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31st October 2017

For the attention of Messrs Andrew Shore and Dean Beale

Dear Sirs

CITY OF LONDON LAW SOCIETY ("CLLS") INSOLVENCY LAW COMMITTEE (THE "COMMITTEE"): THE IMPLICATIONS OF BREXIT FOR THE RESTRUCTURING AND INSOLVENCY PROFESSION

Thank you for your response to our letter dated 17 August (the "August Letter") to Dean Beale setting out the CLLS' views on the above topic. We agree that the position paper entitled "Providing a Cross-Border Civil Judicial Co-operation Framework" (the "**Position Paper**") is helpful in the way it acknowledges the importance of the "approach to managing insolvency in cross-border situations". In particular, the Committee agrees that the effective management of cross-border insolvencies underpins and enhances confidence in cross-border commercial contracts and investment relationships – paragraph 14 of the Position Paper.

The Committee is, nevertheless, disappointed that the Government's response appears – at least on paper – not to have provided any substantive guidance as to how these aspirational statements are to be translated into reality or what is to be done if that is not possible. In the meantime, it is equally unclear whether the Government's intention is for the Recast Regulation to remain a part of English domestic law once the Withdrawal Bill comes into effect by virtue of clause 3 of the Bill (regardless of the position taken in other Member States) or whether it is to be

excluded from the general adoption of EU legislation into United Kingdom domestic law through the exercise of clause 7 powers.

The resulting position is very unsatisfactory. It fails to take account of any of the broader ramifications to the United Kingdom's restructuring industry and its present position as a robust jurisdiction of choice for the implementation and restructuring of financial transactions. The August Letter sets out the Committee's reasoning on these matters in more detail.

Without repeating that letter in its entirety, there are a number of key points that bear further emphasis. First, any intention to preserve the Recast Regulation as an incident of domestic legislation would overlook the Regulation's distinguishing characteristic. That is the surrender by Member States of jurisdiction over entities based elsewhere in the EU or EEA in return for recognition of the effect of proceedings over entities based in their own respective jurisdictions. This makes any proposal for the unilateral retention of the Regulation untenable on two grounds. First, it is impossible for the UK to legislate to replicate the effects of the Recast Regulation by providing for the post Brexit recognition in the EU or the EEA of the UK's own domestic proceedings. That is a matter which would require the agreement of the remaining EU members. Secondly, a legislative outcome which simultaneously obliges the English courts to recognise and give effect to insolvency proceedings taking place in the EU or EEA would destroy any bargaining position that the UK might otherwise have to prevent the undesirable outcome of English insolvency proceedings losing their automatic right of recognition throughout the EU and EEA.

As we said in the August Letter, such an approach would expose the United Kingdom to the potential adverse consequences of having to recognise insolvency proceedings in other European jurisdictions without gaining in return the benefit of recognition, as of right, in the EU and EEA of United Kingdom insolvency proceedings. It would also, for example, give Member States preferential treatment over other trading partners such as the United States.

Additionally, there is no reference in the Position Paper to the Government taking any steps to put into place a contingency plan that would protect the United Kingdom's position in the event that a satisfactory Brexit deal were not concluded. As we said in the August Letter, UK restructuring and insolvency processes will only really be seen as procedures of choice if they are at the very least consistent with and wherever possible improvements upon current and proposed EU legislation. For example, the proposed EU Directive 2016/0359, harmonising restructuring proceedings envisages the introduction of a new, four month moratorium process that would give debtors a breathing space to facilitate negotiating a restructuring plan. The Directive also envisages judicial or administrative authorities being able to confirm a restructuring plan that is not supported by all classes of the company's creditors.

Variations of all these matters were included in the *Review of the Corporate Insolvency Framework* consultation in May 2016 to which the Committee responded in July 2016. As we said in the August Letter, the Committee believes that the Government should focus upon developing, ideally within the remaining Brexit negotiation period, changes to UK restructuring and insolvency law (including the "cram down" restructuring plan) which will ensure that as and when Brexit takes place, United Kingdom restructuring law and practice are "best in class" and thus competitive with their equivalents in other European jurisdictions and the United States.

The Committee understands that the Government's focus in the weeks and months ahead needs to be upon ensuring that the UK's ability to trade freely within the EU and EEA are preserved to the greatest extent possible when Brexit takes place. The Committee recognises that when set against this broad objective, the preservation of the flexibility and reach currently afforded to UK restructuring processes by the Recast Regulation may seem to be an arcane objective. However, the experience of the Committee and other members of the CLLS is that the existence of a predictable and transparent process for the implementation and recognition of insolvency and restructuring procedures is a key factor taken into account by lenders and investors in their decisions on whether and if so to what extent they should enter into financing transactions that are governed by English law as against the law of other jurisdictions.

The Committee is mindful that paragraph 24 and Annex A of the Position Paper deal with transitional provisions in the event that there is no ongoing agreement. Annex A does not refer expressly to cross-border insolvency processes – merely to judicial co-operation but we assume that it is intended to encompass insolvency proceedings. Please confirm that our assumption in that respect is correct. If it is, then, at least principle, there appears to be common ground with the EU negotiating position articulated in its own July Position Paper entitled "Judicial Cooperation in Civil and Commercial Matters". The Committee agrees that the existing regime should continue to apply to insolvency proceedings which have been opened before exit day but observes that such a transitional arrangement would inevitably create a perverse incentive to accelerate the opening of proceedings in order to secure that ongoing advantage.

The Committee is concerned that with less than 18 months remaining before Brexit, the Government is yet to understand or begin to address in any meaningful way the issues set out in this letter, the August Letter and in the meetings held with Dean Beale and his colleagues at the offices of Hogan Lovells in October last year. The Committee remains happy to work with you on these matters. In the short term, the Committee suggests that it might be helpful for you and a couple of your colleagues to attend a Committee meeting in the next few weeks.

Participation in such a meeting will give you an opportunity for hearing, at first hand, the extent and basis of the reservations which both the CLLS and its members have with regard to the

Government's present, apparent, failure to take proper account of the implications of Brexit for the United Kingdom's position as an international financing centre of choice.

Please contact Jennifer Marshall, Hamish Anderson or Joe Bannister as to when you have had the opportunity of digesting the points made above and in the August Letter. Contact details are provided below.

Kind regards,

Yours faithfully

Jennifer Marshall,
Chair, Insolvency Law Committee
City of London Law Society