EUGENE F COLLINS

Corporate Recovery

Brexit – Potential Effect on Insolvency and Restructuring in Ireland

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We now know that the United Kingdom (“UK”) intends to trigger Article 50 of the Treaty on European Union to commence the so-called “Brexit” process in the first three months of 2017.

Once triggered, there will be a strict time limit of two years for the UK to reach agreement with the European Union (“EU”) on the terms of its exit. Unless the EU agrees to extend that deadline the UK will exit after that date, regardless of whether there is an agreed exit arrangement in place, and it will no longer have automatic access to the EU single market.

This article highlights the key implications this will have for Ireland in the area of insolvency and restructuring.

1. **No automatic recognition of Irish Insolvency Proceedings in the UK, and vice versa**

   At present, EC Council Regulation 1346/2000 (the “Insolvency Regulation”) determines which courts in the EU have jurisdiction to commence insolvency proceedings and which EU country’s law applies to those proceedings. It also provides for mandatory recognition of those proceedings in other member states, which is critical to the efficient management of cross-border insolvencies within the EU. On 26 June 2017, the Recast Insolvency Regulation, which updates and amends the Insolvency Regulation following years of negotiation, is due to come into force to further increase the efficiency of the process.

   The Insolvency Regulation currently has direct effect across the EU member states which means that no domestic legislation is required to implement it. Once the UK has exited the EU the Insolvency Regulation will cease to operate there and, as it imposes a requirement on other EU member states to reciprocate in order to function, it cannot simply be replaced by the UK adopting its wording into domestic legislation. Rather, some form of alternative multilateral agreement would need to be negotiated between the UK and the EU, or separate bilateral agreements would need to be put in place with certain key member states.

   Given the particularly close ties between the UK and Ireland there is a clear need for us to recognise each other’s insolvency proceedings. Without the benefit of the Insolvency Regulation, creditors of an Irish debtor with assets in the UK would have to bring separate insolvency proceedings there, or apply separately to the UK for recognition of the existing Irish insolvency proceedings. The same would apply in reverse for creditors of a UK debtor with assets in Ireland and/or another EU member state. This would greatly increase the cost, time, complexity and uncertainty of cross-border insolvencies and inevitably worsen the outcome for creditors.

   With regard to insolvency proceedings currently in play under the Insolvency Regulation, there is uncertainty in relation to how they will be treated once Brexit is finalised and transitional arrangements may need to be put in place. It should be noted that member’s voluntary liquidations, schemes of arrangement and receiverships are not considered to be insolvency processes within the framework of the Insolvency Regulation and will not be directly affected by its absence. However, the enforcement of cross border judgments discussed below may be an issue in some cases.

   It is worth mentioning that the UK has enacted the UNCITRAL Model Law on Cross Border Insolvency (“UNCITRAL”) which provides a separate framework for cross-border insolvencies by way of cooperation and coordination between signatory parties. The assistance provided by UNCITRAL, however, is much more limited than the automatic recognition enjoyed under the Insolvency Regulation and, more importantly, Ireland is not currently a signatory to it.

1. **Cross Border Bankruptcy**

   The Insolvency Regulation also applies to cross border bankruptcies. Historically, the UK with its favourable twelve-month bankruptcy period was the destination of choice for Irish and other EU bankrupts who would engage in so-called “forum shopping”; endeavouring to establish their centre of main interests (“COMI”) in the UK to avail of that more favourable regime. The recent reduction of the bankruptcy period in Ireland to twelve months, bringing it into line with the UK, has eliminated the need for Irish debtors to forum shop in this way. This change, coupled with the forthcoming Brexit, has the potential to make Ireland the new jurisdiction of choice for EU member state debtors to establish their COMI for the purposes of EU bankruptcy proceedings.

2. **Enforcement of Cross Border Judgments**

   Jurisdiction and enforcement of judgments between the UK and other EU member states is currently regulated by the Brussels I Regulation (44/2001) which will cease to apply upon completion of Brexit in the same way as the Insolvency Regulation. As this also operates on the basis of reciprocity, unless an alternative arrangement is put in place with the EU, Irish and indeed other EU proceedings and judgments will not be as easily recognisable and enforceable in the UK. This will apply conversely to UK proceedings and judgments, which will no longer have guaranteed extra territorial effect in EU countries. It has been suggested that this could be at least partially addressed by the UK signing up to the Lugano Convention 1988 in a similar way to other non-EU parties such as Iceland, Norway and Switzerland, but that is not as comprehensive as the current regime.

In conclusion, there will be no immediate impact on the law in this area when Article 50 is triggered until the expiry of the two-year deadline in early 2019. However, there may be structuring issues for any existing insolvency cases with a cross-border element in the UK at the time Brexit is completed. A close eye will need to be kept on any proposed transitional arrangements.

The UK has to date been viewed as having a well-established, creditor-friendly insolvency regime and the direct effect of the Insolvency Regulation was the cornerstone of the UK’s appeal as the destination of choice for creditors of insolvent individuals and companies. Even if the UK does reach an appropriate agreement with the EU prior to the completion of Brexit, once it leaves the EU it will have limited power to influence future negotiations in relation to the EU insolvency regime, which may adversely affect its interests. Even worse, if no agreement is reached it is reasonably foreseeable that companies and individuals may decide to move their COMI out of the UK to another member state.

What is clear is that for the time being uncertainty is the only certainty we have in relation to the full effect of Brexit. Whilst Irish insolvency practitioners may be understandably concerned, we are of the view that there is a significant opportunity for them, together with bodies promoting Irish insolvency across the EU, to promote Ireland as a new, safe destination of choice for creditors seeking to commence insolvency proceedings within the EU.

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