Issues of Legal Uncertainty Arising in the Context of the Withdrawal of the U.K. from the E.U.—the Impact on Cross-Border Insolvency Proceedings

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1. PREFACE

1.1. The role of the Financial Markets Law Committee (the "**FMLC**" or the "**Committee**") is to identify issues of legal uncertainty or misunderstanding, present and future, in the framework of the wholesale financial markets which might give rise to material risks and to consider how such issues should be addressed.

1.2. Following the referendum on Thursday 23 June 2016, in which the U.K. voted to leave the E.U., the FMLC announced that it would work with experts in law and financial services to identify, analyse and address related legal uncertainties potentially arising in connection with the prospective U.K. withdrawal from the E.U. ("**Brexit**" or the "**Withdrawal**") and that it would establish a High Level Advisory Group (the "**HLAG**") to give direction to the Committee's future work in this field. Its research programme is now well under way.[2]

1.3. At the inaugural meeting of the HLAG, it was determined that the FMLC should convene a working group to consider questions of applicable law, jurisdiction and recognition/enforcement in the context of corporate insolvency and the impact of Brexit on the legal framework embodied in Regulation (EU) 2015/848 on insolvency proceedings (the "**Recast EUIR**") which, from 26 June 2017, replaced Regulation (EC) 1346/2000 on insolvency proceedings (the "**EUIR**").[3]

2. INTRODUCTION AND EXECUTIVE SUMMARY

2.1. In the 14 months since the referendum, discussion about the form of the U.K.'s future relationship with the E.U. has centred on the options of a "soft" Brexit—wherein the U.K. might decide to remain within the European Economic Area (the "**E.E.A.**") or conclude a completely new U.K.-E.U. trade agreement—or a "hard" Brexit, in which eventuality the U.K. would leave the E.U. without any treaty provision for trade. While Prime Minister Theresa May had previously indicated a willingness to leave the E.U. without any treaty provisions for the future, the result of the general election held

2 The text of the announcement and further details of the FMLC's work in this area are available at: http://www.fmlc.org/brexit.html.

3 The EUIR and the Recast EUIR will operate, however, in parallel for a transitional period of indeterminate length. While the Recast EUIR applies to legacy insolvency proceedings opened on or after 26 June 2017, Article 84(1) of the Recast EUIR makes clear that any proceedings opened before that date will be governed by the EUIR.

in the U.K. in June 2017, which resulted in a hung Parliament, has again focused media attention on the possibility of a "soft" Brexit.[4]

2.2. In the meanwhile, HM Government has taken steps to begin withdrawal proceedings. On 29 March 2017, HM Government officially served notice of the U.K.'s withdrawal to the E.U. under Article 50 of the Treaty on European Union (the "**TEU**"). On 13 July 2017, a bill, formally known as the European Union (Withdrawal) Bill (the "**Withdrawal Bill**"), was introduced to the House of Commons.

2.3. The Withdrawal Bill serves two main purposes: (i) it provides for the repeal of the European Communities Act 1972; and (ii) it enables the incorporation of the body of E.U. legislation—known as the "*acquis*"—into U.K. law. E.U. law applies in the U.K. both by means of directly-applicable treaties and regulations (which the Withdrawal Bill refers to as "**Direct E.U. Legislation**")[5] as well as *via* domestic implementing legislation, which is passed specifically with the aim of implementing E.U. directives (referred to as "**E.U.-derived Domestic Legislation**").[6] Clauses 3 and 2, respectively, of the Withdrawal Bill provide that both E.U. legislation that is directly applicable as well as any that is enabled by U.K. implementing acts will be incorporated into domestic law. The EUIR, as an "E.U. regulation" will be incorporated into U.K. law under clause 3(2) of the Withdrawal Bill. In addition, clause 7 of the Withdrawal Bill makes provisions for secondary legislation to be passed in order to deal with any "deficiencies" caused by this transposition, including addressing the need for reciprocal arrangements as explained below.

2.4. Despite these plans to accommodate the *acquis* in the domestic legal framework, several legal and operational uncertainties remain. This paper addresses those uncertainties which arise with respect to cross-border insolvency—uncertainties which, in a financial markets context, may mean that it is harder to resolve non-performing loans, facilitate business rescues *via* reorganisations, settle commercial disputes and collect debts.

2.5. On withdrawal from the E.U., the U.K. will cease to be a Member State and U.K. creditors will necessarily lose the benefit of reciprocity in the mandatory recognition of U.K. insolvency proceedings in the E.U. This phenomenon is referred to throughout

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4 See, for example: Blitz, "Soft Brexit hopes seen providing a cushion for the pound", *Financial Times*, (9 June 2017), available at: https://www.ft.com/content/42679902-4cd5-11e7-919a-1e14ce4af89b?mhq5j=e3.

5 Capital letters "D" and "L" and punctuation points here are an editorial addition to bring a defined term into conformity with FMLC publishing guidelines and do not appear in the Withdrawal Bill.

6 See *ibid*.

this paper as the "**loss of reciprocity**". The loss cannot, unlike some other benefits of E.U. law, be rectified by receiving or transposing key E.U. legislation—in this case, the Recast EUIR—into domestic legislation because it is the U.K.'s status as a Member State which gives rise to the obligation on other Member States' courts to enforce the insolvency judgments of U.K. courts and to recognise their proceedings.

2.6. The impact of Brexit will also be felt in connection with restructuring tools, such as schemes of arrangement, as well as in connection with financial markets infrastructure, where E.U. financial services measures—such as Directive 98/26/EC on settlement finality in payment and securities settlement systems (the "**SFD**") and Directive 2002/47/EC on financial collateral arrangements (the "**FCAD**")—are key to the elimination of uncertainty from insolvency proceedings and their adverse effect on collateral and financial market transactions.

2.7. This paper examines these and other elements of the legal framework for cross-border insolvency proceedings and considers the extent to which they may be affected by or give rise to issues of uncertainty in consequence of Brexit. The benefits of the current regime, and the cause of the Committee's concern, are explored in section 3. In section 4, the paper examines some of the particular benefits that arise from insolvency-related legislation such as the SFD and FCAD. Section 5 explores the consequences for insolvency proceedings should these regimes be no longer applicable in the U.K., including the impact on the recognition of E.U. and U.K. insolvency proceedings, the impact on the recognition of U.K. schemes of arrangement and the potential impact on the choice of English law to govern finance documents.

2.8. Sections 6 and 7 set out the Committee's recommendations and conclusions. Section 6 explores whether it may be possible to resolve the uncertainty by concluding a U.K.-E.U. agreement under which the Recast EUIR would continue to apply to the recognition of U.K. proceedings in the E.U. post-Brexit, without any loss of reciprocity. The section also consists of an exploration of alternative options for the smooth operation of insolvency proceedings upon Brexit, including: (i) amendments to the Cross-Border Insolvency Regulations 2006 ("**CBIR**"); (ii) extension of the list of countries covered by section 426 of the Insolvency Act 1986; (iii) relying on English common law and the impact of the rule in *Gibbs v Societe Industrielle des Metaux (1890)* 25 QBD 399 ("**the rule in *Gibbs***"); and (iv) participation by the U.K. in the 2005 Hague Convention on Choice of Court Agreements (the "**Hague Convention**").

2.9. This paper does not cover resolution proceedings under Directive (EU) 2014/59 establishing a framework for the recovery and resolution of credit institutions and investment firms (the "**BRRD**"), nor does it cover insolvency or reorganisation proceedings in respect of such entities falling under Directive (EU) 2001/24 on the reorganisation and winding-up of credit institutions (the "**CIWUD**") or the insolvency or reorganisation of insurance undertakings falling under the Insurers (Reorganisation and Winding Up) Regulations 2003.

2.10. It is not for the FMLC to comment on matters of policy or the form that future regulatory approaches, if any, should take and this paper should not be understood to constitute comments thereon.

3. CROSS-BORDER INSOLVENCY MEASURES

1. <u>The Recast EUIR</u>

3.1. The Recast EUIR applies to proceedings opened on or after 26 June 2017 in E.U. Member States to determine the proper jurisdiction and the applicable law for cross-border insolvency proceedings and provides for mandatory—i.e. mutual and reciprocal—recognition of those proceedings.[7] It has two principal policy objectives: i) to provide a framework (through directly applicable law) for conducting cross-border cases;[8] and ii) to remove incentives for parties to transfer assets or judicial proceedings from one E.U. Member State to another so as to seek a more favourable legal position through so-called forum-shopping.

3.2. Where a debtor's centre of main interests ("**CoMI**") is located within an E.U. Member State, the Recast EUIR identifies that Member State as the appropriate forum for the main insolvency proceedings and requires recognition of the proceedings by the courts of other E.U. Member States. The Recast EUIR also guides the operation of any parallel secondary insolvency proceedings in other E.U. Member States and the

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7 The EUIR is not binding on and does not apply in Denmark by virtue of the limited Danish ratification of the Treaty on the European Union (under which it acquired a complete opt-out on monetary union, the Common Security and Defence Policy (CSDP), Justice and Home Affairs (JHA) and the citizenship of the European Union). Insolvency issues between citizens and/or companies domiciled in any of the Nordic countries (Sweden, Norway, Finland, Iceland and Denmark) are ruled by the Nordic Bankruptcy Convention 1933 and there is full recognition between the five countries of bankruptcy decrees from another Nordic country.

8 More specifically, the Recast EUIR is concerned, much like the EUIR, with intra-E.U. insolvency proceedings and, therefore, with only those cases where the debtor has its centre of main interests ("**CoMI**") in the E.U.

interaction of any such proceedings with the main proceeding. Importantly, it also governs the recognition and enforcement of insolvency-related judgments.[9]

3.3. Since the regime was brought into force by the EUIR in 2000, it has conferred a significant advantage on E.U. creditors and liquidators in the form of increased legal certainty regarding cross-border insolvency matters. Prior to that date, courts in E.U. Member States proceeded in relation to recognition *via* the application of *ad hoc* rules under their own private international law, which resulted in inconsistencies across the E.U. With the introduction of the EUIR, the law with respect to the recognition of cross-border insolvency proceedings was made more functional and certain.

3.4. Central to the framework of the Recast EUIR is the concept of a debtor's centre of main interests, which is defined in Article 3(1) as "the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties". Revisions to the EUIR have been incorporated in the Recast EUIR in an effort by legislators to clarify a legal entity's CoMI and bring greater certainty to the framework for allocating effective and enforceable insolvency jurisdiction.[10]

3.5. The Recast EUIR provides reciprocal benefits among E.U. Member States, including, currently, the U.K. U.K. insolvency proceedings, in respect of companies with a CoMI in the U.K. have automatic recognition across the E.U. and insolvency proceedings initiated in the E.U. in respect of companies with a CoMI in one of the other Member States will be automatically recognised in the U.K.

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9 The enforcement of non-insolvency related judgments takes place pursuant to the Regulation (EC) No 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 (the "**Recast Brussels I Regulation**").

10 As far as companies are concerned, Article 3(1) provides that the CoMI shall be presumed to coincide with the place of the registered office:

> 1. […]
>
> 2. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. That presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings.

3.6. Two provisions of the Recast EUIR, in particular, are crucial in the predictable application of insolvency judgments in a financial markets context: i) Article 8, which protects rights *in rem*;[11] and ii) Article 9, which protects set-off.[12]

3.7. Article 8, which operates only where assets "are situated within the territory of another Member State" (emphasis added), ensures that rights *in rem* (including fixed and floating charges) over U.K. assets are respected in insolvency proceedings opened against the debtor in another Member State.

3.8. Being within the scope of the reciprocal benefits conferred by this article is of considerable importance to the financial markets. The protections in Article 8 apply where a collateral-provider enters into insolvency proceedings to preserve the benefits of E.U. transaction finality legislation—including the FCAD, as implemented in Member States—in these circumstances.[13] For this reason, it is beneficial to banks exposed to credit risk because it promotes the enforceability of a collateral-taker's rights over collateral. As a result, financial institutions can rely on collateral to secure their rights

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11 Article 8 of the Recast EUIR (originally Article 5 of the EUIR) provides:

> 1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets, both specific assets and collections of indefinite assets as a whole which change from time to time, belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.
>
> 2. The rights referred to in paragraph 1 shall, in particular, mean:
>
> a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
>
> b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
>
> c) the right to demand assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
>
> d) a right in rem to the beneficial use of assets.
>
> […]
>
> 4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in point (m) of Article 7(2).

12 Article 9 of the Recast EUIR (originally Article 6 of the EUIR) provides:

> (i) The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of a debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.
>
> (ii) Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in point (m) of Article 7(2).

13 See below, paragraph 4.6.

under financial contracts which in turn means that, for regulatory capital purposes, they can reduce the risk weighting for those exposures.[14]

3.9. Article 9 is an equally important safeguard which protects creditors' rights of set-off by ensuring that, if these are effective under the law which governs the agreement giving rise to the debtor-company's (cross-)claim, they will be enforceable by the creditor whether or not they are recognised by the law of the insolvency forum.

3.10. Like Article 8, Article 9 allows those giving the legal opinions required by rating agencies and regulators to give clear and consistent advice regarding methods of credit enhancement, i.e. security and set-off. If uncertainty regarding the recognition of such rights emerges, the consequences for cross-border investment and funding would be negative, with a potential impact on the cost of credit.

2. Domestic law on cross-border insolvency proceedings

3.11. Besides the Recast EUIR, there are two key statutory cross-border insolvency regimes in place in the U.K.: (i) the CBIR; and (ii) the provisions relating to cooperation between courts in the Insolvency Act 1986.

(i) The CBIR implement the Model Law on cross-border insolvency proceedings (the "**Model Law**") adopted by the United Nations Commission on International Trade Law ("**UNCITRAL**") in 2007. The Model Law is a set of internationally harmonised model legislative provisions on cross-border insolvency sponsored by UNCITRAL and designed to assist Nation States in modernising their cross-border insolvency legislation.[15] The guiding principle of the Model Law is that insolvency proceedings brought in the jurisdiction which is the debtor's CoMI should be given priority.

(ii) Section 426 of the Insolvency Act 1986 ("**section 426**") requires U.K. insolvency courts to assist foreign insolvency courts in any country or territory designated by the Secretary of State by order. Its scope is inherently geographically limited and it

[14] Collateral will be recognised as eligible for this purpose only if supported by a reasoned legal opinion confirming that the collateral arrangement being used is legally effective and enforceable in the default or insolvency of the counterparty in all relevant jurisdictions (see Article 194(1) of the Regulation 575/2013 on prudential requirements for credit institutions and investment firms (the "Capital Requirements Regulation"), implementing Basel III).

[15] Currently, the following countries and territories have adopted the Model Law: Australia; Benin; British Virgin Islands; Burkina Faso; Cameroon; Canada; Central African Republic; Chad; Chile; Colombia; Comoros; Congo; Côte d'Ivoire; Democratic Republic of the Congo; Dominican Republic; Equatorial Guinea; Gabon; Gibraltar; Greece; Guinea; Guinea-Bissau; Japan; Kenya; Malawi; Mali; Mauritius; Mexico; Montenegro; New Zealand; Niger; Philippines; Poland; Republic of Korea; Romania; Senegal; Serbia; Seychelles; Singapore; Slovenia; South Africa; Togo; Uganda; United Kingdom; United States of America and Vanuatu.

applies only to the approximately two dozen members or former members of the Commonwealth or Empire. The Republic of Ireland is the only E.U. Member State which has been designated under section 426.

3.12. The CBIR apply generally to any situation in which those with an interest in foreign proceedings require assistance or co-operation from courts in the U.K.[16] All foreign insolvency proceedings are within scope, no matter where the forum. Notably, it is not a requirement that the foreign jurisdiction involved should itself have implemented the Model Law (i.e., there is no requirement for reciprocity). Where the proceedings are initiated in the E.U., the CBIR state that the provisions of the Recast EUIR prevail.[17]

3.13. Article 21 of the Model Law, as implemented by the CBIR, deals with the types of discretionary relief which might be granted to a representative of foreign proceedings, including: i) staying proceedings before the court;[18] and ii) giving procedural assistance, for example, by providing for the examination of witnesses. The list is non-exhaustive and a general catch-all reference to "granting any additional relief that may be available to a British insolvency officeholder" is included at Article 21(1)(g). Article 25 provides that co-operation with foreign courts and foreign representatives may be given "to the maximum extent possible" and Article 27 provides that co-operation under Article 25 may be implemented by "any appropriate means".[19]

3.14. In the case of *Rubin v. Eurofinance S.A.* [2012] UKSC 46 ("***Rubin***"), the Supreme Court considered the question whether a judgment arising out of Chapter 11 proceedings in New York could be enforced through the CBIR. The court held *per curiam* that the relevant provisions of the CBIR are concerned with procedural matters and, whilst they should be given a purposive interpretation, there is nothing to suggest that they provide

16 The CBIR apply where:

- assistance is sought in Great Britain by a foreign court or a foreign representative in connection with a foreign proceeding;
- assistance is sought in a foreign State in connection with a proceeding under British insolvency law;
- a foreign proceeding and a British insolvency proceeding in respect of same debtor are taking place concurrently; or
- creditors or other interested persons in a foreign State have an interest in requesting commencement of, or participating in, proceedings under British insolvency law.

17 The CBIR were amended by the Insolvency Amendment (EU 2015/848) Regulations 2017 (SI 2017/702), which came into force on 26 June 2017, so as to extend references to the EUIR to include the Recast EUIR.

18 Where the foreign proceedings have already been recognised, a stay will occur automatically under Article 20(a). In the case of a stay, security enforcement or set-off are not affected.

19 Under Article 1(4) of the CBIR, however, relief is not available where it would be prohibited under or by virtue of Part 3 of the FCARs or Part 3 of the SFRs in the case of a proceeding under British insolvency law, or would interfere with or be inconsistent with the rights of a collateral-taker exercised under Part 4 of the FCARs in the case of such a proceeding. It is assumed that these exceptions will continue to apply after Brexit.

for the reciprocal recognition and enforcement of foreign judgments. The court observed that it would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication where it is expressly concerned only with procedural matters.[20]

3.15. As a result of the limitations of the Model Law highlighted in *Rubin* and the absence of any applicable international convention or other regime to address the recognition and enforcement of insolvency judgments (together with a concern that the uncertainty created by the *Rubin* judgment might have a "chilling effect" on continued adoption of the Model Law), the UNCITRAL Working Group has had since 2014 held a mandate to develop a model law to provide for the recognition and enforcement of insolvency-related judgments. The text is currently being developed as a stand-alone instrument, rather than forming part of the Model Law. It is hoped that a final form of the text will be adopted in 2018.

3.16. Under section 426 of the Insolvency Act 1986, an English court with jurisdiction in relation to insolvency law has the discretion, on receipt of a letter of request from a court having the corresponding jurisdiction in any other part of the U.K. or in "any relevant country or territory", to give assistance to that court. The obligation to provide assistance only extends, outside an intra-U.K. context, to a country designated for the purposes of section 426(4) by the Secretary of State by means of a statutory instrument. The list of designated countries is currently a short one, being limited to various common law based jurisdictions such as Australia, Canada, New Zealand and the Republic of Ireland.

3.17. Section 426(5) provides that a request from a foreign court is authority for the English court to apply, in relation to the matters specified in the request, either English insolvency law or the insolvency law of the requesting court. The "insolvency law" of the relevant country is defined for these purposes in section 426(10)(d) as "so much of the law of the country or territory as corresponds to" either provisions contained in the Insolvency Act 1986 or certain provisions contained in the Company Directors' Disqualification Act 1986.

3.18. In relation to the application of English insolvency law, section 426 gives the English court an express statutory power to make orders which could not have been made under the laws of the requesting state, thereby creating additional options for the foreign

[20] In *Rubin*, a judgment of the Australian court was denied recognition under the CBIR because it did not fall sufficiently under the definition of an "insolvency" judgment.

officeholder. Section 426 has, for example, been used to make administration orders and apply the company voluntary arrangement provisions contained in the Insolvency Act 1986 to foreign companies at the request of a foreign court.[21]

3.19. Turning to the application of foreign insolvency law, section 426 has been used, *inter alia*, to apply provisions of Australian insolvency law concerning the examination of witnesses and request that South African insolvency law provisions relating to fraudulent trading and preferential transactions should be applied.[22] There is, however, a strict limit on the English court's ability to give assistance under section 426. The Supreme Court held in *New Cap Reinsurance Corporation Ltd (in liquidation) and Ors v Grant and Ors* [2012] UKSC 46—a case heard together with *Rubin*—that the assistance provided for in section 426(4) does not extend to the enforcement of foreign insolvency judgments.

3.20. In addition to these two regimes aimed at improving coordination between insolvency forums, Part V (*Winding up of Unregistered Companies*) of the Insolvency Act 1986 permits the mandatory winding-up of foreign companies under section 221(1) which provides that "any unregistered company may be wound up under this Act" (where the effect of section 220 of the 1986 Act is that the expression "unregistered company" includes any foreign company).[23] According to case law, U.K. courts can wind up foreign companies under section 221(1) where three conditions are satisfied: 1) there is a sufficient connection with the U.K.; 2) there is a reasonable possibility that the order will benefit those applying; and/or 3) at least one person interested in the company's assets is a person over whom the U.K. courts can exercise jurisdiction.[24]

3.21. Common law principles may also apply. It is possible for a foreign bankruptcy to be recognised in the U.K. at common law on the basis of three clearly established criteria: (i) the domicile of the debtor; (ii) submission by the debtor to the foreign insolvency proceedings;[25] and (iii) the carrying on of business by the debtor in that foreign

[21] *Re Dallhold Estates (UK) Pty Ltd* [1992] B.C.L.C. 621 and *Re Television Trade Rentals Ltd* [2002] B.C.C. 807.

[22] *Fourie v Le Roux (No.2)* [2005] EWHC 922 (Ch).

[23] Under the Foreign Judgments (Reciprocal Enforcement) Act 1933, judgments obtained in the courts of specified foreign countries with which the U.K. has entered into bilateral treaties, may also be recognised in the U.K. The countries covered by this Act include Australia, Canada, Guernsey and India.

[24] See, for example, the judgment in *Re Drax Holdings Ltd* [2003] EWHC 2743 (Ch), where the Court held that it had the jurisdiction to order the meetings and approve the schemes of two foreign companies because they had a sufficient connection with the U.K.

[25] This includes situations where the debtor is the claimant or a counter-claimant in the foreign proceedings.

jurisdiction.[26] Recognition of foreign proceedings implies that the U.K. court will afford active assistance to the foreign court.[27] The common law assistance cases have been largely concerned with matters such as the vesting of English assets in a foreign officeholder, the staying of domestic proceedings, orders for examination in support of the foreign proceedings, and orders for the remittal of assets to a foreign liquidation.[28] In *Rubin*, however, the scope for the recognition and enforcement of foreign judgments at common law was narrowly circumscribed, being limited to situations involving one of the three criteria set out above. The Supreme Court declined to adopt a more liberal rule in the interests of the universality of bankruptcy.[29]

3.22. One rule of common law which does not support coordination in insolvency proceedings is the rule in *Gibbs*. That is, the rule that a party to a contract governed by English law is not discharged from liability under the contract by a discharge in foreign insolvency proceedings. It is a common feature of many insolvency regimes (such as Chapter 11 of the U.S. Bankruptcy Code) and indeed a fundamental principle of the Recast EUIR that contractual rights can be overridden. The rule was implicitly criticised in the case of *Global Distressed Alpha Fund 1 LP v PT Bakrie Investindo* [2011] EWHC 256 (Comm) by Teare J, who nevertheless held that he was bound to follow the decision. At present, the effects of the rule in *Gibbs* do not apply in the context of European insolvency proceedings because provisions of the Recast EUIR which require automatic recognition of insolvency judgments override the rule. If the Recast EUIR is incorporated into English law by the Withdrawal Bill, as anticipated, European insolvency proceedings will continue to be unaffected by the rule in *Gibbs*.

3. <u>Schemes of arrangement</u>

3.23. The purpose of a scheme of arrangement is to allow a debtor-company to reach agreement for a consensual restructuring with 75% by value—and more than 50% by number—of a certain class of its creditors, which then binds all creditors in that class. A scheme can be used to amend, release or write-off debt, release guarantors, provide a standstill from creditor claims and put in place new debt/equity instruments. Schemes,

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26 *Rubin*, [7]-[10].

27 *Re African Farms Ltd* [1906] TS 373, at 377.

28 *Rubin* [31].

29 *Rubin* [115]. The central premise of "universalism" is that the debtor's assets should be collected and distributed in a single set of bankruptcy proceedings in the debtor's jurisdiction of domicile, residence or incorporation.

which have achieved increased status and importance in recent years as a restructuring tool, fall outside the scope of the Recast EUIR.

3.24. There are, currently, two chief means by which the recognition of schemes sanctioned by U.K. courts may be achieved in other E.U. jurisdictions on behalf of debtors and creditors:[30] i) pursuant to Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the "**Recast Brussels I Regulation**") or—at least in relation to schemes compromising English law governed finance documents—ii) pursuant to Regulation (EC) No 593/2008 on the law applicable to contractual obligations ("**Rome I**"). Common law principles of private international law may also assist.

i) *Recast Brussels I Regulation*: in *Rodenstock* ([2012] BCC 459 (Ch)) ("*Rodenstock*") Mr Justice Briggs took the view that the Recast Brussels I Regulation provides a jurisdictional basis for the recognition of a scheme. He concluded that the sanction of a standalone scheme (outside an insolvency) was not constrained by what is now the Recast EUIR and did, therefore, fall within the scope of Article 1(1) ("civil and commercial matters") of what is now the Recast Brussels I Regulation, according to the principle that the Judgments Regulation and the Insolvency Regulation were "intended to dovetail almost completely with each other".[31] The exclusion for insolvency matters in Article 1(2)(b) of what is now the Recast Brussels I Regulation was, he held, to be construed as being specific and so should only exclude proceedings within the scope of the EUIR Annexes, i.e. not schemes of arrangement.[32] This, then, reflects the settled view of the English courts but it is a view which is not necessarily shared by courts in other E.U. Member States. Shortly before *Rodenstock* was heard, a German court declined to recognise an English judgment sanctioning a solvent scheme in comparable, but not identical, circumstances—creditors' rights were governed

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30 U.K. schemes of arrangement have been effected by companies incorporated in Austria, Belgium, Bulgaria, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Netherlands, Portugal, Spain and Sweden.

31 This was an observation made in paragraph 53 the Schlosser Report (OJ 1979 C 59/71) to the Brussels Convention. The Brussels Convention on civil jurisdiction and the enforcement of judgments was signed at Brussels in 1968 by the members of the European Economic Community and acceded to by the U.K. in 1978. It has since been largely superseded by the Recast Brussels I Regulation and the Lugano Convention, a treaty signed in 1988 between the Member States of the E.U. and the member states of EFTA (the "**Lugano Convention**").

32 This was also confirmed by Mr Justice Richards in *Magyar Telecom* [2013] EWHC 3800 (Ch), in which a Dutch holding company of the Invitel group of companies and one of the leading telecommunication services providers in Hungary, completed the restructuring of its €345 million 9.5% Senior Secured Notes due 2016. Mr Justice Richards concluded it logically follows from the exclusion of schemes from Annex A of EUIR (and now the Recast EUIR) that that the Recast Brussels I Regulation should apply, and that the exclusion of insolvency proceedings from the scope of the Recast Brussels I Regulation does not extend to a scheme of arrangement involving an insolvent company unless that company is also subject to an insolvency proceeding.

by German, not English, law—pursuant to what is now the Recast Brussels I Regulation on the ground that an order for sanction by an English court is not a judgment within the meaning of the regulation.[33]

ii) *Rome I:* Although this decision by the German court boded ill for the recognition, in Germany, of his order sanctioning the scheme, in *Rodenstock* Mr Justice Briggs drew comfort from the view of German law experts that, in practice, his decision to sanction the scheme would be legally effective in Germany because the German courts would, pursuant to the Rome Convention, apply English law to the question whether the rights of creditors under finance documents been varied by the scheme. The possibility of viewing the recognition of schemes as a contractual issue governed by Article 12 of Rome I has also been accepted by the English Courts and by legal counsel in many other E.U. Member States.[34] The recognition is founded, where the underlying financing arrangements are governed by English law, on the basis that Article 12 (1)(d) of Rome I provides that the governing law of a contract should also govern "…the various ways of extinguishing obligations ... and limitation of actions" in relation to that contract. Counter-arguments to this view have, however, been raised by commentators. Article 1(2)(f) excludes from the scope of Rome I "questions governed by the law of companies…such as the creation…legal capacity, internal organisation or winding up of companies". A dissenting creditor might argue that schemes fall within this exclusion. Similarly, Recital 7 of Rome I provides that the substance and scope of Rome I should be consistent with the Recast Brussels I Regulation which itself excludes "judicial arrangements, compositions and analogous proceedings".[35]

3.25. In addition to the instruments above, it may in some cases be possible to argue in Member States' courts, where recognition of an English-law-sanctioned scheme is

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33 Decision of the *Oberlandesgericht Celle* in case 8U46/09. The case is discussed by Briggs J in *Rodenstock* at [74]:

> Strictly, that case is distinguishable from the present case precisely because the relevant creditors' rights were governed by German rather than English law, but that was not the basis of the regional court of appeal's reasoning. Rather, its conclusion was that the English court's decision to sanction the Scheme could not be characterised as a judgment within the meaning of Article 32 of the Judgments Regulation.

34 Equivalent provisions in the 1980 Rome Convention on the Law Applicable to Contractual Obligations apply to contracts concluded before 17 December 2009.

35 It should be noted that in *Rodenstock*, these arguments relating to Recital 7 and Article 1 (2) (f) of Rome I were dismissed by both Mr Justice Briggs at [76-77] inclusive of his judgment and by German lawyers Mr Kirchof and Professor Peter Mankouski who gave compelling expert evidence in that case in relation to German law and the construction of the Recast Brussels I Regulation and Rome I. Separately, it might be noted that the U.K. is also party, in its capacity as a Member State, to the Lugano Convention, which is discussed later in the paper and which contains similar language to that in Article 1(2)(f) of the Recast Brussels I Regulation, although it is by no means certain that the same reasoning and interpretation would apply in this context.

sought, that the debtor had already accepted the jurisdiction of the English courts to modify its rights with respect to the indebtedness by entering into an English law financing contract and that this submission to the jurisdiction should be recognised under generally accepted principles of private international law. This analysis would focus on the wording of jurisdiction clauses, which typically sets out the circumstances in which English courts would have the jurisdiction to settle any dispute arising out of, or in connection with, the relevant agreement, including any dispute relating to its existence, modification, validity or termination. The argument may, however, meet the objection that the debtor incorporated non-exclusive jurisdiction clauses into its finance documents or it may be the case that the courts where recognition is sought regard the *lex incorporationis* (or the law of the debtor's CoMI) as determinative of the issue as to whether a U.K. scheme should be recognised.

3.26. As a final point on the recognition of schemes, it should be noted that the U.K. is also a signatory to the Hague Convention in its capacity as a Member State of the E.U. The Hague Convention requires the court or courts designated in an exclusive choice-of-court agreement to hear a case within the scope of the agreement. It precludes courts of other contracting states from hearing parallel proceedings and it requires any judgment granted by the designated court to be recognised and enforced in other contracting states. It does not apply to insolvency proceedings but, in the absence of any other applicable instrument, may play a role in coordinating the recognition of schemes of arrangement (see below, paragraphs 6.14 to 6.17).[36]

4. TRANSACTION FINALITY

4.1. In several financial markets contexts, finality and certainty are provided not by insolvency legislation in the strictest sense but by other European legislation relating to financial collateral, the operation of payment and securities settlement and clearing (central counterparties) systems. By guaranteeing transaction finality, these laws reduce systemic risk. Instances of the relevant legislation include the SFD and the FCAD.

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36 The Hague Convention was the subject of an earlier FMLC paper. See: FMLC, *Issues of Legal Uncertainty Arising in the Context of the Withdrawal of the U.K. from the E.U.—the Application of English Law, the Jurisdiction of English Courts and the Enforcement of English Judgments*, (2 December 2016), available at: http://www.fmlc.org/paper-on-issues-of-legal-uncertainty-arising-in-the-context-of-the-withdrawal-of-the-uk-from-the-eu---the-application-of-english-law-the-jurisdiction-of-english-courts-and-the-enforcement-of-english-judgments.html.

1. Settlement Finality Directive

4.2. The SFD, which is restricted to settlement systems governed by the law of a Member State,[37] has been implemented in the U.K. through the Financial Markets and Insolvency (Settlement Finality) Regulations 1999 (SI 1999/2979), as amended (the "**SFRs**"). This legislation provides key systemic safeguards that contribute to the stability and efficiency of the financial markets.[38]

4.3. In the U.K., the SFRs allow payment and settlement systems to apply for certain protections against what might otherwise be the adverse effects of normal insolvency law insofar as it applies to transfer orders entered into the system and the operation of the rules of the system (e.g. in relation to the system's default arrangements and netting). By disapplying insolvency law, the SFRs protect the finality and irrevocability of the transfer orders, and help to ensure the enforceability of collateral security.

2. Financial Collateral Arrangements Directive

4.4. The FCAD was introduced with the objective of establishing a minimum regime for the provision of financial collateral and of promoting the integration, cost efficiency and stability of the financial markets in the E.U. It requires E.U. Member States to remove formalities to the creation, perfection or enforcement of financial collateral arrangements and to ensure that provisions of E.U. Member States' insolvency law, which may prevent enforcement of security, do not apply to collateral arrangements meeting certain requirements. It also safeguards other contractual rights such as close-out netting and rights of use, establishes a right of appropriation for the collateral taker and permits enforcement of a financial collateral arrangement notwithstanding the imposition of a moratorium on insolvency by a national court.

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37 Article 1 of the SFD restricts its scope.

Article 1

The provisions of this Directive shall apply to:

(a) any system as defined in Article 2(a), governed by the law of a Member State (emphasis added) and operating in any currency…,

(b) any participant in such a system;

(c) collateral security provided in connection with:

— participation in a system, or

— operations of the central banks of the Member States in their functions as central banks (emphasis added).

38 Extensive safeguards are available to recognised investment exchanges and recognised clearing houses under Part VII of the Companies Act 1989 in the insolvency or default of a party to a market transaction, including protections for market charges. However, as Part VII is domestic U.K. legislation, it does not appear to protect against claims raised outside the U.K. (e.g. in respect to non-U.K. held collateral) unless the claimant has entered into insolvency proceedings in a jurisdiction where U.K. law is recognised as applicable.

4.5. The FCAD has been implemented in the U.K. by the Financial Collateral Arrangements (No. 2) Regulations 2003 (S.I. 2003/3226) (the "**FCARs**") which are wider in scope than the FCAD. The FCAD will apply to a collateral arrangement if (broadly speaking) at least one of the parties to the arrangement is a financial institution. It provides for not only the disapplication of certain provisions of insolvency law but also the application, to questions concerning entitlement to the collateral, of the law of the country in which the relevant securities account is maintained under Article 9. The FCARs are not limited in the same way and cover arrangements between any non-natural persons.[39]

4.6. Recitals (1) to (4) of the FCAD make clear that it forms part of the legal framework, together with the SFD, the EUIR (and CIWUD), which was designed to contribute to the stability of the E.U. financial markets. The Recast EUIR in turn dovetails with the FCAD by protecting rights *in rem* in Article 8. Whether a financial collateral arrangement is created by way of title transfer or security interest, it will normally give rise to a right *in rem* in favour of the collateral-taker. The protections in Article 8 of the Recast EUIR, which were considered above, will apply where the collateral-provider enters into insolvency proceedings, subject to a few uncertainties, and will preserve the effect of the FCAD (as implemented in Member States) in these circumstances. Similarly, the Recast EUIR (in recital 71 and Article 12) recognises the "special protections" in the case of payment systems and transactions in the financial markets established under the SFD, and that they should take precedence over the rules laid down in the Recast EUIR. It is desirable, therefore, that these or equivalent protections continue to apply after Brexit between the U.K. and E.U.

5. IMPACT OF BREXIT

5.1. In the context of the historical inter-dependency between the U.K. and the E.U., Brexit is likely to present a significant disruption. Among other aspects of this discontinuity, the U.K. will, upon its ceasing to be a Member State, lose all mutual recognition benefits to which it is entitled *qua* Member State, unless further provision is made by treaty. The impact of a permanent loss of reciprocity has, in the context of the Recast Brussels I Regulation, already been considered by the FMLC.[40]

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39 The FCARs define "non-natural persons" as: "any corporate body, unincorporated firm, partnership or body with legal personality except an individual, including any such entity constituted under the law of a country or territory outside the United Kingdom or any such entity constituted under international law."

40 *Supra*, references at n. 36.

5.2. The retention in the U.K. of all effective E.U. regulations in some form and their incorporation into domestic law upon Brexit under the Withdrawal Bill is currently the anticipated political outcome. There is no reason to believe that the E.U. legislation discussed in this paper is any different and it is, therefore, assumed in the subsections below that it will be retained, albeit in modified form.

1. Impact on recognition of E.U. insolvency proceedings in the U.K.

5.3. The probability that the Recast EUIR will be retained as Direct E.U. Legislation under the Withdrawal Bill, albeit in modified form, is likely to mitigate the impact of Brexit on cross-border insolvency proceedings in the U.K. In the event that rules requiring U.K. courts to recognise E.U. insolvency proceedings were not retained, significant uncertainty would almost certainly be caused. In particular, any effective compromise of the rights of creditors with respect to English law-governed financings by the debtor would incur the increased costs of pursuing parallel, interlocking proceedings in the U.K. thereby inhibiting effective debt recovery and weakening the mechanisms for business exits and rescues so as to create higher cost of capital and heightened perception of risk among investors and financial institutions.

5.4. For the time being, there remains considerable uncertainty as to how the Recast EUIR will be modified as domestic legislation. There are 62 references to "Member States" in the Recast EUIR and more than 100 to "Member State" in the singular. Relatively few of these references will be logical or appropriate in domestic legislation after Brexit. This is not simply a drafting issue: most of the references reflect a policy choice to make provision for debtors, creditors or assets in the E.U. on the basis that standards in the region are broadly convergent on corporate law, insolvency law, civil procedure and contract finality and on the assumption that those benefits will be reciprocal throughout all participating Member States. Replacing "Member State" with "U.K." in phrases such as "the territory of another Member State" makes no sense whatsoever; retaining "Member State [of the E.U.]" might seem oddly discriminatory after Brexit where, say, other G20 countries are concerned, and an unthinking substitution of "Member State" with a general reference to any "country" might not only give priority to laws and standards which do not converge with those in force in the U.K. but would almost certainly have the effect of curtailing the international jurisdiction of the English courts to wind up companies.[41]

[41] The effect of Articles 3(1) and 3(2) of the Recast EUIR is that, in relation to a company with its CoMI in a Member State other than the U.K., the English courts have jurisdiction to wind up only if the company possesses an establishment within the U.K. This limitation does not currently apply to companies with a CoMI in a non-E.U. jurisdiction.

5.5. Article 8 of the Recast EUIR will cease to operate in the 27 E.U. Member States in such a way as to protect the application of the governing law to proprietary rights in assets situated in the U.K. when the U.K. leaves the E.U. since it applies only with regards to assets "which are situated within the territory of another Member State". This adds a further dimension to the general loss of reciprocity in respect of insolvency proceedings.

5.6. Moreover, although it seems likely that efforts will be made to retain the Recast EUIR and incorporate it into domestic law, it is unclear how Article 8, with its odd reference to "the territory of another Member State", will be adjusted (if at all) and incorporated as Direct E.U. Legislation. Given what is said above, U.K. courts may, post-Brexit, be asked by claimants to recognise and enforce insolvency judgments issued by the courts of E.U. Member States against assets in the U.K. in circumstances where the Member States' courts no longer recognise the Article 8 protections as applicable in respect of U.K. assets and where, in reaching their judgments, the courts of the insolvency forum have disregarded both the law governing the asset and local law in the U.K. The U.K. courts may, in these circumstances, find themselves without clear direction from Direct E.U. Legislation as to the enforceability of the foreign judgment.

5.7. The prospective impact of Brexit on the Article 9 safeguard is likely to be less damaging than it is on the safeguard in Article 8 because Article 9 does not refer to Member States. The better view is—subject to only a small degree of residual interpretative uncertainty—that Article 9 may be safely relied upon where the law applicable is that of a jurisdiction outside the E.U. If this view is correct, there will be no loss of reciprocity for rights of set-off unless the provision is repealed or disapplied in the U.K. Given this, the prospective retention of the provision under the Withdrawal Bill and its incorporation into domestic law can be expected adequately to preserve legal certainty in relation to rights of set-off.

2. <u>Impact on recognition of U.K. insolvency proceedings by courts in Member States</u>

5.8. When the U.K. ceases to be a Member State of the E.U., this will necessarily trigger the loss of reciprocity vis-à-vis the recognition of U.K. insolvency proceedings under the Recast EUIR in the E.U. One consequence of this will be a need for costly parallel proceedings in Member States' courts. Another, given that recognition may be denied on a number of grounds, will be legal uncertainty. In some E.U. jurisdictions, non-E.U. (or "**Third Country**") insolvency judgments have been denied recognition on a wide variety of public policy grounds.

5.9. In some E.U. Member States, a U.K. insolvency proceeding may still be afforded recognition based on the domestic law of the particular jurisdiction. These rules are likely to vary, however, depending on the jurisdiction in question, leading to a lack of certainty.

3. Impact on recognition of schemes of arrangement

5.10. Means by which orders by U.K. courts sanctioning schemes of arrangement might garner recognition in other E.U. jurisdictions were discussed in paragraphs 3.23 to 3.26 above. Following Brexit, U.K. schemes may continue to benefit from some of these existing private international law regimes, including the provisions of Rome I, in certain cases—in particular where English law governs the obligations subject to the scheme.

5.11. The subject of the impact of Brexit on the Recast Brussels I Regulation and on Rome I has been comprehensively addressed by the FMLC elsewhere.[42] The FMLC has observed that in order to avoid a loss of reciprocity with respect to the recognition and enforcement of judgments under the Recast Brussels I Regulation, a treaty would need to be put in place providing in essence that the U.K. is still to be treated, post-Brexit, as if it were a Member State for this purpose.[43] Absent such a treaty, the Withdrawal Bill will not prevent a loss of reciprocity and, post-Brexit, the Recast Brussels I Regulation will no longer provide a basis—even to the uncertain extent it currently does so—on which to secure the recognition of U.K.-sanctioned schemes of arrangement in other Member States.

5.12. Rome I, on the other hand, may provide a continuing basis, even after Brexit, for the reciprocal recognition of U.K.-sanctioned schemes of arrangement in other Member States because, unlike the Recast Brussels I Regulation and the EUIR, the choice of law rules which it establishes do not refer exclusively to the law of Member States. Thus, to the extent that Rome already provides a basis for recognising schemes sanctioned in the U.K., it should continue to do so even when the U.K. is no longer a Member State. It should be noted, however, that although a number of expert opinions on the recognition of schemes have, to date, referred to and relied on Rome I, it is possible that courts in Member States may read Rome I more restrictively following Brexit. Restrictive

[42] *Supra*, references at n. 36.

[43] HM Government published a position paper in August 2017 stating that it will seek an agreement with the U.K. which reflects closely the principles of cooperation inherent in the current E.U. framework. See, HM Government, *Providing a cross-border civil judicial cooperation framework—a future partnership paper*, (22 August 2017), available at: https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper.

readings would be likely to emphasise the limitations set out in paragraph 3.24(ii) above.

5.13. The extent to which shared principles of private international law can be relied upon in the courts of E.U. Member States to fill any lacunae in the support for schemes provided by Rome is already unclear, as highlighted in paragraph 3.25 above. The likely success of this argument in E.U. courts following Brexit is even less clear for the reason suggested above, i.e. that, where there is ambiguity, a restrictive approach may be more likely.

4. Settlement Finality Directive

5.14. Once the U.K. ceases to be an E.U. Member State, the insolvency courts of the remaining E.U. states will not be required to recognise SFD protections in so far as they are afforded by the SFRs in the context of insolvency proceedings opened against a participant in a U.K. designated system.[44]

5.15. This is another aspect of the general Brexit-related loss of reciprocity between the U.K. and E.U. systems of law and means, in effect, that, following Brexit, U.K. settlement systems will fall out of scope of provisions which currently prevent courts in any other E.U. Member State from revoking a relevant transfer order given by the insolvent participant in a U.K. designated system, preventing the operation of any netting arrangements of a U.K. designated system or obstructing the proprietary rights of a collateral-taker in respect of collateral security provided by the insolvent participant. The loss of the SFD protections could potentially have a negative impact on the stability and efficiency of the relevant U.K. designated system and, in consequence, on the financial markets.

5.16. These issues cannot be ameliorated or mitigated by the retention of the SFRs under the European Union (Withdrawal) Bill because the issue is the loss of reciprocity rather than a potential lacuna in the U.K. legal framework.

5. Financial Collateral Arrangements Directive

5.17. The same issues do not arise under the FCAD. The implementing measures of E.U. Member States, if they follow the scope of the FCAD, are not expressly limited to the protection of collateral arrangements affecting collateral situated in a Member State, although this is often a prerequisite for enforcement proceedings in the courts of that

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44 *Supra,* references at n. 37.

state, or benefitting only collateral-takers and collateral-providers located in a Member State.[45] Thus, U.K. collateral-takers and collateral-providers will not automatically fall out of scope when the U.K. withdraws from the E.U. For example, where a U.K. financial institution has posted collateral with an E.U. central bank, and the collateral is situated in and subject to the laws of an E.U. Member State, the legislation of that state implementing the FCAD should apply to the collateral, notwithstanding the withdrawal of the U.K. from the E.U.

5.18. Nevertheless, some residual uncertainty arises in respect of the interplay of the FCAD and Article 8 of the Recast EUIR in the courts of the other 27 E.U. Member States vis-à-vis the application of English law and the FCAR in particular to collateral situate in the U.K. Article 8(1) will no longer require courts in other E.U. Member States to have regard to the rights *in rem* of creditors or third parties where the assets are situated in the U.K. This means that, as far as a court in an E.U. Member State is concerned, the insolvency law of the forum—incorporating what is likely to be a narrower implementation of the FCAD—could prevail in respect of rights *in rem* in assets situated in the U.K., rather than the generous protections afforded by the FCAR.[46]

6. SOLUTIONS AND MITIGANTS

1. Bespoke E.U.-U.K. agreement

6.1. If, as part of the Brexit negotiations, a deal were reached between the U.K. and the E.U. to continue the operation of the Recast EUIR—whether as part of transitional or final trading arrangements—then U.K. insolvency proceedings would continue to benefit from recognition in E.U. Member States (and *vice versa*) for so long as the deal were in place. The advantage would be that the *status quo* would be preserved.[47]

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45 According to the FCAD, the collateral-taker and the collateral-provider must be one of the persons listed in Article 1(2). This list includes, by reference to Directive 2000/12/EC relating to the taking up and pursuit of the business of credit institutions, financial institutions authorised in a Third Country and, subject only to the qualification that the other party to the arrangement must be a financial institution or public body, "a person other than a natural person, including unincorporated firms and partnerships".

46 An important point here is that the E.U. Member State in question will have itself implemented the FCAD which provides, in Article 9, that title to book-entry securities collateral, as well as the question of "the steps required for the realisation of book entry securities collateral following the occurrence of an enforcement event" are governed by the law of the country (a term which includes Third Countries) in which the relevant securities account is maintained. Therefore, the private international law rules applicable in the insolvency forum should refer these questions to English law where the arrangement falls within the scope of the implementing legislation.

47 If an agreement with the E.U. as a bloc were not possible, it would have been beneficial to enter into bilateral treaties with individual Member States. The European Council Article 50 Guidelines for Brexit negotiations (available at: http://www.consilium.europa.eu/en/press/press-releases/2017/04/29-euco-brexit-guidelines/) set out core principles, however, which prohibit this. In any event, the implications of this on any secondary legislation made under section 7 of the Withdrawal Bill would need to be considered carefully.

6.2. This option is likely to entail the recognition and acceptance by the U.K. of the role of the European Court of Justice (the "**ECJ**") as the ultimate arbiter of disputes under the Recast EUIR.[48] The U.K. Government made it clear in the March 2017 White Paper preceding the Withdrawal Bill that it intends to end the jurisdiction of the ECJ.[49]

6.3. If a treaty is agreed to establish reciprocity with E.U. Member States in relation to cross-border insolvency proceedings, provision should also be made in respect of the mutual recognition of the protections granted to U.K. designated systems and their participants under the SFD to sustain wider confidence in the U.K.'s financial markets and infrastructures.

2. Transposition of a modified, expanded EUIR

6.4. As mentioned above, in paragraph 5.2, the U.K. is expected to incorporate the text of the Recast EUIR, as at the date of Brexit, into domestic law under the Withdrawal Bill. It could, however, legislate in due course unilaterally to extend the national provisions beyond E.U. Member States (following in the footsteps of Germany). Under this option, the U.K. would recognise insolvency proceedings opened in any jurisdiction in which a debtor has its CoMI.[50] This would promote the concept of universalism and recognise that insolvency proceedings are more efficiently dealt with if one jurisdiction deals with the insolvency whilst preserving the position on rights *in rem* and set off as set out in the Recast EUIR. A significant disadvantage of this option, however, is that it would considerably narrow the international jurisdiction of the English courts—as insolvency proceedings in the U.K. would only be provided for if they were linked to CoMI or an establishment in the U.K. With this in mind, a compromise solution would be to expand the U.K.'s recognition framework (i.e. to encompass insolvency proceedings in any jurisdiction where the insolvent entity has its CoMI) without restricting the U.K. courts' own insolvency jurisdiction in such circumstances. It is to be doubted, however, whether any strategic expansion of the regime established by the

48 An alternative may be to adopt a solution similar to that of Norway and other EFTA states (barring Liechtenstein) under the Lugano Convention whereby ECJ decisions are persuasive but not binding. This may assist with recognition of Schemes of Arrangement but does not fix the problem of the recognition of E.U. or U.K. insolvency proceedings

49 HM Government, *Legislating for the U.K's Withdrawal from the European Union*, (30 March 2017), available at: https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper. Recently, however, HM Government acknowledged in a position paper that the ECJ would continue to play a key role in the U.K. during any transitional period and in relation to any future trade deal signed between the U.K. and E.U. See: HM Government, *Enforcement and dispute resolution—a future partnership paper*, (23 August 2017), available at: https://www.gov.uk/government/publications/enforcement-and-dispute-resolution-a-future-partnership-paper.

50 The U.K. could, of course, also restrict the domestically received EUIR by legislation in due course. This option would see the U.K. not adopt those provisions which may be more challenging in practice post-Brexit, such as continued cooperation of courts and insolvency officeholders or the group coordination concept as set out in the Recast EUIR. See also paragraph 6.5.

EUIR can be achieved under the powers of modification established by the Withdrawal Bill as they are currently drafted.

6.5. An important point to note, whether in respect of a transposed Recast EUIR or an expanded recognition regime, is that a unilaterally-adopted framework would not be based on reciprocity or mutual recognition. Thus, whilst the U.K. would recognise insolvency proceedings initiated elsewhere, other E.U. Member States—or foreign courts under an expanded regime—may not afford reciprocal recognition to insolvency proceedings opened in the U.K. One mitigant might be to incentivise mutual recognition by, for instance, making clear that the U.K. could recognise and enforce insolvency judgments issued by Member States' courts only to the extent that the judgment respects rights *in rem* in U.K.-situated assets. Arguably, modifications of this kind would fall within the ministerial power to remedy or mitigate deficiencies in retained E.U. law set out in clause 7 of the Withdrawal Bill in the case of a transposed Recast EUIR.

6.6. The clause 7 power could also be used to address any difficulties—discussed above at paragraph 5.4—caused by the fact that the drafting in the EUIR is largely unsuited to a new role as domestic legislation and that, even if there were no perceived need to address the automatic loss of reciprocity that will follow Brexit, many of these difficulties would persist.

6.7. Given that the Recast EUIR is regularly updated, thought will, in any event, need to be given as to whether correlative updates will be made to domestic law. While the text of the Recast EUIR does not change that often, the Annexes do. Regardless of what is said above about strategic expansion and modification, for transposition to result in domestic legislation which tracks the Recast EUIR as closely as possible, corresponding amendments will need to be made to U.K. domestic legislation.

3. Expansion of the scope of the CBIR

6.8. One option would be for the U.K. to consider: (i) making amendments to the CBIR so as to allow for the recognition of insolvency-related judgments; and (ii) promoting the Model Law throughout the E.U. Commentators have suggested that this would bridge any gaps created by the exclusion of the Recast EUIR.

6.9. In relation to the former proposal, even if the scope of the CBIR were extended to cover insolvency-related judgments, this would not bridge the gap left by the Recast EUIR.

That is, not least because the implementation of the Model Law has differed across jurisdictions.

6.10. In fact, only five E.U. Member States (namely, the U.K., Greece, Poland, Romania and Slovenia) have adopted the Model Law to date. It has been suggested that, while the Model Law is of benefit to non-E.U. Member States in trade terms, it is less advantageous to Member States, which can rely instead on the Recast EUIR. This will continue to be the case after Brexit in the remaining 27 Member States. Even if the CBIR are extended to cover the limitations identified in *Rubin*, E.U. Member States would continue to benefit from the Recast EUIR and the Recast Brussels I Regulation. Together, these circumstances make it difficult to see what incentive other Member States would have to adopt the Model Law after Brexit.

4. <u>Section 426 of the Insolvency Act 1986</u>

6.11. Another option would be to expand the current scope of section 426 of the Insolvency Act 1986, which constitutes a provision dealing with cooperation between courts exercising jurisdiction in relation to insolvency. The two key advantages of extending section 426 would be that: (i) it would give the English court a wider jurisdiction to assist courts in other Member States than currently exists under the common law; and (ii) an extension of section 426 would be relatively easily to implement.

6.12. The extension of section 426 to include E.U. Member States gives rise to attendant concerns, however, regarding the appropriateness of the mechanism in cases where the new (i.e. E.U.) jurisdictions proposed to be included within the section have a significantly different approach to insolvency law than does the U.K. For this reason, and given that the strategy would not result in reciprocal recognition of U.K. insolvency proceedings, it is hard to see how this option would improve upon the expected retention of the Recast EUIR and its incorporation into domestic law under the Withdrawal Bill.

5. <u>Reliance on and possible adaption by statute of the common law</u>

6.13. The same may be said of reverting to the common law—the actual scope and consequences of recognition are much more complex and uncertain at common law than under the Insolvency Act 1986 or the Recast EUIR. The rule in *Gibbs* will not affect E.U. insolvency proceedings if, as anticipated, the Recast EUIR, which supports the general principle of "universalism", is transposed into English law through the Withdrawal Bill. If rights *in rem* over U.K. assets were no longer protected by Article 8 of the Recast EUIR, however, it might be important for the English court to be able to rely on the rule in *Gibbs* when deliberating the recognition of the effect of a foreign compromise proceeding over secured assets in circumstances where the security agreement is governed by English law.

6. Schemes of arrangement

6.14. It is possible that signing the Hague Convention could assist with the recognition of schemes in the E.U. after Brexit. That is, in particular, if no treaty is put into place providing that the U.K. is still to be treated, post-Brexit, as if it were a Member State for the purpose of the Brussels I Regulation.[51] The U.K. is currently a signatory to the Hague Convention by virtue of its status as an E.U. Member State. Following Brexit, however, the U.K. has the option of becoming a signatory in its own right, which would not require the consent of the remaining E.U. Member States.

6.15. Reliance on the Hague Convention may nevertheless engage a number of questions of legal uncertainty in the context of schemes of arrangement, including the questions whether: i) schemes may fall within an exclusion set out in Article 2(2)(e) which establishes that "insolvency, composition and analogous matters" are not within the scope of the convention; and ii) whether a scheme sanction order is a "judgment" for the purposes of Article 4(1) of the Hague Convention.

6.16. The Hague Convention would, moreover, only assist with the recognition of scheme sanction orders if the parties to the finance documents have agreed to the exclusive jurisdiction of the English courts. Although this will sometimes be the case in a financial markets context, it will not always be so.[52]

6.17. In summary, although it would be relatively easy for the U.K. to adopt the Hague Convention following Brexit, and this may assist with the recognition of schemes in certain cases (i.e. where there is an exclusive jurisdiction clause where all parties agree

51 *Supra*, references at n.43.

52 In particular, some finance documents on Loan Market Association standard terms may include asymmetric jurisdiction clauses. Courts in other E.U. jurisdictions have previously concluded that these are not exclusive jurisdiction clauses for the purpose of the Brussels I Regulation and the authors of the explanatory report to the Hague Convention took the same view. In paragraph 106 of that report, the authors note that it was agreed by the Diplomatic Session that asymmetric jurisdiction clauses are not exclusive choice of court agreements for the purposes of the Hague Convention. Nevertheless, in the recent High Court case of *Commerzbank Aktiengesellschaft v Pauline Shipping and Liquimar Tankers* [2017] EWHC 161 (Comm), Cranston J stated that, in his view, there are "good arguments" that asymmetric jurisdiction clauses would constitute exclusive jurisdiction clauses for the purposes of the Hague Convention (see para 73) and the Recast Brussels I Regulation (see para 79). The issue of asymmetric jurisdiction clauses has been discussed in a previous FMLC publication: FMLC, *Paper on Issues of Legal Uncertainty Arising in the Context of Asymmetric Jurisdiction Clauses*, (29 July 2017), available at: http://www.fmlc.org/paper-on-asymmetric-jurisdiction-clauses.html.

to sue before the U.K. courts), it would not assist in all areas. In particular, it would not result in the recognition of either E.U. or U.K. insolvency proceedings.

6.18. The FMLC has previously recommended that HM Government give further consideration to signing the Hague Convention against the backdrop of Brexit and its impact on the civil jurisdiction and judgments framework embodied in the Recast Brussels I Regulation.[53]

7. CONCLUSION

7.1. In this paper, the FMLC has considered issues of legal and operational uncertainty in relation to cross-border insolvency proceedings, which may arise in consequence of Brexit. Although the shape of the future U.K.-E.U. relationship remains unknown, it seems inevitable that, absent any bespoke agreement, all mutual recognition arrangements between the U.K. and the E.U. will cease. Of particular importance to the financial markets are the mutual and reciprocal recognition provisions written into the Recast E.U. Insolvency Regulation, which cannot be resolved by means of a wide-ranging reception statute such as the Withdrawal Bill.

7.2. Acknowledging this, and other complexities relating to cross-border corporate insolvency—including the effect of restructuring tools such as schemes of arrangement or related financial services measures such as the SFD and the FCAD—the FMLC has provided in this paper an extensive background to E.U. and U.K. cross-border insolvency measures. It has considered, in depth, rights which are written into the EUIR and the loss of which may prove problematic for U.K. market participants. In section 4, the FMLC has examined finality as provided by the SFD and FCAD, which reduce systemic risk.

7.3. In section 5, the FMLC turns to the specific incidents of uncertainty which will arise upon Brexit, should the Recast EUIR be transposed into U.K. law but no other agreement ensuring reciprocity be signed between the U.K. and the E.U. These include questions about: (i) the recognition of E.U. insolvency proceedings in the U.K.; (ii) the recognition of U.K. insolvency proceedings in the E.U.; (iii) the recognition of U.K. schemes of arrangement in the E.U.; (iv) the loss of reciprocity as currently ensured under the SFD; and (v) conflicts arising under the FCAD.

53 *Supra*, references at n. 36.

7.4. To address these uncertainties, the FMLC has made recommendations in section 6 which include a strong preference for preserving the mutual effect of the Recast EUIR via negotiation of transitional arrangements and/or a bespoke treaty between the U.K. and the E.U. It has also recommended that any such treaty or arrangements should establish mutual recognition with E.U. Member States in relation to the protections granted under the SFD to sustain wide confidence in the U.K.'s financial markets.

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