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Brexit and Independence

The impact on UK restructuring and insolvency

Introduction

As the result of the Brexit referendum sinks in, we now need to focus more clearly on its likely practical results for restructuring and insolvency, while remembering that nothing changes for at least two years. At the same time we need to take account of the possibility of a second Scottish independence referendum, in light of the marked difference in attitude to EU membership shown north and south of the border in the Brexit referendum and the subsequent announcements made by the Scottish National Party. There are a number of issues to be addressed here both for the highly effective UK cross-border restructuring industry and for the smooth operation of insolvency and restructuring regimes within the UK.

As indicated in our more general **Brexit Briefing on restructuring and insolvency**, Brexit issues relate more to cross-border recognition of proceedings than substantive laws, although the current rescue harmonisation project under development by the EU Commission as part of Capital Markets Union will remain of interest to the UK along with the current UK-only discussions on extension of our current moratorium provisions.

Post-Brexit recognition of UK procedures

Restructuring and insolvency of financial institutions raise special issues in a cross-border context, as reflected in the existing EU directives and implementing legislation regarding their cross-border resolution, recovery, reorganisation and winding up, with reference to their regulator. Given the inter-relationship of the City of London with other EU financial centres, the economic arguments for post-Brexit recognition of UK procedures throughout the EU (and indeed broader EEA) and vice versa are strong. The approach taken more broadly to post-Brexit regulation and trading of financial institutions across the UK and EU will be of great significance here given its potential influence on the operations and on the distribution of assets, liabilities and other risks of financial institutions. Accordingly, if some form of UK/EU passporting is agreed post-Brexit, continuing UK/EU cross-border recognition of relevant restructuring and insolvency proceedings appears more likely.

EU-wide effect of other insolvencies and restructurings is supported by the general EU insolvency regulation and, to some extent, the Brussels regulation on jurisdiction and recognition of judgments. While the UK may be able to replicate the effects of the Brussels regulation to some extent by acceding to the Lugano Convention, continuing the effects of the general EU insolvency regulation may be less straightforward. The UNCITRAL model law on cross-border insolvency has been adopted in the UK and would provide some lesser effects within the UK for EU insolvencies and for UK insolvencies in Greece, Poland, Romania and Slovenia, which have also adopted the the model law. Stronger mutual insolvency assistance provisions are in place between the UK and Ireland and UK insolvencies would be recognised in other member states on a more ad hoc basis. Unless broader general recognition of restructuring and insolvency between the UK and ongoing EU states is agreed, the current strong position of the UK in European cross-border insolvency will be weakened to some extent and advantageous UK insolvency procedures less readily available to EU companies.

Additional constitutional complexities

The possibility of Scottish independence and continuing Scottish EU membership adds further dimensions here. Continuing Scottish EU membership would preserve the current reciprocal effects of the general EU insolvency regulation and Brussels regulation between Scotland and other EU member states, but would raise issues of continuing mutual recognition of insolvencies within the former UK. Currently broad direct mutual recognition takes place by virtue of s.426 of the Insolvency Act 1986 for most types of insolvency proceedings - and while that is likely to continue under what would likely become parallel Scottish and English Insolvency Acts, some detailed adjustment may be required to prevent arrangements within the former UK undermining Scottish/EU arrangements, in addition to further technical or policy changes required. By way of back-up, the lesser effects of the UNCITRAL model law would probably come into effect between the constituent parts of the former UK through what would likely become parallel Scottish and English implementing regulations. Unless the Lugano Convention could be applied within the former UK, as is currently argued for recognition under the Brussels regulation of UK schemes in other EU member states, parallel schemes of arrangement may, however, be required north and south of the border as a scheme in England currently appears to take direct effect in the Scotland and vice versa simply by virtue of a single Companies Act applying in both - which will not be the case if it turns into two parallel Companies Acts.

The position should be similar regarding financial institutions to that applicable more generally if Scotland becomes independent and remains an EU member, though any special ongoing intra-UK arrangements regarding regulation of financial institutions would be likely to be reflected in special intra-UK arrangements regarding insolvency recognition - while bearing in mind the particular focus of the EU on this sector, leading to possible concerns about special direct effects within Scotland as an EU member state of actions taken in England as a non-member state.

Clearly much remains to be resolved both at the UK/EU level and at the Scottish level. The various options are interdependent and we will be keeping a close eye on developments.

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