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## Breaking Up Is Hard to Do – What Brexit Means for UK Insolvency and Restructuring Law

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**Title:** Breaking Up Is Hard to Do – What Brexit Means for UK Insolvency and Restructuring Law

**Year:** 2021

**Version:** Accepted version

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### **Please cite the original version:**

McCormack, G. (2021). Breaking Up Is Hard to Do – What Brexit Means for UK Insolvency and Restructuring Law. *European Company and Financial Law Review* 18(3), 338-376. <https://doi.org/10.1515/ecfr-2021-0018>

# **Breaking up is hard to do – what Brexit means for UK Insolvency and Restructuring Law**

By Gerard McCormack\*

## *Abstract*

*This paper asks whether the UK can maintain its insolvency and restructuring pre-eminence post Brexit i.e. after Britain's departure from the European Union (EU). In the past 20 years or so, the UK is said to have become the insolvency and restructuring capital of Europe or in less politically correct terms, the bankruptcy brothel of Europe. In part, this is because of the European Insolvency Regulation which provides for automatic recognition of insolvency proceedings opened in a EU Member State in the other EU Member States. Such proceedings may make provision for the discharge of debts and the restructuring of financial obligations.*

*The specific insolvency law regime is part of a more general European Private International Law framework. With Brexit, the UK has now left this framework without any negotiated replacement agreement, a so-called 'skinny' Brexit. The loss of the ability to deal with insolvencies and corporate restructurings through a single process, with automatic recognition across the EU, may make it more complex, lengthy and expensive to resolve cross-border cases. It gives rise to the prospect of parallel proceedings in different jurisdictions. The paper also addresses how any disadvantages associated with the 'skinny' Brexit may be alleviated.*

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## **1 Introduction**

In the past 20 years or so, the UK is said to have become the insolvency and restructuring capital of Europe or in less politically correct terms, the bankruptcy brothel of Europe.<sup>1</sup> In part,

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this is because of the European Insolvency Regulation<sup>2</sup> (EIR) which provides for automatic recognition of insolvency proceedings opened in one European Union (EU) Member State in the other EU Member States. Such proceedings may make provision for the discharge of debts and the restructuring of financial obligations.

The specific insolvency law regime is part of a more general European Private International Law framework including a Regulation on Jurisdiction and Enforcement of Judgments in Civil and Commercial cases (the Brussels 1 Regulation)<sup>3</sup> which provides common European rules on the jurisdiction to institute proceedings in one State rather than another and provides for the recognition of such proceedings in Member States other than the State where the proceedings were opened. This is subject to a limited public policy exception.<sup>4</sup>

This paper asks whether the UK can maintain its insolvency and restructuring pre-eminence post Brexit i.e. after Britain ceased its membership of the European Union (EU). This process is generally referred to as Brexit. The process began with an ‘advisory’ vote by the general electorate in the UK to leave the EU in a referendum on 23<sup>rd</sup> June 2016.<sup>5</sup> The vote was not binding in a strict legal sense but was generally regarded as politically binding on the UK government. The process led to a formal UK/EU withdrawal agreement<sup>6</sup>, the European Union (Withdrawal Agreement) Act 2020 in the UK, and the UK’s formal departure from the EU on 31<sup>st</sup> January 2020. This was followed by a Brexit implementation period and this period concluded with the coming into force of a Trade and Co-operation Agreement between the UK and EU on 31<sup>st</sup> January 2021.<sup>7</sup> This agreement however, is essentially bereft of provisions on judicial cooperation in civil matters.

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<sup>1</sup> *Gerard McCormack*, “Bankruptcy Forum Shopping: The UK and US as Venues of Choice for Foreign Companies” *International and Comparative Law Quarterly*, 2014, 63, 815; “Jurisdictional competition and forum shopping in insolvency proceedings”, *Cambridge Law Journal*, 2009, 68, 169; *Federico Mucciarelli*, “Not just efficiency: insolvency law in the EU and its political dimension”, *European Business Organization Law Review* 14, 2013, 175; *Adrian Walters and Anton Smith*, “Bankruptcy tourism under the EC Regulation on insolvency proceedings: a view from England and Wales”, *International Insolvency Review* 19, 2010, 181.

<sup>2</sup> Regulation 2015/848 replacing Regulation 1346/2000.

<sup>3</sup> Regulation 1215/2012/EU (Brussels 1 Regulation recast) replacing the original Brussels 1 Regulation – Council Regulation 44/2001 – which in turn replaced the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (1968) and see generally *Andrew Dickinson*, “The Revision of the Brussels I Regulation”, *Yearbook of Private International Law* 12, 2010, 248.

<sup>4</sup> Regulation 1215/2012 Article 45 and Regulation 2015/848 Article 33.

<sup>5</sup> See <https://www.gov.uk/government/topical-events/eu-referendum>

<sup>6</sup> <https://www.gov.uk/government/publications/new-withdrawal-agreement-and-political-declaration>

<sup>7</sup> See [https://ec.europa.eu/info/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement\\_en](https://ec.europa.eu/info/relations-united-kingdom/eu-uk-trade-and-cooperation-agreement_en) and

The paper is divided into six sections. After this first introductory section, the second section considers the European insolvency regime and “forum shopping issues” i.e. the movement of assets or operations to take advantage of a more favourable legal position. It also considers the more recently adopted European Directive on preventive restructuring frameworks, debt discharge and insolvency procedures (the ‘Restructuring Directive’).<sup>8</sup> The third section looks at the current regime in the UK insofar as it applies to cross-border insolvency proceedings. The fourth section addresses the way forward given the UK departure from the EU without some form of negotiated replacement agreement on judicial cooperation in civil matters i.e. a so-called ‘skinny’ Brexit. It has been argued by leading practitioners<sup>9</sup> that such a ‘Brexit would negatively impact the UK’s restructuring and insolvency framework, the force of which depends in part, on its pan-European reach. Losing the ability to deal with insolvencies via a single process, with automatic recognition across the EU, may make it more complex, lengthy and expensive to resolve cross-border cases and thereby give rise to the prospect of parallel proceedings in different jurisdictions. The fifth section considers how any disadvantages associated with a ‘skinny’ Brexit can be mitigated. The sixth section concludes.<sup>10</sup>

## 2 The European Insolvency Regime

### a. The European Insolvency Regulation in outline

The Regulation applies automatically in the EU Member States without the need for national implementing legislation.<sup>11</sup> The original Insolvency Regulation – Regulation 1346/2000 - was binding and directly applicable from 31 May 2002. A recast version – Regulation 2015/848 - was formally adopted by the European Parliament on 20 May 2015 and published in the Official Journal on 5 June 2015.<sup>12</sup> Most of the provisions came into force on 26 June 2017.<sup>13</sup>

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/948093/TCA\\_SUMMARY\\_PDF.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/948093/TCA_SUMMARY_PDF.pdf)

<sup>8</sup> Directive 2019/1023.

<sup>9</sup> See the editorial by *Kate Stephenson and Sacha Lürken*, “Hard Choices, Restructuring and Insolvency Dealmakers Face Uncertainty Ahead of Possible ‘Hard Brexit’”, *International Corporate Rescue*, 15, 2018, 311.

<sup>10</sup> For a previous study see *Gerard McCormack and Hamish Anderson*, “Brexit and its implication for restructuring and corporate insolvency in the UK”, *Journal of Business Law*, 2017, 533.

<sup>11</sup> But for the position of Denmark see recital 88 to the preamble “Denmark is not taking part in the application of this Regulation and is not bound by it or subject to its application”. This recital is to the same effect as recital 33 to Regulation 1346/2000.

<sup>12</sup> The recast Regulation opens up the possibility of “group coordination proceedings” but the changes to the original Regulation are largely modest, incremental and procedural. These involve extending the scope of the Regulation; clarifying contentious areas of interpretation; and improving information flows including the inter-connection of national insolvency registers. See *Gerard McCormack*, “Something Old, Something New: Recasting the European Insolvency Regulation” *Modern Law Review*, 79, 2016, 121.

<sup>13</sup> See Articles 84 and 92.

The Insolvency Regulation remains largely however, a conflict of laws rather than a substantive law instrument. While applying only to those insolvency proceedings listed in an annex to the Regulation,<sup>14</sup> it contains rules on jurisdiction to open insolvency proceedings; the choice of which law to apply to those proceedings, and for the recognition of the opening of insolvency proceedings and of insolvency-related judgments in other EU States. Jurisdiction to open main insolvency proceedings is given to the State where the debtor has its 'centre of main interests' (COMI)<sup>15</sup> and the States where the debtor has an 'establishment' have jurisdiction to open secondary proceedings.<sup>16</sup> Main insolvency proceedings are universal in scope and apply to all the debtor's assets wherever situated<sup>17</sup> whereas secondary proceedings are strictly territorial applying only to the assets of the debtor in the territory of the State where the secondary proceedings are opened.<sup>18</sup> The Regulation contains rules on the coordination of the main and secondary proceedings giving primacy to the main proceedings. Where insolvency proceedings (whether main or secondary) are opened in a particular State, generally the law of that State applies to the proceedings.<sup>19</sup> There are a number of exceptions to this general rule and these are set out in Articles 8-18 of the Regulation including for rights in rem (collateral) which are governed by the law of the State where the rights in rem are situated.<sup>20</sup> Both the opening of insolvency proceedings, and insolvency related judgments handed down in the course of the proceedings, are automatically recognised in other EU States subject to a very limited public policy exception.<sup>21</sup> In addition, a party dissatisfied with the decision to open insolvency proceedings in a particular State is required to exercise appellate rights in that State rather than seeking to open insolvency proceedings in a rival EU State.<sup>22</sup>In *Eurofood* <sup>23</sup>the Court of Justice of the European Union (CJEU) stressed that main insolvency proceedings opened by a court of a Member State must be recognised by the courts of the other Member States without the latter being able to review the jurisdiction of the court of the opening state. This recognition principle was said to be based on mutual trust between EU Member States.

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<sup>14</sup> Articles 1(1) and 2(4),

<sup>15</sup> Article 3(1).

<sup>16</sup> Article 3(2).

<sup>17</sup> Recital 23 to the preamble.

<sup>18</sup> Article 3(2).

<sup>19</sup> Articles 7 and 28 of the regulation.

<sup>20</sup> These articles are broadly equivalent to Articles 5-15 of the original Insolvency Regulation. Article 8 of the recast (Article 5 of the original) deals with rights in rem. More correctly stated, under Article 8 rights in rem over property situated in a Member State shall not be affected by the opening of insolvency proceedings in a different Member State.

<sup>21</sup> Articles 19, 20, 32 and 33.

<sup>22</sup> See ECJ, 2 July 2016, *Eurofood IFSC Ltd*, C-341/04, ECLI:EU:C:2006:281.

<sup>23</sup> *Ibid.*

Article 33 permits Member States to refuse to recognise insolvency proceedings in another Member State or to refuse to enforce a judgment handed down in the context of such proceedings where this would be ‘manifestly contrary to that state's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual’. In *Eurofood* it was suggested that the Article 33 exception should be given a limited interpretation. The CJEU has however, ruled that the public policy exception could come into play if the court of the State in which enforcement of a judgment was sought considered that the court of the State of origin had ruled on the claimant's claims without hearing the defendant and in, all the circumstances, that exclusion constituted a manifest and disproportionate infringement of the defendant's right to be heard.<sup>24</sup>

#### b. Forum shopping

One of the ostensible objective of the original Insolvency Regulation was to prevent forum shopping which was defined in recital 4 of the preamble as the creation of incentives for parties to transfer assets or judicial proceedings from one EU State to another and thereby seek to obtain a more favourable legal position. But the recast Regulation makes it clear that only forum shopping to the detriment of the general body of creditors is disfavoured<sup>25</sup> and this is termed “fraudulent” or “abusive” shopping forum.<sup>26</sup> Such a distinction between “good” and “bad” forum shopping had been already drawn in the case law on the original Regulation.<sup>27</sup> In fact, by allowing for the opening of insolvency proceedings where the debtor had its COMI as distinct from its registered office and providing for the automatic recognition of the opening of proceedings and insolvency related judgments in other States, the Insolvency Regulation has done more to encourage forum shopping than to discourage it.

There is certainly 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*<sup>28</sup> where a Luxembourg holding company shifted its COMI to England provides a clear example of this. The holding company's main asset was a shareholding in a Greek operating company carrying on business as one of the main telecoms companies in Greece. In recognising the purported change of COMI, the English court pointed out that the

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<sup>24</sup> ECJ, 2 April 2009, *Gambazzi v DaimlerChrysler Canada Inc*, C-394/07, ECLI:EU:C:2009:219. See also on public policy *flyLAL-Lithuanian Airlines AS v Starptautiska lidosta Riga VAS*, ECJ, 23 October 2014, C-302/13, ECLI:EU:C:2014:2319.

<sup>25</sup> Recital 5 to Regulation 2015/848

<sup>26</sup> Recitals 29-31.

<sup>27</sup> See for example, the observations of AG Colomer in *Staubitz-Schreiber*, 6 September 2005, C-1/04, ECLI:EU:C:2005:500 at paras 71 and 72.

<sup>28</sup> [2009] EWHC 3199 (Ch); [2010] BCC 295.

company had communicated widely that it was shifting its activities to England and all the negotiations between the company and its creditors had taken place in England. Evidence of German companies shifting COMI to England is provided by the *Deutsche Nickel*, *Schefenacker* and *Hans Brochier* cases<sup>29</sup> where the UK administration<sup>30</sup> and scheme of arrangement procedures<sup>31</sup> were seen as more flexible than comparable German insolvency and restructuring procedures and also more familiar to key stakeholders such as bondholders and US banks.<sup>32</sup>

### c. The European Restructuring Directive

It has already been stressed that the Insolvency Regulation is primarily a conflict of laws (private international law) instrument rather than a substantive law instrument. On 26<sup>th</sup> June 2019<sup>33</sup>, the EU adopted a substantive law instrument in the form of the Restructuring Directive. The fact however, that it is a Directive rather than a Regulation means that it does not have direct and immediate application in Member States. It needs national implementing legislation and Member States have until 17<sup>th</sup> July 2021 to implement it though they may request a one year extension.<sup>34</sup> Member States are also given considerable discretion in the implementation process in terms of the precise provisions that have to be adopted. For instance, it has been estimated that the Directive contains at least 70 regulatory options for Member States.<sup>35</sup>

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<sup>29</sup> Only *Hans Brochier* has given rise to a reported decision - [2007] BCC 127 - but the other cases have been commented upon extensively in the professional press.

<sup>30</sup> This procedure bears some similarities with Chapter 11 of the US Bankruptcy Code but does not contain all the Chapter 11 features and differs from Chapter 11 in many significant respects. In particular, it is a management displacement procedure with an insolvency practitioner, the administrator, appointed to take control of the company's business and affairs during the period of administration. Under Schedule BI para 3(1) UK Insolvency Act 1986 the statutory objectives of administration are listed in the following order - (a) rescuing the company as a going concern; (b) achieving a better result from the company's creditors as a whole than would be likely if the company were wound up (without going into administration) and (c) realising property in order to make a distribution to one or more secured or preferential creditors. See generally for a comparative analysis of UK administration and the US Chapter 11 *Gerard McCormack*, "Apples and Oranges? Corporate Rescue and Functional Convergence in the US and UK", *International Insolvency Review*, 18, 2009, 109-133; "Control and Corporate Rescue – An Anglo-American Evaluation", *International and Comparative Law Quarterly*, 36, 2007, 515.

<sup>31</sup> The scheme of arrangement is a procedure based on company law rather than insolvency law; in particular it is based on what is now Part 26 UK Companies Act 2006. It can be used as a debt restructuring tool but also as a mechanism to achieve other objectives such as facilitating the acquisition ("takeover") of shares in a company.

<sup>32</sup> More recently, corporate restructurings in respect of foreign-registered companies have been accomplished by means of schemes of arrangement. See *Look Chan Ho*, "Making and enforcing international schemes of arrangement", *Journal of International Banking Law and Regulation*, 26, 2011, 434; *Jennifer Payne*, "Cross-Border Schemes of Arrangement and Forum Shopping", *European Business Organization Law Review*, 14, 2013, 563

<sup>33</sup> L 172/18. Directive 2019/1023.

<sup>34</sup> Article 34 of the Directive.

<sup>35</sup> See *Horst Eidenmüller*, "The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union", *European Business Organization Law Review*, 20, 2019, 547 at p 560.

The Directive has three main elements; firstly, a “preventive” restructuring framework; secondly, provisions on second chance/fresh start for “individual entrepreneurs” and thirdly, more general provisions designed to enhance the efficiency of restructuring, insolvency and second chance procedures. The objective is to ensure that viable enterprises in financial difficulties are able to access early restructuring procedures, irrespective of where they are located in the EU. A debtor should benefit from a time-limited “breathing space” on enforcement actions in order to facilitate restructuring negotiations – a so-called stay or moratorium. In general terms, the debtor’s existing management team should remain in control of the restructuring process – debtor-in-possession. To facilitate the prospects of a successful restructuring, there is provision for dissenting minority creditors and shareholders to be or outvoted or “crammed down”. The cram down provisions contain significant safeguard for protecting the legitimate interests of creditors and shareholder. But there is also the possibility of “cramming down” an entire class of creditors – cross-class cram-down as it is called in the Directive. There is also special protection for “new financing” so as to enhance the likelihood of a successful restructuring.

The aim of the Directive is to reduce barriers to freedom of establishment and the free flow of capital that arise from differences in the laws and procedures governing restructuring and insolvency in EU Member States. The overall objective is to further economic growth and jobs across Europe.<sup>36</sup> The Restructuring Directive has also been substantially influenced by Chapter 11 of the US Bankruptcy Code.<sup>37</sup> It has been judicially affirmed that the objective of Chapter 11 is “to provide a debtor with the legal protection necessary to give it the opportunity to reorganize, and thereby to provide creditors with going-concern value rather than the possibility of a more meagre satisfaction of outstanding debts through liquidation”<sup>38</sup>. Influential bankruptcy law professors, including Elizabeth Warren, have spoken of Chapter 11 deserving a prominent place in ‘the pantheon of extraordinary laws that have shaped the American economy and society and then echoed throughout the world.’<sup>39</sup>

Chapter 11 is seen as an insolvency procedure. It is part of the US Bankruptcy Code. Technically however, there is no requirement that the company should be “insolvent” and so-called strategic bankruptcies are a conspicuous part of the US scene. In other words,

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Eidenmüller is actually rather critical of the Restructuring Directive and he concludes at p 565 that it is “an inefficient and harmful piece of legislation—it should be repealed.”

<sup>36</sup> COM (2015) 468 at p. 6.

<sup>37</sup> See the Association of Financial Markets in Europe paper <http://www.euractiv.com/section/euro-finance/opinion/a-chapter-11-law-for-europes-entrepreneurs/>

<sup>38</sup> *Canadian Pacific Forest Products Ltd v JD Irving Ltd* (1995) 66 F 3d 1436 at 1442.

<sup>39</sup> See *Elizabeth Warren and Jay Lawrence Westbrook*, “The Success of Chapter 11: A Challenge to the Critics”, *Michigan Law Review* 107, 2009, 603 at 604.



companies may have a number of reasons, other than insolvency strictly so-called, to invoke the protective cloak of Chapter 11.

The Directive puts even more of an emphasis on preventive restructuring. The preamble to the Directive (recital 4) sees preventive restructuring as restoring a business to “a healthy state or, at least, saving those of its units which are still economically viable. That approach, among other benefits to the economy, often helps to maintain jobs or reduce job losses.” Under the Directive, Member States are obliged to provide debtors with access to preventive restructuring procedures.<sup>40</sup> This obligation arises where there is a likelihood of insolvency but not before the debtor has reached the stage of insolvency as this concept is understood under national law.<sup>41</sup> The procedure is intended to enable debtors to restructure, with a view to preventing insolvency and ensuring their viability.

Largely because of this intention to encompass companies that are not yet insolvent, the UK scheme of arrangement has also been spoken of as a model for the ‘early stage’ restructuring procedures envisaged by the EU instrument.<sup>42</sup> It has been suggested that a procedure modelled on the UK scheme would make restructuring “procedures less cumbersome, less costly and speedier than they are currently in some Member States.”<sup>43</sup> Certainly, the procedure does not have any bankruptcy or insolvency stigma since it is a procedure based on company law rather than insolvency law.<sup>44</sup> It is activated by the filing of documents with the court and an application to the court to convene meetings of relevant creditors and shareholders to approve the scheme. The scheme procedure in fact, can be used for various purposes including by companies of doubtful solvency to restructure their debts or rearrange their affairs. It has also proved extremely attractive as a restructuring vehicle of choice for companies incorporated outside the UK since the UK courts have jurisdiction to sanction a scheme if the company is deemed to have “sufficient connection” with the UK irrespective of where it was incorporated.<sup>45</sup>

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<sup>40</sup> Article 4(1).

<sup>41</sup> Article 2(2).

<sup>42</sup> *Stephan Madaus*, “The EU recommendation on business rescue - only another statement or a cause for legislative action across Europe?”, *Insolvency Intelligence*, 27, 2014, 81 at 84 suggesting that the European Commission obviously had this tool in mind.

<sup>43</sup> See SWD (2014) 61 at p 38.

<sup>44</sup> See generally *Christian Pilkington*, *Schemes of Arrangement in Corporate Restructuring* (2<sup>nd</sup> ed, Sweet & Maxwell 2017); *Geoff O’Dea, Julian Long and Alexandra Smyth*, *Schemes of Arrangement Law and Practice* (Oxford University Press 2012); *Jennifer Payne*, *Schemes of Arrangement; Theory, Structure and Operation*. (Cambridge University Press 2014).

<sup>45</sup> See *Re Seat Pagine Gialle SpA* [2012] EWHC 3686; *Primacom Holdings GmbH v Credit Agricole* [2011] EWHC 3746; *Re Rodenstock GmbH* [2011] EWHC 1104 and see generally *Look Chan Ho* (fn. 32), *Jennifer Payne* (fn. 32).

It should be noted however, that the scheme is a procedure that was outside both the original Insolvency Regulation, and the Recast, since it was not listed in Annex A. Annex A sets out exhaustively the list of proceedings covered by the Regulation.<sup>46</sup> There seems something anomalous in the European Commission relying, at least implicitly, on a procedure as the basis for its new approach to restructuring and insolvency that was not covered by the recast Insolvency Regulation and was therefore not entitled to the benefit of automatic EU-wide recognition under that Regulation.<sup>47</sup> There is the possibility however, of restructuring proceedings under the new Directive being recognised under the Jurisdiction and Judgments Brussels 1 Regulation which broadly speaking, covers judgments and orders in civil and commercial matters.<sup>48</sup>

The Restructuring Directive clearly contemplates that procedures envisaged by it will not necessarily be listed under the Insolvency Regulation though the recast variety of the latter Regulation is sufficiently wide to enable such procedures to be listed.<sup>49</sup> The Directive however, does speak of facilitating the cross-border recognition of restructuring procedures and the recognition and enforceability of judgments emanating from such procedures. It also complements the Insolvency Regulation by putting in place certain provisions designed to mitigate against the “abusive” relocations of the debtor’s centre of main interests when seeking to avail of restructuring procedures in a State other than that which appears to be the debtor’s natural ‘home’ location. For instance, under Article 6(8) of the Directive, the total duration of the restructuring stay shall not be longer than 4 months if the debtor’ centre of main interests (COMI) is transferred to another Member State within 3 months prior to the request to open preventive restructuring proceedings.

It may be that certain countries will adopt a flexible approach towards implementation of the Restructuring Directive and may have one procedure that is listed under the Insolvency Regulation but at least one other restructuring procedure that is not; perhaps with a view to the country serving as a forum for global debt restructurings. The UK provides a precedent in this regard in that, pre-Brexit, certain “insolvency” procedures were listed but not schemes of arrangement.

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<sup>46</sup> In *Ulf Kazimierz Radziejewski*, CJEU, 8 November 2012, C-461/11, ECLI:EU:C:2012:704 the Court of Justice of the European Union held that the Regulation applied only to the proceedings listed in the annex. Recital 9 of the preamble to the recast Regulation states that where a procedure is not listed in Annex A, it is not covered by the Regulation.

<sup>47</sup> Regulation (EU) 2015/848 Articles 20 and 32 which are essentially the same as Articles 17 and 25 of Regulation 1346/2000.

<sup>48</sup> See *Dominik Skauradzun and Walter Nijnens*, “Brussels 1a or EIR Recast? The Allocation of Preventive Restructuring Frameworks”, *International Corporate Rescue*, 16, 2019, 193.

<sup>49</sup> Directive 2019/1023 recitals 13 and 14.

The current interlocking and overlapping provisions in the UK on international/cross-border cooperation in insolvency matters will now be addressed.

### 3. Cross Border Insolvency Regime(s) in the UK

Both before and after Brexit, the UK had a number of legislative vehicles for international/cross-border cooperation in insolvency matters:

- EU Regulation on Insolvency Proceedings (supplemented by sector-specific instruments<sup>50</sup>);
- UNCITRAL Model Law on Cross Border Insolvency implemented in the UK by the Cross-Border Insolvency Regulations (CBIR);
- UK Section 426 Insolvency Act 1986.
- Brussels 1 Regulation on Jurisdiction and Enforcement of Judgments<sup>51</sup> which might have facilitated the recognition of certain types of restructuring agreements ('schemes of arrangement') in other EU countries.

Additionally, there is the common law to the extent that it has not been superseded in relation to particular matters.

#### a. The Insolvency Regulation and the UNCITRAL Model Law

The European Insolvency Regulation has already been considered in the previous section. Notwithstanding its origins as a private international law instrument and even certain limitations in this regard, the Insolvency Regulation is however a much more comprehensive legal instrument than the UNCITRAL Model Law on Cross-Border Insolvency<sup>52</sup>, which the US

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<sup>50</sup> For separate legislative initiatives at EU level see, for example, Directive 2001/24/EC, OJ 2001 L 125/15, on the reorganisation and winding-up of credit institutions as amended by the Bank Resolution and Recovery Directive – Directive 2014/59/EU, OJ 2014 L 173/190; and now Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II), OJ 2009 L335/1. The 'credit institutions' exception and the sector-specific measures applicable to credit institutions were considered by the UK Supreme Court in *Goldman Sachs International v Novo Banco SA* [2016] UKSC 34, [2018] 1 WLR 3683. The court acknowledged that the credit institutions regime imposed a greater measure of universality than the Insolvency Regulation and cautioned against adopting interpretations that would undermine the scheme of universal recognition of measures taken by the home Member State to deal with failing financial institutions.

<sup>51</sup> Regulation 1215/2012/EU (Brussels 1 Regulation recast) replacing the original Brussels 1 Regulation – Council Regulation 44/2001 – which in turn replaced the Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (1968) and see generally *Andrew Dickinson* (fn. 3).

<sup>52</sup> The model law is available on the UNCITRAL website at [https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\\_insolvency](https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency) and for a list of countries

has implemented through Chapter 15 of the US Bankruptcy Code and the UK through the Cross-Border Insolvency Regulations (CBIR) 2006.<sup>53</sup> The failure of the Model Law to go as far as the Insolvency Regulation is understandable.<sup>54</sup> The Insolvency Regulation is an emanation from the European Union (EU) whose Member States have agreed to pool their sovereignty and agreed to work towards an ever closer Union.<sup>55</sup> UNCITRAL is a United Nations (UN) organ with the link between Member States being much more diffuse in the case of UN Member States than with EU Member States. The differences between the Insolvency Regulation and the Model Law regime should be highlighted.

The Model Law gives foreign insolvency practitioners (IPs) access to local courts; provides for the recognition of foreign insolvency proceedings; deals with some of the consequences of recognition and provides for the coordination of insolvency proceedings opened in different States. It does not however, directly allocate jurisdiction to open insolvency proceedings nor does it deal with choice of law issues. It does not purport to say which law should govern insolvency proceedings that are opened in a particular State. Moreover, while recognition of insolvency proceedings opened in another EU Member State is automatic under the Insolvency Regulation whereas, under the Model Law, it is dependent upon an application to the court. By virtue of the Insolvency Regulation, insolvency proceedings have the same effect in other EU States as they have in the law of the insolvency forum<sup>56</sup>, whereas under the Model Law the consequences of recognition depend on the law of the recognising State. The Model Law however, deploys the same concepts of 'centre of main interests'/COMI and establishment that underpin the EU Regulation there are differences of detail between the two instruments on the definition of an 'establishment'.<sup>57</sup> The EU COMI case law on the meaning of COMI was used in the UK in a Model Law context in *Re Stanford International Bank Ltd*.<sup>58</sup>

b. Section 426 Insolvency Act 1986 and the Common Law

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that have adopted the model law see [https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border\\_insolvency/status](https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status)

<sup>53</sup> SI 2006/1030.

<sup>54</sup> For comparisons between the UNCITRAL Model Law and the EIR see *Reinhard Bork*, "The European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency", *International Insolvency Review*, 26, 2017, 246.

<sup>55</sup> See Article 1 of the Treaty on European Union, which refers to the Treaty marking "a new stage in the process of creating an ever closer union among the peoples of Europe".

<sup>56</sup> Articles 19, 20 and 32.

<sup>57</sup> Contrast Article 2(c) Schedule 1 CBIR with Article 2(10) EU Regulation 2015/848.

<sup>58</sup> [2010] EWCA Civ 137, [2011] Ch 33 at para 54. See also Snowden J in *Re Videology Ltd* [2018] EWHC 2186 (Ch) stating at para 28 "for so long as the UK remains a party to the Recast EIR, I can see no obvious basis upon which I should adopt any different approach in relation to the concept of COMI under the CBIR/Model Law and the Recast EIR".

Notwithstanding the EU instruments and the legislative implementation of the UNCITRAL Model law, s 426 Insolvency Act 1986 remains on the UK statute books. It enables UK courts to respond favourably to requests for assistance from courts exercising insolvency jurisdiction in certain designated foreign States and territories. The list of countries designated countries is however quite circumscribed and does not include, for instance, the US though it does include Australia.<sup>59</sup> It is presently confined to certain common law countries - certain ex-colonies and dependencies - and the Republic of Ireland is the only EU State designated.

The request may seek the application of either UK or the relevant foreign insolvency law.<sup>60</sup> The UK courts are generally guided by the terms of the request but are not obliged to give assistance whenever it is requested. While the statute appears to lay down an obligation to lend assistance to the requesting foreign court, the Court of Appeal has confirmed in *Hughes v Hannover Rucksversicherungs-AG*<sup>61</sup> that the court enjoys a continued discretion and may reject the request for assistance although “[t]he particular assistance requested should be given unless there is some good reason for not doing so”.<sup>62</sup> In the *Hughes* case itself the request was actually turned down because the circumstances had changed materially since the date of the request.

An English court under s 426 may provide any form of assistance comparable to that given in English insolvency proceedings, whether the assistance takes the form of an order under the Insolvency Act or pursuant to the court's general equitable jurisdiction. The available forms of assistance include an order for examination of a company officer pursuant to s 236 Insolvency Act 1986; an injunction to restrain the institution or continuation of proceedings against the debtor company; a declaration recognising the right and title of a foreign representative to assets and the appointment of a receiver over the company's assets within the jurisdiction. In *Centaur Litigation SPC v Terrill*,<sup>63</sup> the assistance granted to the Cayman court took the form

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<sup>59</sup> For the designated list see Co-Operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986, SI 1986/2123, as amended by SI 1996/253 and SI 1998/2766.

<sup>60</sup> See also *UBS AG New York v Fairfield Sentry Ltd* [2019] UKPC 20 where Lord Hodge observed at para 15 that it was “not uncommon for the courts in one country to apply the insolvency laws of another when giving assistance to the latter country.”

<sup>61</sup> [1997] BCC 921. It was said at 938: “The obligation to assist is imposed on a court, not some executive agency. It would in my view require very clear words to justify a conclusion that the court in England was not intended by Parliament to perform its normal function of seeking to do justice in accordance with the law. There is no such indication.”

<sup>62</sup> The court, however, in *Hughes* did stress that the request could not be conclusive as to the manner in which the discretion of the court should be exercised.

<sup>63</sup> [2015] EWHC 3420 (Ch). Norris J said at para 28 that s 426(5) undoubtedly confers a discretion on the court whose assistance is requested but in this case the discretion was exercised in favour of giving assistance.

of a worldwide freezing order in respect of the assets of a director of the debtor company who may have been implicated in wrongdoing.

The concept of common law judicial assistance in respect of cross-border insolvency proceedings has been developed in recent years by the UK Supreme Court<sup>64</sup> and Privy Council.<sup>65</sup> A principle of “modified universalism” has been enunciated under which insolvency proceedings opened in a debtor’s “home” jurisdiction should be recognised and given effect in other countries throughout the world. Insofar as possible, the courts should try to implement a single scheme of distribution applicable to all the debtor’s assets. 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)*<sup>66</sup> where Lord Hoffmann said:<sup>67</sup>

“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.”

More recent decisions however, have acknowledged the boundaries of judicial creativity and common law judicial assistance stating that any assistance given is subject to local law and public policy and cannot be used to undermine or usurp local law-making.<sup>68</sup> The leading decision is that of the Privy Council in *Singularis Holdings v PricewaterhouseCoopers*.<sup>69</sup> It was held that while under the principle of “modified universalism”, the court had a common law power to assist foreign insolvency proceedings, the exercise of the power was subject to the constraints of local law and local policy norms. The fact that local law might permit local liquidators to do certain things in the case of a domestic insolvency did not necessarily mean

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<sup>64</sup> *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21; [2008] 1 WLR 852.

<sup>65</sup> *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors (of Navigator Holdings Plc)* [2006] UKPC 26; [2007] 1 AC 508. The Judicial Committee of the Privy Council has appellate jurisdiction in relation to certain UK overseas territories and ex-colonies and dependencies, principally in the Caribbean; see [www.jcpc.org](http://www.jcpc.org)

<sup>66</sup> [2006] UKPC 26, [2007] 1 AC 508. See also Lord Hoffmann in *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at para 7 referring to the principle of modified universalism as the “golden thread” running through English cross-border insolvency law since the 18th century and in the *Cambridge Gas* case referring to it as an “aspiration” at para 17.

<sup>67</sup> At para 16 of the judgment.

<sup>68</sup> See *Rubin v Eurofinance SA* [2012] UKSC 46; [2013] 1 AC 236 and *Singularis Holdings v PricewaterhouseCoopers* [2014] UKPC 36; [2015] 2 WLR 971.

<sup>69</sup> [2014] UKPC 36, [2014] 2 BCLC 597, where Lord Neuberger referred at para 157 to the “extreme version” of the principle of universality propounded by Lord Hoffmann in *Cambridge Gas*.

that a foreign liquidator could do the same, or equivalent things, in the absence of statutory authorisation.

In *Rubin*<sup>70</sup> the UK Supreme Court by a 4 to 1 majority overturned an English Court of Appeal decision that a monetary default judgment given in US bankruptcy proceedings could be enforced in England. This was the case even though it could not have been enforced if it had been given in the ordinary US courts of law because the defendant was not considered to be “present” in the US nor had it submitted to the jurisdiction of the US courts. The Court of Appeal had accepted as a general principle of private international law that insolvency law, whether applying to individuals or to corporate entities, should be unitary and universal. In its view, therefore, there should be unitary insolvency proceedings in a court of the insolvent’s domicile that should receive worldwide recognition and also apply to all the insolvent’s assets.

The Court of Appeal had held that the concept of insolvency proceedings as a sui generis category of private international law included transactional avoidance mechanisms. Avoidance proceedings were said to be central to the collective enforcement regime in insolvency and were governed by the special insolvency rules.

The Supreme Court however, held the Court of Appeal decision in *Rubin* should not be followed because, in its view, it was not an incremental development of existing principles, but rather a radical departure from substantially settled law. It said that a change in the settled law governing the recognition and enforcement of judgments had all the hallmarks of legislation, and was a matter for legislative decision rather than judicial innovation. According to Lord Collins:<sup>71</sup>

“the introduction of judge-made law extending the recognition and enforcement of foreign judgments would be only to the detriment of United Kingdom businesses without any corresponding benefit ... a person in England who might have connections with a foreign territory which were only arguably ‘sufficient’ would have to actively defend foreign proceedings which could result in an in personam judgment against him, only because the proceedings are incidental to bankruptcy proceedings in the courts of that territory ... [I]t might suggest that foreigners who have bona fide dealings with the United States might have to face the dilemma of the expense of defending enormous claims in the United States or not defending them and being at risk of having a default judgment enforced abroad.”

Critics of the *Rubin* UK Supreme Court decision argue that it makes it more difficult for liquidators and insolvency administrators to recover assets on behalf of the insolvency estate that have been illicitly transferred abroad. Lord Collins anticipated and countered this criticism

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<sup>70</sup> *Rubin v Eurofinance SA* [2013] UKSC 46, [2013] 1 AC 236.

<sup>71</sup> [2013] 1 AC 236 at para 130.

by suggesting that direct remedies might be available to recover assets for the benefit of creditors. He pointed out that avoidance claims by a liquidator of an Australian company may be the subject of a request by the Australian court pursuant to s 426(4) of the Insolvency Act 1986, applying Australian law under s 426(5).<sup>72</sup>

c. UK schemes of arrangements and the Regulation on Jurisdiction and Enforcement of Judgments

In recent years, many corporate restructurings in respect of foreign-registered companies have been accomplished by means of schemes of arrangement under Part 26 UK Companies Act 2006.<sup>73</sup> The scheme is a three stage process including, at the final stage, an order of the court approving the scheme. It is a form of “debtor-in-possession” restructuring that enables a company to enter into a compromise or arrangement with any class of creditors, or members. The restructuring may involve various elements such as an extension of debt repayments, whole or partial debt forgiveness, and converting debt into shares or share warrants.

Schemes of arrangement were not listed under the Insolvency Regulation. This means that they were not entitled to the benefits of automatic EU-wide recognition under that Regulation.<sup>74</sup> There was however somewhat inconclusive case law on whether the court order was a judgment for the purpose of the Jurisdiction and Judgments (Brussels 1) Regulation and therefore qualifying for automatic EU wide recognition on that basis.

The Brussels 1 Regulation<sup>75</sup> applies in civil and commercial matters but according to Art 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”. This exception mirrors a similar provision in the earlier Brussels Convention, which also covered jurisdiction and the enforcement of judgments in civil and commercial matters.<sup>76</sup>

The overall objective of the Judgments Regulation is to secure the simplification of formalities that govern the reciprocal recognition and enforcement of judgments and to strengthen the

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<sup>72</sup> In addition, Article 23 of the UNCITRAL Model Law allowed for the possibility of avoidance claims to be brought by foreign representatives under the Insolvency Act 1986.

<sup>73</sup> See generally *Look Chan Ho* (fn. 32) and *Jennifer Payne* (fn. 32).

<sup>74</sup> It can be argued that since schemes are derived from general company law and not from a law relating to insolvency, then quite rightly they are not listed under the Insolvency Regulation on this basis – see Recital 16 to the recast Regulation.

<sup>75</sup> Regulation 1215/2012/EU (Brussels 1 Regulation) recast.

<sup>76</sup> The wording of the provisions is the same: see *SCT Industri AB (In Liquidation) v Alpenblume AB* ECJ, 2 June 2019, C-111/08, ECLI:EU:C:2009:419.



legal protection of persons. Recital 21 in the preamble to the Regulation 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 the recast Judgments Regulation, 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 seised must stay its proceedings until the jurisdiction of the court first seised is established and, when it is, decline its jurisdiction in favour of that court.<sup>77</sup>

Recital 7 of the preamble to the recast Insolvency Regulation states that the interpretation of this Regulation should as much as possible avoid regulatory loopholes between the two instruments. It adds, however, that the mere fact that a national procedure is not listed in Annex A to the Insolvency Regulation should not imply that it is covered by the Judgments Regulation.

Despite the large number of cases in the UK on whether applications to approve (sanction) schemes of arrangement in respect of companies registered in other EU States fell within the scope of the Judgments Regulation, there was an appellate court decision that reviewed all the relevant authorities.<sup>78</sup> Instead, there was a number of first-instance decisions, some relatively uncontested, in which the matter was addressed at varying length. In *Re DAP Holdings NV*<sup>79</sup> it was suggested that applications to approve schemes of arrangement fell outside the Judgments Regulation but in *Re Rodenstock GmbH*<sup>80</sup> however, the court took a different view and it was held that proceedings seeking the court's approval for a scheme was within the Judgments Regulation.

The “*Rodenstock*” analysis was also adopted by David Richards J in *Re Magyar Telecom BV*.<sup>81</sup> The latter added that an application to approve a scheme may involve persons being

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<sup>77</sup> Under Article 31(2) of the “recast” regulation, if the parties have given a particular court exclusive jurisdiction, that court may go on to hear the case even if it was not first “seised”.

<sup>78</sup> For general discussion see *Look Chan Ho* (fn. 32) and also *Jennifer Payne* (fn. 44) who comments at p 292: “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.”

<sup>79</sup> [2005] EWHC 2092 (Ch), [2006] BCC 48 at para 14.

<sup>80</sup> [2011] EWHC 1104 (Ch), [2011] Bus LR 1245.

<sup>81</sup> [2013] EWHC 3800 (Ch), [2015] 1 BCLC 418.

“sued” for the purpose of Article 4 of the Judgments Regulation.<sup>82</sup> In those circumstances, the courts of the Member State where a defendant is domiciled had jurisdiction.<sup>83</sup> Where some of the creditors whose rights were being affected by the scheme were domiciled in the UK, the UK courts could sanction the scheme. Article 8 of the recast Judgments Regulation enables a person domiciled in a Member State to be sued, where it was one of a number of defendants, in the national courts where any of the defendants were domiciled. This is on the basis 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 previous authorities were reviewed more recently by Snowden J in *Re Global Garden Products Italy SpA* who said:<sup>84</sup>

“the courts have expressed the view that 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 ... Alternatively, the answer may depend upon a consideration of the number and value of the creditors domiciled in the United Kingdom ...”

Whether schemes in relation to insolvent companies were also within the scope of the Judgments Regulation was considered in *Re Magyar Telecom BV*.<sup>85</sup> David Richards J held that an order sanctioning a scheme between an insolvent company and its creditors was subject to the Judgments Regulation, at least if the company was not subject to insolvency proceedings under the new Insolvency Regulation.

In approving schemes, the UK courts assumed a wide jurisdictional base. They approve a scheme where the relevant foreign company was considered to have a “sufficient connection”

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<sup>82</sup> 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 Chapter 2 of the Regulation were wide enough to encompass schemes of arrangement

<sup>83</sup> See, however, *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 said that it was a stretch to consider company creditors as being defendants for the purpose of the Judgments Regulation, although they were integral to the scheme process and had a right to attend the court hearing.

<sup>84</sup> [2016] EWHC 1884 (Ch) at para 25. See also the full discussion of the authorities by Hildyard J in *Re Lehman Brothers (International) Europe* [2018] EWHC 1980 (Ch) at paras 166–190.

<sup>85</sup> [2013] EWHC 3800 (Ch), [2015] 1 BCLC 418 at para 29.

with the UK even though the COMI of the company may not have been in the UK. The “sufficient connection” test was established in cases like *Re Drax Holdings Ltd*<sup>86</sup> and in *Re Rodenstock GmbH*.<sup>87</sup> A sufficient connection was deemed to exist by virtue of the fact that the company's credit facilities contained English choice of law and jurisdiction clauses and also by reason of expert evidence that the relevant foreign courts would recognise the scheme. Forum shopping issues in relation to schemes were addressed by Snowden J in *Re Van Gansewinkel Groep BV*<sup>88</sup> who commented:<sup>89</sup>

“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 ....”

The matter was further considered by Newey J in *Re Codere Finance (UK) Ltd*<sup>90</sup> who distinguished between “good” and “bad” forum shopping. The case had been characterised at an earlier stage as ‘quite an extreme form of forum shopping, in which the restructuring proceedings were brought in the UK purely by incorporating a company to take on very large liabilities’. Newey J however, said that the English courts had become comfortable with exercising the scheme jurisdiction in relation to companies that did not have longstanding connections with England. He recognised that the present case involved forum shopping in that debtors were seeking to give the English court jurisdiction to take advantage of a

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<sup>86</sup> [2003] EWHC 2743 (Ch); [2004] 1 WLR 1049.

<sup>87</sup> [2011] EWHC 1104 (Ch); [2011] Bus LR 1245. See also *Primacom Holdings GmbH v Credit Agricole* [2012] EWHC 164 (Ch), [2013] BCC 201; *Re Seat Pagine Gialle SpA* [2012] EWHC 3686 (Ch); *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch); [2014] BCC 448; *Re Dtek Finance BV* [2016] EWHC 3562 (Ch); [2017] BCC 165.

<sup>88</sup> [2015] EWHC 2151 (Ch); [2015] Bus LR 1046. Note too the same judge in *Re Global Garden Products Italy SpA* [2016] EWHC 1884 (Ch).

<sup>89</sup> Paras 4 and 5.

<sup>90</sup> [2015] EWHC 3778 (Ch), [2016] All ER (D) 27. Note too *Re Algeco Scotsman PIK SA* [2017] EWHC 2236 (Ch) where Hildyard J commented at para [57] that although ‘forum shopping’ had been used as a pejorative description of a situation where a company resorted to an inappropriate court for inappropriate purposes, the company's resort to the English court in the present case was appropriate and understandable given the lack of any viable or efficient alternatives. The judge also reiterated what he said in *Re Apcoa Parking Holdings GmbH* [2014] EWHC 3849 (Ch) that whenever there is a change in jurisdiction clause for the purpose of opening the gateway to the English scheme jurisdiction, the court should be careful to scrutinise whether the change of law or jurisdiction was inappropriate. See also the full discussion of the authorities in *Re Lehman Brothers (International) Europe* [2018] EWHC 1980 (Ch) at paras 166-190.

procedure for confirming schemes which was available in England but not as available in other countries. The judge said:<sup>91</sup>

“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.”

#### **4. The Position after Brexit**

Under s 3(1) of the UK’s European Union (Withdrawal) Act 2018, direct EU legislation, such as the Insolvency Regulation, that was operative immediately before the UK’s departure from the European Union continued to form part of UK domestic law on and after the exit. Exit day was originally scheduled to be 29<sup>th</sup> March 2019 but was then extended on two occasions. Under the European Union (Withdrawal Agreement) Act 2020, the EU withdrawal date was fixed as 31<sup>st</sup> January 2020. The existing body of EU law, including the Insolvency Regulation (and the Jurisdiction and Judgements Regulation), however remained in force as far as the UK is concerned, until the end of the Brexit implementation period completion which was scheduled to be 31<sup>st</sup> December 2020 at 11 pm UK time.<sup>92</sup> In the UK 2020 Act, there was a prohibition on extending the implementation period.<sup>93</sup>

Sections 8 and 9 of the Act dealt with the legislative consequences of Brexit. It effectively conferred a power to deprive “retained” EU law of force and effect. Section 8 (1) provided that a Minister of the Crown may by regulations make such provision as the Minister considers appropriate to prevent, remedy or mitigate (a) any failure of retained EU law to operate effectively, or (b) any other deficiency in retained EU law arising from the withdrawal of the United Kingdom from the EU.

##### **a. Recognition of foreign (EU) proceedings in the UK- falling back on UNCITRAL rules**

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<sup>91</sup> Para 19.

<sup>92</sup> European Union (Withdrawal Agreement) Act 2020 s 39. “Withdrawal agreement” is defined as the agreement between the United Kingdom and the EU under Article 50(2) of the Treaty on European Union that sets out the arrangements for the United Kingdom’s withdrawal from the EU (as that agreement is modified from time to time in accordance with any provision of it).

<sup>93</sup> Section 33.

Unless there was some replacement treaty, or other bilateral arrangements, the logic of Brexit suggests that the Insolvency Regulation should cease to apply, as far as the UK is concerned. The UK will then have to rely upon the CBIR/Model Law regime, possibly supplemented by the common law, to govern its relations with other EU countries in respect of insolvency matters. The UK government explains:<sup>94</sup> “If the UK continued to apply the [EU] rules unilaterally after exit, the UK’s status as a third country would mean that EU countries would not consider the UK to be covered by these rules. As a result, UK citizens, businesses and families would not benefit from these rules. Because of this loss of reciprocity, in the event of a no deal scenario, we would repeal most of the existing civil judicial cooperation rules and instead use the domestic rules which each UK legal system currently applies in relation to non-EU countries. In some specific areas... we would retain elements of the current EU rules, where they either do not rely on reciprocity to operate or where they currently form the basis for our existing domestic or international rules.”

The Insolvency (Amendment) (EU Exit) Regulations 2019<sup>95</sup> largely deprive the Insolvency Regulation of continued force and effect in the UK. The UK government however plays great store in safeguarding legitimate expectations and the security of transactions and therefore the Insolvency Regulation will continue to apply where main insolvency proceedings have been opened before the completion of the Brexit implementation period.<sup>96</sup> In other words, the existing EU rules will still apply to establishment of jurisdiction, and recognition and enforcement of any resulting judicial decision whether or not the decision has been handed down before, or after, the expiry of this period. This exception for pending proceeding means that the Insolvency Regulation will have a long tail since insolvency proceedings can continue for an extended period. For instance, Lehman Brothers International (Europe) entered UK administration proceedings in September 2008 but, despite protracted litigation, there is no immediate end to the proceedings in sight.<sup>97</sup>

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<sup>94</sup>Statement in UK Government technical guidance on “[Handling civil cases that involve EU countries if there's no Brexit deal](#)”.

<sup>95</sup> See also, SI 2019/146 (Insolvency Brexit Regulations) It should be noted however that post-Brexit the territorial limits on the court’s winding up jurisdiction under s 117(7) Insolvency Act 1986 are removed. Moreover, there is now explicit authority in the UK to wind up a company that has either its COMI, or an establishment, in the UK.

<sup>96</sup> Article 67(3)(c) of the UK/EU withdrawal agreement. The text of the agreement is available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/840655/Agreement\\_on\\_the\\_withdrawal\\_of\\_the\\_United\\_Kingdom\\_of\\_Great\\_Britain\\_and\\_Northern\\_Ireland\\_from\\_the\\_European\\_Union\\_and\\_the\\_European\\_Atomic\\_Energy\\_Community.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/840655/Agreement_on_the_withdrawal_of_the_United_Kingdom_of_Great_Britain_and_Northern_Ireland_from_the_European_Union_and_the_European_Atomic_Energy_Community.pdf). See also UK Government technical guidance on “Handling civil cases that involve EU countries if there's no Brexit deal”.

<sup>97</sup> For recent Lehman proceedings see *Re Lehman Brothers (International) Europe* [2018] EWHC 1980 (Ch).

Post-Brexit, insolvency representatives in the remaining EU Member States may apply for recognition of the foreign insolvency proceeding in the UK courts under the Model Law/CBIR. While the process of getting recognition is likely to be pretty straightforward once the not very onerous procedural requirements have been observed, the fact that it is necessary to apply to the court as distinct from automatic recognition under the EIR adds to the delay and expense.

On the plus side, one could argue that both the Model Law and the European Insolvency Regulation adopt an approach of 'mitigated universalism'. The assumption in each case is that of unitary insolvency proceeding for each debtor, with universal scope but, in addition, there may be territorial insolvency proceedings, with the effects of those proceedings restricted to the assets of the debtor in that territory. A US court in *ABC Learning Centres Ltd*<sup>98</sup> referred to the underlying "universalist" philosophy of the Model Law and contrasted it with a value-destructive "territorialist" approach. It said:<sup>99</sup> 'the Model Law reflects a universalism approach to transnational insolvency. It treats the multinational bankruptcy as a single process in the foreign main proceeding, with other courts assisting in that single proceeding. In contrast, under a territorialism approach a debtor must initiate insolvency actions in each country where its property is found. This approach is the so-called "grab" rule where each country seizes assets and distributes them according to each country's insolvency proceedings.'

The effect of recognition under Model Law rules is however, more limited than that under the EIR regime. The basic rule under the EIR is that insolvency proceedings have the same effect throughout the EU as they have in the State of opening whereas this is not the case under the Model Law regime. If foreign proceedings are recognized as "main" proceedings under the Model Law, then certain consequences follow. First, upon recognition there is a stay on proceedings against the debtor's assets but legal proceedings may still be instituted to prevent an action from becoming statute-barred<sup>100</sup> and the stay is subject to the other exceptions found in domestic insolvency law. The right of a qualified party to request the opening of domestic insolvency proceedings is also preserved though the effect of such proceedings is confined to assets located in the recognizing State. Secondly, there is a stay on executions against the debtor's assets and thirdly, any right of the debtor to transfer, encumber or otherwise dispose of any assets is suspended.

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<sup>98</sup> *In re ABC Learning Centres Ltd* (2013) 728 F3d 301.

<sup>99</sup> (2013) 728 F3d 301 at 307.

<sup>100</sup>Article 20(3) of the Model Law and Cross Border Insolvency Regulations Sch 1 Art 20(4).

Article 20(2) CBIR provides that the stay is to have “the same in scope and effect” as if the debtor had been the subject of a winding-up order under the UK Insolvency Act 1986. 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 pertaining to financial market transactions to the extent that all these rights would be exercisable in a UK context. Where however, the foreign proceedings are rescue or reorganisation proceedings rather than liquidation proceedings, the foreign representative at the time of applying for recognition of the foreign proceedings can apply for the effects of the stay to be modified and more appropriate relief to be granted under Article 21. This Article gives the court discretion on what relief to grant when foreign non-main proceedings are recognised; here there are no prima facie consequences following from recognition. Article 21 also confers discretion to grant additional relief when foreign proceedings are recognised as main proceedings.<sup>101</sup>The Article 21 discretion has been exercised in many UK Model Law recognition cases including in *Re Pan Oceanic Maritime Inc*<sup>102</sup> where the more extensive stay associated with UK administration proceedings that bars the enforcement of security etc. was granted rather than the limited liquidation stay.

The discretionary relief available under Article 21 can take the form, inter alia, of:

- (1) providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor’s assets, affairs, rights, obligations or liabilities;
- (2) entrusting the administration or realisation of all or part of the debtor’s assets to the foreign representative or another person designated by the court;
- (3) extending interim relief;
- (4) granting any further relief that might be available to an insolvency office holder in domestic proceedings.

Article 21 however, does not explicitly allow a UK court to apply foreign insolvency law when granting recognition. Moreover, the application of foreign insolvency law was held not to be

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<sup>101</sup> Articles 20(6) and 21, SI 2006/1030 Sch 1, Cross-Border Insolvency Regulations 2006.

<sup>102</sup> [2010] EWHC 1734 (Ch).

impliedly permitted in *Re Pan Ocean Co Ltd*<sup>103</sup> and *Bakhshiyeva v Sberbank of Russia*<sup>104</sup> applying *Re Pan Ocean Co Ltd*.<sup>105</sup>

b. Recognition of foreign proceedings (including EU proceedings) in the UK and the effect of the ‘*Gibbs*’ rule

In *Re Pan Ocean Co Ltd*<sup>106</sup> Morgan J rejected the argument for a broad interpretation of the expression ‘appropriate relief’ in Article 21 of the Model Law that would permit the application of foreign insolvency law. He considered the preliminary materials leading to the elaboration of the Model Law and said it was not intended that “any appropriate relief” should allow a recognising court to grant relief that it could not grant in relation to a domestic insolvency.

The court declined to follow the US decision in *Re Condor Insurance Co Ltd*<sup>107</sup> that permitted the application of foreign insolvency law by a recognising court in certain circumstances. It suggested that the legislative context and legislative history were different in the US and the US court may have misinterpreted the background negotiations that led to the Model Law. Reference was also made to the decision of the Supreme Court in *Rubin v Eurofinance SA* where Lord Collins said that the Model Law provided “the type of relief that would be available in the case of a domestic insolvency”.<sup>108</sup> *Rubin* supported the view that while Art 21 should be given a wide interpretation in relation to matters of procedure, the relief available was essentially of a procedural nature.<sup>109</sup>

In *Pan Ocean* the court refused to give effect to provisions of Korean insolvency law that allowed contractual termination clauses under an English law governed contract to be overridden. Morgan J said:<sup>110</sup>

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<sup>103</sup> [2014] EWHC 2124 (Ch); [2014] Bus LR 1041.

<sup>104</sup> [2018] EWCA Civ 2802, [2019] 1 BCLC 1, [2018] All ER (D) 83 (Dec). The case is also known as *Re OJSC International Bank of Azerbaijan*.

<sup>105</sup> [2014] EWHC 2124 (Ch); [2014] Bus LR 1041.

<sup>106</sup> [2014] EWHC 2124 (Ch); [2014] Bus LR 1041.

<sup>107</sup> (2010) 601 F 3d 319.

<sup>108</sup> [2012] UKSC 46; [2013] 1 AC 236 at para 143.

<sup>109</sup> For criticism see *Jay Lawrence Westbrook*, “Ian Fletcher and the Internationalist Principle”, Nottingham Insolvency and Business Law E-Journal, 3, 2015, 565 “Despite our high and continuing respect for the British courts, many of us on the west side of the Atlantic have been distressed by *In re Rubin* and its progeny”. See also *Jay Lawrence Westbrook*, “Interpretation Internationale”, Temple Law Review, 87, 2015, 739.

<sup>110</sup> [2014] EWHC 2124 (Ch), [2014] Bus LR 1041 at para 112. It should be noted that now under the Corporate Insolvency and Governance Act 2020 the provisions of UK insolvency law were brought more into line with the relevant provisions of Korean insolvency law on contractual termination clauses that



“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.”

This analysis was carried a stage further in *Bakhshiyeva v Sberbank of Russia*<sup>111</sup> where it was held that the Model Law could not be used to undermine the long-established principle that the discharge of a debt under foreign bankruptcy or restructuring law will not be given effect in the UK if the contract creating the debt is governed by English law.<sup>112</sup> This is the so-called rule in *Gibbs v La Société Industrielle et Commerciale des Métaux*.<sup>113</sup> In that case, 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.”<sup>114</sup> The principle has been acknowledged by the Privy Council in *New Zealand Loan and Mercantile Agency Company v Morrison*,<sup>115</sup> by the House of Lords in *National Bank of Greece and Athens*

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were considered in the *Pan Ocean* case.

<sup>111</sup> [2018] EWCA Civ 2802, [2019] 1 BCLC 1.

<sup>112</sup> [2018] EWCA Civ 2802 at para 95. The court also drew a distinction between liquidation and restructuring proceedings. See however, the more recent comments of the Privy Council in *UBS AG New York v Fairfield Sentry Ltd* [2019] UKPC 20 which arguably point in a different direction. The court said at para 14: “In any event, it is by no means clear that incorporation of the UNCITRAL Model Law would disincline, let alone forbid, a court from applying a foreign insolvency law. It appears to the Board that the United States Courts have interpreted the relevant statutory provisions as permitting the application of foreign insolvency law in both their now-superseded section 304 of the US Bankruptcy Code ( *In re Metzeler* 78 BR 674 , 677 (Bkrcty SDNY 1987) and chapter 15 of the US Bankruptcy Code, which is based on the UNCITRAL Model Law ... *In re Atlas Shipping A/S* 404 BR 726, (April 27 2009, SDNY), *In re Condor Insurance Ltd* 601 F 3d 319 (March 17 2010, 5th Cir), and *In re Hellas Telecommunications II* 535 BR 543, 566-567 (Bkrcty SDNY 2015)).”

<sup>113</sup> (1890) 25 QBD 399.

<sup>114</sup> (1890) 25 QBD 399 at 406.

<sup>115</sup> [1898] AC 349.

*v Metliss*<sup>116</sup> and most recently by the UK Supreme Court in *Goldman Sachs International v Novo Banco SA*.<sup>117</sup> In the latter case, Lord Sumption said:<sup>118</sup>

“The rescue of failing financial institutions commonly involves measures affecting the rights of their creditors and other third parties. Depending on the law under which the rescue is being carried out, these measures may include the suspension of payments, the writing down of liabilities, moratoria on their enforcement, and transfers of assets and liabilities to other institutions. At common law measures of this kind taken under a foreign law have only limited effect on contractual liabilities governed by English law. This is because the discharge or modification of a contractual liability is treated in English law as being governed only by its proper law, so that measures taken under another law, such as that of a contracting party’s domicile, are normally disregarded ....”

The *Gibbs* rule survived an attack in *Global Distressed Alpha Fund v PT Bakrie*,<sup>119</sup> where it was held the movement towards “universalism” in insolvency proceedings did not allow a first instance judge to disregard the established doctrine. In *Bakrie*,<sup>120</sup> the court considered whether the discharge of an English law governed debt under Indonesian bankruptcy and restructuring law would be given effect in the UK on the basis of the principle of universality since the debtor was an Indonesian company with its business operations based in Indonesia. While the court rejected this argument, it did refer to various criticisms of the *Gibbs* principle; namely that 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. Furthermore, 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 hypothesis suggests that recognition of the Indonesian bankruptcy discharge would not be unjust.

In *Bakhshiyeva v Sberbank of Russia*<sup>121</sup> the court rejected an attempt to sidestep the *Gibbs* principle through the grant of a permanent stay under the discretionary relief provisions in

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<sup>116</sup> [1958] AC 509. See also the approval of the *Gibbs* principle by Lord Hope in *Joint Administrators of Heritable Bank plc v Winding up Board of Landsbanki Islands HF* [2013] UKSC 13, [2013] 1 WLR 725 at para [44]. Note too the statement by Lord Hoffmann in *Wight v Eckhardt Marine GmbH* [2003] UKPC 37, [2004] 1 AC 147 at para [11] that the question whether an obligation has been extinguished is governed by its proper law.

<sup>117</sup> [2018] UKSC 34; [2018] 1 WLR 3683.

<sup>118</sup> Para 12.

<sup>119</sup> [2011] EWHC 256 (Comm), [2011] 1 WLR 2038.

<sup>120</sup> *Global Distressed Alpha Fund v PT Bakrie Investindo* [2011] EWHC 256 (Comm), [2011] 1 WLR 2038.

<sup>121</sup> [2018] EWCA Civ 2802, [2019] 1 BCLC 1 affirming [2018] EWHC 59 (Ch).

Article 21 of the Model Law. It was held that, when recognising foreign insolvency proceedings, the court did not have the power to grant a permanent stay or moratorium that prevented creditors from exercising their rights under a contract that was governed by English law. The *Gibbs* rule still applied and it was held that to make such an order would amount to varying or discharging substantive rights by the expedient of granting procedural relief. This course of action had no legislative authorisation. If foreign insolvency or restructuring law purported to modify the English law governed rights and obligations of creditors without their consent or participation in the proceedings, then the English courts would not grant a permanent stay under the CBIR that would have the effect of giving effect to the foreign proceedings and restraining enforcement of the rights still enjoyed under English law.

The position is different however under the European Insolvency Regulation. What is now Article 7(2) of the recast Regulation 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 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:

- “(g) the claims which are to be lodged against the debtor’s estate and the treatment of claims arising after the opening of insolvency proceedings;
- (h) the rules governing the lodging, verification and admission of claims;
- (i) 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;
- (j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;
- (k) creditors’ rights after the closure of insolvency proceedings.”

The European Court decision in Case C-594/14 *Kornhaas v Dithmar*<sup>122</sup> gives an expansive interpretation to Article 7 but there is no need for an expansive interpretation.<sup>123</sup> On a reasonable construction of the words used in the provision, and in particular the language cited above, the modification of English law governed obligations under insolvency proceedings opened in other EU States would be automatically recognized and implemented throughout the EU (including the UK pre Brexit) pursuant to the Insolvency Regulation. This

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<sup>122</sup> CJEU, 10 December 2015, C-594/14, ECLI:EU:C:2015:806.

<sup>123</sup> See also the comments of AG Bobek, 9 June 2016, *ENEFI v DGRFP*, C-212/15, ECLI:EU:C:2016:427, on the width of what is now Article 7.

conclusion was reached in the UK in *Bank of Baroda v Maniar*<sup>124</sup>. The court took the view that the effect of the Insolvency Regulation was to trump the *Gibbs* rule. It cited a leading text<sup>125</sup> to the effect that where main insolvency proceedings in another EU State are closed and the closure has, under the law of that EU State, the effect of discharging the debtor, that discharge must be recognised in the UK even if it is not an effective discharge under the law applicable to the contract which in this case, was English law.<sup>126</sup>

In conclusion, some benefits for foreign proceedings and foreign parties are lost when the UK moves from a EIR regime to a Model Law regime insofar as its relations with EU States is concerned.

### c. Getting recognition of UK proceedings in the remaining EU States

The consequences are even more serious when it comes to getting recognition of UK proceedings, such as schemes of arrangement, in the EU States. There is no longer any automatic recognition throughout the EU and recognition applications on a State-by-State basis are necessary.<sup>127</sup> Before approving a scheme in respect of a company registered in a foreign State, an English court will require evidence to the effect that the scheme will provide benefits to creditors and in the absence of foreign recognition, this benefit to creditors may be difficult, if not impossible, to establish. The creditors may be domiciled outside the UK and the relevant assets may also be located elsewhere.

The recognition complications are added to by the fact that the great majority of other EU countries have not adopted the Model Law.<sup>128</sup> By way of contrast, US courts have used the Model law provisions as the basis for the recognition of UK schemes of arrangement<sup>129</sup> since

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<sup>124</sup> [2019] EWHC 2463 (Comm).

<sup>125</sup> *Dicey, Morris and Collins on the Conflict of Laws* (15th edition) at para 31-114.

<sup>126</sup> The court declined to follow the more restricted approach suggested by Knowles J in *Edgeworth Capital Luxembourg Sarl v Maud* [2015] EWHC 3464 (Comm). While he did not find it necessary to reach a definitive conclusion on the issue, Knowles J seemed sympathetic to the notion that a debt arising under a contract governed by English law was not capable of being discharged by insolvency proceedings in a foreign jurisdiction that were commenced under the Insolvency Regulation.

<sup>127</sup> See the guidance from the UK Insolvency Service - <https://www.gov.uk/government/publications/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states-from-1-january-2021/cross-border-insolvencies-recognition-and-enforcement-in-eu-member-states-from-1-january-2021>

<sup>128</sup> Currently, only Greece, Poland, Romania and Slovenia of the remaining members of the EU are on the list maintained by UNCITRAL of countries that have adopted the Model Law – see [http://www.uncitral.org/uncitral/en/uncitral\\_texts/insolvency/1997Model\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html)

<sup>129</sup> See *Adrian Walters*, “Giving Effect to Foreign Restructuring Plans in Anglo-US Private International Law” (2015) Nottingham Insolvency and Business Law E-Journal, 3, 2015, 376 at 380 citing the observation of NY Bankruptcy Court Judge Sean Lane that “schemes have routinely been recognized

the US version of the Model law covers proceedings in a foreign country “under a law relating to insolvency or adjustment of debt”.<sup>130</sup>

Therefore, to get recognition of UK insolvency proceedings, schemes of arrangement and insolvency-related judgments in other Member States, one has to fall back on the national private international law rules of the relevant State. The process of seeking recognition may be complicated and arduous though some partial support may be provided by the choice of law principles contained in the Rome 1 Regulation<sup>131</sup> applicable throughout the EU and which the UK retains in the new post-Brexit legal order.<sup>132</sup> Under Rome 1, the modification or discharge of contractual rights and remedies is governed by the proper law of the contract; prima facie the law chosen by the contracting parties.<sup>133</sup> Rome 1 suggests that alterations in English law governed obligations has to be done in accordance with the provisions of English law, including through English schemes of arrangement. Moreover, if done in this way and in the absence of formal insolvency proceedings in an EU State, such alterations will be recognised throughout the EU 27. There was German academic evidence to this effect in cases such as *Re Rodenstock GmbH*,<sup>134</sup> *Primacom Holdings GmbH v Credit Agricole*.<sup>135</sup> A question mark remains however, about the extent to which the Rome 1 Regulation affects, or is affected by, schemes of arrangement. Article 1(2)(f) excludes from the scope of the Regulation ‘questions governed by the law of companies’.<sup>136</sup>

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as foreign proceedings, including cases in this court.” See also *Jay Lawrence Westbrook*, “Ian Fletcher and the Internationalist Principle”, *Nottingham Insolvency and Business Law E-Journal*, 3, 2015, 565 at 567 discussing the “active current American practice enforcing English schemes of arrangement in the United States.”

<sup>130</sup> See chapter 15 and also s 101(23) of the US Bankruptcy Code. In the UK however, the Cross-Border Insolvency Regulations 2006, SI 2006/1030, Sch 1, reg 2(i) implementing the Model law does not specifically define relevant foreign proceedings to include proceedings for the adjustment of debts. For different perspectives on the US/UK judicial divide, see *Adrian Walters*, “Modified Universalism & The Role of Local Legal Culture in the Making of Cross-Borders Insolvency Law”, *American Bankruptcy Law Journal*, 93, 2019, 47; *Susan Block-Lieb*, “Reaching to Restructure Across Borders (Without Over-Reaching), Even after Brexit”, *American Bankruptcy Law Journal*, 92, 2018, 1.

<sup>131</sup> Regulation 593/2008 on the law applicable to contractual obligations.

<sup>132</sup> See The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (UK Exit) Regulations 2019 (SI 2019/834). The Regulations are amended by the Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020. See also the statement in the UK Government technical guidance on “Handling civil cases that involve EU countries if there's no Brexit deal” that “the UK would retain the Rome I and Rome II rules on applicable law in contractual and non-contractual matters, which generally do not rely on reciprocity to operate.”

<sup>133</sup> Article 3(1) and in particular Article 12 (1) ‘The law applicable to a contract by virtue of this Regulation shall govern in particular: (a) interpretation; (b) performance ... (d) the various ways of extinguishing obligations ....’

<sup>134</sup> [2011] EWHC 1104 (Ch); [2011] Bus LR 1245.

<sup>135</sup> [2012] EWHC 164 (Ch).

<sup>136</sup> See the discussion in *Re Far East Capital Ltd SA* [2017] EWHC 2878 (Ch) at paras 37-41.

If foreign parties cannot get schemes recognised throughout the EU as a modification mechanism for English law governed debt, then this calls into question the attractiveness of the UK as a destination of choice for the restructuring of foreign companies. Less cases may be “shopped” to the UK with a consequent loss of business for UK based restructuring and legal professionals. Therefore the question arises whether the UK can take any steps to mitigate any of these adverse consequences and this will now be considered.

## 5. Mitigating any adverse consequences of Brexit

The UK government can take various steps to offset any negative consequences associated with Brexit. The first is to continue to promote and maintain the visibility of the UK as venue for insolvency and restructuring work.

### a. Promoting the UK as a forum for restructurings

In this connection, on 26<sup>th</sup> June 2019<sup>137</sup> the Restructuring Directive was officially published in the EU’s Official Journal. EU Member States are obliged to implement the Directive by 17<sup>th</sup> July 2021 though they may request a one year extension under Article 34. The UK is no longer an EU Member State and, of course, the UK is not subject to an implementation obligation.

Nevertheless, changes to UK corporate restructuring and insolvency law have been carried out in the Corporate Governance and Insolvency Act 2020.<sup>138</sup> These changes bring UK law more into line with Chapter 11 of the US Bankruptcy Code and the changes envisaged by the Restructuring Directive. These changes were first heralded in a UK Insolvency Service consultation *A Review of the Corporate Insolvency Framework* published in May 2016, and before the Brexit referendum.<sup>139</sup> The proposed changes were then subsumed into a wider reform project on *Corporate Governance and Insolvency*. This project was taken forward in a September 2018 UK Government response to that consultation.<sup>140</sup>

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<sup>137</sup> L 172/18. Directive 2019/1023.

<sup>138</sup> For a comprehensive analysis see the INSOL Special Report by *Gerard McCormack*, Permanent changes to the UK’s corporate restructuring and insolvency laws in the wake of Covid-19 (London, INSOL International, October 2020)

<sup>139</sup> <https://www.gov.uk/government/consultations/a-review-of-the-corporate-insolvency-framework>

<sup>140</sup> The UK parliamentary materials have acknowledged the importance of keeping the UK at the forefront of international insolvency indicators such as the World Bank Doing Business project and the United Nations Commission on International Trade Law (UNCITRAL) Legislative Guide on Insolvency Law. See, in this connection, the impact assessment on the 2020 Act-<https://publications.parliament.uk/pa/bills/cbill/58-01/0128/IA200519.pdf>: “Existing UK insolvency law has some options for business rescue, but there are gaps when compared, for example, to best practice standards published by the World Bank and recent EU directives set out in the 2019 EU Restructuring Directive... Adoption of these additional rescue support measures will strengthen the UK’s insolvency framework and bring it up to international best practice.” See also, Commons Library analysis of the

The new procedures support business rescue by creating:

- a period of “breathing space” – a moratorium – to allow viable companies more time to consider the options to rescue their business free from creditor action
- a new restructuring plan procedure that will provide an alternative option for financially-distressed companies to restructure their debts
- measures to support companies through a rescue process by the introduction of new rules to prevent suppliers terminating contracts solely by virtue of a company entering an insolvency process.

The UK scheme of arrangement is by now, a well-established and internationally popular restructuring tool. It has “first mover” advantage, and in the uncertain climate brought about by Brexit (and now the Covid 19 pandemic), there is a lot to be said for preserving it in its generally pristine form and capitalising on these advantages.<sup>141</sup> The changes in the UK 2020 Act enhance the range of restructuring options rather than negating the possibility of an already popular choice.

The new restructuring plan introduced by the 2020 Act is designed, to “eliminate, reduce or prevent, or mitigate the effect of, any of the financial difficulties” which have affected or will affect the ability of a company to carry on its business as a going concern.<sup>142</sup> In many ways, it is modelled on the existing UK scheme of arrangement.<sup>143</sup> Like the new procedure, the scheme involves “debtor-in-possession”.<sup>144</sup> The company management can prepare a restructuring plan and submit it to creditors, though obviously in practice there is likely to be a high degree of interaction and consultation with creditors in formulating the detailed terms of the plan and making sure that it is likely to meet with creditor approval.

The new procedure however, contains certain features that the scheme lacks; principally cross-class creditor cramdown. Under the scheme, while dissenting creditors within a class may be “crammed-down”, there is no scope for dissenting classes of creditors in their entirety to be “crammed-down”. In other words, the requisite consents of each class of creditors, who are

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Corporate Insolvency and Governance Bill [HC 2019-21] BRIEFING PAPER Number 8922, 1 June 2020 at p 11 and fn 23 – available at <https://researchbriefings.files.parliament.uk/documents/CBP-8922/CBP-8922.pdf>.

<sup>141</sup> See the statement p 5.125 of the *Government response: Insolvency and Corporate Governance* “Government is aware of the importance of schemes of arrangements to facilitate the restructuring of large international companies and as a result does not propose to make any changes to the existing law of schemes.”

<sup>142</sup> In this connection, the 2020 Act introduces a new Part 26A into the UK Companies Act 2006.

<sup>143</sup> The scheme procedure is contained in Part 26 UK Companies Act 2006.

<sup>144</sup> Schemes of arrangement may be coupled with administration in which case they are no longer debtor-in-possession. See generally on debtor-in-possession versus creditor in-possession: *David Hahn*, “Concentrated Ownership and Control of Corporate Reorganizations”, *Journal of Corporate Law Studies*, 4, 2004, 117; *Sefa Franken*, “Creditor- and Debtor-Oriented Corporate Bankruptcy Regimes Revisited”, *European Business Organization Law Review*, 5, 2004, 645.

asked to approve a scheme must be obtained. In the new procedure, in theory all that is required that a single class with a genuine interest in the proposed restructuring should approved the scheme. A restructuring plan can nevertheless be sanctioned by the court despite the existence of a “dissenting class” or classes, if the court is satisfied that none of the members of the relevant dissenting class would be any worse off than they would be in the most likely alternative scenario. In this respect, the new restructuring plan is intended to achieve outcomes that could not be achieved under the existing scheme.

The 2020 Act therefore expands the range of restructuring options available in the UK.<sup>145</sup> It should be remembered that the UK has a lot of advantages going for it in this respect including robust and efficient court procedures; an independent judiciary committed to the rule of law; the fact that the English language is the language of international business and a wide talent pool of experienced lawyers and insolvency professionals working the UK.

b. Involvement by the UK in international organisations such as UNCITRAL

Apart from changes to national law, the UK can also maintain and enhance its existing position in multilateral organisations such as UNCITRAL which continues its work in the insolvency law area. The UNCITRAL work includes the preparation of a Model Law on the recognition and enforcement of insolvency-related judgments.<sup>146</sup> This new Model Law fills an existing gap revealed in the *Rubin*<sup>147</sup> case. According to UNCITRAL, the case unearthed problems of a global nature. UNCITRAL noted that the Model Law did not provide an explicit solution with respect to the recognition and enforcement of insolvency-derived judgments.<sup>148</sup> This had led to significant uncertainty and may have a chilling effect on the prospects of the Model Law gaining international acceptance. Therefore, it was considered by UNCITRAL to be an opportune time to tackle the recognition and enforcement of these types of judgments and this has now been done through a new Model Law.<sup>149</sup> The new Model Law defines an “insolvency-related judgment” as meaning: (i) a judgment that (a) arises as a consequence of or is materially associated with an insolvency proceeding, whether or not that insolvency

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<sup>145</sup> For examples of the use of the new restructuring plan procedure see *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2191 (Ch) and [2020] EWHC 2376 (Ch) and *Re PizzaExpress Financing 2 plc* [2020] EWHC 2873 (Ch).

<sup>146</sup> See UNCITRAL, ‘UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments with Guide to Enactment’ available at [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml\\_recognition\\_gte\\_e.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/ml_recognition_gte_e.pdf)

<sup>147</sup> [2012] UKSC 46, [2013] 1 AC 236.

<sup>148</sup> UNCITRAL, *Insolvency Law: Recognition and enforcement of foreign insolvency-derived judgements*, UN Doc A/CN.9/WG.V/WP. 126, at 2 (Oct. 6, 2014); UNCITRAL, *Insolvency Law: Background information on topics comprising the current mandate of Working Group V and topics for possible future work*, UN Doc. A/CN.9/WG.V/WP.117, at 7 (Oct. 8, 2013).

<sup>149</sup> See UNCITRAL, *Recognition and enforcement of insolvency-related judgments: draft model law*, para 1, UN Doc A/CN.9/WG.V/WP.156 (Feb 19, 2018) (outlining the Commission’s approval of the draft model law).



proceeding has closed; and (b) was issued on or after the commencement of that insolvency proceeding.<sup>150</sup> The UK government has said that it wishes to maintain and deepen civil judicial cooperation internationally through both continued adherence to existing multilateral treaties, conventions and standards, and through engagement with international bodies that develop new initiatives in this field. But active engagement will necessarily involve national implementing legislation since international treaties and conventions are not self-executing as a matter of UK law.<sup>151</sup>

### c. Enhancing cooperation with EU (and EFTA) countries

A third step could to enhance cooperation arrangements with EU, and also EFTA countries such as Iceland, Norway and Switzerland. Originally, the UK government was quite enthusiastic about this objective. It spoke of developing a deep and special partnership with the EU that builds on years of cooperation and ensures that there are coherent common rules to govern interactions between legal systems. It said: “To this end, the UK, as a non-member state outside the direct jurisdiction of the Court of Justice of the European Union (CJEU), will seek to agree new close and comprehensive arrangements for civil judicial cooperation with the EU. We have a shared interest with the EU in ensuring these new arrangements are thorough and effective. In particular, citizens and businesses need to have continuing confidence as they interact across borders about which country’s courts would deal with any dispute, which laws would apply, and know that judgments and orders obtained will be recognised and enforced in neighbouring countries, as is the case now.”<sup>152</sup>

The intention was to bring about far-reaching and detailed cross-border civil judicial cooperation grounded on reciprocal arrangements that parallel substantive principles of cooperation under the existing EU regime. Negotiation of such a bilateral replacement regime in terms of basic rules on jurisdictional allocation, conflict of laws and enforcement of judgments might not be so difficult – the old framework provided the norms to draw upon. The role of the CJEU is however, certainly a stumbling block. From a UK perspective, allowing continued references from the UK courts to the CJEU can be viewed as an infringement on UK sovereignty and therefore, politically unacceptable. The ambition was therefore scaled back in the UK government led by Boris Johnson.<sup>153</sup>In its negotiation position outline, it

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<sup>150</sup> Article 2 of the Model Law on Recognition and Enforcement of Insolvency-Related Judgments.

<sup>151</sup> See generally on the new UNCITRAL Model Law and possible consequential changes to UK national law *Gabriel Moss* QC, “UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments”, *Insolvency Intelligence*, 32, 2019, 21; *Inga West*, “UNCITRAL Cross-Border Insolvency Model Laws: And Then There Were Two ...”, *International Corporate Rescue* 16, 2019, 82.

<sup>152</sup>See HM Government ‘Providing a cross-border civil judicial cooperation framework: a future partnership paper’ Executive Summary at paras 2, 3.

<sup>153</sup> See ‘The Future Relationship with the EU The UK’s Approach to Negotiations’ available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/868874/The\\_Future\\_Relationship\\_with\\_the\\_EU.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868874/The_Future_Relationship_with_the_EU.pdf)

stated:<sup>154</sup> “The UK proposes continuing to work together with the EU in the area of civil judicial cooperation through multilateral precedents set by the Hague Conference on Private International Law and through the UK’s accession as an independent contracting party to the Lugano Convention 2007.”

This alternative approach regards CJEU decisions, and indeed decisions from courts in EU Member States as being of only persuasive authority in the same way that European courts and the CJEU could regard UK decisions as being of persuasive authority. The UK objective was pursued through seeking UK membership of the Lugano Convention as an independent contracting State since the Lugano Convention<sup>155</sup> does not have the Court of Justice of the European Union (CJEU) as the apex of judicial authority<sup>156</sup>.

The Convention formed the basis of the UK’s private international law relationship with Norway, Iceland and Switzerland and is based on the original version of the Brussels I Regulation on Jurisdiction and Enforcement of Judgments.<sup>157</sup> It might therefore be used to facilitate the pan-European recognition of UK schemes of arrangement and restructuring plans. The Lugano Convention applies between those countries and the EU, and it applied to the UK by virtue of the UK being treated as an EU member State for the purposes of international agreements entered into by the EU. This arrangement ended at the end of the Brexit implementation period. On 8 April 2020 the UK applied to accede to the Lugano Convention as an independent contracting party.<sup>158</sup> That application is however subject to the agreement of the contracting parties to the Lugano Convention, including the EU, and that agreement has not yet been forthcoming.<sup>159</sup>

The EU authorities may regard close civil judicial cooperation as being an aspect or benefit of membership of the Single Market and, if the UK is outside the Single Market, then it should

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<sup>154</sup> Para 64.

<sup>155</sup> <https://ukandeu.ac.uk/the-facts/what-is-the-lugano-convention/>

<sup>156</sup> See <https://www.bj.admin.ch/bj/en/home/wirtschaft/privatrecht/lugue-2007.html>

<sup>157</sup> Regulation 44/2001 which was later “recast” with effect from 1 January 2015 as Regulation 1215/2012.

<sup>158</sup> See <https://www.gov.uk/government/news/support-for-the-uks-intent-to-accede-to-the-lugano-convention-2007>

<sup>159</sup> But see the UK/Norway agreement on the continued application of a 1961 Convention on reciprocal recognition and enforcement of judgments in civil matters – available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/932354/CS\\_Norway\\_2.2020\\_UK\\_Norway\\_Agreement\\_Enforcement\\_Judgement\\_Civil\\_Matters.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/932354/CS_Norway_2.2020_UK_Norway_Agreement_Enforcement_Judgement_Civil_Matters.pdf)

not have the benefit of civil judicial cooperation. The latter is based on the central concept of mutual trust which arguably comes only with membership of the Single Market.<sup>160</sup>

A parallel objective pursued, and indeed achieved, by the UK is to accede to the Hague Convention on Choice of Court Agreements as an independent contracting State.<sup>161</sup> The UK was previously party to the Hague Convention by virtue of its EU membership since the EU is, and was, party to the Hague Convention. The Convention makes choice of court agreements enforceable between contracting parties in the EU and UK. It appears however, that the Convention applies only to “exclusive” choice of court agreements and will not cover the asymmetric jurisdiction clauses that tend to be favoured by finance parties in the UK.<sup>162</sup>

A further step by the UK would be to designate all EU countries for the purpose of s 426 Insolvency Act 1986. Section 426 goes a bit further than the CBIR/Model Law in that in theory it permits the application of foreign insolvency law though it does not allow the recognition of foreign insolvency related judgments.<sup>163</sup> Such a step would be somewhat controversial however, in that the existing designated countries are common law countries whereas this is not the case for most of the EU 27.

## 6. Conclusion

The UK has been an attractive shopping venue both for individual bankruptcies and for corporate insolvencies and restructurings. It remains to be seen whether this state of affairs will continue post-Brexit. The UK government wishes to maintain the UK’s preeminent position; certainly for high-end cases, and is taking steps to keep UK law up to date and in line with international best practices – more an upmarket relationship centre than a grubby down-

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<sup>160</sup> See the paper by Professor *Burkhard Hess*, “The Unsuitability of the Lugano Convention (2007) to Serve as a Bridge between the UK and the EU after Brexit” available at [https://www.mpi.lu/fileadmin/mpj/medien/research/MPEiPro/WPS2\\_2018\\_Hess\\_The\\_Unsuitability\\_of\\_the\\_Lugano\\_Convention\\_2007\\_to\\_Serve\\_as\\_a\\_Bridge\\_between\\_the\\_UK\\_and\\_the\\_EU\\_after\\_Brexit.pdf](https://www.mpi.lu/fileadmin/mpj/medien/research/MPEiPro/WPS2_2018_Hess_The_Unsuitability_of_the_Lugano_Convention_2007_to_Serve_as_a_Bridge_between_the_UK_and_the_EU_after_Brexit.pdf)

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<sup>161</sup> Private International Law (Implementation of Agreements) Act 2020 and see <https://www.gov.uk/government/news/private-international-law-bill-gains-royal-assent>

On the Convention see <https://www.hcch.net/en/instruments/conventions/specialised-sections/choice-of-court>

See also the Civil Jurisdiction and Judgments (Hague Convention on Choice of Court Agreements 2005) (EU Exit) Regulations 2018/1124.

<sup>162</sup> See *Etihad Airways PJSC v Lucas Flover* [2020] EWCA Civ 1707 in the English Court of Appeal. The court said in respect of asymmetric jurisdiction clauses at para 5 that such clauses “are widely used in international financial markets”. Their aim is to “ensure that creditors can always litigate in a debtor’s home court, or where its assets are located”, and they “also seek to reassure the creditor that it can only be sued in its preferred jurisdiction”

<sup>163</sup> See *Rubin v Eurofinance SA* [2012] UKSC 46; [2013] 1 AC 236.

at-heel emporium of unsavoury treats. But the competition may be stiffer.<sup>164</sup> Certainly, the Netherlands and Ireland may now see themselves as stronger competitors for international restructuring business.<sup>165</sup> The European Commission, as well as individual Member States, are also taking steps to put in place modern restructuring and corporate insolvency frameworks. Therefore, despite the familiarity and expertise that the UK has to offer, the need to forum shop cases to the UK may be less. Brexit of course leaves a large question mark over the continued recognition of UK proceedings. The UK government can take unilateral steps to mitigate any adverse consequence of Brexit and it has taken some such steps but it cannot legislate for the EU institutions or for the EU.<sup>166</sup> It takes two or more to tango but certainly, the UK and the EU have mutual interests in securing an outcome that provides stability and confidence for businesses and individuals as well as families.

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<sup>164</sup> But see *Horst Eidenmüller*, (fn. 35).

<sup>165</sup> See Netherlands Commercial Court (NCC0 'Pioneering English language dispute resolution in a civil law jurisdiction' and for information see <https://www.rechtspraak.nl/English/NCC/Pages/default.aspx> and *Michael Murphy and David O'Dea*, "Ireland: An International Restructuring Destination", *International Corporate Rescue*. 16, 2019, 276 and the report by the Law Society and Bar Council of Ireland, "Promoting Ireland as a leading centre globally for international legal services" available at <https://www.lawlibrary.ie/media/lawlibrary/media/Secure/Promoting-Ireland-as-a-leading-centre-globally-for-international-legal-services.pdf>

<sup>166</sup> See the editorial by *Kate Stephenson and Sacha Lürken*, (fn. 9).