Insolvency – Post-Brexit: What does it mean for UK insolvency proceedings?

The UK is frequently chosen as a forum for conducting cross-border restructurings and insolvency proceedings because of the flexibility of our laws, the speed of access to our courts and the commercial attitude of our judges. The UK scheme of arrangement in particular is often chosen to restructure the indebtedness of companies registered outside of England, particularly where English law governs the finance documents. None of these benefits of the UK insolvency and restructuring regime will change as a result of Brexit.

What is more difficult to predict, however, is the impact on the European recognition of UK insolvency and restructuring proceedings. Corporate insolvency proceedings currently have automatic recognition (where the "centre of main interests" of the company is in the UK) across the EU pursuant to the European Regulation on Insolvency Proceedings (EIR). Although schemes of arrangement fall outside the EIR, one of the ways in which schemes are currently recognised across Europe is through the Judgments Regulation (with an alternative, at least in relation to schemes compromising English law governed finance documents, being that the scheme is given effect pursuant to the Rome I Regulation). Resolutions and insolvency proceedings of UK banks are recognised through the Credit Institutions Winding Up Directive (CIWUD), as amended by the Bank Recovery and Resolution Directive (BRRD).

It is not clear at present which, if any, parts of this European legislation will continue to apply in the UK as much will depend on the UK's chosen exit mechanism and what parallel legislation (if any) is put in place with the European Union. For example, if the UK were to become part of the EEA, CIWUD and BRRD would

continue to apply. Although the Judgments Regulation and the Rome I Regulation would no longer apply without parallel legislation, many of the effects of the Judgments Regulation could be replicated by the Lugano Convention or (if the UK were to sign up to it and in appropriate case) the Hague Convention on Choice of Court Agreements.

The remaining EU member states would also be adversely affected by a lack of automatic recognition in the UK of their insolvency and restructuring proceedings. In particular, without the provisions in the EIR requiring UK courts to give effect to compromises as part of any EU "main" insolvency proceedings, the English common law rule in *Gibbs v Societe Industrielle des Metaux (1890) 2 QBD 399* would have the effect that the English court would be unlikely to recognise a compromise through an EU insolvency proceeding of an English law debt. This could potentially be used as a negotiating point in any discussions with the EU regarding any parallel legislation that might replace the EIR.

There are alternative methods of seeking recognition for UK insolvency proceedings and judgments. For example, it may be that (following Brexit) other EU member states will adopt the UNCITRAL Model Law (at present, Poland, Greece, Slovenia, Romania and the UK have done so within the EU) and it may be possible to rely on a particular jurisdiction's rules of private international law (for example, it is understood that in Germany, the principles enshrined in the EIR have been extended to apply to companies with their centre of main interests outside the EU). One might also observe that UK insolvency proceedings have been recognised outside the EU for some time. It should be noted, however, that the UNCITRAL Model Law is much narrower in scope than the EIR (and does not currently extend to the recognition of insolvency-related judgments) and relying on ad hoc rules of private international law (rather than the EIR) can lead to much greater uncertainty than is currently the case.

It should be noted that the UK provides for recognition of foreign proceedings through its adoption of the UNCITRAL Model Law and hasn't done so on a reciprocal basis (i.e. it doesn't matter whether the foreign company is incorporated in a jurisdiction which has likewise adopted the Model Law). Furthermore the UK also provides for recognition of insolvency proceedings in a number of Commonwealth members states plus Ireland through section 426 of the Insolvency Act 1986, again not on a reciprocal basis. Accordingly whilst the UK remains in a position to act as a good global citizen (with perhaps the exception of compromise of English law documents by proceedings in other jurisdictions) that comity will be more exposed to the lack of reciprocity absent the EIR. This may also affect the prospect of recognition of English proceedings in third countries where competing proceedings are opened in Europe, such as under chapter 15 of the US Bankruptcy Code (by which the US has adopted the Model Law).

It is clear that both the UK and Europe have benefitted over the last 16 years from the mutual framework for the recognition of insolvency proceedings (and more recently from the mutual recognition of EEA bank resolutions) which has provided a sound framework for conducting European cross-border cases. For this reason, the Insolvency Sub-Committee would be strongly supportive of any measures that could be adopted to ensure that this mutual recognition continues.

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