

ADRIAN WALTERS

***THE IMPACT OF BREXIT ON JUDICIAL
COOPERATION IN CROSS-BORDER INSOLVENCY
AND RESTRUCTURING IN THE EUROPEAN UNION***

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1. Introduction and context

This article considers the implications of Brexit for cross-border insolvency and restructuring practice under the EU Regulation on Insolvency Proceedings (recast).¹ I will not discuss the detailed implications of Brexit for the EU’s judicial cooperation framework. But much of what I will say about the implications of Brexit for the Insolvency Regulation is directly relevant to other EU judicial cooperation instruments, such as the Brussels Regulation (recast),² that have their legal foundation in Article 81 of the Treaty on the Functioning of the European Union.

The article proceeds as follows, First, I will provide an account of the Brexit phenomenon and an outline of the Brexit negotiations up to the time of writing (July 2018). Second, I will describe law and practice under the Insolvency Regulation at the present moment. These two steps will provide the necessary context for the analysis of how Brexit will affect current practice in the field of cross-border insolvency and restructuring within Europe.

2. The Brexit phenomenon

So what exactly is Brexit?

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¹ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) 2015 O.J. (L. 141/19) [hereinafter “Insolvency Regulation”] (revising and recasting Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, 2000 O.J. (L. 60/1)).

² Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).

As this is a law review article written with an international audience of lawyers in mind, I will characterize Brexit primarily as a *legal* process. But let me offer some personal thoughts on the wider political, economic, social, and cultural background to the UK electorate's decision in the referendum of 23 June 2016 to leave the EU.

Brexit is, of course, a revolution with many causes and I do not have the space to discuss all of those causes here. However, I think Brexit is best understood as the final culmination of a process that unfolded over the forty years prior to June 2016 in which the EU has sought to advance the project of wider and deeper integration while, at the same time, finding ways to accommodate British exceptionalism.

As European integration moved forward with the establishment of the EU in the Maastricht Treaty³ and the subsequent treaty amendments culminating in the Lisbon Treaty of 2007, euroscepticism in the UK grew. The correlation is far from perfect as polling evidence over time suggests considerable volatility in public attitudes towards the EU.⁴ But a persistent theme of public sentiment that has been reflected in UK government policy formation and diplomatic practice is that the UK is generally in favour of the EU's *transactional and market* aspects – the internal market and the customs union – but much less enthusiastic about the treaty commitment to “ever closer union”⁵ and what that might entail in terms of wider and deeper political and monetary integration and further loss of sovereignty.

This tendency to resist the broader political, social, cultural, and monetary aspects of the EU integration project was exacerbated by several other factors: the eastward expansion of the EU and its contribution to inward immigration into the UK under free movement rules; the global financial crisis; the Eurozone crisis; and the refugee crisis. Under the leadership of David Cameron, the UK government increasingly worried about the different priorities of the Eurozone countries as compared to non-Eurozone EU member states, especially the UK. Cameron's view was that the EU could not and should not pursue a common destination (such as a federal Europe) with member states heading for that destination at different speeds (a so-called multi-speed EU). He preferred instead the idea of a Europe of different destinations with a common trading platform – a Europe in which the core Eurozone countries could pursue policies that are essential to support the euro such as banking and fiscal union but in which non-eurozone members could continue to participate fully in the internal market without any binding commitment to integrate further, and without any possibility that they could be outvoted on matters pertaining to the transactional aspects of EU membership that the non-eurozone countries mainly care about.⁶

³ See now Consolidated Version of The Treaty on European Union, 26.10.2012, O.J. C 326/13 (“TEU”).

⁴ *Polling history: 40 years of British views on ‘in or out’ of Europe*, The Conversation, June 21, 2016, <https://theconversation.com/polling-history-40-years-of-british-views-on-in-or-out-of-europe-61250>.

⁵ TEU, art. 1 (“This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe...”).

⁶ For an excellent first hand account of Cameron's thinking on Europe see IVAN ROGERS, *The inside story of how David Cameron drove Britain to Brexit*, PROSPECT, 25 November 2017,

Given the UK's longstanding ambivalence towards European integration in the post-Maastricht era and the cocktail of factors referred to above, the core message of the Vote Leave campaign that the UK should "take back control" from Brussels resonated powerfully. As there had been no referendum on UK membership since 1975 and, it is plausible to suggest that the benefits of the rapid phase of integration and expansion between Maastricht and Lisbon had not been explained directly to the British people in the period between 1990 and 2015, Vote Leave's simple, beguiling, anti-establishment narrative attributing all of the UK's ills to unelected bureaucrats in Brussels, amplified by strong anti-EU sentiment in much of the popular press, captured the public imagination. The Leave campaign was also highly successful in politicizing the impact of free movement on immigration.

Of course, one irony of Brexit is that the UK had arguably the best membership terms of any of the EU28 – benefits such as the Thatcher era budget rebate, and opt outs from the Schengen Agreement on border controls and visa policy⁷ and from the Euro.⁸

3. *The meaning of Brexit in legal terms*

Brexit is both a *process* and a *destination*. It is the process by which the UK is leaving the EU's supranational treaty-based legal order. It is also the end state after the process of leaving is complete. From the EU's perspective, once the UK has left, the UK will be a third country. So my working legal definition of Brexit is as follows. It is the process by which the UK leaves the EU legal order and becomes a third country as far as its relations with the EU are concerned.⁹

4. *The Brexit legal process: May 2015 – July 2018*

David Cameron's Conservative Party governed in coalition with the Liberal Democrats between 2010 and 2015. At the general election in May 2015, the Conservatives campaigned on the basis that, if elected, they would seek to resolve the European question by putting it to a referendum.¹⁰ It was this promise of a referendum on the UK's membership of the EU that

<https://www.prospectmagazine.co.uk/politics/the-inside-story-of-how-david-cameron-drove-britain-to-brexit>. For a similar view see GEORGE SOROS, *Remarks delivered at the European Council on Foreign Relations*, 29 May 2018, <https://www.georgesoros.com/2018/05/29/remarks-delivered-at-the-european-council-on-foreign-relations/>.

⁷ A Protocol annexed to the TEU by the Treaty of Amsterdam records that Ireland and the UK (which share a common travel area) were not bound by Schengen. The same Protocol granted both countries a right wholly or partially to opt into Schengen.

⁸ A Protocol annexed to the Maastricht Treaty recognized that the UK would be under no obligation to participate in economic and monetary union without a separate decision by its government and Parliament. The UK also had an opt out from the social policy aspects of the Maastricht Treaty.

⁹ TEU, art. 21 provides the general legal basis for the EU's external dealings with third countries across the whole gamut of international relations including trade cooperation, international security, environmental standards, and social and economic development.

¹⁰ The Conservative Party Manifesto 2015, <https://www.bond.org.uk/data/files/Blog/ConservativeManifesto2015.pdf> at 72 ("It will be a fundamental principle of a future Conservative Government that membership of the European Union depends on the consent

arguably won the Conservatives an outright parliamentary majority in May 2015 (the first time they had done so since 1992). Cameron's calculation, which had been trailed in a speech about the EU he gave in January 2013,¹¹ was that the electorate would support his idea of a "new settlement" between the UK and the EU and this would enable him to re-establish public consent for EU membership and decisively resolve a long standing split within his own party.

Having won the election, Cameron's government set about honouring the campaign promise. While Cameron sought to renegotiate the terms of the UK's membership of the EU along the lines of his January 2013 speech,¹² Parliament passed primary legislation that provided the domestic legal basis for the "in-out" referendum. This legislation – the European Union Referendum Act 2015¹³ – established the referendum question ("should the United Kingdom remain a member of the European Union or leave the European Union?"), set out who would be entitled to vote, and made other rules about the conduct of the referendum, including rules about campaign expenditure. It is important to note that Parliament did not bind itself to accept and implement the outcome of the referendum in the 2015 Act. The referendum was therefore "consultative" or "advisory".¹⁴ The government used the fact that the referendum was in legal terms advisory rather than binding on Parliament to justify rejecting legislative amendments that would have imposed super-majority voting requirements reflecting the constitutional significance of a decision to leave the EU.¹⁵ In practice, the Cameron government's political commitment to implement the outcome of the referendum has been treated by the UK Parliament as *de facto* binding even though in strict legal terms the 2015 Act was non-binding.¹⁶

of the British people – and in recent years that consent has worn wafer-thin. That's why, after the election, we will negotiate a new settlement for Britain in Europe, and then ask the British people whether they want to stay in the EU on this reformed basis or leave. David Cameron has committed that he will only lead a government that offers an in-out referendum. We will hold that in-out referendum before the end of 2017 and respect the outcome.")

¹¹ See <https://www.gov.uk/government/speeches/eu-speech-at-bloomberg>.

¹² For the outcomes of the renegotiation see the conclusions of the European Council meeting of 18 and 19 February 2016: <http://docs.dpaq.de/10395-0216-euco-conclusions.pdf>.

¹³ Elizabeth II 2015 c.36.

¹⁴ See ELISE UBEROI, *Briefing Paper Number 07212 European Union Referendum Bill 2015-16*, 3 June 2015, at 25.

¹⁵ The Scottish Nationalist Party proposed an amendment with support from Plaid Cymru (the Welsh nationalists) that would have required a majority in favour of leaving the EU in each of the four constituent nations (England, Wales, Scotland, and Northern Ireland) as well as a majority for leaving in the UK as a whole. This was rejected by the Minister for Europe, speaking for the government, HANSARD HC, 16 June 2015, COL. 231 ("The legislation is about holding a vote; it makes no provision for what follows. The referendum is advisory, as was the case for both the 1975 referendum on Europe and the Scottish independence vote last year. In neither of those cases was there a threshold for the interpretation of the result. The Government takes the view that, in respect of EU membership, we are one United Kingdom. The referendum will be on the subject of the United Kingdom's membership of the European Union and it is therefore right that there should be one referendum and one result.")

¹⁶ The effect, in the words of one of the UK's leading constitutional scholars, is that "the sovereignty of the people is coming to trump the sovereignty of parliament": VERNON BOGDANOR, *Brexit broke parliament. Now only the people can fix it*, The Guardian, 23 July 2018,

In the event, as is well known, the UK electorate voted on 23 June 2016 by a margin of 51.9% to 48.1% to leave the EU.

The next and critically important stage of the legal process of Brexit was the UK government's notification to the European Council of the UK's intention to leave the EU. Article 50(1), (2) of the TEU provides that any member state may decide to withdraw from the EU in accordance with its own constitutional requirements and, having decided to withdraw shall notify the European Council of the decision. Having succeeded David Cameron who resigned as Prime Minister after losing the referendum, Theresa May duly notified the European Council of the UK's intention to leave on 29 March 2017.¹⁷ The government's Article 50 notification was pre-authorized by Parliament¹⁸ following a decision of the UK Supreme Court, which held that the government could not trigger such a significant change in the UK's constitutional arrangements under executive prerogative powers without parliamentary assent.¹⁹

The legal significance of the Article 50 notification is twofold. First, Article 50(2) mandates the EU, acting on guidelines provided by the European Council, "to negotiate and conclude an agreement with the leaving state, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union". The Brexit negotiations, led on the EU side by former European Commissioner, Michel Barnier, are accordingly working towards two things: (i) a withdrawal treaty designed to settle such matters as citizens' rights (the rights of EU citizens in the UK and the rights of UK nationals who are based in other member states), transitional arrangements, and the UK's financial obligations; and (ii) a framework agreement, which will amount to a political declaration of the outlines of the future relationship between the EU and the UK as a third country.

The UK's notification therefore started the clock ticking and, unless the EU agrees to extend the two-year period or the withdrawal agreement provides for the UK's departure at a later date or the UK revokes the Article 50 notification,²⁰ the default position is that the UK

https://www.theguardian.com/commentisfree/2018/jul/23/brexit-broke-parliament-people-fix-election-dilemma?CMP=share_btn_tw.

¹⁷ See <https://www.gov.uk/government/publications/prime-ministers-letter-to-donald-tusk-triggering-article-50> ("Today, therefore, I am writing to give effect to the democratic decision people of the United Kingdom. I hereby notify the European Council in accordance with Article 50(2) of the Treaty on European Union of the United Kingdom's intention to withdraw from the European Union.")

¹⁸ European Union (Notification of Withdrawal) Act 2017, Elizabeth II 2017 c.9. The ease with which this legislation passed reflects the collective inclination of parliamentarians to regard themselves as politically, if not legally, bound by the referendum result.

¹⁹ *Regina (Miller and another) v Secretary of State for Exiting the European Union* [2017] UKSC 5, [2018] AC 61.

²⁰ It is clear that, having left, a former member state could only rejoin the EU under the procedure set out in Article 49 TEU. However, Article 50 is silent on whether or not a leaving state can unilaterally revoke an article 50 notification. The risk for the EU if unilateral revocation is legally permissible is that a leaving state could use the processes of notification, revocation, and re-notification to improve its negotiating position. Politically, however, it is plausible to think that the EU would welcome a change of heart from a leaving state where the state was acting in good faith based on a clear domestic mandate. Many serious commentators in the UK take the view

will leave the EU as the clock strikes midnight Central European Time at the end of 29 March 2019.

Shortly after the Article 50 notification, Theresa May called a snap general election with the aim of increasing the Conservative parliamentary majority and securing her own mandate for the Brexit negotiations. However, the general election of 8 June 2017 resulted in a hung parliament. The Conservatives formed a minority government with support from the Democratic Unionist Party, a small party from Northern Ireland, which favours Northern Ireland remaining as part of the UK. At the time of writing (July 2018) the minority government continues in office and the next scheduled general election will not take place until 2022.²¹

To date the UK and EU have made some progress in negotiating a withdrawal agreement and have begun negotiations on the future framework for UK-EU relations. There is still a non-trivial risk of a “no deal” Brexit meaning that the UK would leave without agreement either on the terms of withdrawal or as regards the future framework. This is because the UK seeks to use the threat of “no deal” to secure favourable terms for the future framework. The challenge in reaching an accommodation for the future is the negotiating “red lines” on each side. The UK government’s starting position is that it wishes to have an independent trade and immigration policy and end the jurisdiction of the Court of Justice over the UK²² but at the same time enjoy the “greatest possible access” to the EU’s internal market through what amounts to a bespoke free trade agreement that would provide the legal foundation for frictionless market access and an open Irish border.²³ On the other side of the table, the EU has asserted resolutely and consistently that its founding principles – the “four freedoms” – are indivisible and non-negotiable and, accordingly, has resisted what it describes as “cherrypicking.” This stance makes it apparently impossible for the UK to remain as a member

that an Article 50 notification is unilaterally revocable as long as the member state revoking its notification acts in good faith. See e.g. DAVID ALLEN GREEN, *The three legal paths to stop Brexit are blocked*, Financial Times, 4 April 2018.

²¹ In accordance with the provisions of the Fixed-term Parliaments Act 2011, Elizabeth II 2011 c.14.

²² THERESA MAY, *The government’s negotiating objectives for exiting the EU*, speech at Lancaster House, 17 January 2017, <https://www.gov.uk/government/speeches/the-governments-negotiating-objectives-for-exiting-the-eu-pm-speech>.

²³ THERESA MAY, *PM speech on our future economic partnership with the European Union*, speech at the Mansion House, 2 March 2018, <https://www.gov.uk/government/speeches/pm-speech-on-our-future-economic-partnership-with-the-european-union> (“So existing models do not provide the best way forward for either the UK or the EU...what is clear is that for us both to meet our objectives we need to look beyond the precedents, and find a new balance...So I want the broadest and deepest possible partnership – covering more sectors and co-operating more fully than any Free Trade Agreement anywhere in the world today.”) The UK government’s so-called Chequers White Paper of July 2018 softens the UK’s red lines considerably. See HM GOVERNMENT, *The future relationship between the United Kingdom and the European Union*, Cm 9593 (July 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf. However, at the time of writing, the White Paper’s contents had not been accepted by the EU and were the subject of intense political conflict within the UK government and parliament.

of the internal market without fully accepting free movement of persons. Some EU leaders have quite justifiably accused the UK of “wanting to have its cake and eat it.”²⁴ One suspects that the EU is very willing to negotiate within the parameters of existing models (such as the EEA Agreement, the EU-Canada Comprehensive Economic and Trade Agreement, and the Ukraine-EU Association Agreement). Indeed, the EU has a powerful existential interest in deterring other member states from following the UK’s example²⁵ and arriving at a framework that fits roughly within the parameters of its existing third country relationships, and which would involve trade-offs that, in aggregate, make it less desirable from the UK’s perspective than full EU membership.

A big sticking point for both sides in the negotiations is the Irish border question. The UK government is committed by intergovernmental agreement²⁶ to maintaining an open border between Northern Ireland (part of the UK) and the Republic of Ireland. But this international commitment to an open border is difficult to square with the fact that, after Brexit, the Irish border will become the EU’s external border with a third country. The UK government has been split over what customs arrangements would work to reconcile the UK’s impending third country status with its bilateral obligations to Ireland (which as a continuing member state enjoys the powerful backing of the EU as regards resolution of the border question). But it seems that only a special status for Northern Ireland within the EU (which would mean placing an internal border within the UK in the Irish Sea which is unacceptable to the UK government and anathema to the Democratic Unionists) or the UK remaining within the EU internal market and maintaining a customs union with the EU provide robust solutions to the Irish border problem. A current draft protocol to the withdrawal agreement provides for a backstop solution in Ireland that would involve the creation of a common regulatory area allowing for free movement of goods across the Irish border unless subsequent agreement between the EU and UK is reached on alternative arrangements that avoid a hard border.²⁷

Aside from the Irish border question, if we assume that the UK and EU sign off on the current draft of the withdrawal agreement, the agreement would come into effect on 30 March

²⁴ The Prime Minister of Luxembourg, Xavier Bettel is reported to have said the following in November 2016: “The UK wants to have its cake and eat it. Before they were in and they had many opt-outs; now they want to be out with many opt-ins. We’re not Facebook where there’s an ‘it’s complicated’ status.” There is, it seems, a persistent failure in the UK to understand that “[n]egotiating disintegration is... very different from negotiating differentiation”: ANDREW GLENCROSS, *This Time it’s Different: Legitimacy and the Limits of Differentiation after Brexit*, *The Political Quarterly*, 7 June 2018, <https://doi.org/10.1111/1467-923X.12525>.

²⁵ RONAN MCREA, *EU cannot give May the deal she wants without risking its own existence*, *Irish Times*, 30 July 2018.

²⁶ The Belfast Agreement 1998, also known as the Good Friday Agreement, <https://www.gov.uk/government/publications/the-belfast-agreement>.

²⁷ Joint Report from the Negotiators of the European Union and the United Kingdom Government on Progress During Phase 1 of Negotiations under Article 50 TEU on the United Kingdom’s Orderly Withdrawal from the European Union, https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf at para.49; Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, Protocol on Ireland / Northern Ireland, https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf arts 3-4, 15.

2019 but there would be a transitional period in which the EU *acquis* would continue to apply in the UK until 31 December 2020.²⁸ The UK government calls the transitional period the “implementation period”.²⁹

The withdrawal agreement and future framework agreement will provide the legal underpinnings of Brexit in international law.³⁰ But there is a further domestic aspect of the Brexit legal process that will shape the impact of Brexit after 29 March 2019 (or 30 December 2020 if the transitional agreement is formally agreed). The UK has a dualist theory of international law. Thus, when the UK joined the Common Market, Parliament enacted domestic legislation – the European Communities Act 1972³¹ – to recognize the effects of what is now the EU legal order within the UK’s legal system. The government has determined that domestic legislation is also needed to manage the UK’s departure from the EU legal order and, as a consequence, Parliament has enacted the European Union (Withdrawal) Act 2018 (“the 2018 Act”).

The 2018 Act will repeal the European Communities Act 1972 on exit day (29 March 2019) but, with the aim of providing legal certainty, sections 3-4 of the 2018 Act also domesticate more or less the entire EU *acquis* on exit day. The result will be that EU-derived law (such as domestic law implementing directives) and direct EU legislation (that is, EU regulations) as it applies immediately before exit day will continue to form part of domestic UK law on and after exit day. This will introduce into the UK legal order the concept of retained EU law with the idea being that the UK, as a matter of UK law, will continue to apply EU law *as it stood just before exit day!* Moreover, section 5(2) of the 2018 Act provides that the principle of EU law supremacy will continue to apply on or after exit day to the interpretation of UK law made before exit day. The UK government will then be in a position to decide over time which parts of retained EU law to keep and which parts of EU law to repeal. The theory is that this will give the UK government scope to determine at its leisure where it wishes UK law to remain closely aligned with EU law and where it wishes UK law to diverge from EU law. Of course, the 2018 Act does not *require* the UK courts to apply any post-Brexit changes to EU law or any post-Brexit decisions of the Court of Justice interpreting EU law. But the effect will

²⁸ Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community, https://ec.europa.eu/commission/sites/beta-political/files/draft_withdrawal_agreement.pdf arts 121, 168.

²⁹ DEPARTMENT FOR EXITING THE EUROPEAN UNION, *Legislating for the Withdrawal Agreement between the United Kingdom and the European Union*, Cm 9674 (July 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728757/6.4737_Cm9674_Legislating_for_the_withdrawal_agreement_FINAL_230718_v3a_WEB_PM.pdf from para. 52.

³⁰ The withdrawal agreement will have to be ratified by the European Parliament per Article 281(3) TFEU. Here too the Irish border question is a major sticking point as the European Parliament’s Brexit Steering Group has indicated that the Parliament will not consent to the withdrawal agreement unless it contains “a credible, genuine and operational ‘backstop’” for the border. See this press release dated 27 July 2018: <http://www.europarl.europa.eu/news/en/press-room/20180727IPR08701/brexit-no-withdrawal-agreement-without-a-backstop-for-the-irish-border>.

³¹ Elizabeth II 1972 c.68.

not be entirely to “freeze” applicable retained EU law in whatever form it takes on 29 March 2019 because UK courts and tribunals will be permitted by section 6(2) of the 2018 Act to “have regard to anything done on or after exit day by the European Court, another EU entity or the EU so far as it is relevant to any matter before the court or tribunal” when interpreting retained EU law. While “have regard” means “consider” and is therefore a weaker duty than a duty to “follow” or “apply” and post-Brexit EU legislative changes will have no direct legal effect, section 6(2) offers the possibility that UK courts will interpret retained EU law to reflect post-Brexit changes to the law at the EU level.

This aspect of the Brexit process is important in the cross-border insolvency and restructuring context because it means that the UK will continue to apply the Insolvency Regulation unilaterally as a matter of UK domestic law after Brexit until such time as it is repealed and replaced by something else. I will discuss further the implications of the 2018 Act for UK recognition of insolvency proceedings opened in the remaining EU member states below.

Section 13 of the 2018 Act also creates a mechanism for Parliament to approve the negotiated UK-EU withdrawal and framework agreements and makes parliamentary ratification of the withdrawal agreement conditional on such approval. This means in theory that Parliament could reject the agreements that the UK government reaches with the EU pursuant to Article 50(2) TEU and potentially force the UK government to re-open negotiations or perhaps seek an extension of the two-year Article 50 period. At the time of writing (July 2018) there is therefore continuing uncertainty about the end state. As things stand, however, it is enshrined in UK law that the UK will leave the EU with or without a deal on 29 March 2019.³²

5. *Some working assumptions about the contours of Brexit*

For the purposes of the analysis in the remainder of the article I will make the following two assumptions:

1. That the UK does indeed “Brexit” and becomes a third country on 29 March 2019.
2. That the draft withdrawal agreement in something like its current form is ratified and that EU law continues to apply in the UK until 31 December 2020 by treaty as a matter of EU / international law and domestically in the UK by virtue of parliamentary ratification of the withdrawal agreement.

The first assumption holds even in the event of a “no deal” Brexit. The second assumption only holds if the UK and EU reach agreement on the terms of the UK’s

³² On the rule of law and wider constitutional implications of Parliament’s role in the withdrawal process see JACK SIMSON CAIRD ET AL, *The Withdrawal Agreement and the Political Declaration: A Preliminary Rule of Law Analysis* (Bingham Centre for the Rule of Law, 2018), <https://binghamcentre.bii.cl.org/withdrawalbillworkinggroup/waandpdfrolanalysis>.

withdrawal and as regards the future framework. In a “no deal” scenario, the UK would cease to be subject to, and cease to benefit from, the EU *acquis* on 29 March 2019. But as we have seen retained EU law would continue to apply domestically by virtue of the 2018 Act. In a “deal” scenario, we can safely assume that the transitional provisions of the domestically ratified withdrawal agreement would supersede the 2018 Act provisions on retained EU law for the transitional period. In other words, if there were a deal, the relevant EU law (for our purposes, the Insolvency Regulation) would presumably only become retained EU law for the purposes of the 2018 Act at the end of 31 December 2020.

It is not yet entirely clear how the concept of retained EU law (which, as we have seen above, is defined by reference to EU law as it stands immediately before 29 March 2019) will mesh with the transitional period in the withdrawal agreement. But the government has power under section 9 of the 2018 Act to make regulations necessary to implement the withdrawal agreement and this power could conceivably be used to redefine the scope of retained EU law to reflect the transitional period. Alternatively, the domestic legislation that is necessary to ratify the withdrawal agreement could address the point. Either way, in my opinion, as under the withdrawal agreement the UK would remain subject to the *acquis* and the jurisdiction of the Court of Justice until 31 December 2020 the reference date for the concept of retained EU law in the 2018 Act would surely have to be changed from 29 March 2019 to 31 December 2020 to reflect the legal reality enshrined in international law that EU law and jurisdiction would continue to apply during the transitional period.³³ It would have been much easier simply to provide in the 2018 Act for the UK’s exit to take place on a day to be appointed and then align the exit day with the end of the transitional period once this is agreed.³⁴ But this was politically

³³ This appears to be what the UK government now has in mind. See DEPARTMENT FOR EXITING THE EUROPEAN UNION, *Legislating for the Withdrawal Agreement between the United Kingdom and the European Union*, Cm 9674 (July 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/728757/6_4737_Cm9674_Legislating_for_the_withdrawl_agreement_FINAL_230718_v3a_WEB_PM.pdf at paras. 60 & 69 (“On exit day (29 March 2019) the EU (Withdrawal) Act 2018 will repeal the [European Communities Act 1972]. It will be necessary, however, to ensure that EU law continues to apply in the UK during the implementation period. This will be achieved by way of transitional provision, in which the Bill will amend the EU (Withdrawal) Act 2018 so that the effect of the [European Communities Act] is saved for the time-limited implementation period. Exit day, as defined in the EU (Withdrawal) Act 2018, will remain 29 March 2019. This approach will provide legal certainty to businesses and individuals during the implementation period by ensuring that there is continuity in the effect that EU law has in the UK during this time. The Bill [to implement the Withdrawal Agreement] will make provision to end this saving of the effect of the [European Communities Act] on 31 December 2020... EU rules and regulations will continue to apply in the UK during the implementation period. This means that some provision of the EU (Withdrawal) Act 2018 will not now be needed until the end of the implementation period. The Bill will therefore need to amend the EU (Withdrawal) Act 2018 so that conversion of EU law into ‘retained EU law’, and the domestication of historic CJEU case law, can take place at the end of the implementation period.”

³⁴ DAVID ALLEN GREEN, ‘Saving’ the repeal of EU law really means ignoring Brexit day, *Financial Times*, 24 July 2018. For further discussion from a leading UK constitutional law scholar see MARK ELLIOTT, *Legislating in the dark: The Government’s White Paper on the Withdrawal Agreement Bill*,

unacceptable to so-called “hard Brexiteers” who worry that the longer the UK’s formal exit from the EU is delayed, the greater the risk that Brexit could be reversed.

Based on my two assumptions, I will discuss how Brexit will affect the treatment of UK insolvency proceedings going outbound into the rest of the EU27 and how Brexit will affect the treatment of insolvency proceedings in the EU27 by the UK.

6. *Current law and practice under the Insolvency Regulation*

Before I consider how Brexit will affect cross-border insolvency and restructuring practice in Europe, let me first provide an outline of law and practice under the Insolvency Regulation currently works.

The original Insolvency Regulation became effective on May 31, 2002 and was replaced by the current instrument – Regulation 2015/848 – after a full review process with effect from 26 June 2017.³⁵

It is important to understand that the Regulation does not harmonize the substantive insolvency laws of the Member States. The Commission has now proposed a draft directive on preventive restructuring frameworks, which does aim at minimum harmonization of restructuring law.³⁶ But the Insolvency Regulation does not address the substantive insolvency and restructuring law of member states. What the Insolvency Regulation does instead is create harmonized EU rules that address the following conflict of laws questions: (i) which member states are competent to exercise international insolvency jurisdiction in a cross-border insolvency; (ii) whose law is to govern the conduct of insolvency proceedings that are opened; and (iii) what degree of recognition should be accorded to insolvency proceedings opened in a member state, and further decisions made during the course of those proceedings, throughout the rest of the EU.

Article 1(1) of the Insolvency Regulation defines broadly the types of insolvency proceeding that fall within its scope. It applies to “public collective proceedings... based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganization or liquidation...” (i) a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed; (ii) the assets and affairs of a debtor are subject to control or supervision by a court: or (iii) a temporary stay is granted to allow for debtor-creditor negotiations to take place.

<https://publiclawforeveryone.com/2018/07/27/legislating-in-the-dark-the-governments-white-paper-on-the-withdrawal-agreement-bill/>.

³⁵ Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) 2015 O.J. (L. 141/19) (revising and recasting Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, 2000 O.J. (L. 60/1)).

³⁶ EUROPEAN COMMISSION, *Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU*, COM (2016) 723 final, 2016/0359 (COD), http://ec.europa.eu/information_society/newsroom/image/document/2016-48/proposal_40046.pdf.

The following points flow from the definition. To qualify, the proceedings must be proceedings under insolvency law and they must be “collective.” The concept of collectivity is quite loose. It is clear that proceedings that can be initiated by a single creditor principally for the benefit of the initiating creditor (such as the UK’s administrative receivership procedure) do not qualify as “collective”. But recital (14) indicates that proceedings are collective if they include a significant part of the creditors to whom a debtor owes a substantial proportion of the outstanding debts. The same recital also makes clear that rescue-oriented proceedings involving only financial creditors are eligible (such as a UK scheme of arrangement entered into to restructure a debtor’s obligations to one or more classes of bondholder).³⁷

The proceedings must also be public. In other words, the opening of the proceedings must be formally publicized so that creditors are made aware of the proceedings and can lodge their claims. Confidential proceedings are therefore outside of the scope of the Insolvency Regulation.³⁸ Article 1(2) also excludes from the scope of the Insolvency Regulation proceedings related to certain specified entities – insurance undertakings, credit institutions, and investment undertakings. These financial institution entities are subject to their own parallel but separate EU law conflict of laws regimes.

Article 2 of the Insolvency Regulation further defines “insolvency proceedings” as those proceedings that are listed for each country in Annex A. The Court of Justice has ruled that Annex A determines whether a proceeding is within the scope of the Regulation or not. If a proceeding is not on the list it is outside the Regulation regardless of whether or not it meets the criteria in Article 1(1).³⁹ Conversely, if a proceeding is listed in Annex A, it is within the scope of the Insolvency Regulation even where there are doubts about whether it meets the Article 1(1) criteria.⁴⁰ In order to update the Annex, countries need to notify the Commission of any changes to their domestic law and request the amendment of Annex A so that it accurately reflects national notifications. In the event that it receives such a request, the Commission reviews it and proposes a regulation to replace Annex A with an up to date list. As the legal position is that Annex A exhaustively defines the scope of eligible insolvency proceedings, the Insolvency Regulation has the character of an “opt in” instrument. If member states choose not to notify a particular proceeding, it will not be in Annex A and will therefore be outside the scope of the Regulation.

³⁷ See also Insolvency Regulation, art. 2(1).

³⁸ Insolvency Regulation, recital (13).

³⁹ Case C-461/11 *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten i Stockholm* EU:C:2012:704. The point is further illustrated by an English case, *In re Agrokor dd* [2017] EWHC 2791 (Ch), [2018] Bus LR 64. In *Agrokor*, the English High court recognized a Croatian extraordinary administration proceeding under the Cross-Border Insolvency Regulations 2006, legislation which implements the UNCITRAL Model Law on Cross-Border Insolvency in Great Britain. It was not open to the English court to recognize the Croatian proceeding under the Insolvency Regulation because it was not yet listed in Annex A.

⁴⁰ Case C-116/11 *Bank Handlowy w Warszawie SA v Christianapol sp z oo* EU:C:2012:739.

Article 1(1) now clearly states that public collective insolvency proceedings will qualify whether or not the opening of the proceeding displaces the management of the debtor or leaves the management in place. This widens the scope of the original Regulation by making debtor-in-possession type proceedings eligible for inclusion in Annex A.⁴¹ Indeed, the language of Article 1(1) is broad enough to embrace many of the emerging pre-insolvency or preventive restructuring proceedings that member states have introduced already, or will introduce in the next few years to comply with the proposed directive on preventive insolvency frameworks.

According to recital (25), the Insolvency Regulation applies only to insolvency proceedings in respect of a debtor whose centre of main interests (COMI for short) is located in the EU. Thus, if a court is invited to open proceedings and it ascertains that the debtor has its COMI in another member state, not the member state where the court is located, the court must concede main international jurisdictional responsibility to the courts in that other state. In this situation, the court would only have international jurisdiction to open secondary proceedings based on the presence of an establishment.

What if the court finds that the debtor's COMI is outside the EU altogether? In this situation, the court would revert to its own domestic rules of private international law. This will be relevant in the future where the debtor's COMI is in the UK because, after Brexit, the UK will be a third country outside of the EU. This is another point to which I will return later.

Where a cross-border insolvency falls within the scope of the Insolvency Regulation, the Regulation works as a system of judicial cooperation based on principles of mutual recognition and mutual trust.⁴²

The court with domestic jurisdiction to open insolvency proceedings in the member state where the debtor has its centre of main interests also has international jurisdiction under the Regulation to open what is called a main insolvency proceeding (*procedura principale di insolvenza*).⁴³

⁴¹ Annex A lists the following proceedings for Italy: fallimento; concordato preventivo; liquidazione coatta amministrativa; amministrazione straordinaria; accordi di ristrutturazione; procedure di composizione della crisi da sovraindebitamento del consumatore (accordo o piano); liquidazione dei beni. These proceedings therefore fall within the scope of the Insolvency Regulation. The list reflects the many reforms that Italy has made in this area of law from 2005 onwards.

⁴² This is captured in Insolvency Regulation, recital (65) (“This Regulation should provide for the immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which fall within its scope, and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the Member State in which the proceedings were opened extend to all other Member States. The recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision.”)

⁴³ Insolvency Regulation, art. 3(1).

Once a court has opened a main insolvency proceeding, the proceeding qualifies for automatic and universal recognition based on the principle of mutual trust throughout the whole EU.⁴⁴ Furthermore, the law applicable to the main proceeding (*lex concursus*) – that is the insolvency law of the COMI state governing the opening, conduct, and closure of the proceeding – also applies throughout the EU. Thus, issues such as the ranking of claims and the avoidance of antecedent transactions are, as a general rule, resolved by reference to the COMI state’s insolvency law⁴⁵ and any insolvency practitioner lawfully appointed under the *lex concursus* has an EU-wide license to act.⁴⁶ Judgments relating to the course and closure of the insolvency proceedings – for example, judgments avoiding antecedent transactions – also qualify for universal recognition in the other member states.⁴⁷

Article 3 of the Insolvency Regulation governs the critical question of which court has jurisdiction to open insolvency proceedings in a cross-border case. The taking of jurisdiction is the crucial starting point. If a court in a particular member state finds itself to have jurisdiction to open a main proceeding based on the debtor’s COMI, then, as we have seen, the Regulation demands universal recognition of that proceeding, subject only to a narrow exception to recognition based on grounds of *ordre public*,⁴⁸ and accords it universal effect throughout the EU under its applicable law.

In the case of a company or legal person, the location of the registered office is presumed to be the COMI in the absence of proof to the contrary.⁴⁹ To deal with some member state concerns about forum shopping, the Insolvency Regulation now provides that the registered office presumption does not apply if the registered office was transferred to a member state within the three months before the debtor requested the opening of insolvency proceedings in that member state. In this situation, the debtor or insolvency practitioner will have to prove that the COMI is in that member state without the benefit of the presumption for the insolvency proceeding to be designated as a main proceeding. Recital (13) of the original Regulation contained the following text, now incorporated in Article 3(1), which elaborates on the meaning of COMI:

⁴⁴ With the exception of Denmark, which negotiated an opt-out: Insolvency Regulation, recital (88).

⁴⁵ Insolvency Regulation, art. 7. See also Case C-444/07 *MG Probud Gdynia sp. z o.o.* ECLI:EU:C:2010:24, especially at para. 43.

⁴⁶ Insolvency Regulation, arts. 21-22.

⁴⁷ Insolvency Regulation, art. 32. See also Case C-444/07 *MG Probud Gdynia sp. z o.o.* ECLI:EU:C:2010:24, especially at para. 46.

⁴⁸ Insolvency Regulation, art. 33 states that any member state may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State’s public policy. Case law indicates that this public policy exception should be restrictively interpreted because it says not merely “contrary” but “manifestly contrary”. See Case C-341/04 *Eurofood IFSC Ltd* ECLI:EU:C:2006:281.

⁴⁹ Insolvency Regulation, art. 3(1).

“The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.”

This language focuses on the location from where administrative control of the debtor’s operations is exerted rather than the locations where the debtor and its customers, suppliers and creditors come into direct contact. The fact that a business operation is taking place in, say, the UK in terms of the dealings with customers, the incurring of debts, the owning or operation of property will not be dispositive if the business operation in the UK is being directed by a parent company in Italy. For Article 3(1) purposes, the court must determine where the controlling mind of the corporate debtor is applied and from where the debtor’s operations are directed “on a regular basis.” The location of administrative control must be sustained and systematic rather than occasional. Critically the location of administrative control must be also be transparent to external parties: “...the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties.” This idea of administrative control being objectively ascertainable and therefore transparent is a core idea on which the jurisprudence of the Court of Justice has laid great emphasis.⁵⁰

Once main proceedings have been legitimately opened in one member state, the only basis upon which the courts in a second member state would have international jurisdiction to open an insolvency proceeding is where the debtor is shown to have an establishment – defined as “any place of operations where a debtor carries out or has carried out...a non-transitory economic activity with human means and assets”⁵¹ – in that second member state. But proceedings based on an establishment – which the Insolvency Regulation calls “secondary insolvency proceedings” – are not universal. The effects of secondary insolvency proceedings are restricted to assets of the debtor situated in the territory of the member state in which such proceedings are opened.⁵²

The scheme of the Insolvency Regulation is not one of pure universalism. Although the Insolvency Regulation is inclined towards a fully universalist (single forum / single law) resolution of cross-border insolvencies, it is based on a weaker theory of universalism, usually referred to as “modified universalism.”⁵³ The principle that a main proceeding has universal

⁵⁰ Case C-341/04 *Eurofood IFSC Ltd* ECLI:EU:C:2006:281 paras. 26-37; Case C-396/09 *Interedil Srl v Fallimento Interedil Srl* ECLI:EU:C:2011:671 paras. 45-53.

⁵¹ Insolvency Regulation, art. 2(10). Mere presence of assets is therefore not a sufficient basis for jurisdiction. There needs to be substantial economic activity. If the debtor simply has a bank account or some property, even of high value, in a location that does not reach the threshold of meaningful business activity then it is not enough for an establishment.

⁵² Insolvency Regulation, art. 34.

⁵³ See further IRIT MEVORACH, *The Future of Cross-Border Insolvency – Overcoming Biases and Closing Gaps*, Oxford University Press, Oxford, 2018, chapter 1 and, in the context of the UNCITRAL Model Law on Cross-Border Insolvency, ADRIAN WALTERS, *Modified Universalisms the Role of Local Legal Culture in the Making of Cross-Border*

effect has exceptions or modifications that amount to concessions to local creditor interests and expectations. First, as we saw above, it is possible for secondary proceedings to be opened in member states where the debtor has an establishment. It is possible therefore to have a main proceeding in one member state and a series of parallel proceedings in other member states, which may be a costly obstacle to the smooth, coordinated administration of the insolvency case.⁵⁴ There are also exceptions to the general rule that the insolvency law of the main proceeding applies in relation to assets and claims throughout the EU. These are designed, among other things, to protect the holders of security interests in other member states, to protect employees, to preserve set-off rights, and to safeguard the operation of financial markets.⁵⁵

From my perspective as an Anglo-American, the Insolvency Regulation has been very successful in streamlining cross-border insolvencies in Europe. Before the Insolvency Regulation it was very difficult to coordinate assets and claims because each member state applied its own rules and states were naturally inclined to protect the interests of their own citizens. This tended to result in increased costs and destruction of value.

The UK has benefited greatly from forum shopping under the Insolvency Regulation. COMI has proved to be a mobile concept and so debtors, often acting at the behest of their major creditors, can move their COMIs to the member state in which they prefer to file and then open a main proceeding with pan-European effect under the Insolvency Regulation. The UK's combination of settled substantive law and robust and efficient courts has made it an attractive venue for debtors across the continent. COMI mobility is broadly consistent with freedom of establishment and it is therefore no surprise that parties have devised strategies for relocating headquarters and assets to take advantage of other countries' insolvency systems.⁵⁶

The extent to which a debtor can move its COMI from one member state to another member state in a way that will affect jurisdiction under the Insolvency Regulation has been discussed in two Court of Justice decisions – *Staubitz-Schreiber*⁵⁷ and *Interedil*.⁵⁸ There is no express rule in Article 3 that answers the question: at what point in time must the court assess where the debtor's COMI was located. But the settled view after these cases is that the courts must assess where the debtor's COMI was located at the time the request to open the proceedings was made.

Insolvency Law, forthcoming *American Bankruptcy Law Journal*, latest draft at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3084117.

⁵⁴ There is scope to avoid secondary proceedings if the insolvency practitioner in the main proceedings undertakes to distribute assets in another member state in accordance with that state's priority rules. See Insolvency Regulation, art. 36, which codifies a practice developed in the UK in *Re Collins & Aikman Europe SA* [2006] EWHC 1343 (Ch), [2006] BCC 861.

⁵⁵ Insolvency Regulation, arts 8-18.

⁵⁶ For a useful analysis see WOLF-GEORG RINGE, *Forum Shopping under the EU Insolvency Regulation*, 9 *European Business Organization* LR 579 (2008).

⁵⁷ Case C-1/04 *Susanne Staubitz-Schreiber* ECLI:EU:C:2006:39.

⁵⁸ Case C-396/09 *Interedil Srl v Fallimento Interedil Srl* ECLI:EU:C:2011:671.

In *Staubitz-Schreiber* a German sole trader filed insolvency proceedings in Germany. After she had filed the court papers requesting the opening of the proceedings, she moved to live and work in Spain. The German court declined to grant her bankruptcy relief. The German court said (in effect): you are by your own admission now living and working in Spain, your COMI is no longer here in Germany, and we therefore have no jurisdiction to open main insolvency proceedings in relation to a debtor whose COMI has moved to another member state. The German Supreme Court requested a preliminary ruling from the Court of Justice to determine whether the fact that a debtor's COMI had moved *after* she requested the opening of insolvency proceedings could result in the German court losing jurisdictional competence under Art 3(1) when there was no doubt that the debtor's COMI was in Germany on the date that she requested the opening of the German proceedings.

The Court of Justice concluded that a debtor's COMI cannot move in a way that affects jurisdiction under Article 3 *after* a request for insolvency proceedings has been filed on the basis that such an eventuality is contrary to the purpose of the Regulation. If it were possible for a debtor simply to avoid the court's jurisdiction by fleeing somewhere else after requesting the opening of insolvency proceedings, it would cut against the clearly stated goal of efficient and effective cross-border proceedings.⁵⁹ Creditors would be forced to pursue the debtor wherever he or she might go and this would defeat the expectations of creditors who have worked on the assumption that insolvency proceedings would continue to take place in the member state where they were originally opened.

The circumstances in the *Interedil* case were very different from *Staubitz-Schreiber* because *Interedil* involved an attempt to move a corporate debtor's registered seat from Italy to the UK *before* a request to open insolvency proceedings had been made in either country.

In this case, there was an elaborate transaction the result of which was that a group based in the UK acquired the assets and business of *Interedil*. In the course of this transaction, *Interedil* transferred its registered office to London, deregistered in Italy, and then transferred its assets/business to the acquiring group.⁶⁰ A creditor sought to bring liquidation proceedings against *Interedil* in Italy. The Tribunale di Bari initially took jurisdiction and opened main proceedings based on *Interedil* having an Italian COMI but later (after various appeals) referred the question of whether it had jurisdictional competence to the Court of Justice.

In *Interedil*, the Court of Justice followed the approach taken previously in the *Eurofood*⁶¹ and *Staubitz-Schreiber* cases by underscoring the administrative control test and affirming that courts should assess based on objective third party ascertainability where the debtor's COMI was located at the date of the request to open the insolvency proceedings. As *Interedil* had

⁵⁹ Insolvency Regulation, recital (3).

⁶⁰ See further FEDERICO MUCCIARELLI, *The Hidden Voyage of a Dying Italian Company, from the Mediterranean Sea to Albion*, *European Company and Financial Law Review* 571 (2012/4) (discussing the corporate law aspects with reference to UK, Italian, and EU law on corporate mobility).

⁶¹ Case C-341/04 *Eurofood IFSC Ltd* ECLI:EU:C:2006:281.

successfully moved and lodged its COMI in the UK before the objecting creditor had requested the opening of insolvency proceedings in Italy, the presumption that COMI was now in the UK (the location of the registered office) had not been rebutted. Accordingly, the English court rather than the Tribunale di Bari was the competent court under Article 3(1).

To summarize: a debtor can freely move its COMI consistent with EU law principles of freedom of establishment and corporate mobility. *Interedil* therefore reinforces EU law on corporate mobility in the insolvency context and permits forum shopping by distressed debtors. Furthermore, under the principle of mutual trust, a court's COMI determination cannot be challenged in another member state. A claim of Article 3(1) jurisdiction can only be challenged through the appeal process in the member state where the court made the COMI determination and opened main proceedings.⁶² In other words, where a properly implemented COMI migration has taken place, it is hard to challenge the jurisdiction of the courts in the state to which the debtor has migrated.

There are some concerns about forum shopping, especially where the debtor migrates its COMI just before it requests the opening of insolvency proceedings. Some of this concern is captured in the Insolvency Regulation since the text was recast. Thus, the Regulation now disapplies the presumption that the COMI is in the state where the debtor has its registered office if the debtor only moved its registered office to that state in the three months before it requested the insolvency proceedings. But this measure only addresses last minute transfers of the registered office. You could still have a debtor incorporated in one state that migrates its headquarters and head office functions within three months of filing to another state without transferring its registered office and then seeks to rebut the registered office presumption on *Interedil* principles.

7. *Brexit implications: general points*

Let me start this section of the article by restating my two assumptions set out earlier in section 5 of the article. For the purposes of analysis my assumptions are:

1. That the UK does indeed “Brexit” and becomes a third country on 29 March 2019.
2. That the draft withdrawal agreement in something like its current form is ratified and that EU law continues to apply in the UK until 31 December 2020 by treaty as a matter of EU / international law and domestically in the UK by virtue of parliamentary ratification of the withdrawal agreement.

On these assumptions, the EU *acquis* will cease to apply at the end of 31 December 2020. Thereafter, the position in international law will be governed by whatever future framework (if any) the EU and UK agrees to take effect on 1 January 2021.

⁶² Case C-341/04 *Eurofood IFSC Ltd* ECLI:EU:C:2006:281 at 36-44. See now Insolvency Regulation, recitals (26)-(37), arts 4-5 which reinforce the point but exhort member state courts to make a careful assessment to ensure that the COMI is genuinely located in their territory.

The effect of the 2018 Act, together with the domestic UK legislation required to implement the withdrawal agreement, is that EU law will remain part of UK domestic law. This means that the EU private international law principles in the Insolvency Regulation will continue to apply in the UK as regards insolvency proceedings in the EU27 until such time as the UK government or parliament legislates to diverge from EU law by replacing these principles.

8. *Inbound implications (treatment of EU27 insolvency proceedings in the UK)*

To illustrate, take a hypothetical Italian debtor, with its COMI unquestionably in Italy, that enters a *concordato preventivo* proceeding and needs to bind creditors in the UK. Up until 31 December 2020, the UK will recognize the proceeding and its effects under Italian law in accordance with EU law. If the proceeding starts after 31 December 2020 the effect of the 2018 Act is that UK will continue to apply the Insolvency Regulation principles unilaterally and will therefore automatically recognize the Italian proceeding and its Italian law effects in the UK as a matter of UK law. What if the Italian proceeding commenced, say, on 1 December 2020 but the foreign representative will need continuing UK assistance after 31 December 2020? In other words, what is the implication as regards insolvency proceedings commenced in the EU27 during the transitional period but which need to continue after the EU *acquis* ceases to apply as a matter of international law? Absent some new EU-UK mutual recognition treaty which also grandfathers proceedings commenced between 29 March 2019 and 31 December 2020, the treatment of these proceedings after 31 December 2020 will rest on the UK law foundations of the 2018 Act. Initially, the practical effect may be imperceptible. Insofar as the Italian foreign representative relies on retained EU law domesticated by the 2018 Act, a UK court would be obliged as a matter of UK law to continue to recognize the Italian *concordato* and give full effect to it in the UK. However, the legal basis for the continuing recognition of the Italian foreign representative's authority and the Italian law effects of the proceeding would change, mid-proceeding, from EU law to UK law. As time goes on, inbound treatment of proceedings in the EU27 post-Brexit will depend on either the terms of a future EU-UK agreement (if one is agreed) or UK domestic law (pending such agreement).

As regards UK domestic law, there is, of course, uncertainty about the extent to which the UK may move away in the future from the soft, unilateral application of the Insolvency Regulation as retained EU law envisaged by the 2018 Act. But UK law does provide alternative means by which a foreign representative of an insolvency proceeding in the EU27 could seek recognition and relief in the UK currently and after Brexit. The main statutory alternative to a domestic regime based on Insolvency Regulation principles is the Cross-Border Insolvency Regulations 2006,⁶³ which implement in UK law the UNICTRAL Model Law on Cross-Border

⁶³ S.I. 2006 No. 1030. See, for example, *In re Agrokor dd* [2017] EWHC 2791 (Ch), [2018] Bus LR 64.

Insolvency.⁶⁴ But as I have outlined in a forthcoming article, UK courts, when fashioning relief, do not give full effect to foreign insolvency law under this instrument.⁶⁵ UK courts will only assist under the Model Law insofar as the assistance requested would be available to an English insolvency practitioner in a domestic UK insolvency proceeding. The Model Law has no equivalent of the Insolvency Regulation's *lex concursus* principle. A technical legal problem would therefore arise, for example, if the Italian *concordato* modified or discharged debts governed by English law because the English law rule is that foreign insolvency proceedings are not effective to discharge English law debts.⁶⁶ There would need to be a full parallel restructuring proceeding in the UK.

9. *Outbound implications (treatment of UK insolvency proceedings in the EU27)*

Let us now consider the reverse hypothetical. What will happen if there is, say, a UK administration and the debtor has assets in Italy. On what legal basis will the administrator be authorized to deal with those assets?

At present under the Insolvency Regulation the answer is straightforward. If the COMI is in the UK, the UK court will open a main proceeding and the Italian courts must automatically recognize it and allow the English administrator to deal with the assets (unless there is an Italian establishment and the Italian court opens a secondary proceeding). This will be the position also during the transitional period until 31 December 2020. But in the scenario where the UK and EU do not reach agreement on a future mutual recognition framework to operate from 1 January 2021, EU law will cease to apply both to existing UK proceedings, and to UK proceedings commenced after 31 December 2020. A debtor whose central administration is based in the UK will have its COMI in the UK, a third country, outside of the scope of the Insolvency Regulation. The treatment of a UK administration in Italy – and across the rest of the EU27 – will depend on domestic Italian private international law and the domestic private international law of every other member state in which there are assets or issues that need to be managed.

Without some kind of comparable mutual recognition framework, the UK proceeding would not have universal effect in the EU27 and the result on the UK side would be the disintegration of the harmonized system in the Insolvency Regulation. This fragmentary outcome is far from being in the UK's interests and would almost certainly make the UK less attractive to forum shoppers during and after the transitional period. From a UK perspective therefore it appears to be imperative to conclude a deal with the EU based on mutual recognition.

⁶⁴ U.N. COMM'N ON INT'L TRADE LAW, MODEL LAW ON CROSS-BORDER INSOLVENCY (1997) WITH GUIDE TO ENACTMENT (revised 2013), U.N. Sales No. E.99.V.3 (1999).

⁶⁵ WALTERS, *supra* note 53.

⁶⁶ *Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399; *Re OJSC International Bank of Azerbaijan* [2018] EWHC 59 (Ch), [2018] Bus LR 1270.

10. *The special case of UK schemes of arrangement under the UK Companies Acts*

The UK scheme of arrangement is a mechanism in the UK Companies Act⁶⁷ by which the debts of participating classes can be restructured by means of a court-approved deal supported by a majority in number representing 75% in value of the stakeholders in each class.⁶⁸ The scheme of arrangement was kept out of Annex A to the Insolvency Regulation at the UK's insistence mainly on the ground that it is a company law not an insolvency law proceeding, even though in practice it is widely used by UK and non-UK debtors for preventive restructuring.⁶⁹ At present, it is not entirely clear what is the legal basis for recognition of schemes of arrangements in the EU27. One theory that has some support among practitioners and courts is that the court order approving a scheme is a judgment that qualifies for pan-EU recognition under the Brussels I Regulation (recast).⁷⁰ This theory is open to doubt in my opinion for at least two reasons. First, the Brussels I Regulation expressly does not apply to “bankruptcy, proceedings relating to the winding-up of insolvent companies...judicial arrangements, compositions and analogous proceedings”⁷¹ and there is a good case for saying that a scheme is akin to a judicial arrangement or composition as it involves the court sanctioned compromise of debt obligations. Second, the Brussels I Regulation appears to be concerned with adversarial *inter partes* civil and commercial litigation where there is a dispute between a plaintiff and a defendant. A scheme of arrangement sanctioning the modification of multiple creditor obligations does not have the same character.⁷²

The basis of the theory seems to be the proposition that the Insolvency Regulation and Brussels I Regulation are supposed to dovetail seamlessly and leave no gaps. In other words, a proceeding falling within the Brussels I Regulation is outside of the Insolvency Regulation and *vice versa* in perfect symmetry. On this view, proceedings involving solvent companies – and even possibly insolvent companies where the proceeding is not listed in Annex A – fall within

⁶⁷ Companies Act 2006, ss. 895-899, Elizabeth II 2006 c.46.

⁶⁸ See JENNIFER PAYNE, *Cross-Border Schemes of Arrangement and Forum Shopping*, 13 *European Business Organization* LR 563 (2013).

⁶⁹ See Insolvency Regulation, recital (16) which currently provides the UK with legal cover. (“This Regulation should apply to proceedings which are based on laws relating to insolvency. However, proceedings that are based on general company law not designed exclusively for insolvency situations should not be considered to be based on laws relating to insolvency.”)

⁷⁰ Regulation (EU) 2012/1215 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (hereafter “Brussels I Regulation”) 2012 O.J. (L. 351/1). See *In re Van Ganswinkel Groep BV* [2015] EWHC 2151 (Ch), [2016] Bus LR 1046; *In re Global Garden Products Italy SpA* [2016] EWHC 1884 (Ch), [2017] BCC 637. In *Ganswinkel* and *Global Garden*, the judge (Snowden J) proceeded, in accordance with a common practice, to determine that the UK court would have jurisdiction under the Brussels I Regulation (recast) on the assumption that it does indeed apply to schemes.

⁷¹ Brussels I Regulation, art. 2(b).

⁷² See *In re Van Ganswinkel Groep BV* [2015] EWHC 2151 (Ch), [2016] Bus LR 1046 at para. [44]. For further discussion see GERARD MCCORMACK & HAMISH ANDERSON, *Brexit and its implication for restructuring and corporate insolvency in the UK*, *Journal of Business Law* 533 (2017) at 550.

the scope of Brussels I.⁷³ From this premise, UK judges have suggested that Article 8 of Brussels I would confer jurisdiction on the UK court in respect of a foreign debtor as long as there are “defendants”, meaning creditors within a participating class, domiciled in the UK.⁷⁴ If the EU-UK cannot agree a mutual recognition framework to replace Brussels I then it will have no possible role as a legal basis for UK jurisdiction in respect of foreign debtor schemes of arrangement, or for recognition of such schemes in the EU27, after 31 December 2020. The domestic private international law of each of the EU27 will instead provide a fragmentary legal basis for recognition that will be less stable than the current EU law dispensation.⁷⁵

It is generally assumed that where a foreign debtor and its creditors have selected English law to govern their obligations in the financing documents, a UK scheme of arrangement which discharges or modifies those obligations will currently be recognized in the EU27 under English and EU choice of law principles – in particular the principles in the Rome I Regulation.⁷⁶ On this logic, dissenting creditors who sought to enforce their claims against assets in the EU27 are bound by the discharge or variation of their contractual rights under applicable law. Some commentators are sanguine about the implications of Brexit for this theory of the pan-European enforceability of foreign debtor schemes of arrangement affecting English law governed obligations. They argue that the provisions of Rome I take effect as autonomous private international law of the member states and therefore apply in relation to third countries. As such, they claim that Brexit will have no effect on recognition within the EU27 of foreign debtor schemes of English law obligations.⁷⁷ However, even if this view of Rome I as autonomous member state law is correct, it is arguable that the scheme of arrangement, as an institution that has its domestic legal basis in the UK Companies Act, is

⁷³ But see Insolvency Regulation, recital (7): “Bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings and actions related to such proceedings are excluded from the scope of Regulation (EU) No 1215/2012... Those proceedings should be covered by this Regulation. The interpretation of this Regulation should as much as possible avoid regulatory loopholes between the two instruments. However, the mere fact that a national procedure is not listed in Annex A to this Regulation should not imply that it is covered by Regulation (EU) No 1215/2012.” On dovetailing see further GEERT VAN CALSTER, *COMing and Here to Stay: The Review of the European Insolvency Regulation*, 27 *European Business Law Review* 735 (2016) at 741-743.

⁷⁴ *In re Van Ganswinkel Groep BV* [2015] EWHC 2151 (Ch), [2016] Bus LR 1046 at paras. [50]-[51]; *In re Global Garden Products Italy SpA* [2016] EWHC 1884 (Ch), [2017] BCC 637 at paras. [24]-[28].

⁷⁵ There is an open question as to whether the Brussels Convention of 1968, upon which the Brussels I Regulation is based, would apply. See SUSAN BLOCK-LIEB, *Reaching to Restructure Across Borders (Without Over-Reaching), Even After Brexit*, 92 *American Bankruptcy LJ* 1 (2018) at 17-20, 36. It is hard to envisage how the Brussels Convention could operate as a default backstop regime without the UK acceding to the jurisdiction of the Court of Justice.

⁷⁶ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6, art. 12(1)(d). See further BLOCK-LIEB, *supra* note 75, at 18-20.

⁷⁷ See MANUEL PENADES FONS & MICHAEL SCHILLIG, *The Impact of Brexit on Debt Restructuring and Insolvency Practice*, King’s College London Law School Research Paper No. 2018-06, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3105501.

outside of the scope of Rome I because Rome I excludes “questions governed by the law of companies.”⁷⁸

11. *Final observations*

It would clearly be in the UK’s interests to reach an agreement with the EU that ensures continuity of mutual recognition after 31 December 2020. There is little doubt that the UK government aspires to such an agreement.⁷⁹ In the absence of a mutual recognition framework, the short term prospects for UK treatment of insolvency and restructuring proceedings in the EU27 looks reasonable because retained EU law will continue to apply domestically in the UK under the 2018 Act. However, it will be much less easy for the UK to export its proceedings, as recognition and enforcement would depend on domestic private international law in each of the EU27. For the EU and UK to reach an agreement on mutual recognition, it seems likely that the UK would have to agree to the continuing jurisdiction of the Court of Justice or, at very least, seek to remain within the orbit of EU jurisprudence perhaps by joining the European Economic Area and acceding to the jurisdiction of the EFTA court.

The UNCITRAL Model Law on Cross-Border Insolvency provides another intriguing possible basis for future EU-third country legal relations. To create such a legal foundation would entail the EU adopting the Model Law as a Regulation that would harmonize the legal basis for judicial cooperation between the EU27 and third countries (which will include the UK). Were the EU to pursue EU-wide adoption of the Model Law, it would obviously assist the UK because a uniform pan-European set of procedural private international law rules would apply to the outbound treatment of UK insolvency and restructuring proceedings in the EU27. While this is perhaps not as good as the *status quo* or a replacement mutual recognition framework, it is better than the alternative in a “no deal” scenario. There are reasons for thinking that this move would also be in the EU’s interests. EU participation in the Model Law would help legitimize it as a global solution and the Court of Justice would become an

⁷⁸ For discussion of the conflicting arguments see MCCORMACK & ANDERSON, *supra* note 72, at 551; BLOCK-LIEB, *supra* note 75, at 20-21.

⁷⁹ See HM GOVERNMENT, *Providing a cross-border civil judicial cooperation framework – a future partnership paper* (August 2017), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639271/Providing_a_cross-border_civil_judicial_cooperation_framework.pdf at para. 19 (“The UK will therefore seek an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework.”). The so-called Chequers White Paper continues this theme indicating that the UK will seek to participate in the Lugano Convention as a starting point while exploring a new bilateral agreement that “would seek to build on the principles established in the Lugano Convention and subsequent developments at EU level in civil judicial cooperation between the UK and Member States”: HM GOVERNMENT, *The future relationship between the United Kingdom and the European Union*, Cm 9593 (July 2018), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/725288/The_future_relationship_between_the_United_Kingdom_and_the_European_Union.pdf at paras. 145-148.

important and influential source of Model Law jurisprudence thus providing a counterweight to the current dominant influence of the United States.