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# The UK and EU Cross-Border Insolvency Recognition: From Empire to Europe to "Going It Alone"

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# THE UK AND EU CROSS-BORDER INSOLVENCY RECOGNITION: FROM EMPIRE TO EUROPE TO "GOING IT ALONE"

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## *I. INTRODUCTION*

The conclusion of the EU Insolvency Regulation,[1] after negotiations on earlier versions had languished for nearly forty years, has been described as "one of the finest achievements of European jurisprudence."[2] The success of the recent referendum in the United Kingdom to exit the European Union (Brexit)[3] puts this important law at risk. That the United Kingdom initially declined to sign on to a draft convention on which the original EU Insolvency Reg was based might raise questions as to whether preservation of this Reg is consistent with British interests going forward.[4] But the loss of Community-wide agreement on the recognition and treatment of insolvency proceedings would be a great tragedy, and not just a European tragedy. The loss of the EU Insolvency Reg would hurt the United Kingdom, as well.

This paper argues both that retention of the EU Insolvency Reg would strongly benefit the interests of the United Kingdom, and that

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1. *See generally* Council Regulation 1346/2000/EC on insolvency proceedings, 2000 O.J. L 160/1, art. 46, at 160/13 [hereinafter EU Insolvency Reg or EU Reg, as clarity permits].

2. Personal correspondence with Philip Wood (on file with the editors of the Fordham International Law Journal).

3. Brexit is a snappy moniker, but really it is the United Kingdom and not just Great Britain that is a member of the European Union; the difference between the two involves Northern Ireland, whose interests in the issue of "UKexit" might well be different from that of the interests of Great Britain on Brexit. This paper nonetheless ignores the distinct issues raised by Northern Ireland. It also (perhaps confusingly) uses the terms British as an adjective referring to the United Kingdom, with apologies to Northern Ireland.

4. Although Brexit has been described as motivated mostly by fears that immigrants and asylum seeking were crowding Britain and that the UK's continued membership in the European Union would preclude it from cutting back on free mobility of entry to the United Kingdom, issues distinct from those involved in the EU Insolvency Reg, the Brexit vote might also be characterized as a referendum on free trade within Europe, as well as on dissatisfaction over-intrusive regulatory instincts emanating out of Brussels. Many are hoping out loud for a "soft" Brexit, especially on issues of trade and regulation, but the outcome of these negotiations remain unclear. *See* Financial Times, Mehreen Khan, What Next for Brexit? UK election throws uncertainty on Tory EU exit plans (June 8, 2017), *available at* https://www.ft.com/content/20ddec22-eed6-3c46-9989-85e735c68213. .

its retention or replication will be exceedingly difficult to achieve. In building the case that the EU Reg serves important British interests, I retell the chronology of its adoption. The story of British accession to the terms of the original EU Insolvency Regulation is complicated by the fact that the terms of the EU Reg are the product of negotiations on three earlier draft conventions on the same topic. The story of British implementation of the original EU Reg is further complicated and perhaps clarified by its denouement: this regulation included an obligation to study the effects of its implementation ten years after its entry into force and possibly to revise its terms after reflection on this study;[5] as a result, the original EU Reg has recently been revised by the EU Parliament.[6] British fingerprints on the contents of these revisions suggest that the United Kingdom should try, to the greatest extent possible, to remain committed to the core principles set out in the revised EU Insolvency Regulation.[7] But it will be difficult for the United Kingdom to accomplish the core benefits of this Regulation – automatic recognition and enforcement across Europe – after Brexit and when going it alone. Cross-border recognition is possibly meaningless in the absence of enforcement, and enforcement sits in tension with complete "independence" from the European Union.

In the text that follows, Part I describes negotiations over what subsequently became the original EU Insolvency Regulation. There are four subparts to this section because the EU Reg was adopted after three earlier tries to draft and implement a European-wide convention on the same topic. To supplement secondary literature, since little of this focuses explicitly on British involvement in the making of this regulation, I draw on reports from various British government and private actors analyzing whether accession to a cross-border insolvency convention or regulation was consistent with British interests. These reports highlight distinctly British concerns that were not always telegraphed in the secondary literature commenting on

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5. *See* EU Reg, *supra* note 1, art. 46, at 160/13.

6. *See generally* European Parliament and Council Regulation 2015/848/EU on insolvency proceedings, 2015 O.J. L 141/19 [hereinafter "revised EU Insolvency Reg"]. The effective date on this revision had been delay to Jun 30, 2017, see *id.* art. 84, at 56, but the revised EU Insolvency Reg has now entered into effect throughout the European Union, including the United Kingdom. See *infra* Parts IV and V.

7. But there is a big difference between a regulation that binds all multilateral signators, and unilateral domestic legislation that looks to copy its terms. For discussion of the pros and cons of such "me-too" domestic legislation, see generally John F. Coyle, *Incorporative Statutes and the Borrowed Treaty Rule*, 50 VA. J. INT'L L. 655 (2010).

these drafts, including that written by British academics and practitioners. Part II considers the decisions of British courts when asked to implement the original EU Insolvency Regulation. Perhaps surprisingly, this case law shows that, from the moment the EU Reg entered into effect, British insolvency practitioners argued and courts agreed that the EU Reg allowed coordination of insolvency proceedings in ways that, before accession to the Reg, had been described as prohibited and thus a shortcoming of that regulation. British courts succeeded, in other words, in interpreting the EU Reg to resolve concerns that had been raised before accession and, with this construction, to further British interests. Next, Part III traces the influence of this British case law and insolvency practice on recent revision to the EU Insolvency Reg.[8] It finds that the practical victories that had been achieved in British courts were successfully touted within the European Commission and later the European Parliament as time-tested and ready for implementation across the Continent. British implementation of the original EU Insolvency Reg got "codified" in the revised EU Reg. Part IV reflects on the implications of this experience for European cross-border insolvency practices post-Brexit.

## *II. THREE DRAFT CONVENTIONS AND A REGULATION*

Unified economic markets require coordination and mutual recognition of judgments. In the absence of coordination of recognition and enforcement of judicial proceedings, commercial actors face enormous uncertainty, potentially undermining otherwise unfettered trade in markets. The Treaty of Rome, which first mapped out the contours of the project of creating a united European Community, commits member states to negotiate a range of conventions for the benefit of their nationals, including one to secure "the simplification of formalities of governing the reciprocal recognition and enforcement of judgments of court or tribunals . . . ."[9]

8. Article 46 of the original EU Reg stipulated that the Commission should review practices under the regulation and propose needed revisions beginning in 2012. *See* EU Reg, *supra* note 1.

9. Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 220, 298 U.N.T.S. 11 [hereinafter Treaty of Rome]. For the complete text of the Treaty of Rome, see Treaties and international agreements registered or filed and recorded with the Secretariat

Private international law conventions (PIL conventions),[10] although governing only procedural topics, are not apolitical;[11] international agreement within Europe on matters of jurisdiction, choice of law and the recognition and enforcement of judgments required concessions of sovereignty no less significant than with international agreement on issues of legal substance. The 1968 Brussels Convention concerning Judicial Competence and the Execution of Decisions in Civil and Commercial Matters took ten years to negotiate; in order to reach agreement in this relatively short period of time (at least short in terms of the time taken to negotiate PIL conventions),[12] negotiators carved out several difficult issues for subsequent resolution. As with other PIL conventions, the Brussels Convention excludes bankruptcy and insolvency proceedings from its

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of the United Nations, Vol. 298, I. No. 4302 (1958), *available at* https://treaties.un.org/doc/publication/unts/volume%20298/v298.pdf.

10. PIL conventions regulate private relationships across national borders, and nearly uniformly are limited to procedural topics, such as jurisdiction, applicable law and the recognition and enforcement of judgments.

11. *See generally* HAROLD C. GUTTERIDGE, THE CODIFICATION OF PRIVATE INTERNATIONAL LAW (1951).

12. The first four Hague Conferences on Private International Law (1893, 1894, 1900, 1904) resulted in six treaties dealing with civil procedure (1896), the conclusion of marriages (1900), choice of law and jurisdiction in matters of divorce and judicial separation (1900), guardianship of minors (1900), the personal and proprietary relationships between spouses (1904), and compulsory guardianship of adults (1904). From 1904 to 1925, the work on private international law was on a halt, and between 1925 to the end of the Second World War, discussions and debates resulted only in a protocol accepting the jurisdiction of the International Court of Justice for the interpretation of the Hague Conventions. It was only after 1951 that conventions on procedure, family matters, succession, commercial matters, torts, and conflict of laws were regularly negotiated and went into force. *See generally* Kurt Lipstein, *One Hundred Years of Hague Conferences on Private International Law*, 42 INT'L & COMP. L. Q. 553 (1993). Despite working for years, the Hague Conference has not completed its draft PIL convention on the recognition and enforcement of civil and commercial law matters, although it continues working on this project. *See* Working Group on the Judgments Project, Proposed Draft Text on the Recognition and Enforcement of Foreign Judgments, Prel. Doc. No. 1 (Apr. 2016), *available at* https://assets.hcch.net/docs/01adb7d9-13f3-4199-b1d3-ca62de79360f.pdf.

scope.[13] The EU Insolvency Regulation is thus understood to fill in gaps intentionally set out in the Brussels Convention.[14]

European negotiations on filling in the gap left by the bankruptcy carve-out in the Brussels Convention would span more than thirty years after completion of the general convention on enforcement of judgments. There were at least three different European bankruptcy conventions drafted to remedy this hole before the European Union settled finally on the EU Insolvency Regulation. The following sections detail all four stages, focusing specifically on British involvement in those negotiations and British reaction to the drafts.

### *A. The EEC Draft Convention*

By 1960, even before negotiations on the Brussels Convention were completed, work on a draft European convention on cross-border insolvency procedures had begun. But this quick start on negotiations did not produce quick resolution. Negotiations within the European Economic Community (EEC) Commission did not produce a preliminary draft until 1970,[15] although during that period the EEC included only six member states and did not include the United Kingdom.[16]

When the United Kingdom (and Ireland and Denmark) later joined the EEC in 1973, they agreed in principle to accede to conventions that already had been agreed to by the original six

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13. *See generally* Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, art. 1(2), 1262 U.N.T.S. 153, as amended by various Accession Conventions [hereinafter Brussels Convention] (expressly declaring that the Convention shall not apply to "bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings").

14. *See* Hamed Alavi and Tatsiana Khamionchonak, *A Step Forward In The Harmonization Of European Jurisdiction: Regulation Brussels I Recast*, 8 BALTIC J. L. & POL. 161, 169 (2015)(discussing relationship between Brussels Convention, including Brussels Regulation I and II, and EU Insolvency Regulation).

15. *See generally* Commission of the European Communities, Directorate-General for the Internal Market and Approximation of Legislation, Report on the Convention Relating to Bankruptcies, Compositions and Analogous Procedures, 16.775/XIV/70-E (1970) (written by Jean Noel, Conseiller a la Cour, and Jacques Lemontey, Magistrat au Minstere de la Justice, France) [hereinafter Noel-Lemontey Report].

16. French Prime Minister de Gaulle blocked UK membership twice in the 1960s. Denmark, Ireland and the United Kingdom joined the EEC in 1973 after Charles De Gaulle's resignation in 1969.

member states,[17] and to become immediately involved in negotiations on draft conventions.[18] The British government quickly sought expert advice on the preliminary draft convention on bankruptcy.[19] The Secretary of State for Trade created a six-person committee to review the preliminary draft convention, and appointed Lord Kenneth Cork as chairman of this committee. In its 1976 report, the Advisory Committee advised Parliament that, on the whole, the preliminary draft convention was "of real value."[20] As a result, the United Kingdom quickly joined in negotiations that produced a revised draft in 1980, and additional revisions in 1982 and 1984 (together the EEC Draft).[21] Despite more than a dozen years of work, by the time of this last revision it was clear that there was insufficient support and the EEC Draft was scrapped before seeking the signature of member states.[22]

The EEC Draft was abandoned because many – both inside the United Kingdom and on the Continent – thought it was too ambitious and unrealistic in its goals. The Draft sought guarantees of both universality (that is, agreement that bankruptcies within Europe would be mutually recognized by all member states) and of unity (that is, agreement that a bankruptcy opened in one member state would bar all other member states from opening another proceeding); it also

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17. *See* Kurt H. Nadelmann, *A Reflection on Bankruptcy Jurisdiction: News from the European Common Market, the United States and Canada*, 27 REV. DE DROIT MCGILL 541, 542 (1982) (referring specifically to the Brussels Convention).

18. *Id.* (discussing involvement in negotiations on the 1970 preliminary draft convention on bankruptcy).

19. *See generally* Report of the Advisory Committee, The EEC Preliminary Draft Convention on Bankruptcy, Winding-Up, Arrangements, Compositions, and Similar Proceedings, Presented to Parliament by the Secy of State for Trade by Command of Her Majesty, Cmnd. 6602 (August 1976) [hereinafter Cork Report].

20. *Id.* at 101, ¶ 411. The Cork Report did not view the preliminary EEC Draft as perfect. *Id.* at 100-03, ¶¶ 407-21. The Advisory Committee had collected comments from numerous professionals and professional associations and remarked on the specifics of some of this commentary, many of which were negative. *Id.* at 101-03, ¶¶ 412-21. Further, one member of the Advisory Committee wrote separately in the Cork Report to express his disagreement with the indirect jurisdictional provisions in the Draft. *Id.* at 105-28 (Note of reservation by Mr. A.E. Anton).

21. Nadelmann notes that criticisms to the preliminary draft found in a Note of Reservation to the Cork Report led directly to changes in the 1982 and 1984 versions of the EEC Draft. *See* Nadelmann, *supra* note 17, at 543.

22. *See, e.g.*, Manfred Balz, *The European Union Convention on Insolvency Proceedings*, 70 AM. BANKR. L. J. 485, 490-92 (1996) (describing history of EEC Draft). *See also* Ian F. Fletcher, *International Insolvency: A Case for Study and Treatment*, 27 INT'L LAW. 429, 437 (1993) (also describing history of EEC Draft).

sought harmonization of substantive aspects of bankruptcy law.[23] Each of these attributes of the EEC Draft was highly controversial given broad divergence at the time in the bankruptcy and insolvency laws of member states.[24] Distinct insolvency laws were not the only hurdle to adoption of the EEC Draft. European laws on the treatment of secured and priority creditors were also in conflict,[25] which meant that the unity sought to be achieved through the EEC Draft might easily result in economic loss for "local" creditors situated in member states outside the state in which the "universal" proceeding was first commenced. The Draft came under heavy attack from practitioners and quickly died of its own weight.[26]

Although the criticism of the EEC Draft that ultimately sank it was the complaint that it tried to do too much, there was also a realization within the British government that the Draft did not look to do enough.[27] Insolvent insurance companies and other financial service industries sat outside its scope; the Draft also did not address the financial problems of multinational corporate groups. It was silent on the treatment of insolvency proceedings that straddled European member states and "third countries" situated outside Europe, like the United States but also like Austria (which did not become a member of the European Union for many years) or Norway (which has never

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23. *See* Cork Report, *supra* note 19 at 4, ¶ 16 (describing preliminary EEC Draft as including: "the rule that a declaration of bankruptcy . . . in one Member State will exclude any such declaration . . . being subsequently made in any other Member State; the rule that the liquidator under such bankruptcy orders has powers which extend to all Member States; rules which in broad terms have the effect that most disputed questions arising in the course of bankruptcy will be matters for the courts of the State of the bankruptcy and for the law of that State, even in relation to immoveable property in other Member States, and rules securing the virtually automatic recognition and enforcement of judgments relating to such questions in other Member States."). Moreover, an Annex to the draft contained a proposed Uniform Law "dealing inter alia with the bankruptcy of persons responsible for the management of firms or companies, relation-back periods and set-off." *Id.* ¶ 9.

24. For extensive discussion of this dissensus, *see* Noel-Lemontey Report, *supra* note 15, at 60-61, 73-74, 88-91, 102-03, 106-07, 109-10, 116-17, 124-29; Cork Report *supra* note 19 at 15-85, ¶¶ 127-28, 140-42, 171, 215-16, 294, 334-37. While there were many differences in this regard, two were most emphasized: French insolvency law protected the wage claims of a debtor's employees even above the priority of the debtor's other priority creditors; British administrative receiverships protected a secured creditor's floating charge to such an extent that unsecured creditors were often left empty handed in these proceedings.

25. *See* Cork Report, *supra* note 19 at 57-67, ¶¶ 244-78.

26. *See* Balz*, supra* note 22, at 492, nn.26 & 28 (citing to German practitioners and academics opposed to the EEC Draft). *See also* Fletcher, *supra* note 22, at 437 (1993) (explaining failure of EEC Draft as due to its "universalist goals which conflicted with political imperatives").

27. *See* Cork Report, *supra* note 19 at 17, ¶ 75, and at 51, ¶ 221.

become a full member state). Finally, the EEC Draft was narrowly focused only on court supervised liquidation-type bankruptcy laws. While it would have covered UK laws governing the winding up of insolvent companies, it would not have covered UK administrative receiverships, for example.

It is worth emphasizing at this juncture, however, that the British government *was* inclined to support the EEC Draft. British support for universality in cross-border recognition of bankruptcy proceedings was nothing new,[28] and some might say had been "invented" in 1817 by English courts with the decision in *Odwin v. Forbes*.[29] But British universalism was less universal than the European universalism proposed in the EEC Draft. Cross-border coordination by British courts was not consistently practiced and was more likely to be recognized within the British Empire but not more globally or even necessarily across the Channel.[30] Indeed, when British diplomats travelled to the Hague Conference on Private International Law in 1925 to debate a similar bankruptcy convention[31] they walked out mid-way through negotiations because they viewed the 1925 draft convention as too universal in scope.[32]

British support for the principles of universalism and unity set out in the EEC Draft is perhaps best explained as political and pragmatic, rather than the inevitable product of its commitment to universality in bankruptcy practice. [33] As one member of the House of

28. *See generally* Susan Block-Lieb, *Turnaround: Reflections on the Present Day Influence of Negotiations on International Bankruptcy at the Fifth Session of the Hague Conference on Private International Law in 1925*, 9 BROOK. J. CORP. FIN. & COM. L. 1 (2014); see also Lipstein *supra* note 12, at 553-653.

29. *See generally* Odwin v. Forbes, 1 Buck. 57 (P.C.) (1817) (decision by Jabez Henry). *See also* JABEZ HENRY, THE JUDGMENT OF THE COURT OF DEMARARA, IN THE CASE OF ODWIN V. FORBES, ON THE PLEA OF THE ENGLISH CERTIFICATE OF BANKRUPTCY IN BAR, IN A FOREIGN JURISDICTION, TO THE SUIT OF A FOREIGN CREDITOR AS CONFIRMED IN APPEAL, WITH THE AUTHORITIES, AND FOREIGN AND ENGLISH CASES (London 1823). For more modern discussions of this case, see IAN F. FLETCHER, INSOLVENCY IN PRIVATE INTERNATIONAL LAW, ch. 1 (2d ed. 2005); David Graham, *Discovering Jabez Henry: Cross-Border Insolvency Law in the Nineteenth Century*, 10 INT'L INSOLV. REV. 153 (2001).

30. *See* Leonard Hoffman, *Cross-Border Insolvency: A British Perspective*, 64 FORDHAM L. REV. 2507, 2510-12 (1995-1996).

31. *See* Noel-Lemontey Report, *supra* note 15, at 38-40 (comparing 1970 EEC Draft to bankruptcy convention debated at 1925 Hague Conference on Private International Law).

32. *See* Block-Lieb, *supra* note 28.

33. *See* Cork Report, *supra* note 19 at 104, ¶ 421 (as the Advisory Committee remarked in their Cork Report: "[a]lthough the Convention is unsatisfactory in certain respects, the alternative of excluding its effect may be even more so. As the law now is, a creditor often has no effective remedies at all in trying to recover a debt from a foreign bankruptcy. The present

Lords put it when asked to comment on the Cork Report, the Draft had "received the general support" of a wide range of British experts who were of the opinion "that this convention is too valuable to throw away because of its difficulties."[34] Faint praise, with realpolitik in the driver's seat. First and foremost, the Labor and Tory governments at the helm during negotiations on the EEC Draft both viewed membership in the European Community as critically important to rebuilding the economy of the United Kingdom, which throughout this period was in a shambles. Second, there was a feeling that the Draft Convention was of more importance on the Continent, where a debtor's assets might well be situated in multiple countries, but was likely to "have very little immediate impact" on British insolvency practice because at least at the time there were very few bankruptcies concerning assets spread outside the United Kingdom[35] Trade crossed the Channel, but mostly British goods and services sold to Continental buyers.[36] Because the British government viewed cross-border bankruptcy enforcement as a problem more likely to arise on the Continent, it was willing to live with the EEC Draft, especially since accession to its terms was part of the overall price of admission to Europe.

Regardless of its rationale, the willingness of the United Kingdom to go along with the EEC Draft was, of itself, insufficient. By 1984, it had been shelved without seeking signatures from member states.

### *B. The Istanbul Convention*

The failure of the EEC Draft did not end progress within Europe on agreement on a cross-border insolvency convention. In short order, negotiations restarted within the Council of Europe (which then

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system is so seriously inadequate, that any proposal which seems to offer some kind of advantage should be carefully examined.").

34. Remarks of Lord Scarman, ECC 26th Report: Bankruptcy Convention, H.L. Deb, vol. 424, cc863-78, 4:38 p.m. (Oct. 22, 1981) (referring to Sir Kenneth Cork, "trouble-shooter-in-extraordinary," as well as "Mr. Harper, inspector general of the Insolvency Service in the Department of Trade and his deputy Mr. Armstrong"), *available at* http://hansard.millbanksystems.com/lords/1981/oct22/ecc-26th-report-bankruptcy-convention.

35. Cork Report, *supra* note 19 at 643, ¶ 411.

36. A similar argument was made in 1924 to advocate British involvement in the negotiations on a bankruptcy treaty at the Hague Conference on Private International Law. *See* Block-Lieb, *supra* note 28, at 6.

included twenty member states)[37] on another European convention to coordinate insolvency practices.[38] These negotiations completed quickly, within five short years. Despite this quick progress much changed in Europe, and with the European Communities, during these negotiations. Greece, Spain and Portugal joined the ECs in the 1980s. Although formation of the European Union and its enlargement to include its current 28 member states post-dated these negotiations,[39] the fall of the Berlin Wall, the unraveling of communism in Eastern Europe and eventually the dissolution of the Soviet Union occurred as the finishing touches were being made on the Council's draft bankruptcy convention.

Insolvency law reform was also sweeping Europe over this same period.[40] The United States largely rewrote its federal bankruptcy laws in 1979,[41] in turn prompting reform proposals within the United Kingdom,[42] Germany[43] and elsewhere in Europe at around the same

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37. 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 WASSENBERG, 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/ (last visited Aug. 8, 2017).

38. These efforts culminated in the European Convention on Certain International Aspects of Bankruptcy (commonly referred to as the "Istanbul Convention"). See Balz, *supra* note 22, at 492-94

39. The European Union was not established until the Maastricht Treaty entered into force in 1993. For the complete text of the Treaty on European Union, see Council of the European Communities and Commission of the European Communities, Treaty on European Union (1992), *available at https://europa.eu/european-union/sites/europaeu/files/docs/body/treaty_on_european_union_en.pdf.*

40. Reform of corporate insolvency laws in the United Kingdom and Germany had begun before the political upheavals in Eastern Europe could have been anticipated, but the unification of West and East Germany gave additional impetus for reform of German insolvency law and, in particular, for political pressure for that law to enable and possibly favor corporate reorganization. The preference for adopting insolvency laws favoring corporate reorganization would take on speed, first, as Eastern European countries looked to privatize their economies after the fall of the Soviet Union and, again, as Europe prepared to react preventatively to the Asian Financial Crisis. *See generally* Susan Block-Lieb & Terence C. Halliday, *Settling and Concordance: Two Cases in Global Commercial Law* in TRANSNATIONAL LEGAL ORDERS, at ch. 3 (Terence C. Halliday & Gregory Shaffer eds., 2015).

41. US Bankruptcy Code, effective Oct. 28, 1979; replacing Bankruptcy Act of 1898.

42. Sir Kenneth Cork's work to review the EEC Draft for the British government prompted him to recommend that England and Wales attempt reform of their domestic

time.[44] Each of these reforms looked to revise laws that last had been enacted in the late nineteenth and early twentieth centuries. Corporate insolvency reform initiatives involved more than simply updating longstanding statutory provisions, however. With enactment of chapter 11 of the Bankruptcy Code, US corporate insolvency law enabled and indeed favored the rehabilitation of financially ailing businesses. European reforms also looked to facilitate reorganization of companies in financial distress. The obvious implication of this reform raised questions as to whether the Istanbul Convention should enable coordination of corporation reorganizations and not just coordination of company liquidation proceedings, even though some of these reorganization proceedings might easily be characterized as pre-insolvency proceedings.

The Council draft, completed and opened for signature in Istanbul by 1990 (and so usually is referred to as the "Istanbul Convention"), differed substantially from the EEC Draft. The Istanbul Convention sought neither universality nor unity in insolvency practice. Rather than provide for European-wide recognition of insolvency proceedings opened in a member state, it would only have recognized the standing of the liquidator appointed in a "main" insolvency proceeding (that is, a proceeding pending in the member state in which the debtor's center of interests was located) to take action elsewhere in Europe. [45] Because it mostly limited the standing

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bankruptcy and insolvency laws, which had last been revised in 1914. *See, e.g.*, Remarks of Lord Scarman, *supra* note 34; BRUCE G. CARRUTHERS & TERENCE C. HALLIDAY, RESCUING BUSINESS: THE MAKING OF CORPORATE BANKRUPTCY LAW IN ENGLAND AND THE UNITED STATES 113 (1998). Cork's recommendations on English and Welsh insolvency laws culminated in enactment of the Insolvency Act of 1986. Perhaps ironically, although Cork's recommendations on the EEC Draft did not result in coordination of insolvency proceedings within Europe, he strongly recommended that British reform efforts promote coordination among insolvency courts throughout the Commonwealth, resulting in enactment of section 426 of the Insolvency Act of 1986. For more detailed discussion of the coordination of Commonwealth insolvency proceedings under this British law, see generally Hamish Anderson, *Corporate Insolvency After the Insolvency Act 1986,* 20 BRACTON L.J. 49 (1988).

43. The new German Insolvenzordnung replaced the Konkorzordnung of 1877. Although the Insolvenzordnung was enacted by the Bundestag in 1994 and went into effect in 1999, twenty years of discussion, hearings and negotiations had preceded these legislative events. *See* Balz, *supra* note 22 at 487, n.6.

44. *See generally* Catherine Bridge, European Bank for Reconstruction and Development, *Insolvency – a Second Chance? Why Modern Insolvency Laws Seek to Promote Business Rescue*, LAW IN TRANSITION 28 (2013), www.ebrd.com/documents/legal-reform/insolvency-a-second-chance-.pdf.

45. A "foreign main liquidator" could seek and would be entitled to receive protective measures outside of the debtor's center of main interests, but these protections were likely to

of a "foreign main liquidator" to that authorized under "local" law, and explicitly permitted the opening of multiple secondary proceedings wherever the debtor held substantial assets, the Istanbul Convention would have provided "local" creditors with multiple options for getting paid first out of "local" assets. Moreover, the Istanbul Convention did not propose a procedure for resolution of disputes between national courts, for example as to whether the debtor's center of main interests existed in one or another member state, both because it contained only indirect jurisdictional commitments,[46] and did not provide for the possibility of resolution of such disputes (or any other interpretive issues) in the European Court of Justice.

Only seven countries signed the Istanbul Convention and it failed to enter into force.[47] It was not signed by the United Kingdom. This was hardly surprising. Because the Istanbul Convention envisioned the opening of multiple territorially limited liquidation proceedings, and coordinated these only through recognition of the standing of the liquidator in the "main" insolvency proceeding elsewhere in Europe, and only then by mostly requiring the "main" liquidator to satisfy the requirements of local law, it would have accomplished little in the way of coordination. As a result, many argued that the draft was inconsistent with the development of a unified European market.[48]

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be limited to the sorts of protections otherwise available in that distant member state; relief in excess of that, such as the remittance of assets to the state in which the main proceeding was pending, might have been available, but only after permitting local creditors two months for bringing collection actions against such assets. *See* European Convention on Certain International Aspects of Bankruptcy, E.T.S. 136, art. 11 (1990).

46. Although the Istanbul Convention did not provide for direct agreement on the jurisdiction of any member state to open insolvency proceedings, it did speak indirectly on the subject of jurisdiction by limiting automatic recognition to a liquidator appointed in an insolvency proceeding commenced where the debtor's center of main interest is located. *See* European Convention on Certain International Aspects of Bankruptcy, E.T.S. 136, art. 4 (1990).

47. The Istanbul Convention was signed by Belgium, Cyprus, France, Greece, Italy, Luxembourg and Turkey, with only Cyprus ratifying this treaty. *See* BOB WESSELS ET AL., INTERNATIONAL COOPERATION IN BANKRUPTCY AND INSOLVENCY MATTERS 87, n.77 (2009).

48. For example, one commentator describes the Istanbul Convention as flawed because it would have created a series of sub-estates rather than a single universal proceeding and because it would have provided for discriminatory treatment of foreign creditors. *See* Fletcher, *supra* note 22, at 314-37.

This territorial "light touch" on coordination of European insolvency proceedings might have been prompted by more than simply a reaction to broad dissatisfaction with the utopian goals sought to be furthered through the EEC Draft. Faced with an expanding list of member states and possible future member states whose interests would need to be satisfied with the draft that resulted in the Istanbul Convention, negotiators may well have understood their project in terms of a need for caution, an emphasis on pragmatism over up-to-the-minute reform.

At the same time, the Istanbul Draft suffered from the same timidity as the EEC Draft: it, too, excluded certain regulated industries from its scope; it did not address the problem of insolvent corporate groups or of the assets of a debtor situated in some "third country;" it looked only to coordinate liquidation proceedings,[49] although corporate reorganization was now possible under the UK Insolvency Act of 1986 and would soon become possible under German legislation that would, by 1994, be enacted as the new Insolvenzordnung.

### *C. The (Third Draft) European Convention on Insolvency Proceedings*

A much-altered draft European insolvency convention began to emerge in the early 1990s. This third draft convention would not have provided Europe the unity and universalism envisioned by the EEC Draft, but would have provided far more universality than the Istanbul Convention. Like the Istanbul Draft, the third draft would have provided for the possibility of a main insolvency proceeding and, in theory at least, multiple secondary proceedings. Like the Istanbul Convention, a foreign main liquidator's standing would have been recognized throughout Europe. But, unlike the Istanbul Convention, this third draft convention also established jurisdictional rules for the

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49. Even without this limited reference to the coordination of liquidation proceedings, the Istanbul Convention would have made corporate reorganization nearly impossible. Whenever a debtor's assets spanned borders within Europe, the Istanbul Convention would have allowed creditors located outside the debtor's center of main interests to grab assets; this protection of local creditors' interests would have made rescue of a financially troubled corporation virtually impossible. Uncertainty over which member state had primary jurisdiction because the Convention left the definition of a debtor's center of main interests undefined meant that the prospect of territorial disputes over assets was even more likely to render reorganization impossible and potentially even upend all efficiency gains from coordination. *See* Balz, *supra* note 22, at 493-94.

opening of insolvency proceedings within Europe and provided for European-wide automatic recognition of the opening of main proceedings (in the member state in which the debtor's center of main interests was located) and secondary proceedings (in a member state in which the debtor ran an establishment), and the enforcement of judgments entered in such proceedings; unlike the Istanbul Convention, the third draft also created uniform conflict of law rules governing in insolvency proceedings, as well as certain guarantees for creditors' rights to information about, and to lodge claims in, the proceedings.

By late 1995, the draft convention was opened for signature and twelve countries quickly signed. The format of the third draft convention required member states to accede to its terms within six months of its opening,[50] but Great Britain lagged behind given its internal need for a report on the draft from a select committee of the House of Lords.[51] The select committee of the House of Lords appointed to consider and comment on Community proposals (Subcommittee E) collected testimony and reported on the draft convention in March 1996.

Although the Hoffman Report did not oppose accession to the draft convention on insolvency proceedings, neither did it offer a ringing endorsement of the draft. Thirty years of work resulting in a final draft convention "is a major achievement for the [European] Community," remarked the Report, but "[a]ny sense of relief should not, however, get in the way of an object and critical appraisal of the proposal before any decision on participation in the Convention is taken."[52] The Select Committee was quick to emphasize "major advantages" in the draft Convention: automatic recognition of UK insolvency proceedings and judgments entered in those proceedings,[53] as well as a clear "duty of cooperation between liquidators" and the

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50. That is, by May of 1996. The select committee of the House of Lords on European Community Proposals, Subcommittee E, collected testimony and issued its report on the third draft convention in March 1996, three months before the deadline set in the convention. European Community Proposals Select Committee, Subcommittee E, 1996 HL, at 1, ¶¶ 3-4 (L Hoffman, Chairman) [hereinafter Hoffman Report].

51. *Id.*

52. *Id.* at 15, ¶ 35.

53. *Id.* ¶ 36. *See also id.* at 8, ¶ 15 (referring to testimony that this was "the prize" of the Convention).

right of all creditors to take part in both main and secondary proceedings within Europe.[54]

The Hoffman Report also raised substantive concerns, however, many of which were similar to those raised in the Cork Report as to the EEC Draft: The Select Committee was concerned about the implications of the Convention "for rescue proceedings," noting in particular that administrative receiverships were not recognized as a collective insolvency proceeding within the scope of the draft Convention but that, in its favor, "the floating charge under which receivers are ordinarily appointed by parties appear to be recognized under the Convention as conferring a right in rem" and that "the administrative procedure and company and individual voluntary arrangements" would be recognized.[55] It also critiqued the limited scope of the Convention, which excluded credit institutions, insurance companies and certain investment undertakings,[56] that the draft Convention would have only "intra-Community effect,"[57] and that it would only apply to debtor corporations operating within Europe as an establishment which is a branch of the parent company but had "no special rules for dealing with the insolvency of groups."[58] The Report criticized the lack of definition of the Convention's primary jurisdictional test (the "centre of main interests" or COMI test), and added that the "principal disadvantage" of these jurisdictional tests "was that of the potential loss of jurisdiction [for British courts], [jurisdiction] which is currently exercisable where the debtor has assets in the United Kingdom" but neither a center of main interests or even an establishment.[59] The Report also highlighted three objections to the terms of the Convention that had been raised in testimony before it from banks and other financial interests, who complained about the Convention's treatment of floating charges, contractual netting and set-off rights, and other protections, which

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54. *Id.* at 15, ¶ 36.

55. *Id.* ¶ 37.

56. *Id.* at 7, ¶ 10 (although also noting that "there are currently two proposals before the Council for Directive relating to the winding up of banks and other credit institutions and of insurance companies"), and 15, ¶ 38.

57. *Id.* at 13 ("in the sense that the centre of the debtor's main interests in in a Member State, and only as between Member States").

58. *Id.* at 15, ¶ 38 (although noting that "there may still be an advantage where the Convention assists a United Kingdom parent company in protecting its interest as a shareholder in a company the subject of main proceedings in another Member State").

59. *Id.* at 9, ¶ 19.

financial markets possessed under then-current British insolvency laws and but that might have been lost under the draft Convention.[60]

Still, the Hoffman Report raised a shorter list of complaints about the third draft Convention than had been raised about the EEC Draft.[61] What most seemed to irk the Select Committee was the fact that an explanatory report on the draft Convention, which had been commissioned by the Presidency of the European Union, was unfinished by the time of the writing of the Hoffman Report and unlikely to be completed by the time six-month window for accession to the draft was closing.[62] Although the Select Committee states clearly in its report that "[t]he text [of the Convention] is now fixed," meaning "that it is not open to us to devise or speculate on changes" to its terms, nonetheless the Report noted that several of the substantive concerns raised by them might have been resolved by clarifying language in the as-of-then unfinished explanatory report.[63] The Select Committee would have preferred to know that the explanatory report had reflected its concerns before making its recommendation to Parliament, but that was impossible. This "procedural" concern seems the most likely explanation for the failure of the Select Committee to recommend agreement to the terms of the third draft Convention.

In the end, the Hoffman Report concludes only that "the proposed Convention on Insolvency Proceedings raises important questions," but not that the British government should sign the Convention. Indeed, the Report remarks that:

> [t]he Committee believes that all States are entitled to know, with a reasonable degree of certainty, to what it is they are being asked to sign their names. The six months provided by the Convention would normally be long enough. But the present position is different, in that the Explanatory Report, which would offer a way to remove much uncertainty, has yet to be finalized.[64]

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60. *Id.* at 16, ¶ 39.

61. The Hoffman Report is only a few short pages long, while the Cork Report comprised hundreds of pages of analysis, much of it critical. In the end, however, the Cork Report recommended British accession to the EEC Draft mostly on pragmatic grounds. *See generally* Hoffman Report, *supra* note 52; Cork Report, *supra* note 20.

62. This explanatory report was subsequently completed. *See* Etienne Schmit & Miguel Virgos, *Report on the Convention of Insolvency Proceedings*, DRS 8 (CFC) (May 3, 1996).

63. Hoffman Report, *supra* note 50 at 15, ¶ 35.

64. *Id.* at 16, ¶ 41.

This language might easily be ignored as demonstrating no more than the preferences of the select committee for dotting i-s and crossing t-s in the preparation of international legislation. Except that the penultimate paragraph of the Hoffman Report also invites reexamination of the transnational politics of the European Union.[65] Ultimately, the United Kingdom used its position as the last nation to sign on to the draft Convention as a point of leverage.

That the United Kingdom ultimately refused to sign the draft Convention on Insolvency Proceedings is well known. Although ostensibly declining to sign onto the draft Convention in protest over prohibitions on trade in British beef due to fears of mad cow disease, its refusal might instead have involved an unrelated ongoing dispute concerning the "Gibraltar situation."[66]

Closer examination of the record shows that the Hoffman Report itself seems to invite the inaction ultimately taken by the British government:

> If the deadline in the present text passes, that would not prevent the Convention coming into being at a later date. It would hardly be in the interest of Member States who support the Convention to sacrifice it altogether rather than accept some delay. The Government should not sign the Convention in advance of their being satisfied, following consultation and consideration, that technical uncertainties have been removed.[67]

Prime Minister John Major referred only to British trade interests in declining to sign the third draft convention but Lord Hoffman's political assessment that the convention might not be lost if left unsigned referred more to the Select Committee's peak over the failure of the European Presidency to complete the explanatory report on time rather than over British beef.

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65. *Id.*

66. GABRIEL MOSS, IAN FLETCHER, AND STUART ISSACS, MOSS, FLETCHER AND ISAACS ON THE EU REGULATION ON INSOLVENCY PROCEEDINGS (3d ed. 2016); BOB WESSELS, EUROPEAN UNION REGULATION ON INSOLVENCY PROCEEDINGS: AN INTRODUCTORY ANALYSIS, at ¶¶1.2-1.3 (3d ed. 2007). Gibraltar is a British Overseas Territory located on the southern end of the Iberian Peninsula. The Spanish Crown formally ceded the Gibraltar in perpetuity to the British Crown in 1713. Spain later attempted multiple times to recapture the territory. In 1966, the Spanish Government formally proposed to achieve the return of Gibraltar to Spain. The proposal was rejected by the British Government and by the Gibraltarians, which overwhelmingly voted to remain under British sovereignty in a referendum held in 1967.

67. *See* Hoffman Report, *supra* note 50 at 16, ¶ 41.

Regardless of the precise motivation of the British government in failing to accede to draft EU Convention, the United Kingdom failed to sign on and as a result the third draft EU Convention also failed to enter into force.

*D. The (Original) EU Regulation on Cross-Border Insolvency*

The Select Committee had been right about Europe's unwillingness to throw away a perfectly good draft convention even though it had failed to enter into effect on the basis of the UK failure to join. Undeterred by the failure of the third draft convention to enter into force, Germany and Finland quickly redrafted it to conform to the requirements of a regulation under European law.[68] This "new" EU Regulation on Insolvency Proceedings differed from the third draft EU Convention on the same subject mostly in form; on the substance, it was nearly identical to the draft Convention in nearly every detail.[69] Within a short time, [15] Member States had agreed to be bound to the terms of the EU Insolvency Reg, including Great Britain. By 2002, the EU Reg entered into force, governing cross-border insolvency practice within the European Union.

Like the third draft Convention on the same topic, the EU Insolvency Reg provides for automatic recognition of and coordination among insolvency proceedings pending in EU Member States. In addition, it includes rules governing the jurisdiction of contracting Member States' courts' to open insolvency proceedings, and the effect of insolvency proceedings once commenced. Thus, with its 55 articles, 6 chapters and 3 annexes, the EU Reg included (i) rules of jurisdiction, (ii) rules on the law applicable to insolvency proceedings and the disputes arising in those proceedings, as well as (iii) rules governing the recognition and enforcement of orders entered in such proceedings. While several of the Recitals preceding the Regulation differ from similar language in the draft Convention, the EU Reg is virtually indistinguishable to the substance of the third draft convention.

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68. Initiative of the Federal Republic of Germany and the Republic of Finland with a view to the adoption of a Council Regulation on insolvency proceedings, Procedure 1999/0806/CNS (May 26, 1999).

69. The original EU Insolvency Regulation was meant to be (and was) substantively identical to earlier draft EU Convention. *See* KLAUS PANNEN (ED.), EUROPEAN INSOLVENCY REGULATION, INTRODUCTION, at 11 (2007).

In small ways, however, the third draft Insolvency Convention and original EU Insolvency Reg differ, and many of these differences track substantive concerns that had been raised in the Hoffman Report on the Convention.[70] When the EU Reg was first published but not yet binding on the UK, the Select Committee of the House of Lords made sure that these concerns had been resolved in the EU Insolvency Reg consistent with what it understood to be British interests.[71]

Despite these small changes, the British government did not succeed in redressing other issues that had been raised in the Hoffman Report. The EU Reg is not an explicitly corporate-reorganization-friendly document. It refers to insolvency proceedings as administered by liquidators. It permits the filing, and the recognition and enforcement, of both a "main" proceeding in a debtor's COMI but also "secondary" proceedings potentially wherever a debtor is established. Like the preceding third draft Convention, the original EU Reg does not explicitly define what constitutes a debtor's "centre of main interests" (its COMI).[72] On its face, it only applies to a single corporate actor and, thus, does not resolve the issue of corporate groups. The United Kingdom signed the EU Insolvnency Reg, and the Reg entered into effect on May 2002.

70. These differences are all found in the Recitals to the EU Reg. Balz, *supra* note 22. Since recitals were not a part of the format of a convention, new points could have been added without opening up the articles themselves for revision.

71. *See* House of Lords, Select Committee on European Communities, Letter from Lord Tordoff, Chairman of the Committee, to Dr. Kim Howells MP, Parliamentary Under-Secretary of State for Consumer and Corporate Affairs, Department of Trade and Industry (Nov. 4, 1999), *available at* https://www.publications.parliament.uk/pa/ld199900/ldselect/ldeucom/21/2129.htm [hereinafter "Tordoff Letter"]. In the Tordoff Letter, the Chair of the Select Committee asked: (i) whether various "technical points (concerning floating charges, netting agreements and settlement arrangement in financial markets)" had been expressly resolved in either the recitals or provisions of the EU Reg; (ii) whether the question of the applicability of the EU Reg to Gibraltar had been resolved; (iii) whether the Parliamentary Under-Secretary could comment on "the ability of the United Kingdom to enter into agreements (Treaties, Conventions, etc.) with Third States on insolvency matters"; (iv) whether Ireland and Denmark would be parties to the EU Reg; and (v) whether the Government could share with the Select Committee what it had learned about practitioners' reactions to the EU Reg. An exchange of correspondence results in Lord Tordoff's satisfaction. *See id.*

72. COMI is not defined in the EU Reg, but Art. 3(1) presumes that a corporate debtor's COMI exists at the place of its registered office (that is, its place of incorporation); *see also* EU Reg, *supra* note 1, Preamble ¶ 13.

### *E. British Influence on the EU Regulation on Cross-Border Insolvency*

Spanning nearly forty years and producing three draft conventions before settling on a European-wide regulation, these negotiations more reflect political compromise than coalescence around a singular jurisprudential vision for a unified market approach to the problem. Although negotiations on the EU Insolvency Reg have conventionally been understood as involving compromise between common law and civil law approaches to insolvency practices, the preceding analysis also shows that these negotiations involved compromise of British interests. The British government did not succeed in resolving in diplomatic negotiations criticisms of the EU Reg, which had been raised in testimony and reports within the British government.

This analysis surprisingly reveals that the Cork and Hoffman Reports criticized the European proposals on coordinating cross-border insolvency proceedings on very similar grounds, although these reports addressed distinctly different draft conventions. Despite these criticisms, the British government agreed to be bound to the EU Insolvency Reg. Its last-minute political pretexts for objecting to the third draft Insolvency Convention had almost caused forty years of work to get wasted. The British government achieved small victories in the conversion of the third draft Convention to a regulation, but not more.[73]

Given that the text of the original EU Insolvency Reg was the product of compromise, its meaning was in important ways left for courts to interpret. It is to this judicial record that Part II next turns.

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73. *See generally* Tardoff Letter, *supra* note 71. I leave for another day the effects of the EU Reg, and particularly critiques of the EU Reg, on domestic insolvency legislation within the United Kingdom, but note briefly that the Cork Report suggested that all UK insolvency law should be reviewed, subsequently resulting in enactment of the 1986 Insolvency Act; that based on his involvement in review of the EEC Draft, Sir Cork was clear that modern insolvency law should enable the rescue of a failing corporation rather than simply its liquidation and also that this law should provide statutory grounds for recognition of insolvency proceedings outside the United Kingdom but inside the former Commonwealth countries, resulting in section 426 of the 1986 Insolvency Act. The remedy of administrative receivership fell into disuse also perhaps as a result of the EU Reg's failure to include that proceeding within its scope, and ultimately was repealed in the 2002 Enterprise Act.

## *III. BRITISH IMPLEMENTATION OF THE EU INSOLVENCY REGULATION*

Although British influences on the original EU Insolvency Reg were undeniably important in the drafting of this text, British diplomats did not dominate negotiations on European cross-border insolvency coordination—appropriately so, since European Union requires European consensus. Nonetheless, British actors did have enormous impact *after* the original Regulation went into effect.

To a large degree, this impact was the consequence of the unique attributes of British courts. By 2002, when the original EU Insolvency Reg first entered into effect, British courts already had long experience in coordinating foreign insolvency practice given British imperial history. British courts' early nineteenth century instincts toward universal recognition of foreign insolvency proceedings would certainly have extended to proceedings arising within the British Empire.[74] The Insolvency Act of 1914 governed insolvency proceedings arising anywhere in the Empire. This "Imperial universalism" continued after the fall of British Empire after WWII and was mostly re-codified in the Insolvency Act of 1986.[75]

This influence was also the consequence of how British courts historically had interacted with the insolvency practitioners that effectively ran companies once a company accessed an insolvency proceeding. In the context of administrative receiverships, receivers were allowed broad discretion to resolve a floating charge after an event of default.[76] British administrators and liquidators also exercised a great deal of discretion under the supervision of British courts.[77]

Finally, this influence was also the consequence of the state of British insolvency law in 2002. The Insolvency Act of 1986 had substantially reformed British insolvency law. It included a statutory direction for British courts to cooperate with insolvency courts in a

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74. *See e.g.*, Stewart v. Auld, (1851) 13 D. 1337 (recognizing an insolvency proceeding initiated in Australia); *see also* Hoffmann, *supra* note 30, at 2510; Hoffman Report, *supra* note 50*,* at 8-10.

75. *See* Insolvency Act of 1986, section 426 (UK), *available at* http://www.legislation.gov.uk/ukpga/1986/45/section/426.

76. *See* ROY GOODE, PRINCIPLES OF CORPORATE INSOLVENCY LAW 346-52 (4th ed. 2011); *See also* Hoffman, *supra* note 30, at 2507-08; Hoffman Report, *supra* note 50, at 15, ¶ 37.

77. *See* GOODE, *supra* note 76, at 150-56 (liquidators' powers) & 447-66 (administrators' powers).

broad range of former-Commonwealth countries. More importantly, it sought to create a culture of "corporate rescue" under British law. Although the administration procedure adopted under the Act was viewed by many to be too rigid to fully implement the goals of corporate rehabilitation, it was revised with enactment of the Enterprise Act 2002, streamlining the administration proceedings first adopted in 1986 but also effectively abolishing the administrative receivership.[78] Although the Enterprise Act did not become the law until late 2003, and did not apply to floating charges created before application of the Enterprise Act, by 2002, when the EU Insolvency Reg entered into effect, British insolvency law was nonetheless viewed as far more reorganization-friendly than French or even German law on the topic.[79] This perception was not limited to those from the United Kingdom. Continental bankers and manufacturers and service providers also shared this opinion and a few Continental companies demonstrated this preference by changing their executive offices or otherwise configuring their place of registration so that they could be reorganized under British law rather than some other Continental insolvency law.

### *A. COMI and the Possibility That Presumptions Get Rebutted*

Both the Cork Report on the EEC Draft and the Hoffman Report on the third EU draft convention had criticized predecessors to the EU Insolvency Reg for applying to a single debtor corporation and its branch establishments across Europe, even though market practices commonly provided for pan-European businesses to be run through a group of corporations, many of them registered under distinct European corporate laws.[80] Undoubtedly aware of this criticism, British insolvency practitioners did not feel limited by it. Instead they

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78. *See id.* at 385-86; *See, e.g.*, John Armour, Audrey Hsu and Adrian Walters, *The Impact of the Enterprise Act 2002 on Realisations and Costs in Corporate Rescue Proceedings* (Dec. 2006)(reporting to the UK insolvency service), https://www.researchgate.net/publication/242155506.

79. Although in 1994 the German Bundestag substantially revised their insolvency laws to adopt a "unitary" system that would have enabled corporate rescue and reorganization, Balz *supra* note 22 at 492 n.23, this reform legislation was viewed as less reorganization friendly than UK insolvency laws at that time. *See generally* Müge Adalet McGowan and Dan Andrews, *Insolvency Regimes and Productivity Growth: A Framework For Analysis*, OECD Economics Department Working Papers No. 1309 (July 1, 2016), *available at* https://www.oecd.org/eco/insolvency-regimes-and-productivity-growth-a-framework-for-analysis.pdf.

80. *See supra* Part I.C.

pushed, almost from the moment the EU Reg entered into effect, for a construction of the articles of the Regulation to resolve these complaints. In doing so, these insolvency practitioners were simply viewing the open-ended standards embedded in the EU Reg as opportunities for argument rather than as sources of uncertainty, which is to say that they were engaged in the sort of inventive advocacy that the common law invited.

The first such case, *In re BRAC Rent-A-Car International, Inc.*, did not involve a pan European group of corporations, but instead a company incorporated under US law – Delaware law, to be precise.[81] An administration order against BRAC was entered by the High Court in London, although the debtor was a Delaware corporation. Italian judgment creditors objected. Although before the EU Reg entered into effect in May 2002 the Insolvency Act of 1986 would not have countenanced the filing of the Delaware corporation, Mr. Justice Lloyd found that under Art. 3 of the EU Reg it had jurisdiction because the company's "centre of main interests" were in England and not the United States:

> The Company is incorporated in Delaware, and has its registered address in the United States. However, that is not an address from which it trades, and it has never traded in the US. Its operations are conducted almost entirely in the United Kingdom.[82]

The court, thus, held that the EU Reg extended its jurisdiction beyond that previously available under the Insolvency Act of 1986 by virtue of Art. 3's sole jurisdictional focus on whether the "centre of the debtor's main interests is within that Member State, as is the case in this instance."[83]

But while the most controversial aspects of this case were the extra-territorial extension of the EU Reg outside Europe to apply to a company that had been incorporated in a "third country" – the United States, *BRAC Rent-A-Car* also demonstrated the route through which the EU Reg might cover an entire group of corporations within Europe. This "route" was evident from the facts of the case. For not only did the High Court of London find that the Delaware corporation

81. In re BRAC Rent-A-Car Int'l Inc. [2003] EWHC (Ch) 128 (7 Feb 2003). For the full text of this unpublished opinion, see https://www.iiiglobal.org/sites/default/files/media/Re_Brac_Rent_a_Car.pdf.

82. *Id.* ¶ 4. For further description of the "Englishness" of the debtor, see *id.* ¶ 5.

83. *Id.* ¶ 31.

conducted its operations "almost entirely in the UK," it also mentioned that these operations extended throughout Europe and elsewhere through a group of corporations. In describing BRAC Rent-A-Car International, Inc., it noted that:

> [The Company] was until recently part of the Budget group, and its business is that of managing the European, Middle Eastern and African operations formerly carried on by that group. It has subsidiaries in many Western European countries, each of which has, in turn, agreements with various franchisees. In countries where the company does not have a subsidiary it enters into franchise agreements directly with franchisees.[84]

*BRAC Rent-A-Car* involved not just a Delaware corporation whose "centre of main interests" was in England. It was also a parent of a corporate group whose "centre of main interests" was in England.

Following in the wake of *BRAC Rent-A-Car*, British barristers argued before British courts that the Regulation's presumption that a corporate subsidiary's COMI was located in its place of registration should be rebutted in favor of a finding that the subsidiary's COMI was identical to that of its parent corporation, an English company whose head office and management and books and records were also located in England.[85] For example, three months after *BRAC Rent-A-Car*, the Leeds High Court upheld petitions for administration orders submitted on behalf of a pan-European group of insolvent companies in *In re Daisytek-ISA Ltd*.[86] The petitions involved not only the English parent company, which was itself a subsidiary of an American corporation, but also several subsidiaries of that English company, one registered in France and two in Germany.[87] The Leeds court concluded that it had jurisdiction to enter administration orders involving the French and German subsidiaries so long as their "centre of main interests" were in England under Art 3(1) of the EU Reg,[88] and found that the "centre of main interests" of the subsidiaries was in

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84. *Id.* ¶ 4.

85. For a case holding that Art. 3 of the EU Insolvency Reg enabled the London High Court of Justice to assert jurisdiction over an administration order sought by an unregistered company which could be wound up under the Insolvency Act of 1986, see In re The Salvage Association [2003] EWHC 1028 (Ch), Case No. 2664 of 2003 (May 2003).

86. In re Daisytek-ISA Ltd & Others [2003] B.C.C. 562 (16 May 2003). For extensive discussion of *Daisytek*, see Samuel Bufford, *International Insolvency Case Venue In The European Union: The Parmalat And Daisytek Controversies*, 12 COLUM. J. EUR. L. 429 (2006).

87. *Daisytek*, *supra* note 86, ¶ 2.

88. *Id.*. ¶ 12.

Bradford, England.[89] Specifically, the court found that ISA International plc performed the "head office" functions for the corporate group. It "has negotiated supply contracts with major suppliers," and "given guarantees to major suppliers" and other trade creditors.[90] And because the "centre of main interests" of the French and German subsidiaries were in Bradford, England, the administration orders were entitled to automatic recognition across Europe under Art 16 of the EU Insolvency Reg.

There was one practical difficulty with such an argument, and that is that the English administrators in *Daisytek* found that they needed to convince the creditors and courts in France that the COMI of the French subsidiary was England not France. This construction of the EU Insolvency Reg was not immediately convincing to the Pontoise District Commercial Court.[91] The District Commercial Court opened a main insolvency proceeding in France for the French subsidiary in the Daisytek corporate group, although a main proceeding governing the French subsidiary had already been opened in Leeds, England.[92] This was exactly the sort of result that the EU Insolvency Reg sought to prevent, but the French court viewed the English decision "as tantamount to a denial of the concept of corporate legal personality" on the grounds that "the concept of a group does not have any legal implications and each of the companies in the group has separate legal personality."[93] On appeal, the cour d'appel in Versailles reversed, however, concluding that the High Court of Justice in Leeds, England had sufficient jurisdiction to open insolvency proceedings concerning the French subsidiary based on that court's finding that the French subsidiary's "centre of main interests" was situated in England and not in France, its place of registration.[94]

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89. *Id.* ¶ 3 (holding that "the evidence shows that the trading companies in the group are managed to a large extent from Bradford and that they are managed and controlled as a group so that the activities of the group companies throughout Europe are coordinated by the head office in Bradford").

90. *Id.* ¶ 4.

91. *See* Klempka v. ISA Daisytek SA, 2003 WL 22936778, Cour' d'appel [CA][regional court of appeal] Versailles, civ. (Sept. 4, 2003).

92. *Id*. at 111.

93. *Id*. at 114.

94. *See* Bufford, *supra* note 86, at 462 (concluding that the Versailles cour d'appel "found that the Leeds court had validly opened a main proceeding for Daisytek-France, and that, pursuant to the provisions of the EU Regulation, no French court had jurisdiction to open a subsequent main proceeding for the company, and that the decision of the Pontoise

The support of the Versailles cour d'apel in *ISA Daisytek SAS* ensured that British courts' treatment of pan-European corporate groups would, if the evidence supported it, continue to involve findings that companies not registered under any UK law were nonetheless within the jurisdiction of British courts because their "centre of main interests" was situated in the United Kingdom.[95] This result tentatively allowed corporate groups to reorganize under the gaze of the EU Insolvency Reg, particularly if members of a corporate group all filed in the United Kingdom on the basis of their COMI in common.

Insolvency practitioners and commentators were not perfectly comfortable with this state of the law. Premising jurisdiction on a race to the courthouse places emphasis on the fleet-footedness of a company's professionals, as well as on statutory hurdles preventing the commencement of an insolvency proceeding in some countries. For example, Italian lawyers and Italian courts learned when they lost their arguments that the COMI of a member of the Parmalat corporate group should be viewed as Italian despite its Irish registered office.[96] In *In re Eurofood*, the European Court of Justice upheld the Irish Supreme Court's refusal to rebut the presumption that an Irish subsidiary's COMI was situated in Ireland, its place of registration, and not Italy, the location of the Irish subsidiary's corporate group parent, on a variety of grounds including the perceptions of third party creditors of the Irish financing subsidiary.[97]

The focus in this article is on British influences on European law governing cross-border insolvency proceedings, and so I mention *Eurofood* only for its influence within the United Kingdom. Although the facts of *Eurofood* were distinct from those in *ISA Daisytek SAS,* aspects of this decision might have cautioned British barristers against making assurances that the European Court of Justice would see it their way in some subsequent case. Fortunately, British courts' corporate-group-reorganizing construction of the COMI standard was tested again, after the ECJ's decision in *Eurofood*, providing some comfort to British insolvency practitioners. In *MG Rover*, British

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Commercial Court to open a main insolvency proceeding for Daisytek-France violated the EU Regulation").

95. Klempka *supra* note 91 at 112. *See also* Ci4NET.COM, Inc., [2004] EWHC 1941 (Ch), Nos 556 and 557 of 2004 (May 20, 2004)(involving a Delaware corporation and Jersey registered corporation).

96. *See, e.g.*, Case C-341/04, Eurofood IFSC Ltd., 2006 E.C.R. I-03813.

97. *See id.*

courts opened an administration proceeding involving the Rover corporate group on the basis of a COMI-in-common among the British corporate parent and French and German subsidiaries.[98] Although French creditors again objected to the rebuttal of the French subsidiary's place of registration as an indication of its COMI, this time the French Commercial Court declined to open a second "main" proceeding relating to the French subsidiary in the Rover group and the Versailles cour d'appel upheld this declination as a proper reading of the EU Insolvency Reg post- *Eurofood.*[99]

### *B. Protecting Local Creditors Without Opening Secondary Proceedings?*

Both the Cork and Hoffman Reports also criticized the earlier draft conventions on which the EU Insolvency Reg was premised for focusing on liquidation rather than rescue of companies in financial distress.[100] To some degree, the complaint had been addressed by express inclusion of British administration proceedings and voluntary arrangements within the scope of the original EU Insolvency Reg.[101] But the universalism that had been embraced in the EEC Draft and that was the approach to cross-border insolvency treatment most likely to facilitate corporate rescue was rejected in favor of the so-called "modified" universalism by the third draft Convention and later the EU Reg.[102] Commentators fretted, in particular, that the possibility that numerous secondary proceedings could be opened under the terms of the EU Reg would undermine corporate reorganization in Europe.[103]

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98. MG Rover [2005] EWHC 874 (Ch.)

99. Public Prosecutor v. Segard (as Administrator for Rover France SAS), Cour d'apel [CA] Versailles, civ., 2006.

100. *See supra* Part I.C.

101. *See* EU Reg, *supra* note 1, Annex A.

102. *See, e.g.,* Jay L. Westbrook, *Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and The EU Insolvency Regulation*, 76 AM. BANKR. L.J. 1 (2002).

103. *See, e.g.,* GOODE, *supra* note 76. Goode puts the problem in this way:

> Creditors have a particular incentive to pursue secondary proceedings where the lex concursus governing their claims gives them better rights than they would enjoy under the law governing the main proceedings. For example, French law givens employees greater rights than English law on the insolvency of the employer, so that where main proceedings are opened in England against a French company, then in terms of the range of claims ranking for preferential status employees of the company will fare better in

Again, these concerns did not limit British insolvency practitioners when implementing the EU Insolvency Reg after its effective date. In one case, *In re Collins & Aikman Europe SA,* the British parent had sought and obtained an administration order and had joined in its request several of its subsidiaries, incorporated across several different European jurisdictions, all on the basis of their British COMIs.[104] Once in administration, the joint administrators faced irate creditors in the member states in which some of the subsidiaries where located.[105] These creditors argued informally, and probably rightly, that regardless of the Britishness of the subsidiaries' COMIs, which could not at that juncture have been relitigated, some of the non-British incorporated subsidiaries had establishments outside the United Kingdom and inside Europe, and these establishments alone justified the commencement of secondary proceedings.[106] Because the opening of secondary proceedings would have, as a practical matter, so delayed the reorganization of the corporate group as to thwart its rescue, the joint administrators made "oral assurances" at local creditors' committee meetings "that if there were no secondary proceedings in the relevant jurisdiction then their respective financial positions as creditors under the relevant local law would as far as possible be respected in the English administration."[107] These assurances did the trick. Secondary proceedings were *not* opened and the European body of creditors of the corporate group supported the joint administrators' proposed reorganization plan.[108]

After the fact, the joint administrators sought judicial ratification of what they had informally promised, but the authority of the British court to enforce by the joint administrators' oral promises was unclear. The EU Insolvency Reg specifies that the insolvency law of the main proceeding (that is the High Court of London and so English insolvency law) generally should govern distributions from a

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secondary proceedings in France than they would in main proceedings in England. *Id.* at 749.

104. In re Collins & Aikman Europe SA, et al. 2006 EWHC 1343 (Ch.). In making seeking administration orders for the European wing of the Collins & Aikman corporate group, the debtors were simply following in the footsteps of *BRAC Rent-A-Car*, *Daisytek* and *Rover*. *See supra* Part II.A.

105. *See generally* In re Collins, *supra* note 104.

106. *See Id.* ¶ 8.

107. *Id.*

108. *Id.*

proceeding under its scope rather than the insolvency law of the location of local creditors, at least where local creditors have not opened secondary proceedings in the member states in which the debtor had an establishment. But the joint administrators had assured the local creditors that they would receive no less from the Collins & Aikman estate than what they would have been entitled to under their local insolvency law. In the end, the British court ratified the joint administrators' assurances on the ground that the English statute governing administrations grants administrators broad discretion in their roles, and that other rules of common law supported ratification of the assurances made on the grounds that breach of these would be dishonorable.

That enforcement of the joint administrators' assurances was necessary to accomplish reorganization of the corporate group in *Collins & Aikman* infuses the decision of the British court. But the EU Insolvency Reg was not premised on the desirability of promoting the rescue of a corporation (or corporate group) in financial distress. Indeed, its unfriendliness to corporate rescue culture was a complaint that had been registered when reviewing the desirability of acceding to the terms of the EU Reg (and to the third draft EU Insolvency Convention that preceded it). In reaching this conclusion, however, the British court found jurisdiction to ratify insolvency practices that, while not expressly prohibited by the EU Reg, were also only tenuously supported by it. Because the British court found it had discretion to ratify the assurances as a matter of English law, the court was not contravening the text of the EU Insolvency Reg. But because the court's ratification of the joint administrators' assurances was a matter of its judicial discretion, British insolvency practitioners could not be sure that the same result would follow in later cases.[109]

## *IV. REVISING THE EU INSOLVENCY REG, WHILE MOVING TOWARD CONVERGENCE*

The original EU Insolvency Reg was drafted predominately to reflect laws focused more on the liquidation than the reorganization of corporate debtors, on debtor-corporations structured as singular

109. For discussion of the *Collins & Aikman* approach to secondary proceedings, see John A.E. Pottow, *A New Role for Secondary Proceedings in International Bankruptcy* 46 TEX. INT'L L. J. 579 (2011); Edward J. Janger, *Silos: Establishing the Distributional Baseline in Cross-Border Bankruptcies*, 9 BROOKLYN J. COM. & FIN. L. 180 (2014).

entities rather than groups of corporations, and on the opening of local proceedings to allow for the protection of local creditors' claims to assets situated outside a debtor's "centre of main interests." These shortfalls were apparent to the British government as it engaged in negotiations on each of the draft conventions preceding implementation of the EU Reg, but in weighing the costs against the benefits the decision was made to overlook these details in favor of the big picture: entry into a common European market.

As with any legal document produced to achieve consensus among the interests of numerous national interests, the story of the drafting and production of the EU Insolvency Reg is only part of the story. All laws settle into practices, and often shift in their accepted meaning as later implemented and enforced.[110] This EU Reg is no exception in this regard, which evolved both as practitioners and courts learned to work under within its express language and, over more than a dozen years, were required by one of its provisions to study past practices and consider revisions to this text.

Thus, although the original EU Insolvency Reg was drafted with the roughly equal involvement of the European member states in 1999, much of this settlement and resettlement occurred with British involvement at its core. Notwithstanding what many had perceived as limitations in the text of the EU Reg, over a dozen years, pragmatic British insolvency practitioners appearing before pragmatic British courts interpreted and implemented the EU Reg as a document enabling the rescue and reorganization of global corporate groups in financial distress. The story of the influence of the United Kingdom on cross-border insolvency practice within Europe is, in large part, then, a court-centered story that illustrates the importance of pragmatism, persistence and patience in the long-term project that is the implementation of the European Union. Over time, a corporate-group-reorganization-friendly vision of the EU Insolvency Reg took hold, especially within the United Kingdom. Because this vision was more a function of British courts' implementation of the EU Reg than the express language of its text, however, this settled practice might well have been unsettled.

British actors were intently focused on solidifying the results they had received before British courts. Importantly, buried at the end

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110. *See generally* Susan Block-Lieb & Terence C. Halliday, *Settling and Concordance: Two Case Studies in Global Commercial Law*, *in* TRANSNATIONAL LEGAL ORDERS 75 (Terrence C. Halliday & Gregory Shaffer, eds., 2015).

of the original EU Insolvency Reg was a boilerplate provision, Art. 46, which provided that:

> [n]o later than 1 June 2012, and every five years thereafter, the Commission shall present to the European Parliament, the Council and the Economic and Social Committee a report on the application of this Regulation. The report shall be accompanied if need be by a proposal for adaptation of this Regulation.[111]

It was well understood that a report on practices that had developed under the EU Insolvency Reg could prompt European-wide buy-in on the results in British case law like *BRAC Rent-A-Car*, *Daisytek*, *Rover*, and *Collins & Aikman*. More importantly, revision of the text of the EU Reg could codify aspects of these judicial practices so that they would be more perfectly reflected "on the books" throughout Europe. But would the European Union follow where it had been led?

By 2012, when by its terms the original EU Insolvency Reg was set for review and revision, much had changed within Europe. Beginning in 2008, a global financial crisis had threatened the economies of not only the United States but also Europe and even the BRICS (Brazil, Russia, India, China and South Africa). The United States rescued, through corporate chapter 11 reorganizations proceedings, two economically important automotive manufacturers, Chrysler and General Motors, and cobbled together repairs of its financial markets, providing a combination of tough regulatory love and TARP funding. By 2012, however, Europe's financial crisis had grown to encompass sovereign debt problems, first in Iceland, then Greece, Ireland, Portugal, Spain, Cyprus, Hungary, Romania and elsewhere. Some of these sovereign debt problems were resolved with infusions of financial assistance from the IMF, European Central Bank and European Commission (together referred to as the Troika), but some European countries' debt problems remain even today.

Thus, the European Commission began its work on reporting on possible revisions to the EU Insolvency Reg "[a]t a time where the European Union [was] facing the biggest economic crisis in its history."[112]

By 2015, the European Parliament and Council of the European Union were convinced to promulgate an amended version of the EU

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111. EU Insolvency Reg, *supra* note 1, art. 46.

112. European Commission, Commission Staff Working Document Impact Assessment: Revision of Regulation (EC) No. 1346/2000 on insolvency proceedings (Strasbourg Dec. 2012).

Insolvency Reg, and by late 2016 the European Commission had promulgated a proposal for a Directive of the European Parliament and of the Council aimed at harmonizing corporate insolvency law within Europe. The European Parliament adopted the revised EU Insolvency Reg in May 2015, thirteen months before a British referendum would call for the United Kingdom to exit from the European Union. The Commission finalized the proposed EU Directive in November 2016, five months after the Brexit referendum.

### *A. [Revised] EU Regulation 2015/848 on insolvency proceedings*

Unlike the original EU Insolvency Reg, the revised version is far more reorganization friendly. Some of this reorganization friendliness is expressed indirectly, through definitions. References which under the original EU Reg were to the "liquidator" are replaced with references to the more neutral "insolvency practitioner." The possibility of a debtor in possession is also recognized. The revised EU Insolvency Reg continues to divide insolvency proceedings into main proceedings in the debtor's COMI and secondary proceedings where the debtor has establishments, but now both terms are explicitly defined.[113] Moreover, the definition of COMI in the revised Insolvency Reg is identical to that applied by British (as well as most other European) courts. Judgments opening insolvency proceedings are entitled to automatic recognition, as had been true under the original EU Insolvency Reg, but now the revised version specifies that these effects "may not be challenged in other Member States."[114]

Although the revision continues to permit the opening of secondary proceedings,[115] it also provides the insolvency practitioner in the main proceedings has the "right" to give an undertaking to avoid the opening of secondaries.[116] This undertaking resembles the practices ratified in *Collins & Aikman,*[117] but the revised EU Insolvency Reg also goes on to specify that any "court seised of a request to open secondary insolvency proceedings shall immediately give notice to the insolvency practitioner or the debtor in possession

113. *See* revised EU Insolvency Reg., *supra* note 6, art. 3(1) (defining COMI as "the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties").

114. *Id.* art. 20(2).

115. *Id.* art. 34.

116. *Id.* art. 36.

117. *Id.*

in the main insolvency proceeding" so that the insolvency practitioner or DIP is given "an opportunity to be heard on the request" and presumably obtain an undertaking obviating such opening.[118] To provide clarity on the priority of the preference set by actors in the main proceeding, the revised Insolvency Reg specifies that the giving of an undertaking is itself entitled to recognition of sorts; the court in the would-be secondary proceeding may "not open secondary insolvency proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors."[119] And, whether or not an undertaking is posted, the revised EU Insolvency Reg requires a court that opens secondary proceedings to "stay the process of realization of assets in whole or in part on receipt of a request from the insolvency practitioner in the main insolvency proceedings."[120] The insolvency practitioner is also explicitly empowered to propose a restructuring plan that would bind participants in any secondary proceeding, so long as the restructuring is permissible in all affected jurisdictions.[121]

The revised EU Insolvency Reg also addresses the question of corporate groups.[122] Unlike British practices, which largely leave much to the discretion of a joint administrator in a corporate group with member companies with COMIs situated in England, the revised EU Insolvency Reg specifies in great detail the circumstances under which insolvency proceedings of members of a group of companies should be coordinated.[123]

### *B. Proposed EU Directive on preventative restructuring frameworks*

Shortly after finalizing the revised EU Insolvency Reg, the European Commission also promulgated a draft Directive that looks to promote greater convergence in European insolvency and debt

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118. *Id.* art. 38(1).

119. *Id.* art. 38(2).

120. *Id.* art. 46(1).

121. *Id.* art. 47(1). In this regard, the proposed EU Restructuring Directive is undoubtedly intended to prompt member states to adopt domestic legislation authorizing restructuring of this sort, so that participants in secondary proceedings would be so bound. *See* 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 "EU Restructuring Directive"].

122. *See* revised EU Insolvency Reg., *supra* note 6, ch. V, arts. 56-77.

123. *See id.*

restructuring laws, and specifically convergence around a culture of corporate rescue.[124] Although Continental insolvency laws in existence at the time the original Insolvency Regulation was promulgated mostly favored liquidation of insolvent businesses, the new Restructuring Directive proposes that member states adopt national legislation enabling and perhaps preferring the reorganization of viable businesses facing economic difficulty. Because both detailed and, as of yet, unfinished, I leave for another day description of the Restructuring Directive. Suffice to say for purposes of this article that, if finalized and implemented, the Restructuring Directive would result in the eventual convergence of European insolvency and pre-insolvency laws so that they favored a rescue culture and were more in line with current UK (and also US) laws on the reorganization and restructuring of distressed companies.[125]

## *V. THE EFFECTS OF BREXIT ON EUROPEAN INSOLVENCY PRACTICES*

All of this raises the question of: What next? What will cross-border insolvency law look like after the United Kingdom leaves the European Union?

Currently, the United Kingdom and all other EU countries except Demark are parties to the revised EU Regulation on Insolvency Proceedings, which came into effect in late June 2017. The proposed Directive on Preventive Restructuring Frameworks also became final in late November 2016, although by its terms does not require member states to adopt legislation to implement its terms until two years after the Directive enters into force.

Since Prime Minister Theresa May recently initiated Brexit negotiations under Art. 50, it is reasonably certain that the United Kingdom will leave the European Union within the next two years, [126]

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124. *See* EU Restructuring Directive, *supra* note 121.

125. *See id. See also* text associated with *supra* notes 75-79 (discussing move toward corporate rescue culture in previous ten to twenty years).

126. It is less clear whether the United Kingdom will also leave or re-join the European Economic Area (EEA). If it re-joins the EEA, then the Directive on Preventive Restructuring Frameworks would govern. Directives apply within the EEA, even to countries that are not members of the European Union (such as Norway, Liechtenstein and Iceland), but Regulations and Conventions do not. *See, e.g.*, Moss, *supra* note 66. *See also* David Menzies, ICAS Director of Insolvency, *Brexit: Implications for insolvency and restructuring*, ICAS (Jun. 27 2016), https://www.icas.com/technical-resources/brexit-implications-for-insolvency-and-restructuring ("Whilst it is possible that either the Norwegian or Swiss models could be used

which would mean that, eventually,[127] EU law would not govern recognition of insolvency proceedings commenced in the United Kingdom or British courts' recognition of insolvency proceedings commenced in Europe.[128] Some other law might get negotiated or otherwise put in place as a substitute. But what would that law look like? How effective would it be?

There is discussion of a Great Repeal Bill, which promises to domesticate EU law as the law of the United Kingdom.[129] Many think that the effect of the Great Repeal Bill would mean that the UK is bound, at least initially upon Brexit and the simultaneous enactment of the Repeal Bill, by the EU law to which the United Kingdom was bound on the day before Brexit.[130] But although it is also possible that the Great Repeal Bill could succeed in binding the United Kingdom to EU law as a matter of British law, it would not bind the members of the European Union to reciprocate.[131] After all, the Great Repeal Bill would only be a matter of domestic UK law.

It might also be possible for the United Kingdom to negotiate a treaty with the member states of the European Union that provides for continuation of something closely resembling to the revised EU

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going forward, it is considered by most commentators that the United Kingdom will negotiate its own exit agreement with the European Union.").

127. I say "eventually" because, presumably, proceedings started under EU law would continue to be governed by EU law even after exiting the European Union.

128. *See, e.g.*, *Brexit: What does it mean for restructuring and insolvency?*, FRESHFIELDS BRUCKHAUS DERINGER (July 1, 2016), http://knowledge.freshfields.com/m/Global/r/1574/brexit__what_does_it_mean_for_restructuring_and_insolvency_ ("Unless replacement legislation is given effect before Brexit, we expect that there will no longer be automatic recognition of UK insolvency proceedings in other EU member states.").

129. *See generally* Parliament, House of Lords, Select Committee on the Constitution, The "Great Repeal Bill" and delegated powers, 9th Report, HL Paper 123 (March 7, 2017), *available at* https://publications.parliament.uk/pa/ld201617/ldselect/ldconst/123/12302.htm [hereinafter HL Report on Great Repeal].

130. UK Government, White Paper, The United Kingdom's exit from and new partnership with the European Union, at 10 (describing effects of proposed "Great Repeal Bill" as "preserv[ing] EU law where it stands at the moment before we leave the EU").

131. *See* HL Report on Great Repeal, *supra* note 129. 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.

Regulation on Insolvency Proceedings.[132] The Council of Europe, whose membership is not limited to the EU member states, would be an obvious source for such a treaty.[133] So might UNCITRAL, the Hague Conference on Private International Law ("HCCH"), or the International Institute for the Unification of Private Law ("UNIDROIT").[134]

A treaty of this sort would be consistent with British interests. Regardless of what one thinks about the original EU Reg, the United Kingdom played a significant role in crafting the revised EU Reg and the United Kingdom should want to remain bound to its terms. Given that negotiations on the revised EU Reg and on the Directive of Preventive Restructuring Frameworks are so recently resolved, it would be reasonable to presume that the other 26 members of the European Union should also want the United Kingdom to remain bound to the revised Regulation and the new Directive.[135]

But this common-sense conclusion will be difficult to implement. The history of the making of the original EU Insolvency Reg suggests that negotiations on such a treaty could take some time –hopefully not another forty years!

Although the content of this new treaty would look to parallel that of the recast EU Insolvency Reg, which has already been written, and although there was a quick turnaround time between failure of the third draft EU Convention on Insolvency Proceedings and the original EU Insolvency Reg, there are several new problems, all of which will be difficult to resolve.

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132. *See id.* And depending on whether the United Kingdom also leaves the EEA, to negotiate a treaty through which the European Union and United Kingdom agree to be bound by the Directive on Preventive Restructuring Frameworks. *Id.*

133. For discussion of the Council of Europe, see Wassenberg, *supra* note 37.

134. For information on the HCCH, see *Hague Conference on Private International Law, The World Organization for Cross Border Co-operation on Civil and Commercial Matters*, HCCH, https://www.hcch.net/en/home (last visited Aug. 8, 2017). For information about UNIDROIT, see *History and Overview*, INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW (last updated May 18, 2016), http://www.unidroit.org/about-unidroit/overview. *See also* Susan Block-Lieb & Terence Halliday, *Contracts and Private Law in the Emerging Ecology of International Lawmaking,* in CONTRACTING BEYOND BORDERS: THE LAW OF INTERNATIONAL MARKETS IN THE TWENTIETH CENTURY, (Gregoire Mallard and Jerome Sgard eds. 2016)(discussing emergence and work of HCCH and UNIDROIT as compared to that of UNICTRAL).

135. Personal Correspondence with Gabriel Moss (on file with the editors of the Fordham International Law Journal) ("The common-sense of all this seems to be that the UK and the 27 (or at least the 26, excluding Denmark), should reproduce the Recast Regulation by Treaty.").

First, enforcement of the EU Insolvency Regulation depends on each member state accepting the jurisdiction of the European Union Court of Justice. But it is not at all clear that this sort of enforcement provision can be negotiated as a part of any newly negotiated treaty between the United Kingdom and European Union on the recognition of insolvency proceedings. For some time now, Prime Minister Theresa May has said that she would not accept the jurisdiction of the EU's Court of Justice and it is difficult to see how the revised EU Insolvency Reg can work without enforcement.[136] Currently, there is no alternative transnational court to delegate enforcement authority to in the same way as there are possible alternative lawmaking IOs for treaty drafting.[137] But the question of the UK's continuing submission to the jurisdiction of the CJEU after Brexit, even temporarily, is not an issue unique to the question of cross-border insolvency recognition, which could mean that the solution for recognition of insolvency proceedings takes on greater importance in diplomatic negotiations than one might think. Just this month, important progress has been made on this issue, with the UK Government putting forward a White Paper on various proposals for enforcement and dispute resolution after Brexit.[138] Given the newness of this proposal, there can be no certainty that it would meet with the approval of EU diplomats or that any tentative agreement reached on this issue would continue to exit by the time set for Brexit under Art. 50. Nonetheless, the new White Paper's appearance presents an important shift in the tone of the negotiations so far.

That said, insolvency practitioners should not pop champagne corks just yet. Nearly since the Brexit referendum was first reported, there existed the substantial worry that the political situation within Europe would favor second-best solutions in Brexit negotiations with the United Kingdom so as to signal to other member states that exiting the European Union comes with substantial costs. It might be

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136. *Id*.

137. It might be possible to negotiate a treaty between the United Kingdom and European Union that does not accept the jurisdiction of the CJEU to resolve conflicts raised by national courts' interpretation of this treat, but that creates the possibility of conflicts between this new treaty and existing EU agreements in the recast EU Reg, which after all would continue in effect after Brexit among the remaining EU member states. This potential for conflict would be difficult to tolerate, long term.

138. *See* UK Government, *Enforcement and dispute resolution: A Future Partnership Paper, available at* https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/639609/Enforcement_and_dispute_resolution.pdf.

perfectly consistent with the national interests of all concerned to negotiate a treaty on recognition of insolvency proceedings that closely resembles existing European law, but this issue is just a pin prick in the sea of substantive issues that will need to get resolved between UK and EU diplomats. So far, signals regarding the order in which things get decided do not suggest that the issues on which agreement ought to be relatively easy will get decided first. To the contrary, the easy issues may get decided last.

In the absence of a newly negotiated treaty on cross-border insolvency, domestic UK law would govern, but could not provide resolution equivalent to that under the EU Reg.[139] Whether by means of the Great Repeal Bill, or existing UK law providing for recognition of "foreign" insolvency proceedings, British courts could coordinate with and assist incoming cases – that is, insolvency proceedings commenced in Europe and seeking recognition from British courts – but 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.[140] Even in those EU member states that have enacted legislation to implement UNICTRAL's Model Law on Cross-Border Insolvency, and there are only several of these countries, recognition would not be automatic and assured in the same way as under the EU Reg. Moreover, British law limits the effect of their Model-Law implementing legislation (the 2006 Insolvency Regulation) so that it has no implication for the recognition and enforcement of insolvency related judgments.[141] UNICTRAL has been at work in patching this hole for several years

139. *See, e.g.*, Graham Bushby & Ian G. Williams, Inside the "Brexit Bubble": What's Next for the UK?, XXXV, No. 9 A.B.I. JOURNAL (Sept. 2016)("The ECReg gives automatic recognition to UK 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 What will be the Impact of Brexit on Insolvency Proceedings?*, LEXOLOGY (Oct. 5 2016), http://www.lexology.com/library/detail.aspx?g=7828bfb8-feaf-4a7e-97cb-cc5664f36e47; *Brexit: Restructuring and Insolvency*, HERBERT SMITH FREEHILLS, (Feb. 16, 2017), *available at* https://www.herbertsmithfreehills.com/latest-thinking/brexit-restructuring-and-insolvency.

140. *See Brexit: initial considerations in the restructuring and insolvency market (July 2016)*, CLIFFORD CHANCE, *available for download at* https://financialmarketstoolkit.cliffordchance.com/en/financial-markets-resources/resources-by-type/client-briefings/2016/07/brexit---initial-considerations-in-the-restructuring-and-insolve.html (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").

141. Rubin v. Eurofinance S.A.; New Cap Reinsurance Corp. v. Grant [2012] UKSC 46; [2013] 1 AC 236.

and seems poised to promulgate a new Model Law on the Recognition and Enforcement of Insolvency-Related Judgments,[142] but enactment of legislation to implement one or both of these UNCITRAL Model Laws across Europe cannot be guaranteed and, in any event, also could take a substantial period of time.

## *VI. CONCLUSION*

The negotiation that produced the EU Regulation on Insolvency Proceedings, which entered into force in 2002, was time-consuming (spanning nearly forty years) and complicated (involving three earlier draft conventions). Although commentators generally view British influence on the original EU Reg as important, my review of reports to the House of Lords and Parliament more emphasize flaws than lay out grounds for British support. Despite these early reservations, the United Kingdom joined in the EU Insolvency Reg. Later, British insolvency practitioners sought to construe the EU Reg in ways inconsistent with concerns that had been raised before its entry into force and thus convinced British courts to solve the problem diplomats failed to fix. Based at least in part on this experience, European (including British) diplomats mostly codified British practices in their recent agreement to revise the EU Reg. Ironically, after Brexit, Europe will be left with a recast EU Reg that is heavily influenced by British insolvency practices and a new EU Directive that is heavily influenced by British law. While post-Brexit the United Kingdom may succeed in continuing to be bound by the EU Directive on Restructuring Frameworks, it faces substantial impediments to any replication of the EU Reg, mostly because this Reg is reciprocal and is subject to enforcement by the European Union Court of Justice.

There is a serious risk that the United Kingdom will lose the benefits of the revised EU Insolvency Regulation. Let's hope that this risk gets resolved, and diplomats instead succeed in negotiating a new, similar treaty on cross-border recognition of insolvency proceedings across the Channel. This resolution would be better for both the United Kingdom and the European Union.

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142. *See* UNCITRAL Recognition and Enforcement of Insolvency-Related Judgments: Draft Model Law (Mar. 1, 2017), *available at* https://documents-dds-ny.un.org/doc/UNDOC/LTD/V17/013/46/PDF/V1701346.pdf?OpenElement.