

Brexit and International Insolvency beyond the Realm of Mutual Trust

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Abstract: The outcome of the referendum held in the United Kingdom in June 2016 is of far-reaching and unpredictable consequences. This paper focuses on the particular field of international insolvency with a view to identifying some of them. The consequences of Brexit will be diminished by the already existing coordination among the international instruments dealing with these matters, in particular the EU Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency. However, the fact that the UK will be leaving the EU area of justice and the strong cooperation based on mutual trust between member states will make UK-EU insolvency cases clearly less efficient and effective. In order to lessen the impact of Brexit in this sensitive area of law, both the EU and the UK ought to further pursue the path of harmonization of substantive insolvency law as this may promote international cooperation. Moreover and in view of the fact that many EU member states do not have specific domestic rules on international insolvency, the EU should place on its legislative agenda the implementation of the UNCITRAL Model Law in order to deal with extra-EU cross-border insolvency.

1. Introduction

The outcome of the referendum held in the United Kingdom in June 2016 has literally opened Pandora's Box making "uncertainty" the key word for many years to come. For the time being the number of question marks arising out of the current political scenario clearly outnumber the answers, in particular on the issue of which legal position the UK will have after leaving its status as a member state of the European Union. This paper obviously cannot deal with all these issues and thus it only focuses on international insolvency, the current instruments in place to deal with it and (some) consequences of the UK's withdrawal from the EU. In the light of cooperation being essential to modern international insolvency, the bottom line is whether this principle can mitigate the fact that the UK is leaving the reign of mutual trust.

As in many other areas Brexit in international insolvency matters means leaving a highway and opting for side roads. Following the failed 1995 Brussels Convention, Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings,¹ the well-known European Insolvency Regulation (further EIR), has provided for the highway by which many insolvencies have been solved in an efficient and effective manner within the EU area of justice. In doing so, EIR has also provided British insolvency law a showroom by which

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¹ OJ [2000] L 160/1.

many companies in Europe have learnt how effective it is in restructuring businesses. In this vein, many legal and natural persons have gone to the UK to take advantage of their toolkit of (pre-) insolvency proceedings, including the famous schemes of arrangements.

This trend has coincided with the active engagement of the European Commission in changing the socio-economic approach to insolvency, from a stigma to a second chance as reflected in the 2014 European Recommendation on a new approach to business failure and insolvency,² and more recently by the 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.³ While the shift towards rescuing businesses and individuals by insolvency-related schemes is a global one, there is little doubt about the influence of UK legislation and practice on the EU approach.⁴ Most notably, these and other developments in insolvency practice have triggered the issuance of Regulation (EU) 2015/848 of the European Parliament and the Council of 20 May 2015 on insolvency proceedings (further EIR Recast).⁵

The following pages consist of a brief account of the highlights of the insolvency regulations that will not be kept once Brexit is effective. In this vein, the focus will be on the EIR Recast to the extent that it will enter into force on 26 June 2017 and thus this is the regulation that will cease to apply to the UK after Brexit. Hence, a brief account is first given as to what may be applied after the withdrawal of the UK from the EU. Then, the issues of international jurisdiction, conflict of laws, recognition and enforcement of judgment, and cooperation are separately analysed. The paper also addresses the likely impact of the UK's change of status from member state to third state on schemes of arrangement in view of its significance in practice.

The final remarks of this paper just state what seems obvious, i.e. international insolvency involving EU member states and the UK will become after Brexit more expensive, time-consuming and cumbersome than it is now.⁶ However, insolvency law has considerably evolved in the last two decades and the bridges between jurisdictions are likely to remain laid down given what it is at stake. In this regard, the harmonization efforts undertaken by the EU in this field are to be encouraged as they can only enhance the much needed multinational information, cooperation and communication that it is the key to a successful debtor's restructuring or liquidation. By the same token, member states ought to seriously think about implementing the UNCITRAL Model Law at EU level.

2. The legal panorama after Brexit

The British Government has already announced that the UK's exit from the EU will be followed by a Great Repeal Act which will largely keep all existing EU laws as part of UK

² Brussels, 12.3.2014 [C(2014) 1500 final].

³ Strasbourg, 22.11.2016 [COM(2016) 723 final].

⁴ See with this reminder S. Parker, N. Hood, "Brexit: good news for cross-border insolvency or a disaster?" (October 2016) *Corporate Rescue and Insolvency* 176-177.

⁵ OJ L 141, 5.6.2015.

⁶ The flux of blogs commenting on the topic of this paper and coming to the conclusion mentioned in the text is overwhelming. For all, see B. Wessels, "Brexit and Insolvency: A View from the Continent", in Oxford Business Law Blog, available at <https://www.law.ox.ac.uk/business-law-blog>.

law.⁷ Still, its final contents will only be known once the exit treaties have been drafted, and for that there seems to be a long way to go.⁸ Meanwhile, it can only be assumed that the EU Treaties will cease to apply to the UK.⁹ More specifically, the EIR Recast may follow the same fate as those treaties the moment in which the UK ceases to be an EU member state because that Regulation works on the basis of reciprocity between member states and after Brexit other member states will no longer apply the Regulation vis-à-vis the UK in the absence of an agreement on this in the exit treaties.¹⁰ The same can be held as regards to UK legislation implementing EU directives on insolvency law.¹¹ Although it can be maintained that regulations and directives will be applicable until the Great Repeal Act decides its fate,¹² the point is that these in particular are only applicable among member states, and this will not be the case of the UK after Brexit. The possibility of transitional arrangements after Brexit in relation to “civil justice matters” is mentioned as a possibility in the UK Government’s Brexit White Paper.¹³

It is doubtful that the exit treaties are going to include any special rules on insolvency matters. Nor is a specific convention to be expected. The revival of the Istanbul Convention on Certain International Aspects of Bankruptcy¹⁴ is unlikely twenty six years after its signature because it has only been signed by seven countries,¹⁵ and only one of them, Cyprus, has ratified it. This lack of success can be explained not only by the fact that the possible signatories’ interest has been taken away by EIR, but also because this Convention does not really meet the current challenges posed by international insolvency so that neither the EU nor the UK will be interested in ratifying it.

⁷ See *The United Kingdom’s exit from and new partnership with the European Union* (UK Gov, 2017) 1.1.

⁸ See J. Basedow, “BREXIT and Business Law” (December 23, 2016) *China-EU Law Journal (CELJ)*, Forthcoming 1-23, at 1-8, available at SSRN: <https://ssrn.com/abstract=2889218>

⁹ See Article 50(3) of the Treaty of the Functioning of the European Union (TFEU).

¹⁰ Presumably, it will cease to apply to all insolvency proceedings commenced after the date of the UK’s withdrawal applying by analogy the transition rules already included in the EIR Recast. Insolvency proceedings are complex and could be structured in independent parts, but legal certainty would suggest not to distinguish and to keep applying the Recast’s provisions even to the recognition and enforcement of judgments rendered after the separation of the UK from the EU but on insolvency proceedings commenced before that date. See, applying a similar test, A. Dickinson, “Back to the future: the UK’s EU exit and the conflict of laws” (2006) 12(2) *Journal of Private International Law* 195-210.

¹¹ Several directives lay down provisions on insolvency-related matters, but particularly remarkable are 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, OJ [2001] L 125/15; Directive 2009/138/EC of the European Parliament and of the Council of 25 November 2009 on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) O.J. [2009] L 335/1; Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms and amending Council Directive 82/891/EEC, and Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC, 2011/35/EU, 2012/30/EU and 2013/36/EU, and Regulations (EU) No 1093/2010 and (EU) No 648/2012, OJ [2016] L 173/190. Special attention should be paid to Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer, OJ [2008] L 283/36, given its impact on employees’ rights.

¹² See J. Basedow, *supra* n 7, 8-9.

¹³ See *The United Kingdom’s exit from and new partnership with the European Union* (UK Gov, 2017) 12.2.

¹⁴ European Convention on Certain International Aspects of Bankruptcy signed in Istanbul on 5 June 1990.

¹⁵ These countries are Belgium, Cyprus, France, Greece, Italy, Luxemburg and Turkey.

Those challenges are better addressed by the 1997 UNCITRAL Model Law on Cross-Border Insolvency and other soft law instruments provided by this agency and others which are clearly shaping international insolvency across the world.¹⁶ In fact, the UNCITRAL Model law has already been implemented in the UK by the Cross Border Insolvency Regulations 2006, which is likely to be the main source of law in international insolvency after the EIR Recast ceases to apply in the UK.¹⁷ Additionally, section 426 of the Insolvency Act 1986 dealing with co-operation between courts exercising jurisdiction in relation to insolvency will apply for Commonwealth countries including those in the EU and the Foreign Judgments (Reciprocal Enforcement) Act 1933 will also do for money judgments of the courts of certain listed countries;¹⁸ and finally the common law will be of relevance.¹⁹

The UNCITRAL Model law shares with the EIR Recast similar rules on jurisdiction, recognition, enforcement and cooperation as will be explained in the following sections. Accordingly, cross-border insolvencies involving the UK and any EU member state will not dramatically change in the absence of the EIR Recast. At least, not when it comes to proceedings involving other member states that have also adopted the UNCITRAL Model Law, namely Romania, Poland, Slovenia and Greece or member states that have amended their domestic laws along the same lines as EIR such as Germany,²⁰ Spain,²¹ Belgium,²² and apparently, The Netherlands.²³

Other EU member states apply though their general private international law provisions to insolvency matters, and thus the non-application of the Recast will leave an important gap to be filled up. In this vein, it is worth mentioning that INSOL Europe already proposed in 2012 the adoption of the UNCITRAL Model Law at EU level on grounds that unifying these rules as regard to third states would smooth the functioning of the internal market and provide for an external trade policy.²⁴ Now it can be added to this that the implementation of those rules across Europe would clearly smooth the impact of Brexit in this field of law. It will not

¹⁶ In addition to the Working Group V dealing with insolvency law within UNCITRAL, the activity of the World Bank in this area is remarkable, in particular as regards to the promotion of domestic legal reforms. To this end, valuable reports and other works have been conducted under its supervision such as the Principles for Effective Insolvency and Creditor/Debtor Regimes (Revised 2015). The latter along with the UNCITRAL Legislative Guide on Insolvency Law have been essential to develop the Insolvency and Creditor Rights Standard which captures best practices for assessing and strengthening domestic insolvency.

¹⁷ According to Article 85(i) EIR Recast, there is a bilateral convention between the UK and Belgium providing for the Reciprocal enforcement of civil and commercial judgements (1934) which will take priority over this provision.

¹⁸ Again, mainly countries in the Commonwealth such as Australia, Canada (except Quebec), India, Guernsey, Jersey, Isle of Man, Israel, Pakistan, Suriname and Tonga, for which this act is likely to apply to Ireland but not to other member states.

¹⁹ See generally on insolvency of companies in the UK from a PIL perspective P Beaumont and P McElevy, *Anton's Private International Law* (3rd edn, SULI, 2011) 1094-1142.

²⁰ See §§ 335 to 358 of *Insolvenzordnung* 2003.

²¹ See Articles 10, 11 and 200 et seq. of Spanish Insolvency Act 2003.

²² See Chapter XI of the Code of Private International 2004, Articles 116-121.

²³ See B. Wessels, "Netherlands applies principle of universality in international insolvency cases" (June 17, 2016) *Leiden Law Blog*, available at <http://leidenlawblog.nl>.

²⁴ See addressing some details, B. Wessels, 'Should the EU adopt the UNCITRAL Model Law on Cross-Border Insolvency', October 2016, available at: <<http://bobwessels.nl>>.

change, though, the fact that the enhanced cooperation that goes with the principle of mutual trust will be lost and with it the UK's leading role in further evolving intra-EU insolvency.

3. International Jurisdiction Issues

The EIR Recast, the Istanbul Convention and the UNCITRAL Model Law on Cross-Border Insolvency embedded in the UK thanks to the Cross Border Insolvency Regulations 2006 share the same approach to international insolvency as all of them endorse the so called modified universalism.²⁵

The ideal in international insolvency is just to have a single insolvency proceeding over the one and same debtor with universal effects, i.e. comprising all debtor's assets and creditors regardless of their location; by this means the insolvency objectives of either liquidating or restructuring a business can be better achieved. Modified universalism pays due regard to this approach by establishing that only insolvency proceedings opened at the debtor's centre of main interests (further COMI) can have universal effects. However, it also pays attention to the interests of those states that want to protect local creditors, thereby other insolvency proceedings can be opened over that debtor but they only cover local assets, i.e. they only have territorial effects. In short, modified universalism means that several insolvency proceedings can be opened over the one and same debtor, but only one of them has universal effects although its scope may be restricted by other proceedings.

The distinction between both types of proceeding is made by the heads of jurisdiction where they can be opened. As mentioned, insolvency proceedings with universal effects are only those opened at the debtor's COMI while those with territorial effects can only be opened where the debtor has an establishment, the presence of assets or creditors in that country not being enough. According to the UNCITRAL Model Law, establishment "means any place of operations where the debtor carries out a non-transitory economic activity with human means and goods or services".²⁶ Article 2(10) of EIR Recast closely follows this definition aimed at restricting the opening of proceedings that diminish the efficiency and effectiveness of the main proceeding, that with universal effects. In the language of the UNCITRAL Model Law such proceedings are named non-main proceedings.

In contrast, there is no definition of the debtor's COMI either in the UNCITRAL Model Law or in Article 3 of EIR. After a number of judgments of the Court of Justice on this issue,²⁷ Article 3(1) of EIR Recast provides now for that definition: "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". For the sake of coherence the Guide to Enactment and Interpretation of the UNCITRAL Model Law indicates that the expression "the debtor has the centre of its main interests" "corresponds to the formulation in article 3 of the EC Regulation",²⁸ meaning that this concept ought to be given the same interpretation regardless of the international or national character of the piece of legislation referring to it.

²⁵ See J. L. Westbrook, "Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum" (1991) 65 *American Bankruptcy Law Journal* 457, 458.

²⁶ See Article 2(f) of the UNCITRAL Model Law on Cross-Border Insolvency.

²⁷ See in particular CJEU 2 May 2006, Case C 341/04, [2006] ECR I-3813 (*Eurofood*); and CJEU 20 October 2011, Case C 396/09, [2011] ECR I-9915 (*Interedit*).

²⁸ See Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency, New York, 2014, at para. 81.

Such an autonomous interpretation is obviously critical if forum shopping and conflicts of jurisdictions are to be avoided.

However, both debtor's COMI and establishment are fact-sensitive concepts and thus prone to divergent application. This risk is diminished within the EU area of justice not only by the role played by the Court of Justice in providing an autonomous interpretation,²⁹ but also by the principle of mutual trust informing the automatic recognition of judgments opening an insolvency proceeding. As there is no room for *lis pendens* rules on collective proceedings the potential for parallel proceedings will increase once the UK becomes a non-EU member state.³⁰

In order to diminish the complexities of determining the debtor's COMI, the UNCITRAL Model Law and the EIR Recast also rely on rebuttable presumptions as to where that place is. That would be the registered office in case of debtor legal persons and the habitual residence in case of natural persons according to Article 16(3) of the UNCITRAL Model Law. Article 3 of EIR only refers to the first one, but the Recast already includes both and singles out the case of professional natural persons whose COMI is presumed to be at their principal place of business. Another difference between the two international instruments is that the Recast indicates the point in time when these presumptions are to be examined with a view to avoiding fraudulent forum shopping.³¹ The coupling between the two instruments can be done by domestic law so that the UK would not have problems in reducing this potential for divergence.

Further and more complex problems will be posed by the UK's withdrawal from the EU freedom markets, in particular the freedoms of provision of services and establishment from which legal persons benefit as concluded by the Court of Justice in the familiar set of judgments in *Centros*,³² *Überseering*,³³ *Inspire Art*,³⁴ and *Cartesio*.³⁵ According to this case law, the imposing of requirements other than the ones required in the member state of incorporation is deemed contrary to Articles 49 and 54 of TFEU, i.e. those countries such as Germany applying the real seat theory are obliged to recognize companies set up in countries following the incorporation theory such as the UK, regardless of their lack of contacts with the country of the registered office.³⁶

²⁹ Critical of the Recast for not restricting the concept of COMI more, see M. Weiss, "Bridge over Troubled Water: The Revised Insolvency Regulation" (2015) 24 *International Insolvency Review* 192–213, 199–202.

³⁰ But see Anton, *supra* n 19, 1126–27 and 1137.

³¹ Transfers of place of registration or business undertaken in a three-month period or changes in the habitual residence in a six-month period before the request for the opening of insolvency proceedings are to be disregarded.

³² CJEU 9 March 1999, Case C-212/97, [1999] ECR I-1459 (*Centros Ltd. v. Erhvervs-og Selskabsstyrelsen*).

³³ CJEU 5 November 2002, Case C-208/00, [2002] ECR I-9919 (*Überseering v. Nordic Construction Company Baumanagement GMBH*).

³⁴ CJEU 30 September 2003, Case C-167/01, [2003] ECR I-10155 (*Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*).

³⁵ CJEU 16 December 2008, Case C-210/06, [2008] ECR I-9641 (*Cartesio*).

³⁶ See Ph. Hertz, J. MacLennan, T. Bennett, "Back to the future: the impact of Brexit on the restructuring landscape" (September 2016) 31(8) *Butterwords Journal of International Banking and Financial Law* 476–477, 477.

Taking advantage of that case law, many companies have been set up in the UK while actually operating in other member states.³⁷ However, this case law will not be applicable once the UK ceases to be a member state; EU member states will then apply domestic conflict rules in order to determine whether a UK company is a legal person or not. For example and according to the Spanish conflict rules, the national law of a company governs its existence and validity for which reason a UK company will be recognized in Spain provided, though, that its centre of administration or principal place of business is not located in Spain.³⁸ Otherwise, the company will not be recognized as a foreign one but be considered a Spanish company, and more specifically a civil law company bereft of liability limitations.

Member states will still apply the EIR Recast after Brexit if the debtor's COMI is located within the EU,³⁹ and proceedings are included within its material scope of application.⁴⁰ Hence, they will apply Article 3 of EIR Recast to determine whether a debtor legal person has its COMI at its place of registered office in the UK or elsewhere on grounds that this is the place of its central administration as ascertained by third parties.⁴¹ There is nothing new in this modus operandi as regards to the current legal situation, but there will be a significant difference triggered by domestic private international law rules on company law: establishing a debtor's COMI in an EU member state adhering to the real seat theory after Brexit will amount to the non-recognition of foreign incorporated companies if they do not have their central administration abroad as well.⁴² This is particularly remarkable for UK limited companies as they will not be recognized and deemed improperly incorporated according to the relevant law, their members will lose the shield against debt liability and directors' liability will be shaped by a legal system other than the one of actual incorporation.⁴³

³⁷ See an estimate in J. Armour, H. Fleischer, V. Knapp, M. Winner, "Brexit and the Corporate Citizenship" (January 2017) European Corporate Governance Institute (ECGI). Law Working Paper No. 340/2017 available at SSRN: <https://ssrn.com/abstract=2897419> or <http://dx.doi.org/10.2139/ssrn.2897419>.

³⁸ See Articles 9(11) of the Spanish Civil Code and Articles 8 and 9 of the Spanish Capital Companies Law.

³⁹ Denmark is not a party to Article 81 of TFEU, and thus nor to EIR or EIR Recast.

⁴⁰ See CJEU 16 January 2014, Case C-328/12 (*Schmid*) EU:C:2014:6. Otherwise they have to apply their domestic jurisdiction rules as the UK will do once it leaves the EU.

⁴¹ In this regard, COMI is considered a tribute to the real seat theory. See for all M. Lauterfeld, "Centros and the EC Regulation on Insolvency Proceedings: The End of the "Real Seat" Approach towards Pseudo-foreign Companies in German International Company and Insolvency Law?" (2001) *European Business Law Review* 79-88.

⁴² It is worth mentioning that the divergence between company and insolvency law that the interplay between the abovementioned Court of Justice's case law on company law and the concept of COMI promotes has given rise to a lively debate. As both fields of law are coordinated at a domestic level, this divergence may result in inconsistencies in the protection of creditors as e.g. directors' liability actions may be loose in a given company law because transactional avoidance rules are tight in the related insolvency law so that separating both may give rise to either under- or over-protection of creditors. See H. Eidenmüller, "A new framework for business restructuring in Europe: the EU Commission's proposals for a reform of the European Insolvency Regulation and beyond" (2013) 20 *Maastricht Journal of European and Comparative Law* 133 – 150, and Working Paper No. 199/2013, ECGI Working Paper Series in Law 1-22, 13-17, available at <http://ssrn.com/abstract=2230690>. In view of the interests at stake in case of insolvency, the EIR Recast maintains the COMI as the central concept and not the registered office as suggested. Paradoxically and at least as regards to UK-incorporated companies, this potential divergence will be in many cases solved after Brexit.

⁴³ See extensively for Germany, R. Freitag, S. Korch, "Gedanken zum Brexit – Mögliche Auswirkungen im Internationalen Insolvenzrecht" (2016) *Zeitschrift für Wirtschaftsrecht* 1849-1857, 1850-1852; and in general, J. Armour, H. Fleischer, V. Knapp, M. Winner, *supra* n 37, 18 et seq.

Accordingly, the consequences of the UK's change of status for stakeholders and directors can be huge for which reason this issue should be the matter of at least a transition rule in the exit treaty from the EU, in order to guarantee UK-incorporated companies at that time their status within the single market.⁴⁴ The shift in the governing company law will also have a bearing on the so called insolvency tourism to the extent that relocating a business in order to get advantage of UK insolvency law is going to be harder. However, this issue has already been tackled at EU level by first establishing in the Recast the date on which the debtor's COMI is to be ascertained;⁴⁵ and second by pursuing a new approach to business failure and insolvency across Europe seeking to enhance domestic legislation, but also levelling out the playing field, at least from a regulatory viewpoint.

The Recast has also enshrined the principle of limited *vis attractiva concursus*, meaning that insolvency courts are exclusively competent to hear actions directly deriving from insolvency proceedings and closely linked with them.⁴⁶ The Court of Justice had already asserted this principle⁴⁷ and its case law helps to determine which actions fall within the EIR Recast. Given the terms of the new provision which refers to "any" insolvency-related action, Brexit will not modify member states' jurisdiction as regards to this principle.⁴⁸

4. Conflict rules and harmonized substantive provisions

Unlike the UNCITRAL Model Law, the EIR Recast also furnishes conflict rules in addition to some substantive provisions. In principle, these rules are featured by their territorial scope, meaning that they apply in principle only if the asset or creditor is located in a member state, or the law of a member state is applicable; otherwise, we have to resort to domestic rules in order to solve the conflict of laws.

The general rule is that the *lex fori concursus*, the law of the forum where the insolvency proceeding has been opened, applies.⁴⁹ So far, so good given that this is a quasi-universal conflict rule and will remain in place after Brexit. It is worth, though, reminding again about the role of private international law rules on company law in this sector as it will have severe consequences on the status of a debtor legal person, its members and directors as abovementioned.

⁴⁴ Discussing several options ranging from a soft to a hard Brexit see J. Armour, H. Fleischer, V. Knapp, M. Winner, *supra* n 37, 14-18.

⁴⁵ According to Article 3(1) of EIR Recast, courts have to examine their jurisdiction by the date of the opening of insolvency proceedings unless the debtor's registered office had been moved to another Member State within the three-month period before the request for the opening of insolvency proceedings.

⁴⁶ See Article 6 of EIR Recast.

⁴⁷ See CJEU on 12 February 2009, in Case C 339/07, [2009] ECR I-767 (*Christopher Seagon v. Deko Marty Belgium NV*).

⁴⁸ See R. Freitag, S. Korch, *supra* n 43, 1853. This is confirmed by the CJEU 16 January 2014, Case C-328/12 (Schmid). As to Spain, there would have been no difference if domestic jurisdiction rules apply to the extent that Article 11 of the Spanish Insolvency Act also enshrines the principle of limited *vis attractiva concursus*. That would not have been the case of Germany whose courts posed the prejudicial question leading to CJEU on 12 February 2009, in Case C 339/07, [2009] ECR I-767 (*Christopher Seagon v. Deko Marty Belgium NV*) because international avoidance proceedings are brought before the defendant's domicile and not before the insolvency court.

⁴⁹ See Article 7 of EIR Recast.

In order to protect specific interests, the EIR Recast provides for some exceptions to the *lex fori concursus* that deal with issues such as third-parties' rights in rem, reservations of title, set-off, contracts relating to immovable property and of employment, transactional avoidance or protection of third-party purchasers among others. Two of them are particularly interesting for investors, the one on security rights in rem and that on set-off as it is briefly addressed in the following paragraphs. The latter along with the provision on protection of third-party purchasers poses the issue of whether they are universally applicable as both rules do not contain any territorial reference.

Article 7 of EIR Recast lays down an immunity rule for secured creditors; if the secured asset is located in a member state other than the country of the opening, secured creditors can enforce their rights regardless of the insolvency proceeding. In the actual scenario, that would be the case of a creditor secured by a mortgage over an immovable located in the UK, or a pledge over receivables held in the UK. Those investors can realize their rights, not even taking into account the stay of individual enforcement proceedings that usually accompanies the opening of insolvency proceedings.⁵⁰ The rationale behind this rule is, on the one hand, the protection of secured creditors and on the other hand the simplifying of insolvency practitioners' work as they do not have to deal with adaptation problems between the different applicable laws, in particular the *lex fori concursus* and the *lex rei sitae*, thereby the complexity of proceedings is reduced resulting in cost savings.⁵¹

Be that as it may, this immunity rule only applies if the EIR Recast is applicable, i.e. should the insolvency proceeding be opened in a non-EU member state or secured assets be located in third states, the governing law is determined by EU member states' domestic legislation. Some countries may have specific conflict rules.⁵² Other member states lack specific provisions and it may well happen that the *lex fori concursus* would be the one dealing with this issue if a UK insolvency proceeding is recognized in one of those countries after Brexit. Paradoxically, the outcome would be beneficial for the insolvency objectives of UK proceedings, but not as much for secured creditors' interests.

Hence, secured creditors in the UK and those on the Continent will not be able to rely on the extra-protection granted to them by the EIR Recast. This could trigger an interesting side effect of Brexit, i.e. either a review of the EIR Recast's scope of application or the revision of domestic private international law rules on insolvency matters. The protection of secured creditors is essential in terms of access to credit, and that is a key issue that countries need to address. While the immunity rule has been heavily criticized on grounds of creating hold-out creditors,⁵³ the application of the *lex fori concursus* may surprise them and thus affect debtors' access to credit. Against this backdrop, a different connection such as the *lex rei*

⁵⁰ See extensively G McCormack, R. Bork (eds.), *Security rights and the European Insolvency Regulation* (London, Intersentia, Forthcoming 2017).

⁵¹ See Report on the Convention on insolvency proceedings by M. Virgós and E. Schmit (1996), para. 97 (hereafter, Virgós, Schmit Report).

⁵² See Article 201 of the Spanish Insolvency Law submitting the effects of insolvency proceedings on security rights to the *lex rei sitae*.

⁵³ See Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, Strasbourg, 12 December 2012, COM(2012) 743 final, at 12, and L. Carballo Piñeiro, "Towards the Reform of the European Insolvency Regulation: Codification rather than Modification" (June 2014) *Nederland Internationaal Privaatrecht (NIPR)* 207-215, 211-212.

sitae would be preferable. Alternatively, No. 15 of the Global Rules on Conflict of Laws Matters in International Insolvency Cases promoted by the American Law Institute furnishes them with an immunity rule, but with the caution that “the benefit does not apply if proof is provided that the state where the assets are situated at the time of the opening of insolvency proceedings has no substantial relationship to the parties or the transaction in relation to which the security right was created and there is no other reasonable basis for the fact that the assets are so situated”.⁵⁴ The latter would need, though, further amendments at EU level,⁵⁵ in addition to fostering litigation.

A similar protection is sought for set-off in view of its guarantee function⁵⁶ and the fundamental breach between the common law and civil law approaches to insolvency offsetting.⁵⁷ While most common law countries restrict set off between solvent parties and make it compulsory in the event of insolvency, civil law countries follow the opposite pattern, i.e. they prohibit insolvency set-off, but not if the conditions for offsetting had been met before the opening of insolvency proceedings.⁵⁸ The EU area of justice is not oblivious to these differences between the UK that makes insolvency set-off mandatory and one that cannot be excluded by agreement of the parties,⁵⁹ and those countries that in principle do not allow insolvency set-off, but permit other types of set-off provided that the conditions to offsetting had already been met by the time of the opening of the insolvency proceedings.⁶⁰ Accordingly, the conditions for offsetting in the framework of insolvency proceedings are submitted either to the *lex fori concursus* or the law governing the insolvency debtor’s claim.⁶¹

⁵⁴ See the comments and text in I. Fletcher, “‘L’enfer, c’est les autres’: Evolving Approaches to the Treatment of Security Rights in Cross-Border Insolvency” (2011) 46 *Texas International Law Journal* 489-512.

⁵⁵ A similar safeguard is already provided by Article 7(2)(m) of EIR Recast dealing with actions for voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors, the problem being that Article 16 thereof severely curtails the effectiveness of this measure by providing third parties benefited from such acts with a defence, that of requiring the act to be voidable not only according to the *lex fori concursus*, but also to the one governing it. See further references and criticisms by L. Carballo Piñeiro, *supra* n 53, 214.

⁵⁶ See Recital 70 of EIR Recast.

⁵⁷ See a brief overview in the Heidelberg-Vienna Report on the external evaluation of Regulation 1346/2000 on Insolvency Proceedings (JUST/2011/JCIV/PR/0049/A4) (hereafter, Heidelberg-Vienna Report), 288.

⁵⁸ See Virgós, Schmit Report, para. 109 and P. R. Wood, *Principles of International Insolvency* (2nd edn, London, Thomson-Sweet & Maxwell, 2007), 403.

⁵⁹ This principle is to be found, in case that a company has gone into liquidation in England, in *National Westminster Bank v Halesowen Presswork and Assemblies Ltd* [1972] A.C. 785, and Rule 4.90 of the Insolvency Rules 1986.

⁶⁰ See § 94 German *Insolvenzverordnung*; Article 58 of the Spanish Insolvency Act; Article 36 of the Hungarian Insolvency Law; Article 93 of the Polish Bankruptcy Law; Regulation 17(1) of the Irish Bankruptcy Act, 1988. Other countries require further conditions such as France where set-off is only feasible in exceptional cases, e.g. if claims were related to each other (see Article L-622 CCom.), or Austria (§ 20(2) *Insolvenzverordnung*) and Italy (Article 56 of *Legge Fallimentare*) where set off is only allowed if the creditor’s claim against the insolvency debtor arose three or six months or one year before the opening of the insolvency proceedings.

⁶¹ See Articles 7(2)(d) and 9 of EIR Recast. The conflict rule enshrined in both articles provides the creditor with alternative laws in order to sustain this right; while it is in principle submitted to the *lex fori concursus*, the law applicable to the insolvent debtor’s claim, the so called *lex causae*, may still entitle the creditor to set-off if the former does not permit so or requires more stringent conditions than the *lex causae*. See Virgós-Schmit report, para. 109.

Articles 7 and 9 only apply when the EIR Recast is applicable.⁶² Noteworthy is that there is an ongoing discussion on the territorial scope of this rule. Unlike the other conflict rules of the Recast, Article 9 is unclear to the extent that it refers to “the law applicable to the insolvent debtor’s claim”, i.e. the law of a member state is not specifically mentioned. This lacuna has been interpreted in line with other conflict rules in the EIR Recast by some commentators,⁶³ i.e. Article 9 only applies if the law of a member state is to be applied; otherwise, the law governing set-off in the event of insolvency is to be determined pursuant to domestic conflict rules.⁶⁴ A strong argument in favour of this interpretation is the fact that the second paragraph of this provision deals with set-off avoidance whose conflict rule only applies should the law of a member state be applicable. It would be thus inconsistent that the same provision had different scopes of application depending on the relevant paragraph.

On the other hand, many authors and in particular practitioners advocate for a broader interpretation, i.e. Article 9 of EIR Recast also applies when the law applicable to set-off is that of a third state.⁶⁵ Along these lines, it was suggested the recast of EIR to include a specific reference to the “law of a non-member state” in the relevant recital on set-off.⁶⁶ However, this recommendation was not followed by Recital 70 of EIR Recast. Nevertheless, the policy underlying Article 9 provides strong reasons for this interpretation, namely, if set-off plays the role of a guarantee it would be arbitrary to make this function dependent on whether the applicable law is that of a EU member or a non-member state.⁶⁷

Article 17 of EIR Recast does not mention the law of a member state, and it is also debatable whether it only applies among member states or also covers insolvency proceedings opened in third states. This provision deals with the protection of third-party purchasers of immovable assets, ships, aircrafts and securities subject to registration; if they had acquired their rights after the opening of insolvency proceedings, the validity of that act is submitted to the *lex rei sitae* or the law of the country where the registry is kept. Should it be concluded that this rule does not apply universally the protection of third-party purchasers would rely on domestic rules.⁶⁸

⁶² Provided that the insolvency proceeding is included in its material scope of application as established by Article 1 of EIR Recast and the debtor’s COMI is located in a Member State, all types of set-off are in principle included in its scope ranging from insolvency set-off to legal, independent, current account, transaction or judicial set-off. The classification is taken from P. R. Wood, *supra* n 58, 404-407.

⁶³ See Virgós-Schmit Report, para. 93 invoking systemic reasons to reach this interpretation.

⁶⁴ Such as § 338 of the German Insolvency Act or Article 205 of the Spanish Insolvency Law. However, other member states do not lay down specific provisions for which reason the only connection will be the *lex fori concursus*.

⁶⁵ Remarkably, see Heidelberg-Vienna Report, 287, reporting that only five Member States understood that this provision was only applicable when referring to the law of a member state.

⁶⁶ See Heidelberg-Vienna Report, 291.

⁶⁷ § 338 of the German Insolvency Act and Article 205 of the Spanish Insolvency Act closely follow EIR, but the issue is unsettled in many countries. Should this interpretation prevail, domestic conflict rules on set-off would only apply on insolvency proceedings not opened on the grounds laid down by the EIR Recast, i.e. when the debtor’s COMI is not located in a member state; or in the framework of a third state’s insolvency proceeding recognized in a member state.

⁶⁸ Both § 336 of the German Insolvency Act and Article 203 of the Spanish Insolvency Act lay down a similar provision to Article 17 of EIR Recast although they only mention immovables, ships and aircrafts setting mandatorily registered securities aside. Again, other member states do not lay down specific provisions in this regard.

While the objectives and territorial scope of the EIR Recast make a strong case for both rules not being applied to situations involving third states, the broad interpretation of both provisions should be clearly preferred if account is to be given to the impact of Brexit on the economies of UK and EU member states. In fact, it would be interesting to review all conflict rules and expand the EIR Recast's territorial scope in this respect.

5. Recognition and enforcement of judgments

Modified universalism is also based on strict recognition and enforcement rules meaning that foreign judgments opening insolvency proceedings have to be recognized, even in the country where there is already an ongoing insolvency proceeding, provided that only one of them is a main proceeding or both non-main ones.⁶⁹ Further problems may arise from the characterization of a foreign proceeding as a collective one or not.⁷⁰ Once this type of judgment has been recognized, the recognition of others on insolvency-related matters can follow as well as the adoption of measures in the country of destination.

The system set up by the EIR Recast is based on the principle of mutual recognition. Hence, judgments opening insolvency proceedings in a member state are automatically recognized in other member states without following a specific proceeding and the infringement of public policy is the only ground for refusal.⁷¹ In contrast, judgments coming from third states are submitted to domestic rules which have at least two shortcomings compared to the EIR system.⁷²

The first shortcoming is the moment from which a foreign judgment is effective in another country. While a judgment opening an insolvency proceeding in a member state is immediately effective across the EU area of justice, the effects of third countries' judgments are submitted to domestic rules that usually make their effectiveness depend on the date of their recognition in that country.⁷³ For example and in accordance with the EIR Recast, a UK insolvency stay is effective both in the UK and in Spain at the same time,⁷⁴ while those of third states are only effective once the foreign judgment opening the insolvency proceeding is recognized in Spain. The risks posed by this delay can be reduced by adopting provisional

⁶⁹ As seen in section 3 of this paper, this is decided on the basis of the head of jurisdiction according to which the seized court issued its judgment opening an insolvency proceeding.

⁷⁰ This issue has been undermined in the EU area of justice by making Annex A of EIR Recast mandatory in addition to have broadened its material scope of application as it can be read in Recital 9 and Article 1 thereof.

⁷¹ See Articles 19 and 33 of EIR Recast.

⁷² As seen, the Cross Border Insolvency Regulations 2006, section 426 of the Insolvency Act 1986 in the case of Ireland, and the common law will be the ones applicable in the UK to judgments coming from the Continent. See J. Marshall, J. Ferguson, L. Aconley, "Brexit: what next for cross-border restructurings and insolvencies?" (2016) 4 *Corporate Rescue and Insolvency* 149-151, 149-150.

⁷³ A remarkable exception is the German system which generally operates on the basis of the automatic recognition of foreign judgments.

⁷⁴ The automatic recognition of UK judgments opening insolvency proceedings implies the automatic recognition of their effects across the EU. See specifically Article 20 of EIR Recast, and further discussion in G. McCormack, "Reconciling European Conflict and Insolvency Law" (2014) 15 *European Business Organization Law Review* 309-336, 327-332.

measures where appropriate.⁷⁵ Still, this is considerably less effective than automatic recognition.

The second shortcoming arises from the grounds for refusal of recognition and enforcement of foreign judgments. As said, the Recast severely restricts them as EU member states' judgments can only be refused on grounds of a public policy violation, in particular the infringement of state fundamental principles or the constitutional rights and liberties of the individual.⁷⁶ Most notably, the examination of the country of origin's international jurisdiction is out of the question in the EU area of justice,⁷⁷ but it will always be conducted in any domestic recognition system.⁷⁸ The latter is of great significance again because UK insolvency proceedings over UK limited companies without COMI in that country will not be recognized in those EU member states adhering to the real seat theory.⁷⁹

In the framework of modified universalism the examination of the country of origin's jurisdiction is essential in order to establish the effects of the foreign insolvency proceeding, i.e. whether it is recognized as a main proceeding with universal effects or as a non-main one with territorial effects.⁸⁰ Should the country of destination not have implemented modified universalism, the opening of an insolvency proceeding therein is likely to impede the recognition of a foreign insolvency proceeding.

The recognition and enforcement of other judgments on insolvency-related matters than the one opening the proceeding is also imbued by the principle of mutual recognition in that the EIR Recast submits this issue to Regulation (EU) 1215/2012 of the European Parliament and the Council of 12 December 2012 on international jurisdiction, recognition and enforcement of judgments in civil and commercial matters (Brussels Ia).⁸¹ Remarkably, the latter has

⁷⁵ See Article 19 of the UNCITRAL Model Law. Article 226 of the Spanish Insolvency Law makes the adoption of provisional measures possible while the exequatur is ongoing. The recognition of a foreign insolvency practitioner's powers is usually undertaken before the recognition of foreign judgments opening insolvency proceedings, and this opens the door for them acting in the country of destination and e.g. securing debtor's assets and accessing business and land registers to inform about a debtor's insolvency. However, these measures do not imply advancing the effects of the opening of insolvency proceedings such as an insolvency stay, and it is in this regard that the abovementioned Spanish provision is a novelty because it lists insolvency stay as a provisional measure. The implementation of the UNCITRAL Model Law by all member states would help thus to diminish the impact of Brexit.

⁷⁶ In Case C-341/04, [2006] ECR I-3813 (*Eurofood*), the public policy clause is deemed to be violated on the ground that the provisional insolvency-officer named in the Irish insolvency proceeding was not given notice with sufficient time nor enough documentation in order to make its case before the Italian court deciding on the opening of a main insolvency proceeding over *Eurofood* in Italy.

⁷⁷ Although regarding the Brussels Convention, it is worth mentioning CJEU 28 March 2000, Case C-7/98 (*Dieter Krombach v André Bamberski*) where it was made clear that the examination of the country of origin's jurisdiction was not even possible when the head of jurisdiction was clearly exorbitant as it happened in that case: the criminal judge had based its competence to decide on the civil action accumulated to a criminal action against Mr. Krombach, on Article 5(4) of the Brussels Convention and after having accepted jurisdiction on the criminal action simply because of the French nationality of the victim.

⁷⁸ See Article 220(1)-(3) of the Spanish Insolvency Law. However, this ground for refusal of recognition is drafted in broad terms meaning that the foreign jurisdiction does not have to be based on the very same heads of jurisdiction as the Spanish one but similar non-exorbitant heads could be accepted.

⁷⁹ See R. Freitag, S. Korch, *supra* n 43, 1854.

⁸⁰ See Article 17 of the UNCITRAL Model Law, or Article 220(2) of the Spanish Insolvency Law.

⁸¹ OJ [2012] L 351/1. See Article 32 of EIR Recast.

abolished exequatur meaning that judgments are automatically recognized and enforced. While these provisions are only applicable between member states, the smooth functioning of insolvency proceedings will greatly suffer on both sides of the English Channel.

Further advantages of the EIR Recast are related to the powers of insolvency practitioners as first they are immediately recognised across the EU area of justice,⁸² and second the Recast enhances those powers by setting up additional ones as regards to related proceedings as mentioned in the following section of this paper. The UNCITRAL Model Law also provides for this type of recognition.⁸³ However, the extent of the powers of foreign insolvency practitioners depends on the recognition of the judgment opening insolvency proceedings,⁸⁴ and as this takes time the principles for effective insolvency suffer compared to the EU regulatory framework. The latter scenario is nevertheless better than the absence of any explicit reference to the powers of insolvency practitioners in domestic laws as this makes their access to local courts unclear. In fact, the lack of specific rules in these matters may point out to a further and more significant issue, that of which effects are granted to a foreign insolvency proceeding in the relevant domestic jurisdiction.⁸⁵

Similar uncertainties arise as to foreign creditors' access to insolvency proceedings. More specifically, the EIR Recast takes for granted the principle of non-discrimination and thus foreign and domestic creditors are to be equally treated. However, this may not be the case even in those countries applying the UNCITRAL Model Law. The latter lays down foreign creditors' rights to commence or participate in local insolvency proceedings and provides that they are to participate in any distribution and to rank no less than local unsecured creditors, but the issue of priority ranking is left opened.⁸⁶

6. Rules on communication, cooperation and coordination

Although it is generally acknowledged that the insolvency objectives are better achieved by a single insolvency proceeding with universal effects, the compromise made by modified universalism is a second best option backed up by the cooperation obligations it requires. Those involved in all proceedings opened over the one and same actor have to "communicate, cooperate and coordinate" themselves in order to achieve the relevant insolvency objectives. To this end, the UNCITRAL Model Law establishes general obligations of cooperation, and the EIR Recast has further streamlined them. For example, while the UNCITRAL Model Law distinguishes between main and non-main proceedings, the Recast tellingly does between principal and secondary proceedings.

⁸² To this end, the meaning of insolvency practitioners is spelled out in Article 2(5) and a list of who is an insolvency practitioner in each member state is provided in Annex B while Articles 21 and 22 lay down how to make its appointment as insolvency practitioner effective in another member state, just by issuing a certified copy of the original decision appointing it.

⁸³ See Articles 9-12 of the UNCITRAL Model Law.

⁸⁴ See Article 24 of the UNCITRAL Model Law.

⁸⁵ Both the EIR Recast and the UNCITRAL Model Law are careful in addressing the effects of foreign insolvency proceedings beyond general statements only indicating their extension to the countries recognising the judgment opening insolvency proceedings.

⁸⁶ See Article 13 of the UNCITRAL Model Law.

The EIR Recast ameliorates cooperation rules in several ways in respect to the still in force EIR.⁸⁷ In the first place, the Recast introduces cooperation obligations among insolvency courts and officers as well as strengthens the already existing duties for insolvency officers.⁸⁸ Information, communication and cooperation duties also benefit creditors seated, domiciled or habitually resident in a member state for whom the Recast contains uniform rules on what and in which language are to be informed, and on claim filing and verification.⁸⁹ As these rules may need further implementation, it would be advisable to broaden their scope of application via domestic law in order to include creditors located in third countries as these measures reinforce their position as investors. In contrast, the coordination of electronic insolvency registries as indicated by the Recast will be a measure more difficult to achieve beyond the EU area of justice.⁹⁰

In the second place, while secondary proceedings are maintained in the Insolvency Regulation's architecture, their coordination with the main proceeding is enhanced as they can pursue reorganization purposes now.⁹¹ Moreover and inspired by successful UK case law,⁹² insolvency officers of main proceedings are entitled to avoid the opening of secondary ones by entering into an undertaking by which local creditors' rights are ensured the same treatment in the main proceeding as if the secondary proceeding had been opened.⁹³ By this means, the debtor's insolvency is managed from only one jurisdiction although that court is practically dealing with two insolvency laws, the *lex fori concursus* and the *lex fori concursus secundarii*, i.e. the law of the finally not-opened secondary proceeding. While this may be a significant hurdle for this type of undertaking in terms of costs and time,⁹⁴ the benefits lie in the concentration of actions in just one jurisdiction.⁹⁵

⁸⁷ See the shortcomings in EIR in this area in Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings, Strasbourg, 12 December 2012, COM(2012) 743 final.

⁸⁸ See Articles 41, 42 and 43 of EIR Recast.

⁸⁹ To this end national laws cannot require representation by a lawyer to lodge a claim, and a minimum period of 45 days is provided for this. EU forms are included within the Regulation to cut costs and facilitate access to foreign courts.

⁹⁰ See Articles 24 to 30 of EIR Recast.

⁹¹ Article 3(3) of EIR lays down that secondary proceedings can only be winding-up proceedings. This provision has been deleted in Article 3 of EIR Recast.

⁹² See High Court of Justice Birmingham, Chancery Division, 18 April 2005, *MG Rover I* [2005] EWHC 874 (Ch), EIR-database (Cimejes) No. 76; High Court of Justice London, 9 June 2006, *Collins & Aikmann III*, [2006] EWHC 1343 (Ch), EIR-database No. 134; High Court of Justice London, 11 February 2009, *Nortel Networks SA and Others* [2009] EWHC 206.

⁹³ See Article 36 of EIR Recast. The Recast has provisions to facilitate these undertakings at EU level while establishing some limits in order to avoid abusive behaviour on the part of the insolvency practitioner.

⁹⁴ Further problems are likely to arise from the fact that Article 36 just refers to local creditors as defined in Article 2(11) as the counterpart in the undertaking, ignoring that all debtor's creditors are entitled to claim file in secondary proceedings, and thus their interests are to be taken into account as well. See further E. Torralba Mendiola, "El nuevo reglamento en materia de procedimientos sobre insolvencia", in M. Jimeno Bulnes (dir.), *Aproximación legislativa versus reconocimiento mutuo en el desarrollo del espacio judicial europeo: una perspectiva multidisciplinar* (Barcelona, Bosch Editor, 2016), 83-115, 102-106; M. Weiss, *supra* n 29, 206-207.

⁹⁵ See Heidelberg-Vienna Report, 356 et seq.

In the third place, the Recast manages to address groups of companies' insolvency.⁹⁶ Although its predecessor did not address this type of insolvency, it entered into the EIR by means of procedural consolidation, i.e. by understanding all group companies' COMI to be in the same country. Again, UK courts were the first in addressing this issue,⁹⁷ being their case law followed by other countries later on until the *Eurofood* judgment put clear limits to a broad interpretation of the debtor's COMI.⁹⁸ The current provisions on groups of companies' insolvency in the Recast are built upon this precedent in that they do not pursue a procedural or substantive consolidation, but the coordination of the respective insolvency proceedings over the affected group of companies.⁹⁹ Accordingly, a main proceeding is opened over each insolvent company in a group, but communication, cooperation and coordination duties are established among all insolvency courts and practitioners.¹⁰⁰

All the above mentioned obligations are only binding on and between member states. Nevertheless, it is important to bear in mind that this is an area where soft law reigns.¹⁰¹ Common law countries have solved very complicated insolvencies such as the Maxwell case,¹⁰² by concluding insolvency protocols between the courts involved in international insolvency. In the light of this success international institutions and specialized organizations have been working on providing guidelines that may help less experienced courts in concluding such soft law devices.¹⁰³ In this vein, it is to be welcomed that the EIR Recast encourages insolvency practitioners and courts to "take into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active

⁹⁶ See Articles 56 to 77 of EIR Recast.

⁹⁷ *MM. Klempka, Taylor et Green v ISA Daisytek*, 4.9.2003 (2003) *Rev.crit.dr.int.pr.* 655-659, with comments by G. Khairallah, 659-668.

⁹⁸ See CJEU 2 May 2006, Case C 341/04, [2006] *ECR I-3813 (Eurofood)*. The Court of Justice makes the point in this judgment of "one debtor, one COMI", i.e. companies in a group are separate legal entities and each has its own COMI.

⁹⁹ See R. Bork, R. Mangano, *European Cross-Border Insolvency Law* (Oxford, OUP, 2016), 273-278.

¹⁰⁰ In case of closer cooperation the Recast provides for the opening of a group cooperation proceeding. See Articles 60 and 61 of EIR Recast. Critical, see C. Thole, M. Dueñas, "Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation" (2015) 24 *International Insolvency Review* 214-227.

¹⁰¹ Actually, soft law in the form of protocols and workouts to achieve coordination among the different insolvency courts is considered to be one of the reasons why the UNCITRAL Model Law on Cross-Border Insolvencies has not been widely accepted. See, S. Chandra Mohan, "Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?" (2012) *International Insolvency Review* 199-223, 221-222.

¹⁰² See among others J.L. Westbrook, "The Lessons of *Maxwell Communication*" (1996) 64 *Fordham Law Review* 2531-2541.

¹⁰³ Given their success different guidelines have already been provided such as the European Communication and Cooperation Guidelines elaborated by Profs. B. Wessels and M. Virgós, available at <www.insol.org/INSOLfaculty/pdfs/BasicReading/Session%205/European%20Communication%20and%20Cooperation%20Guidelines%20for%20Cross-border%20Insolvency%20.pdf>; the ALI Court-to-Court Communication principles; and the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation 2009. See further R. Mason, "Cross-Border Insolvency and Legal Transnationalisation" (2012) *International Insolvency Review* 105-126. See also the already mentioned Global Principles for Cooperation in International Insolvency Cases and Global Guidelines for Court-to-Court Communication in International Insolvency Cases, available at (2014) 23 *International Insolvency Review* 221-237.

in the area of insolvency law, and in particular the relevant guidelines prepared by the United Nations Commission on International Trade Law (Uncitral)”.¹⁰⁴

This is particularly interesting because civil law countries are not used to this flexible approach as it is strange to their legal culture. For example, Article 227 of the Spanish Insolvency Law already entitles Spanish courts to conclude insolvency protocols, but it has never been resorted to. Other countries even fail to entitle their courts to engage in international cooperation. This along with other factors such as lack of appropriate resources and linguistic skills may hamper the much needed court-to-court coordination.

However, the legal and judicial panorama is meant to evolve mainly due to the EIR Recast’s provisions in this regard. Further help may come through the EU Cross-Border Insolvency Court-to-Court Cooperation Principles (EU JudgeCo Principles) and Guidelines which specifically take into account the particularities of the EU area of justice.¹⁰⁵ Once these developments are set in motion among member states, it is clear that they will not be confined to the EU area of justice and be applied to third states as well.

7. Schemes of arrangement

Many companies and debtors have shopped for the British restructuring and insolvency toolkit under the umbrella of EIR. However, the most successful tool in terms of company restructuring and attraction of foreign debtors is not within the scope of EIR or the Recast. The reason is because schemes of arrangement do not fit the definition of insolvency proceedings laid down in EIR.¹⁰⁶ Although they have been widely used for capital restructuring purposes by financially distressed companies, the latter do not have to be insolvent to resort to them and the appointment of an insolvency practitioner is not required either. Furthermore, these compromises or arrangements between a company and its creditors do not have to include all creditors.¹⁰⁷ In contrast, the Recast’s scope of application has been broadened to include pre-insolvency proceedings, but it only covers those listed in Annex A thereof not including schemes of arrangement.¹⁰⁸ The issue is then under which rules they have effects abroad.

To begin with, it is important to note that UK courts have constructed their jurisdiction on schemes of arrangement in a broad manner, namely, while a significant connection to the UK is required for foreign companies to take advantage of this mechanism, it has been deemed

¹⁰⁴ See Recital 48, *in fine* of EIR Recast.

¹⁰⁵ See B. Wessels, “A Glimpse into the Future: Cross-Border Judicial Cooperation in Insolvency Cases in the European Union” (2015) 24 *International Insolvency Review* 96–121.

¹⁰⁶ According to Articles 1(1) and 2(a) of EIR, it applies to “collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator”.

¹⁰⁷ See Part 26 of the Companies Act 2006.

¹⁰⁸ Schemes of arrangements are collective composition proceedings for which reason they can be characterized as pre-insolvency proceedings even though they may not be binding on all creditors and do not involve the appointment of an insolvency practitioner. However, Recital 16 of the Recast seems to point to their exclusion given that they are based on general company law not designed exclusively for insolvency situations. By this means UK courts are not bound by the Recast’s jurisdiction rules. See among many providing arguments for keeping this mechanism out of the EIR Recast, G. McCormack, “Reforming the European Insolvency Regulation: A Legal and Policy Perspective” (2014) 10(1) *Journal of Private International Law* 41, 47 et seq.

sufficient that the claims to be restructured are governed by English law.¹⁰⁹ Equally important is that schemes will be recognized and enforced in the country where they are meant to deploy their main effects which can be the country of the company's incorporation, where it has its central administration or most creditors or assets. This prerequisite is significant to the extent that if the binding effect of schemes on dissenting parties is not recognized, it will create hold-out creditors. Likewise, the opening of insolvency proceedings colliding with a UK scheme of arrangement could not be ruled out if they are not recognized abroad.

The non-inclusion of schemes of arrangement in the EIR Recast makes the application of the Brussels Ia Regulation to them almost inevitable given the interaction between both instruments.¹¹⁰ Although this is not clear given the particularities of this type of arrangement as examined later on, the application of the latter has the advantage of vetoing the examination of UK's jurisdiction on schemes when it comes to their recognition and enforcement in other member states. This issue will not be avoided once domestic rules apply.

Once the UK loses its status as a member state, the complexities of depending on domestic rules to recognize schemes of arrangement start with the issue of whether they are pre-insolvency proceedings in the light of the relevant foreign legislation or not. For example, they could be deemed as such according to the Spanish Insolvency Act which has specific provisions on the recognition and enforcement of judgments opening insolvency proceedings; if that is the case, the company involved would need to have its COMI or an establishment in the UK for the scheme to be recognized in Spain.¹¹¹

If not characterized as insolvency proceedings, further problems arise from the fact that schemes of arrangement are collective composition proceedings and do not easily fit in the ordinary heads of jurisdiction. The issue has already arisen in the framework of the Brussels Ia Regulation given the unclear adversarial nature of these schemes that makes it difficult to determine who is the defendant or the obligation on which the lawsuit is based.¹¹² Party autonomy may help but choices of jurisdiction are unlikely to be the solution for creditor schemes of arrangement.¹¹³ Against this backdrop schemes' recognition abroad may be impeded by holding UK jurisdiction to sanction them as unreasonable.

¹⁰⁹ See further J. Marshall, J. Ferguson, L. Aconley, *supra* n 72, 150.

¹¹⁰ See J. Payne, "Cross-border Schemes of Arrangement and Forum Shopping" (2013) 14(4) *European Business Organization Law Review* 563-589, also available at SSRN: University of Oxford Legal Research Paper Series <<http://ssrn.com/abstract=2277451>>. On the interaction between the EIR and the Brussels I Regulation, see G. McCormack, *supra* n 74, 309-336.

¹¹¹ Article 220(1)(1) of the Spanish Insolvency Act indicates that it applies to judgments rendered in a collective proceeding based on the debtor's insolvency by which his or her assets and businesses become subject to court control or supervision with a view to their liquidation or reorganization. Although this provision is interpreted in similar terms to that on the EIR, there are already voices in Spain pointing out that schemes of arrangement should be included within the Regulation's scope. See E. Torralba Mendiola, *supra* n 94, 88-95.

¹¹² See J. Payne, *supra* n 110, 19-20. In this regard, R. Freitag, S. Korch, *supra* n 43, 1854-1856, highlight the similarities between schemes of arrangement and collective actions. However, schemes are even more problematic as it is not clear which position the class has, that of claimant or defendant. In general, it is assumed that the 'person being sued' is the scheme creditors which makes even more complicated the establishment of jurisdiction.

¹¹³ See J. Marshall, J. Ferguson, L. Aconley, *supra* n 72, 151, who also indicate that schemes of arrangement may be included within the scope of The Hague Convention on Choice of Court Agreements 2005.

The recognition of schemes via private international law has also been suggested and dealt with by submitting the issue to 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).¹¹⁴ Member states will still apply Rome I to this end after Brexit. However, the effectiveness of schemes cannot be fully guaranteed under this type of recognition¹¹⁵ to the extent that Rome I is only available for our purposes if the law governing the contracts between a company and its creditors is English law.¹¹⁶ Still, the margin for schemes' effectiveness in member states under this regime will be broad enough to make them an attractive tool for foreign companies.

8. Final remarks

A brief examination of the EIR Recast's features leads to a straightforward conclusion and it is that Brexit will make insolvency proceedings involving the UK and member states less efficient and effective. Moreover, its impact is likely to be more far-reaching if international insolvency rules are analysed against the backdrop of the market freedoms upon which the internal market has been built. The freedoms of provision of services and of establishment from which legal persons benefit is a case in point and no doubt it will be the subject-matter of many discussions to come.¹¹⁷ However and taken into account the increasing awareness about the significance of insolvency law in securing a dynamic and healthy market, both the UK and the EU ought to unilaterally undertake some measures in order to diminish the impact of Brexit in this particular field of law.

One of those measures is already on its way as it seeks for the harmonisation of substantive insolvency law. In general, the developments in international insolvency law of the last two decades have been impressive and largely due to the UK involvement in global insolvency law reform projects, not to mention knowledge and expertise provided in high-profile cases by British academics and practitioners.¹¹⁸ The EU has clearly benefitted from this engagement as the EIR Recast shows.

Against this backdrop, the European Commission has already taken steps towards substantive harmonization in this field of law¹¹⁹ by issuing the 2014 Recommendation on a new approach

¹¹⁴ Although it excludes from its material scope of application questions governed by the law of companies and other bodies that does not refer to schemes of arrangement. See J. Payne, *supra* n 110, 24.

¹¹⁵ See making this point J. Marshall, J. Ferguson, L. Aconley, *supra* n 72, 151.

¹¹⁶ Rome I Regulation lays down both express and implied choice of law as well as the possibility of modification of the law governing the contract at stake. See Article 3 of Rome I.

¹¹⁷ The European Commission is working on this topic as can be seen from a tender made public in August 2014 to conduct a "Study on the law applicable to companies with the aim of a possible harmonisation of conflict of laws rules on the matter" (JUST/2014/JCOO/PR/CIVI/0051). See also the proposal for European rules on the law applicable to companies elaborated by the European Group of Private International Law and promoting the place of incorporation as the main connecting point in determining the law governing companies. See EGPIIL, Twenty fifth meeting, Luxembourg, 10-20 September 2015, available at <http://www.gedip-egpil.eu/>.

¹¹⁸ See S. Parker, N. Hood, *supra* n 4, 176-177.

¹¹⁹ Steps towards harmonization have apparently begun after the INSOL Europe's report on Harmonization of Insolvency Law at EU Level commissioned by the European Parliament. See INSOL Europe, "Harmonization of Insolvency Law at EU Level", European Parliament. Directorate General for Internal Policies, 2002, available at <http://www.europarl.europa.eu/studies>. Afterwards, see the European Parliament Report with recommendations to the Commission on insolvency proceedings in the context of EU company law, 2011/2006(INI), 17 October 2011.

to business failure and insolvency. As the latter's implementation in member states has been patchy,¹²⁰ the Commission is already working on further harmonization,¹²¹ and issued a 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.¹²² Brexit should not stop this movement towards harmonization, but make it more appealing to the extent that sharing the same insolvency and business rescue culture cannot but improve cooperation in cross-border insolvencies.¹²³

As a matter of fact, international insolvency is nowadays far away from exceptional, and it is of course not restricted to intra-EU cases. In this regard, there have already been proposals for the EU to implement the UNCITRAL Model Law on Cross-Border Insolvency in order to smooth the functioning of the internal market.¹²⁴ The fact that the UK is becoming a non-EU member state is an excellent reason for placing this proposal high in the legislative agenda as it can only be in the best interests of businesses and investors on both sides of the English Channel.

¹²⁰ Evaluation of the implementation of the Commission Recommendation of 12.3.2014 on a new approach to business failure and insolvency, 30.9.2015, available at http://ec.europa.eu/justice/civil/commercial/insolvency/index_en.htm.

¹²¹ In preparing for any future steps towards harmonization, the European Commission commissioned a consortium of universities and other entities coordinated by the University of Leeds and under the supervision of Professors Gerard McCormack and Andrew Keay a Study on a new approach to business failure and insolvency. Comparative legal analysis of the Member States' relevant provisions and practices. Tender No. JUST/2014/JCOO/PR/CIVI/0075. The study is available at <ec.europa.eu/justice/civil/files/insolvency/insolvency_study_2016_final_en.pdf>; also published in G. McCormack, A. Keay, S. Brown, *European Insolvency Law: Reform and Harmonisation* (Cheltenham, Edward Elgar, 2017).

¹²² See Commission Staff Working Document Impact Assessment accompanying the Proposal, Strasbourg, 22 November 2016 [SWD(2016) 357 final].

¹²³ Interestingly, in May 2016 the UK government issued a consultation on several proposals to improve its business rescue regime, including a moratorium, a cram-down mechanism and a form of protection for rescue finance. This is a response to World Bank's Doing Business project and the rank granted to the UK as a supposedly debtor-friendly approach adopted by UK procedures. For a critique to the Doing Business methodology, see Gerard McCormack, "World Bank "Doing Business" project: should insolvency lawyers take it seriously?" (2015) 28(8) *Insolvency Intelligence* 119-123

¹²⁴ INSOL Europe 2012. Already regretting this implementation was not done by the EIR Recast, see S. Bewick, "The EU Insolvency Regulation, Revisited" (2015) 24 *International Insolvency Review* 172-191, 190. Discussing though the adequacy of EIR Recast for such endeavour from a constitutional and policy viewpoint, see the post of B. Wessels, *supra* n 24.