Future-proofing against Brexit in insolvency cases

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Introduction

1. As far back as the 18th century European Nations have aspired to address problems of cross-border debt. Indeed, one of the first reported treaties between nations in Europe which contained provisions on insolvency was concluded on 9 May 1715. The parties to it were France and the Catholic Swiss Cantons and the Canton of Valais. It was known as the Treaty of Alliance. Under the treaty, a Swiss debtor fleeing to France to avoid or defraud his creditors could nonetheless be pursued in France. Attempts at multilateral treaties first took place in South America: for example the Treaty of Montevideo dated 12 March 1889. Europe was slower off the mark: the first recorded attempt at a treaty is The Hague Draft Convention of 1925. In the period 1960 to 1996 the European member states negotiated a convention on bankruptcy. By September 1995, the Member States of the European Union had agreed on a Convention on Insolvency Proceedings. Although the convention never came into force (because the United Kingdom wasn't prepared to sign it), it did lead more or less directly to the current insolvency regulation.

2. Since 31 May 2002 Council Regulation (EC) No 1346/2000 on insolvency proceedings has had direct effect in England and Wales. It is widely considered to have been a useful instrument which has been beneficial in cross-border cases involving the European Union. Between March 2012 and February 2015, the European legislative institutions set about reforming the regulation; that led to the publication, on 5 June 2015, of a recast insolvency regulation[1] in the Official Journal of the European Union. The recast regulation is due to apply in this jurisdiction from 26 June 2017. Indeed, on 15 April 2013, the then minister for Business, Innovation and Skills announced that the UK had opted in to the recast regulation. In part that decision was taken on the strength of the unanimous support of stakeholders who had responded to a government call for evidence in early 2013. Times have changed.

3. On 23 June 2016 a slim majority of the British electorate voted for the United Kingdom to leave the European Union thus raising the prospect of the recast regulation ceasing to have any effect in this jurisdiction. There is little room for argument that such an

[1] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)

event would have serious consequences for the UK's restructuring and insolvency market and those operating within it. The regulation now, and the recast regulation as from June 2017 is a, if not the most, significant legislative instrument that can be found in the cross-border armoury of most insolvency practitioners.

4. As well as having an impact on the general economy, the current uncertainty over the future relationship which the UK will have with the European Union generally, and more specifically in the field of insolvency is an unwelcome distraction for all insolvency practitioners who are currently dealing with insolvent individuals and companies. The purpose of this paper is to attempt to dispel some of the present uncertainty, and in instances where that is simply not possible, to provide guidance for practitioners on future-proofing steps that they can take now in respect of the estates over which they are appointed. The assumptions which underlie this paper are that the UK will leave the European Union (whether that is on 'hard' or 'soft' or some other terms) and that it will not be possible for the UK's new trade negotiators to reach any agreement which would have the effect of maintaining the applicability of the recast regulation as regards England and Wales.

5. It is necessary to make clear that at the time of writing this paper (December 2016), there remains a substantial amount of uncertainty in relation to when, and more importantly how and on what terms, the UK will exit the European Union. In fact, there is even room for argument as to whether such a dramatic step will happen: the courts are currently grappling with a judicial review claim which seeks to establish whether the starting gun for the UK's exit can be fired by the relevant government minister, or whether it is instead the responsibility of parliament to decide to give notice to the European Council under Article 50 of the Treaty on European Union: *R (on the application of Miller and anor) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin). A number of members of parliament have already gone on record indicating an intention (subject to certain conditions) to vote against a law intended to enable the UK to give notice under Article 50.

The cross-border toolkit

6. As ever when it comes to considering cross-border issues in an insolvency context it is helpful to start by setting out some clear parameters which can then guide any analysis. The first point to have clearly in mind is the distinction between 'inward-looking' and 'outward-looking' processes. Perspective is important in relation to this

point: the relevant viewpoint is that of a British insolvency office holder. An 'outward-looking' process typically involves, say a UK liquidator or a trustee in bankruptcy, wishing to take steps in another jurisdiction for example to realise an asset or to obtain information or documents from a third party located in another jurisdiction. An 'inward-looking' process is the reverse: a foreign insolvency officeholder seeking the assistance of the UK courts (and possibly a UK insolvency practitioner) in relation to, say, a UK asset. In an ideal world, cross-border insolvency law should provide for both.

7. Next it is necessary to reflect on what specific issue it is that needs to be addressed. Obvious issues which come up in a cross-border insolvency context include for example the jurisdiction / court in which proceedings should be commenced (choice of jurisdiction), which law should be applied to resolve a particular problem (choice of law) whether the judgment of one court will be recognised and enforced in another court (recognition) and how parallel insolvency processes relating to the same debtor should interact (co-operation).

8. With those points in mind, it is possible to supply a brief summary of the law as it stands and in particular the cross-border insolvency laws which are presently available in the UK. They are (in no particular order):

    8.1 The insolvency regulation (soon to be the recast regulation): this is by far and away the single most comprehensive law there is when it comes to cross-border insolvency. It is both 'inward-looking' and 'outward-looking'. It provides for rules on the choice of jurisdiction, the choice of law, the recognition and enforcement of judgments, the co-operation between insolvency office holders (including, under the recast regulation, in relation to corporate groups). It extends to the entirety of the European Union (except Denmark) and applies to the vast majority of insolvency processes (albeit notably not to schemes or arrangement).

    8.2 The UNCITRAL Model Law on Cross-Border Insolvency: on 30 May 1997 UNCITRAL adopted a template law on cross-border insolvency proceedings. The template was incorporated into British law by the Cross-Border Insolvency Regulation 2006 (SI No. 1030/2006). The Model Law has been adopted in 40 other states, including Australia, Canada, Japan, the USA and a number of member states of the European Union. From a UK perspective, the Model Law

as implemented by the CBIR is very much an inward-looking instrument. It enables foreign officeholders and foreign proceedings to apply to the courts in this jurisdiction first to be recognised and second to obtain relief. The Model Law also contains provisions enabling cooperation and coordination of proceedings. Changes and developments in relation to the Model Law are afoot. UNCITRAL Working Group V (Insolvency Law) is currently working on laws to facilitate the cross-border insolvency of multinational enterprise groups and a further law relating to the recognition and enforcement of insolvency-related judgments. There are meetings of Working Group V to discuss those laws scheduled for December 2016, although it is unlikely that there will be a legislative instrument capable of being implemented by the world's nations for at least a couple of years after that.

8.3 s.426 of the Insolvency Act 1986[2]: there has been a statutory provision enabling the High Court (and the county court) to supply aid and assistance to designated courts in other jurisdiction since the Bankruptcy Act 1869. The present incumbent is s.426 of the Insolvency Act 1986. That section provides for orders made in one part of the United Kingdom to be enforced in any other part of the United Kingdom and also for the courts of the United Kingdom to assist the courts of the Channel Island, the Isle of Man, and other relevant countries or territories (of which there are currently 20). This provision is very much inward-looking and is of limited use to UK insolvency office holders who need to take steps in foreign jurisdictions. It will not be affected by the UK leaving the European Union.

8.4 The common law: whilst the source and first reported use of the English court's common law powers in the field of cross-border insolvency are uncertain, there is no doubt that there exists such a common law power. The precise limits of that power are not clearly established and in the last 10 years they have oscillated from a high in *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] 1 AC 508 (Lord Hoffmann) to a low in *Rubin v Eurofinance* [2012] UKSC 46 [2013] 1 AC 236 (Lord Collins) followed by a minor recovery with the fillip of *Singularis Holdings Ltd v*

[2] The Insolvency Act 1986 contains other statutory powers which are cross-border in nature: they include the provisions contained in Part V which relate to the winding-up of unregistered companies which, by s.221 gives the court power to wind-up foreign companies.

PricewaterhouseCoopers [2014] UKPC [2015] AC 1675. Post *Singularis* the extent of this power is best taken from paras. 15 and 19 of the advice of Lord Sumption: "… the principle of modified universalism, namely that the court has a common law power to assist foreign winding up proceedings so far as it properly can…" does exist. In *Singularis*, modified universalism was extended to encompass orders requiring the production of information in oral or documentary form. As will be readily apparent from the very fact that modified universalism is a common law power, it is a source of law which is only applicable in common law countries, and even then, it is applicable to the extent that those countries have embraced modified universalism with enthusiasm. As with s.426, the common law is unlikely to be able to step into the void left by the regulation.

Impact of Brexit

9. For the reasons set out above, it is difficult to predict the impact that Brexit will have on insolvency law. According to a recent House of Commons Library Briefing Paper (Brexit: impact across policy areas, 23 August 2016) the consequence of the UK leaving the European Union is that the recast regulation will cease to have direct effect. It goes on to say that what this will mean for the treatment of UK insolvency proceedings in the courts of the remaining Member States (and the treatment of EU insolvency proceedings in the UK courts) is unclear. Two options are then mooted. The first is that the UK adopts a similar regime to the recast regulation regime – in order to do that, the UK would need to come to an agreement with the EU. The second option is to rely on other mechanisms already in place in English Law (such as the Model Law).

10. On 22 November 2016, the European Commission published a proposed directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures. Whereas the regulation and the recast regulation do not seek to harmonise the substantive insolvency laws of the Member States, the aim of the directive is to achieve precisely that. In particular, the directive will require Member States to enact legislation containing certain minimum requirements in relation to insolvency processes. Insolvency law in England and Wales already contains provisions which address a number of the minimum requirements specified in the directive. The most significant new area in which the directive would require substantive changes to British insolvency law concerns the proposed 'preventive

restructuring frameworks' described in Title II of the directive. They are based in part on US Chapter 11 proceedings. For example, they envisage that a debtor will remain partly or fully in control of their assets and the day-to-day operation of their business and that the appointment of an insolvency practitioner will not be mandatory. Further, the draft directive provides for a stay on individual creditor action to be part of the framework. Another feature of the new framework would be protection for new financing or interim financing used as part of the restructuring plan: such financing would not be vulnerable to anti-avoidance laws in the event of a formal insolvency being declared, and moreover would rank ahead of unsecured creditors. On any view, the changes that will be brought about by the directive are significant. If the UK leaves the European Union without reaching agreement as regards insolvency law, it is quite possible that none of the positive changes required by the directive will ever see the light of day in this jurisdiction.

Transitional provisions?

11. Before turning to set out some of the consequences of the regulation ceasing to have direct effect, it is worth briefly reflecting on a timing issue: what effect will the repeal of the regulation have on existing insolvencies? Or, to put the same question another way, will the withdrawal of the regulation affect only future cases, or will it also affect existing cases? This is best illustrated by an example: one effect of the winding-up of a company in England and Wales is to stay all existing proceedings against the company and to prevent third parties from issuing fresh proceedings against the company (s.130(2) of the Insolvency Act 1986). By Article 17(1) of the regulation the English winding-up order also produces those effects in relation to the same company in all other Member States. The provision currently affects every ongoing liquidation in England and Wales. After the regulation ceases to have effect, and therefore after Article 17(1) ceases to apply to England and Wales does that mean that a foreign creditor could start proceedings in their own country against a company that entered liquidation in England and Wales at a time when the regulation was still in force – at first blush, the answer is 'yes'. To take another example, the effect of s.265(1) of the Insolvency Act 1986 is that it is possible to present a bankruptcy petition against an individual to an English court if the individual's centre of main interests is in England and Wales. The subsection is based on Article 3(1) of the regulation. The jurisdictional test in the event that an individual's COMI is not in the European Union is contained in s.265(2) of the Insolvency Act 1986 (domicile, residence or ordinary residence, carrying on business in England and Wales). It is easy to envisage a scenario whereby

a bankruptcy petition is presented against an individual on the grounds that the conditions in s.265(1) (COMI) are met, but not those in s.265(2), and that, between presentation of the petition and hearing of the petition, the UK leaves the European Union. Would the effect of the UK leaving the European Union mean that the court would cease to have jurisdiction over the relevant individual so much so that the bankruptcy petition would have to be dismissed. Again, at first blush, the answer is 'yes'.

12. In reality, the extent to which the repeal of the regulation will affect existing insolvencies which have benefited from provisions in the regulation or the recast regulation will turn on the transitional provisions which are negotiated as part of the agreement for the UK leaving the EU (assuming that such an agreement is reached). It is much too early to say what position the government will adopt in relation to transitional issues. The simplest and most convenient transitional provision would of course be for the regulation to continue to apply in respect of existing proceedings, but not to apply in respect of proceedings commenced or opened after the UK has ceased to be a member of the European Union.

13. To return to the consequences of the regulation (or recast regulation) ceasing to have effect in England and Wales, it is convenient to address those consequences under separate headings which correspond broadly to the two main key topics which are covered in the regulation: they are jurisdiction and recognition and enforcement. It is also necessary however to touch on two non-insolvency matters which may change after the UK leaves the European Union. The first relates to the European rules which govern the allocation of jurisdiction and the choice of law in civil and commercial matters: those instruments are Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) and Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I). The second relates to the procedural rules as regards service of court (and other official) documents between Member States which are currently contained in Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents).

Jurisdiction

14. Article 3 of the regulation contains rules which allocate jurisdiction to open insolvency proceedings within the European Union on the basis of the location of a debtor's COMI (main proceedings) or a debtor's establishment (secondary or territorial proceedings). The jurisdictional reach of the regulation has also been held by the Court of Justice of the European Union to extend not just to the opening of insolvency proceedings, but also to actions "directly derived from and closely related to" insolvency proceedings: *Gourdain v Nadler* (Case C-133/78) [1979] ECR 733 and *Seagon v Deko Marty Belgium NV* (C-339/07) [2009] 1 WLR 2168. Those actions included the classic insolvency avoidance of actions (transactions at an undervalue, preferences, etc…) but would not include a contractual claim based on a retention of title clause *German Graphics Graphische Maschinen GmbH v Schee*: C-292/08.

15. In the event of the regulation (or recast regulation) ceasing to apply to England and Wales, those jurisdictional provisions would also cease to apply. So far as jurisdiction to open insolvency proceedings (e.g. liquidation, administration, bankruptcy) is concerned, the UK will simply revert to the pre-regulation position – this is not a void which can be filled by the Model Law, by s.426 or by the common law. It will mean the end of COMI as the jurisdictional gateway through which parties must pass in order to successfully open insolvency proceedings in England and Wales. In the case of corporate restructurings this will mean that it will no longer be possible to perform a strategic COMI migration with a view to achieving a better restructuring or realisation for creditors (e.g. Wind Hells or Eurodis). In the personal sphere it will sound the death knell of bankruptcy tourism as a phenomenon (to the extent that that the same hasn't already been achieved by the look-back period contained in the recast regulation). Of course it will still be possible for a foreign debtor to satisfy UK jurisdictional criteria, but without the protection of knowing that a debtor can have a single COMI, and that it is only in that Member State that proceedings can be opened. There seems little point of going to the trouble of moving to a different country if that protection is no longer available: for example, even if a German or Irish debtor made themselves bankrupt in England, if there is nothing to prevent their creditors from making them bankrupt in their 'home' jurisdiction, what is the point of coming over to England and Wales to bankrupt themselves in the first pace?

16. The absence of the regulation will also make it slightly more cumbersome to bring avoidance proceedings against foreign debtors. At the moment, following *Gourdain*

and *Seagon*, if the main proceedings are in England, and the prospective defendant is based in another Member State, the English courts have jurisdiction to hear the avoidance claim. If the regulation no longer applies, it will follow that the English courts do not automatically have jurisdiction. Of course, in appropriate cases, it can readily be envisaged that the UK courts would wish to assert jurisdiction over a foreign defendant – the procedure will, however, be more complicated. At the moment paragraph 6.5(1) of the Practice Direction on Insolvency Proceedings provides that permission of the court is not required to serve proceedings on a defendant in a Member State of the European Union. After the regulation ceases to have effect, that exemption is also likely to cease to have effect. In which case, and on the basis that, by r. 12.1 of the new Insolvency Rules 2016, the CPR applies to insolvency proceedings, it will be necessary to make an application for permission to serve a European defendant to avoidance proceedings out of the jurisdiction. This will be a costlier and slower process than the one that exists at the moment. Practitioners with potential claims against European defendants should get on and issue and serve those before the regulation ceases to have effect. That is really the only form of future-proofing which will work when it comes to jurisdiction.

Recognition and enforcement

17. Chapter II of the regulation, "Recognition of Insolvency Proceedings", contains a number of provisions relating to the recognition of insolvency proceedings in other Member States of the European Union and which also cover the powers that a liquidator or trustee in bankruptcy has in other Member States. As things currently stand, Articles 16 and 17 of the regulation have the effect that the opening of insolvency proceedings in a Member State is automatically recognised (with no further formalities) in other Member States, and that the effects which are consequent on the opening of proceedings under the law of the main proceedings (e.g. automatic stays) shall also apply in other Member States. Further, by Article 18(1) of the regulation, an English liquidator or trustee in bankruptcy is empowered to exercise all his powers in other Member States in which the debtor might for example have assets, or in order to obtain information or documents from third parties. *Aria Inc v Credit Agricole Corporate and Investment Bank* [2014] EWHC 872 (Comm.) is an example of a Greek liquidator obtaining an order from the English court based on powers conferred on him by Greek insolvency law. In some ways, those Articles of the regulation are based and rely on the provisions of Article 4 of the regulation which provides that the law which governs

all ‘insolvency questions’ arising from the opening of insolvency proceedings is the state of the opening of the proceedings.

18. In the event of the regulation ceasing to apply in England and Wales these important provisions will also cease to apply. The absence of these provisions will considerably complicate the task of office holders in achieving either a joined-up restructuring or a rescue of a corporate debtor or the realisation of assets located in other jurisdictions. Save in relation to those European countries that have adopted the Model Law (in addition to the UK, Greece, Poland, Romania, Slovenia) it will be necessary for English officeholders to rely on the private international law provisions of the relevant European country as regards recognition of the UK insolvency proceedings and in order to prevent foreign creditors stealing a march on the English proceedings by, for example, obtaining security over a debtor’s assets. In that regard, it will be key to have access to good quality local law advice and assistance. It will also be important to obtain that advice as soon as possible after appointment so that any necessary steps (if any are available) can be taken in the foreign jurisdiction swiftly. Plainly, those steps will come at extra costs.

19. In relation to Greece, Poland, Romania and Slovenia, an English insolvency officeholder could, as a result of the Model Law, apply in the local courts of those countries for the UK proceedings to be recognised as ‘foreign main proceedings’ or ‘foreign non-main proceedings’ and to obtain relief in those countries such as stays of enforcement action by local creditors. Even on that basis though, recognition is not automatic (an application will be necessary), and depending on the terms of the Model Law as implemented in those countries, a stay of proceedings (which will, in any event, require an application) may be discretionary. Indeed, under Article 21 of the Model Law as implemented in the UK by the CBIR, a large part of the substantive relief which a foreign officeholder can obtain is discretionary (see e.g. *Larsen v Navios International Inc.* [2011] EWHC 878 (Ch) which concerned contractual set-off).

20. For officeholders in existing cases, the simplest form of future-proofing that is available is proceed with whatever action needs to be taken in another Member State whilst the regulation (or the recast regulation) still applies. That might mean, for example, protecting the insolvency estate’s interest in a foreign asset by registration in a public register: e.g. by analogy with the notices which appear at the Land Registry in the UK upon bankruptcy of a property owner, it is possible to obtain from the relevant local

French *cadastre* similar notices relating to French real property. It is possible that, once obtained, such notices will remain registered even after the regulation ceases to apply, thus providing a limited measure of protection. Along similar lines, it is worth remembering that Article 25 of the recast regulation envisages the creation of a 'decentralised system for the interconnection of insolvency registers'. It is of course not clear whether the UK will continue to have access to such a system after the UK exists from the European Union. Given that the information which is contained in the system will be publically available and searchable in the European Union, it is readily obvious that publication of the existence of UK insolvency proceedings should be beneficial (of course, in some cases, immediate publication may not be beneficial if it has the effect of alerting foreign creditors to the existence of proceedings before the officeholder has had the chance to attempt to protect local assets). To the extent that, before the UK exits the European Union it participates in the system, it would no doubt be a straightforward step for officeholders to ensure that the details of insolvencies in respect of which they're appointed appear in the system. That should be done.

21. As regards other future proofing steps, to the extent that foreign assets need to be realised and or remitted back to the UK (as can be done directly by the UK officeholder under Article 18(1) of the regulation) that should be done in plenty of time before the regulation ceases to have effect. Similarly, if an officeholder requires information or documents from a third party in another Member State, the relevant wheels (whether in this jurisdiction or in the other jurisdiction) should be set in motion as soon as possible.

<u>General civil and commercial claims where a party is insolvent</u>

22. The Judgments Regulation and the Rome I Regulation are unlikely to be frequent reading material for insolvency practitioners. Nonetheless they deserve at least a passing mention in this paper. They are relevant in general civil and commercial matters: in particular, they allocate jurisdiction in such cases, provide for the recognition of general civil or commercial judgments, and also fix the law which applies in contractual cases. They will be relevant in a case where the relevant insolvency estate has a pre-existing, pre-insolvency contractual or tortious claim (or vice versa) which the officeholder wishes to bring (or which a third party might bring against the insolvent estate): obvious examples are a breach of contract claim or a claim to an entitlement to land or buildings. If the Judgment Regulations and the Rome I Regulation cease to apply they will leave a large void in the UK's private international law so far as the European Union is concerned. It is impossible to predict what rules

might replace those two regulations, if any. If no new bespoke agreement is reached between the UK and the EU then the position as regards jurisdiction will revert to the common law of *forum conveniens*: i.e. the forum that is the most appropriate. A regards the choice of law in contractual matters, the position, if it reverted to the previous common law would be that the contract is governed by its 'proper law'. If the parties have made a choice of law, then that choice will be respected by the courts on the basis of party autonomy. If the parties have made no choice, a court will seek to infer a choice from the terms and nature of the contract, and from the general circumstances of the case. Failing all else, the contract would be governed by the system of law with which the contract has its closest and most real connection (see para. 32-006 of Dicey & Morris, 15th Edition).

23. Jurisdiction and choice of law are two topics of private international law in which the law which applies in this jurisdiction is enriched by the applicable European regulations. They bring a measure of certainty and predictably to questions of jurisdiction and choice of law. They are also accompanied by a *corpus* of case law which has been developed and refined over decades; by contrast the common law equivalents have not received as much judicial attention. To have revert to the concepts of '*forum conveniens*' and 'proper law' in European cross-border cases can only be a backward step. At any rate, insolvency practitioners should be aware that the UK's departure from the EU will also have consequences in respect of 'regular' non-insolvency cross-border cases. Watch this space.

Service out of the jurisdiction

24. Since *Seagon* it has been clear that if insolvency proceedings opened in the UK qualify as 'main proceedings', then the UK courts have jurisdiction to hear avoidance actions and other actions closely connected with and deriving directly from the insolvency proceedings, even if the prospective defendant is domiciled in another Member State. Even though jurisdiction is settled, there could still be issues as to service of the court proceedings on the foreign defendant, specifically as to the method of service: see for example *Baillies Ltd (in liq), Re; Hornan v James Stuart Baillie & Or* [2012] EWHC 285 (Ch) [2012] BCC 554 in which the High Court set aside service of avoidance proceedings on a foreign defendant. The basis of the decision was that the Service Regulation (mentioned in paragraph 13 above) applied to insolvency proceedings. The Practice Direction on Insolvency Proceedings issued on 29 July 2014 removed any doubt as to whether that regulation applied providing as did, at paragraph 6.2, for the

application of the Service Regulation. The pre-Service Regulation position was contained in r. 12.12(3) of the Insolvency Rules 1986 which provided for the court to order service to be "… effected within such time, on such person, at such place and in such manner as it thinks fit…": pretty much a *carte blanche*. The position under the Service Regulation is near enough the polar opposite. It envisages a relatively complex system of national 'transmitting agencies' and 'receiving agencies' which are required to transmit documents to each other by way of service and thereafter the 'receiving agency' serves the defendant, alternatively the use of the judicial officers, officials or other competent persons of the Member State in which the defendant is domiciled, or finally, post by registered letter with acknowledgment of receipt.

25. It is possible that in leaving the European Union the UK will cease to be bound by the Service Regulation; that would not necessarily be a bad thing. It does however raise, directly and squarely, the question as to what, if anything, will replace the Service Regulation when it comes to the method of serving court documents in insolvency proceedings in another European Member State. As presently drafted, the new Insolvency Rules 2016 contain precious little useful guidance (see r. 12.9). At the moment, the new rules envisage the CPR applying to insolvency proceedings (see new r.12.1); that is fine so far as it goes – the CPR currently provides for parties to service using the Serving Regulation: see rr. 6.40(3) and 6.41! If the Service Regulation ceases to apply, that will necessarily mean that those rules will also need to be changed. It is perhaps too much to hope, but having regarded to the flexibility and discretion which old Insolvency Rule 1986 r. 12.12(3) conferred on the courts of England and Wales, it would be a positive development if, in this instance, English insolvency law took a retrograde step and returned to the pre-EU position.

Conclusion

26. So much uncertainty still lingers in relation to the UK's future relationship with the EU that it is difficult to make respectable predictions about the legal impact that the UK leaving the European Union will have on insolvency practitioners and their cases. To the extent that any useful future-proofing steps can be taken now, assuming the worst and that the regulation ceases to apply, they consist quite simply in making the most of the regulation, and in due course the recast regulation, to take whatever action or steps in another Member State which an individual case may require as soon as possible and before the UK exits. After that has happened, and assuming there is no replacement regulation or alternative law, there is no doubt that the UK's future

‘insolvency relations’ with the EU will become much more complicated than they are now, and much less predictable. In such a scenario it seems almost inevitable that creditors will suffer not least because of the additional expenses which will need to be incurred in taking advice from overseas lawyers, but also because it may be that in some of the smaller cases, the view will simply be taken that it is too complicated and costly to seek to recover a foreign asset. There are no real winners in that scenario, only losers. It is to be hoped that the negotiators which the relevant government departments are actively recruiting will succeed in salvaging some form of agreement in relation to insolvency law following the UK’s departure from the EU. To misquote Alphonse Karr, “plus ca change…” moins c’est bien.

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