

## Chapter 12

# ENGLAND AND WALES

### 1. Under general law

English case law shows a clear tradition of assistance and co-operation with foreign courts so that foreign creditors may gain access to property situate in England and Wales. Foreign insolvency proceedings do not bar the commencement of English insolvency proceedings and the existence of such proceedings will be a factor to be considered in deciding whether concurrent proceedings would be commenced in England and Wales. The English courts will renounce jurisdiction if they consider that it is in the interest of justice and convenience that matters be administered solely in the foreign proceedings rather than in concurrent English proceedings.

The English court's attitude to recognition of foreign insolvency orders is selective although it is based principally upon unity and universality.

According to the decision in *Re BCCI SA & Re BCCI (Overseas) Ltd.* [1993] BCC 787 and *Devon & Somerset Farmers Limited* [1993] BCC 140, the definition of a company for the purposes of the Insolvency Act 1986 (the "Act") does not include a foreign incorporated company. In *Re International Bulk Commodities Ltd.* [1992] BCC 463 the judges disagreed with this interpretation but recent decisions are in line with the former cases. The significance of these decisions was that if a foreign incorporated company was not "a company" under the Act, it could only be wound up as an unregistered company. However, this territorial limitation has been relaxed somewhat by s8(7) of the Act, which expands the definition of a company to include a company

in relation to which an administration order may be made by virtue of the EU Regulation, Article 3 and this in turn has been interpreted quite widely by Budget Rent-A-Car International Inc. [2003] EWCH 128.

The fact that a foreign debtor may have assets in England and Wales is not a sufficient ground alone for the English courts to accept jurisdiction for the debtor's bankruptcy. Conversely, it has become established practice for the English courts to refuse to make a bankruptcy order if it can be shown that a foreign debtor has no assets within the jurisdiction.

Under English law, a foreign judgment may be enforced in England under statute or common law. There are three main statutes that provide for the reciprocal enforcement of foreign judgments. These are: the Administration of Justice Act 1920, The Foreign Judgments (Reciprocal Enforcement) Act 1933 and Civil Jurisdiction and Judgments Act 1982. Where these statutes do not apply, common law principles of recognition and enforcement shall apply. The English courts will recognise and enforce a foreign judgment provided it satisfies the following conditions:

- the foreign judgment is final and conclusive, for an ascertained sum of money and not a penal sum;
- the judgment is not obtained by fraud or misrepresentation;
- it is not contrary to the principles of natural justice or public policy in England; and
- the foreign court had jurisdiction to make that order.

The circumstances in which an English court would consider a foreign court to have competent jurisdiction to make an order in respect of individuals as well as corporate entities was clearly set out by the Court of Appeal in *Adams v Cape Industries Plc* [1990] (Ch) 433.

In the case of individuals, the competence of the foreign court would depend on the physical presence of the debtor at the time of the foreign proceedings. The court held that the voluntary presence of an individual in a foreign country, whether permanent or temporary, and whether or not he was in residence, is sufficient grounds to give the foreign court jurisdiction to make an order under English rules of private international law.

In the case of a foreign judgment given against a corporate body, the English courts would consider the foreign court to have had jurisdiction, if it could be established that the corporate body had sufficient connection by way of having a fixed place of business for a minimal period of time. In other words, it needs to be established that the jurisdiction of the foreign court is determined by considering whether the company has a sufficiently close connection with England and Wales.

## 2. Assisting legislation

### Co-operation under the Act

English insolvency orders are deemed to have universal effect. All the property owned by the bankrupt, wherever situate, will vest in his trustee in bankruptcy (Section 306). Similarly, in the case of a liquidation of a company, a winding-up order also purports to have universal effect in that whilst a company's assets do not automatically vest in a liquidator, he has power to take possession and control of all the company's property, wherever situate.

Sections 426(1) - (3) of the Act provide for the mandatory reciprocal enforcement of orders made by a United Kingdom court exercising its insolvency jurisdiction between different parts of the United Kingdom including Scotland and Northern Ireland. There are, however, certain limitations with regard to the enforcement of court orders against property in different parts of the United Kingdom; for example, an English administrator will only have such powers to act in relation to Scottish property as a Scottish administrator would have in his position.

Section 426(4) of the Act states that as a general principle, the English courts with insolvency jurisdiction have an obligation to assist their counterparts in any other part of the United Kingdom and in any "relevant country or territory".

Section 426(5) of the Act provides that in assisting their counterparts, English courts may apply the insolvency law of either jurisdiction on being requested to do so. English courts have discretion as to the way in which the assistance will be given and must have regard to rules of private international law.

For the purposes of Sections 426(4) and 426(5) of the Act, statutory instruments prescribe the relevant countries or territories<sup>1</sup>. The majority of these countries are either Commonwealth countries or have provisions comparable to Section 426 of the Act.

### European Regulation on Insolvency Proceedings

The Regulation does not attempt to introduce a single European insolvency law but has introduced some significant changes with the objective of improving cooperation between European Community member states. The Regulation has key provisions that (i) assist in determining the international jurisdiction to commence insolvency proceedings; (ii) permit the commencement of secondary proceedings in Member States other than where the centre of main interest is to be found; (iii) provide clear choice of law rules; and (iv) set out the rules relating to the recognition and effect of insolvency proceedings.

<sup>1</sup>Anguilla;  
Australia;  
Bailiwick of Guernsey  
(including Alderney and Sark);  
Bermuda;  
Botswana;  
Brunei;  
Canada;  
Cayman Islands;  
Falkland Islands;  
Gibraltar;

Hong Kong;  
Malaysia;  
Montserrat;  
New Zealand;  
Republic of Ireland;  
Republic of South Africa;  
St Helena;  
The Bahamas;  
Turks and Caicos Islands;  
Tuvalu;  
Virgin Islands.

The Regulation imposes a duty upon administrators of concurrent proceedings to cooperate and communicate information. The administrators of both main and secondary proceedings are required to communicate information with regard to the insolvency proceedings that they control, and in particular, as to the progress that is made in lodging and verifying claims, and terminating proceedings. (Article 31.1)

Where concurrent proceedings exist, the administrator of both main and secondary proceedings is duty bound to co-operate with each other. (Article 31.2)

### **UNCITRAL – Model Law on Cross-Border Insolvency**

The Model Law has not been adopted by the UK. There is provision however in the Insolvency Act 2000 to give effect to the Model Law with or without modification.

## **3. Insolvency practice**

In recent years, the number of cross-border insolvencies has increased and consequently led to greater instances of judicial cooperation and assistance and requests for assistance from the English courts under Section 426. The procedure under this section is that the foreign insolvency officer will petition his local court to issue a letter of request to the English courts for their assistance.

The English courts have applied English law when requested to do so by the court of a relevant country even where no equivalent provision existed under the foreign insolvency law. Conversely, whether the English courts could give effect to a foreign insolvency law provision that had no equivalent provision in English law is unclear, but it is thought that the courts would apply the provision if it was not inconsistent with English insolvency law and public policy. The English courts have a final discretion as to whether they will accede to the request made by a foreign court.

The Court of Appeal in *Hughes v Hanover Ruckersicherungs Aktiengesellschaft* [1997] 1 BCLC 497 dealt with the interpretation of the term “insolvency law” under Section 426(4). Morritt LJ said there were three “sources of law” that an English court could rely on to determine what “insolvency law” meant in the context of Section 426(4):

- a) to invoke its own general jurisdiction and powers; and/or either
- b) to apply the insolvency law of England and Wales as provided for in the Insolvency Act 1986 and other statutes and regulations (for details see 426(10)) or
- c) to apply so much of the law of the relevant country as corresponds to that comprised in (b).

The English courts have these three options to consider when using their discretion as to whether or not to accede to a foreign request. For example, in *Re Dalhold Estates (UK) Pty Ltd.* [1992] BCLC 621, Chadwick J applied option (b), and in *Re Bank of Credit and Commerce International SA (No. 9)* [1994] 2 BCLC 636, Rattee J applied options (a) and (b).

In respect of an insolvent individual, if the relevant foreign law provides for a general assignment of a debtor’s assets to his foreign administrator, the English courts will

recognise the administrator's rights to any of the debtor's moveable property situate in England provided that the English courts do not have jurisdiction in respect of the debtor. In addition, the English courts will tend to recognise the jurisdiction of a foreign court provided the foreign insolvency order is extra-territorial in effect. Immovable property will not vest in the foreign administrator automatically, but he may apply to the English courts requesting that they appoint him as receiver of the rents and profits of the property situate in England.

In respect of an insolvent company, the English courts will recognise a foreign insolvency order provided it is made in the company's country of domicile, although the vesting of the company's English assets in the foreign administrator as a result of the foreign insolvency order will not be recognised. A foreign administrator instead has the right to apply to the English courts for an order empowering him to recover and realize their English assets subject to any rights attaching to the assets before the application. In exercising their discretion to grant relief to the foreign administrator, the English courts will bear in mind the effect on English creditors, and if they would be prejudiced by being required to claim in the foreign insolvency, the English courts will not generally allow the assets to be handed over to the control of the foreign administrator. Ancillary insolvency proceedings may be commenced in England in these circumstances.

Foreign creditors claiming in English insolvency proceedings of any sort may lodge proofs of debt and participate in distributions. The English courts are keen to see that assets are shared equitably amongst all creditors and a creditor who is subject to the jurisdiction of the English courts, and who has already had the benefit of a foreign execution, may be required to surrender the realisation of proceeds for the general benefit of all the creditors.

Reliance on the general discretion of the English courts and Section 426 has its limitations but the English courts used the EU Regulation to overcome some of these limitations. The case of *Re Budget Rent-A-Car International Inc.* [2003] EWCH (Ch) 128 provides a good example where the English courts used the Regulation to accept jurisdiction over a US corporate debtor.

In *Enron Directo* (unreported) and *Daisytek Ltd*, the presumption that a company's centre of main interest is the place where it has its registered office was rebutted and thus the Court of the Member State where the company's centre of main interest was situate accepted jurisdiction and allowed insolvency proceedings to be commenced.

## 4. Examples

### ***Re Budget Rent-A-Car International Inc. [2003] EWCH (Ch) 128***

The question before the English court was whether it had jurisdiction to open insolvency proceedings (specifically administration) in relation to a company incorporated in Delaware, USA. It was acknowledged that this was not possible under the Act as originally enacted because the definition of a company did not extend to cover foreign incorporated companies (save where an order was made pursuant to a request for assistance under s.426 of the Act, *Re Dallhold Estates (UK) Pty.* [1992]

BCLC 621). The US bankruptcy court could not request statutory assistance because it does not fall within the definition of a court in a “relevant country or territory”, under Section 426(4).

Lloyd J made an order to put the Delaware registered company in question into UK administration and held that the EC Regulation gave the English courts jurisdiction to do this. The relevant test was whether the company had its centre of main interest in a relevant Member State, in this case England, which rebutted the presumption, in Article 3(1) of the Regulation, that a company’s “centre of main interest” is the location of its registered office. Although the corporate debtor had its registered office in the US, it had never traded in the US, its operations were conducted almost entirely in England, it was registered in England as an overseas company, all its employees worked in England (except for a small number employed in Switzerland) and most of its main business and operational contracts were governed by English law. Further, there was nothing in the EU Regulation providing that only debtors incorporated in a relevant Member State should be affected by the Regulation.

### ***Re Television Trade Rentals Ltd. [2002] BPIR 859***

The joint provisional liquidators of two companies based in the Isle of Man sought assistance from the English courts to make a declaration that a company voluntary arrangement procedure under the Insolvency Act part 1 should be applied to the companies incorporated in the Isle of Man although the local law did not include similar provisions. The request was granted by the English courts on the basis that it was appropriate to apply the Company Voluntary Arrangement provisions to these companies as there was a close connection between the companies and the UK, and that the Isle of Man was also a specified territory for the purpose of Section 426.

### ***Re England v Smith (Re Southern Equities Corp) [2001] Ch 419***

This was an appeal by the liquidators of an Australian company that was being wound up. In the first instance, the liquidators requested assistance from the English courts under Section 426 for an order requiring the oral examination of the respondent living in England in accordance with Australian law and procedure. The request was refused and the liquidators appealed.

The Court of Appeal held that the refusal was made on the wrong basis and that the lower court judge had ignored the need for comity. The court took the view that if comity was given adequate consideration, there was no reason why an English court could not accede to a request to examine a person under Australian law. The appeal was allowed.

### ***Re Business City Express Ltd. [1997] BCC 826***

The Irish High Court requested the assistance of the English courts under Section 426 for an order that a scheme of composition of the debts of an Irish company approved by the Irish court be made binding on UK creditors.

The Irish court approved the composition scheme on the condition that the English courts would assist in making the necessary co-operation order that was requested.

The English court took the view that that the proper approach was to grant the assistance that had been sought unless the court was satisfied that there was good reason not to do so. In this case, the English court decided that without its assistance, the scheme could not be effective and the company would inevitably have to go into liquidation. In the circumstances, it acceded to the request on the grounds that there was no good reason why the court should not give the required assistance.

***Re Hughes v Hanover Ruckersicherungs-Aktiengesellschaft [1997] 1 BCLC 497***

In this case the Supreme Court of Bermuda requested the High Court in England, pursuant to Section 426, to lend assistance to restrain any actions or proceedings issued by the defendant in England. Knox J declined the request and the liquidators of the foreign company appealed. The Court of Appeal took the view that although Section 426(4) states that “the courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist ... the relevant foreign court”, the English court did have a discretion as to whether or not any assistance could be given. The appropriate test was whether the requested assistance “may properly be granted”, and the suggestion that assistance would be refused only if there were serious public policy considerations was rejected by the court.

The Court refused the appeal on the basis that there had been a change in circumstances that had removed the reasons for lending assistance.

***Re BCCI SA and Re BCCI (Overseas) Ltd. [1993] BCC 787***

A letter of request was issued by the Grand Court in the Cayman Islands for assistance by the English courts under Section 426 (5) of the Insolvency Act to make orders against the officers of BCCI (Overseas) Ltd, a Cayman Island company that was being wound up in the Cayman Islands. The effect of the orders sought was anticipated to be the recovery of assets for the benefit of the liquidation. The letter of request asked the English courts to consider making orders against the officers under the following provisions of the Act:

- Section 212 – Misfeasance in breach of fiduciary duty;
- Section 213 – Fraudulent trading;
- Section 214 – Wrongful trading; or
- Section 238 – Transactions at an undervalue.

Rattee J held that the English courts had discretion to apply the provisions of the Act notwithstanding the fact that there were no equivalent provisions under Cayman Islands’ law. He took the view that if he refused to apply the provisions of the Act, it would defeat the purpose of Section 426 since if the requesting courts should be predisposed to exercise their discretion in favour of giving assistance unless there was a very good reason for not providing assistance.

In addition, Rattee J indicated that the word “company” used in the Act means only a company incorporated in the United Kingdom.

