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Reaching to Restructure Across Borders (Without Over-Reaching), Even after Brexit

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by

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Is there such a thing as "good" forum shopping? Courts and commentators have begun to articulate the "virtues" of at least some forum shopping, including forum shopping to resolve corporate insolvency or financial distress whether on a domestic or global basis. Especially within the European Union (EU), acceptance has grown of debtors' efforts to qualify as eligible to access the forum best able to resolve their financial difficulties, even where the efforts involve substantial "fact shifting," so long as these efforts occurred transparently and were neither abusive nor in bad faith. Growing acceptance of such efforts is partly the result of jurisprudence of the European Union Court of Justice (CJEU) identifying a "freedom of corporate migration" as included among the EU's foundational principles. This forum shopping debate within Europe has extended beyond proceedings subject to the EU Insolvency Regulation to address "pre-insolvency" initiatives, such as schemes of arrangement under English law, a statutory measure through which dissenting creditors may be bound to a company's financial restructuring by court order. Although schemes of arrangement sit outside the EU Insolvency Reg, and only uneasily inside the scope of the EU's Brussels and Rome Regulations, which together govern recognition and enforcement of judgments and choice of law clauses, corporate migrations to enable financial restructuring through schemes of arrangement have been viewed positively by British courts and generally have not been upset by continental European courts.

Debate on whether and when forum shopping to facilitate corporate rescue and restructuring should be viewed as "good" has shifted, recently, from courts and commentators to a broader, more political setting. The diplomats responsible for re-negotiating and revising the EU Insolvency Reg, which entered into

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force late June 2017, in the main accepted the contention that recognition of foreign schemes of arrangement ought to continue, but this resolution has in turn been upended by the recent referendum in the United Kingdom to exit the EU (Brexit). This article aims to do two things: First, it considers the case for and against recognition of foreign schemes of arrangement, in the end proposing a broader test for assessing forum shopping, one that considers the larger forum shopping system involving, not just litigants and courts, but also legislators and, in international settings, diplomats and global (or at least transnational) lawmakers. Second, the article argues that a systems approach provides a superior basis for examining the merits of forum shopping given recent context. What courts and litigants view as "good" forum shopping may well consider a narrower set of issues than those policymakers should view as relevant. The article claims that the Revised EU Insolvency Regulation and the eventual implications of Brexit provide one case study for application of a broad forum shopping system analysis; more extensive analysis of this approach is left for later research.

Is there such a thing as "good" forum shopping? All litigants make choices in deciding where to commence a case, but venue selection decisions that are described as "forum shopping" imply misconduct —the steering of cases to take advantage of favorable laws, sympathetic judges, predictably generous juries, or some combination of these.[1] This rhetoric may not always be justified, but it has been applied most frequently in the United States in three sorts of litigation contexts: personal injury tort cases; patent litigation; corporate reorganization, including cross-border insolvency proceedings.[2] A competing literature has begun to emerge, which points to distinct examples of strategic litigation decisionmaking and venue selection to build a case for

[1]The Supreme Court of the United States recently issued a series of cases limiting venue selection by plaintiffs on the basis that these venue choices involved overreaching and so, implicitly, forum shopping. *See* Bristol-Myers Squibb v. Superior Court of California, ___ U.S. ___, No. 16-466 (June 19, 2007) (reversing finding of specific jurisdiction in tort case on grounds that "[w]hat is needed—and what is missing here—is a connection between the forum and the specific claims at issue."); BNSF Railway v. Tyrell, __ U.S. __ , No. 16-405 (May 30, 2017) (concluding that 14th Amendment bars states court trials when corporation "is not 'at home' in the state and the episode-in-suit occurred elsewhere."); TC Heartland LLC v. Kraft Foods Group, __ U.S. __, No. 16-341 (May 22, 2017) (construing federal venue provisions to limit venue for patent infringement lawsuits); Daimler AG v. Bauman, 571 U.S. __ (2014) (holding that a state court should exercise general jurisdiction over out-of-state corporations only when their "affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum State."). *See also, e.g.*, Tony Mauro, *SCOTUS Limits Forum Shopping in Big Pharma Action*, LAW.COM (June 19, 2017), http://www.law.com/sites/almstaff/2017/06/19/scotus-narrows-forum-shopping-in-big-pharma-action/ (describing this case law as cutting back on forum shopping).

[2]*See, e.g.*, Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 242 (2016) (relying on three case studies involving personal injury tort cases, patent cases, and bankruptcy cases and arguing that, "In non-contractual setting, forum shopping is problematic because it leads to forum selling," by courts with authority to decide among discretionary jurisdictional rules).

the "virtues" in forum shopping, including cross-border forum shopping.[3]

The debate is not wholly academic. Although an American bankruptcy practitioner might be surprised to hear a court recommend a debtor's choice of forum as involving "good forum shopping," over the past fifteen years or more European courts have either explicitly or tacitly approved jurisdiction claimed over corporate debtors that had "migrated" across national borders just prior to the insolvency proceedings or restructurings.[4] The rhetoric surrounding claims of forum shopping—strategic venue selection—to assist corporate rescue has been refashioned and repurposed to fit European markets and European law.[5]

This tolerance for forum shopping might jar the memories of American bankruptcy practitioners recalling that in the early 1990s, American corporations like Eastern Airlines and Enron were scolded for filing for chapter 11 in federal judicial districts distant from both their places of incorporation and the locations of their corporate headquarters.[6] These debtors' choice-of-forum decisions were premised on the location of corporate assets – but, critics claimed, were mostly motivated by the location of bankruptcy judges viewed as pro-debtor and debtor's counsel viewed as the best money could buy.[7] Some characterized bankruptcy filings like these as evidence of forum shopping by corporations and forum selling by the bankruptcy judges receptive to their petitions.[8] To these critics, the practice of picking between legal decisionmakers felt either like a thumb on the scales of justice or, worse yet, something akin to corruption. Critics' concerns also extended beyond venue selection in US chapter 11s to include forum shopping and ancillary recogni-

[3]*See* Pamela K. Bookman, *The Unsung Virtues of Global Forum Shopping,* 92 NOTRE DAME L. REV. 579 (2017) (identifying "unappreciated virtues of global forum shopping" and suggesting "balanced ways for courts to protect them.").

[4]*See, e.g.*, Interedil Srl v. Fallimento Interedil Srl, CJEU Case No. C-396/09 (March 10, 2011) (decision of EU Court of Justice discussing effect of transfer of place of registration prior to commencement of insolvency proceeding governed by EU Insolvency Regulation); Re Codere Finance (UK) Ltd. [2015] EWHC 3778 (Ch) (Dec. 17, 2015) (decision of London High Court concluding that pre-filing transfer of place of registration and other fact shifting did not alter its conclusion that jurisdiction existed to support scheme of arrangement under English law).

[5]For discussion of the connections between regulatory competition for corporate migration and venue competition by migrating corporations, see Luca Enriques & Martin Gelter, *Regulatory Competition in European Company Law and Creditor Protection,* 7 EURO. BUS. ORG. L. REV. 417 (2006).

[6]*See generally* CHARLES JORDAN TABB, LAW OF BANKRUPTCY 376–80 (West Pub. Corp., 4thed. 2016).

[7]For the most famous of these critiques, see Lynn LoPucki, COURTING FAILURE (U. Mich. Press 2005); Lynn LoPucki & S.D. Kalin, *The Failure of Public Company Bankruptcies in Delaware and New York: Empirical Evidence of a "Race to the Bottom"*, 54 VAND. L. REV. 231 (2001).

[8]*See generally* LoPucki, *supra* note 7 (discussing forum shopping in corporate bankruptcy); Klerman & Reilly, *supra* note 2 (referring to "forum selling" by bankruptcy courts in one of several case studies in support of their claims). R R

tion of foreign insolvency proceedings.[9] Many commentators defend bankruptcy venue selection in the United States,[10] but claims of forum shopping in this context persist in the literature.[11] Although congressional inquiries on whether the bankruptcy venue selection statute ought to be changed did not result in 2005 in a new standard,[12] proposals to limit bankruptcy venue choice continue to get raised.[13]

This American debate on bankruptcy forum shopping, in turn, influenced European insolvency and restructuring law and practices. By the early 2000s, European courts prepared to implement the European Union Regulation on Cross-Border Insolvency ("EU Insolvency Regulation"), which had just entered into force.[14] Perhaps cognizant of this American debate, the EU Insolvency Regulation had been drafted to make clear that forum shopping would not be welcomed in Europe: recitals to the regulation expressly condemned forum shopping as inconsistent with the goal of creating a single "internal market" within the European Union;[15] jurisdictional limits on the insolvency proceedings entitled to automatic recognition under the EU Insolvency Regulation required either that the debtor's "centre of main interests"

[9]*See* LoPucki, *supra* note 7, at chs. 7 and 8. R

[10]For reviews of LoPucki, *Courting Failure*, see, e.g., David A. Skeel, Jr. & Kenneth Ayotte, *An Efficiency-Based Explanation for Current Corporate Reorganization Practice*, 73 U. CHI. L. REV. 425–68 (2006) (reviewing Lynn LoPucki's *Courting Failure* and, based on empirical evidence, questioning his contentions); *see also* Todd Zywicki, *Is Forum Shopping Corrupting America's Bankruptcy Courts? Review of Courting Failure: How Competition for Big Cases is Corrupting the Bankruptcy Courts* by Lynn M. LoPucki (2005), 94 GEO. L. J. 1141 (2006) (distinguishing between "good" and "bad" forum shopping pursuant to a structural analysis of forum shopping competition that considers judges' incentives to innovate and achieve efficient results or to engage rent-seeking to redistribute wealth). For earlier literature inconsistent with LoPucki's claims, see, e.g., Barry E. Adler & Henry N. Butler, *On the "Delawarization of Bankruptcy" Debate*, 52 EMORY L. J. 1309 (2003); David A. Skeel, Jr., *Bankruptcy Judges and Bankruptcy Venue: Some Thoughts on Delaware*, 1 DEL. L. REV. 1 (1998); David A. Skeel, Jr., *What's So Bad About Delaware?*, 54 VAND. L. REV. 309 (2001); Robert Rasmussen & R.S. Thomas, *Timing Matters: Promoting Forum Shopping by Insolvent Corporations*, 94 NW. U. L. REV. 1357 (2000).

[11]*See, e.g.*, Klerman & Reilly, *supra* note 2. R

[12]Congressional proposals to limit the federal statute setting venue in bankruptcy cases commenced in the United States (28 U.S.C. § 1411) were introduced in 2005 and hearings were subsequently held. *See* Jeffrey Morris, *American Bankruptcy Institute Legislative Update, S.314 – Fairness in Bankruptcy Litigation Act of 2005: Restricting Venue Choice for Corporate Debtors* (Mar. 1, 2005), https://www.abi.org/abi-journal/legislative-update-s-314-fairness-in-bankruptcy-litigation-act-of-2005-restricting-venue. In the end, these proposals were not included in the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

[13]For more recent debate on the need to circumvent bankruptcy forum shopping, see Robert J. Gayda, *The Bankruptcy Venue Debate: A Never Ending Story*, LAW360 (July 14, 2015), https://www.law360.com/articles/676417/the-bankruptcy-venue-debate-a-never-ending-story; Susan Mathews, *Corporate Chapter 11 Bankruptcies: The Case for Venue Reform*, ABFJOURNAL (Oct. 2014), http://www.abfjournal.com/articles/corporate-chapter-11-bankruptcies-the-case-for-venue-reform/.

[14]Council Regulation (EC) No. 1346/2000 on insolvency proceedings (May 29, 2000) [hereinafter the original "EU Insolvency Reg."].

[15]*See* EU Insolvency Reg., *supra* note 14, at Rec. 4 ("It is necessary for the proper functioning of the internal market to avoid . . . forum shopping."). R

(referred to as the debtor's COMI) was located in the member state in which proceedings were opened or, in the case of a secondary proceeding, that there was at least an establishment in the opening state.[16] These jurisdictional limits looked to prevent the forum shopping that drafters otherwise feared.

Despite these jurisdictional limits, British courts relied on English law to open administration proceedings,[17] sometimes coupled with company voluntary arrangements (CVAs),[18] for companies like Schefenacker,[19] Deutche Nickel[20] and Hellas Wind[21] and others,[22] although these companies within months or weeks before the applications were filed had engaged in elaborate corporate transactions intended to "move" from an earlier place of registration – whether Germany or Lichtenstein or elsewhere – and qualify to file under British insolvency law.[23] Administrations and "voluntary arrangements under insolvency legislation" sit within the scope of the EU Insolvency Regulation and so are limited to companies with either a COMI or establishment in the UK; but with these cases, the grounds for such jurisdiction had been created only shortly before the filing. Complaints by creditors from the company's place of origin arose in these local settings after British court orders opening these proceedings had become final and, thus, too distant and too late for consideration.[24]

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[16]EU Insolvency Reg., *supra* note 14, at Art. 3. While the COMI standard is not explicitly defined in the EU Insolvency Reg., a corporation is presumed to have its center of main interests in the state of its place of registration. For decisions from the EU Court of Justice expanding on this standard, see Interedil Srl v. Fallimento Interedil Srl, CJEU Case No. C-396/09 (March 10, 2011); Eurofood Ifsc, CJEU Case No. C-341/04 (Sept. 27, 2005). Commentary on the EU Insolvency Regulation generally and its primary jurisdictional hook, the "centre of main interests," more specifically, is vast. For examples of this commentary, see generally Roy Goode, Principles of Corporate Insolvency Law, at 719–47 (4th ed. 2011); Gabriel Moss, Ian F. Fletcher & Stuart Isaacs, EU Regulation on Insolvency Proceedings (3d ed. 2016); Reinhard Bork & Kristen van Zwieten, Commentary on the European Insolvency Regulation (3d ed., 2016). R

[17]For a brief description of administration proceeding under English law, see Goode, *supra* note 16, at 33–35. R

[18]For a brief description of "company voluntary arrangements," often referred to as "CVAs," see Goode, *supra* note 16, at 41. R

[19]*See generally* Wolf-Georg Ringe, *Strategic Insolvency Migration and Community Law* in Current Issues in European Financial and Insolvency Law, at 75–77 (Wolf-Georg Ringe et al. eds., 2009) [hereinafter "Ringe, *Strategic Insolvency*"]; Reinhard Bork*, Rescuing Companies in England and Germany*, Oxford Univ. Press, at ¶ 1.07 (July 10, 2012).

[20]*See, e.g.*, Ringe, *Strategic Insolvency, supra* note 19, at 77. R

[21]Re Hellas Telecommunications (Luxembourg) IISCA [2009] EWHC 3199 (Ch) [2010] BCC 295. *See also,* e.g., Ringe, *Strategic Insolvency*, *supra* note 19, at 78–79. R

[22]*See, e.g.*, Re European Directories v (DH6) BV [2010] EWHC 3472 (Ch); Gallery Capital SA, Re, 2010 WL 4777509 (Ch) (21 Apr. 2010).

[23]In each of these instances, the companies accomplished, in practical effect, a cross-border merger with a newly created English entity, shifting their place of registration, assets and liabilities on the eve of their insolvency filings, and satisfying to the satisfaction of the British courts the need to establish the COMI of these companies before commencing English insolvency proceedings. *See generally id.*

[24]*But see* Hans Brochier Holdings Ltd. v. Exner [2006] EWHC 2594, [2007] BCC 127, [2007] NZI

Complaints of forum shopping were viewed as out of step with an emerging European jurisprudence out of the European Union Court of Justice (CJEU), which had identified the "freedom of migration" as among the foundational principles of the European Union, as well as insolvency scholarship built on the shoulders of this corporate law doctrine.[25] Relying on this case law, courts and commentators grew increasingly open to the idea of shopping among fora, at least where corporate debtors were not involved in fraudulent or abusive activity.[26]

CJEU case law makes clear that a corporation's lack of connection with its place of registration is not itself evidence of fraudulent bad faith or abuse,[27] but mostly leaves the question of misconduct to a case-by-case assessment.[28] This doctrine and scholarship struggles to distinguish between good and bad forum shopping, but does not waiver in the certainty that abusive conduct can be identified and abusive cases prohibited.[29] Some emphasize the transparency of corporate actions (or lack thereof) as critically important to a finding of lack of abuse,[30] especially since the CJEU emphasized in *Eurofood* that the facts pertinent to a determination of a debtor's

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187 (involving failed attempt at corporate migration by a German construction company seeking to commence English administration proceedings).

[25]*See* CJEU No. C-21297/97 Centros Ltd. v. Erhvervs-og Selskabsstyrelsen [1999] ECR I-1459 [hereinafter "Centros"]; CJEU No. C-208/00 Überseering BV v. Nordic Construction Co. Baummanagement GmbH [2002] ECR 1-9919; CJEU No. C-167/01 Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd. [2003] ECR 1-10155; *Kornhaas v. Dithmar,* CJEU Case No. C-5941/14 [2016] [hereinafter "Kornhaas"]. For discussion of the European "freedom of migration" and its interaction with cross-border insolvency forum shopping within the EU, see generally Ringe, *Strategic Migration*, *supra* note 19; Horst Eidenmüller, *Free Choice in International Company Insolvency Law in Europe*, 6 EURO. BUS. ORG. L. REV. 423 (2005) [hereinafter "Eidenmüller, *Free Choice*"]; Enriques & Gelter, *Regulatory Competition in European Company Law and Creditor Protection,* 7 EURO. BUS. ORG. L. REV. 417 (2006).

[26]*See, e.g*, Centros, *supra* note 25; see also Horst Eidenmüller, *Abuse of Law in the Context of European Insovency Law*, 6 EURO. COM. FIN. L. REV. 1 (2009) [hereinafter "Eidenmüller, *Abuse of Law*"]; Irit Mevorach, *Forum Shopping in Times of Crisis: A Directors' Duties Perspective*, 4 EURO. C. FIN. REV. 523 (2013); Ringe, *Strategic Migration, supra* note 20.

[27]*See* Centros, *supra* note 25, at ¶ 1.

[28]*See, e.g.*, Eidenmüller, *Abuse of Law, supra* note 25, at 2; Enriques & Gelter, *supra* note 5, at 435–36.

[29]*See, e.g.*, John Armour, *Abuse of European Insolvency Law? A Discussion,* in PROHIBITIONS OF ABUSE OF LAW: A NEW GENERAL PRINCIPLE OF EU LAW? (R. de la Feria & S. Vogenauer eds. 2011); Eidenmüller, *Abuse of Law, supra* note 26; Ringe, *Strategic Migration, supra* note 19; Adrian Walters & Anton Smith, *Bankruptcy Tourism under the EC Regulation on insolvency proceedings: a view from England and Wales*, 10.1002/iir.187, at 19(3) 181, 39 (Oct. 18, 2010), http://ssrn.com/abstract=1630890.

[30]*See, e.g.*, Eidenmüller, *Free Choice, supra* note 24, at 429 (contending that "the most important aspect" of a test of "good" forum shopping "is the east ascertainability and predictability of [insolvency] rules [to the debtor's creditors] when they grant credit."); Eidenmüller, *Abuse of Law, supra* note 25, at 4–5 (discussing influence of *Eurofood*); Peter Mankowski, *The European World of Insolvency Tourism: Renewed, But Still Brave?*, 64 NETH. INT'L L. REV. 95–114 (2017) ("The creditors' legitimate expectations deserve, if not outrightly demand, protection against manipulation.").

COMI should be "readily ascertainable" to its creditors.[31] Some contend that what is most important is whether creditors consented to the move, whether the move benefitted creditors by maximizing the debtor's net assets and, thus, whether the motives for the movement should be described not as gamesmanship or abuse but as a matter of socially beneficial "free choice."[32] Some argue that the timing of a corporation's migration from its original place of registration should not alone be viewed as an indication of "bad faith" or "bad forum shopping."[33] If corporate migrations when a company is solvent are among the "four freedoms," the argument runs, corporate migrations on the eve of an insolvency filing should get protected as well, at least in the absence of additional evidence of misconduct.[34]

Recently, the forum shopping debate within Europe has extended beyond proceedings subject to the EU Insolvency Regulation to address "pre-insolvency" initiatives, especially schemes of arrangement under English law, a statutory measure through which dissenting creditors may be bound to a company's financial restructuring.[35] English schemes of arrangement, unique among EU member states, allow financially distressed companies to work out problematic bank or bond debt without the need for commencing a costly and time-consuming insolvency proceeding.[36] The complication here is that these pre-insolvency restructurings sit outside the EU Insolvency Reg,[37] which means both that its jurisdictional limits are inapplicable and alternative grounds for automatic recognition and enforcement of these arrangements are a matter of dispute.[38] Corporate migrations to enable financial restructuring have been viewed positively by British courts, notwithstanding last minute changes in corporate form, and generally have not been upset by continental European courts.[39] Questions of pre-insolvency forum shopping have been

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[31] These commentators refer to CJEU's emphasis in *Eurofood* to Rec. 13 in the EU Insolvency Reg. *Eurofood*, *supra* note 16, at ¶¶ 32–33 (noting that COMI standard "should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."). R

[32] Eidenmüller, *Free Choice, supra* note 24, at 428–29. R

[33] *See, e.g.*, Ringe, *Strategic Manipulation, supra* note 19, at 92 (arguing that "a creditor is never able to predict which insolvency law his claim will be subject to – as long as the internal market consists of different substantive insolvency regimes."); Mevorach, *Directors' Duties Perspective, supra* note 26, at 539–40 (contending that a test of the reasonableness of directors' migratory decisionmaking should govern assessments of the beneficial effects of the COMI-shift rather than the timing or degree of success of the migration). R R

[34] *See generally* Eidenmüller, *Free Choice*, *supra* note 24; Enriques & Gelter, *supra* note 5. R

[35] *See, e.g.*, Jennifer Payne, *Cross-Border Schemes of Arrangement and Forum Shopping,* 14 EURO. BUS. ORG. L. REV. 563 (2013) [hereinafter "Payne, *Cross-Border Schemes*"]. *See also* text associated with *infra* notes 61–127 R

[36] *See* GOODE, *supra* note 16, at 38–43. R

[37] EU Insolvency Reg., *supra* note 14. R

[38] *See, e.g.*, Payne, *Cross-Border Schemes*, *supra* note 35. R

[39] *See* Ruud Hermanns, *Consequences of the German Equitable Life - Decision for the Use of English*

largely pushed aside by the courts.[40]

For example, a London High Court recently was asked to sanction a scheme of arrangement[41] involving an English subsidiary of a Spanish corporation, Codere SA, engaged in gaming services throughout Spain, Italy, and Latin America.[42] Although the financial difficulties of the Codere group were widely known years before its scheme of arrangement was proposed, the company viewed insolvency proceedings, whether initiated in Spain or elsewhere, as potentially risking its all-important gaming licenses. With the knowledge and encouragement of its creditors, Codere looked to avoid this result through the proposed scheme.[43]

Months before convening a meeting of creditors for their consideration and approval of a scheme of arrangement, the company had formed Codere Finance (UK) Ltd. and caused the newly minted subsidiary to assume most of the debt of the Codere group (initially borrowed by Codere Finance (Luxembourg) SA).[44] The new subsidiary's connections to the UK were otherwise limited: the assumed debt was governed by New York law, guaranteed by Codere SA and other group companies, and subject to an English law inter-creditor agreement originally made in 2005.[45] At the meeting called to consider the proposed scheme of arrangement, creditors were informed that their approval of the proposal would result in the eventual repayment of 47 percent of the outstanding indebtedness owed to them and that their rejection of the scheme would likely be followed by a Spanish insolvency proceeding in which nearly all value would be lost. Not surprisingly, creditors overwhelmingly favored the restructuring, with claims totaling more than 98 percent of the value of the outstanding indebtedness voting in favor of the scheme.

Based on these facts, the London High Court approved the *Codere* scheme of arrangement, acknowledging that the financing subsidiary in that case may have engaged in forum shopping by choosing to reorganize its corpo-

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Schemes of Arrangement in Cross-border Reorganizations, INSOL WORLD 35 (Winter 2013), http://www.debrauw.com/wp-content/uploads/2013/09/Insol-World-Consequences-of-the-German-Equitable-Life.pdf.

[40]*See, e.g.*, Re Rodenstock GmbH [2011] 1104 (Ch.); [2012] BCC 459; Re Primacom Holding GmbH v. Credit Agricole [2011] EWHC 3746 (Ch) (Dec. 20, 2011); Re Van Gansewinkel Group [2015] EWHC 2151 (Ch); Re Apcoa Parking Holdings GmbH [2014] EWHC 3849 (Ch), [2014] All ER (D) 221 (Nov); Re DTEK Finance B.V. [2015] EWHC 1164 (Ch).

[41]For a description of the law and practices surrounding schemes of arrangement under English law, see, e.g., JENNIFER PAYNE, SCHEMES OF ARRANGEMENT: THEORY, STRUCTURE AND OPERATION, at 1 (Cambridge Univ. Press ed. 2014).

[42]Re Codere Finance (UK) Ltd. [2015] EWHC 3778 (Ch).

[43]*Id.* at 5.

[44]*Id.* at 6 ("The accession of the company as a co-obligor in relation to the notes was undertaken pursuant to an instruction from Codere SA as the company's sole shareholder and with the agreement of more than 97 percent of the noteholders.").

[45]*Id.* at 3.

rate structure and debt holdings in an effort to satisfy the requirements of British law.[46] The forum shopping should be forgiven in this case, said the court, because it was "good forum shopping."[47] It was good forum shopping, said the court, because although Codere intentionally sought to avoid Spanish insolvency law, it did not do so in bad faith. The company had worked in tandem with its creditors, the overwhelming majority of which had approved both the scheme of arrangement and the corporate migration and document modification that had preceded the request to convene creditors. Creditors had agreed to the corporate migration and the scheme of arrangement because they were substantially better off as a financial matter. Thus, while Codere might have looked to avoid Spanish insolvency proceedings, it had not been looking to evade repayment of creditors with its foreign scheme of arrangement; instead, it looked to maximize their repayment through the scheme.

Codere was not a one-off case involving a so-called "foreign scheme of arrangement."[48] Over the past several years, British courts have approved a handful of schemes of arrangement that involved shifts in the company's head office functions on the eve of the application to convene the required meeting of creditors,[49] changes in debt instruments regarding the governing law,[50] and the creation of new entities and the assumption of debts governed by English law.[51]

Commentators have agreed with the courts' assessments that *Codere* and similar foreign schemes involving corporate migrations should be tolerated as

[46]Companies Act 2006 (Commencement No. 1 Transitional Provisions and Savings) Order 2006, at Part 26 [hereinafter "Companies Act 2006"].

[47]*Codere*, *supra* note 42, at 18. *See also* Bookman, *supra* note 3; *Note: Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990). R

[48]The phrase was not used by the court in *Codere,* but is widely understood to pertain to a scheme of arrangement under English and Welsh law that involves a company registered outside England and Wales (indeed, the UK), especially one with its center of main interests outside the UK and no establishment in the UK. *See, e.g.*, PHILIP R. WOOD, CONFLICT OF LAWS AND INTERNATIONAL FINANCE, at 20-016 (Sweet & Maxwell eds. 2007). *Codere* arguably was not a "foreign scheme of arrangement" because, as a consequence of the transactions that occurred before the request to call a meeting of creditors, Codere (UK) Ltd. was an English company.

[49]*See, e.g.,* Re Magyar Telecom B.V. [2013] EWHC 3800 (Ch); *but see* Re Indah Kiat International Finance Company *BV* [2016] EWHC 246 (raising procedural and evidentiary concerns to proposed scheme of arrangement, but not to shift of company's headquarters on eve of convening of creditors' meeting). A company's shift of its headquarters or head office functions is directed at accomplishing a shift in its "centre of main interests" or COMI, the jurisdictional standard set out in the original EU Insolvency Reg and UNCITRAL Model Law on Cross-Border Insolvency. *See, e.g.,* BO XIE, COMPARATIVE INSOLVENCY LAW: THE PRE-PAK APPROACH IN CORPORATE RESCUE, at chapter 8 (Elgar Publ. 2016). . Because the EU Insolvency Reg. does not cover schemes of arrangement, COMI shifting is not directed at satisfying the jurisdictional requirements of that Reg. EU Insolvency Reg, *supra* note 14, Art. 3(1). If a R company shifts its COMI before approval of a scheme is sought, it often is with an eye toward subsequent recognition of the scheme under US chapter 15. *See, e.g.*, *Codere*, *supra* note 42. R

[50]*See. e.g.*, Re Apcoa Parking Holdings GmbH [2014] EWHC 3849 (Ch.).

[51]*See, e.g.*, Re AI Scheme Limited [2015] EWHC 1233 (Ch.); *Codere, supra* note 42. R

"good" pre-insolvency forum shopping.[52] Emphasis is placed on the consensus of the restructuring companies' creditors and the obvious economic benefits of the English scheme as compared to a Spanish insolvency proceeding.[53] But this focus on creditors' consent to a foreign scheme of arrangement could suggest that every scheme that meets the statutory threshold should be viewed as involving "good" forum shopping, regardless of the corporate machinations that preceded the scheme, since a scheme is only sanctioned by the court if it is approved by more than 75 percent of the affected creditors or other stakeholders with claims or interests. Focus on economic benefits with reference to facts introduced in an often-uncontroverted court hearing could also lead to an overstatement of the circumstances in which foreign schemes of arrangement ought to get affirmed as exercises in good forum shopping since a super-majority of creditors is unlikely to vote in favor of a proposed scheme except in their self-interest.

A focus on the benefits of a foreign scheme of arrangement to the company and its affected creditors may be the best approach for assessing whether a court should enter a scheme order, but this litigation oriented focus on the micro-incentives of the company and its super-majority of creditors may overstate the beneficial attributes of a foreign scheme of arrangement. It may fail to consider the significance of the subsequent success or failure of the scheme, as well as ignore the wider social, political and economic consequences relevant to the question of whether schemes of arrangement ought to be tolerated (and thus enforced) outside the UK. Empirical evidence on the European-wide effects of foreign schemes of arrangement is also missing and should be developed before settling on the beneficial attributes of this corporate migration.[54]

This article aims to do two things: First, it proposes a broader test for assessing insolvency and pre-insolvency forum shopping, one that views questions surrounding venue selection as more than legal questions. The article focuses predominantly on the forum shopping debate surrounding foreign schemes of arrangement, since the case law in this context is more recent and the literature less developed. It considers the debate from the perspective of a larger forum shopping system involving, not just litigants and courts, but also legislators and, in international settings, diplomats and global (or at least transnational) lawmakers.[55] Second, it argues that this systems approach pro-

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[52]*See, e.g.*, Payne, *Cross-Border Schemes, supra* note 35. R

[53]*Id.*

[54]It is also absent from the discussion of forum shopping for insolvency proceedings within Europe. *See* Eidenmuller, *Abuse of Law, supra* note 26, at 6. R

[55]*See generally* Louise Weinberg, *Against Comity*, 80 GEO. L. REV. 53, 68 (1991) (defining "forum shopping systems" and warning against universal adherence to the doctrine of comity and other forum shopping systems as leading potentially "to problems of global lawlessness, as court after court denies

vides a superior basis for examining the merits of such forum shopping, particularly given recent context: Important revisions to the EU Insolvency Reg,[56] intending to address the problems of insolvency and pre-insolvency forum shopping, got resolved just as the United Kingdom voted on a referendum to exit from the European Union; Brexit is likely to unsettle this regulatory resolution, and will affect more than the law governing cross-border restructuring.[57]

A focus on forum shopping that looks only at the decisions that litigants make and courts mediate would miss larger issues of political economy. But the persistence of a forum shopping system, even a "good" one, is fragile. Not only is it is difficult to distinguish between good and bad jurisdictional encouragements of this sort, but also the continuing benefits of such a system are subject to contestation. Forum shopping systems may look to create a jurisdictional monopoly, and yet the political and economic benefits of this sort of confluence of power invite constant re-examination and occasional trust busting. Current events have created just such a moment for reconsideration and recalibration of the line between good and bad foreign schemes of arrangement and the system in place for their enforcement.

In considering the legal, political, and economic issues involved in the recognition of schemes of arrangement across Europe post-Brexit, this article proceeds as follows: Part I discusses current British case law on foreign schemes of arrangement, including questions of whether the orders entered by British courts are subject to recognition and enforcement under European law as it now (fragilely) stands. Part II reflects on whether recent revisions

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access or recovery to the plaintiff seeking to enforce legal norms under the law of some forum."); Christopher A. Whytock, *The Evolving Forum Shopping System*, 96 CORNELL L. REV. 481 (2011) (refuting claim of transnational litigation explosion in US courts, and related forum shopping system, as an empirical matter). Weinberg and Whytock both define a forum shopping system as involving the interactions of litigants, court and possibly also legislatures such that weak jurisdictional limitations enable unfettered choices among substantive legal options. For a more detailed discussion of this literature on forum shopping systems, see *infra*, text accompanying notes 133–144, infra. For another perspective on "global forum R shopping," see Bookman, *supra* note 3. R

[56] Regulation (EU) of the European Parliament and of the Council on insolvency proceedings (recast) No. 2015/848 (May 20, 2015) [hereinafter the "Recast EU Insolvency Regulation" or "Recast Reg"]. The Recast EU Insolvency Regulation entered into effect on June 30, 2017. *See also* Recast EU Reg., *supra*, at Art. 92.

[57] "Brexit" refers to a recent referendum in the United Kingdom to exit the European Union. Under Art. 50 of the Treaty on Lisbon, exit from the European Union triggers a two-year period of negotiation between the exiting member state and the remaining EU member states on the terms of such a withdrawal. Although in theory the UK's exit from the EU has not explicitly triggered leaving the European Economic Area (EEA), which might if it remained might still bind it to directives and not regulations, the notion that the UK might remain in the EEA but not the EU has been questioned as politically unlikely (although not economically undesirable) by commentators. *See, e.g.*, Andrew Dickinson, *Close the Door on Your Way Out: A Bystander's View of Brexit* (Oxford Legal Studies, Working Paper No. 39/2017) (March 1, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2964967.

to the EU Insolvency Regulation speak to this issue: specifically, whether schemes of arrangement fall within the scope of the recast EU Reg and, if not, how the recast Insolvency Reg might implicate restructuring practices in the UK and EU going forward.[58] Part II also discusses a new draft EU Directive on a Preventive Restructuring Framework.[59] Part III speculates on how Brexit might affect European recognition and enforcement of schemes of arrangement ordered by British courts. Part IV turns from the legal issues surrounding the enforcement of foreign schemes of arrangement to the political economy in which this law is embedded. The importance of the recognition of schemes of arrangement to global financial markets is emphasized. As the UK leaves the EU, London's near monopoly in financial services markets, including the professional services that facilitate European and global trade in these financial services, may be contested.[60]

I. SCHEMES AND FOREIGN SCHEMES

A. Schemes of Arrangement

While initially created with the Companies Act of 1862,[61] the current provisions are found in Part 26 of the Companies Act of 2006.[62] Schemes are widely flexible and allow for the restructuring of a company's capital under English law. Since the Companies Act does not limit its purposes, "in theory, a scheme could be a compromise or arrangement between a company and its creditors or members about anything that they can properly agree amongst themselves."[63] Often enough, schemes of arrangement bind dissenting creditors to a financial restructuring intended to avoid a bankruptcy or insolvency proceeding. But they might be relied on to bind dissenting creditors in some other context, or even to bind dissenting equity interests when the arrangement involve shares of stock not debt.

Schemes of arrangement to restructure a company's financial arrangements are distinct from both purely contractual workouts, on one hand, and

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[58]*See* Recast EU Insolvency Reg., *supra* note 56. R

[59]Proposal for Directive 2016/723, 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, 2016 O.J. (L 141) 19 [hereinafter "proposed Restructuring Directive"].

[60]Although international PIL treaties have long been touted as apolitical, history has shown that PIL negotiations rarely avoid either politics or consideration of issues of substance. *See* Harold C. Gutteridge, Seventeenth Lecture of the David Murray Foundation at the University of Glasgow: *The Codification of Private International Law* (May 11, 1950); Harold C. Gutteridge, The Codification of Private International Law (1951) (discussing pros and cons of PIL conventions versus codification efforts aimed at unifying private laws).

[61]Companies Act 1862 (25 & 26 Vict. c.89), at § 126 [hereinafter "Companies Act 1862"].

[62]Companies Act 2006, at § 895.

[63]*See* Payne, *supra* note 41. R

reorganization proceedings, on the other.[64] They differ from purely contractual restructuring agreements, in that while these sorts of contracts are only binding on consenting parties, court orders sanctioning a scheme bind dissenters, as well. Alternatively, schemes of arrangement might occur in the context of an insolvency proceeding, but should not be confused with the proceedings themselves. Schemes differ from an administration's or company's voluntary arrangements under English law, and what in the US is referred to as a reorganization proceeding (or chapter 11 case). The procedures associated with a scheme of arrangement are far less complicated and involve far less court involvement than any of these other judicial proceedings.[65]

The binding of dissenters through a scheme of arrangement depends on a showing that the meeting of creditors followed procedural requirements set out in the Act, and that the class of affected creditors agreed by more than fifty percent in number and seventy-five percent in value of the voting claims or interests.[66] Judicial involvement in a scheme of arrangement is minimal but court orders are required both to call a meeting of creditors and to sanction any scheme of arrangement approved by the requisite super-majority.

The potential breadth of arrangements is subject to few limits. One of these is jurisdictional; three others are more jurisprudential in origin. Court approval on each of these issues is required for a scheme to bind dissenting creditors.

1. *Jurisdictional Limits.*

Section 895 of the Companies Act 2006 provides only that the arrangement in a scheme should be proposed between "a company" and its creditors or members, and defines "a company" as referring to "any company liable to be wound up under the Insolvency Act of 1986."[67] The 1986 Insolvency Act broadly enables the winding up of companies that are solvent or insolvent, registered or unregistered.[68] Because British courts have long held that the term "unregistered companies" includes foreign companies, foreign schemes of arrangement are nothing new.[69]

Equating "a company" subject to a scheme with reference to a company "liable to be wound up" under the Insolvency Act of 1986 might have been

[64] *See* GOODE, *supra* note 16, at 40–45. R

[65] For a general discussion of the relationship between informal and formal insolvency procedures and restructuring arrangements, see Jose Garrido, *Out-of-Court Debt Restructuring*, World Bank Study, WORLD BANK (2012).

[66] *See, e.g.*, GOODE, *supra* note 16, at 40–45. R

[67] Companies Act 2006, at § 895.

[68] Insolvency Act 1986 (1986 c. 45), at § 221 [hereinafter "Insolvency Act 1986"].

[69] *See, e.g.*, Banque des Marchands de Moscou (Koupetchesky) v. Kindersley [1951] Ch. 112 [hereinafter "*Kindersley*"].

read narrowly by British courts in the wake of jurisdictional limits set out in the EU Regulation on Insolvency Proceedings.[70] The EU Insolvency Regulation requires European-wide recognition of an order commencing a winding up proceeding in the UK.[71] Although the Insolvency Act of 1986 would enable the winding up of any European registered companies, since foreign companies are viewed as "unregistered companies" for this purpose,[72] by its terms, the EU Insolvency Reg applies only to those EU-registered companies that have either a center of main interests or establishment in the UK.[73] Winding up proceedings involving insolvent foreign companies are only subject to recognition under the EU Insolvency Reg if the company has a COMI or establishment in the UK.[74] In this way, the Reg is said to limit the jurisdiction of British courts' exercise of jurisdiction under the Insolvency Act.

British courts have not imported the jurisdictional limits under the EU Reg as imposing parallel limits on the reach of their jurisdiction to sanction foreign schemes of arrangement under the 2006 Companies Act, however.[75] The EU Reg covers only "insolvency proceedings."[76] Several different sorts of insolvency and winding-up proceedings under British law are explicitly included in Annex A to the EU Insolvency Regulation, but schemes of arrangement are not included in Annex A. One explanation for their absence from Annex A is that the Companies Act broadly enables schemes of arrangement, regardless of whether the company is solvent or insolvent and without regard to whether or where it is registered; the definition of "insolvency proceedings" covered by the EU Reg is far narrower.[77] Another is that British diplomats explicitly negotiated this absence.[78]

Courts, thus, construe the Companies Act requirement that a scheme of arrangement pertain to a "company liable to be wound up under the Insolvency Act of 1986" as a hypothetical test: because a solvent foreign unregistered company might get wound up under Insolvency Act, and because the winding up of such a foreign company would sit outside the EU Insolvency Reg, then the court has jurisdiction under the 2006 Companies Act to sanc-

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[70] *See* EU Insolvency Reg., *supra* note 14, at Art. 3. R

[71] *Id.* at Annex A.

[72] Insolvency Act 1986, at § 221.

[73] *See* EU Insolvency Reg., *supra* note 14, at Art. 3. R

[74] *Id.*

[75] *See Kindersley*, *supra* note 69. R

[76] EU Insolvency Reg., *supra* note 14, at Arts. 3(1) & 2(a). R

[77] Horst Eidenmüller, *What Is an Insolvency Proceeding?*, 92:1 Am. Bank. L.J. , (2018).

[78] Richard Baines & Yana Davies, *Legal Briefing, The EC Commission's Proposal for Changes to the EC Regulation on Insolvency Proceedings*, THE IN-HOUSE LAWYER (July 1, 2013), http://www.inhouselawyer.co.uk/index.php/legal-briefing/the-ec-commissions-proposal-for-changes-to-the-ec-regulation-on-insolvency-proceedings/ (noting that Annex A's failure to include schemes of arrangements "was a deliberate omission on the part of the UK, as schemes can be used for reorganisation purposes generally and are not regarded as purely an insolvency procedure.").

tion its scheme of arrangement. In making this assessment, courts do not consider whether the choice to attempt a creditor-approved scheme of arrangement is a decision not to wind up or otherwise liquidate under applicable law and, thus, avoid addressing whether, if the company sought to wind up under English law it would be able to do so consistent with the EU Insolvency Regulation. At least one commentator notes this plausible, alternative construction of section 895's cross-reference to the Insolvency Act of 1986 and on this ground cautions that the line of reasoning that foreign schemes of arrangement are permissible is not entirely free from doubt.[79] Nonetheless, British courts uniformly construe the jurisdictional provisions in section 895 as providing little to no limit on their authority to sanction a foreign scheme of arrangement.[80]

2. *Jurisprudential Limits.*

Although section 895 of the Companies Act 2006 might, in theory, be read to permit any foreign company to propose a scheme of arrangement, British courts have identified additional limits on when they will exercise their discretion to permit schemes involving foreign companies.[81] Courts specify that they will decline to exercise their broad jurisdiction over a foreign company unless it is also shown that: (i) there is a "sufficient connection" between the foreign company and England or Wales, "which may, but does not necessarily have to, consist of assets within the jurisdiction;" (ii) there is a "reasonable possibility" of "benefit" to those requesting the order approving the scheme of arrangement; and (iii) "one or more persons interested in the distribution of assets of the company must be persons over whom the court can exercise a jurisdiction."[82]

Notwithstanding these judge-made limits on foreign schemes, over the past several years, British courts have sanctioned numerous schemes involving foreign companies. Many of the schemes involved companies registered and with a center of main interests elsewhere in Europe, and without either an establishment or much in the way of assets in the UK.[83] Courts found

[79]Payne, *supra* note 35, at 577. R

[80]*Id.*

[81]*See* Re Drax Holdings Ltd [2003] EWHC 2743 (Ch.) (identifying three-factor test as indicative of a court's exercise of discretion rather than limits on its jurisdiction).

[82]*See, e.g.*, Re Real Estate Development Co. [1991] BCLC 210, at 217 (involving winding up of foreign company); Re Drax Holdings Ltd [2003] EWHC 2743 (Ch.) (debt restructuring); [2004] 1 WLR 1049; Re Rodenstock GmbH [2011] 1104 (Ch.); [2012] BCC 459, at 21 (debt restructuring).

[83]*See, e.g.*, Re Rodenstock GmbH [2011] 1104 (Ch.); [2012] BCC 459 (solvent German COMI-ed company with no establishment in UK); Re Primacom Holding GmbH v. Credit Agricole [2011] EWHC 3746 (Ch.) (Dec. 20, 2011); Primacom Holding GmbH v. Credit Agricole [2012] EWHC 164 (Ch.) (Jan. 20, 2012) (solvent German COMI-ed company with no establishment in UK); Re Van Gansewinkel Group [2015] EWHC 2151 (Ch.) (Belgium and Dutch corporations without COMI, establishment or assets in UK); Re Apcoa Parking Holdings GmbH [2014] EWHC 3849 (Ch.), [2014] All ER (D) 221

"sufficient connections" in less tangible factors, and require proof only of the "possibility" of benefit such that this exercise of jurisdiction effectively extends to at least several persons.

a. Sufficiency of connections.

The sufficiency of the connections between the companies seeking court authorization of its scheme of arrangement and England or Wales rarely requires the presence of assets within this jurisdiction. Early cases, such as that involving the German lens manufacturer, Rodenstock, emphasized the domicile of the foreign companies' creditors and the fact that loan or other financial documents between the company and its creditors chose to be governed by English law and subject to English jurisdiction.[84] But later cases, such as that involving the German cable company, Primacom Holding GmbH, found sufficient connections based solely on English choice of law and choice of court provisions, given that nearly all of its creditors were found to have domiciles outside the UK.[85]

The presence of English choice of law clauses has, of late, been found sufficient to satisfy the jurisprudential requirement of "connections" between the foreign company and England.[86] This contractual connection is so strongly presumed that courts have not hesitated to approve a scheme of arrangement proposed by a company whose non-English choice of law clause was amended by a vote of the majority of its creditors to specify that English law governed their financial transactions.[87]

Where English law has not been chosen to govern the debt instrument that forms the subject of the scheme of arrangement, British courts might find a sufficiency of connections in other factors, even in the absence of a contractual amendment. Codere (UK) Finance Ltd, mentioned above, was held to possess sufficient contacts as a result of its (recently acquired) UK registration and UK COMI.[88] Although the debt transferred to it was subject to a US choice of law clause, English law governed a related inter-company guar-

(Nov. 2014) (German COMI-ed company with no establishment in UK); DTEK Finance B.V., Re [2015] EWHC 1164 (Ch.) (Dutch COMI-ed group). *But see* Re La Seda de Barcelona SA [2010] EWHC 1364 (Ch.) (Spanish COMI-ed company with UK establishment); *Codere*, *supra* note 42 (debt transferred to newly created UK registered subsidiary within months before scheme). *See also* Indah Kiat International Finance Company BV [2016] EWHC 246 (Ch.) (application by solvent Dutch company with registered branch in UK denied on procedural grounds). R

[84]Re Rodenstock GmbH [2011] 1104 (Ch.); [2012] BCC 459.

[85]*See* Re Primacom Holding GmbH v. Credit Agricole [2011] EWHC 3746 (Ch.) (Dec. 20, 2011); Primacom Holding GmbH v. Credit Agricole [2012] EWHC 164 (Ch.) (Jan. 20, 2012).

[86]*See, e.g.*, La Seda [2010]; Metrovacesa SA [2011]; Re Rodenstock [2011]; Re PrimaCom [2012]; Cortefiel SA [2012]; Re NEF Telecom Co BV [2012]; Global Investment House [2012]; Monier [2013]; van Gansewinkel Group [2015].

[87]*See* APCOA Group [2015]; *see also* DTEK Bv [2015].

[88]*Codere*, *supra* note 42. R

antee agreement.[89]

British courts have not viewed as problematic the fact that the "connections" to England and Wales had been constructed within months before the request for assistance in putting together a scheme of arrangement. In *Codere*, the company's COMI shifted before seeking approval of the scheme; in *Indah Kiat*, a Dutch registered company gave notice of its intent to shift its COMI to England; in *APCOA Group*, a German group of companies shifted neither its COMI nor its establishment but only the governing choice of law clause in its financial documentation.[90]

b. Possibility of benefits.

If British courts are sanctioning schemes proposed by companies that are not British companies or really in any sense located in Britain, so too is the location of the companies' creditors viewed as mostly irrelevant. Rarely do courts require a showing that the creditors subject to the scheme reside or are domiciled in the UK. Although in *Rodenstock GmbH* the court sanctioned a German registered company's scheme of arrangement in part because more than a majority of its creditors were located in the UK (creditors representing 56.5 % in value of debt voting in favor of the scheme resided in UK), convincing it that there was a "reasonable possibility of benefit" for the scheme on this basis,[91] courts subsequently relaxed this requirement. In *Primacom Holding GmbH*, the court approved a scheme proposed by a German registered company, even thought its creditors were mostly domiciled outside the UK.[92] With *Primacom Holding* the court found that the presence of several creditors in the UK was held open sufficient "possibility of benefit," especially given that the affected debt was contractually governed by English law.

c. Effectiveness of the Foreign Scheme.

While neither the "connections" nor the "benefits" tests have much teeth left to them, the third jurisprudential limit requiring a showing that the court's exercise of jurisdiction extends to at least several persons, which I'll call the "effectiveness" test," has caused British courts to struggle a little more in their sanctioning of foreign schemes of arrangement. Where the creditors are mostly residents of the UK, the scheme order is effective as against them. But with foreign schemes of arrangement, the company's creditors may reside in the EU, the United States, or elsewhere.

When US creditors are involved, chapter 15 of the US Bankruptcy Code

[89] *Id.*

[90] *Codere supra* note 42; *APCOA Group*, *supra* note 50; *Indah Kiat*, *supra* note 49. R

[91] *Rodenstock GmbH*, *supra* note 83 (including English choice of law and choice of court provisions in the affected financial contracts). R

[92] *Primacon Holding*, *supra* note 83. R

simplifies recognition of the foreign scheme of arrangement, which has been held to enable recognition of foreign schemes of arrangement whether or not the arrangement involves restructuring of a solvent entity.[93] Indeed, US bankruptcy courts have held that solvent insurer's schemes of arrangement are subject to recognition under chapter 15, even though neither a domestic nor a foreign insurance company could otherwise access US bankruptcy jurisdiction.[94] The court in *Codere* based its finding that the foreign scheme of arrangement proposed there would be "effective" based in part on the company's conditioning of the scheme on its recognition under US chapter 15.[95]

Foreign schemes of arrangement involving EU-registered companies may also need to demonstrate that they can be enforced under applicable European PIL rules.[96] European law is referenced because this "effectiveness" test asks whether the British court's order sanctioning the scheme of arrangement is subject to recognition and enforcement against the affected creditors. Three EU regulations are relevant here: the EU Insolvency Regulation; the Brussels Regulation; the Rome Regulation.

If the EU Insolvency Regulation had governed these schemes of arrangement,[97] it would have ensured automatic recognition and enforcement of scheme orders[98] but for the regulation's selective application to certain "insolvency proceedings,"[99] which are defined narrowly and specified in an Annex to the Regulation. The Annex does not include reference to the English Companies Act or to schemes of arrangement.[100]

British courts have instead looked to two other sources to satisfy them-

[93]Sections 1501 et seq., U.S.C.A. *See, e.g.*, Look Chan Ho, *Creative Uses of Chapter 15 of the US Bankruptcy Code to Smooth Cross-Border Restructurings*, 24(9) J. INT'L BANKING L. & REG. 485 (Aug. 31, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1465053.

[94]*See, e.g.*, Jennifer D. Morton, *Note: Recognition of Cross-Border Insolvency Proceedings: An Evaluation of Solvent Schemes of Arrangement and Part VII Transfers under U.S. Chapter 15*, 29 FORD. INT'L L.J. 1312 (June 2006).

[95]*Codere*, *supra* note 42. R

[96]Recognition and enforcement of judgments in civil and commercial cases was originally governed within the European Communities by the 1968 Brussels Convention. 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Maters, Council of the European Union (1968), http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:41968A0927(01):EN:NOT [hereinafter "Brussels Convention"]. . The Brussels Convention was initially signed by the six members of the EC and later acceded to by the UK in 1973 (and other new entrants) upon entering the Community. The Brussels Convention should eventually be replaced by the Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Council of the European Union [hereinafter "Lugano Convention"], http://ec.europa.eu/world/agreements/prepareCreateTreatiesWorkspace/treatiesGeneralData.do?redirect=true&treatyId=7481. In the meantime, it has been nearly completely superseded within the EU by subsequent regulation. *See infra*, note 102 (discussing Brussels I and Brussels II Regulations). R

[97]EU Insolvency Reg., *supra* note 14. R

[98]*Id.* at Art. 16.

[99]*Id.* at Arts. 2, 3.

[100]*Id.* at Annex A.

selves that the foreign scheme is "effective" because it is enforceable against creditors residing in EU member states.[101] While neither source alone provides a basis for the recognition and enforcement of scheme orders, cobbled together, courts draw sufficient comfort to find this jurisprudential requirement satisfied.

First, in finding that a foreign scheme would be "effective," English courts have referred to academic opinion letters offered as evidence and concluding that the Brussels Regulation (whether the original 2000 version or the 2012 revised version)[102] would govern and require recognition and enforcement of an order sanctioning a scheme of arrangement across Europe.[103] The scope of the Brussels Regulation is understood broadly to reach "all the main civil and commercial matters apart from certain well-defined matters."[104] Since it is clear that schemes of arrangement sit outside the EU Insolvency Regulation,[105] it has been mostly assumed that schemes sit inside the Brussels Regulation.[106] The two regulations have been viewed as dovetailed with corresponding hand-and-glove scope provisions that, at least presumably, did not allow for gaps in coverage.[107]

But the fit between foreign schemes of arrangement and their enforcement under the Brussels Regulation is not without question. First, there is the issue of the scope and exception provisions in the Brussels Regulation. Whether looking at the initial version of the Brussels Regulation (circa 2000) or its revision (circa 2012), the Regulation states that it "shall apply in civil and commercial matters whatever the nature of the court or tribunal."[108] Both Brussels I and II identically state that the "Regulation shall not apply"

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[101] *See, e.g.*, Lucas Kortmann & Michael Vader, *The Uneasy Case for Schemes of Arrangement Under English Law in Relation to Non-UK Companies in Financial Distress: Pushing Europe?*, 3 NIBLeJ 13 (2015).

[102] For the first Brussels Regulation, see Council Regulation (EC) 44/2001 of 22 December 2000 ("Brussels I"). For the recast Brussels Regulation, see Council Regulation (EC) 1215/2012 of 12 December 2012 ("Brussels II") [Brussels I and Brussels II are sometimes also referred to herein as the "Judgments Regulation"]. For case law referring either to Brussels I or II to support this "effectiveness" finding, see, e.g., *Rodenstock* and *Primacom, supra* note 83; *see also* Payne, *supra* note 35 (analyzing conclusion that foreign schemes of arrangement are subject to recognition and enforcement under Brussels Regulation). R

[103] Despite references to these opinion letters, English courts have not directly ruled on the applicability of the Brussels Regulation to scheme orders. *See The Rise and Rise of English Schemes of Arrangement*, ALLEN & OVERY (Dec. 21, 2013), http://www.allenovery.com/publications/en-gb/Pages/The-rise-and-rise-of-the-English-scheme-of-arrangement.aspx ("Despite an increased focus on the issue in recent cases such as *Van Gansewinkel Groep BV*, no decision has been made on whether the Judgments Regulation [Brussels I] applies to schemes; the English court has proceeded on the basis of arguments that it has jurisdiction whether or not the [it] applies.").

[104] Brussels I, at pmbl., ¶ (7).

[105] EU Insolvency Regulation, *supra* note 14, at Annex A. R

[106] *See* Brussels I, at Art. 1(2)(b).

[107] *See* Payne, *supra* note 35. R

[108] Brussels I, Art. 1(1); Brussels II, Art. 1(1).

to "bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings."[109] Logically, the "bankruptcy exclusion" should match perfectly with the distinct rules for recognition and enforcement of judgments set out in the EU Insolvency Regulation, but a small amount of ambiguity still remains.[110] Unlike the Annex to the EU Insolvency Regulation, which carefully sets out the laws governing "insolvency proceedings" within the meaning of that regulation, the Brussels Regulations do not contain a correlative list.[111]

Second, while broadly perceived as enabling the recognition and enforcement of judgments entered in civil and commercial proceedings, the Brussels Regulation is drafted with mostly adversarial proceedings in mind.[112] Its jurisdictional references to "defendants" are hard to square with the non-adversarial, multi-party structure of schemes,[113] and the recently recast Brussels Regulation is no clearer on this issue of scope.[114] This requirement may be met where there is at least one defendant-creditor residing in England, but given modern debt structures the residence of the company's creditors may not be easy to determine.

Where questions existed, courts also considered the so-called Rome Regulation.[115] The Rome Regulation does not speak to the question of the recognition and enforcement of judgments. Instead, per Article 3(1) it mandates application of the law chosen by the parties; Article 12 provides that the governing law of the contract should also govern "the various ways of extinguishing obligations and prescriptions and limitations on actions" in relation to the contract."[116] Whether these provisions would require deference to English courts' implementation of schemes of arrangement as set out in English law depends in turn on the scope provisions of the Rome Regulation.

[109]Brussels I, Art. 1(2)(b); Brussels II, Art. 1(2)(b).

[110]*See* Payne, *supra* note 35 (describing the argument that the Brussels Regulation does not cover scheme orders, but noting her skepticism for the strength of this contention). R

[111]There are several Annexes to Brussels I and II, but neither lists proceedings that fit within the "bankruptcy exclusion."

[112]*See* Jan-Jaap Kuipers, *Schemes of Arrangement and Voluntary Collective Redress: A Gap in the Brussels I Regulation*, 8(2) J. PRIV. INT'L L. 225–49 (2012).

[113]*Id.*

[114]*See* Brussels II, *supra* note 102. R

[115]Council Regulation (EC) No. 593/2008 of 17 June 2008 on the law applicable to contractual obligations [hereinafter "Rome Regulation" or "Rome I"]. Another regulation, related to Rome I, was promulgated by the European Council, this one on the law applicable to non-contractual obligations, Council Regulation (EC) No. 864/2007 [hereinafter "Rome II"]. Rome I and II together supersede an earlier European convention on the same topic, Convention 80/934/ECC on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980. For discussion of English cases relying on Rome Regulation to find that foreign scheme orders would be "effective," see, e.g., Payne, *supra* note 35. R

[116]Rome I, *supra* note 101, at Arts. 3(1) & 12. R

The breadth of the scope is not entirely free from argument. Article 1(2)(f) of that Regulation states:

> Questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body shall be excluded from the ambit of the regulation.[117]

This reference to "the law of companies" as sitting outside the scope of the Rome Regulation might mean that schemes of arrangement also sit outside Rome since schemes of arrangement are governed by English law. Commentators mostly disagree with this reading.[118] However, the needle can be threaded as follows:

> [I]t could be argued that this exclusion seems to be aimed predominantly at corporate governance issues, and matters concerning the life and death of companies, rather than procedures to vary the contractual rights of the members and other stakeholders. Indeed, it could be argued that the sorts of schemes with which we are concerned, namely creditor schemes aimed at restructuring the debt of the company, seem to be predominantly geared towards rearranging the contractual arrangements of the parties inter se, rather than affecting the company's share capital or anything affecting the company per se.[119]

In practical effect, this would mean that European courts would be bound to recognize the effect of a scheme as a part of its obligation to enforce debt governed by English law, including the contractual variation of the parties' rights under the finance documents as a result of the scheme of arrangement, even if the order sanctioning the scheme was not itself recognized as a judgment covered by the Brussels Regulation. But this construction of Rome I has not been tested in the courts, and reasonable arguments to the contrary might well be viewed as convincing.[120]

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[117] *Id.* at Art. 1(2)(f).

[118] *See, e.g.*, F. Garcimartin, *The Review of EU Insolvency Regulation: Some General Considerations and Two Selected Issues (Hybrid Procedures and Netting Arrangements)*, in L. LENNARTS; F. Garcimartín, *The Review of the EU Insolvency Regulation: Some Proposals for Amendment*, NETHERLANDS ASSOCIATION FOR COMPARATIVE & INTERNATIONAL INSOLVENCY LAW, s. 28 (2011), http://www.naciil.org/publications/preadviezen-reports-2011/.

[119] Payne, *supra* note 35. R

[120] *See, e.g.*, Kortmann & Veder, *supra* note 101, at 253–54 (questioning whether schemes of arrange- R

In the end, expert opinions offered by German, Dutch, Spanish and other European practitioners have satisfied British courts that their orders sanctioning foreign schemes were likely to be enforced across Europe, one way or another. As a result, British courts have found that the schemes would, despite the off-shore residence of many creditors, be "effective."[121] But there is no case squarely holding that either the Brussels or Rome Regulations would so govern.

By and large, European courts have not upset English courts' scheme orders on the grounds that EU Regulations did not require recognition and enforcement, but there is one notable exception. In 2012, the German Federal Court of Justice upheld an intermediate appellate court decision denying recognition of an English court's order sanctioning creditor approval of scheme of arrangement involving Equitable Life, a mutual life assurance company incorporated in the United Kingdom.[122] Although the German policyholders voted against the English scheme of arrangement in *Equitable Life*, they were too few in number and too small in value to preclude entry of an order binding them to the arrangement. Equitable Life defended subsequent litigation before German courts on the grounds that EU law required recognition of the scheme, but the German courts rejected these contentions and held that the English scheme sat outside not only the EU Insolvency Regulation, but also the Brussels Regulation.[123] Because the Equitable Life scheme involved an insurance company, the Brussels Regulation imposed special jurisdictional requirements.[124] The Brussels Regulation subjected the insurer to proceedings brought in the courts of the EU member state in which its creditors are domiciled, whether the creditors are policyholders, insureds, or beneficiaries of a company domiciled in another EU member state.[125] Under the Brussels Regulation, the German policyholders were not bound by the English court's order, especially as relates to questions of German law.

While initially causing concern among London solicitors, British lawyers quickly came to the conclusion that *Equitable Life* was distinguishable on the grounds that the scheme in that case had involved an insurance company, the objecting creditor had been a German policyholder, and that German not English law governed that creditor's claim.[126] In subsequent cases, English

ment should be characterized as "an issue of contract law," and thus governed by Rome I, especially as relates to enforcement of a scheme order against dissenting creditors).

[121] *See, e.g.*, Re Rodenstock [2011] EWHC 1104 (Ch.), *supra* note 83; *see also* Payne, *supra* note 35, at 102 (discussing importance of opinion letters to courts' "effectiveness" findings). R R

[122] Der Bundesgerichtshof (The German Federal Court of Justice) 15 February 2012, IV ZR 194/09; *see also, e.g.*, Hermanns, *supra* note 39. R

[123] Hermanns, *supra* note 39. R

[124] Brussels I, Art. 12; Brussels II, Art. 14.

[125] *Id.*

[126] Payne, *supra* note 35, at 586. R

courts have approved foreign schemes of arrangement, unfettered by the decision of the German *Bundesgerichtshof* in *Equitable Life*.[127]

B. The Forum Shopping System for Foreign Schemes of Arrangement

All of the above confirms that, over the past several years, British courts have permitted foreign schemes of arrangement despite conduct that might well have been considered forum shopping. Courts are aware of these concerns, but do not view foreign companies' efforts to seek court approval of a scheme of arrangement that would not have been available under the law of the debtor's place of registration or COMI as problematic. They justify this extra-territorial assertion of jurisdiction by distinguishing between good and bad forum shopping.

In sanctioning the scheme of arrangement offered on behalf of the Spanish Codere group of companies, for example, the London High Court addressed the claim that the scheme should be denied on the grounds of forum shopping. The *Codere* court conceded that forum shopping might be at work in the case, but distinguished between good and bad forum shopping:

> In a sense, of course, what was done in the *AI Scheme* case, and what is sought to be achieved in the present case is forum shopping. Debtors are seeking to give the English court jurisdiction so that they can take advantage of the scheme jurisdiction available here and which is not widely available, if available at all, elsewhere. Plainly forum shopping can be undesirable. That can potentially be so, for example, where a debtor seeks to move his COMI with a view to taking advantage of a more favourable bankruptcy regime and so escaping his debts. In cases such as the present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping.[128]

Although each of the foreign debtors seeking to reach a scheme of arrangement with their creditors intentionally sought to escape the reach of (foreign) insolvency laws for another (in this case British), they did so for good reasons:

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[127] *See, e.g.*, *Codere*, *supra* note 42. R

[128] *Codere*, *supra* note 42, at 18. R

to maximize distributions to creditors. It follows that this practice is good forum shopping and should be excused, contends the court. Under this view, bad forum shopping involves an evasion of debt rather than an avoidance of insolvency law.[129]

The *Codere* court's characterization of the company's conduct as involving good forum shopping, thus, turns on a combination of factors: some utilitarian and others more focused on consent. As it relates to beneficial effects, whatever advantage-taking might have been involved in this scheme of arrangement, it was not an effort by the company to take advantage of the company's creditors, who were set to receive substantially more than they would have received in a Spanish insolvency proceeding. The court's reference to the scheme as the "best possible outcome for creditors" suggests that both the company and creditors are better off with the scheme – in other words, the forum shopping was "efficient."

The consent, here, might be overrated, however. Schemes differ from assertions of forum shopping made in conventional litigation, in which a plaintiff seeks the substantive benefits of some law and a defendant objects to the application of these benefits in an adversarial setting. Schemes of arrangement involve multiple parties in interest and may be uncontroverted.[130] Still, they are only binding under the Companies Act if 50 percent in number and 75 percent of the value of these claims vote in favor of the proposal. The creditors in this case were, by a large super-majority vote, willing participants in the shopping trip if "forum shopping" was the goal.[131] Moreover, the consent of the creditors and other affected stakeholders in *Codere* was compounded by the consent of two additional institutions: the British court found that the scheme satisfied the jurisdictional and jurisprudential requirements imposed by English law; continental European courts did not decline enforcement of the scheme order.[132]

[129]Although Codere SA and other European companies seeking enforcement of a scheme of arrangement under the English Companies Act are not looking to pay their creditors less, they are seeking to escape harsh aspects of the insolvency laws of Spain, Germany, the Netherlands, Belgium or Luxembourg. In some instances, these "harsh" European insolvency laws look to protect some public interest (intellectual property holders in *Codere*, for example) and narrow class of claimants (intellectual property rights holders in *Codere*, for example).

[130]Schemes of arrangement are often uncontroverted in the sense that dissenting creditors who find themselves outvoted in a scheme of arrangement are left with mostly procedural arguments to be made before the English court; although these sorts of objections do get registered occasionally, as was the case in the *Indah Kiat* scheme, procedural objections are more likely to delay court approval of the scheme than derail it entirely. *See* Re Indah Kiat International Finance Company BV [2016] EWHC 246 (Ch.) (denying on procedural grounds application pertaining to scheme of arrangement filed by solvent Dutch company with registered branch in UK).

[131]For an extensive argument against focusing on litigants' motivations when distinguishing between "good" and "bad" forum shopping, see Bookman, *supra* note 3, at 630–32. R

[132]Continental European courts have declined to enforce a foreign scheme of arrangement on only one

The breadth of institutional support for foreign schemes of arrangement, thus, evidences what some scholars refer to as a forum shopping system.[133] Forum shopping systems are said to arise when permissive jurisdictional rules enabling broad access to certain courts are coupled with favorable substantive laws.[134] These open-ended jurisdictional rules provide access to substantive laws favoring specific economic or social interests. With forum shopping systems, litigants' forum shopping is enabled and sometimes even openly encouraged by a legal system's forum selling.[135] System-wide involvement of litigants, courts, and possibly even legislatures is required to "package" a forum as a desirable destination for dispute resolution.[136]

The treatment of foreign schemes of arrangement fits the paradigm of a forum shopping system. Because schemes of arrangement sit outside the scope of the EU Insolvency Regulation, company's seeking a court-ordered scheme need not satisfy stricter jurisdictional limitations it sets out.[137] British courts' interpretation of weak domestic jurisdictional limitations to the opening of a scheme broadly enables even foreign companies, companies whose place or registration or incorporation sits outside the United Kingdom, to access English restructuring law, although the same company might have been precluded from accessing English insolvency law as a result of the EU Insolvency Regulation.[138] Companies seek access to scheme procedures

occasion, in a context that was easily distinguishable. For discussion of German courts' decisions in *Equitable Life*, see *supra* text accompanying note 37. For an argument that the distinction between "good" and "bad" forum shopping ought to consider questions of consistency with international law, see Bookman, *supra* note 3, at 632-33. R

[133] *See, e.g.*, Weinberg, *supra* note 55; Whytock, *supra* note 55. Some commentators emphasize the involvement of courts in forum shopping, referring to courts' roles in the system as a case of "forum selling." *See* Klerman & Reilly, *supra* note 8; *see also* Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1182–83 (2007). R R R

[134] Weinberg, *supra* note 55; Whytock, *supra* note 55. R

[135] *See* Klerman & Reilly, *supra* note 8 (defining "forum selling" and applying term to several distinct issue areas within United States). R

[136] Where "forum selling" is viewed as the result of judicial decisionmaking aimed at attracting plaintiffs' complaints in particularly issue areas, Klerman & Reilly, *supra* note 2, analysis of "forum shopping systems" examines all relevant actors including the litigants, courts, but also legislators and other lawmakers, since the jurisdictional rules that enable forum shopping may be crafted with an eye to encouraging or limiting access to courts. Commentators presume that forum selling is problematic where decisions about venue are left in plaintiffs' hands, but beneficial where sophisticated contracting parties make venue decisions ex ante in the contract that binds them both. *Id.* This article focuses on "forum shopping systems" in an effort to open up examination of all relevant actors rather than focus predominately on courts' or litigants' participation in a forum shopping system, and to remain agnostic as to whether the forum shopping is "good" regardless of whether venue choices are set by means of contractual agreement. R

[137] EU Insolvency Reg., *supra* note 14, at Art. 3 (limiting recognition to insolvency proceedings as a main proceeding if commenced in the member state of the European Union where the debtor's "centre of main interests" is situated, and allowing recognition of a secondary proceeding in some instances in which an establishment of the debtor is so located."). R

[138] *See* text and accompanying *supra* notes 48–50, and 61–127 (discussing British courts' approval of foreign schemes of arrangements, only some of which involved shifts in the debtors' COMIs). R

because of their speed and simplicity, but also because it is easier to bind dissenting creditors to the terms of restructuring arrangement through a scheme of arrangement than through a composition under most continental European countries' laws, and because schemes are less complicated and cumbersome than a full blown insolvency proceeding.[139]

Cross-border forum shopping systems require a background system of recognition and enforcement to be effective. PIL treaties provide transnational assurances of this sort.[140] Domestic PIL could also provide clarity.[141]

The court in *Codere* found that entry of an order sanctioning a scheme of arrangement involving a Spanish corporate group was consistent with the requirements of EU law,[142] and based its conclusions on expert opinions it had solicited from Spanish and European law experts.[143] British courts' reading of EU regulations might have been second-guessed by courts in other EU member states, but this has not happened.[144] Indeed, only rarely have continental European courts questioned enforcement of British court orders approving foreign schemes of arrangement, and the one case to the contrary can easily be distinguished as involving a company in a regulated industry subject to a distinct set of European PIL rules.[145]

European law governing (or potentially governing) automatic recognition and enforcement of schemes of arrangement (and possibly foreign schemes of

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[139]English schemes of arrangement can be used to bind creditors to a restructuring agreement on the basis of assent by 75 percent in the value of the effected claims, whereas many continental European courts would bind dissenters to a restructuring only if 90-95 percent in the value of the debt agrees to the modification. *See* GOODE, *supra* note 17, at 42; *see also infra* note 245. R

[140]PIL conventions are notoriously difficult to put into place. The Hague Conference on PIL ("HCCH") has existed as an ad hoc organization since 1893, and an inter-governmental organization since 1955, but has succeeded only rarely in negotiating PIL conventions that enter into force. For more information on the HCCH, see, e.g., Georges Droz, *A Comment on the Hague Conference on Private International Law*, 57 LAW & CONTEMP. PROBS. 3 (1994). The European Union has had greater success in negotiating and implementing PIL conventions and regulations, but these bind mostly member states in the EU. For a thorough discussion of such law, see PETER STONE, EU PRIVATE INTERNATIONAL LAW (Elgar Euro. L. 3d ed., 2014). In addition, UNCITRAL's Model Law on Cross-Border Insolvency (MLCBI), now implemented in more than 40 countries, could provide important supplemental enforcement. For the text of this MLCBI, see UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation (2014), http://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf.

[141]*See, e.g.,* Bookman, *supra* note 3, at 633–34 (discussing importance of US law on recognition and enforcement of judgments on distinction between "good" and "bad" forum shopping). R

[142]*Codere*, *supra* note 42, at 15 (concluding that "I do not think that either the [EU] Insolvency Regulation or the recast Judgments Regulation could present any obstacle to my making an order."). R

[143]*Id.*

[144]Ultimately, questions of the proper interpretation of the scope of the Brussels and Rome Regulations, as with other European regulations, would be subject to resolution by the CJEU. *See, e.g.,* KOEN LENAERTS, IGNACE MASELIS & KATHLEEN GUTMAN, EU PROCEDURAL LAW ¶ 21.07, at 721 (Oxford Univ. Press 2014).

[145]For discussion of German courts' unwillingness to recognize and enforce the scheme order entered in *Equitable Life Assurance*, especially its limiting facts, see *supra* text accompanying notes 122–123. R

arrangement) has recently been renegotiated. These revisions might evidence a shifting consensus in the forum shopping system for insolvency or restructuring proceedings. Accordingly, the next section focuses in on these changes.

II. SCHEMES AND THE REVISION OF EU LAW

British courts' willingness to open insolvency proceedings brought on the heels of a corporate migration, and their willingness to approve similar foreign schemes of arrangement, has not escaped Brussels' attention. Very recently, the EU "responded" to practitioners' requests that European law address modern insolvency and restructuring practices in its revisions to the EU Insolvency Regulation and proposal for a harmonizing Directive on Preventive Restructuring Frameworks.[146] Despite questions about whether the EU Insolvency Regulation ought to extend to schemes of arrangement, EU negotiations mostly left the *status quo* in place.

A. RECAST EU INSOLVENCY REGULATION.

In revising the EU Insolvency Regulation, the Council and European Parliament expanded its scope by broadening the definition of covered "insolvency proceedings." Despite this expansion, schemes of arrangement are still not listed in Annex A, and as a result, the Recast Insolvency Regulation still does not cover them. The question of whether "foreign" schemes of arrangement ought to be recognized and enforced across Europe is nonetheless implicitly addressed in these revisions, which tackle the problem of forum shopping through several means.

1. *Scope.*

The scope of the original EU Insolvency Regulation was relatively narrow, covering only "collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator."[147] This is a four-part test requiring (i) collective proceedings (ii) pertaining to an insolvent debtor, which entail both (iii) the partial or total divestment of a debtor's property, as well as (iv) "the appointment of a liquidator."[148] Further, two definitional provisions clarify the meaning of the jurisdictional phrase "insolvency proceedings" in the original Insolvency Reg: First, Art. 2 provides that "insolvency proceedings shall mean the collective proceedings referred to in Art. 1(1)." It goes on to state that "these proceedings are listed in Annex A" to the regulation. Annex A lists the "insolvency proceedings" subject to the scope of the regulation for each EU member state. Relating to the UK, Annex A refers to winding up proceedings,, administrations, volun-

[146] Proposed Restructuring Directive, *supra* note 59. R
[147] EU Insolvency Reg., *supra* note 14, at Art. 1(1). R
[148] *Id.*

tary arrangements under the insolvency legislation, bankruptcy or sequestration; it does not refer to schemes of arrangement under the Companies Act. Commentators report that the exclusion of schemes of arrangement from the original EU Insolvency Regulation was intentional.[149]

The Recast EU Insolvency Regulation is ever-so-slightly broader in scope. It continues to provide that it applies to "collective proceedings,"[150] defined as "proceedings which include all or a significant part of a debtor's creditors, provided that, in the latter case, the proceedings do not affect the claims of creditors which are not involved in them."[151] Although the Recast EU Insolvency Regulation continues to refer to collective proceedings relating to insolvency, the whole of its language is broader and very nuanced. In full, it reads as follows:

> 1. This Regulation shall apply to public collective proceedings, including interim proceedings, which are based on laws relating to insolvency and in which, for the purpose of rescue, adjustment of debt, reorganisation or liquidation:
>   a. debtor is totally or partially divested of its assets and an insolvency practitioner is appointed;
>   b. the assets and affairs of a debtor are subject to control or supervision by a court; or
>   c. temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b).
>
> Where the proceedings referred to in this paragraph may be commenced in situations where there is only a likelihood of insolvency, their purpose shall be to avoid the debtor's insolvency or the cessation of the debtor's business activities.

The proceedings referred to in this paragraph are listed in Annex A.[152] While this test has far more than four parts, several aspects of it are important to emphasize when considering the question of whether schemes of arrangements fit within the scope of the Recast EU Insolvency Regulation.

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[149] *See, e.g.*, Baines, *supra* note 78. R
[150] Recast EU Insolvency Reg., *supra* note 56, at Art. 1. R
[151] *Id.* at Art. 2(1).
[152] *Id.* at Art. 1.

While the original covered "collective insolvency proceedings,"[153] the Recast EU Insolvency Regulation covers "collective proceedings . . . relating to insolvency."[154] In one place, these are referred to as "public collective proceedings."[155] Second, these proceedings must have as their purpose "rescue, adjustment of debt, reorganization or liquidation."[156] In addition, Art. 1 specifies the consequences of such proceedings as involving divestment, judicial supervision, or a moratorium on "individual enforcement proceedings."[157] Importantly, subparts (a) through (c) are expressly identified as three alternative consequences to "collective proceedings . . . relating to insolvency," which is to say (a) or (b) or (c), but not necessarily more than one of these consequences.[158] That the phrase "collective proceedings . . . relating to insolvency" is intended to be broader than "collective insolvency proceedings" is also clear from the first of two unnumbered paragraphs at the end of Art. 1, which refers to covered proceedings "commenced in situations where there is only a likelihood of insolvency" and limits the scope of the Recast EU Insolvency Regulation to those with the purpose of "avoid[ing] the debtor's insolvency or the cessation of the debtor's business activities."[159]

Notwithstanding this expansion in scope, the Recast EU Insolvency Regulation continues to tie its scope provision to Annex A, and as a result cannot be viewed as extending to schemes of arrangement.[160] As currently drafted, Annex A does not include schemes of arrangement in the list of UK laws subject to the EU Insolvency Regulation and so they continue to sit outside its scope.[161] Only member states can make the determination as to what to add to the annex.

Moreover (although there is no reason need for a second ground for ratio-

[153] EU Insolvency Reg., *supra* note 14, at Art. 1(1). R

[154] Recast EU Reg., *supra* note 56, at Art. 1. R

[155] *Id.*

[156] *Id.*

[157] *Id.*

[158] *Id.* at Art. 1(a)–(c).

[159] *Id.* at Art. 1, first unnumbered paragraph.

[160] *Id.*at Art. 1, second unnumbered paragraph.

[161] This does not mean that there was no consideration as to whether schemes ought to get included. Indeed, it is clear that the British Insolvency Service sought guidance from industry actors on their preference regarding the list of UK laws that should get set out on Annex A to the Recast EU Insolvency Reg. *See* British Insolvency Service, European Commission Recommendation of 12.3.14 on a new approach to business failure and insolvency (February 2015). Professional associations responded negatively to the idea of expanding Annex A to include schemes, and did so specifically on the grounds that foreign schemes of arrangement would not have been subject to recognition and enforcement if governed by the EU Insolvency Reg. *See* City of London Law Society, Insolvency Law Committee, the Insolvency Lawyers' Association, and the Association of Business Recovery Professionals, Joint Response to Proposed changes to the European Insolvency Regulation: Call for Evidence, Q5 (February 25, 2013), http://www.citysolicitors.org.uk/attachments/article/119/IS-call-for-evidence-on-changes-to-EU-IR-joint-responses-of-ILA-CLLS-R3-25-~.pdf. *See also, e.g.*, Baines & Davies, *supra* note 78. R

nale), schemes of arrangement involve none of the consequences set out in Recast EU Insolvency Regulation, Art. 1(a) through (c), and so do not fit within this expanded definition: as to (a), the company is not divested of any of its assets, nor is an insolvency practitioner appointed; as to (b), neither the assets nor the affairs of the company are subject to the control or supervision of a court; and as to (c), no stay is automatically triggered. The closest that this scope provision comes to covering schemes of arrangement is with Art. 1(b), in that courts are involved in approving creditors' meetings, in assessing whether the requisite number and value of creditors voted in favor of the scheme, and in entering an order sanctioning the arrangement as binding on the company's creditors, even those dissenting from the proposed scheme.

The reach of Art. 1(b) would depend, in large part, on how the phrase "*subject to* control or supervision of a court" is later defined. It would depend, as well, on whether the United Kingdom adopts legislative proposals to strengthen schemes of arrangement and insolvency law more generally.[162] One proposal would, for example, provide for the possibility of a temporary stay pending negotiations on a scheme.[163] These proposals are controversial, especially those that would alter scheme of arrangement procedures.[164] Given the current political situation in the United Kingdom, legislation on schemes of arrangements or any other effort to build up corporate rescue culture seem unlikely to get acted on any time soon, however.[165]

There is also new language added to the Recitals of the Recast EU Insolvency Regulation, which seems indirectly to speak to whether scheme orders ought to get recognized and enforced in continental European courts. Recital (7), identically to its predecessor, connects the Recast EU Insolvency Regulation to the EU Brussels Regulation on recognition and enforcement of judgments on civil and commercial matters.[166] This paragraph goes on, however, to note that the two regulations "should as much as possible" be interpreted to "avoid regulatory loopholes between the two instruments." The Recital also states that "the mere fact that a national procedure is not listed in Annex

[162]British Insolvency Service, A Review of the Corporate Insolvency Framework: A Consultation on Options for Reform (May 2016), http://www.cicm.com/wp-content/uploads/2016/06/A_Review_of_the_Corporate_Insolvency_Framework.pdf.

[163]*Id.* at 11, ¶ 7.

[164]*See, e.g.*, City of London Law Society, Insolvency Law Committee, Response to Insolvency Service Consultation, *A Review of the Corporate Insolvency Framework – A consultation on options for reform* (July 5, 2016), http://www.citysolicitors.org.uk/attachments/article/119/CLLS%20Response%20to%20Corporate%20Insolvency%20Framework%20Consultation%20-%2005%2007%2016.pdf.

[165]The results of the snap election called by Prime Minister May have called into question the direction and likely success of Brexit negotiations. The degree to which the UK's exit from the EU will favor the UK is even less clear than it already had been.

[166]Recast EU Insolvency Reg., *supra* note 56, at Rec. (7). This language is contrary to commentators' conclusions on how the original EU Insolvency Reg. should be read with Brussels I or II. *See* Payne, *supra* note 35. R
R

A to this Regulation should not imply that it is covered by. . ." the Brussels Regulation.[167]

The language is especially interesting as it relates to the question of whether British courts' scheme orders should be viewed as governed by the Brussels Regulation. Opinion letters submitted to English courts by European law experts had, in the past, justified their conclusion that the Brussels Regulation would govern orders sanctioning a scheme of arrangement under English law in part on the grounds that scheme orders clearly sat outside the scope of the Insolvency Regulation. Since "the scope of [the Brussels] Regulation must cover all the main civil and commercial matters apart from certain well-defined [exclusions],"[168] the view was that the Brussels Regulation must include scheme orders since they are so clearly excluded from the EU Insolvency Regulation. But now the Recitals to the Recast EU Insolvency Regulation provide that gaps can exist between it and the Brussels Regulation, despite jurists' presumptions to the contrary.

2. *Forum Shopping.*

So far this discussion has been limited to the scope of the Recast EU Insolvency Regulation, finding that its expanding scope does not yet extend to foreign schemes of arrangements. In several ways, however, the Recast EU Insolvency Regulation speaks more directly to the issue of forum shopping and, thus, indirectly to the question of whether British courts' scheme orders ought not to be recognized under any other European law.

First, the Recast EU Insolvency Regulation more expressly defines the applicable jurisdictional standard.[169] Among other clarifications, the presumption that a debtor's COMI, or "centre of main interests," is situated in the debtor's place of registration will now apply only if the registered office has not been moved to another member state in the three months before an application to commence insolvency proceedings has been brought.[170] EU drafters made relatively clear that inclusion of this three-month venue reachback period constitutes an effort to curb corporate migrations on the eve of an insolvency filing. Recital (5) to the revised EU Insolvency Regulation speaks to the necessity of avoiding "incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the general body of credi-

[167]*Id.* at Rec. (7). Confusingly, however, Recital (9) refers to Annex A as an exhaustive list. *Id.* at Rec. (9).

[168]Brussels I, at Rec. (7); Brussels II, at Rec. (10).

[169]Recast EU Insolvency Regulation, *supra* note 56, Art. 3. R

[170]Recast EU Insolvency Reg., *supra* note 56, at Art. 3(1). This provision also explicitly incorporates the language, previously found in a Recital to the original EU Insolvency Reg., that "the centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties." *Id.* R

tors (forum shopping)."[171] Moreover, a Commission Staff Report prepared in 2012 identifies forum shopping as among the problems sought to be redressed by revisions to the EU Insolvency Regulation.[172]

Despite this explicit limit on COMI shifts, condemnation of "forum shopping" is more qualified than complete in the revised EU Insolvency Regulation. The 2012 Commission Staff Report, for example, refers to "abusive COMI-shopping" and companies relocating "specifically with the aim of benefitting from a more favourable foreign insolvency regime," but also argues that "not all such relocation can be considered abusive," particularly in light of CJEU case law accepting such moves "as a legitimate exercise of the freedom of establishment."[173] The Recitals to the Recast EU Insolvency Regulation speak of forum shopping as an effort to "obtain a more favourable legal position" for the debtor that is "detriment[al to] the general body of creditors.[174] Despite its emphasis on "picking and choosing between laws" as the epitome of forum shopping, the Recast EU Insolvency Regulation is also careful to define forum shopping as problematically working to the "detriment of the general body of creditors."[175] Elsewhere, the Recast EU Insolvency Regulation describes "a number of safeguards aimed at preventing fraudulent or abusive forum shopping,"[176] without distinguishing between "fraudulent" and "abusive" forum shopping.[177] For example, Recital 30 provides the rules permitting a rebuttal of the presumption that a debtor's place of registration is its COMI, and encourages rebuttal, for example, "where it can be established that the principal reason for moving was to file for insolvency proceedings in the new jurisdiction and where such filing would materially impair the interests of creditors whose dealings with the debtor took place prior to the relocation."[178] Recital 31 similarly talks about a new rule "with the same objective of preventing fraudulent or abusive forum shopping."[179]

[171]Recast EU Insolvency Reg., *supra* note 56, at Rec. (5). R

[172]Commission Staff Working Document, Impact Assessment accompanying the document Revision of Regulation (EC) No. 1346/2000 on insolvency proceedings, SWD (2012) 416 final (Dec. 12, 2012), at 20-22, ¶ 3.4.1.2 [hereinafter "Staff Report"], http://ec.europa.eu/justice/civil/files/insolvency-ia_en.pdf. .

[173]*Id.* at 20 ("There are several cases where COMI relocation to the UK allowed the successful restructuring of a company because of the flexibility which English insolvency law grants companies in this respect.").

[174]Recast EU Insolvency Reg., *supra* note 56, at Rec. (5). R

[175]*Id.*

[176]*Id.* at Rec. (29).

[177]For an effort to distinguish between fraudulent and abusive forum shopping in this context, see, e.g., Eidenmuller, *Abuse of Law*, *supra* note 25. R

[178]Recast EU Insolvency Reg., *supra* note 56, at Rec. (30). R

[179]*Id.* at Rec. (31) (referring to Art. 3(1), ¶ 2, which permits rebutting the presumption that, in the case of a company or legal person, the place of registration is its COMI, but only "if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opining of insolvency proceedings.").

B. Proposed EU Restructuring Directive

Parliamentary proposals to expand and alter the reach of schemes of arrangement are consistent, as well, with European efforts to promote pre-insolvency restructuring in the domestic laws of each of the EU member states. Late November 2016, the European Commission finalized a proposal for a EU Directive on "preventative restructuring frameworks,"[180] which looks to "complement" the Recast EU Insolvency Regulation.[181] Because the Recast EU Insolvency Regulation "covers many types of insolvency procedures, including preventive/pre-insolvency procedures," but does not obligate member states either "to introduce specific types of procedures or to ensure that their procedures are effective in promoting preventive restructuring and second chance,"[182] the Restructuring Directive requires member states:

> [To] ensure that, where there is likelihood of insolvency, debtors in financial difficulty have access to an effective preventive restructuring framework that enables them to restructure their debts or business, restore their viability and avoid insolvency.[183]

It also looks to set "minimum principles of effectiveness" for such procedures,[184] by requiring that debtors accessing them "remain totally or at least partially in control of their assets and day-to-day operation of the business,"[185] by providing for a stay of individual enforcement actions while debtors are renegotiating a restructuring plan with their creditors,[186] and specifying aspects negotiations over and confirmation of the plan and its effects.[187]

A full discussion of the details of the proposed Directive can be left for another day.[188] It is sufficient to remark here that the Directive expressly refers to the World Bank Doing Business Index 2016,[189] which in turn has

[180]Proposal for Restructuring Directive, *supra* note 59. R
[181]*Id.* at 9.
[182]*Id.*
[183]*Id.* at Art. 4(1).
[184]*Id.* at 9.
[185]*Id.* at Art. 5(1)
[186]*Id.* at Art. 6; *see also id.* at Art. 7.
[187]*Id.* at Arts. 8–18.
[188]For commendatory discussing the proposed Restructuring Directive in detail, see Horst Eidenmüller, *Contracting for a European Insolvency Regime*, 16 Eur. Bus. Org. L. Rev. 273 (2017) [hereinafter "Eidenmüller, *Contracting for Insolvency*"]; Horst Eidenmüller & Kristen van Zwieten, *Restructuring the European Business Enterprise: the European Commission's Recommendation on a New Approach to Business Failure and Insolvency*, 16 Eur. Bus. Org. L. Rev. 625 (2015); Kristen van Zwieten, *Restructuring Law: recommendations from the European Commission,* EBRD: Law In Transition Online, at 2 (2014), http://www.ebrd.com/downloads/research/law/lit114e.pdf.
[189]For discussion of the World Bank Doing Business Index, see World Bank, About Doing Business

been influenced by the work of the UN's Commission on International Trade Law (UNCITRAL).[190] The World Bank and UNCITRAL proposals more closely resemble US chapter 11 than UK schemes of arrangement. The EU Restructuring Directive proposal draws on both of these international proposals, and as a result, it bears closer resemblance to US reorganization law than UK schemes of arrangement. However, there are both important differences between the Directive and US chapter 11 and important similarities between it and UK schemes, especially if they were revised as set out in pending proposals.

Whether the proposed Directive will get finalized in its current format or at all is impossible to predict. Within Europe, the proposal has prompted criticism.[191] The debate on the Directive will be interesting to watch, but it is unlikely to be a debate that will involve much British participation given the Brexit decision.

C. Reading Tea Leaves?

Read together, the pre-Brexit revision of the EU Insolvency Regulation coupled with the proposed Restructuring Directive provide less than a full embrace of foreign scheme of arrangement practices, and yet not an outright EU rejection of this forum shopping system. Although Annex A to the Recast EU Insolvency Regulation remains free of reference to any scheme of arrangement, its Recital 7 may make it just a little bit harder for commentators to conclude that the Brussels or Rome Regulations ensure recognition and thus for British courts to sanction scheme orders as sufficiently "effective." Mostly, the revisions leave the question of forum shopping to the opening court, a decision that retains the *status quo* although it provides litigators new language to rely on in future disputes.

This highly negotiated result might have been intended by EU member states to represent an interim resolution, pending full implementation of the EU Restructuring Directive and the next scheduled revision of the EU Insolvency Regulation. But the referendum on Brexit ensured that this incremen-

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(2017), http://www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Annual-Reports/English/DB17-Chapters/DB17-About-Doing-Business.pdf. For more on the coordination between the insolvency related initiatives of the World Bank and UNCITRAL, see Susan Block-Lieb & Terence C. Halliday, Global Lawmakers: International Organizations and the Crafting of World Markets (Cambridge Univ. Press 2017).

[190] In 2004, UNCITRAL promulgated its Legislative Guide on Insolvency Laws and thereafter supplemented it with additional recommendations on the insolvency treatment of enterprise groups (2010) and directors' obligation in the period approaching insolvency (2013). *See*, Legislative Guide on Insolvency Law (Parts I – IV), UNCITRAL (2004, 2010 and 2013), http://www.uncitral.org/uncitral/uncitral_texts/insolvency.html.

[191] *See, e.g.*, Eidenmüller, Contracting for Insolvency, *supra* note 188; Eidenmüller & van Zwieten, *supra* note 188. R
R

tal approach would get re-negotiated less than two years after the Recast EU Insolvency Regulation entered into effect in June 2017.

III. THE EFFECTS OF BREXIT ON FOREIGN SCHEMES OF ARRANGEMENT

In March 2017, Theresa May, the British Prime Minister, triggered Art. 50 and ensured that the United Kingdom would leave the European Union within two years.[192] The regulatory implications of this Brexit are mind-boggling. The UK's exit from the EU puts into question thousands of regulations and directives.[193]

A. Applicable EU Law in the Gap Between the Referendum and Brexit

While the very complexity of Brexit creates enormous uncertainty, several things are perfectly clear about EU law on insolvency and restructuring law. Until March 2019, the UK and all other EU countries except Demark are parties to the Recast EU Insolvency Regulation. Regardless of Brexit, the original EU Insolvency Regulation was repealed and the Recast EU Insolvency Regulation became effective, as of late June 2017. The European Commission proposed its Directive on Preventive Restructuring Frameworks in late November 2016. The EU Council and Parliament have not finalized the proposal. Whether or not the Directive will get finalized, its effects are unlikely to be felt for some time, since by its terms the Directive does not require member states to adopt legislation to implement its terms until two years after it enters into force.

It is also clear that schemes of arrangement as currently configured under the 2006 Companies Act sit outside the Recast EU Insolvency Regulation. Whether recognition and enforcement of scheme orders are governed by either the Brussels or Rome Regulations is not settled, but the working presumption that one or both of these regulations requires enforcement of orders sanctioning schemes of arrangement became less clear in late June 2017 when the recitals in the Recast EU Insolvency Regulation went into effect. In the past, it had been assumed that where the Insolvency Regulation left off the Brussels Regulation would fill in, and as a result no orders or judgments entered in a civil or commercial context would be excluded from those entitled to pan-European recognition and enforcement. Language in the recitals to

[192] It is less clear whether the UK will also exit the European Economic Area (EEA), and whether it might join the European Free Trade Area (EFTA). If it remains in the EEA, or joins the EFTA, there is some possibility that the Directive on Preventive Restructuring Frameworks would continue to govern the UK, even after Brexit, but even this result is subject to contention. *See, e.g.*, Dickinson, *supra* note 57. R

[193] *Id.* This article addresses only those regulations and directives relating to financial restructuring through schemes of arrangement, considerably limiting the scope of this discussion of the effects of Brexit.

Recast EU Insolvency Regulation raises questions as to that common-sense approach. Although the terms of Brexit might resolve this question, resolution seems unlikely given the current pace of negotiations.

Finally, it is also clear that Brexit will mean that, within two years, current EU law will not govern recognition and enforcement of newly commenced schemes of arrangement under English law since the Brussels and Rome Regulations would no longer bind the UK to EU member states, and vice versa.[194] There has been some contention that the Brussels Convention, on which both Brussels Regulations were based, would continue to bind the UK,[195] even after Brexit.[196] Others argue that neither the Brussels nor Rome Conventions will bind the UK following Brexit.[197] But by virtue of later Protocols, parties bound to the conventions have also agreed that disputes under them are subject to review by the European Union Court of Justice. "The UK Prime Minister has said that she does not want to accept the jurisdiction of the EU Court of Justice and it is difficult to see how the [Brussels or Rome Regulations] can work without that."[198] Thus, unless the UK is willing (and allowed) to at least partially submit to ECJ jurisdiction, Brexit will likely result in the UK's withdrawal from the conventions.[199]

B. Post-Brexit Solutions?

Could the UK reproduce and replace the Brussels and Rome regulations

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[194]This is for the simple reason that regulations bind EU member states, and not others. When the UK is no longer subject to the Brussels Regulations, EU law will no longer require automatic recognition of any civil or commercial judgment issued by a British court, not just those pertaining to schemes of arrangement. After Brexit, the Recast EU Insolvency Regulation also will no longer bind British courts. The effect of this on insolvency practice in the UK will be grave, but it may have no effect on recognition and enforcement of schemes of arrangement since these arrangements sit outside the scope of the EU Insolvency Regulation. For more extensive discussion of the effects of Brexit on European *insolvency* practices (distinct from the *restructuring or pre-insolvency* practices discussed in this article), *see* Susan Block-Lieb, *The UK and EU Cross-Border Insolvency Recognition: From Empire to Europe to "Going It Alone,"* 40 Ford. J. Int'l L. 1373(2017).

[195]*See* Brussels Convention, *supra* note 96. R

[196]*See, e.g.*, Gerard Rothschild, *Jurisdiction and Brexit: Back to the Brussels Convention by default?*, Brick Court Chambers (July 2016), https://brexit.law/2016/07/08/jurisdiction-and-brexit-back-to-the-brussels-convention-by-default/; *Jurisdiction and Enforcement of Judgments Post-Brexit: State of Play*, Stibbe (Mar. 29, 2017), https://www.stibbe.com/en/news/2017/march/jurisdiction-and-enforcement-of-judgments-post-brexit-state-of-play.

[197]Gisela Ruehl, *Brexit Negotiations Series, 'The Effect of Brexit on the Resolution of International Disputes – Choice of Law and Jurisdiction in Civil and Commercial Matters'*, Univ. of Oxford (April 13, 2017), https://www.law.ox.ac.uk/business-law-blog/blog/2017/04/brexit-negotiations-series-%E2%80%98-effect-brexit-resolution-international.

[198]Personal correspondence with Gabriel Moss QC (on file with the author).

[199]Recently, suggestions have emerged to create some other court resembling the European Court of Justice to which the UK would agree to be bound. Whether this might be accomplished within the requisite two-year Brexit period, or at all, certainly remains to be seen. *See* UK Government, Enforcement and Dispute Resolution: A Future Partnership Paper, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf.

or conventions with UK domestic law in a way that preserves its pan-European restructuring practices? Here, there is far less clarity in this possibility. There is discussion of a Great Repeal Bill, which promises to domesticate EU law as the law of the United Kingdom with "one simple piece of legislation."[200] Prime Minister Theresa May has remarked that the effect of the Great Repeal Bill "would mean that the UK is bound, at least on day one, by the Regulations and the legislation implementing the Directives,"[201] but because the Great Repeal Bill could only succeed in binding the UK to EU law as a matter of its domestic law, this would only be a one-way obligation. Domestic UK law, no matter how it is phrased, would not bind the other 26 members of the EU to reciprocate.[202] The Great Repeal Bill cannot replicate EU PIL rules such as the Brussels or Rome Regulations.[203] That would require international agreement of some sort.

Alternatively, it might be possible for the UK to negotiate one or more bilateral or multilateral treaties with the member states of the EU, which would resemble the Brussels and Rome Regulations and extend the application of the EU Insolvency Regulation. The Council of Europe, whose membership is not limited to the EU member states, would be an obvious source for a multilateral treaty.[204] The Hague Conference of Private International Law is another.[205] The Hague Conference has already promulgated one similar treaty on enforceable choice of law clauses and the UK could separately join in that.[206] A broader convention on the recognition and enforcement of civil and commercial judgments is still being developed at The Hague.[207]

[200]Parliament, United Kingdom, European Union (Withdrawal) Bill 2017-19. To track progress on the bill, see http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal.html.

[201]Moss, *supra* note 198. R

[202]*Id.* Thus, as far as cross-border recognition of insolvency proceedings, the effects of the Great Repeal Bill may not differ much from that of existing British law pertaining to the recognition of non-European insolvency proceedings – namely, the 2006 Insolvency Regulation implementing UNCITRAL's Model Law on Cross-Border Insolvency. Section 426 of the 1986 Insolvency Act may provide for greater cross-border coordination, but mostly as applies to former Commonwealth countries.

[203]Nor could it replicate the EU Insolvency Regulation.

[204]The Council of Europe was created in the wake of World War II, initially with the goal of reconstructing and reorganizing Europe's economies but soon became involved in many important aspects of international law, most notably in human rights. *See* BIRTE WASSNBERG, HISTORY OF THE COUNCIL OF EUROPE 15 (2013). The Council of Europe is currently comprised of forty-seven countries of Europe, twenty-eight of which are members of the European Union. Id. at 16. While similar in name, the European Council is distinct from the Council of Europe, as the European Council sets the European Union's policy agenda. *See* In Focus, The European Council, http://www.consilium.europa.eu/en/european-council/.

[205]For discussion of The Hague Conference on Private International Law, see *supra* note 140. R

[206]Convention on Choice of Court Agreements, Hague Conference on Private International Law, June 30, 2005, https://assets.hcch.net/docs/510bc238-7318-47ed-9ed5-e0972510d98b.pdf. Because the EU is a party to that treaty, on Brexit, the UK would need separately to accede to the terms of The Hague's Choice of Court Convention to remain a party to it.

[207]For discussion of work on The Hague Convention on Recognition and Enforcement of Civil and Commercial Judgments, see *supra* note 140. R

Given how long the Hague Conference has been negotiating these treaties, however, it would seem foolhardy to presume that negotiations could be concluded in the next two years.

Moreover, no matter the time line, successful negotiation to replicate these regulations cannot be presumed, even if the desirability of their terms is accepted on face value. First, as written and conceived, enforcement of these regulations depends on each member state accepting the jurisdiction of the CJEU.[208] As with the Brussels Convention, the jurisdiction of the CJEU over disputes under these regulations is both the key to the workings of these regulations and the single biggest factor militating against comfort that the UK would agree to be bound to something resembling them post-Brexit. Second, the political situation within Europe may favor second-best solutions in negotiations with the UK regarding the terms of a Brexit so as to signal to other member states that exiting the EU comes with substantial costs. This second-best strategy has been signaled; whether EU diplomats stick to their guns on this issue is an open question, of course.

In the absence of newly negotiated treaties on PIL, the "effectiveness" of foreign schemes of arrangement might still be assured as a matter of the domestic PIL law applicable to the affected foreign company and its creditors.[209] There is nothing about the jurisprudential requirement of "effectiveness" that requires reliance on a convention. Indeed, British courts rely on domestic law when sanctioning foreign schemes of arrangement that sit outside the scope of EU PIL.[210] Reliance on domestic rather than EU PIL law would complicate enforcement of schemes of arrangement, especially where the company and its creditors are located in different countries, but it would not spell the end of foreign scheme of arrangements. Enough money is at stake with these schemes of arrangement that laborious country-by-country analysis is plausible.

In addition, the UK might look west across the Pond for recognition and enforcement assistance. US chapter 15 has developed a consistent practice of recognizing British schemes of arrangement.[211] US bankruptcy courts are likely to continue to recognize schemes of arrangement even after Brexit. But, depending on the facts of the restructuring, US recognition and enforcement may not, standing alone, be sufficient to assure British courts of the effectiveness of a foreign scheme of arrangement involving a EU-registered company.

[208]For discussion of the Brussels Regulations, see *supra* note 102. For discussion of the Rome Regulation, see *supra* note 115. R R

[209]The reference to the "effectiveness" of foreign schemes of arrangement is intended to point to the jurisprudential requirements discussed in the text associated with note 93–127, *supra*. R

[210]*See* Payne, *supra* note 41. R

[211]*See, e.g.*, Eidenmüller, *supra* note 78. R

The UK's previous implementation of UNICITRAL's Model Law on Cross-Border Insolvency (MLCBI) provides little assurance that European courts would recognize British schemes of arrangement.[212] The scope of the MLCBI is broader than the original EU Insolvency Regulation, in that to qualify as a foreign proceeding under this Model Law, the proceeding need only be "pursuant to a law relating to insolvency." Still, the UK's implementation of the MLCBI would not resolve questions related to the enforceability of scheme orders against dissenting foreign creditors.[213] As with any other domestic law solutions to the problem of recognition, outbound enforcement cannot be assured. Whether by means of a Great Repeal Bill or existing UK law providing for recognition of "foreign" insolvency proceedings, British courts could coordinate with and assist incoming insolvency proceedings commenced in Europe and seeking recognition from British courts. However, these laws would not provide assurance of coordination on outgoing cases that have been commenced in British courts and that seek recognition and enforcement across Europe.

This sort of enforcement assurance would be improved if UNICTRAL's MLCBI sweeps across Europe. To date, only a handful of EU member states have enacted legislation to implement the UNCITRAL texts.[214] Some EU member states have not enacted legislation to implement MLCBI, such as Germany and Croatia, but nonetheless have adopted domestic rules of insolvency recognition that mimic or exceed the requirements of the UNCITRAL text.[215] Others, like France, impose greater formality.[216] None of these domestic PIL rules, however, provide recognition, either automatic or assured, in the same way as under the Brussels and Rome Regulations.[217] Moreover, British case law limits the effect of their Model Law implement-

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[212]*See* Cross-Border Insolvency Regulation 2006, SI 2006 No. 1030, http://www.legislation.gov.uk/uksi/2006/1030/pdfs/uksi_20061030_en.pdf.

[213]*See, e.g.*, Graham Bushby & Ian G. Williams, *Inside the "Brexit Bubble": What's Next for the U.K.?*, XXXV, No. 9 A.B.I. J. (Sept. 1, 2016) ("The EC Reg gives automatic recognition to U.K. insolvency proceedings throughout the EU, and without access to it, reliance will have to be placed on each member state's own laws, as was the case in the past."). *See also* Fabio Marelli, *What will be the impact of Brexit on insolvency proceedings?*, LEXOLOGY (Oct. 5, 2016), https://www.lexology.com/library/detail.aspx?g=7828bfb8-feaf-4a7e-97cb-cc5664f36e47; *Brexit: Restructuring and Insolvency*, HERBERT SMITH FREEHILS (Feb. 16, 2017), https://www.herbertsmithfreehills.com/latest-thinking/brexit-restructuring-and-insolvency.

[214]Putting aside the UK, legislation to implement the MLCBI has been enacted by EU member states: Greece, Poland, Romania and Slovenia, Montenegro has enacted legislation to implement the MLCBI, but is still in line to become a member of the EU. For a list of the countries that have enacted legislation to implement UNCITRAL's Model Law on Cross-Border Insolvency, see http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html.

[215]*See, e.g.*, PHILIP R. WOOD, PRINCIPLES OF INTERNATIONAL INSOLVENCY, at para. 28-067–68 (Sweet & Maxwell ed., 2d ed. 2007).

[216]*Id.* at ¶ 28-066.

[217]For a discussion on the exclusion of schemes of arrangement from the original and Recast EU Insolvency Regulations, see *supra* text accompanying notes 147 & 180. R

ing legislation (the 2006 Insolvency Regulation) removing any implication for the recognition and enforcement of insolvency related judgments as applied in the UK.[218] European courts might similarly construe MLCBI. While UNICTRAL has been at work in patching this hole for several years and seems poised to promulgate its Model Law on the Recognition and Enforcement of Insolvency-Related Judgments,[219] enactment of legislation to implement this other Model Law across Europe cannot be guaranteed. Such enactment would take considerable time and, in any event, would not assure recognition of scheme orders as the proposed Model Law on the Insolvency-Related Judgments is currently drafted. This most recent UNCITRAL draft model law might yet be amended to extend to the recognition of scheme orders, of course; it is not final until UNCITRAL's governing Commission says it is final and the General Assembly ratifies their recommendation. And in any event, implementing countries might tweak the provisions of the Model Law on Insolvency-Related Judgment to extend to scheme orders. But the discretion of domestic legislatures to re-work aspects of any model law in their implementing legislation could work the other way, and ensure that scheme orders are not covered. UNCITRAL cannot control this aspect of model laws, which is an attribute considered either to be a bug or a feature of soft law.

In sum, several paths have emerged. Brexit negotiations might result in a PIL treaty (or a series of PIL treaties) between EU member states and the UK replicating those currently in effect. UK Parliament could enact a Great Repeal Act, which, with a single pen stroke, would replicate the European law in existence before Brexit as domestic UK law after Brexit. Or the UK might do neither, leaving existing legislation implementing the UNCITRAL Model Law on Cross-Border Insolvency and inviting subsequent implementation of UNCITRAL's still draft Model Law on the Recognition and Enforcement of Insolvency-Related Judgments.[220]

Of these three possibilities, treaties would accomplish the greatest uniformity and predictability, but are notoriously time-consuming to negotiate.

[218]Rubin v. Eurofinance SA; New Cap Reinsurance Corp. v. Grant [2012] UKSC 46; [2013] 1 AC 236.

[219]*See* UNCITRAL Recognition and Enforcement of Insolvency-Related Judgments: Draft Model Law, UN Doc. No. A/AC.9/WG.V/WP.150 (September 19, 2017), https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/066/58/PDF/V1706658.pdf?OpenElement.

[220]The UK enacted their 2006 Insolvency Regulations to implement UNCITRAL's MLCBI. *See supra* note 212. Some EU member states have enacted similar implementing legislation. *See supra* note 214. Other EU member states might follow this lead and enact something resembling the MLCBI. Whether any country will enact legislation implementing the draft MLERIRJ is at this point pure speculation, but since the UK Supreme Court's decision in *Ruben,* prompted UNCITRAL's initiative in the first instance, it would be reasonable to conclude that Parliament may eventually enact at least some aspects of that model law, as well. *See Rubin*, *supra* note 218,

The hope for multilateral treaties seems to be no more than a moon shot. Unilateral domestic legislation enacted by Parliament is more achievable, but would be unlikely to accomplish much in the way of recognition and enforcement of judgments throughout Europe. That leaves reliance on the domestic PIL rules in individual countries across continental Europe. These might be sufficient to preserve the forum shopping system currently in place, but domestic PIL varies enormously, even within Europe. Uniformity of result may be necessary, at least pragmatically, for schemes involving multinational corporations doing business in a number of European countries, but domestic legislation would not provide that uniformity. Reciprocal enactment by some or all of such member states of one or both UNCITRAL Model Laws on these topics might work after Brexit, at least in this context, but it might takes years for this legislation to be widely enough implemented across Europe. Moreover, domestic PIL legislation, even if patterned after UNCITRAL's Model Law on Cross-Border Insolvency, would not involve automatic recognition of insolvency proceedings, might not extend to the recognition and enforcement of judgments entered in such proceedings, might not extend to recognition of schemes of arrangement, and, in any event, would not be subject to enforcement by any transnational court like the ECJ's enforcement of the EU Insolvency Regulation and other EU regulations.

In the meantime, the EU Restructuring Directive might enter into force, causing members states to enact their own national laws resembling something like the English scheme of arrangement or US chapter 11. In that event, the UK could lose the substantive law edge on which its forum shopping system depends in the context of schemes of arrangement. With neither extra-territorial enforcement nor distinct substantive law, all that would remain of this forum shopping system would be ease in gaining access to the forum, and that might not be enough.

Some would say that this result is not overly problematic, but that depends on whether this has been a good or bad forum shopping. To make this assessment, I turn to the political economy of foreign schemes of arrangement in the next section.

IV. THE POLITICAL ECONOMY OF FOREIGN SCHEMES OF ARRANGEMENT

So far, this article has analyzed arguments on whether foreign schemes of arrangement could and should survive Brexit in terms of arcane issues of PIL rules – that is, the choice between renegotiation of the treaties and regulations governing recognition of insolvency and pre-insolvency proceedings or learning to live with purely domestic legislation on this topic.[221] In this section I argue, however, that negotiations about the desirability of the persistence of this forum shopping system are not purely legal, and should not be viewed solely in terms of the law.[222] They should be addressed with the larger forum shopping system in mind.

The forum shopping system for UK centrality in corporate restructuring practices, at least within Europe, raises several economic issues: some macro-economic; others more micro-economic in their focus. The macro-economic justification for recognition of scheme orders starts generally with the case for recognizing judicial orders entered by national courts within the EU, then distinguishes orders entered in insolvency and insolvency-related proceedings from the general case, and concludes by differentiating insolvency from restructuring proceedings, not just on the basis of the type of laws that are triggered, but also on the source of lending involving. The political economy of bank lending versus funding provided through the capital markets is contrasted. Competition for trade in legal services is also mentioned.

A. Recognition and Jurisdiction in a "Single Market"

Since its inception, the EU has sought to create a "single market" in Europe, which currently is understood to involve not only free trade in goods, but also free movement in services, capital, and people (the so-called "four freedoms"). The four freedoms are enabled by assurances set out in EU law – multilateral treaties binding all EU member states, but also EU regulations and directives. One such agreement involves "measures relating to judicial cooperation in civil matters" on the grounds that these measures "are necessary for the sound operation of the internal market."[223] Diplomats have long understood that if recognition of judgments entered by European courts was to be automatic throughout Europe, then agreement on the proper basis for an assertion of authority to enter such a judgment was necessary. Otherwise, forum shopping would strain commitments to automatic recognition.[224]

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[221]For similar arguments, see Block-Lieb, *supra* note 194. R

[222]*See, e.g.*, *Brexit: initial considerations in the restructuring and insolvency market*, Clifford Chance (July 2016), http://www.lma.eu.com/application/files/2514/6900/7940/Brexit_initialconsiderations_in_restructuring_and_insolvency_market.pdf (noting that, going forward, "any reasoned analysis for cross border deals will inevitably depend on the outcome of the exit negotiations, which may be swayed by matters wholly unrelated to insolvency law.").

[223]Brussels I, *supra* note 102, at Rec. 1. *See also* Brussels II, *supra* note 102, at Rec. 3. These Regulations, and the Brussels Convention that preceded them, *see supra* note 96, are envisioned in the Treaty of Rome, which initiated the notion of a unified Europe. *See* Treaty Establishing the European Economic Community Art. 220, Mar. 25, 1957 (providing that member states "shall, in so far as necessary, engage in negotiations with each other with a view to ensuring for the benefit of their nationals . . . the simplification of the formalities governing the reciprocal recognition and execution of judicial decisions and of arbitral awards."). R R

[224]For one discussion of the debates that preceded finalization of the Brussels Convention, see Kurt H.

Forum shopping exists where jurisdictional rules are malleable enough that plaintiffs enjoy choices and where plaintiffs make those choices with strategic ends in mind.[225] The jurisdictional limits set out in the Brussels Regulations and in the EU Insolvency Regulation (whether in its original form or recast) were drafted to limit jurisdictional options and to clarify, for every EU member state, the boundaries of these options. Although crafted in terms of law, the jurisdictional provisions of the Brussels and Insolvency Regulations are, thus, premised on political agreement on limitations pertaining to economic incentives ever-present in litigation and litigation strategy.[226] Recitals in both expressly warn against forum shopping as contrary to the "mutual trust" on which European Union is premised.[227]

Cross-border recognition of judgments, and of insolvency and restructuring practices, has long been identified as critically important to the development of a single economic market within Europe. But the shift toward a financial market economy within Europe put pressure on cross-border recognition and enforcement within the EU.

B. Recognition Across National Borders: The Bank-Centered Story

Recognition of civil judgments and recognition of insolvency proceedings are both important to the creation and maintenance of a "single market" within Europe, but recently the recognition of insolvency proceedings has taken on an additional significance. The global financial crisis that commenced in 2008, and that we hope finally to have seen the last of, reinforced for many the connections between insolvency and restructuring law and policy, on one hand, and the prevention and resolution of financial crises, on the other.

It is now widely agreed that modern corporate insolvency laws assist in

Nadelmann, *Jurisdictionally Improper Fora in Treaties on Recognition of Judgments: The Common Market Draft*, 67 Colum. L. Rev. 995 (1967). The economic and political union of interests represented by the single European market is premised on "mutual trust," but this is a trust that gets verified in multiple ways. In the Brussels Convention, "mutual trust" was coupled with an agreement on the jurisdictional limits of judgments subject to such recognition and enforcement. *Id.* at 998 (distinguishing between a simple "recognition" treaty and a "double convention" joining agreement on recognition with agreement on jurisdictional limits on the judgments entitled to recognition). The so-called "insolvency carve-out" from the initial Brussels Convention (which persists in the Brussels Regulations that followed) was premised, not on the unimportance of insolvency laws to the existence of a single market, but rather on the difficulties of articulating the distinct jurisdictional agreements that would be needed in any European convention on the cross-border recognition of insolvency proceedings. *See* EU Insolvency Reg, *supra* note 14, at Rec. 16; *see also* Ian F. Fletcher, Insolvency In Private International Law at 10 (Oxford Univ. Press ed., 1999). R

[225] *See, e.g.*, Weinberg, *supra* note 55. R

[226] The political economy of combining jurisdictional rules with agreement on recognition and enforcement of judgments is longstanding and not unique to Europe. *See, e.g.*, Nadelmann, *supra* note 224 ("All legal systems endeavor to protect defendants from suit at an improper forum."). R

[227] *See supra* note 224. R

resolving financial crises because they assist in resolving non-performing corporate loans. In part, this is because cleaning up corporate balance sheets helps in turn to clean up bank balance sheets.[228] This economic argument has been accepted by the G-22,[229] all the international financial institutions (including both the IMF[230] and World Bank[231]), and lawmaking international organizations (such as UNICTRAL).[232] The EU has also adopted this argument in revising their Insolvency Regulation,[233] and proposing to adopt the Directive on Restructuring Frameworks.[234]

Although European *law* draws a clear line between recognition of insolvency proceedings, on one hand, and restructuring agreements, on the other, the *economic* justification for their cross-border recognition is fully in alignment. There is wide acceptance of the policy claim that corporate restructuring arrangements help prevent and resolve financial crises as much as corporate insolvency laws aimed at reorganization.[235] Indeed, the proposed EU Directive on Restructuring Frameworks accepts the policy importance of enabling pre-insolvency proceedings and contractual restructuring of financial arrangements at risk of default and, if finalized and implemented, would move Europe closer to convergence on this topic.[236]

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[228]*See, e.g.*, Block-Lieb & Halliday, Global Lawmakers, *supra* note 189; Susan Block-Lieb & Terence C. Halliday, *The Macropolitics and Microeconomics of Global Financial Crises: Bankruptcy as a Point of Reference* (forthcoming in Sovereign Insolvency: Possible Legal Solutions (Jasna Garasic & Nadia Bodiroga-Vukobrat eds.) (accepted for publication in Springer Press)). R

[229]G-22, Report of the Working Group on Strengthening Financial Systems (Oct. 1998), https://www.imf.org/external/np/g22/sfsrep.pdf.

[230]IMF, *Comments on the Reports on the International Financial Architecture* (Aug. 1999), http://www.imf.org/external/np/g22/comments/.

[231]World Bank, Staff Information Note, International Financial Architecture: An Update on World Bank Activities (April 27, 2001), http://nautilus.org/wp-content/uploads/2015/07/IFARPT4_01-1.pdf.

[232]UNCITRAL, Legislative Guide on Insolvency Law (2005), http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf.

[233]European Commission, Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Regulation (EC) No 1346/2000 on insolvency proceedings, COM(2012) 744 final 2012/0360 (COD), at 3 (Dec. 12, 2012)("The overall objective of the revision of the Insolvency Regulation is to improve the efficiency of the European framework for resolving cross-border insolvency cases in view of ensuring a smooth functioning of the internal market and its resilience in economic crises."), http://ec.europa.eu/justice/civil/files/insolvency-regulation_en.pdf.

[234]European Commission, Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, COM(2016) 723 final, 2016/0359 (COD), at 5 (Nov. 22, 2016) ("Measures to increase the effectiveness of restructuring, insolvency and second chance frameworks would contribute to efficient management of defaulting loans and reduce accumulation of non-performing loans on bank balance sheets."), http://ec.europa.eu/information_society/newsroom/image/document/2016-48/proposal_40046.pdf.

[235]*See, e.g.*, Garrido, *supra* note 65; Thomas Laryea, IMF Staff Position Note, Approaches to Corporate Debt Restructuring in the Wake of the Financial Crisis, SPN/10/02 (Jan. 26, 2010). R

[236]EU Restructuring Directive, *supra* note 59. Moreover, initial commentary on the proposed EU Directive is that it isn't flexible enough and doesn't go far enough. *See, e.g.*, Eidenmüller, *supra* note 191. R R

The bank-centered explanation for the importance of restructuring and schemes of arrangement, including foreign schemes of arrangement, has taken on an outsized significance precisely because London has historically held a position of economic strength in the financial markets, both within Europe and globally. But banks' position at the center of financial markets has shifted of late. Since the global financial crisis hit, proportionately less of the commercial debt taken on by companies has been "bank debt" – that is, debt lent by banks.[237] The global financial crisis triggered a liquidity crisis, bank lending sunk to historic lows, and commercial borrowers learned that they could obtain access to needed funds via the issuance of bonds in the capital markets.[238] Even after this liquidity crisis was resolved, the capital markets continued to grow in commercial lending markets.[239]

The bank-centered justification for cross-border recognition insolvency proceedings and court-facilitated restructuring has not completely dissipated. But it has of late been supplemented by arguments now focused more directly on the importance of such recognition to bond-led capital markets (as distinct from bank-led financial markets).[240]

C. Recognition Across National Borders: The Capital-Markets Story

London has been called Europe's investment banker, and for good reason: over the past several decades, half of the equity and debt raised by Eurozone firms was issued "in the UK, by firms based in the UK, quite often to inves-

On the other side, some German professionals have voiced their preference that the Bundestag consider enacting legislation that would enable an English-style scheme of arrangement. Isabel Giancristofano & Thomas Hoffman, *Scheme of Arrangement: Are hurdles for restructuring German companies getting higher?*, Noerr (March 1, 2016), https://www.noerr.com/en/newsroom/News/scheme-of-arrangement-are-hurdles-for-restructuring-german-companies-getting-higher.aspx (noting that "the German Registered Association of Insolvency Administrators (VID) has submitted a proposal for implementing such a restructuring procedure in addition to the regular insolvency proceedings in Germany.").

[237]For discussion of the immediate effects of the global financial crisis on bank lending and bond debt issued to corporate borrowers, see, e.g., Daniel Carvalho, Miguel A. Ferreira & Pedro Matos, *Lending Relationships and the Effect of Bank Distress: Evidence from the 2007-2009 Financial Crisis*, 50 J. Fin. & Quant. Anal. 1165 (Dec. 2015) (studying 1,564 publicly traded firms from 34 countries and concluding that bond debt issuances increased in 2007-09 but did not equal reduction in bank debt during that period).

[238]For industry assessment of the importance of capital market lending in the wake of the financial crisis, see *Economic Importance of the Corporate Bond Markets*, Int'l Capital Mkt. Assoc. (March 2013), file:///Users/sblocklieb/Downloads/Corporate%20Bond%20Markets%20March%202013%20(2).pdf.

[239]*See* Andrew Bolger, *Debt Issued by European Countries Heads for Post-Crisis High*, Financial Times (Nov. 23, 2014), https://www.ft.com/content/cfd9d3b0-70d5-11e4-8113-00144feabdc0 ("Bonds have taken a rising share of corporate debt since the global financial crisis, now accounting for an average 83 per cent of the total debt of European corporates in developed markets.").

[240]*See, e.g.*, Gerald McCormack, *Business Restructuring Law in Europe: Making a Fresh Start*, 17 J. Corp. L Stud. 167 (2017).

tors in the UK."[241] Before the global financial crisis, continental European corporations often borrowed through a mix of bank-lent debt and publicly-offered debt in the form of bonds, but the liquidity and sovereign debt crises that followed prompted a shift toward bond debt, with a sizeable portion of this bond debt represented by high-yield bonds.[242] Between 2008 and 2013, European companies' high-yield bond debt more than trebled: bond debt issued out of London to EU companies and sold to capital markets throughout Europe, not just the UK.[243]

As continental EU companies defaulted on this high-risk London-issued bond debt, they faced a bind. On one hand, continental European insolvency laws were mostly ill-suited to allowing the restructuring of purely financial difficulties. Some of these laws still do not look to facilitate corporate reorganization. To the extent that the law is reorganization friendly, the reorganization process may be time consuming and costly. Companies nearing default often feared that accessing continental insolvency proceedings would result in an enormous loss in value and possibly even liquidation. On the other hand, success in restructuring bond debt is mercurial. In the past, a restructuring of English-issued corporate debt might have been viewed as plausible, especially where London banks were the lenders.[244] Bond debt is far more difficult to restructure than bank debt. A purely contractual workout of a troubled bond issuance is far more difficult because unanimous or near-unanimous agreement to the terms of the restructuring agreement may be required.[245] Thus, while voluntary restructuring might have been reached if the European

[241]The phrase was first coined by Mark Carney, Chairman of the Bank of England. Chris Giles, *'Carney warns EU over "crucial" City'*, FINANCIAL TIMES (Nov, 30, 2016), https://www.ft.com/content/e2d4801c-b72a-11e6-ba85-95d1533d9a62.

[242]*See* Bolger, *supra* note 232 ("Bonds have taken a rising share of corporate debt since the global financial crisis, now accounting for an average 83 per cent of the total debt of European corporates in developed markets.").

[243]See William Needham & Daniel Bayfield, *A Tide of High Yield Restructurings*, SOUTH SQUARE DIGEST, at 68 (May 2014), http://www.insol.org/emailer/May_2014_downloads/A%20tide%20of%20high%20yield%20restructurings_South%20Square.pdf (noting that in 2008 there were fewer than 40 European high-yield bond issuances totaling € 32, but that by 2013 there were more than 255 issuances worth € 117).

[244]Pen Kent, *The London Approach*, BANK OF ENG. Q. BULL. 110 (Feb. 1993). http://www.bankofengland.co.uk/archive/Documents/historicpubs/qb/1993/qb93q1110115.pdf. *See also* INSOL International, Statement of Principles for a Global Approach to Multi-Creditor Workouts (2000), https://www.insol.org/pdf/Lenders.pdf.

[245]Under the US Trust Indenture Act, unanimous agreement is required for amendment to an indenture's "core payment terms." *See, e.g.*, Marblegate Asset Mgmt. v. Educ. Mgmt. Corp., No. 15-2124-cv(L), 15-2141-cv (CON) (2d Cir. Jan. 17, 2017); *see also* Marcel Kahan, *Rethinking Corporate Bonds: The Trade-Off Between Individual and Collective Rights*, 77 NYU L. REV. 1040 (2002). In Europe, indenture payment terms often can be amended with 90-95 percent consent, although even this bar for revision to the terms of an indenture is likely to create opportunities for some to "hold out." *Marblegate: What Does It Mean for European Restructurings?*, Lexology (Jan. 25, 2017), http://www.lexology.com/library/detail.aspx?g=8daefab3-044e-43ba-92d3-5713a92137d3.

company had borrowed from a small syndicate of bank lenders, unanimous or near-unanimous agreement among numerous bondholders was more likely to have prompted holdouts, precluding the necessary agreement.

Schemes of arrangement are designed to thwart incentives to hold out; dissenters are bound to the deal approved by a super-majority of the affected bondholders. However, dissenters are protected in the process by binding them only where their dissent represents less than 25 percent in the overall value of the affected debt. Schemes of arrangement are unique to England, however; no continental European country has enacted similar legislation, at least to date.[246]

English schemes of arrangement present a way out for financially distressed European companies' bond debt, but only if (i) British courts authorize these schemes, and (ii) European and other courts recognize and enforce the scheme orders against dissenting bondholders' objections. For example, a company with a high-yield bond debt containing a NY choice of law clause in the indenture, might also need to show that the scheme was likely to be recognized under Chapter 15 of the US Bankruptcy Code. Convincing all these courts to go along with the foreign schemes of arrangement is complicated both by the issuing company's non-UK COMI and, in many cases, by choice of law clauses choosing New York (rather than English) law.[247] Depending on the facts of the case, these complications often have been met by shifts in the company's COMI or creditor agreement to new choice of law clauses.[248]

Given increasing reliance on high-yield bond debt by continental European companies, recognition of schemes of arrangement, including foreign schemes of arrangement, has grown in importance. EU-COMI-ed companies have sought to confirm English schemes of arrangement because they have few viable alternatives. European restructuring is unlikely to receive the requisite consensus; European insolvency laws generally are insufficiently nimble to enable a timely financial rescue. To avoid default and subsequent liquidation, these European companies, with the advice of counsel, have done what they needed to do in order to gain access to English courts, sometimes shift-

[246]*See supra* note 236. R

[247]Data on the extent to which European companies bond debt is governed by English, New York or some other law is generally only available on a fee-paid basis and, thus, difficult to access and to analyze critically. For the assertion that approximately 86 percent of European high-yield bond issuances are governed by New York law, see Andrew Wilkinson, Alexander Wood, Patrick Bright, Nitin Konchady & Kate Stephenson, *Marblegate: What Does it Mean for European Restructurings?*, GLOBAL RESTRUCTURING REV. 58, 59 (May 2017) (citing data and analysis conducted by Xtract Research).

[248]In *Codere*, for example, the financing subsidiary's COMI was shifted from Lichtenstein to England. The NY choice of law clause was left in place in the indenture; the company demonstrated sufficient connections to England and Wales by pointing to the company's new English COMI and to the English choice of law clause in the governing inter-creditor agreement. See *supra* text accompanying notes 42–47. R

ing their COMIs to England, sometimes changing the law governing their indenture or guarantee or inter-company debt agreements to English law. They were forum shopping. So far courts have viewed these shifts as "good" forum shopping, and as a result, established a forum shopping system to protect against substantial loss in value. But that tolerance may not last.

D. PROFESSIONAL INFLUENCE

Another economic factor of relevance to the continuation of the forum shopping system centered on schemes of arrangement is the influence of financial service professionals. Much of the high yield bond debt issued to European companies in the last 10 to 12 years has been issued out of London.[249] EU regulation of financial and capital markets has facilitated London's centrality in this lending.[250] This London-based bond lending has benefitted London-based financial and capital markets. Important beneficiaries of this lending have been London-based financial service professionals.

Elite investment banks have profited from combining the benefits of these EU regulations with broad financial services experience in London-based investment banks. So, too, have global London law firms – the so-called Magic Circle.[251] These service providers would benefit from the perpetuation of the forum shopping system in foreign schemes of arrangement.

Distressed-debt servicing out of London has been facilitated both because foreign schemes of arrangement have sought to maximize bondholders' returns, rather than evade their repayment, and because the economics of global restructuring practice does not offer London a monopoly. New York law firms share in the benefits of this practice, especially where cross-border recognition of the scheme of arrangement is required in US markets.[252] Singapore firms are also looking to increase their share of this business.[253] Law firms in other European locations are increasingly loud in their claims to compete for this restructuring practice.[254] So far however, London law firms have enjoyed an important advantage in their ability to craft schemes of arrange-

[249]*See supra* notes 242, 243. R

[250]*See* Niamh Maloney, "*Bending to Uniformity:" EU Financial Regulation With and Without the UK*, 40 FORD. INT'L L. J. 1336 (2017).

[251]*See* Horst Eidenmüller, *The Transnational Law Market, Regulatory Competition, and Transnational Corporations*, 18 IND. J. GLOBAL LEG. STUD. 707 (2011) (arguing that law is a product and assessing the global market for legal rules).

[252]*See* Oscar Couwenberg & Stephen Lubben, *Corporate Bankruptcy Tourists*, 70 BUS. LAWYER 719 (2015) (constructing database of foreign corporate debtors accessing US chapter 11).

[253]*See, e.g.*, Calvin Tan & Justin Kwek, *Key Amendments to the Debt Restructuring Regime in Singapore,* SIMMONS & SIMMONS (2017), http://www.simmons-simmons.com/-/media/files/training/2017/07-july/050717%20key%20amendments%20to%20the%20debt%20restructuring%20regime%20in%20singapore.pdf (describing amendments to Singapore Companies Act, effective May 23, 2017, which the authors describe as "a bid to promote Singapore as an international debt restructuring hub.").

[254]*See supra* note 236. R

ment that both enjoy the approval of a company's creditors and of English courts, and London has looked to keep this advantage.

Two distinct threats could unsettle the advantages enjoyed by the Magic Circle firms. Only one of these is Brexit.

First, recent revisions to the EU Insolvency Regulation may pose some threat to English domination of European restructuring practices. Although schemes of arrangement continue to sit outside the Recast EU Insolvency Regulation,[255] the question of whether scheme orders should be subject to automatic recognition and enforcement under either the Brussels or Rome Regulation was not resolved by revisions to the EU Insolvency Regulation. The Recast EU Insolvency Regulation is not completely neutral on the question of recognition in that its Recitals include an express note of caution to litigants: there might well be a gap between the Insolvency and Judgments Regulation; mind the gap![256]

Brexit poses a second and graver threat to foreign schemes of arrangement practices. As Brexit is negotiated over the next months, the politics of the enforcement of foreign schemes of arrangement will require a weighing of competing economic interests: On one hand, foreign schemes of arrangement emanating out of British courts benefit European balance sheets (the balance sheet of European companies, their stakeholders, including the banks and capital markets that have extended credit to these European companies); on the other hand, recognition of UK foreign schemes of arrangement favor restructuring practitioners and other professionals in financial services markets in London over lawyers and investment bankers located elsewhere in Europe, although perhaps only in the short term.[257] As the EU Restructuring Directive is implemented in emerging financial centers like Frankfurt, and Paris, and even Dublin, German and French and Irish lawyers might benefit from the new corporate rescue practice that will emerge. This implementation will be affected, inevitably, by negotiations over other EU regulations governing passporting and other regulations governing the single European financial and capital markets.[258]

Some argue that Brexit will not affect London's important financial services industries (or at least not by very much).[259] It is undoubtedly right to note that London's centrality in existing financial and capital markets has

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[255]*Id.*

[256]*See* Recast EU Insolvency Reg, *supra* note 56, at Rec. 7. R

[257]For the assessment of one law firm of these interconnected issues, see Ian Jack and Anthony Hewit, England and Wales: Update – Will Brexit Kill Schemes of Arrangement? BAKER & MCKENSIE (July 12, 2017), http://restructuring.bakermckenzie.com/2017/07/12/england-wales-update-will-brexit-kill-schemes-of-arrangement/.

[258]For discussion of the importance of the continuation of passporting to European financial markets, see Maloney, *supra* note 250. R

[259]Wolf-Georg Ringe, *The Irrelevance of Brexit to the Financial Markets*, OXFORD LEGAL STUDIES

benefited both the UK and continental Europe and that a hard Brexit would be economically detrimental for both the UK and the other EU member states. The likely negative implications of a hard Brexit for English financial service industries explain much about continued political wrangling inside Mrs. May's cabinet. It should come as no surprise that Philip Hammond, the UK Chancellor of the Exchequer, has advocated a "soft" Brexit, which would include the development of some sort of submission by the UK to something resembling the CJEU.[260] An agreement by the United Kingdom to be bound by a European court of some sort would be a necessary ingredient to salvaging the Brussels and Rome (and other) Regulations. A recent UK Government White Paper suggests increasingly flexible thinking on this issue.[261] The issuance of this White Paper is, alone, no indication that agreement will be reached in Brexit negotiations; nonetheless, remaining bound to these regulations and establishing some measure for their post-Brexit enforcement may be sufficient to quell threats to the "single" EU financial and capital markets.[262]

All of this is to say that preservation of the existing practices associated with English courts' willingness to sanction requests for a foreign scheme of arrangement, and European courts' willingness to recognize and enforce these English scheme orders, represent a sort of canary in the coal mines. Like soot-filled coal mines, Brexit negotiations threaten to suffocate the many economic gains accomplished in the EU's financials services markets to date. If foreign schemes of arrangement survive Brexit intact, it will be because UK and other EU diplomats have determined that London should remain Europe's financial center even after Brexit. Preservation of London as the world's second most important financial center (after New York) is unquestionably an economically sound choice for Europe.[263] A hard Brexit from existing financial and capital markets in Europe would harm both the UK and Europe.[264] Rather than look to knock down London's involvement in post-Brexit finan-

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RESEARCH PAPER No. 10/2017 (April 21, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2902715.

[260]Robert Hutton, Charlotte Ryan and Alex Morales, Hammond Envisages 'Business as Usual' Brexit Transition, Bloomberg New (July 28, 2017), https://www.bloomberg.com/news/articles/2017-07-28/hammond-sees-increasing-government-support-for-brexit-transition.

[261]*See* UK Government, Enforcement and Dispute Resolution: A Future Partnership Paper, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf.

[262]Niamh Maloney, Negotiating a Financial Services Deal, LSE Law Policy Briefing Paper 25/2017 (Mar. 27, 2017).

[263]*See* Tim Wallace & Ben Wright, *London or New York? Brexit has shaken up the banking rivalry*, THE TELEGRAPH http://www.telegraph.co.uk/business/2016/10/13/london-vs-new-york-brexit-just-shook-up-the-great-banking-rivalr/ (describing potential for Brexit to upset rivalry between London and New York for "top spot" in financial markets).

[264]*See* Ringe, *supra* note 259; Maloney, *supra* note 262. R

cial services, including its restructuring practices, the EU and UK could work together on an economically sensible Brexit that, despite this exit, builds on the "mutual trust" on which the EU is premised. But they might not: politically, a soft Brexit from financial services markets may involve a series of hard sells on the Continent.

CONCLUSION

Recent economic events have created pressure to reorganize failing companies and restructure their defaulting debt obligations through the use of rapidly changing European PIL rules. Bound both to fiduciary obligations to shareholders and jurisdictional limits set out in international instruments, floundering companies and their insolvency professionals seek to construe these rules in ways most likely to result in the company's survival and its stakeholders' satisfaction. In some instances, they have looked creatively to access regulations and venues that would otherwise have been unavailable in the absence of this proactive and inventive conduct. This conduct might be characterized as forum shopping, given the fact shifting they engaged in just prior to the remedies they sought. But given the beneficial effects of the forum shopping, not everyone has referred to these corporate migrations as misconduct. Moreover, CJEU case law supports the notion that COMI-shifting should sometimes be viewed as "good forum shopping." Even given this support, not all venue selection decisionmaking may get recognized, enforced, and forgiven. Practitioners, courts, and commentators have struggled to redefine forum shopping to allow for the possibility of "good forum shopping" that benefitted most if not all stake holders in an effort to rescue financial struggling companies situated in financially struggling economies, especially where creditor consent was coupled with transparency. The EU reached a tentative agreement on the line between good and bad forum shopping, but this resolution has been shaken by negotiations on the terms of Brexit.

Although foreign schemes of arrangement have assisted in preserving EU financial services markets and in resolving EU companies' balance sheets in the wake of global financial crisis, Brexit may well alter assessment of them as "good forum shopping" that should be preserved. The post-Brexit treatment of schemes of arrangement, especially the recognition by European courts of foreign schemes sanctioned by British courts, will depend on resolving questions that are not wholly legal. The trick will be to convince politicians and policymakers to focus more on economics than emotion, and decide how best to retain enough of the good forum shopping system in this context to preserve corporate restructuring practices in a world apparently hell-bent on rejecting globalization.