" test has been used in relation to exercising the jurisdiction to sanction schemes of arrangement. The UK courts may sanction schemes where the relevant foreign company has a "sufficient connection" with the UK, even though its COMI may not be in the UK.

UK courts have also considered the potential application of the recast Jurisdiction and Judgments Regulation (Brussels 1 Regulation)[18] to schemes. The overall objective of this regulation is to secure the simplification of formalities that govern the reciprocal recognition and enforcement of judgments within the EU and to strengthen the legal protection of persons. The preamble makes clear the need, in the interests of the harmonious administration of justice, to ensure that irreconcilable judgments will not be given in two EU states. Under Article 4 of Brussels 1, persons domiciled in a Member State must be sued in the courts of that Member State though there are rules of special jurisdiction allowing proceedings to be brought in other Member States in certain circumstances. Article 31 provides that if proceedings involving the same cause of action between the same parties are brought in the courts of different Member States, then any court, other than the court first seized, must stay its proceedings until the jurisdiction of the court first seized is established and, when it is, decline its jurisdiction in favour of that court.[19]

Brussels 1 applies in civil and commercial matters, but according to Article 1(2)(b) it does not apply to "bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings". There is somewhat conflicting case law at both the European and UK levels as to whether Brussels 1 and the Insolvency Regulation were intended to provide mutually exclusive codes in relation to jurisdiction and this issue is very relevant in relation to whether UK schemes of arrangement are within Brussels 1. This question has been considered in a number of cases, although there has not yet been an appellate court decision that reviews all the relevant authorities. As one commentator remarks:[20]

> "The outcome of these cases is uniform: in each case the English courts were found to have jurisdiction to sanction the scheme provided a sufficient connection was found, i.e. the jurisdiction of the English courts to convene scheme meetings and to sanction these schemes was unaffected by the EU Regulation. However, in reaching this conclusion the reasoning in these cases varies and is often inconsistent."

In *Re DAP Holdings NV*,[21] for example, it was suggested (at paragraph 14) that applications to sanction schemes of arrangement in respect of solvent companies fell outside Brussels 1, but in *Re Rodenstock GmbH*[22] Briggs J took a different view. The "*Rodenstock*" analysis was adopted by David Richards J in *Re Magyar Telecom BV*[23] who decided that an order

[18] Regulation 1215/2012.

[19] Under Art 31(2) of Brussels 1 recast, if the parties have given a particular court exclusive jurisdiction, this court may go on to hear the case even if it was not first "seized".

[20] See J Payne, *Schemes of Arrangement; Theory, Structure and Operation* (Cambridge, CUP, 2014) at p. 292.

[21] [2005] EWHC 2092 (Ch).

[22] [2011] EWHC 1104 (Ch).

[23] [2013] EWHC 3800 (Ch).

sanctioning a scheme between an insolvent company and its creditors was also subject to Brussels 1, at least if the company was not subject to insolvency proceedings under the Insolvency Regulation. Moreover, David Richards J suggested that an application to sanction a scheme may involve persons being "sued" for the purpose of Article 4 of Brussels 1.[24] In those circumstances, the courts of the Member State where a defendant is domiciled had jurisdiction.[25] Where some of the creditors whose rights were being affected by the scheme were domiciled in England, the English courts could sanction the scheme. Article 8 enabled a person domiciled in a Member State to be sued, where he was one of a number of defendants, in the national courts where any of the defendants were domiciled, provided that the claims were so closely connected that it was expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

The authorities were reviewed recently by Snowden J in *Re Global Garden Products SpA*[26] who said (at paragraph 25):

> "on the assumption that the recast Judgments Regulation applies to schemes, and treating the company as a claimant which is suing the scheme creditors, provided that at least one such creditor is domiciled in the United Kingdom, Article 8 is potentially engaged. The question will then be whether it would be expedient to hear and determine the application for sanction of the scheme as regards the other creditors to avoid inconsistent judgments from separate proceedings. On one view, this question will necessarily be answered in the affirmative because of the desirability of binding all scheme creditors to the same restructuring: see *Re Metinvest BV* [2016] EWHC 79 at paragraph 33. Alternatively, the answer may depend upon a consideration of the number and value of the creditors domiciled in the United Kingdom: see *Re Van Gansewinkel Groep BV* at paragraphs 41 to 45."

There are also suggestions in some of the cases that UK courts may have jurisdiction over scheme creditors by virtue of Article 25 of Brussels 1, which confers jurisdiction on the courts of a Member State if parties, regardless of their domicile, agree that the courts of a particular State have jurisdiction to settle any disputes which may arise in connection with a particular legal relationship. The argument is that where the parties to a lending agreement agree to submit their disputes to the jurisdiction of the UK courts, then the latter will have jurisdiction if a scheme purports to modify rights governed by that particular lending agreement.

It is not clear, however, whether an "asymmetric" jurisdiction agreement falls within Article 25. An example of such an agreement would be where borrowers submitted to the exclusive jurisdiction of the UK courts, but the lenders were entitled to take action in any available forum that was convenient for them.

By way of conclusion to this brief review of the position in respect of schemes of arrangement, it will be noted that, in contrast to the position in respect of insolvency proceedings and the application of the EIR, there is considerable uncertainty as to the application of Brussels 1 to determine jurisdiction and, by extension, recognition of approved schemes. In practice, the courts look for reassurance as to recognition when sanctioning schemes and the recognition of approved schemes is therefore less of an issue than might be supposed.

[24] But for a different view, see Warren J in *Re Sovereign Marine and General Insurance Co Ltd* [2006] EWHC 1335 (Ch), [2007] 1 BCLC 228 at para. [62] that none of the jurisdictional rules in Brussels 1 were wide enough to encompass schemes of arrangement.

[25] But see *Primacom Holding GmbH and Another v A Group of the Senior Lenders & Credit Agricole* [2012] EWHC 164 (Ch), [2013] BCC 201 where Hildyard J at para. [13] suggested that it was a "stretch" to consider company creditors, though they were integral to the scheme process and had a right to attend the court hearing, as being defendants for the purpose of Brussels 1.

[26] [2016] EWHC 1884 (Ch). But see further *Re DTEK Finance plc* [2016] EWHC 3562 (Ch), [2017] BCC 165 [10] – [15].

DISCHARGE OR MODIFICATION OF ENGLISH LAW GOVERNED OBLIGATIONS IN FOREIGN INSOLVENCY PROCEEDINGS

The Common Law

There is a long-established principle of the common law that the discharge of a debt under foreign insolvency law will not be given effect in the UK where the contract creating the debt is governed by English law.[27] This doctrine is reflected in *Gibbs v La Société Industrielle et Commerciale des Métaux*[28] where it was held that the foreign bankruptcy law was irrelevant because it was "not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound."

Most recently, the *Gibbs* principle has been approved by Lord Hope in *Joint Administrators of Heritable Bank plc v Winding up Board of Landsbanki Islands HF*.[29] There is also a statement by Lord Hoffmann in *Wight v Eckhardt Marine GmbH*[30] that the question whether an obligation has been extinguished is governed by its proper law.

In *Global Distressed Alpha Fund 1 Ltd Partnership v PT Bakrie*,[31] for instance, it was held that the movement towards "universalism" in insolvency proceedings did not allow a first instance judge to disregard the established doctrine. In that case the question was whether the discharge of a debt under foreign (Indonesian) bankruptcy law would be given effect in the UK where the contract creating the debt was subject to English law. It was argued that recognition of the discharge under Indonesian law would be consistent with the principle of universality because the debtor was an Indonesian company with its business operations centred in Indonesia. While the court rejected this argument, it referred with apparent approval to various criticisms that had been levelled against *Gibbs*. That decision generates anomalies. For example, while a debt governed by English law will not be discharged by a foreign bankruptcy, the debtor's movable assets situated in England are taken to have vested in the foreign trustee in bankruptcy. The debtor remains liable to pay its debts but has been deprived of the means that enable this to be done. Moreover, it was likely that the debtor's creditors would have foreseen the possibility that the restructuring of the Indonesian debts might take place in Indonesia. This suggested that recognition of the Indonesian debt discharge would not be unjust.

The criticisms of *Gibbs* have been taken a stage further in certain foreign jurisdictions, including Singapore. For instance, in *Re Pacific Andes Resources Development*[32] the Singapore High Court suggested that upon recognising foreign insolvency proceedings, it may give effect to a compromise or discharge of debts governed by Singapore law that were purportedly effected by the foreign insolvency law.

In England, the *Gibbs* principle was considered in passing by the Court of Appeal in *Erste Group Bank AG v JSC VMZ Red October*,[33] but the court declined to re-evaluate the correctness of the decision. It referred to the fact that the principle said to spring from the case "has been the subject of what many regard as justifiable criticism" (at paragraph 75) and entered an important caveat in relation to the *Gibbs* line of cases, observing that those

[27] The term "English" is used here and elsewhere in this paper to mean "England and Wales". England and Wales as a jurisdiction form the focus of this paper, but most of the points made in relation to England and Wales are also likely to be relevant for Northern Ireland and Scotland (and reference is made the UK and UK law without attempting to differentiate the constituent jurisdictions).

[28] (1890) 25 QBD 399.

[29] [2013] UKSC 13, [2013] 1 WLR 725 at para. [44].

[30] [2003] UKPC 37, [2004] 1 AC 147 at para. [11].

[31] [2011] EWHC 256 (Comm).

[32] [2016] SGHC 210.

[33] [2015] EWCA Civ 379, [2015] All ER (D) 135.

cases did not address, and could have no application to, the situation where a creditor had submitted to a foreign jurisdiction by actively participating in insolvency proceedings in that jurisdiction. The prospects of judicial reversal of the *Gibbs* principle should nonetheless be viewed with caution. *Gibbs* itself is long-standing Court of Appeal authority binding on that court and all lower courts. It would be open to the Supreme Court to reverse it notwithstanding its recent approval in *Heritable Bank* but it is questionable whether the Supreme Court feel that to do so would stray beyond the proper limits of judicial law-making.[34] The future of the *Gibbs* principle is likely to be an important dynamic in shaping a successful post-Brexit solution to European cross-border insolvency.

Effect of the EIR

Under the EIR the applicable law is the law governing insolvency in the state where the proceedings are opened. This rule is laid down in Article 7 of the new Regulation, which is equivalent to Article 4 in the original Regulation 1346/2000. Article 7(2) states that the law of the state of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure[35] and then sets out a non-exhaustive list of matters that are specifically referred to the law governing the opening of the proceedings. These matters are both substantive and procedural in nature and include:

- the effects of insolvency proceedings on current contracts to which the debtor is party;
- the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;
- the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;
- the rules governing the lodging, verification and admission of claims;
- the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right *in rem* or through a set-off;
- the conditions for and the effects of closure of insolvency proceedings, in particular by composition;
- creditors' rights after the closure of insolvency proceedings;
- who is to bear the costs and expenses incurred in the insolvency proceedings;
- the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

The most straightforward interpretation of Article 7 suggests that if insolvency proceedings are opened under the Regulation in another EU State, then the law of that State will determine whether English law-governed obligations of the debtor are abrogated or modified by those insolvency proceedings.

In *Edgeworth Capital Luxembourg Sarl v Maud*[36] Knowles J, however, seemed inclined to accept a more restricted interpretation though it was not necessary to reach a definitive conclusion in the case. Nevertheless, he seemed sympathetic to the notion that a third party debt arising under a contract governed by English law was not capable of being discharged by insolvency proceedings under the EIR in a foreign jurisdiction. The case concerned a

[34] See above in relation to the common law power to act in aid of foreign insolvency proceedings. In his keynote speech, referred to in fn 14 (at para. 30), Lord Neuberger expressly identified the future of the *Gibbs* principle as an example of the sort of issue which is problematic for judges.

[35] The concept of closure of insolvency proceedings must be interpreted according to national law. There is no autonomous Community-wide interpretation – see Case C-116/11 *Bank Handlowy and Adamiak* [2013] *Bus LR* 956(2012) GBC 054 at para. [52].

[36] [2015] EWHC 3464 (Comm).

loan made to a company with its COMI in Spain and which entered into a formal insolvency process in Spain. The debtor's obligations under the loan agreement had been guaranteed and it was argued by the guarantor that its liability under the guarantee had been discharged by the Spanish insolvency proceedings. The court held that the relevant Spanish law did not have this effect but it was suggested that even if it did, it did not produce any extraterritorial effects by virtue of the EIR.[37]

This suggestion is difficult to square with the European Court decisions in *Simona Kornhaas v Thomas Dithmar*[38] and *ENEFI Energiahatékonysági Nyrt v Direcția Generală Regională a Finanțelor Publice Brașov (DGRFP)*[39] which give an expansive interpretation to what is now Article 7. Moreover, if a guarantor accepts liability under the guarantee and pays the principal debt, then normally it is entitled to be indemnified by the debtor and has a right of reimbursement from the debtor's estate. This enlarges the scope of the claims against the estate. Articles 7(2)(g) and (h) provide that the courts of the state where insolvency proceedings are opened shall determine the claims that may be lodged against the debtor's estate, as well as the rules governing the lodging, verification and admission of claims.

In conclusion, the better view is that one of the reciprocal benefits of the EIR is that insolvency proceedings commenced in accordance with its jurisdictional requirements can have the effect of discharging obligations governed by a foreign law and that in consequence the *Gibbs* principle has no application to EIR cases.

Effect of the CBIR / Model Law

The CBIR / Model Law regime is intended to facilitate the recognition of foreign insolvency proceedings and authorizes the grant of certain relief consequent on such recognition. Article 21, which refers to such discretionary relief, is drafted in broad terms but it was held by Morgan J in *Re Pan Ocean Co Ltd*[40] that it does not permit the application of foreign law. Only domestic law may be applied. Morgan J rejected the argument for a broad interpretation of the expression "appropriate relief" in Article 21 that would permit the application of foreign insolvency law. *Re Pan Ocean Co Ltd* concerned a contract of carriage which a Brazilian company had entered into with a Korean shipper. The contract was governed by English law and contained a clause allowing the Brazilian party to terminate the contract in certain events, including if the shipper entered insolvency proceedings. The shipper entered insolvency proceedings in Korea and the Brazilian party wished to activate the termination provision. The shipper's insolvency administrator, on the other hand, sought to keep the contract alive because it was quite profitable for the shipper. It appeared that under Korean insolvency law, unlike UK insolvency law, termination clauses of this type could be overridden. Morgan J concluded that even if he had the power to do so, it would not be appropriate in this particular case to give effect to the provisions of Korean insolvency law. He said (at paragraph 112):

> "In some cases, it can be argued that anyone who does business with a foreign company which might thereafter enter a process of insolvency, governed by the insolvency law of its country of registration, should expect that the insolvency will be governed by that law … However, in the present case, the parties had deliberately chosen English law as the law of the contract. Whereas the parties might have expected that a Korean court would apply Korean insolvency law to the insolvency of the Company, they might have been very surprised to find that an English court would apply Korean insolvency law to the substantive rights of the parties under a contract which they had agreed should be governed by English law."

[37] See paras 43–45 of the judgment.
[38] Case C-594/14 [2016] BCC116.
[39] Case C-212/15 [2017] IL para. 10.
[40] [2014] EWHC 2124 (Ch).

These comments suggest that the CBIR / Model Law Regime does not have any direct effect on the *Gibbs* principle.

CORPORATE INSOLVENCY AND RESTRUCTURING CONSEQUENCES OF BREXIT

Insolvency Proceedings

The EIR is a much more comprehensive and extensive legal instrument than either the UNCITRAL Model Law on Cross-Border Insolvency or the Cross-Border Insolvency Regulations (CBIR) which implement the Model Law in the UK. The following points emphasise why this is the case:

- Recognition of insolvency proceedings opened in another EU Member State is automatic under the EIR whereas under the CBIR / Model Law regime it is dependent upon an application to the court;
- While the assumption under the CBIR is that main insolvency proceedings should take place where the debtor has its COMI and "non-main" proceedings in a State or States where the debtor has an establishment, the CBIR does not directly allocate jurisdiction to open insolvency proceedings and existing national jurisdictional rules remain in place. The mere fact that a debtor may have assets, or even its COMI, in a particular State does not of itself confer jurisdiction on the courts of that State to open insolvency proceedings. Whether the courts have jurisdiction depends on the relevant national law as it applies to that case;
- The CBIR do not purport to say which law should govern insolvency proceedings that are opened in a particular jurisdiction;
- Under the EIR, insolvency proceedings have the same effect in other EU states as they have in the law of the insolvency forum, whereas under the CBIR the consequences of recognition depend on the law of the recognising State;
- There are many other differences of detail between the EIR and CBIR / Model Law, such as in the definition of an "establishment".

In some respects, however, the Model Law / CBIR regime is potentially wider than the EIR. It applies:

a) to insolvency proceedings throughout the world;
b) to a broader range of procedures than the EIR; and
c) a wider stay than can catch the enforcement of security.

As regards b), the Model Law provides for recognition and relief in respect of a foreign insolvency proceeding. The term "foreign proceeding" is defined in Article 2(a) of the Model Law as meaning a "collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation." The relevant definition in Article 2(i) of schedule 1 to the CBIR is in substantially similar terms. The EIR, on the other hand, only applies to those proceedings listed in Annex A to the Regulation. If national proceedings are listed, they come within the scope of the Regulation, but this is not the case if they are not listed.

It has been held in *Re Bud-Bank Leasing SP*[41] that the CBIR definition may enable the recognition of insolvency proceedings taking place in other EU Member States, even though they have not been listed in EIR Annex A. In this particular case, Polish proceedings were

[41] [2010] BCC 255.

held to fall within the CBIR definition – even though they were not listed in Annex A - since they had the characteristics of insolvency proceedings and specifically incorporated provisions of the general Polish insolvency law.

As regards c), once foreign main proceedings are recognised, then CBIR Article 20 provides that a stay / moratorium comes into effect, precluding certain proceedings against the debtor. It is specifically stated, however, that the stay does not affect rights to enforce security, rights to repossess goods under hire-purchase and retention of title agreements, rights of set-off and rights in respect of financial market transactions to the extent that all these rights would be exercisable in a domestic UK context. However, the foreign representative, at the time of applying for recognition, can apply for the effects of the stay to be modified - such as where the foreign proceedings are restructuring or "rescue" rather than liquidation proceedings - and more appropriate relief to be granted under the discretionary provisions of Article 21**.**

The relevant discretion was exercised in *Re Pan Oceanic Maritime Inc*[42] where an "administration stay" along the lines of paragraph 43 Schedule B1 to the Insolvency Act 1986 was granted, rather than the more limited "liquidation stay". The more extensive stay may bar the enforcement of security. Under the EIR, a stay will be the automatic consequence of the recognition of foreign insolvency proceedings if such a stay is a feature of the law of the State that opens insolvency proceedings. Article 8 of the new Regulation, which is equivalent to Article 5 in the original Regulation, however, provides that this stay does not affect rights *in rem* (security rights) over property in another Member State. This means that while the EIR will bar general legal proceedings against the debtor in other EU Member States, it will not bar the enforcement of security rights over the debtor's property.

Notwithstanding these qualifications, the general point remains that the EIR is a much more comprehensive legal instrument than the CBIR / Model Law. To this extent, the UK legal landscape would be impoverished by a "hard" Brexit and withdrawal from the mutual recognition and cooperation mandate under the EIR. Other EU states are also likely to be disadvantaged because their insolvency proceedings will not automatically be recognised in the UK and, in view of the *Gibbs* principle, will not have the effect of discharging debts governed by UK law. The predictable consequence of this would be an increased need for parallel proceedings with attendant cost and complexity implications.

Restructuring Proceedings

In theory, some corporate restructuring professionals might see Brexit as a business opportunity – an opportunity to break free of jurisdictional shackles imposed by the EIR or The Jurisdiction and Judgments (Brussels 1) Regulation – and to present the UK more openly as the forum in which to do restructuring business. Another view, however, sees Brexit as presenting a distinct risk – a risk that UK-sanctioned schemes of arrangement in respect of EU registered companies will not be recognised in other EU countries. The greater possibility of non-recognition is likely to militate against the attractiveness of the UK as a forum shopping venue in corporate restructuring cases. It may also be disadvantageous as far as jobs and growth in other EU countries are concerned. The domestic laws of these countries may lack the favourable corporate restructuring possibilities presented by the UK scheme of arrangement. It should be added, however, that the European Commission has recently published a proposal for a Restructuring Directive suggesting innovative new restructuring possibilities on a pan-European basis which enhances the chances that foreign companies will "shop locally" for restructuring procedures rather than in the UK.

[42] [2010] EWHC 1734 (Ch).

It seems reasonably clear that the jurisdiction of the UK courts to sanction a scheme of arrangement in respect of a foreign registered company is not negatively impacted by the EIR and the UK courts may sanction a scheme even if the relevant company does not have its COMI or even an "establishment" in the UK. This is most obviously exemplified by the use of UK schemes to restructure financial obligations governed by English law where the enactment of new domestic procedures in other Member States may not be capable of rendering the same benefits as a UK scheme. Further, it must be borne in mind that the enactment of black-letter law is merely the starting point in establishing a viable restructuring forum – much also depends on the professional, financial and judicial infrastructure to make such laws work in practice.

But, as we have seen, the position of schemes vis-à-vis Brussels 1 is much less clear. On one view, they are outside Brussels 1 since they are not strictly speaking adversarial proceedings and it is hard to see creditors whose rights are being "schemed" as "defendants". More recent cases, however, have tended to proceed on the basis that schemes are subject to Brussels 1 and then go on to consider whether the jurisdictional tests of the Regulation have been satisfied and whether the court should exercise jurisdiction. There has been some criticism on the basis that the matter is not one of discretion. The argument based on *Owusu v Jackson*[43] is that if the jurisdiction exists, it cannot be declined. According to the CJEU in *Owusu v Jackson* (at paragraph 41):

> "Application of the *forum non conveniens* doctrine, which allows the court seized a wide discretion as regards the question whether a foreign court would be a more appropriate forum for the trial of an action, is liable to undermine the predictability of the rules of jurisdiction laid … and consequently to undermine the principle of legal certainty, which is the basis of the [Regulation]."

Nevertheless, some element of discretion or at least balancing, is an inbuilt feature of the jurisdictional rules under Brussels 1. According to Snowden J in *Re Global Garden Products SpA*,[44] one may treat the company as a claimant that is suing the scheme creditors. If at least one such creditor has a UK domicile, the question then is whether it would be *expedient* to hear and determine the scheme application with respect to the other creditors so as to avoid inconsistent judgments from separate proceedings. The answer, he said, may depend upon the number and value of the creditors domiciled in the UK.

If schemes are subject to Brussels 1, then they benefit from the recognition machinery provided under that instrument. If they are outside Brussels 1, then recognition in other EU States is more difficult because recognition depends on the national private international law rules in the individual Member States. In a post-Brexit situation, if there is little or no evidence that a scheme will be recognised in a relevant foreign country, it may be hard to argue that the UK courts should sanction a scheme in respect of the foreign registered company.

There may be a chink of daylight, however, if the scheme purports to modify obligations governed by UK law, for example the scheme modifies debt obligations that are subject to English law. It is a generally accepted principle of private international law that the modification or termination of a contract is governed by the proper law of the contract. This principle is also reflected in the Rome 1 Regulation,[45] which provides in Article 12(1) that the law applicable to a contract shall govern in particular: (a) interpretation; (b) performance; (c) the consequences of a total or partial breach of obligations and "(d) the various ways of extinguishing obligations, and prescription and limitation of actions." On the other hand, Article 1(2)(f) excludes from the scope of Rome 1 "questions governed by the law of

[43] (C-291/02) [2005] QB 801.
[44] [2016] EWHC 1884 (Ch).
[45] Regulation 593/2008/EC.

companies … internal organisation or winding-up of companies". This exclusion is not very clear, but it has been suggested that the effect of a scheme of arrangement is one of the questions governed by the law of companies and therefore, it fall outside Rome 1.[46] There is, however, no decisive authority on this point.

UNILATERAL OPTIONS FOR THE UK AND THE EU POST-BREXIT

The EIR is directly applicable EU law and it will therefore cease to apply as such when the UK withdraws from the EU. The Cross-Border Insolvency Regulations, section 426 of the 1986 Act and the common law will be unaffected. It is necessary to consider each of these tools in turn.

In fashioning any unilateral response of the UK to a "hard" Brexit, it is suggested that there are two policy imperatives:

- the UK courts must be accessible to all those with a legitimate need for relief under UK law; and
- the UK courts must have a wide-ranging jurisdiction to recognise and act in aid of foreign insolvency proceedings (in particular, for these purposes, proceedings taking place in Member States of the EU).

The unilateral options in respect of the EIR are limited. The UK Government's White Paper on exiting the EU[47] speaks of its intention to covert the "acquis" into UK law "wherever practical and sensible" so as to provide a seamless transition on day one. In the present context, such an approach would be neither sensible nor practical (unless matched by corresponding action on the part of the EU) because it would ignore the essential and defining characteristic of the EIR which is the reciprocal surrender of jurisdiction in return for recognition. Any unilateral enactment of the inward effects of the EIR would tie the hands of the UK courts to deal with foreign companies (and UK companies with their COMI in the EU) regardless of the need to deal with UK debts and assets whilst achieving nothing as regards the recognition of UK proceedings.

On the contrary, the more pressing need for unilateral action would be to provide a means by which debtors with UK law obligations can obtain relief and restructure those obligations where necessary would suggest that a better option, in the absence of any bilateral solution, would be to remove the jurisdictional restrictions on the ability of foreign companies to access UK procedures under the 1986 Act by making the "sufficient connection" test applicable not only to liquidation (and schemes of arrangement) but also to administration and voluntary arrangements. The prospects of recognition elsewhere are an important consideration in this respect but one which should go to the exercise of discretion rather than the existence of jurisdiction.

As stated, the Cross-Border Insolvency Regulations will remain in place regardless and will be available in support of EU insolvency proceedings. There are legitimate arguments for the expansion of the relief available under the Regulations (for example, in relation to the enforcement of insolvency judgments and the application of foreign law) but those arguments do not arise because of Brexit. Although there is much to be said for a greater degree of international uniformity in the interpretation of provisions enacting the Model Law, there is a powerful argument that close adherence to the Model Law itself is desirable in that it promotes a more readily understood international standard. The unilateral solution, from the UK point of view, does not appear to lie in departing from the terms of the Model Law.

[46] See R Sheldon (Ed) *Cross-Border Insolvency* (4th edition, London, Bloomsbury, 2015) at p. 507.

[47] *Legislating for the United Kingdom's withdrawal from the European Union*, Cm 9446.

On the other hand, enactment of the Model Law is a unilateral action which is available to either the EU or to those Member States that have not already adopted it and would be a welcome development. This may prompt a question as to why the Member States should adopt a measure in the context of Brexit which would facilitate recognition and acting in aid of (amongst others) UK proceedings. There are two answers to this potential objection. First, adoption of the Model Law is a progressive step in the jurisprudence of cross-border insolvency and it is a step which has usually been undertaken by other enacting states, notably the US, without any requirement for reciprocity. Secondly, the terms of the Model Law make relief wholly discretionary where the proceedings are not “main proceedings” which would ensure that there was no question of Member States being required to act in aid of any UK proceedings which might be stigmatised as being the product of an exorbitant jurisdiction in respect of foreign companies.

A third and more promising possibility for the UK would lie in amendment of section 426 of the Insolvency Act 1986. This uniquely UK provision could be amended in response to Brexit in a number of ways. The UK could add EU Member States to the list of designated jurisdictions which could seek section 426 relief or, even more radically, the UK could dispense with the requirement for designation altogether. If taking this step, it would probably be sensible to dilute the “duty” to act in response to a section 426 request (which is far from being an absolute duty in any event) and make relief discretionary – particularly if dispensing with designation and thus admitting the possibility of requests for relief coming from jurisdictions (outside the EU) which have few shared values with the UK. Further updating of section 426 might also include an express discretionary power to discharge UK law debts where that is necessary to give effect to foreign proceedings. Such a solution would lack the automaticity of the EIR but would, in other respects, go a long way towards replicating its benefits for EU Member States – albeit in a more controlled manner.

Further development of the common law would, of course, be another form of possible unilateral action but it is unlikely to be significant in this context for a number of reasons. First, the significantly weakened judicial appetite for common law development. Secondly, the fact already noted that the scope for common law assistance in the UK has been marginalised by the Cross-Border Insolvency Regulations. Thirdly, although common law developments might theoretically arise out of problems created by Brexit, the common law would have nothing to do with Brexit as such.

In conclusion, there are unilateral measures open to both the UK and the EU to mitigate the potential disadvantages of a “hard” Brexit. Those disadvantages are principally the loss of automatic recognition which will occur as a natural result of the EIR falling away. In the absence of a bilateral agreement to replicate the effects of the EIR, the EU, or its Member States, could consider adopting the Model Law. The UK has already enacted the CBIR to give effect to the Model Law but could consider further amendment of section 426 to give itself even greater powers to act in aid of foreign proceedings and thereby to promote its status as a business-friendly jurisdiction in a post-Brexit environment.

However, such unilateral measures would inevitably fall short of what could be achieved, in the interests of both sides, through a new bilateral treaty between the UK and EU or, at the very least, a transitional fall-back regime in the corporate insolvency space. The suggestions made by the Commercial Bar Association (COMBAR) in respect of the Jurisdiction and Judgments (Brussels 1) regime, provide a possible model to follow in relation to corporate insolvency and restructuring.

A NEW BILATERAL FRAMEWORK?

There is a scope for a new bilateral agreement between the UK and EU post-Brexit in respect of insolvency and related matters. This would sit alongside the EIR which would continue to apply as between the 27 remaining EU Member States.

There is a broad consensus that the EIR has been successful and that its effects should be replicated, if possible. Obviously, this could be achieved by a bilateral treaty between the EU and the UK if the necessary political will exists and the matter is considered as meriting sufficient priority. In that connection, as a matter of practicality, it would probably be easier to provide for a seamless continuation of the status quo rather than to attempt to resurrect the effects of the EIR some years later after all concerned have become used to living without it. There are, however, two obvious difficulties with a simplistic approach to maintaining the status quo: first, the EIR is not a static measure and, secondly, the Court of Justice is the ultimate authority on the meaning of its provisions. Quite apart from periodic review and revision, the EIR is amended from time to time to accommodate new procedures and new Member States and, as regards the second of these difficulties, the Court of Justice's jurisdiction in UK affairs is politically controversial in the UK. That is not to suggest that either difficulty could not be finessed – merely to recognise the obstacles.

The bare bones of such an agreement could be as follows:

- The UK would recognise EU insolvency procedures etc. in line with the EIR and the EU 27 would recognise UK procedures etc. on a similar basis;
- In their interpretations, UK courts would "take account" of CJEU decisions but not be obliged necessarily to follow them, nor would UK courts be required or even entitled to make references to the CJEU;
- There would be provision for the UK to update the list of EU insolvency procedures that are automatically recognised in the UK in line with revisions to Annex A of the EIR;
- The UK would not be subject to any of the reporting requirements under the EIR.

The Commercial Bar Association (COMBAR) and the London Solicitors Litigation association group have advocated such an approach for the Judgments (Brussels 1) Regulation.[48] This paper has highlighted the relevance of the Brussels 1 regime in respect of restructuring proceedings and given the obvious overlaps between insolvency and restructuring proceedings, a similar approach appears apposite in relation to the Insolvency Regulation. Moreover, the EIR in Article 31 provides for the recognition and enforcement of insolvency judgments and insolvency related judgments in line with the Brussels 1 regime.

Certainly, the points made by COMBAR about the inadequacies of a unilateral as distinct from a bilateral approach are equally appropriate in an insolvency context. COMBAR states:[49]

> "these issues cannot be addressed solely through domestic action, for example through the Government's stated policy of incorporating certain aspects of EU law into domestic law. Whilst domestic action could be taken to address the establishment of jurisdiction in the UK, it would fail to ensure reciprocity with other States such that they would not be obligated to enforce UK judgments or allocate

[48] COMMERCIAL BAR ASSOCIATION BREXIT REPORT CONFLICT OF LAWS SUB-GROUP available at https://app.pelorous.com/media_manager/public/260/COMBAR%20Brexit%20Conflict%20of%20Laws%20%20Jurisdiction%20Report%20as%20sent%20to%20MoJ%2011.1.17%20(002).pdf.
See also http://www.barcouncil.org.uk/media/508513/the_brexit_papers.pdf at p. 14 stating similar views from the General Council of the Bar.

[49] *Ibid* at para. 17.

> jurisdiction with respect to UK nationals or domiciled corporations as is required at present. Given the vital importance of enforcement and a mutually respected system for the allocation of jurisdiction, a domestic solution is entirely inadequate."

It also argues that the portability of judgments and the predictable allocation of jurisdiction is not intrinsically linked to the free movement of goods, services or persons.[50]
COMBAR has suggested that the UK should enter into a treaty with the EU to remain bound by the Brussels 1 regime. COMBAR point to the 2005 Denmark / EU agreement[51] on the Brussels 1 Regulation. Denmark was part of the former Brussels Convention - which was outside the framework of the EU treaties - but the Brussels Convention then became a Regulation on largely similar terms. Denmark could not sign up to the Regulation because it came under the Justice and Home Affairs domain in the EU treaties in respect of which Denmark had exercised an "opt out". Denmark then negotiated this bilateral replacement agreement to cover the jurisdictional certainties that it would otherwise lose.

The proposed UK-EU agreement would be an international instrument construed in accordance with public international law. It would ensure continuity with the present regime and avoid the need for the unanimous agreement of EU Member States in the future. COMBAR suggest that in a stand-alone UK- EU Agreement, provision is likely to be made for the continued role of the Court of Justice of the European Union (CJEU) such that UK courts would "take due account" of relevant CJEU judgments. COMBAR, however, notes that such a treaty would be an international law instrument and not an EU instrument. It would need UK implementing legislation, but in accordance with generally accepted public international law principles and to ensure a harmonious and uniform interpretation, due account would have to be taken of relevant CJEU decisions in any event. "Clarification of issues of interpretation by the CJEU therefore should be seen in this light as adding to the certainty and efficacy of the system across all participating States. It is inherently undesirable that each country should reach its own interpretation…. In our view, such an obligation is therefore highly unlikely to change the approach of the English courts and agreeing to such an express proviso should not be seen as a cause for concern."[52]

CONCLUSION

Brexit gives rise to uncertainty in the insolvency space. It should be remembered, however, that the EIR and other EU instruments in this area are a relatively recent phenomenon. The original version of the EIR only came into force in 2002 and for the UK essentially to have to fall back on the Model Law regime is not like returning to the legal dark ages, though recognition of UK insolvency proceedings in other EU states may become more problematic

Brexit is also problematic in the corporate restructuring space since it is likely to mean that the recognition in post-Brexit Europe of UK-sanctioned schemes of arrangement for EU registered companies is more precarious and uncertain. This, in turn, may have a knock-on effect on the willingness of foreign companies to use the UK as a venue for corporate restructurings with a consequent loss of business for UK-based legal and other professionals. It may also result in a loss of value for EU businesses, as a well-established restructuring venue becomes more troublesome to use. It is only in the last 20 years or less, however, that the scheme jurisdiction has taken off as a vehicle of choice for foreign companies and there remain a relatively small number of such cases. As one door, and one business opportunity, closes, others may appear on the horizon. There is no reason to suppose that the same results cannot be achieved through parallel proceedings where such are necessary in order to fill the gaps left by the disapplication of the EIR to the UK – albeit

[50] *Ibid* at paras. 28,29.
[51] "Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters": see [2005] OJ L299/62.
[52] *Ibid* at paras. 22, 23.

at greater cost. While the future may be cloudy, the sunlight can break through and this essay has suggested possible ways forward. First and foremost, we conclude that continued co-operation is in the best interests of both the UK and the EU and that co-operation is in no way incompatible with UK ceasing to be a Member State. Time is, however, short when considering not only the possibility of a new bilateral treaty, but also the various steps which might be taken unilaterally to fill the void.

POSTSCRIPT

On 13 July 2017, after this essay was written, the UK Government introduced its European Union (Withdrawal) Bill (that being the formal title of the measure previously referred to as the "Great Repeal Bill"). Clause 3 of the Bill provides that "direct EU legislation" in force on the exit day will become part of domestic law on and after Brexit, but clause 7 provides for a general power to make regulations to overcome any deficiencies resulting from the retention of particular EU measures which, amongst other things, provide for reciprocity. It remains to be seen whether those provisions will be enacted in their present form and, if so, how the EIR will be treated.

The Implications of Brexit for the Restructuring and Insolvency Industry

Lessons from History

The Dissolution of Czechoslovakia

The Re-Unification of Germany

The Dissolution of Czechoslovakia

(Are there Lessons to be Learnt for Brexit?)[*]

Ernst Giese[1]

And

Zuzana Francúzová[2]

At first sight, one might ask what the dissolution of a European republic, accomplished twenty-four years ago, has to do with the impending departure of the United Kingdom from the European Union. When taking a closer look, however, history teaches us that the peaceful emergence of new states in the late twentieth century (through the dissolution of one former state, or separation of a certain region, or in any other way) is a very rare occurrence.

Czechoslovakia's velvet divorce probably serves as the best example of a relatively smooth parting of the ways in post-war Europe. It is sometimes assumed that "[n]o divorce is a particularly happy experience but it is part of life and this one has worked out well".[3]

Considering the above and the fact that there is no historical precedent of a member state exiting the European Union, some aspects of Czechoslovakia's dissolution might actually be useful in the context of the Brexit negotiations.

Certain analogies between the two "divorces" can be found in the reasons for both separations, as both have been affected by a misunderstanding among the nations forming the common entity. Disagreements between the Czechs and Slovaks over political and economic issues were not conditioned by a history of armed conflicts against each other, or atrocities committed by one or both sides.[4] The break-up of the Czechoslovak federation reflected the influence of many factors, with the tensions between Czechs and Slovaks going back to their earlier history and the differing nature of economic and national development that each of them formerly experienced as part of separate, larger political units.[5] This was mirrored by the fact that after November 1989 the values and orientations of citizens of both republics differed in many important ways, which were not limited to differing views concerning the organization of the federation.[6]

[*] The views expressed in this essay are the personal views of the author, which are not to be taken as representing the views of INSOL International or any of its affiliates or representatives.

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[3] Michael Žantovský, the spokesman and adviser to the Czechoslovak president Václav Havel, in 1992 - available at: https://www.theguardian.com/world/2012/nov/19/lesson-catalonia-czecho-slovak-divorce.

[4] Sharon L. Wolchik in Musil J. – "End of Czechoslovakia", Budapest, Central European University Press, 1995 (hereinafter referred to as "End of Czechoslovakia"), p. 230.

[5] End of Czechoslovakia, *supra* note 6, p. 225.

[6] Different polls showed that there was a substantial misunderstanding between the two groups: sizeable numbers of both Czechs and Slovaks ascribed negative traits to members of the other group and they differed considerably in their evaluations of the pace and worth of the economic and political changes that occurred after the end of communist rule. Their expectations of the state and their political preferences differed as well – support for the re-creation of a market economy was essentially lower in Slovakia (for further details see 'End of Czechoslovakia', *supra* note 6).

Despite the fact that from a geographical point of view the United Kingdom is undoubtedly understood as being part of Europe, the relationship between the United Kingdom and Europe has always been specific. Jean Monnet (one of the Fathers of Europe, a French economist, planner and statesman) wanted the United Kingdom to join the European Communities from the very beginning. The British demurred and one of Monnet's compatriots recalled in this regard the British saying: "[y]ou in Europe have been defeated; you have been occupied; that is not our situation."

Another sign of this strange relationship is the following statement during a debate of British diplomats in 1949: "Anti-European feeling is a commonplace of British thought. Everyone has relatives in the US and Canada. Most have no one in Europe except the dead of two wars."[7] However, the reasons for Brexit - officially proclaimed within the Leave campaign - were *inter alia* that Britain was being hindered by the EU and that the time had now come for Britain to make its own laws again, rather than implementing laws created through a shared decision-making process.[8]

Looking back at the dissolution of Czechoslovakia, it was widely criticised at the time for a lack of legitimacy; critics said that it was a mere political resolution which was not supported by a referendum (despite the fact that such a referendum was called for by the former Czechoslovak president as well as the public) and only a minority of Czechoslovak citizens wanted the dissolution in 1992.[9] As a referendum on Brexit was held in Britain on 23 June 2017, there is obviously nothing to be learnt from the past in this regard.

When evaluating the entire negotiation process of the Czechoslovak dissolution, there is one remark to be made. An important part of the negotiations on Czechoslovakia's dissolution was held backstage (some preliminary discussions probably took place even before the elections in 1992 and were only disclosed to the public a couple of years after the dissolution). Lobbying negotiations might of course be helpful in such a situation, but should never remain secret for such a long period of time.[10] This is also one of the reasons why no official publication which summarises the wording of official agreements and statements in regard to the dissolution has ever been issued.[11]

As for some particular aspects of the dissolution, namely the questions relating to the granting of citizenship and work and residence permits – which caused no significant problems in the dissolution of Czechoslovakia – these might serve as an inspiration, even today. These specific topics will undoubtedly represent an important point within Brexit negotiations, as there are many thousands of nationals from different EU states working in the United Kingdom. The same point will apply to the question of the recognition of the time of employment in the United Kingdom for the purposes of social and health insurance (mainly for the calculation of pensions). Considering how many foreigners from other EU countries work in the United Kingdom and *vice versa*, it is clear that an agreement protecting the interests of EU citizens working on both sides of the English Channel will be indispensable.

[7] Available at: http://www.historytoday.com/james-ellison/britain-more-european-it-thinks.

[8] Available at: http://www.bbc.com/news/uk-politics-32810887.

[9] Only 13% in the Czech Republic and only 18% in the Slovak Republic. For further details, see Srb V. and Veselý T. – *Rozdělení Československa* (Dissolution of Czechoslovakia), Bratislava, Karpaty-Infopress, 2004 (hereinafter referred to as "Dissolution of Czechoslovakia"), p. 89.

[10] Dissolution of Czechoslovakia, *supra* note 11, p. 160.

[11] Tigrid P. – "*Jak to šlo*" (How it was working), NLN, s.r.o., 1993, p. 59.

As for the division of assets, which is usually the most important (and difficult) task in every divorce, Czechoslovakia applied simple rules:

- a so-called “territorial principle” in respect of immovable property (immovable property devolved upon the newly established republic on the territory on which it was located and the same rule was applied in respect of the movable accessories of such immovables); and
- a “population ratio principle”, in the ratio of 2:1 (applied to the remaining assets, save for those that were subject to special arrangements). The remaining assets (including financial reserves and art collections) and state debts were therefore mostly divided by applying the same 2:1 ratio.[12]

Last but not least, the divorced partners should – still within divorce process – agree on how their personal relationships after the divorce will work. This was relevant also in the case of Czechoslovakia’s dissolution. On 23 November 1992, an Agreement on Good Neighbourhood, Amicable Relations and Cooperation was signed in which the contractual parties committed to regular consultations in different areas, ensuring the development of their mutual relations (with the prime ministers meeting as often as necessary, but at least once a year). This goal was obviously not achieved in the first years after dissolution. A summary report on conditions in the Slovak society,[13] issued in 1997 by the Institute for Public Matters,[14] states, *inter alia*, that "Slovak-Czech cooperation was constantly deteriorating after the dissolution. The best evidence is the fact that the architects of dissolution who were prime ministers of the newly established republics at that time (Mr. Klaus for the Czech Republic and Mr. Mečiar for the Slovak Republic) first met in October 1997, i.e. four and a half years after the dissolution.”

To conclude, Czechoslovakia’s dissolution, though completely peaceful, was far from being flawless. Both republics have been able to closely cooperate for a long time now and there are no voices calling for reunification. It might therefore be concluded that, in spite of everything, this specific divorce worked out pretty well. Considering that the United Kingdom might leave the EU, but not Europe, the most important lesson to be learnt from the dissolution of Czechoslovakia is undoubtedly the willingness to go through the entire departure process in a peaceful and cooperative way.

[12] At the time of dissolution, the population of Czechoslovakia numbered approximately 10 million Czechs and five million Slovaks. The population ratio principle was therefore applied in such a way that 2/3 of the assets passed to the Czech Republic and the remaining 1/3 to the Slovak Republic.

[13] In Slovak: *Súhrnná správa o stave slovenskej spoločnosti*.

[14] In Slovak: *Inštitút pre verejné otázky*.

The Re-Unification of Germany

(Germany after November 1989)[*]

Christoph G. Paulus[**]

EXPLANATION (RATHER THAN JUSTIFICATION) OF THIS TOPIC

As strange as it might seem to include a description of a historical reunification event into a volume dealing with a separation event to come, there are good reasons for doing so. The first one becomes apparent when the decision for Brexit is put into a larger historical perspective; the second one has to do with generational issues. The conclusion of this contribution will be that every effort should be undertaken (not only by "the" politicians but by each one of us) to reverse the process of Brexit and to re-enter the Union, not unlike the German re-unification some two and a half decades ago.

As to the historical perspective, every proponent and supporter of Brexit should be obliged to read books such as those by Brendan Simms who delivers a description, as fascinating as it is frightening, of the past 600 years under the title *Europe: The Struggle for Supremacy*. Here, the author meticulously describes that the basic political pattern of all those centuries has been to gain supremacy over the territory which was and is known as, Germany.

Everybody was involved in the struggle: England, France, Spain, the Osmanic empire, Russia, and finally Prussia from within, as it were. A constant and dominant factor in this struggle has been bloodshed, i.e. war. The first time ever that war has been prevented for a long period of time, has been the last 70 years; since the contractual agreement tamed the beast of war (and Germany). It is a matter of fact that the differences in interests continue – but the contractual connectivity of the actors of the political scenery excluded resorting to war as the last argument in disputes. By ignoring these origins, Brexiteers play a dangerous game; by stepping out from that consent, they take the first step back to path-dependent continuation of time-honoured behaviour. They tend to forget that this path led not only to glory, but also to misery and losses of hundreds of thousands, both killed and injured.

The generational reason is equally serious and makes you think twice about the wisdom of the Brexit decision. The situation in a friend's household is almost paradigmatic in this regard: not only his adult children but also his parents live in his house. As a consequence of the Brexit vote, my friend's children stopped talking to their grandparents since they, who rarely travelled abroad, had voted in favour of Brexit. The children, having never really learned what borders are in "their" Europe and in which they have travelled extensively, had failed to cast their vote in the referendum. For them, the result of the referendum is devastating.

No doubt this story is well known and is true of many households in the United Kingdom. However, the inherent pattern is interesting. The current younger generation will soon be confronted with the borders which their grandparents had grown up with, with the older

[*] The views expressed in this essay are the personal views of the author, which are not to be taken as representing the views of INSOL International or any of its affiliates or representatives.

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generation now having "imposed" these borders on them. It goes without saying that the Brexit result was achieved through a valid democratic process and the younger generation were short-sighted enough not to cast their vote, but this does not detract from the situation that many British households now find themselves in. However, the older generation has thought and argued often enough and the level of evolution that we have reached so far is well established and cannot be diminished any further. Francis Fukuyama's famous "end of history" essay is the most extreme expression of this thinking. But looking back in history and looking around in the present world, the younger generation should be taught again and again that nothing can be taken for granted and that as a result, everyone has to contribute to the continuation and improvement of the *status quo*. The abovementioned "beast" is lurking around at all times.

THE HISTORICAL BACKGROUND

In 1945, as a consequence of World War II, Germany was divided into four parts and each part was given to one of the victorious powers. Whereas the three western parts joined the western hemisphere and became part of alliances such as the NATO, the eastern part underwent a similar adaptation and joined the Warsaw Pact. That was the split which, in 1962, became brutally evident by the construction of "the wall" and which, finally, was overcome by the re-unification of Germany in 1989 when, due to unique and unforeseeable circumstances, the Soviet Union collapsed and in consequence thereof the wall was torn down.

The roughly 45 years of parallel but separate existence and the opposing orientations, brought about different developments in terms of economy, law, and many other areas, including language.[1] More than one generation on both sides had, as it were, looked in different directions; after all, those had been the days of what was labelled as "the cold war".

TRANSFORMATION

As a result of this parallel but separate existence, an enormous number of changes had to be brought about and time was of the essence given the fact that the geo-political window of opportunity was feared to be open for only a limited period of time. The lifestyle of what had now become two different nations had to be adjusted and, needless to say, the psychological mastering of the respective situations was not always optimal. Many souls were hurt in those days and contributed in no small measure to the still-noticeable tensions among at least some parts of the German population on both sides.

Arguably the biggest practical challenge of re-unification was that innumerable laws, as wide in scope from constitutional law to abortion law, from rehabilitation law to tax law, from criminal law to administrative law, had to be amended and changed.[2] Prudent commentators argued that these changes and amendments should not be done unilaterally, like a one-way street from west to east,[3] but that the west should also accept changes to its own laws. This was meant to prevent an all too strong winner / loser mentality of the respective sides; after all, amidst all the technicality of the tasks that need to be undertaken, it should never be forgotten that at the end of the day it is the individual citizens who have to live with the changes that are brought about by such major events. Change is never an emotion-free zone!

[1] As an interesting aside: the first thing South Korea does when a fugitive from North Korea manages to flee to the southern neighbour, is to put him or her into a language class! After 70 years of separation, the formerly identical language has grown apart at a rate of about 30%.

[2] See, e.g., *DDR-Justizminister Wünsche zur Rechtsangleichung beider deutscher Staaten, Deutsche Rechts-Zeitschrift* (*DtZ*) 1990, 120.

[3] See *Drobnig*, *Überlegungen zur innerdeutschen Rechtsangleichung, Deutsche Rechts-Zeitschrift* (*DtZ*) 1990, 116.

Two of the major changes referred to above shall be described here; they stand *pars pro toto* and shall, therefore, provide some indication of the enormity of the task that confronted Germany at the time. The first representative example deals with the transformation from a Soviet-style plan economy to a western-style market economy; the second example is derived from the first, using the more specific example of insolvency law.

From Soviet-style plan economy to western-style market economy

The transformation of the former East Germany from a Soviet-style plan economy to a western-style market economy was a gigantic task, particularly in light of the fact that there was literally no precedent which could be used, albeit roughly, as a guide in what was obviously uncharted territory. The first orientation point established under these circumstances, was that mentality issues among stakeholders of formerly state-owned (but soon-to-be privatised) enterprises played such an important role that it can hardly be overestimated. As a result, the transformation agency – *Treuhandanstalt* – was set up[4] with the brief of rapid privatisation, resolute restructuring and cautious winding-up if the *status quo* of a company left no other possibility. It was determined right from the outset that the *Treuhandanstalt* should make itself superfluous as quickly as possible; its mandate was therefore meant to be temporary – the shorter the better.

The transformation of the economy was based almost exclusively on law, which is a remarkable fact and an eminent badge of honour for the rule of law in general. Its goal had been to foster the upward growth of rescuable enterprises, as well as to initiate an appropriate de-merging of enterprise structures. Since this process could not be undertaken by the *Treuhandanstalt* itself, everything depended on the question as to who was taking over the enterprise. The guideline used here was not that the highest bid would determine who the acquirer is, but instead that potential buyers who were ready to invest in the firm in order to guarantee continuation of the business, should be preferred. In order to safeguard this purpose, various clauses included in the sales contracts were mandatory; they were *inter alia* directed against disinvestment market exits or speculation and they demanded minimum-employment bankruptcy prevention and investment guarantees. In light of the difficulties of selling an enterprise under these conditions, the criteria for the selection of potential investors were gradually widened to include both local and international interested parties.

This is where the second orientation point came into play, namely the careful selection of the potential buyer. The enormously fragile condition of the overwhelming majority of the former German Democratic Republic (GDR) enterprises, necessitated their protection from insolvency by material endowments and financial stabilisation. For this purpose an immediate cash program was set up, which was only one factor that contributed to the incredibly high cost of re-unification. Moreover, since these payments were actually subsidies pursuant to the European state aid law, the European Commission had to – and did – give its permission for this rescue programme. It was only after these first aid contributions had been made that the *Treuhandanstalt* had all the companies checked, by innumerable insolvency administrators and accountants from the west, in order to determine whether or not they could be rescued. Depending on the result of these investigations and examinations, potential buyers were selected.

Finally, the third orientation point was that the success or failure of the entire project was highly dependent on the functioning and loyalty of the existing institutions. This worked quite well in practical terms, although many side effects of the process had to be taken into

[4] I owe the wide description of the *Treuhandanstalt* in this essay to the former General Counsel of the *Treuhandanstalt*, Dr. Manfred Balz.

account. One of these side effects was, for example, the various enterprises' appearance on the market: there was absolutely no understanding of product merchandising in the former GDR! As a result, the *Treuhandanstalt* supported learning processes for the appointment of capable managers and for the placement of qualified advisors. In addition, the *Treuhandanstalt* used a kind of "gentle force" in the context of financial decisions such as pricing or claims enforcement. Another side effect of this transformation project was the innumerable labour law issues that arose. It will suffice to mention the initial opposition between enterprises and the *Treuhandanstalt* (instead of opposition between employer and employees), as well as the tensions between the *Treuhandanstalt* and the unions.

In the end, however, it is justifiable to conclude that this pioneering task was mastered quite successfully. To be sure, there had been more than one case where things went anything but well. Many individuals used the messy situation to their advantage in order to make big money and many of the actors spoke about wild west mentalities. But, seen as a whole, the transition worked reasonably well – and, again, it was primarily the law that guided this *tour de force*.

Entering the world of insolvency law

The preceding description might already have given the reader a vague understanding of the huge number of regulations that had become indispensable for the process of re-unification. While there are many aspects that are deserving of a closer look – think for example about the question of how expropriation by the GDR regime and the consequent restitution claims were dealt with[5] – this is not possible in a publication of this nature. However, in light of the purpose of this collection of essays, the choice of a closer look falls on insolvency law[6] – an area, after all, that falls quite far outside the Soviet-style plan economy as practiced in that part of the world.

The German Reich had enacted its *Konkursordnung* (Bankruptcy Ordinance) in 1879 and it was applied within that territory for several decades. The GDR, though, derogated it and replaced it with a very brief statute, called *Gesamtvollstreckungsverordnung* (Total Enforcement Decree). This decree was applied in rare cases where the few GDR remnants of private ownership were at stake. In contrast, the BRD (West Germany) kept the *Konkursordnung* but recognized the need for reformation, particularly in the wake of the oil crises in the early 1970s and after the enactment of the Bankruptcy Reform Act in the USA in 1978. The discussion about the shape and content of the new insolvency law dragged on for quite some time – to such an extent that it was still ongoing at the time of re-unification.

This had some impact on at least some of the rules that were eventually contained in the reformed law. For example, a few years after the wall had come down, an enormous and politically significant number of East German households had become hopelessly insolvent due to common western sales practices to which the former GDR inhabitants had never been exposed to before. As a result, the German legislator was bound to do something in order to help these families. The new law therefore had to introduce, for the first time in German insolvency legislation, rules dealing with a discharge.

Since the *Länder* (States) feared that the discharge provision would become very expensive for them, the Federal legislator found a compromise by postponing the commencement of the new *Insolvenzordnung* (Insolvency Ordinance) for a period of five years (until 1 January 1999) and ordered the continued application of the *Konkursordnung* for the western part of

[5] In this regard, *cf.* Leutheusser-Schnarrenberger, *Bewältigung der rechtlichen Probleme der Wiedervereinigung, Deutsche Rechts-Zeitschrift* (DtZ) 1994, 290 (the author was the German Minister of Justice at the time).

[6] In this regard, *cf.* Schmidt-Räntsch, *Das Insolvenzrecht nach dem Einigungsvertrag, Deutsche Rechts-Zeitschrift* (DtZ) 1990, 344; Paulus, *Währungsunion und Insolvenzrecht, Wirtschaftsrecht 1990*, 107.

Germany, i.e. the BRD in its former shape. The eastern part of Germany – i.e., the territory of the former GDR – received its own insolvency law in the shape of a modernized Decree, now called the *Gesamtvollstreckungsordnung* (Total Enforcement Ordinance). Not only did this Ordinance contain a discharge rule (modelled on Swiss law) that applied for the first time in Germany, it also contained the first unambiguous commitment to the principle of universality in cross-border cases. A couple of other minor amendments resulted in this temporary legislation being utilised as an experimental ground for some of the innovations contained in the *Insolvenzordnung* (Insolvency Ordinance), which has been the common insolvency legislation for a unified Germany since its inception in 1999.

CONCLUSION

A re-entry of the UK into the European Union would certainly create completely different challenges than the ones described here. The task at hand would certainly be much easier, since there would after all be no need to overcome two diametrically opposed ideologies as was the case in the re-unification of Germany. But the German re-unification demonstrates that the sheer amount of adaptations that are needed in order to achieve this are enormous and that it takes time and patience to master the agenda step-by-step. The re-unification of Germany also demonstrates that it takes a long time to adjust the mentality of the people themselves. For insiders, conflicts between *Wessis* and *Ossis* (those from the former west and those from the former east) are still visible within Germany – more than 25 years after re-unification. This type of undertaking is a long-term project and therefore requires politicians with vision.

The Implications of Brexit for the Restructuring and Insolvency Industry

Views from Europe

Introduction and Orientation

European Union

France

Germany

Greece

Ireland

Netherlands

Introduction and General Orientation[*]

Michael Veder[**]

INTRODUCTION

Brexit is a serious and important development for the European markets. This series of essays examines the possible implications of Brexit for the restructuring and insolvency industry in a number of European jurisdictions: France, Germany, Greece, Ireland and the Netherlands. In addition, one of the essays presents a bird’s eye-view of the current state of development of EU insolvency law and sketches a few hypotheses on the impact of Brexit on such a process from an EU perspective. As Stanghellini points out in his essay, in all fields of economic activity, the magnitude of the potential problems arising from separating four decades of unified markets is immense and the area of insolvency law is no exception.

The loss of UK input and influence in the process of harmonizing substantive rules on business recovery and insolvency that the EU has embarked upon, is regarded as a loss by many. English insolvency tools have become popular in Europe and, in many instances, serve as an important example in law reform projects in the EU, because they are perceived as flexible, quick and responsive to business needs. It has been pointed out in several of the essays that with Brexit the EU will lose an important source of thrust towards the goal of creating efficient insolvency regimes throughout the EU.

The essays show that Brexit is likely to have an impact on the recognition of UK insolvency proceedings in EU Member States, with the exception of Greece perhaps. The same is true for the recognition of UK schemes of arrangement. In the absence of applicable conventions, recognition will again become an issue that will have to be addressed under the domestic laws of the Member States. This creates a patchwork of approaches with sometimes uncertain outcomes, which may make the UK a less attractive jurisdiction to effect a pan-European restructuring.

However, the essays also show that Brexit may create opportunities for other European jurisdictions to replace the UK as an insolvency and restructuring jurisdiction of choice. This has sparked something of a “beauty contest” between several EU jurisdictions that want to position themselves as an attractive hub for restructuring.

If these essays are indicative of anything, it is that we are not only living in uncertain times, but also in interesting times.

[*] The views expressed in this essay are the personal views of the authors, which are not to be taken as representing the views of INSOL International or any of its affiliates or representatives.

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The European Union[*]

Lorenzo Stanghellini[**]

INTRODUCTION

"*Difficile est longum subito deponere amorem*" (Catullus): it is difficult to stop the effects of a love relationship that has lasted for a long time. Perhaps the relationship between the United Kingdom ("UK") and what is now the European Union ("EU") cannot be described as "love"; nonetheless, for more than 40 years it has produced an intricate web of connections between European countries and the UK that is now difficult to abruptly bring to an end.

In their excellent introductory essay, McCormack and Anderson[1] describe both the issues at stake as well as the possible avenues that can be used to address such issues. The same can be said of the national essays in this publication that look at Brexit from the viewpoint of some Member States.

In this essay, I will attempt to provide a bird's eye-view of what the current state of development of EU insolvency law in the field of insolvency and restructuring is. I will also sketch a few hypotheses on the impact of Brexit on such a process from an EU perspective.

EU LAW IN THE FIELD OF INSOLVENCY: A RAPIDLY EXPANDING SUBJECT

Until 2015, EU law has been concerned only with procedural coordination rules aimed at providing European-wide recognition to national insolvency procedures. However, the law governing such procedures continued to be strictly domestic, without any EU provisions restricting Member States' discretion in this field. This was true for both "normal" commercial firms (in accordance with Regulation (EC) 1346/2000) and for banks and financial institutions (in accordance with Directive 2001/24/EC, on the reorganisation and winding up of credit institutions).[2]

However, the divide between EU rules granting EU-wide recognition to insolvency procedures among all Member States and national rules governing insolvency started to dissolve following the financial crisis. In the wake of the failure (or near-failure) of many systemic financial institutions, it was realised that the mere coordination of national procedures was not sufficient to ensure the smooth functioning of the Single Market. In 2012, the EU institutions started to devise substantive rules aimed at harmonising national proceedings and tools applicable to banks and financial institutions. These efforts gave rise to the Bank Recovery and Resolution Directive (2014/59/EU), which provides for a set of procedural tools to deal with insolvent banks, amongst which the "bail-in" stands out.[3]

[*] The views expressed in this essay are the personal views of the authors, which are not to be taken as representing the views of INSOL International or any of its affiliates or representatives.

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[1] Gerard McCormack and Hamish Anderson, "The Implications of Brexit for the Restructuring and Insolvency Industry in the United Kingdom" – hereinafter referred to as McCormack and Anderson (this essay can be found in this publication *ante*).

[2] See also, for insurance companies, Directive 2001/17/EC, on the reorganisation and winding up of insurance undertakings.

[3] Directive 2014/59/EU deals also with tools aimed at reducing the possibility that banks become insolvent and at facilitating the recovery of banks in difficulty.

The financial crisis, however, had another effect. The huge amount of non-performing loans ("NPLs") that resulted from the economic recession and which threatened the stability of banks and Member States (via the sovereign debts burdened by bank rescues), shed light on the fact that the harmonisation of the proceedings purported to deal with bank crises is merely part of the solution. The stability of the financial system is indeed strictly dependent on the efficiency of the debt collection tools, and therefore (also) on the efficiency of ordinary restructuring and insolvency procedures.

This link is based on two different, yet convergent, assumptions. On the one hand, the lack of efficient restructuring procedures may lead to the failure of financially distressed but viable firms and thus to the loss of jobs and more NPLs. On the other hand, the huge stock of NPLs that have accumulated as a result of the financial crisis, constitutes an important investment opportunity that should be made available to the widest possible pool of investors in the interests of banks and the economy as a whole. Thus, in 2015, the European institutions, through a consistent set of statements and official acts, have vowed to reduce the fragmentation of EU Member States' legislation in the field of insolvency procedures, which was regarded as a hurdle to the establishment of a well-functioning single market.[4] Such efforts should have taken the form of a directive in the field of insolvency law.

At more or less the same time in 2015, the update and recast of Regulation (EC) 1346/2000 was completed: indeed, Regulation (EU) 2015/848 was finalised in May 2015. It is to be noted that the EU has so far not taken any steps to force, or even recommend, the adoption of the UNCITRAL Model Law on Cross-Border Insolvency ("Model Law") by Member States, or even simply the adoption by them of a set of coherent principles for the recognition of non-EU cross-border insolvency cases. In other words, the EU has so far been concerned only with intra-EU cross-border cases, while the recognition of cross-border cases originating from non-EU jurisdictions has been neglected.

THE 2016 PROPOSAL FOR A DIRECTIVE

As a result of the above-mentioned combined effort, after a little more than a year from its conception, the EU has crossed a long-standing barrier and has started to navigate the uncharted waters of the harmonisation of national insolvency procedures. On 22 November 2016, the European Commission published a proposal for a Directive "on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures".

In essence, the directive has five distinct goals. The most significant one is to bind Member States to introducing rules and common tools aiming at ensuring that viable enterprises in financial difficulty have access to effective national preventive restructuring frameworks that enable them to continue operating (Articles 4 to 17). National, harmonised frameworks

[4] See the Five Presidents' Report "Completing Europe's Economic and Monetary Union", 22 June 2015, which states that "[a] true Capital Markets Union also requires other improvements, some of which can only be achieved through legislation, such as: […] the most important bottlenecks preventing the integration of capital markets in areas like insolvency law, company law, property rights and as regards the legal enforceability of cross-border claims". The report was followed by the Letter of President Juncker and the First Vice-President Timmermans to the European Parliament's President Schulz, 9 September 2015 (Priority 4: "A Deeper and Fairer Internal Market with Strengthened Industrial Base" require the "launch and follow-up to the new Internal Market Strategy, including… an initiative on business insolvency law and improved enforcement to simplify life of consumers". The European Commission quickly followed with the Capital Market Union Action Plan (COM(2015) 468 final), of 30 September 2015, in which it is stated that it "will propose a legislative initiative on business insolvency, including early restructuring and second chance, drawing on the experience of the Insolvency Recommendation. The initiative will seek to address the most important barriers to the free flow of capital, building on national regimes that work well (Q4 2016)".
Before 2015, EU institutions had issued only soft law: see in 2011, the European Parliament Recommendation to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)); in 2012, the European Commission Communication on new approach to business failure and insolvency (COM (2012) 742 final); in 2014, the Recommendation on a new approach to business failure and insolvency (C(2014) 1500 final).

would allow the debtor to achieve a composition with creditors based on three models: i) fully consensual, ii) through an intra-class cram-down (which binds only minority creditors in a class with creditors in a similar position) and iii) through a cross-class cram-down (which, under certain conditions, binds also one or more dissenting classes of creditors to a value-maximising plan). Shareholders will not be able to unreasonably block the adoption of a plan that restores the viability of the business and maximises other stakeholders' wealth (Article 12).

No less important, though, are the four remaining goals:

- ensuring that honest, over-indebted entrepreneurs are given a second chance subsequent to a full discharge of debt after a reasonable period of time (Articles 19 to 23);
- setting duties and safe harbours for the directors of financially distressed companies acting in the "twilight zone" (Article 18);
- introducing effective early warning tools to facilitate awareness for debtors, especially SMEs, regarding their financial situation with a view to encouraging early filings for restructurings (Article 3); and
- improving the efficiency of restructuring and liquidation procedures through specialised courts, adequately trained insolvency practitioners, improved communication means and mandatory statistical data collection by the Member States (Articles 24 to 29).

Although the proposed directive covers only a fraction of the applicable national insolvency systems (liquidation procedures, that form the bulk of insolvency cases across the EU, remain unaffected), the task is extremely challenging. The proposed Directive will encounter strong national resistance, both to the introduction of new concepts (for example, the cram-down and "best interest of creditors" test) and to the loss of sovereignty in the field of insolvency law (affecting also the national systems of securities, which is jealously retained in the domain of Member States). However, the ball has been set in motion and it would appear to be difficult to stop it from gaining momentum.

This conclusion is confirmed by other recent developments: the European Economic and Financial Affairs Council (ECOFIN) of 11 July 2017 has approved an action plan to address the problem of non-performing loans in the banking sector.[5] The plan outlines a mix of policy actions to help reduce the stock of NPLs (which remain at high levels within the EU) and to prevent their future emergence. One of the four pillars of this line of action is the renewed thrust to "the reform of insolvency and debt recovery frameworks"*.* It is unclear what shape (if any) further initiatives in this field will take, but it is fair to say that in the years to come we will see more substantive harmonisation, not less.

THE POSSIBILE IMPACT OF BREXIT

Brexit is likely to influence this recent process, although it is too early to say in which direction. Many UK firms have assets or subsidiaries in EU countries and even more EU firms have assets or subsidiaries in the UK. Moreover, thousands of debt instruments in place between non-UK creditors and debtors have chosen UK law as the law governing these instruments. In the case of financial distress or the insolvency of debtors, recognition of national procedures and decisions across the English Channel can no longer be taken for granted, in both directions.

[5] See the press release at: http://www.consilium.europa.eu/en/meetings/ecofin/2017/07/11/.

In all fields of economic activity, the magnitude of the potential problems arising from separating four decades of unified markets, as pointed out by all the European essays in this issue, is immense. Insolvency law is no exception: decisions could be disregarded on both sides and the assets of debtors subject to insolvency proceedings in the UK (which has adopted the Model Law and has a long-standing tradition of comity)[6] could in theory be seized in an EU Member State that has not adopted the Model Law – and most EU Member States have not yet done so.[7] The resulting chaos would not be in the interests of anyone: neither the UK nor the EU. It is not reasonable to think that the EU would stand looking at this potential disaster, doing nothing.

WHAT SCENARIOS, AFTER BREXIT?

While many scenarios could in theory occur after Brexit, one thing is sure: the substantive harmonisation of insolvency law has probably ended for the UK, as good or as bad as this may be.[8] On the other hand, the EU will lose an important source of thrust towards the goal of efficient insolvency procedures and, more substantially, towards the goal of an efficient judiciary. It will of course be possible for the EU to look at the UK system, in much the same way as it could look at any other country's system. However, the capacity of the UK to positively contribute to insolvency law reforms from inside the EU institutions will be lost forever.[9]

The problem of procedural coordination and mutual recognition of national insolvency procedures between Member States and the UK, remains. As pointed out above, the EU has so far not taken any steps to address the situation regarding non-EU cross-border insolvency cases. In my view, this cannot hold, especially in the wake of Brexit and the resulting problems it will most likely create.

Despite the harshness of the current Brexit talks, it appears likely that the hatchet will eventually be buried. The adoption of a bilateral agreement aiming at replicating large parts of Regulation 848/2015, drawn along the general lines proposed by McCormack and Anderson, appears to be the most sensible thing to do.[10]

If all else fails, it is reasonable to think that, after Brexit, the EU will unilaterally press the Member States, now faced with many more non-EU cross-border cases, to adopt an outward-facing measure: be it the Model Law or an even more structured set of rules.
The free-fall in the disarray that would result from no agreement at all and, at the same time, no unilateral, mitigating action from the EU, would be deeply unreasonable: and we want to believe that a reasonable solution will eventually emerge.

[6] See McCormack and Anderson, *supra* note 1.

[7] Only four EU Member States have adopted the Model Law as of September 2017 (Greece, Poland, Romania and Slovenia). See the status of the adoption of the UNCITRAL Model Law on Cross-Border Insolvency at: http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html.

[8] For example, the UK will continue not to have a restructuring mechanism that allows for a cross-class cram-down, which it would have been bound to introduce in its system if the directive proposal is approved as it currently stands (Article 11).

[9] Three extremely competent UK experts assisted the European Commission in the preparation of the 2016 proposal for directive mentioned above.

[10] McCormack and Anderson, *supra* note 1, under the heading "A New Bilateral Framework?".

France[*]

Nicolas Partouche**

INTRODUCTION

When it comes to cross-border insolvencies and restructuring proceedings, the United Kingdom ("UK") seems to be one of the most frequented destinations in Europe for forum shopping. Global competition in this area is mainly with the US Chapter 11 procedure, but has recently increased with the addition of Singapore as a jurisdiction which has made claims to becoming an important actor in cross-border restructurings, not only for the Asia-Pacific region but globally.

The apparent success of the UK scheme of arrangement, cleverly presented as a corporate restructuring tool that falls outside the scope of the EIR (both the original and recast versions), is probably part of the explanation for such success, in addition to, more generally, the importance in Europe of London as a stock market and financial centre. In 2017, *Doing Business* ranked the United Kingdom 12th amongst the OECD countries, whereas France is ranked 20th, which confirms that English insolvency and restructuring proceedings are more attractive than the proceedings available under French law.

However, this description of the British success story is somewhat diminished in regard to companies, or groups of companies, whose hearts are located in France. The number of schemes of arrangement approved in respect of French companies can be counted on one hand. Moreover, 51.9 % of the citizens of the United Kingdom responded "No" to the question: "Should the United Kingdom remain a member of the European Union?". In our view, this will soon have an impact on the attractiveness of insolvency and restructuring proceedings in the UK.

From a French standpoint, we cannot ignore the difficulties resulting from Brexit, particularly in regard to the recognition and efficiency in general of decisions made post-Brexit by the English courts. This situation could also create an opportunity for France to be part of the "beauty contest" among Member States to promote the efficiency and attractiveness of the French toolkit that is available to address and solve special situations in insolvency and restructuring proceedings.

CONSEQUENCES OF BREXIT FOR CROSS-BORDER INSOLVENCIES AND RESTRUCTURINGS

The immediate consequences of Brexit for cross-border insolvencies and restructurings shall first be analysed through the question of the recognition of decisions made by English courts, both in the area of insolvency proceedings (falling in the actual scope of the 2015/848 European Insolvency Regulation ("EIR")) and in the field of so-called corporate restructurings in regard to schemes of arrangement (which fall outside the scope of the EIR).

[*] The views expressed in this essay are the personal views of the author, which are not to be taken as representing the views of INSOL International or any of its affiliates or representatives.

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In fact, as soon as the UK leaves the European Union (“EU”), it will no longer be subject to EU regulations. The EIR will cease to apply to the UK and UK court decisions will lose the automatic recognition they currently enjoy in EU Member States. The UK will also lose all the positive effects of the EIR, as developed in the recast regulation, on interaction between several proceedings opened in different Member States.

No solution for recognition can be found in the UNCITRAL Model Law on Cross-Border Insolvency (“Model Law”) at this stage as France, like most of other Member States of the EU, have not implemented the Model Law.

The same issue will have to be addressed in regard to schemes of arrangement. Pre-Brexit there is already “considerable uncertainty”[1] regarding the application of Brussels 1 for the recognition of schemes of arrangement in France. Post-Brexit, assuming that no alternative will be put in place, English court decisions will no longer benefit from the recognition provided for by Brussels 1.

This being the case, we will have to refer to the basic regime of *exequatur* to see how easy or difficult it will be to enforce an English court decision in France relating to insolvency or corporate restructuring proceedings.

An application for *exequatur* has to be made through a summons before the *Tribunal de Grande Instance*. It must be emphasised that this Court is not really acquainted with insolvency proceedings as it is mostly competent in regard to civil actions, while insolvency proceedings and restructurings for companies having commercial activities are conducted and controlled by the *Tribunal de Commerce*.

From a practical point of view, in order to obtain the *exequatur* of the initial decision, a summons will have to be delivered under the French rules of civil procedure (including a bailiff and translation of documents to be delivered) at the request of the debtor company to all parties to the initial proceeding.

Depending on whether all the creditors concerned are considered in England as a party to the insolvency or corporate restructuring proceeding, it can raise cost and delay issues, in particular with respect to parties located outside of France.

Three conditions have been set by case law to obtain the *exequatur* of a foreign court decision:

(a) Indirect jurisdiction of the English Court

This condition is met if the French rules on conflict of jurisdiction do not grant exclusive jurisdiction to the French Courts, the foreign decision has a clear link with England and the election of jurisdiction in England has not been made in fraud.[2]

The link with England will be seen as sufficient in regard to a single company incorporated in France that wants to restructure financial debt governed by English law, particularly if the legal documentation provides for UK jurisdiction in case of litigation.

[1] See G. McCormack and H. Anderson, “The Implications of Brexit for the Restructuring and Insolvency Industry in the United Kingdom” [McCormack and Anderson]. This essay appears in this publication *ante*.

[2] *Cass. Civ 1ère, 6 février 1985 ; pourvoi n°83-11241.*

However, in the context of a more global restructuring (including, but not limited to, “English debt”), where England has been chosen as an amicable place for a corporate restructuring (thanks to the scheme of arrangement), we cannot exclude the possibility, for example, that local French creditors crammed-down in the scheme will allege the existence of a fraud in the abusive use of forum shopping in England in order to avoid the application of more strict and protective rules provided for by French law.

(b) Compliance with international French public policy statutes

There is case law that rules that a foreign decision will not be compliant if it contains elements that are contrary to the main principles of French law on insolvency proceedings.[3]

In respect of collective insolvency proceedings, the moratorium on the pre-filing of claims is considered a main principle of French law.[4]

Not surprisingly, we have not yet been able to identify any decision of the French courts relating to an *exequatur* in respect of a scheme of arrangement. It is not clear how this condition could be applied to a scheme of arrangement which has no direct equivalent under French law. There is probably some room here in the future for litigation by displeased creditors.

(c) Lack of fraud in respect of legal obligations

This last condition is usually seen as a repetition of the first condition mentioned above, which explains that the French courts focus their attention on these two conditions.

Last but not least, a French judgment that grants an *exequatur* to an English court decision may be appealed by the parties to such judgment and it may be also challenged by third parties to the judgement if they can justify an interest in doing so. In this regard, it should be noted that even if the foreign judgment has been granted with immediate execution (notwithstanding any appeal in its country of origin), the execution of the *exequatur* judgment in France is not immediate and will be suspended for the duration of the appeal procedure if an appeal is lodged.

In conclusion (and without entering into too much detail regarding the French *exequatur* proceeding), it is clear that the route to obtaining an *exequatur* of an English court decision on an insolvency proceeding (and even more so in regard to the enforcement of scheme of arrangement), is not easy. The specific context of negotiations with creditors of companies facing difficulty, may increase the risk of litigation brought by displeased creditors. In other words, the risk on the efficiency in France of a scheme adopted by the English courts, is a reality post-Brexit.

In this regard, the question of the adoption of other regimes to fill the gap left by the consequences of Brexit (including the recognition of judgements) also arises and different solutions have been suggested by McCormack and Anderson.[5]

[3] *Cass.Civ 1ère 8 juillet 2010 ; pourvoi n°08-21740.*

[4] *Cass. Civ. 1ère 6 mai 2009 n°08-10281.*

[5] McCormack and Anderson, *supra* note 1.

In regard to recognition, one solution could come from the implementation in France of the UNCITRAL Model Law, to match the adoption of the Model Law by the UK in the Cross-Border Insolvency Regulations ("CBIR").[6] In addition, it is noted that France participated in the deliberations of UNCITRAL Working Group V which recently (10 - 19 May 2017) constructed a draft Model Law dealing with the recognition and enforcement of insolvency-related judgments. It is our view that this could be interpreted as a positive sign.

However, it is also possible that France may try to take advantage of the UK's possible isolation post-Brexit.

AN OPPORTUNITY FOR FRANCE TO BECOME AN ATTRACTIVE LOCATION REGARDING INSOLVENCY AND RESTRUCTURING PROCEEDINGS?

It is well known that several "non-English" companies have used the English scheme of arrangement to restructure their debt, including Rodenstock (incorporated in Germany), Vivacom (incorporated in the Netherlands and Bulgaria) and Zodiac (incorporated in France).[7]

Considering the situation post-Brexit, it would appear that the beauty contest amongst EU Member States has already started. Examples are Ireland, which can promote (in addition to being a Member State) the fact that it is the only other English language Member State and has its own version of the scheme of arrangement; and the Netherlands, which is already promoting a new restructuring toolkit that is currently under development.

Nobody except the French have ever considered France as an attractive place for restructuring. This can probably be attributed to the general perception that France is more attractive to employees than to entrepreneurs and that French insolvency legislation has long been seen as favouring the debtor and not the creditors.[8]

But the attractiveness of the scheme of arrangement in a "hard" post-Brexit scenario might be challenged by the French toolkit and its possible future development.

The attractiveness of the scheme of arrangement

The scheme of arrangement can be used to restructure English companies as well as overseas companies, thanks to its broad scope of application. Indeed, the only requirement is a "sufficient connection"[9] between the UK and the company that will be subject to a scheme, which makes it easy for foreign companies (whether they are solvent or insolvent)[10] to require the opening of a scheme proceeding and to benefit from its advantages.

The scheme of arrangement allows for a restructuring of the debt and for the management to remain in control of the company (debtor in possession), contrary to many countries' formal insolvency proceedings.[11]

In addition, the constitution of classes of creditors is the main strength of the scheme of arrangement and actually complies with the latest proposal of the Proposed Directive of the

[6] *Ibid*., "The Model Law is international soft law which countries have implemented in somewhat different ways".
[7] A. Plainer, A. Wilkinson, P. Bromfield, A. Wood, M. Lawford, (Weil Gotshal & Mange), "Schemes of arrangement as Restructuring Tools", §13, p.10 [Plainer *et al*].
[8] H. Bourbouloux, A. Pérès, J. Loget and P. Chatelain, *The International Insolvency Review*, 2nd Ed., Law Business Research, Ch. 12, France, p.168 [Bourbouloux *et al*].
[9] A. Wilkinson, A. Wood, K. Stephenson (Weil Gotshal & Mange), "Scheme Hot Topics Bulletin": Part I, § Jurisdiction, p.1 [Wood *et al*].
[10] Plainer *et al*, *supra* note 9, §3, p.2.
[11] Wood *et al*, *supra* note 11, Part III – Schemes vs Chapter 11, § Control, p. 4.

EU Commission.[12] Indeed, classes of creditors are made up with creditors whose rights are "not so dissimilar as to make it impossible for them to consult together with a view to their common interest".[13]

The efficiency of this proceeding is also ensured by the use of a cram-down. It allows the English courts to sanction a scheme of arrangement even where creditors representing the minority in any class, voted against the scheme. In a nutshell, the scheme of arrangement allows a company to modify its initial obligations agreed by the majority of its creditors without using an insolvency proceeding.

However, the scheme of arrangement is not the only proceeding that provides such advantages.

What already exists under French law?

French insolvency legislation has shifted over the years to provide more protective rights for creditors.[14] In this vein, France also has a very efficient toolkit in order to restructure (solvent or insolvent) companies facing difficulties and which allows the debtor to remain in possession.

The combination (for the same company) of pre-insolvency confidential tools (like conciliation proceeding) and public proceedings (like "fast-track safeguard") with, at each stage, the assistance of an insolvency practitioner - which is a guarantee for both the debtor and the creditors that the negotiation and the restructuring will be conduct in a fair manner protective of legitimate interests - is indeed probably unique!

The financial fast-track safeguard ("SFA") and the fast-track safeguard ("SA") record a 70% success rate in practice.[15]

Both these proceedings involve two stages:

- First, a confidential conciliation proceeding is opened, which usually brings around the table of discussion the debtor and the main parties among each class of creditors, with the active participation of an insolvency practitioner appointed by the Court. Subject to specific requirements provided by legal documentation, the discussion remains confidential so that it does not harm the business of the debtor, in particular for companies having a Business to consumer model (BtoC). The debtor company remains in possession and may even obtain an individual stay against aggressive creditors who refuse to join the discussion;
- As soon as an agreement is reached with a sufficient number of creditors which would lead the company and the insolvency practitioner to think that a positive vote might be obtained at committee level, a time-efficient public proceeding is opened which also triggers a moratorium (stay). If the debt that is to be restructured is exclusively financial, the SFA proceeding is used. In all other cases, the SA proceeding is used.

[12] Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, Procedure 2016/0359/COD.

[13] Plainer *et al*, *supra* note 9, §6, p.5.

[14] Bourbouloux *et al*, *supra* note 10, p. 168.

[15] Directorate General for Internal Policies of the Union, The Commission Insolvency Proposal and its Impact on the Protection of Creditors, p.7.

The restructuring plan has to be approved by a two-thirds majority in value of the claims of the creditors voting at both the credit institutions committee and the general meeting of bondholders. For the SA, an additional positive vote from the committee of goods and services providers must be obtained with the same majority requirement. In this regard, French proceedings appear more flexible and could therefore be more attractive than the scheme of arrangement, which must be approved by a majority of 75% in value and a majority in number of the creditors within each class.[16]

Both the SA and the SFA proceeding enable a cram-down of dissenting creditors who represent less than one third of the value of the claims of the creditors in each class and the opening of the proceedings triggers an automatic stay against all creditors.

The swift time frame within which this process takes place, is one of the most attractive elements of these proceedings: in the case of the SFA proceeding, the proposed restructuring plan has to be approved within one month after the opening of the proceeding, which can be extended by the court to two months. In the case of the SA proceeding, the maximum duration is three months.

The costs involved in the process (including advisors' fees) are usually less important in France than in the UK or in the US.

The main differences between these proceedings in France and the English scheme of arrangement, are that UK schemes of arrangement:

- do not provide for any formal moratorium,[17] and
- there is no possibility of setting up a debt restructuring agreement in complete confidentiality (which is the case when agreement is reached at the conciliation stage of the French proceedings).

This French toolkit has been used successfully by companies having a European and even a worldwide footprint, cases where they could probably have attempted to use a scheme in the UK or the Chapter 11 procedure in the US.

It of course needs to be borne in mind that the international attractiveness and efficiency of the SA and the SFA procedures came about due to their incorporation in Annex A of the EIR. Consequently, the main issue for foreign companies will be to demonstrate that their COMI is located in France in order to file for the opening of those proceedings. This could be seen as a constraint in comparison to the soft links required to open scheme of arrangement proceedings in the UK. However, it is important to note that this constraint does not exist with the same intensity at the first stage, when the opening of a pre-insolvency proceeding might be required. If the company really wants to benefit from the full French restructuring package, this will probably give the debtor company sufficient time to contemplate a modification in the organisation of its company or group to better qualify for a COMI located in France.

Moreover, there is no doubt that Brexit might lead foreign investors, or companies entering into the market, to anticipate which country might be more favourable in the case of a restructuring and to choose France (in addition to the other obvious, but less legal, reasons) as the perfect place to set up their COMI from the very beginning.

[16] R. Dammann and G. Podeur, "*Les enjeux de la réforme des comités de créanciers, La semaine juridique Entreprises et Affaires*", n°47, 19 nov. 2009, 2094, §40.

[17] The English courts have discretion to stay litigation pending the scheme outcome. Wood *et al*, *supra* note 14, Part III Schemes vs Chapter 11, p. 3.

CONCLUSION

In conclusion, a source (The Directorate General for Internal Policies of the European Union) that might be seen by certain readers as being more objective than the author of this contribution, publicly stated that the "French law (…) two-stage model (…) provides for more extensive restructuring tools than the scheme of arrangement".[18] This opinion did not include post-Brexit considerations, nor possible future improvements to French insolvency proceedings as a result of the adoption and implementation (under French law) of the proposed directive 2012/30/EU,[19] that will in particular include a cross-class cram down.

Brexit might just create opportunities for France to be seen as a friendly jurisdiction for cross-border insolvency and corporate restructuring proceedings.

[18] Directorate General for Internal Policies of the Union, The Commission Insolvency Proposal and its Impact on the Protection of Creditors, p.7.

[19] Proposed Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharges procedures.

Germany[*]

Reinhard Bork[**]

INTRODUCTION

The cross-border insolvency relationship between Germany and the United Kingdom is rather tense. German debtors move to England in order to obtain a discharge under English law. German companies believe that German restructuring law is not very helpful and prefer to restructure their debts by entering into English scheme of arrangement proceedings, as evidenced by a remarkable list of cases, starting with *Rodenstock GmbH*[1] and *Primacom Holding GmbH*[2] and ending with *Apcoa*.[3] Against this background, the German focus is on recognition. Currently, decisions of English courts are recognised automatically, since Article 19(1)(1) of the European Insolvency Regulation[4] ("EIR") as well as Article 36(1) Brussels I Regulation (recast)[5] provide for automatic recognition of decisions handed down by courts of other Member States. After Brexit, however, the matter of recognition and enforcement is at the mercy of national cross-border insolvency and procedural laws, unless the negotiations on the terms and conditions of the UK leaving the EU result in creative solutions on a bilateral or multilateral level. The impact of Brexit on recognition under German law has been discussed by many authors[6] and is summarised below.

INSOLVENCY PROCEEDINGS

In Germany, recognition of foreign insolvency proceedings is regulated by Article 19 EIR as far as proceedings opened in another Member State of the EU are concerned. Regarding insolvency proceedings opened in non-EU-Member States, section 343(1) of the *Insolvenzordnung*[7] ("InsO") applies. According to this statutory provision, which resembles Article 19 of the EIR, the opening of foreign insolvency proceedings shall be recognised automatically. However, automatic recognition can be withdrawn if the courts of the state of the opening of proceedings do not have jurisdiction in accordance with German law, or if recognition leads to a result which is manifestly incompatible with major principles of German law, in particular if it is incompatible with fundamental rights (public policy exception).

[*] The views expressed in this essay are the personal views of the author, which are not to be taken as representing the views of INSOL International or any of its affiliates or representatives.

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[1] *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch).

[2] *Re Primacom Holding GmbH (No 1)* [2011] EWHC 3746 (Ch) and *(No 2)* [2012] EWHC 164 (Ch).

[3] *Re Apcoa Parking (UK) Ltd. and Ors.* [2014] EWHC 997 (Ch). The scheme included the German companies APCOA Parking Holdings GmbH and APCOA Parking Deutschland GmbH.

[4] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, [2015] OJ L 141 p. 19.

[5] 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, p. 1.

[6] Selected articles on the German perspective: *Robert Freitag/Stefan Korch*, "*Gedanken zum Brexit – Mögliche Auswirkungen im Internationlen Insolvenzrecht, Zeitschrift für Wirtschaftsrecht*" (ZIP) 2016, 1849-1857; *Burkhard Hess*, "Back to the Past: BREXIT *und das europäische internationale Privat- und Verfahrensrecht, Praxis des Internationalen Privat- und Verfahrensrechts*" (IPRax.) 2016, 409-418; *Peter Mankowski*, "Brexit and European International Insolvency Law", *Hamburg Law Review* (HLR) 2017, 8-19; *Peter Mankowski*, "The European World of Insolvency Tourism: Renewed, But Still Brave?", *Netherlands International Law Review* (NILR) 64 (2017), 95-114; *Stefan Sax/Artur M. Swierczok*, "*Die Anerkennung des englischen* Scheme of Arrangement *in Deutschland post Brexit, Zeitschrift für Wirtschaftsrecht*" (ZIP) 2017, 601-607; *Stefan Sax/Artur M. Swierczok*, "The Recognition of an English Scheme of Arrangement in Germany Post Brexit: The Same But Different?", *International Corporate Rescue* (ICR) 2017.

[7] Insolvency Ordinance - English text available at www.gesetze-im-internet.de/englisch_inso/index.html, last accessed 23 August 2017.

The first exception (international jurisdiction in accordance with German law) is of relevance here. It applies the so-called *Spiegelbildprinzip* (principle of reflection) and requires German courts to examine whether English courts which have opened insolvency proceedings under English law, would have had jurisdiction if German law were applied to determine international jurisdiction of the court. German courts will most likely follow the doctrine of the CJEU in *Schmid v Hertel*[8] and determine their international jurisdiction by applying Article 3 of the EIR, which means that the debtor's centre of main interests (COMI) is decisive. The same is true under national German cross-border insolvency law. According to section 3 InsO, which is applicable to determine local as well as international jurisdiction, courts are only competent to open insolvency proceedings if the centre of the debtor's self-employed business activity is within the court's district (jurisdiction).[9] This is very close to the COMI-test under Article 3(1)(2) of the EIR. Either way, the opening of insolvency proceedings by English courts is not recognisable in Germany unless the debtor has its COMI in England. As opposed to this, the mere fact that a debtor with a COMI in Germany has close connections to England – particularly, that its contracts are governed by English law – does not suffice.

JUDGMENTS

Similarly, after Brexit, judgments of the English courts will no longer be automatically recognised under Article 36 of the Brussels I Regulation (recast). Which rules will apply instead, is unclear at this stage. One possibility is that the Convention between the Federal Republic of Germany and the United Kingdom of Great Britain and Northern Ireland for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters as of 14 July 1960,[10] could be revived after Brexit.

Alternatively, German national cross-border civil procedure law could apply. According to section 328 of the *Zivilprozessordnung*[11] ("ZPO"), a judgment handed down by a foreign court is automatically recognised unless:

- the courts of the state to which the foreign court belongs do not have jurisdiction according to German law;
- the defendant, who has not entered an appearance in the proceedings and who takes recourse to this fact, has not duly been served the document by which the proceedings were initiated, or not in sufficient time to allow him to defend himself;
- the judgment is incompatible with a judgment delivered in Germany, or with an earlier judgment handed down abroad that is to be recognised, or if the proceedings on which such judgment is based are incompatible with proceedings that have earlier become pending in Germany;
- the recognition of the judgment would lead to a result that is obviously incompatible with essential principles of German law, and in particular if the recognition is not compatible with fundamental rights; or
- reciprocity has not been granted.

Beginning with reciprocity, this is guaranteed by the Convention of 14 July 1960.[12] The decisive prerequisite is therefore international jurisdiction under the *Spiegelbildprinzip* (principle of reflection): German courts can only recognise English judgments if English

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

[9] If no such activity exists, the courts will have jurisdiction if the debtor's place of residence or registered seat (which is deemed to be the place at which it has its administrative centre) is within the court's district - Article 3(1)(1) InsO.

[10] The Convention is published in the German *Bundesgesetzblatt* 1961 II, 301 *et seq*.

[11] *Zivilprozessordnung* (Code of Civil Procedure) - English text at https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0044, last accessed 23 August 2017.

[12] *Cf. supra* note 10.

courts have international jurisdiction under German law.[13] In Germany, international jurisdiction is not regulated in special rules. Hence, the general rules on local competence apply.[14] These rules do not settle for a sufficient connection with the forum state, but instead refer to the residence[15] or registered seat of the defendant, which is deemed to be the place where the defendant has its administrative centre.[16] Here, again, we more or less end up at the COMI of the defendant. However, (international) jurisdiction is also available where the defendant has assets[17] or where the claim in question is to be performed.[18] Jurisdiction clauses are accepted in Germany as well, provided they have been validly incorporated.[19] Finally, a court before which a defendant enters an appearance will also have jurisdiction.[20] In sum, whether recognition of English judgements will be granted or not in the post-Brexit era, will depend on the facts of each individual case.

SCHEMES OF ARRANGEMENT

The important question as to whether English court decisions sanctioning a scheme of arrangement for a company with its COMI in Germany will be recognised, is difficult to answer. If scheme proceedings are assessed as foreign insolvency proceedings within the meaning of section 343 of the InsO, recognition can only be granted if the company has its COMI in England. However, the German *Bundesgerichtshof* [21] has ruled that English scheme proceedings are not governed by German international insolvency law, since the prevailing opinion requires collective proceedings similar to liquidation proceedings, meaning that substantive insolvency and the involvement of all creditors is necessary.[22] This excludes scheme proceedings from the scope of section 343 of the InsO.

Hence, court decisions sanctioning a scheme of arrangement can only be recognised under the Convention of 14 July 1960, or under section 328 of the ZPO. Again, the specific norms that are applicable are uncertain. Under section 328 of the ZPO, the decisive prerequisite is international jurisdiction in accordance with the *Spiegelbildprinzip* (principle of reflection).[23] This can be a difficult matter both in principle as well as depending on the facts of the individual case. Several questions arise:

- German jurisdiction law refers to the affairs of the defendant. However, it is entirely unclear as to who is regarded as the defendant in a scheme procedure. Is it the company that defends itself against opposing creditors, or is it the creditor who objects to the application by the company to sanction the scheme?
- If the company is the defendant and the company has its COMI[24] in Germany and no considerable assets in England,[25] it does not suffice to have creditors in England or to have the underlying contract governed by English law.
- If the creditors are the defendants, jurisdiction would at least be granted to creditors with a residence or administrative centre in England.[26] But what about the German creditors? Does jurisdiction for English creditors extend to their fellow German creditors? Unlike Article 8(1) of the Brussels I Regulation (recast), German civil

[13] ZPO, s. 328(1) No. 1.
[14] *Ibid*., ss. 12 *et seq*.
[15] *Ibid*, s. 13.
[16] *Ibid*., s. 17.
[17] *Ibid*., s. 23.
[18] *Ibid*., s. 29.
[19] *Ibid*., s. 38.
[20] *Ibid*., s. 39.
[21] BGH, Federal Court of Justice.
[22] BGH, 15.02.2012 – IV ZR 194/09 (“Equitable Life“), ZIP 2012, 741, paras. 22 *et seq*.
[23] Under the Convention of 14 July 1960, international jurisdiction is also decisive yet regulated by its Article IV.
[24] ZPO, s. 17 (administrative centre).
[25] *Ibid*., s. 23.
[26] *Ibid*., ss. 13, 17.

procedure law does not provide for a common venue for joint parties *ex lege*, but requires a decision of a superior court as to where these parties can be sued as joined parties.[27] Is such a decision of a superior court a requirement for recognising the scheme sanctioning?

- To avoid these difficulties, the only remedy seems to be a valid jurisdiction clause.[28] However, the conditions under which such a jurisdiction clause will be valid are also unclear. Section 38 of the ZPO permits such clauses, albeit under certain formal requirements. Whether these requirements can be met if the jurisdiction clause is implemented retroactively after the commencement of the scheme negotiations (or even during the scheme proceedings[29]) and whether this is possible by a majority vote of the creditors involved, is still unexplored and German courts will thoroughly examine the validity of the jurisdiction clause in question.

CONCLUSION

It follows from the above that practitioners will mourn the cessation of European recognition law in relationship between Germany and the UK. Certainly, problems which must be handled can be handled and will be handled in practice. However, in many respects it is entirely unclear at present how German courts will answer the recognition question. This is particularly true for the recognition of schemes of arrangement in Germany. Hence, Brexit will amplify legal uncertainty unless the Brexit negotiations lead to satisfying results.

[27] *Ibid*., s. 36(1) No. 3.
[28] *Ibid*., s. 38.
[29] *Cf. Re DTEK Finance B.V.* [2015] EWHC 1164 (Ch).

Greece[*]

Stathis Potamitis[**]

INTRODUCTION

English law is familiar to Greek practitioners as it is frequently used in transactions with an international dimension, especially financing transactions. Recent sovereign bond issues provide a good example of reliance on English law for transactions originating in Greece; corporate bonds are also frequently governed by English law, as are most shipping financing agreements.

By contrast, there has been very limited resort to English proceedings or tools for companies seeking to restructure or address potential insolvency. Nevertheless, there have been cases of companies moving their centre of main interests to the UK in the hope of subjecting themselves to English insolvency laws. The best-known example involves the Luxembourg based holding company of a Greek telecommunications operator, the case of *Re Hellas Telecommunications (Luxembourg) II SCA*.[1] The most likely explanation of why Greek entities, unlike other European entities, have not been attracted by UK proceedings is that the Greek economy has remained relatively closed to foreign investment and, as a result, there have been very few insolvencies or restructurings with an international dimension.
In view of the above, we would not expect Brexit to have a significant impact on the Greek insolvency and restructuring industry. We also note that Greece is better placed than many other EU countries to deal with the anticipated non-application of the European Insolvency Regulation ("EIR") to the UK post-Brexit, i.e. to facilitate recognition in Greece of insolvencies originating in the UK, as it has adopted the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law").

POST-BREXIT: RECOGNITION AND ENFORCEMENT OF UK INSOLVENCY PROCEEDINGS IN GREECE – THE IMPORTANCE OF THE MODEL LAW

In formal terms, the most obvious impact of Brexit will be the inability to rely on the EIR for the recognition and enforcement of insolvency proceedings originating in the UK. This would not seem to have an immediate serious practical impact. To date, there are no reported cases involving the application of the EIR in Greece for UK proceedings. Moreover, given the limited number of bankruptcies declared in Greece (according to the most recent statistics, there were only 189 bankruptcies declared in the whole of 2015[2]), it is very unlikely that there have been many cases in the opposite direction.

In any case, the impact of not being able to rely on the EIR will be lessened by the adoption by Greece (in 2010) of the Model Law. Greece is only one of 5 EU countries to have adopted the Model Law (the others being the UK, Poland, Romania and Slovenia).[3]
Law No. 3858/2010 of the Hellenic Republic,[4] which substantially repeats the text of the Model Law, introduces the concept of recognition of a foreign insolvency procedure upon

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[1] [2009] EWHC 3199 (Ch); [2010] B.C.C. 295.

[2] Corporate insolvencies in Europe 2015/16, Creditreform International.

[3] See http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html.

[4] *Government Gazette* A 102/01.07.2010.

application made by the foreign insolvency representative to the competent court. It also provides for cooperation between domestic and foreign courts and domestic and foreign insolvency representatives in cross-border insolvencies and reorganisations. Law No. 3858/2010 applies when the debtor has assets in more than one state, or when some of its creditors are not from the state where bankruptcy proceedings were opened.

While Law No. 3858/2010 repeats to a large extent the text of the Model Law, preserving even the numbering of the provisions, caution is required with the definition of "foreign proceeding", as Law No. 3858/2010 seems to apply only to foreign proceedings that involve the appointment of an insolvency representative (*syndikos*).[5] Accordingly, Greek law will not allow recognition of proceedings in which the debtor remains in control of its assets and affairs ("DIP proceedings"). In addition, the Greek court will refuse recognition if it identifies a violation of public order. This is due to the fact that Law No. 3858/2010 departs from the text of the Model Law, which provides for non-recognition only where the foreign procedure is "manifestly" contrary to the public order. The difference may be slight, but may still provide an opening to litigants to successfully resist recognition.

This is not intended to suggest that the Model Law is a perfect substitute for the EIR. Under the EIR recognition is automatic and the filing of an application for recognition by the insolvency representative is not required. Moreover, a judgment declaring the opening of insolvency proceedings issued by a court of a Member State is recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings.[6] In addition, the recast EIR also covers pre-insolvency "rescue" proceedings, which are outside the scope of the Model Law. Other recent additions that are outside the scope of the Model Law include synthetic secondary proceedings and provisions for the co-ordination of group insolvencies. Nevertheless, the fact that Greece has adopted the Model Law makes the expected loss of the application of the EIR less of a problem for Greece than for many other EU countries.

CONCLUDING REMARKS

Perhaps one of the most important consequences of Brexit for the Greek insolvency industry is the loss of British influence on what seems to be a trend towards harmonisation of the substantive rules on business recovery and insolvency within the European Union. English insolvency tools have become popular with European entrepreneurs because they are perceived as flexible, quick and responsive to business needs. These are precisely the features that Greek insolvency law and practice lack and it is precisely those needs that we would hope to address through the process of gradual harmonisation of the European rules and practices. It is therefore a source of regret that this harmonisation is now likely to proceed, post-Brexit, without the participation of the jurisdiction that seems to have had the greatest practical success in dealing with insolvency and business rescue.

[5] Article 2(a) of Law No. 3588/2010.

[6] However, the EIR allows that there may be exceptional circumstances where the effects of recognition or enforcement of a judgment declaring the opening of insolvency proceedings in another Member State would be contrary to the public policy of a Member State; in such a case that State may refuse to enforce such judgment - art. 33 (recast) Regulation (EU) 2015/848 on insolvency proceedings.

Ireland[*]

Jane Marshall[**]

and

Moya Moore[***]

INTRODUCTION AND BACKGROUND

Corporate insolvency and bankruptcy in Ireland operate for the most part within the framework of European law. The impact of the Insolvency Regulation[1] has been supplemented by the Rome Regulation[2] on choice of law and the Brussels Regulation[3] on the recognition and enforcement of judgments in civil and commercial matters.

On the corporate side, apart from liquidation, Ireland has a long-standing and well-developed regime for corporate restructuring in the form of examinership. Under examinership the company, or group of companies, benefits from comprehensive court protection, including a prohibition on enforcement of security during the period of the examinership, pending the implementation of a scheme of arrangement. A company incorporated outside Ireland is permitted to utilise the examinership regime, provided its "centre of main interests" ("COMI") is in Ireland and it meets the other preconditions for court protection, namely that it has a reasonable prospect of survival as a going concern.

Irish law includes provisions for schemes of arrangement in terms which are very similar to the English law provisions. Schemes of arrangement under the Companies Act, 1963 ("CA 1963") were not used frequently in Ireland to effect compromises between insolvent companies and their creditors. This was due to a number of factors, including the success of the examinership regime and the fact that the procedure includes a very limited form of stay. The Companies Act, 2014 ("CA 2014") simplified the procedure, now requiring only one court application to effect a scheme of arrangement.

As with examinership, a company incorporated outside Ireland is permitted to utilise a scheme of arrangement, provided its COMI is in Ireland. Irish schemes of arrangement are not an insolvency procedure designated for automatic recognition under the Insolvency Regulation and thus require recognition in other EU member states by virtue of the Brussels Regulation.[4]

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[1] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, recently recast by Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

[2] 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).

[3] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, restated by 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 (recast).

[4] The English Court will not exercise its discretion to approve a scheme of arrangement if the scheme will not be effective, or is not capable of achieving its substantial purpose. In the case of foreign companies, this criterion often requires consideration by the English court of whether the scheme will be recognised in other jurisdictions where the relevant

In recent years, the term of Irish bankruptcy has been reduced from twelve years to a period of just twelve months, bringing the Irish regime in line with that of the UK.[5] The Personal Insolvency Act, 2012 introduced three new procedures for personal insolvency, the debt settlement notice, the debt settlement arrangement and the personal insolvency arrangement, each of which is recognised under the Insolvency Regulation. As a result, there is now a variety of options for dealing with personal insolvency in Ireland, all of which have extra-territorial effect within the EU.

For a period, Ireland experienced forum shopping out of the jurisdiction in the context of personal insolvency. However, the pattern of bankruptcy tourism out of Ireland has all but ceased since 2012. Despite the Insolvency Regulation, Ireland has not experienced any pattern of insolvency tourism into Ireland. Recent changes to both corporate and personal insolvency law in Ireland, however, may make Ireland a more attractive destination for the insolvent forum shopper.

BREXIT: THE VISTA

What Brexit will ultimately look like remains, at present, entirely unclear. Our assumption for the purposes of this essay is that Britain will choose a "hard Brexit". It is necessary therefore for us to consider what, if anything, will replace the Insolvency Regulation in cross-border matters involving Britain.

We will consider this question from the Irish perspective, in terms of "recognition outward" and "recognition inward" – post-Brexit what treatment can we expect for Irish insolvency proceedings in Britain and what should British practitioners expect for the recognition and enforcement of British insolvency proceedings in Ireland?

Post-Brexit: the continuing relevance of COMI

Notwithstanding Britain's withdrawal from the EU, individuals domiciled, and companies incorporated, in the UK will remain liable to be made subject to an Irish insolvency procedure, if their COMI is in Ireland.

In *Re Harley Medical Group (Ireland) Limited*[6] the Irish Court, "guided by the approach adopted by Lloyd J."[7] in *Re Brac*,[8] determined that the jurisdiction conferred on the court of a particular member state by virtue of a debtor's COMI being located in its territory, applies even where the debtor is incorporated or domiciled in a non-EU country.

Post-Brexit: recognition and enforcement of Irish insolvency proceedings in Britain?

Prior to the introduction of the Insolvency Regulation, Irish insolvency practitioners were accustomed to applying to the Irish Court for a letter of request, followed by an application to an English court for an order in aid, for the recognition and enforcement of Irish insolvency proceedings in Britain. Such applications were based on the common law and on section 426 of the UK Insolvency Act, 1986.

company has a significant pool of assets or creditors. In this context, based on expert evidence the English Court has been satisfied that a scheme would be recognised in other EU jurisdictions on the basis of the Brussels Regulation, where the Brussels Regulation is relied upon by the English court in accepting jurisdiction over the company. See for example *Re Van Gansewinkel Groep B.V.* [2015] All ER (D) 241 (Paragraphs 71-75).

[5] Personal Insolvency Act 2012 and Personal Insolvency (Amendment) Act 2015.

[6] *Re Harley Medical Group (Ireland) Limited* [2013] 2 IR 596.

[7] *Ibid*., at para. 33.

[8] *Re Brac Rent-A-Car International Inc* [2003] 1 WLR 1421.

This option has now been supplemented by Britain's adoption of the UNCITRAL Model Law through the Cross-Border Insolvency Regulations.[9]

It is anticipated that such applications will resume post-Brexit, adding a burden in both time and cost to the Irish cases, though it is likely that recognition and enforcement will ultimately be forthcoming.

Post-Brexit: recognition and enforcement of British insolvency proceedings in Ireland?

Prior to the Insolvency Regulation, pursuant to section 250 of CA 1963 the Irish court was empowered to act in aid and enforce orders of a court of any country (made for, or in the course of, a winding up) where the country had been recognised for the purposes of the Act by ministerial order. Britain and Northern Ireland were specifically recognised for the purpose of this section.[10]

Those provisions were repealed with the introduction of CA 2014. Though section 250 was replaced by section 1417 of CA 2014 in substantially the same terms, the Minister may not designate any EU Member State other than Denmark for the purposes of that section. As a result, Britain and Northern Ireland lost their special status under Irish company law.

Similarly on the personal insolvency side, prior to the Insolvency Regulation the Irish court was empowered to act in aid of the courts of bankruptcy of certain specified jurisdictions including Northern Ireland, Scotland and England and Wales under the Bankruptcy Act, 1988[11] ("BA 1988"). However, the recognition of those jurisdictions was repealed by the statutory instrument which implemented the Insolvency Regulation in Ireland.

Ireland has not adopted the UNCITRAL Model Law on Cross-Border Insolvency. Accordingly, the position for both corporate and personal insolvency will fall back to common law principles once the Insolvency Regulation ceases to apply to Britain. There has been limited consideration in Ireland of the position with regard to non-EU insolvencies at common law. It does appear, however, that Irish law differs from the law in Britain quite significantly in this regard. It is necessary to draw an important distinction between the *recognition* of foreign insolvency proceedings, and *enforcement* in Ireland of orders made in foreign insolvency proceedings. It is also unclear whether the Irish court would be prepared to afford recognition to a foreign insolvency procedure of which there is no equivalent under Irish law.

Ireland has followed *Cambridge Gas Transport v Official Committee of Unsecured Creditors of Navigator Holdings*[12] in respect of the recognition of insolvency proceedings, in the context of both personal[13] and corporate insolvency.[14]

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

[10] Companies (Recognition of Countries) Order 1964.

[11] Section 142.

[12] *Cambridge Gas Transport v Official Committee of Unsecured Creditors of Navigator Holdings* [2006] 3 WLR 689.

[13] *David K. Drumm, a Bankrupt* (High Court, 13 December 2010).

[14] See, e.g., *Fairfield Sentry Limited (in liquidation) & Anor. v. Citco Bank Nederland NV & Ors.* (High Court, 28th February, 2012) in which liquidations of the British Virgin Islands were recognised and *Re Valartis Group AG* Record Number 2015/52 FJ in which a Swiss administrator (equivalent to an Irish examiner) was recognised (see http://www.williamfry.com/newsandinsights/news-article/2016/01/13/high-court-recognises-swiss-corporate-insolvency-and-restructuring-proceedings).

Re Mount Capital Fund Limited (in liquidation)[15] is the leading Irish authority regarding the principle of universality in insolvency proceedings. In that case, the High Court recognised orders for the liquidation of two companies made by the Eastern Caribbean Supreme Court in the British Virgin Islands ("BVI"). Recognition was sought as a precursor to applications by the BVI liquidators for orders requiring the companies' Irish auditors and financial advisors to furnish them with certain documents required in the course of the liquidation. In making orders recognising the BVI liquidations, the High Court emphasised that no enforcement was sought in the liquidators' application, suggesting that such an application might fall to be decided upon different principles.

Mount Capital has been endorsed by the Supreme Court in *A.A. v B.A.*[16] and in *Re Sean Dunne (A Bankrupt).*[17] In *Dunne,* considering a claim that the Irish Official Assignee in Bankruptcy had no jurisdiction to deal with the assets of the bankrupt where there had been a prior foreign bankruptcy order, the Supreme Court held:

> "There have been a number of recent decisions of the High Court in this jurisdiction which recognise that at common law an inherent jurisdiction exists, deriving from the underlying principle of universality of insolvency proceedings, by virtue of which the courts in this jurisdiction can give recognition to insolvency proceedings in a foreign jurisdiction and act in aid of the court in that jurisdiction."

The distinction between recognition and enforcement drawn in *Mount Capital* arose from the seminal case of *Re Flightlease (Ireland) Limited.*[18] In that case, the Supreme Court cautioned against the indiscriminate adoption of the law in *Cambridge Gas*, finding that the enforcement of foreign judgments *in personam* in Ireland would fall to be decided upon traditional conflicts of law principles. This was so even where a judgment arose in the course of an insolvency process. *Cambridge Gas* appeared to extend the English common law beyond those traditional boundaries, contemplating the enforcement of orders in the nature of judgments *in personam* where the order is made in the course of insolvency proceedings. The Supreme Court was critical of the approach of recognition of orders "even though a foreign judgment in personam in similar terms and circumstances would not be recognised."

Irish case law in which foreign insolvency proceedings have been recognised, has been limited to procedures for which there is an equivalent procedure in Irish law. The Irish court is familiar with the concepts of liquidation and bankruptcy, and is unlikely to have reservations recognising foreign equivalents, subject to the facts of the particular case. Even in the case *Re Valartis*, involving a Swiss procedure in which an administrator was appointed for the purposes of a restructuring, it appears from the limited reports available that the application for recognition was founded on the similarities between the Swiss law process and examinership.[19]

Administration under English law is a procedure for which there is no Irish equivalent. Thus, some doubt may arise as to whether an administration would be recognised in Ireland. We are not aware of any instance of administration being recognised in Ireland pursuant to the common law jurisdiction prior to the Insolvency Regulation. In our view, it cannot be assumed that recognition would be given as a matter of course.

[15] *In re Mount Capital Fund Limited (in liquidation)* [2012] IEHC 97.

[16] *A.A. v B.A.* [2015] IESC 102.

[17] *Re Sean Dunne (A Bankrupt)* [2015] IESC 42.

[18] *In the matter of Flightlease (Ireland) Ltd. in Voluntary Liquidation* [2012] IESC 12.

[19] *Re Valartis Group AG*, *supra* note 14, in which a Swiss administrator (equivalent to an Irish examiner) was recognised (see http://www.williamfry.com/newsandinsights/news-article/2016/01/13/high-court-recognises-swiss-corporate-insolvency-and-restructuring-proceedings).

In light of the foregoing, British insolvency practitioners should be mindful of the following points where they seek recognition and enforcement in Ireland pursuant to a request for an order in aid:

(a) Recognition:

The Irish court may recognise foreign insolvency proceedings, in accordance with its inherent common law jurisdiction. We anticipate that the Irish court will be amenable to exercising this jurisdiction in favour of the recognition of British insolvency proceedings post-Brexit. However:

- Recognition is not automatic: a substantive (rather than purely procedural) court application is required, with the attendant implications in terms of time and cost;
- Recognition is not certain: the inherent jurisdiction of the court is subject to there being "no discretionary reason for withholding recognition"[20] and the court being "satisfied that recognition is being sought for a legitimate purpose";[21]
- Recognition could be limited: the Irish court may not grant recognition in respect of a procedure for which there is no Irish equivalent;
- Recognition is subject to challenge: unlike insolvency procedures in a domestic context, the Irish court will hear objections from interested parties in the context of applications for recognition of a foreign insolvency process.

(b) Enforcement:

Whether an order made in the course of non-EU insolvency proceedings will be enforced in Ireland falls to be determined on a case by case basis depending of the nature of the order. Case law indicates that even where foreign proceedings are recognised in Ireland, enforcement of orders made in those proceedings do not follow as a matter of course.

Under EU law, Ireland is not permitted to enter into a bilateral agreement with Britain to deal with these matters,[22] but there are steps that it could take to mitigate some of the effects of Brexit for British insolvency practitioners seeking assistance from the Irish court:

- Section 1417 CA 2014: once Britain is no longer a Member State, Ireland could designate Britain by secondary legislation as a country recognised for the purpose of section 1417, permitting the Irish court to act in aid of an order made by a British court for, or in the course of, winding up a company as if the order has been made by the Irish High Court;
- Section 142 BA 1988: Ireland may also re-designate the courts of England & Wales, Scotland and Northern Ireland as courts to which the Irish court and its officers may act in aid in any bankruptcy matter;
- UNCITRAL: Ireland could adopt the UNCITRAL Model Law on Cross-Border Insolvency into Irish law.

[20] *Cambridge Gas*, *supra* note 12, at para. 21.
[21] *Mount Capital, supra* note 15, at para. 5.3.
[22] EU members states cede their discretion to enter into bilateral arrangements with any non-EU country in the area of the Common Commercial Policy under Part 5 of the Treaty on the Functioning of the European Union (TFEU).

BREXIT: OPPORTUNITIES FOR IRELAND?

There are undoubtedly many challenges for Ireland dealing with Brexit, but there may also be some opportunities.

Britain has historically seen an influx of debtors (both individual and corporate) moving their COMI to Britain in order to avail of its insolvency procedures and its lenient bankruptcy regime. However, transferring COMI to Britain may be less attractive post-Brexit. The uncertainty for recognition may pose particular discomfort for individuals seeking to move again and have their bankruptcy recognised at home or elsewhere in the EU, or for companies seeking restructuring that will enable them to continue to trade in the EU post-procedure. Contractors and financiers may also be less inclined to choose English law to govern their contracts or the English courts to resolve their disputes.

As Ireland will be the only remaining English-speaking member state, with a common law system similar to Britain's, Ireland may become a destination of choice for increased international commerce and for debtor's seeking to move their COMI to a country with well-developed systems for insolvent restructuring. The recent improvements to Irish procedures for both personal insolvency and corporate schemes of arrangement will increase Ireland's attractiveness as a restructuring destination.

The Netherlands[*]

Michael Veder[**]

and

Sijmen de Ranitz[***]

INTRODUCTION

The United Kingdom is the second most important trade partner for the Netherlands after Germany. In 2016, the import from the United Kingdom amounted to roughly EUR 21 billion and the export from the Netherlands to the United Kingdom amounted to roughly EUR 39 billion.[1] As a consequence, Brexit and the manner in which Brexit will eventually take place, may have a serious impact on the Dutch economy.

This paper does not address the wider economic implications of Brexit for the Netherlands. In this essay, we focus on some of the possible implications of Brexit on the restructuring and insolvency practice in the Netherlands.

Up to now, the EU Insolvency Regulation[2] provides a clear and convincing framework to address cross-border issues that may arise in insolvency proceedings that involve both the Netherlands and the UK. The clarity and predictability provided by the EU Insolvency Regulation falls away as soon as the Insolvency Regulation ceases to apply to the UK following Brexit.

We will not address the effects of Brexit on the recognition in the United Kingdom of insolvency and restructuring proceedings opened in the Netherlands. The tools that are available in the United Kingdom after the Insolvency Regulation has ceased to apply, to provide assistance to insolvency practitioners and courts in Dutch insolvency proceedings, notably the Cross-Border Insolvency Regulations that have implemented the UNCITRAL Model Law on Cross-Border Insolvency in the UK, have been addressed by McCormack and Anderson.[3]

In this essay, we will focus on the impact that Brexit will have on the recognition in the Netherlands of insolvency proceedings opened in the UK and restructurings through a scheme of arrangement under part 26 of the UK Companies Act 2006. We will conclude with a brief outlook on the possible opportunities that Brexit may entail for the insolvency and restructuring industry in the Netherlands.

[*] The views expressed in this essay are the personal views of the authors, which are not to be taken as representing the views of INSOL International or any of its affiliates or representatives.

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[1] Source: *Centraal Bureau voor de Statistiek* (Statistics Netherlands) (www.statline.cbs.nl).

[2] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

[3] G. McCormack and H. Anderson, “The Implications of Brexit for the Restructuring and Insolvency Industry in the United Kingdom”. This essay appears in this publication *ante*.

THE IMPACT OF BREXIT ON RECOGNITION OF ENGLISH INSOLVENCY PROCEEDINGS

Assuming that after Brexit the Insolvency Regulation ceases to apply to the UK and no agreement is reached between the EU and the UK to apply the same or similar rules (and in the absence of applicable conventions between the UK and Member States[4]), the effects of UK insolvency proceedings in Member States of the EU must be determined on the basis of each relevant Member State's own rules of private international law.

With regard to the Netherlands, this means that UK insolvency practitioners and courts must (again) try to come to terms with the lack of a clear, coherent and modern statutory framework in Dutch law for cross-border insolvencies. Dutch domestic international insolvency law is largely based on case law, in particular of the Dutch Supreme Court (*Hoge Raad*).[5] This case law, however, does not provide for a coherent, clear and convincing set of rules either. Dutch law, for example, still adheres to the outdated and troublesome territoriality principle in order to determine the effects that foreign insolvency proceedings may have in the Netherlands. Furthermore, many of the questions arising in a cross-border insolvency context have not (yet) been addressed in litigation before the *Hoge Raad*, leading to undesirable uncertainty.

In its decision of 13 September 2013, regarding the insolvency of the Russian oil company Yukos, the *Hoge Raad* provided some clarity on the extent to which foreign insolvency proceedings and the insolvency practitioners appointed in them are recognised in the Netherlands.[6] The *Hoge Raad* confirmed its long-standing adherence to the territoriality principle, but at the same time mitigated the consequences thereof. The *Hoge Raad* held that, insofar as an international regulation that is binding on the Netherlands does not determine otherwise, an insolvency proceeding opened in another State has territorial effect. According to the court, this entails that the legal effects of an insolvency proceeding under the laws of the State where the proceeding has been opened (*lex concursus*) cannot be invoked in the Netherlands insofar as that would result in unpaid creditors no longer being able to take recourse – either during or after the insolvency proceeding – against the assets of the debtor that are situated in the Netherlands. However, the court also decided that other legal effects attached to insolvency proceedings under the *lex concursus*, including the powers of the insolvency practitioner to manage and dispose of the debtor's assets, are in principle recognised and given effect to in the Netherlands.

This decision was helpful, as it provided clarity in respect of what had been a controversial issue up to that point, i.e. the question as to whether a foreign insolvency practitioner can sell assets of the debtor that are situated in the Netherlands. But many other important questions remain unanswered. For example, it is unclear what the relevance is of the location of the debtor's centre of main interests ("COMI"). Should a distinction similar to the Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency be made between foreign main and foreign non-main proceedings when determining the scope of the foreign proceedings and the powers of foreign liquidators appointed in them? If so, who should decide (and when) whether the foreign proceedings were opened in the State of the debtor's COMI? Unlike the Insolvency Regulation, Dutch domestic private international law also lacks a coherent set of conflict of laws rules that determine the law applicable to a great

[4] Insolvency proceedings are excluded from the scope of application of the Convention between the Kingdom of the Netherlands and the United Kingdom of Great Britain and Northern Ireland, providing for the Reciprocal Recognition and Enforcement of Judgments in Civil Matters, The Hague 17 November 1967, see art. 2 e).

[5] For an overview of Dutch domestic international insolvency law, see *inter alia*: P.M. Veder, *Cross-Border Insolvency Proceedings and Security Rights*, Deventer: Kluwer, 2004, chapter II; B. Wessels, *International Insolvency Law*, 4th edition, Deventer: Kluwer, 2015, chapter II.

[6] HR 13 September 2013, ECLI:NL:HR:2013:BZ5668.

number of fundamental issues arising in a cross-border insolvency context. Even though it is not unlikely that Dutch courts will, in principle, apply similar conflict of laws rules to those laid down in the EU Insolvency Regulation, more guidance and legal certainty would be helpful.

The approach of the Dutch *Hoge Raad* to the effects of foreign insolvency proceedings in the Netherlands, as set out above, creates substantial risks for the success of a cross-border restructuring in UK insolvency proceedings. In its Yukos judgement of 2013, the *Hoge Raad* reconfirmed its position that creditors can continue to take recourse against the debtor's Dutch assets, notwithstanding the fact that insolvency proceedings were opened abroad (unless the Insolvency Regulation applies). We take the view that it is undesirable and unacceptable in this day and age to maintain the territoriality principle and to start from the assumption that creditors should, notwithstanding foreign insolvency proceedings, be able to continue to take recourse against assets in the Netherlands. Even though the *Hoge Raad* stresses that many effects attached to foreign insolvency proceedings will also produce effects in the Netherlands, the territoriality principle as it is maintained by the *Hoge Raad* will jeopardise rescue plans adopted in a foreign insolvency proceeding as creditors will still be able to seek recourse against assets in the Netherlands beyond the terms of the plan. We believe that Dutch law should finally become more favourable and accommodating to cross-border rescue.

In that respect Brexit creates an opportunity (and, in our view, necessity) for the Dutch government to introduce a clear, coherent and modern statutory framework to deal with the cross-border effects of insolvency proceedings. Insolvency is an inherent risk of doing business. When it comes to our second largest trade partner, we need to make sure that we accommodate the resolution of business failure as much as doing business itself.

Towards the end of 2012, the Dutch government indicated that it would start a (limited) programme to modernize and reform Dutch insolvency law: the legislative programme *Herijking Faillissementsrecht*. Unfortunately, the modernization of Dutch domestic international insolvency law is not part of the government's plans, even though this is an area where a "quick win" could be achieved. All the legislator needs to do is pick up the proposals for the 2007 draft Insolvency Act.[7] These proposals were aimed at restyling Dutch international insolvency law to meet internationally acceptable standards and sought to facilitate an effective and efficient administration of cross-border insolvency proceedings and further legal certainty.[8]

THE IMPACT OF BREXIT ON RECOGNITION OF ENGLISH SCHEMES OF ARRANGEMENT

Over the last couple of years an increasing number of non-UK companies, including Dutch companies, have sought the assistance of the scheme of arrangement under part 26 of the UK Companies Act 2006 to restructure their debts in order to avoid the opening of insolvency proceedings in their "home" jurisdiction. The scheme can, of course, only produce the desired effect if it is effective in those member states where the debtor company has assets. As English courts want to make sure that they only sanction schemes that will be effective, the courts address the question whether the scheme will be recognised in the other relevant jurisdictions. In doing so, they rely on expert advice from the relevant member

[7] See also P.M. Veder, "Bob's 'Unvollendete'?", in B. Santen and D. van Offeren (eds.), *Perspectives on international insolvency law. A tribute to Bob Wessels*, Deventer: Kluwer, 2014, p. 139-150.

[8] For a more elaborate exposé on these proposals, see B. Wessels, "International Insolvency Law in the Netherlands: The Pre-Draft of Title 10", *International Insolvency Review (III)*, Vol. 17, Iss. 2:143-161 (2008) and M.L. Lennarts and P.M. Veder, "The Dutch domestic cross-border insolvency framework (and why it is badly in need of reform, illustrated by the Yukos Litigation)", *International Insolvency Law Review (IILR)*, Vol. 4, Issue 2 (2012), p. 228 *et seq*. These proposals were discussed at a conference in Leiden, see B. Wessels and P. Omar (eds.), *Crossing (Dutch) Borders in Insolvency*, INSOL Europe 2009.

states. In most cases the advice is (apparently) that a scheme will be recognised, albeit that the underlying reasoning may differ. In some cases, it is argued that recognition is a procedural matter with a focus on the recognition of the judgment of the court sanctioning the scheme that is governed by Regulation (EU) 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 (recast) ("Brussels I Regulation (recast)"). In other cases, recognition is based on a more contractual approach and it is argued that the scheme of arrangement falls within the ambit of Council Regulation (EC) No 593/2008 of 17 June 2008 on the law applicable to contractual obligations ("Rome I Regulation"). We support the procedural approach and take the view that, at present, an English court order sanctioning a scheme of arrangement is eligible for recognition in other Member States of the EU based on the fact that the court order falls within the scope of the Brussels I Regulation (recast).[9]

If as a result of Brexit the Brussels I Regulation (recast) ceases to apply to the UK, that raises the question as to whether the recognition of schemes of arrangements in the Netherlands and other EU Member States is put at risk.

Even though, as McCormack and Anderson acknowledge in their essay,[10] Brexit does indeed increase the uncertainty regarding the recognition of schemes throughout the EU, there may be some light at the end of the proverbial tunnel. It may be argued that, in the absence of other agreements between the EU and the UK on the issues addressed in the Brussels I Regulation (recast), the Brussels Convention on jurisdiction and enforcement of judgments in civil and commercial matters could again emerge as the tool for recognition of the court order sanctioning a scheme. The Brussels Convention was never abrogated or formally denunciated by any of the Contracting States and remains in place today (albeit with limited effect). The UK became a contracting party to the Brussels Convention in 1978 and up to this day remains as such. However, it must be noted that if this view is correct, it cannot provide a basis for the recognition of schemes throughout the entire EU. The Brussels Convention of course only applies to the Member States that were signatories to that Convention, including the Netherlands, so its geographical scope is limited.

But even if Brexit would leave the UK without a convention or other EU instrument that provides for recognition of schemes in Member States of the EU, that may not be a problem in regard to the Netherlands. It has been argued that under the rules of Dutch domestic private international law, schemes of arrangement will in principle be recognised and given effect to in the Netherlands.[11] However, we note that as far as we are aware there is no case law on this issue.

BREXIT: OPPORTUNITIES FOR THE NETHERLANDS

Brexit undoubtedly raises many challenges for the Netherlands, but there may also be opportunities for the Dutch insolvency and restructuring practice. These opportunities are, of course, not triggered by Brexit alone, but may be the result of legislative reforms that are underway in the Netherlands.

[9] See also L.P. Kortmann and P.M. Veder, "The Uneasy Case for Schemes of Arrangement under English Law in relation to non-UK Companies in Financial Distress: Pushing the Envelope?", *Nottingham Insolvency and Business Law e-Journal* (*NIBLeJ*), Volume 3, 2015 (special edition), Festschrift in Honour of Professor Ian Fletcher QC, p. 239-261.

[10] McCormack and Anderson, *supra* note 3.

[11] H.LE. Verhagen and J.J. Kuipers, "*De erkenning van een Engelse* Scheme of Arrangement *door de Nederlandse rechter*", in: N.E.D. Faber, J.J. van Hees and N.S.G.J. Vermunt (eds.), *Overeenkomsten en insolventie*, Deventer: Kluwer, 2012, p. 335-357.

Brexit increases the uncertainty regarding the recognition of schemes throughout the EU. This uncertainty may make the UK scheme less attractive for companies with assets in one of the remaining 27 EU Member States that seek to restructure their debts.

In line with the draft Directive on insolvency, restructuring and second chance[12] the Dutch government has proposed a change in the Dutch Bankruptcy Act that should enable quite flexible restructurings outside the framework of formal insolvency proceedings, similar to the UK scheme of arrangement. This legislative initiative has a number of features that are quite new in the Dutch legal landscape and are likely to reduce the need for Dutch companies to use the UK scheme of arrangement to restructure their debts. It would go beyond the scope of this paper to go into detail regarding this legislative initiative and in fact the legislative process is still ongoing so that it is not entirely clear what the end result will be. But the contours of the "Dutch scheme" as we see it emerging are, briefly stated, as follows:[13]

- Unlike the composition (*akkoord*) under current Dutch insolvency law, a restructuring plan may affect only one or more classes of creditors and may also affect preferred and secured creditors as well as equity holders;
- Voting takes place in classes and can be done electronically so that no physical creditors' meeting is required;
- The possibility of a "cross-class cram down" is available;
- The rescue plan may also, under certain conditions, entail the release or amendment of third party guarantees;
- Court involvement will be limited to those instances where it is necessary to safeguard the interests of affected parties, in particular the sanctioning of a scheme in order for it to become binding on dissenting minorities;
- No convening hearing will be required.

If designed well, the process will be flexible, efficient and cost effective.

The "Dutch scheme" appears to fit into the scope of application of the EU Insolvency Regulation and therefore could be included in Annex A of the EU Insolvency Regulation. If and when it is included in Annex A, it may provide the basis for a restructuring with effect throughout the EU (with the exception of Denmark). This of course also entails that the Dutch courts may assume jurisdiction in this type of restructuring proceeding only if the COMI of the debtor is in the Netherlands. However, in the near future companies that need to restructure their debts may find the Netherlands an attractive jurisdiction to move their COMI to in order to restructure with full and immediate effect throughout the EU.

[12] Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, 22 November 2016, COM (2016) 723 final.

[13] On 5 September 2017, the Dutch government published a new consultation draft of legislation aimed at introducing a "Dutch scheme". The Dutch text of the draft Act, including an explanatory report, can be accessed at: https://www.internetconsultatie.nl/wethomologatie. An unofficial English translation of the draft Act can be accessed at: www.resor.nl.

The Implications of Brexit for the Restructuring and Insolvency Industry

Views from Other Jurisdictions

United States of America

Canada

East Asia and the Pacific Rim

- Introduction
- Australia
- China (PRC)
- Hong Kong
- Singapore

United States of America[*]

Hon. Leif Clark (Ret.)[**]

and

Daniel M. Glosband[***]

INTRODUCTION

Unless Brexit stimulates changes to the internal United Kingdom laws that apply to insolvency and restructuring (including the interpretation of applicable common law), US insolvency professionals can safely sleep through the UK's great escape from the European Union (although they may want to take advantage of the Brexit-driven drop in the exchange rate and the enhanced purchasing power of the dollar). The excellent "centrepiece" essay by Gerard McCormack and Hamish Anderson – "The Implications of Brexit for the Restructuring and Insolvency Industry in the United Kingdom" ("Centrepiece") – comprises six sections: the current cross-border insolvency landscape – pre-Brexit; the current corporate restructuring law – pre-Brexit; how current law deals with foreign insolvency proceedings that purport to deal with English law governed obligations; the effect of a "hard" Brexit resulting in separation from the European Insolvency Regulation ("EIR"); what the UK and EU might each do to fill the gap; and the terms of a possible replacement regime.

This essay will review the scenarios for inbound US cross-border insolvency and restructuring proceedings emanating from the UK. It will also consider certain of the deficiencies in the current approach to assisting US insolvency proceedings outbound to the UK, with a view to supporting positions discussed in the Centrepiece. The likely Brexit from the EIR - itself not very relevant to the US insolvency community - is not discussed.

Brexit alone is not likely to dampen the US receptivity to UK restructuring and insolvency proceedings, so the current landscape under chapter 15 for cross-border insolvency assistance and recognition of insolvency proceedings and schemes of arrangement ("Schemes") will remain unaltered. Conversely, Brexit will not directly breach the barricades that English courts interpose to assisting foreign insolvency proceedings.[1] Since chapter 15 has no reciprocity requirements, US courts have not closed their doors to UK cases because of the UK's parsimonious approach to assisting foreign insolvency proceedings. Brexit will not change the attributes of UK proceedings that render them eligible for chapter 15 recognition, so Brexit should not make any difference to US courts' decisions on recognition and relief under chapter 15.

The Centrepiece suggests possible salutary post-Brexit changes to the limitations imposed by the *Gibbs* principle, constraints on relief available under the Cross-Border Insolvency Regulations, restriction to former British Commonwealth members of section 426 of the Insolvency Act 1986 and the limited adoption of the Model Law by additional EU Member

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[1] See Centrepiece, p. 5 ("The presently restrained approach to judicial innovation is likely to continue.").

States. Ameliorative changes to any of these impediments to universality would be welcome, but will not automatically follow Brexit.

CROSS-BORDER INSOLVENCY LANDSCAPE

In 2005, the US adopted its version of the UNCITRAL Model Law on Cross-Border Insolvency as chapter 15 of the Bankruptcy Code, *Ancillary and Other Cross-Border Cases*.[2] Chapter 15 is divided into several subchapters that address general provisions, access of foreign representatives and creditors to courts in the United States, recognition of foreign proceedings and relief, cooperation with foreign courts and foreign representatives and coordination of concurrent proceedings. Insofar as possible and as recommended by the UNCITRAL Guide to Enactment and Interpretation of the Model Law, chapter 15 follows the language, section numbering and general structure of the Model Law to promote uniformity in its adoption and application. The Cross-Border Insolvency Regulations 2006[3] ("CBIR") also track the Model Law and provide that it shall have the force of law, in the form appended as Schedule 1.[4] The Model Law was nipped, tucked and adapted to accommodate existing legislation in both the US and the UK but, unlike the CBIR, chapter 15 became part of an existing statute and not a separate statutory instrument. While there are a handful of chapter 15-specific provisions in the US Federal Rules of Bankruptcy Procedure and in the accompanying Official Forms, the CBIR is accompanied by more expansive Procedural Matters (separate for (i) England and Wales and (ii) Scotland) and Forms. [5]

Both the US and UK versions of the Model Law embody provisions and procedures for "recognition" designed to test the eligibility of a foreign insolvency proceeding to request assistance from the respective domestic courts. In each case, recognition requires that there be a "foreign proceeding", commenced by a "foreign representative", on a prescribed form of application (or petition); and that the foreign proceeding be a "foreign main proceeding" or a "foreign nonmain proceeding". Recognition is specifically subject to the condition of Article 6, Schedule 1 (CBIR) and section 1506 (chapter 15); i.e. that it not be manifestly contrary to public policy. Each of the recognition elements is discussed in detail below in the context of analyzing the recognition and enforcement of Schemes.

As signaled in the Centrepiece and discussed below, the structural and terminological similarities between chapter 15 and the CBIR diverge when it comes to the relief that will actually be granted in reliance on the respective versions of the Model Law. US Courts treat the relief provisions of chapter 15 as empowering them to grant relief based on the statutory language, consistent with the overarching principles of comity and constrained only to assure sufficient protection of affected parties and the absence of a manifest violation of US public policy.[6] Subject to the same conditions, US courts will apply foreign law when appropriate.[7] The UK courts add a barrier of anachronistic principles which, in their view, the

[2] The Bankruptcy Code is Title 11 of the United States Code, 11 U.S.C. §101, *et seq*.

[3] 2006 SI 2006/1030.

[4] CBIR, Reg. 2(1).

[5] See, e.g., Federal Rules of Bankruptcy Procedure 1004.2, Petition in chapter 15 Case and 2002(q), Notice of Petition for Recognition of Foreign Proceeding and of Court's Intention to Communicate with Foreign Courts and Foreign Representatives, Official Form 401, Petition for Recognition of a Foreign Proceeding; *cf.* CBIR Schedule 2, Procedural Matters in England and Wales, CBIR Schedule 3, Procedural Matters in Scotland, CBIR Schedule 5, Forms.

[6] See, e.g. *In re AJW Offshore, Ltd.*, 488 B.R. 551, 559 (Bankr. S.D.N.Y. 2013) (finding that the foreign representative could, via section 1521(a)(7) ["granting any additional relief that may be available to a trustee…"] employ the turnover powers of ss. 542 and 543 to obtain books and records, subject to providing sufficient protection to creditors and other interested parties).

[7] *Fogerty v. Petroquest Res., Inc. (In re Condor),* 601 F.3d 319, 329 (5th Cir. 2010) ("[a]s chapter 15 was intended to facilitate cooperation between US courts and foreign bankruptcy proceedings, we read section 1521(a)(7) in that light and hold that a court has authority to permit relief under foreign avoidance law under the section."); *In re Hellas Telecommunications (Luxembourg) II SCA*, 525 B.R. 543, 568 ("The Plaintiffs allege various avoidance claims under foreign law, which may be adjudicated by this Court under chapter 15 of the Bankruptcy Code.").

CBIR did not supersede.[8] Lord Neuberger understated the divergence: "The extent to which the Model Law promotes substantive universalism (i.e. the application of the law governing the foreign insolvency proceeding) appears to be answered differently in different jurisdictions. Thus, the US courts seem to have adopted a rather more universalist approach than the courts of the UK."[9] Even though the CBIR have the force of law, the English courts seem to require reassurance that Parliament meant what it said.

WE LIKE SCHEMES OF ARRANGEMENT BUT DO YOU FEEL THE SAME WAY ABOUT CHAPTER 11'S?

The friendly Americans began recognizing and enforcing Schemes before chapter 15 was adopted.[10] Attributes of Schemes that might cause UK courts to deny assistance to an analogous US proceeding have not discouraged US courts from embracing Schemes. For example, the primary reason to seek chapter 15 recognition of many UK Schemes is to ensure enforcement in the US of modifications of US law-governed debt (usually New York law). But the *Gibbs* principle would appear to prevent a UK court from enforcing a US reorganization plan that modified English law-governed debt:

> "There is a long-established principle of the common law that the discharge of a debt under foreign insolvency law will not be given effect in the UK where the contract creating the debt is governed by English law. This doctrine is reflected in *Gibbs v La Société Industrielle et Commerciale des Métaux* where it was held that the foreign bankruptcy law was irrelevant because it was "not a law of the country to which the contract belongs, or one by which the contracting parties can be taken to have agreed to be bound; it is the law of another country by which they have not agreed to be bound." (Footnotes omitted.)[11]

The High Court has recently recognized a chapter 11 proceeding of a UK-registered debtor whose COMI was in the US but the debtor's reorganization plan apparently did not implicate non-consensual modification of English law-governed debt.[12] 19 Entertainment Limited ("19 Entertainment") was one of nearly 50 direct and indirect subsidiaries of CORE Entertainment Inc. ("CORE Group") which all filed chapter 11 petitions in the United States Bankruptcy Court for the District of Delaware on April 28, 2016. The CORE Group is perhaps best known as the producer of American Idol. Unique among the members of the CORE Group, 19 Entertainment was incorporated in England and had its registered office in London.

The CORE Group defaulted on its secured bank debt and 19 Entertainment's former CEO served a demand for nearly $3 million that could have led to winding-up proceedings in the UK. To prevent this, 19 Entertainment sought recognition of its chapter 11 case under the CBIR. On the day following the chapter 11 filings, the UK court heard and granted 19 Entertainment's application for recognition, apparently on an *ex parte* basis.[13] The decision illustrates the contrast between the English common law approach and the UNICTRAL Model Law approach embodied in the CBIR. The former permits assistance only to foreign proceedings of companies domiciled in the foreign jurisdiction while the latter permits

[8] See the discussion of *Gibbs* at Centrepiece at 8, 9, of *Singularis* at 5 and *Pan Ocean* at 11.
[9] Keynote speech on June 19, 2017 to the International Insolvency Institute (III) Annual Conference 2017, London.
[10] See, e.g. *In re Board of Directors of Hopewell International Insurance Ltd*., 275 B.R. 699 (S.D.N.Y. 2002).
[11] Centrepiece, at 8, 9.
[12] *In re AOG Entertainment, Inc., et, al*, Case No. 16-11090-smb (Bankr. S.D.N.Y. 2016).
[13] *Re 19 Entertainment Limited* [2016] EWHC 1545 (CH), (England and Wales High Court (Chancery Division) April 29, 2016) ("UK Decision").

assistance to companies which have their domicile in the forum country and their center of main interests (or an establishment) in the foreign jurisdiction.[14] As the UK Court notes:

> "…it is very clear that, although the registered office of the company is in London, at New Bridge Street, it is, in fact, the paradigm case of a letterbox company because its business, direction and operation is now entirely conducted in the United States of America and, in particular, in Los Angeles. It has closed down, as I mentioned a moment ago, its London office; its directors are United States citizens and are resident there. Its board meetings are held in the United States. The Company's website, or rather that of the group to which it belongs, makes it clear that it is a Los Angeles-based concern with a Los Angeles telephone number. Further, the major creditors of the company are in the United States and its business dealings are also conducted there, as is its banking …. In my judgment, the fact that its COMI is situated in that country is extremely clear and I shall approach this case on that basis."[15]

The UK Court goes on to find similarities between chapter 11 and "the administration order regime applicable in England" and acknowledges that "… the effect of the Model Law is to give to the English court the possibility of enabling the position of a company which is in chapter 11 Bankruptcy in the United States, to be put on a similar footing in England with regard to any action against it by creditors, such as it would be if proceedings were being conducted in the United States."[16]

Before granting relief, the UK Court addressed the requirements that the 19 Entertainment's chapter 11 case be a "foreign proceeding" and that the applicants, the debtor's directors, be foreign representatives. The UK Court easily concluded that the chapter 11 was a foreign proceeding under Article 2 of the Model Law and the 2006 Regulations; i.e. "a collective judicial or administrative proceeding in a foreign state pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purpose of reorganisation or liquidation."[17]

To conclude that the applicants comprised a foreign representative under Article 2; i.e. "a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding," the UK Court relied on an affidavit of the debtor's US counsel. The evidence explained that section 1107 of the Bankruptcy Code gave the debtor in possession the functions and duties of a trustee and that this sufficed to qualify the directors as foreign representatives.

The UK Court (Jeremy Cousins, QC sitting as a Deputy Judge of the High Court) entered an order recognizing the chapter 11 case as a foreign main proceeding (triggering an automatic stay under Article 20 of Schedule 1 of the CBIR) and also entered discretionary relief specifically staying enforcement of security, seizure of assets, appointment of an administrative receiver and the presentment of any winding-up petition or application for appointment of an administrator:

> "I turn then to the question of discretionary relief. As I have explained already, there is a degree of urgency in the matter which is now before me, in the light of Mr. Fuller's position and in the light of his entitlement, within a matter of days, to commence

[14] See *Northshore Mainland Services, Inc., et al, Commonwealth of the Bahamas Supreme Court*, 2015/COM/Com/00039 (July 31, 2015) (Bahamas court applies English common law in denying recognition of a US chapter 11 case filed by a Bahamian debtor).

[15] UK Decision at paras 4, 6.

[16] UK Decision, at paras 10, 11.

[17] UK Decision at para. 14.

> winding up proceedings. If discretionary relief were to be granted, he would not be able to take that step, nor would other creditors. In my judgment, it is entirely consistent with the policy behind the adoption of the Model Law that I should grant relief of a kind which is similar to the moratorium relief provided in para. 43 of sch. B1 of the 1986 Act."

The English court was not faced with the ultimate *Gibbs* question since 19 Entertainment's former CEO settled his disputes with the Core Group in the context of resolving his objection to its plan of reorganization.[18]
In contrast to the one recognition of a chapter 11 case under the CBIR, we found thirty-one English schemes of arrangement recognized under chapter 15 (unless we missed a couple),[19] as well as a few from other former British Commonwealth countries.[20]

In many of these cases, the foreign representative also sought "additional relief", with the primary relief comprising what the US vernacular denominates as "third-party releases," or releases of one non-debtor third party by other non-debtor third parties, accompanied by complementary injunctions. The third-party releases, discussed in more detail below, have regularly been enforced.

WHY SCHEMES OF ARRANGEMENT GENERALLY SATISFY THE RECOGNITION REQUIREMENTS

Section 1517 of the Bankruptcy Code sets forth the requirements for recognition of a foreign proceeding. If these requirements are met and if recognition would not be "manifestly contrary" to the public policy of the United States, a bankruptcy court should issue an order granting recognition of a foreign proceeding as either a "foreign main" proceeding or a "foreign nonmain" proceeding.[21] Sections 1521 and 1522 set forth the provisions for

[18] *Findings of Fact, Conclusions of Law and Order Confirming Second Amended Joint Chapter 11 Plan of Reorganization for AOG Entertainment, Inc. and Its Affiliated Debtors, In re AOG Entertainment, Inc., et al*, Case No. 16-11090 (BANKR. S.D.N.Y. Sept. 23, 2016).

[19] *In re Metinvest B.V.*, No. 17-10130-LSS (Bankr. D. Del. Feb. 8, 2017); *In re DTEK Finance (plc)*, No. 16-13521-shl (Bankr. S.D.N.Y. Jan. 18, 2017); *In re Abengoa Concessions Investments Limited*, No. 16-12590-kjc (Bankr. D. Del. Dec. 8, 2016); *In re Metinvest B.V.*, No. 16-11424-LSS (Bankr. D. Del. Jun. 30, 2016); *In re EnQuest PLC*, No. 16-12983 (Bankr. S.D.N.Y. Oct. 24, 2016); *In re YH Limited*, No. 16-12262 (Bankr. S.D.N.Y. Sep. 8, 2016); *In re Metinvest B.V.*, No. 16-10105-LSS (Bankr. D. Del. Jan. 29, 2016); *In re OIC Run-Off Limited*, No. 15-13054-scc (Bankr. S.D.N.Y. Jan. 11, 2016); *In re Codere Finance (UK) Limited*, No. 15-13017-jig (Bankr. S.D.N.Y. Dec. 22, 2015); *In re Towergate Finance*, No. 15-10509 (Bankr. S.D.N.Y. Mar. 27, 2015); *In re New World Resources N.V.*, No. 14-12226 (Bankr. S.D.N.Y. Sept. 9, 2014); *In re Zodiac Pool Solutions SAS*, No. 14-11818 (Bankr. D. Del. Aug. 29, 2014); *In re hibu, Inc.*, No. 8-14-70323-reg (Bankr. E.D.N.Y. Feb. 27, 2014); *In re Zlomrex International Finance S.A.*, No. 13-14138 (Bankr. S.D.N.Y. Jan. 31, 2014); *In re Magyar Telecom B.V.*, 2013 WL 10399944, No. 13-13508 (Bankr. S.D.N.Y. Dec. 11, 2013); *In re Allianz Global Corporate & Specialty (France)*, No. 10-4990-smb (Bankr. S.D.N.Y. Nov. 4, 2011); *In re Tokio Marine Europe Ins. Ltd.*, No. 11-13420-mg (Bankr. S.D.N.Y. Sep. 8, 2011); *In re Hellas Telecomms. (Luxembourg) V*, No. 10-13651 (Bankr. D. Del. Dec. 13, 2010); *In re Baloise Insurance Ltd.*, No. 10-15358-jmp (Bankr. S.D.N.Y. Dec. 9, 2010); *In re Highlands Ins. Co. (U.K.)*, No. 07-13970 (Bankr. S.D.N.Y. Aug. 18, 2009); *In re Minister Insurance Co. Ltd.*, No. 10-bk-13899 (Bankr. S.D.N.Y. Sept. 1, 2010); *In re Castle Holdco 4, Ltd.*, No. 09-11761 (Bankr. S.D.N.Y. May 7, 2009); *In re Global General and Reinsurance Co. Ltd.*, No. 08-14939 (Bankr. S.D.N.Y. Jan. 21, 2009); *In re Sphere Drake Insurance Limited*, No. 08-12832-jlg (Bankr. S.D.N.Y. Sep. 11, 2008); *In re Grayfriers Insurance Company Limited.*, No. 07-12934 (Bankr. S.D.N.Y. Oct. 23, 2007); *In re Compagnie Européenne d'Assurances Industrielles S.A.*, No. 07-12009-mg (Bankr. S.D.N.Y. Sep. 26, 2007); *In re Endresen (Oslo Re UK)*, No. 07-12211 (Bankr. S.D.N.Y. Aug. 29, 2007); *In re AXA Insurance UK PLC*, No. 07-12110 (Bankr. S.D.N.Y. Aug. 15, 2007); *In re Europaische Ruckversicherungs-Gesellschaft in Zurich*, No. 06-13061 (Bankr. S.D.N.Y. Jan. 22, 2007); *In re Gordian RunOff (UK) Ltd., f/k/a/ GIO (UK) Ltd.*, No. 06-11563 (Bankr. S.D.N.Y. Aug. 29, 2006); *In re Lion City Run-Off Private Ltd.*, No. 06-10461 (Bankr. S.D.N.Y. Apr. 13, 2006); *In re La Mutuelle du Mans Assurances IARD, U.K. Branch)*, No. 05-60100, 2005 WL 3764946 (Bankr. S.D.N.Y. Dec. 7, 2005).

[20] See, e.g., *In re Cell C Proprietary Limited*, case No. 17-11735 (Bankr. S.D.N.Y. July 27, 2017); *In re Winsway Enterprises Holdings Limited*, No. 16-10833-mg (Bankr. S.D.N.Y. Jun. 16. 2016) (Hong Kong); *In re Kaisa Group Holdings Ltd.*, No. 16-11303-shl (Bankr. S.D.N.Y. Jul. 14, 2016); *In re Murray Holdings Limited*, No. 15-11231-mg (Bankr. Jun. 25, 2015); *In re LDK Solar Co. Ltd. (in Provisional Liquidation)*, No. 14-12387 (PJW) (Bankr. D. Del. Nov. 21, 2014); *In re Chartis Excess Limited*, No. 13-10888-shl (Bankr. S.D.N.Y. May 1, 2013) (Ireland; no third-party release); *In re Arion Insurance Company Limited,* No. 07-12108-rdd (Bankr. S.D.N.Y. August 9, 2007) (Bermuda).

[21] Section 1517(a), (b)(1)-(2); s. 1506.

additional relief that may be granted upon recognition and the conditions to granting such additional relief.

As a threshold matter, the United States Court of Appeals for the Second Circuit[22] has held that a debtor that is the subject of a foreign proceeding must meet the requirements of section 109(a) of the Bankruptcy Code before a bankruptcy court may grant recognition of the foreign proceeding in chapter 15.[23] Section 109(a) provides the general criteria for eligibility to be a debtor under the Bankruptcy Code, and requires specifically that a debtor either reside, have a domicile, a place of business, or property in the United States. The decision in the *Barnet* case has been criticized.[24] As a practical matter, there is a very low threshold for satisfaction of the section 109(a) requirement. Either an attorney retainer account or contract rights under a US-law debt indenture constituted property that satisfied the Section 109(a) debtor eligibility requirements.[25]

Section 1517(a) provides that, subject to section 1506 (the public policy exception) an order recognizing a foreign proceeding shall be entered, after notice and a hearing, “if – (1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of [section 1502]; (2) the foreign representative applying for recognition is a person or a body; and (3) the petition meets the requirements of [section 1515].”[26] Section 1517 employs terms defined elsewhere in the Bankruptcy Code and implicates those definitional provisions among the requirements for recognition. Specifically, section 101(23) defines “foreign proceeding”, section 101(24) defines “foreign representative”, section 1502(4) defines “foreign main proceeding” and section 1502(5) defines “foreign nonmain proceeding.”

Section 101(23), states:

> The term “foreign proceeding” means a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

US bankruptcy courts interpret section 101(23) as imposing a seven-part test, each element of which must be satisfied before a proceeding may qualify as a “foreign proceeding” within the scope of chapter 15. These elements are (i) the existence of a proceeding; (ii) that is either judicial or administrative in nature; (iii) that is collective in nature; (iv) in a foreign country; (v) authorized or conducted under a law related to insolvency or the adjustment of

[22] The Federal courts for Connecticut, Vermont and the Eastern, Northern, Southern and Western Districts of New York comprise the Second Circuit.

[23] *In re Barnet (Drawbridge Special Opportunities Fund LP)*, 737 F.3d 238, 247 (2d Cir. 2013); *In re Suntech Power Holdings Co., Ltd.*, 520 B.R. 399 (Bankr. S.D.N.Y. 2014).

[24] See *In re Berau Capital Resources Pte Ltd*, 540 B.R. 80, 81-82 (Bankr. S.D.N.Y. 2015), citing Daniel M. Glosband and Jay Lawrence Westbrook, “Chapter 15 Recognition in the United States: Is a Debtor ‘Presence’ Required?”, 24 Int. Insolv. Rev. 28 (2015).

[25] *In re Berau Capital Resources Pte Ltd*, 540 B.R. at 84 (Bankr. S.D.N.Y. 2015); *See also In re Cell C Proprietary Limited*, case No. 17-11735 (Bankr. S.D.N.Y.July 27, 2017); *In re Inversora Electric de Buenos Aires S.A.*, 560 B.R. 650, 654 (Bankr. S.D.N.Y. 2016) ; *In re Yukos Oil Co.*, 321 B.R. 396, 407 (Bankr. S.D. Tex. 2005); *In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 38-39 (Bankr. D. Del. 2000). Following the decision by the Second Circuit in the *Barnet* case, the foreign representative in that case again sought recognition and the bankruptcy court, applying the Second Circuit’s ruling, held that cash in a client trust account maintained by the foreign representatives’ US counsel satisfied the section 109(a) requirement. *In re Octaviar Administration Pty Ltd. (Debtor in a Foreign Proceeding)*, 511 B.R. 361, 372 (Bankr. S.D.N.Y. 2014) (the court also found that causes of action manifested in US-filed lawsuits also satisfied s. 109(a)).

[26] Section 1517(a)(1)-(3). Section 1506 provides: “Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States.” A Scheme is roughly analogous to a consensual restructuring under chapter 11 of the Bankruptcy Code in which a sufficient majority of impacted creditors have, after notice of the proposed terms, voted to accept their treatment under the plan and the plan is ultimately approved by the Court. Therefore, it is consistent with US public policy.

debts; (vi) in which the debtor's assets and affairs are subject to the control or supervision of a foreign court; and (vii) which proceeding is for the purpose of reorganization or liquidation.[27]

A Scheme is a "proceeding"

For purposes of section 101(23), the *Betcorp* opinion endorses the broad definition of "proceeding" suggested by the EC Regulation on Insolvency Proceedings 1346/2000 and characterizes the essence of a proceeding as "acts and formalities set down in law so that courts, merchants and creditors can know them in advance, and apply them evenly in practice."[28] A Scheme meets the definition of a "proceeding."[29] In this case, the statutory framework is Part 26 of the UK Companies Act 2006, which sets forth the requirements for the company to apply to the English Court to initiate and implement a process by which its debts may be adjusted. The Scheme is subject to the provisions of the Companies Act 2006 and the company will be under the direction of the English Court up to and including final approval of the Scheme.

A Scheme is judicial in nature

A proceeding is deemed "judicial in nature" under section 101(23) where the proceeding is subject to review by a court.[30] An order of the English Court is required in order to convene a meeting of affected creditors and to sanction the Scheme before the Scheme can become effective. Because the procedures established by the Companies Act 2006 mean that involvement and oversight of the English Court is required to utilize the scheme of arrangement procedure, the Scheme clearly qualifies as "judicial in nature" under section 101(23).

A Scheme is collective in nature

Section 101(23) also requires that the proceeding be "collective". The legislative history of chapter 15 notes that it adopts the definition of "foreign proceedings" nearly verbatim from the Model Law.[31] It also directs reference to the Model Law and the Guide as aids to interpreting chapter 15.[32] The Guide, in turn, takes a broad view of collective proceedings which may include "a variety of collective proceedings … be they compulsory or voluntary, corporate or individual, winding-up or reorganization."[33] Case law takes a similar approach.[34]

A Scheme Takes Place in a Foreign Country

A Scheme self-evidently will take place in England before the English Court.

[27] *ABC Learning Centres*, 728 F.3d 301, 307-08; *In re Betcorp Ltd.*, 400 B.R. 266, 276-77 (Bankr. D. Nev. 2009); *In re Ashapura Minechem Ltd.*, 480 B.R. 129, 136 (S.D.N.Y. 2012).

[28] *Betcorp*, 400 B.R. at 278.

[29] The fact that a Scheme may be deemed to involve a solvent debtor is no obstacle to recognition under ch. 15. As the US Bankruptcy Court for the Southern District of New York has held, it is the nature of the proceeding and not the status of the debtor which determines ch. 15 eligibility and there is no requirement that a foreign debtor in a foreign insolvency proceeding must actually be insolvent in order to gain recognition under ch. 15. See *In re Millard*, 501 B.R. 644, 649-50 (Bankr. S.D.N.Y. 2013).

[30] *Betcorp*, 400 B.R. at 280-81.

[31] House Report 109-31, pt. 1, 109th Cong., 1st Sess. (2005) ("H.R. Rep.") at 118.

[32] *Idem*. at 109; See also footnote 9, *supra*.

[33] Guide, para. 71.

[34] *Betcorp*, 400 B.R. at 281; *In re Gold & Honey, Ltd.*, 410 B.R. 357, 370 (Bankr. E.D.N.Y. 2009); *ABC Learning Centres*, 728 F.3d at 310 (internal citations omitted); *In re Board of Directors of Hopewell Int'l Ins. Ltd.*, 275 B.R. 699, 707 (S.D.N.Y. 2002).

A Scheme is under a law "relating to insolvency or adjustment of debt"

A Scheme will be conducted under Part 26 of the UK Companies Act 2006 for the purpose of reorganization. Numerous US courts have held that this manner of reorganization under the provisions of Part 26 of the Companies Act qualifies for purposes of section 101(23).[35]

The assets and affairs of the Company are subject to the control of a foreign court

Section 1502(3) defines "foreign court" as a "judicial or other authority competent to control or supervise a foreign proceeding." By virtue of the applicable provisions of the UK Companies Act 2006, the English Court has direct supervisory authority over a Scheme. In light of the direct involvement of the English Court in considering the application to convene a Scheme Meeting and entering a Convening Order and the requirement that the English Court ultimately sanction (approve) the Scheme, a Scheme certainly meets this element of the 101(23) analysis.[36]

A Scheme is for the purpose of reorganization

The final element of the 101(23) analysis requires that the proceeding be for a reorganization or liquidation purpose. US courts will often look to the debtor's own description of the proceedings to determine whether they are for the purpose of reorganization or liquidation.[37]

A scheme of arrangement is a statutory process under the applicable provisions of the UK Companies Act 2006 for the adjustment of debts. As such, a Scheme is "for the purpose of reorganization" within the meaning of section 101(23).

A Scheme must qualify for recognition as a "Foreign Main Proceeding" or a "Foreign Nonmain Proceeding"

In order to be recognized under chapter 15, a foreign proceeding must be either main or nonmain.[38] The essence of the requirement that there be either COMI or an establishment as a condition to recognition, is the determination of the legislators that a debtor must have an economic presence in the country that is conducting the foreign proceeding to be eligible for assistance from courts in the United States.[39]

Section 1502(4) defines a foreign main proceeding as a "foreign proceeding pending in the country where the debtor has the center of its main interests." Section 1502(5) defines a foreign nonmain proceeding as "a foreign proceeding, other than a foreign main proceeding, pending in a country where the debtor has an establishment." While no Scheme has been denied recognition because of the absence of the debtor's COMI or an establishment in the

[35] See, e.g., *In re New World Resources N.V.,* No. 14-12226 (Bankr. S.D.N.Y. Sept. 9, 2014); *In re hibu, Inc.*, No. 8-14-70323-reg (Bankr. E.D.N.Y. Feb. 27, 2014); *In re Magyar Telecom B.V.*, 2013 WL 10399944 (Bankr. S.D.N.Y. Dec. 11, 2013); *In re Hellas Telecomms. (Luxembourg) V*, No. 10-13651 (Bankr. D. Del. Dec. 13, 2010); *In re Highlands Ins. Co. (U.K.)*, No. 07-13970 (Bankr. S.D.N.Y. Aug. 18, 2009). See also the additional cases listed above.

[36] *Betcorp*, 400 B.R. at 284.

[37] *Betcorp*, 400 B.R. at 284-85 (noting that directors' minutes stated that winding-up was for the purpose of liquidation).

[38] *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 126-27 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008).

[39] *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 333-334 (S.D.N.Y. 2008). ("The objective criteria for recognition reflect the legislative decision by UNCITRAL and Congress that a foreign proceeding should not be entitled direct access to or assistance from the host country courts unless the debtor had a sufficient pre-petition economic presence in the country of the foreign proceeding. *See* House Report at 110; s. 1509(b)(3).").

UK, other UK proceedings have been rejected as neither "foreign main proceedings" or "foreign nonmain proceedings".[40]

The foreign representative must qualify

The foreign representative applying for recognition must be a person or a body authorized to act on behalf of the foreign proceeding. Typically, the debtor's board of directors designates an officer to act as foreign representative for purposes of seeking chapter 15 recognition of a Scheme. Section 101(24) defines the term "foreign representative" as being "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding."[41] Under section 101(41), the term "person" includes an "individual". The definition of foreign representative in section 101(24) closely follows the language of the Model Law, Article 2(d), which provides that a foreign representative be a "person…authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs …or to act as a representative of such foreign proceeding."[42] This definition of "foreign representative" does not require that the individual be appointed by a foreign court or other judicial body.[43] Instead, it is sufficient that the foreign representative be authorized to act "in the context" of a foreign bankruptcy proceeding, such as by resolution of the debtor's board of directors authorizing the representative to commence foreign bankruptcy proceedings on the debtor's behalf.[44]

The tricky issue of third party releases

In cases under chapter 7 (Liquidation) and chapter 11 (Reorganization) of the Bankruptcy Code, third-party releases are unusual and difficult or impossible to obtain.[45] US bankruptcy courts have regularly recognized and given full force and effect to English schemes of arrangement that included third-party releases (i.e. of claims against third parties other than the debtor) and / or stays of actions against third parties.[46] In December of 2013, the United

[40] See *In re Kemsley*, 489 B.R. 346 (Bankr. S.D.N.Y. 2013) (Trustee of individual debtor denied recognition because debtor had neither his habitual residence / COMI nor an establishment in England). Recognition has also been denied when an individual debtor in an English bankruptcy was below the debt limits established by ss. 1501(c)(2) and 109(e) of the Bankruptcy Code. *In re Steadman*, 410 B.R. 397 (Bankr. D. N.J. 2009).

[41] Section 101(24).

[42] *In re Vitro S.A.B. de C.V.*, 701 F.3d 1031, 1045 (5th Cir. 2012); *see also* UNCITRAL Report of the Working Group on Insolvency Law on the Work of the Eighteenth Session, para. 110, U.N. Doc. A/CN.9/419 (Dec. 1, 1995).

[43] *Vitro*, 701 F.3d at 1047. See also *In re OAS S.A.*, 533 B.R. 83, 90, 94-95 (Bankr. S.D.N.Y. 2015).

[44] *Idem.* at 1047, 1049 (affirming recognition of foreign representatives nominated by boards of directors).

[45] *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005); some judicial circuits (the 5th, 9th an 10th) prohibit them entirely. See, e.g. *Resorts International v. Lowenschuss,* 67 F. 3d 1394 (9th Cir. 1995), cert. denied 517 U.S. 1243, 116 S.Ct. 2497 (1996). The US District Court for the District of Delaware ruled in an appeal from a bankruptcy court order confirming a ch. 11 plan in *In re* Millennium Lab Holdings II, LLC*, 2017 WL 1032992* that the releases of a non-debtor third party's non-bankruptcy fraud and RICO (a civil cause of action for acts performed as part of an ongoing criminal organization) claims against equity holders was beyond the power of the bankruptcy court. Under the peculiar limitations on the jurisdiction that may be exercised by bankruptcy judges, who are not appointed under Art. III of the US Constitution and who do not have lifetime tenure and protection against salary reduction, the *Millennium* Court, citing *Stern v. Marshall*, 564 U.S. 462 (2011), stated that a bankruptcy court does not have final adjudicatory authority over "a private right, that is, of the liability of one individual to another."

[46] See, e.g. *In re Magyar Telecom B.V.*, 2013 WL 10399944 (Bankr. S.D.N.Y. Dec. 11, 2013). Likewise, in *Hellas Telecommunications (Luxembourg) V*, No. 10-13651, the United States Bankruptcy Court for the District of Delaware issued a similar order giving "full force and effect" to such an English scheme of arrangement and ordering broad injunctive orders that effected third-party releases. (Docket No. 38, Dec. 13, 2010). On February 27, 2014, the United States Bankruptcy Court for the Eastern District of New York in *In re hibu Inc.*, No. 14-70323 granted recognition to an English scheme of arrangement as a "foreign nonmain proceeding" and entered an order giving effect to a series of releases required for implementation of the scheme. On September 9, 2014, the United States Bankruptcy Court for the Southern District of New York in *In re New World Resources, N.V.*, No. 14-12226 granted recognition to an English scheme of arrangement as a "foreign main proceeding" and ruled that the scheme was entitled to full force and effect. The *New World* scheme of arrangement contemplated that existing scheme creditors would provide releases of the debtor and of affiliated persons and entities, including affiliates who had guaranteed the debtor's obligations to the scheme creditors. US Courts have also regularly granted recognition to schemes of arrangement emanating from former British Commonwealth countries other than

States Bankruptcy Court for the Southern District of New York entered an order granting recognition to an English Scheme and granting ancillary relief under sections 1520, 1521, 1507(a), 1509(b)(2)-(3), 1525(a) and section 105(a) of the Bankruptcy Code giving "full force and effect" to a Scheme and ordering broad injunctive orders that effected third-party releases. The courts that recognized and enforced Schemes that included third-party releases and complementary injunctive protection, primarily relied on precedent in US case law for the enforcement of third-party releases and related injunctions as additional relief upon recognition under chapter 15 where the releases are permissible under the law of the foreign proceeding, the affected parties had notice and an opportunity to be heard and the releases were approved by the foreign court.[47] These decisions each recognize that section 1507 provides authority to approve the release provisions under the doctrine of international comity.[48]

Brexit will not affect any of the recognition factors or the conditions for obtaining additional relief. If debtors establish a sufficient connection to the UK to qualify as Scheme debtors and if they have either their COMI or an establishment in the UK, then the US will welcome them and continue to grant chapter 15 recognition.

UNCITRAL, NOT BREXIT, MAY ENTICE THE UK TO BE MORE ACCOMMODATING

Brexit is also unlikely to have much of an impact, from the US perspective, on how foreign judgments are recognized on either side of the pond. The recast Jurisdiction and Judgments Regulation (Brussels 1) of course has no impact on the recognition of judgments as between Britain and the US (or between the EU and the US for that matter).

The history of recognition of foreign judgments on the part of the UK relative to the US has been less than felicitous, after the Supreme Court's ruling in *Rubin v Eurofinance SA*.[49] There, a lower court decision that had followed Lord Hoffman's decision in *Cambridge Gas* was reversed, the court holding that a judgment is a judgment from an English perspective, regardless whether it issued from a foreign bankruptcy proceeding. For such a judgment to be enforced in the UK, it must be established that the judgment debtor was present in the foreign jurisdiction at the time the action was initiated, was either a claimant or

England and have enforced third party releases granted pursuant to such schemes of arrangement. See *In re Winsway Enterprises Holdings Limited*, No. 16-10833-mg (Bankr. S.D.N.Y. Jun. 16. 2016) (Hong Kong); *In re Kaisa Group Holdings Ltd.*, No. 16-11303-shl (Bankr. S.D.N.Y. Jul. 14, 2016); *In re Murray Holdings Limited*, No. 15-11231-mg (Bankr. Jun. 25, 2015); *In re LDK Solar Co. Ltd. (in Provisional Liquidation)*, No. 14-12387 (PJW) (Bankr. D. Del. Nov. 21, 2014); *In re Chartis Excess Limited*, No. 13-10888-shl (Bankr. S.D.N.Y. May 1, 2013) (Ireland; no third-party release); *In re Arion Insurance Company Limited*, No. 07-12108-rdd (Bankr. S.D.N.Y. August 9, 2007) (Bermuda; no third-party release).

[47] See, e.g., *In re Metcalfe & Mansfield Alt. Invs.*, 421 B.R. 685, 700 (S.D.N.Y. 2010); *In re Sino-Forest Corp.*, 501 B.R. 655, 666 (Bankr. S.D.N.Y. 2013); *In re Magyar Telecom B.V.*, 2013 WL 1039994 (Bankr. S.D.N.Y. Dec. 11, 2013). A notable exception occurred in the case of *In re Vitro, S.A.B. de C.V.*, 473 B.R. 117 (Bankr. N.D. Tex. 2012), *aff'd*, 701 F.3d 1031 (5th Cir. 2012) (cert. dismissed), where the bankruptcy court declined to enforce a Mexican *concurso* (similar to a Scheme) where the plan granted relief not available under US law and did not give "sufficient protection" to creditors. In our opinion, however, *Vitro* is distinguishable from the Scheme for at least two significant reasons: first, the *Vitro* opinion is peculiar to the United States Court of Appeals for the Fifth Circuit, which appears to take a different and altogether more stringent approach to the question of third-party releases, and second, the Scheme and surrounding facts are much more analogous to the circumstances of the *Metcalfe & Mansfield* and *Sino-Forest* proceedings, where the Scheme in question will require the support of the requisite majority of creditors in order to secure approval by the Hong Kong Court.

[48] *Sino-Forest*, 501 B.R. at 663; *Metcalfe & Mansfield*, 421 B.R. at 699-700. The *Metcalfe & Mansfield* court noted that the Second Circuit Case law, which governs the Bankruptcy Court for the Southern District of New York, "places narrow constraints on bankruptcy court approval of third-party non-debtor release and injunction provisions" but that "the use of such provisions is not entirely precluded." *Metcalfe & Mansfield*, 421 B.R. at 697, citing *In re Metromedia Fiber Network, Inc.*, 416 F.3d 136, 142 (2d Cir. 2005). The *Magyar* court adopted the following formulation in enforcing Scheme-related injunctions: "Each of the injunctions contained in this Order (i) is within the Court's jurisdiction, (ii) is essential to the success of the Scheme, (iii) is an integral element of the Scheme and / or to its effectuation, (iv) confers material benefits on, and is in the best interests of, the Debtor and its creditors, including without limitation the Scheme Creditors, and (v) is important to the overall objectives of the Restructuring." *Magyar Telecom B.V.*, 2013 WL 1039994, at *2.

[49] [2012] UKSC 46.

counterclaimant in that proceeding and voluntarily submitted to the foreign court's jurisdiction by appearing voluntarily or by agreement.

The fact that the UK also subscribes to the principle of cooperation with foreign insolvency proceedings – both by virtue of its enactment of the Model Law in its Cross-Border Insolvency Regulations and by its continued use of Section 426 of the Insolvency Act of 1986 – did not seem to matter much in the court's analysis, perhaps because the court viewed the insolvency process itself as distinct from the discrete nature of an adversary proceeding resulting in a discrete judgment against a third party. Nonetheless, the decision in *Rubin* leaves open a number of unanswered questions, including whether the discharge or injunctive features of a confirmation order issued by a US court would also run afoul of its rule.

In point of fact, we already have some indication that the UK courts might be less than receptive toward a discharge or release injunction. In *Singularis Holdings Ltd. v. Pricewaterhouse-Coopers*,[50] the Privy Council found that a court could not via ancillary relief afford a remedy not available under its own law – at least not under the common law. While assistance at common law is generally recognized, such as in granting stays or the enforcement of judgments (when otherwise permissible under the common law), and statutory assistance for foreign insolvency proceedings is also appropriate, an English court can only apply its own law, and not the law of another jurisdiction, when it is functioning in an ancillary capacity. The court is particularly critical of the reasoning in *Cambridge Gas* that the US bankruptcy court's order be given effect in the Isle of Man, even though no proceeding for winding up, nor any Scheme under Manx law had been initiated and the US court had neither personal jurisdiction over the shareholders nor *in rem* jurisdiction over the shares. While the facts in *Singularis* render its holding reasonable, the sharp criticism of *Cambridge Gas* and its purported attempt at judicial legislation suggests an unwillingness on the part of the UK courts currently to stray far outside the lines already drawn by the common law over the last century or so.

The court's rulings in *Joint Administrators of Heritable Bank plc v Winding up Board of Landsbanki Islands HF*[51] and *Global Distressed Alpha Fund 1 Ltd Partnership v PT Bakrie*,[52] to the effect that the common law rule set out in *Gibbs v La Société Industrielle et Commerciale des Métaux*[53] is still good law and binding on the lower courts, gives further support to the sense that English courts draw a distinction between "judgment-like" rulings and ordinary assistance to a foreign insolvency proceeding (such as, by way of example, transferring assets within the jurisdiction to the foreign insolvency representative). The difficulty for US courts, of course, is that our chapter 11 process contains many "judgment-like" decisions, regardless whether they are so denominated. Decisions regarding executory contracts, for example, can alter the rights of the counterparty significantly and are deemed an essential part of the restructuring process.[54] Will such decisions be treated as insolvency-related matters, or will they too be deemed essentially as judgments? The question remains for future decision.

[50] [2014] UKPC 36.

[51] [2013] UKSC 13.

[52] [2011] EWHC 256 (Comm.).

[53] [1890] 25 QBD 399.

[54] See, e.g., *In re Abbott Laboratories Derivative Shareholders*, 325 F.3d 795 (7th Cir. 2003) (decision to assume or reject is solely within the business judgment of the estate and will be approved so long as conditions of s. 365 are otherwise satisfied). A counterparty has the right to insist on cure of outstanding liabilities in the event of assumption and assignment, as well as "adequate assurance of future performance." The counterparty cannot simply refuse the substitution of a third party on grounds that either local law or the terms of its own contract would otherwise forbid it. *See* 11 U.S.C. s. 365(f).

Of course, the UK adopted the Model Law on Cross-Border Insolvency, promulgated by UNCITRAL in 1997; so has the US.[55] However, the UK courts are not as expansive as the US courts in applying its provisions. Article 21 of the Model Law, for example, affords a court broad authority to enter such relief as may be appropriate to assist the foreign representative. In the US, the courts have been expansive in granting such relief (though not without limitation).[56] In the UK, however, the courts have taken a somewhat more restrained approach to the relief that ought to be accorded under Article 21. *In re Pan Ocean Co Ltd*,[57] the court ruled that relief could not exceed what would otherwise be available under domestic law, a decidedly more restricted approach than US courts would take. The court held that the contract in question was governed by English law, so English law, rather than the insolvency law of Korea, had to control the question whether the contract could be terminated. Not only does this ruling contrast with the US approach to the Model Law, it contrasts even with the approach counseled under UNCITRAL's Guide to Enactment.[58]

What is more, the ruling does not augur well for the unanswered question posed earlier, regarding how an English court might respond to a request under the CBIR to enforce terms of a US court order authorizing the assumption and assignment of an executory contract governed by English law (assuming, for the sake of discussion, that *in personam* jurisdiction were otherwise not an issue). *Gibbs* may thus control, even in the face of statutory authority to the contrary, undermining the nod to the legislature stated in *Singularis*.

The English Parliament may yet have more to say on the subject of recognition of foreign judgments originating in an insolvency proceeding if UNCITRAL's latest project ultimately reaches fruition and the UK opts to adopt it. UNCITRAL Working Group V is nearing completion of its work on a model law for the cross-border recognition and enforcement of insolvency-related judgments.[59] A draft of the Model Law was prepared at its 51st session and was attached as an annex to the Report. It will be taken up at its 52nd session in December. The draft is designed to be compatible with existing regimes for the recognition of foreign judgments (such as those adopted by The Hague Convention) and with general principles of private international law relating to conflicts of law and the enforcement of judgments. However, it seeks as well to complement the Model Law, encouraging broad enforcement along lines consistent with the Model Law if the judgment in question is "insolvency-related." Currently, that definition provides as follows:

> "(d) 'Insolvency-related foreign judgment' means a judgment that:
> (i) [Is related to] [Derives directly from or is closely connected to] [Stems intrinsically from or is materially associated with] an insolvency proceeding;
> (ii) Was issued on or after the commencement of the insolvency proceeding to which it is related; and
> (iii) Affects the insolvency estate;
> and subparagraphs (i), (ii) and (iii) shall apply irrespective of whether or not the proceeding to which the judgment is related has been concluded.

[55] See 11 U.S.C. s.1501 *et seq.*

[56] See *In re Metcalfe & Mansfield Alternative Investments,* 421 B.R. 685, 697 (Bankr.S.D.N.Y. 2010) ("The relief granted in the foreign proceeding and the relief available in a US proceeding need not be identical."); but see *In re Vitro SAB de CV*, 701 F3d 1031 (5th Cir. 2012) (declining to extend third party release granted in Mexican *concurso* proceedings because the relief exceeds relief otherwise appropriate under s. 1521, due to the restrictions of s. 1522, and relief under s. 1507 ought to be tested under a more rigorous standard).

[57] [2014] EWHC 2124 (Ch).

[58] 1997 Model Law on Cross-Border Insolvency Law and Guide to Enactment and Interpretation (United Nations 2013). "The types of relief listed in art. 21, para. 1, are typical of the relief most frequently granted in insolvency proceedings; however, the list is not exhaustive and the court is not restricted unnecessarily in its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case. *Idem.*, at 87-88, para. 189.

[59] See Report of Working Group V (Insolvency Law) on the work of its fifty-first session (New York, 10-19 May 2017), Doc. A/CN.9/903 (United Nations May 26, 2017) (hereinafter "Report"). "The Working Group completed its work by considering a revised text of the draft model law on the cross-border recognition and enforcement of insolvency-related judgments …." *Idem.* at 3 (bracketed language indicates phraseology with regard to which either the Working Group has not reached consensus or which the Working Group intends to be left available as options for the enacting state).

> For the purposes of this definition:
>
> 1. An 'insolvency-related foreign judgment' includes a judgment issued in a proceeding in which the cause of action was pursued by:
>   (a) A creditor with approval of the court, based upon the insolvency representative's decision not to pursue that cause of action; or
>   (b) The party to whom it has been assigned by the insolvency representative in accordance with the applicable law;
>
>   and the judgment on that cause of action would otherwise be enforceable under this Law;
>
>   and
>
> 2. An 'insolvency-related foreign judgment' does not include a judgment commencing an insolvency proceeding."[60]

The definition is sufficiently expansive to include not only an order authorizing the assumption and assignment of an executory contract of the type posited in the earlier question, but also the judgment rendered by the bankruptcy court that became the subject of *Rubin*.

The draft model law is intended to be broadly applied to the limits of an enacting state's treaty obligations and contains the same "manifestly contrary" public policy limitation as is found in the Model Law. Not surprisingly, the lengthiest article sets out the circumstances under which the enacting state may decline to grant recognition and enforcement of an insolvency-related judgment.[61] Of particular interest in the context of this paper is subparagraph (g):

> "(g) The ***originating*** court did ***not*** satisfy one of the following conditions:
> (i) The court exercised jurisdiction on the basis of the explicit consent of the party against whom the judgment was issued;
> (ii) The court exercised jurisdiction on the basis of the submission of the party against whom the judgment was issued, namely that the defendant argued on the merits before the court without contesting jurisdiction within the time frame provided in the law of the originating State unless it was evident that an objection to jurisdiction or to the exercise of jurisdiction would not have succeeded under that law;
> (iii) The court exercised jurisdiction on a basis on which a court in this State could have exercised jurisdiction; or
> (iv) The court exercised jurisdiction on a basis that was not inconsistent with the law of this State."[62]

This last proviso thus would still leave the door open for UK courts to conclude that the originating court exercised jurisdiction on a basis that the common law as espoused by the UK courts would not recognize. However, it is helpful to note that the entirety of sub-paragraph (g) relates to an improper exercise of jurisdiction (from the point of view of the enacting state, i.e., the receiving court), not to the nature of the remedy afforded by the judgment. Thus, the model law, if enacted, might be viewed to overrule both *Singularis* and *Gibbs*. Of course, these are ruminations upon ruminations regarding events that may never take place and so are at this point only an academic exercise.

[60] See Report, at Annex, Draft model law on cross-border recognition of insolvency-related judgments: revised text, at Art. 2.
[61] See Report, at Annex, at Art. 13.
[62] See Report, at Annex, at Art. 13(g) (emphasis added for clarity).

CONCLUSION

While it is morbidly fascinating to watch the UK struggle with the consequences of its Brexit vote, it does not appear to make any difference from the perspective of US cross-border insolvency. The US is also coping with the aftereffects of surprising election results – empathy all around.

Canada[*]

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INTRODUCTION

"Like as the waves make towards the pebbl'd shore, so do our minutes, hasten to their end;"[3] and as we hasten towards the end of Brexit negotiations, those same waves will make their way to the other side of the pond. In the case of the cross-border insolvency and corporate restructuring industries, it remains to be seen whether those waves are tiny ripples or a tsunami.

This essay addresses potential scenarios for cross-border insolvency and corporate restructuring in Canada post-Brexit. The impact of Brexit on Canada has the potential to manifest itself on the Canadian restructuring and insolvency landscape in three key ways. The first is the mix of companies that will undergo restructuring or insolvency proceedings, due largely to the disproportionate impact of the new Canadian-EU free trade agreement on certain industries. The second is the nature of the proceedings themselves for Canadian / EU companies and our speculation on the nature of future cross-border recognition and enforcement orders. The third section discusses two recent Canadian cases where recognitions orders were sought.

As with all considerations of Brexit, the extent to which these potential scenarios manifest themselves depends heavily on the particulars of the UK's withdrawal agreement. This essay also considers the above impacts in the context of a "hard" Brexit and a "soft" Brexit and the ways each will have a differing effect on the insolvency and restructuring industry in Canada.

MIX OF COMPANIES (TRADE IMPACT)

The UK is Canada's largest trading partner in Europe and its third largest export market.[4] Canada's trade surplus with the UK was CAD10.3 billion in 2016, which represented the country's second largest trade surplus. The UK thus plays an important role in the Canadian trade economy. The current tariff system in place for Canadian imports and exports with the EU varies depending on product, but is higher on average for Canadian imports than exports.[5] Of these products, nearly 500 are subject to a tariff of more than 10%.

[*] The views expressed in this essay are the personal views of the authors, which are not to be taken as representing the views of INSOL International or any of its affiliates or representatives.

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[3] William Shakespeare, Sonnet 60.

[4] The UK follows the United States (CAD392B) and China (CAD22B): http://www.statcan.gc.ca/tables-tableaux/sum-som/l01/cst01/gblec02a-eng.htm.

[5] See http://www.pbo-dpb.gc.ca/web/default/files/Documents/Reports/2017/CETA/CETA_EN.pdf.

As a result of these close economic ties and significant tariffs, the UK, along with Canada's two other largest European trade partners, Germany and France, began considering a free trade agreement in 2008.[6] Eight years later, the Comprehensive Economic and Trade Agreement ("CETA") between Canada and the European Union was ratified, and is set to come into force on September 21, 2017. The agreement eliminates 98% of tariffs between Canada and the EU, with a goal of 99% of tariffs being eliminated on full implementation.[7] While CETA is currently set to include the UK, Brexit will mean an exclusion of the UK from CETA and a loss of tariff-free trade with Canada. The disproportionate impact of this development on certain industries has the potential to create additional insolvencies and restructurings in those industries.

It should be noted that it is possible that Canada and the UK could negotiate a new free trade agreement (indeed, such negotiations have already informally begun).[8] However, given that the particulars of Brexit are not known currently, the UK cannot enter into such an agreement until post-Brexit and given the length of time CETA took to negotiate, it is likely that there will be at least some portion of time where trade between the countries would be subject to tariffs again at the rates that would apply before CETA comes into force.

As an additional factor highlighting the importance of the EU and UK as trade partners for Canada, the North American Free Trade Agreement ("NAFTA") is currently being renegotiated. Canada's largest trading partner by far is the United States, but depending on the outcome of the renegotiation, Canada might look to increase trade with the EU even more, exacerbating the disproportionate impact of Brexit on certain industries.

As a broad concept, a "hard" Brexit will mean that Canadian companies importing products from the UK will have a competitive disadvantage relative to their competitors that import from continental Europe, meaning companies that are tied to the UK exclusively could face a deteriorating economic climate. Conversely, Canadian companies exporting to the UK could face less demand, as their products become subject to tariffs again.

There is also another complexity with respect to the expected gap between the implementation of CETA this year and Brexit. There will be approximately two years between CETA coming into force and Brexit, meaning two years of free trade between Canada and the UK. The investment decisions made by companies during these two years may magnify the impact of Brexit on Canadian companies that invest heavily in UK trade during this window of free trade.

Top imports into Canada from the UK include aerospace parts and aircraft, pharmaceuticals, gems and precious metals, motor vehicles, petroleum products, and electronics.[9] Canadian companies importing these products from the UK will likely face higher costs post-Brexit and risk becoming less competitive. Additionally, multi-national UK companies with Canadian subsidiaries might shrink with a contracting UK economy.

Canadian exporters may experience a more challenging economic environment with Brexit. This changing environment will not be based exclusively on the largest exports by volume or dollar amount. Rather, exporters whose products will benefit from the greatest reduction in tariff under CETA may be subject to the greatest fluctuations in demand as a result of the duties being reinstated (on goods shipped to the UK) following Brexit. The following is an

[6] Kurt Hübner *et al*., "CETA: the Making of the Comprehensive Economic and Trade Agreement Between Canada and the UE", *Institut français des relations internationales*, April 2016 [Hübner].

[7] See http://www.international.gc.ca/gac-amc/campaign-campagne/ceta-aecg/index.aspx?lang=eng.

[8] See http://www.cbc.ca/news/business/brexit-trade-talks-canada-1.4049364.

[9] See http://tradecommissioner.gc.ca/united-kingdom-royaume-uni/market-facts-faits-sur-le-marche/0000978.aspx?lang=eng.

illustrative list of products that will benefit from significant reductions in duty rates under the CETA:[10]

- Chemicals and plastics (currently subject to a 6.5% tariff);
- Machinery and equipment (currently subject to an 8% tariff);
- ICT and electronics products (currently subject to a 14% tariff);
- Wood products (currently subject to a 10% tariff);
- Agriculture and agri-food products, including wheat and Meslin flour, breads, pastries, and other baked goods, and maple syrup (tariff varies, depending on product);
- Seafood, including shrimp (currently subject to a 20% tariff) and salmon (5.5% tariff).

The temporary elimination and then subsequent reintroduction of the above tariffs may cause significant price volatility for these goods. The result may be significant negative outcomes for Canadian exporters.

Basic economics suggests that Canadian companies dependent on the most affected industries could start appearing in insolvency and restructuring proceedings more frequently over the next few years. The overlap of CETA and Brexit negotiations means that some companies may briefly enjoy the benefits of tariff reductions, before losing these benefits as tariffs return. There may be new companies that spring up during this overlap period who will be especially vulnerable to changes brought by Brexit, particularly if they are highly leveraged.

In a “hard” Brexit scenario, the companies who are unprepared, highly leveraged, or overinvested in growth opportunities, are at higher risk. It is logical to expect that such companies could be driven to seek creditor protection at a greater rate than their less-affected peers. Conversely, companies that switch to partners / suppliers and / or subsidiaries in continental Europe, may be better positioned to withstand any increased cost of doing business with the UK.

Conversely, under a “soft” Brexit or no Brexit, it is possible that products remain duty free. In such an event, companies that gamble on remaining in or moving to the UK may enjoy an advantage over their peers. At the same time, the UK has historically had a closer trading relationship with Canada than countries in continental Europe. Close political ties (including a picture of the UK Monarch on our currency), a common language and legal system (for most Canadians), and economic stability all contribute to making the UK attractive to Canadian companies (and vice versa).

To summarize, Brexit creates significant uncertainty for Canadian companies reliant on the UK market. The strategies these companies employ and the final result of Brexit could have a significant impact on the mix of companies in the Canadian insolvency and restructuring arena. CETA, which will apply to the UK only until Brexit, subsequent uncertainty over trade talks between the UK and Canada, and the results of the NAFTA renegotiation will combine to make this a very uncertain time for Canadian importers and exporters.

[10] *Ibid*.

PROCEDURAL DIFFERENCES

The cross-border restructuring regime in Canada is governed by Part IV of the Companies' Creditors Arrangement Act ("CCAA").[11] The CCAA recognizes that main insolvency proceedings should take place under the supervision of a court in the jurisdiction that shares the greatest nexus with the company's centre of main interest (COMI).[12] Canadian courts have the authority to recognize foreign proceedings, which includes a mandatory stay.[13] Canadian courts must also specify whether a recognized foreign proceeding is the main proceeding or a non-main proceeding.

Whether a Canadian court recognizes a foreign proceeding as a main proceeding depends on the existence of a "real and substantial connection between the matter and the jurisdiction."[14] However, it is not required that an entity engage in economic activity in the foreign jurisdiction for a Canadian court to recognize proceedings, unlike the US Bankruptcy Code and the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law").

The vast majority of cross-border insolvency proceedings in Canada involve recognition under the CCAA of foreign proceedings in the United States or, alternatively, US recognition of Canadian proceedings under Chapter 15 of the US Bankruptcy Code. Both countries have substantially adopted the recognition of foreign proceedings as set out in the Model Law. This means that along with recognition of foreign proceedings, there will be an automatic stay of claims against creditors' claims if the receiving court accepts that the COMI is in the country from which recognition is being sought (which means that the foreign proceeding has been recognized as the main proceeding). Even if the receiving court does not agree that the COMI is located in the foreign country, so the foreign proceeding is considered a "non-main" proceeding, the receiving court has the discretion (but not the obligation) to grant a stay of proceedings.

Canada and the UK have adopted the Model Law and implementing legislation is in force in both countries. However, the majority of EU countries have not implemented the Model Law. The Model Law is aimed at facilitating cooperation between courts in different jurisdictions where there are companies with assets or creditors in more than one jurisdiction. Accordingly, proceedings commenced in the UK are easily recognized in Canada and offer companies protection from Canadian creditors. The same is true for proceedings started in Canada, seeking recognition in the UK.

The EU does have a series of mechanisms for creating co-operation and recognition between member states, being the European Insolvency Regulations ("EIR"), which includes the UK. (The Model Law was copied in large parts on the original EIR.) The UK therefore offers a doubly-attractive location for Canadians to do business: both as signatory to the Model Law but also as a gateway to Europe, where proceedings commenced in the UK can be recognized and companies can be afforded stays of proceedings. Additionally, Canadian proceedings commenced under the CCAA and obtaining recognition in the UK can also (theoretically) receive recognition under the EIR. This offers attractive stability for Canadian stakeholders with respect to their investments in multinational companies with operations in the UK and continental Europe.

[11] RSC 1985, c. C-36, as amended. It should be noted that Part XIII of the Bankruptcy and Insolvency Act, RSC 1985, c. B-3, as amended ("BIA") has virtually identical recognition provisions. However, in Canada the more complex cases, including a multi-national restructuring, would be conducted under the CCAA instead of the BIA as there is more flexibility afforded under the CCAA.

[12] Section 45(2) creates a rebuttable presumption that a company's COMI will be the location of their registered office.

[13] Section 47, CCAA.

[14] *2017 Annotated Bankruptcy and Insolvency Act*, p. 1487.

For the reasons noted in the prior section, it stands to reason that a Canadian company might prefer to have its COMI in the UK to elsewhere in Europe. However, post-Brexit this may no longer be the case. Without recognition of proceedings and accessible creditor moratoriums across the EU, UK proceedings may require multiple, multi-jurisdictional court attendances for recognition and stay orders. Creditors in other European jurisdictions could attempt to seize assets or move to start proceedings domestically. This can add costs, delay and litigation risk to restructuring UK companies with assets in other parts of Europe. Post-Brexit, Canadian companies will have to become more adept at dealing with creditors in continental Europe and civil law courts.

We also expect that a “hard” Brexit will result in a loss of attractiveness of UK schemes of arrangement for Canadian companies because of the decreased jurisdiction and influence of UK courts in continental Europe. Unless there continues to be recognition of UK proceedings across the EU, it is expected that the number of UK schemes of arrangement used to compromise Canadian debts would decrease. There would be no inherent advantage to using the UK schemes over Canadian proposals under the CCAA with respect to creditors, assets, or operations elsewhere in Europe.

RECENT CANADIAN CASES

It is not expected that Brexit will have a significant impact on inbound recognition orders. Representatives seeking recognition of foreign proceedings in Canada can apply to Canadian courts under section 47(1) of the CCAA. Under that section, recognition of foreign proceedings is mandatory so long as the pre-conditions are met. That is, an application for recognition must be related to a foreign proceeding and the applicant must be a foreign representative in respect of that foreign proceeding. For recognition orders related to UK proceedings, these conditions are easily met. Where administrators are appointed by an English court pursuant to the UK Insolvency Act 1986, a Canadian court will recognize those proceedings.[15]

Foreign states that are signatories to the Model Law are expected to continue receiving straightforward recognition orders by Canadian courts. In *MtGox Co, Re*,[16] the Court determined that the Japanese Bankruptcy Act was a law relating to bankruptcy and insolvency, and that the Japanese proceedings qualified as foreign proceedings. The definition of foreign proceedings under the CCAA is so broad that Canadian courts will likely continue to recognize proceedings in the EU whether or not UK courts are involved and whether or not a country is signatory to the Model Law.[17] Inbound recognition orders are unlikely to be affected by Brexit.

While a similar analysis would likely be undertaken regardless of where foreign proceedings had been commenced, there is an additional factor that makes Canadian courts particularly likely to recognize foreign proceedings. In *Urbancorp Toronto Management Inc.*,[18] the Court considered a co-operation protocol designed to realize upon the assets of the insolvent company. The protocol included, *inter alia*, that the Israeli representative would apply to a Canadian court for recognition that the Israeli proceedings were foreign main proceedings. Mr. Justice Newbould considered this protocol sufficient to recognize the Israeli proceedings as main proceedings, despite the fact that it was, in his words, “[n]ot clear that the COMI…is in Israel.” Assuming that Canadian courts continue to take such agreements into consideration in their decisions to recognize foreign proceedings (and thus, in granting

[15] *Tucker v Aero Inventory (UK) Ltd.*, 2009 CarswellOnt 7007 (ONSC) (Commercial List) at para. 15.
[16] *MtGox Co, Re*, 2014 ONSC 5811 (ONSC) (Commercial List).
[17] For example, a similar analysis was undertaken to recognize the Cayman Islands proceedings as main proceedings: see *Centaur Litigation SPC, Re*, 2016 BCSC 1224.
[18] *Urbancorp Toronto Management Inc., Re,* 2016 ONSC 3288.

automatic stays of proceedings), then Canada will continue to be a relatively easy place to get recognition orders.

Broadly, the challenges in cross-border insolvencies and restructurings for Canadian companies are the same as those for any multi-national company. That is, protection from creditors that comes with recognition of proceedings having begun in one jurisdiction and enforcement and recognition of courts' orders. Canadian insolvency proceedings are governed by the CCAA, which contains cross-border proceeding recognition guidelines. Foreign proceedings that receive recognition orders in Canada also receive an automatic stay of proceedings for Canadian creditors. The CCAA and United States Bankruptcy Code both borrow substantially from the Model Law ideas of cross-border insolvency proceedings recognition.

The UK has adopted both the Model Law and the EIR, which means Canadian proceedings can receive a stay of proceedings in the UK. This will not change post-Brexit. However, because the EU has similar cross-border rules under EIR, proceedings in the UK are recognized across the EU. This could change post-Brexit.

Our view is that the current foreign proceeding recognition rules in the UK are attractive to Canadian businesses with operations across Europe. Establishing a COMI in London makes sense and initiating restructurings under a UK scheme of arrangement or other order makes sense for Canadian companies doing business in Europe that require formal restructuring proceedings.

Canadian companies that proceed under the CCAA and rely on a judgment from the UK court recognizing a stay of proceedings, can also theoretically rely on that judgment being recognized across the EU.[19] As with other matters involving the interplay of the Model Law and EIR, this does not affect Canada more than other signatories. However, when considered in connection with the close economic ties between Canada and the UK, this may be a factor considered by international restructuring professionals when planning a strategic solution for an insolvent Canadian company with operations in Europe. This may encourage other EU countries with close economic ties to Model Law signatories to adopt the regime and to entice international insolvency proceedings to be commenced from their financial centres. Practitioners will undoubtedly consider the potential additional costs, delay and litigation risk in determining the COMI for an international corporate group.

On a macro-economic basis, if investors and lenders believe that the post-Brexit legal regime available to UK companies to restructure their businesses or realize on collateral is now more uncertain, investment may be curtailed and / or pricing may be increased. The UK is likely to become less attractive as the main jurisdiction to run a European reorganization (particularly in the case of a hard-Brexit).

CONCLUSIONS

The impact of Brexit on the Canadian economy generally and on the insolvency and restructuring industry in particular, depends on the entity in question and how "hard" or "soft" a Brexit happens. If the UK loses the preferred tariff arrangements available under CETA, importers of British goods to Canada and exporters of Canadian goods to the UK could suffer compared to their competition who arrange to ship to and from continental Europe.

Brexit creates meaningful uncertainty for Canadian companies reliant on the UK market. The strategies these companies employ and the final result of Brexit could have a significant

[19] EIR council regulation No 1346/2000, Art. 22.

impact on the mix of companies that may require insolvency and restructuring proceedings. CETA, which will apply to the UK only until Brexit, subsequent uncertainty over trade talks between the UK and Canada and the results of the NAFTA renegotiation will combine to make this a very uncertain time for Canadian importers and exporters.

Subsequent to Brexit, if the UK and Canada quickly negotiate a successful new free trade deal, the risks we identify may be short lived. Alternatively, if the result of a “soft” Brexit is that the UK continues to enjoy the benefits of CETA, the disruption to Canadian / UK trade could be minimized.

Brexit may create new challenges in cross-border proceedings for Canadian main proceedings seeking recognition in Europe. While Canada and the UK are both signatories to the UNCITRAL Model Law, few EU countries are. If the EU no longer recognizes UK proceedings under the EIR, Canadian companies would have less reason to bring proceedings in the UK. Currently an attractive centre of operations for Canadian companies, London might lose some of its luster post-Brexit for this reason. Additionally, duplicative proceedings might be necessary in the EU, which would mean additional complexity and expense for Canadian-led restructurings or those involving Canadian companies with significant European operations.

Canada and the UK are close economic partners. A “hard” Brexit will likely have an impact on Canada and on the nature of the companies that may require insolvency and restructuring expertise.

East Asia and the Pacific Rim

Introduction and General Orientation[*]

Scott Butler[**]

INTRODUCTION

This series of papers examines the impact of Brexit in Australia, the People's Republic of China ("China"), Hong Kong and Singapore; four jurisdictions in the Asia Pacific Rim with very different histories, cultures, political systems and economies.

For Singapore and China, Brexit presents opportunity.

In Singapore, Brexit presents another potential reason for debtors to choose Singapore's new and improved scheme of arrangement and judicial management regimes to restructure; possibly instead of restructuring in the UK.

In China, Brexit gives rise to an opportunity to negotiate and settle a bilateral treaty with the UK covering the recognition of restructuring and insolvency proceedings. Despite having the power to do so under Chinese insolvency laws, Chinese courts have refused to recognise UK restructuring or insolvency proceedings due to the absence of any treaty with the EU or evidence of reciprocity.

For Australia and Hong Kong, it will be more a case of 'business as usual' as the impact of Brexit in each jurisdiction will be rather limited.

In Hong Kong, the ability to seek recognition of Hong Kong insolvency proceedings in the UK and the ability of UK insolvency proceedings to be recognised in Hong Kong will not change. Brexit will also have no impact on the substantial restructuring and insolvency work conducted in Hong Kong in relation to offshore jurisdictions such as Cayman, Bermuda and the BVI.

Lastly, Brexit will not impact the various ways that Australian insolvency practitioners can seek recognition of Australian restructuring and insolvency proceedings in the UK and *vice versa*.

[*] The views expressed in this essay are the personal views of the authors, which are not to be taken as representing the views of INSOL International or any of its affiliates or representatives.

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East Asia and the Pacific Rim

Australia[*]

Scott Butler[**]

INTRODUCTION

Despite being on the opposite sides of the globe, Australia's history as a former colony and its place in the Commonwealth, give Australia and the United Kingdom strong historical ties. The decision on 23 June 2016 by the United Kingdom to withdraw from the European Union, was a shock to many Australians. The overall economic impact on the UK will depend largely on whether there is a "hard Brexit" or a "soft Brexit" (terms which have become part of the lexicon), or somewhere in between.

Whilst one in twenty of Australia's population was born in the UK and the rivalry on the rugby field and cricket pitch may be strong, the economic ties between the nations do not match the personal ties and the economic impact of Brexit on Australia's economy is likely to be limited. This paper does not focus on the limited economic impacts of Brexit on Australia, but rather considers the impact of Brexit on Australian restructuring and insolvency practices.

BREXIT'S IMPACT ON THE ABILITY OF AUSTRALIAN INSOLVENCY PRACTITIONERS TO OBTAIN ASSISTANCE FROM UK COURTS

As identified by McCormack and Anderson,[1] there are four main methods by which foreign parties can seek the assistance of UK courts in relation to foreign insolvency proceedings.

Firstly, section 426 of the UK Insolvency Act 1986 ("UK Insolvency Act") provides a statutory power to assist insolvency proceedings in countries specified in the Act or designated by the UK government. All the countries to which it currently applies are common law countries or countries sharing a common legal tradition with the UK.[2] Australia is one of the designated countries.

Secondly, European Council Regulation No. 2015/848 ("EC Regulation"), which recast the former Regulation 1346/2000, applies to insolvency proceedings opened on or after 26 June 2017 in respect of debtors with their centres of main interests ("COMI") within the EU (excluding Denmark).

[*] The views expressed in this essay are the personal views of the authors, which are not to be taken as representing the views of INSOL International or any of its affiliates or representatives.

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[1] McCormack, Gerard and Anderson, Hamish, "The Implications of Brexit for the Restructuring and Insolvency Industry in the United Kingdom" ("McCormack and Anderson") (for this contribution, see this publication *ante*).

[2] The countries designated to date 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 and the Virgin Islands, South Africa, Malaysia and Brunei Darussalam.

Thirdly, the Cross-Border Insolvency Regulations 2006, S.I. 2006/1030 ("CBIR") and the Cross-Border Insolvency Regulations (Northern Ireland) 2007, SRNI 2007/115 ("CBIRNI") implement the UNCITRAL Model Law on Cross-Border Insolvency ("Model Law") in the UK.

Fourthly, at common law the court has power to recognise and grant assistance to foreign insolvency proceedings.

Other than via the EC Regulation, Australian insolvency practitioners have the ability to seek assistance from UK courts under all these methods.

SECTION 426 OF THE INSOLVENCY ACT

Section 426 of the UK Insolvency Act ("section 426") allows UK courts, upon request, to assist courts in specified countries and to apply either the insolvency law of the UK or of the country where the request emanates from.[3] Australian insolvency practitioners have used section 426 to obtain assistance from English courts on more than one occasion.

In *England v Smith*[4] the Australian court overseeing the liquidation of Bond Corporation, made an order for the examination of a London partner in Arthur Andersen. It issued a letter of request asking the English court to assist it by making its own order for the examination. The Court of Appeal decided that the order should be made under section 426.

In *Re HIH Casualty and General Insurance Ltd: McGrath v Riddell*[5] ("*HIH*"), four insurance companies conducted business in Australia and the UK. The companies were ordered to be wound up in Australia. Subsequently, provisional liquidators were appointed in the UK over the companies' UK operations. The Australian court requested the UK High Court to assist by ordering remittal to Australia of assets collected by the UK provisional liquidators so they could be dealt with by the Australia liquidators.[6] This request was made both under section 426 and the common law (the position under the common law is discussed further below).

The House of Lords, as it then was, unanimously agreed it had discretion under section 426 to order remission of assets located in England to Australia and that in the exercise of that discretion an English court could order remission of assets located in England to a liquidator in a country whose insolvency scheme was not exactly in accordance with English law.[7] Brexit will have no impact on the ability of Australian insolvency practitioners to access UK courts via section 426.

CBIR

The CBIR and the CBIRNI implement the Model Law in the UK. Whilst Australia has also implemented the Model Law,[8] there is no requirement for reciprocity under the CBIR and so any "foreign representative" of a "foreign proceeding" can access the CBIR to seek relief.

[3] Sections 426(4) and 426(5).
[4] [2001] Ch 419 (CA).
[5] [2008] UKHL 21.
[6] It was proposed for the companies to enter into a scheme of arrangement approved both in Australia and in the UK.
[7] Section 562A of the Australian Corporations Act 2001 requires the proceeds of contracts of insurance to be distributed, in priority to other creditors, to those creditors who have insurance claims against the company. In the case of HIH, this would include proceeds of reinsurance contracts. In *Re HIH Casualty and General Insurance Ltd* 215 ALR 562, 591, the Supreme Court of New South Wales held that the principles of 'hotchpot' do not apply so as to require dividends received by a creditor under section 562A to be brought into account by the creditor when proving against other assets of the insolvent insurance company. By contrast, in a winding up in England governed by English distribution rules, creditors who had received dividends under section 562A in Australia would have to bring them into account, by way of hotchpot, when claiming dividends in the English winding up.
[8] Via the Cross-Border Insolvency Act 2008 (Cth).

Under article 17 of the CBIR, a foreign proceeding can be recognised as either a "foreign main proceeding" or a "foreign non-main proceeding". Recognition as a "foreign main proceeding" brings with it the automatic stays under article 20.[9] Recognition as a foreign proceeding, whether main or non-main, allows the court to use its discretion to grant appropriate relief under article 21.

The English courts have made various orders under article 21, including to remit British-based assets to an overseas liquidator,[10] to stay secured creditors from enforcing their security against assets in British waters[11] and to alter the automatic stay to allow English arbitrations to continue.[12]

Brexit will not impact on the ability of an Australian foreign representative to apply for relief under the CBIR or the CBIRNI.

COMMON LAW

Whilst in *HIH* Lords Scott and Neuberger refused to make an order under the common law and relied on section 426 of the Insolvency Act, Lords Hoffmann and Walker both considered there was an inherent common law power to order remittal of English assets to the Australian liquidation, the only limit being whether remittal would be contrary to UK public policy and considerations of justice.

As is well known, the limits on the common law power to grant assistance were more recently decided by the UK Supreme Court in *Rubin v Eurofinance SA*[13] ("*Rubin*") and *New Cap Reinsurance Corporation (In Liquidation) v A E Grant*[14] ("*New Cap*") and by the Privy Council in *Singularis Holdings Limited v PricewaterhouseCoopers*[15] ("*Singularis*").

Enforcing Australian insolvency judgments in the UK - *Rubin* and *New Cap*

Rubin was an appeal against the enforcement at common law of a judgment of the US Bankruptcy Court, obtained within a US Chapter 11 proceeding, given in default of appearance, in respect of fraudulent conveyances and transfers. The proceedings brought were analogous in nature to claims under section 238 (transactions at an undervalue) and section 423 (transactions defrauding creditors) of the UK Insolvency Act.

The Supreme Court in *Rubin* did not agree with the Privy Council's earlier views in *Cambridge Gas*[16] that judgments in proceedings (e.g. the recovery proceedings) which are taken under the umbrella of an insolvency proceeding (e.g. a Chapter 11 proceeding under the US Bankruptcy Code) fall outside of the usual rules applicable to common law recognition and enforcement of judgments and decided that *Cambridge Gas* was wrongly decided. Given the judgment debtors were neither present in the US at any time, nor had they submitted to the US court's jurisdiction, the Supreme Court held that the judgment could not be recognised in the UK under the common law.

[9] Which imposes the same stays as if the corporate debtor had been wound up under the UK Insolvency Act.
[10] *Re Swissair Schweizerische Luftverkehr-Aktiengesellschaft* [2009] EWHC 2009 (Ch).
[11] *Samsun Logix Corp v DEF* [2009] EWHC 576 (Ch).
[12] *Cosco Bulk Carrier Co Ltd v Armada Shipping SA* [2011] EWHC 216 and *American Energy Group Limited (Claimant) v Hycarbex Asia Pte Limited (In Liquidation)* [2014] EWHC 1091 (Ch).
[13] [2012] UKSC 46.
[14] [2012] UKSC 46.
[15] [2014] UKPC 36.
[16] *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 A.C. 508 P.C.

Given the similarity of issues, the Supreme Court heard the *New Cap* appeal at the same time as *Rubin* and handed down a single judgment addressing both matters.

In *New Cap*, an Australian liquidator asked the UK courts to recognise and enforce a judgment obtained in Australian unfair preference proceedings. The defendants, members of a Lloyd's Syndicate, did not appear in the proceedings and judgment was entered by default.

Contrary to the situation in *Rubin*, the Supreme Court held that the Syndicate had submitted to the jurisdiction of the Australian courts responsible for the supervision of the liquidation because they had submitted proofs of debt in the liquidation and attended and participated in creditors' meetings, including voting in favour of a scheme of arrangement.[17] The court held that having chosen to submit to New Cap's liquidation, the Syndicate should bear the burden of complying with orders made in the proceeding.[18]

In *Isis Investments Ltd v Kaupthing HF*,[19] the UK High Court distinguished *New Cap*. The defendants had filed proofs of debt in a Manx liquidation which were expressed as being contingent (on any entitlement to a fund held by the company in liquidation as trustee). In that circumstance, the court decided the creditor could not have elected to have submitted to the courts of the Isle of Man in respect of the liquidation.

Importantly, the court held that because the defendants had submitted to the jurisdiction of the Australian court (and hence would be enforceable under the common law), the judgment fell within the scope of the UK Foreign Judgments (Reciprocal Enforcement) Act 1933 ("1933 Act").[20] Section 6 of the 1933 Act excludes common law enforcement of a judgment caught by the 1933 Act and so the court held that the judgment should be enforced by way of registration under the 1933 Act.

This makes it clear that judgments in Australian insolvency proceedings can be enforced in the UK under the 1933 Act if they would have been enforceable at common law by meeting the Dicey Rule test. Brexit will not alter this.

Production of information necessary for the administration of an Australian winding up – *Singularis*

The majority of the Privy Council in *Singularis* held that there was a common law power to assist a foreign insolvency court "by ordering the production of information in oral or documentary form which is necessary for the administration of a foreign winding up."[21] In doing so, it upheld the general principle of modified universalism[22] (and said neither *HIH* or *Rubin* had discredited it), but imposed limitations on its application. In relation to orders for the production of documents under the common law, the power was subject to the following limitations:[23]

[17] At para. 158.
[18] At para. 167.
[19] [2013] EWHC 7.
[20] By reason of the terms of the Reciprocal Enforcement of Foreign Judgments (Australia) Order 1994, art. 4, which applied Part I of the 1933 Act to Australian judgments in respect of civil and commercial matters, which included insolvency proceedings.
[21] At para. 25.
[22] The principle is perhaps best summed up by Lord Hoffmann where he famously said in *HIH* at p. 861, para. 30: "The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."
[23] At para. 25.

(a) It is only available to assist foreign court-appointed officers or equivalent public officers in an insolvency. It is not available in a voluntary winding up, which is essentially a private arrangement that is not conducted by a court officer;

(b) The power exists for the purpose of assisting foreign courts who are otherwise bound by their territorial limits. Therefore, the power does not allow foreign liquidators to do something that they could not do under the law pursuant to which they were appointed;

(c) It is only available where necessary for the performance of the foreign office holder's functions;

(d) The order must be consistent with the substantive law and public policy of the assisting court. It follows that the power is not available for purposes which are properly the subject of other legislation which governs the compulsory provision of information and is intended to cover the field, e.g. statutes governing obtaining information for the purpose of actual or anticipated litigation. It may also be contrary to domestic public policy to make an order which there would be no power to make in a domestic insolvency;

(e) The exercise of the power is conditional upon the liquidators paying the third party's reasonable costs of compliance.

Brexit will have no impact on an Australian court-appointed liquidator’s rights to seek the assistance of the UK courts in ordering production of documents or information from parties located in the UK in accordance with the principles set out in *Singularis*.

Using the common law to remit assets to Australian insolvency practitioners

Following *HIH*, in *Re Swissair Schweizerische Luftverkehr-Aktiengesellschaft*[24] the High Court (in addition to its power to do so under the CBIR) considered its inherent jurisdiction under the common law to order remittal of assets from an English ancillary liquidation to a Swiss foreign principal liquidation. Richards J ordered the remittal on the basis that he had inherent jurisdiction to do so under the common law and on the basis of art 21.2 of the CBIR.

In summary, subject to the limits on its availability imposed by *Rubin* and *Singularis*, the common law is still an avenue available to Australian insolvency practitioners to seek assistance from UK courts. However, given the scope for relief under section 426 and the CBIR, and the requirement that insolvency judgments are enforced under the 1933 Act, the common law will often remain an option of last resort.

SCHEMES OF ARRANGEMENT

A number of decisions[25] have made it clear that as long as there is a “sufficient connection” with England or Wales, the UK courts will exercise their jurisdiction to implement a scheme of arrangement, even if the company neither has its COMI or an “establishment” in the UK.[26]

Schemes of arrangement are not governed by the Regulation and so other ways of seeking recognition within the EU need to be pursued.[27] As McCormack and Anderson[28] note, there

[24] [2009] EWHC 2009 (Ch).

[25] The decisions include *Re Drax Holdings Ltd; Re Inpower Ltd* [2004] 1 BCLC 10; *Re La Seda De Barcelona SA* [2010] EWHC 1364; *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch); *Tele Columbus GmbH* (No 7359 of 2010, 14 December 2010); *Re Stemcor (S.E.A.) Pte Limited* [2014] EWHC 1096 (Ch); *Re Primacom Holdings GmbH (No.1)* [2011] EWHC 3746 (Ch) and (No.2) [2012] EWHC 164 (Ch), [2013] BCC 201; *Re Hibu Finance (UK) Ltd* [2014] EWHC 370 (Ch); *Re Apcoa Parking (UK) Ltd and Ors* [2014] EWHC 997 (Ch).

[26] Referring to those terms as defined in the Regulation.

[27] The Regulation only applies to those collective “insolvency proceedings” listed in Annex A of the Regulation and schemes of arrangement are not included in the list of insolvency proceedings applicable for the UK.

[28] McCormack and Anderson, *supra* note 1, at p. 8.

is uncertainty as to whether the UK courts can find jurisdiction to sanction schemes of arrangement under the Jurisdiction and Judgments Regulation ("Brussels 1") and hence open the door to seeking recognition of scheme orders in other EU member states via Brussels 1, or whether schemes fall outside of Brussels 1 meaning that recognition of schemes in other EU members states falls to reliance on principles of private international law. Rules of private international law have been used to seek recognition of UK schemes in other EU member states where jurisdiction to sanction the scheme in the UK was based on UK governing law clauses[29] and there would appear to be no reason why that could not occur post Brexit.

The only decision to date involving an Asia-Pacific based company to restructure via an English scheme of arrangement is *Re Vietnam Shipbuilding Industry Group*[30] where Vietnam Shipbuilding Industry Group (popularly known as "Vinashin"), used the UK courts in 2013 to enter into a scheme to restructure a US$600 million debt facility with a group of international lenders, led by Credit Suisse. Vinashin was incorporated in Vietnam and has its main operations in Vietnam.

Whilst Brexit will not impact on the ability of overseas debtors to access the UK courts to implement schemes of arrangement, given Australian corporate debtors can enter into schemes of arrangement under Australian laws, it would be unlikely for an Australian debtor company to seek to implement a scheme via the UK courts and as far as the author is aware, none have tried to do so.

To the extent that Brexit could impact on the attractiveness of the UK as a forum for schemes of arrangement, one may think that foreign debtors could turn to other countries, such as Australia, to implement schemes, by, for instance, amending finance documents to give jurisdiction to Australian courts or to make Australian law the governing law of the contract. Unfortunately, Australia's laws relating to schemes of arrangement limit the jurisdiction of Australian courts to sanction schemes of Australian incorporated debtors or foreign debtors that have registered as a foreign company under our Corporations Law and so such scheme forum shopping is not possible in Australia.

Brexit will also have no impact on the (limited) ability of an Australian debtor to seek recognition of Australian scheme orders in the UK against UK-based scheme creditors. In *Rubin*, the Supreme Court said, given the CBIR and the Model Law say nothing about the enforcement of foreign judgments, there was nothing to suggest that articles 21, 25 and 27 apply to the recognition and enforcement of judgments and held the Model Law was not intended to deal with judgments by implication.

Therefore, the only basis that the CBIR could be used to seek recognition of an Australian scheme of arrangement was if it was found to be a "foreign proceeding". There is considerable doubt whether an Australian scheme would be recognised as a foreign proceeding under the CBIR. A scheme would not fall within the definition of a "foreign proceeding" in article 2(b) of the Model Law as adopted under the CBIR.[31] Whilst a UK scheme has been recognised as a foreign proceeding by the US courts under Chapter 15 of the US Bankruptcy Code,[32] the definition of "foreign proceeding" in the US Bankruptcy Code is wider than under the CBIR and includes proceedings, whether or not under bankruptcy

[29] For instance, in *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch) and in *Tele Columbus GmbH* (No 7359 of 2010, 14 December 2010).

[30] [2013] EWHC 2476 (Ch).

[31] Under the CBIR, "foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation.

[32] *In re Magyar Telecom B.V.*, Case No. 13-13508 (SHL) (Bankr. D. Del. Dec. 12, 2013).

law, for the purpose of adjusting debts by composition, extension, or discharge, or effecting a reorganisation.[33]

In *Rubin,* Lord Collins did not consider that section 426 could be used to recognise and enforce a foreign judgment and so recognition of scheme orders could not be sought under section 426 of the Insolvency Act.

Accordingly, the only basis for obtaining orders enforcing an Australian scheme order against a UK-based creditor would seem to be if the creditor was caught by the jurisdiction of the Australian courts under the Dicey Rule, in which case the scheme order would be a judgment enforceable under the 1933 Act. Brexit will have no impact on this.

ACCESSING EUROPE VIA THE REGULATION

Under the EC Regulation, the location of a debtor's COMI (and hence the jurisdiction where "main" insolvency proceedings can be opened) is determined at the time when the application to open the insolvency proceedings is filed with the court.[34]

As McCormack and Anderson note,[35] some European companies have shifted their COMIs to the UK to be able to take advantage of using UK restructuring procedures.[36] The primary reason for this appears to have been the fact that UK insolvency procedures are more flexible and better suited to the restructure trying to be achieved. Australian debtors have access to perfectly good, flexible restructuring options in Australia and so are unlikely to wish to shift their COMI to the UK simply for that reason.

However:

(a) if an Australian debtor wished to ensure that the restructuring that it entered into was binding on stakeholders in Europe (for instance, because it had operations in mainland Europe and wanted to prevent creditors from taking direct action against those assets);

(b) it had no other basis for seeking recognition of an Australian insolvency proceeding in the EU member state where the operations were located (e.g. under the Model Law[37]); and

(c) incurring the costs in doing so made economic sense,

it could consider shifting its COMI to the UK and restructuring there via an insolvency proceeding caught by the EC Regulation and rely on the Regulation for recognition in the EU.

Such an opportunity would be lost following Brexit in the absence of a bilateral treaty with the EU replicating the effects of the Regulation. However, to date the author is not aware of any Australian debtor that has implemented such a COMI shift and restructure in the UK and so this impact of Brexit is more theoretical than real.

[33] Under s. 101(23) of the US Bankruptcy Code, "foreign proceeding" means a proceeding, whether judicial or administrative and whether or not under bankruptcy law, in a foreign country in which the debtor's domicile, residence, principal place of business, or principal assets were located at the commencement of such proceeding, for the purpose of liquidating an estate, adjusting debts by composition, extension, or discharge, or effecting a reorganisation.

[34] *Re Staubitz-Schreiber* (Case C-1/04) [2006] BCC 639.

[35] McCormack and Anderson, *supra* note 1, at p. 3.

[36] See e.g., *Deutsche Nickel* (2004) and *Schefenacker* (2007)*, Damovo* (2007), *Re Hellas Telecommunications (Luxembourg) II* (2009) *and Interedil Srl* (2011)*.*

[37] Which has been adopted in Slovenia, Serbia, Romania, Poland and Greece.

East Asia and the Pacific Rim

China (PRC)*

Kingsley Ong,[1] Eleanor Lau[2] and Anissa Ng[3]

INTRODUCTION[4]

Having initiated its withdrawal from the European Union under Article 50 of the Treaty on European Union in March 2017, the UK is expected to formally leave the European Union in March 2019.

This essay will consider the impact of Brexit on cross-border insolvency recognition between the UK and the People's Republic of China ("PRC" or "China"). This impact has significant relevance given that the PRC and the UK are respectively the second largest and the fifth largest economies in the world.

HISTORY AND DEVELOPMENT OF PRC BANKRUPTCY LAW JURISPRUDENCE[5]

In order to understand the PRC Bankruptcy Law framework and system, it is first necessary to obtain some perspective on the history and development of Chinese bankruptcy law jurisprudence.

Traditional Chinese Jurisprudence

Historically, the Chinese legal system never formally recognised the concept of bankruptcy. It was noted that the Chinese tradition was that "debts incurred by the father shall be assumed by the son".[6] Hence, traditionally enshrined in Chinese culture (even though not necessarily protected by a formal legal framework), creditors rights were unquestionable and debts were never forgiven - debts were passed down to the next generation.

The first attempt at introducing the concept of bankruptcy law (with the concept of debt resolution) in China, was in 1906 during the late Qing Dynasty. However, this effort was annulled in 1908 by Emperor Guang Xu due to difficulties of implementation. In 1935, the Nationalist Government published a bankruptcy law that is still in force in Taiwan today.[7]

* The views expressed in this essay are the personal views of the authors, which are not to be taken as representing the views of INSOL International or any of its affiliates or representatives.

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[4] We have endeavoured to state the law as at 25 August 2017.

[5] It is acknowledged that this section is cited from an article first published by the first author in: K. Ong and M. Hsiao, "From ISDA to NAFMII: Insolvency stalemate and PRC bankruptcy jurisprudence", (2013) *Capital Markets Law Journal* 77.

[6] S. Li, "Bankruptcy Law in China: Lessons of the Past Twelve Years", (2001) 5(1) *Harvard Asia Quarterly* (23 Feb 2006) [Li].

[7] *Ibid.*

Influence of Marxism

When the Communist Party established the PRC in 1949, all laws enacted by the Nationalist Government were abolished. Many former privately-owned enterprises were turned into State-owned enterprises.[8] State-owned enterprises became the backbone of the economy, providing goods, services, employment and other benefits. State-owned enterprises were supported by the State and did not have to bear their losses (or profits) independently, so bankruptcy was never an issue.

As State-owned enterprises were not profitable entities in their own right, the State was required to support them financially. In practical terms, State-owned enterprises proved to be economic disasters.[9] It came to a stage where certain State-owned enterprises that found themselves in serious financial difficulties, could no longer continue to operate. However, the PRC Government feared that strict application of bankruptcy laws to insolvent State-owned enterprises would create two serious problems: (a) high unemployment, which could result in social unrest; and (b) a knock-on effect on the banking sector leading to the bankruptcy of many State-owned banks.[10] Amazingly, these factors are strikingly similar to the reasons provided by Western governments to justify the bailing-out of Western banks following the 2008 financial crisis.

Given these overriding fears, unsustainable State-owned enterprises had to be closed, suspended or consolidated, the business model would be changed by administrative orders, or they went bankrupt automatically without going through any legal procedure. The facts surrounding bankruptcies were also kept secret. In such cases, bankruptcy or insolvency would occur without any legal recourse and nothing would be due or owing to creditors.[11] Hence, following the communist revolution, there was a complete shift in policy and attitude away from creditors' rights. From traditionally having supreme and unquestionable rights, creditors suddenly found themselves having practically no rights in a bankruptcy.

1986 PRC Enterprise Bankruptcy Law

In the early 1980s, shortly following the inauguration of PRC's "open door policy", the PRC government realised the drawbacks of the Marxist planned economy model in dealing with insolvent enterprises. This resulted in the enactment of PRC's 1986 Enterprise Bankruptcy Law in December 1986 ("1986 EBL"), which dealt with bankruptcies of State-owned enterprises. This was the first significant attempt at bankruptcy reform under the Chinese Communist Party, and was significant in that it provided a legitimate method for the bankruptcy of State-owned enterprises (which previously could not enter proper bankruptcy).

In April 1991, the National People's Congress issued an amendment to the Code of Civil Procedure that provided a direct basis for handling bankruptcies of non-State-owned enterprises. The Code provided that repayment procedures specified in the 1986 EBL were applicable to all legal entities. This resulted in a major increase in company insolvency cases involving both State-owned and non-State-owned enterprises.[12]

Notwithstanding these developments, creditors still faced great difficulty in recovering their debts from bankrupt Chinese companies. Consistent with Marxist ideology on protecting

[8] This was in line with the Marxist theory that the production of capital belonged to the people of China. See K. Ong & C. Baxter, "A Comparative Study of Fundamental Elements of Chinese and English Company Law" (1999) 48(1) *ICLQ* 88, at fn. 18. [Ong & Baxter].

[9] *Ibid.,* at p. 91.

[10] C Booth "The 2006 PRC Enterprise Bankruptcy Law: The Wait is Finally Over", (2008) 20 *SAcLJ* 275, p. 285 [Booth].

[11] S. Li, *supra* note 6, at fn. 19.

[12] *Ibid*. Reportedly, over 16,000 cases between 1988 to 2006.

workers' rights,[13] money recovered from bankrupt companies must be used to settle employees first. In addition, bank creditors have priority over non-bank creditors for the remaining money (if any).[14] There is often little or no money left after settling employee creditors, such that even bank creditors generally oppose bankruptcy filings. The bankruptcy process is made even more challenging by concerns about "identity" and "instability" and the need to resettle employees into new jobs – this is because, fundamental to communist ideology, State employees (or government servants) were guaranteed an "iron rice bowl" or life-time employment.[15] These challenges meant that for non-bank creditors, it was simply commercially not worth initiating or pursuing bankruptcy. Commentators have noted that "legal mechanisms to guarantee creditor's interests are weak at best",[16] and the 1986 EBL was no more than a "paper tiger".[17]

2006 PRC Enterprise Bankruptcy Law

The PRC insolvency law received a major overhaul following the introduction of the 2006 PRC Enterprise Bankruptcy Law ("2006 EBL"). The 2006 EBL, which became effective on 1 June 2007, introduced a uniform bankruptcy law for all legal persons in PRC. The 2006 EBL imported concepts drawn from international market bankruptcy standards for restructuring, reorganisation and conciliation.

Of particular interest is the strong protection afforded to creditors. For example, the 2006 EBL entitles creditors to enforce a foreign bankruptcy decision against a debtor's assets inside China in accordance with bilateral or multilateral treaties or the principle of reciprocity.

Although there remain some concerns about its proper function in practice,[18] the 2006 EBL nevertheless has improved creditors' standing in bankruptcy cases.

RECOGNITION OF CROSS-BORDER INSOLVENCY PROCEEDINGS IN THE PRC

For the first time in China's bankruptcy jurisprudence, the 2006 EBL formally provided for the recognition and enforcement of foreign insolvency proceedings in China.

Article 5 of the 2006 EBL provides as follows:

> "Bankruptcy proceedings initiated according to this Law shall be effective with respect to the debtor's property located outside the territory of the People's Republic of China.
>
> With regard to a legally effective ruling or decision on a bankruptcy case made by a foreign country, if such ruling or decision involves the property of the debtor within the territory of the People's Republic of China, and an application or a petition for the recognition and execution thereof is filed with the People's Court, the People's Court shall, according to *international treaties* concluded or participated by the People's Republic of China or the principle of *reciprocity*, review the ruling or decision, and shall decide to recognise or execute the ruling or decision when believing that such reorganisation or execution *does not violate the fundamental principles of the law of the People's Republic of China*, impair the state sovereignty, security and *social public interests* or *impair the legitimate rights and interests of the creditors within the People's Republic of China*." (Emphasis added.)

[13] K. Ong & C. Baxter, *supra* note 8*,* fn.21.
[14] This was because the major creditors of State-owned enterprises were State-owned banks.
[15] S. Li, *supra* note 6, fn.19.
[16] *Ibid.*
[17] C. Booth, *supra* note 10, fn. 23 at p. 285.
[18] X. Lan, "Outdated Bankruptcy Law Upgraded: China submits new drafts of bankruptcy law to facilitate move towards a full market economy", *The Beijing Review*. Available at http://www.bjreview.cn/EN/200430/Business-200430(B).htm.

Commentators have generally criticised Article 5 for not being clear, for example, what do the concepts of “fundamental principles”, “social public interests”, etc. actually cover?[19]

Nonetheless, Article 5 represents a significant milestone in the development of China’s bankruptcy jurisprudence. In settling the 2006 EBL, the PRC Government also studied the UNCITRAL Model Law on Cross-Border Insolvency, and adopted the principle of universalism from the Model Law.[20] This included incorporating a more universalist approach to cross-border insolvency recognition under Article 5.

RECOGNITION OF UK INSOLVENCY PROCEEDINGS IN PRC

The question of whether a PRC Court would recognise UK insolvency proceedings was tested in the case of *Hua An Funds v Lehman Brothers International Europe (LBIE)* in 2011.[21] This case is particularly interesting as it was the first time the recognition of a UK insolvency proceeding had been put before the PRC Courts since the 2006 EBL had come into force. It was also before the Brexit referendum.

LBIE is a UK entity and part of the Lehman Brothers group which collapsed in September 2008. Hua An Funds is a PRC fund management firm.

In 2006, Hua An Funds invested in principal protected notes, which were designed by LBIE. When the Lehman Brothers group collapsed in September 2008, Hua An Funds feared that the notes might default and filed a petition at the People’s Court of Shanghai. In its petition, Hua An Funds claimed damages for an amount of USD96.4 million and sought an attachment of LBIE’s assets in the PRC. LBIE argued that, given the commencement of its UK insolvency proceedings, the UK insolvency proceedings should be recognised in the PRC and any individual enforcement action by Hua An Funds should be stayed.

The PRC Court refused to recognise LBIE’s UK insolvency proceedings, primarily on two grounds:

- No treaty existed between UK and China for reciprocal recognition of insolvency proceedings;[22] and
- No reciprocity. The PRC Court also found that there was no precedent to demonstrate that the UK Courts would recognise and enforce insolvency rulings rendered by the PRC Courts.

LESSONS FROM *HUA AN FUNDS v LEHMAN BROTHERS INTERNATIONAL EUROPE* (LBIE)

It has been argued that the PRC Court should “not just [look] back to history alone”, but should make “some investigation as to whether or not the UK Court would be willing to enforce a Chinese bankruptcy ruling”.[23]

[19] X. Gong, “To Recognise or Not to Recognise? Comparative Study of Lehman Brothers Cases in Mainland China and Taiwan”, (2013) *International Corporate Rescue* 240.

[20] W. Wang, “National Report for the People’s Republic of China”, in D. Faber *et al* (Ed), Oxford University Press, *Commencement of Insolvency Proceedings*, p. 172-173 (2012).

[21] F. Zhang, “从华安基金与雷曼欧洲金融衍生产品投资合作纠纷案看我国相关法律制度的完善” (2012). Available at: http://old.ccmt.org.cn/showexplore.php?id=4148. Zhang, who heard the case and wrote this article, is a Senior Judge at Shanghai High People’s Court. The LBIE case was eventually resolved through arbitration, and hence there is no judgement available.

[22] There is a treaty on Mutual Legal Assistance in Criminal Matters published in 2 Feb 2016 – but there is no treaty for Civil / Commercial Matters yet. See: https://www.gov.uk/government/publications/ts-no102016-ukchina-treaty-on-mutual-legal-assistance-in-criminal-matters.

[23] X. Gong, *supra* note 19, at p. 242.

The UK adopted the UNCITRAL Model Law on Cross-Border Insolvency in 2006, pursuant to the UK's Cross-Border Insolvency Regulation 2006. Reciprocity is not a requirement for recognition under the UK's Cross-Border Insolvency Regulation 2006. Arguably, while there is no precedent for UK Courts recognising PRC insolvency proceedings, it does not necessarily mean that if this question came before the UK Courts, the UK Courts would not be willing to recognise PRC insolvency proceedings.

Nonetheless, the LBIE case demonstrates the conservative attitude of the PRC Courts in applying Article 5 and recognition of cross-border insolvency proceedings where there is a lack of an international treaty.

IMPACT OF BREXIT?

Even before Brexit, the PRC Court has refused to recognise UK insolvency proceedings due to the absence of any treaty or evidence of reciprocity.

Indeed, to date, the UK and PRC still do not have any formal international treaty for the recognition of cross-border insolvency proceedings, or for civil and commercial judicial assistance.[24]

As part of the European Union, EU member states are restricted from forming bilateral agreements with third countries on civil and commercial matters. For example, any EU member state wishing to enter into bilateral agreements with third countries on contractual and non-contractual obligations must follow the rules and procedures prescribed under EU Regulation (EC) No. 662/2009.[25] This includes notification (Article 3), assessment by the European Commission (Article 4) and authorisation to negotiate and to conclude (Articles 5 and 8 respectively).

It is also not easy for the EU to enter into a mutual assistance / multilateral agreement on the recognition of cross-border insolvency with China, given that the interests of all the current 28 member states would need to be balanced.

At the time of writing, there are no ongoing negotiations on mutual assistance / multilateral agreement on civil and commercial matters between the EU and China.[26] There is also no report of such negotiations taking place on a bilateral basis between the UK and China.

In the context of trade, it has been suggested that a post-Brexit UK would be better able to sign free trade agreements with China, as the UK could move more "nimbly" to sign bespoke deals to benefit UK's highly specialised economy (which is 80% comprised of services) if unencumbered by the need to balance the interests of 27 other nations.[27]

Similarly, it is envisaged that, with Brexit, the UK will very soon no longer be subject to EU restrictions on its ability to negotiate and settle a bilateral treaty with China (or other countries) for the recognition of insolvency proceedings, or a wider agreement on civil and commercial judicial assistance.

[24] The latter may be useful in view of Article 262 of the PRC Civil Procedure Law, which provides: "In accordance with the international treaties concluded or acceded to by the People's Republic of China or with the principle of reciprocity, the People's Courts of China and foreign courts may make mutual requests for assistance in the service of legal documents, in investigation and collection of evidence or in other litigation actions."

[25] Regulation (EC) No 662/2009 of the European Parliament and of the Council of 13 July 2009. Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009R0662&from=EN.

[26] See: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.

[27] S. Winders, "Brexit and Free Trade: Would a post-Brexit UK be better able to sign free trade agreements with the rest of the world?", the Bruges Group. Available at https://www.brugesgroup.com/images/papers/brexitandinternationalfreetrade.pdf.

If the UK and China considered it to be in their mutual national interests to settle such a treaty between themselves, Brexit presents a golden opportunity to do this and may actually accelerate the recognition of cross-border insolvency between the UK and China.

East Asia and the Pacific Rim

Hong Kong[*]
(A Special Administrative Region of the PRC)

Robin Darton[**]

INTRODUCTION

Although it is now more than 20 years since the Handover, when Hong Kong ceased to be a British Dependent Territory, reference to Hong Kong as “the former British colony” is still something one often sees. There is still a sizeable community of British citizens living and working in Hong Kong. English remains one of the official languages. Importantly, and not merely in the context of this article, the Hong Kong legal system has continued to be a strong advantage for Hong Kong over other Asian jurisdictions, taking strength from its English law roots, with which it is still very much in touch.

With all this in mind, it would perhaps be thought that the Brexit vote had (and Brexit itself will have) a substantial effect on Hong Kong, including the insolvency and restructuring community. Certainly, feelings between the “leavers” and the “remainers” did run high from time to time when the referendum took place (even though many of us were not eligible to vote). However, what has been the real effect on Hong Kong as a result of the Brexit vote? And importantly for what we are considering for this discussion, what effect are we likely to see on the areas of restructuring and insolvency when the UK has actually left the EU?

In short, my view is that the answer to this question is that there is likely to be very little impact.

ECONOMIC LINKS BETWEEN HONG KONG AND THE UK

Economically, notwithstanding the historical links between the UK and Hong Kong, the UK has become a relatively minor (albeit still important) trading partner for Hong Kong. For 2016, exports to the UK accounted for only 1.4% of Hong Kong’s total exported goods by value.[1] This represented the third highest out of the EU countries (Germany representing 1.9% of exports and the Netherlands 1.6% in 2016).[2] The latest figure for export of services is higher but still not significant (6.6% in 2014).[3] Exports to the EU as a whole accounted for 9.3% (goods) and 14.9% (services).[4] By way of comparison, in 2015, the US accounted for

[*] The views expressed in this essay are the personal views of the author, which are not to be taken as representing the views of INSOL International or any of its affiliates or representatives.

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[1] “Brexit: Recent Developments and Potential Repercussions” (*HKTD Research* 19 April 2017) <http://economists-pick-research.hktdc.com/business-news/article/Research-Articles/Brexit-Recent-Developments-and-Potential-Repercussions/rp/en/1/1X000000/1X0A9SH7.htm> accessed 28 August 2017.

[2] *Ibid*.

[3] “Half-Yearly Economic Report 2016: Brexit and its possible impacts on the Hong Kong economy” (*Hong Kong Economy* August 2016) <http://www.hkeconomy.gov.hk/en/pdf/box-16q2-2-1.pdf> accessed 28 August 2017.

[4] For 2015 and 2014 respectively, see “Half-Yearly Economic Report 2016: Brexit and its possible impacts on the Hong Kong economy” (*Hong Kong Economy* August 2016) <http://www.hkeconomy.gov.hk/en/pdf/box-16q2-2-1.pdf> accessed 28 August 2017.

9.5% of Hong Kong's exports (goods), and China accounted for 53.7%.[5] As the Hong Kong Dollar is pegged to the US Dollar, the fall in the British pound after the Brexit vote will likely have had a negative impact on exports, but in economic terms (i.e. ignoring any political uncertainty concerns) may have a possible positive impact on outward investment from Hong Kong to the UK. That said, even with regard to the latter, the latest figure available, for 2015, shows that the UK was the destination for only 2.1% of Hong Kong's outward direct investment.[6]

Another indicator of the limited effect can be seen by looking at the Hang Seng Index at around the time of the vote. In common with the markets in other major financial centres, the Index took a fall after the vote, being around 4% down by the Monday following the result. However, it recovered very quickly; by the end of July it was more than 5% higher than its pre-vote levels (so a 9% increase from the trough which immediately followed the vote). Of course, in an increasingly global marketplace the uncertainty associated with Brexit could very well cause difficulties for Hong Kong-based businesses. However, the (admittedly simple) data referred to in the previous paragraph helps to demonstrate that it is likely the impact on Hong Kong will be limited.

HONG KONG'S LEGAL SYSTEM

Hong Kong has for many years had its own legislation, even prior to the Handover on 1 July 1997 (when the People's Republic of China assumed sovereignty over Hong Kong). After the Handover, the common law continued to apply in Hong Kong. In this regard, Article 8 of the Basic Law[7] reads:

> "The Laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

Decisions of the Privy Council on Hong Kong appeals delivered before 1 July 1997 remain binding in Hong Kong, but other decisions of the Privy Council or House of Lords (now the Supreme Court) of the United Kingdom are of persuasive authority only.[8] It has been made clear in Hong Kong's highest court (the Court of Final Appeal ("CFA")) that the Hong Kong court will continue to respect and have regard to decisions of the English Courts. In practice, the common law in Hong Kong has continued to develop and the courts will commonly gain assistance from decisions in other common law jurisdictions, not just English decisions. That said, great weight is still given to decisions from the English House of Lords (now the Supreme Court). This is important in the fields of restructuring and insolvency given, as we see below, the lack of specific corporate rescue legislation, coupled with the fact that (a) certain relevant Hong Kong legislation remains almost identical to that in England; and (b) other common law based jurisdictions are frequently involved in Hong Kong insolvency and restructuring matters, including jurisdictions where the Privy Council remains the highest appellate court.

[5] "Brexit and its Implications" (*HKTD Research* 28 June 2016) <http://economists-pick research.hktdc.com/business-news/article/Research-Articles/Brexit-and-its-Implications/rp/en/1/1X000000/1X0A6KWG.htm> accessed 28 August 2017.

[6] "Brexit: Recent Developments and Potential Repercussions" (*HKTD Research* 19 April 2017) <http://economists-pick-research.hktdc.com/business-news/article/Research-Articles/Brexit-Recent-Developments-and-Potential-Repercussions/rp/en/1/1X000000/1X0A9SH7.htm> accessed 28 August 2017.

[7] The Basic Law in effect forms a "mini-constitution" for Hong Kong, which is a Special Administrative Region of the People's Republic of China.

[8] *China Field Limited v Appeal Tribunal (Buildings) and Building Authority* (2009) 12 HKCFAR 342.

HONG KONG'S INSOLVENCY AND RESTRUCTURING REGIMES

Hong Kong's insolvency legislation is of considerable vintage. It is largely based on the English legislation that was in place prior to the Insolvency Act 1986.The relevant statute is the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32 of the Laws of Hong Kong) ("CWUMPO"). CWUMPO was recently the subject of various amendments (taking effect from February 2017) but these were not extensive. Even after these amendments, the legislation has no provisions dealing with restructuring / corporate rescue and no provisions dealing with cross-border situations. As to restructuring / corporate rescue, there have been stop-start attempts (mostly stop) to introduce specific legislation for over 20 years. The Hong Kong Government has recently indicated that a new Bill should go to our Legislative Council in early 2018, but I think it is fair to say that most professionals involved in the industry here are not holding their breath.

Cross-border issues are important for Hong Kong given the number of companies incorporated outside Hong Kong but which have substantive Hong Kong connections. By way of example, over 87% of the companies listed on the main board of the Hong Kong Stock Exchange are incorporated outside of Hong Kong. That number rises to almost 97% in relation on the Growth Enterprise Market (or GEM), being Hong Kong's "second" board.[9] Between them, the Cayman Islands and Bermuda (which will be familiar jurisdictions for most practitioners here) account for over 73% of the companies listed on the main board.[10]

The Hong Kong court does have jurisdiction to wind up a company which is not incorporated here, including where such company is not even registered as carrying on business here. A lot has been written about this in the recent past and I do not propose to repeat the position in any detail. In short, the court has power to wind up an "unregistered company"[11] if 3 core requirements are met. These can be summarised as:

- There needs to be a sufficient connection with Hong Kong, but this does not necessarily have to consist in the presence of assets within the jurisdiction;
- There must be a reasonable possibility that a winding up order would benefit those applying for it; and
- The court must be able to exercise jurisdiction over one or more persons in the distribution of the company's assets.

There are a number of examples where this jurisdiction has been used to appoint provisional liquidators here in Hong Kong over foreign companies, with powers being given to those provisional liquidators to explore a restructuring.[12] An example is *Re Z-Obee Holdings Limited*[13] where provisional liquidators were appointed in Hong Kong over a Bermudian company, with the Judge stating "…any negotiation with creditors or for further restructuring will be better carried out by the provisional liquidators…".

Importantly, the Hong Kong court has also made great strides in recent years in recognising office holders from other jurisdictions (and also recognising the proceedings by which they were appointed). There are several examples from before the Handover of the Hong Kong

[9] *The Stock Exchange of Hong Kong Limited*, Hong Kong Exchange Fact Book, 2016.

[10] In addition, the BVI is commonly used as the jurisdiction of incorporation for intermediate holding companies.

[11] Section 327 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32).

[12] Indeed, the use of the appointment of provisional liquidators to effect a restructuring was a tool commonly used in Hong Kong (particularly in the wake of the 1997/8 Asian Financial Crisis).Although that practice was scaled back after the widely reported decision of the Court of Appeal in *Re Legend International Resorts* [2006] 2 HKLRD 192 (where the court held that it was not proper to appoint provisional liquidators for the *sole* purpose of a restructuring), it is still legitimate for the court to give restructuring powers to provisional liquidators where there is a case to be made that they should be appointed on the "traditional" grounds, such as to protect assets in jeopardy.

[13] Unreported, 27 June 2014.

courts using common law powers of assistance to aid foreign liquidators, but the court has now developed a well-established practice of giving formal recognition, provided the powers sought are available to such an office holder in the jurisdiction of incorporation and would also be available in a Hong Kong proceeding.[14] This is a welcome development because notwithstanding the pre-Handover examples of assistance, until the recent decisions referred to, the practice had been to seek an ancillary winding up here in Hong Kong. This was much more cumbersome and time-consuming.

Although the recognition of foreign insolvency proceedings is based on common law principles, and in many instances the foreign jurisdiction involved is also a common law jurisdiction, the principle is not based on reciprocity or restricted to those jurisdictions.[15]

Given these general principles, it is not easy to see what effect Brexit will have in this regard. There is no specific treaty or legal principle that deals with recognition of Hong Kong proceedings in the UK or the EU, with the exception of section 426 of the UK Insolvency Act 1986. Broadly, that section provides that the UK court shall assist courts with jurisdiction in relation to insolvency matters where those courts are in another part of the UK or in a relevant country or territory. The relevant countries and territories listed in the subsidiary legislation are largely Commonwealth or former Commonwealth jurisdictions. The list includes Hong Kong. The English court has allowed use of this section for Hong Kong proceedings in at least one case after the Handover,[16] notwithstanding that from 1 July 1997 Hong Kong became an entirely different territory and part of a different country (being a Special Administrative Region of the People's Republic of China). There is no equivalent provision in the Hong Kong legislation. Had there been a similar "free-standing" legislative provision in Hong Kong, permitting statutory assistance to the UK court, then notwithstanding the provisions of Article 8 of the Basic Law, such provision would have ceased to have effect from 1 July 1997 (unless there was reciprocity). This is because the Reunification Ordinance amended the Interpretation and General Clauses Ordinance (Cap. 1) by adding a new section (section 2A), which reads, at section 2A(2)(b):

> "…provisions conferring privileges on the United Kingdom or other Commonwealth countries or territories, other than provisions giving effect to reciprocal arrangements between Hong Kong and the United Kingdom or other Commonwealth countries or territories shall have no further effect."

Further, and importantly for our discussion, the Hong Kong court has jurisdiction to give effect to schemes of arrangement where the company concerned is a foreign company. The legislation relating to schemes of arrangement makes clear that it applies to a company "liable to be wound up" under CWUMPO[17] and therefore extends to "unregistered" (including foreign) companies. The Court has made clear that this does not mean that the applicant must show that the company *would* be wound up in Hong Kong, just that it is a company which *may* be wound up by the court in Hong Kong. As regards schemes, the court has adopted the reasoning of English decisions, namely that it must be shown that there is sufficient connection between *the scheme* and Hong Kong.[18] The Hong Kong legislation relating to schemes is almost identical to that in the UK, although there are procedural differences.

[14] The decisions in this regard start with *Joint Official Liquidators of A Co v B* [2014] 5 HKC 152 and have recently been re-iterated in *Re Pacific Andes Enterprises (BVI) Limited* (unrep.; 27 January 2017). A helpful discussion of the approach appears in *BJB Career Education Company Limited (in provisional liquidation)* [2017] 1 HKLRD 113.

[15] See e.g., *Hong Kong Institute of Education v Aoki Corporation* [2004] 2 HKLRD 760, referring to Japanese rehabilitation proceedings.

[16] *Re The New China Hong Kong Capital Ltd* [2003] EWHC 1573.

[17] Section 668 of the Companies Ordinance (Cap. 622).

[18] *See for example, Re LDK Solar Co Ltd* [2015] 1 HKLRD 458 *("LDK"); Re Winsway Enterprises Holdings Limited* [2017] 1 HKLRD 1*("Winsway"); and Re Kaisa Group Holdings Ltd* [2017] 1 HKLRD 18*("Kaisa").*

Before sanctioning a scheme, the Hong Kong court will want evidence that the scheme will have the effect intended. Where the governing law of the debt which is to be varied by the scheme is a law other than Hong Kong law, this will require evidence from the relevant jurisdiction that such jurisdiction will recognise the scheme. This is because the law in Hong Kong follows the *Gibbs*[19] principle that a debt can only be discharged or varied by the court of the jurisdiction of the governing law. It is not uncommon for businesses in this part of the world to raise capital in the international debt markets and the governing law for such debt is commonly New York law. Fortunately, the courts in New York have been willing to recognise Hong Kong schemes through the Chapter 15 mechanism (of the US Bankruptcy Code).[20] As to restructurings concerning offshore incorporated companies, a common mechanism is for there to be parallel schemes in Hong Kong and the jurisdiction of incorporation, e.g. Cayman.

EFFECT OF BREXIT ON THE POSITION

As will be apparent from the discussion above, the principles applied, both in connection with the recognition of Hong Kong proceedings elsewhere (including the UK) and for Hong Kong recognising “incoming” proceedings, are not reliant on the UK being part of the EU and are not affected by the EU Insolvency Regulations. In those circumstances, it is difficult to see how Brexit will have any effect on Hong Kong insolvency and restructuring matters. I can see that it is possible for a Hong Kong incorporated company to have its COMI in the UK, with operations or assets in other parts of the EU, with the result that it could at present take advantage of the EU Insolvency Regulations by starting an insolvency process in the UK. In that situation, there may also be the need for Hong Kong proceedings too (for example, perhaps because there is Hong Kong law governed debt). In that scenario, post-Brexit the company would not of course be able to use the EU Regulations, so that would change, but the Hong Kong end would remain the same.

In the circumstances, although Brexit may have an effect on the economy in Hong Kong, that effect is likely to be limited. A greater focus economically for Hong Kong is likely to be the so-called “Belt and Road Initiative” announced by President Xi Jinping a few years ago. In terms of insolvency and restructuring, there is no evidence that the principles applied and the mechanisms available in Hong Kong will change after Brexit comes into effect. What *may* be possible is that uncertainty created around Brexit could perhaps take the shine off London as a premier hub for restructuring, thus giving an opportunity for other jurisdictions to take a more prominent role. It is clear that the recent changes to the regime in Singapore are aimed at creating a debt restructuring hub, and practitioners there will no doubt be looking to Brexit to give some momentum to those initiatives. My own view is that the UK (and London in particular) will remain a pre-eminent centre for a number of reasons, including its position as a major financial zone; the strength and depth of the insolvency profession there; the pre-eminence of its judiciary; the scheme legislation that will continue to exist; the Cross-Border Insolvency Regulations which will remain unaffected; and for US law governed debt, there is no indication that the US courts will treat UK schemes any differently post-Brexit.

In any event, as for Hong Kong, it is likely that the lack of specific corporate rescue legislation will mean that Hong Kong is less likely to be in a position to take advantage of any opportunity that does present itself. However, as we have already seen, a lot of the cross-border issues faced by Hong Kong practitioners concern the offshore jurisdictions such as Cayman, Bermuda and the BVI. This will not be affected by Brexit. The bigger challenge for practitioners in this part of the world is in relation to the recognition problems

[19] *Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399.

[20] Again, see *LDK*; *Winsway*; and *Kaisa*, *supra* note 18.

that still exist when assets of a troubled company are located in the Mainland of the People's Republic of China.

As a final comment, as this article is being prepared, there are various reports in the UK press regarding concerns about the European Court of Justice having a continued influence in relation to UK matters post-Brexit. However, the Hong Kong experience post-Handover could hopefully be of some comfort here. Our common law has developed rationally and as required by Hong Kong, with that development being assisted on many occasions by reference to decisions of the English courts, notwithstanding that no UK judgment post-1 July 1997 can have a binding effect here. In other words, Hong Kong has continued to benefit from UK legal developments even though the Handover was Hong Kong's own kind of Brexit. In certain areas, I see no reason why the UK could not benefit in a similar way by reference to European Court jurisprudence.

East Asia and the Pacific Rim

Singapore[*]

Mark Cheng[**] and Matthew Teo[***]

INTRODUCTION

Shortly after the UK voted to leave the European Union on 23 June 2016, the impact of Brexit on Singapore's economy was debated in Singapore's Parliament on 11 July 2016.[1] During the Parliamentary session, the Deputy Prime Minister and Minister of Finance, Mr Tharman Shanmugaratnam, warned of the economic and political uncertainties resulting from Brexit, noting the lack of clarity within the UK as to its future relationship with the EU. The Minister also highlighted the risk of nationalism gathering pace amongst the EU members as a result of Brexit, and the danger of a shift towards protectionist policies worldwide; in the Minister's view, these would have major implications for Singapore, which thrives on an open global trading system.

Whilst these comments were discussed in context of the potential economic impact of Brexit, the same considerations are relevant to Singapore's restructuring and insolvency industry. Brexit has come at a time when Singapore has sought to position itself as an attractive debt restructuring hub by making sweeping changes to its Companies Act and which came into force on 23 May 2017. These legislative amendments have strengthened its statutory tools for reorganisation and rehabilitation, whilst eschewing protectionism and territorialism by adopting the UNCITRAL's 1997 Model Law on Cross-Border Insolvency, effectively endorsing a concept of modified universalism.

Singapore's attempts would be in vain if Brexit engenders the proliferation of protectionist and territorial policies worldwide. Only 43 states have adopted the Model Law, and these do not include China, Russia and most of the EU.[2] Insolvency and Restructuring orders made by a Singapore court would be less attractive if there is no certainty of recognition in a foreign jurisdiction, similar to the uncertainties which will confront the UK post-Brexit.

STRENGTHENING SINGAPORE AS A DEBT RESTRUCTURING HUB

Pre-amendments to the Companies Act

In 2010, the Ministry of Law of Singapore appointed a Review Committee of insolvency practitioners, academics and stakeholders to review the existing insolvency regimes in Singapore and make recommendations to, amongst other things, modernise these regimes.[3] In its report issued in 2013, the Review Committee recognised that Singapore's insolvency

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[1] See http://www.mof.gov.sg/news-reader/articleid/1672/parentId/59/year/2016,<accessed 22 August 2017>.
[2] See http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html <accessed 28 August 2017>.
[3] Report of the Insolvency Law Review Committee 2013 at [1].

and restructuring regimes had not been fully developed to deal with cross-border insolvencies. The burgeoning cross-border nature of commercial trade, Singapore's growth as a regional financial and business hub and the increased volatility of the global economy, necessitated a strengthening of the corporate rescue mechanisms available under Singapore law.

Following the recommendations of the Review Committee, the push to overhaul the existing insolvency and restructuring regimes in Singapore maintained its momentum with the appointment of a Reform Committee in 2015, tasked specifically with recommending initiatives and legal reforms to enhance Singapore's effectiveness as a centre for international debt structuring.

The Reform Committee published its Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring, on 20 April 2016 ("Restructuring Hub Report"). Interestingly, the Restructuring Hub Report acknowledged that locations such as New York and London had emerged as leading restructuring centres which had succeeded in attracting restructurings even though the stakeholders had little or no connection to their jurisdiction.[4]

The Reform Committee recognised that Singapore shares various similarities with these leading restructuring centres, such as their status as leading financial centres in which major financial institutions were present (and therefore subject to jurisdiction) and which substantial commercial lending originated from. Singapore's two primary restructuring procedures – judicial management and schemes of arrangement – were based on established equivalents in English law, but were not equipped to effectively deal with the staying of creditors' action and dealing with cross-border insolvencies.

The shortcomings of the scheme of arrangement regime in Singapore, pre-amendment to the Companies Act, were evident in the case of *Pacific Andes Resources Development Ltd*.[5] In that case, Pacific Andes Resources Development ("PARD"), a Bermuda-incorporated company which was listed in Singapore, had applied for a moratorium under section 210(10) of the Companies Act to restrain creditors from pursuing legal proceedings in Singapore *and overseas*. PARD also sought to apply for similar moratorium for and on behalf of certain of its subsidiaries, none of which were incorporated in or had any substantial connection to Singapore. The Court took the view that it had no jurisdiction to render protection to the subsidiaries under section 210(10) of the Companies Act, given that the subsidiaries themselves did not intend to file any application under section 210(1) of the Companies Act for leave to convene a creditors' meeting for the purpose of considering a scheme of arrangement to be proposed, i.e. the Court could not grant any protection to related entities. In response, the subsidiaries filed applications under section 210(1) of the Companies Act, along with fresh applications under section 210(10) of the Companies Act, similarly asking for orders to enjoin creditors from pursuing legal proceedings in Singapore *and overseas*. Bank creditors of PARD and its subsidiaries objected to the applications, arguing, first, that section 210(10) of the Companies Act had no extraterritorial effect; any moratorium could only apply to proceedings in Singapore. Second, the bank creditors also contended that PARD's subsidiaries had absolutely no connection to Singapore. The High Court of Singapore accepted these arguments and acknowledged that it did not have the statutory power to grant an extraterritorial moratorium under the then section 210(10) of the Companies Act; consequently, the Court only ordered a moratorium on creditor action in Singapore in respect of PARD. The Court also dismissed the subsidiaries' applications

[4] Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring at [2.3].
[5] [2016] SGHC 210.

under sections 210(1) and 210(10) of the Companies Act, on the ground that they lacked connection to the jurisdiction.

Shortly after the High Court's decision, PARD withdrew its scheme of arrangement application in Singapore, and instead sought the protection of the US Courts under Chapter 11 of the United States Bankruptcy Code, taking refuge in its more extensive extraterritorial moratorium.

Post-amendments to the Companies Act

Indranee Rajah, Senior Counsel, Singapore's Senior Minister of State for Law and Finance commented that "23 May 2017 is a date for Singapore insolvency practitioners to remember… [t]hat's when the Companies Act amendments for our enhanced debt restructuring regime came into effect… [t]his heralds an exciting new chapter for debt restructuring work in Asia".[6]

These amendments have boosted the powers and attractiveness of the restructuring regimes in Singapore. The relevant amendments are discussed below.

Schemes of arrangement

Under the previous interim moratorium provision, the High Court was only empowered to restrain further proceedings against the applicant company itself and only upon application for such an order. Under the new regime, the applicant company can apply for a court-ordered moratorium to grant the company breathing space so long as it has proposed, or intends to propose, a scheme of arrangement.[7] Further, and more importantly, an automatic interim moratorium of not more than 30 days kicks in from the date of such an application; the debtor company is afforded immediate and automatic protection pending a hearing before the Court.[8] The moratorium can be expressed to apply to any person who is either in Singapore or within the jurisdiction of the Singapore Court, whether the acts take place in Singapore elsewhere, i.e, it can now have extraterritorial effect.[9]

In addition, the types of creditor action that can be restrained under such an interim moratorium has been expanded to include enjoining the enforcement of security over any property of the debtor company.[10] Previously, a restraint of enforcement of security was only available under the judicial management regime.

Whilst these amendments are intended to afford greater protection to the insolvent company, the new regime is also tailored to prevent and regulate abuse of the system. The applicant for an interim moratorium is required to disclose its secured creditors and substantial unsecured creditors, provide evidence of support of its creditors and a brief description of the proposal giving sufficient details for the court to be able to assess its feasibility and merits.[11] Failure to comply with these requirements will provide grounds for discharge, or variation of the interim moratorium.[12]

[6] *Enhancing Singapore as an International Debt Restructuring Centre for Asia and Beyond*, dated 20 June 2017, Indranee Rajah SC: https://www.mlaw.gov.sg/content/minlaw/en/news/legal-industry-newsletters/note-by-senior-minister-of-state-for-law-and-finance--indranee-r5.html <accessed 28 August 2017>.
[7] Section 211B(1) of the Companies Act.
[8] Section 211B(8) of the Companies Act.
[9] Section 211B(5)(b) of the Companies Act.
[10] Sections 211B(1)(e) and 211B(8)(e) of the Companies Act.
[11] Section 211B(4) of the Companies Act.
[12] Sections 211B(10) and 211B(11) of the Companies Act.

In order to facilitate a restructuring of a group of companies where some related companies may not have any meaningful connection to Singapore (as was the case in *Pacific Andes*), the new regime allows moratoriums to be granted in respect of the subsidiaries, holding company or ultimate holding company of the applicant company.[13] This is subject to certain requirements, such as establishing that the related companies play a necessary and integral role in the restructuring, which would be frustrated if no moratorium was granted and demonstrating that the creditors of these companies will not be unfairly prejudiced.[14]

The cram-down in the schemes of arrangement regime has also been relaxed; a scheme of arrangement may be approved even if there is a dissenting class of creditors, if:

(a) at least one class of creditors has approved the scheme as per the statutory requirements;
(b) a majority in number of creditors and representing three-fourths in value have agreed to the scheme;
(c) the arrangement does not discriminate unfairly between two or more classes of creditors; and
(d) the arrangement is fair and equitable to each dissenting class.[15]

The last major change is the introduction of super-priority for rescue financing, which is a concept adopted from the US Chapter 11 regime. The Singapore courts can now grant orders to give rescue financiers priority over preferential debts and security (super or subordinate) over the applicant's encumbered assets.[16]

In summary, the new regime has adopted the more attractive features of the US Chapter 11 regime, such as the extraterritorial moratorium and super priority rescue financing, whilst also introducing new features to deal with the restructuring of groups of companies.

Judicial management

The new regime for judicial management also introduces the same provisions for super priority of rescue financing as discussed above.[17] Under the old regime, judicial management was only available to companies incorporated in Singapore. In order to enhance its availability, the new regime is now available to foreign companies, so long as they have a substantial connection to Singapore and are hence liable to be wound up in Singapore.[18]

To provide greater certainty, the Companies Act now sets out various matters which can support the determination that a foreign company has a substantial connection with Singapore.[19] These include:

(a) where Singapore is the centre of main interests (COMI) of the Company;
(b) where the company has substantial assets in Singapore;
(c) where the company has chosen Singapore law as the governing law of a loan or other transaction of the company, or the governing law to resolve disputes arising out of a loan or other transaction; and
(d) where the company has submitted to the jurisdiction of the Singapore courts for the resolution of a dispute relating to a loan or other transaction.

[13] Section 211C(1) of the Companies Act.
[14] Section 211C(4) of the Companies Act.
[15] Section 211H of the Companies Act.
[16] Section 211E of the Companies Act.
[17] Section 227HA of the Companies Act.
[18] Section 227AA of the Companies Act.
[19] Section 351(2A) of the Companies Act.

The other major change in the judicial management regime, is the lowering of the insolvency threshold required to make a judicial management application. Under the new regime, a company that is likely to become unable to pay its debts can also avail itself of the judicial management procedure,[20] whereas only companies which were unable, or would be unable, to pay its debts had access to the previous regime.

UNCITRAL Model Law on Cross-Border Insolvency

As part of the legislative amendments, Singapore has enacted the Tenth Schedule of the Companies Act to introduce the UNCITRAL Model Law on Cross-Border Insolvency into the statutory framework. This accords with Singapore's recognition of the need for co-operation in cross-border insolvency and restructuring and the principle of modified universalism. In conjunction with the adoption of the Model Law, Singapore's judiciary organised a Judicial Insolvency Network conference in October 2016, which was attended by insolvency judges from 10 jurisdictions, including England and the US, for the purpose of preparing draft guidelines for judicial cooperation and communication.[21]

Singapore chose to diverge from the original text of the Model Law when enacting provisions under the Tenth Schedule. First, Singapore inserted and provided for the presence of property in a jurisdiction to be a factor demonstrating that a company has an "establishment" in that jurisdiction.[22] This is a wider definition of "establishment" than in the original text of the Model Law and makes it easier for companies to demonstrate that that it has an "establishment" in a jurisdiction for the purpose of recognition of a foreign non-main proceeding. Second, Singapore omitted the word "manifestly" in its public policy exception in Article 6 of Tenth Schedule of the Model Law. The Singapore courts can refuse recognition if it is merely "contrary to the public policy of Singapore"; it does not have to be "manifestly contrary". This deliberate omission of the qualifier suggests that the threshold to invoke the public policy exception may be lower than in other jurisdictions which have adopted the original text of Article 6 of the Model Law.

IMPACT OF BREXIT

As acknowledged in the Brexit Centrepiece Essay, the UK has benefited from the European Insolvency Regulation ("EIR") and the forum shopping it has enabled; European companies have moved operations to the UK to avail themselves of more advantageous or better-designed insolvency regimes. Should there be a "hard Brexit" with no replacement or alternative to the EIR, these European companies may lose any incentive to restructure in London.

The changes to the restructuring and insolvency regimes in Singapore are monumental and intended to promote and strengthen Singapore's restructuring tools in a bid to become an international restructuring hub. Arguably, the adoption of US Chapter 11 features, which enhance debtor protection and facilitate rescue financing, coupled with the expansion of the scheme of arrangement regime to companies in a group, have made the scheme of arrangement regime in Singapore more robust, flexible and debtor-friendly than its UK equivalent. The same applies to the judicial management regime, which is now available to foreign companies which can demonstrate a sufficient connection to Singapore; the "sufficient connection" test does not apply to the administration regime in the UK, which reduces the ability of foreign companies to benefit from this restructuring tool.

[20] Section 227B(1)(a) of the Companies Act.

[21] See the media release of the Supreme Court of Singapore, accessible at http://www.supremecourt.gov.sg/news/media-releases/judicial-insolvency-network-discusses-guidelines-for-cross-border-insolvency-matters <accessed 24 August 2017>.

[22] Article 2(d) of the Tenth Schedule of the Companies Act.

The *Gibbs* principle, under which a discharge of a debt under foreign insolvency law will not be effective in the jurisdiction which law governs the debt, continues to apply in the UK. The Singapore Courts appear to have departed from the UK position; the High Court of Singapore in *Pacific Andes* criticised the *Gibbs* principle and opined that it was not bound by any precedent (unlike the position in the UK).

All these developments have certainly made Singapore a more attractive proposition for companies to base and operate from and to avail themselves to the more robust restructuring regime should the need arise. Singapore is poised to become an Asian or even international restructuring hub. However, it is the authors' view that it is unlikely that Singapore will supplant London. The fact remains that many European companies are likely to have a much closer connection to the UK than Singapore, by virtue of the UK's membership in the EU and the common EU market. However, where European companies are multi-national in nature and have a strong presence in Asia, they may very well elect to restructure through the Singapore courts.

From a more macro perspective, Brexit may result in increasingly protectionist and territorial policies adopted by countries across the globe. Whilst these policies are likely to be economic or political in nature, the territorial mind-set may bleed and influence the legal framework in these countries. This is antithetical to the principle of modified universalism, and is a threat to the success of Singapore's new restructuring regimes and its aspiration to become an international (or even Asian) restructuring hub. Even within Asia, jurisdictions with major economies such as China, India, Indonesia and Thailand have not adopted the Model Law; the recognition of restructuring proceedings in Singapore in these jurisdictions is therefore not guaranteed.

Member Associations

American Bankruptcy Institute
Asociación Argentina de Estudios Sobre la Insolvencia
Asociación Uruguaya de Asesores en Insolvencia y Reestructuraciones Empresariales
Association of Business Recovery Professionals - R3
Association of Restructuring and Insolvency Experts
Australian Restructuring, Insolvency and Turnaround Association
Bankruptcy Law and Restructuring Research Centre, China University of Politics and Law
Business Recovery and Insolvency Practitioners Association of Nigeria
Business Recovery and Insolvency Practitioners Association of Sri Lanka
Canadian Association of Insolvency and Restructuring Professionals
Canadian Bar Association (Bankruptcy and Insolvency Section)
Commercial Law League of America (Bankruptcy and Insolvency Section)
Especialistas de Concursos Mercantiles de Mexico
Finnish Insolvency Law Association
Ghana Association of Restructuring and Insolvency Advisors
Hong Kong Institute of Certified Public Accountants (Restructuring and Insolvency Faculty)
Hungarian Association of Insolvency Practitioners
INSOL Europe
INSOL India
INSOLAD - Vereniging Insolventierecht Advocaten
Insolvency Practitioners Association of Malaysia
Insolvency Practitioners Association of Singapore
Instituto Brasileiro de Estudos de Recuperação de Empresas
Instituto Brasileiro de Gestão e Turnaround
Instituto Iberoamericano de Derecho Concursal
International Association of Insurance Receivers
International Women's Insolvency and Restructuring Confederation
Japanese Federation of Insolvency Professionals
Korean Restructuring and Insolvency Practitioners Association
Law Council of Australia (Business Law Section)
Malaysian Institute of Certified Public Accountants
National Association of Federal Equity Receivers
Nepalese Insolvency Practitioners Association
NIVD – Neue Insolvenzverwaltervereinigung Deutschlands e.V.
Recovery and Insolvency Specialists Association (BVI) Ltd
Recovery and Insolvency Specialists Association (Cayman) Ltd
Restructuring and Insolvency Specialists Association of Bermuda
REFOR-CGE, Register of Insolvency Practitioners within "Consejo General de Economistas, CGE"
Restructuring Insolvency & Turnaround Association of New Zealand
Russian Union of Self-Regulated Organisations of Arbitration Managers
Society of Insolvency Practitioners of India
South African Restructuring and Insolvency Practitioners Association
Turnaround Management Association (INSOL Special Interest Group)

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