Although the referendum resulted in a vote to leave the EU, the nature and shape of the exit model and the continuing arrangements between the UK and the EU, including the impact on the cross-border restructuring and insolvency landscape, remains uncertain.

The biggest impact of Brexit is likely to be the loss of automatic recognition of insolvency proceedings under the EC Regulation on Insolvency Proceedings, which will cease to apply upon Brexit (absent agreement to the contrary).

The effectiveness and popularity of schemes of arrangement and English governing law is likely to be largely unaffected by Brexit.

### KEY POINTS

- Although the referendum resulted in a vote to leave the EU, the exit model and the continuing arrangements between the UK and the EU, including the impact on the cross-border restructuring and insolvency landscape, remains uncertain.
- The biggest impact of Brexit is likely to be the loss of automatic recognition of insolvency proceedings under the EC Regulation on Insolvency Proceedings, which will cease to apply upon Brexit (absent agreement to the contrary).
- The effectiveness and popularity of schemes of arrangement and English governing law is likely to be largely unaffected by Brexit.

### STRANDS OF CROSS-BORDER INSOLVENCY LAW APPLICABLE IN E&W: WHAT IS THE CURRENT POSITION?

The primary strands of cross-border insolvency law currently applicable in England and Wales are as follows:

- within Europe, the EC Regulation on Insolvency Proceedings (‘EIR’), the Credit Institutions (Reorganisation and Winding Up) Regulations 2004 (‘CIWUR’) and the Insurers (Reorganisation and Winding Up) Regulations 2004 (‘IWUR’) which apply automatically if certain conditions are met;
- the Cross Border Insolvency Regulations 2006 (‘CBIR’) which apply where an application for recognition is made by a foreign representative of a debtor with its centre of main interests or an establishment in the foreign jurisdiction (the CBIR implements the UNCITRAL Model Law on Cross Border Insolvency (‘the Model Law’) in the UK);
- ss 426 of the Insolvency Act 1986 (IA 1986) which applies where a request for assistance is made by the courts of certain relevant countries (largely commonwealth jurisdictions);
- the Foreign Judgments (Reciprocal Enforcement) Act 1933 which applies to the money judgments of the courts of certain listed countries; and

### EXIT MODELS

Existing models for the EU’s relations with non-member states suggest that there are a number of arrangements that could be agreed in connection with a UK exit from the EU. A detailed discussion of the various models is outside the scope of this article but options include the so-called ‘Norwegian Model’, the ‘Swiss Model’, the ‘Turkish Model’, the ‘Canadian Model’ and the ‘WTO Membership Model’. It is too early to foresee which option will be pursued by the UK in its exit negotiations with the EU. However, the chosen option will determine the impact upon the restructuring and insolvency legal landscape.

### INSOLVENCY PROCEEDINGS

**The EIR cornerstone**

Restructuring and insolvency lawyers, insolvency practitioners and market participants will be aware of the fundamental importance of the EIR to the existing European cross-border insolvency regime, determining (amongst other things) where insolvency proceedings can be opened and the law that will apply. The EIR is certainly the most comprehensive strand of the UK’s cross-border insolvency regime both in terms of its application and the scope of what it governs.

Crucially (particularly in the context of Brexit) it should be noted that recognition of insolvency proceedings under the EIR is reciprocal and automatic in nature. Therefore, the UK gets the same benefits for English insolvency procedures that it provides to the
insolvency proceedings of other member states without the need for a court order.

At present the EIR, as a European regulation, is directly applicable in the UK. When the UK leaves the EU, under any of the exit models outlined above, it will no longer be a party to the EIR. In this scenario, the UK would lose all the benefits of the recognition of English proceedings under the EIR. The UK could of course adopt domestic legislation imposing obligations on the UK equivalent to the EIR. By way of example, German autonomous international insolvency law provides a similar regime to the EIR and post-Brexit, as between the UK and Germany, it will apply in place of the EIR. The main differences (compared with the EIR) are that German courts will check whether COMI is actually in the UK and there is a formal procedure to make the foreign decision enforceable in Germany. However, in order to obtain reciprocity of recognition in remaining EU member states, such member states would need to agree to such reciprocity – which is likely to be some way down the list of priorities as part of Brexit negotiations.

Once the EIR ceases to apply, those seeking recognition of UK insolvency proceedings throughout the EU will need to rely on the cross-border insolvency rules of the remaining member states outside of the EIR to obtain recognition. The ease or difficulty of achieving recognition will vary from member state to member state and will depend on the private laws of the relevant jurisdiction in which recognition is sought. It is noted that currently very few of the remaining EU member states have implemented the Model Law – only Greece, Poland, Romania and Slovenia. Therefore, the Model Law does not provide a comprehensive alternative to the EIR. However, in those jurisdictions in which it has been adopted it may be possible to obtain the more limited recognition afforded by the Model Law.

In addition, foreign insolvency procedures seeking recognition in the UK will be forced to rely on s 426 of the IA 1986 (in the case of Ireland), the common law and the CBIR, which are more limited in scope. The type of exit model agreed is unlikely to impact how these recognition procedures currently operate.

The need to rely on this ‘patchwork quilt’ of legislation and common law to obtain recognition is likely to result in delays as well as increased cost and uncertainty. In complex cross-border restructurings where an insolvency procedure may simply be used as an implementation tool to deliver a restructuring (eg an administration pre-pack) any uncertainty and delay is unhelpful – however, advanced planning at an early stage may make it possible to avoid the worst effects of an inability to obtain automatic recognition. Conversely, in 'free-fall' insolvencies it may not be possible to give advanced consideration to all recognition issues that may arise and to plan around such issues – potentially resulting in delays in recoveries for creditors.

CIWUR and IWUR

The issues referred to above would apply equally to credit institutions, insurers and other financial institutions within the scope of the Credit Institutions Winding Up Directive and the Insurers Winding Up Directive (as implemented in the UK by the CIWUR and the IWUR).

However, these issues may be mitigated if the UK remains part of the EEA (such as under the Norwegian Model). In these circumstances the UK will continue to enjoy the benefits of the CIWUR and IWUR (and equivalent implementing legislation in other member states) with respect to these types of entities and Brexit would be of no impact in this respect.

SCHEMES OF ARRANGEMENT

The English scheme of arrangement has been one of the key restructuring tools for European financial restructurings in the recent past. It is likely that the scheme's popularity will continue notwithstanding Brexit because of the scheme's flexibility and predictability and the speed of access to, and the commercial attitude of, English judges.

The English scheme of arrangement is not a procedure listed in the annex to the EIR and will not be a ‘rescue’ procedure listed in the recast EIR. Therefore, the potential impact of Brexit on the EIR highlighted above is not applicable to schemes of arrangements. So will Brexit have any impact on schemes of arrangement at all?

Jurisdiction: a potential benefit of Brexit?

Recent case law on schemes has not fully resolved the interplay between the EIR and the recast Brussels Regulation 1215/2012 (‘the Judgments Regulation’) (which governs the recognition and enforceability of judgments). There is an argument that European legislators did not intend there to be any gap between these two regulations such that the English scheme must fall within the scope of one of them. As noted above, schemes are not included in the list of UK insolvency proceedings contained in the annexes to the EIR. However, on the face of it, schemes fit awkwardly into the wording of the Judgments Regulation. The practical effect of this debate has meant that in recent schemes of arrangement it has been necessary to demonstrate jurisdiction in respect of scheme creditors (as the ‘person being sued’) and not just the scheme company.

If the UK is no longer a party to the Judgments Regulation upon Brexit, there will no longer be any debate about its applicability. The position, upon Brexit, of treaties which were superseded by the Judgments Regulation (eg the Brussels Convention) is not yet clear and it is possible that they may, in any event, be superseded again by the new legal regime negotiated as part of the UK’s exit. Despite this uncertainty, it is expected that post-Brexit, the English court will retain its wide jurisdiction with respect to schemes in relation to foreign companies (through the ‘sufficient connection’ test – English governing law is sufficient to satisfy this test), and it is possible that jurisdiction requirements may even be simplified a little with respect to foreign scheme creditors.

Evidence the effectiveness of a scheme

In sanctioning a scheme of arrangement, the English court will want to ensure that its order will be effective in practice and,
In the case of an English insolvency, the Hague Convention on Choice of Court was entered into force as between those member states and Mexico on 1 October 2015. (Singapore has recently ratified the Hague Convention and it will come into force as between the relevant EU member states, Mexico and Singapore on 1 October 2016.) The Hague Convention provides a mechanism for the allocation of jurisdiction in cases where parties have agreed to an exclusive jurisdiction clause in favour of a contracting state and the recognition of judgments rendered pursuant to such clauses. Although a potential option if scheme proceedings fall within the scope of the convention, the requirement for an exclusive jurisdiction clause may make it unsuitable for a typical financial creditor scheme of arrangement, where the relevant debt documents commonly contain an asymmetric jurisdiction clause.

Ultimately, if there remains any concern regarding the recognition of the English scheme following Brexit, this may be a reason for choosing a restructuring process from one of the remaining member states. Other European jurisdictions continue to reform and improve their insolvency laws to develop credible alternatives to the scheme of arrangement. For example, the Dutch equivalent of the scheme of arrangement that may be introduced in the Netherlands could be an attractive option for companies who have their centre of main interests in the Netherlands. Accordingly, in practice, it is likely to become even more important for the full range of international restructuring options/procedures to be analysed in each restructuring situation.

**WHAT DOES THIS MEAN IN PRACTICE?**

Notwithstanding the clear outcome of the referendum, the exit model remains uncertain and accordingly the detailed legislative changes that will need to be implemented are equally uncertain. As a result, the consequential legal effects on those involved in the restructuring market cannot currently be ascertained with any certainty.

Even so, it is worth noting that many (if not most) restructurings are conducted outside of a formal insolvency process and implemented by way of contract (amending existing agreements and/or entering into new agreements). They are ‘consensual’ in the sense that the requisite creditor majorities are obtained to implement the restructuring using the amendment mechanics in existing documentation. English law, as it applies in relation to commercial contracts between parties conducting business internationally, will largely be unaffected by the uncertainty surrounding Brexit and will therefore continue to be certain, stable, predictable, commercially orientated and familiar. To the extent a ‘cram down’ procedure is needed to bind dissenting creditors, the English scheme of arrangement will remain an important tool for English and foreign companies (who can satisfy the ‘sufficient connection’ test) post-Brexit.

That said, post-Brexit, parties involved in UK/EU based restructuring and insolvency situations may need to consider a number of new or additional factors, which may include the following:

- **In the case of an English insolvency proceeding, is recognition of the insolvency proceeding in a remaining member state required or beneficial?** For instance, are assets of the insolvent company located in a remaining member state and will the insolvency practitioner need recognition to deal with/sell such assets?

- **Have creditors taken part in the English insolvency process (eg by voting or proving) and by doing so have they submitted to jurisdiction of the English court?** If this is the case, automatic recognition under the EIR (or lack thereof post-Brexit) may not be a concern.

- **Where an English insolvency process is used as a tool to implement a financial restructuring, will the lack of automatic recognition increase the nuisance value of an ‘out of the money’ creditor?** For instance, could ‘out of the money’ creditors...
use the lack of automatic recognition to launch tactical jurisdictional challenges to the actions of the office holder in relation to non-UK assets?

- Where there are significant assets in a member state, might it in fact be more efficient to use an EU-based insolvency procedure which still benefits from automatic recognition? Or does the scope and flexibility of the UK procedures still provide the best solution notwithstanding the lack of automatic recognition in the EU?

Might US chapter 11 proceedings be preferable to any European process if the automatic recognition given by the recast EIR for European proceedings is no longer available?

- If recognition is considered desirable or necessary, what timing implications might this have on the transaction? For instance, where insolvency proceedings are being used simply as a mechanism to implement a restructuring (e.g. a pre-pack administration) how quickly can recognition be obtained? Will the administrator/parties be willing to transact prior to obtaining recognition? What steps can be taken in advance to prevent delay?

- Are the documents governed by English law? If so, the common law rule in Gibbs v Societe Industrielle des Metaux (1890) 2 QBD 399 may have the effect that only an English insolvency process would be effective to vary or discharge the obligations under those agreements. While the EIR required the UK to recognise the effect of certain EU compromise proceedings on English law governed agreements, if the EIR no longer applies, the English courts may revert to the rule in Gibbs. This could potentially be used by the UK as a leverage point in any negotiations regarding the cross-border insolvency provisions to be put in place as part of Brexit.