JURISDICTION AND RECOGNITION IN CROSS-BORDER RESTRUCTURING

"WHO DARES WINS"

I am very grateful to the Chief Justice for his kind invitation to deliver this Annual Lecture. It gives me the very welcome opportunity to return to the Cayman Islands – a place which has many happy memories for me, both professionally and socially. It is, both literally and metaphorically, a long way away from the gloom of London.

As you are aware, the topic for my talk is cross-border restructuring. In these days of global economic uncertainty, this is an area of considerable international interest and importance. It is also a field in which the UK has been a world leader for a number of years. But the prospect of BREXIT undoubtedly raises questions for the future of the UK's restructuring profession in Europe, and other jurisdictions, both in Europe and further afield, are now seeking to develop a competitive offering.

I shall try to set those developments into a legal and business context later in my talk, but in order to do so, I first need to set the scene by a short review of recent history.

In very large measure, the success of the UK in attracting high quality restructuring work in recent years has been due to the highly developed skills of the insolvency practitioners from the large firms of accountants. The members of this new profession first emerged as a result of the major reforms introduced in the UK under the Insolvency Act 1986. These reforms followed the influential report of the Cork Committee in 1982. Insolvency practitioners were regulated for the first time and were charged with implementing the new "rescue culture" in the UK. They were given the exciting new restructuring tool of the administration order and the enhanced status of office-holders with far-reaching investigative powers.

The new breed of insolvency practitioners rose to the challenge over the course of the recessions in the late 1980s and 1990s, acquiring experience and expertise in taking

control of companies in financial difficulties, making rapid commercial decisions as to which parts of the business were viable, and trading those parts with a view to sale as a going concern. In stark contrast to the old-style liquidations or the forced sales by receivers appointed by lenders to realise their security, this positive attitude saved jobs and maximised the value to be returned to creditors.

The success of the new restructuring regime in the UK was also due to the expertise and positive attitude of a new group of specialist insolvency lawyers and the judges of the Chancery Division who responded with enthusiasm and a willingness to act quickly and constructively to assist the insolvency practitioners to achieve the statutory goals.

But although this all brought about a dramatic improvement in the nature and outcome of domestic insolvencies in the UK, very little thought was given to international insolvency by the legislators. Because of its limited terms of reference, the Cork Committee had barely touched the subject, commenting instead that,

> "The statutory provisions governing this branch of UK law were largely devised in the Victorian era during the heyday of Imperial supremacy. They have never been reviewed or overhauled in the light of modern constitutional developments and as a result [they] make a totally inadequate contribution to the structure of international commercial life."

So what occurred to change that situation and to provide opportunities for English insolvency professionals to have such international success in recent times? Two things stand out. The first, and most important, was the coming into force of the EU Insolvency Regulation (EIR).[1] The second was the adoption of the UNCITRAL Model Law on Cross-Border Insolvency in the UK[2] and a number of major jurisdictions outside the EU.

[1] (EC) No. 1346/2000.
[2] By the Cross-Border Insolvency Regulations 2006 (SI 2006/1030).

The EIR came into force in 2002. It provided for a coherent regime of allocation of jurisdiction and recognition of insolvency proceedings among the member states of the EU. The allocation of jurisdiction was founded on the concept of the debtor's centre of main interests (COMI). This broadly corresponded to the place of central management and administration of the debtor's affairs in a way that could be ascertained by third parties. It was presumed to be, but was not necessarily, the place of incorporation. The EIR also provided for the automatic and unquestioning recognition in all member states of main insolvency proceedings commenced in the state in which the debtor had its COMI. And the law applicable in those main proceedings was generally applicable in the insolvency. It applied, in particular, to the reduction or discharge of debts by composition in the insolvency, irrespective of the governing law of the debt.

This was a coherent regime for resolving conflicts of laws in insolvency matters. But the EIR was not without its flaws. Importantly, for example, it did not make any provision for the insolvency of pan-European groups of companies with subsidiaries in different member states. Each company was required to be treated separately.

These features of the new EU regime played straight into the hands of the UK insolvency practitioners. These practitioners had at their disposal the experience of the administration process that they had been perfecting as part of the rescue culture for over 15 years since 1986. Through their large accountancy firms they had a network of European offices to call on for support; and they had specialist lawyers and judges who had become accustomed to the need to move swiftly in insolvency matters. This UK team had few, if any, competitors in continental Europe, where formal winding–up over a lengthy period, supervised by court-appointed lawyers, was still very much the order of the day.

It should, therefore, be no surprise that the UK insolvency practitioners had much to offer EU companies and groups in financial difficulties whose domestic laws did not provide any means of restructuring outside a formal insolvency. The result of the formal procedures in those other states was the destruction of businesses and the loss of value for

creditors. This meant that continental European companies in financial difficulties voted with their feet.

Some companies shifted their COMI to England - often in relatively short order - to enable an administration order to be made by the English court.[3] In the case of groups, the movement of the central management and administration of each of the companies in the group meant that the English court could make a unified appointment of administrators from the same firm to all of the companies in the group.[4] The obvious commercial benefit of such an approach was that by conferring control upon practitioners from a single firm, coordination was achieved and the prospect of selling the whole business as a going concern was increased, with the potential of maximising the return to creditors of each company.

If one looks to the sub-text of my talk – "Who Dares Wins", that pretty much summarises the attitude exemplified by the UK profession within Europe.

Outside the EU, the UK had its existing network of countries with whom it could co-operate on a reciprocal basis under section 426 of the Insolvency Act 1986. The exciting developments in the civil law countries of the EU did nothing to diminish the continuing importance of those long-standing common law connections. But the common law network was significantly enhanced by the informal initiatives by practitioners and courts, especially in the UK and USA, for cross-border co-operation by way of protocols in various high profile international insolvencies such as Maxwell Communications. Again, things were very much done in a spirit of pioneering and adventure.

Those initiatives were then reinforced by the promulgation and adoption by the US, the UK, and a significant number of other countries of the UNCITRAL Model Law on Cross-Border Insolvency. Like the EIR, the Model Law is based upon the central idea of recognition of foreign main proceedings in the state of the debtor's COMI. But unlike

[3] See e.g. Re Hellas Telecommunications (Luxembourg) II SCA [2010] BCC 295.
[4] See e.g. Re Collins & Aikman Corp Group [2006] BCC 606.

the EIR, the UK's adoption of the Model Law is not dependent upon reciprocity. It signifies an outward-looking and open-door approach to the world. Recognition and automatic assistance can be obtained under the Model Law in the UK by foreign representatives from countries who do not accord the same recognition to UK insolvencies themselves. In that regard, because the countries of continental Europe were economically focussed on the EU and because they had the EIR to cover that area, very few of them, and none of the main jurisdictions, thought it necessary or appropriate to adopt the Model Law.

So that is a birds-eye view of the landscape that evolved from 1986 to the present day. But what about the detail of the law? Given that the UK now intends to withdraw from the EU, and unless some other arrangement is reached, will cease to be a member state of the EU to which the EIR applies, now is a particularly appropriate time to remind ourselves of the English common law principles relating to the assumption of jurisdiction and recognition in international insolvency matters. In conducting that review, it is instructive to look not only to the UK, but to some of the common law jurisdictions who have not been affected by the EIR or the Model Law. In that regard, I need look no further than Hong Kong, Singapore and, of course, the Cayman Islands.

To go back to basics, at common law the English courts held that a liquidator appointed in the place of incorporation of a corporate debtor would be recognised in England. Moreover, English law has long adopted a universalist approach under which the winding-up in the place of incorporation is regarded as the main proceeding in which assets should be collected and from which distributions should be made to creditors worldwide.

These principles have some logical foundation and certainly would have appealed to the Victorians to whom the Cork Committee referred. A company is a fictional legal person owing its existence to incorporation under a particular legal system. In the early days, when insolvency was essentially based upon winding-up and dissolution, there was an

obvious symmetry in looking to the same system of law to put an end to the company as that under which it had been founded in the first place.

From the start, English law also held that the scope of an English winding-up was not limited to assets located in England. In theory, a winding up under the English statutory scheme bound all assets and all creditors worldwide. These principles also had much to do with the fact that they were developed at a time at which the power of Imperial Britain was at its height. English companies traded far and wide and often owned significant assets in the colonies and empire abroad. It was thought to be important that if the English company became insolvent, those foreign assets should be brought under the control of the English court.

So much for English companies. When it came to exerting power to wind-up foreign companies, the weight of English trade also often meant that many foreign companies would have a large cohort of English trade creditors who, it was thought, would need protecting in the event of insolvency of their counterparties. So English law has long operated on the basis that the English court has the power to wind-up any foreign company.

Crucially, however, the English courts have also acknowledged that this is a potentially exorbitant jurisdiction which has to be exercised with discretion. In Real Estate Development Co[5] in 1991, Mr. Justice Knox reviewed the earlier authorities and decided that the jurisdiction to wind up a foreign company should not be exercised unless there was a "sufficient connection" with England and a reasonable prospect of benefit to creditors. The "sufficient connection" usually, but did not necessarily, require the presence of assets in England.

Mr. Justice Knox also recognised that his proposition that there had to be a "sufficient connection" prompted the question "sufficient for what"? He gave what he acknowledged was a rather circular answer, namely "sufficient to justify the court setting in motion its

[5] [1991] BCLC 210.

winding up procedures over a body which prima facie is beyond the limits of its territoriality".

Circular or not, the inherent flexibility of the "sufficient connection" test appealed to common-law judges. The test was firmly embedded in English law by the decision of the Court of Appeal in 2001 in Stocznia Gdanska SA v Latreefers[6] and it has been adopted and applied in a number of other common law jurisdictions ever since, most notably in Singapore and by Lord Millett in the Court of Final Appeal in Hong Kong last year in Kam Kwan Sing.[7]

As everyone is well aware, however, the same test does not apply in all common law jurisdictions: Bermuda does not permit the winding up of foreign companies, and the Cayman Islands has a more limited jurisdiction in section 91(d) of the Companies Law to wind up a foreign company based upon the presence of assets, the conduct of business in the Cayman Islands, or certain other specified grounds. It is not, I am told, a jurisdiction frequently exercised.

So much for liquidations. But the English lawyer has at his disposal a far more flexible restructuring tool – the scheme of arrangement. Originally introduced in 1870 as part of the liquidation regime, in 1907 it was extended so as to be available to facilitate compromises and arrangements between a company and its creditors or members or any class of them, irrespective of whether the company was insolvent or in a formal insolvency procedure.

In relation to international matters, the scheme jurisdiction took an important turn in 2003 in a case involving a Cayman Islands company.[8] Drax Holdings Limited was the Cayman Islands holding company for a group of subsidiaries that owned, financed and operated a large coal fired power station in Yorkshire that provided 8% of the electricity

[6] [2001] 2 BCLC 116.
[7] FACV No. 4 of 2015.
[8] Re Drax Holdings Ltd [2004] 1 WLR 1049.

consumed in England and Wales. Most (but not all) of the liabilities of Drax Holdings were governed by English law and were secured over the power station in England. The Drax group fell into financial difficulties and made a restructuring proposal to its creditors. This involved exchanging their existing debt for new debt and equity in a Jersey holding company to which the power station was to be transferred. The mechanism chosen to implement this proposal was for there to be parallel schemes of arrangement in the Cayman Islands and in England.

The basis for promoting a scheme in the Cayman Islands had an obvious parallel with the general importance accorded to the place of incorporation at common law. The basis for a second scheme to be promoted in England was less obvious. Mr. Justice Lawrence Collins noted that the statutory jurisdiction for sanctioning a scheme of arrangement was that the company in question was "liable to be wound up" by the English court, and that, as a general proposition, this included foreign companies. Mr. Justice Lawrence Collins also decided that this could not mean that the court only had jurisdiction to sanction a scheme for a foreign company if the grounds actually existed at the time for it to be wound up compulsorily, because the link between schemes and insolvent liquidations had been severed in 1907.

Instead, he said, the same "sufficient connection" test that Mr. Justice Knox had devised in Real Estate Development to be applied to decide whether the court should exercise its discretion to wind up a foreign company, should also be applied when the court was deciding whether to exercise its discretion to sanction a scheme for a foreign company. In other words, the court should ask the question "is there a sufficient connection with England to justify exercising the scheme jurisdiction"?

On the facts of the Drax Holdings case, Mr. Justice Lawrence Collins held that there was a sufficient connection. In particular, he thought that it was important that some of the debts to be compromised were governed by English law and that they were secured over assets in England. He said,

> "In the case of a creditors scheme, an important aspect of the international effectiveness of a scheme involving the alteration of contractual rights may be that it should be made, not only by the court in the country of incorporation, but also (as here) by the courts of the country whose law governs the contractual obligations. Otherwise dissentient creditors may disregard the scheme and enforce their claims against assets (including security for the debt) in countries outside the country of incorporation."

Underlying Mr. Justice Lawrence Collins' comments was a principle of English private international law that he doubtless took for granted. That was the principle established in the 1890 case of Anthony Gibbs v La Société Industrielle et Commerciale des Métaux.[9] The principle in Gibbs is that the English court will not recognise a discharge of a debt as effective unless it is a discharge in accordance with the law governing the debt. This principle has been applied and is accepted in a number of jurisdictions in the English common law world. It can, as it happens, conveniently be illustrated by two of the leading cases involving Cayman Islands companies.

In the Privy Council on appeal from the Cayman Islands in Wight v Eckhardt Marine[10] in 2003, a debt governed by Bangladesh law had been proved in a Cayman Islands liquidation. It was then extinguished by a statutory scheme in Bangladesh. The Privy Council held that Cayman law should recognise the extinction of the debt in accordance with its governing law.

The principle in Gibbs is also clearly the law in Hong Kong. That much is apparent from the case of LDK Solar in 2014. That case was also notable for being my last court appearance in the Cayman Islands before Mr. Justice Andrew Jones. The LDK Solar case involved the now familiar structure of a Cayman Islands holding company for a group of high tech companies based in the PRC, who had raised finance in Hong Kong and in the US, resulting in debts governed by Hong Kong law and New York law. When

[9] (1890) 25 QBD 399.
[10] [2004] 1 AC 147.

the group encountered financial problems, a scheme of arrangement was proposed in the Cayman Islands between the Cayman Islands company and its creditors. In addition, with a view to ensuring that the discharge of the debts was recognised abroad, a parallel scheme was proposed on the same terms in Hong Kong, and recognition was sought for the Cayman Islands scheme in the US under Chapter 15 of the US Bankruptcy Code (the US enactment of the UNCITRAL Model Law).

In Hong Kong, in a careful reserved judgment,[11] Mr. Justice Godfrey Lam adopted the "sufficient connection" test from Real Estate Development, and, referring to the Gibbs principle, found a sufficient connection with Hong Kong primarily because of what he viewed as the need to provide a back-up scheme which compromised the Hong Kong law debts in accordance with their governing law.

Now let us go back to 2003 and consider the position following Drax Holdings from the perspective of a UK restructuring professional. In addition to all of the formal insolvency options for EU companies based upon moving their COMI to the UK, you have now been told that the most inherently flexible tool in your restructuring toolkit, the scheme of arrangement, is potentially available for foreign companies on the basis of a test as flexible as "sufficient connection". The court has also accepted - at least as a back-up to a scheme in the place of incorporation – that a sufficient connection can be found in the need to provide a compromise in accordance with the governing law of the debt. This is marvellous, because which is indisputably the most popular choice of governing law for financial instruments in Europe? Answer: English law.

In other words, Europe represented a potential gold-mine of foreign companies with English law debts which were ripe for restructuring. The problem, of course, was that Drax Holdings pre-supposed that the English scheme was done in parallel to a scheme in the place of incorporation. But no EU countries had anything like a scheme of arrangement that enabled companies to be saved without putting them into a formal insolvency process.

[11] HCMP 2215, 2216 and 2218 of 2014.

At this stage I will put on my own "Who Dares Wins" restructuring beret and confess that as an advocate I was one of the first to persuade a judge to break down this barrier. Rodenstock is a well-known German company which heads a group making precision optics. In 2012 it was in dire financial straits, on the brink of a covenant default on its English-law governed credit facilities. If the debts could not be restructured, its directors would have been forced to put the company and its subsidiaries into liquidation in Germany. There was no domestic restructuring option in Germany, and Rodenstock had no time to move its COMI or set up an establishment in England, or move any material assets here.

Necessity was the mother of invention. It was a deserving case crying out for a solution and a daring approach was required. What about a free-standing scheme of arrangement? Step forward Mr. Justice Briggs who oversaw the whole process in the Chancery Division from beginning to end in about six weeks.[12] He concluded that even though there was no parallel scheme available in the place of incorporation, the fact that the debts were governed by English law was itself a sufficient connection to justify the English court sanctioning a scheme. It also helped that the finance parties had included a jurisdiction clause in favour of England and that a significant proportion of the creditors were domiciled in England.

But in the absence of a scheme in the place of incorporation, how could we give Mr. Justice Briggs any comfort that the scheme would be effective by being recognised in Germany so as to prevent any dissentient creditor from seeking to enforce its original claims against the company and its assets there? The automatic recognition provisions of the EIR could not provide any help, because schemes of arrangement designed to avoid formal insolvency are not, by their very nature, collective insolvency proceedings governed by the EIR.

[12] Re Rodenstock GmbH [2012] BCC 459.

Mr. Justice Briggs found the answer in expert evidence to the effect that a German court would be likely to recognise the scheme under the Rome I Regulation on the law applicable to contractual obligations[13] as a variation of contractual rights in accordance with the governing law of the contract. He rejected the suggestion that the scheme would be entitled to automatic recognition as a judgment under Chapter III of the EU Judgments Regulation.[14]

As it happens, the prevailing view of the experts and academics who have expressed views on this issue in cases since Rodenstock is that Mr. Justice Briggs was right to conclude that schemes will be recognised in the other EU member states, but for the wrong reasons. The prevailing view is that the Rome Convention does not apply because a scheme is, by definition, not a consensual variation but is a statutory intervention that is only needed because there cannot be unanimous consent. But the experts now seem to agree that the judgment and order of the English court sanctioning a scheme of arrangement will be entitled to automatic recognition as a judgment in other EU member states under the Part III of the EU Judgments Regulation.

That being so, I should observe, as an aside, that in order to ensure that the order sanctioning a scheme has the necessary characteristics of a judgment rather than being a mere administrative exercise, it is vitally important for the English court hearing a scheme to adopt an active role in questioning what is proposed critically, even in the absence of opposition from dissentient creditors. The court is not and cannot be a rubber stamp.

Outside the EU, this question of effectiveness and recognition has also been considered in a number of other scheme cases. As examples, I can refer to two recent cases, both of which involved the now familiar financing structure for investment in groups operating in the PRC, of a parent company incorporated in the BVI or the Cayman Islands, with

[13] (EC) 593/2008.
[14] (EC) 44/2001, now recast as (EU) 1215/2012.

shares listed in Hong Kong. In Winsway Enterprises,[15] the parent company was incorporated in the BVI: in Kaisa Group[16] it was incorporated in the Cayman Islands. In both cases there were parallel schemes in the place of incorporation and Hong Kong.

Kaisa Group was the more straightforward of the two cases, because some of the debts in question were governed by Hong Kong law, and so applying the approach in Drax Holdings and Rodenstock, Mr. Justice Harris was satisfied that there was a sufficient connection to justify the exercise of the Hong Kong court's scheme jurisdiction. But he also received evidence that the Hong Kong scheme would be likely to be recognised in the US under Chapter 15 of the US Bankruptcy Code as a foreign non-main proceeding, and that the ancillary relief necessary to give effect to the scheme in the US would probably be granted by the US judge as a matter of discretion.

In Winsway, the debts to be restructured were solely governed by US law. So the Rodenstock and Drax Holdings point was not available. But Mr. Justice Harris nonetheless found a sufficient connection between Winsway and Hong Kong on the basis of the company's listing, the residence of some of its directors, shareholders and creditors in Hong Kong, and the fact that it conducted some of its financial and administrative operations in Hong Kong. He also had evidence that the US court had already granted recognition to a representative of the company in the Hong Kong proceedings as foreign non-main proceedings and that the US court would be likely to grant the necessary ancillary relief. Putting aside the issue of whether some of the factors to which Mr. Justice Harris referred really had anything to do with the scheme at all, what the judgment does expressly acknowledge is that the question of whether the scheme will be recognised and effective in the one foreign jurisdiction that mattered - in this case New York – was very important to the court's decision to exercise its scheme jurisdiction in the first place.

[15] HCMP 453/2016.
[16] HCMP 708/2016.

In that regard, Winsway is a very good illustration of a point first made by Mr. Justice David Richards in Magyar Telecom[17] in 2013. Mr. Justice David Richards observed that although the jurisdiction and recognition questions can be posed separately, namely (i) should the court exercise its scheme jurisdiction, and (ii) will the resultant scheme be recognised in other jurisdictions, in reality these two considerations are inseparably linked and can be regarded as different aspects of the same issue. In other words, when considering whether the connecting factors are sufficient to justify the exercise of what might be regarded as an exorbitant scheme jurisdiction, one important consideration is whether other jurisdictions will actually regard the court as exercising an exorbitant jurisdiction, or whether they will be content to assist. So, one might say, the proof is in the pudding, or "Who dares wins".

That said, I do not think that it is necessary or even possible in all cases to have certainty as to the attitude of a foreign court. It is a question of degree and much will depend upon the nature of the scheme itself. In all cases it will, however, be necessary for the applicant company as a bare minimum to provide expert evidence of foreign law as to whether the scheme will be likely to be recognised abroad. In many cases that will be enough. In other cases, perhaps where recognition of the scheme abroad is so obviously central to the whole purpose of the scheme, or where the scheme might be regarded as on the edge of what is acceptable, it might well be sensible for the court to go further and make sanction conditional upon the scheme being granted formal recognition in the other jurisdictions. Alternatively, the court could sanction the scheme so that the recognition application can then be made on the basis of the approved scheme, but to extract an undertaking from the company not to take the final step of making the scheme effective unless and until the necessary recognition has been obtained.

In this sea of unity there is, however, one swimmer who might be heading in a slightly different direction. It is well known, and no secret is made of the fact, that Singapore is very keen to establish itself as a litigation, arbitration and restructuring hub for Asia. It has indeed, been making great strides in that direction, for example by recently adopting

[17] [2013] EWHC 3800 (Ch).

the UNCITRAL Model Law and being at the forefront of initiatives to strengthen cross-border communication between courts in insolvency and restructuring matters. One can only admire the single-minded determination with which all of Singapore's institutions have been applying themselves to this task.

That determination comes through in a very recent decision of the High Court of Singapore in the Pacific Andes case.[18] The issue for the court was whether it could grant a moratorium to a number of foreign companies in order for them to pursue the development of a restructuring plan to be implemented by a scheme of arrangement in Singapore. The judge adopted the sufficient connection approach to jurisdiction which I have explained based upon Drax Holdings and Rodenstock, and held that only one of the foreign companies had a sufficient connection to Singapore that would justify a scheme being approved by the Singapore court. So far so good.

The judge also went on to say, obiter, that the fact that none of the debts to be schemed were governed by Singapore law would not of itself be a bar to entertaining a scheme if sufficient connection with Singapore was otherwise shown. Again, as a general proposition I have no issue with that conclusion for reasons that I have explained.

Where I part company with the judge is why he took that view. He re-examined the principle in Gibbs and referred to a number of leading academics who have criticised it as being out of date and giving too much importance to the parties' choice of law in a modern restructuring world. He concluded that the Singapore courts should not be bound by the same principle, pointing out that there are other jurisdictions that do not apply it. However, I think that the judge missed the point.

Whether or not the Gibbs principle is right is a question of recognition. If the jurisdiction in which a scheme company has its assets would apply the Gibbs principle and would not recognise a compromise except in accordance with the governing law of the debt, then this may present an insuperable obstacle to the effectiveness of a scheme, because, as Mr.

[18] [2016] SGHC 210.

Justice Lawrence Collins pointed out in Drax Holdings, dissenting creditors would be free to attack the company and its assets in that country. For the reasons that I have explained, this might well be a good reason for the court to which the scheme is presented refusing to sanction it.

It is, in my view, no answer for the court considering whether to sanction the scheme to say, as the judge in Pacific Andes said, that,

> "Ultimately, the failure to recognise is an issue for the debtor and perhaps not the creditor. …if the [company is] comfortable restructuring debts governed by Hong Kong law and English law under a Singapore scheme, I see no reason why the court should be slow to assume jurisdiction provided that it had subject matter jurisdiction and there exists sufficient nexus to exercise that jurisdiction."

I am afraid I don't agree. If, to take the judge's example, the assets of the company were located in Hong Kong and England, given the present state of the law in both those countries, neither would recognise the discharge of the debts by the Singapore scheme and its effectiveness would be compromised. I do not accept that it is appropriate for the court considering the scheme simply to wash its hands and say that this is ultimately a matter for the company, and not the court. Of course the company must decide whether to take the commercial risk, but in cross-border restructuring cases I think the court must itself take some responsibility for the international consequences of its decision.

So that is where the questions of jurisdiction and recognition have got to. But what does the future hold? Apart from BREXIT, to which I shall return briefly at the end of this talk, the last couple of weeks have seen an important development concerning the EU. You will recall that I described how successful the UK has been in using schemes to restructure EU companies whose domestic laws did not provide for any pre-insolvency restructuring mechanisms. Well, the European Commission has struck back. On 22

November 2016 it published a draft Directive[19] that would, if implemented, require all EU member states to enact into their domestic legislation a pre-insolvency restructuring tool, based upon the approval of classes of creditors by a 75% vote, and approved by a court. The will also be a moratorium and a cross-class cram-down. Sound familiar? The proposal is an amalgam of the UK scheme process and Chapter 11 of the US Bankruptcy Code. If successfully implemented in each member state, that proposal will substantially reduce the commercial need for EU companies in financial difficulties to seek the assistance of a UK scheme.

But the Commission's proposal is not without its difficulties. One of the beauties of the scheme in the UK and the Cayman Islands is the fact that the legislation is very short and simple, which gives it great flexibility when in the hands of practitioners and judges who have considerable commercial and restructuring experience. That is not, however, the civil law model, which tends to require everything to be codified in great detail so that it can be applied by career judges who have often been appointed at an early age after leaving university and who have little or no commercial experience to guide the exercise of discretion. That is not just my view. The EU Commission itself recognises the shortcomings in the EU in these respects and the draft Directive itself contains several sections which would expressly require the EU member states to train and continue to train their judges and practitioners in insolvency.

It is also very noticeable that the Commission's proposal is entirely silent about the jurisdictional basis upon which debtors could seek to use an EU restructuring plan in a particular member State, or as to how the discharge or modification of debts under an approved plan would be recognised in the other member States. It may be that this is deliberate, because to suggest substantive harmonisation of insolvency laws in the EU is a dramatic step in itself, and the issues of jurisdiction and recognition can be potentially divisive issues. But the EU is going to have to grapple with these questions – which are precisely the issues that I have been addressing in the context of schemes of arrangement - sooner rather than later.

[19] COM (2016) 723.

When the EU does address those issues, I would be prepared to wager that the civil jurisdictions will not reach for the "sufficient connection" test that has served the common law well but which leaves so much up to the discretion and good sense of the judge. Instead, it seems to me inevitable that the EU will adopt the same tests as in the recast EIR under which jurisdiction is allocated on the basis of a debtor's COMI, and that the restructuring plan is then automatically recognised in other EU member states as having discharged or modified the creditors' claims irrespective of their governing law. That would, of course, also make the EU plan automatically recognisable on the same basis under the UNCITRAL Model Law in the UK, the US and any other country which has adopted the Model Law.

What this points to is the fact that the restructuring world is likely to move in the next few years to a model under which the gold-standard for both jurisdiction and recognition is the COMI of the debtor. I think that it is inevitable that jurisdiction and recognition based upon the common law factors of the place of incorporation or the governing law of the debt will become of secondary importance. These changes have potentially profound implications for both our jurisdictions for obvious reasons.

Although the Cayman Islands has long been a jurisdiction of choice when it comes to the place of incorporation of companies for financing structures, experience of seeking automatic recognition in the US in cases such as SPhinX[20] shows that when the recognition question is posed in terms of the COMI, it might fare less well. Obviously the Cayman Islands could take measures to encourage the controllers of such companies to base their management and administration activities here to increase the likelihood of COMI being found to correspond with the place of incorporation.

There may also be a further practical factor that could preserve the place of the Cayman Islands at the high table of restructuring. For many of the companies and groups for which the Cayman Islands serves as a place to incorporate holding and finance

[20] Case No. 06-11760(RDD).

companies, the alternate candidate for the COMI will be a jurisdiction such as the PRC. This is unlikely to have the type of flexible and transparent restructuring procedures that will appeal to creditors. In such cases, even if conceptually second best, the place of incorporation is likely to continue to play a significant role in cross-border restructurings of this type of vehicle.

The outlook for the UK is not so clear. As I have indicated, it has been the combination of deficiencies in the EIR, the ingenuity of the UK's restructuring profession to overcome them, and the automatic recognition which the EIR gave to their solutions that enabled the UK to surge to the top of the EU restructuring table. But the EIR has now been recast and a new version comes into force in June next year that will make good some of the deficiencies, at least in principle. Moreover, so far as recognition is concerned, when the UK leaves the EU, it will cease to be a party to the EIR and cease to be entitled to automatic recognition for its insolvency procedures. And the position is no better for schemes, because leaving the EU will also mean that the UK ceases to be a party to the EU Judgments Regulation.

So far as any move away from reliance upon the governing law of the debt as a connecting factor is concerned, I would venture to suggest that this is unlikely to have any great significance for the Cayman Islands. The law of the Cayman Islands is not in widespread use in international debt instruments and financial contracts. The opposite is true for England.

The widespread use of English law as the law of choice to govern debt instruments and financial contracts for investors in companies in the EU, together with jurisdiction clauses in favour of the courts of England to resolve commercial disputes has been of great importance in bringing financial business to the City of London and international restructuring business to the UK. That phenomenon has undoubtedly been based in part upon the justified confidence that overseas investors have in the commerciality and predictability of English law, the quality of the English judiciary and court systems, and

in the event of insolvency, the expertise of the restructuring professionals in the UK. None of those things will change.

But if a judgment obtained from an English court is no longer entitled to automatic recognition and enforcement in the EU because the UK has ceased to be a party to the EU Judgments Regulation, and if less importance is attached to the need to restructure a debt in accordance with its governing law, and greater importance is attached to whether the restructuring is done in the place of the debtor's COMI, then the legal imperative to choose English law as the governing law of the debt, to specify the English courts as the forum for dispute resolution, and to choose the UK as the venue for restructuring will inevitably diminish.

In the end it may simply come down to practicality. It has to be hoped that the conceptual problems to which I have referred will be outweighed by the continued commercial attractions of London and the English courts in comparison, say, to the French or Italian legal systems.

But in this sunniest of jurisdictions, I must not end on a gloomy note.

The one thing which I am certain will continue, and which no amount of legal or political change can harm, is the expertise, experience, sense of purpose and ingenuity that our two jurisdictions share in business matters. We have a common legal and professional heritage and strong bonds between the institutions and individuals involved in the administration of the rule of law. I am certain that this will continue to stand both our jurisdictions in good stead among all the changes which are coming in the international restructuring arena.

I first came to the Cayman Islands to argue a case not long after Hurricane Ivan. In every visit to the Cayman Islands over the intervening years I have been made to feel at home and I have been privileged to have been here. Looking around now, I see a thriving and vibrant commercial community. Given our common heritage and values, I am confident

that the UK will show the same fortitude in riding out the storm that it faces, and in building for the future.