

# Brexit: its impact on forum and law shopping

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# What is 'forum shopping'?



## A preliminary definition

A debtor, previously situated in a certain country, relocates relevant factors (according to conflict of laws criteria) to another country before its insolvency, with the aim of shifting the competence to hear the case to courts of the latter country and to apply its insolvency procedures and rules.

## Hierarchy of sources of insolvency law in the UK (now)

1. Insolvency Regulation (recast 2015) (if the debtor's COMI is in the EU, except Denmark)
2. Model Law on Cross-Border Insolvency 2006
3. Insolvency Act 1986
4. Common law conflict of laws rules

## Insolvency Regulation (recast 2015)

- Competent court: the court of the country where the debtor's 'centre of main interests' (COMI) is situated (article 3(1) Insolvency regulation)
- Applicable insolvency law: law of the country of the COMI is situated (article 7(1) Insolvency regulation)
- Definition of COMI: 'the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties" (article 3(1) Insolvency regulation)

## Companies

- A company's COMI is presumed to be in the Member State of its registered office (article 3(1) Insolvency Regulation)
  - Coincidence between country of incorporation – country of COMI
  - The same Member State governs company law issues and insolvency proceeding

## Natural persons

- Two presumptions (article 3(1) Insolvency Regulation):
  - Individuals “exercising an independent business or a professional activity”: their COMI is “presumed to be that individual’s principal place of business”
  - Over-indebted private persons and consumers: their COMI is presumed to be in the country of their habitual residence, unless the contrary is proved.

- How are fictive relocations of a company’s administrative seat (or a natural person’s residence) to be distinguished from real relocations of COMI?
- Insolvency Regulation aims at avoiding “incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position (forum shopping)” (recital 5)
- Forum shopping should be avoided only if detrimental to the general body of creditors. Recital 5 Insolvency Regulation Recast (formerly Recital 4 Insolvency Regulation).
- European Parliament Resolution 2011: “disparities between national insolvency laws create competitive advantages or disadvantages and difficulties for companies with cross-border activities [which] favour forum shopping;[...]” (Recital A) “[...] steps must be taken to prevent abuses, or any spread, of the phenomenon of forum shopping” (Recital B).

# Companies and freedom of establishment

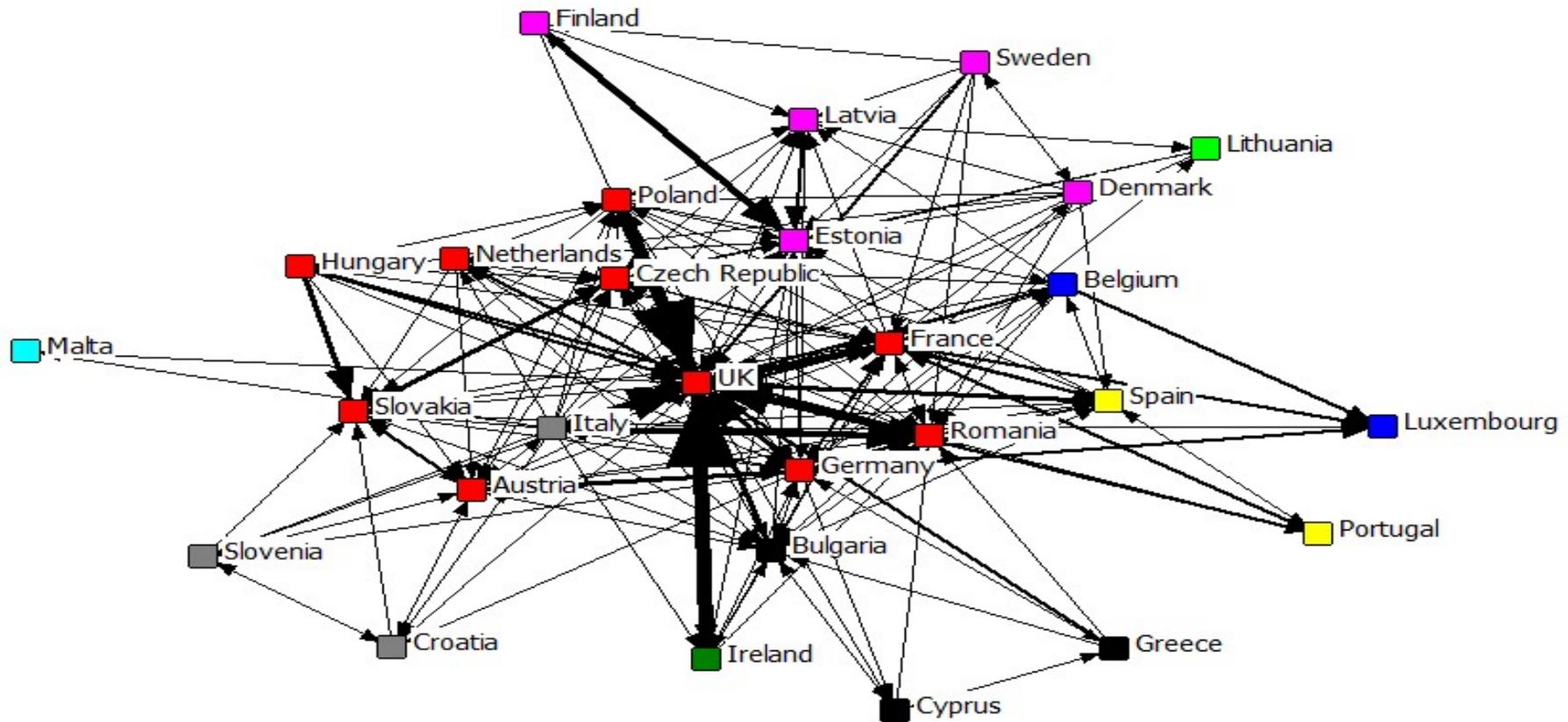
- Companies can be incorporated in a Member State and have all their assets, business and/or headquarter in any other Member State
- Examples:
  1. A Plc, incorporated in England, headquarter and business in France
  2. B Plc, incorporated in England, headquarter in France, business and assets in England and France
  3. C Plc, incorporated in France, headquarter in England, business and assets in England and France

# Companies and freedom of establishment

1. C-81/87 *Daily Mail* [1988]: Companies are creatures of National law, and Member States of incorporation can restrict outbound mobility of own companies' headquarter
2. C- 212/97 *Centros* [1999]: The incorporation in a Member State (the UK) of a company that aims at operate exclusively in another Member State (Denmark) is not abusive.
3. C-167/01 *Inspire Art* [2003]: A company was incorporated in the UK while operating exclusively in the Netherland: the latter can not impose own company law requirements to such 'pseudo-foreign companies'
4. C-208/00 *Überseering* [2002]: Dutch company with real seat in Germany (applying the real seat theory): the requirement to reincorporate under German law (and the non recognition of this company) was a restriction to the freedom of establishment
5. C-210/06 *Cartesio* [2008]: Member States have the power to define connecting factors (including the 'real seat'), and yet they can not prohibit outbound reincorporations (*obiter dictum*)
6. C-378/10 *Vale* [2012]: Member States can not ban inbound reincorporations.

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**UK is the winner of regulatory competition**  
*(Report on the Law Applicable to Companies 2017)*



# Strategies for insolvency tourism: relocation of headquarters and assets



## Relocation of a foreign company's headquarter and/or activities to the UK

- Cases in which 'insolvency tourism' has been identified, for example:
- *Hans Brochier Holding Ltd v. Exner* [2006] EWHC 2594:
  - Transfer of all assets of a German company to a British Ltd short before the insolvency
  - Insolvency proceedings were simultaneously opened in Germany and in the UK
  - The COMI was still in Germany, since the debtor had creditors and employees only in Germany, all contracts were written in German and its bank account was still in Germany

# Strategies for insolvency tourism: relocation of headquarters and assets

- In some cases, English courts have recognised a foreign company's COMI being in the UK after a relocation of its headquarter or activities; see for example:
- *Re Hellas Telecommunication (Luxembourg)* [2010] related to the insolvency of a Luxembourgish company; the reasons for its COMI being in the UK were that
  - creditors “were notified of its change of address”;
  - “an announcement was made by way of a press release that its activities were shifting to England”;
  - Hellas has opened a bank account in London “and all payments are made into and from that bank account”;
  - Hellas “has registered under the Companies Act in this country, although its registered office remains in Luxembourg and it may remain liable to pay tax in Luxembourg too”;
  - “all negotiations between the company and its creditors have taken place in London”

# Strategies for insolvency tourism: transfer of registered office)

## Relocation of registered office to the UK

- English conflict of laws does not allow foreign companies to relocate their domicile and reincorporate as English companies
- From the standpoint of English conflict of laws rules, only two options are available:
  - a. A new company is incorporated in England
  - b. The company is registered in England as a foreign company having a 'place of business' in England (see eg C-396/09, *Interedil* [2011])
- Foreign companies, however, can incorporate a 'shell' company in England and merge into it (Cross-Border Merger Directive)

# Strategies for insolvency tourism: transfer of registered office

## Cross-border reincorporations and freedom of establishment

- It is still debated whether freedom of establishment also grant a right to reincorporate from one Member State to another
  - C-210/06 *Cartesio* [2008]: Member States of origin can not restrict outbound re-incorporations (obiter dictum)
  - C-378/10 *Vale* [2012]: Member States can not restrict inbound reincorporations, unless similar restrictions are applied to domestic companies
  - C-106/16 *Polbud*, Opinion AG Kokott [2017]: Member States can not restrict outbound re-incorporations (unless such restriction is justified by general interests and proportionate to attain these goals) provided that the company has also relocated a fixed establishment.

# Strategies for bankruptcy tourism



- Natural persons can relocate their activities or residence more easily than companies
- Low-cost flights and fast transports throughout Europe allow natural persons to dissociate their main residence from the place where they work, for example:
  - Eurostar train between London and Paris
  - Many low-cost flights between London and Munich, Milan (and Bologna...)

# Strategies for bankruptcy tourism



## Bankruptcy tourism of natural persons in front of British courts

- *Malcolm Brian Shierson v Clive Vlieland-Boddy* [2005] EWCA Civ 974
  - Mr Shierson divorced his wife and then moved from the UK to Spain, and yet he maintained a property in the UK and came regularly to the UK
  - No competence of British courts to hear the case
  - Careful assessment of all elements in order to avoid fictive relocations
  
- *Irish Bank Resolution Corp Ltd v Quinn* [2012] NICh 1 = [2012] B.C.C. 608.
  - Mr Quinn, a professional resident in the Republic of Ireland (near the border), went bankrupt and claimed that his business was based in Northern Ireland
  - The Court held that Mr Quinn's COMI was in the Republic of Ireland.
  - COMI's ascertainability by third parties:
    - *'It should be reasonably or sufficiently ascertainable or ascertainable by a reasonably diligent creditor'*.
    - Necessary "[t]o make the COMI available on the internet or through telephone directories or trade directories or otherwise generally available in the Member State in which he has established his centre of main interest would make it public"

# Brexit: an uncertain future

## At least two main scenarios

### 1. 'Soft' Brexit

- Special agreements with the EU or with single Member States (such as with Switzerland)
  - The Insolvency Regulation might be included or not (it would be however rational including it)

### 2. 'Hard Brexit'

- No Freedom of Establishment
- No Insolvency Regulation

# The Hard Brexit scenario

## Under the standpoint of EU Member States

- The UK would be considered as a ‘third country’
- Each member State would apply own private international law rules vis-à-vis the UK with regard to both company law and insolvency law
  - regarding company law: companies would not enjoy freedom of establishment with regard to the UK
  - Regarding insolvency proceedings: general tendency to increase cooperation in cross-border insolvency, but no automatic recognition of insolvency decisions

# The hard Brexit scenario

## Relocation of a company's headquarter and/or activities to the UK without reincorporation

- English conflict of laws rules: incorporation theory
  - Foreign companies are recognised and governed by the law of the country of incorporation
  
- Member States of the EU: it largely depend on each country's own conflict of laws criterions
  - 'Pure' real seat theory: such a relocation should not be allowed
  - Incorporation theory: such a relocation is not problematic

# The Hard Brexit scenario

## Hierarchy of sources of insolvency law after Brexit

1. Model Law on Cross-Border Insolvency 2006
  - In the EU it was only enacted by Greece, Slovenia, Romania, Poland and the UK
  - No reciprocity clause
  - No general private international law criterions
  - Recognition in the UK of ‘foreign main proceedings’, based upon the concept of COMI
    - In the Model Law, it is not mentioned that a debtor’s COMI should be ascertainable by third parties, but see *Re Stanford International Bank Ltd* [2010] 2 WLR 941 (ascertainability requirement is relevant for the purposes of the Model Law)
2. Insolvency Act 1986
  - Section 426 IA 1986: request for assistance made by courts of Commonwealth countries (Ireland)
3. Common law conflict of laws rules



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Thank you