Non-UK officeholders acting in the UK after Brexit

Chris Laughton reinforces the importance of communication and cooperation in EU-UK cross-border cases

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> ***Communication and cooperation is the bridge between different insolvency proceedings involving the same debtor with assets in different jurisdictions.***

Experienced cross-border insolvency practitioners know that communication and cooperation is fundamental to success, but how is this evolving and what developments should we expect?

I make no apology for labouring the importance of communication and cooperation, as they unlock the unfamiliar laws and mechanisms you will need to employ in EU-UK cross-border cases.

Communication and cooperation

Communication and cooperation is the bridge between different insolvency proceedings involving the same debtor with assets in different jurisdictions. The objective is to enhance overall efficiency and minimise total costs, maximising returns to the creditors as a whole. Of course, cooperation may lead to an apparently sub-optimal outcome in one jurisdiction while producing a better outcome for the debtor's estate and the creditors as a whole.

A simple example is allowing a business with interdependent units in different jurisdictions to be sold in a single transaction as a going concern. The intangible assets in the main (EU) jurisdiction would have limited value if the business and assets were sold piecemeal, but a very high value in a going concern. The non-main (UK) jurisdiction business unit is smaller and has tangible assets that would generate good value if sold piecemeal. Neither business unit can exist separately as a going concern. The non-main practitioner might seek a piecemeal asset sale for the best result in that jurisdiction and be resistant to cooperation, whereas the main practitioner would prefer to cooperate and achieve a going concern sale of the whole business, yielding a better return to creditors overall.

Communication and cooperation occur both at the insolvency practitioner level and between courts. As an insolvency practitioner (and not a lawyer), I will concentrate in this article on the former. However, I will also draw your attention to some key points about court-to-court cooperation.

Guidance

Historic guidelines include the Model International Insolvency Cooperation Act, an International Bar Association initiative published in 1989, and their Cross-Border Insolvency Concordat published in 1996.

A major step in the promotion of cross-border communication and cooperation came in 1997 with the publication of the UNCITRAL Model Law on Cross-Border Insolvency, which was adopted in the UK by the Cross-Border Insolvency Regulations 2006 ("**CBIR**"). These regulations now lie at the heart of cross-border insolvency involving the UK. A non-UK officeholder (known as a foreign representative) must use the CBIR if they wish to have their non-UK insolvency proceeding recognised in the UK, and they can ask the UK court to have UK insolvency law (but not their own national or European law) apply in the UK to the insolvent estate. Associated with the Model Law is the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, which was published in 2010.

The introduction of the European Insolvency Regulation with effect from 2002 led to the European Communication and Cooperation Guidelines for Cross-border Insolvency, which were published by INSOL Europe in 2007. Of significant assistance to insolvency practitioners dealing with EU cross-border cases, these "Co-Co" Guidelines became less relevant in the UK from 31 December 2020 as a result of Brexit.

In relation to court-to court communication and cooperation, the UK courts' Chancery Guide identifies:

- the American Law Institute/International Insolvency Institute Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases (2000);
- the EU Cross-Border Insolvency Court-to-Court Communications Guidelines (2014); and
- the Judicial Insolvency Network Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (2016).

It goes on to provide that: "*In a cross-border insolvency case, the insolvency practitioner involved, together with any other interested parties, should consider, at an early stage in the proceedings, whether the Court should be invited to adopt one of these sets of*

guidelines for use in the proceedings, with such modifications as the circumstances of the case may require."

The existence of such court guidance is clearly helpful to the main practitioner in our example above who is seeking to persuade his UK counterpart to cooperate. But arranging for the adoption of court guidelines will itself require communication and cooperation with UK advisers and lawyers.

Protocols

Protocols, agreements or memoranda of understanding between insolvency practitioners in cross-border insolvencies are a mechanism for supporting communication and cooperation that can be tailored to the circumstances of each case.

The UNCITRAL Practice Guide contains both some illustrative sample clauses and a number of case summaries. Precedent protocols are available commercially and some protocols are publicly available following court approval. An example is the 2019 Jet Airways protocol[1] between the Indian (main) and Dutch (non-main) insolvency officeholders in parallel proceedings. In that case the main proceedings were a rescue procedure and the non-main proceedings were directed at liquidating local assets. The core of the protocol was that the Dutch trustee would submit a consistent reorganisation plan to the Dutch court if a resolution plan was submitted to the Indian court. A similar protocol might well prove valuable to the main practitioner in our example above.

Protocols are a well-established tool in cross-border insolvencies and are particularly useful where there are multiple jurisdictions and/or insolvent entities. They both facilitate and, to an appropriate degree – which may be different in different cases – formalise communication and cooperation between officeholders. They also help to avoid jurisdictional disputes. They do not, however, affect the jurisdiction of the courts or local domestic rules and procedures.

Best practice tips

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, notably, 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.

Some tips:

- The most important tip is that when working with another officeholder from a different jurisdiction, get to know them. Meet them, in person, as soon as possible. Establish a rapport. Build trust.
- Concentrate on securing assets from third-parties first. Work together. You can determine the different estates' interests later.
- You need both a personal relationship and documentation of the interaction between the estates (e.g., a protocol).
- Appreciate the other officeholder's system and structures and the limitations you might perceive. But equally be aware that your regime may appear limiting to an officeholder in another jurisdiction.
- Care will be needed when seeking to transfer data across borders. Data protection laws can be challenging to cooperation. Work together to overcome the challenges.
- Being too domestically legalistic may make a commercial, consensual and diplomatic approach difficult. Remember that speed of solution can be valuable.
- Courts can be helpful in resolving problems, but beware of the different legal systems, traditions and practices involved.

Conclusions

Communication and cooperation remain crucial in cross-border restructuring and insolvency cases involving the UK post-Brexit. You are likely to be able to make best use of the cross-border mechanisms available by communicating and cooperating with UK insolvency professionals. ■

Footnotes:

1 See: <https://ibbi.gov.in/uploads/order/b7bbd5ba93be73bb4602dfe25f25cdd4.pdf>.

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