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Brexit – the impact on German restructuring and insolvency

FW discusses the impact of Brexit on German restructuring and insolvency with Christian Graf Brockdorff, Fabian von Ritter, Peter Jark and Tom Braegelmann at BBL Bernsau Brockdorff.

THE PANELLISTS

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Christian Graf Brockdorff has worked in the field of restructuring and insolvency for over 20 years as advisor and administrator. Alongside his regular insolvency administrator activities, he is currently one of the most frequently appointed trustees in Germany. He also advises self-administrating debtors on restructuring and insolvency law issues. In the field of trusteeships, he acts as trustee or adviser.

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Fabian von Ritter specialises in corporate and insolvency law. After working for various international law firms and advisory companies, Mr von Ritter joined BBL Bernsau Brockdorff to work on insolvency proceedings for legal entities within the German market. He holds a bachelor's degree in business administration and is a qualified lawyer admitted to the German Bar.

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Peter Jark has worked for over 20 years in an international environment. He specialises in advising creditors and debtors in relation to the legal, financial and operational restructuring of companies. Furthermore, he is a recognised and experienced adviser in the field of buying and selling, as well as workout and enforcement of non-performing and non-core loans. He also advises various funds in the financing or purchase of companies in difficult situations.

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Tom Bräegelmann is an experienced international restructuring practitioner. He worked many years as an international business lawyer, focusing on international restructuring matters. He also worked for more than three years as a bankruptcy and intellectual property (IP) lawyer in New York. He is closely following the latest technological developments currently transforming the legal sector, namely the digitalisation of restructuring and insolvency practice worldwide.

FW: In broad terms, what major impact do you predict Brexit will have on Germany's legal framework for restructuring and insolvency, especially in the context of competition between different European jurisdictions to be a hub for insolvency/bankruptcy proceedings?

Brockdorff: We assume that the impact and influence of the British scheme of arrangement on Germany and the rest of the EU will be reduced as, going forward, its recognition within the EU may be questionable. We hope that the jurisdictions involved will be quick to find solutions, since the only thing we do not have in an insolvency and restructuring scenario is time. This not only impacts the recognition of a proceeding – the United Nations Commission on International Trade Law (UNCITRAL) could be a solution – but also what procedures are accepted or what centre of main interests (COMI) is defined. Above all, it is about the proceedings that need to be in line. The key challenge will be the day after the transition period, when we will all need to work on new provisions with no experience.

von Ritter: We assume that the stakeholders involved – especially on the administrator side – will need to actually work together in the best interests of the debtor, rather than to discuss legal topics for the sake of 'I am right'.

FW: How will UK entities with an administrative seat in Germany be recognised post-Brexit?

Jark: We predict that the rules for UK entities will apply in a similar way as they do to Swiss or Singapore registered companies that shifted their administrative seats to Germany. It has been ruled several times, not only by the German Federal Court of Justice but also confirmed

by the European Courts, that, in the absence of a special treaty between two different jurisdictions, non-EU limited liability companies active in Germany will not be accepted if their headquarters is in Germany. As a matter of fact, all shareholders of limited liability companies in England that are actually active with their COMI in Germany would not be limited in their liability. This has also been stressed by the German government online.

Braegelmann: We have already seen a number of companies that have changed their legal form from a UK to a German entity, where the main company seat was already in Germany. But we still believe that there are a number of companies and shareholders that are not aware of this significant liability risk and should use the time remaining to reconsider their liability exposure.

FW: What measures might the German parliament introduce during the transition period to aid UK entities doing business in Germany?

von Ritter: Germany has already become active in this role and introduced an amendment to its Corporate Merger and Transformation Act. This will enable those companies active in Germany, but registered in the UK, to change their seat as easily as possible, so that they can retain limited liability in future.

FW: With the European insolvency regulation no longer applying after Brexit, how severely will this limit provisions as to the recognition and enforceability of court decisions? How might arrangements with other jurisdictions, such as Singapore, allow the EU and the UK to come to an understanding, both during the transition period and beyond?

Jark: We hope that there is enough political will and statecraft to ensure that the fallout from Brexit becomes manageable and will not be subject to decades of litigation. Since the UNCITRAL Model Law has not been adopted in Germany, we need a rapid solution with a legal basis. Until the end of the transition period, all existing regulations will stay in place and we can all work on existing provisions. Crucially, the European insolvency regulation attempts to create a cross-border insolvency proceeding recognition regime that is similar to and in line with the UNCITRAL Model Law on Cross-Border Insolvency. Other countries have implemented this law into their national law, chiefly the US, Australia and, in 2006, the UK. Hence, even though the European insolvency regulation will soon cease to apply to the UK, it remains a legal fact that the UK, and the EU and Germany in particular, will continue to share many principles of cross-border insolvency proceeding recognition, and will continue to share a common language of such principles and issues. All things considered, that bodes well for future cooperation between the UK, the EU and Germany concerning cross-border insolvencies. We expect that in practice, due to typical time pressures, all actors will come to a reasonable understanding in order to resolve cross-border insolvency cases swiftly and correctly in the interests of creditors, debtors' employees and debtors themselves.

Braegelmann: Following Brexit, the UK has announced its intention to accede to the Lugano Convention 2007. The Convention provides certainty as to which courts may hear a civil or commercial cross-border dispute, as well as ensures that the resulting judgment is recognised and enforced across borders. This helps prevent multiple court cases taking place on the same subject matter in different countries and reduces costs for the parties involved. Importantly, the UK has already received statements of support from Norway, Iceland and Switzerland over its intention to accede to the Convention. This is a crucial development as the Lugano Convention 2007 is a means by which non-EU Member States can ensure a certain level of mutual recognition and enforcement of judgments in civil and commercial matters in relation to EU Member States, and vice versa. In the future, this may potentially help the UK scheme of arrangement to continue to play

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> BBL Bernsau Brockdorff

> WE DO HOPE THAT THE NEW DIRECTIVE WILL CONVINCE MORE MANAGING DIRECTORS IN GERMANY TO FILE AS EARLY AS POSSIBLE, IN ORDER TO ENABLE A VIABLE RESTRUCTURING.
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> FABIAN VON RITTER
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an economic role within the EU, as it may still be enforceable to a certain extent.

FW: How do you foresee the confidentiality of court proceedings, such as that provided by the German protective shield, playing out in relation to the UK? Moreover, will a secret proceeding in the EU need to be kept secret if it involves a UK entity?

Braegelmann: The German legislature is currently looking into the confidentiality of court proceedings. While it is possible to keep proceedings confidential, the eventual results – haircut, rejection of contracts, exchange of shareholders, banks and managing directors, among others – cannot be kept confidential for practical reasons as the debtor will continue to do business. So, other market participants will find out, sooner or later, that a previous restructuring took place. We will see whether the German legislature and Ministry of Justice will come up with a solution. An obvious compromise would be to keep proceedings initially confidential, until their successful resolution, and then publicise restructuring results in order to inform the market.

FW: Post-Brexit, how will EU transparency rules apply to UK entities? With the UK commercial register having little or no faith in its German counterpoint, what might this mean for transactions such as cross-border mergers or the buying and selling of real estate?

Jark: The key issue is the difference in jurisdiction. Both the commercial register and the land register have a very important role in the German system. Whatever is registered is deemed to be correct by operation of law, unless proved to be wrong. That said, anyone purchasing a plot of land from someone who is registered, purchases from the legally correct owner. All encumbrances are correct. The same applies with respect to companies. Any power of attorney registered is correct, any managing director registered is the managing director. Public trust in both the land register and the commercial register is the basis for a number of transactions. In the UK especially, the commercial register does not hold such public trust. A German clerk for a land register who receives a deletion notice concerning a mortgage land charge from a British bank signed by an individual faces a number of challenges. The notary system is different. No one known to the notary has to appear in front of a notary in the UK, whereas this condition is essential in Germany. Only then is a notarial deed valid. The person signing is not registered. The UK notary does not have to review in full whether or not the individual is the correct person to sign. These problems were already pressing while the UK was part of the EU and made it difficult for UK corporations, banks and financiers to own real estate in Germany or hold it as collateral. Following Brexit, it may be extremely difficult to convince German land register clerks that a UK corporation was validly represented by signatories.

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Braegelmann: During a transaction it is always difficult to find the right way between what should, in the view of German authorities, be delivered, and what, in the view of UK entities, can be delivered. A busy chief executive of a major international bank cannot be asked to sign hundreds of land charge releases, even if a local German land registry clerk demands this. So, one needs to find a way to convince clerks and judges in Germany that a proper English notarisation done with an employee of such a bank is sufficient. This is a question of experience, legal skills and persuasion skills. But Brexit may make German clerks and judges a bit less receptive to UK entities operating in Germany.

FW: Going forward, what are your hopes and expectations for German restructuring and insolvency processes in a post-Brexit environment, also taking into account asset classes and timing?

Braegelmann: We hope that the implementation of the EU's restructuring directive will result in a new German restructuring statute independent of the German insolvency code and the

German insolvency courts. These courts sometimes still operate in the spirit of the 19th century – liquidate the debtor, fresh starts are undesirable, let creditors pick up the crumbs. A real restructuring law for Germany would mean that honest companies that fail without wrongdoing can be given a fresh start without unduly minimising the rights of creditors and employees – for the benefit of the company, its creditors and employees.

von Ritter: We do hope that the new directive will convince more managing directors in Germany to file as early as possible, in order to enable a viable restructuring. A lack of trust in the system and a loss of control and standing, were issues that hindered stakeholders when using the law as a means to restructure.

Jark: We do see a number of asset classes that we have to deal with in the near future – automotive, retail, renewable energy and logistics, to name just a few. We appreciate it when the appointed restructuring practitioner possesses knowledge of the relevant asset class. You do not go to a dentist if your leg is broken. The heart of our economy is where people are employed. So, from a strictly legal perspective, let us agree that a restructuring should be done by an individual who knows what he or she is talking about.

Brockdorff: Cross-border restructuring is our daily business – and not only in relation to the UK and Germany, but across various borders. The new directive needs to enable us to smoothly restructure and rescue companies within the EU. It also needs to have links to countries that are no longer part of the EU but are still friends with whom we do business. All the issues discussed are of the utmost importance, especially in light of the new challenges that we are all facing together with coronavirus. ■