Journal of Commercial Law Review
2024, VOL. 8, NO. 4, 55-60
DOI: 10.47297/wspjclrWSP2516-249708.20240804

# Post-Brexit Cross-Border Insolvency: The UK's Shift from the EIR to the UNCITRAL Model Law

Junyu Ma

University of Glasgow, Glasgow, Scotland, United Kingdom

**ABSTRACT**
This article examines the evolution of cross-border insolvency law in the United Kingdom following Brexit, focusing on the transition from the European Insolvency Regulation (EIR) to the UNCITRAL Model Law on Cross-Border Insolvency. It evaluates the pre-Brexit benefits of the EIR, such as automatic recognition and jurisdictional clarity, and contrasts them with the challenges posed by the UK's departure from the EU framework. The article explores the opportunities offered by the Model Law, emphasizing its flexibility and global applicability, while highlighting the procedural gaps and complexities that have arisen in EU-UK insolvency interactions. Ultimately, it underscores the importance of refining the UK's post-Brexit framework to maintain its prominence as a global hub for insolvency and restructuring practices.

**KEYWORDS**
Cross-Border Insolvency; Brexit; European Insolvency Regulation; UNCITRAL Model Law

## 1 Introduction

Cross-border insolvency law plays a critical role in managing cases involving multinational corporations and complex creditor structures. Before Brexit, the United Kingdom operated under the European Insolvency Regulation (EIR), a harmonized framework that facilitated seamless cooperation among EU member states. The EIR's mechanisms, such as the Centre of Main Interests (COMI) and the principle of automatic recognition, ensured efficiency and legal certainty in insolvency proceedings across borders. However, Brexit marked a significant turning point, severing the UK from the EIR framework and creating a fragmented legal landscape. Post-Brexit, the UK has turned to alternative mechanisms, particularly the UNCITRAL Model Law on Cross-Border Insolvency, incorporated into domestic law through the Cross-Border Insolvency Regulations 2006 (CBIR). While this shift aligns the UK with globally recognized standards, it introduces complexities and challenges, particularly in interactions with EU jurisdictions that continue to rely on the EIR. This article examines the evolution of cross-border insolvency law in the UK, exploring the transition from the EIR to the Model Law. It critically analyses the implications of this shift, addressing both the challenges and opportunities it presents for insolvency practitioners and stakeholders.

## 2 Historical Context and Pre-Brexit Framework

### 2.1 The European Insolvency Regulation (EIR)

When analysing the legal framework for cross-border insolvency within the pre -Brexit European

Union, the European Insolvency Regulation (EIR) is the central legal instrument dealing with cross-border insolvency proceedings in member states. The provisions of EIR laid the foundation for a coordinated approach to insolvency cases in multiple EU countries, which is crucial for understanding the pre-Brexit legal landscape.

The EIR is a landmark piece of legislation introduced by the EU to address the complexity of cross-border insolvency proceedings, and the primary objective of the EIR has been to create a unified legal framework that governs the recognition and enforcement of insolvency proceedings across EU member states.

In order to prevent the fragmentation of insolvency cases within the EU, the EIR introduced the concept of "Centre of Main Interests" (COMI), which is a key factor in determining the jurisdiction to initiate insolvency proceedings. According to the Article 3 of the EIR, the COMI of debtor is presumed to be the location of its registered office, unless evidence to the contrary proves otherwise. This presumption is intended to enhance legal certainty by providing a predictable and straightforward rule for determining jurisdiction. To be specific, by assuming that the debtor's COMI is located at its registered office, the EIR minimizes the risk of conflicting jurisdictional claims and helps to ensure that insolvency proceedings are centralized in a single court. This centralization might prevent multiple courts from asserting jurisdiction over the same debtor, which could lead to parallel proceedings and inconsistent decisions. In addition, by providing a clear rule for jurisdiction, the COMI presumption would help to discourage forum shopping that could potentially undermine the interests of major creditors.

The EIR established the principle of automatic recognition, ensuring that insolvency proceedings and related judgements initiated in one member state are recognized without further formalities across other member states. This principle plays a critical role in facilitating the efficient handling of cross-border insolvency cases, reducing the potential for legal conflicts of laws and procedural delays. In addition to the automatic recognition, the EIR distinguished between "main proceedings", which were to be opened in the COMI, and "secondary proceedings", which could be initiated in other member states where the debtor had an establishment. The EIR could ensure a comprehensive and efficient approach to managing cross-border insolvency by coordinating these proceedings.

### 2.2 Impact of the EIR on Cross-Border Insolvency Pre-Brexit

The EIR promotes a more coordinated and efficient handling of insolvency cases in the EU involving debtors with assets or creditors in multiple jurisdictions by introducing the concept of COMI, establishing an automatic recognition regime and distinguishing between main and secondary proceedings. By creating clear and predictable framework for cross-border insolvency, the EIR has had a profound impact on the management and resolution of cross-border insolvency cases within the EU.

One of the most significant impacts of the EIR is its ability to centralize insolvency proceedings through the concept of COMI. On the one hand, the EIR provides clear and predictable rule for determining jurisdiction by establishing that the courts of the member state in which the debtor's COMI is located have jurisdiction to initiate the main insolvency proceedings. This rule significantly reduces the potential for conflicting claims to jurisdiction, which are frequently a significant issue in cross-border insolvency cases. On the other hand, by creating a presumption that the debtor's COMI is at its registered office, the EIR further simplifies the proceedings and provides legal certainty for both creditors and debtors.

The automatic recognition of main insolvency proceedings across all member states is another key aspect of the EIR's impact. Once main insolvency proceedings are initiated in the COMI of the debtor, they are automatically recognized in all other member states, ensuring that the decisions of the court in the COMI are respected throughout the EU. The application of this principle significantly reduces procedural delays and legal conflicts, as a separate recognition procedure for each member state is no longer required. The efficiency gains from the principle of automatic recognition are even more significant in complex insolvency cases involving multinational corporations, where rapid and coordinated action is essential to maximize the value of the debtor's assets and to ensure an equitable distribution among creditors.

Moreover, the framework of EIR for secondary proceedings plays a crucial role in protecting local creditors while maintaining the overall efficiency of the insolvency proceedings. Secondary proceedings could be started in the member state in which the debtor has an establishment, and those proceedings would be limited to assets located in that jurisdiction. This provision helps to ensure that local interests are safeguarded without compromising the general scope of the main proceedings. Coordination between main and secondary proceedings under the EIR plays an important role in balancing the need for local creditor protection with the goal of efficient and harmonized insolvency proceedings across the EU.

Overall, EIR has played an instrumental role in cross-border insolvency management within the EU before the Brexit of the UK. This regulation significantly improves efficiency, legal certainty and fairness in cross-border insolvency cases by centralizing proceedings in the COMI, ensuring automatic recognition between Member States and coordinating primary and secondary proceedings.

### 2.3 The United Kingdom's Participation in the EIR

Prior to the UK's departure from the EU, it played an important role in cross-border insolvency law in the EU and was even known as the insolvency and restructuring capital of Europe. The UK's courts commonly rely on the EIR to resolve complex cross-border insolvency cases, benefiting from the regulation's clear rules on jurisdiction and recognition. In terms of recognition, the principle of automatic recognition under the EIR allows insolvency proceedings initiated in one member state to be recognized in all others without additional formalities. This principle has benefited the UK in managing multi-jurisdictional insolvency cases. As to the jurisdictional aspect, several key cases could illustrate how the UK applied the EIR framework, particularly concerning the concept of COMI. For instance, in *Stanford International Bank Ltd* (2009), the English High Court was tasked with determining the COMI of a bank that, although incorporated in Antigua, conducted significant business operations from London. The court concluded that the bank's COMI was in the UK due to the significant management activities conducted from London, illustrating how the EIR was used by UK courts to assert jurisdiction over cross-border insolvency cases involving entities with strong economic ties to the UK.

Another notable case was *Interedil Srl v Fallimento Interedil Srl* (2011), where the European Court of Justice (ECJ) provided critical clarification on the interpretation of COMI. The ECJ has held that the COMI of a company is the place where the debtor carries out the regular administration of its interests and which is identifiable by third parties, usually corresponding to the main place of business rather than the registered office. The decision of this case is of relevance to the UK as the principles to determine the COMI contained within are consistent with the approach of the UK courts to the determination of the COMI of a company involved in a cross-border insolvency, thus reflecting the consistency of the UK legal framework with the EIR.

Overall, the UK's participation in the EIR framework allowed it to effectively manage cross-border insolvency cases within the EU, using the EIR's automatic recognition provisions and the COMI mechanism it established. However, with Brexit, the UK's departure from this framework poses significant challenges as EU member states no longer guarantee automatic recognition of UK insolvency proceedings. This loss, coupled with the inherent complexity of cross-border insolvency, sets the stage for the legal and practical challenges that the UK will have to address in the post-Brexit era.

## 3 Post-Brexit Legal Framework

### 3.1 Overview of Changes Post-Brexit

The legal landscape for cross-border insolvency in the UK has changed significantly since Brexit. Prior to Brexit, the UK was governed by the EIR, which provided a framework for the automatic recognition and enforcement of insolvency proceedings across EU member states. However, with Brexit, the UK is no longer part of this regulation and there is a need to move to alternative mechanisms for managing cross-border insolvencies.

One of the most significant changes to the UK's post-Brexit cross-border insolvency legal framework has been the increased emphasis on the UNCITRAL Model Law on Cross-Border Insolvency (Model Law), which has been incorporated into UK law through the Cross-Border Insolvency Regulations 2006 (CBIR). The Model Law plays a central role in governing cross-border insolvency cases involving the UK and non-EU countries. However, post-Brexit, its application has expanded to include cases involving EU member states, filling the gap left by the UK ' s exit from the EIR.

The transition from the EIR to the Model Law has had several implications for the UK ' s insolvency regime. Firstly, the principle of automatic recognition, which was one of the cornerstones of the EIR, no longer applies to insolvency proceedings initiated in the UK. Instead, recognition of UK insolvency proceedings in EU countries now depends on the individual laws of those countries, as well as any bilateral agreements that may be negotiated in the future. This means that insolvency proceedings initiated in the UK will require more complex procedures to be recognized within EU countries and may face conflicts from courts in other countries while the application for recognition itself is in progress. Secondly, the Model Law ' s emphasis on cooperation between courts in different jurisdictions introduces a more flexible, but potentially more complex, process for dealing with cross-border insolvency cases.

The Model Law allows for a variety of approaches depending on the specific circumstances of the case, including the recognition of foreign main and non-main proceedings, the granting of relief and the possibility of coordinating parallel proceedings. While this flexibility can be beneficial, it also places greater responsibility on UK courts to engage in international judicial cooperation and to navigate the varying insolvency laws of different jurisdictions. At the same time, the limited number of EU countries that have adopted the Model Law has also had a negative impact on the management of insolvency proceedings in the UK.

The inherent complexity of dealing with cross-border insolvency cases due to differences in legal frameworks will increase with the loss of the EIR automatic identification mechanism. In other words, UK courts and insolvency practitioners will now have to turn to the judicial rules of the relevant country when dealing with cross-border insolvency cases, leaving them with a more fragmented and potentially unpredictable legal landscape.

Despite these challenges, the transition to the Model Law also present opportunities for the UK. By aligning itself with a globally recognized legal framework, the UK has positioned itself as a jurisdiction open to cross-border insolvency cooperation beyond the EU. This shift will not only facilitate the UK's continued attraction to case management on a global scale but will also provide the EU with an alternative.

### 3.2 The Role of Domestic Law and International Treaties

After Brexit, the UK had to rely more on its domestic laws and international treaties to manage cross-border insolvency cases. The primary piece of domestic legislation that now governs cross-border insolvency in the UK is the CBIR, which incorporates the UNCITRAL Model Law on Cross-Border Insolvency into UK law. Despite the loss of the automatic recognition mechanism of the EIR, the UK is still able to continue to recognize and enforce foreign insolvency proceedings through active judicial cooperation, as guided by the CBIR. For instance, in the case of *Re OJSC International Bank of Azerbaijan*, the High Court applied the CBIR to recognize foreign insolvency proceeding, demonstrating that domestic law plays an important role in filing the gaps left by the EIR.

In addition to the CBIR and the Model Law, international treaties signed by the UK still play an important role in the area of cross-border insolvency. For example, the UK remains a participant in the Lugano Convention, which does not focus exclusively on insolvency but contains provisions for the recognition and enforcement of civil and commercial judgments in signatory countries (including some EU member states).

While there are some alternatives, both in terms of domestic law and international treaties, there are still many challenges when compared to the comprehensive and harmonized framework of the EIR. At the domestic law level, although section 21 of the CBIR assists the domestic judiciary in dealing with cross-border insolvency cases by conferring judicial discretion, it does not expressly allow the UK courts to directly apply foreign insolvency law in conjunction with recognition. As far as international treaties are concerned, apart from the relatively well-known Lugano Convention, there are no more comprehensive and replaceable treaties in force, so it can be assumed that the gap following the absence of the EIR is still to be filled.

In summary, the UK' s post-Brexit cross-border insolvency framework relies heavily on the CBIR and the UNCITRAL Model Law, supplemented by bilateral treaties and international conventions. While these tools provide a foundation for managing cross-border insolvencies, they are not sufficiently developed and therefore do not fully replace the benefits of the EIR.

## 4 Conclusion

The UK's departure from the European Insolvency Regulation (EIR) has created challenges in managing cross-border insolvencies, including the loss of automatic recognition and increased procedural complexities. By adopting the UNCITRAL Model Law through the Cross-Border Insolvency Regulations, the UK has aligned with global standards, maintaining its relevance in international insolvency law. However, gaps in recognition processes, particularly with EU jurisdictions, persist. To remain a global leader in insolvency practices, the UK must refine its framework, strengthen cooperation, and adapt to emerging challenges in the post-Brexit era.

## References

[1] Regulation EU)2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) 2015 (OJ L141/19.

[2] Reinhard Bork and Renato Mangano, 'Introduction' in Reinhard Bork and Renato Mangano (eds), *European Cross-Border Insolvency Law* (Oxford University Press2016)

[3] Gerard McCormack, EU Insolvency Law: Cross Border Insolvency Law in Comparative Focus (Edward Elgar Publishing2022) 43-52.

[4] Gerard McCormack, 'Chapter8: Recognition and Enforcement of Insolvency Proceedings and Insolvency-Related Judgments', *EU Insolvency Law* (Edward Elgar Publishing2022)

[5] Stuart Isaacs and Richard Brent, 'The Insolvency Regulation as an EU Legal Instrument' in Gabriel Moss, Ian F Fletcher

and Stuart Isaacs (eds), Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings (Oxford University Press2016)

[6] Michael Bogdan and others, 'Recast Regulation2015/848 on Insolvency Proceedings ("RR")' in Gabriel Moss, Ian F Fletcher and Stuart Isaacs (eds), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings* (Oxford University Press2016)

[7] Irit Mevorach, 'Jurisdiction in Insolvency: A Study of European Courts' Decisions' (2010) 6 Journal of Private International Law 327.

[8] Federico M Mucciarelli, 'Not Just Efficiency: Insolvency Law in the EU and Its Political Dimension' (2013) 14 European Business Organization Law Review 175.

[9] Gerard McCormack, 'US Exceptionalism and UK Localism?Cross-Border Insolvency Law in Comparative Perspective' (2016) 36 Legal Studies 136.

[10] *Re Stanford International Bank Ltd* [2009] EWHC 1441 (Ch).

[11] *Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA* [2011] ECJ Case C-396/09.

[12] Gabriel Moss, 'The Impact of the EU Regulation on UK Insolvency Proceedings' (2002) 11 International Insolvency Review 139.

[13] Chris Umfreville and others, 'Recognition of UK Insolvency Proceedings Post-Brexit: The Impact of a "No Deal" Scenario' (2018) 27 International Insolvency Review 422.

[14] McCormack, 'Breaking Up Is Hard to Do – What Brexit Means for UK Insolvency and Restructuring Law' (n6).

[15] The Cross-Border Insolvency Regulations2006, SI2006/1030.

[16] Gerard McCormack, 'Chapter9: UNCITRAL Model Law on Cross-Border Insolvency Compared with the European Insolvency Regulation', EU Insolvency Law (Edward Elgar Publishing2022)

[17] McCormack, 'US Exceptionalism and UK Localism?' (n20).

[18] *Re OJSC International Bank of Azerbaijan* [2018] EWHC 59 (Ch).