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Title	Recognition of UK insolvency proceedings post-Brexit: The impact of a 'No Deal' scenario
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Publication date	2018-10-10
Original Citation	Umfreville, C., Omar, P., Lücke, H., Fannon, I.L., Veder, M. and Carballo Pineiro, L., 2018. Recognition of UK Insolvency Proceedings Post#Brexit: The Impact of a 'No Deal'Scenario. International Insolvency Review, 27(3), (22pp). DOI:10.1002/iir.1325
Type of publication	Article (peer-reviewed)
Link to publisher's version	https://onlinelibrary.wiley.com/doi/abs/10.1002/iir.1325 - 10.1002/iir.1325
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Download date	2026-09-16 19:39:04
Item downloaded from	https://hdl.handle.net/10468/8485

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Recognition of UK Insolvency Proceedings Post-Brexit: The Impact of a 'No Deal' Scenario

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Abstract

This paper examines the impact of a 'no deal' or 'hard' Brexit on the recognition of insolvency proceedings commenced in the UK by the remaining Member States of the European Union (EU) post-Brexit. The paper considers the framework currently implemented by the Recast European Insolvency Regulation and the possible approaches when it will cease to apply to proceedings commenced post-Brexit. The paper identifies that there will be no overarching framework in the event that 'no deal' is reached between the UK and the EU for post-Brexit arrangements, resulting in reliance on individual Member States' domestic laws to determine recognition of insolvency proceedings commenced in the UK. The paper sets out the contrasting approaches of five of the UK's key trading partners in the EU: France, Germany, Ireland, the Netherlands and Spain. The paper concludes that UK insolvency proceedings will not be recognised in a consistent manner in these Member States, which will be detrimental to stakeholders in, and ultimately the economies of, the UK and these Member States. In doing so, the paper underlines the importance of an agreement being reached between the

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Int. Insolv. Rev., Vol. 27: 422–444 (2018)
Published online 10 October 2018 in Wiley Online Library (wileyonlinelibrary.com). DOI: 10.1002/iir.1325

UK and the EU on the recognition of cross-border insolvency proceedings for the benefit of all parties. Copyright © 2018 The Authors International Insolvency Review published by INSOL International and John Wiley & Sons Ltd.

I. Introduction

'Brexit means Brexit' as Theresa May famously announced when launching her campaign to become leader of the Conservative Party in June 2016.[1] Yet quite what that means has been the subject of much debate in academia and beyond since. As we move towards the UK's departure from the European Union (EU), following the triggering of Article 50 of Treaty of the European Union in March 2017, there remains a lack of certainty as to the nature of the future relationship between the two post-Brexit. With so many important aspects of social and commercial policy at stake, it is easy for the apparently less significant issue of cross-border insolvency to be overlooked in these discussions. This would be a mistake, however, given the significant role that a reliable system of insolvency law has on inward investment, an issue of significant importance as the UK seeks to build trading partnerships beyond the remaining 27 EU Member States.

According to the March 2018 Consultation *Insolvency and Corporate Governance*, '[t]he UK has a leading international reputation for being a dependable place in which to do business'.[2] This reputation is in part credited to the insolvency regime, which is an 'important part of the UK's business environment and is well regarded internationally'.[3] Confidence in the reliability of a state's insolvency law framework is acknowledged as a key factor in general investment confidence.[4] As such, any changes which may undermine confidence should be made with utmost caution.

The UK Government appears to be adopting a negotiating position whereby it can walk away from Brexit negotiations without having concluded a deal with the EU.[5] As the deadline draws closer, and the prospect of a 'no deal' or 'hard' Brexit seemingly increases, it is pertinent to consider the impact of a 'no deal' scenario on the resolution of cross-border insolvencies involving UK companies operating in the EU. This paper will consider the current cross-border insolvency framework in the EU, the impact on this of a 'no deal' Brexit from a UK perspective and in turn the manner in which cross-border aspects of UK insolvency proceedings would be dealt with in some of the UK's key trading partners in the EU in the event of such a 'hard' Brexit. The paper will conclude that the consequences of such an outcome are potentially dire, for the UK and

1. See, for example, Jessica Elgot and Rowena Mason, "Theresa May launches Tory leadership bid with pledge to unite country" (*The Guardian*, 30 June 2016), available at: <https://www.theguardian.com/politics/2016/jun/30/theresa-may-launches-tory-leadership-bid-with-pledge-to-unite-country>.
2. Department of Business, Energy and Industrial Strategy, *Insolvency and Corporate Governance* (Consultation Paper 2018), 5.
3. Ibid.
4. See, for example, the World Bank doing business reports, in which resolving insolvency is one of the 10 factors considered; see also HMG, *Providing a Cross-border Civil Judicial Cooperation Framework – A Future Partnership Paper* (2017) ("Judicial Cooperation Future Partnership Paper"), paragraphs 9–20.
5. See, for example, "Brexit: Bill approved after May sees off rebellion" (*BBC News*, 20 June 2018), available at: <https://www.bbc.co.uk/news/uk-politics-44542156>.

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the remaining Member States, and as such, it is crucial that a suitable solution is arrived at.

II. The Current Framework

In order to understand the impact of Brexit on cross-border insolvency proceedings, it is necessary to establish the current system operating in the EU to draw comparison with the possible post-Brexit landscape. Insolvency proceedings involving companies with their centre of main interests (COMIs) located in an EU Member State (other than Denmark) are governed by Regulation (EU) 2015/848 on Insolvency Proceedings (Recast EIR), which replaced the earlier Regulation (EC) 1346/2000 on Insolvency Proceedings (EIR 2000) with effect from 26 June 2017.[6] The provisions of the Recast EIR and its application are quite nuanced.[7] It is not the purpose of this paper to review these in detail but rather to understand the operation of the Recast EIR in cross-border insolvencies to be able to draw comparison with post-Brexit systems.

The Recast EIR does not harmonise insolvency law across Member States but rather establishes rules on the jurisdiction to commence insolvency proceedings and the law that applies to such proceedings. Where a company has its COMI in the UK, only the UK will have the jurisdiction to open main insolvency proceedings, such as administration.[8] These insolvency proceedings would then be governed by UK law in all respects, save for some exceptions including security interests and rights under contracts of employment in other Member States.[9] Additionally, but significantly, any appointment will be recognised automatically in all other Member States, and the insolvency practitioner will be able to exercise all powers, subject to limited exceptions.[10] Similarly, any insolvency proceedings commenced in another Member State will be automatically recognised in the UK together with the insolvency practitioners' powers. As such, the Recast EIR has both outbound and inbound effects in each Member State.

Under this system, if, for example, an administrator is appointed over a company having its COMI in the UK pursuant to paragraph 22 of Schedule B1 of the Insolvency Act 1986, the appointment should automatically be recognised across the EU. In turn, the administrator will be able to exercise the powers afforded to it by the Insolvency Act 1986, subject to the limited exceptions considered above.[11] This has clear benefits, with the moratorium pursuant to paragraphs 42–43 of Schedule

6. Denmark exercised its right not to be party to the EIR 2000 or the Recast EIR. Consequently, hereafter references to the EU and Member States in the context of cross-border insolvency proceedings will be read as excluding Denmark.

7. COMI is not defined within the Recast EIR, although guidance is found in Article 3 and Preamble paragraphs 28–32. Insolvency proceedings are defined in Annex A of the Recast EIR and include administration, company voluntary arrangements, creditors' voluntary liquidation and compulsory winding up from the UK.

8. Article 3(1) and Annex A, Regulation (EU) 2015/848 of 20 May 2015 on Insolvency Proceedings (Recast) OJ L 141/19 ("the Recast EIR").

9. Ibid., Articles 7–18.

10. Ibid., Articles 19–21. Automatic recognition of the appointment is subject only to public policy, while exercise of powers will only be limited by secondary or territorial proceedings being opened in the Member State and the provisions of Articles 8 and 10.

11. Although the scope of the definitions within the Recast EIR allows for recognition of out-of-court administration appointments, where an administration is likely to involve significant extra-territorial aspects, the administrator will often be appointed by court order pursuant to paragraph 12, Schedule B1, Insolvency Act 1986, to facilitate the recognition of the insolvency proceedings in other Member States.

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B1 coming into immediate effect and the administrator able to exercise its full range of powers immediately. This can prevent the dissipation of valuable assets, allow the administrator to continue the business of the insolvent company or even facilitate a pre-packaged administration allowing for the continuation of the business under new ownership. Such is the appeal of the latter option that companies have in the past shifted their COMI to the UK in order to undergo a pre-packaged administration, the effects of which are recognised throughout the EU.[12] This additional benefit of pre-packaged administrations was noted in the 2014 Graham Review.[13]

These provisions offer certainty for all parties affected by the company's insolvency, allowing the insolvency practitioner to act promptly without incurring cost or delay, to achieve the best possible outcome for the company and its creditors without unnecessary waste. It is pertinent to consider, therefore, how this will be affected by Brexit.

III. The Framework Post-Brexit

While the nature of the relationship between the UK and the EU post-Brexit is currently unknown, the UK Government has made it clear it 'wants to build a new, deep and special partnership with the European Union'[14] and has published seven Future Partnership Papers to this end.[15] Cooperation in cross-border insolvency proceedings is addressed, albeit fleetingly, in the future partnership paper *Providing a Cross-border Civil Judicial Cooperation Framework*. In essence, the UK Government is seeking to preserve the existing benefits, but outside of the direct jurisdiction of the Court of Justice of the European Union (CJEU), recognising that:

> Businesses and investors value certainty. The EU and the UK will continue to be key trading partners and to invest in each other's economies. Confidence in cross-border commercial contracts and investment relationships is underpinned and enhanced by clear rules governing: … [*inter alia*] the approach to managing insolvency in cross-border situations.[16]

This position has been reiterated in the UK Government's presentation *Framework for the UK–EU Partnership: Civil Judicial Cooperation*. The presentation, one of a number to form part of discussions with the EU around the future relationship, echoes the message of the Future Partnership Paper that '[b] usinesses and creditors value the certainty of predictable and efficient cross-border insolvency rules'.[17]

12. See, for example, *Re Hellas Telecommunications (Luxembourg) II SCA* [2009] EWHC 3199 (Ch).
13. Teresa Graham, *Graham Review into Pre-pack Administration: Report to the Rt Hon Vince Cable MP* (The Insolvency Service, June 2014), available at: <www.gov.uk/government/publications/graham-review-into-pre-pack-administration>, paragraph 3.7.
14. Judicial Cooperation Future Partnership Paper, above note 4, 1.
15. Available at: <https://www.gov.uk/government/collections/article-50-and-negotiations-with-the-eu#future-partnership-papers>.
16. Judicial Cooperation Future Partnership Paper, above note 4, paragraph 14.
17. HMG, *Framework for the UK–EU Partnership: Civil Judicial Cooperation* (2018) ("Framework Presentation"), 14. The case study presented is, however, flawed from an EU perspective, as it overlooks the continuation of the Recast EIR between remaining Member States and the availability of alternative recognition procedures in the UK, as considered in Part IV below.

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The wish for preservation, for the most part, of the *status quo* is reflected in the European Union (Withdrawal) Act 2018 (Withdrawal Act),[18] which received Royal Assent on 26 June 2018 following a much-debated passage through Parliament. Section 3 of the Withdrawal Act provides that all direct EU legislation in operation immediately before 'exit day' will form part of domestic law once the UK leaves the EU.[19] As a consequence of this provision being enacted, the Recast EIR would be added to the statute book. This would not, however, ensure the preservation of current arrangements. In such a situation, the UK would continue to recognise insolvency proceedings commenced in EU Member States. As a piece of UK rather than EU legislation, however, the provisions would not be binding on those Member States. As such, proceedings commenced in the UK would not be recognised by the remaining Member States. Such reciprocity could only be achieved by way of treaty or international convention between the UK and the EU. It would not be possible for the UK to agree bilateral agreements with individual Member States, given the prohibition on such arrangements in the European Council's guidelines for Brexit negotiations.[20]

The EU addressed the issue of cross-border insolvency, again briefly, in its *Draft Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community* (EU Draft Withdrawal Agreement).[21] Jurisdiction, recognition and enforcement of judicial decisions, and related cooperation between central authorities are addressed in Article 63, which states the EU's intention that the Recast EIR would continue to apply to insolvency proceedings opened before the end of any transition period.[22] With much of the EU Draft Withdrawal Agreement to be agreed following several rounds of negotiations, this provision was agreed following the June 2018 round of negotiations with a minor amendment extending to proceedings under Article 6(1) of the Recast EIR.[23] Importantly though, there is no consideration of the relationship post-Brexit in the EU Draft Withdrawal Agreement.

With fundamental issues such as the Irish border and EU citizens' rights yet to be agreed, not to mention the thorny issue of the role of the CJEU in any arrangement, agreement on the coordination of cross-border insolvency post-Brexit would

18. European Union (Withdrawal) Act 2018.

19. Ibid., Section 3. 'Exit day' is defined in Section 20(1) as 29 March 2019 at 11.00 p.m.

20. European Commission, *Guidelines Following the United Kingdom's Notification under Article 50 TEU* (EUCO XT 20004/17) ("EU Guidelines"), paragraph 2, available at: <http://www.consilium.europa.eu/media/21763/29-euco-art50-guidelinesen.pdf>. This reflects the position of the CJEU generally that once an EU Regulation on judicial cooperation (and other matters) is issued, the external competence to determine international agreements with third countries is exclusive to the EU, not individual Member States. This is not therefore exclusive to the UK in the context of Brexit.

21. European Commission, *Draft Agreement on the Withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community*, COM TF50 (2018) 35 ("EU Draft Withdrawal Agreement"), available at: <https://ec.europa.eu/commission/sites/beta-political/files/draft_agreement_coloured.pdf>.

22. Ibid., Article 63.

23. Ibid., Article 63(3)(c), as set out in the 'Joint Statement from the Negotiators of The European Union and The United Kingdom Government on Progress of Negotiations under Article 50 TEU on The United Kingdom's Orderly Withdrawal from The European Union' (19 June 2018), available at: <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/717697/Joint_Statement_-_19_June_2018.pdf>.

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DOI: 10.1002/iir

seem some way off. While the so-called Henry VIII powers in Section 8 of the Withdrawal Act could be used to unpick any one-way recognition in the absence of reciprocity,[24] the issue of recognition of cross-border insolvency proceedings still needs to be addressed.

IV. Alternative Options for Recognition

If the current arrangements for cross-border insolvency proceedings pursuant to the Recast EIR cannot be retained, it is pertinent first to consider the availability of any existing international arrangements that could fill the gap. This part will consider whether the UK may be able to rely on alternative existing frameworks for the recognition of proceedings initiated in the UK post-Brexit.

The obvious starting point would be the UNCITRAL Model Law on Cross-Border Insolvency (Model Law). Incorporated into UK law through the Cross-Border Insolvency Regulations 2006,[25] other Member States would be able to take advantage of its provisions in gaining recognition of insolvency proceedings in the UK. The outbound benefits for the UK are, however, limited. To date, The Model Law has only been adopted by four other Member States—Greece, Poland, Romania and Slovenia[26]—none of which could be considered a key trading partner of the UK.[27] Furthermore, while The Model Law provides a clear pathway for recognition of foreign insolvency proceedings, this recognition is not automatic as with the Recast EIR but requires application to a local court to gain recognition and relief.[28] As such, The Model Law is unlikely to offer much succour, unless other Member States introduce it in the near future. Only 44 states have adopted The Model Law globally since its introduction in 1997, however, and this has tended to form part of a larger review of domestic law. With the presence of the Recast EIR, and Member States' focus on harmonisation rather than individual reform,[29] such hope would appear optimistic.[30]

24. Section 8, European Union (Withdrawal) Act 2018. These have been referred to as 'Henry VIII powers' due to the ability for ministers to amend or repeal UK statute through secondary legislation without recourse to Parliament, a reference to Henry VIII's purported preference for legislating by proclamation rather than through Parliament. For more, see <https://www.parliament.uk/site-information/glossary/henry-viii-clauses/>.
25. SI 1030/2006.
26. See <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html>. Although not adopting The Model Law, as seen in Part X below, Spain has adopted provisions similar to those enshrined in The Model Law.
27. The countries rank 10th (Poland), 17th (Greece), 18th (Romania) and 24th (Slovenia) in terms of value of trade with EU Member States, for which see:<https://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/datasets/9geographicalbreakdownofthecurrentaccountthepinkbook2016>.
28. General Assembly Resolution 52/158, Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law A/RES/52/158 (30 January 1998), Article 15.
29. See, for example, European Commission, Proposal for a Directive of The European Parliament and of The Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU (COM (2016) 723 final).
30. UNCITRAL Working Group V has produced a draft model law for the recognition and enforcement of insolvency-related judgments that was considered at its 53rd session in New York (7–11 May 2018). While this would not assist with the recognition of insolvency proceedings, it may offer some assistance with issues arising within insolvency proceedings if approved by UNCITRAL and subsequently incorporated by Member States. For details of the progress of the draft model law on recognition and enforcement of insolvency-related judgments, see <http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html>.

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An alternative could be reliance on judicial cooperation. There is a long history of judicial cooperation involving the UK courts in cross-border and extra-territorial insolvency matters, seen in cases such as Maxwell Communication Corporation and more recently the fallout from the collapse of Lehman Brothers. Such cooperation would need to be fostered with Member States' domestic courts for this to be a viable alternative. The benefits of such an approach are recognised in the May 2017 amendments to the 2016 Chancery Guide, which states that 'communication between courts in different jurisdictions may be of assistance in the efficient conduct of cross-border insolvency cases' and that a co-ordinated approach can lead to 'maximisation of benefit for all stakeholders of financially troubled enterprises'.[31] The requirement for multiple proceedings for such an approach would represent a significant step backwards from the current streamlined and efficient provisions of the Recast EIR. Such an approach would add cost and delay, and it is not even certain that proceedings would or could be opened in other Member States. With the restriction on secondary or territorial proceedings subject to presence of an establishment in the other Member State removed once the UK is no longer a Member State,[32] opening such proceedings will be subject to local law.

The Chancery Guide endorses three sets of international guidelines on judicial cooperation, of which the EU Cross-Border Insolvency Court-to-Court Cooperation Principles (EU JudgeCo Principles),[33] which operate as non-binding guidance to all Member States, are most relevant here.[34] Although principally targeting cross-border insolvency proceedings covered by the Recast EIR, the EU JudgeCo Principles extend beyond Member States. Courts and insolvency practitioners are encouraged to communicate and cooperate in international cases that do not fall under the Recast EIR, in which case they 'should apply the EU JudgeCo Principles by way of analogy'.[35]

The EU JudgeCo Principles have the overriding objective of 'enabling courts and insolvency practitioners to operate effectively and efficiently in international insolvency cases with the goals of maximising the value of the debtor's global assets, preserving where appropriate the debtor's business' with due regard to creditors' interests.[36] Direct court access for foreign insolvency practitioners is also encouraged,[37] which would remove the need for multiple proceedings, although would be subject to UK proceedings first being recognised in the relevant Member States. Importantly, in respect of the concerns of cost and delay if the benefits of the

31. Chancery Guide (HM Courts & Tribunals Service, 2016), paragraph 25.29.
32. Articles 3(2) and 3(4), Recast EIR, only apply where a company's COMI is in another Member State.
33. Bob Wessels (ed), *EU Cross-Border Insolvency Court-to-Court Cooperation Principles* (Eleven International Publishing, 2015) ("EU JudgeCo Principles"), available at: <http://www.tri-leiden.eu/uploads/files/eu-cross-border-insolvency-court-to-court-cooperation-principlespdf.pdf>.
34. See Chancery Guide, paragraph 25.30. The Chancery Guide also promotes the American Law Institute/International Insolvency Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases and The Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters.
35. Principle 26, EU JudgeCo Principles.
36. Ibid., Principle 3.
37. Ibid., Principle 13.

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DOI: 10.1002/iir

Recast EIR are not available for UK proceedings post-Brexit, the aims expressly include saving costs and expense while ensuring cases are dealt with effectively, efficiently and in a timely manner.[38] The EU JudgeCo Principles also encourage the use of a moratorium 'at the earliest possible time in each State where the debtor has assets or where litigation is pending' even where local law does not make such provision.[39]

While not a perfect solution, the EU JudgeCo Principles may offer some optimism in the event of no Brexit deal being reached in the absence of any recognition framework or treaties.[40] While UK proceedings would need to gain recognition in other Member States, compliance by those Member States with the EU JudgeCo Principles would see decisions made in a timely and cost-effective manner in the best interests of the creditors.

V. The Impact of a 'Hard' Brexit

One of the most significant benefits of the Recast EIR to cross-border insolvency proceedings is the automatic recognition of proceedings commenced in another Member State. In the event of the UK leaving the EU without some form of treaty to mirror the existing provisions of the Recast EIR, there does not appear to be any suitable overarching framework in place that will fill this void. As a consequence, recognition of insolvency proceedings opened in the UK will be subject to the private international law of individual Member States. This will lead to two possible options for insolvency practitioners: first, seeking to open ancillary proceedings in other Member States and then seeking coordination of these proceedings; or second, seeking recognition of UK proceedings in accordance with Member States' local law.

This raises the question of how insolvency proceedings commenced in the UK following a 'hard' Brexit would be treated by individual Member States. It would not be possible to address the approach of all 26 Member States still subject to the Recast EIR in this paper. Instead, the paper will consider the likely approach of five of the UK's key trading partners: France, Germany, Ireland, the Netherlands and Spain.[41] The paper will now consider on what basis collective insolvency proceedings commenced in the UK in respect of a company with its

38. Ibid., Principle 4.3.
39. Ibid., Principle 8.
40. There has been some discussion of the resurrection of the European Convention on Certain International Aspects of Bankruptcy 1990 (Council of Europe Treaty number 136) ("Istanbul Convention") as an alternative to the Recast EIR post-Brexit. See, for example, "Brexit and the Future of European Insolvency: Discussion between G Moss Q.C. and Professor B Wessels" (European Law Academy, Trier, 8 June 2017) (notes available at: <http://www.bobwessels.nl/blog/2017-06-doc4-eu-insolvency-law-after-brexit/>). On the basis that the UK was not a signatory to the Istanbul Convention, it was never formally ratified by sufficient members to come into force and has been superseded by the Recast EIR (see Article 85(1)(k)), furtherance of this discussion is beyond the scope of this article.
41. The countries rank first (Germany), second (France), third (the Netherlands), fourth (Ireland) and seventh (Spain) in terms of value of trade with EU Member States. See <https://www.ons.gov.uk/economy/nationalaccounts/balanceofpayments/datasets/9geographicalbreakdownofthecurrentaccountthepinkbook2016>

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DOI: 10.1002/iir

COMI in the UK would be recognised under the domestic law of these five Member States.

VI. France[42]

In France, it would first be necessary to establish that the finding of COMI in the UK was supported by the facts. Given that the mutual respect and sincere cooperation principles underlying European texts, such as the Recast EIR, would no longer be applicable as of right,[43] the existence of foreign proceedings would not place any limits on a French court being able to conduct insolvency proceedings in respect of a foreign business. In general, a French court would be competent to exercise jurisdiction where, in the case of a foreign business, its 'principal interests' are located within the territorial jurisdiction of the court.[44]

Jurisdiction would also extend to the situation where the business operates in France via a branch or other presence without legal personality.[45] In such cases, the court would examine the reality of the business' operations, especially if it thinks that the centre of interests is in France.[46] Even without a centre of interests, French courts have historically acceded to creditors' petitions to open insolvency proceedings, often on the basis of any connecting factors they deem important.[47] This type of jurisdiction rests on the 'exorbitant jurisdiction' principles of the Civil Code.[48] Although this liberal jurisprudence has on occasion been curbed,[49] courts have held that parties are not free to contract out of exorbitant jurisdiction rules.[50]

On the assumption that the COMI is indisputably in the UK, the approach of the French court would be to first examine whether there was any international text applicable to cross-border recognition and enforcement that could be invoked. As identified above, France has not adopted The Model Law, despite recommendations in this direction.[51] Similarly, the few treaties that exist between France and other countries do not involve the UK.[52] Therefore, recourse to the *droit commun* (ordinary law) and the *exéquatur*[53] procedure will be necessary to register a foreign judgment opening insolvency proceedings.[54]

An *exéquatur* is necessary because, while the probative value of the foreign judgment or the right of the foreign office-holder to manage the insolvency might be acknowledged by a French court, without the formal *exéquatur* procedure, this might not produce any effect on the debtor or assets situated in France. As a result, creditors in France could still exercise any rights against the debtor, including suing

42. This section was provided by Paul Omar, Editor, International Insolvency Review.
43. Article 4(3), Treaty on European Union [2012] OJ C 326.
44. Article R. 600–1, Commercial Code.
45. CA Paris, 8 July 1992, *RJ. Com.* 1993, 7.
46. Cassation civile, 21 July 1987, *Dalloz* 1988, 169.
47. Cassation commerciale, 26 October 1999, Case no. 96–12946 (unpublished).
48. Articles 14–15, Civil Code.
49. Cassation commerciale, 23 May 2006, Dalloz 2006, 1880.
50. Cassation commerciale, 1 July 2009, Judgement no. 771, available at: <https://www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/771_1er_13158.html>.
51. See Jean-Luc Vallens, "La faillite internationale - vers une loi modèle?" *Petites Affiches* 1996 no. 72, 21.
52. Treaties with Switzerland (15 June 1869), Belgium (8 July 1899), Italy (3 June 1930), Monaco (13 September 1950) and Austria (27 February 1979).
53. From the Latin: "let it be executed."
54. Article 509, New Code of Civil Procedure.

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for payment, attaching property and petitioning for insolvency, despite the existence of a foreign judgment. Furthermore, in the absence of specific legal recognition through the *exéquatur* procedure, a foreign judgment will encounter difficulties with enforcement if doubts are raised as to its compliance with the rules of private international law or general public order rules (which defendants or third parties will undoubtedly raise as objections in the enforcement process).

Where there is no formal judgment, such as an out-of-court appointment of administrators, a French court could look to the previous inclusion of these procedures within Annex A of the Recast EIR as evidence of their regularity as far as former law and procedure were concerned, which could add weight to any arguments in favour of the continued recognition of the procedures in a post-Brexit scenario. However, the absence of a formal judgment might constitute an impediment to the *exequatur* process being engaged.

The procedure for the recognition of a foreign judgment follows the ordinary rules of civil procedure and involves an application to the court by any interested party, including the foreign office-holder. The debtor must be cited to appear, even if the foreign judgment was obtained *ex parte*.[55] The court hearing the application must content itself with an examination of the regularity of the foreign judgment and that the public interest and legal system in France would not be offended by the recognition of the judgment. The elements a court will look at in its examination include whether the foreign court had proper jurisdiction, whether the proper law was applied, compliance with due process and public policy rules, including whether the procedure was adversarial, and the absence of fraud.[56] The COMI issue noted earlier will also receive attention as part of this examination process.

The civil process administered by the commercial courts is generally fast. Moreover, the recent establishment of specialist insolvency courts for the hearing of large matters will further enhance the speed of hearings for cases within their purview. Once the foreign judgment is recognised, the court will order that it receive the *exéquatur*, the formal stamp of recognition. Once obtained, the foreign judgment carries the same authority as a French judgment and is treated as *res judicata*.[57]

The *exéquatur* will render the judgment capable of being enforced. More importantly, concurrent insolvency proceedings in France against the debtor may not be initiated. The foreign office-holder may take any steps permitted by foreign law to carry out any act in France (with some exceptions), although the court will still retain the discretion to supervise the office-holder in the exercise of his functions and may decide not to accord him automatic recognition of all his acts.[58] Thus, while the recognition of UK proceedings might be forthcoming, it is by no means certain that all the effects of the judgment will be recognised automatically.

55. Cassation civile, 12 November 1986, *Bull. Civ. I* no. 257.
56. Cassation civile, 20 February 2007, Dalloz 2007, 324.
57. Grant of an *exéquatur* must be advertised in the same manner as any domestic judgment.
58. Cassation civile, 25 February 1986, *JCP éd E* 1987 No. 14969.

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VII. Germany[59]

In the absence of the provisions of the Recast EIR, the competence of the German courts will be determined by Section 3 of the German Insolvency Code (*Insolvenzordnung* – 'InsO').[60] The German Insolvency courts will be competent to exercise jurisdiction where the company's centre of an independent commercial activity (*Mittelpunkt einer selbständigen wirtschaflichen Tätigkeit*) is within the jurisdiction of the German courts.[61]

Germany has not adopted The Model Law; therefore, answers relating to the recognition of UK proceedings cannot be found therein.[62] Several bilateral agreements between Germany and other countries exist but do not include the UK. Consequently, if the COMI of the company lies within the UK, the domestic provisions on 'German International Insolvency Rules' (Sections 335 to 358 of the InsO) will apply.[63] The fundamental principle of *lex fori concursus* applies for international insolvencies just as it does for insolvencies regulated under the Recast EIR; the insolvency law of the country in which the proceedings have been opened applies.[64]

In contrast to the Recast EIR, there is no automatic recognition of foreign proceedings. The competence of the foreign courts to exercise jurisdiction is fully reviewable and has to be ascertained. Recognition in Germany will not be granted if the foreign court that opened the proceedings did not have the competence to exercise jurisdiction on the basis of German standards.[65] This reflects the so-called mirror-image principle (*Spiegelbildprinzip*);[66] in other words, the German court will examine whether the English court would have had the competence of exercising jurisdiction if German law was to be applied when deciding jurisdictional competence.[67] Recognition will also not be granted if it would lead to a breach of the fundamental principles of German law, especially to a breach of German fundamental rights (*Grundrechte*).[68]

An insolvency proceeding with its COMI in the UK will only take effect in Germany if, first, the foreign proceeding qualifies as an insolvency proceeding in accordance with German law.[69] The term 'insolvency proceeding' under Section 335 ff of the InsO does not necessarily have to be interpreted in the same way as

59. This section was provided by Dr Heike Lücke, Kingston University.

60. Section 3, *Insolvenzordnung* ("InsO") does not explicitly include foreign proceedings but applies by analogy. See the English text, available at: <https://www.gesetze-im-internet.de/englisch_inso/index.html>.

61. Section 3, InsO.

62. Sven-Holger Undritz, in Karsten Schmidt (ed), *Kommentar zur Insolvenzordnung* (19th edn) (C.H. Beck, 2016), Vorbemerkung Section 335 Insolvenzordnung, recital 21.

63. BAG, *Neue Zeitschrift für das Insolvenzrecht* (2013) 758, 759.

64. Article 4, Recast EIR; Section 335, InsO; Annerose Tashiro, in Eberhard Braun (ed), *Kommentar zur Insolvenzordnung* (7th edn) (C.H. Beck, 2017), Section 335, recital 7–14.

65. Section 343, subsection 1, InsO.

66. Section 343, subsection 1, No. 1, InsO; Patrick Ehret, in Braun, above note 64, Section 343, recital 9; BGHZ, 122,373.

67. German courts would normally follow the doctrine of the CJEU in Case C328/12 *Schmid v Hertel* [2014] EUECJ C-328/12 by applying Article 3, Recast EIR to determine the international jurisdiction, thereby the location of COMI is decisive.

68. Section 343, subsection 2, InsO; Ehret, above note 66, Section 343, recital 12.

69. Section 343, InsO; Undritz, above note 62, Vorbemerkung Section 335 Insolvenzordnung, recital 6.

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under the Recast EIR. It is in general orientated towards determining whether the proceeding in question has the aim of creditors' satisfaction, in accordance with Section 1 of the InsO. The procedures in Annex A of the Recast EIR could serve as examples for the purpose of guidance for the German courts.

In regard to UK proceedings, a distinction has to be made between appointments made in-court and out-of-court. As far as an in-court administration proceeding[70] is concerned, there is no doubt that the German courts would recognise this procedure as an insolvency proceeding as interpreted under Section 343, subsection 1, of the InsO. The question is whether out-of-court appointments, such as the appointment of an administrator under paragraph 22 of Schedule B1 of the Insolvency Act 1986, would be seen as insolvency proceedings in accordance with Section 343, subsection 1, of the InsO. While the process can be completed without the involvement of the courts, Section 343 of the InsO unambiguously refers to opening decisions of 'foreign courts', and therefore, out-of-court proceedings cannot be recognised under Section 343 of the InsO. A procedure without any court involvement would also not be recognised under Section 328 of the German Code of Civil Procedure (*Zivilprozessordnung* – 'ZPO') on the recognition of foreign judgments, due to the lack of a judgment by a court.[71]

Consequently, there is a *lacuna* in the German law in regard to proceedings that can be implemented without any involvement of the court, including the out-of-court administration procedure. As both of these procedures are mentioned in Annex A of the Recast EIR at present, it is conceivable that the German courts would recognise them; however, up to now, German law has not provided for the possibility of recognising such out-of-court procedures.[72]

There are further practical issues that need to be considered. There are in excess of 600 courts in Germany that deal with corporate insolvency matters. The judges in these courts act alone and often in isolation. As a consequence, application for recognition can be cumbersome, and there is a risk of judgments being inconsistent. Furthermore, the insolvency practitioner needs to satisfy the court that he has *locus* to represent the company in the proceedings. This requires appropriate documentary evidence in addition to the issues raised above.

If a proceeding is recognised in Germany, all decisions of the foreign courts that take action to secure the estate after opening of the proceedings will also be recognised. This also applies to other measures of the foreign court that are taken for the implementation or termination of the proceeding.[73]

Outside of the provisions of the Recast EIR, it will be easier for the German courts to open a territorial insolvency proceeding (*Partikularinsolvenzverfahren*) for national assets. In contrast to Article 3(2) of the Recast EIR, which requires that the

70. Paragraph 12, Schedule B1, Insolvency Act 1986.
71. *Zivilprozessordnung* (Code of Civil Procedure). See English text, available at: <https://www.gesetze-im-internet.de/englisch_zpo/englisch_zpo.html#p0044>.
72. On the recognition of schemes of arrangement, see Reinhard Bork, "Germany" in *The Implications of Brexit for the Restructuring and Insolvency Industry, A Collection of Essays* (INSOL International, 2017), (*The Implications of Brexit*) 51–54.
73. Section 343, subsection 2, InsO; Ehret, above note 66, Section 343, recital 14–16.

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debtor must have an establishment in Germany, Section 354 of the InsO only requires that the debtor should have assets in Germany.

In summary, post-Brexit and on the assumption that the provisions of the Recast EIR will not be applicable, insolvency proceedings of a debtor company with its COMI in the UK will still in most cases be recognised in Germany under German domestic law. There is a *lacuna* in the German regulations with regard to procedures with no court involvement, however.

VIII. Ireland[74]

The legislative framework in the Republic of Ireland provides similar insolvency processes to those available under UK legislation, including compulsory and voluntary liquidations, receiverships, and a debtor in possession rescue process known as the Examinership process.[75] In addition, Irish company law also contains provisions that are similar to the UK Scheme of Arrangement provisions.[76]

The Irish High Court has jurisdiction to wind up any unregistered company, including a company incorporated outside Ireland that has been carrying on business in the State. Importantly, under Section 1417 of the Companies Act 2014, an order 'made for or in the course of winding up' of a company incorporated outside Ireland by the courts of a country recognised by ministerial order under that section may be enforced by the High Court 'in the same manner in all respects as if the order had been made by the High Court'.[77] Essentially, winding up proceedings initiated in prescribed states will be recognised by the Irish courts. An order under Section 1417 may not be made in respect of other EU Member States (save for Denmark), due to the presence of the Recast EIR.

It is noteworthy that only one such ministerial order was made in respect of the predecessor to Section 1417, Section 250 of the Companies Act 1963. This recognised Northern Ireland and Great Britain for the purposes of that section, though was revoked following the introduction of the EIR 2000. Prior to this revocation, any compulsory winding up commenced in the UK was automatically recognised in Ireland. There is no reason to suppose that such an order could not be put in place again after the UK leaves the EU, though it must be emphasised that this would require positive action by the Minister for Enterprise, Trade and Employment. In such a situation, winding up proceedings initiated in the UK would be automatically recognised in Ireland.

Looking beyond winding up proceedings, Ireland is not party to The Model Law at present, although there are ongoing discussions concerning its adoption.

74. This section was provided by Professor Irene Lynch-Fannon, University College Cork, with acknowledgment to Dr Emilie Ghio, Birmingham City University, and an unpublished paper by Noel Rubotham presented to the Irish Company Law Review Group.

75. See, generally, Irene Lynch Fannon and Gerard Murphy, *Corporate Insolvency and Rescue* (2nd edn) (Bloomsbury Professional, 2012).

76. Idem. See also Companies Act 2014; Irene Lynch Fannon, "Insolvency and Rescue," in Thomas Courtney (ed), *Bloomsbury's Professionals Guide to the Companies Act 2014* (Bloomsbury Professional, 2015). See also chapter in the same work by Lyndon MacCann, "Mergers and Acquisitions."

77. Section 1417, Companies Act 2014. This is the counterpart to Section 426, Insolvency Act 1986 (UK).

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Neither are there any relevant treaties to which the UK is a party. Recognition and assistance of foreign insolvency proceedings not subject to the Recast EIR or Section 1417 of the Companies Act 2014 (assuming the UK is recognised by ministerial order as discussed above) would therefore be governed by the common law rules of private international law in this area. These principles could apply to insolvency proceedings originating in the UK post-Brexit. There are few Irish cases in this area, and so reliance can be placed on relevant English and other common law case law.

The approach at common law in England to recognition of foreign insolvency proceedings relevant to Ireland has been described by Fletcher as being 'in a state of arrested development for most of the [twentieth] century'.[78] In the Irish context, this is because of the application of Section 1417 of the Companies Act 2014 (and its predecessor, Section 250 of the Companies Act 1963) and its counterpart in UK law, Section 426 of the Insolvency Act 1986, together with the impact of the EIR 2000 and more recently the Recast EIR, all of which covered most instances of cross-border insolvency. Nevertheless, the common law rules apply and the principal rule on the effect of a foreign winding up order is that '[t] he authority of a liquidator appointed under the law of the place of incorporation is recognised in England'[79] and by analogy Ireland. This is similar to the rule in personal bankruptcy law that is based on domicile, which in a company law context is determined by the place of incorporation.[80]

There are some exceptions where this rule is not followed, the most significant of which, is where the proceedings are not considered to be final. Other exceptional situations where this rule might not be followed include where the proceedings might be in breach of natural justice (which in Ireland might include constitutional justice) or where the proceedings are contrary to public policy[81] or contrary to other principles of law of the jurisdiction. These are exceptional situations.

The position in relation to recognition of collective proceedings falling short of a winding up seems to be less clear. Earlier decisions in England and Canada indicated that Chapter 11-type proceedings would not receive automatic recognition. By analogy, this would apply to administration and company voluntary arrangements from an Irish perspective. Although recognition of such proceedings would not be automatic, following the Privy Council decision in *Cambridge Gas Transport Corporation v The Official Committee of Unsecured Creditors of Navigator Holdings PLC and others*,[82] it is possible that assistance could be given to such proceedings on the basis that there was no suggestion of any prejudice to local creditors or any infringement of a local law.

78. Ian Fletcher, *Insolvency in Private International Law* (1st edn) (OUP, 1999), 93.
79. Lawrence Collins (ed), *Dicey and Morris on the Conflict of Laws* (13th edn) (Sweet & Maxwell, 1999), 1141 (Rule 158).
80. Fletcher, above note 78, 166.
81. Article 26, Recast EIR, contains a similar public policy exception that has been applied in Irish bankruptcy proceedings in the McCann case in recent times: *ACC v McCann* (Dunne J. *ex tempore*, High Court, 21st August 2012).
82. [2006] UKPC 26.

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The authority of *Cambridge Gas* was acknowledged by the Irish Supreme Court in *Re Flightlease (Ireland) Limited (In Voluntary Liquidation)*.[83] Here, Finnegan J. noted *obiter* that the decision in *Cambridge Gas* 'represented a significant change in the common law in relation to bankruptcy and insolvency proceedings, the full effects of which are in the process of being worked out in subsequent cases'[84] and expressed a disinclination to follow the rule set out therein. O'Donnell J. on the other hand stated in a concurring judgment that he would not wish to see this possibility ruled out, noting that the issue had not been fully argued in the present case. He commented that he:

> … would not wish to entirely rule out the possibility of the development of an insolvency principle as a matter of common law as indeed was discussed by Lord Hoffman in The Privy Council in [*Cambridge Gas*] and in the United Kingdom House of Lords in *In re HIH Insurance Ltd* [2008] UKHL 21, [2008] 1 W.L.R. 852 and in the United Kingdom Court of Appeal in *Rubin v Eurofinance SA* [2010] EWCA Civ 895, [2011] Ch. 133.[85]

He did, however, express a preference for such change happening through legislation. The UK Supreme Court subsequently delivered judgment in *Rubin*.[86] The view of the Irish Supreme Court remains the same: that the courts have recognised the possibility of the development of a common law rule of recognition and at the same time have expressed some preference for legislative intervention.

There is therefore a lack of certainty as to how proceedings commenced in the UK will be recognised in Ireland in the absence of the Recast EIR, particularly with regard to non-terminal proceedings. In any event, recognition will likely need sanction of the court and will depend on the impact on local creditors.

IX. The Netherlands[87]

Brexit will have an impact on the recognition and effects in the Netherlands of insolvency proceedings opened in the UK. Until now, the Recast EIR (and before it, the EIR 2000) has provided a clear and convincing framework to address cross-border issues that may arise in insolvency proceedings that involve both the Netherlands and the UK. In the absence of the clarity and predictability provided by the Recast EIR, the effects of UK insolvency proceedings in the Netherlands must be determined on the basis of Dutch rules of private international law. There are no applicable conventions between the UK and the Netherlands, nor has the Netherlands implemented legislation based on The Model Law, although this

83. [2012] 1 IR 722.
84. Ibid., paragraph 62 (judgment of Finnegan J).
85. Ibid., paragraph 9 (judgment of O'Donnell J).
86. [2012] UKSC 46.
87. This section is provided by Professor Michael Veder, Radboud University Nijmegen. It is an amended version of Michael Veder and Sijmen de Ranitz, "The Netherlands," in *The Implications of Brexit* above note 72, 64–65.

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has been proposed in the past.[88] This means that UK insolvency practitioners and courts must (again) try to come to terms with the lack of a clear, coherent and modern statutory framework in Dutch law for cross-border insolvencies.

Dutch domestic international insolvency law is largely based on case law, in particular that of the Dutch Supreme Court (*Hoge Raad*).[89] This case law, however, does not provide for a coherent, clear and convincing set of rules either. Dutch law, for example, still adheres to the outdated and troublesome territoriality principle in order to determine the effects that foreign insolvency proceedings may have in the Netherlands. Furthermore, many of the questions arising in a cross-border insolvency context have not yet been addressed in litigation before the *Hoge Raad*, leading to undesirable uncertainty.

In its decision of 13 September 2013 regarding the insolvency of the Russian oil company Yukos, the *Hoge Raad* provided some clarity on the extent to which foreign insolvency proceedings and the insolvency practitioners appointed in them are recognised in the Netherlands.[90] Importantly, recognition of foreign insolvency proceedings in the Netherlands is automatic and does not require a court decision. The *Hoge Raad*, however, confirmed its longstanding adherence to the territoriality principle, although at the same time mitigated the consequences thereof.

The *Hoge Raad* held that, insofar as an international regulation that is binding on the Netherlands does not determine otherwise, insolvency proceedings opened in another State have territorial effect. According to the court, this entails that the legal effects of insolvency proceedings under the laws of the State where the proceeding has been opened (*lex concursus*) cannot be invoked in the Netherlands in so far as that would result in unpaid creditors no longer being able to take recourse, either during or after the insolvency proceedings, against the assets of the debtor that are situated in the Netherlands. However, the court also decided that other legal effects attached to insolvency proceedings under the *lex concursus*, including the powers of the insolvency practitioner to manage and dispose of the debtor's assets, in principle are recognised and given effect in the Netherlands.

This decision was helpful as it provided clarity in respect of what was, until then, a controversial issue: whether a foreign insolvency practitioner can sell assets of the debtor that are situated in the Netherlands. But many other important questions

88. In 2007, a proposal for a new Dutch Insolvency Act was presented to the government by a (temporary) advisory committee to the government and parliament on insolvency law, the *Commissie Insolventierecht*. This draft included proposals aimed at restyling Dutch international insolvency law to meet internationally acceptable standards and sought to facilitate an effective and efficient administration of cross-border insolvency proceedings and further legal certainty. These proposals, which were based on a combination of The Model Law and the Recast EIR, have until now not led to legislation. For a more elaborate exposé on these proposals, see Bob Wessels, "International Insolvency Law in the Netherlands: The Pre-Draft of Title 10" (2008) 17(2) *International Insolvency Review* 143; Loes Lennarts and Michael Veder, "The Dutch Domestic Cross-border Insolvency Framework (and why it is badly in need of Reform, illustrated by the Yukos Litigation)" (2012) 4(2) *International Insolvency Law Review* 228. These proposals were discussed at a conference in Leiden, for which see the report of conference proceedings in Bob Wessels and Paul Omar (eds), *Crossing (Dutch) Borders in Insolvency* (INSOL Europe, 2009).

89. For an overview of Dutch domestic international insolvency law, see, *inter alia*, Michael Veder, *Cross-Border Insolvency Proceedings and Security Rights* (Kluwer Law International, 2004), Chapter II; Bob Wessels, *International Insolvency Law* (4th edn) (Kluwer Law International, 2015), Chapter II.

90. HR 13 September 2013, ECLI:NL:HR:2013:BZ5668.

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remain unanswered. For example, it is unclear what the relevance is of the location of the debtor's COMI. Should a distinction similar to the Recast EIR and The Model Law be made between foreign main and foreign non-main proceedings when determining the scope of the foreign proceedings and the powers of foreign liquidators appointed in them? And, if so, who should decide (and when) whether the foreign proceedings were opened in the State of the debtor's COMI? Unlike the Recast EIR, Dutch domestic private international law also lacks a coherent set of conflict of laws rules that determine the law applicable to a great number of fundamental issues arising in a cross-border insolvency context. Even though it is not unlikely that Dutch courts will, in principle, apply similar conflict of laws rules to those laid down in the Recast EIR, more guidance and legal certainty would be helpful.

The approach of the Dutch *Hoge Raad* to the effects of foreign insolvency proceedings in the Netherlands, as set out above, creates substantial risks for the administration of assets and a cross-border restructuring in UK insolvency proceedings. In its Yukos judgment of 2013, the *Hoge Raad* has reconfirmed its position that creditors can continue to take recourse against the debtor's Dutch assets, notwithstanding the insolvency proceedings opened abroad (unless the Recast EIR applies). Consequently, a moratorium on creditor actions in UK administration proceedings will not prevent creditors from attaching and taking recourse against assets of the debtor that are situated in the Netherlands.

X. Spain[91]

The introduction of the EIR 2000 acted as a trigger for the reform of the outdated Spanish insolvency regime and informed the cross-border insolvency model enshrined in the Spanish Insolvency Act of 2003 (SIA).[92] While the latter closely follows many of the provisions now found in the Recast EIR, there are significant differences to the extent that it is meant to be applied to third countries, as the UK will be post-Brexit. In particular, the provisions on recognition and enforcement and on cooperation between insolvency proceedings could stop being applicable if a third country does not systematically recognise Spanish judgments or cooperate with Spanish proceedings.[93] Reciprocity is not, however, strictly a basis for recognition or cooperation for matters endorsed by Spanish courts, which have only reluctantly applied it, as it may infringe rights to access to justice and to a fair trial.

There is no automatic recognition of foreign insolvency proceedings like in the Recast EIR. The recognition and enforcement of court orders opening foreign insolvency proceedings must proceed through *exequatur* before specialised commercial courts to be recognised. Hence, the recognition of UK proceedings in Spain will be more time-consuming and expensive than at present. Foreign insolvency practitioners' powers may be recognised prior to formal recognition of proceedings

91. This section was provided by Professor Laura Carballo Piñeiro, World Maritime University.
92. Law 22/2003 of 9 July on Insolvency ("SIA").
93. Ibid., Article 199.

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DOI: 10.1002/iir

(whether provisional or not, court or out-of-court appointed),[94] and they can also apply for provisional measures, including the stay of individual enforcement proceedings.[95] SIA lists the usual grounds for non-recognition, including a public order clause.[96]

While the foreign court order does not have to be final for recognition of proceedings to be commenced, it must open a collective proceeding based on the debtor's insolvency and by which its estate is submitted to the control or supervision of a foreign court or administration for liquidation or reorganisation purposes.[97] Although this definition does not seem to encompass pre-insolvency proceedings, SIA has been amended to include these. Therefore, this type of proceeding, including schemes of arrangement,[98] is a likely candidate to be submitted to the *exequatur* for recognition and enforcement in Spain.

Most notably, SIA requires the examination of the foreign court's international jurisdiction. Only those proceedings opened in a jurisdiction where the debtor has its COMI or an establishment are to be recognised. The definitions of COMI and establishment mirror those of the Recast EIR.[99] However, there is a margin for flexibility in recognising foreign decisions, if a reasonable connection with the country of origin, similar to those heads of jurisdiction such as the location of significant assets therein, is proven.[100]

The incorporation of a company in the UK may lead to the presumption that its COMI is located there. While applying domestic rules on recognition and enforcement, Spanish courts will need to recognise the UK company as such, in addition to determining where its COMI is located. The first operation is so far blocked by the Court of Justice's case law applying the principle of mutual recognition to companies whose place of registered office is seated in a Member State. Once that case law is no longer applicable, Spanish courts will recognise UK companies provided that they are properly incorporated under UK law and that its centre of administration or principal place of business is not located in Spain.[101] If the latter is located in Spain, the company will be deemed a Spanish company and it will face the problem of not having been properly incorporated under the Spanish law.[102] In such a scenario, a UK limited company will be held a Spanish irregular company bereft of liability limitations. Hence, shareholders and directors of such companies will be held also accountable *vis-a-vis* insolvency creditors. This could pose significant problems for companies incorporated in the UK but operating substantially in Spain.

94. Ibid., Article 221.
95. Ibid., Article 226. The same provision entitles Spanish courts to recognise provisional measures adopted by foreign courts.
96. Ibid., Article 220.
97. See the definition in Article 220(1)(1), SIA.
98. The debate about how to classify schemes of arrangement is open in Spain. See Laura Carballo Piñeiro, "Brexit and International Insolvency beyond the Reign of Mutual Trust" (2017) 28(3) *International Insolvency Review* 246.
99. Article 8, SIA, establishes the international jurisdiction of Spanish courts.
100. Ibid., Article 220(1)(3).
101. Article 9(11), Civil Code; Articles 8–9, Capital Companies Law.
102. Article 39, Capital Companies Law.

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In line with the cross-border insolvency model endorsed by the Recast EIR and The Model Law,[103] a foreign insolvency proceeding will be granted universal or territorial effects depending on the head of jurisdiction upon which it was opened. With this limitation, and once recognised, the effects of foreign insolvency proceedings in Spain are those of the country of commencement.[104] In principle, they are determined by the *lex fori concursus*, but the fact that assets are in Spain implies that insolvency practitioners have to take into account the Spanish law. Moreover, if they want to undertake specific acts and claims in Spain, they may be subject to special conflict rules mirroring those laid down by the Recast EIR, such as those dealing with third party security rights *in rem* or transaction avoidance.[105]

Further judgments on insolvency-related matters issued in foreign jurisdictions will be automatically recognised in Spain if the foreign insolvency proceedings have been previously recognised.[106] Nevertheless, the grounds for non-recognition will always need to be examined and the relevant counterparty may oppose their recognition through the *exequatur* proceeding.

The cross-border insolvency model enshrined in SIA does not preclude the opening of Spanish proceedings over the same debtor. This law lays down rules on communication, cooperation and coordination between foreign and Spanish insolvency proceedings. Interestingly, Spanish courts are already legally entitled to conclude insolvency protocols.[107] However, this power has not yet been used. While the provisions in SIA bear similarity to the Recast EIR in many regards, these rules cannot be compared in efficiency and effectiveness to those enshrined in the Recast EIR, not to mention the fact that there are no provisions in SIA on group company insolvency, as were introduced by the Recast EIR.

XI. 'Hard' Brexit: The Need for a Deal

The examples of the five key trading partners considered in this paper show a variety of approaches in different Member States to the recognition of UK insolvency proceedings in the event of a 'no deal' or 'hard' Brexit. The approach in these Member States is far from consistent. In some cases, the basis and procedure for recognition is set out in legislation, while in others, it will be necessary to look to the common law. In either situation, it is evident that the law is not fully developed and as such remains to be tested, which could give rise to more questions than answers. In the most part, recognition of foreign insolvency proceedings will require involvement of the courts. Insolvency practitioners may experience delays, costs and potentially inconsistent responses as they address a range of different local requirements in order to exercise their powers effectively. Then, once the proceedings have been recognised, the rights and protections for local creditors vary across the Member States, although these will generally prove more onerous for the UK insolvency practitioners than under the Recast EIR. This uncertainty will

103. Article 220(2), SIA.
104. Ibid., Article 223.
105. Ibid., Articles 200–209.
106. Ibid., Article 222.
107. Ibid., Article 227.

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DOI: 10.1002/iir

have a significant impact on the conduct of insolvency proceedings with cross-border implications and the outcomes of these proceedings, potentially harming returns to creditors, continuation of businesses, and the preservation of employment. In turn, this could undermine the current attractiveness of the UK as a place in which to do business.[108]

The UK Government appears to recognise this danger. The future partnership paper *Providing a Cross-border Civil Judicial Cooperation Framework* published in August 2017 sets out the intention to:

> seek an agreement with the EU that allows for close and comprehensive cross-border civil judicial cooperation on a reciprocal basis, which reflects closely the substantive principles of cooperation under the current EU framework.[109]

This position was reiterated in the House of Commons on 5 April 2018, with the response to a written question to the Secretary of State for Business, Energy and Industrial Strategy:

> The exact future relationship between the EU and UK on civil judicial cooperation, including the recognition of insolvency and restructuring procedures, judgments and Insolvency Practitioner qualifications is subject to negotiations with our EU partners. It is in the interests of the UK and the EU that there continues to be an effective, and fit for purpose, framework for resolving cross-border legal disputes. The Government has made clear that an effective framework of civil judicial cooperation is an important part of the deep and special partnership we want to establish with the EU.[110]

This stance is developed in subsequent publications. The presentation *Framework for the UK–EU Partnership: Civil Judicial Cooperation*, published by the Department for Exiting the European Union on 13 June 2018, sets out that the UK Government intends to seek a bilateral treaty that recognises the UK as a third country while at the same time recognising 'the close and continuing ties between our citizens and our businesses'.[111] This position is reiterated in the UK Government's White Paper *The Future Relationship between the United Kingdom and the European Union* published on 12 July 2018, the so-called Chequers Agreement, which calls for a bilateral treaty to cover a package of rules, including insolvency.[112] This need for effective cooperation for effective future relationships between the UK and the EU post-Brexit is relevant to all aspects of the Brexit negotiations. Many significant issues remain unresolved following conclusion of the March 2018 round of negotiations,[113] just 7 months before a final deal was due to be agreed ahead of the UK's anticipated departure from the EU in March 2019.

108. See *Insolvency and Corporate Governance*, above note 2, 5.
109. Judicial Cooperation Future Partnership Paper, above note 4, paragraph 19.
110. HC Deb 5 April 2018 C134602 W (Answer provided by Andrew Griffiths MP, Parliamentary Under-Secretary, Department for Business, Energy and Industrial Strategy).
111. Framework Presentation, above note 17, 17.
112. Department for Exiting the European Union, *The Future Relationship between the United Kingdom and the European Union* (Cm 9593), paragraph 148.
113. EU Draft Withdrawal Agreement, above note 21, 35.

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Recognition of outbound proceedings is not solely an issue that will impact on the UK and companies with their COMIs there. It cannot be ignored that there should be reciprocal concerns for the remaining EU Member States if the UK does not continue to benefit from the provisions of the Recast EIR. The potential loss of trade and business operations of UK companies together with loss of employment of Member State nationals either directly or in the UK supply chain will be detrimental to the remaining Member States. Increased costs and difficulties in preserving business operations, due to potential delays in recognition of UK insolvency proceedings, will also reduce potential returns for creditors, through both lower realisations and higher expenses. This will impact on local creditors, even where local protection measures are in place; they may gain immediate benefits of priority repayment but will lose the longer-term benefits of continued trade.

Should a 'hard' Brexit entail no agreement on the continuation of reciprocal arrangements under the Recast EIR, there will no doubt be an inclination for the UK Government to use the powers under Section 8 of the Withdrawal Act to reverse the enactment of the Recast EIR into UK law. There is some logic in this: why automatically recognise inbound insolvency proceedings commenced in the remaining Member States, when such approach would not be reciprocated with regard to outbound proceedings? It could be argued, however, that incorporating the Recast EIR into UK law could prove beneficial, even without immediate reciprocity. If the UK is to rely on the private international law of individual Member States for recognition of insolvency proceedings post-Brexit, engendering goodwill could prove all important to encourage both timely and efficient recognition. The examples considered above identified requirements of reciprocity from remaining Member States to some extent, such as seen in Ireland and Spain. Furthermore, automatic recognition of insolvency proceedings in other Member States by the UK may encourage adoption and engagement with the EU JudgeCo Principles by Member States' judiciary when considering UK proceedings. While recognition of UK insolvency proceedings would not be frictionless, the process could certainly be made much smoother. With Member States able to benefit from the UK's adoption of The Model Law together with various other established means for recognition and cooperation, it is arguable that the UK has nothing to lose by adopting the Recast EIR on an inbound-only basis.

XII. Conclusion

The potential outcome does not look promising should the UK leave the EU without having reached a deal on the future regulation of cross-border insolvency proceedings. The UK would cease to enjoy the benefits of the Recast EIR, including automatic recognition of UK insolvency proceedings and insolvency practitioners' powers across the EU, irrespective of whether the Recast EIR is incorporated into UK law through the Withdrawal Act. With both sides adopting the approach that

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DOI: 10.1002/iir

'nothing is agreed until everything is agreed',[114] the prospect of no deal being reached appears to be very real.

The EU has indicated that the current arrangements will cease to apply to UK proceedings initiated after the proposed transition period comes to an end. While the UK Government seemingly recognises the importance of maintaining the *status quo*, albeit within a different relationship and without the oversight of the CJEU, its position on and approach to Brexit negotiations appears to be in a state of flux, with little evidence of agreed approach within government. This is apparent in the lack of clear guidance provided by the UK Government to date. The published documentation, including the future partnership paper *Providing a Cross-border Civil Judicial Cooperation Framework* and the presentation *Framework for the UK–EU Partnership: Civil Judicial Cooperation*, is aspirational and speculative, in sharp contrast to the approach of the EU and the legislative basis of the EU Draft Withdrawal Agreement.

In the absence of any alternative overarching instrument, recognition of UK-initiated insolvency proceedings will be subject to the private international law of individual Member States. It can be said with confidence that the approach across different Member States will not be consistent; in some instances, it will be unclear because of a lack of statutory provision or developed jurisprudence; and whether recognition is automatic or not, there will likely be significant cost and time implications for insolvency practitioners seeking to exercise their powers. Furthermore, proceedings will be subject to more local law restrictions, and in some cases even protections, than is the case at present. This would represent a significant departure from the current arrangements and would likely be an impediment to the rescue of these companies, which would result in considerable detriment to creditors, particularly in terms of the returns available.

The UK currently prides itself on having a stable and reliable business environment that is attractive to external investors. In the post-Brexit landscape, this attraction will be more important than ever as the UK seeks to expand its trading relationships with states beyond the EU membership. As the date for Brexit draws nearer, and with the UK Government's apparent desire to have the ability to leave the EU without a deal to boost its negotiating position, the prospects of a 'hard Brexit' are very real. This paper has shown that such an outcome would create significant uncertainty—uncertainty for businesses, uncertainty for creditors and uncertainty for investors— that will impact on all Member States and their citizens. While some larger businesses may be able to avoid some of the problems with recognition of proceedings identified in this paper by managing their corporate structures, for example, by incorporating subsidiaries in one or more other Member States, this approach will not be viable, or even possible, for all companies.

114. EU Guidelines, above note 20, paragraph 2; Prime Minister's statement to the House of Commons on negotiations for the UK's departure from the European Union, HC Deb 11 December 2017, vol 633, cols 25–28 at col 26.

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It is of crucial importance, both for the UK and the remaining Member States, that agreement is reached on this issue of far-reaching importance. Any hiatus will cause uncertainty and unnecessary disruption, with potentially significant effects for the UK and remaining Member States. This will impact negatively on both sides; while foreign direct investment in the UK from the EU and beyond is predicted to decline,[115] the economies of the remaining Member States are expected to contract as a result of Brexit.[116] In the event of a 'no deal' Brexit, the only winners will be professional advisers trying to assist stakeholders in navigating these uncertain waters. But at what cost to the economies of the UK and the remaining Member States and entrepreneurial activity therein? The failure to find a solution for the consistent recognition of UK insolvency proceedings in other Member States post-Brexit will likely limit the number of Member States with which the UK can sensibly do business, due to the different approaches being adopted and the uncertainty arising therefrom.

115. See, for example, Swati Dhingra *et al.*, *The Impact of Brexit on Foreign Investment in the UK* (CEP London, 2017), available at: <http://cep.lse.ac.uk/pubs/download/brexit03.pdf>.

116. See, for example, International Monetary Fund, *Country Report No. 18/224: Euro Area Policies* (July 2018), available at: <http://www.imf.org/~/media/files/publications/cr/2018/cr18224.ashx>.

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DOI: 10.1002/iir