Weil

# Brexit

## Implications for the restructuring and insolvency market

For those restructurings that are purely consensual and capable of being implemented without any recourse to the court or a formal insolvency procedure, Brexit will not ultimately have any real legal impact in the near term. But for those deals that require either a scheme of arrangement or a formal insolvency procedure as part of an implementation process, Brexit will indeed have an impact, although it remains unclear exactly what that impact will be.

Despite some criticism from certain parts of the market, neither the EC Regulation on Insolvency Proceedings (the European Insolvency Regulation) nor the UNCITRAL Model Law on Cross-border Insolvency has resulted in the harmonisation of European insolvency law. There is, therefore, no substantive body of insolvency law from which the UK needs to extricate itself. The substantive body of UK restructuring and insolvency law will continue to apply once Brexit is formally achieved.

However, there are two European Regulations, having direct effect in the UK, that do have a bearing on how certain aspects of UK restructuring and insolvency law are deployed on an EU-wide basis: the European Insolvency Regulation and the Judgements Regulation. These two Regulations have had a significant impact in recent years on restructuring contingency planning and implementation planning in particular. The status of both Regulations is now in doubt in the light of Brexit. The terms of the recent referendum gave the British public a choice between Remain and Leave, and we know the outcome. But the shape of the Brexit itself is very much uncertain and its impact on the application of the European Insolvency Regulation and the Judgments Regulation to the UK remains to be seen.

In certain restructurings, all that is required in terms of implementation is an appropriation of charged shares in an intermediate holding company. The Financial Collateral Arrangements Regulations (the FCA Regulations) can be used to achieve this. Since the FCA Regulations are substantive UK Regulations (implementing the EU Financial Collateral Directive), and not in and of themselves EU law, Brexit will have no effect on their standing and availability. The situation is similar in terms of the Cross-Border Insolvency Regulations, 2006.

Depending on the eventual terms of Brexit, restructuring and insolvency professionals will be dusting down the reach and impact of other (non-EU) international arrangements that may be helpful in plugging gaps in post-Brexit in EU-wide restructurings, for example the Lugano Convention and the Hague Convention.

### European Insolvency Regulation

The European Insolvency Regulation has been in place since 2002 and there is now a recast version of the Regulation which will apply to most EU insolvency and pre-insolvency proceedings commenced after 26 June 2016. What started as a slightly elusive piece of EU law – the concept of a company's centre of main interests (COMI) was ill-defined and took some grappling with by lawyers to make sense of – has become an incredibly helpful means of ensuring the most appropriate proceedings are opened in the most appropriate member state on a case by case basis. It single-handedly put a stop to competing insolvency proceedings being opened which might result in a restructuring becoming uncoordinated and unnecessarily fractious.

Group-wide insolvency was never achieved but, even so, the European Insolvency Regulation has been a force for good in the restructuring market. For the time-being the European Insolvency Regulation will remain in place and continue to have direct effect in the UK. However, once a formal exit has been achieved (in whatever form it can be negotiated) the Regulation will no longer apply automatically as a matter of EU law and, subject to the terms of the eventual exit deal, there will cease to be automatic pan-European recognition of UK insolvency proceedings, and vice-versa.

Going forward, recognition by EU member states of English insolvency proceedings will revert back to principles of comity or local law provisions – in particular, whether relevant member states have implemented the UNCITRAL Model Law. In the UK, the courts will revert to their pre-2002 very broad discretion to open insolvency proceedings in relation to overseas companies, and COMI may well not be the central axis around which the new judicial analysis will revolve.

## Financial Collateral Arrangements Regulations

The UK, like many other EU member states, has chosen to implement the EU Financial Collateral Directive in the form of the Financial Collateral Arrangements Regulations (the FCA Regulations). The FCA Regulations essentially provide for the very effective appropriation of share security in circumstances where the relevant security has become enforceable. They have been extremely useful in restructurings where implementation is capable of being effected through top level share pledge enforcement. This means of enforcement is quick, cheap and predictable. The FCA Regulations are a piece of substantive UK legislation and, as such, there is no reason why Brexit should have any impact on their use and availability going forward.

## Cross-Border Insolvency Regulations

Although not a creature of the EU, the UK chose to implement the UNCITRAL Model Law on Cross-Border Insolvency through the enactment of the Cross-Border Insolvency Regulations, 2006 (the CBIR). The CBIR allow a UK court to provide recognition and assistance to a foreign insolvency office-holder. They are a means through which cooperation and coordination can be achieved without the need for parallel insolvency proceedings being opened in the UK.

Whilst, of course, potentially helpful to have in the cross-border restructuring toolkit, the assistance capable of being achieved through the CBIR is nothing like the equivalent of automatic recognition under the European Insolvency Regulation. The unanimous view of the Restructuring team at Weil is that the CBIR – alone, and without the support of an automatic recognition procedure such as that provided the European Insolvency Regulation – is likely to be insufficient for complex cross-border European cases.

Similar to the FCA Regulations, the CBIR are a substantive piece of UK legislation and will be unaffected by Brexit.

## Schemes of Arrangement

Schemes of Arrangement are a UK Companies Act procedure and fall outside the scope of the European Insolvency Regulation. The popularity and reliability of the English scheme of arrangement as a restructuring implementation option is well-appreciated. There have been two developments in particular over the last number of years that have further enhanced their popularity – their use for non-UK distressed companies, and their increased use as a means of underpinning exchange offers in high yield debt restructurings. The Weil Restructuring team have been at the forefront of the developing high yield restructuring technology, and schemes of arrangement play a pivotal role.

There has been a rapid development in the jurisdictional case law around schemes, largely as a result of increasing numbers of non-UK companies' ever creative attempts to access the UK court jurisdiction for scheme purposes. Given that this case law has developed in parallel with, but independent of, the jurisprudence around the European Insolvency Regulation, Brexit should not impact the availability of schemes in any significant way. That said, there are two areas where there will be an impact:

- in some instances the "sufficient connection" requirement of the scheme jurisdiction has been established using a COMI shift in accordance with the European Insolvency Regulation. COMI has also been; and
- the jurisdictional analysis contained within the various non-UK scheme cases has given rise to a very difficult question of whether the EU Judgments Regulation applies. The Judgments Regulation, like the European Insolvency Regulation, has direct effect in the UK and, like the European Insolvency Regulation, would cease to apply on Brexit. If the Judgments Regulation no longer applies, a benefit would be that it would no longer be necessary to focus on the domicile of creditors in circumstances where an exclusive jurisdiction clause in finance documents did not apply to lenders and borrowers alike. But the corollary of that is that it would then be necessary, when considering the question of whether a scheme would have the desired effect, to fall back on an application of private international law. This may not be as predictable as simply relying on the application an EU-wide Regulation.

## Final Thoughts

In terms of the commercial position of the restructuring and insolvency market, it is tempting to think that the volatility that comes hand in hand with an event like Brexit will create opportunities for distressed players. There may also be increased opportunities for the alternative funders if mainstream banks pull back.

Ultimately, the impact of Brexit from a legal perspective will largely be a function of the terms of the ultimate exit that can be achieved by the UK negotiation team once Article 50 is eventually triggered.

## Appendix

| Legislation | Ambit of Legislation | Potentially affected by Brexit? |
|---|---|---|
| **EC Regulation on Insolvency Proceedings** | Framework governing the automatic recognition of insolvency proceedings commenced by debtors whose COMI is in the EU (except Denmark) | ✔ |
| **UNCITRAL Model Law on Cross-Border Insolvency** | International framework between signatory states governing the recognition of main foreign insolvency proceedings and assistance between insolvency courts.<br><br>Only EU signatories are Greece, Poland, Romania, Slovenia and the UK. | ✕ |
| **The Financial Collateral Arrangements Regulations** | Framework governing the types of financial collateral and security arrangements which a title holder can appropriate on the default of a collateral provider. | ✕ |
| **Recast Judgments Regulation EU** | Framework governing the automatic recognition and enforcement of judgments on civil and commercial matters within the EU. | ✔ |

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