Brexit and the cross-border conundrum

The UK's wholesale adoption of EU laws on Brexit will result in an imbalanced and inconsistent cross-border insolvency regime that could be damaging for both the UK and the EU

1 MINUTE READ

The EU's existing insolvency framework is a example of the sort of good things the European Union is capable of doing if it puts its mind to it, says Gibson Dunn & Crutcher partner Gregory Campbell.

But upon Brexit, the UK will find itself in an absurd situation when it comes to insolvency and restructuring laws. While it will have to continue enforcing the Insolvency Regulation, it will not be able to apply the recognition and reciprocal arrangements within member states as they relate to entities having their so-called Comi or an establishment in the UK for instance.

A common sense approach is needed to ensure consistency is maintained, and here several solutions are outlined.

The UK's decision to exit the European Union is dominating our political and legislative landscape. The succinctly titled European Union (Withdrawal) Bill 2017-19 (more colloquially known as the Great Repeal Bill) currently under consideration proposes, in addition to what is said on the tin, to adopt all EU laws then in force into domestic law *en bloc* and by so doing avoid a legal black hole. The legislature will then be empowered to disapply or amend such laws as and when it sees fit following Brexit. The impact of this ostensibly pragmatic step on our insolvency and restructuring laws and the UK legal and restructuring industry is potentially significant.

Historical perspective

For all our island nation separatism and idiosyncratic relationship with our European neighbours, the British approach to insolvency and restructuring has been consistently internationalist in outlook. In the 1820s, Jabez Henry – a little known colonial administrator and judge who had served as the president of the court of the united colonies of Demerara and Essequibo – had become unfashionably occupied by the unsystematic and illogical jurisprudence relating to cross-border insolvency cases in Europe. His concerns stemmed from the need to provide procedural transparency, reduce inefficiencies, fraud and cost and promote the interests of justice. Henry also had in mind the negative impact the absence of such jurisprudential cohesion could have on the economies of the major western powers at that time. He went on to publish a pamphlet (on the back of his earlier seminal work on conflicts of laws) arguing in favour of the adoption of a convention between leading European powers, their colonial possessions and the US. The convention would be high level and principle-based, with individual signatory states adding legislative flesh to the bones under domestic law.

Henry's concerns remain as valid today as when they were first expressed, although his convention – and the man himself – were largely forgotten for the best part of two centuries. English law, in the

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meantime, had set about its own ad hoc exploration of the boundaries of insolvency jurisdiction for the most part unguided by higher principle.

The need for cross-border consistency

The EU Regulation on Insolvency Proceedings, which came into force in May 2002 (revamped as of June 26 of this year by the recast insolvency regulation) represents a glowing beacon in the dense fog of prevailing cross-border insolvency practice. Notwithstanding the common law/civil law compromise of the centre of main interest (Comi) concept and the resulting Comi-shifting debate, the regulation facilitates and enforces pragmatic and consistent practice in international cases and, from a political, economic and legal perspective, is something of a poster-child of the sort of good things the EU is capable of doing if it puts its mind to it. Upon leaving the EU, the UK will simply fall out of the regulation as far as member states and their laws are concerned. Assuming the Great Repeal Act, when passed, adopts the regulation into domestic law, the UK will, however, continue to recognise and enforce the regulation and its effects in full, but will not be in a position to apply the recognition and reciprocal arrangements within member states as they relate to entities having their Comi or an establishment in the UK. This is an absurd and undesirable outcome, whether or not one factors in the importance of London-sourced finance and English governing law provisions in the documentation that drives European and British corporate activity and, by extension, the European and British economies.

Of course, there will be other ways of addressing the imbalance in the post-Brexit regulation. The traditional long arm jurisdiction of the English courts to wind up companies where a sufficient connection with England and Wales is found will continue to be relevant. This jurisdiction however relates to winding up, not rescue or restructuring – the English administration procedure cannot, without further domestic legislation, be so applied, although the availability of the scheme of arrangement (premised on the ability of the English court to wind up the company in question) will remain an option for non-UK companies to the extent there is a sufficient connection with the UK.

The UK has also adopted the United Nations Commission on International Trade Law (Uncitral) model law on cross-border insolvency which proscribes the circumstances and basis of recognition and cooperation between courts and office holders in international cases. The model law is less ambitious in its aims and scope than the regulation and, in many respects, represents the modern reflection of Jabez Henry's convention, but unfortunately has not been widely adopted by other EU member states (unsurprising given the existence of the regulation) and is unlikely to be of much utility as regards the majority of European jurisdictions following Brexit.

Some additional consideration would also need to be given to conflicts of law questions relating to the judicial recognition and enforcement of foreign judgements, which, at risk of understatement, is a fairly dense subject in its own right.

Ensuring consistency

Should (in a presumably rare moment of boredom) the UK's Brexit minister find himself reading this article, it might be appropriate to consider what Jabez Henry might make of it all.

An independent, non-federalised Britain would, no doubt, be to his liking – not least having lived through Napoleon's attempt to unite Europe by force. Nevertheless, I think Jabez would be saddened by the effect Britain's European withdrawal could have on the rationalisation of cross-border insolvency law and practice. However, being the pragmatic fellow that he undoubtedly was, he might go on to suggest a solution. Extrapolating from his Convention and factoring in the progress that has been made in the cross-border universe in the 21st century, one obvious solution would be the pursuit of an agreement with Europe by which the regulation would continue to apply to member states but also to the UK following Brexit. Such an agreement would in a very real sense promote the interests of justice and economic success that were close to Jabez's heart, but would also promote the interests of the UK in a changing world, in which rational and consistent cross-border insolvency practice has never been more important.

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