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The Certainty of Choice of Law Rules in the Uncertain World of International Bank Insolvency

"You cannot solve a problem from the same consciousness that created it. You must learn to see the world anew." –Albert Einstein

The current initiative by the UNCITRAL Working Group V (Insolvency) in respect of an international convention in international insolvency presents the significant opportunity to address the harmonization of choice of law rules in cross-border bank insolvency cases. The current study of an international convention in international insolvency law presents the chance to conceptualize an approach that can greatly assist other global leaders by addressing the choice of law issues in the cross-border insolvency of large, complex financial institutions. In a post-Brexit climate, the cross-border insolvency of large, complex financial institutions creates new complex choice of law and jurisdictional issues including the law applicable in insolvency proceedings. As the international insolvency law in the European Union (EU) progresses in the harmonization of its laws,[1] the dichotomy has emerged with the exit of the United Kingdom (UK) in respect of choice of law issues in international bank insolvency. When national interests override international objectives, the conflicts consistently remain problematic, with little potential for the creation of solutions. These conflicts have exposed the need for harmonized choice of law rules to resolve the multi-jurisdictional complexities in international bank insolvency. Whenever another State intervenes between the relationship of territory and jurisdiction, the result will be a loss of legal certainty.[2] The exit of the UK from the EU deepens the complexity of perplex jurisdictional questions. Although these issues have been discussed in past cross-border insolvency cases, the implications of Brexit will affect the terms of recognition of judgements in complex cross-border bank insolvency matters. For example, as the European Insolvency Regulation is no longer applicable to the UK post-Brexit, banks that open insolvency proceedings in the UK risk competing insolvency proceedings being commenced in other jurisdictions with no reliance on the primacy of the UK proceedings.[3] The multiple openings of competing insolvency proceedings post-Brexit premised on the need to seize its assets in each of the jurisdictions where these are located creates new complex choice of law issues. This proposal will

[1] European Commission Proposal for a 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 and Amending Directive 2012/30/EU (2016/0359 (COD)), 17.
[2] Matthias Herdegen, *Principles of International Economic Law*, (Oxford University Press, London), 2013, 91.
[3] Hogan Lovells, The Brexit Effect: the Legal Implications Behind the Headlines' (2016), 10 <https://www.hoganlovells.com/en/publications/brexit-effect-note-the-legal-implications-behind-the-headlines>.

focus on the critical analysis of the uncertainty of the international insolvency architecture post-Brexit in respect of international bank insolvency and the significant contribution that UNCITRAL can make towards the certainty of substantive choice of law rules in international bank insolvency.

The Objectives of the Research Proposal

The objective of this research proposal is to contribute towards the innovation of international insolvency in respect of achieving solutions to choice of law issues in international bank insolvency. The greater precision and uniformity of solutions would reduce the uncertainty caused by variations between the choice of law rules deployed by different legal systems.[4] As full convergence of insolvency laws is currently not realistic, improving problems related to choice of law in the context of cross-border insolvency is an outstanding task.[5] Conflicts between common law and civil law systems and within their competing legal systems also indicate that there is a need to harmonize choice of law rules between national insolvency regimes. The differences in substantive law between national regimes occur because of the economic structure of the market, the underlying policies of the legal systems, the order of private law, and the protected interests in the system of insolvency law.[6] These conflicts have exposed the need for standard international rules[7] to govern choice of law issues in international bank insolvency. The debates over traditional legal doctrine and new policy present a significant opportunity to reconsider solutions to choice of law issues in international bank insolvency underlying the EU and the UK post-Brexit.

The proposal acknowledges the importance of the UNCITRAL Model Law on Cross-Border Insolvency as a source of reference by national authorities and legislative bodies when preparing new laws and regulations or reviewing the existing adequacy of existing laws and regulations.[8] The proposal further acknowledges that reconciling international insolvency regimes between common and civil law systems is a key objective of insolvency law. Although the UNCITRAL Model Law has not led to harmonization across common and civil law systems, the proposal aims to make a significant contribution towards the harmonization across common and civil legal systems, the further harmonization of choice of law rules,[9] as well as to the innovation of substantive choice of law rules

[4] Ian F. Fletcher, *Insolvency in Private International Law: National and International Approaches* (Oxford University Press, 2nd ed, 2005), 508.
[5] Ibid, 508.
[6] Bob Wessels, *International Insolvency Law* (Kluwer Law International, 2nd ed, 2006), 5.
[7] Michael H. Krimminger, 'The Resolution of Cross-border Banks: Issues for Deposit Insurers and Proposals for Co-operation', (2008) 4(4) *Journal of Financial Stability* 376, 379.
[8] United Nations Commission on International Trade Law, *UNCITRAL Legislative Guide on Insolvency Law*, (25 June 2004).
[9] Charles. W Mooney, Jr., 'Harmonizing Choice of Law Rules for International Insolvency Cases: Virtual Territoriality, Virtual Universalism, and the Problem of Local Interests', 9(1) (2014) *Brooklyn Journal of Corporate, Financial & Commercial Law* 120.

in international bank insolvency. The proposal addresses the opportunity that is presented to UNCITRAL to formulate substantive choice of law rules in international bank insolvency within its study of an international convention. Ultimately, the contribution of UNCITRAL in seizing this opportunity would result in greater legal certainty in international insolvency law and procedures towards uniformity with international implications.

The Current State of Affairs

In March 2017, the official exit of the UK from the EU is intended to be marked by the instigation of *Article 50* of the Lisbon Treaty.[10] When the UK officially leaves the EU, this creates the potential lacuna in respect of choice of law issues concerning automatic recognition of cross-border insolvency proceedings, the law applicable and governing jurisdiction in complex international bank insolvency cases. In the absence of a common recognition framework, alternative agreements or treaties, the UK will return to its pre-2002 conflicts position without an international framework addressing the cross-border recognition post-Brexit.[11] The UK Government has confirmed that on the day of the exit of the UK, EU law will (in the absence of specific agreement) cease to apply.[12] As a consequence, EU law will no longer be given primacy, and legal provisions on the statute book which originated will be afforded the same status as other provisions of domestic law.[13] In the path forward, recognition by EU

[10] *Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community of the Treaty on European Union*, signed on December 13, 2007, *Official Journal of the European Union* 2007/C 306/01, (entered into force on December 1, 2009), Article 50. See also United Kingdom Department for Exiting the European Union, 'The United Kingdom's Exit From and New Partnership with the European Union White Paper' (February 2017), 65 which states that, 'As set out in Article 50, the Treaties of the EU will cease to apply to the UK when the withdrawal agreement enters into force, or failing that, two years from the day we submit our notification, unless there is a unanimous agreement with the other 27 Member States to extend the process'; Vaughne Miller et al, 'Brexit: How Does the Article 50 Process Work?', (Briefing Paper No. 7551, House of Commons Library, Parliament of United Kingdom, 2016); Paul Bowers et al, 'Brexit: Some Legal and Constitutional Issues and Alternatives to EU Membership' (Briefing Paper No. 07214, House of Commons Library, Parliament of United Kingdom, 2016); United Kingdom Department for Exiting the European Union, 'A Statement from the Secretary of State for Department for Exiting the European Union on the process of invoking Article 50 (7 November 2016), Gov.UK, <https://www.gov.uk/government/speeches/process-for-invoking-article-50-ministerial-statement-7-november>.

[11] Hogan Lovells, above n3, 7; Jack S. Caird, 'Brexit: Legislating for the Great Repeal Bill', (Briefing Paper No. 7793, House of Commons Library, Parliament of United Kingdom, 2016), 52 where it states that: 'The UK Government has since stated that one of the aims of the Great Repeal Bill is to end the jurisdiction of the Court of Justice of the European Union (CJEU) over the UK. It will no longer be obligatory for post-Brexit courts in the UK to abide by the rulings of the CJEU. Once the European Communities Act (1972) is repealed, the courts in the United Kingdom will no longer be under the obligation to give effect to EU law over and above domestic law'.

[12] United Kingdom Department for Exiting the European Union, 'Government announces end of European Communities Act' (2 October 2016), Gov.UK, <https://www.gov.uk/government/news/government-announces-end-of-european-communities-act>. The Great Repeal Bill will repeal the European Communities Act (1972) and 'convert existing law into domestic law, while allowing Parliament to amend, repeal, or improve any law after appropriate scrutiny and debate'.

[13] Caird, above n 11 whereby it states that, 'A related question concerns the approach of the UK's courts to interpreting domestic laws based on EU law after Brexit day. Currently domestic courts will often look behind a

Member States of English insolvency proceedings will revert back to principles of comity or local law provisions; in particular, whether relevant Member States have implemented the UNCITRAL Model Law.[14] Although the philosophy of the European Commission has greatly emphasized and required a new approach to the recognition of judgments in English private international law,[15] the focus of private international law whereby jurisdiction and private international law rules dominate has been to the detriment of choice of law rules.[16] As most recent legislation in respect of private international law has been concerned with recognition, the Law Commission recommendations and Hague Conventions on choice of law issues have, generally, not been legislated in statute to the disadvantage of the governing law.[17] The emergence of the doctrine of *forum non conveniens* has also reduced the likelihood that cases will be heard in England which requires application of choice of law rules to determine the governing law.[18]

The Certainty of Choice of Law Issues in International Bank Insolvency post-Brexit

In the past, a major characteristic of conflict of laws was that states developed individualistic solutions to resolve the diverse problems caused by various sovereign states.[19] In effect, this had the consequence of creating numerous systems of conflicts of laws and the ensuing choice of law issues[20] which exacerbates the legal uncertainty of international bank insolvency post-Brexit. In the present EU legal framework, the choice of law to govern the insolvency procedure is decided in part on the allocation of a jurisdiction, and also, on the private international law rules inherent in the legal systems of the Member States.[21] While these rules decide the primacy of rules where there is conflict and the extent to which other systems of rules will be recognised,[22] this choice of law system will no longer include the UK's jurisdictional paradigm post-Brexit. It is the law of the jurisdiction where proceedings are opened that will govern many of the substantive issues during proceedings. However, the regulatory framework of international insolvency law has not been analysed against

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provision of domestic law to the relevant EU provision, for example a Directive, to assist their interpretation and application of the law. It is not known to what extent this will continue after Brexit.'

[14] Weil, Gotshal and Manges, 'Brexit: Implications for the Restructuring and Insolvency Market', (2016), 1, <http://www.weil.com/~/media/brexit/pdf/brexit-implications-for-the-restructuring-and-insolvency-mark.pdf>.

[15] Rhona G. Schuz, *'Conflicts between Choice of Law Rules and Recognition of Judgement Rule with Particular Reference to Cases involving Determination of Status'*, (Phd Thesis, University of London, 2014), 58.

[16] Ibid, 55.

[17] Ibid, 59.

[18] Ibid.

[19] Bob Wessels, *Cross-Border Insolvency Law* (Kluwer Law International, 2007), 836.

[20] Michael J. Whincorp & Mary Keyes, *Policy and Pragmatism in the Conflict of Laws* (Dartmouth Publishing Ltd, 2001), 188. See also Brooklyn Law School Center for the Study of Business Law and Regulation, Brooklyn Journal of Corporate, Financial & Commercial Law Annual Symposium: Choice of Law in Cross-Border Bankruptcy Cases (March 7, 2014).

[21] Gabriel Moss QC, Ian Fletcher QC, and Stuart Isaacs QC, *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings*, (Oxford University Press, 3rd edn, 2016), 7274.

[22] Paul Omar, 'The European Insolvency Regulation 2000: A Paradigm of International Insolvency Cooperation', (2003) 15(1) *Bond Law Review* 214, 234.

traditional conflict of laws thinking.[23] In deferring to foreign courts and their proceedings, the recognition of foreign judgements and application of foreign law may not be workable if the domestic court does not recognise or permit the enforcement of the foreign judgement or law, if the application of foreign law creates conflicts, and if national interests override international concerns.[24] In the case of *Rubin v Eurofinance*,[25] the court stated that there was no expectation of reciprocity from other countries and no UK case or statutory law as such; being in the provenance of legislature.[26] While a common law system often claims for itself a universal role,[27] this is based on the preservation of the fundamental unity of its national laws by insisting that they be followed in other jurisdictions. The majority opinion of *Rubin* represents a deliberate decision to favor traditionalist common law over the policy objectives of modified universalism.[28] The persuasive precedent of the case illustrates that courts worldwide can maintain parochial authority while eschewing cooperative measures by foreign courts. The inadvertent consequence is that other courts facing conflict of laws issues in an insolvency context will view the case as a prominent guide to the interpretation of the Model Law.[29] In a post-Brexit climate, the distinct territorialist policies are at the forefront of cross-border insolvency jurisprudence.[30] Furthermore, when the UK is no longer bound by the Insolvency Regulation, conflicts with the UK will fall outside its scope of application. When the UK leaves the EU, so too will its adherence to the Insolvency Regulation and the laws applicable to the recognition of insolvency proceedings and foreign judgements. The consequences of 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) remain unclear.[31] The applicable insolvency law is to be determined according to the national rules of cross-border insolvency law;[32] the variations of which render the outcome uncertain. The international insolvency architecture to resolve conflicts that arise

[23] Hannah L. Buxbaum, 'Rethinking International Insolvency: the Neglected Role of Choice-of-Law Rules and Theory', 36 (2000) *Stanford Journal of International Law* 23, 25.
[24] Ralf Michaels, *Max Planck Encyclopedia of Public International Law*, (Oxford University Press, 2009), 1.
[25] *Rubin v Eurofinance SA* [2012] UKSC 46.
[26] *Rubin v Eurofinance SA* [2012] UKSC 46, [126-129]. See also Tristan G. Axelrod, *'*UK Supreme Court Highlights Parochial Roadblocks to Cooperative Cross-border Insolvency in *Rubin V. Eurofinance SA',* 31(4) (2014) *Cooperative Cross-border Insolvency* 818, 837.
[27] Patrick H Glenn, Patrick H, *Legal Traditions of the World* (2007), 165.
[28] *Rubin v Eurofinance SA* [2012] UKSC 46, [128-132].
[29] Axelrod, above n26, 852.
[30] Ibid.
[31] Vaughne Miller (ed,), 'Brexit: Impact Across Policy Areas', (Briefing Paper No. 07213, House of Commons Library, Parliament of United Kingdom, 2016); 44; Burkhard Hess, 'Back to the Past: Brexit and European International Private and Procedural Law', (November 14, 2016), Max-Planck-Gesellschaft <https://www.mpg.de/10824865/back-to-the-past> which states that: 'While the cross-border recognition and coordination of insolvency proceedings cannot be excluded, it will nevertheless be laden with significant legal uncertainty'.
[32] Thomas Bil and Glen Flannery, 'Brexit: Implications for Restructuring and Insolvency- a British and Dutch Perspective', (November 2016), 52, <http://www.nabarro.com/media/644166/brexit-dutch-perspective.pdf>.

from choice of law issues creates no mechanism for balancing the international and domestic considerations nor arriving at a choice between them.[33]

On a national level, the choice-of-law codification in the EU has provided comprehensive and uniform systems of carefully drafted and workable rules. However, when the UK leaves the EU, the European choice-of-law codification must co-exist with competing choice-of-law regimes on multiple levels.[34] The new paradigm post-Brexit necessitates codifications from several levels to be applied in parallel which creates difficulties if they are not sufficiently coordinated in multi-jurisdictional international bank insolvency. The lack of synchronisation can instigate the confusion and uncertainty which the codification intended to mitigate at the first instance.[35] The necessity to address the fundamental juridical nature, classification and private law enforcement of jurisdiction and choice of law issues in the private international law regime of the EU and the UK is greater than ever. When international structural order is compromised in the unilateral private law enforcement of jurisdiction and choice of law agreements,[36] national sovereignty gives rise to conflicts between national regimes and sovereign legal orders.[37] The possibility of 'regime collision' through interference with the jurisdiction, judgments[38] and choice of law apparatus of foreign courts creates the complex multilateral problems of international bank insolvency. The nature of international bank insolvency magnifies the cross-border conflicts when the regime collision between the domestic rules of the EU and the UK occur post-Brexit. This undermines the certainty of international bank insolvency post-Brexit and gives rise to significant choice of law issues.

At present, when a conflict arises between the laws of the UK and the EU, the Insolvency Regulation takes precedence[39] to decide the recognition of main and secondary insolvency proceedings. However, in a post-Brexit climate, the automatic recognition of main and secondary proceedings provided by the Regulation may not be possible when the administration orders by the English courts may no longer be recognized in the EU.[40] The automatic recognition and relief provided by the Credit

[33] Buxbaum, above n23, 41. See, generally, Albert Venn Dicey, *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxell, 15th edn, 2016); David C. Jackson, 'The Conflicts Process: Jurisdiction and Choice on Private International Law', (Oceana Publications, 2005).
[34] Mathias Reimann, 'Choice of Law Codification in Modern Europe: the Costs of Multi-level Law-Making', (2015) 49 *Creighton Law Review* 507, 514.
[35] Ibid.
[36] Mukarrum Ahmed, *'A Comparative Study of the Fundamental Juridical Nature, Classification, and Private International Law Enforcement of Jurisdiction and Choice of Law Agreements in the English Common Law of Conflict of Laws, the European Private International Law Regime and the Hague Convention on Choice of Law Agreements'*, (Phd Thesis, University of Aberdeen, 2015), 12.
[37] Ibid.
[38] Ibid.
[39] United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment*, (30 May 1997), Article 3.
[40] Clifford Chance, 'Briefing Note: Brexit: Initial Considerations in the Restructuring and Insolvency Market' (July 2016), 2.

Institutions Winding-Up Directive[41] would also cease to extend its recognition to the UK.[42] As EU directives prevail only if and to the extent that there is applicability, the Credit Institutions Winding-Up Directive will cease to extend recognition to the UK post-Brexit.[43] The single entity approach under the Directive would cease to exist in the absence of an agreement to the contrary.[44] When an international bank is incorporated within the EU with a legitimate argument as to its COMI, there is potentially the greater risk of conflict of jurisdiction and a denial of recognition of the UK court's judgement.[45] In the Member States in which the regulations are applicable, they do not constitute a choice-of-law regime.[46] If the international bank is incorporated within the EU and with no COMI establishment in the UK, there is also the greater risk that those proceedings would not be recognized by that EU Member State.[47] Once the advantage of automatic recognition ceases to apply, the extent that the Model Law has been adopted by the Member State requires significant consideration. In this instance, the level of assistance under the Model Law becomes much more restrictive than the automatic recognition regime available under the Insolvency Regulation.[48] There would not only be no automatic recognition of EU Member State insolvency proceedings in the UK, but the UK courts could exercise judicial discretion to commence insolvency proceedings. The dichotomy of the UK and the EU post-Brexit means that the opening of main insolvency proceedings in respect to all foreign group companies of an international bank will be granted recognition in one jurisdiction. International banks with complex operational structures and various foreign group companies would face great uncertainty in the recognition of the opening of foreign main proceedings and the law applicable to govern those proceedings. The contest for jurisdiction when dealing with the insolvencies of a group with non-European member companies becomes exacerbated[49] in international bank insolvency with jurisdictional claims that conflict with the EU. In the absence of choice of law rules, there is no guarantee that the domestic rules of different jurisdictions with various

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<http://www.lma.eu.com/application/files/2514/6900/7940/Brexit_initial_considerations_in_restructuring_and_insolvency_market.pdf>.

[41] *European Parliament and Council Directive 2001/24/EC on the Reorganisation and Winding-up of Credit institutions* (entered into force on 5 May 2001).

[42] Sonya L. Van de Graaff, Peter J.M. Declercq and Howard Morris, 'Brexit: Impact on Restructuring and Insolvency for Credit Institutions' (July 7, 2016), <http://www.lexology.com/library/detail.aspx?g=239ce14e-1049-473e-8dc6-6e00f5c0c4b2>.

[43] Ibid.

[44] Ashurst, 'Brexit: Potential Impact on the UK Banking Industry' (1 March 2016), <https://www.ashurst.com/en/news-and-insights/insights/brexit-potential-impact-on-the-uk-banking-industry/>.

[45] Clifford Chance, above n40; and generally, Matthias Lehmann and Dirk Zetzsche, 'Brexit and the Consequences for Commercial and Financial Relations between the EU and the UK' (2016) 27 *European Business Law Review* 999, 1020;
Nicholas W.A. Tollenaar, 'Dealing with the Insolvency of Multi-national Groups under the European Insolvency Regulation, (2010) 23(5) *Insolvency Intelligence* 65, 70.

[46] Reimann, above n34, 515.

[47] Clifford Chance, above n40.

[48] CMS-LawNow, 'When the Dust Settles: Cross-border Restructuring and Insolvency after Brexit' (20 September 2016), <http://www.cms-lawnow.com/ealerts/2016/09/when-the-dust-settles-crossborder-restructuring-and-insolvency-after-brexit>.

[49] Paul J. Omar, The Extra-Territorial Reach of the European Insolvency Regulation, 2007 (18)2 *International Company and Commercial Law Review* 57, 63.

jurisdictional claims would provide for consistency of outcome, thus resulting in inconsistencies and uncertainty among the nations involved post-Brexit.

The choice of law regime within the EU consists of systemic complexity and incoherence on both a theoretical and practical level.[50] The jurisprudence of the EU would impose new limitations in terms of the law applicable in the courts of the UK post-Brexit. Since the Insolvency Regulation would no longer be applicable in the UK, national law with substantive differences, disparate underlying policies and various protected interests in the systems of insolvency law[51] would be relied on. There will be ensuing uncertainty not only as to the applicable law but also, as to whether the strong protection of third parties' rights in rem and set-off rights can be maintained.[52] There would no longer be a judicial obligation to apply EU jurisprudence by the UK nor would the judgements of the EU Court of Justice directly bind the UK. When the applicable insolvency law is to be determined according to the national rules of cross-border insolvency law, the reliance instigates great uncertainty in the recognition and enforcement of insolvency proceedings and judgements within individual EU Member States whose rules conflict with the UK and vice-versa. The ensuing inconsistent decisions and conflicting judgements in cases of multi-jurisdictional international bank insolvency would have no legal certainty. The institutional differences and disparities between insolvency laws will ensue in new conflicts in respect of the substantive law to govern the distribution of proceeds, the ranking of claims, and the subsidiary rights remaining after the end of insolvency proceedings in international bank insolvency. The existence of institutional differences in the overall legal system of the country may impact on formal insolvency law and compound the disparities between insolvency laws in particular jurisdictions.[53] There is the opportunity for conflicts of substantive law in the legal nature of acts detrimental to creditors' interest which may be declared void, voidable or unenforceable at the instance of the presiding court.[54] The struggle in deciding the outcome of these issues without choice of law rules complicates the determination of the law applicable. While the Insolvency Regulation intended to have effect without conflict between domestic rules,[55] the non-member State status of the UK results in greater reliance on domestic rules of jurisdiction. These domestic rules decide the primacy of rules when there is conflict, and the extent that other systems of rules will have recognition and be given effect within the host jurisdiction.[56] The uncertainty of outcomes affects the extent that the systems of common law rules will be recognised by the EU and given effect if the host

[50] Reimann, above n34, 518.
[51] Bob Wessels, *International Insolvency Law* (Kluwer Law International, 2nd ed, 2006), 5.
[52] Bob Wessels, 'Brexit and its Consequences for European Insolvency Law' on Bob Wessels, *Leiden Law Blog* (March 2, 2016) <http://leidenlawblog.nl/articles/brexit-and-its-consequences-for-european-insolvency-law>.
[53] Bob Wessels, *International Insolvency Law*, (2nd edn, 2006), 221.
[54] See also Miguel Virgos & Etienne Schmidt, (1996) 'Report on the Convention on Insolvency Proceedings', Virgos-Schmidt Report, 63.
[55] Omar, above n22.
[56] Paul Omar, 'The European Insolvency Regulation 2000: A Paradigm of International Insolvency Cooperation', (2003) 15(1) *Bond Law Review* 214, 234.

jurisdiction of the international bank is located in the UK. As a consequence, the determination of the law applicable in a choice of law process is no longer subject to reciprocity, and must involve a multilateral consideration of the appropriateness of the law applicable.[57]

Finally, the implications of Brexit would include that the mandatory duties of communication and cooperation between insolvency practitioners and courts are without a legal basis.[58] The main pillar of the EU insolvency framework lies in the recast EU Insolvency Regulation (EIR)[59] which focuses on the principle of coordination and communication between the insolvency office holders appointed in the insolvency proceedings. The reliance of the insolvency office-holder on the domestic law of conflicting jurisdictions in which recognition is sought would result in disparity and different outcomes, and instigate greater impediments to the recognition of foreign insolvency proceedings and judgements. The new choice of law issues in international bank insolvency post-Brexit give rise to several impediments, in particular those concerning the coordination between multiple jurisdictions and the inadequate protection of creditors[60] when there is no longer automatic recognition of foreign insolvency proceedings and judgements. In the Insolvency Regulation, international insolvency proceedings can be effectively conducted only if the States concerned recognize the jurisdiction of the courts of the State of the opening of the proceedings, the powers of their liquidators and the effects of their judgements. The extensive grounds of jurisdiction that result in overlapping and conflicting proceedings are inseparable from the traditional legal context of cross-border insolvency.[61] However, the cross-border insolvency provisions that may be applicable post-Brexit would not necessarily assist in the case of cross-border bank insolvency with the opening of multiple concurrent proceedings in the EU and the UK.[62] The English cross-border insolvency provisions (including the Cross-Border Insolvency Regulations 2006 which adopts the UNCITRAL Model Law, s426 Insolvency Act and the common law recognition rules) would not necessarily be of assistance in the case of multiple openings of insolvency proceedings of an international bank with conflicts of jurisdiction in the EU and the UK.[63] As a consequence, there would be dependence on domestic insolvency laws of the jurisdictions in question which would, most likely, result in an incongruent approach. The recent banking crisis in

[57] See generally Ronald H. Graveson, *Conflict of Laws,* (Sweet and Maxwell, 7th ed., 1974); Peter Stone, *EU Private International Law: Harmonization of Laws* (Elgar European Law, 2006).
[58] Bob Wessels, 'Brexit and its Consequences for European Insolvency Law' on Bob Wessels, *Leiden Law Blog* (March 2, 2016) <http://leidenlawblog.nl/articles/brexit-and-its-consequences-for-european-insolvency-law>.
[59] European Commission, Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on Insolvency Proceedings (Recast) [2015] OJ L 141/19.
[60] Dobah Care, 'Le Systeme Canadien et le Systeme Europeen', (LLM Thesis, Universite de Montreal, 2007).
[61] Jonas Israel, *European Cross-border Insolvency Regulation*, (Intersentia, Antwerpen-Oxford, 2005), 36.
[62] Ashurst, 'Brexit: Potential Impact on the UK Banking Industry' (1 March 2016), <https://www.ashurst.com/en/news-and-insights/insights/brexit-potential-impact-on-the-uk-banking-industry/>.
[63] Hogan Lovells,above n3. See also Stefan Remal, Guildhall Chambers, 'Future-proofing Against Brexit in Insolvency Cases' (November 2016) <http://www.guildhallchambers.co.uk/uploadedFiles/InsolvencyBrexit2016SR.pdf>, 8; The Insolvency Service, 'Summary of Responses: A Review of the Corporate Insolvency Framework' (25 May 2016), <https://www.gov.uk/government/consultations/a-review-of-the-corporate-insolvency-framework>, 157.

Europe has highlighted the significant obstacles in the current regime when effective cooperation and coordination among national regimes has not occurred. The uncertainty and instability has been and continues to be problematic in international bank insolvency cases where choice of law issues persist in national insolvency regimes. The innovation and harmonization of substantive choice of law rules would contribute to increasing the efficiency and effectiveness of insolvency proceedings, the predictability of the internal market, and foster greater confidence in the insolvency systems of the EU and UK. The various conflicts abovementioned have exposed the need for standard international rules[64] to resolve choice of law issues in international bank insolvency.

The Contribution of UNCITRAL to Choice of Law Rules in International Bank Insolvency

The current study of an international convention in international insolvency presents the opportunity to conceptualize an approach that can greatly assist other global leaders by addressing the choice of law issues in the cross-border insolvency of large, complex financial institutions. The concept of an international convention in international insolvency by UNCITRAL provides the ideal platform for the formulation of detailed and predictable substantive choice of law rules.[65] Although the Model Law envisages situations where proceedings may cause conflicts in concurrent proceedings between foreign jurisdictions, the choice of law issues are left open.[66] When the national law may apply its own laws or otherwise foreign laws that concede to territorial elements, this is likely to lead to more cross-border insolvency litigation whereby questions of choice of law in insolvency will become more frequent[67] post-Brexit. Indeed, 'a treaty-based approach may have a serious gap in its coverage if it does not deal by its terms with the issue of how insolvencies arising from jurisdictions outside the particular region in question should be addressed to the extent that such foreign insolvencies intersect with insolvencies in the region itself.'[68] This critical issue is highly relevant to the EU and UK in the absence of substantive choice of law rules to resolve the inevitable multi-jurisdictional international bank insolvency conflicts post-Brexit.

The absence of choice of law rules in international bank insolvency is, arguably, most prevalent in times of financial and banking crises. When there is worldwide uncertainty as to the answers to

[64] Michael H. Krimminger, 'The Resolution of Cross-border Banks: Issues for Deposit Insurers and Proposals for Co-operation', (2008) 4(4) *Journal of Financial Stability* 376, 379.
[65] Israel, above n61, 89.
[66] Jenny Clift, 'The UNCITRAL Model Law on Cross-border Insolvency – A Legislative Framework to Facilitate Coordination and Cooperation in Cross-border Insolvency', (2004) 12 *Tulane Journal of International and Comparative Law* 307, 334.
[67] Ibid.
[68] Steven Kargman, 'Emerging Economies and Cross-Border Insolvency Regimes: Missing BRICS in the International Insolvency Architecture (Part II)' (2013) 7(1) *Insolvency and Restructuring International* 7; Gregory Baer, 'Towards an International Convention: Issues, Options and Feasibility Considerations', (2016) 17(1) *Business Law International* 5, 8.

complex choice of law issues, the principle of *pari passu* remains an elusive ideal because of the limitations of the law. The certainty of choice of law rules in international bank insolvency is fundamental in resolving the inevitable jurisdictional conflicts of law issues that will arise between the EU and the UK post-Brexit, and in times of crises. The choice of law problems that has been created by private international law[69] principles has been ineffective in resolving the multi-jurisdictional conflicts[70] in cross-border bank insolvencies. In international bank insolvency, the bank's branches and subsidiaries cross various jurisdictions with assets abroad, including claims against companies in various jurisdictions, and also insolvent subsidiaries whereby sovereign states are confronted with a collective action dilemma.[71] In the determination of the law applicable in international bank insolvency post-Brexit, the paradigm of co-operation breaks with the 'all or nothing' attitude prevalent under traditional approaches underlying international insolvency.[72] As a multinational bank operates as an integrated global unit,[73] the conflicts have created additional problems which are due to the lack of harmonisation of conflicts rules.[74] This lack of harmonization may create difficulties in the enforcement of legal rights and obligations, conflicting judgements and inconsistent decisions. The risk of inconsistent judgments that inevitably arise from a failure to address international problems in a single forum or with a central, main proceeding[75] is inevitable in the absence of substantive choice of law rules. In *Re Maxwell Communication Corporation*,[76] the issue of which law was applicable to a bankruptcy preference instigated extensive litigation in the US and England. However, 'a clear choice of law rule incorporated into the state's insolvency system could have avoided the expense and delay of litigation'.[77] In consideration of this, it may be argued that specific solutions depend on the 'convergence of national laws, adoption of an international substantive rule, or adoption of an international choice-of-law, choice-of-forum rule.'[78] At present,

[69] Michael J. Whincorp & Mary Keyes, *Policy and Pragmatism in the Conflict of Laws* (Dartmouth Publishing Ltd, 2001), 188.
[70] Ibid.
[71] David Darrell Evanoff & George G. Kaufman (eds), *Systemic Financial Crises: Resolving Large Bank Insolvencies*, (World Scientific Publishing Co. Pty Ltd, 2005), 314.
[72] Israel, above n61, 91.
[73] Eva H.G. Hupkes, 'The Legal Aspects of Bank Insolvency: A Comparative Analysis of Western Europe, the United States and Canada', (Kluwer Law International, 2000), 14.
[74] Talian Einhom 'American vs European Private International Law- The Case for a Model Conflict of Laws Act (MCLA)', in *Convergence and Divergence in Private International Law*, (Eleven International Publishing, 2010), 34.
[75] Jay Lawrence Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum', 65 (1991) *American Bankruptcy Law Journal* 457.
[76] *Re Maxwell Communication Corporation plc* (No 2) [1992] BCC 757].
[77] *Re Maxwell Communication Corporation plc* (No 2) [1992] BCC 757] at [392].
[78] Jay Lawrence Westbrook, 'A Global Solution to Multinational Default', 98 (2000) *Michigan Law Review* 2276, 2318. See also Jay Lawrence Westbrook, 'Universalism and Choice of Law', 23 (2005) *Penn State International Law Review* 625; Charles. W Mooney, Jr., 'Harmonizing Choice of Law Rules for International Insolvency Cases: Virtual Territoriality, Virtual Universalism, and the Problem of Local Interests', 9(1) (2014) *Brooklyn Journal of Corporate, Financial & Commercial Law* 120.

the incoherency in international insolvencies destroys asset value, whereby there is no uniformity for the most equitable and efficient treatment of creditors.[79]

The contribution that UNCITRAL can make in addressing and formulating substantive choice of law rules in international bank insolvency assists its' aims in firstly, the harmonization and modernization of insolvency law and, secondly, the promotion of cooperation and coordination in cross-border insolvency proceedings.[80] The international insolvency architecture allows the change from the jurisdictional-selecting approach of the conflict of law[81] to a substantive choice of law approach. Within the new paradigm, the existence of choice of law rules in international bank insolvency can reside to ensure greater legal certainty, resolution of multi-jurisdictional conflicts and procedural fairness. The economic underpinning of insolvency has resulted in national sovereignty and strong resistance in order to prevent national sovereignty from being undermined. This adverse consequence of the jurisdiction being able to select rules tends to benefit certain interests to the detriment of others.[82] In recent times, traditional views of sovereignty have given way to a growing consensus on the need for comity.[83] However, the concept of comity is of little guidance to decide the law applicable in choice of law decisions.[84] The need for reform in insolvency law to 'assist sovereignty-sensitive states to acclimate to the extraterritorial reach of foreign laws'[85] is imperative in resolving choice of law conflicts in international bank insolvency post-Brexit. While there has been some support in the Working Group for treating choice of law as a separate topic, it was generally agreed that it should be approached, at least in the immediate future, by reference to those aspects of choice of law necessary to address enterprise group insolvency and directors' obligations.[86] The architectural development of choice of law by UNCITRAL presents the significant opportunity to assist other global leaders by addressing substantive choice of law rules in international bank insolvency as a future mandate. In international insolvency, international legal rules are in place today that were

[79] Elizabeth K. Somers, 'The Model International Insolvency Cooperation Act', (2011) 6(4) A*merican University International Law Review* 677, 701-2.
[80] Jenny Clift, 'Choice of Law and the UNCITRAL Harmonization Process', 9(1) (2014) *Brooklyn Journal of Corporate, Financial and Commercial Law* 20.
[81] Rodolfo de Nova, 'Glancing at the Content of Substantive Rules under the Jurisdiction-Selecting Approach, (1977) 41(2) *Law and Contemporary Problems* 1, 27.
[82] Ibid. The consequence stems from the analysis of the banking group in terms of general jurisdiction which regards states interests as relevant to private international law. This approach examines the relationship between the state and the banking group, and questions whether the exercise of jurisdiction over the group can be justified, in terms of state policy or political rights. One shortcoming of this approach is that it does not consider the complexity, conflicts and difficulties prevalent in international bank insolvencies or their complex legal structures which may be formed to evade state policy.
[83] Fletcher, above n4, 433.
[84] Buxbaum, above n33.
[85] John Pottow, 'Procedural Incrementalism: A Model for International Bankruptcy', (2006) 45(4) *Virginia Journal of International Law* 936, 1011.
[86] United Nations Commission of International Trade Law, Report of Working Group V (Insolvency Law), Vienna, Forty-Fourth Session, 9-13th November, 2009, UN Doc. No. A/CN.9/686, 22.

seemingly not possible ten years ago, and would have been unimaginable ten years before that.[87] The work of UNCITRAL forms a strong foundation upon which new insolvency law topics can be developed.[88] The form and function of UNCITRAL, its' composition, and its' concept of an international convention is best equipped to accomplish the certainty of choice of law rules in international bank insolvency when the time comes. The contribution of UNCITRAL to future work in respect of this and subsequent choice of law rules will significantly contribute to a wider harmonization and modernization of insolvency law, achieve a greater degree of harmony within national systems' conflict of laws, and ensure considerable certainty in the future world of multi-jurisdictional insolvencies. The contribution of UNCITRAL to address substantive choice of law rules in international bank insolvency would have a profound and far-reaching impact on jurisdictions around the world and on the international economy.

[87] Westbrook, above n78, 2328.
[88] Clift, above n80, 47.