MIND THE GAP: INSOLVENCY, INTERSTITIAL INNOVATION AND IMPLICATIONS OF BREXIT

1. I am honoured to have been asked by your President Adam Plainer to give this pre-ILA dinner speech in this magnificent and historic new venue; but I must admit to a certain wariness, if not anxiety, which has been exacerbated by a quick scan of the internet for reports on previous such dinners.

2. The scan was unsettling. The roll-call of previous pre-dinner speakers is at once flattering and sobering: Lord Justice David Richards, then Judge James Peck of the US Bankruptcy Court for the Southern District of New York, then my colleague Mr Justice Richard Snowden, and last year, the Chancellor of the High Court Sir Geoffrey Vos. It is difficult to think of brighter stars in the Insolvency firmament.

3. What, on earth, am I doing here, I have wondered; and without even so much as the prop of a friendly dinosaur, or even an airborne whale skeleton?

4. And I have chided myself for disobeying a vital lesson shared with me by my grandfather, who combined farming with being a lawyer. He said that the combination of jobs had taught him the secret of being thought wise and reliable. This was to speak, when talking to farmers, only about the law; and when talking to lawyers, only about farming. Each group would depart mystified but impressed. Well, at least I can aim for one of those results tonight.

5. You may think that part of the mystification process for which I aim is in the title to this talk. Let me explain what I think I mean so that at least you know where I think I am going.

6. The broad subject-matter it is intended, perhaps somewhat pretentiously, to capture is the difficult but interesting part of the job of a judge: this is, when needs must and equity calls, to make law and provide answers which are not provided in precedent and which are not legislated for in the relevant statutes, but without treading on the constitutional toes of parliament.

7. Hence my reference to ‘Interstitial innovation’: this is intended to echo US Justice Wendell Holmes’s famous observation that

> “judges do and must legislate, but they can only do so interstitially”.

That means, as I understand it, that judges must proceed, as Lord Bingham wrote, by advancing the law “in small steps and not by giant bounds”; and they must operate in the small spaces or interstices, not in the wide plains left to the legislature. The common law is a broad and magnificent tapestry: but its stitching or needlework is tiny.

8. To mix my metaphors, Insolvency law is, to my mind, a particularly fertile but difficult field to cultivate in this context.

(1) Fertile, because the call for pragmatic solutions in situations where there is no established answers is, in my experience, more common than in other areas of the law;

(2) difficult,

- first, because the Insolvency Act is so often thought of as a complete code, where all the answers should be, excluding by implication judicial discovery of solutions not provided for in that code;

- and secondly, because more often than not, in days when cross-border issues are the stuff of insolvency life, any innovation must not only bear scrutiny in this jurisdiction, but in any other jurisdiction in which its effects are felt, and especially so when its recognition abroad is necessary.

9. That brings me to the third element of my talk: the implications of Brexit in the context of insolvency. That, of course, is a huge field for debate: too huge a field for me to plough; and in any event, I am merely a judge and not a soothsayer, and my

guesses will be as good as yours. Nevertheless, I can essay some thoughts prompted by cases that have come before me in the last year or two. I can also beg some questions, especially in the context of schemes of arrangement, which have attracted an enthusiastic European following in the last five years or so, and which I believe the market, both here and in Europe, will continue to have an interest in supporting, Brexit or no Brexit, and whatever Brexit means.

10. Let me start, then, with various lessons from the *Lehmans* administrations, my acquaintance being in consequence of having succeeded Lord Justice David Richards, who succeeded Lord Briggs (as he now is) as the assigned first-instance judge.

11. The decision of the Supreme Court in *Waterfall I* in May of this year (*In re Lehman Bros International (Europe) (No. 4)* [2017] UKSC 38, [2017] 2 WLR 1497) seems to me to offer a prime illustration of the limitations of judicial innovation and the constitutional confinement of judges to smaller spaces.

12. Take the decision of the majority in relation to issue 2.

    By way of reminder, issue 2 arose from the fact that LBIE's creditors with debts denominated in a foreign currency were entitled to be paid under rule 2.86 of the then current Insolvency Rules at the rate of exchange prevailing at the date LBIE went in to administration, leaving relevant creditors exposed to the risk (which has eventuated) of depreciation in the value of sterling between that date and the date of payment. The question was whether the relevant foreign currency creditors were entitled to receive any contractual shortfall as a non-provable claim.

13. Put shorty, the competing submissions were as follows:

    (1) For the foreign currency creditors it was argued that the currency depreciation gave rise to a contractual shortfall which, given the surplus in the administration, they should be able to recover as a non-provable debt.

        This was on the basis that the provisions of Chapter 10 of Part 2 of those Rules, and in particular of rule 2.86, did not impinge on the underlying contractual debt

between the company and a creditor, and where there is money left over after all creditors and all statutory interest had been paid in full, the foreign currency creditors should be entitled to satisfaction of their contractual claim in debt.

(2) By contrast, the administrators of LBHI2, as both creditors and members of LBIE, contended that there was no room for any such claim, on the ground that the foreign currency debts should be satisfied and discharged when the proved claims based on those debts had been paid in full.

The LBHI2 administrators supported this contention on two bases:

(a) a primary, narrower, basis, simply relying on the provisions of Rule 2.86, which mandatorily converts the foreign currency debts into sterling, and renders only the sterling equivalent of the debt provable in the administration, so that (it was argued) payment in full of the proved, sterling, sum together with statutory interest, satisfies the claim in full, leaving no further claim against any surplus; and

(b) an alternative, wider, basis, to the effect that payment in full of a proved debt, as assessed in accordance with any of the provisions of Part 10 of Chapter 2 or Chapter 9 of Part 4 of the 1986 Rules, satisfies in full the underlying contractual debt.

14. It was held, both at first instance (by David Richards J, as he then was) and by the majority in a Court of Appeal comprising Moore-Bick, Lewison and Briggs LJJ, that the foreign currency creditors were entitled to claim the shortfall in consequence of currency movements, though Lewison LJ dissented on this issue.

15. Further, the Supreme Court appears from the leading judgment of Lord Neuberger PSC to have accepted that (quoting from para. 80)

> "at any rate, it is hard to quarrel with the argument that, if it turns out that there is a surplus, it would be commercially unjust to distribute it to the

> members without first making good the shortfall suffered by the foreign currency creditors";

And Lord Neuberger also referred to the statement of Lord Wilberforce in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 that a creditor contracting in his own currency had bargained only for his own currency and

> "justice demands that the creditor should not suffer from fluctuations in the value of sterling".

16. Nevertheless, the Supreme Court, overturning the result in both courts below, held (by a majority of 4-1, Lord Clarke JSC dissenting) that rule 2.86 spells out the full extent of a foreign currency creditor's rights. Neither it nor any other express provision left room for a non-provable contractually based currency depreciation claim; and that was that. The claim thus foundered on the rock of the statutory provision and its architecture.

17. The narrow submission of the LBHI2 administrators was accepted: the demands of justice could not trump or set aside the statutory scheme. As to the wider issue, by a majority of 3-2 (Lord Sumption JSC and Lord Clarke dissenting) the Supreme Court "inclined to the view" that it is inconsistent with Chapter 10 of Part 2 of the 1986 Rules, and the natural meaning of rule 2.72(1), to treat a debt which has been met in full under the statutory scheme nevertheless has a non-provable component capable of resurrection and vindication.

18. That as it seems to me, is an illustration of a "bottom up" rather than a "top down" approach: a reaffirmation or reflection of the rule that it is not for judges to step over the statute or add towers to its architecture; nor too easily to find gaps, even small gaps, even if "justice" seems to demand it, where in truth the legislature, either expressly or by implication, has entirely dealt with the issue. Lord Sumption put it this way at para. 194:

> "I have no difficulty with the concept that non-provable debts may be recoverable from a surplus, but I do not accept the conclusion of David Richards J and the majority of the Court of Appeal that the unsatisfied balance of a foreign currency debt can be recovered on that basis. The reason can be shortly stated. It is axiomatic that where the Insolvency Rules deal expressly with some matter in one way, it is not

> open to the courts to deal with it in a different and inconsistent way. The recoverability of non-provable debts put of a surplus means that the statutory rules for recovering a dividend on provable debts cannot be regarded as a complete code of the creditor's rights of recovery. But rules 2.86 and 4.91 must be regarded as a complete code for the specific case of foreign currency debts. Non-provable debts are normally debts for which no provision is made in the statutory mechanism of proof and distribution. But the Insolvency Rules do provide for foreign currency debts. Rules 2.86 and 4.91 provide that they are to be valued at the cut-off date and that distributions are to be made in accordance with that valuation. The limitations of these provisions are as much part of the statutory scheme as their positive enactments. It follows that if a debt is provable but the limited character of these provisions nonetheless leaves part of it unsatisfied, the creditor cannot recover more in respect of the same debt by reference to the judge-made rules governing non-provable debts. It is both inherently implausible and inconsistent with the language of the Rules to suppose that the legislator envisaged that the same debt could at one and the same time be recoverable as to part as a provable debt and as to the rest as a non-provable, conditionally on there being a surplus."

19. In other words: mind the gap, for it may not be there; misgivings (which indeed Lord Sumption and others expressed) as to the result in terms of overall justice open up no interstice.

20. The same lesson appears from the decision in relation to issue 3 in the same case. If anything the warning is starker.

    Issue 3, you will all remember, concerned whether a creditor of LBIE who had been entitled to, but had not been paid, statutory interest, could claim such interest in a subsequent liquidation.

21. At first instance, David Richards J, as he put it "with no enthusiasm", held that it could not. The rule entitling a creditor to statutory interest in an administration, that is (or at least was) rule 2.88(7) comprises a direction only to an administrator of a company, and applies only so long as the company is in administration and not thereafter.

22. But the Court of Appeal disagreed and held that in the interests of a commercially sensible conclusion it could, on the basis that a liquidator should be obliged to continue to treat the interest as accrued and treat it as a liability of the company.

23. The Supreme Court sympathised with the Court of Appeal's objectives but disagreed with their analysis and the result, holding (*nem con*) that rule 2.88(7) applied only in an existing administration and constitutes a direction to an administrator while in office. No obligation of the company is established; and sections 189(2) and rule 4.93 were held to exclude rule 2.88(7) interest being proved for or paid once a company previously in administration is put in to liquidation. Further, any contractual right to interest for the post-administration period does not revive or survive in favour of a creditor who has proved for a debt and been paid on his proof in a distributing administration.

24. Lord Neuberger explained the position in broad and fundamental terms evocative of Professor Dicey in para. 120 of his judgment:

> "Under the United Kingdom's constitutional arrangements, it is not normally appropriate for a judge to rewrite or amend a statutory provision in order to correct what may appear to have been an oversight on the part of Parliament. That would involve a court impermissibly usurping the legislative function of Parliament…For this reason, it would be impermissible to have recourse to an entirely new judge-made rule to fill the gap in the present case…"

25. Again, overall justice or commerciality opened no gap or interstice.

26. In this context too, the decision of the Supreme Court in *Waterfall II* seems to me to illustrate the common law's insistence that it is not for a judge to read into legislation what is needed to achieve what that judge conceives to the just result: the judge may make law only when it is clear that the legislature has not.

27. And yet, and yet: some room there must be, even in an area of law, such as insolvency, where legislation is overwhelmingly the natural source.

28. With what some of you may detect to be a note of defensiveness, I turn to another more recent decision involving *Lehmans* with even more wariness and diffidence: for it is a decision of my own, and one which I have confessed caused me not a little anxiety at the time. It is, and this, I assure you, is a confession and not an advertisement, reported in that invaluable resource, BAILII, under neutral citation number [2017] EWHC 2031 (Ch).

29. I will not detain you with much detail. Suffice it to say that the question arose out of the fact that there is no express provision in the insolvency legislation for distributions to members as distinct from creditors within an administration; and furthermore, Briggs J (as he then was) had held in an unreported decision in an earlier application relating to Lehman Brothers Europe Limited "LBEL") in June 2012 that the statutory administration regime does not permit administrators to make distributions to a company's members.

30. The application before me concerned a scheme which, with considerable ingenuity, the Administrators and their advisers had devised and intended in broad terms to enable a distribution by the company further to the exercise of residual powers said to be retained by directors and shareholders to implement a reduction of capital as the way to effect the required distribution under the continuing aegis of administration. Some of the advantages of that course flowed from the decision in *Waterfall II*

31. The question for me, then, was whether it was permissible and proper for me to direct the administrators of Lehman Brothers Holdings plc ("LBH") to implement a full distribution to members in the administration by way of a reduction of capital, rather than first placing the company into liquidation in accordance with the usual (and perhaps hitherto invariable) procedure provided for in the Insolvency Act 1986.

32. The commerciality of the proposed solution was not in doubt. The creditors were in support. HMRC were given the opportunity to attend lest their tax take might be eroded; but they did not feel it necessary to appear. And the solution offered a more amorphous prize: I was told that the, as it were, "right" answer would undoubtedly facilitate the settlement of proceedings in *Waterfall III,* then due to be heard by me in September: temptation indeed.

33. But, as you can perhaps imagine, Lord Neuberger's admonition in para. 120 of his judgment in *Waterfall II* was ringing in my head. I "ummed" and I "ahhed" and I puffed at the edifice put before me. Ms Toube QC for the administrators was on her third supplemental skeleton and third adjourned hearing. I toyed even with the notion

of inviting contrary argument, given the obvious difficulties of determining tricky points without adversarial argument inevitable.

34. But, after much agony for all, I relented and I made the direction sought. I concluded my judgment as follows:

> "85. The need for judicial caution, in the context of an existing administration, before enabling an act or exercise of power not expressly enabled by the provisions of the 1986 Act, which are full and detailed and ordinarily taken to be comprehensive and often exclusive, is plain. I have borne anxiously in mind throughout Lord Neuberger's admonition as expressed in...his judgment in *Re Lehman Brothers International (Europe)*... The need for caution is the greater having regard to the firm refusal of Briggs J to give the approval sought in the 2012 Application for a distribution by the Administrators themselves on the simple ground that the 1986 Act (even as amended to enable distributions to creditors with the permission of the Court) did not provide any such power.
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> 86. I have also had well in mind that the fact that a proposed course is beneficial and pragmatic in the particular and rare and exceptional circumstances does not justify assuming or presuming, let alone exercising, power where none in law exists; and *a fortiori* if such power is prohibited. It is important also that the objectives of having a full and detailed code, and especially the objective of certainty for office-holders and creditors alike, should not be undermined by unwarranted judicial intervention and, indeed, invention.
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> 87. Thirdly, and this is not the only context in which the difficulty arises especially in the Insolvency and Companies Court where many substantial applications are *ex parte*, the Court is bound to feel especial concern given that it has not had the benefit of adversarial argument in this context, though Ms. Toube has been properly vigilant to raise any points that she has identified as relevant for and against her position and to address points that have arisen along the way.
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> 88. For all these reasons, and in the fundamental nature of the problem, I have found this a difficult matter to determine.
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> 89. However, after considerable consideration and hesitation, I have concluded that in this particular case, the gap can be filled, not by judicial intervention in terms of

expounding a new rule or expanding the ambit of a provision of the 1986 Act or the 2016 Rules, but by permitting reliance on parallel legislation and the specific provisions of the 2006 Act enabling reductions of capital (see sections 641 *et seq.*)

90. Paragraph 64 of Schedule B1 to the 1986 Act specifically acknowledges and envisages the exercise by the Company, by its members in general meeting or its board (as appropriate or mandated by the 2006 Act). If the powers concerned could be exercised so as to interfere with the exercise of the administrator's own powers they are "management powers" (as defined in paragraph 64) and their exercise requires the consent of the administrator; if not, they can still be exercised in accordance with the 2006 Act (and, of course, the general law). On either footing, such power seems to me to include the power to resolve to reduce capital and release and distribute capital and to undertake the necessary tasks to satisfy the conditions to make that legitimate.

91. Consent has been offered; and I am satisfied that the exercise of powers contemplated under the Proposal with the consent of the Administrators would not (provided properly considered and exercised in good faith) offend the statutory scheme or offend or undermine the purpose of the administration. I consider, therefore, that the directions sought in the present application provide a pragmatic solution to a practical problem and are consistent with the Administrators' duty to deal with the administration for the purpose for which it was sought, in the interests of creditors and expeditiously.

92. There is the additional comfort in this case that all relevant constituencies, the creditors, the shareholder and the Administrators as well as the intended director himself, are all supportive of the Proposal, or at least (in the case of creditors, including contingently or prospectively, HMRC) have raised no objection.

93. The circumstances in which such reliance is both necessary and possible will be very rare: the combination of a substantial surplus, but no prospect of intention of the company being restored to activities as a going concern is unusual.

94. In short, in this rare and exceptional case, I am satisfied that the Proposal is legally permissible as well as pragmatic and beneficial. Subject to detailed consideration of the Order I shall give the permission sought."

35. The settlement of *Waterfall III* swiftly followed. Job done. But was I right? Was this an interstitial innovation? Or an unprincipled plunge into a constitutional crevasse? The application was not opposed and there is no appeal process to correct me. Only time, I suppose, will tell; hopefully, after my retirement and retreat to the country.

36. I shall move on from *Lehmans* and my lingering neuroses about the past to consider briefly the future for schemes of arrangement, and then float some guarded and hesitant thoughts in that context about Brexit.

37. Let me start with an expression of pride. If ever there was an example of interstitial innovation prompted by the ingenuity of insolvency practitioners in searching for and finding solutions to avoid insolvency processes which inevitably erode or even eradicate value and promote a rescue culture I nominate the development by this jurisdiction of schemes of arrangement as a strong contender.

38. The statutory provisions, now in Part 26 of the Companies Act 2006, which have enabled this development are, as you all will know, short and skeletal. You will all know the essential architecture:

    (1) There must be some deal involving sufficient "give and take" to qualify as an arrangement between a company and its creditors and/or members

    (2) The sanctioning of the scheme involves a three-stage process: (a) an application to court to approve the proposed constitution of classes to vote for or against what is proposed and give directions as to how class meetings are to be held; (b) the holding of class meetings at which the scheme, to proceed, must be approved by 75% in value and a majority in number of creditors within each class; and (c) a hearing in court for its determination as to whether the scheme is free of any 'blot' and is a reasonable one such that a reasonable member of the class concerned acting honestly and in its own interests could have voted for it.

39. These statutory provisions offer a loose, or open-textured, framework, as the oft-used phrase now has it; but also in consequence interstices a-plenty. These interstices have

been filled by a process of judicial rule making and interpretation, prompted and guided by skilled and resourceful practitioners who have adopted schemes of arrangement as an extraordinarily flexible restructuring tool. This development is in many ways a surprise; and their common use presently to restructure foreign companies all the more so.

40. Surprise, because at least for the historians amongst us, it is of interest that the scheme of arrangement became an endangered species for almost all the Twentieth Century: not quite a dodo, but well on the way to historical footnote status.It was suffering in particular perhaps from a somewhat cautious judicial attitude to the necessary composition of classes. This led to fragmentation of creditor groups such as to undermine the main purpose at least in the case of creditor schemes, which is to ensure that proper commercial restructurings which have the support of a strong well motivated majority are not scuppered by a minority wielding a veto and holding the majority to ransom.

41. Furthermore, the statutory footings on which the scheme jurisdiction is built make no provision for anything like a statutory moratorium, which bankruptcy theory for some time propounded as essential to secure safe and effective formulation implementation of any restructuring. Chapter 11 seemed so much more sophisticated; the lack of any provision for cross-class cram down appeared unworldly; and even the description of a “scheme” of arrangement seemed to hint of some dark Victorian past.

42. But this century has seen a renaissance in the use and development of schemes of arrangement despite their quaint name. Why? Largely, I would suggest, because a generation of rescue culture practitioners and judges responsive to their ingenuity has gone back over the interstices and put them to better use.

43. I would cite especially, in seeking to explain both the near-death and the modern renaissance of the scheme jurisdiction, two examples of a change in perception or attitude the gaps or interstices in the open-textures drafting: both arise out of interstices in the legislation and both relate to the constitution of class meetings, one being a matter of substantive interpretation, the other an issue of procedure with

commercial ramifications. Both also illustrate how commercial need may be the mother of judicious invention.

44. The first of these is a quiet revolution in the attitude to what has always been the same test whether a separate class meeting is required. You will already know the interstice which has enabled the judges to fashion the test: it is simply that the legislation requires approval by class meeting or meetings but does not define what a 'class' is, and the gap has been filled by the Court. The accepted test was set out as long ago as 1892 by Bowen LJ in *Sovereign Life Assurance Co v Dodd* [1892] 2 QB 573 at 582-3, where he said this:

> "It seems plain that we must give such a meaning to the term 'class' as will prevent the section being so worked as to result in confiscation and injustice, and that it must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest."

45. The test is classic and hallowed; but the tension in it is also obvious: genuinely different rights require the protection of separate class meetings; but artificial distinctions will lead to a proliferation of classes and expose the scheme to veto by what may be a very few. A familiar balance is required between the twin dangers of majority oppression and minority veto rights.

46. I would say that for nigh on 50 years, after the scheme of arrangement was first introduced into legislation outside the context of an existing liquidation in 1908, the balance was tilted in favour of what Professor Jennifer Payne has described in her invaluable book on Schemes of Arrangement as "overzealous distinctions that give minorities strong veto rights".[1] In particular, different interests came to be treated as different rights, leading inevitably to proliferation of classes, and the triumph of interest groups. Just as damagingly that fostered the commercial perception of that being the likely result, so that a scheme was no longer perceived as a solution, but as a platform for minority demands deploying the threat of a veto.

47. Now, and in the last 15 or 20 years, the Court has rowed back or forward (according to your perspective) and adopted an approach which is at once more legalistic and

[1] *Jennifer Payne, 'Schemes of Arrangement: Theory, Structure and Operation', Cambridge UP, 2014*

more commercial. It has repeatedly emphasised that, in the words of Lord Millett (in fact in the Final Court of Appeal of Hong Kong) in *Re UDL Holdings Ltd* [2002] 1 HKC 172 at 184-5:

> "The test is based on similarity or dissimilarity of legal rights against the company, not on similarity or dissimilarity of interests not derived from such legal rights. The fact that individuals may hold divergent views based on their private interests not derived from their legal rights against the company is not a ground for calling separate meetings…The question is whether the rights which are to be released or varied under the scheme or the new rights which the scheme gives in their place are so different that the scheme must be treated as a compromise or arrangement with more than one class."

48. This restatement of the required approach to class constitution has had a very clear effect: the modern tendency is to accept that far fewer class meetings are required, and that the greatest danger is in excessive fragmentation. This approach has enabled such schemes as the *Equitable Life* scheme, which I would hazard the thought would have been all but impossible in earlier days, and has done much to resuscitate the scheme of arrangement as an instrument for rescue reconstruction.

49. Hand in hand with this restatement another procedural change has greatly assisted the renaissance. In the old days, as I shall call them, the Court steadfastly insisted that class constitution was a matter for the parties at all stages until the last sanction scheme: only at that final stage would the Court consider the decisions made. So a scheme could proceed at considerable expense only to fall ignominiously at the last hurdle. This element of expensive uncertainty was commercially next to unacceptable.

50. But in *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241, one of the very, very few scheme cases to go to the Court of Appeal, Chadwick LJ reviewed the decisions which had led to the rule of practice that class composition would never be reviewed by the Court until the final stage, and swept them away. A Practice Direction was swiftly promulgated advancing to the initial stage of court review the decision as to class composition. It is I think hard to overestimate the importance of this interstitial reform in altering the perception of the commercial feasibility and utility of a creditors' scheme.

51. Moving from those attempted explanations of the renaissance of the domestic scheme to consider, briefly, cross-border schemes, my colleague and renowned poacher turned gamekeeper, Snowden J explained this development as follows in his clear and illuminating judgment in *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch):

> "In recent years, schemes of arrangement have been increasingly used to restructure the financial obligations of overseas companies that do not have their COMI or an establishment or any significant assets in England…The use of schemes of arrangement in this way has been prompted by an understandable desire to save the companies in question form formal insolvency proceedings which would be destructive of value for creditors and lead to substantial loss of jobs. The inherent flexibility of a scheme of arrangement has proved particularly valuable in such cases where the existing financial agreements do not contain provisions permitting voluntary modification of their terms by an achievable majority of creditors, or in cases of pan-European groups of companies where co-ordination of rescue procedures or formal insolvency proceedings across more than one country would prove impossible or very difficult to achieve without substantial difficulty, delay and expense."

52. I do not think it is an exaggeration to say that England has become the restructuring capital of Europe; and in this, schemes of arrangement have played a great part, with an ever increasing number of overseas companies turning to the English courts to restructure their financial obligations under them.

53. What were and are the interstices which have been the basis for this successful extension of the scheme process to foreign companies?

54. Here are what appear to me to be the obvious ones:

    (1) First, section 895 states that the arrangement has to be proposed between a company and its creditors (and/or members in a members' scheme). But what qualifies as a company for these purposes? The answer is in section 221(1) of the Insolvency Act 1986 which extends the definition to an unregistered company which could be wound up under that Act. Neither Act places any express territorial restrictions on the jurisdiction of the English Court to wind up a company: it was left to the Court to determine whether the exercise of jurisdiction in respect of a foreign company would be permissible or exorbitant.

In *Re Drax Holdings Ltd* [2004] 1 WLR 1049 Lawrence Collins J (as he then was) decided that the jurisdiction did enable a scheme in respect of a foreign body corporate provided there was a "sufficient connection" with England.

That opened the door.

(2) The question then arose whether the door was slammed shut again by European legislation, at least in the context of a European body corporate.

In *Re Rodenstock* [2011] EWHC 1104 (Ch), Briggs J (as he then was) posed and answered in the negative the question whether any such jurisdiction was ousted or its exercise prohibited by the European Insolvency Regulation ("EIR") in relation to a company with its COMI in another EU member state and no establishment here: he decided that the EIR was simply never intended to limit the scheme jurisdiction of the English court.

(3) Briggs J also considered that, at least in the case of solvent companies, a scheme of arrangement falls within the Judgments Regulation ("the JR" or "Brussels 1"), with the double-edged consequence that (i) the English Court must be satisfied of its jurisdiction under one or more of the Articles in Chapter II of the JR but if so satisfied (ii) the scheme is entitled to recognition throughout Europe.

Briggs J, not without some expression of concern, was so satisfied. That I should note is an area which has been the subject of debate., and where different judges have taken different views: cf *Rodenstock; Primacom Holdings GmbH* [2011] EWHC 3746 (Ch); *Magyar Telecom BV* [2013] EWHC 3800 (Ch); ther two schemes in *Re Apcoa GmbH* [2014] EWHC 997 (Ch), [2014] EWHC 1867 (Ch) and [2014] EWHC 3849 (Ch), and *Van Gansewinkel* amongst others.

I think it a reasonably fair summary to say that there is still not consensus on the application of the JR; but the Chancery judges have proceeded on the basis that whether or not it applies is not determinative; and the door has been kept open whatever the answer.

(4) With the door thus kept open, the question turned more specifically to what would, under the judge-made interstitial rule, suffice as a "sufficient connection".

The question was further explored in a series of cases, and a consensus developed that it would ordinarily suffice if the rights of the relevant creditors were governed by English law, and/or that the English Courts had an exclusive or even non-exclusive jurisdiction in respect of disputes: see, for example, in addition to *Rodenstock, Re Primacom Holdings GmbH (No 1)* [2011] EWHC 3746 (Ch); *Re Primacom Holdings GmbH (No 2)* [2012] EWHC 164 (Ch); *Re Vietnam Shipbuilding Industry Group* [2013] EWHC 2476 (Ch); *Re Magyar Telecom BV* [2013] EWHC 3800 (Ch); and *Re Van Gansewinkel Groep BV* [2015] EWHC 2151 (Ch) to name but a few.

And in all those cases the view was endorsed that the EIR had no application.

(5) Overarching all these matters also is the concern lest the availability of the jurisdiction may prompt unacceptable forum shopping, in the past described in the House of Lords as a "dirty word".

But as my colleague, Newey J, soon to be Newey LJ, put it in *Codere Finance (UK) Limited* [2015] EWHC 3778 (Ch), reflecting perhaps the outlook of Lord Denning, there can be good as well as bad forum shopping: and a scheme which maximises value for creditors may be an example of one.

I should perhaps voice a note of caution in this context, despite my own acceptance of what I considered to be acceptable forum shopping in *Apcoa.* It remains extremely important to be very vigilant about extending the scheme jurisdiction too far and permitting resort to it in artificial contexts. I tried to adumbrate some hypothetical limitations in *Apcoa* which are sometimes overlooked.

And my colleague Richard Snowden J, gamekeeper now as he is, has been particularly anxious to emphasise this, rightly so as I think.

It is important at this stage for me to stress once again the warning "Mind the Gap": for nothing could more imperil the cross-border development of schemes of arrangement that excessive zeal or less than scrupulous assessment of any change.

55. Now: time marches on and drinks and dinner beckon. I shall now proceed smartly to my final topic, which is the effect of Brexit.

56. As to that it hardly needs a seer or soothsayer to appreciate that the cross-border scheme jurisdiction faces undoubted challenges.

57. That is especially so if, as one must suppose, Brexit entails the cessation of the mutual recognition parts of the Judgment Regulation (being dependent on membership of the EU). The likelihood of recognition is in effect a pre-condition to the exercise of the jurisdiction; and post-Brexit the Court may have to be satisfied, in the absence of automatic recognition under the Judgments Regulation, that recognition will nevertheless be accorded under the foreign jurisdiction's domestic law. In that context, the extent to which the political atmosphere may affect the past propensity of most European Courts, according to expert evidence, to give recognition on dual grounds of its own domestic rules and the Judgment Regulation.

58. Further, not only are there such basic systemic uncertainties, but also, it has to be recognised, there is competition for the business. Brexit will add further fire to the determination of the EU to build on its recent proposals for a substantial harmonisation Directive to ensure that EU member states all have minimum provisions for preventative restructuring procedures; procedures leading to a discharge of debts for honest entrepreneurs; and to improve efficiency of procedures. These seek a combination of UK and US processes. They are novel for Europe and interesting to us. Imitation may be the sincerest form of flattery; but it is a call to arms as well.

59. But in any battle ahead to protect and enhance this jurisdiction's pre-eminence I would suggest that its essential strengths should abide: and not least of its strengths is

the flexibility of the system, its inventive but careful and considered use of interstices and the constructive interaction between insolvency practitioners of the highest quality, as this jurisdiction has a-plenty, and the judiciary, with what I do not blush to say its experienced and reliable judges.

60. This may well need sympathetic consideration, development and sometimes even revision of our laws. It may be, for example, that we will have to re-think areas of well-established approach and law. An obvious example is this jurisdiction's historic emphasis on the underlying contracts between creditors and between them and the company, and their connection with this jurisdiction, as being the foundation for a 'sufficient connection' justifying this jurisdiction's intervention.

61. The European attachment to COMI, which chimes after all with the UNCITRAL Model Law (which, parenthetically, I note that no large economy in the EU has adopted), is undoubtedly a potential rival as a connecting factor, and may have to be more extensively accommodated in the scheme context.

62. And it may be, as Lord Neuberger suggested in his keynote speech to the International Insolvency Institute in June this year, that even such hallowed rules as that in *Anthony Gibbs & Sons v La Societe Industrielle et Commerciale des Metaux* (1890) 25 QBD 399 (to the effect that the discharge of a debt under the laws of a particular foreign country will be recognised only if the debt is governed by the law of that foreign country) will have to be revisited.

63. We have to do our bit to ensure that this jurisdiction is up to any necessary change.

64. But Brexit does not alter the fact that at the end of the day, it is expertise, flexibility, and judicious pragmatism which makes for good commercial and financial law; and this jurisdiction's practitioners and courts' reputations for it which will ensure that this forum and English law remain a preferred choice of the commercial community. We must mind the gap; but also make use of it, judiciously, but inventively, in the future as in the past.

65. Thank you.