

TALLINN UNIVERSITY OF TECHNOLOGY

School of Business and Governance

Department of Law

Piia Kuoksa

**Future of Consumer Insolvency Tourism After Brexit:
Will Brexit or European Insolvency Regulation of 2015 End it or is
There a Future in France?**

Bachelor Thesis

Supervisor: Thomas Hoffmann, LL.M, J.D.

Tallinn 2017

Table of Contents

Introduction	3
1. Consumer insolvency tourism and its regulatory base explained	8
1.1. What is consumer insolvency tourism?	8
1.2. Regulatory base in EIR 2000 and EIR recast	9
1.2.1. The European Insolvency Regulation 1346/2000/EC	9
1.2.2. The recast on EIR of 2015/848	10
1.3. Who forum shop for consumer insolvency?	12
2. Member state insolvency law on insolvencies of natural persons	14
2.1. What insolvency procedures are and the policy choices behind them	14
2.2. Countries without or with a very weak consumer insolvency settlement regime	15
2.3. Countries with payment programs of 5 years or more & discharge	15
2.4. Countries with payments programs of 2-5 years & discharge	17
2.5. The most favorable systems: discharge within 2 years of filing	19
2.5.1. UK	19
2.5.2. Regions of Alsace and Moselle in France	20
3. Should national insolvency laws be harmonized across EU?	21
4. Why is consumer insolvency tourism so problematic?	25
5. Process of UK exiting the European Union	28
5.1. Legislative base for exit	28
5.2. Lack of clear constitution raising issues in UK	28
5.3. The foreseeable impacts of triggering Art 50 in UK	30
6. Brexit's impact on consumer insolvency tourism	32
6.1. The consequences impacting the future of consumer insolvency tourism	32
6.2. UK's future and options ranging between EFTA and third-state position	33
6.2.1. A return to 1972	33
6.2.2. Access to EEA and options for determining jurisdiction	35
6.2.2.1. <i>Rejoining the European Free Trade Association</i>	35
6.2.2.2. <i>Bilateral negotiations with EU and individual EEA accession</i>	36
6.2.2.3. <i>Solving jurisdiction in the EEA-framework</i>	36
6.2.3. Brexit to mean Brexit – positioning as a third-country in relation to EU	38
Conclusion	40
List of Sources	45

Abbreviations

CJEU	Court of Justice of the European Union
COMI	Center of Main Interests
ECA	European Communities Act 1972
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
EIR	European Insolvency Regulation (in general)
EIR 2000	European Insolvency Regulation, 1346/2000/EC
EIR 2015	European Insolvency Regulation, 2015/848/EU
MS	Member State of the European Union
PIL	Private International Law

Introduction

Bankruptcies have long been a widely known method for companies to be discharged of their debts. However, only during the past few decades have legislators been enabling this mechanism to be at the disposal of natural persons.

Since the world economy crashed in 2008, recovery in Europe has been slow. Crawling Euribor reference rates indicate problems with growth are more or less a European Union wide problem. On top of which low interest rates tend to encourage consumer debt-taking.¹ The 2008 crisis has been recognized to be the largest overall trigger of increased consumer insolvency rates in EU Member States (hereon MS).² Once EU released the Regulation on Insolvency Proceedings of 2000, it became clear that the methodology for granting natural persons a “fresh start” varied widely. At the same time a court decision in a jurisdiction that was one’s Center of Main Interests (hereon COMI) would also be recognized in all other courts of MS and have impact on debts where the creditor was located in any of the MS.

The complexity of the situation only increases when clarified that the outcomes of insolvency proceedings vary vastly across the Union. Whereas debtors in some MS have to forfeit virtually all control over their assets, others remain in control of theirs. Moreover, some countries grant discharge within a year, whereas others require following payment plans for years. Thus companies, business owners and even private consumers are relocating within the European Union in order to be discharged of their debts faster by entering insolvency proceedings in another Member State.

Such re-locating within EU under freedom of establishment just to qualify for personal bankruptcy has been contested not to be a genuinely legitimate reason in all cases³, but clarity to whether this is in alignment with the spirit of the law has been deemed more a case-by-case decision to be made.⁴ Multiple interests collide in insolvency cases in general and even more so when the debtor

¹ Sentance, A.” We are in danger of becoming addicted to low interest rates.” The Telegraph 25.3.2016. www.telegraph.co.uk/business/2016/03/25/we-are-in-danger-of-becoming-addicted-to-low-interest-rates/ (21.4.2017)

² Brown *et al.*, European Insolvency Law: Reform and Harmonization. Cheltenham, Edward Elgar Publishing Limited 2017, p 339.

³ Hoffmann, T. The Phenomenon of “Consumer Insolvency Tourism” and its Challenges to European Legislation. Journal of Consumer Policy 2012, 35 (4), pp 461-475, p 461.

⁴ CJEU, 9.3.1999, C-212/97, *Centros*, para 25, cited in Eidenmüller (Eidenmüller, H. Abuse of Law in the Context of European Insolvency Law. European Company and Financial Law Review 2009, 6 (1), pp 1-28, p 2.)

engages in searching for an easier insolvency scheme with quicker discharge. This also sparks the question of which is better – discharge or repayment? Which should be favored and what should be done to level out the divergence between MS insolvency regimes?

It is in fact Germans who seem to have noticed the opportunity this divergence in legal regimes gives. Not only have, *inter alia*, two German professors, Eidenmüller⁵ and Hoffmann⁶, written on this topic, but it has also repeatedly shown up in German news⁷ and the message has streamed down to the general public – judging by it being discussed even on a German discussion forum⁸. The Insolvency Service of UK has even quoted the inflow of German nationals as a “quite invasion”⁹. The Commission has in its staff’s impact assessment’s summary, in preparation of the 2015 recast on the original European Insolvency Regulation (1346/2000/EC, hereon EIR 2000; and 2015/848/EU, hereon EIR 2015 or recast), brought up this same fact, as well as a flow of tourism from Ireland and Eastern European countries to UK.¹⁰ The Commission’s impact assessment also mentions cases from northeast France¹¹, as has also been reported in German newspapers¹². The driver for this stream of tourism is the difference between having to wait for six years for discharge, as in Germany, or for approximately a year, as in some cases in the UK.

However, on June 23rd, 2016 UK citizens voted to leave the European Union.¹³ The country’s Prime Minister, Theresa May, announced October 2nd the same year, that the demerging from EU based on Article 50 of the Treaty on the European Union (hereon TEU) was initiated March 29th, 2017.¹⁴ With no precedents on EU demergers under the current Treaties, estimates of how long the process will take, how long the transition periods are and what the future legal status will be, are still very rough. Yet it is known that if no substituting solution is concluded within two years

⁵ Eidenmüller, *supra* nota 4, p 1-28.

⁶ Hoffmann (2012), *supra* nota 3, p 461-75.

⁷ Rath, G. “In London blüht der Konkurstourismus”, Die Presse 6.3.2013. diepresse.com/home/wirtschaft/eurokrise/1352836/In-London-blueht-der-Konkurstourismus (23.2.2017)

⁸ Wie kann ich als Deutscher in England oder wo auch immer. www.gutefrage.net/frage/wie-kann-ich-als-deutscher-in-england-oder-wo-auch-immer (23.3.2017)

⁹ Smith, A., Walters, A. ‘Bankruptcy Tourism’ under the EC Regulation on Insolvency Proceedings: A View from England and Wales. *INSOL International Insolvency Review* 2010, 19 (3), pp 181-208, p 183.

¹⁰ Commission Staff Working Document – Executive Summary of the Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, SWD(2012) 417 final, Strasbourg, 12.12.2012, p 20-1.

¹¹ *Ibid.* p 20.

¹² Pott, W. “Schulden-Tourismus nimmt zu”, Die Welt 22.10.2006. www.welt.de/print-welt/article88980/Schulden-Tourismus-nimmt-zu.html (23.2.17)

¹³ Bowler, T. “How has economy fared since Brexit vote?” BBC 17.1.2017. www.bbc.com/news/business-36956418 (28.2.2017)

¹⁴ Hunt, A., Wheeler, B. “Brexit: All you need to know about the UK leaving the EU” BBC, 20.3.2017. www.bbc.com/news/uk-politics-32810887 (21.3.2017, continuously updated)

of initiating the demerger, should there be absence of further agreements, EU law will cease to apply in the UK after those two years run out.

Given that hunters of quick discharge have been flowing especially towards UK, once UK leaves the Union it remains unsettled whether consumer insolvency tourism into UK will remain a feasible solution. Considering the opportunities in North-Eastern France, the type of debtors now relocating into UK might find those areas of France an option. The aim of this thesis is to draw possible scenarios on what the future might look like.

Thus the research question is: **“Does bankruptcy tourism into UK have a future after Brexit, will the tourism possibly flow to France or will the phenomenon come to its end altogether?”**

The methodology for researching this problem exploits a comparative approach. This includes discussing both national and EU law and comparing the contents and applications of the aforementioned. The comparison is based on literature, academic articles and case studies, juxtaposed to the framework set by European Union and national legislation. Due to the novelty of the phenomenon of a MS leaving the EU, currency of Brexit and the situation being under continuous development, this thesis will also have to refer to contents of news articles to provide information on the development of the Brexit-process where academia can not keep up with the pace of the process. In establishing what the situation was prior to the application of EIR 2000 some older academic articles will also be used as sources. It is also noteworthy, that some of the material will discuss the interpretation of the relevant EU regulation in insolvency of businesses, however, as will be seen, it has been held across academic sources that, for example, the interpretations of European Courts of EIR 2000 on corporate insolvency cases do also apply in cases on consumer insolvency. This is a logical continuation of the fact that the rights, which are conveyed to natural persons by way of EU citizenship, are also conveyed to legal persons established under EU law at least in connection with freedom of establishment¹⁵ – and analogically vice a versa.

At this point it shall also be brought to the attention of the reader that this thesis will be submitted for review before its publication and at the time of the publication factual matters connected with the process of Brexit moving forward might already be outdated. Neither can academic sources

¹⁵ Guzewicz, A. EU Citizenship and EU Entities: New Perspectives for Citizens and Companies. *Wroclaw Review of Law, Administration & Economics* 2013, 3 (1), pp 48-58, p 53.

keep up with the pace of such a current and urgent issue, thus it is advisable to follow up on the current status of Brexit at the time of reading and analyze the findings of the thesis also under the light of the latest events.

On determining what the future of bankruptcy tourism is, the key will be examining the “return on investment” (hereon ROI) the debtor gains by relocating to be discharged of their debts. Currently there are three main advantages for a foreigner in entering insolvency proceedings in the UK. Firstly, the process is quick. Secondly, the process aims at full exemption of debt. Thirdly, EIR and the principle of mutual recognition of judgments in EU force courts in other MS to recognize these judgments. The ROIs are key factors for evaluating what the future of bankruptcy tourism will be – will the return (forgiving debt) on the investment (moving to UK) remain high or will some step of the process (relocating, getting a court ruling, getting the ruling recognized in other countries, the wait for being exempted of debt) become too burdensome to actually bother going through the process? Or will new incentives to direct the flow of bankruptcy tourism elsewhere otherwise emerge? This balance of sacrifices versus the gains has already been presented, *inter alia*, by Hoffmann in contemplating whether the pay-off of being discharged has been disproportionate to the sacrifices to be made by relocating to another country to seek discharge.¹⁶

Essentially the hypothesis to support the research question above is that relocation into UK and the wait of discharge will become too burdensome to engage in such an endeavor. UK is known to have had reservations already regarding the former pillar of justice and home affairs during its EU membership. With Brexit the movement of persons will likely become even more restricted than it is now, considering UK is not even a part of the Schengen area, even though still in EU. Thus it seems taking the first step for a debtor will already become quite burdensome and costly. What the internal legal state will be, does not raise many concerns, but what will also matter is how easily UK judgments will be recognized later on in other countries?

If UK will become an unfeasible option for discharge seeking debtors, there is still the option to seek discharge in Northeast France. This thesis shall briefly explore the possibilities and hurdles connected with relocating in that area and whether a change of habitual residence necessary for a discharge can be maintained. Yet, one last important consideration in the context of this topic is, how possible consumer insolvency tourism will be once the recast of EIR enters into force?

¹⁶ Hoffmann (2012), *supra* nota 3, p 472.

The motivation for such a topic is the author's interest towards insolvency law in general. The topic touches upon two current issues: UK exiting EU and the recast of the European Insolvency Regulation entering into force June, 2017. The scope has been chosen to cover both of these issues, firstly, due to the peculiarity of consumer insolvency tourism as a phenomenon and the passing of the recast regulation bringing new aspects to the situation. Secondly, because UK has been a target country for forum shoppers in the context of consumer insolvency tourism and now with it potentially exiting EU, it is unclear what the regulatory connection between UK and EU will be in the future. Thus there are many things going on in this small regulatory space. Not only do changes in regulation cause turmoil, but a regulatory vacuum may also appear and thus it is interesting to establish whether or not this will be the case. The passing of the recast Regulation might have been a point of interest in itself, but considering the importance of UK as a target country for forum shopping in insolvency, it would from a holistic perspective be insufficient to discuss the impact of the recast without discussing Brexit, and vice versa, as the recast enters into force before Brexit. In addition to all of the above, the supervisor of this thesis is also familiar with the topic and having published academic writings on it, can ensure the quality of this thesis.

This thesis will first (chapter one) explain what so called "bankruptcy tourism", or in this case "consumer insolvency tourism" (the two expressions being interchangeable in this thesis) is on a general level. It is also essential to understand the drivers for forum shopping in this context, thus comparing relevant national legislation is done in chapter two. Having established the divergence between national legislation it shall be briefly discussed, why not harmonize national legislation completely? (Chapter three.) Where after chapter four will continue to discuss, why consumer insolvency tourism is so problematic and needs to be dealt with in private international law, if it cannot be removed by harmonization. To understand what Brexit is, chapter five will discuss what actually will take place during the process of exiting EU. After this, some models of what the future may look like for will be drawn in chapter six and how cross-border situations, especially in insolvency cases will be solved under each possible solution. Finally, the conclusions shall draw together a picture of what has been discussed and present the final standpoint of the author.

1. Consumer insolvency tourism and its regulatory base explained

1.1. What is consumer insolvency tourism?

Some percentage of households with debt will fail to repay and this is the assumption financial markets operate under. When all else fails, it is the “central aim of these households”¹⁷ to get rid of their remaining debt, i.e. discharged. As will be more specifically established in chapter two, discharge conditions vary depending on the political motivations behind the insolvency schemes in different countries: whereas some favor quick discharge, others favor prevention and enforce strict payment programs if a person ends up insolvent anyway. At the same time EU law grants recognition of debt discharges and bankruptcies decided in other MS. This due to the principle of mutual recognition having been established a desired EU principle already in 1999.¹⁸

Consumer insolvency tourism refers to “the relocation of over-indebted natural persons into a Member State granting a more favorable discharge regime from personal debt than the home country”¹⁹. This chapter will attempt to more precisely explain what consumer insolvency tourism is on a general level and what has been mentioned in the regulatory base, namely the European Insolvency Regulations of 2000 and 2015 (hereon generally referred to as EIR; individually EIR 2000; and EIR 2015 or recast).²⁰ Later chapters will address the regulatory divergence in insolvency law across EU, opening up better the understanding as to why forum shopping in this context exists. Only then can the inherent problems forum shopping gives rise to be addressed thoroughly.

¹⁷ Hoffmann (2012), *supra* nota 3, p 462.

¹⁸ European Parliament. Tampere European Council 15 and 16 October 1999 Presidency conclusions, 1999. www.europarl.europa.eu/summits/tam_en.htm (28.2.2017).

¹⁹ *Ibid.*, p 461.

²⁰ Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, OJ L 160/11 30.6.2000; and Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), OJ L 141/19 5.6.2015.

1.2. Regulatory base in EIR 2000 and EIR recast

1.2.1. The European Insolvency Regulation 1346/2000/EC

After the first version of the EIR was regulated a small, but noticed trend of relocating within EU, especially into the United Kingdom, in order to transfer one's Center of Main Interests there started emerging. COMI is a term in EU law that in the case of EU and insolvency of natural persons refers to habitual residence.²¹

Pursuant to recital nine of the European Insolvency Regulation of 2000 the regulation was to be applied "to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual." Article 16 of EIR 2000 grants that judgments in insolvency proceedings of a court, which holds international jurisdiction pursuant to Article 3 of the said regulation, shall be recognized in courts of all other MS. This excludes Denmark, which did not exercise its opt-in with this regulation.²² Acknowledging the disparity between insolvency schemes, the term "court" also includes non-judicial authorities with national jurisdiction to decide on an insolvency case, as specified in recital 10 of 1346/2000.

What is peculiar about this regulation is that, even though natural persons are covered by it pursuant to the recitals, no specifications as to necessary definitions are made later in the articles of the regulation. According to Art 3 of EIR 2000 a person's COMI determines the forum of insolvency procedures they enter, however, there is only specification as to the COMI of a company or legal person being by presumption their registered office. However, a close option can be found in recital 13 of the regulation.²³ It draws focus to the location where the debtor conducts the administration of their interests on a regular basis, and which therefor can be verified by third parties to be the COMI.²⁴ Some have argued that a recital cannot be considered a reliable source for a definition.²⁵ Nevertheless the Court of Justice of the European Union (hereon CJEU) confirmed in *Eurofood*, that the interpretation of COMI should focus on habitual residence and that the objectiveness and ascertainability of the fact by third parties is necessary and should be applied in assessment by all MS in a uniform manner.²⁶ Applying varying national definitions of,

²¹ Eidenmüller, *supra* nota 4, p 18.

²² Regulation 1346/2000/EC, *supra* nota 20, recital 33.

²³ Regulation 1346/2000/EC, *supra* nota 20, cited in Hoffmann (Hoffmann (2012), *supra* nota 3, p 467)

²⁴ Regulation 1346/2000/EC, *supra* nota 20, recital 13, cited in Weber (Weber, J.D. The rise of insolvency tourism: An enquiry into the centre of main interests of natural persons. LLM thesis, University of Leiden (2010) p 8)

²⁵ Fletcher 2007, p 1-2 and Virgós, Garcimartin & Alférez 2004, p 39, cited in Weber (*ibid*, p 8-9).

²⁶ CJEU, 2.5.2006, C-341/04, *Eurofood*, para 32-33, cited in Eidenmüller (Eidenmüller, *supra* nota 4, p 4-5) and Hoffmann (Hoffmann (2012), *supra* nota 3, p 467).

inter alia, domicile, would lead to different results in different MS and cause a disarray in the interpretation of EU law. Such would contradict the principle of ascertainability.²⁷

Once the court that was first seized deems to have jurisdiction, it shall as a general rule according to Art 7 of the regulation apply the insolvency law of the forum in the proceedings.²⁸ The court that is now the forum of main proceedings cannot, however, preclude initiation of secondary proceedings under Art 3(2) of the regulation in the courts of other MS. At the same time the decision to declare insolvency procedures initiated in the court of main proceedings should also have equivalent impact in all other MS fora, as local judgments on declarations of opening of proceedings would have. This is set out in Art 17 (1) of EIR 2000.

This pan-European impact of opening of insolvency proceedings in one MS is what gives rise to forum shopping. Given the later specified diversity between national insolvency laws, it is desirable for a debtor to seek declaration of insolvency in another country if they would gain a more favorable position in exchange for that, than they would in their home country. What grants this relocation possible is the freedom of establishment enshrined in Art 49 of the Treaty on the Functioning of the European Union (hereon TFEU). Whereas the term “establishment” at first might indicate this principle to be applicable on legal persons only, the Court of Justice in its judgment in, *inter alia*, *Daily Mail* has verified this principle to be applicable on natural persons especially.²⁹

1.2.2. The recast on EIR of 2015/848

In Article 46 of the EIR 2000 it was determined that the Commission should report to the European Parliament on the application of the regulation by 1 June 2012. The report recognized also some issues in connection with insolvencies of private persons. Due to various reasons not all proceedings available for private persons were recognized under EIR 2000, which lead into consumer debtors not being able to apply for recognition of discharge in all MS. The Commission saw this as a problem from the perspective of free movement.³⁰ The report also recognized that in

²⁷ Hoffmann (2012), *supra* nota 3, p 467.

²⁸ Regulation 1346/2000/EC, *supra* nota 20, Art 7.

²⁹ CJEU, 27.9.1988, C-81/87, *Daily Mail*, para 12.

³⁰ Report From the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, COM(2012) 743 final, Strasbourg, 12.12.2012, p 7

order to limit wrongful forum shopping, there was, among other procedures, the need to clarify the application of COMI-rules for individuals.³¹

The Commission Staff Impact Assessment on the Regulation of 2000 proposed the drafting of an amended regulation.³² Thus, as recital 1 of the Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) defines it, for the sake of clarifying some provisions and increasing the efficiency of cross-border insolvency proceedings, the recast regulation was passed in June 2015 and will, according to Art 92, with some minor exceptions enter into force 26 June 2017.

The recast was by no means a revolution. The attempt is to keep the current status quo more or less in place and merely streamline some processes.³³ The aim was clearly not to ban relocations of overindebted consumer debtors in general, as that would be in violation of the freedom of establishment. However, the regulation had received some critique on allowing forum shopping.³⁴ The issue to begin with was that the rights of debtors and creditors were not in balance.³⁵ The biggest concern seem to have been the non-banker creditors, who do not consider such a risk when issuing a loan to the debtor and unwilling creditors, such as victims of tort. Neither do they have the resources to acquaint themselves with all national legislation of the fora, which' discharge-judgments are recognized at home courts.³⁶

As in EIR 2000, in the recast the requirement of the correct forum being that where the debtor's COMI is, is also mentioned in Art. 3. However, in the recast Art. 3(1)(4) also explicitly specifies COMI of natural persons to mean habitual residence and mentions a qualifying period of six months. This means that before a person can qualify for filing for entry to a consumer insolvency regime in a MS court (Denmark did not exercise its opt-in with the recast either), they need to have had their COMI in that MS for at least six months. What was priorly found in recital 14 of EIR 2000, can now be found an equivalent for in recital 28 of the recast. Thus the point of administration of main interests still holds significance in determining where a person's COMI in

³¹ *Ibid.*, p 17

³² Commission Staff Working Document – Impact Assessment Accompanying the Document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, SWD(2012) 416 final, 12.12.201, p 46.

³³ McCormack, G. Reforming the European Insolvency Regulation: A Legal and Policy perspective. *Journal of Private International Law* 2014, 10 (1), pp 41-67, p 65.

³⁴ Latella, D. The “COMI” Concept in the Revision of the European Insolvency Regulation. *European Company & Financial Law Review* 2014, 11 (4), pp 479-94, p 482.

³⁵ Hoffmann (2012), *supra* nota 3, p 463.

³⁶ *Ibid.*, p 469-70.

actuality is. Articles 4 and 5 are also completely new without prior equivalents³⁷ and prorogate the obligation of determining whether the court first seized has jurisdiction to that court. In this context a court can still also refer to a non-judicial party assigned with the interim processing of the insolvency.³⁸

1.3. Who forum shop for consumer insolvency?

It might seem counter-intuitive that someone, who has no way of paying for their debts would nevertheless have the means to relocate into a foreign country and get everything needed to indicate a genuine change of habitual residence in place. This genuine change has said to be indicated by registration of inhabitation, employment, respective maintenance costs at the alleged residence and social ties in local communities.³⁹ Showing such genuine change of habitual residence would require having sufficient amounts of liquid funds available to acquire a place to live, apply for residency and other permits, as well as the capability to bare possible temporary unemployment and therefor possibly no welfare support, as EU law does grant social support in a target country for relocation only under limited conditions.

Therefor the consumer debtors privileged enough to transfer their COMI, yet capable of getting overindebted, are usually middle class professionals.⁴⁰ They have transferable skills and assets.⁴¹ These kinds of intellectual resources ease adaptation to a new society elsewhere. Such debtors can “maintain a sufficiently sophisticated administrative infrastructure”⁴² to go through the trouble of traveling abroad and setting up a life there. Debtors with in practice no liquid funds and in over their heads in debt have no real resources to do so. It is also noteworthy, that Brown et al. have noted overindebtedness usually refers to legal persons, however, it is now also being used in connection with natural persons and, depending on jurisdiction, refers to consumer insolvency or bankruptcy specifically or being “a basis for relief from debt more generally.”⁴³

³⁷ Regulation 2015/848, *supra* nota 20, Annex D.

³⁸ *Ibid.*, recital 20.

³⁹ Hoffmann (2012), *supra* nota 3, p 468.

⁴⁰ *Ibid.*, p 470.

⁴¹ Smith, A., Walters, A., *supra* nota 9, p 204-5.

⁴² Hoffmann (2012), *supra* nota 3, p 470.

⁴³ Brown et al., *supra* nota 2, p 342.

In UK The Insolvency Service has recognized attempts to forum shop for discharge counted in some hundreds, but only a part has been successfully rejected.⁴⁴ A majority of discharge seeking foreigners were indeed German at the time of the Insolvency Service's research.⁴⁵ Others have also recognized there are not many actual cases to compare.⁴⁶ Additionally, these few are not easily found due to being national judgments in over 20 different languages.⁴⁷ This is not too surprising considering that, even in the United States an econometric study on the economic effects of pre-bankruptcy interstate migration showed only modest impact.⁴⁸ Including Smith and Walters recognize, that in terms of quantity the phenomenon is limited, but what is more interesting here is how norms regulated by different entities, such as national legislators and EU legislators, interplay.⁴⁹ Hoffmann has also argued that this kind of forum shopping has been not only something that should be disapproved of, but also something contrary to recital 4 of the EIR of 2000 itself.⁵⁰ This makes forum shopping an issue even within the norm itself. To put this in simple terms – the quantitative magnitude of this phenomenon has never been the biggest issue, it is the fact that a moral point of view reflected in the aims of the regulation would deem it unacceptable, but currently it seems that the application of law nevertheless has allowed it.

As established above, the motivator for these overindebted individuals to move abroad is a chance to be discharged of their debts faster than they would in their own home countries or current countries of residence. Next chapter will compare different types of insolvency regimes available for consumer debtors and help understand the geographical streams of forum shopping.

⁴⁴ The Insolvency Service (2012), cited in Hoffmann (Hoffmann (2012), *supra* nota 3, p 462).

⁴⁵ The Insolvency Service (2012), cited in Brown et al. (Brown et al., *supra* nota 2, p 403).

⁴⁶ Weber, *supra* nota 24, p 4.

⁴⁷ Wessels, B. Revision of the EU Insolvency Regulation: What type of facelift? (2011) <http://www.eir-reform.eu/uploads/papers/PAPER%205-1.pdf> (5.3.2017).

⁴⁸ Elul, R. Subramanian, N. Forum-Shopping and Personal Bankruptcy. *Journal of Financial Services Research* 2002, 21 (3), pp 233-255, p 250.

⁴⁹ Smith & Walters, *supra* nota 9, p 183.

⁵⁰ Hoffmann 2012), *supra* nota 3, p 462.

2. Member state insolvency law on insolvencies of natural persons

2.1. What insolvency procedures are and the policy choices behind them

Insolvency procedures are a way to treat over-indebtedness, but the content of these procedures vary ranging from emphasizing repayment to discharge or combining features of the two.⁵¹ Those emphasizing mere discharge are referred to as neo-liberal, and those in favor of financial control are said to be enforcing a social market –policy. The social market –model protects creditors against early termination of debt and discharge.⁵² The approach can be characterized by having “usury ceilings, capped default interest rates, protection against early termination and discharge, [...] warnings and information on debt.”⁵³ This approach is visible in many continental European countries, such as France and Germany.⁵⁴ Neo-liberal politics in turn favor extensive disclosures to consumers on the credit terms and educating them on financial literacy.⁵⁵ UK is one country to exercise such debt politics.

Whereas policy choices are the foundation for how insolvency regulation is built in different countries, Niemi has presented a classification based on the discouragement respective regimes provide for taking debt.⁵⁶ In his article Hoffmann in turn groups countries into five groups, the first two including countries with no or partial discharge and the latter three groups including countries with different regimes granting full discharge.⁵⁷ Combining elements of these two approaches, the following comparison will build on a flow starting from systems of weak debtor protection and finish with those, which discharge the quickest. The division into groups will follow a more quantifiable system of classification, as the number of years one has to wait for discharge and whether one is granted are apparent main drivers for insolvency tourists fleeing their home country. The comparison is more an overlook on different legal families within EU, as individually discussing legislation of 26 MS is beyond the focal point of this thesis.

It is noteworthy that the definition of over-indebtedness and the limit to accessing consumer insolvency proceedings vary depending on the jurisdiction. Some jurisdiction put emphasis on an absolute amount of debt that is required to access proceedings, other calculate a debt-to-income-

⁵¹ Niemi, J., Ramsay, I., Whitford, W.C. (ed.) *Consumer Credit, Debt and Bankruptcy Comparative and International Perspectives*. Oxford, Hart Publishing 2009, p 2.

⁵² *Ibid.*, p 3.

⁵³ *Ibid.*, p 78.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*, p 3.

⁵⁶ *Ibid.*, p 102.

⁵⁷ Hoffmann (2012), *supra* nota 3, p 463-6.

ratio with a certain limit being decisive.⁵⁸ Whereas these factors likely do have impact on when a person might seek for discharge in another jurisdiction, it seems like evident discharge possibilities would have more input on the decision to forum shop.

2.2. Countries without or with a very weak consumer insolvency settlement regime

Consumer natural persons cannot currently seek discharge in Bulgaria.⁵⁹ This is confirmed by the fact that only the bankruptcy proceedings of companies (*Производство по несъстоятелност*) are recognized in the EIR 2015.⁶⁰ Though it has been noted, that a draft for insolvency procedures for individuals is under progress.⁶¹ Malta neither recognizes consumer debtors in insolvency proceedings, but does provide for a bankruptcy scheme for sole traders.⁶²

2.3. Countries with payment programs of 5 years or more & discharge

Legal developments of recent years have lead to a good situation, where all countries that have an insolvency regime for consumer debtors, now have at least one insolvency regime among many available, that also provide discharge. However, in most systems extrajudicial negotiations attempting to reach settlement are rather a precondition to access judicial proceedings upon their failure. Most countries try to direct people to private settlements, as such proceedings are often less costly and more flexible than court proceedings.

In German law –based legal systems “The debtor earns the discharge by fulfilling the payment obligations of the plan”⁶³. The emphasis is truly on earning and going through a number of phases before being awarded a discharge.⁶⁴ However, the possibility to be discharged will only present itself after six years in Germany.⁶⁵ In Austria the equivalent is generally seven years.⁶⁶ Before that, all liquid assets and income above the minimum standard for living will be used to satisfy outstanding debts.⁶⁷ In Austria debtors will in most cases automatically proceed to discharge

⁵⁸ Brown et al., *supra* nota 2, p 342-3.

⁵⁹ Hoffmann (2012), *supra* nota 3, p 463; Brown et al, *supra* nota 2, p 343.

⁶⁰ Annex A.

⁶¹ Brown et al., *supra* nota 2, p 364.

⁶² *Ibid.*, p 343.

⁶³ Niemi et al., *supra* nota 51, p 102.

⁶⁴ Ramsay, I. Between Neo-Liberalism and the Social Market: Approaches to Debt Adjustment and Consumer Insolvency in the EU. *Journal of Consumer Policy* 2012, 35 (4), pp 421-441, p 432.

⁶⁵ Eidenmüller, *supra* nota 4, p 19.

⁶⁶ Brown et al., *supra* nota 2, p 396 and 404.

⁶⁷ Eidenmüller, *supra* nota 3, p 19.

handling after following the payment plan for its set time.⁶⁸ In Germany the decision to discharge has been considered a separate judgment from those of the initiation and closing of the insolvency proceedings themselves.⁶⁹ One debate around this has also been over whether or not the discharge judgment is an integral part of the insolvency proceedings as under Art 4(2)(j) of EIR 2000.⁷⁰ Only as an integral part of the proceedings will it have cross-border impact. This separation of debt-settling and discharge judgments is also applicable in Spain.⁷¹ Both Spain and Portugal require a five-year-plan should be followed thru with as a pre-condition before an application for discharge can be submitted.⁷²

France and Benelux-countries put very much emphasis on prevention and if despite that a person becomes insolvent, payment plans are rigorous and long before a discharge is granted.⁷³ France has had a version of its own on consumer insolvency law enacted also already in 1989, but with very strict conditions to bankruptcy, which have been loosened in 2003 to enable the debtor being discharged of all their debt.⁷⁴ As of 2016 the discharge period has been reduced from eight to seven years.⁷⁵ The regime recognizes two types of debtors and respective procedures: the *surrendettement*, where debtors are debtors in good faith but clearly unable to meet their non-professional debts and *rétablissement personnel*, where the debtor has no actual ability to repay their debts and are thus in need of rescue. Luxembourg has also two options available, where the first one reminds *surrendettement* of the French regime and the second option covers guarantees made for debts of a sole trader.⁷⁶ Whereas a judge may order complete discharge of some debt, payment plan is adhered to for a maximum of 7 years.⁷⁷ Belgium grants discharge after five years have passed from the conclusion of a payment plan.⁷⁸ The Netherlands falls somewhere in between with no discharge in some cases but a discharge period even down to a maximum of three years in another type of proceeding.⁷⁹

⁶⁸ Brown et al., *supra* nota 2, p 401 and 404.

⁶⁹ Insolvenzordnung, Section 300, cited in Hoffmann (Hoffmann (2012), *supra* nota 3, p 466).

⁷⁰ An equivalent provision is in Art 7(2)(j) of EIR 2015.

⁷¹ Brown et al., *supra* nota 2, p 396.

⁷² For Spain, *ibid.*, p 419; and for Portugal *ibid.*, p 416.

⁷³ Niemi et al., *supra* nota 51, p 102.

⁷⁴ *Ibid.*, p 100.

⁷⁵ Brown et al., *supra* nota 2, p 366.

⁷⁶ *Ibid.*, p 345.

⁷⁷ *Ibid.*, p 413.

⁷⁸ *Ibid.*, p 404.

⁷⁹ *Ibid.*, p 413-4.

Other countries with payment plans generally in force for over five years are Hungary and Romania with some exceptions that require a larger portion of debt having been repaid.⁸⁰

2.4. Countries with payments programs of 2-5 years & discharge

Nordic countries issued their laws on non-commercial private persons' bankruptcies in the early 1990's. Nordic insolvency regimes favor pre-judicial negotiations between the debtor and creditors, much like the systems later adopted in Benelux-countries.⁸¹ On a general the countries also put very much emphasis on good faith of the debtor: only may a cooperating and unwillingly overindebted individual be granted access to insolvency procedures.⁸² The Scandinavian (also applies to Finland) model offers relief from all remaining debt after a payment plan has been followed for a set period of time.⁸³ In Finland payment plans begin at three years and can extend to about seven.⁸⁴ The extension from five years up only applies for creditors, who are private persons, such as victims of crime.⁸⁵ Sweden similarly has five-year-payment plan extendable up to seven.⁸⁶

Italy offers different options with payment plans with ranging time spans. Extrajudicial payment plan only results in a re-established sum of debt – no possibility for a discharge.⁸⁷ But a later established judicial procedure does grant discharge after four years.⁸⁸ Despite the period being short, the requirements the debtor has to follow during that period in terms of seeking employment and trying to gain financial stability are rather harsh. Kilborn has characterized the Italian system as on of earned start, rather than the so called fresh start. However, what eases access to discharge is not having to attempt a settlement with debtors as a pre-requisite, even though such a system exists.⁸⁹

⁸⁰ Hungary: *Ibid.*, p 409; Romania: *Ibid.*, p 417.

⁸¹ Niemi et al., *supra* nota 51, p 101.

⁸² *Ibid.*, p 102.

⁸³ *Ibid.*, p 101.

⁸⁴ Laki yksityishenkilön velkajärjestelystä 57/1993, 30 §.

⁸⁵ Finnish Government, HE 52/2010, ch 3.

⁸⁶ Brown et al., *supra* nota 2, p 420.

⁸⁷ *Ibid.*, p 411.

⁸⁸ Kilborn, J. Reflections of the World Bank's Report on the Treatment of the Insolvency of Natural Persons in the Newest Consumer Bankruptcy Laws: Colombia, Italy, Ireland. *Pace International Law Review* 2015, 27 (1), pp 306-44, p 325.

⁸⁹ *Ibid.*, p 324.

Croatia's first Act on Consumer Bankruptcy entered into force January 1st, 2016.⁹⁰ Access to court proceedings requires a declaration of unsuccessful out-of-court settlement proceedings. If a debtor is deemed to have no means to pay their debts, the proceedings are closed immediately and the court appoints a so called behavior-checking period, lasting for five years. Where the debtor has assets, the court sets a behavior-checking period, during which all assets that can be subject to enforcement, are used to repay debt.⁹¹ Garasic has specified the behavior-checking period for debtors with assets to be one to five years.⁹² Specific statistics on the actual application of the law is yet to be available. Access to court proceedings and discharge require going through pre-judicial proceedings, where only those with no funds can access court proceedings quickly, but are not *per se* discharged and will remain under scrutiny for the upcoming five years, which in the author's view seems to make the Croatian scheme slightly more burdensome for the debtor than the lighter schemes available are.

Also Greek law requires failed pre-judicial settlement attempts in order to qualify for court proceedings.⁹³ However, once in Court, some of debt may be discharged immediately, subject to the condition that the debtor follows their payment plan.⁹⁴

Ireland permits discharge in principle even after a year, but has other conditions which effectively extend payment order to three years.⁹⁵ Moreover, a challenge to the discharge may extend the wait for it up to eight years.⁹⁶ Similarly to Irish payment orders, UK courts can order debtors to use their income or assets for repaying debt left over for five years following discharge.⁹⁷ However, the impression various sources have given is that UK courts are more lenient towards granting discharge and letting it be from there on.

Other countries with payment plans of three years or so are Lithuania, Cyprus, Latvia and Poland⁹⁸. Those with approximately five years of wait before discharge include also Czech Republic, though

⁹⁰ Ivković, O. & Kruc, M. Croatia: Consumer Bankruptcy Act Introduces Consumer Bankruptcy into the Legal System. (2016) www.schoenherr.eu/uploads/tx_news/Croatia_Consumer_Bankruptcy_final_pdf3.pdf (28.2.2017), p 1.

⁹¹ *Ibid.*, p 4.

⁹² Garasic, J. New bankruptcy law in Croatia. *EuroFenix*, Autumn 2016, (65), pp 36-8. www.insol-europe.org/publications/eurofenix-past-issues (20.4.2017), p 38.

⁹³ Brown et al., *supra* nota 2, p 375

⁹⁴ *Ibid.*, p 408.

⁹⁵ *Ibid.*, p 367.

⁹⁶ *Ibid.*, p 395.

⁹⁷ *Ibid.*, p 401.

⁹⁸ For Lithuania; *Ibid.*, p.368; Cyprus, *Ibid.*, p 405; Latvia, *Ibid.*, p 411; and Poland, p 415.

evidence show court rules for payment plans of approximately two years.⁹⁹ In turn in Estonia a debtor can apply for discharge from the court after five years of the initiation of insolvency proceedings.¹⁰⁰ Slovenia has slightly more variation with payment plans ranging from two to five years, but after its fulfilment the court grants discharge *ex officio*.¹⁰¹

2.5. The most favorable systems: discharge within 2 years of filing

2.5.1. UK

UK exercises neo-liberal politics in its debt policy.¹⁰² Common law has also traditionally emphasized nearly unconditional access to discharge¹⁰³. This political choice, traditional in Anglo-Saxon legal tradition, is also increasingly common in Europe and puts emphasis on consumer relief.¹⁰⁴

The actual law in UK has been relatively debtor friendly and that can be attributed to their neo-liberal approach. However, it has moved to an even debtor-friendlier direction during the past couple of decades. In the original 1986 Insolvency Act discharge was granted after 3 years.¹⁰⁵ This was recently reduced down to one year for first-time bankrupts, who show cooperation and have failed due to external reasons.¹⁰⁶ Access to discharge is not a sole prerogative of the first-timers – even others may be relieved of their remaining debts after they have complied with a repayment program for an appointed time.¹⁰⁷

In practice the fastest way out of debt can only be initiated if the debtor cannot reach an agreement with its creditors on debt repayment.¹⁰⁸ Once a private individual officially enters bankruptcy, the process of repayment is outsourced to a trustee, who shall take care of settling with the creditors and paying off all debt possible.¹⁰⁹ “Discharge is granted automatically after 1 year [...], but the

⁹⁹ *Ibid.*, p 405.

¹⁰⁰ Pankrotiseadus, RT I 22.1.2003, 17, 95, § 175(1).

¹⁰¹ Brown et al., *supra* nota 2, p 418.

¹⁰² Niemi et al., *supra* nota 51, p 3.

¹⁰³ *Ibid.*, p 7; 8. Grossman, A. Conflicts of laws in the discharge of debts in bankruptcy. *INSOL International Insolvency Review* 1996, 5 (1), pp 1-35. www.uniset.ca/microstates/5IntlInsolvRev1_ocr.pdf (28.2.2017), p 1.

¹⁰⁴ Niemi et al., *supra* nota 51, p 6.

¹⁰⁵ *Ibid.*, p 101.

¹⁰⁶ *Ibid.*, p.76 and 101.

¹⁰⁷ *Ibid.*, p 101.

¹⁰⁸ Insolvency Act 1986, sec. 264, cited in Hoffmann (Hoffmann (2012), *supra* nota 3, p 465).

¹⁰⁹ Hoffmann (2012), *supra* nota 3, p 465.

official receiver is entitled to declare the investigation of the bankrupt's affairs as unnecessary or concluded [...], which results in immediate discharge after filing of the respective note at court.”¹¹⁰

2.5.2. Regions of Alsace and Moselle in France

Whereas most of France follows a stricter insolvency regime, a discharge will follow immediately after insolvency proceedings have ended ”in *départements* of Haut-Rhin, Bas-Rhin and Moselle.”¹¹¹ Handling times revolve around one year and thus the discharge period is very similar to the UK.

Even the Commission Impact Assessment recognizes the above mentioned areas as a destination of forum shopping.¹¹² Despite doing so, this area of France has for some reason not posed itself as equally attractive as UK has, regardless of its vicinity to, *inter alia*, Germany, an otherwise popular origin of forum shoppers.¹¹³ The reason might be that the discharge seeking debtors might not speak French as widely and find UK an easier target country. It could also be speculated, whether the local courts will find a COMI change genuine enough, if access to home country is as easy as it is with neighboring states.

With the divergence between the systems apparent, some might consider the solution self-evident: harmonizing national law. Why bother building up complex layers of jurisdiction rules, when EU has an opportunity to harmonize national legislation? The answer is not as simple as it at first might seem. Next chapter will discuss the possibilities and problems around harmonizing national insolvency laws.

¹¹⁰ Insolvency Act sec. 279, cited in Hoffmann (*Ibid.*).

¹¹¹ Eidenmüller, *supra* nota 4, p 19.

¹¹² SWD (2012) 416 final, *supra* nota 32, p 20.

¹¹³ *Ibid.*, p 20.

3. Should national insolvency laws be harmonized across EU?

Despite the divergence having been acknowledged in EIR 2000, there was already then no effort to bring national legislation closer to each other because it was considered an impractical mission.¹¹⁴ A research by Insol Europe in 2010 suggested, however, that MS should harmonize their insolvency law.¹¹⁵ This would definitely be a method for ending the problem of forum shopping in insolvency for good. Yet there are some differences in impacts respective national insolvency regimes have. If national legislation was to be harmonized, EU bodies would need to decide which way to go: repayment or discharge?

Currently the majority of jurisdictions have put in place systems, where discharge is available at around 2-5 years after filing or as of starting with a payment program. As an example, in Canada easing access to bankruptcy has increased their amount.¹¹⁶ Whereas an increasing amount of bankruptcies and debts that likely will never be completely repaid definitely have an adverse impact on businesses, which will never receive their earnings in full, it is also noteworthy, that fast discharge might nevertheless be less costly to the society as a whole. Firstly, many repayment plans are lengthy and seem to fail. Secondly, administering these repayment plans is costly.¹¹⁷ Especially considering they require supervision and efforts in planning. Thirdly, the creditor actually barely gets their own back.¹¹⁸ Lastly, shorter discharge periods preserve more human capital.¹¹⁹ Even the Dutch replaced their prior system emphasizing bilateral agreements between the creditors and debtors with judicial settlement, which creditors actually prefer.¹²⁰

In connection with the last argument, few articles actually further discuss the socio-economical aspect of *debt-imprisonment* (in Finnish “*velkavankeus*”) – a person being held in debt for as long as the debtor is alive or has paid their debt. Whereas demanding payment of debt in full would benefit the creditors in them getting more or less the sum they were expecting, the actual economic value of that debt-repayment is far more questionable. Not only will they have to administer that repayment over the years the little wells of money slowly accumulate to a repaid debt, but the

¹¹⁴ McCormack, G. Reconstructing European insolvency law – putting in place a new paradigm. *Legal Studies* 2010, 30 (1), pp 126-146, p 127.

¹¹⁵ Mucciarelli, F.M. Not just Efficiency: Insolvency Law in the EU and its Political Dimension. *European Business Organization Law Review* 2014. 14 (2), pp 175-200, p 177.

¹¹⁶ Niemi et al., *supra* nota 51, p 6.

¹¹⁷ *Ibid.*, p 8.

¹¹⁸ *Ibid.*, p 103.

¹¹⁹ Eidenmüller, *supra* nota 4, p 19.

¹²⁰ Niemi et al., *supra* nota 51, p 9.

repayments will also lose some of their value with the effect of inflation despite interest rates, as reference rates are only trying to keep up with inflation. Essentially the net present value of such an investment for the creditor, accounting for inflation, their profit expectations and costs, would likely not rise above zero – making it an investment any knowledgeable investor would avoid if they were given the chance to do so in advance. Few investors want to be tied to administration of a costly process with essentially no return on investment, when they likely will consider such a failed relationship with a debtor and their investment as a sunk cost and would presumably prefer to write it off.

For example, banks have margins in addition to the reference rates just so they can cover all the actual revenue making costs and accumulate some profit on the lending. A creditor not expecting to be waiting for repayment for, let's say 15 years in stead of five, does not know they should be taking such risks into account. Especially not an unexpected creditor, such as a victim of tort, where the debtor would be the tortfeasor. At the same time the debtor might see little psychological motivation in getting back on their feet, when all their income above the required minimum for living will go into paying their debt back. The adverse psychological impact of, *inter alia*, losing a home as the consequence of asset liquidation is also recognized.¹²¹ This might inhibit the motivation to get a higher paying job, or a job at all for that matter – especially if there are any fiscal disincentives for earning larger sums of money. Thus there are reasons beyond the mere legal or purely economical to consider when trying to put the benefits of the debtor and creditor into balance. Mitigating social and financial exclusion both have also been recognized necessary by the EU Commission.¹²²

What this seems to suggest, and Niemi et al. have also brought up in their work, is that there is pressure to adopt more neo-liberal schemes.¹²³ Such options emphasize discharge. Discharge has actually been brought to many European countries' legal systems, but executed heterogeneously.¹²⁴ Yet it has also been presented that the neo-liberal culture itself is one of the causes for liberal attitudes towards debt taking.¹²⁵ The disincentives difficult access to discharge

¹²¹ Brown et al., *supra* nota 2, p 337.

¹²² Brown et al., *supra* nota 2, p 338.

¹²³ Niemi et al., *supra* nota 51, p 9.

¹²⁴ Hoffmann (2012), *supra* nota 3, p 473; and Brown et al., *supra* nota 2, p 363.

¹²⁵ Niemi et al., *supra* nota 51, p 77.

is presenting to the public in continental Europe may be one reason behind Europe's lower bankruptcy rates compared to that of the United States.¹²⁶

This brief outlook on the political reasons for differences in the aims of debt release systems has been the foundation for bankruptcy tourism to even have emerged. Once EIR 2000 entered into force, the recognition of UK rulings on discharge being recognizable offered residents of other EU MS the opportunity to get a "fresh start" easier than they probably could have ever imagined. Whereas regulatory competition is natural, the access to easier insolvency regimes with recognition of judgments in creditors' countries may lead to what initially seem like unfair results.

Ramsay also presents that there is tension between EU and the MS that promote the social market –approach, because EU tends to promote a more neo-liberal policy, whereas continental European countries emphasize the social market –approach.¹²⁷ However, as observed above in France's case, continental European bankruptcy schemes are feeling the pressure and reacting to level the divergence between legal systems. Some are relaxing their cumbersome accessibility criteria and simplifying procedure.¹²⁸

Yet it seems that the choice then made by EU legislators the first time has been correct, since the econometric study by Elul and Subramanian in US also discovered that interstate differences in discharge regimes is not a major driver of the choice where to migrate amongst those who file for bankruptcy.¹²⁹ The study strongly suggested that the focus of insolvency regulation should be the impacts of regimes on local population, rather than on potential forum shoppers.¹³⁰ Differences between EU and US limit the applicability of the results of the aforementioned study on the circumstances in EU. However, if anything, there are more barriers to freedom of movement in EU than in US, such as cultural, socio-political and linguistic heterogeneity, which in the author's view actually are larger than those present in the US at face value. Thus EU MS should in the author's view first and foremost regulate insolvency laws suitable for their respective local cultures and debt-policies – not necessarily harmonize substantial laws across EU. This especially keeping in mind that EU is a Union of nation states, not a federal state, and is known to be culturally very diverse with MS in different stages of economic development.

¹²⁶ *Ibid.*, p 102.

¹²⁷ *Ibid.*, p 78.

¹²⁸ *Ibid.*, p 7.

¹²⁹ Elul & Subramanian, *supra* nota 48, p 249.

¹³⁰ *Ibid.*, p 250.

Therefore harmonization of national legislation does not seem like a feasible option for ending all kinds of forum shopping in insolvency. Thus it remains relevant to discuss the other options available post Brexit to discover if consumer insolvency tourism has a future further along the way?

Having established the fundamentals for what factors enable (freedom of establishment and mutual recognition of judgments) and drive consumer debtors to forum shopping (regulatory diversity with access to easier insolvency schemes), the grounds for understanding why relocations within freedom of establishment are problematic have been established. These problems will be discussed in the next chapter.

4. Why is consumer insolvency tourism so problematic?

The actual issue with consumer debtors forum shopping when at the brink of insolvency is that of balancing between freedoms and obligations. Freedom of establishment is enshrined in TFEU, a founding Treaty of the Union itself. It is one of the fundamental principles of EU and thus grants every EU citizen a principal right to relocate to any other MS within the EU, given they have no history that would grant them a danger to that society. At the same time forum shopping is considered something to be disapproved of in the recitals of both EIR 2000 and the recast. Even though, for example, Szydło has argued in the context of companies forum shopping for bankruptcy, that forum shopping should be permitted where it is done before initiation of proceedings and is not an evident abuse of law.¹³¹

Hoffmann contemplated in his article on consumer insolvency tourism that is this form of forum shopping a mere violation of EIR 2000 or is it rather in violation of the founding Treaties even? British courts have been popular under the EIR 2000, as they comply with the freedom of establishment very literally. Under the current regime they have required nothing else but a COMI shift for a person to be eligible for discharge.¹³² However it did require the CJEU to specify that the time of filing the application is decisive in determining COMI.¹³³ The British courts have remained in *Eichler* that there is no consideration as to the motivations of the shift, as long as the COMI shift can be ascertained to be physically genuine.¹³⁴

Neither is it certainly not in the creditors' interest that a debtor seeks discharge under a more favorable insolvency regime, when the creditor has not foreseen that possibility.¹³⁵ In a corporate bankruptcy the legal person in debt becomes dissolved and thus it is effectively in the benefit of the creditor to partake in the proceedings to get some of their credit paid. However, in an insolvency regime for a consumer debtor, the natural person will not cease to exist, they will live on and will be granted a small portion of their income as means to live.

¹³¹ Szydło, M. Prevention of Forum Shopping in European Insolvency Law. *European Business Organization Law Review* 2010, 11 (2), pp 253-272, p 272.

¹³² Hoffmann (2012), *supra* nota 3, p 468.

¹³³ CJEU, 17.1.2006, C-1/04, *Staubitz-Schreiber*, cited in Hoffmann (*Ibid.*, p 468).

¹³⁴ HCOJ, 20.12.2006, [2007] BPIR 1636, *Official Receiver vs. Eichler*, cited in Hoffmann (*Ibid.*).

¹³⁵ Hoffmann (2012), *supra* nota 3, p 461.

At the same time there is also the prohibition of abuse of the freedom of establishment to consider, vaguely established a EU principle by CJEU in *Centros*.¹³⁶ The Court listed in paragraph 24 of the *Centros*-judgment that it has in multiple cases allowed for measures to be taken if a national is attempting to circumvent their own national legislation improperly. However, as the Court of Justice has put in *Centros* and *Inspire Art* in connection with companies forum shopping, a lack of real intentional connection to the MS of residence was not in itself alone an abuse of law.¹³⁷ This can be supported by CJEU's judgment in *Emsland-Stärke*, where an abuse would require gaining advantage through the application of community rules and gaining that advantage by conducting an artificial operation, which a genuine change in COMI by definition cannot be.¹³⁸ Yet, in *Eurofood* CJEU put more emphasis on the importance of the real COMI that can also be foreseen by creditors.¹³⁹

The outcome of the jurisprudence in the author's view is all but clear. It was not until the Commission Impact Assessment on EIR 2000 and passing of the recast that it became evident creditors' interests should also matter. Although the wording of the recitals disapproving of forum shopping in both of the EIRs specifically mentions the ban, it was not until in the recital 5 of the recast that the phrase "to the detriment of the general body of creditors" was added. Considering that the six-month-qualifying period set out in Art 3 of the recast is also to be fulfilled before gaining access to insolvency proceedings in a MS in the future, it seems clear that forum shopping should be prevented in every way possible. However, what remains unsettled, is whether or not managing to transfer one's COMI even under the new regime will constitute something that should be punished of, or will it fall within a gray area where complying with the letter of the law will be considered lawful, even if the motivation of the relocation would be against the spirit of the law?

Managing with such a maneuver would, according to Eidenmüller's criteria, be a book example of what constitutes as abuse of law.¹⁴⁰ But Eidenmüller does add, that there should also be some kind of manufacturing of facts included – as was set as a requirement in *Emsland-Stärke* above. What is also clear in Eidenmüller's opinion, is that the concept of abuse of law cannot stand alone,

¹³⁶ CJEU, 9.3.1999, C-212/97, *Centros*, cited in Eidenmüller (Eidenmüller, *supra* nota 4, p 2).

¹³⁷ *Centros*, *ibid.*, para 26; CJEU, 30.9.2003, C-167/01, *Inspire Art*, para 139, both cited in Eidenmüller (Eidenmüller, *supra* nota 4, p 2).

¹³⁸ CJEU, 14.12.2000 C-110/99, *Emsland-Stärke*, para 39, cited in Hoffmann (Hoffmann, T. The Brexit and Private International Law – an Outlook from the Consumer Insolvency Perspective. Unpublished article 2017, available from Hoffmann, T., pp 1-12, p 9).

¹³⁹ *Eurofood*, cited in Eidenmüller (Eidenmüller, *supra* nota 4, p 4-5).

¹⁴⁰ Eidenmüller, *supra* nota 4, p 9.

but should always be interpreted in connection with the law that is supposedly being abused.¹⁴¹ In practice this would mean first determining what the main purpose of a given instrument or law is, and then, whether or not the instrument has been used contrary to its true purpose. In the context of EIR 2000 Eidenmüller held one purpose to be the prevention of forum shopping, as it formulated in the recitals.¹⁴² In the new regulation it is evident that this aim still stays, but given also *Eurofood* and the addition to the wording of the recital, the recast regulation seems to put more emphasis also on foreseeability of risks for the creditor. Eidenmüller has also foreseen such a possibility and written that the kind of qualifying period that now will exist, once EIR 2015 enters into force, could even be referred to as an “ ‘institutionalised anti-abuse rule’.”¹⁴³ Thus making forum shopping with manufactured facts an act where the instrument is used against its purpose – qualifying forum shopping as abuse of law under Eidenmüller’s conditions.

Given EIR recast enters into force soon after this thesis has been published, the issue post-Brexit remains that if bankruptcy tourism can still be facilitated under the future legal regime where EIR recast applies and UK is no longer a part of EU, is there still a need to react to forum shopping or should the new status quo remain?

¹⁴¹ *Ibid.*, p 10.

¹⁴² *Ibid.*, p 14.

¹⁴³ *Ibid.*, p 15.

5. Process of UK exiting the European Union

5.1. Legislative base for exit

The exit-vote having come as a slight surprise, planning for Brexit had failed.¹⁴⁴ Actually the Act that initiated the Referendum-vote and the discussion around Brexit does not force the legislature to comply with the outcome of the Referendum.¹⁴⁵ Yet it seems that Theresa May is determined to carry through with it. Her mantra is “Brexit means Brexit”, but no one seems to be sure what this exactly entails?¹⁴⁶ The aim of the process seems to be regaining sovereignty, but the content of sovereignty as a concept is a whole other question remaining unanswered.¹⁴⁷

The exit-clause is in Art 50 TEU, which for its relevant parts states the following:

1. Any Member State may decide to withdraw from the Union in accordance with its own constitutional requirements.

2. A Member State which decides to withdraw shall notify the European Council of its intention. In the light of the guidelines provided by the European Council, the Union shall negotiate and conclude an agreement with that State, setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union.

[...]

3. The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification referred to in paragraph 2, unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period.

[...].

5.2. Lack of clear constitution raising issues in UK

The core of confusion in UK is sparked by paragraph 1 of Art 50 TEU. The Article requires withdrawal to be carried out in accordance with the constitution of the MS withdrawing. However, UK does not have a clearly verified set of rules that can be called their definite constitution.¹⁴⁸ In fact, the foundation of UK law deemed traditionally admirably flexible seemed to be facing an

¹⁴⁴ Besch, S. & Black, J. Brexit: What Have We Learned So Far? *Survival* 2016, 58 (5), pp 59-67, p 60.

¹⁴⁵ Douglas-Scott, S. Brexit, Article 50 and the Contested British Constitution. *The Modern Law Review* 2016, 79 (6), pp 1019-40, p 1022.

¹⁴⁶ *Ibid.*, p 1023.

¹⁴⁷ *Ibid.*, p 1019.

¹⁴⁸ *Ibid.*, p 1019.

overwhelming challenge¹⁴⁹ by not being able to clearly define which regulatory institutions get to partake in the Brexit-process and what was needed as a precondition to triggering Art 50.¹⁵⁰

The core discussion revolved around three dimensions of sovereignty: 1) parliamentary sovereignty, 2) popular sovereignty (referring to the people) and 3) external sovereignty. More precisely, on which of these was to be the leading principle in deciding who gets to decide on different aspects of Brexit¹⁵¹

Parliamentary sovereignty essentially refers to the UK parliament in Westminster having unlimited legislative power.¹⁵² Popular sovereignty in turn essentially means the nationals' right to vote and indicate their will in referendums. By external sovereignty a country is sovereign and recognized as independently such in the international community, even though this view accepts that sovereign states may allow invasion of their sovereignty to a certain extent by opting in on international treaties, because such partaking may in the end support their sovereignty in the long run. The problem arises with the above definitions being at odds with each other and even internally incoherent.¹⁵³ Whereas Scotland recognizes popular sovereignty, UK constitution sees sovereignty lies with the Crown in the Parliament and only this should be recognized in legislating.¹⁵⁴ Analogically, this seems to be the grounds upon which UK government and parliament could have chosen to ignore the vote results, especially since the referendum Act itself poses no obligation to act upon the results of the vote.¹⁵⁵

However, a mechanism for constitutional amendment has not been specifically defined.¹⁵⁶ Even with parliamentary sovereignty, some might argue that with the referendum not being posed with any questions on the content of Brexit and the electorate, as well as the Prime Minister having changed since, the parliament has no power to decide on what will happen.¹⁵⁷

¹⁴⁹ *Ibid.*, p 1040.

¹⁵⁰ *Ibid.*, p 1022.

¹⁵¹ *Ibid.*, p 1019-20.

¹⁵² *Ibid.*, p 1019-20.

¹⁵³ *Ibid.*, p 1020.

¹⁵⁴ *Ibid.*, p 1021.

¹⁵⁵ *Ibid.*, p 1020.

¹⁵⁶ *Ibid.*, p 1021.

¹⁵⁷ *Ibid.*, p 1023-4.

Before the exit-process could be triggered, the administration had to ascertain that the prerogative power of the Crown allows them to initiate leaving EU.¹⁵⁸ At the same time the House of Lords Constitutional Committee voiced their opinion of it having been inappropriate for the Executive to have passed a law without the Parliament's approval.¹⁵⁹ Perhaps even more so for the reason that the Parliament will have to repeal and possibly replace the European Communities Act of 1972 (hereon ECA).¹⁶⁰ In the end the Prime Minister cleared her back and the so called Brexit Bill was passed.¹⁶¹ It first passed in the Parliament, after which the Queen gave her Royal Assent to it.¹⁶² Brexit means Brexit, but at least now the Parliament has been included in the process and the executive have not abused their sovereignty, as Douglas-Scott feared.¹⁶³ Prime Minister May did act on the referendum vote's result and notified EU of UK's exit at the end of March.¹⁶⁴

5.3. The foreseeable impacts of triggering Art 50 in UK

Whether Theresa may will be implementing a hard or soft version of Brexit is a somewhat unresolved question.¹⁶⁵ Currently May is still attempting to show MS that Brexit means Brexit – calling for a general election.¹⁶⁶ It is to be held already in June.¹⁶⁷ Given the Brexit-train will roll forward, what is to follow are the actual negotiations of the exit terms, going through domestic legislation the process impacts, as well as building new institutional and international relationships in diplomacy and trade.¹⁶⁸ Some suggest UK will be excluded from the Union after the first two years run out and is forced to engage in temporary measures.¹⁶⁹

But what exactly will happen in the legal sphere as a consequence of Brexit? The impact of EU on all its MS is an influx of legislation created on an EU level and then implemented on a national

¹⁵⁸ Phillipson, G. A Dive into Deep Constitutional Waters: Article 50, the Prerogative and Parliament. *The Modern Law Review* 2016, 79 (6), pp 1064-89, p 10.

¹⁵⁹ "The invoking of Article 50 on the Constitution", House of Lords Select Committee on the Constitution, 4th Report of Session 2016-1 at 8, cited in Douglas-Scott, *supra* nota 145, p 1026.

¹⁶⁰ Douglas-Scott, *supra* nota 145, p 1026.

¹⁶¹ European Union (Notification of Withdrawal) Act 2017.

¹⁶² Payne, A. "The Queen has officially signed the Brexit Bill", *Business Insider Nordic*, 16.3.2017. nordic.businessinsider.com/the-queen-signs-the-article-50-brexite-bill-2017-3 (20.4.2017)

¹⁶³ Douglas-Scott, *supra* nota 145, p 1032.

¹⁶⁴ Hunt & Wheeler, *supra* nota 14.

¹⁶⁵ "100 days after the Brexit vote – what's the plan?" *The Lawyer*, 17.10.2016, p 12.

¹⁶⁶ Wintour, P. "May's real reason for calling election? To show EU that Brexit really means Brexit" *The Guardian*, 18.4.2017. <https://www.theguardian.com/politics/2017/apr/18/mays-real-reason-for-calling-election-to-show-eu-that-brexite-really-means-brexite> (20.4.2017).

¹⁶⁷ "Theresa May to seek general election on 8 June" *BBC*, 18.4.2017. <http://www.bbc.com/news/uk-politics-39629603> (20.4.2017).

¹⁶⁸ *Ibid.*

¹⁶⁹ *The Lawyer*, *supra* nota 164, p 12.

level. Sir David Edward, a former CJEU judge has described the withdrawal to cause “unravelling of a highly complex skein of budgetary, legal, political financial, commercial and personal relationships, liabilities and obligations.”¹⁷⁰ Hence the question that arises is, will each individual relationship and EU legal act be dismantled from UK legislation individually, or will they be abolished *en bloc*.¹⁷¹ And henceforth, what will the impact on, *inter alia*, application of EIR be?

It is not yet sure, how the UK government will treat foreigners in and entering the country. It has been reported that many foreign nationals residing in UK themselves are worried about their post-Brexit status in the country.¹⁷² Hostility definitely has increased and foreigners are applying for certificates of their permanent residency in the UK, but no certain information on the status after the 2-year-resignation period is out there yet.¹⁷³ Given this is the situation for even the currently residing foreign nationals in the UK – how possible will it be to seek for entry into the country after the EU-exit? Forum shoppers cannot hide behind their freedom of establishment and will likely face difficulty in showing the genuineness of their will to reside in the country for legitimate and credible reasons.

All the above questions need to be resolved due to the fact that status quo will not remain.¹⁷⁴ EU Treaties and by accession all other non-harmonized EU law will cease to apply in UK by default after end of March 2019 – if no other model is agreed upon. The following chapter will discuss some possible scenarios, which may cause different kinds of results in terms of application or revocation of EU law in the UK and thus on whether or not the EIR will be applied or will there be a substituting scheme?

¹⁷⁰ ”Leaving the EU” House of Commons Library (2013) RP 13/42 10, cited in Douglas-Scott (Douglas-Scott, *supra* nota 145, p 1028).

¹⁷¹ Douglas-Scott, *supra* nota 145, p 1028.

¹⁷² Sipilä, A. ”Huorittelua, nimittelyä ja kylmää tuijotusta: Suomen passi ei auta brexit-Britanniassa, eikä oikeudesta jäädä maahan ole mitään takeita” Helsingin Sanomat, 3.3.2017; Bulman, M. “UK-born children of EU couple living in Britain denied permanent residency”, The Independent 14.4.2017. www.independent.co.uk/news/uk/home-news/uk-born-children-eu-couple-parents-dutch-spanish-denied-permanent-residency-brexit-a7682696.html (16.4.2017).

¹⁷³ Sipilä, *Ibid.*

¹⁷⁴ Douglas-Scott, *supra* nota 145, p 1032.

6. Brexit's impact on consumer insolvency tourism

6.1. The consequences impacting the future of consumer insolvency tourism

As a primary assumption ECA would be repealed, leading to all EU instruments regarding recognition of judgments ceasing to apply after Brexit, including the insolvency regulation, which governs recognition of insolvency decisions.¹⁷⁵ This will create a gap in regulation of international relationships between UK and remaining MS – unless something substitutes this gap. What remains to be figured out is, will UK establish some other network for recognition of judgments in the future?

How EU operates is, that in areas where EU does not have the authority to harmonize national laws, such as in insolvency law, it can only regulate cross-border relationships between MS. The current setup of the Union has also meant that the Union as a whole governs many aspects of its MS's international relationships with non-EU countries. Repealing ECA would at face value mean that the mechanisms in place before ECA would again be applicable.¹⁷⁶ However, it is not that straight-forward and UK's options in this respect will be further discussed below in 5.2.

On an internally national level the repeal of ECA will, however, not directly mean that all EU-originated legislation will be abolished. All EU legislation that has separately been implemented into national law, mainly directives, will continue to live on in national legislation¹⁷⁷, unless re-legislated upon. Moreover, non-harmonized legislation will evidently stay as it is, which should also apply to insolvency law when it comes to dissolution and discharge criteria and other matters the like. A vacuum will in insolvency matters only enter the international regulatory space in relation to other MS.

Considerable is, that the impacts of Brexit will not enter into play earlier than after two years of Art. 50 having been triggered.¹⁷⁸ Any insolvency proceedings with cross-border elements initiated within the resignation period should be carried through with the regime applicable at the time of initiation, applied until the end of proceedings. One interesting aspect in the passing over to the time post-Brexit will be, is whether or not discharge will be considered an integral part of the same

¹⁷⁵ Dickinson, A. Back to the Future - the UK's EU Exit and the Conflict of Laws. Oxford Legal Studies Research Paper No. 35/2016. Faculty of Law, University of Oxford 2016. ssrn.com/abstract=2786888 (20.4.2017), p 2-3.

¹⁷⁶ Hoffmann (2017), *supra* nota 137, p 2.

¹⁷⁷ *Ibid.*, p 1.

¹⁷⁸ Meager, L. Brexit further blurs EU insolvency picture. *International Financial Law Review*, 25.7.2016, p 6. search.ebscohost.com/login.aspx?direct=true&db=bth&AN=116978878&site=ehost-live (5.3.2017)

proceedings, under which the insolvency regime has been initiated under. As discovered above, many countries do not grant automatic discharge after fulfilment of payment plan, but rather require a separate application and consider the discharge judgment to be separate of the insolvency proceedings. If not considered one unity, discharge proceedings that have not been initiated before the window for Brexit closes, may not be recognized in remaining MS. However, this legal question will be relevant only for a very short period of time in the passing over to a new regime and thus a question not discussed beyond this brief notion

6.2. UK's future and options ranging between EFTA and third-state position

6.2.1. A return to 1972

Once there supposedly will be a regulatory vacuum in the international regulatory space as a consequence of repealing ECA and possibly not concluding negotiations and new arrangements before the 2-year-window closes – what are the options?

If purely looking at a situation where UK was to return to time before ECA, the thing to look at would be the international conventions in place at that time. When resolving cases with cross-border elements, the relevant dimensions of jurisdiction to determine in context with the problem here are international and substantial jurisdiction.

As EIR will become inapplicable in insolvency cases with a cross-border dimension, what has to be determined is which rules will determine international jurisdiction? Currently the Brussels Ia Regulation solves international jurisdiction in civil and commercial matters, including recognition and enforcement of judgments.¹⁷⁹ What existed before the regulation was Brussels Convention.¹⁸⁰ UK accessed it until 1978.¹⁸¹ Despite that the Convention is not an EU instrument and thus repealing ECA will not impact UK's participation in it. The Convention remained in force despite the latter imposition of Brussels Regulations and may still have applicability in signatory states. However, this would not solve the relationship with the 13 new MS that have joined since the passing of the first Brussels Regulation.¹⁸² Moreover, the Convention does not provide for solutions in insolvency-cases. International jurisdiction and recognition of judgments would be resolved by

¹⁷⁹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). OJ L 351, 20.12.2012; Hoffmann (2017), *supra* nota 137, p 2.

¹⁸⁰ Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed 27 September 1968, OJ L 299-32, 27.9.1968.

¹⁸¹ Dickinson, *supra* nota 175, p 4.

¹⁸² Hoffmann (2017), *supra* nota 137, p 2.

national Private International Law (hereon PIL) –rules, which may well mean higher and more complex standards for gaining recognition of a UK judgment in other fora. That if the court of the forum, where the pending debt would be would even recognize the UK court, or any other court granting discharge, to have had jurisdiction for that matter. ¹⁸³

The Rome Conventions in turn were created to determine applicable substantial law in cross-border cases. Hoffmann has reasoned that despite latter adoption of Rome Regulations, the original Rome Convention of 1980 is still in force.¹⁸⁴ It continues to be applied by MS in relation to Denmark, Greenland and overseas territories of states that were MS at the time of signing.¹⁸⁵ However, disputable is the fact that the addressees are the then EEC countries, now MS. A purely technical observation would deem Rome Convention concluded between sovereign states and thus without a revision of the Convention itself, UK would still be within the circle of application of the Convention, despite it being mean for the members of the internal market. Noteworthy is also the fact, that the Rome Convention of 1980 only applies on contractual matters and in non-contractual obligations UK would return to applying its national PIL-rules. ¹⁸⁶ This could lead to different kinds on positions between creditor types depending on whether the debt is based on an agreement or the creditor is involuntary.

Despite the discussion above, as Dickinson has accurately pointed out, repealing the ECA will not mean a direct return back to 1972 for the UK as many internal developments in law have taken place since.¹⁸⁷ Dickinson has presented some thoughts on UK's options.¹⁸⁸ Influenced by these, the author suspects UK has at least the following two main options post-Brexit: firstly, apply for return to the European Free Trade Association (hereon EFTA) or a similar position towards EU by joining the European Economic Area (hereon EEA) Agreement, or, secondly, seek for a completely separate, third state –position. Lehmann and Zetzsche have grouped the possibilities into multilateral, bilateral or no arrangements at all.¹⁸⁹ This latter grouping has very similar features to the one presented by Dickinson, but from the perspective of this topic Dickinson's

¹⁸³ *Ibid.*, p 5-6.

¹⁸⁴ *Ibid.*, p 3

¹⁸⁵ Dickinson, *supra* nota 175, p 7.

¹⁸⁶ Hoffmann (2017), *supra* nota 137, p 3-4

¹⁸⁷ Dickinson, *supra* nota 175, p 3.

¹⁸⁸ *Ibid.*, p 12

¹⁸⁹ Lehmann, M. & Zetzsche, D.A. Brexit and the Consequences for Commercial and Financial Relations between the EU and the UK. *European Business Law Review* 2016, 27, pp 999-1027, p 1003.

grouping serves better in describing what the impact of an arrangement is on cross-border insolvencies.

6.2.2. Access to EEA and options for determining jurisdiction

6.2.2.1. *Rejoining the European Free Trade Association*

UK was one of the founding members of EFTA.¹⁹⁰ UK left EFTA to join EEC in 1973. The central idea of establishing EFTA was to be an option to the already then politically driven EEC.¹⁹¹ Considering that the drivers of Brexit are UK's dissatisfaction in many areas of politics, EFTA may very well seem like a perfect option.

Current signatory states are only four: Iceland, Liechtenstein, Norway and Switzerland.¹⁹² It has an internal system of free trade, as well as individual bi- or multilateral free trade and partnership agreements with different areas of the world and, perhaps most importantly, has access to EU's internal market through its EEA accession.¹⁹³ One advantage of EEA is for UK would be regaining political independence by being able to negotiate their own tariff-policies with other states – something they cannot do currently as the members of the customs union. However, EEA members are bound by relevant EU law without being able to influence their content themselves.¹⁹⁴

In terms of private international law joining EFTA does not provide an automatic solution. Only in 1988 did the then EFTA-states sign the Lugano Convention.¹⁹⁵ Essentially it annexed EFTA-states to the sphere of Brussels Convention of 1968. But it should be noted that the Convention is no longer applicable law between countries where Brussels Regulations apply.¹⁹⁶ However, accessing EFTA would not mean accessing the original Lugano Convention, but the ratification of the latest version of the Lugano Convention of 2007. Yet, Hoffmann also presents, that subject to the consent of other signatory states, UK could try and access the Lugano Convention of 2007 without accessing EFTA. This would mean re-accessing the framework for recognition of judgments in EU, as well as all EFTA-states but Liechtenstein.¹⁹⁷

¹⁹⁰ EFTA Through the years. www.efta.int/about-efta/history (28.2.2017).

¹⁹¹ The European Free Trade Association. <http://www.efta.int/about-efta/european-free-trade-association> (28.2.2017)

¹⁹² The EFTA States. <http://www.efta.int/about-efta/the-efta-states> (28.2.2017)

¹⁹³ The European Free Trade Association, *supra* nota 191.

¹⁹⁴ Lehmann & Zetzsche, *supra* nota 90, p 1000.

¹⁹⁵ Convention on jurisdiction and the enforcement of judgments in civil and commercial matters - Done at Lugano on 16 September 1988, OJ L 319/9, 25.11.1988.

¹⁹⁶ Dickinson, *supra* nota 175, p 6.

¹⁹⁷ Hoffmann (2017), *supra* nota 137, p 3.

6.2.2.2. *Bilateral negotiations with EU and individual EEA accession*

UK may also seek access to EEA without EFTA – as its own entity. In practice joining EEA would mean access to the same markets, as it would access through EFTA’s EEA-accession. The major difference would be that as accessing through EFTA would mean accepting EEA terms in most respects as other EFTA states do. Considering the political motives of Brexit and that such “standard” inclusion in EEA would mean having to transpose directives as well as keep free movement of workers in place, it seems unlikely this could be sold to the public.¹⁹⁸ Being tired of the the influx of immigrants seemed to be one of the facts to spark the Brexit-vote to begin with.

It is also clear that UK’s thus far impactful position in the Union means that it holds likely more bargaining power in negotiating its future position in relation to EU than EFTA states ever have. But would UK have the negotiation power to negotiate an *EEA minus* state with less obligations, *inter alia*, in respect to free movement of workers? According to Lehmann and Zetzsche the goal might be negotiating a quota for the amount of workers from other EEA-countries that would be permitted in, such as Liechtenstein has. At the same time the aforementioned authors see it highly unlikely that such would be accepted on EU’s part, as Liechtenstein’s cap is largely argued by its tiny size.¹⁹⁹

If anything, such independent accession to EEA might resemble the relationship Denmark has with the Union. Despite being a MS, Denmark has an opt-out in justice and home affairs. This essentially means the country has its own arrangement for judicial cooperation under TFEU.²⁰⁰ However, this arrangement does not include insolvency matters.²⁰¹ which are left to be resolved according to national PIL-rules.

6.2.2.3. *Solving jurisdiction in the EEA-framework*

It has been speculated whether or not countries remaining in the EU will want to recognize UK judgments. For reasons of political nature or the sheer will to protect creditor interest, EU MS will

¹⁹⁸ Lehmann & Zetzsche, *supra* nota 189, p 1000.

¹⁹⁹ *Ibid.*, p 1000-1

²⁰⁰ COM(2012) 743 final, *supra* nota 30, p 3

²⁰¹ Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 149/80, 12.6.2009.

likely not recognize UK courts' judgments in insolvency proceedings, unless required to do so.²⁰² On the other hand it, despite political despise, might be beneficial to maintain a system for recognition of judgments, as "proceedings with pan-European effects are more likely to produce better returns for creditors etc., than a collection of separate national proceedings."²⁰³

From the perspective of jurisdiction accessing EEA through EFTA or autonomously would not provide an automatic solution. Neither solution includes an integrated system for resolving cross-border insolvency matters. Denmark has its individual arrangement with the EU, but has chosen not to be included in the sphere of application of the EIR. EEA states in turn have implemented the regulation through their framework of cooperation with EU, this simply because no other uniform option implemented equally wide in Europe exists. If anything, UK would have to negotiate how it could retain access to the framework brought by EIR 2015, whether it be by accessing the Lugano Convention or separately. However, considering how Brexit is raising also negative feelings in the negotiating parties that are remaining MS, nothing should be taken for granted.

At the same time, with immigration being one of the biggest political triggers to spark Brexit, UK might not want to enter Schengen acquis. Especially considering it is not even currently a part of the Schengen area.²⁰⁴ So, will EU allow UK to pick-and-choose which forms of cooperation it will partake in? Currently the benefits of free market have in EU been conditional to free movement of labor and pooling of sovereignty.²⁰⁵ Considering the prior, it seems unlikely EU would be ready to give in much in this exchange. There would have to be some other serious concessions UK would have to be making in order to access EEA and the common market. Paying into the EU budget and allowing free movement are considered to be such obligations to be fulfilled.²⁰⁶ Free movement of labor definitely does not seem like one UK would be ready to give in to, so would UK be subject to the EIR in the future? That might depend on whether it is considered a burden and a concession UK is ready to make, or something they want to remain being a part of.

²⁰² Meager, *supra* nota 177, p 6.

²⁰³ J. L. Westbrook, 'Theory and Pragmatism in Global Insolvencies: Choice of Law and Choice of Forum' (1991) 65 American Bankruptcy Law Journal 457, cited in McCormack (McCormack, G. Something Old, Something New: Recasting the European Insolvency Regulation. The Modern Law Review 2016, 79 (1), pp 121-46, p 123)

²⁰⁴ "Schengen: Controversial EU free movement deal explained." BBC, 26.4.2016. www.bbc.com/news/world-europe-13194723 (5.3.2017)

²⁰⁵ Besch & Black, *supra* nota 144, p 61.

²⁰⁶ *Ibid.*

6.2.3. Brexit to mean Brexit – positioning as a third-country in relation to EU

Douglas-Scott has specified, that some Leave-voters may have been motivated by the fact that they wanted an end to the free movement of persons.²⁰⁷ This free movement seems like something difficult to exclude from any arrangement of treaties or agreements between EU and UK. Thus, in reality the so called hard Brexit would in its most extreme version mean positioning as a third-country in relation to EU. Trade would follow international agreements, such as GATT and GATS.²⁰⁸

However, insolvency law has really no universally applicable framework of law. As a general rule national courts would solve PIL-issues in insolvency according to their own national PIL acts. During the era before EIR, Grossmann has stated that the recognition of a discharge abroad would “depend on the characterization given to that discharge under the foreign legal system.”²⁰⁹ Grossmann specifies that it may be a question of substantive matters, a procedural action or connected to the legal status of the person going through the proceedings.²¹⁰ A discharge may have been rejected in foreign courts due to public policy reasons.²¹¹

This would mean solving jurisdiction, applicable law and enforcement separately according to applicable acts. In relation to remaining MS this would mean outcomes completely based on what happen to be the individual circumstances and balance of insolvency related acts in the states relevant to the proceedings. In consumer insolvency this in some cases could mean applying UK law where another jurisdiction would not have relief procedures for consumers available if the case was being handled in UK and the court would consider it *contra legem* to not grant a consumer access to insolvency just because such a possibility would not exist in another relevant jurisdiction. Though such a scenario is very unlikely considering that close to all MS are slowly implementing consumer insolvency acts with discharge regimes.

A peculiar fact that Art 44 of EIR 2000 reveals, is that UK has had bilateral treaties on mutual recognition of judgments in civil and commercial matters with the Netherlands, Belgium and Germany. Of the EFTA-states UK had a pre-existing convention for recognition of judgments with

²⁰⁷ Douglas-Scott, *supra* nota 145, p 1023.

²⁰⁸ Lehmann & Zetzsche, *supra* nota 188, p 1002.

²⁰⁹ Grossman, *supra* nota 103, p 1.

²¹⁰ *Ibid.*, p 1-2.

²¹¹ *Ibid.*, p 3.

Norway from 1961.²¹² It does seem feasible that at least some of these bilateral arrangements could be reinstated, but how much of them cover insolvency law is another question. As is the speculation of how much animosity UK's actions may have sparked in remaining MS, impacting their willingness to enter bilateral negotiations.

UK has also implemented the UNCITRAL Model Law on Cross-Border Insolvency 1997, which “purpose - - is to provide effective mechanisms for dealing with cases of cross-border insolvency”²¹³. However, significant in this context is, that of the remaining MS only Greece, Poland, Romania and Slovenia have also applied the rules in their legislation²¹⁴, making them fairly irrelevant in considering whether or not there is a future for consumer insolvency tourism, as we have above observed that many of the discharge seekers are from central and western European countries with harsh insolvency schemes for consumer debtors.

²¹² Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, L339/3, 21.12.2007, ANNEX VII.

²¹³ United Nations Commission of International Trade law. UNCITRAL Model Law on Cross-Border Insolvency, 30.5.1997, Preamble para 1.

²¹⁴ Status UNCITRAL Model Law on Cross-Border Insolvency (1997) www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (20.4.2017)

Conclusion

The phenomenon of consumer insolvency tourism arose in the context of the European Insolvency Regulation, that granted mutual recognition of judgments in all EU-based insolvency proceedings initiated in an EU Member State. This form of forum shopping was driven by the fact that despite harmonization of legislation in many fields, the rationale behind debt relief for private consumers vastly varied between different Member States. Some systems driven by neo-liberal politics, such as UK, emphasize easy and quick access to discharge. Others, like Germany, in turn favor a social market –philosophy, whereby consumers shall be educated and well informed about the risks of over-indebtedness and not granted discharge as easily. Thus the flow of forum shoppers seemed to be streaming from Germany and some Eastern European countries towards UK, as well as some provinces in northeastern France – both being areas granting discharge in the best case within some 12 months from the initiation of the proceedings.

This thesis' aim was to look at this phenomenon and draw scenarios on what kind of an impact UK exiting EU and the entering into force of the EIR recast would have on consumer insolvency tourism flows. The research question itself already explored the question of whether or not one option could be Northeast France with liberal schemes available like in the UK. Yet, on the other hand, the passing of EIR 2015 is imposing stricter rules as of June 2017 and it serves to look at the question of whether insolvency tourism can be facilitated at all, even though the divergence between MS insolvency schemes would continue to exist. The thesis also in passing discussed why harmonizing national insolvency law would not be the best option to end consumer insolvency tourism for good.

To resolve if there would be relevant access to UK's lighter insolvency schemes after Brexit, the thesis established various options for filling in the regulatory vacuum in the international relationships in recognizing judgments in civil and commercial matters.

Firstly, UK opting to return home to EFTA would mean an option to enter EEA. Essentially this would be exploiting the commercial benefits of the free trade area without the burdens brought by more difficult policy areas, such as immigration issues. However, EEA accession in any of its forms would not provide an automatic solution. No other prior Convention contains provisions on determining different aspects of jurisdiction in insolvency cases, thus the future of insolvency

tourism into UK would wholly depend on whether or not UK can continue to be included in EIR after Brexit?

Be the outcome of Brexit which it may, its impact within EU might be limited in any case. Before the final exit of UK for example the flow of Germans attempting to forum shop for discharge might slightly decrease given the recast of EIR will be making forum shopping more difficult anyway. The outcome might largely depend on the coverage the topic has in the media. Thus far the biggest surge was already years ago and the topic has resurfaced only slightly since then. Given the fact that there are mentions of the forum shopping streaming to Germany's neighbor, France, especially its northeastern part, leads to suggest this is also a relevant option for some forum shoppers despite there being various cultural barriers to COMI shifts, such as language. Thus it might be some of the flow that has until now sought discharge from UK courts might now seek them in French ones.

However, in chapter 3 it was also discovered that much of the national legislation on debt relief for consumer debtors has evolved. This development has taken place especially in the countries where no relief for consumer debtors existed. Whereas Malta still remains uncharted territory in this context and Bulgaria is not much better, many other countries, such as Croatia and Greece have made the effort to legislate on debt relief schemes for consumer debtors. Whereas in newer schemes the immediate discharge is rather for those completely out-of-funds, which seem not like the potential target group to forum shop, the existence of a debt relief scheme with discharge in general likely reduces the incentive to seek faster discharge in the first place. As Niemi et al suggested²¹⁵ and was discussed in chapter 3, the development of national law across EU Member States seems to also have a general pressure to head towards a more neo-liberal direction. This would suggest that over time the legislation on consumer debt relief will across the board become harmonized or maybe even a race to the bottom – towards discharge.

Now it has been suggested that this form of forum shopping is not only contrary to the spirit of the European Insolvency Regulations, both old and new, but might even be a downright abuse of law. For example, Hoffmann suggested that consumer insolvency tourism is in explicit violation of what is now recital five of the EIR recast. Eidenmüller in turn had defined a formula for determining when a COMI-shifter would be abusing the law. It is, however, difficult for the CJEU

²¹⁵ Niemi et al., *supra* nota 51, p 7

to set definite precedents that would help block forum shopping completely, as it attempts to take into consideration all the relevant factors that impact the outcome of a case and thus no crystal clear and definite precedents have been set. However, the additions to recitals and, *inter alia*, Article 3 in the EIR recast, suggest that EU regulatory bodies are doing the best they can to block forum shopping. Nevertheless, it remains to be seen what CJEU will hold if potential forum shoppers are recognized even under the scheme the recast will set and if such cases will even end up in front of the CJEU. Thus far most interpretations have been made more on the basis of cases where debtors are legal persons.

Considering the following: firstly, the fact that consumer insolvency tourism never seems to have been an extremely wide spread phenomenon. Secondly, that Brexit will likely lead to a result where UK resorts to an option whereby it very much is its own sovereign entity, but trying to keep up its beneficial ties to main partner-countries. Thirdly, the fact that much of the regulatory vacuum causing forum shopping, i.e. lack of consumer debtor insolvency regimes, that existed in this matter in some EU Member States has now been filled; and lastly, the fact that regulation on consumer debtor relief seems to face an overall pressure to head towards a more neo-liberal direction in the EU. It much looks like not only will Brexit and especially EIR 2015 trigger the slowing down of consumer insolvency tourist flows, but that the phenomenon might not have any incentives left to drive its existence. Consumer insolvency tourism may very well die down on its own and the fact that it may very well be contrary to recital 5 of EIR might not be a concern that the CJEU should take the time to address at all. By the time a judgment would be out, it might very well be irrelevant.

Despite all of the above discussed, the change will not take place tomorrow. As Brexit is at least two years away, only the entry into force of the EIR recast will start to play a role in the near future of consumer insolvency tourism. Thus there might not be large changes to the current scope of the phenomenon. In considering whether or not people will see an incentive to forum shop depends on the return (discharge) they will get in exchange of all their efforts and sacrifices to get it – the ROI-point-of-view discussed in the introduction. The only foreseeable consequence could be that the more difficult qualifying requirements, extending the wait to six months, will narrow down the possible candidates for consumer insolvency tourism to higher middle class. These people still have the infrastructure to relocate and excessive debt, but also even larger sufficient liquid funds to survive for six months, if the person cannot qualify as a job seeker and apply for social security they would be in limited amounts granted under EU law. Only these kind of debtors will have the

resources to sacrifice for being discharged of their debts and only these kinds of debtors might have debts due large enough for a discharge to offer sufficient return on the significant efforts it will take to relocate.

To answer the research question set for this thesis: “Does bankruptcy tourism into UK have a future after Brexit, will the tourism possibly flow to France or will the phenomenon come to its end altogether?” For the part impacted by Brexit, once the EU exit is over, what will play a role is the entry requirements set for foreign nationals for permanently residing in the UK and whether or not judgments will be recognized abroad. Before its inclusion in EU, the requirements were relatively demanding. Entrants, even from Europe, had to go through rigorous questioning to be let in. Even if UK were to choose an unlikely road of joining *Schengen acquis*, it would hold more control over its foreign policy and thus might set perhaps even stricter requirements for entering the country for those with a plan of residing there permanently. In addition, it would be contrary to the principle of equality to ban access to insolvency proceedings in general from foreign nationals permanently residing in UK, but qualification period requirements, such as those set in the EIR recast, might appear in national legislation. That is, unless UK considers it beneficial to maintain their competitive regulatory infrastructure in this context. Moreover, even though entry and access to proceedings would be possible, recognition of discharge abroad might not be.

Yet the core issue ended up not being about the size of the problem, but the legality of it. As was established in the introduction to this thesis already, the necessity to discuss this problem with the EIR did not even originally necessarily arise from the physical size of the problem measured in recognized as the amount of forum shoppers in destination countries. It was rather the sheer legality of it – is forum shopping for a faster discharge at all in alignment with the EIR or EU law principles in general? Because if it wasn't, EU institutions should definitely had reacted on it. So had they? – As was discovered in the discussion of the recast to the EIR and its preparatory documents, EU institutions did recognize this phenomenon brought up in academia to be a problem. It has been addressed and the recast tries in multiple ways to prevent consumer insolvency tourism with forum shopping bans articulated in the recitals and qualification period set in Art 3 of the recast – all to help courts better identify forum shoppers, a task that was, in particular, delegated to them in the recast. Thus the question remains: was this enough? Will the EU have to address this issue again in the future or will forum shopping to the detriment of the creditors “go away” by itself now?

Forum shopping into UK likely will. It may become so marginal that it is unlikely to cause a debate to the extent it has thus far. But how about forum shopping in Alsace-Moselle? Will it gain more traction with UK no longer being necessarily an option? It might. Those who attempt to do so will nevertheless have to face those same stricter requirements set in the EIR recast before even attempting to file for a discharge. Whether or not the courts will also evaluate the genuineness of a relocation based on other factors might come down to a single factor: language. Even though one could portray living in the region based on apartment leases, utility bills, etc., they might not be able to show that they truly administer their interests from that place of residence, nor permanent intent to stay without knowing the language at all and being able to apply for a job later on. However, none of this can be said for certain until the French courts' line of interpretation of the new guidelines set in the recast regulation will start to develop. Yet it seems that if a debtor is able to overcome all the qualifications for transferring their COMI and surviving the six-month-period in await of eligibility to file, they will have sacrificed very much to do so and not many will even have the capability to do that. Thus, if a very marginal group will manage this, the genuineness of the intent of their COMI-shift might not matter anymore, as the physical genuineness of the shift will already have required major personal sacrifices from the debtor. The hurdles to overcome could be considered so high, that making a shift back to the earlier might already also have become equally high and the person once a forum shopper, might very well have become a genuine permanent resident.

Whereas the future of consumer insolvency tourism was discussed quite widely in this thesis, there is room also for future research. Something of equal legal and even more of economical interest would be the future of companies forum shopping for easier restructuring regimes under UK law. This trend came up in many of the articles used as sources also in this context, strongly indicating such an alteration of forum shopping exists. The outcome of such research can potentially be very different, since allowing corporates establishment in a country is not equally subject to politically sensitive immigration issues, as is in the context of consumer insolvency tourism. Thus it would benefit not only academia, but also the community of legal professionals as a whole to engage in such research.

List of Sources

Science books

1. Brown, S., Keay, A., McCormack, G. *European Insolvency Law: Reform and Harmonization*. Cheltenham, Edward Elgar Publishing Limited 2017.
2. Niemi, J., Ramsay, I., Whitford, W.C. (ed.) *Consumer Credit, Debt and Bankruptcy Comparative and International Perspectives*. Oxford, Hart Publishing 2009.

Science articles

3. Besch, S. & Black, J. Brexit: What Have We Learned So Far? *Survival* 2016, 58 (5), pp 59-67.
4. Dickinson, A. Back to the Future - the UK's EU Exit and the Conflict of Laws. *Oxford Legal Studies Research Paper No. 35/2016*. Faculty of Law, University of Oxford 2016. ssrn.com/abstract=2786888 (20.4.2017)
5. Douglas-Scott, S. Brexit, Article 50 and the Contested British Constitution. *The Modern Law Review* 2016, 79 (6), pp 1019-40.
6. Eidenmüller, H. Abuse of Law in the Context of European Insolvency Law. *European Company and Financial Law Review* 2009, 6 (1), pp 1-28.
7. Elul, R. Subramanian, N. Forum-Shopping and Personal Bankruptcy. *Journal of Financial Services Research* 2002, 21 (3), pp 233-255.
8. Grossman, A. Conflicts of laws in the discharge of debts in bankruptcy. *INSOL International Insolvency Review* 1996, 5 (1), pp 1-35. www.uniset.ca/microstates/5IntlInsolvRev1_ocr.pdf (28.2.2017)
9. Guzewicz, A. EU Citizenship and EU Entities: New Perspectives for Citizens and Companies. *Wroclaw Review of Law, Administration & Economics* 2013, 3 (1), pp 48-58
10. Hoffmann, T. The Brexit and Private International Law – an Outlook from the Consumer Insolvency Perspective. Unpublished article 2017, available from Hoffmann, T., pp 1-12.
11. Hoffmann, T. The Phenomenon of “Consumer Insolvency Tourism” and its Challenges to European Legislation. *Journal of Consumer Policy* 2012, 35 (4), pp 461-475.
12. Kilborn, J. Reflections of the World Bank’s Report on the Treatment of the Insolvency of Natural Persons in the Newest Consumer Bankruptcy Laws: Colombia, Italy, Ireland. *Pace International Law Review* 2015, 27 (1), pp 306-44.
13. Latella, D. The “COMI” Concept in the Revision of the European Insolvency Regulation. *European Company & Financial Law Review* 2014, 11 (4), pp 479-94.
14. Lehmann, M. & Zetsche, D.A. Brexit and the Consequences for Commercial and Financial Relations between the EU and the UK. *European Business Law Review* 2016, 27, pp 999-1027.
15. McCormack, G. Reconstructing European insolvency law – putting in place a new paradigm. *Legal Studies* 2010, 30 (1), pp 126-146
16. McCormack, G. Reforming the European Insolvency Regulation: A Legal and Policy perspective. *Journal of Private International Law* 2014, 10 (1), pp 41-67.
17. McCormack, G. Something Old, Something New: Recasting the European Insolvency Regulation. *The Modern Law Review* 2016, 79 (1), pp 121-46.
18. Mucciarelli, F.M. Not just Efficiency: Insolvency Law in the EU and its Political Dimension. *European Business Organization Law Review* 2014. 14 (2), pp 175-200.
19. Phillipson, G. A Dive into Deep Constitutional Waters: Article 50, the Prerogative and Parliament. *The Modern Law Review* 2016, 79 (6), pp 1064-89.

20. Ramsay, I. Between Neo-Liberalism and the Social Market: Approaches to Debt Adjustment and Consumer Insolvency in the EU. *Journal of Consumer Policy* 2012, 35 (4), pp 421-441.
21. Smith, A., Walters, A. 'Bankruptcy Tourism' under the EC Regulation on Insolvency Proceedings: A View from England and Wales. *INSOL International Insolvency Review* 2010, 19 (3), pp 181-208
22. Szydło, M. Prevention of Forum Shopping in European Insolvency Law. *European Business Organization Law Review* 2010, 11 (2), pp 253-272.
23. Weber, J.D. The rise of insolvency tourism: An enquiry into the centre of main interests of natural persons. LLM thesis, University of Leiden (2010)

EU legal acts and international conventions

24. Agreement between the European Community and the Kingdom of Denmark on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 149/80, 12.6.2009.
25. Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed 27 September 1968, OJ L 299-32, 27.9.1968.
26. Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, L339/3, 21.12.2007.
27. Convention on jurisdiction and the enforcement of judgments in civil and commercial matters - Done at Lugano on 16 September 1988, OJ L 319/9, 25.11.1988.
28. Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings. OJ L 160/1, 30.6.2000.
29. European Union. The treaty on European Union, OJ C 326/15, 26.10.2012.
30. European Union. The treaty on the Functioning of the European Union, OJ C 326/15, 26.10.2012.
31. Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast). OJ L 351, 20.12.2012.
32. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast). OJ L 141/19, 5.6.2015.
33. United Nations Commission of International Trade Law. UNCITRAL Model Law on Cross-Border Insolvency, 30.5.1997.

National legal acts of states

34. European Communities Act 1972.
35. European Union (Notification of Withdrawal) Act 2017.
36. Insolvency Act 1986.
37. Insolvenzordnung vom 5. Oktober 1994 (BGB). I S. 2866).
38. Laki yksityishenkilön velkajärjestelystä 57/1993.
39. Pankrotiseadus RT I 22.1.2003, 17, 95.

Case law

40. CJEU, 27.9.1988, C-81/87, *Daily Mail*.
41. CJEU, 9.3.1999, C-212/97, *Centros*.

42. CJEU, 14.12.2000 C-110/99, *Emsland-Stärke*.
43. CJEU, 30.9.2003, C-167/01, *Inspire Art*.
44. CJEU, 17.1.2006, C-1/04, *Staubitz-Schreiber*
45. CJEU, 2.5.2006, C-341/04, *Eurofood*
46. HCOJ, 20.12.2006, [2007] BPIR 1636, *Official Receiver vs. Eichler*.

Other sources

47. "100 days after the Brexit vote – what's the plan?" The Lawyer, 17.10.2016
48. Bowler, T. "How has economy fared since Brexit vote?" BBC, 17.1.2017
www.bbc.com/news/business-36956418 (28.2.2017)
49. Bulman, M. "UK-born children of EU couple living in Britain denied permanent residency", The Independent 14.4.2017. www.independent.co.uk/news/uk/home-news/uk-born-children-eu-couple-parents-dutch-spanish-denied-permanent-residency-brexit-a7682696.html (16.4.2017)
50. Commission Staff Working Document – Impact Assessment Accompanying the Document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, SWD(2012) 416 final, Strasbourg, 12.12.2012.
51. Commission Staff Working Document – Executive Summary of the Impact Assessment Accompanying the document Revision of Regulation (EC) No 1346/2000 on insolvency proceedings, SWD(2012) 417 final, Strasbourg, 12.12.2012.
52. EFTA Through the years. www.efta.int/about-efta/history (28.2.2017)
53. European Parliament. Tampere European Council 15 and 16 October 1999 Presidency conclusions. www.europarl.europa.eu/summits/tam_en.htm (28.2.2017)
54. Finnish Government. Hallituksen esitys 52/2010.
55. Garasic, J. New bankruptcy law in Croatia. EuroFenix, Autumn 2016, (65), pp 36-8.
www.insol-europe.org/publications/eurofenix-past-issues (20.4.2017)
56. Hunt, A., Wheeler, B. "Brexit: All you need to know about the UK leaving the EU" BBC, 20.3.2017. www.bbc.com/news/uk-politics-32810887 (21.3.2017, continuously updated)
57. Ivković, O. & Kruc, M. Croatia: Consumer Bankruptcy Act Introduces Consumer Bankruptcy into the Legal System. Schönerr 5.1.2016.
www.schoenherr.eu/uploads/tx_news/Croatia_Consumer_Bankruptcy_final_pdf3.pdf (28.2.2017)
58. Meager, L. Brexit further blurs EU insolvency picture. International Financial Law Review, 25.7.2016, p 6.
search.ebscohost.com/login.aspx?direct=true&db=bth&AN=116978878&site=ehost-live (5.3.2017)
59. Payne, A. "The Queen has officially signed the Brexit Bill", Business Insider Nordic, 16.3.2017. nordic.businessinsider.com/the-queen-signs-the-article-50-brexit-bill-2017-3 (20.4.2017)
60. Pott, W. "Schulden-Tourismus nimmt zu", Die Welt, 22.10.2006. www.welt.de/print-welt/article88980/Schulden-Tourismus-nimmt-zu.html (23.2.17)
61. Rath, G. "In London blüht der Konkurstourismus", Die Presse, 6.3.2013.
diepresse.com/home/wirtschaft/eurokrise/1352836/In-London-blueht-der-Konkurstourismus (23.2.2017)
62. Report From the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, COM(2012) 743 final, Strasbourg, 12.12.2012.

63. "Schengen: Controversial EU free movement deal explained." BBC, 26.4.2016.
www.bbc.com/news/world-europe-13194723 (5.3.2017)
64. Sentance, A. "We are in danger of becoming addicted to low interest rates." The Telegraph 2016. www.telegraph.co.uk/business/2016/03/25/we-are-in-danger-of-becoming-addicted-to-low-interest-rates/ (20.4.2017)
65. Sipilä, A. "Huorittelua, nimittelyä ja kylmää tuijotusta: Suomen passi ei auta brexit-Britanniassa, eikä oikeudesta jäädä maahan ole mitään takeita" Helsingin Sanomat, 3.3.2017.
66. Status UNCITRAL Model Law on Cross-Border Insolvency (1997)
www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html (20.4.2017)
67. The EFTA States. <http://www.efta.int/about-efta/the-efta-states> (28.2.2017)
68. The European Free Trade Association. <http://www.efta.int/about-efta/european-free-trade-association> (28.2.2017)
69. "Theresa May to seek general election on 8 June" BBC, 18.4.2017.
<http://www.bbc.com/news/uk-politics-39629603> (20.4.2017)
70. Wessels, B. Revision of the EU Insolvency Regulation: What type of facelift?
www.eir-reform.eu/uploads/papers/PAPER%205-1.pdf (5.3.2017)
71. Wie kann ich als Deutscher in England oder wo auch immer.
<http://www.gutefrage.net/frage/wie-kann-ich-als-deutscher-in-england-oder-wo-auch-immer> (23.2.17)
72. Wintour, P. "May's real reason for calling election? To show EU that Brexit really means Brexit" The Guardian, 18.4.2017. <https://www.theguardian.com/politics/2017/apr/18/mays-real-reason-for-calling-election-to-show-eu-that-brex-it-really-means-brex-it> (20.4.2017)