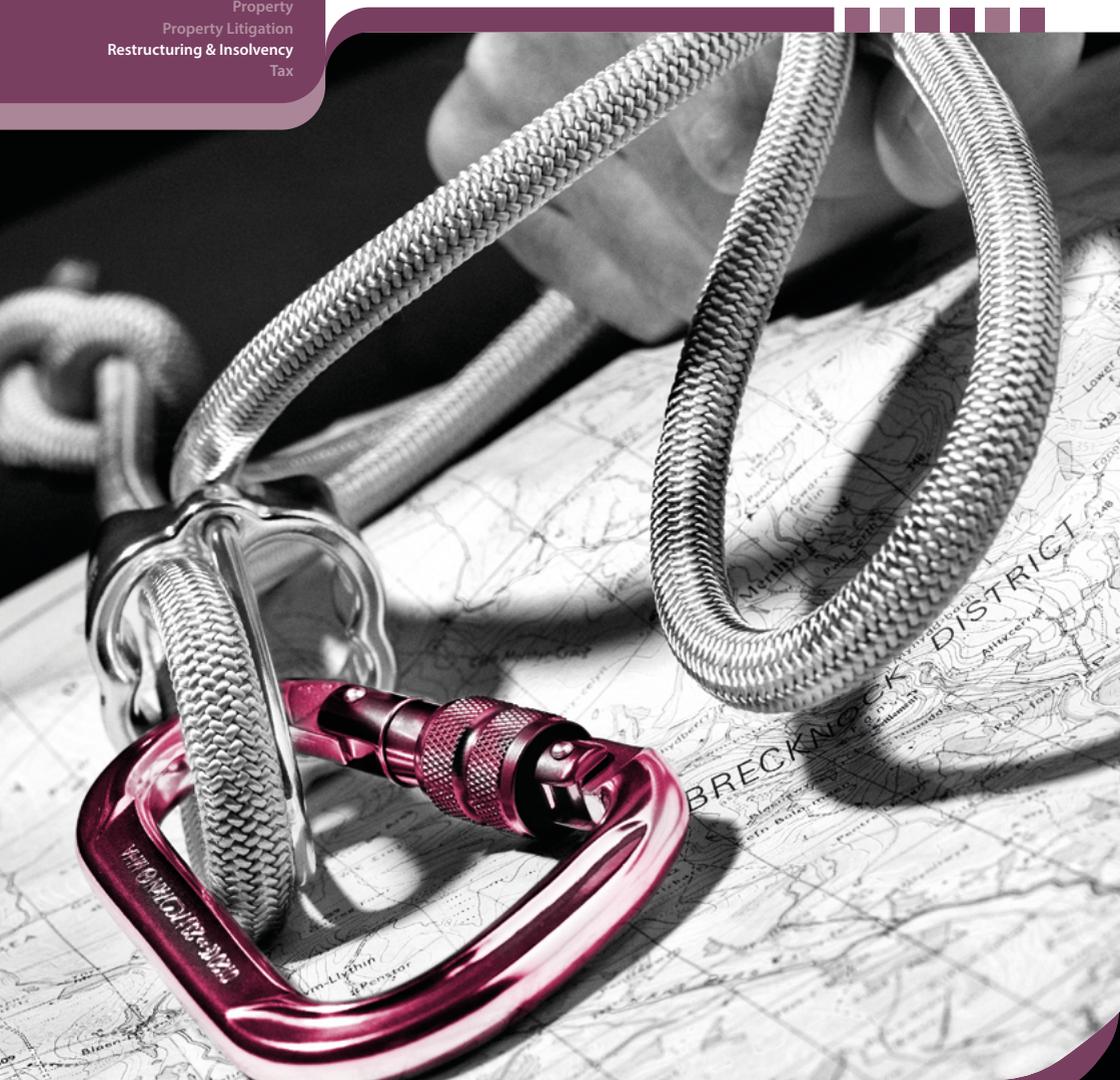


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Brexit Implications



## Restructuring & Insolvency

# Brexit Implications

## Post-Brexit Cross-Border Insolvencies: unprecedented, uncertain times

The EU referendum outcome - to "Brexit" has divided the country. Whilst supporters of both the "Remain" and "Leave" campaigns continue to speculate on what might have happened had the result been different, or what will happen if, as or when Article 50 of the Lisbon Treaty is invoked, the only apparent certainty is that these are uncertain times for the UK. Unprecedented, uncertain times.

We can though be confident that the entire legal sector will face complex challenges; UK law, across all areas, is set to undergo significant reform in the forthcoming years as a consequence of Brexit. Aside from our regular blogging on this topic, this article will consider the likely implications of Brexit on cross-border restructuring and insolvency proceedings in the UK and the effect of Brexit on the UK's international reputation for balanced restructuring processes.

### EC Regulation

The EC Council Regulation on Insolvency Proceedings 1346/2000 (the "EC Regulation") presently has direct effect in all EU member states (except Denmark, which opted out) and provides a framework of rules for the application to insolvent companies and individuals of prescribed insolvency proceedings. The EC Regulation is the legislation from which rules on jurisdiction to open insolvency proceedings in an EU member state have been standardised; it sets out the rules by which national laws are applicable to insolvency proceedings across EU member states; and it is the legislation from which recognition of insolvency proceedings is derived throughout the EU. Post-Brexit, there is great concern that the UK will cease to enjoy the benefit of these established reciprocal rules.

Following the UK's vote to Brexit, the Government will at some stage begin extensive negotiations with the EU to determine what continuing relationship the UK will have with the EU. It is possible that, from these negotiations, an agreement could be reached whereby the EC Regulation continues to apply to the UK; however, to do so, the UK Government must first seek such recognition and, secondly, all EU member states must ratify any such agreement. →

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## Cross-Border Insolvencies

For compulsory windings up, CVLs, administrations, CVAs, IVAs and bankruptcies, both jurisdiction and recognition are governed by the EC Regulation. If no agreement is reached between the Government and EU as to the continuation of the EC Regulation in the UK, the jurisdiction to open these insolvency processes in the UK would fall back to the pre-existing jurisprudence and criteria set out in the Insolvency Act 1986. Similarly, the jurisdiction for the opening of processes in EU member states would be governed by the domestic law of that EU member state. It is here that the processes would become messy, as interested parties would be required to consider a combination of statute and case law for each individual member state in place of the current clarity and established principles by which the EC Regulation applies throughout the EU.

Similarly, recognition by EU member states of the prescribed insolvency processes opened as main proceedings or secondary proceedings in the UK, would no longer be automatic. And of course, insolvency proceedings opened in EU member states would no longer receive automatic recognition in the UK. The two main alternative options to the EC regulation in the UK (1. relying on the other EU member state's domestic law; or 2. opening secondary proceedings in the other EU member state) may very well lead to increased costs and complexity, as a result of the additional procedures; decreased certainty and consistency, as a result of each matter having to be dealt with on a case by case basis; and a general worsening of outcome for creditors given the increased time, cost and uncertainty.

Then there is of course the Cross-Border Insolvency Regulations 2006 (the "CDR"). As implemented by the UK pursuant to the UNCITRAL Model Law, the CDR provides scope for office holders and insolvency proceedings opened outside the UK to be recognised. No reciprocity is required and whilst the CDR would offer inward applicants many of the benefits enjoyed from recognition under the EC Regulation, the only other member states to have signed up are Greece, Poland, Romania and Slovenia and so the CDR is of limited effect in reality to UK office holders for outward recognition.

MVLs, schemes of arrangement and receiverships are not considered to be insolvency processes, and so being outwith the EC Regulation, the processes would not be affected by a UK withdrawal from the collective EC Regulation regime. The same uncertainty surrounds the application, however, of the European Judgments Regulations which caters for solvent collective processes.



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## In the wake of the Referendum

UK office holders and lawyers alike will be hoping for positive negotiations with the EU in the wake of the referendum. It remains to be seen what is meant by "Brexit means Brexit", and whether the UK adopts the EC Regulation regime. Notwithstanding any agreement that is reached, once the UK leaves the EU it will have limited involvement in future negotiations on the EU cross-border insolvency regime and so may suffer revisions that prove to be against the UK's interests, which is ironic given the Government's apparent concern with UK standing in the World Bank rankings.

If no agreement is reached, it is anticipated that the increased costs, complexity and uncertainty in cross-border insolvency proceedings will knock the UK's global reputation in this arena. Will we see corporates and individuals moving their "Centres of Main Interest" out of the UK to other EU member states so as to secure certainty of outcome across the EU? Only time will tell.

## What next?

The UK insolvency framework was set for change, with or without Brexit, what with the new Insolvency Rules 2016; the Recast EC Council Regulation on Insolvency Proceedings 848/2015; and the EU Commission's minimum standards directive, which is expected to be published by the end of 2016. With the addition of Brexit, speculation is mounting, clarity is diminishing and greater change is inevitably pending... These are interesting times.

## Contact Details

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