

Recognition and Assistance for Foreign Insolvency Proceedings in England; Brexit Effect.

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Overview

- EU (Regulation)
- Commonwealth s.426
- Model Law (“CBIR”)
- Common Law
- Effect of Brexit
- NB: unless otherwise stated, the slides deal with English law: Scotland and Northern Ireland have their own insolvency law. Northern Irish insolvency law is very similar to English law.

EU: General

- Regulation on Insolvency Proceedings 1346/2000 (cases opened before 26 June 2017).
- Recast Regulation 2015/848 (cases opened on or after 26 June 2017).
- Useful book - Moss, Fletcher and Isaacs: The EU Regulation on Insolvency Proceedings, 3rd Edition. OUP 2016. Deals with the old and new Regulations.
- Applies automatically to all EU Member States except Denmark. Mandatory, apart from narrow public policy exception.
- Mandatory rules of allocation of jurisdiction, choice of law, recognition and enforcement within the EU and by case law interpretation, jurisdiction over non-EU defendants to avoidance actions: *Schmid v Hertel* (case C-328/12)
- Main proceedings in place of COMI and secondary proceedings where there is an “establishment” and for co-ordination/ co-operation/ communication between courts.
- Regulations exclude specialist areas- see next slide.

EU/EEA: Specific

- Banks, Investment Firms and Direct Insurance Companies are subject to special Directives (statutes which required Member State implementation)
- They provide for a single proceeding in the Home Member State where the entity is regulated and headquartered within the EEA (EU plus Norway, Iceland and Liechtenstein) which is recognised and enforced throughout the EEA.
- Useful Book – Moss Wessels and Haentjens: EU Banking and Insurance Insolvency (2nd ed OUP, 2017)

Commonwealth/ s.426

- s.426 in the UK Insolvency Act 1986 provides recognition and enforcement of foreign insolvency proceedings on a quasi-mandatory basis for a defined list of mostly Commonwealth countries, including Australia.
- Requires a request from the relevant foreign court.
- Can apply either relevant English insolvency law or foreign insolvency law.
- Cannot be used to recognise and enforce foreign *in personam* judgement (unless usual non-insolvency law criteria for recognition met), e.g. avoidance of preference: *Rubin/ New Cap* [2013] AC 236 (SC)
- Can be used to obtain English non-insolvency law remedies such as injunctions: *Hughes v Hannover Re* [1997] BCC 921 (CA)
- Can be used to obtain foreign insolvency law remedy not available under English law: *Southern Equities* [2000] BCC 123 (CA)

Model Law

- Implemented in Great Britain (England/Wales + Scotland) as the Cross - Border Insolvency Regulations 2006.
- Closely based on original Model Law, except that there are specially privileged provisions for secured creditors.
- Recognition and enforcement of foreign insolvency proceedings from any country.
- No reciprocity requirement.
- Cannot be used to enforce an *in personam* judgement unless usual non-insolvency law criteria for recognition are met, e.g. in respect of voidable preferences- *Rubin*
- Cannot use foreign insolvency law provisions (e.g. foreign insolvency law avoidance provisions) but can use British insolvency law avoidance etc. provisions as if foreign proceeding were a British proceeding. Contrast US Chapter 15, which allows use of foreign insolvency law but not US law without a plenary (full) proceeding in US.

Common Law

- Has limited application in UK in view of the three statutory systems, but occasionally there are gaps.
- Very important in English law based countries with no statutory equivalent of s.426 or Model Law e.g. Bermuda.
- No recognition of foreign insolvency law *in personam* judgement unless usual non-insolvency law criteria met: *Rubin*.
- Subject to certain limitations, can be used to secure assets of foreign debtor and to obtain information/discovery: *Singularis* [2015] AC 1675 (PC)
- Cannot be used to obtain discovery which, apart from personal jurisdiction issues, would not be available in the foreign insolvency proceeding: *Singularis*.
- Said not to apply to voluntary liquidation: *Singularis*: this appears to be a mistake and the dictum not followed in Singapore.
- Should in principle, in my view, apply to avoidance actions, as long as they can be referred to pre-statutory English common law cases (e.g. Lord Mansfield's avoidance of preferences). This has been argued but not decided in Cayman.

Brexit

- Brexit hasn't happened yet, but the 2 year Article 50 Notice has been given. Depending on the negotiations, the UK could leave in March 2019, or years later, or there could be transitional arrangements.
- Subject to any negotiated deal with the remaining 27 Member States, the EU aspects of cross-border insolvency law assistance are all at risk.
- From a rational point of view, the Regulations and Directives are 'win-win' for all parties and should be kept. However, some Continental academics say 'no cherry picking.' Some EU politicians consider that the UK must be seen to be worse off outside the EU, otherwise other countries will make for the exit.
- The UK is to have a 'Great Reform Bill' which will initially keep all EU law as domestic UK law, but this will only be temporary and subject to change. In the case of the Regulations and Directives, they cannot sensibly be applied on unilateral basis, and reciprocity will disappear when the UK leaves, unless a deal is agreed.
- If we lose the EU legislation, UK will still have s.426, the Model Law and the Common Law to assist the 27. However, the 27 do not have s.426 or common law (except Ireland) and only a few have the Model Law. The result would be a "win" for the 27 and "lose" for the UK.

Thank you

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