



## Article

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# CROSS-BORDER INSOLVENCIES AFTER BREXIT: CHALLENGES AND RECOMMENDATIONS

John WOOD\*

## **Abstract**

The UK's approach to cross-border insolvencies is likely to face a number of challenges when it leaves the EU in the next few years. At the point of Brexit, should there be a clean break away from the EU legal frameworks, the UK will have to be prepared to address any shortcomings that may occur. As a priority, it would be in the interest of the UK to remain party to a number of cross-border agreements in order to protect its commercial and financial position in Europe. To ensure that this could be achieved, much would need to be made of the UK's relationship with the other member states of the EU. This would be vital since the success and predictability of cross-border insolvencies rely heavily on the legal cooperation between the member states, along with each country providing recognition of proceedings to allow an orderly cross-border insolvency system. It is therefore imperative that the UK takes preliminary steps to explore the impact that Brexit could have on cross-border insolvency law.

To this end, the article will consist of three parts. First, the existing legal framework will be explored to identify the relevant issues that would need to be addressed in any future cross-border model. Second, the influences that have helped to shape the law will be explored to determine whether the challenges that face the UK post-Brexit could be adequately addressed. Third, the article will address some of the challenges that the UK could face before proposing recommendations.

## **Introduction**

The UK's impending exit from the European Union raises a number of important questions concerning the impact that this would have on cross-border transactions and resultant legal proceedings.<sup>1</sup> The current position relating to cross-border

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<sup>1</sup> This paper expands on a previous article, J Wood, 'Brexit and the Legal Implications for Cross-Border Insolvencies: What does the Future Hold for the UK?' (2017) 396 CLN 1.

proceedings is complex in nature, as it is often an issue in both identifying which law would be applicable, and the ability to foresee any subsequent legal proceedings.<sup>2</sup> The complexities are often further enhanced by the lack of detail pertaining the level of recognition (relating to legal proceedings) that would apply to the UK after it leaves the EU.

As the UK looks to negotiate its exit and determine what laws will apply post-Brexit, it is worth noting that over the last few years all the member states within the EU have seen the continued development of national insolvency rules and regulations. However, despite the growth in national insolvency laws it is evident that English insolvency and restructuring procedures remain highly regarded in Europe.<sup>3</sup> Besides sometimes being able to offer a more favourable legal position, English insolvency law provides a highly flexible, comprehensive restructuring toolkit that can adapt according to circumstances, and when warranted, it can rely on the commercial knowledge of the judiciary for input.<sup>4</sup> In selecting a preferred legal framework, it remains common practice for creditors who provide funds to a foreign company to dictate the law that they wish to apply. This can be achieved through a variety of methods, such as the creditor stating the legal jurisdiction to govern a contract, or by the creditor shifting the centre of main interests (“COMI”) to the UK.<sup>5</sup> The practice of preferring UK insolvency law has led to aspects of the English insolvency procedures being afforded wide recognition across Europe. Such recognition has ensured that the influence of English insolvency procedures remain extensive, a position that has provided a stable and predictable system for commercial parties to rely upon when structuring cross-border deals and making investment decisions.<sup>6</sup>

Until Brexit has been fully realised it will not be clear what the impact on the recognition of UK proceedings abroad will be. However, what is clear is that irrespective of the UK’s post-Brexit deal, the legal landscape in which cross-border

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<sup>2</sup> A Keay, ‘The Harmonization of the Avoidance Rules in European Union Insolvencies’ (2017) 66(1) ICLQ 79, 79.

<sup>3</sup> See generally, A Walters and A Smith, ‘Bankruptcy Tourism’ under the EC Regulation on Insolvency Proceedings: A View from England and Wales’ (2010) 19 IIR181; G McCormack and H Anderson, ‘Brexit and its Implications for Restructuring and Corporate Insolvency Law’ (2017) 7 JBL 533, 536. It also encouraged some European companies to move 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, see *Re Hellas Telecommunications (Luxembourg) II SCA* [2009] EWHC (Ch); [2010] BCC 295.

<sup>4</sup> For example, the court hearing an application for recognition has a discretionary power to modify from the outset the stay which will come into effect on the making of its order, see *Re Dalnyaya Step LLC (In Liquidation)* (Case CR-2016-002375) [2017] EWHC 756 (Ch) [73]; the discretion may also, in certain circumstances, be applied broadly and be applicable to deciding on the proportionality of costs, see *Tchenguiz v Grant Thornton UK LLP* (Case No: A3/2015/2509) [2017] EWCA Civ 83 [84-85].

<sup>5</sup> Note that the EU Regulation 1346/2000 has now been replaced by the European Parliament and Council Regulation (EU) 2015/848 (OJ L141, 5.6.2015, 19) on insolvency proceedings (with application, subject to certain exceptions, from 26 June 2017: art 92). The efficacy of Regulation (EU) 2015/848, in particular its provisions to avoid abusive shifts in COMI and secondary proceedings is considered in the new provisions, see M Brown et al, ‘The Recast EU Insolvency Regulation: An Overview’ (2017) 4 CRI 127.

<sup>6</sup> For a detailed discussion on the issues concerning recognition, see I Mevorach, ‘On the Road to Universalism: A Comparative and Empirical Study of the UNCITRAL Model Law on Cross-Border Insolvency’ 12 EBOR (2011) 534; G McCormack, ‘Jurisdictional Competition and Forum Shopping in Insolvency Proceedings’ (2009) 68(1) CLJ 169.

insolvencies occur will have continued to evolve.<sup>7</sup> Many changes can be credited to a number of key EU dictated policies,<sup>8</sup> which will likely be exacerbated rather than limited by Brexit. While it will be many years before the actual impact of Brexit can be fully determined, the potential threat that it could deter creditors from using English insolvency and restructuring procedures should encourage the UK to proactively consider its options.<sup>9</sup>

The purpose of this article is to examine the UK and its post-Brexit response to cross-border insolvencies. The article will consist of four parts. First, the pre-Brexit landscape will be explored to highlight the current legal framework that applies to the UK, and what challenges the UK would likely have to address post-Brexit. Second, the different approaches to cross-border insolvency will be examined to highlight the conflicts that exist between territoriality and universalism, and how the influence of both have shaped cross-border insolvency law. This would lead onto the third part of the article which will explore the rule of law and the implications that path-dependency could have on the UK future cross-border insolvency law. Part four of the article will address some of the challenges by proposing recommendations.

### **The Pre-Brexit Position and the Challenges Ahead**

The UK has three main provisions for cross-border cooperation in insolvency matters. They are: the EU Regulation on Insolvency Proceedings,<sup>10</sup> the UNCITRAL Model law, and section 426 of the Insolvency Act 1986. In addition to these strands, the common law remains relevant and has in recent years steadily grown in importance due to a number of high profile decisions in both the UK Supreme Court and Privy Council. These cases have offered valuable guidance on cross-border insolvency at common law and, in particular, the limits of common law judicial assistance in respect of foreign insolvency proceedings.<sup>11</sup>

As cross-border insolvency law continues to evolve, by the time Brexit is realised there will have been a number of changes to the legal landscape. In terms of how significant these changes will be depends on whether the UK decides to divert away from the legal framework contained in the European Insolvency Regulation - Regulation 1346/2000, the provisions of which have now been amended by the 'recast' Regulation - Regulation 2015/848.<sup>12</sup> For the purposes of this article the

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<sup>7</sup> In particular, legal pluralism can legitimately exist on a transnational basis, and as such differences can be accommodated. See, P Rijkema, 'The Concept of a Global Rule of Law' (2013) 4(2) TLT 167, 168; F Deane and R Mason, 'The UNCITRAL Model Law on Cross-border Insolvency and the Rule of Law' (2016) 25 IIR 138, 139.

<sup>8</sup> The European legal instruments of relevance are the Financial Collateral Directive 2002/47, the Insurers Winding Up Directive 2001/17 and the Credit Institutions Winding Up Directive 2001/24.

<sup>9</sup> See Wood (n 1).

<sup>10</sup> In addition to sector-specific instruments, see Directive 2001/24 [2001] OJ L125/15 on the reorganisation and winding-up credit institutions as amended by the Bank Resolution and Recovery Directive – Directive 2014/59 [2014] OJ L173/190; and now Directive 2009/138 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) [2009] OJ L335/1.

<sup>11</sup> G McCormack and H Anderson, 'Brexit and its Implications for Restructuring and Corporate Insolvency Law' (2017) 7 JBL 533, 534.

<sup>12</sup> Applies to proceedings opened on or after 26 June 2017.

importance of the Recast regulation will be limited since it would only apply where a debtor has its COMI in the EU.<sup>13</sup> Should the debtor have its COMI in the UK after Brexit, and no provisions have been taken to address this as an exception, then as the law stands the EIR would cease to apply. The strands relevant to the pre-Brexit position, and the challenges that they may face, will now be examined.

*“Recast” Regulation on Insolvency Proceedings (“EIR Recast”)*

For a number of years the key EU legislation on cross-border insolvency was the EC Regulation on Insolvency Proceedings 1346/2000 (“EIR”).<sup>14</sup> The recast Regulation on Insolvency Proceedings 2015/848 (“EIR Recast”) came into force on 26 June 2017, modernising the scope of the EIR by, amongst other things, bringing pre-insolvency “rescue” procedures within its remit.<sup>15</sup> In addition to the EIR Recast, other European legal instruments of relevance that have influenced the cross-border position include: the Financial Collateral Directive,<sup>16</sup> the Insurers Winding Up Directive<sup>17</sup> and the Credit Institutions Winding Up Directive.<sup>18</sup> Beyond the legislative frameworks that these directives have implemented, what they have demonstrated is that the EU has steadily addressed the elusive rule of law concept that often operates in the context of “national legal orders”, to instead apply to different legal systems.<sup>19</sup> To suggest that legal pluralism can exist on a transnational basis is not a stretch too far when it is realised that within most national legal orders, pluralism in some form or another exists. On that basis, cross-border insolvency law is no different. By embracing legal pluralism it provides for consistent and predictable rules that can exist within different legal systems, even if the consistency in the substantive rules themselves do not exist.<sup>20</sup>

As legal pluralism permits national laws to co-exist, different member states will have their own insolvency laws that apply on a national and transnational basis, with the latter designed to reflect the transactions and stakeholder requirements within the wider commercial and financial market.<sup>21</sup> The differences can be tolerated to take into account a wide variety of factors including national laws, culture and customs, but this would be on the basis that the common purpose of cross-border insolvency could be realised. It is therefore imperative that the insolvency practices of a country are relevant and applicable to market expectations. If this is not the case it is highly

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<sup>13</sup> See recast Regulation on Insolvency Proceedings 2015/848, para 25.

<sup>14</sup> Council Regulation (EC) No 1346/2000 of 29<sup>th</sup> May 2000, *OJ* 2000 L 160/1, 30<sup>th</sup> June 2000.

<sup>15</sup> For an overview of the of the original European Commission recommendations for reform for the Regulation, see Proposal for a new regulation COM (2012) 744, and see also Report from the Commission on the application of Council Regulation (EC) No 1346/2000 of 29<sup>th</sup> May 2000 on insolvency proceedings, COM (2012) 744.

<sup>16</sup> Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements.

<sup>17</sup> See Directive 2009/138/EC Risk management and supervision of insurance companies (Solvency 2).

<sup>18</sup> Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions.

<sup>19</sup> Rijpkema (n 7) 168; Deane and Mason (n 7) 139.

<sup>20</sup> Deane and Mason (n 7) 139.

<sup>21</sup> J Westbrook, ‘A Global Solution to Multinational Default’ (2000) 98 *Mich L Rev* 2276, 2283.

likely that this position would not only isolate the jurisdiction in question, but it would deter creditors from investing in businesses in that jurisdiction.

Under EIR Recast, recognition is reciprocal and automatic in nature so the UK as a member state within the EU has the benefit that allows its insolvency practitioners to quickly and easily take control of, and realise, an insolvent company's assets that are situated in another EU country. This is reflective of market practices and one that promotes the rule of law concept across the member states. The EIR Recast, by embracing legal pluralism while respecting national rules, has brought into line common insolvency law practices. The impact of this has constrained the UK courts to open insolvency proceedings in respect of a debtor, and it has established uniform rules on both jurisdictions to open insolvency proceedings and the choice of law that applies in respect of those proceedings. The choice of law has often correlated with where the debtor has its COMI, and the secondary proceedings have been opened where the debtor has its "establishment".<sup>22</sup> In practice this can often be manipulated by a process known as "forum shopping", which involves a creditor choosing a preferred legal system that may be more favourable to them should the company become insolvent.<sup>23</sup> While there are good and bad practices associated with forum shopping,<sup>24</sup> the EIR Recast has done more to enhance rather than eradicate the practice.<sup>25</sup>

Since the UK is generally seen as a good place to "shop",<sup>26</sup> if the UK was to relinquish its recognition, whether intentional or not, the post-Brexit position would likely lead to the UK to revert back to the pre-EIR Recast model. As this outcome would be undesirable since it has the potential to undermine the UK's strong position as a leader in cross-border insolvencies, a compromise would likely be struck with other member states that permits the UK to rely on some pre-Brexit case law that has since become part of the common law.<sup>27</sup>

If a compromise is not possible, and the UK loses its automatic recognition, the UK would find its relationship with other EU member states in cross-border insolvency cases dramatically altered. A change in position would mean court applications would be required in each jurisdiction where assets belonging to the insolvent party were situated. The application would ask the court to recognise their authority to act and to represent the insolvent company, and then give leave to apply for permission

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<sup>22</sup> EIR Recast art.3(2). For a discussion on "establishment", see J Wood, 'The Meaning of "Economic Activity" and "Establishment" in Cross-border Insolvency Proceedings – the Implications of Olympic Airlines SA case' (2015) 9 ICCLR 302.

<sup>23</sup> See generally M Szydło, 'Prevention of Forum Shopping in European Insolvency Law' (2010) 11 EBOR 253; W G Ringe, 'Forum Shopping Under the EU Insolvency Regulation' (2008) 9 EBOR 579; G McCormack, 'Jurisdictional Competition and Forum Shopping in Insolvency Proceedings' (2009) 68 CLJ 213.

<sup>24</sup> See, *Re Codere Finance (UK) LTD* [2015] EWHC 3778 (Ch), para 18.

<sup>25</sup> McCormack and Anderson (n 11) 536.

<sup>26</sup> See, the scheme of arrangement (and pre-packaged administration) for Wind Hellas Telecommunications SA, a Luxembourg company which relocated its head office to London in order to make use of English restructuring mechanisms. For a detailed overview of forum shopping see J Payne, 'Cross-border Schemes of Arrangement and Forum Shopping' (2013) 14(4) EBOR 563.

<sup>27</sup> See below.

to repatriate their assets. Such a process could be costly and time consuming and if this were to occur it would likely act as a deterrent to securing investment for UK based companies, in addition to companies strategically placing their European COMI outside of the UK.

While the UK will be the obvious focus of any Brexit discussion, cross-border insolvencies naturally involve other jurisdictions. The implications of Brexit should therefore involve a discussion concerning other jurisdictions and the requirement of their insolvency practitioners, should assets reside in the UK, to apply to the UK for recognition. Foreign insolvency proceedings seeking recognition in the UK would have to rely on section 426 Insolvency Act 1986, the common law, and the Cross-border Insolvency Regulation 2006 (“CBIR”), which in comparison to the EIR Recast are limited in scope. As such, it would in the interest of all member states to address this issue as a matter of priority.

#### *Recognition, and the Enforcement of Orders and Judgements*

Following Brexit, recognition, and the enforcement of orders and judgments made and given in foreign insolvency proceedings will no longer be automatic where those proceedings are being conducted in an EU member state.<sup>28</sup> Instead, the UK may have to rely on other avenues to secure recognition, finding assistance in the following provisions.

#### *The Common Law Doctrine of Modern Universalism*

This doctrine allows for recognition and assistance, but not the enforcement of orders and judgments.<sup>29</sup> The application of this approach would be limited since it would not be able to assist with outbound UK cases post-Brexit (apart from in another jurisdiction applying the common law). Much will depend on the EU and the importance it places on the UK remaining part of the cross-border agreement. Should the EU not afford the UK with its current level of recognition, then this could undermine the UK’s ability to portray itself as a key influencer when it comes to cross-border insolvencies.

#### *Cross Border Insolvency Regulations 2006*

The Cross Border Insolvency Regulations 2006 (“CBIR”)<sup>30</sup> implemented the UNCITRAL Model Law on Cross-Border Insolvency, which provided a framework for recognition made by a foreign representative of a debtor with its COMI or an establishment in the foreign jurisdiction.<sup>31</sup> While the Regulations provide for

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<sup>28</sup> For a discussion on foreign insolvency proceedings, see N Segal, J Harris, and M Morrison, ‘Assistance to Foreign Insolvency Office-holders in the Conflict of Laws: is the Common Law Fit for Purpose?’ (2017) 30(8) *Insolv Int* 117.

<sup>29</sup> *Rubin v Eurofinance SA* [2012] UKSC 46; *Singularis Holdings Ltd v PrincewaterhouseCoopers* [2014] UKPC 36.

<sup>30</sup> The Cross-Border Insolvency Regulations 2006 (SI 2006/1030).

<sup>31</sup> The CBIR apply without the need for reciprocity (which means, for example, that the UK will recognise eligible Chinese insolvency proceedings even if China has not itself enacted the Model Law). However, the EIR Recast prevails if the other country is an EU Member State. Like the EIR Recast, the CBIR do not apply to certain types of entities including credit institutions, insurance companies etc. The Model

recognition and the giving of assistance, it does not provide for the enforcement of insolvency-related orders and judgments. Some valid arguments have been made for the expansion of the relief available under the Regulations (for example, in relation to the enforcement of insolvency-related judgments<sup>32</sup> and the application of foreign law),<sup>33</sup> though this is not because of Brexit.<sup>34</sup> The CBIR, given its application, would remain in place regardless and would be available in support of EU insolvency proceedings. This position would also be desirable from a consistency point of view in that the Model articles, or at least provisions that closely follow the articles, are widely endorsed and therefore compliance would promote a model that is understood on an international basis. With this in mind, the UK would do well not to depart from the terms of the Model Law for this reason. To do so would also run the risk of alienating member states with a Brexit model that would merely strive to facilitate recognition and acting in aid of (among others) UK proceedings. While CBIR could continue to offer the UK with a solution post-Brexit, the limited endorsement of the CBIR<sup>35</sup> would suggest that more viable options would be reviewed first.

#### Section 426 of the Insolvency Act 1986

In comparison to the CBIR, an alternative option would be to consider section 426 of the Insolvency Act 1986. This section enables any court in the UK to assist those courts with corresponding insolvency jurisdiction in any other part of the UK or any relevant country or territory, and to apply comparable insolvency law applicable by either court.<sup>36</sup> The number of territories that section 426 applies to is wider than those under the CBIR, and they include: the Channel Islands, the Isle of Man, the Republic of Ireland and a number of Commonwealth and former Commonwealth members whose laws are based on the common law, some of which have similar provisions to assist courts in the UK.<sup>37</sup> In terms of how the section is applied, requests for assistance must come from foreign courts rather than directly from foreign officeholders, and as such, speed and consistency in the usage of this section will vary considerably. However, the flexibility of this provision means that it could be

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Law has, to date, been adopted in Australia, Canada, Colombia, Eritrea, Greece, Japan, Mauritius, Mexico, Montenegro, New Zealand, Poland, Republic of Korea, Romania, Serbia, Slovenia, South Africa, United Kingdom, British Virgin Islands and the United States of America.

<sup>32</sup> In *Rubin v Eurofinance SA* [2012] UKSC 46; [2013] AC 236, it was held that the provisions of the Model Law authorising the grant of discretionary relief in respect of foreign insolvency proceedings did not provide a basis for overturning long-established common law principles governing the enforcement of foreign monetary judgments.

<sup>33</sup> This would deal with some of the issues thrown up by *Re Pan Ocean Co Ltd* [2014] EWHC 2124 (Ch); [2014] Bus LR 1041.

<sup>34</sup> McCormack and Anderson (n 11) 552.

<sup>35</sup> Which include Greece, Poland, Romania, Slovenia and the UK (including Gibraltar).

<sup>36</sup> Case law on s426 shows that, although the court has a discretion regarding whether to provide assistance, and in what form, the general rule is that the court should provide assistance unless there are powerful reasons not to, see *England v Smith* [2001] Ch 419; *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852; *Singularis Holdings Limited v PricewaterhouseCoopers* [2014] UKPC 36.

<sup>37</sup> The full list of designated countries includes: Anguilla, Australia, the Bahamas, Bermuda, Botswana, Brunei, Canada, Cayman Islands, Falkland Islands, Guernsey (modified), Gibraltar, Hong Kong, the Republic of Ireland, Malaysia, Montserrat, New Zealand, South Africa, St Helena, Turks and Caicos Islands, Tuvalu and the Virgin Islands



amended to accommodate issues that arise out of Brexit, but as it stands the scope of section 426 is limited to the jurisdictions in which it currently can be applied.

#### Foreign Judgments (Reciprocal Enforcement) Act 1933

The Foreign Judgments (Reciprocal Enforcement) Act 1933 applies to the judgments of the courts of certain listed countries (which for example include Australia, Guernsey, India and parts of Canada), but as it is bilateral in nature it is limited in scope.<sup>38</sup> While in theory the UK could utilise this Act in cross-border insolvencies should it lose its in-bound recognition from other jurisdictions, it is likely to prefer a legal framework that can offer a wider scope in terms of application and enforcement.

#### Common Law

The English courts may assist overseas officeholders under common law principles but this does not assist in any way with reciprocal recognition of English proceedings.<sup>39</sup> Although not in itself an insolvency procedure falling within the ambit of the EIR Recast, the English courts have accepted jurisdiction in approving schemes of arrangement under the Companies Act 2006.<sup>40</sup> This would relate to overseas debtors where there is a sufficient connection with English law in circumstances where a scheme would be recognised by another EU member state in which the debtor has its COMI.<sup>41</sup>

Common law could be useful in the absence of any other treaty or convention, to govern the enforcement of the orders of foreign courts. Given that there is extensive case law dealing with common law principles governing judicial assistance in insolvency matters and the recognition of foreign insolvency judgments, there is much literature to refer to.<sup>42</sup> How the principles have been applied over the years has gradually changed, with the more expansive interpretation seeing a decline.<sup>43</sup> However, some concepts like ensuring fairness between creditors have remained of paramount importance. To this end, the courts have used its wide discretion to provide assistance to a foreign insolvency proceeding by doing whatever was considered to be just and appropriate in all the circumstances of the particular case,

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<sup>38</sup> The leading case on the foreign law enforcement judgment is *Jimmy Wayne Adams and others v Cape Industries plc and Capasco Limited* [1990] 2 WLR 657.

<sup>39</sup> The common law sits alongside the CBIR and they are often seen pleaded as alternative grounds of relief. There is debate about whether the common law also sits alongside s426 (because the House of Lords was split on this issue in *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852). However, within the EU the EC Regulation ordinarily applies to the exclusion of the common law.

<sup>40</sup> The Scheme of Arrangement will be discussed below.

<sup>41</sup> See *Re Global Garden Products Italy SpA* [2016] EWHC 1884 (Ch). Under s.895(2) of the Companies Act 2006, the court had jurisdiction to sanction a scheme in relation to any company liable to be wound up under the Insolvency Act 1986; that extended to a foreign company, see *Re Van Gansewinkel Groep BV* [2015] WEHC 2151 (Ch), [2015] Bus. L.R. 1046.

<sup>42</sup> Cases often, but not exclusively, feature from offshore jurisdictions such as the Isle of Man, the Cayman Islands and the British Virgin Islands (BVI).

<sup>43</sup> Lord Hoffman referred to the principle of modified universalism as the "golden thread" running through English cross-border insolvency law since the 18th century, see *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852 HL at [30].

to the extent that the court could do so in a domestic insolvency.<sup>44</sup> The narrow interpretation has highlighted the limits of common law judicial power, and in one case it was held that it did not have a common law power to assist foreign liquidators by exercising powers analogous to those that would have been exercisable in a domestic insolvency, but which did not apply to a cross-border insolvency.<sup>45</sup> Nonetheless, with common law recognising English law schemes this has been useful in effecting restructurings of EU incorporated companies,<sup>46</sup> and the schemes have continued to grow in importance.<sup>47</sup>

#### *Scheme of Arrangement after Brexit*

It would be expected that Brexit would have a limited impact on the popularity of the English scheme of arrangement since the scheme falls outside of the EIR Recast. As a “rescue” mechanism it operates as a European restructuring tool and the jurisdictional barriers would be easily overcome since the approval of a scheme would be satisfied if there was a “sufficient connection” with England and Wales, and English law governed agreements would suffice for this purpose. While the schemes may continue in popularity, the difficulties arise with determining whether the scheme falls within Regulation (EU) 1215/2012 (“Recast Brussels Regulation”) and therefore benefit from EU-wide recognition under that Regulation.<sup>48</sup> Should the Recast Brussels Regulation cease to apply to the UK post-Brexit the level of recognition afforded to the UK from foreign jurisdictions would likely be heavily diminished. However, in the unlikely situation should the Recast Brussels Regulation continue to apply it will have to address some concerns as to whether the scheme of arrangement would favour the domestic laws of member states. The European Commission has recently published a proposal for a Restructuring Directive<sup>49</sup> suggesting new restructuring possibilities on a pan-European basis which would enhance the chances that foreign companies would “shop locally” for restructuring procedures rather than prefer the scheme evident in the UK. To this

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<sup>44</sup> See *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2007] 1 AC 508 (PC) (Isle of Man) at [16].

<sup>45</sup> See *Singularis Holdings v PricewaterhouseCoopers* [2014] UKPC 36; [2015] AC 1675 at [108].

<sup>46</sup> See *Re Metinvest BV* [2017] EWHC 178 (Ch), which involved a company incorporated in the Netherlands. Two classes of creditors under a proposed scheme of arrangement were not fractured by a lock-up agreement under which the class members agreed to vote in favour of the scheme of arrangement in exchange for a small payment from the company; In *Re DTEK Finance Plc* [2016] EWHC 3562 (Ch); [2017] B.C.C. 165 the court declined to decide whether Regulation 1215/2012 applied to schemes of arrangement. It commented that when assessing whether it was “expedient” for claims to be heard together, the relevant factors included more than the number of creditors domiciled in the jurisdiction and the value of the debts they held, they also included the number of creditors who had submitted to the jurisdiction and the desirability of binding all scheme creditors to the same restructuring.

<sup>47</sup> See generally, J Payne, *Schemes of Arrangement; Theory, Structure and Operation* (CUP 2014).

<sup>48</sup> Council Regulation 44/2001 (“Brussels Regulation”) was superseded by the similar, but not identical Regulation (EU) 1215/2012 (recast) (“Recast Brussels Regulation”), and came into force January 2015. Collectively, the ‘judgment regulations’ to which they are sometimes referred to have largely replaced the Brussels Convention 1968, which only remains relevant in relation to matters concerning dependent territories of Brussels Convention countries.

<sup>49</sup> See generally G McCormack, ‘Business Restructuring Law in Europe: Making a Fresh Start’ (2017) 17 JSCL 1; S Madaus, ‘The EU Recommendation on Business Rescue: Only Another Statement or a Cause for Legislative Action across Europe?’ (2014) 27 *Insolv Int* 81.

end, member states may look to take advantage of the uncertainties that surround Brexit and replicate the same benefits as a UK scheme, but under another jurisdiction. While this could be an option, the actual application of such a scheme would be complex and much would depend on the professional, financial and judicial infrastructure to make such laws work in practice.<sup>50</sup> For now the UK has in its favour a scheme of arrangement that is credible and proven, which offers reassurances to those wishing to rely on it.

#### *Brussels Recast Regulation: Automatic Recognition of Court Judgments*

The overall objective of the Brussels Recast Regulation is twofold. First, to simplify the formalities that govern reciprocal recognition, and second, to promote the interests of the harmonious administration of justice, to ensure that irreconcilable judgments will not be given in two EU states. Following on from the scheme of the arrangement it remains debateable as to whether they fall within the Brussels Recast Regulation and therefore benefit from EU-wide recognition under that Regulation. The EU and the UK have provided differing viewpoints on the matter, but what appears to be clear is that the position post-Brexit would mean that the Brussels Recast Regulation would unlikely apply to schemes.<sup>51</sup> Invariably, such an outcome would lead to some confusion and questions would be raised concerning foreign companies and the jurisdiction that applies, as well as the recognition given to UK court-sanctioned schemes.<sup>52</sup> To address the concern of the Brussels Recast Regulation becoming redundant, and the schemes losing its recognition, much reference has been made to the Lugano Convention.<sup>53</sup> The UK is currently a party to the Lugano Convention through its membership of the EU which provides for a similar regime to that applicable under the Brussels Recast Regulation for the recognition and enforcement of judgements (except it applies to EU member states and European Free Trade Area states other than Liechtenstein). The position post-Brexit would potentially allow for the UK to re-join the Lugano Convention, which would mitigate some of the challenges that the UK would face with the enforcement of schemes. Thereby a post-Brexit membership to the Lugano Convention could be highly desirable.

#### *Other Challenges Post-Brexit*

With regard to the challenges that the UK is likely to face post-Brexit, there are two issues that need to be addressed. First it would be highly likely that the remaining EU member states will explore ways to take advantage of the uncertainties caused by the UK's position. Therefore, the UK would have to be mindful that it would need

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<sup>50</sup> McCormack and Anderson (n 11) 552.

<sup>51</sup> See generally A Dickinson, 'The Revision of the Brussels I Regulation' (2010) 12 Yrbk Priv Intl L 248.

<sup>52</sup> For example, *Re DAP Holding NV* [20015] EWHC 2092 (Ch); [2006] BCC 48 suggested that applications to sanction schemes of arrangement in respect of solvent companies fell outside Brussels I, but in *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch) a different view was taken.

<sup>53</sup> For a discussion on the consequences of Brexit and the Regulation, see A Andreangeli, 'The Consequences of Brexit for Competition Litigation: an End to a "Success Story"?' (2017) 38(5) ECLR 228. For a more general discussion see, G McCormack, 'Reconciling European Conflicts and Insolvency Law' (2014) 15(3) EBOR 309.

to somehow retain the status quo, or create a legal framework that would allow business as usual. Second, and perhaps more difficult to assess, would be to determine what jurisdiction will the Court of Justice of the EU have after the UK leaves the EU. Each of the challenges will now be explored.

#### *Competition from other EU Member States*

Should the UK's position differ substantially after Brexit, this could lead to uncertainty regarding the recognition of foreign insolvency proceedings since it would not be automatic where those proceedings are being conducted in an EU member state. From the UK's perspective, while the UK has plenty of laws that enable the recognition and assistance of foreign proceedings, the cause for concern would be whether foreign courts would recognise UK proceedings abroad after Brexit. Should the lack of recognition significantly diminish, it is likely that the UK will face some serious competition from other EU member states, such as the Netherlands, who are in the process of presenting its revised restructuring regime that mimics the scheme of arrangement as a viable alternative for businesses who wish to continue to have a presence within the EU.<sup>54</sup>

While opportunities will exist for the member states, they would need to consider the bigger picture and be mindful to not cause severe disruption to a system that has on the whole worked successfully. Therefore, it is likely that differences between member states will be kept to a minimum to avoid uncoordinated and inconsistent approaches adopted by different courts in different jurisdictions in a cross-border matter. Since the purpose of the UNCITRAL Model Law was to address such issues it is unlikely that the law would drastically change. However, what remains critical is the manner in which the laws would be applied and how the domestic courts would implement the insolvency proceedings. To address this concern, it has already been evident that steps have been taken recently in the courts of the British Virgin Islands joining the judiciaries from New York, Delaware, Singapore, Bermuda and the UK, in adopting guidelines for communication and cooperation amongst courts from different jurisdictions on cross-border insolvency matters.<sup>55</sup> It therefore seems plausible that much flexibility will be granted to the UK to ensure that the overriding objective of maintaining certainty in insolvency proceedings is achieved.

#### *The Jurisdiction of the Court of Justice of the EU ("CJEU")*

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<sup>54</sup> A new procedure, the Continuity of Companies Act II ("CCA II") has been under consideration in the Netherlands. The CCA II would introduce the concept of a voluntary creditors' arrangement into Dutch law, an arrangement similar to an English Scheme which can be confirmed by the court and become binding on all creditors (and even shareholders, irrespective of whether they voted in favour of the arrangement). However, it has recently been put on hold in light of the recent ECJ preliminary judgment in the *Estro/Smallsteps* case on 22 June 2017.

<sup>55</sup> The initiative was the result of work by the Judicial Insolvency Network. The Judicial Insolvency Network last met in 2016 in Singapore. Judges participating at the Singapore Conference hailed from Australia (Federal Court and New South Wales), the British Virgin Islands, Canada (Ontario), the Cayman Islands, England & Wales, Hong Kong SAR (as an observer), Singapore and the United States of America (Delaware and Southern District of New York).

Should an agreement occur between the UK and the EU for the UK to retain its recognition, the next obstacle to overcome would be to determine how an EIR-like measure would operate without the possibility of recourse to the CJEU. While the discontinuance of the CJEU's jurisdiction may be inconceivable it would appear paradoxical to the purpose of Brexit, should the CJEU continue to have jurisdiction over the UK to resolve disputes following the post-Brexit position.<sup>56</sup> In addition, further reforms and judge-made decisions that would affect the EIR would also pose problems since the UK would be outside of the CJEU's jurisdiction. In this case, it would be desirable, if such a compromise was possible, to devise a specific opt-in clause for the UK to remain part of the EIR, and should any cross-border conflict arise the UK could agree to allow the CJEU to resolve the dispute. Such a position is unlikely to be well received by the other member states, especially given that the EU has been careful not to offer favourable terms to deter other member states who may have been thinking about enacting their own exit from the EU.<sup>57</sup> If a compromise were struck, how well this would work in practice, or even if such a proposal were tenable, would entirely depend on what could be negotiated.

Given that Brexit will be a highly complex affair, it is unlikely that insolvency would be given priority over other commercial areas that would be deemed essential for trade. Nevertheless, should insolvency be granted priority status (or at least properly address as part of the UK's wider commercial interests) the UK could be afforded with the opt-in clause. This would solve the issue of which court would have supremacy over EIR matters. However, while opt-in clauses may provide convenient respite for the UK's position regarding EIR, it would likely impede the purpose of Brexit since it does not represent a clean break away from EU institutions. On the other hand, should a clean break with the CJEU occur, the UK would likely have to either follow, as much as possible, the case law that is decided in Europe on matters concerning cross-border insolvencies, or legislate to deal with changes so the UK can continue to operate consistently with the EU. It should be a priority for the UK to take all measures possible to ensure that as far as possible its recognition status remained intact.

### **The Rule of Law and the Implications of Path Dependency**

Prior to the EIR the process of implementing cross-border insolvency suffered a setback on issues concerning the recognition of proceedings and the enforcement of those decisions.<sup>58</sup> While the EIR facilitated cross-border economic activity, the way in which such proceedings operated in the different countries' insolvency systems

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<sup>56</sup> See Wood (n 1) 4.

<sup>57</sup> The bleak warnings of an emasculated UK were made by former EU ministers including two former prime ministers at an event seeking to simulate the UK-EU negotiations over the terms of the UK's continued membership. The all-day war games session was organised by the Open Europe think tank, Guardian (2016) <<https://www.theguardian.com/world/2016/jan/25/uk-should-be-punished-if-it-leaves-european-union-to-deter-other-exits>> accessed 10 March 2018.

<sup>58</sup> For example, see *Re Agrokor* [2017] EWHC 2791 (ch); *Re OGX Petroleo e Gas SA* [2016] EWHC 25 (ch).

had in many ways been the root of the struggle.<sup>59</sup> Depending on the country that initiates insolvency proceedings, the outcome in relation to the creditors interests could vary considerably. The practice of forum shopping has already been mentioned above and is considered to be undesirable since it encourages certain jurisdictions to market themselves at the cost of member states. With the EU seeing a rise in the amount of companies that are going insolvent it is imperative that companies and creditors are seen to be getting a fair deal irrespective of where the insolvency proceedings are initiated.

In response to forum shopping there have been a number of academic reports that have examined domestic insolvency frameworks to determine what legal principles could be harmonised.<sup>60</sup> At this stage, it is imperative to note that harmonisation can appear in many different forms. To discuss all of the different types of harmonisation is beyond the scope of this article, but it suffices to mention that any attempt to achieve complete harmonisation is likely to be impossible given the different national legal orders evident across the member states. But it should also be noted that even something resembling partial harmonisation will also face a number of barriers as there would be a need for some member states to relinquish its preferred insolvency approach, an outcome that could lead to a lack of cooperation amongst the states who would be required to adopt substantive change.<sup>61</sup>

To that end, the extent of change required could prove to be the challenge for some member states that have legal systems that are highly path dependent on national customs and practices.<sup>62</sup> To endorse substantive change that is contrary to its existing insolvency framework could be construed as being one of the fundamental barriers to achieving the intentions as set out in both the EIR and the EIR Recast.<sup>63</sup> The concept of path dependency is not based on a voluntary preference towards a particular trait or character evident within an insolvency model but it is often the result of following the historical development of a legal system that has since become its norm. In other words, there would be a considerable lack of choice for the legislators to direct an insolvency model in a way that would be different from what has developed within the legal parameters of a particular jurisdiction. An attempt to implement change would be difficult to achieve as the tendency to rely on traditional principles runs deeply within a legal framework such that the differences between insolvency theory, especially in regards to being creditor or debtor focused,

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<sup>59</sup> S M Franken, 'Cross-Border Insolvency Law: A Comparative Institutional Analysis' (2014) 34(1) OJLS 97, 97.

<sup>60</sup> For example, see J Gant (ed), *Harmonisation of European Insolvency Law* (INSOL Europe 2017); G McCormack, A Keay, S Brown, and J Dahlgreen, 'Study on a New Approach to Business Failure and Insolvency: Comparative Legal Analysis of the Member States' Relevant Provisions and Practices' European Commission Report (2016) <[https://www.cak.cz/assets/pro-advokaty/mezinarodni-vztahy/insolvency\\_study\\_2016\\_final\\_en.pdf](https://www.cak.cz/assets/pro-advokaty/mezinarodni-vztahy/insolvency_study_2016_final_en.pdf)> accessed 14 December 2017.

<sup>61</sup> For a full discussion on the different types of harmonisation, see P Slot, 'Harmonization' (1996) 21 E L Rev 378, 378; see also Keay (n 2) 79.

<sup>62</sup> It is evident especially in the UK and the US, see G McCormack, 'Control and Corporate Rescue – An Anglo-American Evaluation' (2007) 56 ICLQ 515, 533.

<sup>63</sup> *ibid.*

would remain even if the reasons for those differences no longer exist.<sup>64</sup> Hence, insolvency regimes such as the ones present in Europe demonstrate how similar concepts can be interpreted differently, and for a jurisdiction to choose one model over the other in these situations is prevented by a sense of belonging to one system as opposed to another.<sup>65</sup> As such, any change that leads to a member state rewriting its legal texts would often face resistance. To assume that the reason for this is merely administrative would be to misunderstand the significance that path dependency has on a jurisdiction. Path dependency often results in a considerable lack of flexibility for the legislators to transplant any cultural, historical, or legal philosophies in a way that is in contrast to the existing legal framework.<sup>66</sup> While legal differences can distinguish between different forms of application, it can also be deliberately created for the purpose of gaining a competitive advantage over the other member states in the EU.<sup>67</sup> While creating favourable insolvency conditions for creditors may be intended to encourage investment, it could also encourage forum shopping as debtors are likely to take advantage of insolvency laws in other countries to fulfil their own objectives.<sup>68</sup>

For member states, the need to remain competitive and knowing when to embrace change is difficult. While path dependency may create barriers to change, partial harmonisation of cross-border insolvency laws appears to offer a pragmatic step towards reducing some of the legal differences, while respecting national laws. However, this position has been made particularly difficult when the traditional views on cross-border theory are reviewed. Both territorialist and universalist approaches to insolvency law offer valuable but contrasting views on how cross-border laws should be implemented.<sup>69</sup>

In response to this difficulty, a closer inspection of the original draft EIR reveals a willingness to embrace the diverse and occasionally opposing principles and philosophies of these two approaches, and as such the EIR in its original form is generally agreed to be the start of a comprehensive European legal order in

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<sup>64</sup> G McCormack, 'Rescuing Small Businesses: Designing an "Efficient" Legal Regime' (2009) JBL 299, 330.

<sup>65</sup> For further reading on path dependency see R J Gilson, 'Corporate Governance and Economic Efficiency: When Do Institutions Matter?' (1996) 74 Wash ULQ 327; M J Roe, 'Chaos and Evolution in Law and Economics' (1996) 109 Harv L Rev 641.

<sup>66</sup> See S Wen and J Zhao, 'Exploring the Rationale of Enlightened Shareholder Value (ESV) in the Realm of UK Company Law — The Path Dependence Perspective' (2014) 14 Int'l Trade & Bus L Rev 153, 161.

<sup>67</sup> Forum shopping continues to split opinion with some countries continuing to be popular places for forum shopping while in others the process is seen as bad. For an insight into the debate see G McCormack, 'Bankruptcy Forum Shopping: the UK and US as Venues of Choice for Foreign Companies' (2014) ICLQ 815.

<sup>68</sup> The increase in forum shopping rests with the EC regulation and how the COMI is identified, which permits a company to change its registered office throughout the EU. This has led some commentators to suggest that forum shopping has become an unavoidable component of EU insolvency law. See F M Mucciarelli, 'The Unavoidable Persistence of Forum Shopping in European Insolvency Law' (2013) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2375654](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2375654)> accessed 10 December 2017.

<sup>69</sup> M Bogdan, 'The EU Bankruptcy Convention' (1997) 6 IIR 114.

insolvency law.<sup>70</sup> The EIR's biggest task was to determine how it was going to effectively deal with complex international insolvencies.<sup>71</sup> The limitations on domestic solutions to resolve cross-border insolvencies was and continues to be a major concern as the proceedings are not always confined within territorial borders.<sup>72</sup> To deal with cross-border insolvencies the EIR had to be ambitious in its objective and scope. To that end, the EIR's overriding objective was to create a uniform body of law that would be applicable to all of the member states. However, despite a legal framework being provided, the number of procedural conflicts between member states continued to be high.<sup>73</sup> These procedural challenges, were and persist to be considered as part of the cross-border reality due to the influx of business activities being implemented across national boundaries.<sup>74</sup> To accommodate the differences that could arise from cross-border procedures, an up-to-date and transparent set of legal rules was required which would promote cooperation and compromise; an approach that has traditionally had strong support amongst the judiciary.<sup>75</sup>

While the judiciary has often demonstrated understanding of the importance of cooperation, it has unfortunately not been a strong trait that has been evident across the member states. This was particularly evident in the first legislative attempt at addressing the cross-border issue which collapsed at the last moment due to political and trading reasons.<sup>76</sup> Despite this setback, the essence of the 1996 EC Convention remained sound and simply laid dormant until the political and trading divisions were subdued.<sup>77</sup> Predictions that the Convention would be revived in some manner

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<sup>70</sup> P J Omar, 'European Insolvency Law' (Ashgate Publishing Ltd 2004) 128. It must be stressed that this therefore implies that the Regulation is a working text, one that accepts its own limitations and is open to future amendments in order to fulfil its objectives more effectively; but nevertheless there is no doubt about its potential to influence many of the future proposals within this sphere.

<sup>71</sup> See generally R Mason, 'Cross-border Insolvency and Legal Transnationalisation' (2012) 21 IIR 105 – 126.

<sup>72</sup> R K Rasmussen, 'A New Approach to Transnational Insolvencies' (1997) 19 Mich J Int'l Law 1.

<sup>73</sup> P J Murphy, 'Why Won't the Leaders Lead? The Need for National Governments to Replace Academics and Practitioners in the Effort to Reform the Muddled World of International Insolvency' (2002) 34 U Miami Inter-Am L Rev 121, 139.

<sup>74</sup> Its explanation and description is given greater justice within the Guide to Enactment of the UNCITRAL Model Law on Cross-Border Insolvency, December, 1997, A/CN.9/442, para 13, which states that: 'The increasing incidence of cross-border insolvencies reflects the continuing global expansion of trade and investment. However, national insolvency laws have by and large not kept pace with the trend, and they are often ill equipped to deal with cases of a cross-border nature. This frequently results in inadequate and inharmonious legal approaches, which hamper the rescue of financially troubled businesses, are not conducive to fair and efficient administration of cross-border insolvencies, impede the protection of the assets of the insolvent debtor against dissipation, and hinder maximization of the value of those assets'.

<sup>75</sup> See per Browne-Wilkinson V-C in *Re Bank of Credit and Commerce International S.A* [1992] BCLC 570, 577, or per Nicholls V-C in *Re Paramount Airways Ltd. (in administration)* [1993] Ch. 223, 239.

<sup>76</sup> Despite nearly all the Member States signing the EC agreement by the middle of May 1996, the United Kingdom was engaged in the 'beef war' with its European neighbours and the Commission. The Government adopted a blocking policy and the EC Convention was left unsigned as the 23<sup>rd</sup> May 1996 deadline passed.

<sup>77</sup> See 'EC Convention on Insolvency Proceedings: A consultative Document', The Insolvency Service, February 1996 (Introduction). For the Explanatory Report by M Virgos and E Schmidt, see EU Council Doc 6500/96, DRS8 (CFC) (2 May 1996) <[http://aei.pitt.edu/952/1/insolvency\\_report\\_schmidt\\_1988.pdf](http://aei.pitt.edu/952/1/insolvency_report_schmidt_1988.pdf)> accessed 3 May 2018. For a detailed



proved correct when the EIR was developed.<sup>78</sup> Notwithstanding the political fallout, the development of EIR acted as a reminder that member states would, given the circumstances, promote their own interests over that of the collective good. While the Regulation does not aim to harmonise national approaches to insolvency matters, it was believed that an international approach that would confine its reach to the opening and recognition of insolvency proceedings in the member states would be a worthwhile and achievable goal.<sup>79</sup> To achieve this objective a strong emphasis was placed on cooperation between member states within the EIR and that this objective should be promoted heavily given that insolvency has far reaching consequences on society as a whole, across all member states.<sup>80</sup>

As the volume of complex international insolvency matters continue to increase, so have the challenges that member states face. In response, the European Commission and the European Parliament have in recent years been keen to consider the possibility of harmonising aspects of domestic insolvency laws, or at least test the viability of such an ambitious project.<sup>81</sup>

The Commission's Action Plan on Building a Capital Markets Union 2015,<sup>82</sup> is an example of how the EU seeks to address the critical role that strong capital markets have in providing sources of funding for businesses, as well as the role of insolvency law in contributing to this process. Amongst the key themes of this action plan was the desire to facilitate cross-border investment, in particular reviewing legal certainty and the market structure for cross-border investing, as well as working with member states to resolve unjustified national barriers to the free movement of capital stemming from insufficient implementation or lack of convergence in interpretation of a single rulebook. It is this latter issue that has been singled out as hindering a well-functioning capital market union across Europe, and this could be overcome if national barriers were dissolved and a convergence of corporate insolvency and restructuring proceedings initiated.

It is thought that if the path dependent obstacles could be reduced then there would be less divergence of national insolvency frameworks, which should lead to less dislocation in local and national communities throughout the EU.<sup>83</sup> This position

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discussion see G W Johnson, 'European Union Convention on Insolvency Proceedings: A Critique of the Convention's Corporate Rescue Paradigm' (1996) 5 IIR 170; P Smart, *Cross-Border Insolvency* (Butterworths 1998) 10.

<sup>78</sup> Mario Monti, European Financial Services Commissioner, see 'No Progress Yet on Insolvency Convention' European Report (11 February 1998).

<sup>79</sup> Council Regulation (EC) 1346/2000 on insolvency proceedings [2000] OJ L160/1, recital 6.

<sup>80</sup> Whose interests, the courts must take into account, see P J Omar 'European Insolvency Law' (Ashgate Publishing Ltd 2004) 17.

<sup>81</sup> See Gant (n 60); Keay, Brown, and Dahlgreen (n 60).

<sup>82</sup> For a detailed discussion of the Capital Markets Union see G Ringe, 'Capital Markets Union for Europe: A Commitment to the Single Market of 28' (2015) 9 LFM 5. For an overview with responses to the European Commission's 'Action plan on Building a Capital Market Union', dated 30.09.15, see <[http://ec.europa.eu/finance/consultations/2015/capital-markets-union/index\\_en.htm](http://ec.europa.eu/finance/consultations/2015/capital-markets-union/index_en.htm)> accessed 2 February 2018.

<sup>83</sup> In recent years there has been much literature dedicated to exploring this possibility, for example see IF Fletcher and B Wessels, 'Harmonisation of Insolvency Law in Europe', Reports presented

could also lead to other benefits such as securing predictability of outcomes of judicial proceedings.<sup>84</sup> Whether the realisation of these aims would mark the start of a single EU cross-border insolvency model remains to be seen, but before any act to harmonise the domestic insolvency laws are taken there must be a clear justification for convergence. It should not be done merely for the sake of it.

### **Cross-border Insolvency: Theory and Approaches**

The reconciliation of legal differences across the member states has and continues to be a troublesome affair. However, where compromise has been reached member states have achieved greater success in addressing international insolvency through the adoption of uniform laws that give recognition to insolvency proceedings and to insolvency representatives.<sup>85</sup> Part of its success has been by focusing on the recognition and enforcement of foreign proceedings and the coordination and cooperation between concurrent proceedings, rather than attempting to introduce strict agreements as to how they should be undertaken.<sup>86</sup>

The purpose of developing uniform recognition rules was to create a system based on common rules of mutuality that promoted an open channel of communication between the member states.<sup>87</sup> By harmonising aspects of international law it was thought that if the members developed a recognised uniform insolvency law, investors and creditors would not waste resources and time examining and interpreting the laws of each individual nation.<sup>88</sup> It would instead likely produce a speedier system that would result in a larger estate for distribution among the creditors' of an insolvency estate as a whole.<sup>89</sup> To this end, one of the main purposes of insolvency law was realised.

The extent to which common ground can be found often leads to a tendency to emphasise, invest, or invent key legal concepts, which have the unfortunate effect of introducing "different shades of meaning so that a further element of bewilderment enters the debate".<sup>90</sup> The danger of trying to find common ground when perhaps one

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to the *Nederlandse Vereniging voor Burgerlijk Recht* (Netherlands Association of Civil Law), Deventer, 2012 <[http://bobwessels.nl/wordpress/?attachment\\_id=2409](http://bobwessels.nl/wordpress/?attachment_id=2409)> assessed 11 February 2018; A recent in-depth study by the University of Leeds, commissioned by the European Commission DG Justice, documents a comparative legal analysis on substantive insolvency law throughout the EU. See McCormack et al (n 59); B Wessels, 'Harmonisation of Insolvency Laws in Europe' (2011) 8(1) ECL 27.

<sup>84</sup> See F M Mucciarelli, 'Not Just Efficiency: Insolvency Law in the EU and Its Political Dimension' (2013) 14 EBOR 178, 178.

<sup>85</sup> For example, the European Insolvency Regulation – Regulation 1346/2000, and now the recast Regulation – Regulation 2015/848, established uniform rules on both jurisdictions to open insolvency proceedings and the choice of law that applies in respect of those proceedings.

<sup>86</sup> For assistance in interpreting the main features of the model law, see UNCITRAL Model law on Cross-Border Insolvency with Guide to Enactment and Interpretation (2014) <<http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf>> accessed 6 March 2018. See also Mason (n 71) 117.

<sup>87</sup> Murphy (n 73) 137.

<sup>88</sup> B M Devling, 'The Continuing Vitality of the Territorial Approach to Cross-Border Insolvency' (2001) 70 UMKCL Rev 435.

<sup>89</sup> Smart (n 77) 5.

<sup>90</sup> See H Hanisch, 'Universality versus Secondary Bankruptcy: A European Debate' (1993) 2 IIR151.

does not exist can create a false impression as to the extent that common principles do exist. Similarly, if differences are identified it is important to realise that common insolvency principles could be viewed differently depending on how the specific jurisdiction construes the procedure in question. This position could be explained by the concept of path dependency, where a jurisdiction's interpretation of an insolvency procedure will be influenced by reading it in context with its own national doctrines and laws. Despite these difficulties in creating a uniformed law, it can be said that the pursuit of such an ambitious plan has been "necessitated by the special qualities of insolvency itself".<sup>91</sup> As such, cross-border insolvency law takes into consideration the obstacle of national laws and has as a result limited the scope of its harmonisation to dealing with only a few legal principles.<sup>92</sup>

#### *The Approaches: Territoriality and Universalism*

Cross-border insolvency disputes involve three main issues that must be determined. First, which court has jurisdiction over a cross-border insolvency case; second, which substantive insolvency law applies to the case; and third, whether the judgment opening an insolvency proceeding rendered by a foreign court should be recognised and, if so, whether the effects of this proceeding under foreign law should be extended to the assets located in the jurisdiction recognising the foreign judgement. Depending on the approach taken, alternative outcomes would be possible. Broadly speaking, there are two approaches to cross-border insolvency: territorialism and universalism.

Territorialism involves a jurisdiction that applies its own substantive insolvency law without any regard for foreign elements. The approach does not recognise any extraterritorial dimension to an insolvency administration, only the law of the country where the company resides. The assets within the jurisdiction are realised for the benefit of satisfying the interests of local creditors. As a result, creditors will have to file their claims in each jurisdiction in which insolvency proceedings are opened raising the possibility of several proceedings co-existing simultaneously, each with diverging distributive rules.<sup>93</sup>

Universalism, on the other hand favours the concept of unity. It is a contrast to territorialism as it promotes the extension of jurisdiction to cover all of the assets of the debtor, where that is to be determined, leading to a single insolvency proceeding. The approach may be regarded as "idealistic",<sup>94</sup> but its appeal is in the requirement that the creditor only has to file his or her claim once, that being with the main

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<sup>91</sup> I F Fletcher, 'The European Union Convention on Insolvency Proceedings: Choice-of-law Provisions' (1998) 33 *Tex Intl LJ* 121.

<sup>92</sup> See Keay (n 2) 81.

<sup>93</sup> For a discussion on territorialism and universalism, see Mevorach (n 6); G McCormack, 'Universalism in Insolvency Proceedings and the Common Law' (2012) 32(2) *OJLS* 325.

<sup>94</sup> I F Fletcher, *Insolvency in Private International Law* (2<sup>nd</sup> edn, OUP 2005) 12.

proceedings. This would lead to a single set of destructive rules as promoted by the jurisdiction where the main proceedings have been opened.<sup>95</sup>

*Shaping Cross-border Insolvency Law: the Influence of the Two Approaches*

Theoretically, universalism is ideal for the purposes of international cooperation,<sup>96</sup> but while the approach has near unanimous support, it has not always been favoured by some policy makers.<sup>97</sup> There were a variety of reasons why universalism was overlooked, with the path-dependency argument making a strong case against any drastic change that would go against a jurisdiction's cultural, historical, and legal customs. It dictated that any attempt to harmonise insolvency law<sup>98</sup> would strike at the "deep-seated cultural differences and the legal codes founded on quite different principles".<sup>99</sup> While national laws have posed problems for harmonisation projects, the extent to which path-dependency can derail any harmonisation goal has become a focal point.<sup>100</sup> The present view is that such barriers are not as impregnable as they were once considered, leaving the door open for a wider universal approach to be adopted.

To that end, identifying specific legal principles that could be harmonised has in recent years has led to a gradual merging of the universalist and territorial approaches in practice, even if this has been in a reduced capacity.<sup>101</sup> However, this is not to say that the procedures have now been simplified. At the point at which Brexit occurs, the UK would have to do more than simply incorporate aspects of EU law into its domestic law, since procedural disparities would continue to exist. This would be the natural result of attempting to harmonise practices, as the task of finding similarities would also involve highlighting legal differences. In turn this would create the possibility for existing procedures to evolve into new frameworks that reflect the new circumstances.

Disparities can therefore cause, rather than prevent change. However, the extent to which this occurs needs to be put into context. First, the method employed in relation to the substantive rules of a particular jurisdiction will not be compatible unless the jurisdiction develops its laws to comply with the universal approach. Second,

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<sup>95</sup> See generally, J L Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (1991) 65 Am Bankr LJ 457, 461; A Guzman, 'International Bankruptcy: In Defence of Universalism' (2000) 98 Mich L Rev 2177, 2179.

<sup>96</sup> For example, see P Wood, 'Principles of International Insolvency' (Sweet & Maxwell 1995) 228.

<sup>97</sup> Guzman (n 95) 2184.

<sup>98</sup> It will later be observed that the Regulation does not seek to harmonise insolvency laws of the various Member States, instead enshrining to the general principle that the applicable law shall be that of the State in which the particular insolvency proceedings (whether main, secondary or territorial) are being conducted; see L Sealy and D Milman, 'Annotated Guide to the Insolvency Legislation: Insolvency Acts 1986 and 2000; Enterprise Act 2002; EC Regulation on Insolvency Proceedings 2000; Insolvency Rules 1986' (2<sup>nd</sup> edn, Sweet & Maxwell 2004) 603.

<sup>99</sup> D G Boshkoff, 'Some Gloomy Thought concerning Cross-Border Insolvencies' (1994) 72 Wash U LQ 931, 939 (citing J Lowell 'Conflict of Laws as Applied to Assignment for Creditors' (1888) 1 Harv L Rev 259, 264).

<sup>100</sup> For example, see McCormack et al (n 60).

<sup>101</sup> A Keay and P Walton, *Insolvency Law: Corporate and Personal* (Jordans 2012) 405.

territorial distinctions will continue to act as national barriers therefore the logical conclusion would be to remove that barrier so the first point could be achieved. Third, if there was an unwillingness to comply with the first and second point, then a two tier system could come into force whereby the national laws will apply to the extent the issues are territorial, but would give way to the universal approach if the issue became extraterritorial. On this basis the position with the EIR Recast is clear. The EU's policy embraces both a national and universal approach depending on the specific insolvency principle in question. Cross-border insolvency law is therefore designed to be flexible in embracing national and universal laws with the purpose of reducing disagreements and to actively encourage compromise between states.

Notwithstanding the recent developments aimed at encouraging harmonisation,<sup>102</sup> member states have shown an unwillingness to compromise and have laws which may conflict with their own or encroach on their sovereignty.<sup>103</sup> As such, resistance to harmonisation should not be seen as an act that is beyond the norm. Harmonisation has the potential to discriminate against lesser-developed countries, as most multinational companies have their principal place of business in industrial, developed countries.<sup>104</sup> Therefore, adopting a universalist approach would likely lead to the laws of developed countries displacing the laws of those that are either under-developed in terms of international business operations, or lacking the recognition of being a regional financial and transactional hub within the area.<sup>105</sup>

While such a concern has not had an impact on the UK, over time Brexit has the potential to limit the UK's ability to influence developments within the EU cross-border insolvency framework. As such, the UK's support for universalism would be dependent on whether the remaining member states would continue to accommodate the UK's approach to cross-border insolvencies. Since this position is unlikely, attention has turned to the other theories of modified universalism and co-operative territoriality.<sup>106</sup>

Modified universalism<sup>107</sup> is best described as the most workable system for cross-border cooperation as it lacks the rigid requirements of universalism, in particular

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<sup>102</sup> See European Commission's 'Action plan on Building a Capital Market Union' (30 September 2015) <[http://ec.europa.eu/finance/consultations/2015/capital-markets-union/index\\_en.htm](http://ec.europa.eu/finance/consultations/2015/capital-markets-union/index_en.htm)> accessed 19 November 2017. For a detailed discussion on the Capital Markets Union see Ringe (n 82).

<sup>103</sup> C Farley, 'An Overview, Survey, and Critique of Administrating Cross-Border Insolvencies' (2004) 27 *Hous J Int'l L* 181, 202; VV Stepanov, 'Systems of Legal Regulation of Cross-Border Insolvency: Discussion of a Draft Agreement on International Bankruptcy Procedures in the CIS' (1999) 25 *Rev CEE L* 287, 293.

<sup>104</sup> F Tung, 'Fear of Commitment in International Bankruptcy' (2001) 33 *Geo Wash Int'l L Rev* 555, 576-77.

<sup>105</sup> *ibid*, see generally at 577.

<sup>106</sup> See L M LoPucki, 'Cooperation in International bankruptcy: a Post-Universalist approach' (1999) 84 *Cornell LR* 696, 725-28, 737, 742-43; J L Westbrook, 'A Global Solution to Multinational Default' (2000) 98 *Mich L R* 2276, 2298-99, 2302-09.

<sup>107</sup> The United Nations Commission on International Trade Law (UNCITRAL) Model Law, and the EC Regulation on Insolvency Proceedings are both examples of modified universalism.

the demand for foreign recognition.<sup>108</sup> However, despite its relaxed approach that could aid international texts, not all insolvency regimes have undertaken this approach, as evident in the response to the EIR,<sup>109</sup> and also the European Commission's 2014 Recommendations.<sup>110</sup>

While the EIR may have been categorised as a universalist text,<sup>111</sup> it was in fact a hybrid model combining both universalism and territorialism.<sup>112</sup> This was evident in how main proceedings could be initiated but allowed for secondary, or territorial proceedings in member states where the debtors' assets were situated.<sup>113</sup> However if secondary proceedings had been omitted from the text, and a strictly modified universalist approach followed, there would have been a possibility that the EIR's prospects for success would have been greatly enhanced. This approach would have permitted the EIR to further its universalist objective of forming an unified administration of assets while at the same time maintaining a level of flexibility that would permit it to work within the current "multi-forum, multi-law" business world.<sup>114</sup>

Such a world could include the UK's post-Brexit position, since it would likely present cross-border insolvency laws as a complex legal field that is overwhelmed and undermined by the availability of the cross-border secondary proceedings. However, this may not necessarily be the case since there exists a precondition in which an "establishment" must be identified before such proceedings could be brought in that jurisdiction.<sup>115</sup> The opening of secondary proceedings were designed to act as a measure to ensure that the cross-border nature of primary proceedings were workable, while critically establishing policies and procedures that left room for differences.<sup>116</sup> The scope of flexibility that this afforded brought success in fostering cooperation since the member states were not coerced into a position that was contrary to their legal standing.<sup>117</sup>

To this end, should a member state lack choice in implementing laws that are contrary to its national laws, the member state would likely find a way to influence

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<sup>108</sup> J L Westbrook, 'Multinational Enterprises in General Default: Chapter 15, the ALI Principles, and the EU Insolvency Regulation' (2002) 76 Am Bank LJ 1, 9; L M Clark and K Goldstein, 'Sacred Cows: How to Care for Secured Creditors' Rights in Cross-Border Bankruptcies' (2011) 46 Texas Intl L Rev 513, 518-19.

<sup>109</sup> J Pae, 'EU Regulation on Insolvency Proceedings: Need for a Modified Universal Approach' (2003) 27 Hastings Int'l & Comp. L. R 555, 556.

<sup>110</sup> See the European Commission's Recommendation 2014/135/EU on a 'new approach to business failure and insolvency' (2014) <[http://ec.europa.eu/justice/civil/commercial/insolvency/index\\_en.htm](http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm)> accessed 7 November 2017.

<sup>111</sup> As the principles of 'one law, one court' is emphasised, see W Leuke, 'The New European Law on International Insolvencies: A German Perspective' (2000) 17 Bank Dev J 369, 373.

<sup>112</sup> J Pae, 'EU Regulation on Insolvency Proceedings: Need for a Modified Universal Approach' (2003) 27 Hastings Int'l & Comp. L. R 555, 556; Stepanov (n 103) 300.

<sup>113</sup> Article 27, Insolvency Regulation.

<sup>114</sup> Westbrook (n 95) 2302.

<sup>115</sup> Must have an 'establishment' in that state, see Article 3(2) Insolvency Regulation. For a detailed discussion see Wood (n 22).

<sup>116</sup> Murphy (n 73) 139.

<sup>117</sup> *ibid* 140.

the extent in which it would apply. For example, a wide interpretation on the procedural requirements could be taken to reach a less restrictive approach, which subsequently could undermine the EIR's universalist goals.<sup>118</sup> To manage the potential danger of non-compliance, such as what was seen with the European Commission's 2014 recommendations, an inclusive approach that benefits all member states would be required.

#### *Harmonisation of Substantive Insolvency Law*

The pursuit towards harmonising substantive insolvency law across the member states has gained momentum over the last few years. A key turning point was the recommendations put forward by the European Commission in its 2014 report entitled *on a new approach to business failure and insolvency*,<sup>119</sup> which proposed to restructure frameworks across EU member states. The objective was put on the Commission's agenda for 2016 which, in addition, recommended that protection should be provided to the providers of new finance.

This latter recommendation was part of wider efforts put forward in the 2015 Commission's *Capital Markets Union Action Plan*.<sup>120</sup> This proposed a Directive to be developed in three key areas, namely: common principles on the use of early restructuring frameworks; rules to allow entrepreneurs to benefit from a second chance; and finally produce targeted measures for member states to increase the efficiency of insolvency, restructuring and discharge procedures.<sup>121</sup> Since the recommendations were published the Commission noted that they had only been implemented partially by the member states. The low up-take was attributed to the divergent national insolvency laws, and member states being concerned about the uncertainty as to who owns secured assets and whose rights take precedence in the event of a default. The pursuit of harmonisation it seemed had hampered the timely restructuring of viable companies in financial distress, and with it form a barrier to the free flow of capital. It is fortunate that despite the issues in other member states the UK has advanced restructuring laws that are not too dissimilar to the model that the Commission wants to promote. This would mean that the UK's position on cross-border insolvencies post-Brexit will not be too far removed to what already exists in the EU.

#### **Recommendations**

While there are still a number of uncertainties on the exact course that the UK's cross-border insolvency regime will take, it does present some foreseeable issues that would need to be addressed. In terms of protecting the UK's commercial and

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<sup>118</sup> F Tung, 'Is International Bankruptcy Possible' (2001) 23 Mich. J. Int'l. L. 31, 97.

<sup>119</sup> European Commission's Recommendation 2014/135/EU on a 'new approach to business failure and insolvency' (2014) <[http://ec.europa.eu/justice/civil/commercial/insolvency/index\\_en.htm](http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm)> accessed 7 November 2017.

<sup>120</sup> European Commission's Capital Markets Union Action Plan COM (2015) 468 Final <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52015DC0468>> assessed November 2 June 2017.

<sup>121</sup> For a discussion on the directive see, N Tollenaar, 'The European Commission's Proposal for a Directive on Preventive Restructuring Proceedings' (2017) 30(5) *Insolv Int* 65.

financial position after Brexit, it would be paramount to ensure that the UK continues to have some input in the shaping of cross-border insolvency laws. To that end, any future reform would do well to consider the following issues.

#### *Protecting the UK's Automatic Recognition*

In considering the threats that the UK could face following Brexit, the loss of its automatic recognition would be the most critical. If foreign jurisdictions did not provide the UK with recognition to those cases that operate outside of its jurisdiction, the UK's ability to effectively deal with cross-border insolvencies would be greatly diminished. To address this, the dynamics between the UK and the EU would have to be explored to determine whether the inclusion of the UK is what makes the cross-border insolvency laws successful. Should it be determined that a cross-border law would be enhanced with the UK included in the model, then this would be highly likely to encourage the EU to take measures to ensure that the present position is maintained. Should the existing laws not simply be extended to have application after Brexit, it seems quite possible that the benefits of the EU Regulation could be preserved in negotiations via an equivalent treaty between the UK and the EU.

The extent of the treaty, should one be required, would depend on whether a "soft" or "hard" Brexit is realised. Recent negotiations with the EU suggest that the soft version of Brexit is highly likely, although this is subject to change as the negotiations continue with the trade deals and concessions.<sup>122</sup>

#### *Expanding on the Brussels Recast Regulation*

To maintain its current position, the UK could consider entering into a similar agreement to Recast Brussels Regulation, which regulates jurisdiction and the recognition and enforcement of judgments between EU member states.<sup>123</sup> This option would depend on how the Recast Brussels Regulation and the EIR Recast are viewed, with some cases indicating that they are mutually exclusive instruments acting harmoniously together.<sup>124</sup> In practice, a broad interpretation to "civil and commercial" matters in the Brussels Recast Regulation has often been given but it has previously been suggested that the jurisdictional scope of the EIR (and now the EIR Recast) "should not be broadly interpreted".<sup>125</sup> That said, the CJEU has viewed the notion of insolvency-related actions in a fairly broad light

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<sup>122</sup> Theresa May has previously made it clear that she does not accept the terms *hard Brexit* and *soft Brexit*, preferring to state that she will negotiate the best possible deal for the United Kingdom (see Hansard HC Deb 18 December 2017, vol 633, col 757). However, the government's position on the single market and customs union, along with the willingness (and preference) to permit Ireland to have a soft border with Northern Ireland indicates a shift (in all but name) to a soft Brexit. To this end, and with concerns that the government do not produce a hard Brexit, the House of Lords have shown its desire to ensure that the Brexit strategy is as 'soft' as possible by making key amendments to the European Union (withdrawal) Bill 2017-19, see BBC news '10 defeats and counting...' (3 May 2018) <<http://www.bbc.co.uk/news/uk-politics-parliaments-43988189>> accessed 4 May 2018.

<sup>123</sup> Regulation (EU) 1215/2012 of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (Recast Brussels Regulation).

<sup>124</sup> For example, see *Seagon v. Deko* (Case C-339/07 [2009] ECR I-767).

<sup>125</sup> *Polymer Vision v Van Dooren* [2011] EWHC 2951, at paras. 46 and 62.



causing further confusion as to what would be the correct approach on this matter.<sup>126</sup> Expanding the Recast Brussels Regulation remains an option, but it will be subject to how this is viewed on the international scene. Given the uncertainty of Brexit, it would be highly unlikely that the UK would want to adopt any measures that would only add to the confusion of its position.

#### *The Lugano Convention Pledge*

An interesting option would be for the UK to join the “Lugano Convention 2007”, which imposes a similar regime to the Brussels Recast Regulation in relation to recognition and enforcement (in civil and commercial matters) of judgments between EU Member States, Switzerland, Iceland, and Norway. However, there are some limitations with the Lugano Convention since it would not apply to tax, customs and administrative matters or to the status and legal capacity of natural persons, rights in property arising out of matrimonial relationships, wills and succession, bankruptcy or composition, social security or arbitration. While the limitations may appear too extensive, the Convention’s importance is realised in its ability to facilitate the mutual recognition and enforcement of judgments handed down by the national courts of the EU member states and those of the countries named above. While it offers a replacement for the Recast Brussels Regulations, the UK would have to be mindful that the process of joining would likely take at least 12 months,<sup>127</sup> as it could trigger a lengthy negotiation process with the signatories, who all have to agree.<sup>128</sup>

#### *Widen the Scope to Include further Designated Countries*

Referring back to the law that already exists in the UK, the UK could look to expand section 426 of the Insolvency Act 1986 to include further designated countries<sup>129</sup> (perhaps all EU member states) to widen its scope, or as a radical alternative, dispense with the requirement for designation altogether.<sup>130</sup> The latter option could only be achieved if a number of steps were taken, such as to dilute the “duty” to act in response to a section 426 request (which is far from being an absolute duty in any event)<sup>131</sup> and make relief discretionary. To this, extending the designated countries would only be workable if wide discretion was afforded to section 426, and that there was nothing unacceptably discriminatory or otherwise contrary to public policy in

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<sup>126</sup> *Gourdain v Nadler* (Case 133/78 [1979] 3 CMLR 180).

<sup>127</sup> D Greene, ‘Brexit Manoeuvres’ (2018) 168 NLJ 7781 7.

<sup>128</sup> For example, the EU, Switzerland and the EEA states (Norway, Lichtenstein, Iceland). It is incorporated in UK law by the Civil Jurisdiction and Judgments Regulations 2009 (SI 2009/3131). See also E Wymeersch, ‘Post-Brexit: the Factors Increasing the Pressure to Refer to EU Law’ (2018) 3 JIBFL 135, 136.

<sup>129</sup> The current list includes: The Channel Islands (Jersey, Guernsey, Sark and Alderney), Isle of Man, Anguilla, Australia, Bahamas, Bermuda, Botswana, Brunei Darussalam, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Ireland, Malaysia, Montserrat, New Zealand, St Helena, South Africa, Turks and Caicos Islands, Tuvalu, Virgin Islands.

<sup>130</sup> McCormack and Anderson (n 11) 553.

<sup>131</sup> See *Hughes v Hanover Rucksversicherungs AG* [1997] BCC 921 CA (Civ Div). For a general discussion on the discretion of the court, see *I Fletcher, Insolvency in Private International Law* (2nd edn Oxford University Press 2005) 239–240.

the country's insolvency provisions.<sup>132</sup> Should a flexible approach not be adopted there would be a danger that section 426 would be narrowly construed and as such be of limited value to the UK as an option post-Brexit.

*Would a New Restructuring Law be Desirable Post-Brexit?*

As a last resort, or as a radical new alternative to the existing legal framework, the UK could take the opportunity to rethink its cross-border insolvency approach and create a new restructuring law akin to the US Chapter 11. Chapter 11, given its extensive influence,<sup>133</sup> has long since been considered a desirable model for European restructuring laws.<sup>134</sup> This can be seen in the similarities that are evident between Chapter 11 and the European Commission's proposed European restructuring directive,<sup>135</sup> the proposal of which is firmly anchored in the Capital Markets Union project.<sup>136</sup> Whether the UK would opt to redesign its restructuring laws would depend on how effective its scheme of arrangement remains after Brexit. Since Chapter 11 is very similar to the scheme of arrangement, the question would be whether it would be more beneficial to amend the scheme to achieve the desired result. In addition, the UK would have to appreciate that Chapter 11 has its own complications since it does not always operate as intended given the rise of business sales in the US, and also Chapter 11 depends on specialist courts, something which the UK does not have.

Should the UK consider that it would not be suitable to endorse aspects of the US bankruptcy regime it could simply align its existing laws to reflect what the current cross-border insolvency laws are at the point of Brexit. On this basis, automatic recognition from the other member states would be crucial to give credibility to the UK's redesigned cross-border law. Therefore, to encourage the member states to accept the UK's model it would likely have to look similar to EIR Recast. However, while a sense of familiarity could be achieved, the UK would be wise to take the opportunity to deal with some of the increased complexities<sup>137</sup> evident in EIR Recast and tighten the scope around the EIR Recast which has the potential to lead to inflexible results which subvert the establishment of a rescue-friendly culture.<sup>138</sup> With such restrictions relaxed it would be likely that the UK's redeveloped restructuring model would appeal to businesses and creditors alike.

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<sup>132</sup> McCormack (n 93) 334.

<sup>133</sup> See E Warren and J Westbrook, 'The Success of Chapter 11: A Challenge to the Critics' (2009) 107 Mich L Rev 603, 604.

<sup>134</sup> See M Brouwer, 'Reorganization in US and European Bankruptcy Law' (2006) 22 EJLE 5; A Tilley, 'European Restructuring: Clarifying Trans-Atlantic Misconceptions' (2005) 8 Journal of Private Equity 99; C Pochet, 'Institutional Complementarities within Corporate Governance Systems: A Comparative Study of Bankruptcy Rules' (2002) 6 Journal of Management and Governance 343.

<sup>135</sup> COM (2016) 723 final 2016/0359 (COD); and see also European Commission Staff Working Document accompanying the proposal, SWD (2016) 357 final.

<sup>136</sup> McCormack (n 49) 532.

<sup>137</sup> I Fletcher, 'The European Insolvency Regulation Recast: the Main Features of the New Law' (2005) 28(7) Insolv Int 100, 101.

<sup>138</sup> MT Epeoglou, 'The Recast European Insolvency Regulation: a Missed Opportunity for Restructuring Business in Europe' (2017) 6(1) UCL JL & J 31, 42.

## **Conclusion**

Brexit presents an unprecedented situation within the EU that will challenge the way that cross-border insolvencies are undertaken. When the UK leaves the EU it remains unclear as to what laws will continue to apply, and what laws would need to be adopted to ensure that the UK can effectively deal with cross-border insolvencies. Before Brexit occurs the UK needs to decide what its response should be – to attempt to maintain the status quo, or to see Brexit as an opportunity to redesign its cross-border insolvency rules.

The answer to this question it will depend on whether the UK has a choice in the matter, or whether that decision would be made on its behalf. The extent to which change will occur is unlikely to be known for some time since the UK continues to negotiate the finer details of its exit plan. Should the EIR Recast continue to apply it would be because it has been mutually decided by the UK and the EU that it would be in their best interests. An important factor that is likely to influence this decision would be the need to maintain predictable outcomes in cross-border insolvencies so that creditors can be reassured about their rights, and in turn encouraged to invest in businesses.

While Brexit will provide many challenges to the UK, the loss of its automatic recognition could potentially have dire consequences in its ability to remain a key player in European cross-border insolvency law. Whether the UK decides to enact a law to take into account EIR Recast or it decides to expand on section 426 remains to be seen. Given the ease in which the former option could be achieved it is likely that this would be preferred, especially since it would build on the existing judge-made decisions that are integrated in the UK's common law. Any ambitious plan for the UK to rewrite its approach to cross-border insolvencies would likely struggle to amount to anything different to what already currently applies given the role that path dependency plays.

Ultimately, given the complexities that Brexit is likely to raise, the extent of the challenges would depend on the legal and political climate that the UK finds itself in when the negotiations have been completed. Until then, the questions need to continue.