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MEMORANDUM

TO: Shari Bedker

FROM: Bruce Leonard

DATE: August 1, 2012

RE: American College of Bankruptcy: International Insolvency Resources

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Dear Shari,

I am pleased to enclose for posting to the International Resources Section of the College website the paper presented by Patricia Godfrey at the Annual Induction Ceremonies in March. Please call it "Cross-Border Insolvencies in England".

I am very pleased to see that the amount of material on the International Insolvency Resource Section is continuing to grow and I will continue to persuade Fellows of the College to contribute materials to it. Thank you very much for all of your help with this. With very best regards.

Bruce.

NABARRO

An Introduction to the fundamental principles governing cross-border insolvency in an English law context

1. COMPETING DOCTRINAL POSITIONS IN INTERNATIONAL INSOLVENCY

1.1 Whilst there are similar fundamental principles underlying the respective insolvency laws of many countries[1], insolvency law is an area in which there are a number of public policy considerations which have the effect that, more than in many other areas of law, there are considerable substantive differences in the insolvency law of different countries[2].

1.2 The differences have so far proved too great to enable the creation of a harmonised insolvency law system. Instead, doctrinal argument has centred around two different camps – the universalists and the territorialists. The universalists assert that the country with which the debtor entity has its closest connection should determine the insolvency law governing that entity in relation to all its assets and liabilities wherever they are situated in the world even if they are situated in countries whose own insolvency law, if applied, has completely different consequences. The territorialists assert that the country that opens an insolvency proceedings should limit the effects of that proceeding to that country and should not seek to apply its insolvency law to assets and creditors situated abroad.

1.3 The universalists typically defend universalism on the ground that it is best in harmony with the principle of collectivity as it ensures creditors, no matter where they are situated, are accorded equal treatment. Territorialists counter that universalism is unfair on foreign creditors in that it may defeat their legitimate expectations where they agreed with the debtor that their dealings would be subject to that foreign law, particularly where they have agreed that their dealings would be subject to that territory's insolvency laws.

1.4 The recent case-law, as described in greater detail below, evidences a tentative shift away from territorialism towards universalism. The philosophy underpinning the EC Regulation on Insolvency Proceedings (1346/2000) ("**EIR**"), which came into force on 31 May 2002, is a modified universalism, sc. making the insolvency law of the country to which the debtor is most closely connected of universal effect upon the opening of insolvency proceedings there but permitting the opening of ancillary insolvency proceedings in certain circumstances and mitigating the full effect of the insolvency for foreign creditors whose legitimate expectations would otherwise be upset.

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[1] One thinks in particular of the principle of collectivity, which is to the effect that, on an entity's insolvency, economic value is best preserved not by paying out the creditors on a first come first served basis but on the basis that each creditor is entitled to a share of the debtor's assets in proportion to the amount owed by the debtor to it.

[2] In the case of insolvency generally, there are considerable policy differences around (i) the circumstances in which pre-insolvency transactions can be reversed; (ii) the priority in which creditors are paid out in an insolvency, including the priority or otherwise of the secured creditor, the ability of other creditors and the debtor to affect the priority of the secured creditor without his agreement, the insolvency officeholder's costs and expenses and the criteria needed to qualify as a preferential creditor. Furthermore, there are considerable differences, in the case of individual insolvency, in the length of the bankruptcy prior to discharge, and, in the case of corporate insolvency, in the extent to which limited liability protects the directors and shareholders.

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2. SOURCES OF LAW APPLIED BY ENGLISH COURTS

2.1 The English conflict of laws rules governing international insolvency law cases before its courts are complex and multifaceted. In particular, they involve consideration of a number of different sources of law some of which may overlap:

(a) The opening of ancillary proceedings in England. Where the jurisdictional requirements are met, notwithstanding the existence of a foreign insolvency process, insolvency proceedings may be opened in England.

(b) The common law principle of co-operation with a foreign insolvency court where the foreign insolvency proceeding is capable of recognition in England.

(c) Section 426 of the Insolvency Act 1986. This section of the Insolvency Act, inter alia, requires the English courts with jurisdiction in relation to insolvency law to assist courts having the corresponding jurisdiction in any other part of the United Kingdom, the Channel Islands, the Isle of Man and any country so designated by the Secretary of State. The countries so designated are predominantly Commonwealth states[3].

(d) The EIR. Insolvency proceedings were specifically excluded from the scope of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters 1968 and from the Judgments Regulation (44/2001) which superseded it. The EIR governs a debtor[4] whose "centre of main interests" is in an E.U. Member State other than Denmark, Denmark having opted out of the regulation. The term centre of main interests has not been defined in the EIR though in one of the recitals it is stated that it should correspond to the place where the debtor conducts the administration of his business on a regular basis and is therefore ascertainable by third parties.

(e) The Cross Border Insolvency Regulations 2006 ("**CBIR**"). These regulations seek to bring into effect in the UK the UN Commission on International Trade Law's model law on cross-border insolvency. The regulations, inter alia, provide assistance to recognised foreign insolvency proceedings in a far more systematic and detailed way than under the common law principle of co-operation with a foreign insolvency court as described at (b) above. Importantly, they set out specific criteria for recognition that differs considerably from the idiosyncratic criteria for recognition at common law. Moreover, they do not depend on the foreign state's having itself enacted the UNCITRAL model law into its own domestic law. In the case of a conflict between the EIR and the CBIR, the EIR prevails.

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[3] The designated countries are: Anguilla, Australia, the Bahamas, Bermuda, Botswana, Brunei, Canada, Cayman Islands, Eire, Falkland Islands, Gibraltar, Hong Kong, Malaysia, Montserrat, New Zealand, St Helena, South Africa, Turks and Caicos Islands, Tuvalu and the Virgin Islands.

[4] Insurance undertakings, credit institutions and investment undertakings are expressly excluded from the scope of the EIR. The E.U. has enacted separate legislation in regard to the insolvency of insurance undertakings and credit institutions which, for lack of space, will not be detailed in this note. There is presently no E.U. legislation governing investment undertakings; as an example, neither the EIR nor the separate credit institution or insurance undertaking legislation applied to Lehman Brothers International Europe Ltd when it went into administration in England.

3. JURISDICTION TO OPEN INSOLVENCY PROCEEDINGS IN ENGLAND

3.1 Even though insolvency proceedings have been opened in another country, this does not prevent the opening of further insolvency proceedings in England where the jurisdictional criteria for the opening of such proceedings are otherwise met.

3.2 The jurisdictional criteria for bankruptcy and winding up as set out at **paras** 3.3 to 3.5 below assume that the EIR does not apply. Where it does apply, different jurisdictional criteria apply as detailed at **Section** 6 below.

3.3 In the case of an individual, and on the assumption that the insolvency criteria for bankruptcy are otherwise met, a bankruptcy order may be obtained from the English court where the debtor:

(a) is domiciled in England and Wales,

(b) is personally present in England and Wales on the day the petition is presented, or

(c) at any time in the period of 3 years ending with the date of presentation-

(i) has been ordinarily resident, or has had a place of residence, in England and Wales, or

(ii) has carried on business in England and Wales.

3.4 There are some limited judicial examples where the English court has refused to grant a bankruptcy order even where the jurisdictional criteria set out in **para** 3.3 have been satisfied, in particular where the debtor has no assets in England.

3.5 In the case of a company, on the assumption that the insolvency criteria for a winding up order are otherwise met, the jurisdictional criteria for the making of a winding up order are satisfied where the company is registered in England and Wales. Where the company is foreign registered, it may nevertheless be wound up as an unregistered company. No statutory criteria for when an English court may assume such a jurisdiction have been laid down but case-law establishes that an English court will only assume jurisdiction where:

(a) there is a "sufficient connection" with the English jurisdiction which may, but does not necessarily have to, consist of assets within the jurisdiction,

(b) there is a reasonable possibility of benefit for those petitioning for the winding up order, and

(c) one or more persons interested in the distribution of the assets of the company are persons over whom the court can exercise jurisdiction.

3.6 The company voluntary arrangement and administration procedures are available in England to:

(a) a company incorporated in England and Wales or in Scotland;

(b) a company incorporated in an E.E.A.[5] state other than the United Kingdom; and

(c) (as mandated by the EIR), a company not incorporated in an E.E.A. state but whose centre of main interests is in an E.U. Member State other than Denmark.

[5] The E.E.A. consists of the E.U. Member States plus Iceland, Liechtenstein and Norway but not Switzerland.

The specific jurisdictional criteria for the opening of proceedings in accordance with the EIR is detailed at **Section** 6 below.

The extension of these procedures to E.E.A. incorporated companies as set out in (b) above is not mandated by the EIR.

The effect of a bankruptcy or winding up order on the debtor's foreign assets and creditors

3.7 English law takes a strongly universalist stance in relation to the effect of its own insolvency adjudications on debtor's assets situated abroad, even where that insolvency process is ancillary to a foreign insolvency process occurring simultaneously in another country. An English winding up or bankruptcy purports to embrace all the debtor's interests, assets and creditors wherever situate, for example, the statutory insolvency provisions when read together purport automatically to assign all of an individual debtor's foreign assets whether movable or immovable to his trustee in bankruptcy and purport to create a statutory trust over all of a corporate debtor's foreign assets whether movable or immovable for the benefit of the liquidation creditors[6]. Nevertheless, the English courts have long since sought to co-operate with foreign insolvency proceedings where these are concurrent with English proceedings[7].

3.8 Where bankruptcy, winding up or administration proceedings are opened in England, the insolvency practitioner can make use of the English insolvency mechanisms for avoiding actions detrimental to the debtor's creditors in the twilight period prior to the commencement of the insolvency process.

4. RECOGNITION OF FOREIGN INSOLVENCY PROCEEDINGS IN ENGLAND UNDER THE COMMON LAW

4.1 The right of recognition may arise in England, in the case of foreign bankruptcy, where the foreign bankruptcy has been opened in the state of the bankrupt's domicile as defined under English law and, in the case of foreign liquidation, where the foreign liquidation has been opened in the state in which the company is incorporated. Alternatively, the right of recognition may arise where the debtor voluntarily participated in the foreign bankruptcy proceedings, for example by presenting his or its own petition in that foreign country.

4.2 The circumstances in which recognition may otherwise be accorded are not clear. There is precedent for recognition to be afforded to a foreign liquidation of an English incorporated company where most of the English company's business has been conducted in that other country. There would not appear to be any precedent for recognising foreign bankruptcies on the ground, for example, of habitual residence.

4.3 Recognition may not be accorded to foreign bankruptcies or liquidations, notwithstanding that the jurisdictional criteria as set out above have been satisfied, where the foreign bankruptcy or liquidation is in essence a tax bankruptcy.

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[6] Of course, the effect the English bankruptcy or winding up has on foreign assets is in practice affected more by whether the foreign country recognises and gives effect to the English insolvency process which is a matter for that foreign country's own conflict of laws rules.

[7] For an early example of such enlightened co-operation: see *In re P.MacFayden & Co* [1908] 1 KB 675.

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The effect of recognition

4.4 In the event that the foreign bankruptcy law has the effect of divesting a bankrupt of his movable property, there is long standing English case-law that subsequent recognition of the foreign bankruptcy in England will have the similar effect of divesting the bankrupt of all his movables situate in England. Furthermore, these cases establish that, upon recognition in England, the divestment is deemed effective under English law as from the date the divestment took effect under the foreign law. Accordingly, if, for example, the divestment took effect under the foreign law at the date of the bankruptcy order, rights of third parties that were perfected after the foreign bankruptcy order but before recognition is accorded by the English court will nevertheless be ineffective to defeat the foreign bankruptcy officeholder's title. The position of third parties in these circumstances is to be contrasted with the position of third parties who have perfected their title prior to the date of divestment under the foreign law which is analysed in more detail at **para** 4.7 below.

4.5 As regards immovable property, this does not automatically vest, however, on the application of the foreign officeholder, the court may, in its discretion, compel the transfer of title or appoint the foreign officeholder a receiver of the property.

4.6 Upon recognition of a foreign liquidation, there is no automatic vesting of either immovable or movable property but, similar to foreign bankruptcies in the context of immovables, the court may compel conveyance to the foreign officeholder or appoint him receiver.

4.7 Notwithstanding recognition, any "relation back" doctrine under the foreign law (whereby transactions in the period immediately prior to the bankruptcy or liquidation are automatically voided even though the bankruptcy and liquidation assets have not yet under the foreign law vested in the foreign insolvency officeholder) are accorded no effect in England. Accordingly, if divestment occurs under the foreign law at the date of the bankruptcy or liquidation order, the officeholder's title is subject to the rights of third parties which have been perfected prior to the order despite the existence of a "relation back" doctrine under the foreign law[8].

4.8 The foreign officeholder's position in this regard has been ameliorated by the Court of Appeal's recent decision in *Rubin v Eurofinance* [2011] Ch 133. In that case, a trust entered bankruptcy in New York. The insolvency officeholder brought proceedings in New York that were the equivalent of claims to reverse a transaction at an undervalue and a preference contained in sections 238 and 239 respectively of the Insolvency Act 1986. The defendants were not resident in New York and did not submit to its jurisdiction. The New York court entered judgment against them and the insolvency officeholder subsequently sought, inter alia, the enforcement of the judgment in England at common law. The Court of Appeal reasoned that the judgments of a foreign insolvency court were not subject to the usual common law conflict of laws principle preventing the enforcement of a foreign judgment where the defendant was neither present in the jurisdiction nor had submitted to the jurisdiction. Furthermore, for this purpose, the judgment of a foreign insolvency court included a judgment pursuant to New York powers that were the equivalent of the transaction at an undervalue and preference mechanisms available in England. Accordingly, the English court could under the common law offer assistance in enforcing the New York court's judgment in England notwithstanding that the defendants were not resident in New

[8] See *Galbraith v Grimshaw* [1910] AC 508.

York and had not submitted to the New York court's jurisdiction. The defendants are appealing to the Supreme Court and the appeal has been listed for hearing in May 2012[9].

4.9 The foreign officeholder's position in this regard has been further ameliorated by the even more recent first instance decision in *Schmitt v Deichmann* [2012] EWHC 62 (Ch). In that case, it was held that a foreign administrator recognised at common law by the English court could avail himself of the mechanism to reverse transactions defrauding creditors contained in section 423 of the Insolvency Act 1986[10].

Recognition of other types of foreign insolvency proceedings

4.10 There is precedent of long standing for the English court both to recognise and give assistance to a receiver appointed by a court whose competence to make the appointment is recognised by English law. Indeed, where there are assets in England that are vulnerable, the court may on the application of the foreign receiver after presentation by the receiver of a winding up petition, appoint a provisional liquidator to protect and administer the local assets[11].

4.11 As regards recognition and assistance at common law afforded to other foreign corporate rescue procedures, the law is still evolving[12]. Given the marked policy differences underpinning corporate rescue procedures in different states, each application needs to be carefully reviewed on its own merits as the body of English case-law in this area demonstrates.

5. SECTION 426, IA

5.1 By section 426(4):

> "*The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or in a relevant country or territory*[13]."

By section 426(5):

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[9] The judgment has been the subject of considerable criticism: see, for example, *Look Chan Ho, "Recognition Born of Fiction"* JIBLR 2010 25(12), 579-587. Simplifying his ideas somewhat for instructional purposes, he is of the view that the English court's description of the New York judgment as neither in rem nor in personam but sui generis such that the usual English conflict of laws rules did not apply to it was illogical and contradicted case precedent. Furthermore, the admirable universalist result achieved by the court's reasoning could anyway have been achieved by a different route, sc. by the use of Article 21 of the CBIR. Also of relevance is the more recent judgment of the Court of Appeal in *In re New Cap Reinsurance Corporation Ltd* [2011] EWCA Civ 971 detailed at **para** 5.3 below.

[10] The judgment in the *Galbraith v Grimshaw* case referred to at footnote 8 above was a House of Lords judgment binding on the first instance judge in *Schmitt*. However, the two cases are distinguishable. *Galbraith* concerned whether or not a foreign bankruptcy law's doctrine of relation back, which in the foreign law had the effect of automatically voiding executions against the debtor's assets prior to the bankruptcy on the making of the foreign bankruptcy order, could be applied by the English court; *Schmitt*, by contrast, concerned whether or not the English statutory mechanism allowing a court in its discretion to undo a transaction at an undervalue of the company prior to its entry into a formal insolvency process could be made available to a foreign officeholder. Clearly, however, the two decisions, separated in time by 102 years, illustrate very different philosophies on the universality of foreign insolvencies.

[11] See the judgment of Lightman J in *In re Daewoo Motor Company Ltd (No 336 of 2001)* (unreported), 18 January 2001, where such an order was made.

[12] Important cases are the Privy Council decision in *In re Cambridge Gas Transportation Co* [2007] 1 AC 508, the Court of Appeal's decision in *In re Maxwell Communications Corpn plc (No 2)* [1992] BCC 767 and the first instance decision in *Felixstowe Dock and Railway Co v United States Lines Inc* [1989] QB 360.

[13] Including the states listed at **para** 2.1(c) and footnote 3 above.

"For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, ... the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.

In exercising its discretion ... a court shall have regard in particular to the rules of private international law."

The English insolvency court, when receiving a request from the insolvency court of a relevant country, may apply in aid of that request its own law even if the insolvency law of the relevant country has no equivalent provision and may apply the foreign insolvency law where there in no equivalent English provision but in exercising its discretion, the English court must take into regard private international law.

5.2 An important case on the application of section 426 was *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852. That case involved four Australian insurance companies that had substantial dealings and assets in England. The four companies were wound up in Australia. The English court, following a letter of request from the New South Wales Supreme Court for assistance pursuant to section 426, appointed provisional liquidators over the English assets. The New South Wales Supreme Court then sent a second letter of request to the English court asking that the provisional liquidators be directed, after payment of their expenses, to remit the assets realised by them to the Australian liquidators. The first instance judge refused the request on the ground that the priority of distributions in an Australian insurance insolvency was not substantially the same as the priority under English law in that, under Australian law, insurance creditors were given preference to the prejudice of ordinary creditors. On appeal to the Court of Appeal the court upheld the refusal. On a further appeal to the House of Lords, their Lordships overturned the inferior court judgments. Their Lordships held unanimously that, by section 426, the court had a discretion to order remission of assets to a relevant country even where that country's priority of distribution to creditors was not in accordance with English law. Lords Hoffmann and Walker went even further, stating, *obiter*, that there was also a power to order such remission under the common law. Lords Neuberger and Scott stated, *obiter*, that no such power at common law existed and Lord Phillips withheld his view.

5.3 A further important judgment on the application of section 426 was very recently handed down by the Court of Appeal in *In re New Cap Reinsurance Corporation Ltd* [2011] EWCA Civ 971. New Cap Reinsurance was in liquidation in Australia. The liquidator brought proceedings in the New South Wales court to recover payments made to the defendants which the liquidator claimed were preferences. The defendants did not accept service of the proceedings, did not submit to the jurisdiction of the New South Wales Court and did not take part in the proceedings. They did take part in the liquidation, however, by submitting proofs of debt. The New South Wales Court gave judgment in favour of the liquidator declaring two payments made by New Cap to the defendants voidable as preferences pursuant to the relevant Australian legislation and ordered the two defendants to pay back the two payments. By a letter of request, the New South Wales court requested the English court's assistance to enforce the judgments. There were three routes of enforcement possibly open to the liquidator: enforcement (i) pursuant to the Foreign Judgments

(Reciprocal Enforcement) Act 1933; (ii) pursuant to section 426; and (iii) pursuant to the common law, which was the same mechanism by which the claimants in *Rubin's* case referred to at **para** 4.8 above sought to enforce the New York Court's judgments. (The 1933 Act and section 426 were not available in *Rubin's* case as the United States is not a country to which these statutory powers apply.) The court held (i) that the 1933 Act does apply to money judgments made in insolvency proceedings; and (ii) that section 426 can also be used to seek assistance to enforce a money judgment in foreign insolvency proceedings, notwithstanding the existence of a concomitant jurisdiction under the 1933 Act. The court withheld judgment on the question of whether the common law power to assist foreign insolvency proceedings is also available where the statutory powers apply.

6. EIR

6.1 The EIR distinguishes therein defined "main" insolvency proceedings from "territorial" insolvency proceedings[14]. The courts of a Member State have the jurisdiction under the EIR to open main insolvency proceedings against a debtor whose centre of main interests is in that Member State. Where the centre of main interests of the debtor is situated within the territory of a Member State ("the **First Member State**"), the courts of another Member State ("the **Second Member State**") have jurisdiction to open territorial proceedings against that debtor only if he possesses an establishment[15] in the Second Member State AND:

(a) Where main proceedings have not yet been opened against the debtor, only where

(i) either main insolvency proceedings cannot be opened in the First Member State because of the conditions laid down by the law of the First Member State;

(ii) or the territorial proceedings are requested by a creditor who has his domicile, habitual residence or registered office in the Second Member State or whose claim arises from the operation of that establishment.

(b) Where main proceedings have already been opened against the debtor in the First Member State, there are no further requirements to be satisfied before territorial proceedings can be opened in the Second Member State. Such territorial proceedings are described in the EIR as secondary proceedings. However, unlike territorial proceedings in (a) above which can be any type of insolvency proceeding, secondary proceedings must be winding up proceedings[16].

6.2 Under the EIR, territorial proceedings are limited to the assets of the debtor that are situated in the Second Member State. There is no such limitation in the EIR as regards main proceedings.

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[14] By Article 1(1) of the EIR, it is stated that the EIR applies to "collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator". (Liquidator is defined very broadly by the EIR and includes all English formal insolvency process officeholders.) The proceedings to which the EIR applies are then expressly listed by country in Annex A to the regulation. The EIR does not apply to proceedings that are not listed in this annex. The proceedings listed for the UK are (i) winding up by or subject to the supervision of the court; (ii) creditors' voluntary winding up; (iii) administration; (iv) voluntary arrangement; and (v) bankruptcy or sequestration. Thus receivership, including administrative receivership, is excluded from the scope of the EIR. This is because it is not collective in character in that the receiver's primary duty is not owed to the company's creditors as a whole but to the person who appointed him. Furthermore, schemes of arrangement pursuant to section 895 of the Companies Act 2006 are also excluded from the scope of the regulation.

[15] Establishment is defined in the EIR as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.

[16] Importantly winding up proceedings listed for the UK in Annex B to the EIR include winding up through administration.

6.3 In addition to establishing the jurisdictional basis for the opening of insolvency proceedings where the debtor's centre of main interests is in a Member State, the EIR establishes a modified universalism with regard to the choice of law affecting the opening, conduct and closure of the insolvency proceedings (whether main or territorial) – that is, the law governing the insolvency proceedings is the law of the Member State in which the proceedings were opened subject to various exceptions. In particular, the law of the Member State in which the proceedings were opened governs the respective powers of the debtor and the insolvency officeholder; the rules governing the lodging, verification and admission of claims; the creditors' rights after the closure of the proceedings and the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

6.4 One of the most important exceptions to this choice of law rule is contained in Article 5 which is in terms that the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of assets belonging to the debtor which are situated within the territory of another Member State at the time of the opening of the proceedings. Furthermore, by Article 15, the effects of insolvency proceedings on a lawsuit pending concerning an asset or right of which the debtor has been divested shall be governed solely by the law of the Member State in which that lawsuit is pending[17].

6.5 A literal reading of the EIR would suggest that it does not establish jurisdictional criteria for claims brought by the insolvency officeholder after the insolvency proceedings have been opened (for example proceedings seeking to undo transactions at an undervalue or preferences). In *Seagon v Deko Marty Belgium NV* [2009] 1 WLR 2168, however, the European Court of Justice held that the EIR confers jurisdiction on the state in which insolvency proceedings had been opened to hear and decide on claims which derived directly from those proceedings and were closely connected to them, which claims included claims under insolvency law to undo transactions detrimental to the debtor's creditors and that, it followed, that the courts of that member state had jurisdiction to decide such a claim notwithstanding that the defendant was domiciled in another Member State. It is not clear from this case whether the courts of another Member State might also have jurisdiction to hear such a claim under its own domestic conflict of law rules notwithstanding the EIR.

6.6 By Article 25 of the EIR, subsequent judgments of courts of the Member State in which insolvency proceedings are opened relating to the course and closure of the insolvency proceedings[18] shall be recognised by the courts of other Member States with no further formalities and shall be enforced in a similar manner to the enforcement provisions for foreign judgments as laid down in the Judgments Regulation (EC 44/2001).

7. CBIR

7.1 The CBIR permits an officeholder (known therein as a foreign representative) appointed in a foreign insolvency proceeding to apply to the English court for recognition of the foreign proceeding. The proceeding must be collective in character and so, as with the EIR, a

[17] The exact effect of this exception has been the source of some scholarly and judicial debate: see in particular the criticism at para 8.246 of *Moss, Fletcher and Isaacs, The EC Regulation on Insolvency Proceedings (2nd. Ed)* of the interpretation given to this exception by Lawrence Collins J in *Mazur Media Ltd v Mazur Media GmbH* [2004] 1 WLR 2966.

[18] Including judgments deriving directly from those proceedings and which are closely linked with them even if they were handed down by another court.

foreign receiver whose primary duty is owed not to the company's creditors as a whole but to his appointor will not be accorded recognition under the CBIR[19]. The procedure for making a recognition application is straightforward and requires no special formalities.

7.2 A foreign proceeding must be either a foreign main or foreign non-main proceeding. The distinction between the two follows the distinction between main and territorial proceedings within the EIR: a foreign main proceeding is defined as a foreign proceeding taking place in a state where the debtor has his centre of main interests. A foreign non-main proceeding is defined as a foreign proceeding, other than a foreign main proceeding, taking place in a state where the debtor has an establishment. There is no jurisdiction under the CBIR for recognising a foreign proceeding opened against a debtor in a state other than one in which he has his centre of main interests or an establishment.

7.3 Recognition as a foreign main proceeding has the effect, subject to certain exceptions, that execution against the debtor's assets is automatically stayed and the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended. In the case of a foreign proceeding that has been recognised as a foreign non-main proceeding, such stay or suspension is not automatic but the court may order it at the request of the foreign representative.

7.4 Upon recognition of a foreign proceeding, whether main or non-main, at the request of the foreign representative, the court may, inter alia:

(a) provide for the examination of witness; and

(b) entrust the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative.

Furthermore, upon such recognition, the foreign representative has standing to undo transactions by the debtor in the twilight period before or during the insolvency procedure[20].

7.5 In the Court of Appeal's recent decision in *Rubin v Eurofinance SA* [2011] Ch 133 referred to at **para** 4.8 above in the context of its application to the common law, the court withheld judgment on the question of whether the judgment of the New York court given in proceedings that were the US equivalents of the transaction at an undervalue and preference claims could be enforced pursuant to the CBIR. As we have already seen, the court held that the judgments could be enforced under the common law; surprisingly, therefore, the assistance afforded to foreign insolvency officeholders by the English court may in certain circumstances be wider under the common law than under the CBIR. As previously stated, this judgment has been appealed to the Supreme Court with the hearing expected to come on in May 2012.

8. CONCLUSION

8.1 Cross-border insolvency is an area of English law that continues to evolve. The CBIR and the EIR have both had dramatic impact on the legal landscape but cases such as *Rubin v*

[19] For an analysis of the requirement of collectivity in the CBIR, see *In re Stanford International Bank* [2011] Ch 33.

[20] The transaction avoidance mechanisms made available to the foreign officeholder are those available in English insolvency law including section 238, IA (transactions at an undervalue) and section 239, IA (preference). The foreign representative does not have standing by the CBIR to bring transaction avoidance mechanisms available to him under the foreign insolvency law.

Eurofinance and *In re New Cap Reinsurance* evidence the continuing importance of the common law and section 426.

8.2 The courts have shown an increasing willingness to give universalist effect to foreign insolvency procedures. Indeed, this is one of the few areas of the common law that has seen considerable judicial activism in recent years.

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Dated [5] April 2012