Regulations, recognition and relief in the UK: A primer for non-UK insolvency professionals

Chris Laughton and Daniel Lewis discuss an overview of the rules and procedure and give practical guidance for the recognition and enforcement of foreign insolvency judgments in England and Wales

CHRIS LAUGHTON
Chartered accountant and insolvency practitioner, Mercer & Hole, UK

DANIEL LEWIS
Barrister, Wilberforce Chambers, UK

Chris: Let's start by setting the legal framework. Dan, now that the UK has left the EU and the transition period has ended, what is the principal legal basis in the UK for the recognition of, and the provision of assistance in, foreign insolvency proceedings?

Dan: *The Cross-Border Insolvency Regulations ("CBIR"), a UK statutory instrument (SI 2006/1030), became a more significant tool for insolvency practitioners on 31 December 2020, when the transition period ended after the UK had left the EU. Other EU insolvency office-holders now need to use the CBIR (or the Northern Ireland equivalent) to deal with assets in the UK. They are no longer able to use the provisions of the European Insolvency Regulation ("EIR"), unless main proceedings were already open when the transition period ended.*

Before we look in more detail at what the law now provides, what about practicalities? Chris, what does the change from the EIR to the CBIR mean in practice for an EU insolvency practitioner whose insolvent estate has assets – including claims or potential claims – in the UK?

Chris: Equally important as the law, communication and cooperation are fundamental to the successful execution of any cross-border restructuring or insolvency. They are the lubrication allowing the mechanism of the legal framework to function. Without communication and cooperation that mechanism will seize up. In the world of restructuring and insolvency we are each used to our own local laws, rules and systems. The challenge comes when we try to make them work with someone else's.

In practice, communication and cooperation are likely to be the best way to achieve your objectives in a jurisdiction other than your own where the law, practice and customs are not familiar to you. Different laws, language and culture will all contribute to your challenges.

Communication and cooperation are particularly relevant when using the CBIR because of the court's power to entrust the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court.

The best cross-border approach is to put yourself in the shoes of your counterparty and think what they might want. Explain yourself clearly, check you've been understood and check that you understand. As ever when dealing with people, focus less on what you want to say and more on achieving the response you're seeking from the other person. Recognise that they, hopefully, will be adopting the same approach. Remember that cultural issues may well require time to navigate and that your counterparty's level of authority may be very different from yours. Be aware that by working together across borders you are likely to achieve hugely more – and more quickly – than going it alone.

Dan, you spend much of your time in Court, appearing before insolvency and other High Court judges. How likely do you think it is that an English judge would want an English IP to be entrusted with the assets on a CBIR application?

Dan: *The starting point is that under the CBIR it is English law, not the law of the foreign representative's jurisdiction or some supranational law, that will apply to the assets in England and Wales. The court can 'entrust' (and this word is important) the administration or realisation to either the foreign representative or another person designated by the court. In practice the other person will be a UK insolvency practitioner.*

In choosing between the two, the courts will generally decide to appoint the foreign representative where the case is straightforward, such as where the purpose of the appointment is to sell a piece of real estate.

The courts will favour entrusting the administration or realisation of assets to a UK insolvency practitioner where the purpose of the appointment is more wide-ranging and it is intended that the person appointed will use

all the powers available under the Insolvency Act. This is likely where there is a contentious insolvency, where assets are difficult to realise, where a business is continuing to operate or where it is intended that the role of the appointee will be investigatory.

Chris: So how does an EU office-holder engage with the CBIR? Is recognition of foreign insolvency proceedings automatic?

Dan: *Unlike the EIR, the CBIR do not provide automatic recognition of foreign insolvency proceedings. They do, however, allow recognition through a straightforward court application. The legislation is mature, its provisions are understood, the procedures are well-established and the approach of the UK courts is predictable.*

The court will require evidence of the opening of the foreign proceeding and of the appointment of the foreign representative. Foreign documents submitted as evidence do not need to be notarised or legalised, but they must be accompanied by a translation into English. If the necessary evidence is before the court, recognition is likely to be granted.

Chris, do you think that's clear enough and enticing enough for EU office-holders to come to you and me whenever they need to make use of the CBIR?

Chris: It's fair to say that you and I are always happy to help our friends from INSOL Europe, Dan, and would be keen to do so, although there are other lawyers and insolvency practitioners in the UK who could advise and assist! But I think there's a more practical point.

The key thing is to talk to us early. It's back to communication and cooperation. If you, as a foreign IP, tell me what you want to achieve, I can tell you how to go about achieving it using UK insolvency law. Remember that the detail of how we achieve that goal may be a little different from how you would do so in your own jurisdiction. This is a team game.

So, Dan, our foreign representative has applied for recognition in the UK. What's next?

Dan: *The application is likely to be heard quickly – within days – but the court can at the time the application is filed:*

- *order a stay of creditor execution over the debtor's assets;*
- *provisionally appoint the foreign representative, or another person designated by the court (typically a UK insolvency practitioner) to protect the assets. This means that there will be someone in office to take actions to protect assets before recognition is formally granted; and/or*
- *give the foreign representative the use of any of the powers available under the Insolvency Act to preserve assets.*

In practice, what is often most important at this stage is an application for a freezing order, and which could be either limited to the UK or worldwide. This may be a particularly useful power in cases where the non-UK proceeding is taking place in a jurisdiction with no provision to grant the necessary injunction. As soon as recognition is granted however, the need for a freezing injunction may fall away as the legal effect of recognition in main proceedings will be to stop any dealing with the assets of the debtor.

Chris, we've talked already about the role of the UK insolvency practitioner here, but is this a straightforward exercise for you?

Chris: Well, we need to start from the foreign representative's strategy. What are they trying to achieve? How have we agreed they should go about it? What specific powers should be sought from the court?

Assuming the court grants the powers we agreed should be sought, then yes, it should be straightforward as a UK IP to use them as the court and the foreign representative intended.

Again, you can see why communication and cooperation is so important.

But Dan, what if the estate is not straightforward? How does UK law help in gathering information?

Dan: *The CBIR give the foreign representative the power to make anti-avoidance applications under UK insolvency law, to set aside transactions entered into pre-insolvency to the detriment of creditors, even though the insolvency proceeding is not in the UK.*

Chris: OK Dan, so would it be fair to say that although the CBIR do not allow foreign law to apply in the UK and they don't provide for automatic recognition, they do provide for recognition on a quick and simple application?

Dan: *Yes, and they allow a foreign representative, usually through a UK IP, to exercise the powers that would have been available if the debtor has been subject to UK insolvency proceedings in the first place.* ■

> ***Under the CBIR it is English law, not the law of the foreign representative's jurisdiction or some supranational law, that will apply to the assets in England and Wales***