Fraud and Insolvency

September 2016

BREXIT: THE EFFECT ON CROSS-BORDER INSOLVENCIES

At first glance, it seems that cross-border insolvencies between the UK and EU are likely to become more time-consuming, complex and expensive post-Brexit. However, the situation may not be as dire as it first appears due to the existence of alternative legislation and the exemptions to the EU legislation. As with other areas of law, when it comes to insolvencies much will depend on what steps are taken to maintain the current arrangements with the EU or whether they fall away altogether.

The main risk of Brexit relates to those involved in current, complex insolvencies which cross EU borders, have a British angle and are expected to last until after Brexit happens. However, advice can be taken on how best to limit the adverse effects of Brexit and give insolvency practitioners and creditors the best chance of recovery.

Where are we now?

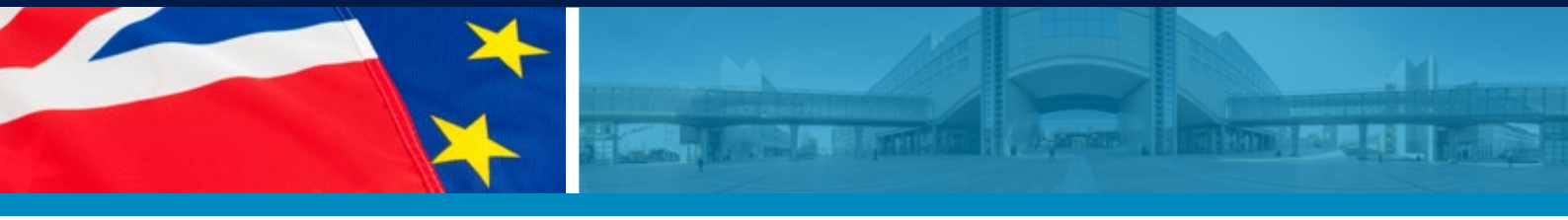
Cross-border insolvency in England and Wales is currently governed by four main sources of law. These are discussed below:

EU legislation

The EC Insolvency Regulation (EUIR)[1]

Strengths: This provides for obligatory EU wide recognition (except in the case of Denmark) as to the appropriate forum for proceedings, which is generally the Member State in which the debtor has its centre of main interest (COMI). Subsequent proceedings in other Member States will be recognised as secondary proceedings and relate only to those assets located within the local jurisdiction. The liquidation of entities registered outside of the EU, but with their COMI in a Member State will also be regulated by the EUIR.

1 Council Regulation (EC) 1346/2000



Limitations: The EUIR does not harmonise the substantive law of each Member State but encourages cooperation between countries. Individual insolvency regimes still exist across the EU. The EUIR does not apply to members voluntary liquidations, schemes of arrangement, administrative receiverships or receivers appointed under the Law of Property Act 1925. It also does not apply to insolvency proceedings in certain sectors (e.g. insurance undertakings).

Following Brexit: The EUIR will no longer apply and EU insolvency proceedings will no longer be automatically recognised by the English courts. A recast EUIR comes into effect in June 2017. The EUIR is generally reviewed every five years. The UK is unlikely to be involved in this review process going forwards.

Beyond the EU legislation

The Cross Border Insolvency Regulations 2006 (give force to the Model Law adopted by the UN Commission on International Trade Law) (CBIR)

Strengths: The CBIR apply without any need for reciprocity. English Courts can recognise eligible foreign insolvency proceedings even if the foreign jurisdiction would not recognise proceedings commenced in England and Wales.

Limitations: The Model Law has only been adopted by 41 jurisdictions worldwide and the only EU Member States which are signatories to it are the UK, Slovenia, Greece, Romania and Poland. Each state that adopts the CBIR is free to modify the standard provisions, meaning that there are inconsistencies in the way states implement the CBIR.

Following Brexit: It is likely that Member States will be able to apply to the English Courts who will recognise EU insolvency proceedings without the need for reciprocity under the CBIR, although this recognition will not be automatic.

S.426 of the Insolvency Act 1985

Strengths: It is currently possible to apply to the English Court for assistance in relation to insolvencies commenced in designated countries, including many key offshore jurisdictions (e.g. the British Virgin Islands, the Cayman Islands, Guernsey and Hong Kong).

Limitations: The reach of this section is limited to those countries designated by the Secretary of State through a statutory instrument.

Following Brexit: It remains unclear whether s.426 will be extended to include EU Member States.

The common law

Strengths: At present, this is often pleaded in the alternative to the CBIR in recognition applications. In principle, the common law recognises the concept of universalism; namely that there should be one insolvency proceeding based in the country where the entity has its COMI and this proceeding should be recognised worldwide. The common law encourages co-operation between competent courts in which the foreign main proceedings have been commenced.

Limitations: Due to the three key legal frameworks mentioned above, the precise scope of the common law is unclear.

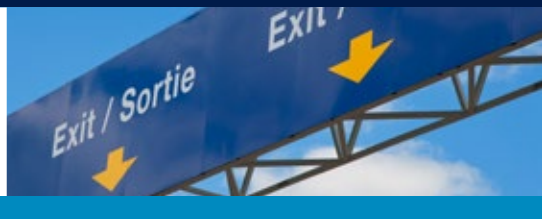
Following Brexit: It remains to be seen what role the common law will have post-Brexit.

What can IPs do now to limit the adverse effects of Brexit?

Obtain legal advice as to whether you can rely on the local laws of the EU Member State in question pertaining to recognition or comity with other jurisdictions.

If the COMI is in another EU Member State and there are assets located in the UK then you are likely to be able to apply to the English courts for recognition under the CBIR (as currently drafted) following Brexit, even if the EU Member State is not a signatory to the CBIR.

Remember that members' voluntary liquidations, schemes of arrangement and receiverships fall outside of the EC Regulation, as do insolvency proceedings concerning certain subject matters. These areas will continue to be governed by UK domestic law post-Brexit.

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As the new legal landscape begins to take shape we can help you to steer your business through the challenges and new opportunities that these changes will inevitably bring. Please contact our team of sector specialists for further information and support:

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