NEW YORK UNIVERSITY
JOURNAL OF LAW & BUSINESS

VOLUME 14 SUMMER 2018 NUMBER 3

PARTING IS SUCH SWEET SORROW: BREXIT'S POTENTIAL IMPACT ON THE UNITED KINGDOM'S CROSS-BORDER INSOLVENCY LAW REGIME

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INTRODUCTION

On June 23, 2016, citizens of the United Kingdom ("U.K.") voted to withdraw from the European Union ("E.U.") by popular referendum (commonly referred to as the "Brexit"), triggering the most significant political event in modern British politics and catapulting the world's fifth largest economy into an era of unprecedented financial and legal uncertainty. In the days following the surprise decision, new British Prime Minister Theresa May assured the public, "Brexit means Brexit, and we are going to make a success of it."[1] As May continues to deal with one of the most challenging legal

1. Tom McTague, Vince Chadwick & Paul Dallison, *Theresa May: We're Going to Make a Success of Brexit,* POLITICO (July 11, 2016, 7:06 PM), http://www.politico.eu/article/theresa-may-were-going-to-make-a-success-of-brexit/.

and constitutional crises to face the U.K., one question remains: what does Brexit actually mean?

Brexit supporters argue that the U.K.'s sovereignty and legal system have been systematically undermined by the E.U. With policies such as the free movement of workers (which generally requires the U.K. government to provide social assistance and the right to work to any E.U. citizens coming to Britain) and the binding legal decisions of an activist European Court of Justice ("ECJ"),[2] the pro-Brexit camp has argued that the E.U. is an unsustainable bureaucracy.[3] Crippling financial woes, such as the Greek sovereign debt crisis, and national security concerns, like terrorist attacks in France and Brussels, have also eroded support for the E.U.[4]

One of the most difficult challenges facing Brexit is unwinding the European legal and regulatory regime in the U.K. While Brexit supporters contend that British sovereignty is subverted due to overregulation from the E.U., opponents argue that several financial regulations may actually benefit the British economy, most notably the U.K.'s cross-border insolvency laws (which are largely connected with and governed by E.U. law). With 28 diverse member states and 28 separate legal regimes, the E.U. needed a unifying solution to ensure that creditors from one member state may be able to legally claim assets from debtors in another member state in the event of corporate bankruptcy.

Broadly speaking, the E.U.'s transnational bankruptcy laws govern proceedings that involve liquidation or divestment

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2. *See* Henri de Waele & Anna van der Vleuten, *Judicial Activism in the European Court of Justice – The Case of LGBT Rights*, 19 MICH. ST. INT'L. L. REV. 639, 640 (2011). The ECJ is the highest court in the E.U. and presides over matters of European Union law. Unlike the Anglo-American legal tradition of following precedents, the ECJ plays a more active role in interpreting law and is not bound by common law. In the past, the ECJ has made controversial legal judgments criticized by Brexit supporters, including the decision that E.U. law may supersede the national laws of individual member states, that European law may be used in national courts, and that individuals may sue their home governments for failing to comply with E.U. law.

3. *See The Brexit Delusion*, ECONOMIST (Feb. 27, 2016), https://www.economist.com/briefing/2016/02/27/the-brexit-delusion.

4. *Id.*

of a debtor with assets across multiple member states.[5] These laws were designed to allow for the seamless, automatic, and binding recognition of insolvency proceedings and court decisions throughout the E.U. At the same time, the laws allow individual member states to craft their own bankruptcy laws internally; each individual country's legislature and judiciary creates its own cross-border insolvency laws that must then be recognized across the Union. The U.K.'s restructuring regime has been well-received throughout Europe and the world, attracting many to seek insolvency proceedings under the British legal system.[6] The decision to withdraw complicates the future of British cross-border insolvency law and the international parties engaged in such proceedings.

This paper will examine the possible consequences that Brexit would have on the U.K.'s cross-border insolvency legal regime, focusing on how such a change would impact the determination of the center of main interests and ultimately arguing for proposals that Parliament should consider to ease the Brexit transition. Part I discusses the relevant statutory provisions that have developed the U.K.'s cross-border insolvency laws, along with the current state of these laws pre-Brexit. Part II examines the impact that Brexit may have on these laws. Finally, Part III analyzes proposals that will hopefully retain the effectiveness of the U.K.'s cross-border insolvency laws following Brexit.

I. RELEVANT STATUTORY PROVISIONS OF THE U.K.'S CROSS-BORDER INSOLVENCY LAWS

A. *The European Perspective: Insolvency Regulation 1346/2000*

1. *Unifying Insolvency Law Across Europe*

Much of the U.K.'s cross-border insolvency law derives from the E.U. Insolvency Regulation 1346/2000 ("Insolvency

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5. MAYER BROWN, OVERVIEW OF THE ENGLISH LEGAL FRAMEWORK FOR CROSS-BORDER INSOLVENCY 1 (2012), https://www.mayerbrown.com/public_docs/Overview_English_Legal_Framework.pdf.

6. Charlie Thomas, *Bankruptcy Tourism: Why Foreign Companies and Individuals Are Choosing to go Bankrupt in Britain*, HUFFINGTON POST (Nov. 24, 2012, 9:13 AM), http://www.huffingtonpost.co.uk/2012/11/23/bankruptcy-tourism-why-foreign-companies-and-individuals-are-choosing-to-go-bankrupt-in-britain_n_2177924.html.

Regulation," or "Regulation"), passed in May 2000 to provide rules on determining the proper jurisdiction for a debtor's insolvency proceedings within the E.U. As such, the nuances of the Regulation are critically important in forming the foundations of British cross-border insolvency law. As 28 member states are currently part of the E.U., multiple insolvency proceedings with different laws proved to be increasingly complex before any sort of unifying legislation. Prior to the Insolvency Regulation, these divergent insolvency laws were viewed as contrary towards the E.U.'s stated goals of creating a single European economic union—a major point of concern for supporters of Brexit, who contend that the U.K. has lost control over its own economic independence.

Designed to address the prickly issue of multiple insolvency proceedings in different jurisdictions, the Regulation identifies the relevant law to use in cross-border insolvency proceedings (which broadly include public company bankruptcy proceedings, interim proceedings such as temporary stays to allow negotiations with creditors, and pre-insolvency proceedings); the Regulation also provides a mandatory automatic recognition of those proceedings amongst E.U. member states, effectively establishing comity through statute.[7] Additionally, the Regulation specifies that each proceeding will have *one* primary jurisdiction while all other jurisdictions are considered secondary.[8] The judgments of the main proceeding are automatically recognized in the other E.U. member states.[9] Interestingly enough, unlike most E.U. regulations,[10]

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7. *See* MAYER BROWN, *supra* note 5, at 3 (explaining that if a debtor has establishment or commercial ties with another member state, it may also open secondary proceedings in that state, but the effects of those proceedings are limited to the assets located in that jurisdiction).

8. *Id.* at 1.

9. EVERSHEDS, BREXIT – IMPLICATIONS FOR THE U.K. RESTRUCTURING AND INSOLVENCY MARKET (2016), http://blogs.lexisnexis.co.uk/randi/brexit-implications-for-the-uk-restructuring-and-insolvency-market/.

10. PAUL CRAIG & GRÁINNE DE BÚRCA, E.U. LAW: TEXT, CASES, AND MATERIALS 106 (6th ed. 2015). The E.U. typically employs two types of statutes to pass laws: directives (which are mandatory for member states to comply with but allow states to individually transpose and implement into national law) and regulations (which are mandatory and sweep broadly, with very little room for states to implement individually). Member states are generally required to follow all regulations and set aside any national laws that may be in conflict with European Union law.

the Regulation does not attempt to *universally* harmonize the cross-border insolvency laws of every member state. In fact, the Regulation is largely viewed as a conflict of laws measure, empowering member states to shape their own insolvency proceedings.[11] In June 2017, the Insolvency Regulation was recast, or reformed, in order to provide more effective administration of cross-border insolvency proceedings within the European Union.[12]

In short, the Insolvency Regulation leaves member states free to determine the civil procedure and substance of insolvency proceedings within their borders but ensures that one jurisdiction will be the primary jurisdiction (the member state where the debtor has its center of main interest, or "COMI") while all proceedings in other member states are considered ancillary jurisdictions (jurisdictions where a debtor is established in one member state but maintains its COMI in another).

2. *The Regulation's Interpretation of Center of Main Interest*

Most notably, the Regulation largely allows member states to define the debtor's singular COMI in their implementation of the law.[13] The main proceedings may only commence in the member state where the debtor's COMI is located, and the insolvency laws of that state will generally govern those proceedings.[14] The Regulation dictates that the judgments from the main proceedings will be binding and will be automatically recognized across all member states, making it easier for a foreign creditor to enforce bankruptcy orders and claim the assets of a debtor located in another member state.[15]

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11. CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 224 (Franco Ferrari & Stefan Kröll eds., 2011).

12. Commission Regulation 2015/948, 2005 O.J. (L 141) 19, 56 [hereinafter Insolvency Regulation]. While the recast legislation itself was finalized in 2015, the text of the recast regulation states that it would come into force on June 26, 2017. *See also* STEPHEN PHILLIPS, SCOTT MORRISON & SIOBHAN SHERIDAN, ORRICK, RECAST E.U. INSOLVENCY REGULATION COMES INTO FORCE (2017).

13. Adam Gallagher, *Center of Main Interest; The E.U. Insolvency Regulation and Chapter 15*, AM. BANKR. INST. J. 44 (July/Aug. 2009).

14. *Id.*

15. MAYER BROWN, *supra* note 5, at 2.

The Regulation, however, offers little guidance on how to determine COMI, stating only that the "'center of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."[16] Consequently, there exists a rebuttable presumption derived from case law that holds that for corporate debtors, COMI is the location of the company's registered office.[17] Subsequent case law from the ECJ has held that COMI should be focused on the place of the debtor company's central administration, with greater emphasis placed on "objective criteria" ascertainable by third parties, particularly creditors; for instance, the location of where the main debtor company's management sits may be considered objective factors.[18]

On the other hand, defining where a company is established in the E.U. is often controversial because of conflicting, non-harmonized doctrines of corporate registration and incorporation between member states. For instance, the U.K. adheres to the *incorporation theory*, which holds that a corporation is subject to the laws of the country in which it is legally incorporated; conversely, Germany has adopted the *siège reel* (real seat) *theory*, which holds that a corporation is subject to the laws of the country in which it has its central administration—not necessarily where it is incorporated.[19] The location of the "registered office" (and subsequently COMI) is rather contentious, and the rebuttable presumption tying COMI to the location of the company's registered office is often the source of litigation.[20]

The recast version of the Regulation, which took effect in June 2017, provides more clarity into the thorny definition of COMI under E.U. law. Specifically, the recast Regulation will distinguish between a company or a legal person *and* an individual exercising an independent business or profession.[21] For

16. Council Regulation 1346/2000, 2000 O.J. (L 160) 1 (EC).
17. *In re* Aim Underwriting Agencies (Ireland) Ltd, Re, 2004 WL 2246316.
18. Case C-341/04, *In re* Eurofood IFSC Ltd., 2006 E.C.R. I-3813.
19. Karsten Engsig Sørensen & Mette Neville, *Corporate Migration in the European Union*, 6 COLUM. J. EUR. L. 181, 185 (2000).
20. *See, e.g.*, *In re* Aim Underwriting Agencies (Ireland) Ltd., 2004 WL 2246316.
21. Insolvency Regulation, *supra* note 12.

the former category, the member state of the registered office is assumed to be a company or legal person's COMI; for the latter category, the principal place of business is assumed to be the COMI.[22] One of the more important changes related to COMI in the recast Regulation is to limit abusive forum shopping. Under the recast Regulation, if debtors are contesting the validity of the location of their COMI, they have the burden of proof of presenting evidence to the relevant court for removing jurisdiction to another member state.[23] Additionally, the legislation also provides creditors with the opportunity to refute the debtor's claims for relocating jurisdiction based on a contested determination of COMI.[24]

3. *The Regulation's Interpretation of Establishment*

Besides defining jurisdiction based on COMI, the Regulation also covers situations in which a debtor has "establishment" in one member state but maintains its COMI in another. In these situations, ancillary insolvency proceedings may take place in jurisdictions *outside* of the primary jurisdiction (the member state where COMI is located). Much like the definition of COMI, the Regulation itself provides thin guidance on the actual definition of "establishment;" currently, the statute defines "establishment" as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods."[25] Additionally, if the actual center of management is not located in the same jurisdiction as the debtor company's establishment, then courts will likely find that secondary proceedings may be initiated in the member state where the debtor is established.[26]

There are two types of ancillary proceedings: territorial proceedings (which are opened before main proceedings) and secondary proceedings (which are opened after the main proceedings).[27] Originally, the Regulation only allowed secondary proceedings to be used for overseeing liquidation proce-

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22. *Id.*
23. *Id.*
24. *Id.*
25. Council Regulation 1346/2000, 2000 O.J. (L 160), 5 (EC).
26. MAYER BROWN, *supra* note 5, at 1.
27. *Id.*

dures (and not for rehabilitation or rescue).[28] However, under the recast Regulation, secondary proceedings have expanded scope, as they (and by extension the Regulation) can now govern rescue proceedings designed to save and restructure economically viable but distressed businesses.[29]

B. *The U.K. Adopts a More Global Approach: The Model Law on Cross-Border Insolvency*

1. *Applying the Regulation to the U.K.'s National Cross-Border Insolvency Laws*

While the Regulation has focused largely on implementing automatic recognition of insolvency proceedings across the E.U., member states and their respective legislatures and courts determine the substantive bankruptcy laws and proceedings within their own borders. In implementing the Regulation, the British government has decided that main proceedings may only be opened in the United Kingdom if the debtor has its COMI in the U.K.[30] Per the Regulation, main proceedings opened in the U.K. are automatically recognized across the E.U.[31] If the debtor's COMI is located in another E.U. member state, secondary proceedings may be initiated in the U.K. if the company has an establishment within Britain.[32] If the debtor's COMI is outside the E.U., the Insolvency Regulation will not apply and the U.K., in common accordance with other member states, is free to act under its own domestic laws and exercise its sole discretion in deciding to grant jurisdiction, open main insolvency proceedings, or recognize and enforce foreign proceedings.[33]

In the immediate years following the Regulation's passage, the U.K. liberally recognized and granted comity in E.U.-related insolvency procedures. In the last few years, however,

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28. *Id.*, at 2. Under U.K. law, the process of selling and distributing the assets of a distressed business to shareholders and creditors is referred to as "winding up" instead of "liquidation."

29. Insolvency Regulation, *supra* note 12.

30. EVERSHEDS, *supra* note 9.

31. *Id.*

32. SLAUGHTER & MAY, THE INTERNATIONAL INSOLVENCY REVIEW: U.K. INSOLVENCY LAW 1–2 (2003), http://www.slaughterandmay.com/media/2050696/the-international-insolvency-review-uk-insolvency-law.pdf.

33. *In Re* Arena Corporation Ltd., [2003] EWHC 3032 (Ch), affirmed on appeal ([2004] EWCA Civ. 371).

the U.K. courts, perhaps echoing the pro-Brexit sentiment surrounding the country, have tried to dampen the effects of the Regulation's automatic recognition of E.U. proceedings, bringing British law closer in conflict with E.U. law.

Specifically, under British common law, judgments of foreign courts are classified as either *in personam* or *in rem* and are enforceable under British law only if the foreign court properly exerted jurisdiction.[34] Although some have argued that the transnational nature of foreign insolvency proceedings (with the debtor's assets potentially spread across the world) should warrant an exception to this strict jurisdictional requirement, the British Supreme Court decided in *Rubin v. Eurofinance SA* that foreign insolvency procedures deserve no special treatment with respect to jurisdiction.[35]

As such, the jurisdictional test laid out in *Rubin* places another hurdle before British courts will recognize foreign insolvency proceedings and any bankruptcy-related orders (such as automatic stays against creditors and approval of liquidation procedures) from foreign courts, putting British law directly in conflict with the Regulation's mandate of automatic recognition across the member states; absent *Rubin*, courts in other E.U. member states would not have to prove that they have jurisdictional power over proceedings. Even though lower British courts previously held that foreign bankruptcy orders may enforce the rights of creditors collectively without the need to establish *in rem* or *in personam* jurisdiction,[36] *Rubin* has reversed this once liberal approach towards automatically recognizing insolvency proceedings from other E.U. member states, complicating the implementation of the Regulation within the U.K. even before Brexit.

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34. In other words, the foreign courts must demonstrate that they had jurisdictional power to adjudicate matters directed against a party (*in personam* jurisdiction) or against real or personal property (*in rem* jurisdiction) in order for British courts to recognize foreign proceedings. In the case of *Rubin*, the English defendant in a cross-border insolvency proceeding had not submitted to the jurisdiction of a primary foreign court and was not subject to the *in personam* jurisdiction of that court. *See* Rubin v. Eurofinance SA [2012] UKSC 46.

35. *Id.*

36. *See, e.g.*, Cambridge Gas Transp. Corp. v. Official Comm. of Unsecured Creditors of Navigator Holdings PLC. [2006] UKPC 26.

2. *A Framework for Implementing the Insolvency Regulation*

As the Regulation empowered individual member states to decide how to implement their cross-border insolvency laws domestically, the U.K. adopted the United Nations Commission on International Trade ("UNCITRAL") Model Law on Cross-Border Insolvency ("Model Law"). The Model Law provides a framework for recognizing foreign insolvency proceedings of jurisdictions that have also adopted the measure, specifically regulating and dealing with distressed debtors that have assets or creditors in more than one country *or* in situations where creditors are not located in the jurisdiction where the insolvency proceeding is occurring.[37] Like the Regulation, the Model Law is based on the concept of COMI as the jurisdiction where the principal insolvency proceedings should take place; if a debtor should have assets in other countries, bankruptcy courts in those jurisdictions should recognize the insolvency proceedings that stem from the main proceedings.[38]

Much like how the United States implemented the Model Law through Chapter 15 of the Bankruptcy Code, the U.K incorporated the Model Law through domestic law as well (namely, the U.K. Insolvency Act of 2000).[39] As part of the transposition, the U.K. reserved the power to modify parts of the Model Law in 2006, but mostly, the original provisions of the law have largely been implemented into British insolvency law with few changes.[40] However, if the Model Law's provisions conflicted with those of the Regulation, the European Union

37. *See* Marcela Ouatu, Modified Universalism for Cross-Border Insolvencies: Does it Work in Practice? (Oct. 2014) (unpublished LL.M. thesis, University of British Columbia), https://open.library.ubc.ca/clRcle/collections/ubctheses/24/items/1.0103613; *see also* NORTON ROSE FULBRIGHT, INSOLVENCY: IMPACT OF A BREXIT ON INSOLVENCIES (2016), http://www.nortonrosefulbright.com/knowledge/publications/136993/insolvency.

38. Ouatu, *supra* note 37, at 57–58, 62.

39. SLAUGHTER & MAY, AN INTRODUCTION TO ENGLISH INSOLVENCY LAW 11 (2015), https://www.slaughterandmay.com/media/251437/an-introduction-to-english-insolvency-law.pdf.

40. Sandy Shandro, *The Implementation of the UNCITRAL Model Law on Cross-Border Insolvency in Great Britain*, AM. BANKR. INST. J. (June 1, 2006), https://www.abi.org/abi-journal/the-implementation-of-the-uncitral-model-law-on-cross-border-insolvency-in-great-britain.

retains supremacy, and the U.K. must act in accordance with the Regulation.[41]

3. *Scope of the Model Law on U.K. Cross-Border Insolvency Proceedings*

A major area where the scope of the Model Law and the Regulation differs is in foreign insolvency proceedings with non-E.U. parties. As previously discussed, the Regulation does not apply to jurisdictions outside the member states of the European Union. However, the Model Law allows for recognition of foreign insolvency proceedings in the U.K. and access to British courts for non-E.U. debtors and creditors.[42] Specifically, the Model Law fills the legislative gap in four fundamental areas where the Insolvency Regulation is too broad to apply: (i) where recourse is sought in the U.K. by a foreign court or representative in connection with a foreign insolvency proceeding; (ii) where assistance is sought in a foreign state in connection with a British insolvency proceeding; (iii) where a foreign insolvency proceeding and a British insolvency proceeding with respect to the same debtor are occurring simultaneously; or (iv) where creditors or other interested persons in a foreign jurisdiction have an interest in initiating or participating in a British insolvency proceeding.[43]

4. *The Model Law's Conception of COMI in the U.K.*

The U.K. has decided to also incorporate the Model Law's conception of COMI.[44] Much like the Insolvency Regulation, the Model Law also includes a definition of COMI that is rather abstract and general, conceptualizing COMI as the place where the debtor regularly conducts the administration of its main business.[45] Similar to the Regulation, the Model Law holds that main proceedings may only commence in the jurisdiction where the debtor's COMI is located, and the insolvency laws of that location will generally govern those proceedings.[46] Any other foreign proceedings that take place outside

41. *Id.*
42. SLAUGHTER & MAY, *supra* note 39.
43. Shandro, *supra* note 40.
44. *Id.*
45. *Id.*
46. *Id.*

of the jurisdiction where the debtor's COMI is located (such as the liquidation of the debtor's assets in these countries, the staying of claims, etc.) should be decided in deference to the laws of the principal jurisdiction.[47] In the U.K., the courts have interpreted and sharpened the Model Law's definition so that it is more applicable to British law.

In *In Re Stanford International Bank*, the British High Court of Justice ("High Court") formulated a "public face" test for COMI. In this case, the court emphasized that merely identifying a location where the debtor's head office functions occurred was not enough to determine COMI.[48] Instead, the court deployed a more stringent analysis to determine COMI, examining the location where creditors themselves believed the debtor company was operated from.[49] Courts were also permitted to consider the "public face" of the company (through marketing and public relations materials, advertising, corporate communications, etc.) to further identify the location of the debtor's COMI.[50]

Correctly identifying COMI (and subsequently the main proceedings) is critical under British law with respect to automatic stays; once the correct jurisdiction's applicable laws are determined and the proceedings are recognized, British courts can protect debtors by precluding creditors from collecting debts against debtors who have declared bankruptcy. When foreign main proceedings are recognized by British courts, the following matters are automatically stayed or suspended in the U.K.: (i) commencement or continuation of individual actions or proceedings concerning the debtor's assets, rights, obligations or liabilities; (ii) execution against the debtor's assets; and (iii) the right to transfer, encumber, or otherwise dispose of any assets of the debtor.[51]

C. *Schemes of Arrangement: A Uniquely British Restructuring Tool*

In addition to the adoption of the Model Law, the U.K. courts also recognize schemes of arrangement ("schemes") as

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47. *See* Ouatu, *supra* note 37.
48. *In Re* Stanford International Bank Limited [2009] EWHC 1441 (Ch).
49. *Id.*
50. *Id.*
51. MAYER BROWN, *supra* note 5, at 3.

valid, unique tools in cross-border insolvency proceedings and debt restructuring solutions. Defined in the U.K. Companies Act of 2006, a scheme is a court-approved agreement between a company and its shareholders or creditors as a restructuring implementation option.[52] So long as the scheme is supported by a majority of each class of shareholders and/or creditors who are affected by it, it will be binding on all shareholders and/or creditors in that class.[53] Schemes are often used to help provide immediate relief during the restructuring process for distressed companies, such as rescheduling debt, injecting new liquidity, and cramming down secured creditors.[54] Additionally, schemes are more flexible for quick relief before a final ruling in an otherwise protracted insolvency proceeding, as they can provide a diverse range of restructuring solutions including debt for equity swaps, new money, re-setting of payment terms, and the release of security or guarantees.[55]

Traditionally, British courts have approved schemes involving companies incorporated outside England and Wales[56] so long as the corporation maintained "sufficient connections" with England and Wales.[57] Additionally, U.K. courts must also be satisfied that the approved scheme will be enforced in foreign jurisdictions where the distressed company's assets are located; currently, local experts furnish an opinion to the British

52. WEIL, GOTSHAL & MANGES, Schemes of Arrangement as Restructuring Tools (2015), https://eurorestructuring.weil.com/wp-content/uploads/2015/01/140553_LO_BFR_Schemes_Arrangement_Brochure_v12.pdf.

53. *Id.*

54. *See* MAYER BROWN, SCHEME OF ARRANGEMENT: AN ENGLISH LAW CRAM DOWN PROCEDURE (Mar. 2012), https://www.mayerbrown.com/public_docs/scheme_of_arrangement.pdf.

55. *Id.* at 2.

56. It should be noted that the United Kingdom is comprised of four nations: England, Scotland, Wales, and Northern Ireland. Because of this political union, the country maintains three separate legal systems (English law for England and Wales, Northern Irish law for Northern Ireland, and Scots law for Scotland). As such, schemes are based primarily on English law and are recognized under such laws. *See* Sarah Carter, *Update: A Guide to the UK Legal System*, NYU LAW GLOBAL, HAUSER GLOBAL LAW SCHOOL PROGRAM (Jan./Feb. 2015), http://www.nyulawglobal.org/globalex/United_Kingdom1.html.

57. FRESHFIELDS BRUCKHAUS DERINGER, BREXIT: WHAT DOES IT MEAN FOR RESTRUCTURING AND INSOLVENCY? (July 1, 2016), http://knowledge.freshfields.com/en/Global/r/1574/brexit__what_does_it_mean_for_restructuring_and_insolvency.

courts that the scheme would be recognized and enforced.[58] Within the E.U., the Brussels I Regulation (more commonly known as the "Judgments Regulation") ensures automatic recognition of schemes in the other E.U. member states, allowing British courts to determine with relative ease that their approved schemes would be enforced throughout the E.U.[59] As such, schemes have remained immensely popular because of their easy enforceability throughout the E.U. and because they can provide immediate restructuring relief during a formal insolvency procedure before the court issues a final opinion.

II.
THE POTENTIAL IMPACT OF BREXIT ON BRITISH CROSS-BORDER INSOLVENCY LAWS

While joining the European Union has been a frequent and popular trend for countries all over Europe in recent years, a member state's withdrawal is largely unprecedented, with little to no legal and historical guidance to facilitate the transition.[60] Therefore, predicting the long-term impact of Brexit on the U.K.'s cross-border insolvency laws is a difficult task, largely rooted in hypothetical possibilities and outcomes.

Despite the lack of precedent, the European Union has built in a legal means by which a member state may withdraw. Specifically, a member state that chooses to leave the Union

58. *Id.*

59. The Judgments Regulation states that once a judgment has been issued, it must be recognized in all E.U. member states. *Recognition and Enforcement of Judgments*, EUR. COMM'N, http://ec.europa.eu/justice/civil/commercial/judgements/index_en.htm (last visited Jan. 6, 2016). Typically, the Judgments Regulation only applies to civil or commercial litigation and does not include bankruptcy proceedings. However, because schemes can be used in a large number of corporate law contexts (including mergers and acquisitions), they are not considered a formal instrument of bankruptcy proceedings per se, and the Judgments Regulation can still be used to enforce automatic recognition of U.K. schemes across the E.U. *See* WEIL, GOTSHAL & MANGES, *supra* note 52.

60. The only notable precedent is the withdrawal of Greenland, formerly a sovereign territory of the E.U. member state Denmark. However, the example of Greenland probably does not serve as a strong parallel to the situation in the U.K. because it was not an independent member state that left the Union. In fact, no independent state has ever left the E.U. to date. *See* Jens Dammann, *Revoking Brexit: Can Member States Rescind Their Declaration of Withdrawal from the European Union?*, 23 COLUM. J. EUR. L. 265, 273 (2017).

will have two years after the notice of withdrawal is given to agree to and sign an exit plan with the E.U. leadership; the formal exit will take place either after the two-year period or whenever the agreement is signed (whichever occurs earlier).[61] Note withstanding the E.U.'s withdrawal requirements, May's government has encountered its own challenges in trying to initiate the U.K.'s formal exit. Amongst the most significant involved prolonged litigation that reached the U.K. Supreme Court[62] although there are still discussions regarding a litany of unresolved issues, including the harmonization of E.U.-U.K. cross-border insolvency laws, immigration (both European citizens to the U.K., and vice versa), and free trade between the Union and the U.K.[63] However, in accordance with the *Miller* decision, Parliament passed the European Union (Notification of Withdrawal) Act 2017 in March 2017 to give the Prime Minister authority to invoke Article 50(2) and begin the process of departure from E.U. membership.[64]

With her newfound authority, on March 29, 2017, Prime Minister May formally triggered Article 50, signaling the U.K.'s official decision to withdraw from the European Union,[65] with the countdown to Brexit set for March 29, 2019. Still, the first

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61. The process for any member state to exit the European Union is described in Article 50 of the landmark E.U. law, the Treaty of Lisbon. *See* Horst Eidenmüller, *Negotiating and Mediating Brexit*, 2016 PEPP. L. REV. 39, 40 (2016).

62. R (Miller) v. Secretary of State for Exiting the EU [2017] UKSC 5. The case focused on interpreting the meaning of the words "own constitutional requirements" in the text of Article 50 (which reads "Any Member State may decide to withdraw from the [European] Union in accordance with its own constitutional requirements."). The U.K. Supreme Court ruled that British constitutional requirements dictate that only Parliament, and not the Prime Minister, can trigger Article 50. In such a scenario, any withdrawal negotiations and proposals will likely be subject to Parliamentary scrutiny and approval. As such, May's formal decision to trigger Article 50 was subject to Parliamentary approval.

63. *See* Shannon Togawa Mercer, *Brexit Negotiations Phase One: Winter is Coming*, LAWFARE (Sept. 21, 2017, 6:30 AM), https://www.lawfareblog.com/brexit-negotiations-phase-one-winter-coming (predicting a Brexit delay past the formal March 29, 2019 deadline based on an inability to resolve these issues in the negotiations process).

64. European Union (Notification Act of Withdrawal) Act 2017, c. 9, § 1 (Eng.), http://www.legislation.gov.uk/ukpga/2017/9/contents/enacted.

65. *Article 50: U.K. Set to Formally Trigger Brexit Process*, BBC NEWS (Mar. 29, 2017), https://www.bbc.com/news/uk-politics-39422353.

few months of the negotiation process have been rocky, as talks have focused on the most difficult, polarizing policy questions (e.g. immigration). In fact, in the first phase of negotiations, the issue of cross-border insolvencies was not heavily discussed, let alone resolved.[66] As a result, Prime Minister May has sought to negotiate an extension of the transition period to allow for greater latitude with a proposed end date of December 31, 2020 (although the date has not been officially finalized by the U.K. or E.U.).[67] Regardless, the U.K. currently has two years to renegotiate and reposition its cross-border insolvency regime with the European Union as the clock ticks quickly towards 2019.

A. *The Insolvency Regulation Would Cease to Apply to the U.K.*

Upon withdrawal, European Union law will no longer apply to the U.K., including the Insolvency Regulation. Brexit supporters celebrate this as freedom from the E.U.'s burdensome laws and regulations – a restoration of the integrity of Britain's independence and legal sovereignty. Nevertheless, no immediate changes would actually affect the British restructuring market for at least two years, as the U.K. will still be governed under E.U. law until the formal withdrawal is completed.[68] Nonetheless, the U.K.'s ability to participate in the current E.U. insolvency regime would be severely hampered, and insolvency proceedings commenced in Britain would no longer receive automatic recognition by other E.U. member state courts, placing the comity of British law and proceedings at risk.[69]

Apart from the jurisdictions governed by the Model Law,[70] the U.K. insolvency proceedings would likely only be

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66. *See Joint Report from the Negotiators of the European Union and the United Kingdom Government on Progress During Phase 1 of Negotiations Under Article 50 TEU on the United Kingdom's Orderly Withdrawal from the European Union*, TF50 (2017) 19 – Commission to EU 27 (Dec. 8, 2017), https://ec.europa.eu/commission/sites/beta-political/files/joint_report.pdf.

67. *A Quick Guide: What is the Brexit Transition Phase?*, BBC NEWS (Feb. 1, 2018), http://www.bbc.com/news/uk-politics-42906950.

68. *See* FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 57.

69. *See* NORTON ROSE FULBRIGHT, *supra* note 37.

70. Currently, the only E.U. member states that have adopted the Model Law are Greece, Poland, Romania, and Slovenia. *See* FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 57.

recognized in countries whose domestic laws already recognize British foreign proceedings and vice versa. Additionally, secondary proceedings related to main insolvency proceedings initiated in another member states probably cannot take place in the U.K., as it is no longer governed by the Regulation.[71] It is difficult to predict when other member states will begin to recognize the U.K.'s insolvency proceedings, potentially placing any proceedings with other member states in a state of limbo.[72] For example, Germany's bankruptcy laws allow for the recognition of foreign insolvency proceedings as a matter of German law, but in no way is this mechanism so clearly defined across all the other E.U. member states.[73]

In particular, the determination of a debtor's COMI within the U.K. would also be affected. Because of the relatively debtor-friendly nature of the U.K.'s domestic insolvency laws, debtors have long attempted to establish COMI within the U.K. and avail themselves of British insolvency proceedings.[74] Should the U.K. no longer be governed by the principles of automatic E.U. recognition of foreign proceedings and judgments, debtors, especially those with significant ties to Europe, may seek to establish COMI in other E.U. member states in order to retain the protection of the Insolvency Regulation.[75]

With the U.K.'s status as a restructuring haven in peril, forum shopping could undermine the E.U.'s vision of economic unity and lead to more regulatory competition, with member states jockeying to establish their country as the most debtor-friendly jurisdiction.[76] In fact, London's future as a global financial center may also be in peril post-Brexit, as several other E.U. financial hubs (most notably Paris and Frank-

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71. Bob Wessels, *Brexit and Insolvency–A View from the Continent*, OXFORD BUS. L. BLOG (Aug. 1, 2016), https://www.law.ox.ac.uk/business-law-blog/blog/2016/08/brexit-and-insolvency-%E2%80%93-view-continent.

72. FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 57; *see also* EVERSHEDS, *supra* note 9.

73. FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 57.

74. *See* Thomas, *supra* note 6 (documenting the numerous examples where British insolvency laws are much more favorable to debtors, including a reduced normal bankruptcy discharge time from three years to one). Additionally, the previously discussed schemes of arrangement are also immensely popular.

75. *See* EVERSHEDS, *supra* note 9.

76. *See* Sørensen & Neville, *supra* note 19.

furt) have already vied to create more business-friendly environments to attract corporations seeking to headquarter themselves within the European Union.[77] As creditors will also likely want to continue taking advantage of the benefits of automatic recognition under the Regulation, another E.U. member state could become the most favored jurisdiction for cross-border insolvency proceedings, eroding the U.K.'s premier restructuring market.

B. *Schemes of Arrangement Will be Relatively Unaffected*

Because schemes of arrangement originated from domestic British law (the U.K.

Companies Act of 2006), there is no component of E.U. law that would be directly affected by Brexit per se.[78] However, the Judgments Regulation, which provides the "teeth" behind recognizing schemes in the E.U., would cease to apply to the U.K. Therefore, British courts may be concerned that schemes will not be enforced in E.U. member states and may be reluctant to approve them as liberally as they had before Brexit.[79] Nevertheless, given the popularity and large volume of schemes in restructuring procedures, the more likely scenario is that E.U. member states will still respect and recognize British law regarding schemes, reverting to greater reliance on the local experts (rather than just the Judgments Regulation) to demonstrate to U.K. courts that schemes will be properly enforced in foreign E.U. jurisdictions.[80]

C. *Credit Institutions, Insurers, and Financial Collateral Arrangements: Unfinished Business*

Although financial institutions play a large role in the restructuring process, credit institutions, insurance and investment undertakings, and collective investment undertakings are not governed by the Regulation.[81] Rather, two E.U. directives separately govern these institutions in bankruptcy pro-

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77. Patrick Jenkins, *What Will Brexit Mean for the City of London?*, FIN. TIMES (June 24, 2016), https://www.ft.com/content/23d576b0-386a-11e6-a780-b48ed7b6126f.

78. Wessels, *supra* note 71.

79. FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 57.

80. *Id.*

81. *Id.*

ceedings (the Credit Institutions Winding Up Directive and the Insurers Winding Up Directive).[82] Because E.U. directives must be implemented by each member state into its own national law,[83] the U.K. passed the Credit Institutions Regulations and the Insurers Regulations in 2004.[84] These laws provide automatic recognition of insolvency and reorganization proceedings commenced in financial institutions' home member states without any other stipulations or further requirements.[85]

As pieces of E.U. legislation, the Credit Institutions Winding-Up Directive and the Insurers Winding Up Directive would cease to apply to the U.K. upon Brexit. However, the Credit Institutions Regulations and the Insurers Regulations would still be valid in the U.K., as fully legitimate British statutes. As such, an unresolved challenge remains: the two British regulations would mean that the U.K. must still legally recognize insolvency proceedings involving E.U. financial institutions and insurers, *but* E.U. member states would no longer have to recognize such proceedings that commenced in the U.K. (since the E.U. directives no longer apply to the U.K.).[86] More likely than not, Britain will need to either reach an agreement with the E.U. to continue the recognition of insolvency proceedings involving financial institutions or the British government will repeal the Credit Institutions Regulations and the Insurers Regulations. The latter option would necessarily leave a substantial legal vacuum and would require a re-negotiation with the other member states in order to receive automatic recognition and minimize disruption to bankruptcy proceedings involving financial institutions.

III.
BRACING FOR IMPACT: PROPOSALS TO PRESERVE THE U.K.'S CROSS-BORDER INSOLVENCY REGIME POST-BREXIT

During the transition period to leave the E.U., the U.K. should work to preserve its cross-border insolvency regime

82. *Id.*
83. CRAIG & DE BÚRCA, *supra* note 10, at 192.
84. Graham Bushby & Ian G. Williams, *Inside the Brexit "Bubble": What's Next for the U.K.?*, 35-9 AM. BANKR. INST. J. 32, 33 (Sept. 2016).
85. FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 57.
86. *Id.*

with the E.U.—especially if May is able to secure the proposed extension to the formal withdrawal date. Some possible options include bilateral agreements with individual E.U. member states or British ascension into the European Economic Area. Ultimately, given the tremendous political pressure both within the U.K. and throughout the E.U., a more practical option may be the establishment of a separate cross-border insolvency agreement between the E.U. and the U.K.

A. *Individual Bilateral Agreements with E.U. Member States Should be Considered*

Completely new agreements will likely need to be reached between each of the E.U. member states and the U.K. with respect to cross-border insolvency laws. The proposal would likely include agreements for the continued and mutual recognition of insolvency proceedings between the U.K. and E.U. states, effectively creating a distinct and separate Insolvency Regulation between the U.K. and E.U.[87] Because of the strong preference towards establishing COMI in the U.K. and the relative convenience of the current Insolvency Regulation's regime, this proposal may curb forum shopping: with much of the original legal regime preserved, debtors will still be able to establish COMI in the U.K. and avail themselves of British insolvency laws.

Conversely, this agreement would be rather problematic because of both mechanics and political resistance. On the one hand, any sort of post-Brexit relationship agreement with the E.U. would need to be ratified by every member state, and the negotiations may be complicated if there is not consensus between each state and the U.K.[88] Therefore, it is still possible that there may not be an agreement reached. In this case, the U.K. would likely allow the Model Law to govern proceedings and recognition of countries within the Model Law's jurisdiction. However, for jurisdictions not governed by the Model Law (a large number of E.U. member states are not), the British court system may provide further common law guidance to decide recognition of foreign proceedings on a case-by-case

87. EVERSHEDS, *supra* note 9.
88. *Id.*

basis, likely leaving the courts more empowered to create a new U.K. cross-border insolvency law regime.[89]

Furthermore, E.U. member states that have large numbers of immigrants in the U.K. (particularly Eastern European nations such as Romania and Poland) have suggested that they will not entertain any negotiations without a guarantee of free movement of workers and the right for their citizens to remain in the U.K. without visa requirements.[90] Given a deep-seated populist sentiment to leave the European Union based on issues related to mass immigration and free movement of workers, Prime Minister May and her cabinet have signaled that they will be considering a "hard Brexit," whereby any sort of agreement must include tighter immigration controls and a limit on E.U. workers coming into Britain.[91] The demands from the Eastern European member states have raised further challenges to May's ability to come into negotiations with an upper hand and may result in an impasse, as she also faces tremendous political pressure at home to limit E.U. immigration. In any event, the British courts should also use the two-year transition period to unwind and conclude any ongoing proceedings to ensure that the laws do not "switch overnight" and throw current debtors and creditors into an uncertain legal regime in the midst of litigation.

B. *The European Economic Area: A Model for the U.K. to Follow?*

On the other hand, Brexit is not necessarily a death sentence for the U.K.'s cross-border insolvency law regime. While the situation is admittedly unprecedented and the U.K. would potentially have to unwind and reevaluate regulations imposed under E.U. law, some models suggest that the U.K. may be

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89. *See* FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 57.

90. Arj Singh, *Eastern European Countries 'Will Veto Any Brexit Deal that Diminishes Rights of Their Citizens Who Live and Work in U.K.'*, INDEPENDENT (Sept. 17, 2016), http://www.independent.co.uk/news/world/europe/brexit-eastern-european-countries-citizens-rights-robert-fico-slovakia-czech-republic-hungary-poland-a7314306.html.

91. Jarrod Tudor, *Consumer Protection and the Free Movement of Goods in the European Union: The Ability of Member-States to Block the Entry of Goods Across Borders*, 39 HOUS. J. INT'L L. 557, 561–62 (2017); *see also* Peter Dominiczak & Steven Swinford, *Theresa May to Set Out 'Brexit Vision' and Warn U.K. Will Quit Single Market if it is Not Given Control Over Borders*, TELEGRAPH (Jan. 4, 2017, 10:00 PM), http://www.telegraph.co.uk/news/2017/01/04/theresa-may-set-brexit-vision-warn-uk-will-quit-single-market/.

able to still participate in the E.U.'s cross-border insolvency law regime without the difficult, piecemeal process of negotiating individually with all 27 other member states. This model would encompass the so-called "soft Brexit" which would preserve access to the E.U.'s customs union and free trade agreements but would also require the U.K. to abide by critical E.U. law, including the free movement of people.

Most notably, the U.K. may elect to follow Norway, Iceland, and Liechtenstein (which are all non-E.U. member states) under the European Economic Area ("EEA") framework to take advantage of the tariff-free E.U. single market. Under the EEA agreement, Norway, Iceland, and Liechtenstein are part of the E.U. "in name," as they enjoy free trade with all 28 current member states and their citizens have the right to move and work throughout the E.U.; on the other side of the deal, Norway, Iceland, and Liechtenstein also agree to abide by certain E.U. laws and regulations such as the free movement of workers (it should also be noted that Norway has signed on to the Insolvency Regulation).[92]

It is possible for the U.K. to join the EEA, effectively returning to the status quo under the Insolvency Regulation. As an EEA member, the U.K. would continue to recognize E.U. member states' insolvency judgments and proceedings automatically and vice versa.[93] In doing so, U.K. insolvency proceedings would be the first non-E.U. proceedings to be recognized automatically across the E.U.[94] Although insolvency laws have not yet reached universal harmonization across the Union, E.U. policy has nonetheless focused on a path towards *greater* harmonization across the different member states. Therefore, it is unlikely that the U.K. would be integrated back into the insolvency regime as a non-member unless it is prepared to submit itself to E.U. regulations again (which would fundamentally undermine the key reasons for withdrawing in the first place).[95]

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92. VAUGHNE MILLER ET AL., EXITING THE E.U.: U.K. REFORM PROPOSALS, LEGAL IMPACT AND ALTERNATIVES TO MEMBERSHIP 38–40 (2016); *see also* CRAIG & DE BÚRCA, *supra* note 10, at 14; FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 57.

93. *See* FRESHFIELDS BRUCKHAUS DERINGER, *supra* note 57.

94. *Id.*

95. EVERSHEDS, *supra* note 9.

Furthermore, domestic politics may jeopardize the U.K.'s ascension to the EEA. Under the previously discussed "hard Brexit" approach, the U.K.'s ascension into the EEA is less likely to occur. Because the EEA currently requires its participants to abide by the principles of free movement of workers and accept a virtually limitless cap on immigration, May will probably be unwilling to consider such an option under the tremendous pressures of the British electorate. Operating under a full rejection of the ECJ's jurisdiction and the free movement of people, May's government has hinted that it will be pursuing a "hard Brexit" option with no membership in the European single market or customs union.[96]

C. *A Whole New World? Establishing a Unique E.U.-U.K. Cross-Border Insolvency Regime*

Given the potential political impasses involved with individual bilateral agreements and the British ascension to the EEA, the U.K. and E.U. should instead start from scratch and create an entirely separate legal agreement for cross-border insolvency proceedings. Such a scenario would not be entirely unprecedented, as the E.U. has previously forged individual agreements with member states and even non-member states.[97] This will be a feasible method to bypass both bilateral negotiations and British ascension to the EEA; instead, Britain and the E.U. would enter into their own separate legal regime for the purposes of maintaining current cross-border insolvency laws.

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96. *See* Susanne Augenhofer, *Brexit – Marriage 'With' Divorce? – The Legal Consequences for Consumer Law*, 40 FORDHAM INT'L L.J. 1475, 1477 (2017); *see also Mind Your Step; The Tories and Brexit*, ECONOMIST (Oct. 8, 2016), https://www.economist.com/britain/2016/10/08/mind-your-step.

97. For example, the E.U. signed a separate agreement with Denmark to implement the Judgments Regulation after there were disagreements between the E.U. Council, the main executive body of the Union, and the Danish government. *See* BRUSSELS I REGULATION 25 (Ulrich Magnus & Peter Mankowski, eds., 2007). Additionally, the E.U. recently reached a historic free trade with Canada, subject to legislative approval, that would eliminate 98% of tariffs between Canada and the E.U., effectively bringing Canada into the European single market as a "unofficial" member state. *See* Steven Chase & Paul Waldie, *Tentative Deal Puts CETA Back on Track as Text Reveals Countries Can Opt Out of Dispute Court*, THE GLOBE & MAIL (Oct. 27, 2016, 9:54 PM), http://www.theglobeandmail.com/news/national/belgians-reach-deal-on-eu-canada-free-trade-agreement/article32542390/.

Such a proposed agreement would effectively implement the principles of automatic recognition of cross-border insolvency proceedings between the E.U. member states and the U.K. under the Regulation. Instead of forcing member states to individually sign bilateral agreements to recognize transnational bankruptcy proceedings with the U.K. (as is required between foreign jurisdiction not bound by the Model Law), the E.U. should instead treat the United Kingdom as a "special entity" and continue to provide automatic recognition throughout the member states, provided that a debtor has established its COMI within Britain. Under such an agreement, the U.K. Parliament should work to transpose and preserve, as domestic British law, the major portions of the Regulation as a separate agreement or treaty ratified with the E.U. Additionally, given their effectiveness and flexibility, schemes of arrangement should continue to be recognized as a special restructuring tool.

Although there may be political resistance from supporters of a "hard Brexit" as well as member states that seek to force free movement of people as a bargaining chip in the negotiation process, the popular and largely effective British cross-border insolvency regime should not be eliminated completely as a result of Brexit; instead of throwing the proverbial "baby out with the bathwater," the U.K. legislature and judiciary should fully incorporate the Regulation as part of its national law upon departure from the European Union.

Conclusion

For Prime Minister Theresa May, leading and shaping a post-Brexit Britain will most likely be the fight of her political life. As the United Kingdom faces an era of radical change in its legal regime and national identity, the corporate regulations and laws promulgated by the European Union will no doubt be impacted as well, particularly longstanding efforts to unify cross-border insolvency laws through the Insolvency Regulation. In this new era of uncertainty, only time will reveal what Brexit truly means for the future of the U.K. and the British people. With numerous political, legal, and economic issues that are remain unresolved, the road ahead will undoubtedly be challenging for Prime Minister May to fulfill her

pledge to "making a success" of Brexit and to deliver on her campaign promise of providing a "strong and stable government in the national interest."[98]

98. Sam Leith, *The Surprising Origins of May's 'Strong and Stable' Slogan*, FIN. TIMES (July 12, 2017), https://www.ft.com/content/8c41b7d2-663f-11e7-9a66-93fb352ba1fe.