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Cross Border Insolvency –

Impact of Brexit on both the recognition of Irish Insolvency proceedings in the UK and the recognition of UK Insolvency proceedings in Ireland

This publication has been jointly developed by the member bodies of the Consultative Committee of Accountancy Bodies – Ireland (CCAB-I), being the Institute of Chartered Accountants in Ireland, The Association of Chartered Certified Accountants and The Institute of Certified Public Accountants.

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A. Introduction

This Technical Release considers the impact of Brexit on both the recognition of Irish Insolvency proceedings in the UK and the recognition of UK Insolvency proceedings in Ireland.

B. Cross Border Insolvency – Recognition of Irish Insolvency proceedings in the UK and the impact of Brexit

Recognition Pre-Brexit

When considering the impact of Brexit on the ability and ease for cross border insolvency recognition, it is useful to examine the former legal relationship between the UK and Ireland.

EU Member States have benefitted from an automatic recognition of cross border insolvencies under the European Insolvency Regulation ("EIR") which was introduced in 2002. The regulation permits Insolvency Practitioners within EU Member States to request assistance from Member State Courts to recognise proceedings commenced in a different jurisdiction. Securing recognition under the EIR is a relatively straight-forward process, whereby the Court may recognise insolvency proceedings and grant enforcement without reviewing the merits of the foreign judgment. Following the United Kingdom's exit from the EU on 31 December 2020, recognition applications for proceedings post this date, cannot be made under EIR (it can still be relied upon for proceedings prior to this date). Where EU Member States require a main proceeding to be recognised, this is done in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross Border Insolvency ("Model Law"). The process for recognition under the Model Law is similar to EIR, however, as Ireland has not adopted the Model Law and insolvency cooperation is not covered by either the Belfast Agreement or the Northern Ireland Protocol annexed to the Withdrawal Agreement with the EU, this creates uncertainty for Insolvency Practitioners when considering the best course of action.

Prior to 2002 recognition of insolvency proceedings was governed by Section 426 of the Insolvency Act 1986 ("the Act"), which applies to Northern Ireland, England, Scotland and Wales. Although Section 426 focuses on automatic recognition of insolvency proceedings between jurisdictions in the UK, Insolvency Practitioners in Ireland can request assistance from the UK Courts under The Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986. In practice, seeking recognition under section 426 of the Act became redundant with the introduction of the EIR although the right remains and may be used in appropriate circumstances.

Recognition Post-Brexit

The cross-border regime in recognising insolvencies between Member States and the UK has fundamentally changed in the post-Brexit era. As such, the process of requesting assistance from UK Courts is not as apparent as it was. Determining the grounds on which an application for recognition is to be made, depends on the circumstances of each case. It is therefore important for Insolvency Practitioners to obtain legal advice on the process within the relevant jurisdiction, likelihood of success, costs and timeframes before proceeding with any application to a UK Court.

Generally, there are two options available to Insolvency Practitioners in Ireland:

1. Recognition in accordance with Section 426 of the Act;
2. Recognition under common law.

Section 426 of the Act

The Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 lists the countries that have the right to request assistance under Section 426. Notably, Ireland is the only EU Member State that has the benefit of Section 426. Recognition of insolvency proceedings in accordance with this Section requires an Insolvency Practitioner to make an application to the relevant UK Court. The relevant Court within the UK will hear the application and grant any order it deems fit.

Section 426 was recently applied by the UK Courts for the first time since 1997 in the matter of Silverpail Dairy (Ireland) Unlimited Company and Havana Company Unlimited Company where an Irish Insolvency Practitioner was appointed Examiner of those companies. An application to recognise the Republic of Ireland examinership was made concurrently in England and Northern Ireland. The application in each jurisdiction was successful.

Common law

Where recognition cannot be secured in accordance with Section 426, it may be sought under common law. Each case will be dealt with on its own merits, which means a successful outcome is not guaranteed. When assessing common law applications, the Court may consider, but is not limited to, the following;

- The centre of main interest of the debtor;
- If recognition is being sought for a legitimate purpose; and
- If there is any public policy reason why assistance should not be granted.

An example of when recognition may be sought under common law is when a Liquidator has been appointed over a company whose registered address and place of business is in Ireland but the company has assets within the UK to be realised. The Liquidator may be required to make an application to the Court for an order recognising the appointment and permitting the Liquidator to realise any assets within the relevant UK jurisdiction.

When considering the future of cross-border insolvencies between the UK and Ireland, law reform groups in Ireland have highlighted the need to establish cross-border insolvency provisions with the UK as a priority for Ireland and recommend Ireland adopt the Model Law. If Ireland adopt the Model Law this would give Insolvency Practitioners some comfort as to the chance of success when seeking the UK Court's assistance for recognition. In the meantime, it is important for Insolvency Practitioners to obtain advice from the relevant jurisdiction.

C. Cross Border Insolvency – Recognition of UK Insolvency proceedings in Ireland and the impact of Brexit

Recognition Pre-Brexit

Prior to Brexit, cross-border insolvency and restructuring regimes as between Ireland and the UK (Great Britain and Northern Ireland) were governed by the European Insolvency Regulation Recast (2015/848) ("EIR Recast"). Generally speaking, the EIR Recast operates between the Member States of the European Union ("the EU") and it focuses on establishing a framework for the commencement of insolvency proceedings throughout the EU together with the automatic mutual recognition of such proceedings in each EU Member State. As the EIR Recast is no longer applicable from a UK perspective due to the impact of Brexit, the Withdrawal Agreement does not afford insolvency cooperation and there are no applicable treaties with Ireland in this area, issues therefore arise for UK Insolvency Practitioners in relation to the recognition and enforcement of UK insolvency proceedings in this jurisdiction.

With respect to the EIR Recast, Article 3 provides that main insolvency proceedings are to be opened in the Courts of the Member State where the debtor's centre of main interests ("COMI") is situated, which in the case of a company is the place of its registered office and main place of business. It further notes that secondary insolvency proceedings can be opened in another Member State where the debtor possesses an establishment in that particular Member State, and these proceedings are also known as territorial proceedings. Importantly, Article 19 of the EIR Recast provides that any judgment which gave rise to the opening of insolvency proceedings by a Court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all other Member States of the EU, and accordingly, any such judgment is ultimately afforded automatic recognition.

In the aftermath of Brexit, the options in terms of recognising UK insolvency proceedings in this jurisdiction, to include liquidations and administrations and all associated judgments, will now depend on when the relevant proceedings were commenced. Article 67(3)(c) of the Withdrawal Agreement provides that the EIR Recast shall only apply to insolvency proceedings which were commenced prior to 31 December 2020 (the end of the transition period of the UK leaving the EU). Accordingly, any insolvency proceedings which were commenced in Great Britain or Northern Ireland prior to 31 December 2020 will retain automatic recognition in Ireland. Given the automatic recognition afforded by the EIR Recast, an Insolvency Practitioner appointed in the UK prior to the date of the UK's departure from the EU, would for the most part be in a position to exercise his/her powers in Ireland without any necessity for significant additional measures or steps to be taken.

Recognition Post-Brexit

The EIR Recast shall not be applicable to UK insolvency proceedings commencing after 31 December 2020 and the EU-UK Trade and Cooperation Agreement makes no reference to cross-border insolvency proceedings between the UK and European Member States. On that basis, the automatic recognition of insolvency proceedings commenced in the UK post Brexit no longer applies. Accordingly, where insolvency proceedings were commenced in the UK on or after 1 January 2021, advice should be obtained by the UK Insolvency Practitioner in terms of having his/her appointment and any associated proceedings recognised in the relevant EU Member State. To that end, if UK Insolvency proceedings require recognition in Ireland, separate recognition proceedings will need to

be brought before the Irish Courts and those proceedings will be governed by the common law rules in this jurisdiction with judgments delivered on a case-by-case basis.

As matters currently stand, an application will, in most cases, have to be made to the High Court in Ireland to recognise the appointment, for example, of the Liquidator or Administrator of any given company, and the related insolvency proceedings. As stated, given that Ireland is a common law jurisdiction, the recognition of insolvency proceedings before the Irish Courts will be dealt with on a case-by-case basis, and accordingly, no certainty can be provided in terms of any such application being successful. Generally, the Irish Courts have an inherent jurisdiction to recognise orders of foreign Courts, and this will, in many cases, allow the Courts to recognise insolvency proceedings which originate in Great Britain or Northern Ireland depending on the facts of the matter.

Factors which may be taken into account by the Courts in Ireland when determining recognition are whether the law in the UK and Ireland imposes similar procedures in the particular area, the recognition of the Judgment is being sought for a legitimate purpose and there is no public policy reason which should deter the Courts in Ireland from assisting by way of recognising the insolvency proceedings. An example of where such an application may be necessitated is where a UK Insolvency Practitioner has been appointed as Liquidator over a company based in Great Britain or Northern Ireland and that company has assets in the Republic of Ireland. In those circumstances, an application would have to be made to the Courts in this jurisdiction to recognise that Liquidator's UK appointment, and also, to apply to the Irish Courts for the appropriate order(s) in order to allow him/her to realise the assets in this jurisdiction.

In terms of greater certainty returning to this area from a UK and Ireland perspective, a separate framework for cross-border insolvencies is provided for by UNCITRAL Model Law on Cross-Border Insolvency by way of cooperation and coordination between signatory States. The Model Law offers a framework to encourage cooperation and coordination between those States, to include the cooperation between the Courts with respect to cases relating to cross-border insolvency. There are currently 62 jurisdictions which adopted the Model Law to include the UK (through its Cross Border Insolvency Regulations 2006), Australia, USA, Poland, and Greece. Whilst the Model Law has yet to be incorporated into Irish Law, like many EU Member States, recommendations have been made for its adoption by law reform groups in this jurisdiction. If it is adopted into Irish Law, greater certainty would be provided for UK Insolvency Practitioners in relation to insolvency proceedings which are no longer afforded Irish recognition pursuant to the EIR Recast.