Post-Brexit Cooperation and Coordination of EU-UK Insolvencies

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Introduction[1]

On 23 June 2016, the British public voted by a small margin in a referendum, whose sole question was a yes/no option on whether to leave the European Union. The campaign, which focused on a limited range of economic, political and social issues, did not concern itself especially with the particular fate of the business sector and the integration of business with the European Union, not just in terms of trade links and supply chains, but also with respect to contract enforcement and the resolution of disputes as well as the organisation of restructuring and insolvency. In the aftermath of the referendum, the realisation of its potential impact on cross-border restructurings and insolvencies became a concern.

This is large and lucrative fee-earning activity of course, but also very useful endeavours contributing to the rescue of business opportunities and associated employment. The twin pillars of any modern insolvency law system are not just a good restructuring law, which should permit rescue and liquidation as well as other measures enabling upstream solutions to be found before the advent of formal insolvency, but also an efficient cross-border framework that allows for coordination of instances involving related entities across jurisdictional frontiers. This is a particularly cogent issue given the move in Europe towards more of a preventive rescue culture, in which cross-border instances will undoubtedly be a strong feature.

The problem faced by commentators on insolvency law, and particularly its cross-border aspects, is to know what arrangements will survive the exit process. Currently, the only certainty is that the present arrangements will last as long as the United Kingdom remains a member state of the European Union and while transition arrangements are in place that anticipate the eventual departure of the United Kingdom from the structures created since the Rome Treaty 1957 and ancillary instruments.[2] The present arrangements, which have served well in the past, rely on a number of very useful cross-border texts adopted at European Union level which form the underpinning for the organisation of cross-border instances. Unresolved questions thus far include whether arrangements in fact will be made, what form they will take, how they will assist or impede cross-border restructurings etc.

Other considerations include the underlying concern of practitioners and judges in this area as to whether the United Kingdom will continue to be a key player in the market for financial and operational restructurings. Given the rise of competing jurisdictions for insolvency business, in Europe and elsewhere, it is not inconceivable that Brexit will spell the decline of the United Kingdom's current pre-eminence in the insolvency

[1] This paper features material and updates delivered at the INSOL Europe Academic Forum Annual Conference, Warsaw, 4-5 October 2017; the LUISS Conference on "Cross-Border Business Crisis: International and European Horizons", Rome, 3-4 November 2017; and the 7th European Insolvency and Restructuring Congress, Brussels, 28-29 June 2018.

[2] The Draft Withdrawal Agreement (TF50 (2018) 33), published on 28 February 2018, contains an Article 63, which stipulates that judgments finalised and main insolvency instances opened before the end of the transition period will continue to benefit from the current framework for the duration of those procedures.

field. This paper deals with the impact of what has now become known as the "Brexit" vote on the organisation of cross-border insolvency proceedings, particularly looking at the assistance and cooperation aspects of that framework. It also speculates on some possible answers to the questions above.

A. The Current Framework[3]

This section outlines the frameworks for achieving cross-border cooperation in insolvency matters in the United Kingdom, of which there are currently four.

(i) Section 426 of the Insolvency Act 1986 ("section 426")

Section 426 owes its genesis to cooperation provisions dating back to the early 19th century, applying uniquely to bankruptcy (personal insolvency).[4] The cooperation provision was designed to co-ordinate proceedings and enabled courts within the Empire (now Commonwealth) to request other courts to assist in the management of bankruptcy proceedings within their own jurisdiction. Owing to the consolidation of provisions relating to the bankruptcy and corporate insolvency in the same text in 1986, section 426 now applies to both types of insolvencies.

Under section 426, the courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.[5] Assistance is deemed authority for the court to which the request is made to apply the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction. The presumption on the granting of an order pursuant to an application, usually made through the Letter of Request process, is that the assistance is mandatory in nature, subject to a limited residual exercise of discretion.[6] Assistance may be achieved through the application of provisions and use of remedies deriving from the law of the assisting or assisted state, as the court sees fit.

The number of countries to which the rules on assistance apply at present is limited. The section itself specifies automatic assistance internally between courts in different parts of the British Isles and also between the United Kingdom and Jersey, Guernsey as well as the Isle of Man. Statutory instruments made under the authority of the statute have extended co-operation to other countries and territories, which, although not limited in scope by the text itself, in practice means a category constituted predominantly of Commonwealth countries and some former members, such as Hong Kong and Ireland.[7] Section 426 does not exclude assistance in the case of particular types of entity, as some of the other texts do.[8]

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[3] This section is an updated summary of part of an article by this author: "Cross-Border Insolvency Law in the United Kingdom: An Embarrassment of Riches" (2006) 22 *Insolvency Law & Practice* 132-136.

[4] Section 220, Bankruptcy Act 1849; sections 73-74, Bankruptcy Act 1869; sections 117-118, Bankruptcy Act 1883; section 122, Bankruptcy Act 1914.

[5] Section 426 applies to England and Wales and Scotland. It was extended to Northern Ireland by section 441(1)(a), Insolvency Act 1986. Section 426 also applies as part of the domestic law of Guernsey, having been extended by the Insolvency Act 1986 (Guernsey) Order 1989 (SI 1989/2409).

[6] *Re HIH Casualty & General Insurance Ltd* [2008] UKHL 21.

[7] The Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (SI 1986/2123); The Co-operation of Insolvency Courts (Designation of Relevant Countries)

(ii) The Recast European Insolvency Regulation 2015 (the "Recast EIR")[9]

The Recast EIR and its predecessor, the "EIR 2000",[10] were the result of a project that first began in the 1960s during the preparatory work leading up to the adoption of the Brussels Convention 1968. The exclusion by Article 1(2) of the convention text of "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings" led to a separate working group to consider the merits of a convention in the area of insolvency. Although, eventually, a European Bankruptcy Convention 1995 was agreed, it failed to come into force because the United Kingdom failed to adhere within the six months the convention was open for signature.

The proposal returned to the table following an initiative co-authored by Germany and Finland in 1999. This resulted in the adoption of the EIR 2000, in the form of a Regulation, which applied to all insolvencies with a cross-border element where the debtor (company or individual) concerned had a "centre of main interests" ("COMI"), with the possibility of other "establishments", within the territory of the European Union.[11] The EIR 2000 entered directly into force on 31 May 2002 in all of the member states in the European Union subject to what was then Title IV of the EC Treaty. This meant that countries which had secured an opt-out under the Maastricht Treaty 1992, such as the United Kingdom and Ireland, were required to opt-in to be bound by the text, which was duly done. Denmark's opt-out, which was permanent, meant that it could not be bound by the terms of the EIR 2000.[12]

Under the EIR 2000, rules were provided for the allocation of jurisdiction in cross-border matters, for resolution of conflict of laws, for the recognition and enforcement of judgements as well as for co-ordination between any proceedings that were instituted, the last of these underpinned by practitioners being bound by a duty to cooperate and communicate in Article 31. The proper assumption of jurisdiction based on COMI under Article 3 of the text led automatically to the recognition and enforcement in other member states of the opening judgment under Article 16 and of any other judgments emanating from those proceedings under Article 25. While the jurisdiction tests were predicated in their application to single entities,[13] practitioners were able to use several strategies to effectively apply the EIR 2000 to groups, such as collocation of the COMI of group companies in a single place,[14] the avoidance of secondary proceedings (limited to liquidation only) by means of an undertaking being

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Order 1996 (SI 1996/253); The Co-operation of Insolvency Courts (Designation of Relevant Country) Order 1998 (SI 1998/2766). The full list of designated jurisdictions is displayed in Table 1.

[8] In fact, section 129, Banking Act 2009 stipulates what is insolvency law for the purposes of the application of section 426 to institutions covered by banking legislation.

[9] Regulation (EU) No. 2015/848 of 20 May 2015 ("Recast EIR").

[10] Council Regulation (EC) No. 1346/2000 of 29 May 2000 ("EIR 2000").

[11] Article 3(1), EIR 2000.

[12] Denmark was supposed to enact legislation to parallel the EIR 2000, but to date has not undertaken that task.

[13] *Eurofood IFSC Limited* (Case C341/04) [2006] BCC 397.

[14] *Re Brac Rent-A-Car International Inc.* [2003] EWHC 128 (Ch); *Re: Daisytek-ISA Limited and others* [2003] BCC 562.

given to respect the local priority rules[15] and attempting to require forewarning of applications being made for secondary proceedings.[16]

Article 46 of the EIR 2000 mandated its revision, a process which began in 2012 and concluded with the adoption of the Recast EIR in 2015 (in force on 26 June 2016). The text of the Recast EIR extends the scope to more proceedings, including upstream and debtor-in-possession procedures, while excluding pre-packs. It also uses the same jurisdictional bases with a similar recognition and enforcement paradigm. However, acknowledging the group dynamic, the text institutes a group coordination procedure, and also explicitly permits the avoidance of secondary proceedings in the case of single entities by means of an undertaking being given. The text extends the duty to cooperate and communicate to the courts as well as between courts and practitioners. As with its predecessor, the Recast EIR excludes instances involving some types of entity,[17] only some of which are regulated by other texts inspired by the regulation paradigm.[18]

(iii)The UNCITRAL Model Law on Cross-Border Insolvency 1997 ("Model Law")

The UNCITRAL Model Law on Cross-Border Insolvency 1997 contains a similar jurisdiction and co-operation paradigm to the EIR 2000 text, as it was based on work done leading up to the adoption of the European Bankruptcy Convention 1995. The Model Law contains four key areas, the first outlining the scope of the Model Law itself and rules for access by representatives of foreign insolvency proceedings, including those governing the treatment of foreign creditors. The text goes on to cover the effects of domestic recognition of foreign procedures with the remedies available differing based on the presence of either a COMI or an establishment in the state whose proceedings are subject to an application for recognition.[19] The text also contains rules for co-operation and for co-ordination of simultaneous proceedings in several jurisdictions over the same debtor. The text is accompanied by a Guide to Enactment, which was produced in order to assist legislative draftsmen in adapting the Model Law to local conditions.

From a slow start, the Model Law has increased in popularity and a number of major trading states have adopted or begun the process of adopting the text. In the United Kingdom, express recognition to the Model Law was given through section 14 of the Insolvency Act 2000, which included a provision allowing the Secretary of State to adopt regulations giving effect to the Model Law.[20] The provisions also allowed for amendment of the co-operation provisions of the Insolvency Act 1986 and for the modification of the application of insolvency law to foreign proceedings. All these

[15] *Re Collins & Aikman Europe SA and others* [2006] EWHC 1343 (Ch).
[16] *Re: Nortel Networks SA & Ors* [2009] EWHC 206 (Ch).
[17] Article 1(2), Recast EIR, excludes insurance undertakings, credit institutions, investment firms and other firms, institutions and undertakings (to the extent that they are covered by Directive 2001/24/EC) and collective investment undertakings.
[18] Directive 2001/17/EC and Directive 2001/24/EC regulate the insolvency of insurance undertakings and credit institutions respectively.
[19] Test analogous to those in the EIR 2000 and Recast EIR.
[20] The Act applied to Scotland as well as to England and Wales. According to its section 17, it would not apply to Northern Ireland, although extension of the Model Law has in fact occurred by means of The Cross-Border Insolvency Regulations (Northern Ireland) 2007 (SI 2007/115).

elements were the subject of a statutory instrument adopted in 2006.[21] Limiting the scope of the text, there are a considerable number of exclusions of types of entities, chiefly those subject to special regulation or oversight.[22] The Model Law has been the subject of a considerable number of applications, the latest being in 2017-2018.[23] In most reported cases, recognition is granted with the appropriate remedies forthcoming enabling assistance to be given for the coordination of activities within the jurisdiction and procedures occurring elsewhere.

(iv) Common-law Cooperation and Assistance

Judges have been active in the area of cooperation and assistance since at least the 1700s,[24] examples of assistance being known in a number of areas: recognition of instances and appointments, granting of title to assets and powers to act, ordering examinations, production of documents, injunctions and stays as well as approving reconstructions and the opening of ancillary proceedings destined to assist procedures elsewhere.[25] Only in recent times, with the advent of cooperation provisions in domestic law, such as section 426, and the adoption of international texts, such as the Model Law and the EIR 2000, has such judicial cooperation appeared to stagnate, becoming side-lined by the emphasis on and prominence given to statutory frameworks. Judicial intervention in such cases has extended solely to interpreting the permissible extent of cooperation under the law and to exercising any discretion to assist.

In 2006, the decision in *Cambridge Gas*,[26] a case heard before the Privy Council, appeared to inaugurate a special treatment for orders and judgments in insolvency, particularly in the context of requests for cross-border assistance. The rationale was impeccable, drawing on a principle of "active assistance" that was articulated in an earlier case from the Transvaal.[27] Under this principle, designed to promote the ideals of unity and universality in insolvency cases, judges would do their utmost to assist, subject to two conditions: where a domestic rule prevented them from doing so or where to do so would prejudice creditors. Where cross-border assistance provisions did not exist (whether domestic or international in origin) or were defective in their scope, such "judge-made" cooperation would fill the gap in legislative frameworks.

The reiteration of the principle of "active assistance" in *Cambridge Gas* rapidly found an echo in the jurisprudence of the Commonwealth, both among countries which had the Privy Council at the apex of their judicial hierarchies as well as those for whom

[21] The Cross-Border Insolvency Regulations 2006 (SI 2006/1030), which came into force on 4 April 2006.
[22] Ibid., Article 1(2) (in Schedule 1).
[23] *Re Agrokor DD* [2017] EWHC 2791 (Ch) (9 November 2017) ("*Re Agrokor*"); *Bakhshiyeva v Sberbank of Russia & Ors* [2018] EWHC 59 (Ch) (18 January 2018) ("*Bakhshiyeva*").
[24] *Solomons v Ross* (1764) 1 Hy. Bl. 131n; 126 ER 79; *Sill v Worswick* (1781) 1 H. Bl. 665.
[25] Authorities include: *Re Matheson Brothers Ltd* (1884) 27 Ch D 225; *Re Queensland Mercantile Agency* (1888) 58 LT 878; *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385; *Bergerem v Marsh* (1921) B&CR 195; *Macaulay v Guaranty Trust Company of New York* (1927) 40 TLR 99; *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196; *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112; *Re BCCI (No 10)* [1997] Ch 213; *In re Impex Services Worldwide Ltd* [2004] BPIR 564.
[26] *Cambridge Gas Transportation Corp v. Official Committee of Unsecured Creditors of Navigator Holdings plc* [2006] UKPC 26 ("*Cambridge Gas*").
[27] *Re African Farms Ltd* [1906] TLR 373 ("*Re African Farms*").

the court's rulings were simply persuasive precedent. Cases proliferated in jurisdictions ranging from Australia,[28] Bermuda,[29] the Cayman Islands,[30] Ireland,[31] Jersey[32] and New Zealand[33] to the United Kingdom.[34] The Privy Council, in the person of Lord Hoffmann, appeared to have responded to the peculiar situation of international insolvency matters, which required creative solutions to be found in the case of problems experienced, particularly in the British overseas jurisdictions, particularly where it came to securing assistance for the pursuit of information and funds to swell the estate for the benefit of creditors.

The "active assistance" principle has found its articulation in a number of diverse situations, ranging from the recognition and enforcement of foreign judgments non-compliant with traditional private international rules at common-law,[35] via the opening of domestic proceedings designed to further requests from jurisdictions absent an appropriate rescue procedure,[36] to the extension of domestic litigation powers to assist an overseas office-holder despite no domestic proceedings being envisaged or possible.[37] In *Re Phoenix*, in order to extend at common-law the domestic statutory power to permit action by the office-holder, the judge held that (i) the common-law contained powers to recognise and assist foreign office-holders; (ii) assistance (particularly "active assistance") meant, in the instant case, doing whatever the court could do in domestic proceedings; and (iii) insolvency proceedings were about collective enforcement for the benefit of all creditors and necessarily included set aside proceedings, which were central to its purpose.[38]

The precedent in *Re Phoenix* has been used to authorise a foreign office-holder to bring set-aside proceedings in the Caymans[39] and the issue of a discovery and

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[28] *Bank of Western Australia v Henderson (No 3)* [2011] FMCA 840 (*obiter*).
[29] *Re Founding Partners Global Fund Ltd (No 2)* [2011] SC (Bda) 19 Com.
[30] *Re Lancelot Investors Fund Ltd* (2008) (unreported), cited in S. Dickson, "The Quick March of Modified Universalism: Rubin v Eurofinance SA" (Mourant Ozannes Briefing, June 2010).
[31] *Fairfield Sentry Ltd (In Liquidation) & Anor v Citco Bank Nederland NV & Ors* [2012] IEHC 81.
[32] *Re Montrow International Ltd* 2007 JLR Note 40.
[33] *Williams v Simpson Civ 2010-419-1174* (12 October 2010) (High Court, Hamilton).
[34] *Rubin & Anor v Eurofinance SA & Ors* [2010] EWCA Civ 895 ("*Rubin CA*"); *New Cap Reinsurance Corp Ltd & Anor v Grant & Ors* [2011] EWCA Civ 971.
[35] Idem., particularly *Rubin CA*. This line of jurisprudence was disavowed in *Re Flightlease (Ireland) Ltd (In Voluntary Liquidation)* [2012] IESC 12; *Conjoined Appeals in (1) Rubin & Anor v Eurofinance SA & Ors and (2) New Cap Reinsurance Corp Ltd & Anor v Grant and others* [2012] UKSC 46 ("*Rubin SC*"). See, by this author, "The Limits of Co-Operation at Common Law: *Rubin v Eurofinance* in the Supreme Court" (2013) 10 *International Corporate Rescue* 106; "An Irish Perspective on Insolvency Cooperation: The *Re Flightlease* Case" (2013) 10 *International Corporate Rescue* 158.
[36] *HSBC Bank v Tambrook Jersey Limited* [2013] EWCA Civ 576. See, by this author, "Visa Denied: An End to the Jersey Practice of Insolvency "Passporting"?" (2013) 17 *Jersey and Guernsey Law Review* 182; "Passport Renewed: Extension of Rescue Proceedings to Foreign Companies under Section 426 of the Insolvency Act 1986" (2013) 10 *International Corporate Rescue* 310.
[37] *Re Phoenix Kapitaldienst GmbH, Schmitt v Deichmann & Ors* [2012] EWHC 62 (Ch) ("*Re Phoenix*"). See, by this author, "The Resurgence of Cross-Border Recognition and Enforcement of Insolvency Judgments: The *Re Phoenix* Case" [2013] 9 *International Company and Commercial Law Review* 329.
[38] Ibid., at paragraph 62.
[39] *Picard and Anor v Primeo Fund (In Official Liquidation)* (unreported) (14 January 2013); Judgment in CICA 1/2013 and 2/2013 Appeals (16 April 2014). See, by this author, "*Après Rubin: le Déluge*? Thoughts on the Future of Common Law Insolvency Cooperation" (2013) 10 *International Corporate Rescue* 356; "The Universe of Insolvency Cooperation and the Primeo Directive" (2015) 12 *International Corporate Rescue* 32.

examination order against a third party in Bermuda.[40] The Bermudian case was taken to the Privy Council, which produced two related judgments in November 2014.[41] The second of these covered the issue of whether powers existed to further the ability of the liquidators to seek discovery and production orders against the company's auditors. It also took the opportunity to pronounce on the court's earlier judgment in *Cambridge Gas*, which had already been determined as wrongly decided by the United Kingdom Supreme Court in *Rubin SC*. The Privy Council agreed stating that *Cambridge Gas* and the line of jurisprudence reliant on it, including *Re Phoenix* and *Singularis PC*, was wrongly decided. Judgments after *Singularis PC* have tended to either accept its terms[42] or, while respecting its strict tenets, continue to explore methods of assistance that might achieve the ends sought.[43]

B. Application of the Cross-Border Texts

This section outlines the application of the texts in terms of its adherents or coverage, it being understood that cooperation at common-law is open to all applicants. Note that the application of the Model Law here refers to countries that have adopted the Model Law so as to regulate inbound requests for recognition and enforcement. The position in the United Kingdom is that whether a country has or has not adopted the Model Law is not material to an application made for recognition of proceedings in the United Kingdom.

Country	Section 426	Recast EIR	Model Law
Anguilla	x		
Australia	x		x
Austria		x	
Bahamas	x		
Belgium		x	
Benin			x
Bermuda	x		
Botswana	x		
British Virgin Islands	x		x
Brunei	x		
Bulgaria		x	
Burkina Faso			x
Cameroon			x
Canada	x		x
Cayman Islands	x		
Central African			x

[40] *Re Saad Investments Company Ltd (In Official Liquidation) and Re Singularis Holdings Ltd (In Official Liquidation)* [2013] SC Bda 28 Com (15 April 2013); [2013] CA (Bda) 7 Civ (18 November 2013). See, by this author, "The "Empire" Strikes Back: Lessons for the Mother Country in Insolvency Cooperation" [2013] 11 *International Company and Commercial Law Review* 411; "A Singular Tide in Insolvency Cooperation in Bermuda" (2014) 11 *International Corporate Rescue* 159.

[41] *PwC v Saad Investments Company Ltd* [2014] UKPC 35; *Singularis Holdings Ltd v PwC* [2014] UKPC 36 ("*Singularis PC*"). See, by this author, "Diffusion of the Principle in *Cambridge Gas*: A Sad and Singular Deflation" (2015) 3 *Nottingham Insolvency and Business Law e-Journal* 31.

[42] *In the matter of X (A Bankrupt), Brittain v JTC (Guernsey) Ltd* (Judgment 36/2015) (6 July 2015); *Northshore Mainland Services Inc and Others v The Export Import Bank of China* (2015/COM/Com/00039) (31 July 2015). The cases here and in the footnote below are noted in, by this author, "Judicial Cooperation in the Post-*Singularis* World" (2018) 15 *International Corporate Rescue* 22.

[43] *In the matter of Energy XXI Limited* [2016] SC (Bda) 79 Com (18 August 2016); *In the matter of C and J Energy Services Limited and another* [2017] SC (Bda) 20 Com (28 February 2017).

Republic			
Chad			x
Chile			x
Colombia			x
Comoros			x
Congo			x
Côte d'Ivoire			x
Croatia		x	
Cyprus		x	
Czech Republic		x	
Democratic Republic of the Congo			x
Dominican Republic			x
Equatorial Guinea			x
Eritrea			x
Estonia		x	
Falkland Islands	x		
Finland		x	
France		x	
Gabon			x
Germany		x	
Gibraltar	x	x	x
Greece		x	x
Guernsey	x		
Guinea			x
Guinea-Bissau			x
Hong Kong	x		
Hungary		x	
Ireland	x	x	
Isle of Man	x		
Italy		x	
Japan			x
Jersey	x		
Kenya			x
Korea (South)			x
Latvia		x	
Lithuania		x	
Luxembourg		x	
Malawi			x
Malaysia	x		
Malta		x	
Mali			x
Mauritius			x
Mexico			x
Montenegro			x
Montserrat	x		
Netherlands		x	
New Zealand	x		x
Niger			x
Philippines			x
Poland		x	x
Portugal		x	
Romania		x	x
St. Helena	x		
Senegal			x
Serbia			x
Seychelles			x
Singapore			x

Slovakia		x	
Slovenia		x	x
South Africa	x		x
Spain		x	
Sweden		x	
Togo			x
Turks & Caicos Islands	x		
Tuvalu	x		
Uganda			x
United States of America			x

Table 1: Application of the Texts (as at 30 April 2018)
Source: Statutory Instruments; Recast EIR; Status of Texts (www.uncitral.org)[44]

C. Insolvency and Non-Insolvency Matters

A further issue arises because of the complexity of insolvency matters at domestic level in the United Kingdom. Not all insolvency-related practice or procedures are contained in insolvency legislation. This affects recourse to the cross-border texts explicitly dealing with insolvency and may invite consideration of other appropriate cross-border mechanisms, if available.

(i) Informal Restructuring Measures

For example, informal restructuring practice is well-developed in the United Kingdom. It is referred to by various names, such as "consensual restructuring" or "informal workout". Pioneering work encouraging the development of informal approaches was done in a largely unofficial capacity by the Bank of England as far back as the early 1970s to deal with large insolvent entities, usually banks and major commercial bodies. This process, also known as the "London Approach", has been taken on and further developed by leading British commercial banks with some success in the field of corporate reconstruction, a number of variants of this model being known around the world, pioneered largely by financial institutions. For larger workouts with a cross-border dimension, adherence to standards promoted by INSOL is encouraged.[45]

Such informal practices do not currently receive recognition under any of the instruments noted in the text above. The definition of insolvency law for the purposes of section 426 does not include informal processes.[46] Informal processes clearly do not fall within the definitions in the Recast EIR of procedures covered by the scope of the text.[47] However, as the view may be taken that workout agreements could have effect as contractual compromises, their cross-border effect might fall under the ambit of the Brussels-Ia Regulation,[48] not being a type of procedure specifically excluded from the ambit of the regulation by the exceptions in Article 1 of that text (which include insolvency). The common-law view is broadly similar as to the contractual nature of any compromise, though there is a long-standing limitation on the ability of

[44] This table is an updated version of one previously contained in the article previously mentioned, above note 3.
[45] See INSOL International, *Statement of Principles for a Global Approach to Multi-Creditor Workouts* (2000, INSOL International, London), available at: <https://www.insol.org/pdf/Lenders.pdf>.
[46] Section 426(10), Insolvency Act 1986.
[47] Article 1(1), Recast EIR.
[48] Regulation (EU) 1215/2012 of 12 December 2012.

overseas proceedings (which would also include workouts) to affect contracts governed by English law.[49] The position in the Model Law is that recognition depends on there being judicial oversight of the process (Article 2), which would not exist in the case of informal workouts.

(ii) Corporate Restructuring Measures

The scheme of arrangements, governed by the Companies Act 2006,[50] avoids the formality of insolvency procedures, even those that might be considered light-touch. The scheme stems from a development in the mid-19th century, which saw the introduction of provisions permitting a compromise or other arrangement with creditors.[51] In the early 20th century, schemes were made available to govern restructurings of members' interests.[52] In the period since the framework was first introduced, the flexibility and versatility of the scheme has seen its use extend from its original scope as a method of compromising or settling creditors' claims to now allowing for the court-directed procedure to produce a plan with a number of possible outcomes, including the sale or disposal of the business, the merger or demerger of companies, the restructuring of capital, debt and other obligations, including the injection of new capital, to effect changes in management and also to carry out takeovers. Schemes are really designed to work with solvent companies, although schemes are also available as an option in winding up,[53] while recent moves in practice have pushed the envelope for schemes to encompass companies near the insolvency threshold.[54]In fact, in jurisdictions inheriting versions of the United Kingdom Companies Acts, but where insolvency procedures have not been developed for some time, the scheme procedure has undergone a renaissance as a method for restructuring companies, especially in the Commonwealth Caribbean.[55]

Schemes, however, are not within any of the instruments noted in the text above, although their popularity for cross-border restructurings is demonstrated by frequent recourse to them in recent years, especially for financial restructurings involving major European companies.[56] The definition of insolvency law for the purposes of section 426 does not include schemes. Neither are they included within the scope of the Recast EIR. In fact, as for informal workouts, the view can also be taken that schemes are a species of contractual compromise. As such, their cross-border effect might fall under the ambit of the Brussels-Ia Regulation.[57] The common-law view is

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[49] The rule in *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399 ("*Gibbs*"), confirmed most recently in *Bakhshiyeva*, above note 23.
[50] Section 895 *et seq.*, Companies Act 2006.
[51] Section 136, Companies Act 1862; section 411, Joint Stock Companies Arrangement Act 1870.
[52] Section 120, Companies (Consolidation) Act 1908.
[53] Section 110, Insolvency Act 1986. The advantage here is that court approval is not required, but creditors' claims must be met in full and it may be difficult to achieve a cram-down on dissentients.
[54] *Re Drax Holdings Ltd; Re Inpower Ltd* [2004] 1 BCLC 10 (a Jersey/United Kingdom case).
[55] See I. Kawaley, "Cross-Border Insolvency in the British Atlantic and Caribbean World: Challenges and Opportunities", Chapter 14 in B. Wessels and P. Omar (eds), *Insolvency and Groups of Companies* (2011, INSOL Europe, Nottingham).
[56] Apcoa, La Seda de Barcelona, Magyar Telecom, Rodenstock and Wind Hellas can be cited as examples.
[57] See G. McCormack and H. Anderson, "The Implications of Brexit for the Restructuring and Insolvency Industry in the United Kingdom, in INSOL International, *The Implications of Brexit for the Restructuring and Insolvency Industry: A Collection of Essays* (2017, INSOL International, London), at 9-10.

broadly similar as to the contractual nature of any compromise as well as the limitation of the rule in *Gibbs*. The position in the Model Law is that recognition depends on there being judicial oversight of the process, which would exist here, given the formality of the process.[58] However, the need would arise of compliance with the remainder of the definition including whether the nature of the procedure could be viewed as one leading to reorganisation or liquidation. If so, then a recognition application could be brought under the Model Law, even though the law providing for these outcomes is not labelled as one explicitly connected with insolvency.[59]

C. Formal Insolvency

The law relating to corporate insolvency currently contained in the Insolvency Act 1986 refers to four procedures applicable to corporate bodies (in order of their appearance in the Act):

(i) the "corporate voluntary arrangement" ("CVA");
(ii) "administration";
(iii) "receivership" (retitled "administrative receivership" in the 1986 legislation); and
(iv) "winding up" (or "liquidation") (both voluntary and involuntary).

Of these, three receive mention in Annex A of the Recast EIR, with the exception of receivership, which is not able to satisfy the test of a collective process included in Article 1(1). The same would be true of the Model Law, whose Article 2, of similar origin, also mandates a collective process. At common-law and under section 426, receiverships would be regarded as part of the law of insolvency and would be likely to receive recognition and enforcement on that basis.

D. The Brexit Decision and Legal Consequences

The Brexit decision was viewed as a vote for leaving the structures of the European Union and, in the Government's most recent interpretation, also for leaving the Single Market and Customs Union. During the negotiations initiated between the Government and the institutions of the European Union, the Government issued a "Future Partnership Paper" in August 2017 stating its intention, *inter alia*, to:

> "seek an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework."[60]

While the Brussels-Ia Regulation and Recast EIR are listed among the cross-border rules supporting the cross-border framework, there is still a lack of clarity about what the proposed "agreement" will contain. As such, this section sets out some of the options, their advantages and disadvantages, in order of desirability based on the

[58] Article 2, Model Law.
[59] *Re Agrokor*, above note 23, at paragraphs 100 *et seq*.
[60] HMG (Department for Exiting the European Union), *Providing a cross border civil judicial cooperation framework* (A Future Partnership Paper) (August 2017), at paragraph 19.

certainty and continuity they will offer when compared to the existing system. However, it should be noted that the outline that follows is predominantly devoted to the position of the United Kingdom *vis-à-vis* the other member states of the European Union.

(i) The Option for Continued Adhesion (The Best-Case Scenario)

The best-case scenario would be for the agreement to permit the United Kingdom's continued adhesion to the Brussels-Ia Regulation and Recast EIR texts, which at present form part of domestic law through the doctrines of direct application and direct effect. This would ensure that both the insolvency and company law related restructuring mechanisms would have a framework for jurisdiction as well as recognition and enforcement of judgments that is broadly consonant with the present structure. The Model Law and common-law frameworks would be able to supplement this position and govern situations outside the two texts. Given the avowed intention in section 3 of the European Union (Withdrawal) Act 2018 to incorporate "direct EU legislation", the retention mechanism that will be developed could serve to ensure these key texts are explicitly incorporated into domestic law. The chief advantage of such a structure would be to keep the automatic recognition and enforcement mechanisms available for judgments in the case of jurisdiction being taken and to permit cross-border coordination of instances, whether those involving multiple establishments of a single debtor or corporate group cases.

The sticking point from the United Kingdom's perspective would be the issue of judicial oversight, currently given to the CJEU, whose jurisdiction the Government seeks to remove. Furthermore, the European Union (Withdrawal) Act 2018 states its intention to give the courts in the United Kingdom the authority to determine which CJEU judgments and European Law principles to continue to follow (section 6), though the text rules out cases and principles determined after the "exit day" having any effect. Both steps could cause some problems with ensuring uniformity of interpretation of the texts after the withdrawal date. This is not necessarily a difficulty, as courts can develop jurisprudence reliant on examining developments and trends elsewhere, as is the case with the Model Law. It has also been suggested the EFTA Court have a mediating role in respect of disputes between the European Union and United Kingdom. It could be conceivable that an oversight role could similarly be conferred, if it were politically acceptable. There would still remain the issue of uniformity of interpretation, although the EFTA Court often follows European Union jurisprudence in determining similar provisions.

There are, however, some current "unknowns". The first is whether the European Union institutions would countenance what will effectively be a third country directly participating in European Union instruments and enjoying the same access and benefits as a member state, while "cherry-picking" on issues such as curial oversight. In particular, the issue of the automatic recognition and enforcement of judgments could pose problems, since the United Kingdom would no longer be bound by the principle of sincere cooperation. This might not be acceptable to the member states and could require some finessing as to the structure chosen for the transposition and access, i.e. whether the effect of direct adhesion could be conferred through the use of another form of instrument that may be more politically acceptable, e.g. an international treaty. The issue of an appropriate oversight structure could be

determined by this arrangement. Even if the adhesion were viewed more neutrally, the change in oversight structures would necessarily constitute a different arrangement with the possibility of regulatory and interpretative divergence.

A further "unknown" is what might happen to the instruments in the future. Article 90 of the Recast EIR (and Article 79 of the Brussels-Ia text) provide for review and possible adoptions of revised texts. The transposition and accession text might have to concede the possibility of the United Kingdom acceding, perhaps without the ability to influence the review process, to a future agreed text. In the absence of this possibility, the likelihood is that two separate structures will end up being created by default, a post-review structure binding the EU27 and one linking the European Union with the United Kingdom. In fact, this two-speed structure already exists in the relationship that the Lugano Convention 1988 (though itself an improvement on the Brussels Convention 1968 whose format it was designed to mimic) has with the Brussels-Ia Regulation structure, which represents a more advanced approach to its subject matter.

NB. Note that the same issues would arise for those insolvencies with a cross-border element for entities covered by Directive 2001/17/EC and Directive 2001/24/EC.

(ii) The Tailor-Made Arrangement (The Next Best Option)

If continued adhesion to the Recast EIR and Brussels-Ia Regulation is deemed unacceptable, perhaps because of the oversight issue or the United Kingdom's status as a "third country", the next best option would be a text or texts which mimic the format provided by both regulations.[61] As stated above, the effect of adhesion could be secured by a text or texts that confer the effect of adhesion while being substantively in a form that would be more politically acceptable to both parties. A number of issues will arise here:

(a) The type of text(s): the convention or treaty format is cumbersome and difficult to easily alter, requiring a further convention or treaty to do so. Changes in practice might only be able to be incorporated at a remove from when they happen, although the same is also true of the regulation format, where currently amendments to the Annexes of the Recast EIR take on average 18 months to go through the legislative process.[62]
(b) The content of the text(s): would the text(s) enable the automatic recognition and enforcement of judgments in the same way as the current framework created by the Recast EIR and Brussels-Ia Regulation? The duties of sincere cooperation and mutual trust might not be regarded as having the same resonance for relations between states within the European Union and those outside, even given the long-shared history and former degree of trust and

[61] See McCormack and Anderson, above note 57, at 19-20, discussing the scope and content of a proposed bilateral framework. This "bespoke" option has been signalled by the Government as being its preference, for which see HMG (Department for Exiting the European Union), *Framework for the UK-EU Partnership: Civil Judicial Cooperation* (13 June 2018), available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/715834/Framework_for_the_UK-EU_partnership_Civil_judicial_cooperation.pdf>.

[62] This delay led to the recognition application in *Re Agrokor*, above note 23, ostensibly a Croatian case, being made under the Model Law, as the then recently introduced domestic legislation had not yet been included in schedule to the Recast EIR.

cooperation between courts. As such, the text(s) might require some form of built-in discretion, such as is inherent in the Model Law paradigm. This could also affect the structure of any provisions on coordination and cooperation, which are usually predicated on a high degree of mutual trust.

(c) Oversight: In the event that the CJEU is not regarded as an appropriate supervisory court for such a text or texts, would the EFTA Court be seen as a satisfactory alternative? The text or texts might in fact opt to eschew oversight completely, thus leaving the possibility of divergent interpretations, which could have a consequent impact on attitudes to recognition and enforcement, particularly where an element of discretion is built in to the framework(s) provided.

(iii) The Default Convention Scenario (The Third Best Option)

In the case of both the Recast EIR and Brussels-Ia Regulation, there are certain embryonic convention texts, which could serve as a fall-back position. However, both the Brussels Convention 1968 and the European Bankruptcy Convention 1995 do not have the sophistication of their regulation counterparts and represent at best the state of art at the time of their adoption. A further issue would be that the European Bankruptcy Convention 1995 never came into force, the United Kingdom failing to adhere within the 6-month period stipulated because of a period of non-cooperation with the European institutions triggered by the BSE crisis. As such, even if the convention texts could be resurrected, the framework they create would be less than desirable, while the issue of CJEU oversight would remain a potential problem for the Government.

(iv) The Private International Law Scenario (The No-Deal Option)

Under the no-deal option, the assumption is made that adhesion to the Recast EIR and Brussels-Ia Regulation is not possible, nor would a text mimicking their effect be likely to be adopted. The result would be to throw back cooperation on the other frameworks that exist, chiefly the Model Law, but also section 426 and judicial cooperation at common-law. In substance, the European Union member states would be in no different a position to countries in the rest of the world in their ability to resort to any available cross-border frameworks. Unfortunately, the United Kingdom's position would be exactly the same *vis-à-vis* the other European Union member states. Here, two situations must be distinguished: the incoming and outgoing requests for cooperation.

As previously stated, the courts in the United Kingdom do not require reciprocity in that requests can come from the courts of any country, whether they have or have not adopted the Model Law. This would enable the courts of European Union member states, not otherwise adherents, to make requests, although recognition orders would lack the automaticity of the Recast EIR and subsequent judgments would be likely to require further applications to be made, increasing the time and cost of procedures. For cooperation at common-law, the position is one of open access, although here the level of discretion is quite high, and it is unlikely that cooperation will be forthcoming at an enhanced level unless there is some likelihood of comity being offered in return.

For section 426, cooperation is dependent on being a designated country or territory. At present, most of the European Union, apart from Ireland and Gibraltar (the latter being bound, the Government indicates, to also leave when the United Kingdom does), Is not so designated. It is unlikely, though feasible, that the member states of the European Union would make the necessary approaches to the Insolvency Service to become designated. For matters that fall outside the insolvency law cross-border framework, the position will depend on the private international law rules of the United Kingdom as to whether recognition and enforcement are forthcoming, including the rule in *Gibbs*, but also rules on *in rem* and *in personam* jurisdiction, which featured in *Cambridge Gas*.

For outgoing requests, the position is also complex. Some European Union member states (and some candidate members) have adopted the Model Law, notably Greece, Poland, Romania and Slovenia. Conceivably, requests could be made under its framework for recognition and enforcement, which would also lack the automaticity of the Recast EIR and require further applications for subsequent judgments or orders as necessary. In the case of other European Union member states, some have adopted rules of private international law in insolvency that broadly mimic the structure of the Recast EIR, such as Germany and Spain. Others retain more classic formulations of private international law in insolvency that have not been reviewed for some time and which feature rules that support territoriality, as opposed to universality. This was true of the Netherlands until recently.

For matters outside insolvency, there is no cross-border framework comparable to the Model Law or section 426, albeit there is the Foreign Judgments (Reciprocal Enforcement) Act 1933 which applies selectively to some European and other states and requires an element of reciprocity as a pre-condition to extending assistance. In any event, this legislation is designed to deal with the situation of individual judgments and is not really suitable to cover corporate restructuring processes going further than simple judgments or orders of the court. As such, there may be divergence in the way insolvency and non-insolvency matters are treated at private international law, requiring the understanding of the differences between the rules. This in turn may have an impact on the choice between procedures, depending on the perceived ease of using the applicable cross-border framework. It may also inadvertently discourage pre-insolvency restructuring attempts, given the absence of a dedicated cross-border framework. In all cases, recourse to private international law will require appreciating the multiplicity of national approaches that potentially apply in cross-border instances, making uniform cooperation and the coordination of outcomes difficult.

(v) Support Structures

The frameworks alone, although important, are not the only element of cross-border recognition and enforcement whose fate will be necessary to determine. The continuation of other forms of judicial and curial cooperation, such as the rules relating to service, will need to be decided.[63] Furthermore, the issue of transitional

[63] S. Ramel, "Future Proofing against Brexit in Insolvency Cases" (November 2016), at paragraph 24.

provisions where cases are brought whose progress may straddle the exit date, will also need to be determined.[64]

(vi) The Impact of the Choice of Options on Types of Procedure

In general, for both insolvency and non-insolvency matters, the optimal choice is the option to continue adhesion, although the tailor-made arrangement would also be satisfactory. The default to the predecessor conventions would offer an outcome only marginally better than the position at private international law, in the event of a no-deal. Much better, though, than either of these, would be recourse to the Model Law, although it would only be available for collective processes that lead to a restructuring or liquidation outcome. The case would need to be made that consensual or corporate restructurings would fall within this, provided there is an element of court supervision that can be shown. Difficulties might still arise with hybrid procedures that seek to combine insolvency and non-insolvency processes, e.g. administration with view to a scheme, where consideration of the availability and appropriateness of the cross-border framework may play a part in the structuring of the procedure.

One outstanding matter, however, is the current proposal for a Draft Directive on Preventive Restructuring *etc.* which is not anticipated to reach the adoption stage until late-2018. Although some commentators have recommended its utility,[65] the likelihood is that it will not be implemented prior to the United Kingdom's departure from the European Union. As the current intention appears to be to add the procedures the member states will adopt or adapt to those in Annex A of the Recast EIR, the result will undoubtedly have an impact on those structures that are created as a result of the options for continued adhesion or a tailor-made arrangement. The outcome might be to have a two-speed framework with the member states applying a text that includes the directive-inspired procedures, while the version applicable to the relationship with the United Kingdom does not.

E. Summary: The Impact of Brexit and New Kids on the Block

The position with respect to Brexit continues to change day to day. The paucity of information with respect to the Government's intentions make this outline highly speculative in nature, as it is predicated on a range of possibilities subject to change. It should be noted that Brexit will not prevent some forms of restructuring from continuing to happen, such as the "passporting" that occurs between Jersey and the United Kingdom under section 426 which sees administration regularly being applied to Jersey entities used for property investment.[66] Similarly, debt restructurings that regularly happen in parallel between the United Kingdom and the United States are unlikely to cease. However, their use might diminish as a function of the effect on continued recourse to the markets in the United Kingdom for the purposes of raising finance for European entities by the probable loss of rights, should there be a failure to agree provision for the financial services sector within the Brexit negotiations. Furthermore, non-European restructurings via the vehicle of the Model Law, section

[64] Ibid., at paragraphs 11-12.
[65] Ibid., at paragraph 10 (advocating its introduction).
[66] See, by this author, "Insolvency Practice in Small Jurisdictions: A Study in Innovation in Jersey" (November 2017, Global Law and Business Blog), available at: <http://www.globelawandbusiness.com/blog/insolvency-practice-in-small-jurisdictions>.

426 or common-law cooperation continue to be possible. In that light, there will still be insolvency and restructuring business occurring in the United Kingdom. This position is comforted somewhat by the avowed intention of the judges to continue to maintain the attractiveness of the United Kingdom as a destination for litigation/dispute resolution.[67]

Good news, however, may be more limited in some fields of practice. One area that will undoubtedly see a great impact is the activity that arises from collocation of group companies in a single jurisdiction, predominantly benefitting the United Kingdom, under the terms of the Recast EIR, for the purposes of achieving a group-wide restructuring. A further impact will undoubtedly occur with respect to the type of (mostly financial) restructuring activity that is carried out by means of schemes of arrangement, where the entities involved are based in the European Union. A summary would conclude that, short of a managed and agreed solution, the continued ability of the United Kingdom to serve as a full-service global centre for restructurings will be imperilled. This is particularly true when one considers the steps that have been taken by countries within Europe, such as the Netherlands, to adopt practices, such as the pre-pack and schemes, in order to be able to provide global clients with services analogous to those available in the United Kingdom. The situation globally is no less concerning, as some countries, such as Singapore, are actively promoting themselves as regional centres for international debt restructurings and setting themselves up in competition for business.[68]

In hindsight, the Brexit vote was a decision the electorate took, without necessarily appreciating the consequences. Short-term decision-making motivated by propaganda and/or manipulation is no basis on which to secure the long-term future of the country. Even if criticism can be emitted as to the nature, scope, purpose or intentions of the European Union project, the optimal decision would have been for the United Kingdom to stay within the union and use its influence to shape the future, as it has done on a number of occasions, not least in the formation of the Single Market and the push to widen the membership of the union through the accession process. Even if the vote could be legitimised as a decision to leave the political and institutional structures of the European Union, it was by no means a vote for all the other consequences now claimed for it, such as departing the Single Market and/or Customs Union. However, as much as many commentators strongly desire to stop Brexit, should it go ahead, then planning and clear direction will be critical. Apart from during the transition period, when matters will continue much as normal, what happens beyond this has yet to be determined.

4 July 2018

[67] See statement by Lord Thomas of Cwmgiedd LCJ at the launch of the Business and Property Courts on 4 July 2017: < https://www.judiciary.gov.uk/announcements/launch-of-business-and-property-courts/>.

[68] See, by this author, ""Super-Priority" and the Singapore Scheme: The *Attilan* Case" (2018) 15 *International Corporate Rescue* 99.

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