

Turning back the Clock: Post-Brexit cross-border recognition in Cyprus & UK

Chris Iacovides and Andri Antoniou outline some of the new cross-border recognition issues between the two jurisdictions of Cyprus and the UK



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The process for recognising UK insolvencies in Cyprus, in the absence of the EIR Recast, is largely untested



The loss of the relatively streamlined and automatic recognition regimes which applied between the UK and EU member states by virtue of the EU Regulation on Insolvency Proceedings 2015 (848/2015) (EIR Recast), has been described as a “great tragedy”¹

What was a clear and smooth route to recognition between Member States, facilitating more efficient and swift cross border insolvency proceedings with obvious benefits to creditors and other stakeholders, no longer applies for UK office holders who will need to seek recognition in EU member states and *vice versa*, leaving office holders to navigate

through a fragmented and less predictable landscape of common law, domestic legislation and international treaties to identify the most appropriate route.

For insolvency proceedings which commenced prior to 31 December 2020, the position was clarified by the Withdrawal Agreement (2019/C 384 I/01); the EIR Recast continues to apply to those cases. The pathway, however, to recognition for insolvency proceedings commenced post 31 December 2020 will undoubtedly be more complex and the increase of cross border structures involving Cyprus means it is necessary to identify the legislative framework which will be applicable for recognition to be achieved.

Recognition of UK insolvency proceedings in Cyprus

(i) Statute

The process for recognising UK insolvencies in Cyprus, in the absence of the EIR Recast, is largely untested. There are a limited number of reported cases where the Foreign Judgments (Reciprocal Enforcement) Law 1935, Chapter 10 (“Cap 10”) has been relied upon as the basis for the recognition of receivers in other common law jurisdictions.² Section 3 of Cap 10 provides that any judgment (by virtue of the amendments introduced by Law 130 (1)/2000 the definition of a judgement was extended to include judgements or orders

regardless of whether a monetary sum is awarded) of a Superior Court will be recognized by the Cypriot court.

Section 3(1)(b) goes on to provide that particular courts of a foreign country will be deemed superior Courts of that country for the purposes of Cap 10, while section 9(1) provides that Cap 10 applies to, *inter alia*, judgments obtained in courts of the United Kingdom. Recognition will be forthcoming provided the judgment is considered final between the parties. Section 3(3) Cap 10 provides that a judgment is deemed to be final, irrespective of whether an appeal is pending or the judgment is subject to an appeal.

(ii) Common Law

Common law may be another route to recognition; in the first instance case of *Eitan Erez v Dr Borris Bannai* (Appl no. 1535/2011),³ although the court refused to recognise the foreign insolvency proceedings because the respondents were not Cypriot residents and the applicant failed to sufficiently prove that they held assets within the jurisdiction, nonetheless the Cypriot court was willing to follow common law principles as a route to recognition.

As guidance as to the necessary requirements to be met for the recognition of foreign insolvency proceedings, the Cypriot court may use the UK Supreme Court decision of 24 October 2012 in *Rubin v Eurofinance*,⁴ pursuant to which, upon enforcing foreign insolvency orders at common law, it is necessary to meet the test set out in Rule 3 of *Dicey & Morris*,⁵ namely that the judgment debtor:

- (i) was present in the foreign jurisdiction at the time proceedings were commenced;
- (ii) that he claimed or counterclaimed in the foreign proceedings;
- (iii) that he had submitted to the foreign proceedings by voluntarily appearing; or
- (iv) had agreed to submit to

the jurisdiction of the foreign court.

(iii) Model Law 1997

Another route to the recognition of, *inter alia*, UK insolvency proceedings, could be achieved if Cyprus were to decide to adopt, via domestic legislation, the UNCITRAL Model Law on Cross Border Insolvency (“Model Law”). Although this would not be a replacement *per se* of the EIR Recast, in the sense that the recognition would not be automatic, it would at the very least create a procedure to be followed for recognition through court and the scope of that recognition would be defined in the domestic legislation through which the Model Law would be adopted. Nevertheless, adoption of the Model Law is not currently under consideration in Cyprus and, in any event, any court route to recognition will mean unavoidable and possibly protracted delays with further risks of loss and asset dissipation to creditors and other stakeholders.

Recognition of Cypriot insolvency proceedings in the UK

(i) Model Law 1997

The UK already has domestic legislation in place through which it can continue to recognise Cypriot (or other member state) insolvencies; the UK implemented the UNCITRAL Model Law on Cross Border Insolvency (“Model Law”) via the Cross Border Insolvency Regulations 2006 (SI 2006/1030) (“CBIR”) pursuant to which a foreign representative appointed in foreign insolvency proceedings may make an application to a court in Great Britain for recognition of those proceedings. The impact of the recognition is, *inter alia*, that the foreign representative will have standing to make an application to the English Court under the claw back provisions under the Insolvency Act 1986. Also, for foreign main proceedings only (commenced where the debtor has

its centre of main interests) recognition results in an automatic stay on certain enforcement actions against the debtor, equivalent to the stay which applies in English liquidation proceedings.

(ii) Section 426, Insolvency Act 1986

Furthermore, section 426 of the Insolvency Act 1986 enables the UK courts to assist in relation to insolvencies commenced in the courts of “a relevant country or territory”, upon request, and the scope of the assistance which may be provided via this route can be much wider than that in the CBIR. Unfortunately, however section 426 does not apply to Cyprus, as it is not a relevant country for these purposes. It remains to be seen whether, in light of Brexit, section 426 will be extended to apply to Cyprus or even all EU Member States.

Summary

Thus, whilst there are routes available for recognition the position is not anywhere near as clear and predictable as it was under the EIR Recast; the procedures will now be more costly and time consuming and automatic recognition between Cyprus and the UK, at least for now, is a thing of the past. Furthermore, where a UK debtor has a nexus to several EU Member States, this analysis will need to be repeated for each one separately with clear adverse implications for stakeholders. For practitioners who need to act expeditiously to protect and safeguard assets, even a few months’ delay in their recognition may mean it is too late. ■

Footnotes:

- 1 Susan Block-Lieb, “The UK and the EU Cross Border Insolvency Recognition: from Empire to Europe to “Going it alone”” (2017) 40(5) *Fordham International Law Journal* 1373.
- 2 Application no 449/19 of the D.C. of Nicosia, judgment dated 13/7/2020; Application no 7/15 of the D.C. of Limassol, judgment dated 18/7/2017.
- 3 A. G. Erotocritou LLC, “Cross Border Recognition of Insolvency Proceedings” (13/05/2009).
- 4 [2010] EWCA Civ 895.
- 5 Lawrence Collins and Jonathan Harris (eds), *Dicey, Morris & Collins on the Conflict of Laws* (15th edn) (Sweet & Maxwell, 2018).



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