UK INSOLVENCY AFTER A "NO DEAL" BREXIT

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UK / EU Restructuring & Insolvency Alert

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INTRODUCTION

On 20 November 2018, the UK government issued new draft insolvency legislation. In the event of a "no deal" Brexit, the proposed legislation would amend UK insolvency legislation and European Union ("EU") insolvency legislation retained in the UK on exit day, expected to be 29 March 2019. The Insolvency (Amendment) (EU Exit) Regulations 2018 (the "UK Regulations") are made in exercise of the UK government's powers under the European Union (Withdrawal) Act 2018 in order to address failures of retained EU law to operate effectively and other deficiencies arising from the withdrawal of the UK from the EU without a deal. The UK Regulations make amendments to legislation in the field of cross-border insolvency.

BACKGROUND

Currently, the EU regulation on insolvency proceedings ((EU) 2015/848) ("the EUIR") determines in which EU member state main insolvency proceedings (including those in the UK) may be opened and provides that decisions opening proceedings in one member state are to be recognised in the other member states. Main insolvency proceedings may only be opened in the member state where the "centre of main interest" ("COMI") of the debtor is located. Secondary proceedings may be brought in a member state where the debtor has an establishment. The EUIR makes other provisions to facilitate the operation of EU cross-border insolvency proceedings, including for co-operation between courts and insolvency practitioners.

The proposed UK Regulations seek to address the deficiencies that would arise from the absence of mutual application of the EUIR, if the UK leaves the EU without a deal. The UK government's position is that it is not appropriate to continue to apply the EUIR unilaterally in the UK in respect of cross-border EU proceedings when continuing member states will not apply the EUIR to UK proceedings. There is however a saving and transitional provision which continues to apply the EUIR, the previous EU insolvency regulation and the associated domestic law where main proceedings have been opened before exit day.

HIGHLIGHTED PROVISIONS OF THE UK REGULATIONS

This alert highlights certain of the provisions of interest to a wide audience. The UK Regulations are, of necessity, very detailed in nature. Their interpretation will be closely monitored if a "no deal" Brexit becomes more likely.

Part 1 (which applies to the whole of the UK) amends the EUIR. It retains the jurisdictional test based on COMI as an additional test (no longer the sole test) of jurisdiction. The restrictions on opening insolvency proceedings where the COMI is in a member state are removed. From exit day it would be possible to open insolvency proceedings where any of the tests in UK domestic law are satisfied, regardless of whether or where the debtor is based in Europe. The majority of the EUIR, which is based on mutual application between member states, is omitted.

Parts 2 and 3 make consequential amendments to the Insolvency Act 1986. These Parts extend to England and Wales and Scotland, with a few exceptions.

Part 4 amends the Insolvency (England and Wales) Rules 2016. These amendments are consequential on the amendments made to the EUIR by Part 1. These Rules govern the conduct of corporate and personal insolvency proceedings under the Insolvency Act 1986 in England and Wales.

Parts 5 and 6 make further consequential amendments, including amendments to the Cross-Border Insolvency Regulation 2006 which will apply after exit day to new cross-border proceedings previously within the EUIR. Parts 5 and 6 extend to England and Wales and Scotland.

Part 11 makes amendments to the Employment Rights Act 1996 and the Pension Schemes Act 1993. The relevant provisions provide for payment to employees of outstanding sums owed to them in defined circumstances where their employer becomes insolvent. Part 11 applies to England and Wales and Scotland.

CONCLUSION

The UK Regulations will be of interest to those involved in unresolved EU cross-border cases opened before exit day and new cases which commence after exit day (in each case in the event of a "no deal" Brexit).

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