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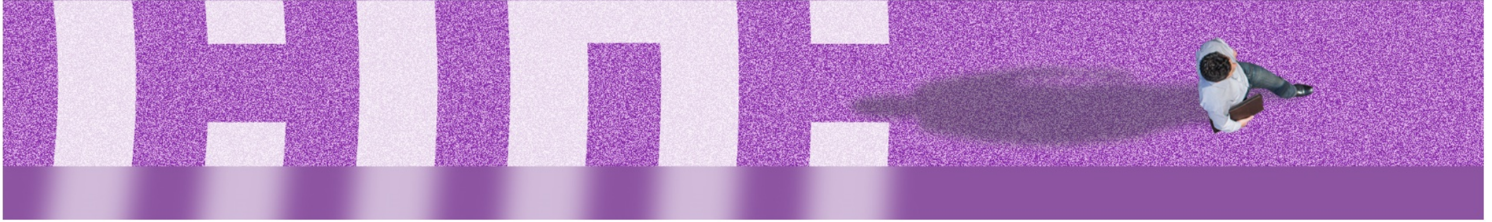

# BREXIT: WHAT DOES IT MEAN FOR THE RESTRUCTURING AND INSOLVENCY MARKET?

Following the UK's vote to leave the EU, companies will need to consider the implications for existing transactions and the potential impact of future legislative changes.

Existing EU law continues to apply and there will be no immediate impact until the UK's exit terms have been negotiated, however companies can start thinking about these issues now. In the longer term, whilst there will inevitably be some uncertainty, there will also be many opportunities for businesses that are able to embrace the changes ahead.

**Key issues**

- No immediate impact on the law
- Structuring issues for deals that span before and after Brexit
- Different analysis for offshore and onshore jurisdictions
- Unwinding the EUIR
- Prominence of UNCITRAL Model Law
- Schemes of arrangement: the same but different

Philip Hertz, Global Head of our restructuring and insolvency team comments: "From a restructuring and insolvency law perspective currently there are separate insolvency regimes which operate in each individual Member State. This ought to make the exit simpler. There are, however, some aspects of insolvency law that do have on EU-wide effect on cross border cases. In relation to those EU wide aspects, until the exit terms have been negotiated and agreed, the existing EU law will continue to apply and so there will be no immediate impact. Any reasoned analysis for cross border deals will inevitably depend on the outcome of the exit negotiations, which may be swayed by matters wholly unrelated to insolvency."

There may be structuring issues for any deals that span the period before and after exit given the uncertainty around what the post-exit position will be. Transitional arrangements will need to be put in place for existing formal cross-border insolvencies and restructurings which would likely continue and replicate the existing recognition arrangements in place. But for some deals, the insolvency analysis would remain unaffected, for example in structured debt transactions for typical offshore issuer jurisdictions (e.g. Jersey, Cayman Islands, BVI). For onshore jurisdictions (e.g. Luxembourg, Ireland), the jurisdictional reach of the English courts could – at least in theory and for the purposes of legal opinions - expand in the absence of the European Regulation on Insolvency proceedings (EUIR) (e.g., through, where available, a Part V winding up or section 426).

## EU INSOLVENCY REGULATION

Since 2002, the UK has been subject to the EUIR which determines which courts in the EU have jurisdiction to commence insolvency proceedings and which EU country's law applies to those proceedings. There is now a recast European Regulation on Insolvency Proceedings which is due to come into

effect for pre-insolvency and insolvency proceedings commenced after 26 June 2017. So, either the current or recast Regulation will remain in force in the UK until the conclusion of the leave negotiations. If the UK European Communities Act 1972 is repealed, the EUIR will no longer apply. Adrian Cohen, Co-ordinating partner for our European restructuring and insolvency practice notes: "This would mean a return in the UK to the position prior to 2002, without a common recognition framework".

In practice this means that:

## NO AUTOMATIC RECOGNITION OF UK INSOLVENCY PROCEEDINGS

- UK insolvency proceedings would not benefit from automatic recognition in EU member states.
- In relation to companies incorporated outside the UK and with no COMI establishment in the UK there is potentially a greater risk that those proceedings or those involving a COMI shift of a company incorporated in another EU member state to the UK would not be recognised by that EU member state (albeit that the test for the EU member state's asserting jurisdiction will remain unchanged).
- It is also uncertain how existing cross-border insolvency cases started in the UK, based on UK COMI or establishment and which are continuing at the point of exit would be treated. This will depend on what (if any) transitional arrangements are agreed.
- Recognition would depend on principles of comity or local law (for example, by way of the UNCITRAL Model Law – see below).

The UK would not be obliged to recognise EU Member State main or secondary insolvency proceedings automatically.

## LOSS OF SAFEGUARDS?

The automatic transaction avoidance, set-off and netting "safe harbours" provided for in English law governed contracts in insolvency proceedings of other EU member states would be lost. However some protection may be available for certain transactions in the form of the financial collateral arrangements and, assuming that EU member states' implementation of the Financial Collateral Directive continues to work in a similar way, the enforceability of collateral should not be affected following Brexit.

## NO AUTOMATIC RECOGNITION OF FOREIGN INSOLVENCY PROCEEDINGS

David Towers, partner in our restructuring and insolvency team remarks: "On the other hand, the UK would not be obliged to recognise EU member state main or secondary insolvency proceedings automatically and the courts could exercise their discretion to commence insolvency proceedings in relation to companies incorporated outside the UK and with no COMI".

## CROSS-BORDER INSOLVENCY REGULATIONS 2006

However, in terms of a framework for recognition, the UK is not entirely dependent on the EUIR. Foreign insolvency proceedings also benefit from the UK's enactment of the UNCITRAL Model Law by way of the Cross-Border Insolvency Regulations 2006 (CBIR 2006). The CBIR 2006 is a mechanism for the UK courts to grant recognition of foreign proceedings and assistance by way of co-operation and co-ordination. Whilst the assistance provided under

the CBIR is much more limited than the effects of automatic recognition under the EUIR, it is not limited to other EU countries. Interestingly of the EU member states, only Greece, Poland, Romania and Slovenia have adopted the UNCITRAL Model Law. Iain White, partner in our restructuring and insolvency team comments: "There would therefore be a recognition asymmetry between the UK and non-adopting EU member states which up until now the EUIR has bridged".

## SCHEMES OF ARRANGEMENT AND THE JUDGMENTS REGULATION: THE SAME BUT DIFFERENT?

There has been a broad body of case law over the last decade which has confirmed the independence of the court's scheme jurisdiction from the EUIR. This has been based on a scheme company being "liable to be wound up" for the purposes of Part 26 of the CA 2006.

The good news from a restructuring markets perspective is that a withdrawal from the EUIR would not therefore curtail scheme jurisdiction, but a withdrawal from the Judgments Regulation may affect the basis on which recognition opinions are obtained from local counsel in EU member states in which a scheme company is incorporated or has material assets. This is because in recent years, some EU jurisdictions (e.g. Germany and France) have placed a greater emphasis on the application of the Judgments Regulation in their recognition analysis over the application of domestic private international law (including the provisions of the Rome I Regulation). Withdrawal of the UK from the Judgments Regulation would require greater reliance on a robust private international law analysis in affected EU jurisdictions.

John MacLennan, partner in our restructuring and insolvency team notes: "This will mean that getting the right advisers will be key. Establishing effective scheme jurisdiction based on a COMI shift, where the scheme company is not incorporated in England or Scotland, or does not have English law governed liabilities, may be more vulnerable to challenge in its EU member state of incorporation. So careful planning and structuring will be required to avoid this".

Schemes could also benefit from recognition as a result of the Hague Convention if the UK were to accede as an independent state following Brexit and on the basis that the jurisdiction clause in question was exclusive.

## CREDIT INSTITUTIONS AND INSURERS

The originating credit institutions and insurance Directives have application beyond EU member states to the EEA. A pan-EU/EEA framework for credit institution and insurance undertaking insolvency proceedings would remain in place for so long as local implementing laws for directives in EU and EEA member states remain in place. Assuming that the UK would not remain part of the EEA, it will be difficult to preserve this framework which depends on mutual recognition.

The underlying policy to have a single set of insolvency proceedings under the guardianship of the supervisory home state would seem one the UK may wish to preserve and would be consistent with its approach on an international level (for example, through the Financial Stability Board).

## BANK RESOLUTION

While the current bank resolution regime under Part 1 of the Banking Act 2009 enacts the BRRD, there seems no obvious reason why the regime would need to be amended following an exit.

EU member states may continue to give recognition of UK resolution proceedings as "third country resolution proceedings" under the BRRD (as implemented in the relevant EU member state). Likewise, the UK will have discretion to recognise EU member states' resolution proceedings.

## OPPORTUNITIES FOR THE FUTURE

Hertz concludes: "We used to look back with nostalgia at the time when the European influence on insolvency law simply did not feature. It seems like those days are soon to be upon us again. Given the fact that the insolvency legislation (despite some calls for greater harmonisation across the EU) currently operates on an individual Member State basis the impact, save for in cross border cases is likely to be limited. Whilst there will inevitably be some uncertainty, there will also be many opportunities for businesses that are able to embrace the changes ahead. Being able to navigate through the different individual insolvency regimes that operate across Europe is and will continue to be key. Having local experts to assist and also analyse the effects that living in a post Brexit world will be essential."

For more information on the different restructuring and insolvency regimes that operate in the Key European Member States see our Restructuring and Insolvency Guide.

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