Brexit: A deal that leaves recognition of UK insolvency procedures uncertain

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The announcement of white smoke from Brussels on Christmas Eve was welcomed in most circles, providing a smoother landing for the UK at the end of the transition period on 31 December 2020. However, for insolvency and restructuring law, the announcement failed to prevent the consequences of a 'hard Brexit'. From the start of 2021 the UK will leave the EU's private international law orbit including the scope of the Judgments Regulation and the Insolvency Regulation. The Deal between the UK and the EU does not provide for any cooperation in insolvency law matters or private international law more generally.

Lawyers and stakeholders will need to adapt rapidly to the changed position. The UK has the domestic legislation in place to ensure it can continue to recognise and assist EU Member State insolvency proceedings. However, the position for UK insolvency practitioners seeking recognition and/or assistance in the courts of an EU Member State is uncertain and unclear. It is quite possible that, while the UK will continue to recognise EU insolvencies, many EU Member States will not recognise UK insolvencies. This lack of reciprocity in recognition and assistance could affect the competitiveness of the UK restructuring market going forward and will create additional costs and uncertainties for UK insolvency officeholders and those seeking restructuring in the UK.

Cross-Border Insolvency in the UK

Following 31 December 2020, the UK will leave the scope of the EU's Insolvency Regulation. The Insolvency Regulation is of central importance to insolvency proceedings in respect of debtors based in Europe. The EU Insolvency Regulation governs, in relation to all Member States of the EU (except Denmark), the jurisdiction to commence insolvency

[1] The authors gratefully acknowledge the assistance and advice given by our colleague Riz Mokal.

proceedings and the recognition and enforcement of judgments arising from such proceedings. The EU Insolvency Regulation seeks to allocate jurisdiction to open main proceedings and secondary proceedings within the EU.

The general scheme of the EU Insolvency Regulation is that the jurisdiction to open insolvency proceedings in respect of a company with its centre of main interests ('**COMI**') within the EU is conferred on the courts of the Member State where the debtor's centre of main interests is situated.[2] These proceedings are known as 'main proceedings'. Where a debtor's centre of main interests is located in a Member State, the courts of other Member States only have jurisdiction to open insolvency proceedings in relation to the debtor if he has an 'establishment' in that Member State;[3] the effects of such proceedings (known as 'secondary proceedings') are restricted to the assets situated in that Member State.[4]

After Brexit, the UK will cease to be within the scope of the EU Insolvency Regulation. By the Insolvency (Amendment) (EU Exit) Regulations 2019 (the '**2019 Regulations**'), the UK has made significant amendments to the Insolvency Regulation ('the **Retained Insolvency Regulation**'). The amendments to the Insolvency Regulation, in so far as they relate to proceedings in England, are contained in paragraphs 1 to 15 of the Schedule to the 2019 Regulations. These amendments would only apply in the UK after Brexit and cannot affect the EU Insolvency Regulation as it applies in the EU27. One oddity is that no amendments have been made to the recitals. The status of the recitals after Brexit is accordingly unclear. They appear to become UK law on 31 December 2020 in their current form and should continue to be an interpretive resource in relation to concepts found in the Retained Insolvency Regulation, particularly where those concepts have not been modified. The UK courts would continue to have regard to the rulings of the CJEU and other courts on provisions that remain unaltered.[5] One obvious example is the meaning of the COMI. That is unaltered and so UK courts ought to look at rulings of the CJEU and other European courts in determining its meaning and application. Thus, if a German court determines that the COMI of a debtor is in Germany and the CJEU effectively agrees, the UK courts are likely to reach the same decision.

[2] Insolvency Regulation, Article 3 (1)
[3] Insolvency Regulation, Art 3 (2).
[4] Insolvency Regulation, Art 3 (2).
[5] See the European Union (Withdrawal) Act 2018, section 6.

However, aside from leaving the recitals and the possibility of consistent rulings in relation to common concepts such as the location of the COMI in place, the 2019 Regulations take a wrecking ball to the system of jurisdiction and recognition that was put together in the EU Insolvency Regulation. All the provisions on recognition of insolvency proceedings would be repealed, including the provisions dealing with court-to-court communication and communication between insolvency practitioners.[6] The provisions relating to the provision of information for creditors and the lodgment of creditor claims would be repealed, as would the provisions relating to groups.[7]

The Retained Insolvency Regulation merely preserves, as a matter of English law, the grounds of jurisdiction which the EU Insolvency Regulation established.[8] These grounds of jurisdiction are expressly additional to any other grounds of jurisdiction the English court may have.[9] It allows the English courts to open insolvency proceedings in respect of a debtor which has its centre of main interests in the UK or an establishment in the UK. The list of insolvency proceedings that was in Annex A would be replaced so that the 'insolvency proceedings' to which the Regulation would relate would be limited to the five UK procedures in Article 1 (1B), including interim proceedings.[10]

The English courts will be able to grant recognition and assistance to foreign insolvencies under the Cross-Border Insolvency Regulation 2006 ('the **CBIR**'). The CBIR implements the UNCITRAL Model Law ('the **Model Law**') into English law. It enables the English court to grant relief in support of foreign insolvency proceedings already taking place abroad. Foreign proceedings are either main or non-main depending on the location of the debtor's centre of main interests. Recognition as a foreign main proceeding gives an automatic stay on the commencement or continuation of actions or proceedings concerning the debtor's assets, rights, obligations, and liabilities.[11] In addition, the court may as a matter of discretion grant further forms of relief in support of the foreign insolvency.[12]

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[6] The 2019 Regulations, para 7 of the Schedule.
[7] The 2019 Regulations, para 7 of the Schedule.
[8] The 2019 Regulations, para 2(3) of the Schedule.
[9] Retained Insolvency Regulation, Article 1.
[10] The 2019 Regulations, regulation 3.
[11] CBIR, Schedule 1, Article 20 (1).
[12] CBIR, Schedule 1, Article 21 (1).

There are two differences, aside from the nomenclature of "main proceedings" in the EU Insolvency Regulation and "foreign main proceedings" in the CBIR. The first is that a line of English authorities has held that recognition under the CBIR is procedural rather than substantive.[13] The second is that recognition under the CBIR follows an application and is not automatic. In the immediate aftermath of Brexit, the UK would recognise insolvency proceedings brought in the EU27 by applying analogous procedures available in UK insolvencies. That would be the case whether the EU proceedings are in the country of the COMI or where there is an establishment.

Cross-Border Insolvency in the EU

It has been suggested in some quarters that the question whether the EU27 will recognise UK proceedings is simply a question of turning the clock back and applying the law in each EU27 country that applied before the EU Insolvency Regulation. That is wrong. It fails to recognise that the EU Insolvency Regulation is now a part of the domestic laws of each EU country and that the Regulation applies to aspects of all insolvencies both in Member States and in third countries. The domestic law applicable to the recognition of UK insolvencies and to the impact of insolvencies upon certain rights to property located in the UK, or contracts governed by a law of a UK jurisdiction, was altered in all EU member states by the EU Insolvency Regulation. The EU Insolvency Regulation would continue unamended in the EU27 – for those legal systems the clock has not been turned back and the EU Insolvency Regulation must be applied.

After 31 December 2020, the provisions of the EU Insolvency Regulation relating to Member States would cease to apply to the UK. The automatic precedence given to main proceedings where the COMI is in the UK would be lost. EU Member States would not recognise a secondary insolvency proceeding opened in the UK on the ground of an establishment in a UK jurisdiction.

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[13] *Rubin and another v Eurofinance SA and others* [2012] UKSC 46; *Re: Pan Ocean Ltd* [2014] EWHC 2124 (Ch). *Bakhshiyeva (Representative of the OJSC International Bank of Azerbaijan) v Sberbank of Russia & Ors* [2018] EWHC 59 (Ch); [2018] 4 All E.R. 964; [2018] Bus. L.R. 1270; [2018] 1 WLUK 212; [2018] B.C.C. 267; [2018] 2 B.C.L.C. 396; [2018] B.P.I.R. 287; *Bakhshiyeva (Foreign Representative of the Ojsc International Bank of Azerbaijan) v Sberbank of Russia & Ors* [2018] EWCA Civ 2802 (18 December 2018) ([2018] EWCA Civ 2802, [2018] FCA 153, [2018] WLR(D) 784, [2018] 12 WLUK 286. This has arisen in particular in the context of the rule in Gibbs, *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) LR 25 QBD 399.

As regards recognition and enforcement across the EU27, the EU Insolvency Regulation would determine how Member States deal with insolvencies falling within the Regulation. The EU27 would not recognise UK insolvency proceedings or determinations that are inconsistent with the determination of how a debtor's insolvency proceedings fall to be dealt with under the EU Insolvency Regulation. So, for example, if an EU member state national court determines (particularly if effectively confirmed by the CJEU) that the COMI is in a Member State, it would be a matter of indifference to all EU27 countries if a UK court determined that the COMI is in the UK. If a question arose that was determined under the EU Insolvency Regulation in relation to a third country, the EU27 would apply that determination in relation to the UK. It is only after the application of the EU Insolvency Regulation across all EU27 members, that questions would be determined by a Member State's domestic law.

Turning to that domestic law, there are 4 EU Member States that have adopted the UNCITRAL Model law, although they do not include Germany, France, or Italy. Greece, Poland, Romania, and Slovenia have implemented the Model Law.[14] UK insolvency proceedings may be recognised and enforced in those countries by an application made to their courts under the local laws giving effect to the Model Law. In other EU Member States, the position will vary depending on the domestic cross-border insolvency apparatus. The one certainty is that the EU Insolvency Regulation will take precedence and no EU Member State will do something which is inconsistent with the provisions of that Regulation. The position concerning residual questions would of course depend on law of applicable law of the EU jurisdiction in which recognition and enforcement was sought, though there appears to be a broad divide between the Romantic and the Germanic jurisdictions. The Romantic jurisdictions are likely to give effect to residual aspects of a UK insolvency where the relevant EU member state national court determines that the COMI is in the UK. The Germanic jurisdictions are likely to give effect to residual aspects of a UK insolvency where the court proceeding by which the insolvency was commenced is itself recognised. The scope and application across the 23 EU jurisdictions that have not adopted the Model law remains uncertain.

[14] https://uncitral.un.org/en/texts/insolvency/modellaw/cross-border_insolvency/status

Civil Jurisdiction and Judgments

In relation to civil jurisdiction and judgments, the Judgments Regulation will continue to apply where the UK or foreign court was seised of proceedings before 31 December 2020.[15] For proceedings commenced after 31 December 2020 the Judgments Regulation will not apply.[16] The UK applied to join the Lugano Convention on 8 April 2020. While the Lugano Convention is not identical to the Judgments Regulation, it would allow the UK and EU to retain the benefits of the mutual recognition and enforcement of judgments. The UK's accession requires the unanimous agreement of the other contracting parties and at the time of writing the EU and Denmark have so far not indicated their support.[17] The Deal between the UK and the EU makes no mention of the Lugano Convention. In any event, even if the EU and Denmark do indicate support shortly, there is a three-month lag between an agreement and the entry into force of the Lugano Convention.[18]

As things stand, therefore, the rules for establishing jurisdiction in respect of defendants in the EU are essentially the same as the common law rules currently applied to non-EU defendants. The mutual recognition and enforcement of judgments from other EU Member States in the UK and vice versa has ended. Parties may be able to rely on one of two bases to obtain recognition and enforcement of judgments in EU Member States. Firstly, the UK is a signatory to the 2005 Hague Convention on Choice of Court Agreements ('the **Hague Convention**').[19] The EU is also a signatory to the Hague Convention, as is Singapore.[20] The Convention applies to cases where the courts take jurisdiction having been designated by an exclusive choice of court agreement i.e. an agreement designating the courts of one state to the exclusion of the jurisdiction of courts of any other state.[21] Signatories to the Convention are obliged to recognize and enforce such judgments subject to certain exceptions.[22] By the terms of its instrument of accession, the UK government has sought to apply the Convention to choice of court agreements concluded over the period from 1 October 2015 (when the EU acceded to the Convention) to 31 December 2020 (when the

[15] Judgments (Amendment) (EU Exit) Regulations 2019/479, regulation 92.
[16] Civil Jurisdiction and Judgments (Amendment) (EU Exit) Regulations 2019/479, regulation 89.
[17] Switzerland, Norway and Iceland have done so.
[18] See the Lugano Convention, Article 72.
[19] Private International Law (Implementation of Agreements) Act 2020.
[20] https://www.hcch.net/en/instruments/conventions/status-table/?cid=98.
[21] Hague Convention, Article 3.
[22] Hague Convention, Article 8.

Convention stops applying to the UK as an EU member upon the end of the transition period).[23] However, there is some indication that the European Commission regards the effective date as being 1 January 2021.[24] As a result, the position on enforcement of judgments in other EU states is uncertain where the choice of court agreement was entered into before 1 January 2021. It should be noted that the Convention excludes a number of subject matters from its scope including 'insolvency, composition and analogous matters'.[25] However, the Hague Convention might provide a useful basis for the recognition of schemes of arrangement or arrangements and restructurings which are sanctioned outside of insolvency proceedings.[26]

Secondly, the UK has treaties with a number of states that cover the recognition and enforcement of money judgments. These apply with states including Austria, Belgium, France, Germany, Italy, the Netherlands and Norway. The implementation of treaties in local law will depend on the state concerned. In English law, the treaties involving the EU states listed above are registered under the Foreign Judgments (Reciprocal Enforcement) Act 1933 ('the **1933 Act**').[27] However, under the 1933 Act the foreign judgment must be "final and conclusive" and for the payment of "a sum of money, not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty".[28] Moreover, the English court must set aside the registration of a foreign judgment if it considers that the foreign court lacked jurisdiction according to a concept of jurisdiction which largely mirrors the common law rules for recognition and enforcement of judgments.[29]

If neither of these bases applies, then the recognition and enforcement of an English court judgment in EU Member States will depend on default rules for the recognition and

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[23] Private International Law (Implementation of Agreements) Act 2020, Schedule 5, paragraph 7.
[24] EU Commission Notice to Stakeholders dated 27 August 2020 available at https://ec.europa.eu/info/sites/info/files/brexit_files/info_site/civil_justice_en.pdf.
[25] Hague Convention, Article 2(2).
[26] For the view that the Hague Convention will apply to schemes of arrangements see Matthews and Oehm, 'The Hague Convention on Choice of Court Agreements: an unexpected game changer for English schemes of arrangement' (2016) 11 JIBFL 641-647.
[27] Administration of Justice Act 1920 applies to treaties with some other states, principally Commonwealth ones.
[28] See Foreign Judgments (Reciprocal Enforcement) Act 1933, sections 1 (2) and 11 (1).
[29] Foreign Judgments (Reciprocal Enforcement) Act 1933, section 4. The fit with the common law is not exact, for example the common law unlike the 1933 Act regards presence as sufficient to found jurisdiction: see *Adams v Cape Industries plc* [1990] Ch 433, CA.

enforcement of foreign judgments in each jurisdiction. In English law, for example, these are principally founded on the presence of the defendant in the foreign jurisdiction when proceedings began or their submission to the foreign court.[30] These default rules are likely to require local advice and a certain amount of uncertainty – a far cry from the automatic recognition and enforcement that the Judgments Regulation (or the Lugano Convention) would bring.

Governing Law

One thing that will stay the same in the UK are the Rome I and Rome II Regulations. Those EU instruments determine the law governing contractual and non-contractual obligations. They will continue to apply post-Brexit subject to amendments.[31] Rome I will continue to prove useful in achieving recognition of schemes of arrangement. Rome I enables the parties to a contract to choose the law applicable to their contract and provides that the chosen law governs "the various ways of extinguishing obligations".[32] That applicable law does not need to be the law of an EU Member State. If English law is chosen, the rule in *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux*[33] is that an English law contract will not be discharged by a foreign insolvency. In the context of a scheme of arrangement, where English law has been chosen only an English scheme will be effective to extinguish or vary the debt. Applying Rome I, where there is an English choice of law, and a scheme of arrangement varies or extinguishes that debt, that contractual effect will continue to be recognised across the EU.

Post-Brexit Challenges in Cross-Border Insolvency

With the UK out of the scope of the EU Insolvency Regulation, the challenges for the UK insolvency and restructuring industry will be large and varied. The UK will no longer benefit from guaranteed recognition in other EU Member States under the Judgments Regulation and Insolvency Regulation. Going forward the position will involve considerable uncertainty. It may be necessary to go back to having an EU process or

[30] See Dicey, Morris & Collins on the Conflict of Laws (15th Ed), 14-054- 14-096.
[31] The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment) (EU Exit) Regulations 2019 (SI 2019/834).
[32] Articles 3(1) and 12(1)(d) of Rome I.
[33] (1890) LR 25 QBD 399, CA.

multiple processes in each country in which a UK based debtor operates as well as a UK process. This will inevitably increase the costs of restructuring in the UK and make the UK a less attractive destination for global restructurings to take place.

This uncertainty is bound to encourage other EU Member States to seek to compete with the UK as a destination for restructuring. A number of EU Member States have recently introduced new restructuring procedures to take advantage of this position. For example, the Dutch have developed a new restructuring procedure which allows for court confirmation of extrajudicial plans, combining features of both US Chapter 11 and the English scheme of arrangement.[34] This Dutch restructuring plan will, unlike the English scheme of arrangement, benefit from automatic recognition in the EU. The insolvency and restructuring industry will need to be prepared for EU Member States to have a competitive advantage over the UK.

As for recognition and assistance for insolvency proceedings and jurisdiction to open insolvency proceedings, much will depend on the determination of a debtor's COMI by the courts of the EU Member State concerned. If that court decides that the debtor's COMI is in an EU Member State then it will be obliged to apply the EU Insolvency Regulation. If courts in the EU determine that the COMI is in an EU jurisdiction, EU insolvency proceedings commenced in that jurisdiction would be recognised across the EU, whereas UK insolvency proceedings would not.

The UK's absence from the scope of the EU Insolvency Regulation will raise difficult issues in relation to governing law under that Regulation. The basic rule under the Insolvency Regulation is that the lex concursus in both main and secondary proceedings governs both procedural and substantive matters.[35] The main and secondary proceedings must be in a Member State, so this basic rule applies to the laws of Member States. However, the EU Insolvency Regulation contains exceptions to this basic rule that apply the law of a Member State other than the lex concursus. After 31 December 2020 the UK

[34] The *Wet Homologatie Onderhands Akkoord* or 'WHOA'.
[35] Article 7(1) of the EU Insolvency Regulation. This includes the Member State's law of applicable law ('conflicts'). So if the Member State's law of applicable law says that the *lex situs* governs rights in movable assets, and the assets are situate in England, then 7(1) requires ("shall be that…") that English law governs.

will not be a Member State and so these exceptions will not apply in the UK. That means that in the EU27 the lex concursus will apply. There are several examples:

(a) Article 8 of the EU Insolvency Regulation applies to rights in rem in respect of assets situated within the territory of a Member State protecting them from the effects of the opening of insolvency proceedings in another Member State. Now Member States will not be bound to recognise rights in rem of assets situated in the UK unless the lex concursus points to English or other UK law as the governing law.[36]

(b) Article 10 of the EU Insolvency Regulation provides that insolvency proceedings shall not affect sellers' ROT rights where "at the time of the opening of proceedings the asset is [in a Member State]." Therefore, after 31 December 2020, the EU Courts will only recognise the ROT rights of a seller whose assets are in the UK if the lex concursus points to English or other UK law[37].

(c) Article 11 of the EU Insolvency Regulation concerns the effects of insolvency proceedings on a contract conferring the right to acquire or make use of immovable property. EU courts will now not apply this provision to immovable property in the UK.[38] A contract conferring the right to acquire or make use of immovable property in England will almost certainly be governed by English law.[39] Applying the rule in *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux*,[40] the effect of EU insolvency proceedings on an English law contract is limited. However, there is considerable scope for uncertainty as to the effect of EU Insolvencies on such contracts.

(d) Article 12 of the EU Insolvency Regulation provides that the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market "shall be governed solely by the law of the Member

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[36] Pursuant to the EU Insolvency Regulation, Article 7. Of course, there is a practical aspect. To the extent that assets are situate in a UK jurisdiction, it may turn out that only such alterations in rights in rem in relation to such assets are effective as may be recognised by the courts of that UK jurisdiction.
[37] Whilst there may be conflicts between potentially applicable laws, if the assets are in the UK it is likely to be UK law that matters.
[38] The same practical question arises. There may be conflicts between potentially applicable laws but with the property situated in the UK it will be the law of the UK jurisdiction that matters.
[39] Rome I, Article 4(1)(c).
[40] (1890) LR 25 QBD 399, CA.

State applicable to that system or market"[41] although English law would govern securities that are publicly registered in England.[42] The provisions of Article 12 will not be applied by the EU27 to the UK's payment systems and markets after 31 December 2020. This could lead to UK courts and the courts of the EU applying different laws to different aspects of transactions on the London markets. It is difficult to see how this problem could be solved by the UK alone, because the problem is primarily the failure of the EU27 to apply English law to the London markets.

(e) Article 13 of the EU Insolvency Regulation provides that "the effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment." After 31 December 2020, if the COMI of a company is in an EU Member State, the effect of the insolvency on contracts of employment, for example whether the employment contract has terminated, will be governed by the law of the COMI jurisdiction.[43] However, as a matter of contract law in England, contracts governed by English law, could not be discharged or terminated by the foreign insolvency.[44]

Moreover, there are some provisions of the EU Insolvency Regulation which are not reciprocal. There is a distinction within the EU Insolvency Regulation between Member States and third countries. Whilst the UK would cease to be a Member State, it would become a third country. There are provisions in the EU Insolvency Regulation that apply the law of a third country – these are provisions where reciprocity would be maintained even after the UK left the EU. However, the Retained Insolvency Regulation has repealed these provisions from UK law also. Far from the UK repealing provisions of the EU Insolvency Regulation on the ground that reciprocity has been lost, the UK has repealed provisions in circumstances where Member States would continue to reciprocate.

For example, Article 9 provides that set-off is available where "a set-off is permitted by the law applicable to the to the insolvent debtor's claim." If set off applies in England to an

[41] Article 12 of the EU Insolvency Regulation.
[42] Article 12 (1) read with article 8 (3) of the EU Insolvency Regulation.
[43] The law of the contract would be recognised under Rome I Article 8 and would almost certainly be English law.
[44] Because of the rule in *Antony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) LR 25 QBD 399, CA..

English law claim,[45] that would be recognised by the EU Member States. However, the Retained Insolvency Regulation means that English courts would no longer recognise a set off permitted by the applicable law of a Member State. Article 17 gives protection to third party purchasers[46] in relation to acts concluded after the opening of insolvency proceedings where a debtor disposes of an immovable asset, a ship, an aircraft or securities. The validity of the disposition is governed by the law of the State within the territory where the immovable asset is or where the register is kept. This is not restricted to Member States and so would continue to apply to assets in the UK or registered in the UK. Notably it would apply to securities registered in the UK. However, the Retained Insolvency Regulation means that the UK would no longer apply the law of the EU Member state where the immovable asset or the register is kept.

The Future

In the insolvency context it is very difficult to take comfort from the Deal between the UK and the EU or the current position after 31 December 2020. What then is to be done about the situation? It is to be hoped that two measures will alleviate much of the difficulty caused by the current hard Brexit in insolvency cooperation:

(1) The UK's accession to the Lugano Convention; and

(2) The EU's implementation of the Model Law.

It must be recognised that these two measures are not in the UK's gift but will depend on action from the EU side. The UK's accession to the Lugano Convention would remedy the majority of what has been lost by the UK's departure from the scope of the Judgments Regulation. The implementation of the Model Law by the EU would enable EU courts to give recognition and assistance to UK insolvencies on a more certain basis. It is not a complete remedy for the loss of the EU Insolvency Regulation. For example, the process of recognition under the Model Law is not automatic but requires a court application. Moreover, the issues relating to governing law under the EU Insolvency Regulation will

[45] Rome I would continue to apply to determining the law of the contract because Rome I is not limited to Member States.
[46] Rome I will continue to apply to determining the law of the purchase contract.

remain. However, it will resolve the difficulties that would otherwise be faced by a UK insolvency practitioner seeking the recognition and/or assistance of the courts of an EU Member State, by providing a clear and predictable process to follow. In short, given where we are, an EU which has implemented the Model Law is much better for the UK insolvency and restructuring industry than one which has not.