Brexit:
The UK perspective

Chris Laughton asks what does it really mean for the UK and other EU Member States?

CHRIS LAUGHTON
Partner, Mercer & Hole,
London (UK)

THE UK ELECTORATE HAS EXPRESSED ITS VIEW AND THE UK GOVERNMENT HAS SAID THAT IT WILL HONOUR THE RESULT

What really is Brexit – and what is its impact on European cross-border insolvency proceedings? These are easy and obvious questions to ask, but neither answer is straightforward.

To declare my interests, I voted to remain in the EU and I was disappointed by the referendum result, but I believe that businesses and people in the UK and the EU should look to their own interests and the common interests they identify, pursuing their goals in the context of a constantly changing political environment. Brexit is unlikely to be the most important issue any one of us will face over the next three years.

What happened on 23 June 2016?

The UK[1] conducted a referendum on whether to leave the EU or to remain a member of it. The referendum was not itself legally binding, but the UK government, both before and after voting took place, made clear that it would honour the result.

37% of the electorate voted leave, 35% voted remain and 28% did not vote[2].

The UK electorate has therefore expressed its view and the UK government has said that it will honour the result. But that is not the same as the UK, as an EU Member State, having decided to leave the EU. It has not. For the time being the UK remains a full member of the EU, and European law applies in the UK exactly as it did before the referendum.

So what happens next?

The UK government has said that it will honour the referendum result, but what does that statement mean and when will steps be taken? As with any political statement, it will be interpreted in the future in the light of the then current situation and with the benefit of hindsight. Perhaps the best way to view it is in the context of what Brexit means.

"Brexit means Brexit"
Theresa May,
UK Prime Minister

Brexit might be absolute, with the UK not participating in the EU's freedom of movement of goods, services, capital or people, or indeed in anything else to do with the EU except as a non-EU country. Or it might be some form of "Brexit-lite", such as the so-called Norway model. Or it might, for a variety of reasons, be a "non-Brexit" where something akin to the status quo prevails.

The real problem is that no-one yet knows what Brexit actually means. The UK government had no plan for leaving the EU at the time of the referendum. It was, after all, government policy to remain in the EU. It is now working on that plan and on the development of whatever relationships the UK might establish with the EU and other countries as a result of leaving the EU. Indeed, three Cabinet Ministers[3] are tasked with a variety of pertinent foreign policy briefs (*see box*). The "Three Brexiteers" (all were prominent in the Leave campaign) are nevertheless led firmly by the Prime Minister, who was a moderate Remainer.

How long all this planning and relationship development might take is an interesting question. A variety of EU diplomats and UK politicians are favouring late 2017 as the earliest the UK might be ready to give formal notice of its leaving the EU, with some suggesting 2018. There are several elections that might have a bearing on that timing, from a number of Member State elections in 2017 to the European parliament elections in 2019 and the next scheduled general election in the UK in 2020.

What is the Brexit process?

The mechanism for the UK (or any other Member State) to leave the EU is set out in Article 50 of the Treaty on European Union (The Lisbon Treaty).[4] There is no alternative mechanism for leaving, such as negotiating a separate treaty. Significantly, it is for a Member State to decide to withdraw **in accordance with its own constitutional requirements** (emphasis added). It is not for the EU to trigger that mechanism. Many believe it is not even a matter for the UK government, but for both Houses of Parliament.

Even if the EU were to seek to trigger Article 50 in the case of the UK (on the grounds some commentators have put forward that a Member State that decides to withdraw is obliged to notify the European Council of its decision) it would have to wait until the UK, as a Member State, had made that decision – which, as discussed above, it has not yet done.

A key feature of the mechanism is that absent any other agreement with the European Council (which would have to be unanimous to extend the time), the EU treaties will cease to apply two years from the UK notifying its intention to withdraw. That date of notification is unlikely to be before late 2017 (as discussed above). The effective date of Brexit is therefore unlikely to be before late 2019.

That means it will be at least three years before there is any legal change to the UK's relationship with the EU.

What will be the impact of Brexit on cross-border insolvency proceedings between the UK and EU Member States?

As I feel the need to repeat, there is no change yet. The principal legislation to consider includes the European Insolvency Regulation ("EIR")[5] and the credit institutions and insurers reorganisation and winding-up directives.[6] Until the UK ceases to be an EU Member State, the EIR (and all other EU Regulations, such as the Judgment Regulation and the Rome I Regulation)

THE UK GOVERNMENT HAS SAID THAT IT WILL HONOUR THE REFERENDUM RESULT, BUT WHAT DOES THAT STATEMENT MEAN?

The brief of the Foreign Secretary includes:

- foreign policy.

The brief of the Secretary of State for Exiting the European Union includes:

- the policy work to support the UK's negotiations to leave the European Union and to establish the future relationship between the EU and the UK;
- working very closely with the UK's devolved administrations, Parliament, and a wide range of other interested parties on what the approach to those negotiations should be;
- conducting the negotiations in support of the Prime Minister including supporting bilateral discussions on EU exit with other European countries; and
- leading and co-ordinating cross-government work to seize the opportunities and ensure a smooth process of exit on the best possible terms.

The brief of the International Trade Secretary includes:

- developing, co-ordinating and delivering a new trade and investment policy to promote UK business across the globe;
- developing and negotiating free trade agreements and market access deals with non-EU countries; and
- negotiating plurilateral trade deals (focused on specific sectors or products).

THE BULK OF THE RECAST REGULATION WILL APPLY IN THE UK AS IN THE REST OF THE EU (EXCEPT DENMARK) FROM 26 JUNE 2017

continue to apply and UK domestic law must continue to align with the directives. Indeed, any new Regulation enacted by the EU will apply to the UK while it remains a Member State, and any existing Regulation not yet in force – such as the Recast Insolvency Regulation ("Recast Regulation")[7] – will come into force in the UK if it is a Member State on the relevant date.

Accordingly, the bulk of the Recast Regulation will apply in the UK as in the rest of the EU (except Denmark) from 26 June 2017. Similarly, the UK and those other Member States will have to have a searchable electronic register of insolvency proceedings in place by 26 June 2018. Whether the UK's electronic register might be connected to those in the rest of the EU by 26 June 2019 seems likely to depend on the timing of Brexit.

What will happen to UK-EU cross-border insolvency proceedings after Brexit is much less clear. An effective cross-border insolvency regime is key to the encouragement of international trade and investment. This is a well-rehearsed argument, similar to that which stimulated the European insolvency harmonisation initiative as part of the drive for Capital Markets Union. European recognition of the UK's post-Brexit insolvency regime and, formally, of the judgments made under it (including the opening of insolvency proceedings) will be a critical consideration as the new regime is put in place.

If the UK sought unilaterally to implement European cross-border insolvency legislation as part of UK domestic law after Brexit, there would, without more, be a significant imbalance due to the reciprocity between Member States inherent in that legislation. In such an implementation, the UK would voluntarily recognise other Member States under the conflicts of law and jurisdiction and the recognition and enforcement of judgments provisions of the EIR and related legislation, but the rest of the EU would not recognise the UK in those respects.

At the opposite end of the spectrum, if the UK took no steps to replace any of the European cross-border legislation and chose to repeal the domestic regulations made under the various directives, there would again be significant imbalance. Recognition of EU insolvency proceedings within the UK would be facilitated by the Cross-Border Insolvency Regulations 2006 (the UK implementation of the UNCITRAL Model Law), which do not require reciprocal arrangements with the applicant's country. Additionally, for Irish proceedings s426 Insolvency Act 1986 would enable the UK courts to provide assistance. However, beyond general notions of judicial comity and EU Member States' domestic provisions, there would be nothing to facilitate recognition in the EU of UK insolvency proceedings except in Greece, Poland, Romania and Slovenia, which have their own implementations of the Model Law.

The range of solutions – short of a non-Brexit – to address these imbalances varies from the EU agreeing to include the UK within its cross-border insolvency legislation despite it being a non-EU country, to the UK seeking bilateral agreements with EU Member States. Any such arrangement will require significant negotiation. It might therefore appear that the UK's attractiveness as a restructuring centre of activity will be diminished, but such a conclusion would underestimate the resourcefulness of the UK restructuring and insolvency profession.

Schemes of Arrangement

This non-insolvency tool, which can be used for insolvent restructuring, is often regarded by non-UK European commentators with some suspicion (at the same time as being respected by US investors and professionals). After Brexit, as the Judgment

Share your views!

Regulation and the Rome I Regulation (on the law applicable to contractual obligations) fall away in the UK, questions might arise about schemes' enforceability. The Lugano Convention or the Hague Convention on Choice of Court Agreements could perhaps assist if the UK became a signatory. One should probably also reflect on the number of successful cross-border schemes that involve non-EU countries.

Harmonisation

No discussion of European insolvency law development would be complete without the context of the harmonisation project. As the UK is likely to be a Member State for at least the next three years, it will properly continue to play a full part in the harmonisation debate. The minimum standards directive foreshadowed by the European Commission's Inception Impact Assessment[8] issued on 3 March 2016 appears likely to cover a range of relatively uncontroversial areas where approximation of laws will be required. In this context, the perspective from an efficient and effective insolvency regime, not dissimilar to that in Ireland, will contribute significantly to ensuring that Europe's insolvency law development is fit for purpose on the global stage. ■

AS THE UK IS LIKELY TO BE A MEMBER STATE FOR AT LEAST THE NEXT THREE YEARS, IT WILL PROPERLY CONTINUE TO PLAY A FULL PART IN THE HARMONISATION DEBATE

Footnotes:

1. The United Kingdom of Great Britain and Northern Ireland, which includes the countries of England, Scotland, Wales and Northern Ireland (and, for EU purposes only, Gibraltar, a British Overseas Territory) but not, for the avoidance of doubt, the British Crown Dependencies of the Channel Islands and the Isle of Man although these have subsidiary relationships with the EU. The UK therefore includes, for EU purposes, four separate legal jurisdictions: England and Wales, Scotland, Northern Ireland and Gibraltar. Whilst the insolvency laws of these four jurisdictions are to an extent similar, they also exhibit some significant differences.
2. The regions where the majority of those who voted sought to remain are London, Scotland, Northern Ireland and Gibraltar.
3. Her Majesty's Principal Secretary of State for Foreign and Commonwealth Affairs, The Rt Hon Boris Johnson MP, has overall responsibility for the work of the Foreign & Commonwealth Office. Her Majesty's Principal Secretary of State for Exiting the European Union, The Rt Hon David Davis MP, is responsible for the work of the Department for Exiting the European Union. Her Majesty's Principal Secretary of State for International Trade and President of the Board of Trade, The Rt Hon Liam Fox MP, is responsible for the work of the Department for International Trade.
4. Further analysis of Article 50 and its consequences may be found in the excellent analysis by INSOL Europe's Technical Officer, Emmanuelle Inacio, on pages 8 & 9 of the Summer 2016 issue of Eurofenix.
5. Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings
6. Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions and Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings
7. Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)
8. DG JUST (A1), 2016/JUST/025 – Insolvency II

Dentons. Now the world's largest global elite law firm.*

大成 DENTONS

dentons.com

© 2016 Dentons. Dentons is a global legal practice providing client services worldwide through its member firms and affiliates. Please see dentons.com for Legal Notices.

* Acritas Global Elite Law Firm Brand Index 2013-2015.