

III ANNUAL MEETING, MADRID
THE BREXIT PANEL
(to be held on 17 June 2019)

Dear Colleague,

Mark Phillips QC and I are truly grateful for your agreement to contribute to this panel, and to the underlying project.

I have repeatedly deferred asking you to provide your input in the expectation that the exact form that Brexit would take — if it is to occur at all — would become clearer. Thanks in significant part to the incompetence, short-sightedness, and sheer cluelessness of Her Majesty's Government, this has not fully occurred even to date. So we must do the best we can.

I have provided a brief outline of five types of UK proceedings. The outline is greatly simplified and therefore multiply inaccurate; it is nevertheless sufficiently accurate for present purposes. Importantly, it takes account of the changes that are likely to be implemented in case of a 'hard' Brexit, i.e. in case the UK exists the European Union without a withdrawal agreement.¹

The outline of each of the five types of proceeding is followed by questions. I would be grateful if you could provide responses. **The responses need not be lengthy**: a brief paragraph or two supported by reference to statutory provisions and any judicial decisions (and indeed any other form of authority you consider appropriate) would do nicely.

In each case, assume a 'hard' Brexit such that the UK becomes like any other third country not party to special arrangements in relation to jurisdiction, recognition, cooperation, or enforcement.

I would be most grateful to receive your responses **by 24 May at the latest**.

Please contact me (by email or at +44 7956 169 208) for more information.

With thanks and best personal regards,

Riz

¹ These changes will be implemented through the (currently draft) Insolvency (Amendment) (EU Exit) Regulations 2018, which are set to go into force pursuant to section 8 of the European Union (Withdrawal) Act 2018.



A. Administration (companies)

- ◆ **Source:** UK insolvency legislation
- ◆ **UK court's jurisdiction:** over companies (i) registered in the UK, or (ii) with COMI in the UK, or (iii) with COMI in an EU27 state and an establishment in the UK; or (iv) incorporated in an EEA State, or (v) not incorporated in an EEA State but with COMI in an EEA State other than Denmark
- ◆ **Nature:** collective — affects and addresses all of the assets, liabilities, and affairs of the debtor company
- ◆ **Commencement:** either
 - ◆ by court order — obtained by the company, its directors, or a creditor,
or,
 - ◆ out of court — by appointment of the administrator by the company itself, its directors, or its main secured creditor
- ◆ **Management:** independent administrator displaces the board's powers and must act primarily in the interests of creditors as a whole
- ◆ **Court oversight?** Yes. Whether appointed in or out of court, the administrator is an officer of the Court, is under the Court's control, and is accountable to it for the discharge of their functions
- ◆ **Intended objectives:** Rescue of the company as a going concern, or realisation of the company's assets (possibly as a going concern) for payment to secured, statutory preferential, and possibly unsecured creditors
- ◆ **Questions:** Would the relevant Courts in your jurisdiction:
 - (i) recognise the UK moratorium?
 - (ii) recognise the administrator's right to deal with the company's assets?



- (iii) recognise the effect of a UK Court order on the company's liabilities, such as an amendment or extinguishment of debt?
- (iv) assist in the enforcement of a judgment or order imposing personal liability upon the company's erstwhile director?
- (v) enter into court-to-court communication with the relevant UK Court?

Are there any other important issues that you consider would arise in relation to such proceedings?

B. Winding-up (companies)

- ◆ **Source:** UK insolvency legislation
- ◆ **UK court's jurisdiction:** over companies (i) registered in the UK, or (ii) with COMI in the UK, or (iii) with COMI in an EU27 state and an establishment in the UK, or (iv) with a "*sufficient connection*" with the UK, such as presence of assets
- ◆ **Nature:** collective — affects and addresses all of the assets, liabilities, and affairs of the debtor company
- ◆ **Commencement:** either
 - ◆ by court order — obtained by the company, its directors, or a creditor,
 - or,
 - ◆ out of court — by resolution of the company's members/shareholders
- ◆ **Management:** independent liquidator displaces the board's powers and must act primarily in the interests of creditors as a whole
- ◆ **Court oversight?** Yes. All liquidators are under the Court's control, and are accountable to it for the discharge of their functions. The court-appointed liquidator is also an officer of the Court and thereby subject to certain additional duties



- ◆ **Intended objectives:** Gathering and realisation of the company’s assets and distribution of the proceeds to creditors; investigation of and reporting to the authorities about the circumstances surrounding the company’s insolvency

- ◆ **Questions:** Would the relevant Courts in your jurisdiction:
 - (i) recognise the UK moratorium?

 - (ii) recognise the liquidator’s right to deal with the company’s assets?

 - (iii) recognise the effect of the UK proceedings and/or a UK Court order on the company’s liabilities, such as that they are deemed to have been fully discharged by payment of a dividend in the winding up?

 - (iv) assist in the enforcement of a judgment or order imposing personal liability upon the company’s erstwhile director?

 - (v) enter into court-to-court communication with the relevant UK Court?

Are there any other important issues that you consider would arise in relation to such proceedings?

C. Schemes of Arrangement (companies)

- ◆ **Source:** UK companies legislation

- ◆ **UK court’s jurisdiction:** over any company with a “*sufficient connexion*” with the UK. Debt governed by English law usually suffices.

- ◆ **Nature:** selective — affects and addresses only those of the assets, liabilities, and affairs of the debtor company that the company chooses to subject to the scheme

- ◆ **Commencement:** at the debtor company’s initiative

- ◆ **Management:** company’s board retains control; no moratorium



- ◆ **Court oversight?** Only over the scheme process, not more generally over the company's assets or liabilities
- ◆ **Intended objectives:** Restructuring of the company's capital structure (equity and/or debt) and possibly also its assets
- ◆ **Questions:** Would the Courts in your jurisdiction recognise the effect of a Court-approved scheme on the rights of creditors in EU27 states. It may be useful to distinguish between the scheme's effect on
 - (i) debt governed by English law and where the debtor company has a UK COMI;
 - (ii) debt governed by English law but the debtor company does not have a UK COMI: Rome I may be relevant here; and
 - (iii) all other cases.

Are there any other important issues that you consider would arise in relation to such proceedings?

D. Voluntary arrangements (companies and natural persons)

- ◆ **Source:** UK insolvency legislation
- ◆ **UK court's jurisdiction:**
 - ◆ over companies (i) registered in the UK, or (ii) with COMI in the UK, or (iii) with COMI in an EU27 state and an establishment in the UK; or (iv) incorporated in an EEA State, or (v) not incorporated in an EEA State but with COMI in an EEA State other than Denmark
 - ◆ over natural persons with (i) COMI in the UK; or (ii) COMI in an EU27 state other than Denmark and an establishment in the UK; or (iii) domicile in the UK; or (iv) was ordinarily resident or had a place of residence in the UK at any time within the three years preceding the making of the petition; or (v) carried



on business in the UK at any time within the three years preceding the making of the petition

- ◆ **Nature:** selective — affects and addresses only those of the assets, liabilities, and affairs of the debtor that the debtor chooses to subject to the scheme
- ◆ **Commencement:** by the debtor
- ◆ **Management:** debtor retains control of their own assets and affairs. There may or may not be a moratorium. Implementation of the arrangement occurs under supervision of an independent supervisor
- ◆ **Court oversight?** Only over the arrangement process, not more generally over the company's assets or liabilities. However, the supervisor is an officer of the Court, is under the Court's control, and is accountable to it for the discharge of their functions
- ◆ **Intended objectives:** Restructuring and discharge of the debtor's liabilities; there may or may not be a restructuring of the debtor's assets and affairs
- ◆ **Questions:** Would the Courts in your jurisdiction recognise the UK moratorium?

Are there any other important issues that you consider would arise in relation to such proceedings?

E. Bankruptcy (natural persons)

- ◆ **Source:** UK insolvency legislation
- ◆ **UK court's jurisdiction:** where the debtor has (i) COMI in the UK; or (ii) COMI in an EU27 state other than Denmark and an establishment in the UK; or (iii) domicile in the UK; or (iv) was ordinarily resident or had a place of residence in the UK at any time within the three years preceding the making of the petition; or (v) carried on business in the UK at any time within the three years preceding the making of the petition



- ◆ **Nature:** collective — affects and addresses all of the assets, liabilities, and affairs of the debtor company
- ◆ **Commencement:** by court order, typically obtained by the debtor or a creditor
- ◆ **Management:** virtually all of the debtor’s property vests in an independent trustee in bankruptcy who must act primarily in the interests of creditors as a whole
- ◆ **Court oversight?** Yes. All trustees in bankruptcy are under the Court’s control, and are accountable to it for the discharge of their functions.
- ◆ **Intended objectives:** Gathering and realisation of the debtor’s assets and distribution of the proceeds to creditors
- ◆ **Questions:** Would the relevant Courts in your jurisdiction:
 - (vi) recognise the UK moratorium?
 - (vii) recognise the trustee’s right to deal with the bankrupt’s assets?
 - (viii) recognise the effect of the UK proceedings and/or a UK Court order on the bankrupt’s liabilities, such as that they are deemed to have been fully discharged by payment of a dividend in the bankruptcy?

Are there any other important issues that you consider would arise in relation to such proceedings?