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Withdrawal Agreement between the European Union and the United Kingdom: cross-border insolvency and Brexit. What will happen after the transition period?

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Obvious issues which come up in a cross-border insolvency context include the jurisdiction / court in which proceedings should be commenced (choice of jurisdiction), which law should be applied to resolve a particular problem (choice of law) whether the judgment of one court will be recognized and enforced in another court (recognition) and how parallel insolvency processes relating to the same debtor should interact (co-operation).

The EIR

Council Regulation (EC) No 1346/2000 on insolvency proceedings and Regulation (EU) 2015/848 of the European Parliament and of the Council on insolvency proceedings (recast) ("EIR") is the most comprehensive legislation when it comes to cross-border insolvency. It provides for rules on the choice of jurisdiction, the choice of law, the recognition and enforcement of judgments, the co-operation between insolvency office holders (including in relation to corporate groups). With the exception of Denmark, it extends throughout the European Union and applies to most insolvency proceedings (with the exception of the schemes or arrangement in the UK).

Since when, on 23 June 2016, a slim majority of the British electorate voted for the United Kingdom to leave the European Union, insolvency practitioners have tried to make predictions about the legal impact that Brexit will have on their cases. All agree on the unpredictability and uncertainty of future scenarios.

The draft Withdrawal Agreement between the European Union and the United Kingdom

The draft Withdrawal Agreement between the European Union and the United Kingdom that was published on 28 February 2018 (an updated draft was published on 15 March) provides some indications. It consists of six parts, including introductory provisions, citizens' rights, other separation issues such as goods placed on the market before the withdrawal date, the financial settlement, transitional arrangements, and institutional provisions and a protocol on Ireland / Northern Ireland. Regarding insolvency, the draft establishes that the EIR will continue to be applicable to all insolvency proceedings, which are commenced in the Member States (including the UK) before the end of the transition period, which is 31 December 2020.

What will happen after the transition period?

As an obvious consequence, insolvency proceedings commenced in the UK would not automatically be recognized by EU Member States, and *vice versa*.

Other consequences include that the main insolvency proceedings opened in one of the Member States would not have as an auxiliary measure secondary proceedings in the UK, and that mandatory duties of communication and cooperation between insolvency practitioners and courts would be without a legal basis.

In facts, all these questions will have to be resolved on the basis of domestic law.

There are some ancient legal documents, which may be considered. The EIR replaced the European Convention on Certain International Aspects of Bankruptcy (the "Convention"), signed in Istanbul on 5 June 1990. The Convention has been signed by Belgium, Cyprus, France, Greece, Italy, Luxembourg and Turkey, but only Cyprus has ratified it. Article 40 of the Convention offers the opportunity to make a reservation with regard to its Chapter II (exercise of certain powers by the insolvency administrator) and Chapter III (secondary proceedings). For this reason, it allows for different rules to apply in different states, which evidently results in a substantial hindrance to the application of the Convention.

In Italy, as well as in the other EU countries, the loss of such a useful tool as the EIR would imply longer time and higher costs in a cross-border litigation context.

Since Italian bankruptcy proceedings are in theory bound to a time limit – even if the relevant provision has not been implemented yet -, the receiver, in order not to incur professional liability because of the long duration of the procedure and in order to save money, may well be inclined not to commence a proceeding for recognition in the UK even if the company involved had assets in that country that could satisfy the Italian creditors.

The "dream" provided by Head V of the EIR concerning the cooperation between administrators and judges of the local insolvency procedures, aimed at speeding up the cases and exchanging information, is destined to disappear to the detriment, once again, of the creditors.

No doubt, it is in the interest of both the UK and the EU to reach an agreement with regard to recognition, applicable law and cross-border cooperation, in order to preserve a legal framework similar to the one available under the EIR. An efficient and effective cross-border regime is a precise need of businesses and investors.