

MOFO BREXIT BRIEFING

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Flourishing by becoming familiar: how to attract restructuring investors to the post-Brexit UK

By James M Peck and Howard Morris

The process of Brexit will take years, and the implications for our clients' businesses will unfold over time. Our MoFo Brexit Task Force is coordinating Brexit-related legal analysis across all of our offices, and working with clients on key concerns and issues, now and in the coming weeks and months. We will also continue to provide MoFo Brexit Briefings on a range of key issues. We are here to support you in any and every way that we can.

Go West

Instead of looking wistfully east, smitten by gloom at the prospect of falling out of the European Insolvency Regulation (EIR), the UK ought to be turning west. It's not Brexit that provides an opportunity, nothing so clichéd because the country could actually do this anytime, but the UK should seize this moment of realignment to improve the UK insolvency system. Not so much to make it the best in the world but with the aim of making it *familiar*.

“We're all doomed!” they say, but...

Read a random sampling of law firm summaries of the consequences of Brexit for the UK as an international corporate restructuring centre and one is struck by the underlying mood of pessimism. The UK, on exiting the EU, will lose the mutual recognition of insolvency proceedings among Member States conferred by the EIR. While the scheme of arrangement (SoA), a restructuring tool that has been precociously successful in attracting foreign companies to London to undertake massive restructurings, is technically unaffected, European sentiment may turn against the SoA. The enforceability of SoAs in EU countries, something the UK has taken very much for granted while a member of the EU, may be challenged, undermining their use.

Absent a treaty with the EU to recreate the EIR, that will be it.

No one expects the UK government or the EU to have replacing the EIR with an international treaty to the same effect high on the negotiating agenda. Plus the EU Commission already plans to further align European insolvency regimes. Without the UK, the difficult common law outlier, and fueled by a desire to publicly commit to the European ideal, harmonisation of the 27's insolvency laws must be

on the cards. So not only does the UK lose the EIR, it may see the rump of the EU accelerating away – hence the gloomy attitude to the restructuring consequences of Brexit is no surprise.

It's all about perception

Just weeks before the Brexit referendum, on 25 May, the government published a consultation document with four big ideas for reforming UK insolvency law focusing on the rescue of viable businesses. The government has a 'Better Markets Bill' planned for the autumn, and some or even all of the proposals could then be included.

In the introduction to the consultation document, Sajid Javid, the Secretary of State for Business at the time, called for the UK to be at the forefront of what is perceived as best international insolvency practice. He goes on to say that in 2016:

"An increasing international focus on company rescue has helped to shift the perceptions of what constitutes best practice; the UK needs to reflect this if our businesses, investors and creditors are to remain confident that the best outcomes can be achieved when things go wrong."

In response some restructuring professionals simply see the ideas as a poorly conceived "Chapter 11 lite".

But Mr. Javid and the Insolvency Service are really on to something - something big. It touches a fundamental goal of the government in its Brexit negotiations, namely ensuring that the UK and its City of London remain a key international financial centre. And the prescient insight is in grasping that it's "*perception*" that is central to deciding what is best practice. What is "best" is what the market views as best. What international capital perceives and wants as the "best" in terms of a restructuring system - the laws, the judicial system administering the laws and the professional advisers with whom the capital providers must work - is one with which capital is familiar, recognizable, what they are used to.

The UK needs to take to heart that capital looks to similar restructuring and recovery regimes in order to price risk. And among the most important providers of capital, certainly in the restructuring world, are now the hedge funds, an industry born in the USA in the 1940s and growing to be the massive sector it is today. Add to that the influence of US investment banking and the strongly US character and culture of the international capital markets with which we are familiar, is plain. It is still a shock to American hedge fund staff arriving in Europe to find how very different our recovery systems are to the Federal Bankruptcy Code and in particular, Chapter 11, with which they are so familiar.

The negative consequences of Brexit on restructuring business in the UK are irrelevant if what the country now does is make its system more familiar to the capital markets attracting its investors and the companies needing to restructure.

The UK can grow as a centre for corporate restructuring

Singapore, for example, has made it a priority to adopt a number of changes to its insolvency practice and procedure to better attract global investors. The changes are to make the system more familiar to capital market participants, closer to something they know and understand and, so, more

attractive. Harmonising laws between jurisdictions is not easy. The EU shows that path is long and difficult but having identical laws is much less important than the feel of the system being familiar so that participants in an industry can use their experience in other jurisdictions to predict outcomes, understand the strengths and weaknesses of their position and buy, sell, invest and make deals in an environment where they have an appreciation of the rules. For the international capital markets, American in character and style, the foundation of a successful corporate restructuring system is that it demonstrably enables the rehabilitation of companies and has an efficient range of dispute resolution mechanisms with professionals of quality to serve them.

Don't retrofit – look forward

The UK has become a centre for restructuring albeit the preferred means is to achieve a consensual deal often using the SoA, not administration. The SoA has helped the UK bruit its attractions, and these qualities won't be lost by reason of Brexit; flexible laws that nonetheless permit accurate prediction of outcomes, a respected judicial system, transparency and a highly qualified community of restructuring professionals.

Instead of sweating about retrofitting links to the EU nations whose restructuring systems are quite different, the UK should proceed with refining and then implementing the reform proposals of May. Stepping beyond the compass of restructuring, the same approach should be taken in other areas of commercial and financial practice, the goal being to make UK laws more familiar to the market participants and the UK a comfortable and attractive place to do business.

Please do not hesitate to call with any question or concern that you may have. We're here to help.

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