



**INSOL INTERNATIONAL**

**CROSS-BORDER INSOLVENCY II**

**A Guide to Recognition and Enforcement**



# **INSOL INTERNATIONAL**

International Association of Restructuring, Insolvency & Bankruptcy Professionals

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One of the defining characteristics of human beings is the way that we specialise. Biologists have pointed out that if you take a chimpanzee from one tribe and place it in another, it will at least know what it is expected to do, what its role is. That is, it will get on with mutual grooming rituals, join in hunting for food etc. But take a lawyer and put him or her in a nuclear submarine and they will be lost. Similarly, if a shop-keeper were asked to fly a plane on a moment's notice. Specialisation brought efficiency and led to barter. One person was good at collecting coconuts and another was good at weaving fishing nets - they swapped with each other. Bilateral swapping became multilateral trade. Money was invented to make keeping score easier.

With the industrial revolution came a capacity to trade quickly and efficiently over vast distances. (And for the anthropologists among you who wish to point out that man had the capacity to travel long distances thousands of years earlier as can be demonstrated by the discoveries of Viking DNA on the east coast of Canada, I should say that I am focusing here on the speed and ubiquity of travel and trade.)

So trade is international and a merchant in one country will have interests – goods, employees, claims – in other countries. There is and will be business failure (the only way not to fail is not to try). How are humans, the great co-operators, to deal with this? The cheapest and most efficient method is to have one main insolvency/bankruptcy and for other jurisdictions to recognise that proceeding and co-operate with its office-holder. UNCITRAL developed a Model Law to make it easier for countries to buy in to this approach. INSOL International was delighted to have been a central part of the process of developing the Model Law. Lord Hoffmann in an English case *In re HIH Casualty and General Insurance Ltd* [2008] 1 WLR, 852, used some rhetoric to explain the universalist approach.

“The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution”.

This, then, is an expression of the ideal approach. But we are dealing with humanity in all its diversity and there are those who do not necessarily sign up to this. First, there are jurisdictions unable or unwilling to look up from the page containing their own domestic concerns. I was intrigued recently when I asked some academics in a country which had just introduced new restructuring laws whether the new laws applied to foreign companies. After some days' study they weren't sure they knew the answer. The point had never even been considered by the legislators. And another approach is that often ascribed to the Little Englander: "Abroad? I've been there once and I didn't like it...". That is, who knows what impurities or wickedness might we be importing if we recognise another jurisdiction's restructuring or bankruptcy laws? Or a modified version of that is shown by those who insist on reciprocity. That is, we will only recognise jurisdictions which will recognise our insolvency procedures. You can see the point but life is too short for such a limited approach. Better to set an example and extend the hand of friendship and recognition. It's better for *your* creditors.

Neil Cooper has always been a practitioner who can see the big picture. The first edition of the book on which this is based – *Recognition and Enforcement of Cross-border Insolvency* (1996) which he co-authored with Rebecca Jarvis – was a seminal work. Many have followed in the path they first cleared. Much has been done to improve the law and practise of cross-border insolvency. Much still needs to be done but the way forward is now clear. Under the editorship of Neil, INSOL updated the book in 2003. Since then change has continued apace and this second edition published under the INSOL banner has much new material for members and will bring readers up to date on where 46 countries now stand in this important area.



Gordon Stewart  
*President,*  
*INSOL International*

## Introduction

This publication, the expanded third edition of this study, has been produced by INSOL International to help members seeking guidance as to the assistance they can expect when dealing with insolvency proceedings that span national borders. It is also hoped that it will provide a helpful stimulus to those responsible for the reform of insolvency laws and systems especially when considering the adequacy of the assistance that their courts are able to give foreign representatives.

The need for such assistance has increased exponentially since the first edition of this work almost twenty years ago. The growth in global trade; the rapid expansion of foreign direct investment in the nineties and the start of the new millennium, shortly followed by the global financial crisis have contributed to an increased number of occasions when the assistance of foreign courts is necessary if insolvency proceedings are to achieve their desired objective. While time-consuming applications based upon comity or *exequatur* may have been almost adequate in times when insolvency procedures were mainly of the liquidation variety, the universal emphasis of insolvency law reform on the development of workable reorganisation procedures has made timely and predictable assistance essential.

### ***The background to this study***

The first edition of “Recognition and Enforcement of Cross-Border Insolvency – A Guide to International Practice” by Cooper and Jarvis<sup>1</sup>, was published by John Wiley and Son in 1996. The research for this book assisted the production of the report of the INSOL International Expert Committee<sup>2</sup> to a symposium hosted by UNCITRAL and INSOL International in April 1994. We identified the needs as access for foreign representatives, recognition of the proceedings under which they were appointed, relief to protect assets, and judicial co-operation. The conclusions of that symposium led UNCITRAL to constitute the Working Group that prepared the Model Law on Cross-Border Insolvency.

Due to the continuing law reform and extending jurisprudence in this area of law, in 2003 INSOL International published an updated second edition on which this book is based.

### ***The UNCITRAL Model Law – process and outcome***

Working Group V comprised representatives of the member nations and the two global insolvency bodies, INSOL International<sup>3</sup> and the International Bar Association<sup>4</sup>. Among the representatives were a number of European nations that for many years had debated the European Bankruptcy Convention. For good or for

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<sup>1</sup> Rebecca Jarvis, now a partner in Linklaters, London. The researcher for this project was a young solicitor, Sonali Abeyratne, who is now technical director at INSOL International.

<sup>2</sup> Chaired by Professor Ronald W Harmer, London University, formerly a partner in Blake Dawson Waldron and Evan Flaschen, now partner in Bracewell and Giuliani, New York.

<sup>3</sup> Represented by Ron Harmer and the author.

<sup>4</sup> Represented by Dan Glosband.

ill, and on balance I still think the former, the Working Group adopted some of the significant terminology of the Bankruptcy Convention working group. The definitions of “centre of main interest” (COMI) and “establishment” were utilised, while the concepts of territorial proceedings in the bankruptcy convention were not required at UNCITRAL.

Some nations were strongly of the opinion that the COMI should invariably be the domicile of incorporation: others supported a wider definition although there was little support for the mere presence of assets or the existence of a bank account as the basis of jurisdiction to commence insolvency proceedings. Without doubt, no one foresaw the extent to which the subject of COMI would dominate the jurisprudence on the output of the Working Group.

For the avoidance of doubt, we did not, as is sometimes reported, base the Model Law on the bankruptcy convention. Neither did the Working Group anticipate the adoption of the European bankruptcy convention in the near future. The bankruptcy convention had lain moribund at that stage for several years and it was to be another seven years before the Belgian presidency brought the convention rapidly to the EU statute book in the form of the regulation.

Although often regarded as the two primary influencers on cross-border co-operation, the European Insolvency Regulation and the Model Law have completely different roles – in summary, the Regulation determines jurisdiction to commence proceedings and the applicable law for conduct of proceedings commenced in the relevant member states of the European Union<sup>5</sup>. It is therefore geographically limited in effect.<sup>6</sup>

On the other hand, the Model Law is a post-commencement resource to aid realisation of assets in foreign proceedings. No geographical limitations. The potential effects are not even limited to proceedings commenced in nations adopting the Model Law. Thanks to the absence of a requirement for reciprocity in the Model Law, proceedings commenced in any nation can take advantage of the assistance granted by nations adopting the Model Law.

In the light of the fundamental difference between the two models, it is surprising to which extent the case law on each has informed the development of the other.

### ***State of reform***

The adoption of the Model Law by the United Nations in 1997 marked an acceptance among nations that there was a need for the courts of market economies to provide timely, adequate and predictable assistance to foreign

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<sup>5</sup> Excluding Denmark.

<sup>6</sup> Recital 8 Council Regulation (EC) N° 1346/2000 of 29 May 2000 on Insolvency Proceedings: In order to achieve the aim of improving the efficiency and effectiveness of insolvency proceedings having cross-border effects, it is necessary, and appropriate, that the provisions on jurisdiction, recognition and applicable law in this area should be contained in a Community law which is binding and directly applicable in Member States.

representatives charged with dealing with the affairs of a multi-national debtor, as opposed to their courts merely being permitted to assist when it did not conflict with domestic considerations. Importantly, it also strengthened the positions of creditors involved in international transactions. The steady adoption of the Model Law by nations reforming their insolvency laws has demonstrated the need for these provisions<sup>7</sup>. There had been material improvement by the time of the publication of the last edition in September 2003, although these were early days for the other great influencer on cross-border insolvency, the European Community Council Regulation (EC) No 1346/2000, referred to in this edition as the European Insolvency Regulation or the EIR.

As editor, I had the unique ability to assess the extent of change since the last edition. The courts of the considerable majority of jurisdictions summarised in this publication have shown a material improvement in their willingness to assist insolvency practitioners dealing with cross-border insolvencies. Nations previously considered to be bastions of territoriality have embraced UNCITRAL's guidance and numerous states whose laws have been reformed with the informed assistance of the global institutions including the World Bank, IFC, IMF and the development banks now include provisions to assist practitioners from those countries and those seeking assistance from those countries. Not all states adopted the full UNCITRAL provisions: some nations, largely those in early stage transition, have adopted more modest provisions based on the Model Law. Even these reforms can provide the all-important gateway to assistance. In such cases of transition and emerging economies, the challenge of developing the institutional capacity and deontology within the nations and especially that of the courts is just as important as the extensiveness of the law. Once again, so often, it is the IFIs that drive this reform<sup>8</sup>.

### ***Barriers to reform***

It would be misleading to imply that it is universally good news. The extent of the reform referred to above is far from uniform. There are still bastions of either announced or effective territoriality: some based on out-moded protectionism and some a denial of the extensiveness of the globalised economy. In cases where laws have been reformed without the inclusion of cross-border provisions, we must recognise that important opportunities have been lost, as major reforms can be a generation apart.

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<sup>7</sup> At the date of publication, the following states had adopted the Model Law. Australia; British Virgin Islands; Canada; Colombia; Eritrea; Greece; Japan; Mauritius; Mexico; Montenegro; New Zealand; Poland; Republic of Korea; Romania; Serbia; Slovenia; South Africa; Uganda; United Kingdom of Great Britain and Northern Ireland; United States of America.

<sup>8</sup> Institutions do not automatically assist with such matters. The global community is indebted to Mahesh Uttamchandani of the Investment Climate Team, IFC; Vijay Tata of the World Bank; and Sean Hagan of the International Monetary Fund and the teams that they lead for encouraging the adoption of appropriate legislation.

Furthermore, we must reluctantly accept that reform in some of these states will be a long-term challenge. However, most are simply the result of a lack of incentive to reform possibly coupled with a lack of domestic demand for reform. Many of these jurisdictions are states where it is not yet commonplace for reform to be demanded. We can hope that it is only a matter of time before the professionals and the financial communities in these states demand the resources available in more enlightened regimes.

### ***The continuing dialogue at UNCITRAL***

Since the Model Law was completed in 1997, UNCITRAL has not rested. The next major contribution to insolvency law reform was the UNCITRAL Legislative Guide on Insolvency Law, which started life with modest ambitions and ended as a 400-page handbook to lawmakers.

From the outset, the 800-pound gorilla in the room has been that virtually all insolvency laws only deal with single incorporated entities. This remains the case despite the fact that economic interest groups<sup>9</sup> are inescapable commercial realities and that it is recognised that our inability to deal with them in an integrated manner increases financial losses, loses of jobs, and economic production. The challenges of course are immense because of the accepted need to respect the unity of the incorporated entity, which underpins economic activity universally. Further information on this topic can be found in the UNCITRAL Legislative Guide on Insolvency Law; Part Three Treatment of Enterprise Groups in Insolvency.

Recognising the fairly general nature of the guidance in the Model Law as to judicial co-operation, the next major contribution for courts and those in charge of law reform was the UNCITRAL Practice Guide on Cross-Border Insolvency Co-operation which, *inter alia*, contains very practical advice on the subject of cross-border agreements, frequently referred to as protocols. Specifically aimed at judges is a lesser-known document in the UNCITRAL library, the UNCITRAL Model Law on Cross-Border Insolvency: The Judicial Perspective.

It is through such work coupled with missions, tutorials and continued advocacy of the need for such reform that UNCITRAL has performed an invaluable role in stimulating law reform in the last twenty years.<sup>10</sup>

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<sup>9</sup> The term adopted by UNCITRAL in its recommendations for groups of companies joined by ownership or control.

<sup>10</sup> Nearly all of this after the initial adoption of the Model Law has been under the leadership and guidance of Jenny Clift, Senior Legal Officer at UNCITRAL, Vienna for whose dedication the profession owes a debt of gratitude. Jenny received the INSOL International Scroll of Honour in 2010.

### ***Current reform***

As this publication is completed, the European Union is in the process of reviewing the European Insolvency Regulation. There are conflicting views as to the extent to which it is necessary to amend the Regulation: some desired to leave well alone while others want to attend to well-recognised deficiencies. It is too early in the debate to speculate as to the outcome – this will be the scope of future revisions of this work.

As mentioned above, the genesis of the first edition was the global symposium organised at UNCITRAL over 20 years ago. No one imagined we would be working there 20 years later, once again on the Model Law. UNCITRAL Working Group V is currently revisiting the “guidance notes” which accompany the Model Law to see whether any common ground can be established as to COMI and, by implication, jurisdiction. The wording of the Model Law will not be changed but ambiguity in the original guidance may be reduced. Furthermore, greater clarity as to the generally acceptable rules for identifying the most convenient forum will assist in distinguishing the quite necessary and usual “choice of forum” that is required whenever a multinational group gets into financial difficulty from the practice of “forum-shopping”, adopted by directors and other parties keen to optimise the strengths and weaknesses of different jurisdictions. The former has to be made in every multinational case while the latter is fortunately rare (although still unacceptable).

### ***This edition and our contributors***

INSOL International sincerely hopes that this publication is of use to practitioners, courts and those considering law reform. The guide however is intended to assist practitioners with a general understanding of the law and is not intended to replace specific legal advice. The completeness or accuracy of the information on any country cannot, therefore, be guaranteed.

We have adopted a common format of general law, assisting legislation, insolvency practice and examples for each jurisdiction, recognising that these distinctions may be clearer in some jurisdictions than others. In addition, where reform of the law is imminent, we have noted this to alert readers of potential changes.

In common with the Model Law, we have used the term “foreign representative” to indicate the holders of all types of foreign insolvency appointments, whether as liquidator, trustee, administrator, syndic or debtor in possession.

In this area of continuing law reform and extending jurisprudence, the authors would be extremely grateful to hear of any revisions, alternative interpretations or case law on the matters covered by this guide or of the law and practice in jurisdictions not yet covered.

Since the first edition the country sections have been updated and in some cases substantially rewritten with the assistance of the country reporters whose names appear on a folio close to this introduction. As with other INSOL publications of this nature, it grows by a few countries in each edition. The countries we selected are generally those where there have been interesting developments or there is an increased level of cross-border activity.

Our sincere thanks go to all of our contributors. We would also like to thank The Trustees of The Barbican Settlement, Artemis Trustees Limited for kindly agreeing to assist with the publication of this book.

The research on which this publication is based took several months and the laws are stated as at mid 2012.

A handwritten signature in black ink, appearing to read "Neil Cooper". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Neil Cooper  
*Past President,  
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## Chapter 1

# ARGENTINA

### 1. General law

Foreign claimants will experience restrictions when seeking to enforce foreign bankruptcy judgments in Argentina. Argentine law does not contemplate access to foreign insolvency administrators and the Argentine National Supreme Court in 1972 (“Panair do Brasil”) ruled that to allow a foreign bankruptcy administrator to exercise his powers would be a violation of Argentine internal “ordre public”. The construction was based on the notion that an administrator in bankruptcy is a public official that can only act on an appointment by an Argentine court in accordance with the rules imposed under Argentine law. This construction has not been yet overruled, but in a more recent, albeit domestic case (“Amiano”, cited below), the same Court has decided that the administrator in bankruptcy is not a public official, but an “auxiliary” of the Court, a decision that gives rise to the possibility of access being granted to foreign bankruptcy administrators in the future, although it is still improbable that a foreign bankruptcy administrator could be considered an “auxiliary” of the Argentina bankruptcy court.

Multiple Appellate Court decisions have notwithstanding recognised the authority of the insolvency administrator to act in Argentina as an agent of the insolvent debtor.

A foreign insolvency order shall be recognised as an “act of bankruptcy” for the purposes of opening an Argentine bankruptcy procedure on the petition of a creditor whose debt is payable in Argentina. The standing of a foreign bankruptcy administrator shall also be recognised towards this. The existence of assets in

Argentina has been a prerequisite in most courts, although there is also authority to the contrary. Such an Argentinean bankruptcy shall not be considered ancillary to the foreign bankruptcy. No *exequatur* will thus be necessary.

There is authority denying this possibility to a debtor in possession in reorganization procedures, although the matter is not settled.

Thus, a debtor with domicile outside the borders of Argentina can be subjected to a liquidation bankruptcy in Argentina by an Argentine bankruptcy administrator appointed by a Argentine bankruptcy judge, provided there is proof of assets of that debtor in Argentina. The opening of this procedure entails no disqualifications on the debtor and will be limited to the liquidation of the local assets by a local bankruptcy administrator. In the case of foreign offshore companies not registered in Argentina that have operated mainly in Argentina, the Argentine judge has jurisdiction to open a liquidation bankruptcy procedure in Argentina.

## 2. Assisting legislation

The insolvency law of Argentina<sup>1</sup> contains specific provisions in articles 2, par. 2; 3 par. 5; and 4. Article 4 prescribes that foreign bankruptcy orders shall not be recognised for the purposes of setting aside acts performed by the debtor in Argentina: all transactions performed in Argentina by that debtor shall be deemed valid; including secured rights granted before and after the foreign bankruptcy order was made.

Argentina has been a party to two international treaties concerning international bankruptcies, signed in 1889 and 1940. Both these treaties were approved in Montevideo, Uruguay (“Montevideo Treaties on International Bankruptcy”) and configure a system that is different to that envisaged by the domestic Argentine legislation. Relations with Peru, Bolivia and Colombia are governed by the Treaty of 1889. Relations to Uruguay and Paraguay are governed by the Treaty of 1940. The 1889 Treaty envisages only liquidation bankruptcy while the 1940 Treaty includes all insolvency procedures, including reorganisations.

Under the Montevideo Treaties, access of foreign bankruptcy administrators to Argentine courts shall be allowed, and the effects of the foreign bankruptcy order shall be recognised. All preventive remedies and effects prescribed by the law of the judge ordering bankruptcy shall be enforced in Argentina.

Under both Montevideo Treaties, only one insolvency procedure with extra-territorial effects shall be commenced in the signatory countries, the judge that ordered the insolvency having full jurisdiction on all matters concerned (“unity”). Only in the case of a debtor having two or more economically autonomous establishments in different States will jurisdiction be assigned to the courts of each State, and then, two or more bankruptcies will ensue (“plurality”). Insolvency orders are to be published in all States where the debtor has assets. Local creditors,

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<sup>1</sup> Law nr. 24.522 of 1995, “Ley de Concursos y Quiebras” “AIL 1995”.

defined as those whose rights are enforceable in the pertinent State (e.g. domicile of payment), are entitled to petition the opening of separate local insolvency procedures (“plurality”).

Whenever no local creditors petition for a separate insolvency procedure, there shall be only one procedure, and all creditors shall file their claims in it, in accordance to the law of the State where the proceedings were opened. Local creditors take precedence over foreign creditors in the collections of the proceeds of the liquidation of the assets.

### **3. Insolvency practice**

In case of parallel insolvency proceedings opened both in Argentina and in a foreign country, a creditor of a debtor whose liquidation bankruptcy has been ordered in Argentina shall be subordinated, whenever he has proven his claim in the foreign procedure, whether the latter is in reorganisation or liquidation.

The claim in an Argentine insolvency proceeding of a creditor who has contracted exclusive place of payment in a foreign country (e.g. the U.S.) shall be subjected to the proof of reciprocity. Reciprocity in this context means that a creditor who has contracted exclusive place of payment in Argentina will be allowed *pari passu* with other creditors in the U.S. Lack of evidence of reciprocity shall result in the non-allowance of the claim. Any monies collected from the debtor in a foreign jurisdiction after the opening of an Argentine insolvency proceeding shall be credited towards that creditor’s dividend (Hotchpot rule).

Secured creditors are excepted from the requirements of the reciprocity rule.

### **4. Future reforms**

A Committee of experts was appointed in 2002 by the Argentine Ministry of Justice to consider reform of various aspects of the present insolvency law.

The Committee recommended the adoption of the UNCITRAL Model Law on Cross-Border Insolvency. To date, the recommendation has not been made into a Bill in the Congress.

### **5. Examples**

**Argentine National Supreme Court of Justice, 4.11.2003**, “Amiano, Marcelo E.”  
Published: *Jurisprudencia Argentina* 2004-I-77. *Fallos* 326:4445. The Argentine administrator in bankruptcy is not a public official, in the sense that the interests that it represents are not those of the State. He is an auxiliary to the bankruptcy judge, without hierarchy in the State rolls, and enjoys no delegation of public powers, and the State having no responsibility for his errors.

**Cámara Nacional de Comercio, Div. A, 30.6.11**, “Líneas Aéreas Privadas Argentinas”, *Boletín Cámara Nacional de Comercio*, 35320/10. (1) A mere statement containing the rules applicable to the proof claims for a foreign creditor in a U.S. bankruptcy procedure will be allowed as sufficient evidence to comply with the reciprocity rule contained in art. 4 of AIL; (2) the subordination rule contained in art. 4 of AIL embraces only creditors who have been able to prove their claims in a foreign insolvency procedure of the same debtor, the latter whether in liquidation or reorganisation.

**Cámara Nacional de Comercio, Div. E, 4.3.2008**, “Gelabert, Pedro” *Boletín Cámara Nacional de Comercio*, EZS5. Foreign laws are to be interpreted within the notion of “notorious evidence”, and can be evidenced by a written statement signed under oath by a lawyer admitted in the relevant jurisdiction, which in this case was the Federal bar in the U.S. to comply with the reciprocity rule contained in art. 4 of AIL.

**Cámara Nacional de Comercio, Div. D, 11.4.95**, “Dispropal S.A.”, *idem Div. A*, 30.8.96, “Plásticos Siilvatrin S.A.” both in *Boletín Cámara Nacional de Comercio*, The reciprocity rule contained in art. 4 of AIL applies only in Argentine liquidation insolvency procedures and not in Argentine reorganisations.

**Cámara Nacional de Comercio, Div. F, 24.2.2011**, “People and Partners S.R.L.”, La Ley 2011-E,132, note Gerbaudo.

(1) An attorney empowered by a foreign bankruptcy administrator has legal standing to appear and petition before an Argentine bankruptcy Court on behalf of the foreign bankrupt estate, even when there are no specific treaties with the country involved.

(2) Evidence of the foreign bankruptcy order shall be sufficient for the Argentine Court to order the opening of an Argentine bankruptcy liquidation procedure. The conditions for opening a liquidation bankruptcy in Argentina in such case do not require proof of impossibility to make payments, as in other cases.

(3) The debtor may not petition for the opening of a reorganisation procedure in Argentina: only a liquidation bankruptcy that shall be pursued with entire autonomy with the foreign bankruptcy.

(4) The possibility of opening an Argentine bankruptcy procedure based on the evidence of a previous bankruptcy ordered in a foreign country is to be limited to the existence of assets in Argentina. This last requirement shall be satisfied even with evidence of a standing debt payable in Argentina, whether or not in default.

**Cámara Nacional de Comercio, Div. E, 2.9.2004**, “Collectivemind Inc., S.A.”, *Boletín de la Cámara Nacional de Comercio*, RI6 *idem Div. D*, 13.4.2000, “Proberan International Corp. S.A.”, La Ley 2001-B, 101, note Rouillon in La Ley 2002-A, 387. It is not admissible to reject a bankruptcy petition of a debtor domiciled in a foreign country under the rationale that there are no assets in Argentina, based on the wording of art. 2, par. 2 of AI, which only limits the scope of the effects of such bankruptcy.

**Argentine National Supreme Court of Justice, 24.2.2009**, “Compañía General de Negocios SAIFE”, La Ley 2009-B, 493, note Vitolo, idem *Cámara Nacional de Comercio, Div. A, 18.4.2006*, “Boskoop S.A.”, La Ley 2006-D, 369, note Vitolo. The Argentine bankruptcy court has jurisdiction to order the liquidation bankruptcy of an offshore foreign company that operates exclusively in Argentine territory, but has not registered in this country. The criteria was that of principal location of business.



## Chapter 2

# AUSTRALIA

### 1. General law

Most of the practice and procedure in Australian courts (including laws relating to the recognition of foreign judgments) has been based upon the practices and procedures in force in English courts at the time that the Australian judicial system was founded. There have, however, been changes to the procedures to reflect local conditions and, in more recent times, to provide for the faster pace and multi-jurisdictional nature of business in the 20th and 21st centuries. Australian insolvency law was originally based upon the then English legislation.

Australian insolvency law draws a distinction between:

- Individuals and most partnerships<sup>1</sup>, whose insolvencies are governed by the *Bankruptcy Act 1966* (Bankruptcy Act);
- Corporations (and some larger partnerships) whose insolvencies are governed by the *Corporations Act 2001* (Corporations Act).

Australian courts will generally recognise the appointment of foreign insolvency trustees, liquidators and like persons provided that the appointment appears to be valid under the laws of the place of the appointment and provided that there is sufficient connection between that place and the appointment. To the extent that the existing provisions are not inconsistent with the *Cross-Border Insolvency Act*

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<sup>1</sup> A partnership with more than 5 partners is a “Part 5.7 body” and therefore able to be wound up under section 583 of the Corporations Act.

2008 (Cross-Border Act), assistance for the recognition and enforcement of foreign judgments or orders and foreign insolvency proceedings in Australia is also available under the following regimes:

- The Corporations Act and Bankruptcy Act allow an Australian court to act “*in aid of*” and to “*be auxiliary to*” foreign courts in bankruptcy and insolvency matters.;
- The *Foreign Judgments Act 1991* (the FJA) generally provides for the registration in Australia of judgments of certain foreign courts. The FJA only allows registration of the judgments of courts in foreign jurisdictions that have “reciprocal” arrangements with Australia;
- The common law in respect of judgments of those courts in jurisdictions that do not have reciprocal arrangements with Australia (i.e. those jurisdictions not governed by the FJA).

Judicial comity provisions are a well recognised feature of Australian insolvency law. Under section 581(2) of the Corporations Act, Australian courts exercising jurisdiction over corporate insolvency related matters are obliged to “*act in aid of*” and to “*be auxiliary to*” the courts of “prescribed countries”<sup>2</sup>. This is a mandatory obligation. The terms of section 581(2) of the Corporations Act are relevantly identical with those of section 29(2) of the Bankruptcy Act relating to individual debtors.

The “prescribed countries” for the Bankruptcy Act are largely the same as that under the Corporations Act.<sup>3</sup> Where a “prescribed country” is concerned, any potential incongruence between the respective foreign and Australian laws will not be considered as an appropriate basis for denying judicial assistance.<sup>4</sup>

Where the application is from a court in a country which is not a prescribed country, the Australian court will have a discretion, but not a duty, to act in aid of the foreign court. The exercise of that discretion can include a consideration of such issues as:

- Determining the proper law to be applied (to be assessed using Australian private international law rules);
- Considering the advantage of avoiding duplication in multiple administrations not working together;
- Assessing whether any Australian creditor will be disadvantaged by the assistance in terms of additional delay, risk that a security will not be acknowledged and cost; and
- Considering the desirability for cooperation and uniform administration.

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<sup>2</sup> See regulation 5.6.74 of the *Corporations Regulations 2001 (Cth)*: Jersey, Canada, Papua New Guinea, Malaysia, New Zealand, Singapore, Switzerland, the United Kingdom and the United States of America.

<sup>3</sup> The “prescribed countries” are the United Kingdom, Canada, New Zealand under section 29(5)(a) of the Bankruptcy Act and Jersey, Malaysia, Papua New Guinea, Singapore, Switzerland, United States of America under regulation 3.01 of the *Bankruptcy Regulations 1996* and any colony, overseas territory or protectorate of the above countries.

<sup>4</sup> *Re Chow Cho Poon (Private) Limited* [2011] 249 FLR 315; [2011] NSWSC 300 at paragraph 21.

Among other things, section 29 of the Bankruptcy Act and section 581 of the Corporations Act allows an Australian court to:

- Recognise the appointment of an external administrator to a foreign company;
- Make orders for the delivering up of the property of a corporation to a foreign person;
- Appoint an Australian receiver to the property of a foreign bankrupt, with power to take possession of and to sell such property;
- Make orders for the determination of the assets of a foreign bankrupt within Australia subject to the appointment of the trustee;
- Make Australian land available to a trustee in bankruptcy to enable them to realise that asset for the benefit of the creditors in the foreign bankruptcy<sup>5</sup>; and
- Compel a person made bankrupt under the laws of another country to produce their books and records and be examined before the Court.<sup>6</sup>

The discretionary obligation under s 581 to “*act in aid of*” and to “*be auxiliary to*” courts of countries other than those prescribed countries, does not render the provision void for inconsistency with the UNCITRAL Model Law on Cross-Border Insolvency (Model Law) on the basis that the latter invokes a mandatory duty “to cooperate” with those foreign courts or a foreign representative.<sup>7</sup> Therefore, a foreign representative from a jurisdiction that is also a “prescribed country” under section 581 Corporations Act or section 29 of the Bankruptcy Act has a choice as to which process to follow in seeking the assistance of an Australian court.<sup>8</sup> Where Article 25 of the Model Law is invoked, the request for assistance will be a matter for application and submission on a case by case basis.

As a matter of principle, Australian courts will generally recognise bankruptcy orders made by foreign Courts, provided that the foreign Court had an appropriate jurisdictional basis for the making of the orders<sup>9</sup>. As a matter of proof, foreign parties are assisted by a presumption that documents which purport to contain an imprint of a seal of a body established under a law of a foreign country are duly sealed. Of course, it is open to other parties to lead evidence to set aside the presumption<sup>10</sup>.

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<sup>5</sup> Section 29 *Bankruptcy Act*; *Dick as Trustee in Bankruptcy v McIntosh* [2001] FCA 1008 (31 July 2001) paragraph 7 quoting with approval *Australian Mutual Provident Society v Gregory* (1908) 5 CLR 615 at 623, 625, 628, 630; *Radich v Bank of New Zealand* (1993) 45 FCR 101 at 109, 115, 119.

<sup>6</sup> *Radich v Bank of New Zealand* (1993) 45 FCR 101 at 125; *Dick v McIntosh* [2002] FCA 1135 (13 September 2002).

<sup>7</sup> *Re Chow Cho Poon (Private) Limited* [2011] 249 FLR 315; [2011] NSWSC 300 at paragraph 67.

<sup>8</sup> *McGrath & Anor as liquidators of HIH Insurance Ltd* [2008] 26 ACLC 921.

<sup>9</sup> See *Dick v McIntosh* [2002] FCA 1135 (13 September 2002) at paragraph 17 quoting with approval from *Australian Private International Law* 3rd Ed. Sykes & Pryles at pp 791 - 793; *Radich v Bank of New Zealand* (1993) 45 FCR 101 at 105 - 106.

<sup>10</sup> Section 150(1)(f) of the Evidence Act 1995 (Cth). See an example of the application of this principle in *Yoon v Song* [2000] NSWSC 1147 (8 December 2000).

The *Foreign Corporations (Application of Laws) Act 1989* (FCAL) provides that where any question arises under Australian law concerning the officers of foreign corporations and their rights and liabilities (in relation to that corporation), and where it is necessary to determine that question by reference to a foreign law, then the question is to be determined by reference to the law used by persons in the place of incorporation of that foreign corporation<sup>11</sup>.

The FCAL was introduced by the Australian government to provide predictable statutory guidance to ensure that in the relevant circumstances, the applicable law would be determined by the place of the company's incorporation without regard to the political circumstances or legal status of the government authorities in that place.

Whilst the provision has been seldom considered in an insolvency context, it has been observed by an Australian court that under the FCAL, directors of a foreign corporation will be held liable for director's duties under that foreign law. Further, under the common law, where that foreign law is not proved, then there is a rebuttable presumption that the law is the same as the law in Australia.<sup>12</sup> This appears to provide authority for a liquidator appointed to a foreign corporation in its place of incorporation to have the same powers of management of the foreign corporation in Australia as enjoyed by them in their own jurisdiction. Accordingly, the provision would empower the liquidator to replace officers of the foreign corporation and realise assets in Australia.

Section 601CL (14) of the Corporations Act requires an Australian court, on application by a liquidator of a registered foreign corporation in the place of incorporation of that foreign corporation, to appoint an Australian liquidator of that foreign corporation. Such a local appointment will have the advantage of being able to make use of the statutory powers conferred upon Australian liquidators under the Corporations Act<sup>13</sup> and also attracts a moratorium on proceeds against the corporate without leave of the Court<sup>14</sup>.

## 2. Assisting legislation

### ***The Cross-Border Act***

On 1 July 2008, Australia implemented the Model Law into its domestic legislation under the Cross-Border Act<sup>15</sup>. The Australian parliament chose to pass the enactment as a 'stand alone' instrument instead of incorporating the enactment into the existing insolvency statutes.

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<sup>11</sup> Section 7.

<sup>12</sup> *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)* [2008] WASC 239 at paragraph 5956.

<sup>13</sup> For example, the power to obtain the assistance of officers (section 530A of the Corporations Act), to obtain the books of the corporate (section 530B of the Corporations Act) and to examine certain persons (Part 5.9 of the Corporations Act).

<sup>14</sup> Section 597(2) of the Corporations Act.

<sup>15</sup> Section 4 of the Cross-Border Act provides that it does not extend to the Australian external territories of Christmas Island or Cocos (Keeling) Islands (Section 4 of the Cross-Border Act).

Australia has not departed greatly from the text of the Model Law which is scheduled to the Cross-Border Act itself. The Australian modifications to the Model Law are set out at Part 2 of the Cross-Border Act. The Model Law does not exclude the potential application of assistance under other laws<sup>16</sup>.

### **Scope and exclusions**

The Cross-Border Act applies the Model Law to both corporate debtors under the Corporations Act and personal debtors under the Bankruptcy Act. To the extent of any inconsistency, the Model Law is taken to prevail.<sup>17</sup>

The Model Law does not apply to private receiverships or external administration regimes which may not be insolvency related, such as a members' voluntary winding up or a court-ordered winding up as a result of investigations by ASIC, Australia's corporate regulator. The better view is that a winding up based upon a "just and equitable" jurisdiction is covered by the Model Law<sup>18</sup>.

Banks<sup>19</sup>, general insurers<sup>20</sup> and life companies are excluded from the operation of the Cross-Border Act<sup>21</sup> as special insolvency arrangements already exist for those entities under Australian domestic law.

### **Authorised courts**

The Australian courts that have jurisdiction under the Cross-Border Act are<sup>22</sup>:

- The Federal Court of Australia (where the debtor is an individual); and
- The Federal Court of Australia and the Supreme Court of a state or territory (where the debtor is a corporate entity).

This distinction is generally consistent with the Australian allocation of individual insolvencies under the Bankruptcy Act to the Federal Court<sup>23</sup> and non individual insolvencies to the Federal Court and state Supreme Courts.

### **Public policy exception**

Article 6 of the Model Law allows a competent court to refuse to take action if that action were to be manifestly contrary to the public policy of Australia.<sup>24</sup>

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<sup>16</sup> Article 7.

<sup>17</sup> Sections 21 and 22 of the Cross-Border Act.

<sup>18</sup> See the discussion in paragraphs 34 to 52 of *Re Chow Cho Poon (Private) Limited* [2011] 249 FLR 315; [2011] NSWSC 300.

<sup>19</sup> And other "authorised deposit taking institutions" under the Banking Act 1959 (Cth).

<sup>20</sup> See section 116 of the Insurance Act 1973 (Cth).

<sup>21</sup> Section 9 of the Cross-Border Act and the Cross Border Insolvency Regulations 2008 (Cth).

<sup>22</sup> Section 10 of the Cross-Border Act and Article 4 of the Model Law.

<sup>23</sup> Although the Federal Magistrates Court also has jurisdiction in individual bankruptcy matters and generally deals with most bankruptcy matters.

<sup>24</sup> See *Stern v National Australia Bank* (1999) FCA 1421 at paragraph 138.

There are two sub categories of this defence which have some relevance in Australia<sup>25</sup>:

- An income tax debt owing to a foreign government will generally be regarded by an Australian court as being unenforceable in Australia<sup>26</sup>. However, this does not stop the remission of funds from an ancillary Australian liquidator or trustee to the principal liquidator or trustee<sup>27</sup>; and
- Judgments for penalties. An award of a punitive damages award in civil proceedings will generally be regarded as penal in nature. If the order is distinct, it can be severed so that the foreign judgment will otherwise lead to a judgment in an Australian court for the remainder of the foreign judgment<sup>28</sup>.

### ***Access of foreign representative***

A “foreign representative” may apply directly to an Australian court for assistance<sup>29</sup>. In making an application, the foreign representative does not subject themselves to the jurisdiction of the Australian court for any purposes other than the application<sup>30</sup>.

“Foreign representative” means a person or body<sup>31</sup> who has been appointed in a foreign proceeding to administer a reorganisation or liquidation of a debtor’s assets or affairs, including on an interim basis<sup>32</sup>.

“Foreign proceeding” includes any collective judicial or administrative procedure pursuant to a law relating to insolvency where the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation.

### ***Means of application and disclosure***

At the time of making an application for assistance, the foreign representative is required to disclose a statement identifying all foreign proceedings in relation to the debtor known to the foreign representative<sup>33</sup> and any proceedings under the Bankruptcy Act, any appointment of a receiver and any proceedings under Chapter 5 or section 601CL of the Corporations Act<sup>34</sup>.

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<sup>25</sup> Also see generally Chapter 18 of Nygh “Conflict of laws in Australia” 8th Ed (2010).

<sup>26</sup> *Government of India v Taylor* [1955] AC 491; *Re Denton Sub-divisions Pty Ltd (in liq)* (1968) 89 WN (Pt 1) (NSW) 231 and *Oygepould International BV* (1994) 14 ACSR 245.

<sup>27</sup> *Ayers v Evans* (1981) 51 FLR 395.

<sup>28</sup> *Peter Schnabel and others v Kevin Yung Lui and others* [2002] NSWSC 15 at 180.

<sup>29</sup> Article 9 of the Model Law.

<sup>30</sup> Article 10 of the Model Law.

<sup>31</sup> See for example *Backman v Landsbanki Islands* [2011] FCA 1430.

<sup>32</sup> Article 2 of the Model Law.

<sup>33</sup> Article 15 of the Model Law.

<sup>34</sup> Section 13 of the Cross-Border Act.

The application must be made in a prescribed form naming the foreign representative as the applicant and the debtor as the respondent<sup>35</sup> and be accompanied by certain evidence certifying the appointment of the foreign representative and the continuance of the relevant foreign proceedings<sup>36</sup>.

### **Notification to creditors**

The foreign representative must notify creditors of the application. Generally, the notification must be to creditors individually<sup>37</sup>. However, the court may order other notification “if more appropriate”<sup>38</sup>. The notification to foreign creditors needs to indicate a reasonable time for filing claims, a place for filing and whether secured creditors need to file and comply with the relevant rules of the Court<sup>39</sup>.

Following the making of an application for assistance, the foreign representative is required to advise the court promptly of any substantial change to the status of the debtor, any further foreign proceedings concerning the debtor,<sup>40</sup> any further proceedings under the Bankruptcy Act, any appointment of a receiver and any proceedings under Chapter 5 or section 601CL of the Corporations Act<sup>41</sup>.

### **Hearing the application for recognition**

The Australian court is to decide the application at the earliest possible time<sup>42</sup>. Until such time as a decision is made, the Australian court may make interim orders such as staying execution, making a provisional appointment, or giving any other relief on a provisional basis<sup>43</sup>.

### **Centre of main interest and main proceedings**

The Australian court is obliged to recognise the foreign proceeding and the foreign representative providing that they fall with the definitions under the Model Law and the application complies with the requirements of the Model Law<sup>44</sup>.

At that time, the foreign proceeding is to be recognised as either a foreign main proceeding or a foreign non main proceeding<sup>45</sup>. A “foreign main proceeding” is defined to be a “foreign proceeding taking place where the debtor has its centre of main interest”<sup>46</sup>.

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<sup>35</sup> See Division 15A of the Corporations Rules for the relevant court and Part 14 of the Federal Court (Bankruptcy) Rules 2005.

<sup>36</sup> Article 15 of the Model Law and the rules of court referred to in the above footnote.

<sup>37</sup> Paragraph 1 of Article 14.

<sup>38</sup> Paragraph 2 of Article 14.

<sup>39</sup> Paragraph 3 of Article 14.

<sup>40</sup> Article 18 of the Model Law.

<sup>41</sup> Section 14 of the Cross Border Act.

<sup>42</sup> Paragraph 3 of Article 17.

<sup>43</sup> Article 19 See *Lawrence v Northern Crest Investments Limited* (In Liq) [2011] FCA 672.

<sup>44</sup> Article 17.

<sup>45</sup> Paragraph 2 of Article 17.

<sup>46</sup> Paragraph (b) of Article 2 of the Model Law.

The Cross-Border Act and the Model Law contains no definition for the concept of “centre of main interest” (COMI). However, the Model Law contains a presumption that the COMI is at the registered office of a corporate or habitual place of residence of an individual<sup>47</sup>.

The explanatory memorandum for the Cross-Border Act states<sup>48</sup>:

*The Bill does not seek to define COMI as a considerable body of common law exists in overseas jurisdictions in relation to that concept. It is expected that Australian courts will be guided by that body of law in considering the definition of COMI in the context of this Bill. Such an approach will ensure that Australian law is in harmony with that in other jurisdictions.*

If the Australian court recognises the foreign proceeding as a “foreign main proceeding” then:

- Proceedings and the enforcement of judgments in Australia against the debtor are generally stayed and the debtor’s right to transfer, encumber or otherwise dispose of assets is suspended<sup>49</sup>;
- The Australian court may grant other relief including the examination of witnesses, the taking of evidence or the delivery of information and appointing a local representative for the purposes of administering the estate or realising assets within Australia<sup>50</sup>;
- The Australian court may defer granting additional powers until a later date in order to determine whether those additional powers will be needed<sup>51</sup>; and
- Proceedings in relation to the debtor in Australia may only be commenced if the debtor has assets in Australia and to the extent necessary to implement cooperation and coordination<sup>52</sup>.
- Upon recognition of a foreign proceeding, the foreign representative may intervene in any proceedings in relation to the debtor in Australia, providing that the requirements of the relevant court are first met<sup>53</sup>.
- Upon recognition of a foreign proceeding, the foreign representative has standing to initiate proceedings for unfair preferences or other transactions that are able to be challenged by a liquidator or trustee in bankruptcy under Division 2 of Part 5.7B of the Corporations Act or sections 120 and following of the

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<sup>47</sup> Paragraph 3 of Article 16.

<sup>48</sup> Paragraph 1.7 of the Explanatory Memorandum to the Cross-Border Insolvency Bill 2008.

<sup>49</sup> Article 20 of the Model Law.

<sup>50</sup> Article 21 of the Model Law.

<sup>51</sup> In *Backman v Landsbanki Islands* [2011] FCA 1430 the Federal Court deferred granting the foreign representative body all of the powers of a liquidator on the basis that that such a grant of power may have been too wide at the time but stood over the proceedings for three months.

<sup>52</sup> Article 28 of the Model Law.

<sup>53</sup> Article 24 of the Model Law.

Bankruptcy Act, as the case may be<sup>54</sup>. These provisions apply in respect of a debtor who is the subject of foreign proceeding in the same way that the provisions would apply in relation to an individual being bankrupted or company being wound up, as the case may be<sup>55</sup>.

- Recognition of a foreign main proceeding gives rise to a presumption of insolvency for the purposes of the commencement of a proceeding under the Bankruptcy Act of the Corporations Act<sup>56</sup>.

If the Australian court recognises the foreign proceedings as a “foreign non-main proceedings”, the court must be satisfied that it is appropriate for the foreign representative to administer the assets in Australia (rather than a representative appointed in the relevant foreign main proceeding)<sup>57</sup>.

### **Court to court co-operation**

Australian courts are required to “*co-operate to the maximum extent possible with foreign courts*”<sup>58</sup> in cross-border insolvency matters. Australian courts are entitled to communicate directly with foreign courts and foreign representatives<sup>59</sup>.

If there are multiple proceedings in place in different jurisdictions, the Australian court is to seek co-operation and co-ordination in all orders<sup>60</sup>. In particular, the Australian court must ensure that any relief granted to a foreign representative in a non main proceeding is consistent with the foreign main proceeding<sup>61</sup>.

In exercising this jurisdiction, Australian courts will not seek to prejudge a matter that is to be determined by a foreign court and generally only in accordance with established protocols<sup>62</sup>. The obligation to co-operate does not mean that Australian courts must defer to other Courts:

- In *Bank of Western Australia v Henderson* (No.3)<sup>63</sup> the Federal Magistrate’s Court considered that the Cross-Border Act and the Model Law did not prevent the Federal Magistrates Court from making an order bankrupting a debtor who had already been made a bankrupt in New Zealand<sup>64</sup>.

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<sup>54</sup> Article 23 of the Model Law and section 17 of the Cross-Border Act.

<sup>55</sup> Section 17(2) of the Cross-Border Act.

<sup>56</sup> Article 31 of the Model Law.

<sup>57</sup> Paragraph 2 of Article 23.

<sup>58</sup> Paragraph 1 of Article 26(1) Model Law.

<sup>59</sup> Paragraph 2 of Article 25 of the Model Law.

<sup>60</sup> Article 29 of the Model Law.

<sup>61</sup> Article 30 of the Model Law.

<sup>62</sup> Parbery; *In the matter of Lehman Brothers Australia Limited* (in liq) [2011] FCA 1449.

<sup>63</sup> [2011] FMCA 840.

<sup>64</sup> [2011] FMCA 840 at paragraph 45.

- According to the Australian judicial practice notes, case-specific protocols are to be developed by the parties for court approval with consideration given to the guidelines published by UNCITRAL and the American Law Institute.<sup>65</sup>

### **Creditors**

Foreign creditors generally have the same rights regarding proceedings in Australia relating to the insolvency of a debtor<sup>66</sup>. However, claims by foreign creditors concerning tax or social security obligations are excluded<sup>67</sup>.

A creditor who has been partly paid is not to receive further payment for so long as payments to creditors of the same class is proportionately less than the payment the creditor has already received<sup>68</sup>.

### **Requesting assistance in other countries**

Where an Australian trustee or external administrator wishes to pursue investigations to recover or prevent the dissipation of assets located overseas, the assistance of overseas courts may be obtained following a request under sections 29(4) of the Bankruptcy Act and 581(4) of the Corporations Act.

On application to an Australian court, a letter of request may be issued to a foreign court to “*act in aid of*” and “*be auxiliary to*” the Australian representative or proceedings.

Generally, the debtor should be given notice of the application for the letter of request unless there is evidence of a possible avoidance by the debtor.<sup>69</sup>

In considering such an application:

- The Australian court needs to be satisfied that the request is related to a “bankruptcy” (in the case of section 29(4)) or an “external administration matter”<sup>70</sup> (in the case of section 581(4)). Accordingly, there is a need to lead evidence of the financial position of the relevant person<sup>71</sup>. Nonetheless, the section enables a wide scope to be given to “external administration matters” and what is “related” to such a matter<sup>72</sup>;

<sup>65</sup> Federal Court of Australia Practice Note CORP 2 ‘Cross-Border Insolvency Co-operation with Foreign Courts or Foreign Representatives’; NSW Supreme Court Practice Note SC Eq 6.

<sup>66</sup> Article 13 of the Model Law.

<sup>67</sup> Section 12 of the Cross-Border Act.

<sup>68</sup> Article 32 of the Model Law.

<sup>69</sup> *Re Official Trustee in Bankruptcy, in the matter of Lyons* [2000] FCA 1428; *Re Pascoe; in the matter of Hudson* [2005] FCA 1421.

<sup>70</sup> Defined in section 580 of the Corporations Act to include winding up and any insolvency of a body corporate.

<sup>71</sup> *Re AFG Insurances Ltd* [2002] 20 ACLC 1588; *Re Independent Insurance Company Ltd* [2005] NSWSC 587.

<sup>72</sup> *Joye v Beach Petroleum NL & Cortaus Ltd (In Liquidation)* (1996) 67 FCR 275; (1996) 137 ALR 506; (1996) 20 ACSR 525; (1996) 14 ACLC 1174; *Federation Group Ltd (ACN 007 532 827) (in liquidation)* [2005] FCA 900.

- The Australian court will be mindful of the power of the foreign court to be able to give effect to the orders sought. This may involve a consideration by the Australian court of the law governing the foreign court<sup>73</sup>. Of course, this will differ from case to case depending upon the particular overseas court involved;
- There is a remaining discretion upon the Australian court in deciding whether to make the request. The discretion will depend upon “considerations of utility and comity”<sup>74</sup>.

### **3. Examples**

#### ***Backman v Landsbanki Islands hf***<sup>75</sup>

The Federal Court of Australia was satisfied that a member of a board of winding up appointed by the District Court of Iceland under emergency legislation to permit the reorganisation and winding up of banks and other financial undertakings was a “foreign representative” appointed under a “foreign proceeding”.

#### ***Pink v MF Global UK Limited (In Special Administration)***<sup>76</sup>

The Court was satisfied that special administrators of an English merchant bank appointed by the High Court of Justice of England and Wales under the *Investment Bank Special Administration Regulations 2011* and the *Insolvency Act 1986* (UK) were “foreign representatives”. In so finding, the Court gave consideration to the nature of that legislation. However, the Court declined to make an order declaring the applicants were “foreign representatives” but only on the basis that such an order lacked utility<sup>77</sup>.

#### ***Akers v Saad Investments***<sup>78</sup>

This case involved an application to the Federal Court of Australia by official liquidators appointed to a company incorporated in the Cayman Islands. The Court compared the US approach<sup>79</sup> against the approach adopted by the UK / European courts<sup>80</sup> with respect to the rebuttable presumption contained in paragraph 3 of Article 16 of the Model Law. The Federal Court favoured the UK / European approach and held that in the absence of proof to the contrary, a company’s COMI will be presumed to be its registered office.

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<sup>73</sup> See for example *Re John Cecil Clunies-Ross Ex Parte: Geoffrey Frank Totterdell* (Federal Court of Australia 26 August 1988) where the Court analysed the authority of the Supreme Court of the Cocos Islands to give effect to a proposed letter of request at paragraphs 25 to 36.

<sup>74</sup> *Re John Cecil Clunies-Ross Ex Parte: Geoffrey Frank Totterdell* (Federal Court of Australia 26 August 1988) at paragraph 37.

<sup>75</sup> [2011] FCA 1430.

<sup>76</sup> [2012] FCA 260.

<sup>77</sup> [2012] FCA 260 at paragraph 16.

<sup>78</sup> [2010] FCA 1221.

<sup>79</sup> The decision involved consideration of the judgment in *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Limited (in provisional liquidation)* 389 BR 325.

<sup>80</sup> Compared to *Re Eurofood IFSC Ltd* [2006] Ch 508 and *Re Stanford International Bank Ltd* [2010] 3 WLR 941.

***Backman v Landsbanki Islands***<sup>81</sup>

The Federal Court of Australia was satisfied by evidence that the debtor had its COMI in Iceland. The evidence included the place of incorporation and registered office being in Reykjavik<sup>82</sup>. The Court noted that it was important that courts in the United States and in Canada had accepted that the debtor's COMI was in Iceland<sup>83</sup>.

***Cussen v Bank of Nauru***<sup>84</sup>

The Federal Court of Australia considered the establishing legislation in being satisfied that a bank incorporated under legislation and conducting business principally from Nauru had its COMI in Nauru.

***Re Chow Cho Poon (Private) Limited***<sup>85</sup>

The Supreme Court of NSW made ex parte declarations under s 581(2) Corporations Act that recognised judicial orders made in Singapore and authorised the relevant Singaporean liquidator to deal with the company's assets that were located in Australia to the extent that the law of Singapore permitted. In that case, it was held that the Australian court was not being called to "co-operate with" the Singapore court or foreign liquidator under Article 25 of the Model Law. Rather, the request was that the Australian court "act in aid of" and "be auxiliary to" the Singapore court by taking steps to facilitate possession of the company's assets located in Australia. It was held that this was quite different to seeking co-operative or complementary action between two courts that were each exercising independent jurisdiction.<sup>86</sup>

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<sup>81</sup> [2011] FCA 1430.

<sup>82</sup> [2011] FCA 1430 at paragraph 2.

<sup>83</sup> [2011] FCA 1430 at paragraph 8.

<sup>84</sup> [2011] FCA 1009.

<sup>85</sup> [2011] 249 FLR 315; [2011] NSWSC 300.

<sup>86</sup> [2011] 249 FLR 315; [2011] NSWSC 300 at paragraph 59.

## Chapter 3

# AUSTRIA

### 1. General law

On July 1, 2010 the long-debated Austrian Insolvency Law Amendment Act (*Insolvenzrechtsänderungsgesetz*) entered into force with the intention of encouraging the reorganisation and reconstruction of distressed businesses over their liquidation under Austrian insolvency law.

The reform focuses on:

- reducing rejections of insolvency proceedings on the ground of insufficient assets (*Konkursabweisung mangels Masse*);
- enhancing procedural flexibility and cost efficiency;
- raising the threshold for avoidance of restructuring loans, and encouraging distressed businesses to commence insolvency proceedings earlier, thus increasing the probability of a successful reorganisation; and
- prohibiting the cancellation of material contracts and obligations by the counterparty under certain circumstances: it provides that for six months from the opening of insolvency proceedings, counterparties may terminate their contracts only for good cause if an early termination would jeopardise the continuation of the debtor's business. Neither the deterioration of the debtor's financial status nor the occurrence of a default prior to the opening of insolvency proceedings qualifies as a good cause.

The new Insolvency Act (*Insolvenzordnung*) replaced the Bankruptcy Act (*Konkursordnung*) and the Settlement Act (*Ausgleichsordnung*). However, in regard to cross-border insolvencies the amendment has not brought anything new. It just adopted the rules enacted with the International Insolvency Law Amendment Act (*Bundesgesetz über das Internationale Insolvenzrecht*) in 2003. Since Austria is a Member State of the European Union, the European Regulation on Insolvency Proceedings replaces national law in its area of application. Therefore, cross-border insolvency proceedings are recognised on two bases.

## 2. Assisting legislation

### **EU Regulation 1346/2000**

The aim of the European Regulation on Insolvency Proceedings is to simplify the formalities governing the reciprocal recognition and enforcement of decisions from courts and tribunals concerning insolvency proceedings within the European Union. The Regulation applies to collective insolvency proceedings which involve the partial or total divestment of a debtor and the appointment of a liquidator. An Annex to the Regulation lists the national proceedings covered by the Regulation. The Regulation applies only when the centre of the debtor's main interest is within a Member State of the EU. Therefore, it must be emphasised that different national laws will still play an important role.

The Regulation excludes proceedings relating to insurance undertakings, credit institutions, investment undertakings holding funds or securities for third parties and collective investment undertakings. The rationale for these exclusions is that such corporate entities are subject to special arrangements and their national supervisory authorities have wide ranging powers of intervention.

The Regulation provides for two basic types of insolvency proceedings: main proceedings of universal scope and local proceedings of territorial scope. The Regulation provides for the opening of main proceedings in the State in which the centre of a debtor's main interest is situated. In the case of companies there is a rebuttable presumption that this is the State where it has its registered office. The preamble to the Regulation states that the centre of its main interest should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. There can only be one main proceeding, which must be recognised in all other Member States.

The Regulation permits the opening of secondary proceedings in another Member State after the opening of main proceedings if the debtor has an establishment in that state. Establishment is defined as meaning any place of operation where the debtor carries out a non-transitory activity with human means and goods. Secondary proceedings may only take the form of winding up proceedings and are restricted to assets of the debtor in the territory of that State. Such proceedings are conducted according to the law where they are opened. Therefore, the law of this Member State decides which persons are entitled to request the opening of proceedings.

The underlying disassociation of the notion of universality from the ideal of unity of insolvency proceedings and the acceptance of certain local interest leads to a modified or mitigated universality.

If secondary proceedings are opened before the main proceedings are initiated, they are called territorial proceedings. Such proceedings are only allowed for, if the main proceedings cannot be opened because of the conditions laid down by the law of the Member State where the centre of the debtor's main interest is situated, or if the proceedings are requested by a creditor who has its domicile, habitual residence or registered office in the Member State where the establishment is situated. This rule shall avoid to some extent, the opening of parallel proceedings without the co-ordination umbrella which is ensured through main proceedings. Territorial proceedings can be liquidation or rescue proceedings. After the opening of main proceedings, territorial proceedings become secondary proceedings. The liquidator of the main proceedings can therefore change rescue to liquidation proceedings. Generally secondary proceedings cannot be finally closed without the consent of the liquidator in the main proceedings. Consequently, the liquidator can apply to stay the liquidation in secondary proceedings.

All decisions of a court in a Member State through which a main or secondary insolvency proceeding is opened and judgments handed down in connection with those proceedings are automatically recognised in all other Member States with no further formalities. Such a decision has the same effect in all Member States as it has according to the laws of the Member State in which the proceedings are opened. However, it must be noted, that in line with present national laws, the recognition of foreign proceedings is curtailed by different national public policy rules. Also decisions relating to the conduct and/or closure of insolvency proceedings must be recognised.

The powers of the liquidator of the main proceedings are determined according to the *lex fori concursus*. His powers must be recognised in all Member States and he may in particular remove any assets of the debtor from the territory of any Member State, subject to provisions regarding reservation of title clauses and certain rights *in rem*.

Where secondary or territorial proceedings are opened, the office-holder in the main proceedings is not allowed to remove assets. This also applies if secondary proceedings are opened after the liquidator has removed assets. In such a case, the local liquidator can recover assets from other Member States to which they have been moved. The purpose of this restriction is to guarantee national creditor interests.

The liquidator of the main proceedings and the liquidators of secondary proceedings are under a duty to co-ordinate the proceedings and to ensure through this co-operation a maximisation of the benefits for all creditors. This includes especially the lodging and admission of claims, rescue plans and the sale of essential assets. The European Regulation does not explicitly impose such a duty between the liquidators of secondary proceedings. However, the liquidator of the main proceedings is entitled to pass on information regarding all secondary proceedings at his own discretion.

According to the Regulation, the law applicable to the opening, conduct and closure of the proceedings is generally the law of the state in which the proceedings were opened (*lex fori concursus*). However, the Regulation deviates from this general rule in several instances (e.g. third parties' rights *in rem*; set-off and reservation of title).

### ***Insolvency Act***

In cases where cross-border insolvency proceedings are not governed by the European Regulation, the possibility of opening insolvency proceedings in Austria is determined by the rules of the Insolvency Act. Austrian Courts have international jurisdiction to open proceedings if according to the rules of the Jurisdiction Act (*Jurisdiktionsnorm*) the court has territorial competence to hear the case. In other words the court has the power to open proceedings, if the geographical location of the persons, things or occurrences involved falls within its jurisdiction.

As the European Regulation and the Austrian International Insolvency law differentiates between main and secondary proceedings, foreign insolvency proceedings are normally only recognised in Austria if the centre of the debtor's main interest is situated in the respective country. Vice versa, Austrian insolvency proceedings cover not only assets located in Austria, but assets of the debtor situated abroad. If the debtor's centre of main interest is not in Austria, foreign assets are normally not included in the Austrian proceedings, because insolvency proceedings at the debtor's place of main interest have priority, not only in regard to the assets in the respective state, but also for assets located in other states.

The Austrian insolvency law also deviates from the principle of universality if the country in which assets are located has opened insolvency proceedings. This rule applies regardless of the debtor's centre of main interest.

In cases where a foreign state does not open insolvency proceedings and does not recognise the Austrian proceedings, the Austrian insolvency laws tries to ensure that assets located abroad are included in the insolvency proceedings. Therefore, the debtor is obliged to participate and co-operate with the insolvency administrator in the disposal of his foreign assets. Austrian courts can force a reluctant debtor to co-operate.

A major difference between European and Austrian insolvency proceedings is that Austrian proceedings can be universal if the debtor's centre of main interest is not situated in Austria whereas proceedings according to the European Regulation can only be of universal character if the centre of main interest is in the respective country. Another main distinction can be seen in the rules on jurisdiction. According to the Austrian rules on jurisdiction, a court can hear a case if the debtor has assets in Austria. According to the European Regulation, proceedings can only be opened in countries where the debtor has its centre of main interest or an establishment.

If there are insolvency proceedings parallel to the Austrian proceedings, the Austrian insolvency court and the administrator are obliged to notify the foreign administrator about all circumstances which could be relevant for the foreign

proceedings. The foreign administrator also has the possibility to make suggestion in regard to the disposition of the debtor's assets located in Austria. Moreover, the foreign administrator has the ability to comment on a restructuring plan.

For the recognition of foreign insolvency proceedings, two fundamental conditions must be met. First, as already mentioned above, the debtor's centre of main interest must be situated in the State in which the proceedings were opened. In contrast to the European Regulation, Austrian courts have to verify that the debtor's centre of main interest lies within the respective state. In other words, the Austrian Courts have to "second-guess" the decision of the foreign court. Secondly, these proceedings must have basically the same features as an Austrian proceeding (In this respect it is fundamental that there is no discrimination of Austrian creditors). The second condition is necessary because the recognition of foreign proceedings means that Austrian creditors can be forced to participate in the proceedings abroad, which normally has the power to dispose of any assets situated in Austria.

Since the International Insolvency Law Amendment Act was introduced, the recognition of foreign insolvency proceedings does not require reciprocity. Consequently, insolvency proceedings of another state can even be recognised if Austrian proceedings would not be taken into account in the foreign State. Nonetheless, the recognition of foreign insolvency proceedings can be refused, if the recognition would be contrary to the fundamental principles of the Austrian legal system, if Austrian insolvency proceedings are already opened or provisional measures have been granted in Austria. The criterium that a violation of the Austrian *ordre public* must be evident is inspired by the corresponding rules of the European Regulation. While it is difficult to imagine that a violation of the *ordre public* is not evident, the intention is that this is an exceptional remedy.

Even if the above stated (positive and negative) requirements are met, a foreign administrator is not necessarily entitled to dispose of the assets located in Austria, because according to Austrian international insolvency law, an Austrian proceeding can also be initiated if a foreign insolvency proceeding has been opened. The opening of an Austrian proceeding simply requires the existence of assets in Austria and the opening of such proceedings prevents the inclusion of assets located in Austria in foreign proceedings. Any domestic or foreign debtor can file a petition for bankruptcy with the competent court. However, the filing of this petition does not prevent the inclusion of assets in foreign proceedings. Only if the court opens insolvency proceedings or if a court allows provisional measures in regard to the insolvency, assets located in Austria cannot be included in foreign proceedings.

Foreign proceedings are recognised automatically if the above mentioned conditions are met. A formal decision on recognition of the competent court is only necessary if the debtor argues that the above described criteria are not met. Upon recognition of the foreign insolvency proceedings, the foreign insolvency administrator is entitled to manage the assets of the debtor in Austria according to the laws of the state where the proceedings were opened. Naturally, the insolvency administrator is not allowed to take any steps which would contradict the

fundamental principles of Austrian law, even if he would be allowed to take such steps according to the foreign law. Generally, the foreign administrator has to take into account the Austrian laws, especially in regard to the necessary notifications of employees and also in the context of the realisation of assets. The administrator must prove his authority by presenting a notarised copy of the judgment by which he was appointed as administrator for the debtor. The Austrian court can request a German translation of this document.

The foreign insolvency administrator is entitled to request the publication of the opening of insolvency proceedings in the electronic edict database (*Ediktsdatei*). For such a publication to take place, the foreign administrator has to produce a public document which certifies that the debtor's centre of main interest is situated in the state where the insolvency proceedings were opened. In cases where the debtor has an establishment in Austria, the foreign insolvency administrator is obliged to publish the opening of insolvency proceedings.

According to the Austrian Insolvency Act, the law applicable to the opening, conduct and closure of the proceedings is generally the law of the state in which the proceedings were opened (*lex fori concursus*). The *lex fori concursus* governs:

- the debtor, who can be subject of an insolvency proceeding;
- the assets constituting the estate and how assets acquired by the debtor after the opening of the insolvency proceeding shall be dealt with;
- the respective authority of the debtor and the administrator;
- the prerequisites for a set-off in a bankruptcy proceeding;
- the effects of the opening of an insolvency proceeding on contracts of the debtor;
- the effects of the opening of an insolvency proceeding on the creditors' right to enforcement with the exception of pending law suits;
- which claims have to be filed as insolvency claims and how claims which arose after the opening of the insolvency proceeding are treated;
- the filing and ascertaining of claims;
- the distribution of the proceeds from a realisation of the debtor's assets;
- the ranking of claims and rights of the creditors, who obtained partial satisfaction after the opening of the insolvency proceedings due to a real property right or a set-off;
- the prerequisites and effects of a termination of the insolvency proceeding, especially a settlement; the creditors' rights after a termination of the insolvency proceeding; who has to bear the cost of the insolvency proceeding;
- and the legal transactions which are void, avoidable or ineffective, due to a discrimination of the creditors as a whole.

However, also Austrian law deviates from this general rule in several instances.

### 3. Insolvency practice

Past practice in cross-border insolvency cases shows that multinational co-operation would be the key to a successful restructuring or winding-up of a debtor. From experiences made in cross-border insolvencies it can be derived, that protocols are a very useful tool to co-ordinate the efforts of different administrators under the supervision of the courts. In essence protocols can be used to shape the proceedings according to the underlying case. However, this past experience is gained mainly from Anglo-American cases. In these cases protocols touch upon issues related to procedural co-ordination, court to court communication and also substantive issues.

Several Austrian academics make a strong case for the use of protocols in regard to the disposal of assets. However, there are no published cases where the co-operation between insolvency administrators was regulated with protocols.

### 4. Examples

Until now there are no cases published which concern the International Insolvency Law of Austria. Since the enactment of the European Regulation several cases have been decided by the Austrian Supreme Court.

***Supreme Court (Oberster Gerichtshof), decision of March 17, 2005, 8 Ob 135/04t, ZIK 2005, 103 – ecollex 2005, 901***

An Austrian bank filed a bankruptcy petition against the debtor. As a result, the Vienna Commercial Court opened insolvency proceedings. One day after the insolvency proceedings were opened, a written submission was received by the Court, in which the debtor informed the Court that main insolvency proceedings were already pending in England.

It was accepted that the Austrian Courts were obliged to recognise the prior opening of main proceedings in London. It was held that there is an obligation under the European Regulation to recognise the prior opening of insolvency proceedings regardless of whether the Austrian Courts thought that the English courts were correct on the issue of the debtor's centre of main interest. The Court made it also clear that the public policy exception can only be relied upon in exceptional cases. Therefore, it would have been only proper to open secondary proceedings in Austria. However, the Austrian Courts were not aware of the English proceedings and without a declaration to the contrary, the Austrian proceedings were also main proceedings. The European Regulation has no provisions which deal with the wrongful exercise of jurisdiction. The Court followed the main view, that the absence of jurisdiction cannot be objected, if there is a final bankruptcy order. Nevertheless, the court held that the Austrian court of first instance is able to cancel the insolvency proceedings if it learns of earlier main proceedings.

**Higher Regional Court of Innsbruck (Oberlandesgericht Innsbruck), decision of July 8, 2008, 1 R 176/08d, ZIK 2008/347**

The directors of a company sought to initiate main insolvency proceedings against their company before the Austrian courts. In this petition it was argued that the debtor's centre of main interest was in Austria. Therefore, the Austrian courts have jurisdiction to hear the case. The court of first instance opened main insolvency proceedings in Austria. Some creditors and the preliminary insolvency administrator appealed against this decision because the *Amtsgericht Freiburg* had already appointed a preliminary insolvency administrator. That administrator was empowered to request any measures to secure and preserve any of the debtor's assets situated in another Member State, provided for under the law of that State, for the period between the request for the opening of insolvency proceedings and the judgment opening the proceedings.

The Higher Regional Court of Innsbruck had to deal with the question of whether the German insolvency proceedings already constituted main proceedings because such a decision must be recognised in any other Member State.

After examining the reasons of Eurofoods (EuGH 2.5.2006, C-341/04) the court held that also the appointment of a "strong" preliminary insolvency administrator constitutes the opening of main proceedings. It is interesting that the Court did not take into account the case *Hans Brochier Ltd v Exner* [2006] EWHC 2594 (Ch), because Justice Warren held that the appointment of a preliminary insolvency administrator is not the opening of insolvency proceedings for the purposes of the European Regulation. However, the reasoning of the Austrian court seems perfectly sound whereas Justice Warren failed to explain why the appointment of a preliminary insolvency administrator who is named in Annex C of the European Regulation does not constitute the opening of insolvency proceedings.

Further the court had to decide if the recognition of the German decision would violate the *ordre public*, because the court appointed the preliminary insolvency administrator without hearing the debtor. The court reasoned that the Austrian *ordre public* was not violated, because the debtor could have been heard if he appealed against the appointment. Because Austrian law provides for such preliminary measures, the Austrian *ordre public* was not violated.

Therefore, the Higher Regional Court of Innsbruck declared the decision of the first instance as null and void, because the main proceedings which must be recognised, had been already initiated.

**Supreme Court (Oberster Gerichtshof), decision of April 22, 2010, 8 Ob 78/09t, ZIK 2010/294 – ecolex 2010/323 – EvBl 2010/125**

The Austrian Supreme Court had to decide if an action to reopen proceedings in which the insolvency administrator had partially verified a claim is governed by the European Regulation. The court reiterated the principles laid down by the European Court of Justice in *Seagon* (EuGH 12.2.2009, C-339/07). According to those principles, the European Regulation confers international jurisdiction on the member state within the territory of which insolvency proceedings were opened

to hear and determine actions in the insolvency proceedings and are closely connected with such proceedings. After this recital, the Supreme Court held that it is obvious that such an action falls within the ambit of the European Regulation.

***Higher Regional Court of Vienna (Oberlandesgericht Wien), decision of Mai 6, 2011, 28 R 70/11m, ZIK 2011/273***

The Higher Regional Court of Vienna held that a decision which opens insolvency proceedings under the European Regulation has to state clearly if the proceedings are main or territorial proceedings. The court also had to consider what is necessary to form an establishment, defined as “any place of operations where the debtor carries out a non-transitory economic activity with human resources and goods”. According to the court an establishment is proven if the debtor has an office with a worker in a country. Furthermore, it was held that an application to open insolvency proceedings under the European Regulation tacitly implies a petition to open territorial proceedings, if the debtor’s centre of main interest is in another state.



## Chapter 4

# BELGIUM

### 1. General law

The continuing internalisation of European businesses whereby companies are forced to expand in a struggle to compete has accelerated the number of cross-border activities, but has also increased the numbers of conflicts with multi-jurisdictional elements with the result that it is often uncertain to know what will be the applicable law, the competent court and therefore the final outcome for the creditor.

To this end, the EU has adopted regulations determining the law applicable to contractual obligations (Rome I)<sup>1</sup> and the possibilities of recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation)<sup>2</sup>. Until the introduction of EC Council Regulation n° 1346/2000 of 29 May 2000 on Insolvency Proceedings (“EIR”), a common insolvency approach was missing due to the lack of political understanding between the EU Member States. This led to Member States applying their own conflict of law rules in cross-border cases based on territorial principals or the universal system as in Belgium.

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<sup>1</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

<sup>2</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

The Belgian courts only give effect through the recognition of foreign bankruptcy judgments that were intended to have extra-territorial effects.<sup>3</sup> Bankruptcy judgments handed down by courts in legal systems that adhere to the strict territoriality of the bankruptcy were not given effect in Belgium, despite Belgium's strong preference for the universality and unity principle. The Court of Cassation explicitly laid down this rule in 1991 when the Supreme Court ruled that even though the principles of universality and unity formed part of Belgian international public policy, the foreign court needed to have the intention to render a bankruptcy judgment that would have had extraterritorial effects<sup>4</sup>.

Prior to the EIR, different national insolvency proceedings did not allow for collective or co-ordinated efforts: plurality of insolvency proceedings resulted in individual countries breaking up the debtor's estate and indirectly creating a "first come, first served system". This produced sub-optimal results, usually losing the opportunity to preserve and enhance value through collective efforts<sup>5</sup>. Going concern values were reduced where important parts of a business were located in different jurisdictions and subject to different proceedings: "*fragmented reorganizational processes, particularly those that are also jurisdictionally fragmented, are ultimately self-defeating*"<sup>6</sup>. The Belgian part of an international insolvency proceeding often suffered because of the limited value of the Belgian assets compared with the costs and uncertainties involved with a full Belgian insolvency proceeding and the importance of the foreign creditors.

This has been addressed in the EU by the EIR, the main provision of which is that the court of the EU Member State within the territory of which the debtor's centre of a main interest ("COMI") is situated has jurisdiction to open insolvency proceedings. Proceedings relating to entities registered in other EU Member States can only be joined if it is established that the COMI of that second company is also situated in the first Member State<sup>7</sup>. A US-based company may also be considered to have its COMI in the EU<sup>8</sup>.

Furthermore, the courts of another EU Member State shall have jurisdiction to open secondary insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other EU Member State and the effects of those proceedings shall be restricted to the assets of the debtor situated in the

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<sup>3</sup> Belgian Court of Cassation September 26, 1991; Court of Appeal Liege February 7, 1959, *Pas. II-77* and Commercial Court of Brussels June 18, 1965, *TBH* 1966, 161.

<sup>4</sup> P Torremans *Ibid.*, 58.

<sup>5</sup> T. Kraft & A Aronson, "Transnational bankruptcies: section 304 and beyond", *Col. Bus. Law Rev.* 1993.

<sup>6</sup> E B Leonard & C W Besant, "New Frontiers in Canadian Cross-Border Reorganizations", *Current Issues in Cross-Border Insolvency and Reorganizations*, (International Bar Association Series), 1994, 103-105.

<sup>7</sup> ECJ Case C-191/10 of December 15, 2011: *Rastelli Davide e C. Snc v Jean-Charles Hidoux*, paragraph 29.

<sup>8</sup> High Court of Justice Chancery Division Court (England; The Honourable Mr. Justice Lloyd), February 7, 2003 – 0042/2003; ZIP 2003, 813.

territory of the latter Member State<sup>9</sup>. By implementing this legislation by means of a regulation, instead of a directive, Member States have no option but to amend their national insolvency laws accordingly, thus improving the compatibility between insolvency proceedings including an improved interaction between national courts of EU Member States.

## **2. Assisting legislation**

While the EIR has assisted EU insolvency practitioners, it is limited to insolvency proceedings where the debtor's COMI is in the EU (which for these purposes excludes Denmark) or where the COMI has been rebutted to an EU Member State. Therefore, Belgian law practitioners rely on the Belgian Code on Rules of Conflict dated July 16, 2004 when facing insolvency proceedings involving third countries. Article 118 § 1 of the Rules of Conflict contains similar provisions to the EIR: if the main establishment of a non-EU company is situated in Belgium<sup>10</sup>, the Belgian courts retain their jurisdiction<sup>11</sup>.

Furthermore, if the COMI of a company is outside the EU, this company's foreign insolvency proceeding can be recognised in Belgium according to Article 121 of the Rules of Conflict. A non-EU insolvency judgment would be recognised and declared enforceable in Belgium by a Belgian Commercial Court, as a main proceeding or a territorial proceeding, insofar as the foreign judgment does not infringe Belgian rules of public order (which does not mean that all details need necessarily be identical<sup>12</sup>). In addition, the rights *in rem* of the parties in Belgium, their rights on compensation, retention of title and immovable property and existing employment contacts must be recognised<sup>13</sup>.

Belgian courts adhere closely to the rule that a foreign judgment (falling outside the scope of the EIR) will only be given the effect that the foreign court intended it to have when rendering the judgment<sup>14</sup>. This view has been confirmed in a judgment of the Court of Cassation whereby the court ruled that a Danish bankruptcy judgment with respect to a Danish company only contained a territorial effect, resulting in an obligation of the Belgian courts not to grant the Danish bankruptcy judgment any additional extra-territorial consequences<sup>15</sup>.

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<sup>9</sup> Article 3.1 and 3.2 of the EIR.

<sup>10</sup> Brussels Court of Appeal, April 8, 2004, Rev. Prat. Soc. 2004, 175: The Brussels Court of Appeal declared itself incompetent on a bankruptcy request with respect to a company having its registered office in Lumumbashi (Congo) because the majority of the company's employees and its commercial activities were located in Congo. As a result, the main establishment was located in Congo.

<sup>11</sup> E Dirix en V. Sagaert "Cross-Border Insolvency in Belgian Private International Law" Int Insol Rev. 2006, 63.

<sup>12</sup> Ghent Court of Appeal October 29, 1962, RW 1962, 1825.

<sup>13</sup> T. Liangyuan and N. Wouters, "A passage to China: A Cross-border Insolvency Between Belgium and the People's Republic of China" *INSOL World*, 2<sup>nd</sup> quarter 2008, 36.

<sup>14</sup> P Torremans *Cross Border Insolvencies in EU, English and Belgian Law*, The Hague, Kluwer, 2002, 58.

<sup>15</sup> Court of Cassation September 16, 1991, RW 1991-1992, 917.

The obligation of collaboration is foreseen in Article 120 of the Belgian Code on Rules of Conflict which stipulates that the Belgian administrator in bankruptcy must collaborate with and inform any administrator of foreign insolvency proceedings regarding the same debtor providing this does not excessively increase the cost of this procedure. However, contrary to the EIR, the Rules of Conflict include conditions of reciprocity: the obligation to collaborate need only be complied with by the Belgian administrator if the applicable law of the foreign proceedings includes a similar collaboration system<sup>16</sup>.

The competence of the trustee in bankruptcy of the main insolvency proceeding is limited by the national legislation of the country where he seeks to execute his decisions<sup>17</sup>. Therefore, a trustee of a foreign main insolvency proceeding who wants to attach and sell assets located in Belgium has to seek permission from the Belgian Court of First Instance. The District Court of Liège ruled that the competence of the Court of First Instance is bound with its competence to recognise and execute foreign insolvency judgments in Belgium<sup>18</sup>.

### 3. Insolvency practice

#### *Scope of the EIR*

According to Article 1, the EIR applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator. A list of collective procedures for each country is in Annex A.

In case of Belgium, the following are considered to be collective insolvency procedures:

- bankruptcy as organised by the Bankruptcy Law of August 7, 1998;
- judicial reorganisation (a) through the transfer under judicial supervision and (b) through a collective agreement under the Law on the Continuity of Undertakings of January 30, 2009 (the “Belgian Chapter 11 Proceeding”);
- collective debt settlements under the Law of July 5, 1998 on the Collective Debt Settlements;
- voluntary/judicial liquidations under Articles 183 to 195 of the Companies’ Code; and
- temporary withhold of management under Article 8 of the Bankruptcy Law of August 7, 1998.

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<sup>16</sup> E Dirix & V Sagaert “Cross-Border Insolvency in Belgian Private International Law”, *Int. Insol. Rev.* 2006.

<sup>17</sup> N Watte, “Droit international privé (conflit de lois)”, II, *RCJB* 2005, 324.

<sup>18</sup> District Court of Liege May 12, 2005, *JLMB* 2005, 1688-1690.

It is surprising that the Belgian Chapter 11 Proceeding is included as there is no divestment of the debtor. Furthermore, from a practical standpoint, control of these proceedings by local judges would not be feasible and would lead to legal uncertainty which is counterproductive<sup>19</sup>.

Insolvency proceedings of investment undertakings which provide services involving the holding of funds or securities for third parties, or of collective investment undertakings do not fall under the scope of the EIR. This has been confirmed by the High Court of England and Wales in the Phoenix Kapitaldienst case<sup>20</sup>. Insolvency proceedings concerning insurance undertakings<sup>21</sup> and credit institutions<sup>22</sup> are subject to specific directives. Article 19 of the UCITS IV Directive<sup>23</sup> states that a management company of a collective investment undertaking which manages collective cross-border portfolios by establishing branches or in accordance with the freedom to provide services shall comply with the liquidation rules of the UCITS home Member State which relate to the constitution and functioning of the UCITS.

### **Centre of Main Interest (COMI)**

In order to determine the applicable law and court which is competent to regulate the (main) insolvency procedure, one must verify the debtor's COMI. According to Recital 13 of the EIR, the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. In case of corporations and legal persons, the EIR contains the assumption that a debtor's COMI coincides with the registered office, but this does not always have to be the case<sup>24</sup>.

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<sup>19</sup> R Dammann, "Mobility of companies and localisation of assets – arguments in favour of a dynamic and teleological interpretation of EC Regulation NO 1346/2000 on insolvency proceedings" in G. AFFAKI (ed.), *Cross-border insolvency and conflict of jurisdictions (a US-EU experience)*, Brussels, Bruylant, 2007, 120.

<sup>20</sup> High Court of Justice Chancery Division dated January 23, 2012 in the matter of Phoenix Kapitaldienst GmbH and in the matter of the Insolvency Act 1986. EWHC 62 CH/2010/0684 Between Frank Schmitt and Henning Deichmann and 14 Others, nr. 4: "It is common ground that the Council Regulation (EC) No 1346/2000 on Insolvency Proceedings does not apply because the company was an investment undertaking. Again, it is common ground that the UNCITRAL Model Law (the Legislative Guide on Insolvency Law (2005) as reflected in the Cross-Border Insolvency Regulations 2006 SI 2006/1030 could not be invoked because of the date when it was incorporated into English law. As a result the administrator's only recourse in this court is to common law principles".

<sup>21</sup> Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings.

<sup>22</sup> Directive 2001/24/EC of the European Parliament and of the Council of 4 April 2001 on the reorganisation and winding up of credit institutions.

<sup>23</sup> Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the co-ordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS).

<sup>24</sup> A. J. BELOHLÁVEK, (2008), "Centre of main interest (COMI) and jurisdiction of national courts in insolvency matters (insolvency status)", *International Journal of Law and Management*, Vol. 50 Iss: 2, 2008, 60.

The European legislator intended a strict interpretation of COMI, only allowing exceptions if it was clear that the registered office was no more than a fictitious place<sup>25</sup>. This strict interpretation was initially followed by Belgian courts such as the Commercial Court of Dendermonde which had to decide whether a company which was registered in Greece, but without any business activities there while being established in Belgium, would fall under the competence of the Greek or the Belgian courts. In this case, the court firmly stated that the COMI of a company must be determined by the location of his registered office, which was Greece. This assumption could only be rebutted on proof that the registered office in Greece is only of a fictitious nature, which was not the case<sup>26</sup>. Other Belgian cases replaced the COMI of a company registered in another Member State to Belgium. The Brussels Commercial Court decided twice that the registered office of a non-Belgian company could not be considered to be its COMI. On the first occasion, the two directors were Belgian nationals, all activities were organised in Belgium and all invoices had to be paid to a Belgian bank account or were addressed to a Belgian establishment<sup>27</sup>. On the second occasion, the company was not traceable at the registered address in another EU Member State<sup>28</sup>.

As a result, the starting point whereby the registered office is considered to be the debtor's COMI can be countered, bearing in mind the ECJ's opinion in the *Eurofood* case that the COMI "*must be identified by reference to criteria that are both objective and ascertainable by third parties*"<sup>29</sup>, whereby "*the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect*"<sup>30</sup>. The Court of Appeal of Liège followed the ECJ's *Eurofood* interpretation in a case whereby a company registered in Luxembourg but with an establishment in Belgium was initially declared bankrupt in Belgium. The Court of Appeal revised this judgment because the accounting documents were located in Luxembourg, the meetings of the Board of Directors and the Shareholders' Meetings were held at the registered office and banking documents were held at the Luxembourg registered address<sup>31</sup>. However recent case law of the Court of Appeal in Liège has shown us again that Belgian courts may confirm the presumption in favour of the registered office and its rebuttal would only be allowed in case there would be a totally fictitious location of the company<sup>32</sup>. In this case a company with a registered office in France was actually managed from its Brussels office. Furthermore, the French company did not employ any staff in

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<sup>25</sup> T. BOSLY, 'La faillite internationale. Une ère nouvelle s'est-elle ouverte avec le règlement du Conseil du 29 mai 2000', *JT* 2001, 691, nr. 32.

<sup>26</sup> Commercial Court of Dendermonde August 18, 2005, *RW* 2005-2006, 595-596.

<sup>27</sup> Commercial Court of Brussels October 2, 2003, *DAOR* 2003, 94.

<sup>28</sup> Commercial Court of Brussels December 8, 2003, *DAOR* 2003, 96.

<sup>29</sup> Case C-341/04 of May 2, 2006: *Eurofood IFSC Ltd*, paragraph 33.

<sup>30</sup> *Ibid.* paragraph 34.

<sup>31</sup> Court of Appeal of Liège January 25, 2007, *JLMB* 2007, 1231.

<sup>32</sup> Y. BRULARD, *Eurofenix*, Summer 2011, 43.

France, had its main banking creditor in Belgium and its formal acts were adopted in Belgium. Nevertheless, the Liege Court of Appeal ruled that the presumption of the registered office being the COMI is extremely strong and its rebuttal would only be possible in case of a total fiction<sup>33</sup>.

Article 16 of the EIR provides that a judgment opening insolvency proceedings handed down by a court of an EU Member State shall be recognised in all the other EU Member States from the moment that it becomes effective in the State opening the proceedings, and other national courts are not allowed to review whether the judgment of court opening proceedings is valid<sup>34</sup>. Belgian courts have confirmed that it is not a competence of a Belgian court to verify the decision of a court in another Member State regarding its competence to open an insolvency proceeding, even if the facts would indicate that Belgium would be the competent jurisdiction<sup>35</sup>. These decisions are in line with the ECJ *Eurofood* decision requiring the *de plano* recognition of main insolvency proceedings, based on the European principle of mutual trust in each other's legal systems<sup>36</sup>. Furthermore, such automatic recognition reduces forum shopping, strengthens the administrator's rights, and increases legal certainty.

This approach has been approved by the ECJ in a case whereby a German company transferred €50,000 to a Belgian company the day before applying for opening insolvency proceedings in Germany. The German administrator brought an action to set the transaction aside, but both the Belgian and German courts declined competence. The German Bundesgerichtshof asked the ECJ whether the court of a Member State which opened insolvency proceedings has jurisdiction under the EIR to determine an action to set aside a transaction against a company whose registered office is in another Member State. The ECJ declared that such actions were within the scope of the EIR and that the administrator of the German company could bring avoidance action before a German court<sup>37</sup>.

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<sup>33</sup> Court of Appeal of Liège (2011/RG/8).

<sup>34</sup> The Commercial Court of Tongeren decided on February 20, 2003 that, notwithstanding the decision by a Luxembourg court opening insolvency proceeding with respect to a Luxembourg based company had to be opened in Belgium because this apparently was the country where the centre of main interests was located.

<sup>35</sup> Civil Court of Brussels July 11, 2005, *RW* 2005-2006, 1028.

<sup>36</sup> Case C-341/04 of May 2, 2006: *Eurofood IFSC Ltd*, paragraph 39: "As is shown by the 22nd recital of the Regulation, the rule of priority laid down in Article 16(1) of the [Insolvency] Regulation, which provides that insolvency proceedings opened in one Member State are to be recognised in all the Member States from the time that they produce their effects in the State of the opening of proceedings, is based on the principle of mutual trust."

<sup>37</sup> Case C-339/07 of February 12, 2009: *Christopher Saegon v Deko Marty Belgium NV*, paragraph 21: "Taking into account that intention of the legislature and the effectiveness of the [Insolvency] regulation, Article 3(1) thereof must be interpreted as meaning that it also confers international jurisdiction on the Member State within the territory of which insolvency proceedings were opened in order to hear and determine actions which derive directly from those proceedings and which are closely connected to them."

Problems can arise determining the procedure to be followed in a group of companies. According to the ECJ in *Eurofood*, the subsidiaries should be considered independent entities<sup>38</sup>. This is highly relevant for Belgian companies, of which a significant proportion are subsidiaries of foreign multinationals. However, the notion “independent entity” is not formally defined, which led to opportunities for judicial discretion<sup>39</sup>.

Finally, the EIR does not provide a similar presumption to determine the COMI of a natural person. Therefore, if the court is not able to determine the COMI without doubt, the debtor bears the burden of proving that he is carrying on an independent professional activity or that he has his habitual residence in a foreign state at the time of the request for the opening of insolvency proceedings. Otherwise in cases where the court is not able to prove if the debtor is right or wrong, it would be possible for the debtor to force his creditors to take action against him wherever he claimed to have moved, even for a short period<sup>40</sup>. This was the case in a judgment of the County Court of Cologne (Germany) where the debtor was not able to prove that he had been carrying on an independent professional activity in Belgium or had his habitual residence in Belgium. As a result, despite the fact that he had officially moved to Belgium before his creditor filed for insolvency in Germany, the Court was not able to determine a residence for the debtor in Belgium and found itself competent to handle the insolvency proceeding<sup>41</sup>.

### **Secondary insolvency proceedings**

If the COMI is located in another EU Member State, secondary insolvency proceedings can be opened if the debtor has an establishment in Belgium<sup>42</sup>. Claims regarding the secondary insolvency proceeding can be filed at the debtor’s Belgian establishment<sup>43</sup>. According to Article 2(h) of the EIR, an establishment is any place of operation where the debtor carries out a non-transitory economic activity with human means and goods. The mere presence of the debtor’s assets in a Member State’s territory is not considered to be an establishment nor justification for opening secondary insolvency proceeding<sup>44</sup>. The ECJ confirmed this, stating that an establishment requires a structure comprising a minimum level of organisation and a degree of stability necessary for an economic activity whereas the presence of goods or bank accounts in isolation does not, in principle,

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<sup>38</sup> Case C-341/04 of May 2, 2006: Eurofood IFSC Ltd, paragraph 36: “By contrast, where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation.”

<sup>39</sup> As seen in the Rastelli case (ECJ Case C-191/10 of December 15, 2011).

<sup>40</sup> M. DAHL and J. THOMAS, “The centre of main interest of the debtor”, in *International Insolvency Law Review*, 3/2012, 436.

<sup>41</sup> AG Köln (County Court Cologne), January 19, 2012 – 74 IN 108/10, BeckRS 2012, 07 122.

<sup>42</sup> Commercial Court of Charleroi July 16, 2002, *TBH* 2004, 811.

<sup>43</sup> Commercial Court of Brussels November 25, 2002, *DAOR* 2002, 92 and Commercial Court of Brussels December 16, 2002, *DAOR* 2003, 90.

<sup>44</sup> J C VAN APeldoorn and A W DE MAN, *De Europese Insolventieverordening: grensoverschrijdend insolventierecht*, Deventer, Kluwer, 2006, 33.

satisfy that definition<sup>45</sup>. In addition, the Belgian Court of Cassation has further defined what should be understood under an establishment. According to the Court, the fact that the debtor acknowledged having no activities in Belgium is insufficient to determine that he has no Belgian establishment. One must also consider other facts such as his registration in the Belgian commercial register, the VAT and Social Security registration, the employment provided in Belgium for which one was also affiliated with a Belgian social payroll office, the depot rented in Belgium, the debts created in Belgium and the time spent in Belgium managing the administration of the company. This means that according to the Court of Cassation a broad definition must be given to an establishment whereby one must verify whether there are any operational activities in Belgium<sup>46</sup>.

The presence of an establishment does not give the automatic right to file for secondary insolvency proceedings. The Commercial Court of Ghent had to consider the possibility of the opening of a secondary insolvency proceeding with respect to the Belgian establishment of a Dutch company which was already in insolvency proceeding in the Netherlands and the Court decided that all assets of the Belgian establishment had been transferred more than one year before to the Netherlands with the knowledge of the Belgian creditor. As a result, the secondary proceeding would have been useless and inconsistent with the *ratio legis* of the EIR which gives the possibility but not the obligation to open secondary insolvency proceedings in case of an establishment. This meant that the Belgian (privileged) creditor who had filed for the opening of a secondary proceeding in Belgium had to claim in the Dutch insolvency proceeding which was managing all assets of the company in bankruptcy<sup>47</sup>.

The competence of the trustee in a main proceeding is limited by the competence of the trustee in the secondary insolvency proceeding, whereby collaboration between both is required. The Court stated that the secondary insolvency proceeding has a degree of independence from the main one, even if the *ratio legis* of the EIR intended the secondary proceeding to be subordinate to the main proceeding. As a result, the trustee of the Belgian secondary proceeding was competent to proceed against parties (including incorporated entities) which have contributed to the bankruptcy of the Belgian establishment of a French company. In addition, the Belgian trustee in bankruptcy was competent to reject some transactions. As long as the trustee in bankruptcy limits his competence to the assets located in Belgium, he has a discretionary power to decide and he is obliged to contact the trustee in bankruptcy of the French main insolvency proceeding<sup>48</sup>.

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<sup>45</sup> ECJ Case C-396/09 of October 20, 2011: *Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA.*, paragraph 64.

<sup>46</sup> Belgian Court of Cassation June 27, 2008, *JLMB* 2008, 1222.

<sup>47</sup> Commercial Court of Ghent February 21, 2006, *Tijdschrift@jpr.be* 2006, vol. 1, 47-52.

<sup>48</sup> Commercial Court of Charleroi September 14, 2004, *Rév. Rég. Dr.* 2005, 359 (see P. WAUTELET, "Développements récents du règlement 1346/ 2000 en Belgique et aux Pays-Bas", *DAOR* 2005, 318-319, nr. 36).

### ***Territorial insolvency proceedings***

These are restricted to a country other than the COMI prior to the opening of a main insolvency proceeding, at which point they become secondary proceedings. Under the EIR Article 3 para. 4, territorial insolvency proceedings are possible where both (a) main insolvency proceedings cannot be opened because of requirements of the law of the EU Member State of the debtor's COMI; and (b) the proceedings are requested by a creditor whose domicile, habitual residence or registered office is in the territory in which the establishment is situated, or whose claim arises from the operation of that establishment<sup>49</sup>. The Belgian Public Prosecution Service did not agree with the judgment of the Court of Appeal of Antwerp and went to the Belgian Court of Cassation, which posed a prejudicial question regarding the quality of the creditor<sup>50</sup>. The ECJ ruled that, bearing in mind that the conditions for opening territorial insolvency proceedings under EIR Article 3 paragraph 4 must be interpreted strictly, the Belgian Public Prosecution Service did not have the competence to file for a territorial insolvency proceeding as it could not be considered to be a creditor as mentioned under Article 3 paragraph 4<sup>51</sup>.

### ***Conclusions***

Although it is still limited to EU Member States (except Denmark), the EIR has made it possible to co-ordinate insolvency proceedings across-borders, which should lead to reduced costs, better realisation of a company's assets and preservation of employment. The uncertainty with respect to the COMI of the debtor which triggers the applicable law remains problematic. There are widely differing views as to the "badges" of COMI. The short time typically available prior to opening insolvency proceedings makes an objective assessment of the COMI difficult for the bankruptcy judge and the professionals involved. Besides the uncertainty regarding the debtor's COMI, no specific provisions are made for groups of companies.

In Belgium, Articles 118 - 121 of the Code on Rules of Conflict have qualified the principles of the EIR and restricted the universality principle by introducing the condition of reciprocity, which had been a general rule in Belgium for cross-border insolvencies (EU and non EU).

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<sup>49</sup> Commercial Court of Dendermonde August 18, 2005, *RW* 2005-2006, 595-596.

<sup>50</sup> Belgian Court of Cassation February 4, 2010.

<sup>51</sup> ECJ Case C-112/10, *Zaza Retail BV*, November 17, 2011, paragraph 36: "The term 'creditor' in Article 3(4)(b) of the Regulation, which is used to designate the persons empowered to request the opening of territorial insolvency proceedings, must be interpreted as not including an authority of a Member State whose task under the national law of that State is to act in the public interest, but which does not intervene as a creditor, or in the name or on behalf of those creditors".

## Chapter 5

# BERMUDA

### 1. General law

Bermuda is a British Overseas Territory of the United Kingdom and the courts and legal system are based on the English legal system. The rules of practice and procedure are therefore very similar to those of England.

In Bermuda, the winding-up of companies is governed by the Companies Act 1981 (which is based upon the English Companies Act 1948) and the Companies (Winding Up) Rules 1982.

There is no separate bankruptcy court in Bermuda and the winding up of companies is administered by the Commercial division of the Supreme Court, a first instance court of unlimited jurisdiction.

Foreign money judgments can be enforced under Bermuda law either under statute or common law, depending upon the country in which the original judgment was obtained. Under the Judgments Reciprocal Enforcement Act 1958 ('JRE') a foreign money judgment will be recognised and enforced by the Bermuda courts as if it had been originally obtained in Bermuda. The JRE generally follows the same procedure as the Foreign Judgments (Reciprocal Enforcement) Act 1933 of the United Kingdom.

The JRE applies to the following countries:-

The United Kingdom including England and Wales, Scotland, Northern Ireland, Bahamas, Barbados, Gibraltar, Grenada, Guyana, Hong Kong, Leeward Islands (the British Virgin Islands, Anguilla, Saint Kitts, Nevis, Barbuda, Antigua, Redonda), Montserrat, St Vincent, Jamaica, Nigeria, Dominica, St Lucia, the Federal Courts of the Commonwealth of Australia, as well as the State or Territory Courts of New South Wales, The Northern Territory, Queensland, Tasmania, Victoria, the Australian Capital Territory, Western Australia, South Australia, the Australian Antarctic Territory, the Heard & MacDonald Territory, the Coral Sea Islands Territory, the Territory of Ashmore and Cartier Islands.

A judgment that is not registrable under the JRE cannot be directly enforced. A fresh action must be commenced by writ of summons. Assuming that the defendant enters an appearance, summary judgment can be obtained on the basis of the foreign judgment, which will usually be treated as evidence of a debt. A foreign money judgment will be recognised and enforced by the Bermuda Court as a debt against the judgment debtor where the judgment:

- was final and conclusive in the foreign court;
- was obtained in a court with jurisdiction over the debtor;
- was not obtained by fraud;
- was not in respect of taxes, fines or penalties (i.e. for a definite sum); and
- did not contravene the public policy of Bermuda and the rules of natural justice were observed in the foreign proceedings.

## **2. Assisting legislation**

There are no specific provisions in Bermuda legislation that provide that a Bermuda court will recognise a foreign personal bankruptcy, save for the Bankruptcy Act 1989, section 144. That section provides that the Bermuda court shall assist the court having personal bankruptcy jurisdiction in any part of the United Kingdom.

There is no express provision under the companies legislation, which specifically provides for assistance to a foreign administrator appointed in respect of a foreign Company, however, this has been achieved through common law recognition principles (see below).

A foreign creditor may apply for the bankruptcy of an individual or for the winding-up of a company provided the creditor follows the procedures set out in the Bankruptcy Act 1989 and the Companies Act 1981 respectively. Note however, that the CA incorporates by reference certain of the provisions of the Bankruptcy Act as they relate to the proof of claims in a corporate insolvency.

### **3. Insolvency practice**

Bermuda courts view English case law which prevailed prior to the enactment of the Insolvency Act 1986, section 426 as highly persuasive authority. To the extent that the provisions of the Insolvency Act 1986 are the same or similar, the Bermuda courts will look to English case law in respect of decisions after 1986.

Bermuda courts will therefore tend to follow English common law in giving assistance to foreign administrators recognising both the existences of the foreign administrator and his title to moveable property situated in Bermuda.

In relation to the winding-up of a foreign company by a foreign court, the Bermuda court will generally grant recognition to the foreign appointee and grant assistance to that appointee in carrying out their duties applying the principles of international comity (*Founding Partners Global Fund Limited* [2009]). In addition, there have been a number of recent cases where the Bermuda court has granted recognition to provisional liquidators of Bermuda companies where those persons have been appointed by a foreign court (*In Re Dickson Group Holdings Ltd.* [2008], *First Natural Foods Limited* [2012]).

The general approach of the Bermuda courts since the decision of the Privy Council in *Cambridge Gas Transport Corp v. Official Committee of Unsecured Creditors (of Navigator Holdings plc)* [2006] 1 AC 508, has been to offer assistance to foreign appointees where such assistance would (a) not be contrary to the laws of Bermuda, (b) not be beyond the scope of the powers that would be available to a similarly appointed person in Bermuda, or (c) not prejudice creditors who may have sought to advance their claims in Bermuda (whether as a result of their being located in Bermuda or that they may have different (possibly more advantageous) rights under Bermuda law).

There is no provision within the Bermuda legislation that provides for the winding up of foreign companies in Bermuda unless such companies are registered under the Bermuda Companies Act 1981. However, there have been several (uncontested) cases in recent years in which the Bermuda courts have allowed the winding up of foreign companies with sufficient nexus to Bermuda (*Informission Group Inc.-v- Convertix Corporation* [2000] Bda LR 75, *Kingate Global Fund Ltd. and Kingate Euro Fund Limited* [2009]).

There is currently no provision under Bermuda law for making administration orders such as those available under the Insolvency Act 1986. The only options available for reorganising companies under the Bermuda law are schemes of arrangement (Companies Act 1981, section 99), provisional liquidation or a combination of both. In the latter cases, the court is asked to appoint a provisional liquidator with the consequential statutory stay in the appropriate case, usually to allow a rescue package to be considered for the general benefit of creditors. In such circumstances, the company will request that the powers of the provisional liquidator be limited to allow the company's management to direct the rescue under the supervision of the provisional liquidator and the court.

Historically the cases availing themselves of this remedy have been for groups that operate outside Bermuda (principally in the United States or in Asia) and the Bermuda court would allow the restructuring to take place through that foreign process provided that the court was satisfied that such foreign process treated all parties fairly. The Bermuda Court will then sanction a scheme of arrangement in Bermuda to reflect the foreign restructuring. More recently, the Court has not required that there be a parallel scheme of arrangement in Bermuda if there is a restructuring outside Bermuda and has granted recognition and provided for enforcement of the foreign restructuring plan in Bermuda upon application (see MPF Limited [2010]).

#### **4. Future reforms**

Several years ago a sub-committee of the Bermuda Law Reform Committee was appointed to consider a complete overhaul of the winding up regime in Bermuda. The sub-committee, comprising representatives of the Ministry of Finance, Registrar of Companies Office and legal and accounting professionals considered the implementation of legislation based on the English Insolvency Act 1986. Recommendations were made for limited changes in the current statutory framework but there has been no movement on these changes.

#### **5. Examples**

Noted in text above.

## Chapter 6

# BRAZIL

### 1. General law

Provided it is not contrary to Brazilian law, any foreign judgment may be recognised and enforced in Brazil, subject to any treaties and conventions to which Brazil is a party.

Once certain formal requirements are satisfied, a foreign judgment will be recognised by the Brazilian Superior Court of Justice and thereafter it may be enforced. The confirmation will generally occur if the foreign judgment:

- fulfils all formalities required for its enforceability under the laws of the country where the foreign judgment is granted;
- is issued by a competent court in the jurisdiction where the judgment took place (i) after proper service on the parties, which must be made in accordance with the law where the foreign judgment took place and not contrary to the applicable Brazilian law, or (ii) after sufficient evidence of the failure of the defendant to attend court has been given, as established pursuant to applicable law;
- is final and not subject to appeal;
- is authenticated by a Brazilian consular office in the country where the foreign judgment is issued (unless such authentication is exempted by international treaties executed between Brazil and the country in which such competent court is located) and is accompanied by a translation into Portuguese by a Brazilian registered sworn translator; and

- is not contrary to Brazilian national sovereignty, public policy, good morals or public morality (as set forth in Brazilian law), and does not contain any provision which for any reason would not be upheld by the courts of Brazil.

The Brazilian Superior Court of Justice will not look into the merits of the foreign judgment, but retains discretion to grant enforcement.

In addition to the above, and pursuant to Article 835 of the Brazilian Code of Civil Procedures, a plaintiff (whether Brazilian or non Brazilian) who resides outside or leaves Brazil during the course of litigation in Brazil must provide a bond to guarantee court costs and legal fees if the plaintiff owns no real property in Brazil that may ensure such payment. This bond must have a value sufficient to satisfy the payment of court fees and defendant's attorneys' fees, as determined by the Brazilian judge. This requirement does not apply to enforcement of foreign judgments which have been duly confirmed by the Brazilian Superior Court of Justice, nor to the exceptions set forth in certain limited circumstances (which are not applicable here).

Brazil is a signatory to the following relevant International Conventions (among others) in relation to recognition of foreign judgments:

- Inter-American Convention on the Extraterritorial Effectiveness of Foreign Judgments and Arbitral Awards, Montevideo, Uruguay, May 8, 1979;
- Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, USA, June 10, 1958; and
- Inter-American Convention on International Commercial Arbitration, Panamá, January 30, 1975.

In general terms, Brazilian courts do not recognise or enforce foreign insolvency orders in Brazil and none of these international compacts apply to the recognition and enforcement of foreign bankruptcy orders. A bankruptcy order against a Brazilian company may only be obtained before a relevant Brazilian court.

## **2. Assisting legislation**

### ***Brazilian regulation on insolvency proceedings***

In the past decade, the United Nation's Commission on International Trade Law ("UNCITRAL") and the World Bank Group, among many other important international organisations, have contributed to help create comprehensive, modern insolvency guidelines in order to assist countries with weak insolvency systems to adopt the principles laid therein and therefore strengthen global financial stability.

In 2005, the Brazilian government enacted Law No. 11.101 (the "New Bankruptcy Law"), which was clearly influenced by the World Bank's Principles and Guidelines for Effective Insolvency and Creditor Rights Systems, published in 2001 by experts on insolvency process of over 75 countries. The law that preceded the New Bankruptcy Law had a very outdated insolvency regime, favouring debtors and granting no flexibility for restructuring processes. Although the main purpose of

the new system is to preserve the company and its business (which still indicates a tendency of favouring debtors), it reduced the involvement of the courts while establishing circumstances where creditors and shareholders are able to be more involved in the process.

One of the most important innovations of the New Bankruptcy Law was the creation of the judicial reorganisation proceeding, which is similar to the US Chapter 11. It seeks to help a company in financial distress to overcome that situation. In a judicial reorganisation proceeding, debtors are able to negotiate with creditors the repayment of debts under the protection of the law. The judicial reorganisation is binding on all credits (whether matured or maturing) existing on the filing date of the judicial reorganisation request, except tax liabilities or credits originating from agreements related to: (i) conditional sale of goods; (ii) leasing; and (iii) foreign exchange contracts for future liquidation (the so-called “ACC”). The parties are free to negotiate how judicial reorganisation is implemented, including, for instance, the reduction of liability and priority of repayment. Further to that, debtors may carry out corporate actions to facilitate recovery, provided that such actions have been included in the reorganisation plan approved by the creditors.

### **3. Insolvency practice**

The relevant Brazilian court having jurisdiction over the place where:

- (a) the main establishment of a Brazilian company is located; or
- (b) the branch of any foreign company carrying out business in Brazil is located, will be competent to declare the bankruptcy or the judicial reorganisation of that entity. Brazilian bankruptcy orders are deemed to have universal effect and all the property owned by the bankrupt, wherever situate, will vest in his trustee in bankruptcy.

The petition in bankruptcy may be filed by any creditor, the debtor’s successors, partners or shareholders, or even by the debtor itself, when it is in financial distress and believes that it is unable to meet the requirements for judicial reorganisation. Bankruptcy may not be petitioned for by the holders of credits that do not qualify as claims under bankruptcy proceedings.

Foreign creditors have the right to prove their claims in local bankruptcy proceedings, and are treated equally among local creditors. As explained above, creditors not domiciled in Brazil must post a bond to petition for a debtor’s bankruptcy.

### **4. Examples**

Even though it is common for foreign judgments to be recognised and enforced in Brazil, generally the Brazilian legal system does not allow for foreign judgments relating to insolvency to be enforced in the country.

## ***Challenged foreign judgment NR. 1,735 - PT (2007/0140920-4) (f)***

Judge: Minister Arnaldo Esteves Lima

Plaintiff: Antônio Moraes Sarmiento Patrício

Lawyers: Carlos Roberto de Siqueira Castro and Other(s)

Francisco Teixeira Júnior and Other(s)

Defendant: Raul Lopes Patkoczy Fonseca

Lawyer: Eli Ferreira das Neves and Other(s)

### **Summary**

Challenged Foreign Judgment. Bankruptcy. Portuguese Justice. Art. 1,030, Sole Paragraph, Civil Code. Art. 3rd. Law 11,101/05. Universal Principle. Bankruptcy Order. Jurisdiction of the Brazilian Judiciary of the location of the main establishment of the debtor. Foreign judgment that restricts the Brazilian jurisdiction. Offence to National Sovereign. Homologation denied.

1. Under terms of the sole paragraph of art. 1,030 of the Brazilian Civil Code of 2002, the plaintiff's interest in the present homologation is justified by him being partner of the defendant in a company located in Brazil. 2. According to the universal principle, the jurisdiction of the location of the main establishment of the debtor shall be entitled to issue a bankruptcy order (art. 3rd of Law 11,101/05). 3. The homologation of the foreign judgment, which prevents the opening of any enforcement proceeding against the bankrupt company and restricts the Brazilian jurisdiction, is not acceptable, under penalty of offence against the national sovereignty. 4. Homologation request denied.

The question before the Brazilian Superior Court of Justice was whether the Portuguese courts had jurisdiction to open an insolvency proceeding requested by a Portuguese partner of a company with its main establishment located in Brazil. It was acknowledged that this was not possible under Brazilian legislation since the request for insolvency proceedings against companies established in Brazil is in the exclusive jurisdiction of the Brazilian courts.

## **5. Future reforms**

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

The UNCITRAL Legislative Guide on Insolvency Law (2004) ("Model Law") had not been adopted by Brazil. However, in 2011, a study was sent from the Public Prosecutor's Office of the State of São Paulo to the Ministry of Justice suggesting the adoption of the principles of the Model Law into the insolvency legislation in Brazil. This study is currently being analysed by the Brazilian government.

## Chapter 7

# BRITISH VIRGIN ISLANDS

### 1. General law

Any final monetary judgment obtained against a Company in the High Court of England and Wales, Northern Ireland, or Court of Session in Scotland or any other country as detailed in section 6(1) of the Reciprocal Enforcement of Judgments Act (“REJA”), for a definite sum, may be registered and enforced as a judgment of the BVI Court under REJA provided that the following three conditions are fulfilled:

- (i) application must be made for registration of the judgment within twelve months of its date or such longer period as the Court may allow;
- (ii) there must not be an appeal or the outstanding right and intention to appeal;  
and
- (iii) the Court must consider it just and convenient in all circumstances of the case that the judgment be so enforced.

Any monetary judgment obtained in a superior court of a part of the Commonwealth to which section 9 of the Foreign Judgments (Reciprocal Enforcement) Ordinance applies may be registered and enforced through the BVI court provided:

- (i) the Governor of the BVI is satisfied that reciprocal provisions have been made, or substantial reciprocity of treatment will be assured, with respect to the enforcement in that part of the Commonwealth of judgments given in the High Court of the BVI;

- (ii) application is made for registration of the judgment within six years after the date of the judgment, or, where there have been proceedings by way of appeal against the judgment, after the date of the last judgment given in the appeal proceedings;
- (iii) the judgment given by such court is final and conclusive (notwithstanding that an appeal may be pending or that it may be subject to an appeal);
- (iv) the judgment is capable of being enforced by execution in the superior court of that part of the Commonwealth; and
- (v) the judgment is not in respect of penalties, taxes, charges, fines or similar fiscal revenue obligations.

In the case of a final and conclusive judgment obtained in a court of a foreign country (with which no reciprocal arrangements exist) for either a liquidated sum (not in respect of penalties or taxes or a fine or similar fiscal or revenue obligations), or in certain circumstances, for *in personam* non-money relief, such judgment will be recognised and enforced by the BVI court without any re-examination of the merits at common law, by an action commenced on the foreign judgment.

The BVI court would allow enforcement of the relevant judgment (i.e. by way of some form of insolvency proceeding in the BVI), provided that:

- (i) the judgment had not been wholly satisfied;
- (ii) such court had jurisdiction in the matter and the judgment debtor either submitted to the jurisdiction of the foreign court or was resident or carrying on business within such jurisdiction and was duly served with process;
- (iii) in obtaining the judgment there was no fraud on the part of the person in whose favour judgment was given or on the part of a court;
- (iv) recognition or enforcement of the judgment in the BVI would not be contrary to public policy or for some other similar reason the judgment could not have been obtained in the BVI court; and
- (v) the proceedings pursuant to which judgment was obtained were not contrary to natural justice.

## 2. Assisting legislation

Insolvency orders are deemed to have universal effect. All the property comprised in a bankrupt's estate, as defined in the Act, will vest in his trustee in bankruptcy (section 313), although the Act does not expressly state that it extends to assets wherever situated nor does it limit the assets to which it extends. Similarly, in the case of the liquidation of a company, an order for the appointment of a liquidator confers on the liquidator powers to obtain custody and control of the assets of the company. Again the Act does not express limits as to where those assets are situated.

***Appointment of a liquidator in respect of a foreign company***

Pursuant to section 163<sup>1</sup> of the BVI Insolvency Act, 2003 (“the Act”) the BVI court may appoint a liquidator in respect of a foreign company[1] if it is satisfied that the company has a connection with the BVI and:

- (a) the company is insolvent<sup>2</sup>;
- (b) the Court is of the opinion that it is just and equitable that a liquidator should be appointed;
- (c) the Court is of the opinion that it is in the public interest for a liquidator to be appointed;
- (d) the company is dissolved or has otherwise ceased to exist under or by virtue of the laws of the country in which it was last registered;
- (e) the company has ceased to carry on business; or
- (f) the company is carrying on business only for the purpose of winding up its affairs.

Pursuant to section 163(2), a foreign company is taken to have a connection with the BVI only if:

- (a) it has or appears to have assets in the BVI;
- (b) it is carrying on, or has carried on, business in the BVI, or
- (c) there is a reasonable prospect that the appointment of a liquidator of the company under the Insolvency Act will benefit the creditors of the company.

***Assistance of the BVI Court with foreign representatives in relation to foreign proceedings***

Pursuant to section 467 of the Act, a foreign representative may apply to the Court for an order in aid of the foreign proceeding in respect of which he is appointed. Liquidators or other persons appointed to act as a representative of a company in foreign proceedings can therefore come to the Court in the BVI to seek the assistance of the Court. The Court has wide powers under this part of the Act to make such orders as it considers appropriate and the orders granted may include orders to restrain commencement of proceedings against the company or execution against the company’s assets as well as orders for the delivery up of the company’s property, for the appointment of an interim receiver in the BVI, for the examination by the foreign representative of any person who could be examined

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<sup>1</sup> “Foreign company” is defined in section 2 of the Act as “a body corporate that is incorporated, registered or formed outside the British Virgin Islands but excludes a company within the meaning of section 3”.

<sup>2</sup> Section 8 of the Act states that a company is insolvent if (a) it fails to comply with a statutory demand that has not been set aside, (b) execution or other process issued on a judgment of a BVI court in favour of a creditor is returned wholly or partly unsatisfied, or (c) it is proved to the satisfaction of the Court that (i) the value of the company’s liabilities exceed its assets or (ii) the company is unable to pay its debts as they fall due.

pursuant to the Act relating to a BVI insolvency proceeding. Interestingly, when making an order pursuant to section 467, the Court may apply the law of the Virgin Islands or the law applicable in respect of the foreign proceeding.

### ***Appointment of overseas insolvency practitioners***

Pursuant to section 483 of the Act, individuals resident outside of the jurisdiction may be appointed by the BVI court to act jointly with a BVI insolvency practitioner if they meet the criteria which are, basically, that they are appropriately qualified, have given written consent to act and prior notice of the intended appointment has been given to the Financial Services Commission.

### ***Co-operation under the Act***

The Act provides a broad definition of “foreign proceedings” which extends to:

*“a collective judicial or administrative proceeding in a relevant foreign country, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization, liquidation or bankruptcy and “debtor shall be construed accordingly”.*

Whilst the Act contains provisions that specifically deal with cross-border insolvency (contained in Part XVIII of the Act) those provisions have not yet been brought into effect. However, the Act does provide (in Part XIX) for the Court to make orders in aid of foreign proceedings.

For the purposes of Section 466 of the Act, the BVI Financial Services Commission has designated the following as relevant foreign countries for the purposes of Part XIX of the Act.

Australia	Jersey
Canada	New Zealand
Finland	United Kingdom
Hong Kong	United States of America
Japan	

## **3. Insolvency practice**

Although in recent years, the number of insolvency cases originating from the BVI which have had a cross-border element has increased, primarily due to the hedge funds industry and the widespread use of BVI companies in structures based in Asia and Eastern Europe, the BVI court has not had to consider many requests for judicial assistance in respect of foreign insolvency proceedings.

Judicial assistance may be sought in the BVI by foreign representatives. To obtain assistance, they are required to file an application pursuant to section 467 of the Act, supported by affidavit evidence, together with a draft of the order sought.

Upon the hearing of such an application, the BVI court has wide powers as to the orders it may make. Importantly the Court may, among other things, order that a person deliver up to the foreign representative any property of the debtor or the proceeds of such property, stay or terminate a BVI insolvency proceeding, or authorise the examination by the foreign representative of the debtor or any person who could be examined under BVI law in respect of the debtor.

The Act empowers the BVI court to apply either the law of the BVI or the law applicable to the foreign proceedings. The BVI court will seek to give effect to a foreign insolvency provision where no equivalent provision exists under the Act, to the extent that to do so would not otherwise be contrary to BVI law or public policy. At all times, however, the BVI court has discretion as to whether it will make an order, so there is no firm test that can be applied to such applications.

Historically the BVI court has sought to promote consistency where there are concurrent insolvency proceedings, such that if a step is undertaken under the foreign law that may not be consistent with the equivalent provision under BVI law, provided the BVI court does not consider any prejudice would arise or any legal bar exists, the BVI court will seek to promote consistency between the proceedings and make Orders consistent with the foreign law. For example, pursuant to the provisions of Hong Kong insolvency law, a committee of inspection can be made up of up to seven members, whereas the equivalent creditors' committee under BVI law would be made up of up to five members; in an insolvency proceeding where liquidators had been appointed in respect of the same BVI company under both Hong Kong law and BVI law, the BVI court was asked to approve the appointment of seven members to the creditors committee (being the same seven members who were appointed to the committee of inspection in Hong Kong. The Court granted the order to promote consistency between the two insolvency proceedings.

The Act provides that when determining an application for orders to be made in aid of the foreign proceedings, the Court shall be guided by what will best ensure the economic and expeditious administration of the foreign proceeding to the extent consistent with matters such as the just treatment of persons claiming in the foreign proceeding (subject to the need for distribution to claimants in the foreign proceedings to be substantially in accordance with the order of distribution in a BVI insolvency proceeding), the prevention of preferential or fraudulent disposition of property subject to the foreign proceedings or the proceeds of such property and having regard to the principles of comity.

The making of an application by a foreign representative does not operate as a submission by that foreign representative to the jurisdiction of the BVI court for any other purpose other than the costs of the proceedings.

In terms of the effect on creditors, the Act provides that the rights of secured creditors to take possession of and realise or otherwise deal with property of the debtor over which the creditor has a security interest is not affected by any orders which the Court may make in aid of the foreign proceedings. Equally a foreign creditor wishing to claim in a BVI insolvency proceeding of any sort may lodge a claim form (akin to a proof of debt) and participate in any distributions to the extent their claim is admitted.

Whilst the Act sets out the priority of distribution of the assets of a company in liquidation in section 207, there remains some uncertainty as to where, in the statutory order of distribution, redeemed members who are due redemption proceeds fall. It is generally accepted that such members rank after discharge in full of creditor claims. However whether they rank ahead of the claim of continuing members is not clear. It is anticipated that issues such as this will only be resolved by a specific ruling from the Court dealing with the issue (which there has not yet been) or by amendment of the Act.

## 4. Examples

***In the matter of Bernard L Madoff Investment Securities LLC  
(In Securities Investor Protection Act Liquidation) [BVIHCV 2010/149,  
decision of Bannister J dated 12 November 2010]***

This was an application by Irving H Picard, the trustee appointed by the United States District Court for the Southern District of New York for the liquidation of Bernard L Madoff Investment Securities (“BLMIS”). Mr. Picard sought an order recognising his appointment as a foreign representative under Part XIX of the Act and establishing his entitlement in principle to seek orders from the BVI court in aid of the liquidation of BLMIS.

The BVI court held that, unlike Part XVIII, Part XIX of the Act did not confer status on a foreign representative. Instead, Part XIX gave a foreign representative express rights to apply for aid from the BVI court in relation to a foreign proceeding. Whilst the BVI court accepted that Mr Picard was the validly appointed trustee of BLMIS, it held that there was no power to confer any general authority or status on him. The application was accordingly dismissed though the BVI court expressed its readiness, in a proper case, to grant whatever relief it may decide is appropriate upon an application by Mr Picard under for specific aid under Part XIX of the Act.

## 5. Future reforms

The UNCITRAL Model Law on Cross-Border Insolvency was largely incorporated into the Act. However the administration provisions and the provisions relating to cross-border insolvency have not been brought into effect. The Act is presently undergoing a process of review and bringing the administration and cross-border provisions into effect is currently under consideration.

## Chapter 8

# CANADA

### 1. General law

Canada's legal system is founded in English common law, except in the Province of Quebec, where the legal system is based on French civil law. Today both systems are greatly changed from their roots, with adaptations necessitated by, among other things, the federal-provincial division of powers and the relatively recent tendency of legislators to codify the common law. These changes are particularly evident in the area of the recognition of foreign proceedings in cross-border insolvencies where they have been amplified by efforts of the courts and legislators to modernize the Canadian approach to international cooperation and provide increased certainty for trade and commercial finance.

Since 1990, Canada's highest court has sought to modernize the approach in Canada to private international law. In *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, the Supreme Court of Canada reduced the relevance of reciprocity and territoriality, which had been integral to the 19th century English law of recognition of foreign judgments and which had been carried over to the Canadian common law courts. Comity remains elemental to conflicts of laws but, in *Morguard*, the Court adopted the "real and substantial connection" test for the first time in Canada – i.e., was there a real and substantial connection between the originating court and the subject matter and party against whom the court gave judgment? If so, with only limited exceptions, a Canadian court will be inclined to recognize and give effect to a foreign judgment that was final and conclusive.

The *Morguard* case involved an inter-provincial rather than an international dispute but the Supreme Court definitively adopted the “real and substantial connection” test on an international scale in *Beals v. Saldanha*, [2003] 3 S.C.R. 416, upholding the recognition of a Circuit Court judgment from the State of Florida on the basis that the foreign court had a real and substantial connection to the defendant.

The test was thoroughly re-examined, confirmed and refined by the Supreme Court very recently in *Club Resorts v. Van Breda* [2012 SCC 17] released on April 18, 2012. At issue was whether an Ontario Court correctly assumed jurisdiction over a tort damages case involving an accident in Cuba, but the effort to add more certainty to the application of the “real and substantial connection” test is still relevant to a recognition case.

Even where a real and substantial connection is established there are some limits on the enforcement of foreign judgments. Canadian courts will refuse to enforce a foreign judgment if it is grounded in penal, revenue or other public law of the foreign state. Also available are “impeachment” defences, if the foreign judgment was obtained in a manner contrary to Canadian notions of justice. These defences are natural justice, public policy and fraud, but the modern Canadian approach applies these defences narrowly.

Many Canadian provinces have statutes that establish procedures for registering judgments of certain foreign jurisdictions. However, the Court in *Morguard* confirmed that such legislative provisions are procedural only and do not alter the rules of private international law.

## 2. Assisting legislation

In Canada, matters relating to bankruptcy and insolvency are within the exclusive jurisdiction of the federal Parliament. There are three principal federal statutes governing insolvency in Canada: the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the “BIA”), the *Companies’ Creditors Arrangement Act*, RSC 1985, c. C-36 (the “CCAA”) and the *Winding-up and Restructuring Act*, RSC 1985, c. W-11 (“WURA”). WURA, which in practice only applies to a limited type of companies including banks and insurance companies, does not deal with foreign proceedings. The BIA is a complete code for personal and corporate bankruptcy liquidations and proposals to creditors. The CCAA is directed at larger corporate insolvent reorganizations and, although it has been described as “skeletal” or “framework” legislation, the most recent amendments codify many developments that courts had addressed or at least faced over the previous two decades.

Both the BIA and the CCAA were first amended to introduce provisions dealing with international insolvencies in 1997. Sections 267 to 275 were added to the BIA under the heading “Part XIII - International Insolvencies”. In the much shorter CCAA, a truncated set of provisions was added as section 18.6, also under the heading “International Insolvencies”. The 1997 amendments essentially granted the courts a broader discretion to apply the respective Act and Canadian common law in a manner that facilitated cooperation and coordination with a foreign

proceeding. Although these provisions were utilized successfully during a decade of unprecedented growth in cross-border restructurings, mostly involving the United States, they fell far short of standardizing procedures for the recognition of foreign insolvency proceedings.

To address these shortcomings and reflect Canada's adoption, in large part, of the UNCITRAL Model Law on Cross-Border Insolvencies (the "Model Law"), the CCAA and the BIA provisions dealing with cross-border insolvencies were substantially expanded by amendments that came into force on September 18, 2009. The 2009 amendments to the CCAA included the repeal of section 18.6 and addition of sections 44 to 61 under the heading "Part IV – Cross-Border Insolvencies" with the stated purpose (set out in section 44 and virtually identical to the Preamble to the Model Law) of providing "mechanisms for dealing with cases of cross-border insolvencies and to promote ... (b) greater legal certainty for trade and investment ...." The 2009 amendments to Part XIII of the BIA were similar.

Part IV of the CCAA and Part XIII of the BIA permit a "foreign representative" to apply to the court for recognition of the "foreign proceeding" (essentially, a bankruptcy or insolvency proceeding outside of Canada) that authorized the foreign representative to act in that capacity. Furthermore, if the court is satisfied that the application relates to a foreign proceeding and that the applicant is a foreign representative in respect of that foreign proceeding, the court is required to make an order recognizing the foreign proceeding. Such an order must also specify whether the foreign proceeding is a "foreign main proceeding" or a "foreign non-main proceeding" which turns upon whether or not the centre of main interests (COMI) of the debtor company is in the jurisdiction of the foreign proceeding (thus making it a foreign main proceeding). This finding determines the level of discretion left to the court in granting the stay of proceedings that is usually the fundamental purpose of the application.

If the court determines that the application is in respect of a foreign main proceeding, then on the making of the order recognizing that proceeding, the court must make an order, subject to any terms and conditions it considers appropriate, staying, restraining and prohibiting actions against the debtor's property or business and prohibiting the disposal of assets by the debtor. If, on the other hand, the court determines that it is recognizing a foreign non-main proceeding, then the court will retain the discretion whether or not to grant the stay, and will do so only if it is satisfied that it is necessary for the protection of the debtor's property or the interests of a creditor or creditors.

In both cases, on further application by the foreign representative, the court has the discretion to grant any additional order that the court considers appropriate, again if satisfied that it is necessary for the protection of the debtor's property or the interests of a creditor or creditors.

The provisions include an overriding exception that permits the court to refuse to do something that would be contrary to public policy. As noted above, this is a narrow exception in the context of enforcing foreign judgments in Canada.

### 3. Insolvency practice

The combined effects of the widespread adoption of the real and substantial connection test and the 1997 and 2009 amendments to the two key corporate insolvency statutes have allowed Canadian courts to adapt as cross-border issues became increasingly important to the insolvency practice. Even with the more comprehensive codification of the Model Law in the 2009 amendments, lawyers and the courts have continued to demonstrate creativity and flexibility in addressing deficiencies inherent in the Model Law that was for the most part drafted in the 90's and focussed more on liquidation than debtor-in-possession reorganization.

One such shortfall in the new provisions is the presumption that the foreign proceedings necessarily involve the appointment of a representative who fits into the definition of a "foreign representative". Canada is geographically and economically tied to the United States. It is not surprising that most of the foreign recognition proceedings in Canada originate in the US and, in the corporate world, those are generally debtor controlled Chapter 11 proceedings which are not commenced by a court hearing but by the electronic filing of a bankruptcy petition that triggers an automatic stay under the US Bankruptcy Code. So-called "first day" motions in Chapter 11 proceedings are typically held one or even several business days after the petition is filed. So not only is there no "person or body" typically appointed at the outset of a Chapter 11 as contemplated by the definition of foreign representative, there is no opportunity to seek an order in a Chapter 11 to designate a foreign representative until a day or more after the filing. Since Part IV of the CCAA (as does Part XIII of the BIA) clearly requires the application for recognition of the foreign proceeding to be brought by a foreign representative, insolvency practice in Canada has had to adapt to address both differences inherent in a Chapter 11 proceeding.

To address the need for a foreign representative, US bankruptcy courts have become accustomed to granting "first day" motions (whenever they are ultimately heard) to authorize a debtor entity as a "foreign representative" for the purposes of recognition proceedings in Canada and elsewhere. Canadian courts in turn have accepted as "foreign representatives" debtor companies so authorized by the US court.

As mentioned above, the primary concern in a Part IV proceeding is typically to obtain a stay of proceedings as quickly as possible to protect assets in Canada, especially where the Chapter 11 filing may have triggered default remedies exercisable by creditors who may choose not to abide by the US automatic stay. To address the need for a stay of proceedings effective on the same day as the Chapter 11 filing, courts in Canada (especially in the specialized Commercial List in Toronto, Ontario) have adopted the practice of granting an interim initial stay, upon the application of the debtor company which has yet to be authorized in the US court to be the foreign representative. The proposed foreign representative files the application for recognition that it will rely upon at a later hearing that can only take place after the foreign order has been made and on the basis that it is necessary for the protection of the assets in Canada, the court is asked for a stay

until the return of the main application a few days later. The jurisdiction for this interim stay is unclear, and has yet to be tested at the higher appellate levels, but it is an essential element of current practice in applying Part IV of the CCAA.

Another element of the Model Law and hence the current Canadian legislation that could present a barrier when applied to actual situations in Canadian cross-border insolvencies is the singular approach to the debtor proceeding, including the concept of COMI, which ignores the reality of corporate group proceedings. As worded in the legislation, COMI must be determined for every debtor involved in a particular foreign proceeding and there is a presumption that the COMI of a company is its registered office, in the absence of proof to the contrary. There is no standard in the legislation to gauge the level of proof required to rebut this presumption and certainly no reference to there being a COMI of a corporate group. Thus, where a US based corporate group that operates a small proportion of business in Canada through a Canadian company (i.e. with a registered office in Canada) is reorganizing under Chapter 11 and seeks recognition under Part IV to preserve that business in Canada, a strict application of Part IV could result in an anomalous ruling that COMI of the subsidiary is in Canada and thus the Chapter 11 proceedings would only be given the status of foreign non-main proceedings. Clearly, the ability to effect a corporate restructuring of a group can be hampered by initial uncertainty, or worse, inconsistent rulings, about the COMI of debtors in different jurisdictions. Fortunately, Canadian courts recognize the benefits of group restructurings and the importance of this consistency. So to address the gap in the legislation, Canadian courts have often interpreted COMI in relation to the corporate group rather than the particular Canadian debtor entity. Even though they apply the test individually required by the statute, the courts give more weight to factors such as the location of the management, than they do to the registered office of the particular subsidiary, and thus achieve the appropriate result.

The role of “information officer” is not found in the legislation. However, the practice of appointing an accounting firm that is a Canadian licensed trustee as an “information officer” in a recognition proceeding is a practical development the courts have adopted to assist foreign representatives, especially (but not exclusively) where debtor companies are appointed as foreign representatives. Since these firms are experienced as monitors in traditional domestic CCAA proceedings, the courts are comfortable entrusting these firms with notification and reporting duties and the authority to assist foreign representatives with their obligations.

Part XIII of the BIA and especially s.18.6 and now Part IV of the CCAA have been successfully used in applications varying from the straightforward recognition of a foreign stay in respect of a single insolvent corporation, to granting a stay of proceedings for a solvent Canadian company because it is part of a group being reorganized pursuant to Chapter 11 and more complex cases involving recognition of foreign DIP financing orders and sale approval orders.

The goal of being able to restructure a cross-border group under a single plan of restructuring can now be readily achieved though the coordination of complex foreign proceedings with recognition proceedings under the CCAA, particularly in connection with Chapter 11 proceedings in the United States.

## 4. Examples

### ***Roberts v. Picture Butte Municipal Hospital, [1999] 4 WWR 443***

Morguard has been applied in cases where the Canadian Court was asked to recognize proceedings in the U.S. Bankruptcy Court without concurrent insolvency proceedings having been brought in Canada. The leading example of this is the decision of the Alberta Court of Queen's Bench in *Roberts v. Picture Butte Municipal Hospital, [1999] 4 WWR 443*. In *Roberts*, Forsyth J. recognized a permanent stay of proceedings against the defendant Dow Corning Corporation ("DCC") pursuant to DCC's Chapter 11 proceedings. The Court found that the plaintiffs in the action had submitted to the jurisdiction of the U.S. Bankruptcy Court by filing a proof of claim, but went on to hold that even without this submission, "common sense dictated that these matters would be best dealt with by one Court, and in the interest of promoting international comity, it seems the forum for this case is in the U. S. Bankruptcy Court." (p. 451). Presumably a court now would come to the same conclusion but use terminology consistent with the real and substantial connection test.

### ***Re Babcock & Wilcox Canada Ltd. (2000), 18 CBR (4th) 157 (Ont. SCJ)***

In *Babcock & Wilcox*, the parent of the Canadian corporation filed for bankruptcy protection under Chapter 11 in the United States in order to deal with asbestos-related mass tort litigation claims. The Canadian subsidiary sought a stay under s.18.6 of the CCAA even though it was not at that time claiming insolvency. In granting the stay, Farley J. produced a set of guidelines for the application of s.18.6 that remains useful today for Part IV applications even though many are now codified:

- a) The recognition of comity and cooperation between the courts of various jurisdictions are to be encouraged.
- b) Respect should be accorded to the overall thrust of foreign bankruptcy and insolvency legislation in any analysis, unless in substance, generally it is so different from the bankruptcy and insolvency law of Canada or perhaps because the legal process that generates the foreign order diverges radically from the process here in Canada.
- c) All stakeholders are to be treated equitably, and to the extent reasonably possible, common or like stakeholders are to be treated equally, regardless of the jurisdiction in which they reside.
- d) The enterprise is to be permitted to implement a plan so as to reorganize as a global unit, especially where there is an established interdependence on a transnational basis of the enterprise and to the extent reasonably practicable, one jurisdiction should take charge of the principal administration of the enterprise's reorganization, where such principal type approach will facilitate a potential reorganization and which respects the claims of the stakeholders and does not inappropriately detract from the net benefits which may be available from alternative approaches.

- e) The role of the court and the extent of the jurisdiction it exercises will vary on a case by case basis and depend to a significant degree upon the court's nexus to that enterprise; in considering the appropriate level of its involvement, the court would consider:
- the location of the debtor's principal operations, undertaking and assets;
  - the location of the debtor's stakeholders;
  - the development of the law in each jurisdiction to address the specific problems of the debtor and the enterprise;
  - the substantive and procedural law which may be applied so that the aspect of undue prejudice may be analysed; and
  - such other factors as may be appropriate in the instant circumstances.
- f) Where one jurisdiction has an ancillary role,
- the court in the ancillary jurisdiction should be provided with information on an ongoing basis and be kept apprised of developments in respect of that debtor's reorganizational efforts in the foreign jurisdiction;
  - stakeholders in the ancillary jurisdiction should be afforded appropriate access to the proceedings in the principal jurisdiction.
- g) As effective notice as is reasonably practicable in the circumstances should be given to all affected stakeholders, with an opportunity for such stakeholders to come back into the court to review the granted order with a view, if thought desirable, to rescind or vary the granted order or to obtain any other appropriate relief in the circumstances.

***Re Loewen Group Inc. (2002), 32 C.B.R. 4th 54 (Ont. S.C.J.)***

In Loewen, a large cross-border corporate group with a Canadian parent was permitted to restructure pursuant to a Chapter 11 Plan of Reorganization that was declared effective and in force in Canada pursuant to the CCAA s. 18.6. The Court applied the guidelines from Babcock & Wilcox.

***Re Tucker v. Aero Inventory (UK) Ltd., 2009 CanLII 63138 (ON SC)***

This was one of the first recognition applications under the 2009 amendments. The applicants (Tucker et al.) were partners of KPMG LLP in the UK who had been appointed by the High Court of England and Wales as joint administrators of two UK companies - Aero Inventory (UK) Ltd. ("Aero") and its corporate parent. Aero provided procurement and inventory management services in the aerospace industry around the world. Aero had a registered office in Quebec but no employees, premises or other presence in Canada except for \$130 million of assets stored at its Canadian customer's warehouses in four provinces, including Ontario.

The Administrators brought an application for recognition under Part IV of the CCAA before the Ontario Superior Court of Justice [Commercial List] in Toronto. Despite the registered office in Quebec, the Ontario court held that it had jurisdiction to deal with the application because there were assets in the province and there was no “place of business” in Canada. The court recognized the appointment of Administrators as “foreign representatives” and was satisfied that there was evidence to rebut the presumption that COMI was in Quebec because of the registered office there, based on facts that the foreign debtors had business interests globally and their head office was in the United Kingdom from where they were managed and administered. Thus, the court recognized the UK administration proceedings as foreign main proceedings. The court also appointed the Canadian firm KPMG Inc. as Information Officer to assist the Foreign Representatives, noting that, “In the circumstances of this case, in which the foreign debtors have no place of business or employees in Canada, it is particularly appropriate to have an information officer appointed who can deal with matters as they arise in Canada and who can also provide information and advice to the Foreign Representative as needed.”

***Re Tucker v. Aero Inventory (UK) Ltd., 2010 ONSC 1196 (Ont. S.C.J. [Commercial List])***

On a subsequent motion, the Foreign Representatives sought an order under Part IV of the CCAA to temporarily lift the stay granted in the Recognition Order and for leave to assign the Foreign Debtors into bankruptcy (i.e. liquidation proceedings under the BIA). The stated purpose of the assignment was to engage in a review of a potential preference transaction. Against the opposition of the Canadian customer who was the potential target of the review, the court found it was appropriate in the circumstances to grant the motion.

***Re Hartford Computer Hardware, Inc., 2012 ONSC 964 (Ont. S.C.J. [Commercial List])***

The CCAA authorizes the granting of a priority “DIP Charge” to secure amounts advanced post-filing under debtor-in-possession financing (“DIP financing”). So-called “roll-up” DIPs, where amounts advanced pre-filing are deemed to be part of the DIP financing, are not to be secured by a DIP Charge. In Hartford Computer, the Chapter 11 proceedings had previously been recognized under Part IV as foreign main proceedings and one of the Chapter 11 debtors was the Foreign Representative. In a subsequent motion under s. 49 the Foreign Representative sought, among other things, recognition and implementation in Canada of an order of the US Court approving a DIP financing that included a partial “roll-up” as it deemed certain cash collateral in existence under a revolving credit facility at the time of the filing to be treated as a borrowing under the DIP facility. Justice Morawetz found that as the US proceeding had been found to be the foreign main proceeding and the US Court had granted the DIP financing order, he saw “no basis for this court to second guess the decision of the U.S. Court”. Although the DIP charge in respect of the “roll-up” portion of the DIP financing under s. 11.2 if it had been sought in a main Canadian proceeding, the court had the jurisdiction under s. 49 to recognize the foreign order. The court considered the public policy exception in s. 61(2) but found that it should be interpreted restrictively and that the

US order therefore did not raise any public policy issues. The court found that it was appropriate to grant the requested relief.

***Re LightSquared LP, 2012 ONSC 2994 (Ont. S.C.J. [Commercial List])***

In a corporate group Part IV application, the court held the Canadian subsidiaries' COMI was in the United States such that the Chapter 11 proceedings were foreign main proceedings. Justice Morawetz found that where it is necessary to go beyond the registered office presumption for the COMI of a debtor, just three "principal factors, considered as a whole, will tend to indicate whether the location in which the proceeding has been filed is the debtor's [COMI]...: (i) the location is readily ascertainable by creditors; (ii) [it is where] the debtor's principal assets or operations are found; and (iii) [it is] where the management of the debtor takes place."



## Chapter 9

# THE CAYMAN ISLANDS

### 1. General law

The Cayman Islands are a British Overseas Territory by virtue of the British Overseas Territories Act 2002, and accordingly are ultimately the responsibility of the British Government. For practical purposes, the Cayman Islands are self-governed, save in respect of foreign affairs, defence and certain other specified areas, under a constitution that gives executive and legislative power to a Governor, a Cabinet and a Legislative Assembly. The Governor is appointed by the British Government and has overall responsibility for the administration of the Cayman Islands. The Judiciary is separate from the Legislature and the Executive, and its members are appointed by the Governor, on the advice of the Chief Justice. There are three tiers of Court in the Cayman Islands: the Summary Court, the Grand Court and the Cayman Islands Court of Appeal. Appeals lie from the Grand Court to the Cayman Islands Court of Appeal, which sits three times a year in Grand Cayman, and from there to the Judicial Committee of the Privy Council in London.

Cayman Islands' law is based on English common law and principles of equity. The Courts of the Cayman Islands are likely to be persuaded by relevant English case law to the extent that there is no Cayman Islands statute or authority to the contrary.

## 2. Assisting legislation

The primary Cayman Islands' insolvency legislation is contained within Part V and Part XVII (specifically dealing with the recognition of foreign insolvency proceedings) of the Companies Law (2011 Revision) (as amended) (the "Companies Law"). Supplementing the Companies Law is a comprehensive framework of rules and regulations including the Companies Winding Up Rules (as amended) (the "CWRs") and the Foreign Bankruptcy Proceedings (International Co-operation) Rules (as amended).

## 3. Insolvency practice

The Cayman Islands have a significant involvement with the US hedge funds industry. Accordingly, applications for ancillary relief by US-based insolvency officials are particularly prevalent in Cayman Islands jurisprudence. The Cayman Islands have made considerable effort to promote international co-operation and enforcement with respect to cross-border insolvencies through the implementation of relevant enabling legislation and development of case law to assist such situations.

### ***Universalist Approach to Recognition and Part XVII of the Companies Law: International Co-operation***

Under the common law, the Cayman Islands adopt the "universalist" approach and will recognise a foreign insolvency proceeding if:

- a) the Cayman Islands' Court recognises that the foreign court had jurisdiction to commence the insolvency proceeding as it had domiciliary jurisdiction over the company or, in the case of the equivalent of a voluntary liquidation, that the voluntary liquidator has been appointed in accordance with the laws of the domiciliary jurisdiction;
- b) the domiciliary jurisdiction's decree or order commencing the insolvency proceeding was final and conclusive; and
- c) that the commencement of the foreign insolvency proceeding does not conflict with the public policy of the Cayman Islands.

Notwithstanding the "universalist" approach adopted by the Cayman Islands' Courts, Part XVII of the Companies Law (specifically Sections 240 to 243 of the Companies Law) dealing with international co-operation was enacted in March 2009: it applies to insolvency proceedings brought outside of the Cayman Islands and to applications of recognition and assistance by foreign representatives of those proceedings. Part XVII formalised the Cayman Islands' Court's powers to make orders in respect of and by way of assistance of foreign insolvency proceedings. It defines "*foreign bankruptcy proceedings*" as including proceedings for the purpose of reorganising or rehabilitating an insolvent debtor. A "*debtor*" is defined as a foreign corporation or other legal entity subject to a foreign bankruptcy proceeding in the country in which it is incorporated or established. A "*foreign representative*" is defined as a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign bankruptcy proceeding.

Part XVII requires no centre of main interest (COMI) analysis in respect of the debtor or a determination of whether particular foreign proceedings are main or non-main. In addition, there is no requirement for the foreign bankruptcy proceeding to be subject to the control or supervision of a foreign court. Given the definition of “*foreign bankruptcy proceedings*” includes “*proceedings for the purpose of reorganising or rehabilitating an insolvent debtor*”, non-court processes such as out-of-court appointment of administrators in the United Kingdom by a company’s directors or a qualified floating charge holder would be among the proceedings in relation to which the Cayman Islands Court could make orders. Also schemes of arrangement proposed outside any formal insolvency process would fall within the ambit of the Cayman Islands’ Court’s discretionary powers.

Section 241 of the Companies Law prescribes the relief which is available under Part XVII and enables the Court to make orders ancillary to a foreign bankruptcy proceeding for the purposes of:

- a) recognising the right of a foreign representative to act in the Islands on behalf of or in the name of a debtor;
- b) enjoining the commencement or staying the continuation of legal proceedings against a debtor;
- c) staying the enforcement of any judgment against a debtor;
- d) requiring a person in possession of information relating to the business or affairs of a debtor to be examined by and produce documents to its foreign representative; and
- e) ordering the turnover to a foreign representative of any property belonging to a debtor.

In determining whether to make an ancillary order under Section 241 of the Companies Law, the Cayman Islands Court is required pursuant to Section 242 to be guided by matters which will best assure an economic and expeditious administration of the debtor’s estate consistent with:

- a) the just treatment of all holders of claims against or interests in the debtor’s estate wherever they may be domiciled;
- b) the protection of claim holders locally against prejudice and inconvenience in the processing of claims in the foreign bankruptcy proceeding;
- c) the prevention of preferential or fraudulent dispositions of property comprised in the debtor’s estate;
- d) the distribution of the debtor’s estate amongst creditor substantially in accordance with Part V orders;
- e) the recognition and enforcement of security interests created by the debtor;
- f) the non-enforcement of fines, foreign taxes and penalties; and
- g) comity.

The above corresponds with similar cross-border provisions found in the United Kingdom and United States legislation (and in particular Section 242 of the Companies Law mirrors the language used in the former Section 304 of the US Bankruptcy Code<sup>1</sup>). The grant of relief pursuant to Part XVII is wholly within the Cayman Islands Court's discretion.

Insolvency proceedings in a jurisdiction which purports to "ring fence" assets for the benefit of only those creditors within its jurisdiction would be contrary to Cayman Islands' public policy as all creditors of a Cayman Islands' company would be entitled to prove as a creditor in any parallel Cayman liquidation notwithstanding their domicile. This occurred in the BCCI liquidation where some foreign jurisdictions purported to ring fence assets within their jurisdictions for the benefit of local creditors. The Cayman Islands' liquidation of the same legal entity has allowed all creditors to prove.

In the case of a debtor which is registered under Part IX of the Companies Law (Overseas Companies), the Cayman Islands Court is not permitted to make an ancillary order pursuant to Section 241 of the Companies Law without also considering whether it should make a winding up order under Part V of the Companies Law in respect of its local branch. Section 91 of the Companies Law (in Part V) provides that the Cayman Islands Court has jurisdiction to make winding up orders in respect of a foreign company which (i) has property located in the Cayman Islands; (ii) is carrying on Business in the Cayman Islands; (iii) is the general partner of a limited partnership; and (iv) is registered under Part IX as an overseas company.

Section 243 of the Companies Law provides that where a debtor becomes the subject of foreign bankruptcy proceedings, notice of this fact must be filed with the Registrar of Companies in the Cayman Islands and a notice published in the Cayman Gazette. The provision seeks to protect local creditors so that they are provided with sufficient notice and not disadvantaged as compared to creditors in the debtor's home jurisdiction or other jurisdictions. Failure to comply with Section 243 may result in a fine of C\$10,000.

### ***International protocols***

The Cayman Islands Court has an established history in assisting foreign bankruptcy proceedings (and their representatives). It recognizes that one of the most essential elements of co-operation in cross-border cases is communication among the administering authorities of the countries involved.

Whilst the Cayman Islands has not implemented the UNCITRAL Model Law on Cross-Border Insolvency, the Cayman Islands Court is mindful of Articles 25, 26, 27, 29 and 30 and respects the issue of comity between states. The foregoing provisions place obligations on courts and representatives in different states to communicate and co-operate to the maximum extent possible, to ensure that a

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<sup>1</sup> Section 304 of the US Bankruptcy Code was replaced by Chapter 15 on 17 October 2005.

debtor's insolvent estate is administered fairly and efficiently, with a view to maximising benefits to creditors. Those principles are designed to meet the following public policy objectives<sup>2</sup>:

- a) the need for greater legal certainty for trade and investment;
- b) the need for fair and efficient management of international insolvency proceedings, in the interest of all creditors and other interested persons, including the debtor;
- c) protection and maximisation of the value of the debtor's estate for distribution to creditors, whether by reorganisation or liquidation;
- d) the desirability and need for courts and other competent authorities to communicate and co-operate when dealing with insolvency proceedings in multiple states; and
- e) the facilitation of the resumption of financially troubled businesses with the aim of protecting investment and preserving employment.

In addition to the foregoing principles that will be considered by the Cayman Islands Court in its consideration of an international insolvency with Cayman aspects<sup>3</sup>, Order 21 of the CWRs contains provisions as to international protocols. Order 21 applies: (i) when a Cayman Islands company in liquidation is the subject of a concurrent bankruptcy proceeding under the law of a foreign country; or (ii) when the assets of a Cayman Islands company in liquidation are located in a foreign country and are the subject of a bankruptcy proceeding or receivership under the law of that country. Prima facie, Order 21 applies to official Court based liquidations; however the recent Cayman case of *Trident Microsystems (Far East) Ltd* [2012] states that such principles should similarly apply to a provisional liquidation of a Cayman Islands company.

It is the duty of the liquidator of that Cayman Islands company to consider whether it is appropriate to enter into a protocol with any foreign officeholder. Order 21 states that the purpose of a protocol is to promote the orderly administration of the estate of a company in liquidation and avoid duplication of work and conflict between the Cayman Islands liquidator and the foreign officeholder. An international protocol agreed between the Cayman Islands liquidator and the foreign officeholder of a Cayman Islands company in liquidation shall take effect and become binding upon them only if and when approved by the Cayman Islands Court and the foreign court or authority.

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<sup>2</sup> See paper written by Chief Justice Smellie extra-judicially entitled "A Cayman Islands Perspective on Trans-Border Insolvencies and Bankruptcies – The Case for Judicial Co-operation" (6 October 2011).

<sup>3</sup> *Trident Microsystems (Far East) Ltd* [2012].

Order 21 provides that an international protocol may define and allocate responsibilities between the Cayman Islands liquidator and foreign officeholder (by reference to geographical location or otherwise) in respect of:

- a) the formulation and promotion of restructuring proposals, including a scheme of arrangement pursuant to Section 86 of the Companies Law;
- b) the preservation of assets located outside the Cayman Islands;
- c) the realisation of assets located outside the Cayman Islands;
- d) the pursuit of causes of action against debtors or other persons outside the Cayman Islands;
- e) procedures for the exchange of information between the Cayman Islands liquidator and foreign officeholder;
- f) procedures for reporting to and communicating with the liquidation committee and with creditors and/or contributories;
- g) procedures for co-ordinating sanction applications made to the Cayman Islands Court and to the foreign court or authority;
- h) administrative procedures relating to the adjudication of proofs of debt and consequential appeals or expungement applications;
- i) procedures relating to the payment of claims; and
- j) procedures relating to the remission of funds between the official liquidator and foreign officeholder.

In addition, an international protocol may establish procedures for review, approval and payment of:

- a) the remuneration of the Cayman Islands liquidator and the foreign officeholder;
- b) the fees of counsel to the Cayman Islands liquidator and lawyers engaged by the foreign officeholder; and
- c) other expenses incurred by the Cayman Islands liquidator and/or foreign officeholder.

Any provision contained in an international protocol which is contrary to Cayman Islands law or purports to exclude the jurisdiction of the Cayman Islands' Court in respect of the Cayman Islands company in liquidation shall be void and of no effect.

The Cayman Islands' Court has a history of authorising cross-border protocols (including those with respect to Chapter 11 bankruptcies) and subject to the relevant detail of any protocol and based on the foregoing Cayman legal principles and case law, the Cayman Islands' Court should be willing to work with foreign courts with respect to adopting an international cross-border protocol in order to ensure that a debtor's insolvent estate is administered fairly and efficiently, with a view to maximising benefits to creditors.



***“Soft Touch” Liquidations and Schemes of Arrangement***

It is usual to find the business of the Cayman Islands’ companies being conducted elsewhere and the Cayman Islands’ Court has long practiced a “soft touch” primary insolvency in the Cayman Islands to facilitate the substantive foreign insolvency in the place where the company’s business and assets are located. There have been many cases in the Cayman Islands where the affairs of a Cayman Islands’ company have been reorganised in the context of proceedings before the Cayman Islands’ Grand Court (the primary proceeding) and a foreign ‘ancillary’ jurisdiction. Most of these cases have involved a scheme of arrangement under Section 86 of the Companies Law in parallel with schemes of arrangement in other common-law based jurisdictions or a plan of reorganisation under the US Bankruptcy Code Chapter 11.

The provisions of Section 86 of the Companies Law mirror substantially the provisions of the English Companies Act 1986 Section 425 in that the Grand Court can sanction a compromise between a company and its creditors or members once the requisite sanction of the classes of members and creditors has been obtained (a majority in number representing 75% in value).

One issue with respect to the Companies Law is the lack of a statutory equivalent rescue jurisdiction to the Bankruptcy Code’s Chapter XI and the English Insolvency Act’s Administration. Whilst the foregoing two procedures have their own nuances, they require a considerable amount of creditor support in order to allow the company to “work out” its problems within the protective custody provided. Paramount to achieving this aim is the ability of the company to obtain a moratorium against any actions or remedies (whether Court based or otherwise) that may be available to creditors and/or investors. With its creditors/investors rights suspended in this way, the company has an opportunity to seek fresh capital or otherwise restructure its finances. This can be achieved in the Cayman Islands through the appointment of Joint Provisional Liquidators (“JPLs”) and a Court ordered prohibition against any actions against the relevant Cayman Islands company under Section 97 of the Law (so called “soft touch” provisional liquidations).

The development in the Cayman Islands is the use of JPLs to act as Court appointed “watchdogs” whilst the company, through its directors, attempts to obtain new finance or otherwise restructure, the intention being for the company to continue as a going concern with an ultimately better realisation for creditors/investors. Such a reorganisation involving new capital and/or a variation of creditors/investors’ rights is usually accomplished by a scheme of arrangement pursuant to Section 86 of the Companies Law within the context of a provisional liquidation.

The concept of a “soft touch” provisional liquidation has been addressed by the Companies Law pursuant to Section 104(3) of the Law which provides that an application for the appointment of a provisional liquidator may be made by a Cayman Islands company *ex-parte* on the grounds that:

- a) the Cayman Islands company is or is likely to become unable to pay its debts;  
and
- b) the Cayman Islands company intends to present a compromise or arrangement to its creditors.

## 4. Future reforms

Given the comprehensive framework of rules and regulations supporting cross-border insolvencies and the development by the Cayman Islands’ Court of the jurisprudence in respect of cross-border insolvency issues, the Cayman Islands continues to maintain its reputation as a sophisticated, progressive and pro-active insolvency jurisdiction. The Cayman Islands continue to consider further legislative updates in order to keep pace with developing cross-border insolvency principles and practices.

## 5. Examples

Schemes of arrangement with parallel plans of reorganisation have been successfully completed in ICO Global (the Cayman Islands, Bermuda and the United States), Fruit of the Loom, Ltd. (the Cayman Islands and United States) and Seapower Resources International Ltd. (the Cayman Islands and Hong Kong).

The recognition of foreign representatives pursuant to Part XVII of the Companies Law has been successfully employed by the SIPA Trustee in respect of BLMIS and Straumur in connection with its own reorganisation.

### ***Bernard L. Madoff Investment Securities LLC***

Part XVII has assisted numerous foreign representatives in dealing with Cayman aspects of foreign bankruptcy proceedings. For example, it has been used by the SIPA Trustee, Irving Picard, in respect of the liquidation of Bernard L. Madoff Investment Securities LLC (“BLMIS”) with respect to the ability of the SIPA Trustee to act in the Cayman Islands for and on behalf of BLMIS (the debtor).

### ***Straumur-Burdaras Investment Bank hf***

Further, an application was made by the Moratorium Assistant in respect of Straumur with respect to the enjoinder of proceedings against Straumur in the Cayman Islands.

## Chapter 10

# CHINA

### 1. General law

Cross-border insolvency procedures to be executed in China are required to comply with a number of general principles. Under Articles 18 and 32 of the Constitution of the People's Republic of China, any foreign enterprise, economic organisation and individual shall abide by Chinese laws and their lawful rights and interests shall be protected under Chinese laws and jurisdiction.

Chinese laws recognise international conventions and bilateral or multilateral treaties. China may offer or provide judicial assistance and co-operation to countries that have participated in the conventions and treaties based on reciprocity.

On China's accession to the WTO, China confirmed its commitment to follow its international treaties, to perform its obligations and duties and implement the WTO Agreement by amending its current laws or making new laws and regulations. It also established, for administrative acts, a judicial review procedure in conformity with the WTO Agreement. China will adopt a more open attitude towards international co-operation and this will influence the laws and practice of cross-border insolvency.

China's general attitude towards recognition and enforcement of foreign court judgments is:

- based on international treaties and bilateral agreements joined by China or on reciprocity, Chinese courts may, presuming that it will not impair the sovereignty and security nor jeopardise the social and public interest of China, recognise and execute foreign court judgments;
- Chinese courts may not recognise nor execute foreign court judgments and rulings in those cases over which Chinese courts have jurisdiction; and
- after being recognised or executed by Chinese courts, foreign court judgments and rulings may have equal effect with the Chinese court decisions.

## 2. Assisting legislation

The PRC Enterprise Bankruptcy Law 2006 (the "Bankruptcy Law") Article 5 establishes the basic legal foundation for cross-border insolvency issues in China. This article first stipulates the outbound effect of bankruptcy judgments made in China by stating "*The bankruptcy proceedings initiated in accordance with this law shall have legal effects on the debtor's assets located outside PRC.*" Then it stipulates the inbound effect of foreign bankruptcy judgments or rulings by stating that "*If legally valid foreign bankruptcy judgment or ruling involving assets inside China is applied in a Chinese court for recognition and execution in China, the Chinese court shall grant its recognition and execution after investigating the application on the basis of international treaties China enters or the principle of reciprocity and confirming that the recognition and execution (a) does not contradict the basic principles of the law of the PRC; (b) does not violate China's sovereignty, security, and social and public interest; and (c) does not infringe upon the lawful rights and interests of creditors within the PRC.*"

In order to determine the correct court of jurisdiction, the Bankruptcy Law Article 3 stipulates that "*The court of the debtor's domicile shall have jurisdiction upon the bankruptcy case.*" The registration place of an enterprise is generally considered as its domicile. If the registration place and the place where the enterprise conduct its major business are different, we may refer to the General Principles of Civil Law of China Article 39, which provides that "*The place where a legal person enterprise conducts its major business operation shall be its domicile.*"

The Legal Application Law of Foreign Civil Relations of PRC provides further legal justifications in solving this problem. Article 14 of this law stipulates that: (1) The civil rights competence, civil action competence, organisation structures, shareholder rights and responsibilities of a legal person and its branches are governed by the law of its registration; (2) If the place where the legal person conducts its major business is not the registration place, the law of the place where the legal person conducts its major business shall govern.

Based on the above mentioned laws, recognition or enforcement of foreign bankruptcy judgments or rulings may be applied with the People's Courts ("Chinese courts") that have the jurisdiction. Specifically, the application for recognition or enforcement of foreign bankruptcy judgments or rulings may be made with the People's Court in the registration place of the debtor or the location of the major business operations of the debtor.

Recognition or execution of foreign bankruptcy judgments or rulings may be requested either by the litigant or the foreign court in accordance with the international treaties, judicial assistance agreements or reciprocity agreement entered or joined in by both its home country and China. Should there be no international treaty or reciprocity agreement, the foreign court may request assistance through diplomatic means.

A litigant may also file a request to an intermediate People's Court that has the jurisdiction for recognition or enforcement of the foreign court judgment. Should there be no international treaty, the litigant may bring an action to the People's Court that has the jurisdiction.

After receiving the request, the Chinese court will review the request in accordance with the international treaties or agreements entered or joined in by China and the foreign country or on the basis of reciprocity. The review is only restricted to whether the foreign court judgment is in conformity with Chinese legal provisions or with the terms and conditions for recognition and enforcement of foreign judgments confirmed in the judicial assistance agreements. Matters regarding findings of facts and application of law may not be reviewed.

### **3. Insolvency practice**

Although the new Bankruptcy Law has been implemented for almost five years, completed cross-border insolvency cases are few. So it is necessary to combine the few cross-border cases before and after the Bankruptcy Law to provide a whole picture of the practice of cross-border insolvency in China. The justification for including cases determined before the Bankruptcy Law is that what the Chinese courts did before the Bankruptcy Law was enacted will influence what they do after.

In respect of a foreign bankruptcy declaration that has become legally effective, a foreign administrator may need to take action in respect of bankruptcy property situated in China. In the absence of any judicial assistance agreement between China and the foreign country, the Chinese courts' usual practice is to permit the administrator to bring an action directly in the Chinese courts provided the foreign administrator and the debtor accept the jurisdiction of Chinese courts. A foreign creditor attempting to seize property situated in China may be allowed, after negotiation and mediation, to realise his rights on his foreign debtor's property in China by way of a share transfer.

In respect of recognition of foreign bankruptcy procedures, the Chinese courts have, in some cases, recognised the validity of foreign bankruptcy procedures after permitting the foreign receiver and the local government to negotiate. (*Re bankruptcy of the Nanyang Textile Trading Co., Ltd.* 1983)

In some cases, however, the Chinese courts have refused to recognise the validity of foreign receivers and have shown a strong tendency to protect Chinese creditors in dealing with the cases. (*Re Guangzhou Liwan Construction Co. Ltd. v. Euro-America China Property Ltd. and Re Bankruptcy of the Shenzhen branch of the Bank of Commerce and Credit International (BCCI).* 1992)

Starting from this century, the Chinese courts in some areas have begun to recognise the legal effect of foreign bankruptcy procedures. For example, the Intermediate People's Court in Foshan, Guangdong Province had made a civil order to recognise the legal effect of a bankruptcy judgment made by Italian courts in November 2001. (Docket No. 2000 (633) civil judgment)

After the new bankruptcy law came into operation, there appears a new trend of cross-border insolvency case in China. That is, some Chinese enterprises choose to register abroad for the purpose of evading taxes while conducting major businesses in China. For instance, on April 2010, Citigroup, one of the largest creditors, petitioned the Court of Cayman Islands to liquidate the Taizi Milk Company Ltd (Taizi Milk) in China, which is one of the largest milk producers in China. Although Taizi Milk is a Chinese company with the whole of its business in China, it was registered in the Cayman Islands. However, other creditors of Taizi Milk petitioned the Chinese court to commence proceedings to reorganise the debtor and the petition was accepted by the court. The reorganisation of Taizi Milk at the time of writing this chapter was ongoing.

## 4. Examples

### ***Guangdong International Trust and Investment Corp***

On 10 January 1999, "GITIC" and its subsidiaries GITIC Shenzhen, Guangdong International Leasing Corp. and Guangxin Enterprise Development Corp. petitioned the courts for bankruptcy. This was the first bankruptcy case in China that involved a large number of foreign creditors. Altogether 494 domestic and foreign creditors claimed RMB¥46.7 billion of which more than 80% was creditors from countries including U.S, Japan, Switzerland, Germany, France, Spain and Hong Kong.

This case sought to protect foreign creditors in its procedure, in that:

- a committee of creditors was set up comprising domestic and foreign creditors who take turns to preside over creditors' meetings; and
- if any foreign creditor objected to the rights confirmed by the liquidating committee, the court may review the ruling.

In a case relevant to GITIC, the Hong Kong courts recognised the legal effect of the bankruptcy procedure of GITIC by the Hong Kong High Court judgment No. 15651 (1999). The judgment was made on the basis that the bankruptcy procedure of GITIC gave equitable treatment to all creditors

On Feb. 28, 2003, the GITIC bankruptcy procedure was determined after four years. After hearing by the Supreme Court of Guangdong Province, the Guangzhou Intermediate Court and the Shenzhen Intermediate Court, discharge rates for claims of GITIC and its subsidiaries, Guangxin Enterprise Development Corp, Guangdong International Leasing Corp. and GITIC Shenzhen were fixed respectively at 12.52%, 28%, 11.5% and 19.48%, which exceeded the record discharge rate of 8% in China.

### **Taizi Milk Company Ltd**

The legal issues in the case of Taizi Milk is very complicated and worthy of further study. In Sep. 2007, a banking Syndicate headed by Citigroup extended a 500million CNY unsecured and low interest loan to Taizi Milk. The term of the loan was three years. However, Taizi Milk became insolvent in 2008. Although the local government extended help to this large enterprise, the government support did not turn the enterprise around. In April 2010, Citigroup petitioned the court in the Cayman Islands where Taizi Milk was registered to liquidate the debtor while on July 23, 2010 other creditors petitioned the PRC court where the debtor was domiciled to reorganise the debtor. The court ruled to reorganise Taizi Milk. Later, in Sep. 2010, the court also ruled to reorganise two subsidiaries of Taizi Milk and consolidated the reorganisation of the three companies based on the justification that the assets, claims and debts of the three companies are highly mixed.

The key issue of this case is whether the foreign judgment of liquidation of Taizi Milk is properly recognised in China. Based on available information, the conclusion of Chinese court complies with Chinese laws concerning the recognition and execution of foreign judgments but the process might have been flawed. The Bankruptcy Law article 70 second paragraph states that *“Where a creditor files liquidation against the debtor with the court, during the time after the court accepts the case and before the court declares the bankruptcy of the debtor, the debtor and equity holders whose equity amount is more than ten percent of the total equity amount may file reorganization petitions with the court.”* From the available information, most of the stakeholders apart from financial creditors like Citigroup wanted reorganisation. So the ruling of the Chinese court has complete legal justification under China’s bankruptcy law.

However, based on the information available, the procedure may be questioned. Based on the Civil Procedure Law of PRC article 266, the due process should have proceeded as follows: (1)The liquidator designated by the foreign court should have applied to the local court having jurisdiction over Taizi Milk for recognition and execution of the liquidation judgment of the foreign court; (2) The local court should have received the application and ruled that the applicable law should be Chinese law because the place of real interest of the debtor is in China;

(3) Based on China's bankruptcy law, before the court declared the bankruptcy of the debtor, other interested parties were entitled to file for reorganisation proceedings; and (4) the court would have accepted the petition for reorganisation.

## 5. Future reforms

With the new 2006 Enterprise Bankruptcy Law covering cross-border insolvency, there is at least a principal legal guidance for cross-border issues in China. Article 5 of China's bankruptcy law in two paragraphs shows its attitude toward cross-border insolvency. For the outbound effect of China's bankruptcy judgment, it adopts a "universality approach" by stating that "*The bankruptcy proceedings initiated in accordance with this law have legal effects on the debtor's assets located outside PRC.*" For the recognition and execution of foreign bankruptcy judgment or orders, it adopts a "conditional territoriality approach" by stating that "*If legally valid foreign bankruptcy judgment or ruling involving assets inside China is applied in a Chinese court for recognition and execution in China, the Chinese court shall grant its recognition and execution after investigating the application on the basis of international treaties China enters or the principle of reciprocity and confirming that the recognition and execution (a) does not contradict the basic principles of the law of the PRC; (b) does not violate China's sovereignty, security, and social and public interest; and (c) does not infringe upon the lawful rights and interests of creditors within the PRC.*" This stipulation, together with other related legal rules on solving the conflicts of laws, seems to constitute a sound legal framework of cross-border insolvency in China.

However, from the limited number of cross-border insolvency cases since the implementation of the Bankruptcy Law, we may conclude that there is only a legal framework of cross-border insolvency in China; we still need more effort to make the cross-border insolvency regime in China more complete and predictable. The following gaps should be the ones to be dealt with first:

- Further specify the jurisdiction of cross-border bankruptcy cases, especially when the place of registration and major business place differs;
- Clarify the process of the recognition and execution of foreign bankruptcy judgments or orders; and
- Specify the co-operation of the Chinese court with foreign courts in asset administration and corporate reorganisation in cross-border insolvency.

## Chapter 11

# COLOMBIA

### 1. General law

The administration of justice in Colombia is both a public function and a manifestation of national sovereignty. For this reason, the Colombian Constitution dictates that only those authorities duly authorised by the Constitution may administer justice. However, the local recognition and execution of judgments rendered by foreign authorities has been accepted as a necessary extension of cross-border commerce, international co-operation, particularly as it relates to the concept of comity, and ultimately as a practical necessity.

The Republic of Colombia accepts an exception to its sovereignty in this context, under which foreign judgments are recognised locally, subject to *exequatur* proceedings. The *exequatur* process allows for judgments rendered abroad to be executed in Colombia, in accordance with articles 605 and 606 of the General Code of Procedure (Law 1564 of 2012) (the ‘GPC’), which provide substantive and procedural requirements to this effect. The *exequatur* is simply a process of judicial validation that renders a foreign judgment valid within the territory of the Republic of Colombia and, crucially, allows for its local execution.

Article 605 of the GPC regulates the effects of foreign decisions (including final judgments and any other decision issued outside of Colombia) when jurisdiction has been found abroad. These decisions shall have the validity granted to them under international treaties executed between Colombia and the country in which

the decisions were issued (i.e. diplomatic reciprocity)<sup>1</sup>. If no such treaty exists, the validity of these decisions shall be assessed with reference to the validity that the country in which they were issued would grant to an analogous decision by a Colombian authority (i.e. legislative reciprocity)<sup>2</sup>.

It follows that, in sum, Colombian courts would give effect to and enforce a judgment obtained in a court outside Colombia without re-trial or re-examination of the merits of the case, provided that there is a treaty or convention relating to such recognition and enforcement or, in the absence of such treaty, that proper evidence is provided to the Supreme Court of Colombia to the effect that the courts of the country that issued the decision would recognise a similar decision made by a Colombian court. It must be noted that the Colombian Supreme Court has also recognized that the evidence required to activate the principle of legislative reciprocity can be contained in 'legal texts or in the jurisprudential practice of the country of origin of the judgment subject matter of the *exequatur*'<sup>3</sup>.

Moreover, article 606 of the GPC sets forth the following requirements for the recognition or enforcement of foreign judgments:

1. That the judgment does not refer to *in rem* rights over assets located in the territory of Colombia at the time when the proceeding began.
2. That the judgment does not run contrary to Colombian public order provisions, except for rules of procedure.
3. That the foreign decision is enforced according to the law of the country of origin and submitted before the Supreme Court in authenticated copy.
4. That the matter of the judgment to which it refers does not lie within the exclusive jurisdiction of Colombian courts.
5. That there are no proceedings or enforced judgments in Colombia concerning the same subject matter.
6. That if the judgment has been rendered in a contentious matter, the requirements of summons to and opportunity of opposition by the defendant have been fulfilled as provided for by the law of the country of origin, which shall be presumed if the foreign judgment is final.

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<sup>1</sup> "Diplomatic reciprocity occurs when Colombia and the country issuing the judicial judgment subject matter of the *exequatur* have signed a public treaty allowing the judgments of Colombian courts to be treated equally in the other country, and as a consideration, allowing the judgments issued in the other country to be binding in Colombia." Execution in Colombia of foreign judgments concerning debts, Cavelier Abogados, available [www.Cavelier.com](http://www.Cavelier.com)

<sup>2</sup> "Legislative reciprocity occurs when juridical effects are recognised to the judgments of Colombian courts by the legislation of the country from which the judgment subject matter of the *exequatur* comes, and the judgments made by their courts have the same binding strength in Colombia." Execution in Colombia of foreign judgments concerning debts, Cavelier Abogados, available [www.Cavelier.com](http://www.Cavelier.com) Supreme Court of Justice, judgment February 2 1994, Ref. File No 4150 Magistrate Hector Naranjo Marín.

<sup>3</sup> Supreme Court of Justice, judgment February 2 1994, Ref. File No 4150 Magistrate Hector Naranjo Marín.

7. Full compliance with the *exequatur* process in accordance with article 607 of the GPC.

These provisions included in international treaties apply preferentially over article 606 of GPC even if the treaty does not include the *exequatur* procedure. Subject to any applicable treaty that attributes powers to other authorities, the Colombian Supreme Court will recognise a foreign judgment providing that if the judgment or award is not in Spanish, an official translation must be filed along with the copy of the original writing and the following formal requirements are satisfied:

- a. The relevant evidence must be requested in the demand brief.
- b. The Colombian Supreme Court will reject the complaint if any requirements of numerals 1 to 4 of Article 606 are missing.
- c. The complaint is served to the party summoned and the Delegate Attorney for the nature of the subject matter in accordance with article 91 during 5 days.
- d. After the service term, the evidence requested is ordered and defined and the parties allegations are heard and a judgment is rendered.
- e. If the Court grants the *exequatur*, and the foreign judgment requires execution, a competent judge shall handle the execution pursuant to the general rules.

Colombia has executed the following International Treaties and Conventions:

1. Montevideo treaty on Commercial International Law 1889, Title X on Bankruptcies, regulates relations with Argentina, Bolivia, Paraguay, Peru and Uruguay.
2. Inter-American Convention on Extraterritorial Validity of Foreign judgments and Arbitral Awards, Montevideo Uruguay May 8 of 1979 (Ratified by Law 16 of 1981).
3. Inter-American Convention on Proof of and Information on Foreign Law, Montevideo Uruguay May 8 of 1979 (Ratified by Law 49 of 1982).
4. Inter-American Convention on execution of preventive measures, Montevideo Uruguay May 8 of 1979 (Ratified by Law 42 of 1986).
5. Inter-American Convention on International Commercial Arbitration, Panama City, January 30 1975 (Ratified by Law 44 of 1986).
6. Inter-American Convention on the Legal Regime of Powers of Attorney to be used abroad, Panama City, January 30 1975 (Ratified by Law 80 of 1986).
7. Inter-American Convention on the taking of evidence abroad, Panama City, January 30 of 1979, Protocol La Paz, Bolivia May 24 of 1984 (Ratified by Law 31 of 1987).
8. Treaty on Letters Rogatory between Colombia and Chile, Bogotá June 17 of 1981 (Ratified by Law 45 of 1987).

9. Inter-American Convention on Letters Rogatory, and Protocol on Letters Rogatory, Montevideo May 8 1979 (Ratified by Law 27 of 1988).
10. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, The New York Convention 1958 (Ratified by Law 39 of 1990).
11. Convention Abolishing the Requirement of Legalisation for Foreign Public Documents October 5 of 1961 (Ratified by Law 455 of 1998).
12. Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, November 15 of 1965 (Ratified by Law 1073 of 2006).
13. Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18 of 1970 (Ratified by Law 1282 of 2009).

## 2. Assisting legislation

### *Co-operation under Law 1116 of 2006*

Law 1116 of 2006, as amended by Law 1429 of 2010, regulates insolvency proceedings in Colombia. The Superintendency of Companies<sup>4</sup> has been attributed judicial powers, as authorised by Article 116 of the Colombian Constitution, to act as an insolvency judge. These powers allow the Superintendency to oversee the insolvency processes of companies, sole proprietorships, branches of foreign companies, and individual merchants<sup>5</sup>. Individual merchants may choose between the Superintendency and a civil court to act as their insolvency judge. Civil courts oversee the insolvency processes of all other debtors, such as natural persons and non-profit organisations.

Insolvency proceedings in Colombia have the purpose of credit protection, recovery of amounts owed by the debtor and the preservation of companies as economic production units and sources of employment. The above-mentioned purposes are accomplished through the following mechanisms:

1. Reorganisation in bankruptcy proceedings.
2. Out of court reorganisation agreements validated by an insolvency judge.
3. Judicial liquidation.

The objective of the reorganisation procedure is the preservation of economically viable companies as going concerns through the acceptance of creditors-debtor agreements, and the normalising of their commercial and credit relationships. To achieve this, the debtors must undergo administrative and operational

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<sup>4</sup> The Superintendency of Companies is a public institution founded in 1931 whose principal mission is the protection of public economic order by ensuring confidence in the legal system, the generation of reliable accounting and financial data and by the supervision and intervention of private companies in risk and/or in a situation of insolvency, corporate fraud or corporate internal conflict.

<sup>5</sup> Law 1116 of 2006 excluded individuals from its application, the insolvency proceedings for individuals are regulated by Law 1564 of 2012 (GPC).

reorganisations as well as a restructuring of their assets and liabilities. The judicial liquidation process seeks to have a prompt and organised liquidation of the debtor's assets.

The Superintendency of Companies also manages the list of insolvency administrators, including receivers, liquidators and valuation experts and appoints and removes insolvency administrators.

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

Title III of Law 1116 of 2006 introduced the UNCITRAL Model Law on Cross-Border Insolvency as articles 85 to 116, without any deviation from the text of the Model Law. Both the Superintendency of Companies and Civil Courts recognise the foreign insolvency proceedings in accordance with these provisions.

In addition, Colombia has adopted in Decree 1749 of 2011, the recommendations of Part Three of UNCITRAL's Legislative Guide relating to the insolvency of groups of companies, including the provisions about international issues. Accordingly, the application for recognition of foreign insolvency proceedings must include the following (Article 100, Law 1116 of 2006):

1. A copy certified by the foreign court of the resolution which commenced the foreign proceeding and whereby the foreign insolvency representative was appointed.
2. A certificate issued by the foreign court which recognises the existence of the foreign proceeding and appointment of the foreign representative; or
3. In the absence of any evidence pursuant to 1 and 2, any other evidence admissible to competent Colombian authorities pertaining to the existence of a foreign proceeding and the appointment of the foreign representative.

Any request for recognition shall be filed enclosing documentation that duly certifies the completeness of information of all open foreign proceedings pertaining to the debtor, known to the foreign representative.

A competent Colombian authority may demand that every supporting document submitted for a petition of recognition is officially translated into Spanish and is duly registered before the corresponding Colombian Consulate.

## **3. Insolvency practice**

Upon recognition of a foreign proceeding, the foreign representative will be empowered to intervene in any insolvency proceeding concerning the debtor, in accordance with the conditions prescribed by Colombian legislation. Additionally the foreign representative will be empowered to request the commencement of reorganisation and liquidation proceedings in Colombia.

Foreign creditors have the same rights afforded to those local creditors in Colombia. Foreign creditors must participate in any insolvency proceedings being carried out in Colombia under the same rules applicable to domestic creditors.

Once the reorganisation proceeding begins, the insolvency administrator must inform all creditors that the process has started.

In liquidation proceedings the creditors must submit their claims to the liquidator. To participate in insolvency proceedings, foreign creditors can act directly or appoint Colombian counsel of their choice.

## **4. Examples**

There are no practical examples on recognition in Colombia. Since Title III of Law 1116 of 2006 came into force, there have been no court decisions concerning cross-border insolvencies.

## Chapter 12

# CYPRUS

### **1. General law**

The Cypriot insolvency regime, generally speaking, accords greater emphasis to the protection of creditors' rights rather than to the preservation of businesses as going concerns. There are no equivalent provisions to Chapter 11 proceedings applicable in Cyprus.

Unlike most commonwealth countries, Cyprus does not give effect to mutual assistance arrangements such as those set out in sections 426(4) and 426(5) of the English Insolvency Act 1986.

On 10 December 1993 Cyprus ratified the European Convention on the Recognition of Certain Aspects of Bankruptcy Law 36 (III) of 1993 ("Convention"). Although Cyprus has ratified the Convention, it requires at least three ratifications in order to come into force, and it is unlikely that the Convention will be implemented as its objectives have been replaced in the EU by the European Insolvency Regulation.

## 2. Assisting legislation

The primary legislation governing bankruptcy and insolvency proceedings in Cyprus is the Bankruptcy Law, Cap 5 (“Bankruptcy Law”), Part V of the Companies Law and the Insolvency Regulation<sup>1</sup>. The type of insolvency proceedings a Cypriot company could be subject to in Cyprus are winding up by (a) the court, (b) voluntarily by creditors or (c) subject to the supervision of the court. A company may also be wound up voluntarily in a situation where it is solvent by a decision made by its shareholders.

Cypriot insolvency orders are deemed to have universal effect. The provisions of the Bankruptcy Law provide that all property owned by the bankrupt, wherever situate vests in his trustee in bankruptcy. In the case of a company, a liquidator has power to take custody or bring under his control all the property of the company, wherever situate and therefore a winding up order has indirect universal reach. Where the winding up is by Court, the Court may on application of the liquidator by order direct that all or any part of the company’s property including property held by trustees on its behalf, vest in the liquidator by his official name and the liquidator may, after giving any indemnity that the Court may direct, bring or defend in his official name any action or other legal proceedings which relate to that property or which is necessary for the purpose of recovering the property and winding up the company.

The Insolvency Regulation (the “European Insolvency Regulation” or “EIR”) came into effect on 31 May 2002 and is directly applicable in Cyprus<sup>2</sup>. The EIR seeks to harmonise the framework regarding insolvency proceedings in the European Union (EU) for the purpose of preventing “forum shopping” and may affect cross-border insolvencies.

The EIR applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and appointment of a liquidator which includes a natural or legal person but excludes insolvency proceedings relating to insurance undertakings, credit institutions, and investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings.

Where the EIR applies, it will determine the EU member state in which insolvency proceedings can be commenced and the law that will govern those insolvency proceedings.

There are three types of proceedings and they are:

- (i) “Main Proceedings”- the courts of the member state in which the debtor has its centre of main interests (COMI) have jurisdiction to open the insolvency proceedings. In the case of a company or legal person and in the absence of proof to the contrary, the COMI is presumed to be the place of its registered office.

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<sup>1</sup> Council Regulation (EC) No 1346/2000 of May 29, 2000 on Insolvency Proceedings.

<sup>2</sup> Cyprus became a member of the European Union on 1 May 2004.

- (ii) “Secondary Proceedings”- secondary or ancillary proceedings may be opened against the debtor in a member state where the debtor has an establishment on the basis that such proceedings are limited to the assets situated in the jurisdiction and the debtors insolvency shall not be re-examined in that jurisdiction.
- (iii) “Territorial proceedings”- insolvency proceedings may be commenced prior to the opening of the main proceedings where main proceedings cannot be opened due to the laws of the member state of the COMI or where a creditor in the place of the establishment requests that territorial proceedings be opened.

The law applicable to the insolvency proceedings is, subject to some exceptions, the law of the member state in which proceedings are opened and the EIR contains provisions regulating and co-ordinating parallel proceedings in different member states.

In particular the EIR imposes a duty on the liquidator of the main and secondary proceedings to co-operate with each other and to communicate information which may be relevant to the other proceedings especially the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings.

The UNCITRAL Model Law on Cross-Border Insolvency has not been adopted by Cyprus.

### **3. Insolvency practice**

The Court system in Cyprus favours and is likely to give effect to a request for cross-border judicial co-operation and assistance. However, despite the financial crisis and repercussions of the same in Cyprus leading to an increase in insolvencies, such matters are yet to be tested before Cyprus courts and therefore there remains a degree of uncertainty in the procedural detail and outcome of such proceedings.

### **4. Examples**

There are no known examples of recognition proceedings involving other jurisdictions.



## Chapter 13

# CZECH REPUBLIC

### 1. General law

There are no treaties to which the Czech Republic is a party that deal with bankruptcy proceedings with a foreign element.

Nevertheless, since the Czech Republic is a member of the European Union, the Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings (European Insolvency Regulation or EIR) is directly applicable. The new Czech Insolvency Act No. 182/2006 Coll. only refers to the EIR and does not provide any guidelines concerning cross-border insolvency outside the EU.

Foreign insolvency orders outside the EU could be recognised in the Czech Republic only based on general rules of private international law (procedural international law). However, such orders would be subject to the following conditions and restrictions if they are to apply:

- insolvency proceedings in the country where the insolvency order was adjudicated must be regarded as having a universal effect, i.e. the country's legislation includes a debtor's property situated abroad in the bankruptcy estate available to creditors;
- the country where the insolvency order was adjudicated observes the principle of reciprocity. There must be evidence that reciprocity is actively maintained and practiced by the courts: it is not sufficient for reciprocity to be declared in legal Acts but not enacted;

- the debtor's property is not the subject of current Czech insolvency proceedings;
- a foreign insolvency order may only apply to the movable property of a foreign debtor in the Czech Republic. This means, based on published expert's opinions that a foreign insolvency order does not apply to the foreign debtor's investment in: -
  - a Czech limited liability company;
  - its shares in a Czech joint stock company;
  - any other property in Czech companies;
  - the property of a Czech subsidiary;
- property may only be surrendered upon a request of a foreign court or another appropriate authority;
- property may only be surrendered to a foreign court (i.e. not to the administrator of the bankrupt's estate); and
- the rights to exclude movable property from the bankrupt's estate and the rights of secured creditors, acquired prior to the request of the foreign court or another authority, have been satisfied.

## **2. Assisting legislation**

In the Czech Republic, there is no express assisting legislation relevant to bankruptcy proceedings with a foreign element. Bankruptcy proceedings with a general foreign element are not regulated at all, only bankruptcy proceedings with an EU element are mentioned in the Insolvency Act referring to the EIR.

Czech insolvency proceedings are regarded as having universal effect. They apply to any of the debtor's property in the Czech Republic, as well as to the movable property abroad.

## **3. Insolvency practice**

There are no known cases involving the recognition of a foreign insolvency order in the Czech Republic.

## **4. Future reforms**

The Czech law is changing. A completely new Civil Code, Commercial Code and Private International Act were recently adopted and shall be effective from 2014. A new Penal Code and Insolvency Act (No. 182/2006 Coll.) are already in force. However, the original intention to govern cross-border insolvency proceedings by this Act was not fulfilled and the Act remains silent. Even the new Private International Act does not deal with insolvency explicitly.

Proceedings involving the Czech Republic and an EU Member State will comply with the provisions of the EIR and the EU Directive on the reorganisation and winding up of credit institutions. The Czech Republic will then apply specific rules of jurisdiction, applicable law and recognition of judgments, enhancing the co-ordination of measures to be taken regarding insolvent debtor's property.

Cross-border insolvency proceedings involving the Czech Republic are quite unpredictable and depend on case law of the Czech Supreme Court.

## **5. Examples**

There are no examples concerning cross-boarder insolvency outside the EU. Nevertheless it may be interesting to mention cases relating to the application of the EIR. The High Court of Prague dealt with a case where a debtor did not disclose the claim of a foreign creditor intentionally in his bankruptcy proceedings. The creditor filed a claim in the bankruptcy proceeding, but it was initially rejected by the court as late. However, the High Court reversed the decision and accepted the claim based on the principle of just bankruptcy proceedings and equality of foreign creditors.

A similar case was the subject of a decision of the High Court of Olomouc, this time the court did not know about the foreign creditor because of general non co-operation of the debtor. The late claim of the foreign creditor was finally accepted based on the principle of equality of all creditors. The reasoning was based on the argument that the Czech creditors had easy access to the insolvency register, while the foreign creditors find it much more difficult and this complication should be taken into consideration in order to secure equal treatment of all creditors.



## Chapter 14

# DENMARK

### 1. General law

According to the Danish Bankruptcy Act (Konkursloven) consolidated No 217 of 15 March 2011, section 6, the Minister of Justice is entitled to issue guidelines under which foreign insolvency orders issued by foreign courts and authorities are recognisable and enforceable in Denmark provided they are not in breach of public policy. Apart from the Nordic Bankruptcy Convention of 7 November 1933, which includes the five Nordic countries (Denmark, Sweden, Norway, Finland and Iceland), the Minister of Justice has not used his authority to issue such guidelines. As Denmark does not participate in the judicial co-operation between the EU Member States, the EU Insolvency Regulation is not binding on and does not apply in Denmark.

Accordingly, a foreign insolvency order will, as a rule, not be recognised in Denmark and does not prevent either proceedings against the debtor's assets in Denmark or an independent Danish insolvency being declared. The same applies to other foreign remedies, such as suspensions of payments, schemes of compositions and debt rescheduling. A foreign insolvency estate will only be entitled to take possession of the debtor's assets if insolvency could not have been adjudged in Denmark and a judgment to enable this to happen must first be obtained from a Danish civil court (not a probate court). Representatives from countries other than the Nordic countries are not authorised to act with respect to assets located in Denmark. A foreign representative must either obtain a power of attorney from the debtor or try to collect the assets in competition with other creditors.

The Danish Bankruptcy Act (DBA) does not prevent a foreign creditor from filing a petition in bankruptcy against his Danish debtor. The DBA, section 3, which also applies to international relationships, determines the competent probate court depending on the area of jurisdiction where the debtor performs his “business activity” or his place of domicile. If the debtor does not have an established place of residence, the court having jurisdiction is the court in the place where the debtor sojourns or the last place where he is known to have resided or sojourned. If the main business activity of a foreign company is outside Denmark, it is not possible to file a petition in bankruptcy against the company in Denmark. If a Danish subsidiary company to a foreign parent company performs its business activity in Denmark, it is possible for a foreign creditor to file a petition in bankruptcy against the Danish subsidiary. It has not yet been resolved whether this also applies to a registered “branch” of a foreign company but is the subject of debate in legal literature.

If the Danish courts do not have jurisdiction according to DBA, section 3, the debtor cannot be declared insolvent in Denmark, even if the debtor has assets or property in Denmark.

Whether legal proceedings to recover assets belonging to the debtor in Denmark can be initiated depends on whether the Danish courts have jurisdiction. For EU Member States, this issue is governed by the EC Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (EC Regulation); for the Nordic countries it is governed by the Nordic Judgment Convention 1934 and for other countries by the Danish Act on Administration of Justice. As a general rule, Danish courts have jurisdiction if:

- the debtor is domiciled in Denmark;
- the debtor resides in Denmark without any established domicile;
- the debtor has left Denmark but has not yet established a domicile abroad; and
- the debtor’s principal place of business is in Denmark.

In addition, legal proceedings other than insolvency may be instituted if the debtor’s assets or other property are located in Denmark.

A foreign creditor commencing legal proceedings in Denmark may have to provide security for costs made at the debtor’s (defendant’s) request. This does not apply to creditors domiciled in the EU or in countries with which Denmark on the basis of mutuality has entered into an agreement exempting parties from such an obligation.

Legal proceedings to seize the debtor’s assets initiated in Denmark are governed by Danish private international law, which is based on the provisions of the EC Regulation or, for non-EC Member States, Danish Act No 122 of 15 April 1964.

A judgment, other than an insolvency judgment, ordered by a foreign court may be recognised in Denmark in accordance with the EC Regulation or the Nordic Judgment Convention. Such judgments are directly enforceable in the bailiff's courts unless in breach of public policy. Other foreign court decisions are not recognised in Denmark but may, and often will, influence the Danish court's view upon a case.

## **2. Assisting legislation**

The EU Insolvency Regulation is not binding on and does not apply in Denmark. The only existing legislation is the Nordic Bankruptcy Convention of 7 November 1933 (Nordic Bankruptcy convention). This convention contains provisions with regard to bankruptcies declared in the Nordic countries. The principal rule is that a bankruptcy declared in Denmark also includes the debtor's property in the other Nordic countries and vice versa. In other words, the Nordic Bankruptcy Convention provides for full recognition of bankruptcy decrees from all the Nordic countries without the need for an exequatur. The law applicable is the law of the country in which the insolvency proceedings were initiated, except for issues about the legal effect of the insolvency on the debtor's assets in other contracting states regarding securities, execution, etc.

The Nordic Bankruptcy Convention has given rise to few disputes. Case law is almost non-existent.

## **3. Insolvency practice**

An insolvent estate comprises all the debtor's property, including assets situated in foreign countries. The debtor is obliged to co-operate with the trustee by providing information to assist the recovery of assets, including foreign assets.

If an insolvent estate includes foreign assets, it is the trustee's duty to secure and recover these assets. In order to be able to do this, Danish authorities and courts provide the trustee with the necessary official certificates and documents confirming that the trustee has authority over the assets situated abroad.

A foreign creditor having a claim in a Danish estate will only have to notify his claim to the trustee who will then determine whether the claim can be acknowledged. Claims from foreign creditors rank equally with other claims in the insolvent estate. If a foreign creditor has obtained a dividend through the debtor's insolvency in another jurisdiction, this dividend is regarded as a partial payment of the claim and only the rest of the claim can be acknowledged by the trustee.

A foreign estate has legal capacity and legal personality in Denmark, meaning that the estate may be a party to litigation but a foreign insolvency order, unless covered by the Nordic Bankruptcy Convention, does not affect the debtor's property in Denmark and a foreign trustee has no power to deal with the debtor's assets. Because of this, the debtor's property remains at his disposal.

Under insolvency practice in Denmark, insolvency proceeding rules will always be Danish law (DBA). Foreign law applies on contractual relationships between the debtor and the foreign creditor if Danish private international law dictates this or if the parties have agreed upon this. An exception to this in Danish legislation are the rules protecting creditors, which will apply if the assets were situated in Denmark at the time of the bankruptcy decree.

Proceedings in Denmark concerning voidable transactions are always to be resolved by using Danish law on voidable transactions (DBA). The EC Regulation does not apply in these cases.

## **4. Examples**

There is little helpful case law. Most of the cases appear to be on retention of title matters.

## Chapter 15

# ENGLAND AND WALES

### 1. General law

#### *The general approach of the English courts to cross-border insolvencies*

English courts have historically taken an expansive, “universalist”, view in relation to cross-border insolvency issues, treating English insolvency proceedings as having worldwide effect. This approach is reflected in both case law and the main source of English insolvency legislation, the Insolvency Act 1986 (the “Insolvency Act” or “IA”), the key procedures in which are not limited to companies incorporated in England and Wales.

This approach is, however, tempered by both realism (courts have, where appropriate, accepted that English insolvency proceedings should be ancillary to main proceedings elsewhere) and by the statutory restrictions imposed by the EC Regulation on Insolvency Proceedings (discussed in Section 2 below) and the Insolvency Act (which limits the English Court’s jurisdiction in relation to companies registered in Scotland and Northern Ireland).

This universalist approach is reflected in the English court’s attitude to recognising and assisting foreign insolvency proceedings, as English courts have a long track record of using their inherent discretion to assist foreign officeholders, in appropriate cases. This trend has been reinforced by the introduction of the legislation described in Section 2 below.

### ***The approach of the English courts and legislation to assuming jurisdiction***

All but one of the insolvency procedures contained in the Insolvency Act may be used, subject to certain limitations, by foreign companies. The only exception is the secured lender's remedy of appointing an administrative receiver, which may only be exercised in respect of a company registered under the Companies Act in England and Wales or Scotland.<sup>1</sup> The availability of the remaining insolvency procedures to foreign companies and individuals does, however, vary between those procedures.

**Administration:** There are three routes under which a foreign company can be put into administration:-

- If that company has its centre of main interests ("COMI") in England and Wales, the English courts may make an administration order in respect of it<sup>2</sup>. This was done in the unreported case of *Re Enron Directo SL* and followed in subsequent cases, including *Daisytek*, *MG Rover*, *Collins & Aikman* and *Re Brac Rent-A-Car International Inc*<sup>3</sup>, where an administration order was made in relation to a Delaware incorporated company which had its COMI in England.
- If a foreign company's COMI is not in England, English courts may still make an administration order in respect of that company if it is incorporated in an EEA State which is not bound by the EC Regulation on Insolvency Proceedings 1346/2000 (the "EC Insolvency Regulation")<sup>4</sup>. This effectively extends the scope of administration to companies incorporated in Denmark, Iceland, Liechtenstein and Norway.
- Finally, English courts may make an administration order in respect of a foreign company whose COMI is not in England, if requested to do so by a court in a Section 426 IA jurisdiction in which that foreign company is domiciled (see Section 2.3 below). Examples of this are the *REO (Powerstation) Limited* case described in Section 4 below and *Re Dallhold Estates (UK) Pty Ltd*<sup>5</sup>, where an Australian company owning land in England was put into administration.

**Company Voluntary Arrangements:** The same definition of "Company" is used for Company Voluntary Arrangements<sup>6</sup> as for Administration, with the result that any foreign company which can enter administration can also use the Company Voluntary Arrangement procedure contained in the Insolvency Act.

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<sup>1</sup> Section 28(1) IA.

<sup>2</sup> Para 111(1A) of Schedule B1 IA and Article 3 of the EC Insolvency Regulation.

<sup>3</sup> [2003] 1 W.L.R 1421.

<sup>4</sup> Para 111(1A)(b) of Schedule B1 IA and Article 3 of the EC Insolvency Regulation.

<sup>5</sup> [1992] BCLC 621 394.

<sup>6</sup> Section 1(4) IA.

*Liquidation:* Section 221 IA gives English courts the jurisdiction to wind up any foreign company as an “unregistered company”. There are, however, three key limitations on the exercise of this jurisdiction, as:-

- a court will generally not make an order if it would be more appropriate for the winding up to occur in another jurisdiction (in particular the company’s place of incorporation);
- a court will only exercise its discretion if the company in question has “*sufficient connection*” with England and there is a reasonable possibility that its creditors would benefit from the winding up<sup>7</sup>. A company will normally satisfy this test if it has assets in, or is carrying on business in, England; and
- if a company has its COMI in another EC state (other than Denmark), and does not have an “*establishment*” in the UK, English courts cannot open liquidation proceedings, even if that company would otherwise satisfy the “sufficient connection” test.

*Bankruptcy:* Bankruptcy is available to any individual who is either domiciled in England and Wales or who is personally present in England and Wales on the day when the bankruptcy petition is presented. It is also available if the relevant individual has at any time within the last 3 years either (i) been ordinarily resident, or (ii) had a place of residence, or (iii) carried on business in England and Wales<sup>8</sup>. This very wide test for assuming jurisdiction has, however, been limited to some extent in relation to nationals of EC member states other than Denmark, as such individuals can only seek the making of a bankruptcy order if their COMI is in England and Wales<sup>9</sup>.

This has led in recent years to a degree of “bankruptcy tourism”, with foreign individuals claiming residence in England and Wales in order to take advantage of a bankruptcy procedure which they consider less onerous than the equivalent in their own jurisdiction.

*Individual Voluntary Arrangements:* The test of eligibility for an Individual Voluntary Arrangement is effectively the same as for bankruptcy, as the IVA may only proceed if the nominee is satisfied that the debtor is “able to petition for his own bankruptcy”.<sup>10</sup>

*Schemes of Arrangement:* While not, strictly speaking, an insolvency process, English courts have adopted a similar universalist approach in relation to permitting foreign companies to propose Schemes of Arrangement under the Companies Act 2006. A Scheme can be sanctioned in respect of “any company liable to be wound up under the Insolvency Act 1986”<sup>11</sup>, resulting in a similar “*sufficient connection*” test being applied to that for taking jurisdiction in a liquidation<sup>12</sup>.

<sup>7</sup> See, for example, *International Westminster Bank PLC v. Okeanos Maritime Corp* [1987] BCLC 450.

<sup>8</sup> Section 265(1) IA.

<sup>9</sup> Article 3(1) of the EC Insolvency Regulation.

<sup>10</sup> Section 256A(3) IA.

<sup>11</sup> Section 895(2) Companies Act 2006.

<sup>12</sup> As confirmed in *Re Drax Holdings Ltd* [2003] EWHC 2743.

In a number of high profile cases, English courts have accepted that the fact that a foreign company wishes to compromise agreements governed by English law may be sufficient to satisfy the “sufficient connection” test, permitting a number of Spanish, German and Luxembourg companies to use a Scheme, where this was considered a better implementation solution than the equivalent procedure available to that foreign company under the laws of its own jurisdiction<sup>13</sup>.

### ***The English court’s general approach to providing assistance to foreign officeholders***

Historically, English courts have been willing to use the common law doctrines of comity and universality to provide assistance in respect of recognised foreign insolvency proceedings. This approach was exemplified in *Cambridge Gas Transportation Corpn v. Official Committee of Unsecured Creditors of Navigator Holdings plc and ors*<sup>14</sup>, in which the Privy Council supported the “underlying principle of universality”, namely that there should, subject to public policy issues, be a single insolvency process, whereby the English court would recognise and assist a foreign insolvency representative. Lord Hoffmann explained in this judgment that:

*“At common law...it is doubtful whether assistance could take the form of applying the provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency... The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel proceedings and to give them the remedies to which they would have been entitled, if the equivalent proceedings had taken place in the domestic forum”.*

The exact extent of this common law power to assist is, at the time of writing, still the subject of vigorous legal debate, particularly in relation to the question of whether it can be used to enforce judgments made by foreign insolvency courts against English companies and individuals.<sup>15</sup>

## **2. Assisting legislation**

### ***Introduction***

This common law approach to recognising foreign insolvency proceedings and giving assistance to foreign office holders, has been reinforced by a statutory overlay which provides three additional bases for the English court to provide judicial co-operation, namely:

- the EC Insolvency Regulation, which provides a framework for the co-ordination of insolvency proceedings where a debtor’s COMI is in an EC member state other than Denmark;

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<sup>13</sup> See, for example, *Primacom Holdings GmbH v Credit Agricole* [2012] EWHC 164 (Ch).

<sup>14</sup> [2007] 1 AC 508 (sometimes referred to as the Navigator case).

<sup>15</sup> See, for example, *Rubin v Eurofinance SA* Court of Appeal (Civil Division), [2010] EWCA Civ 895.

- Section 426 of the Insolvency Act, which provides for international judicial co-operation between courts in the United Kingdom and courts in a designated list of foreign countries or territories, which comprise mainly Commonwealth countries; and
- The UNCITRAL Model Law on Cross-Border Insolvency (the “Model Law”), which was designed to facilitate recognition of insolvency officeholders and to encourage co-operation between courts having insolvency jurisdiction.

The key distinction between these three pieces of legislation is that Section 426 IA and the Model Law each simply provide additional methods for providing assistance to foreign officeholders. The EC Insolvency Regulation goes beyond this, determining the correct jurisdiction, and governing law, for the opening of insolvency proceedings (thus assisting the recognition of English insolvency procedures within the EC where the debtor has an English COMI and, conversely, limiting the English court’s jurisdiction to initiate such procedures where a debtor has its COMI in another EC member state).

While the EC Insolvency Regulation and the Model Law do not generally apply to banks and insurance companies, there are two specific pieces of English legislation (the Insurers (Reorganisation and Winding Up) Regulations 2004 and the Credit Institutions (Reorganisation and Winding Up) Regulations 2004) which give effect in England to EC Directives providing a framework for the co-ordination of insolvency proceedings relating to such entities across the EC.

### ***EC Insolvency Regulation***

The EC Insolvency Regulation does not attempt to introduce a single European insolvency law. Its objective is instead to provide a framework for the co-ordination of insolvency procedures relating to insolvent debtors having either their COMI or an “establishment” in an EC member state, thus reducing the need for multiple insolvency proceedings. It does this by dividing insolvency proceedings into “*main proceedings*” and “*secondary proceedings*”, stating that:

- (i) main proceedings are those opened in the EC state where the debtor has its COMI<sup>16</sup>;
- (ii) secondary proceedings may be opened in any EC member state where the debtor has an “*establishment*” (essentially a place of business test), but will only affect assets of the debtor situated in that member state; and
- (iii) the law of the main proceedings will be the governing law for all matters concerning the insolvency procedure, including its commencement, conduct, closure and the priority of creditor claims<sup>17</sup>. There are, however, limited exceptions to this general rule, protecting (inter alia) security interests and other rights *in rem*, set-off rights, rights under employment contracts and rights under retention of title provisions.

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<sup>16</sup> Article 3(1) of the EC Insolvency Regulation.

<sup>17</sup> Article 4(1) of the EC Insolvency Regulation.

“Centre of main interests” is not defined in the EC Insolvency Regulation but its preamble states that the COMI should correspond to *“the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.”* A debtor may only have one COMI. For a company, there is a rebuttable presumption that its COMI is where its registered office is located<sup>18</sup>.

### **Section 426 IA**

Section 426 authorises judicial co-operation between courts in the UK and courts in certain foreign countries or territories.

Sections 426(1) to (3) provide that any order made in insolvency proceedings in any part of the UK will be enforceable in any other part of the UK as if made there. There are, however, limitations with regard to the making of court orders against property in different parts of the UK, so that, for example, an English administrator cannot be given greater powers to act in relation to property located in Scotland than a Scottish administrator would have had.

Section 426(4) goes on to provide that courts in the United Kingdom *“shall assist the courts having the corresponding jurisdiction [in relation to insolvency law] in any other part of the United Kingdom or any relevant country or territory.”* A “relevant country or territory” is defined as any of the Channel Islands or the Isle of Man (Section 426(11)) or any country or territory designated by the Secretary of State.<sup>19</sup>

Under Section 426(5), English courts can apply any combination of English insolvency law and the insolvency law of the requesting state when responding to a request for assistance. The discretion to apply English law gives the English court the power to make orders which could not have been made under the law of the requesting court.

It was, however, made clear by the Court of Appeal in *Hughes v Hannover Ruckversicherungs AG*<sup>20</sup> that the court would not be bound to provide the requested assistance if doing so was against public policy or would be contrary to justice.

### **The Model Law**

The Model Law does not contain any substantive insolvency law. It was instead designed to provide a harmonised approach to cross-border insolvency and to facilitate co-operation between the insolvency courts of any state which enacts it. The Model Law also provides for the recognition of foreign insolvency officials, giving them direct access to the courts of any enacting state.

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<sup>18</sup> Article 3(1) of the EC Insolvency Regulation.

<sup>19</sup> The countries and territories which are currently designated are Anguilla, Australia, The Bahamas, Bermuda, Botswana, Brunei, Canada, The Cayman Islands, The Falkland Islands, Gibraltar, Hong Kong, The Republic of Ireland, Malaysia, Montserrat, New Zealand, St Helena, South Africa, Turks and Caicos Islands, Tuvalu and The British Virgin Islands.

<sup>20</sup> [1997] B.C.C. 921.

The Model Law has been incorporated into English law by the Cross-Border Insolvency Regulations 2006 (“CBIR”), which can be used by foreign insolvency officials to apply to English courts for recognition and assistance. There is, however, one key limitation to the use of the CBIR, as it can only be used where either the EC Insolvency Regulation does not apply or, if it does, to the extent that there is no conflict with the EC Insolvency Regulation.

### **3. Insolvency practice**

The EC Insolvency Regulation has been used to:

- remove the need for multiple insolvency processes where a company has a business or assets in a number of EC jurisdictions, and to make it clear which insolvency law will apply to those proceedings; and
- make it easier for a debtor to use insolvency procedures in other EC member states, where these potentially offer a better outcome for its stakeholders. Moving a debtor’s COMI to another jurisdiction allows main proceedings, which will be recognised across the EC, to be opened in that jurisdiction. The question of where a debtor’s COMI is located is, however, very fact specific, and can give rise to legal debate, as illustrated by the *Eurofood* and *Wind Hellas* cases described in Section 4 below.

Section 426 IA has been used to:

- make an administration order against a foreign company where this would not otherwise be possible (*REO (Powerstation) Limited* and *Re Dallhold Estates (UK) Pty Ltd*);
- enforce a monetary order made in a foreign insolvency proceeding (*Re New Cap Reinsurance Corporation Ltd (in liquidation)*<sup>21</sup>);
- allow foreign officeholders to conduct investigations, and require the disclosure of information, using powers contained in the Insolvency Act where no equivalent powers were available to them in the jurisdiction in which they were appointed (*Re Trading Partners Ltd*<sup>22</sup>);
- make orders seeking compensation or damages against officers of a foreign company where there were no equivalent local law provisions available to the relevant officeholder (as occurred in the *BCCI* case described in Section 4 below); and
- order the transfer of assets collected by the English liquidators in an ancillary liquidation so that they could be distributed by the liquidators in the main winding-up proceeding (*Re HIH Casualty and General Insurance Ltd*<sup>23</sup>).

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<sup>21</sup> [2011] EWCA Civ 971.

<sup>22</sup> [2002] B.P.I.R 606.

<sup>23</sup> [2008] 1 W.L.R. 852.

The CBIR have, to date, been used in a similar manner to S 426 IA, for example to:

- allow foreign officeholders to require the disclosure of information, using powers contained in the Insolvency Act where no equivalent powers were available to them in the jurisdiction in which they were appointed (as occurred in the *Chesterfield United* case described in Section 4 below); and
- order the transfer of assets collected by English liquidators in an English ancillary liquidation to the liquidators in the main winding-up proceeding for distribution in those proceedings (as occurred in the *Swissair* case described in Section 4 below).

## 4. Examples

### Assistance using Section 426 IA

#### ***Re REO (Powerstation) Limited [2011] JRC 232A***

In this case, the applicants sought a Letter of Request on the basis of Section 426 IA from the Royal Court in Jersey to the English High Court, requesting that administration proceedings be opened in respect of four insolvent Jersey companies. The companies concerned were the ultimate owners of land on which Battersea power station is located

The Jersey court, having regard to principles of comity and the interests of the company's creditors, made the request, and an administration order was subsequently made by the English court. This case followed *Re Dallhold Estates (UK) Pty Limited*, where an Australian company went into administration, following the same Section 426 route.

#### ***Re Bank of Credit and Commerce International SA (In Liquidation) (No.9) [1994] 1 W.L.R 708***

In this case, the English court made orders under Section 426, pursuant to a request made by the Grand Court in the Cayman Islands, against officers of the company under Section 212 (*misfeasance*), Section 213 (*fraudulent trading*), Section 214 (*wrongful trading*) and Section 238 (*transactions at an undervalue*) IA, as there were no equivalent provisions under Cayman Islands law.

The order was made despite objections that the application of English insolvency law to a foreign company exposed its directors to liabilities for actions which were lawful under the law of the country in which the company was incorporated.

### Assistance using the CBIR

#### ***Re Swissair Schweizerische Luftverkehr-Aktiengesellschaft [2009] EWHC 2009 (Ch)***

This case involved a request by the Swiss liquidator under the CBIR for the proceeds of an ancillary English liquidation (less costs and English preferential claims) to be remitted to the Swiss liquidator for distribution in accordance with Swiss insolvency law. Richards J ordered the remittal, on the basis that the court

had inherent jurisdiction to do so both on the basis of Article 21.2 of the CBIR and under the common law. Section 426 IA, which would also have allowed remittal, was not relevant in this case as Switzerland is not a designated territory for the purposes of that section.

***Re Chesterfield United Inc [2012] EWHC 244 (Ch)***

In this case joint liquidators appointed over two companies incorporated in the British Virgin Islands applied to the English court for an order under Section 236 IA (*Inquiry into the company's dealings*) requiring a bank to disclose documents relating to transactions entered into by those companies. The court made the requested order, concluding that Article 21(g) of the CBIR (which permits the court to grant any additional relief available under English law “*where necessary to protect the assets of the debtor or the interests of the creditors*”) allowed the liquidators to apply for an order under Section 236 IA for the production of documents and records relating to the companies over which they had been appointed.

**Assistance using the Common Law**

***Cambridge Gas Transportation Corp v. Official Committee of Unsecured Creditors of Navigator Holdings plc and ors [2007] 1 AC 508***

The US bankruptcy court approved a Chapter 11 plan requiring shares in an Isle of Man company to be vested in certain creditors. The New York Court sent a letter of request to the Isle of Man court seeking assistance to give effect to the plan. Applying the rationale that the domestic court could only grant such assistance as would have been available in a domestic insolvency, the Privy Council somewhat controversially concluded that the requested assistance should be provided, as a company and its creditors could, under Isle of Man law, enter into a compromise or arrangement achieving a similar result to the Chapter 11 plan.

**Use of the EC Regulation**

***Re Eurofood IFSC Ltd [2004] BCC 383***

This case highlighted some of the difficulties in determining a debtor's COMI. The case involved an Irish subsidiary of Parmalat S.p.A. The subsidiary's registered office was in Ireland, and its day to day administration took place in Ireland. Its board comprised both Irish and Italian directors and it held bank accounts both inside and outside Ireland. Creditors contracted with the subsidiary as an Irish company.

The Irish High Court appointed a provisional liquidator on the basis that the subsidiary's COMI was situated in Ireland, a conclusion based principally on the subsidiary having been set up to take advantage of the Irish tax and regulatory regime and the fact that all board meetings had taken place in Ireland. However, the Italian court subsequently determined that the subsidiary shared its parent's Italian COMI, as (a) it was used as a financing conduit for the parent and (b) the court was satisfied that it was controlled from Italy.

On referral, the European Court of Justice ruled that, where a debtor is a subsidiary with a registered office in a different EC member state to that of its parent, the presumption that its COMI was where its registered office is situated can be rebutted *“only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating [its COMI] at the registered office is deemed to reflect”*.

In the case of group companies, it is not enough to rebut the presumption that the debtor’s economic choices are, or can be, controlled by a parent company in another EC member state.

### ***Re Hellas Telecommunications (Luxembourg) II SCA [2010] B.C.C. 295***

This case concerned an application to the English court for an administration order in respect of a Luxembourg entity that was a combination of a joint stock company and a limited partnership registered in Luxembourg. The English court needed to consider, when hearing this application, whether this entity had transferred its COMI to England, thus giving the English court jurisdiction under the EC Insolvency Regulation to open main insolvency proceedings.

As the entity had its registered office in Luxembourg, there was a rebuttable presumption under the EC Insolvency Regulation that its COMI was in Luxembourg. Lewison J was, however, satisfied in this case that this presumption had been rebutted, and that the entity’s COMI was now in England, as, amongst other factors:-

- its head office and principal operating address had been moved to London;
- its creditors had been notified of this change in address and a press release had been issued that its operations were shifting to England;
- the entity had opened a bank account in London and most payments were made into and from that account; and
- restructuring negotiations between the company and its creditors had taken place in London.

This case is an example of a company moving its COMI to England in order to take advantage of English insolvency procedures. The judgment both illustrates the steps that may have to be taken in order to move COMI (with an increasing emphasis being placed on where a company’s head office is located) and highlights the importance of a company’s creditors being aware of the factors being relied on to support a COMI shift argument.

## Chapter 16

# FRANCE

### 1. General law

Under private international law and in the absence of an international treaty, competing insolvency proceedings can be opened in several states ignoring other proceedings. Even if the Cassation Court has upheld the principle of the universality of proceedings opened in France, this universality generally stops at the first border in the absence of the *exequatur* procedure. In order to be effective in France, all foreign decisions must compulsorily undergo an *exequatur* procedure.

It is appropriate to distinguish whether the decisions were rendered by a Member State of the European Union or by a third party.

Concerning decisions rendered by a Member State of the European Union, there is a certain flexibility as several international agreements, most often labelled “judicial co-operation”, exist with other EU Member countries, which set the conditions in which a foreign judgment can acquire *exequatur* status. It was within this framework that an international convention was concluded (The Brussels Convention of 27 September 1968) between Member States of the European Union, considerably simplifying the conditions of granting *exequatur* except for or in the case of uncontested claims, Regulation 805/2004 institutes a European enforcement title (writ of execution), that is to say it abolishes the *exequatur* (with the exception of Denmark to which this procedure does not apply).

Failing a bilateral agreement on judicial co-operation between France and another State, the *exequatur* system of a foreign judgment is the system that applies in France, confirmed by the French Court of Cassation, lastly in the *Cornelissen* judgment of 20 February 2007.

*Exequatur* is subordinate:

- to connecting the case to the foreign judge assigned;
- to *res judicata* (claim preclusion); and
- in respect of the international French law and order in both substance and form.

Without *res judicata*, a foreign judgment cannot dispossess the debtor in France. A judgment however, is a legal fact, and once the foreign practitioner's professional credentials are confirmed; the practitioner can request the French court on behalf of the creditors to solicit *exequatur*.

## 2. Assisting legislation

Since the coming into force in 2002 of the European Regulation n°1346/2000 dated 29 May 2000 (the EIR) relating to insolvency procedures, jurisprudence now exists in the form of rules and decisions aimed at coordinating procedures opened against a debtor whose goods and activities are dispersed in several E.U. Member States. The EIR adopted the "Centre of Main Interests (COMI)" as a fundamental criterion in identifying the competent jurisdiction, and as a result, the applicable law. It is generally the national law of the jurisdiction seized (*lex fori*) which is applied. Nevertheless, the wide interpretation of the notion of COMI<sup>1</sup> has sometimes led to difficulties and the practice of *forum shopping*<sup>2</sup>. The EIR established rules to coordinate, to a certain extent, the rights of creditors and employees, and encourage co-operation between insolvency practitioners. Judicial co-operation could increase by allowing foreign administrators access to the French courts. The equivalent to the French profession of judicial administrator or liquidator, as it exists in France since 1938, cannot be found in other countries. Justice auxiliaries, the French insolvency practitioners operate within an

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<sup>1</sup> Cassation Court, Commercial, Financial and Economic Division, 1 Oct 2002, No. 99-11858: Corporate Law, Commercial Section, 89, obs. J-P Legros: following payment default on several loans granted to a company under English law whose registered office is in London, the bank summoned its debtor to appear before the Commercial Court in France in the territorial jurisdiction in which the company owns several buildings to see insolvency proceedings opened against it. The Appeal Court overturned the first court's decision which had pronounced the judicial liquidation of the company by declaring the Commercial Court incompetent to rule on the bank's petition. The Appeal Court held that the bank did not submit any evidence demonstrating that the Company's Centre of Main Interests was in France and that the simple fact of having granted three loans to this Company to allow it to acquire three individual homes does not demonstrate the existence of a business centre of main interests. The Cassation Court quashed the judgment on the grounds that it was alleged and left undisputed that the Company had taken out the loans for its business needs in France which meant that it had interests in France.

<sup>2</sup> Term referring to the possibility given a debtor to choose among competing courts of competent jurisdictions the one which will most favourably answer to his request.

autonomous system separate from other legal professions and this to better protect their independence when appointed to manage insolvency proceedings. The ability of foreign insolvency practitioners to intervene on French territory whether concerning the enforcement of the effects of a foreign procedure or the administration of secondary proceedings in France depends on the universal character of proceedings in the French courts. A foreign insolvency practitioner, once his title is recognized, would be authorized to appear before the French courts and to exercise powers or perform duties under the foreign proceedings. However, a foreign IP would be unlikely to get appointed as administrator or liquidator to secondary proceedings in France as the practice of the French Commercial Courts is only to appoint practitioners listed with their jurisdiction: courts create unofficial registers specific to their circuit, which narrows the playing field considerably. In the past, hybrid solutions have involved the appointment of French judicial administrators as *ad hoc* administrators alongside foreign main proceedings to manage the French aspects, including layoffs and discussions with the National Wage Fund. But with French protocols evolving, in practice nothing would prevent a foreign practitioner from being appointed by a French court as judicial administrator.

Nevertheless given the extremely procedural and administrative nature of these “*court-driven*” procedures, there is a risk that the occasional foreign practitioner may find it difficult to comply with the numerous constraints that the law imposes, and even more so with the intervention of both the bankruptcy judge and the prosecutor’s office at all stages of the court procedure. Due to this and the intricacies of the French salary guarantee fund it is advisable that foreign practitioners work alongside French insolvency professionals. Practitioners of main and secondary proceedings have a duty to keep each other informed<sup>3</sup>. They must communicate without delay any information which might be useful to the other procedure: in particular, regarding claims lodged, verified or contested; the priority ranking of the creditors; assets; actions which could modify the composition of or opportunities for disposing of assets; any measures to finalize the proceedings; recovery plans being considered; proposed creditor schemes and progress made in the proceedings.

Nevertheless, French practitioners are pessimistic in view of difficulties they encounter and the absence of communication between practitioners in the same court and procedure.

An example of co-operation between representatives of the same insolvency proceedings is a protocol concerning Sendo International Company Limited in which the main proceedings were in England and secondary proceedings in France aimed at “establishing a working method which would allow the simultaneous coordination of the two proceedings”, in particular by specifying the treatment terms of the invitations to file claims, of the claims themselves, as well as the terms of treatment of the debtor’s assets and of the distribution of the gains

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<sup>3</sup> Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings, Art. 31, Sec.1.

through the realized assets. The protocol was approved by Order dated 29 June 2006 by the Nanterre Court Bankruptcy Judge.

Co-operation is encouraged through agreements with practitioners from other EU Member States such as the French Corporation of Insolvency Practitioners (CNAJMJ) agreements with Italy in May 2007; Spain in January 2012; and proposed agreements with Germany and Ireland.

No other legislation dealing with non-EU cross-border insolvency exists today in France. The structure is therefore limited to jurisprudential, the European Regulation and decisions rendered by the Court of Justice of the European Union (CJEU) formerly the ECJ.

### 3. Insolvency practice

The first applications of the European Regulation raised questions, particularly in regards to groups of companies. The Nanterre Commercial Court in the EMTEC group of companies interpreting COMI in a fairly liberal manner, opened main reorganization proceedings for all legally independent and autonomous companies within the Group. The Court relied on the European Regulation although the Regulation, by its architecture, only relates to companies with branches or secondary establishments abroad. This interpretation of the texts was also used by the British courts in the “Rover” case. This approach has important consequences as it means that French law is applied to each of the main proceedings opened against insolvent foreign-registered companies.

Further it solves the problems that arise when several reorganisations are proposed in the main proceedings or in secondary proceedings: the Regulation requires the subordination of secondary proceedings to the main proceedings: secondary proceedings must be liquidation procedures listed in Appendix B of the Regulation. Meanwhile and as per Article 34 of Regulation 1346/2000, “*Where the law applicable to secondary proceedings allows for such proceedings to be closed without liquidation by a rescue plan, a composition or a comparable measure, the liquidator in the main proceedings shall be empowered to propose such a measure himself.*”

Subsequently there were a number of cases where the COMI of the subsidiaries was considered to be the registered office of the company which controlled them, mainly in the *Daisytek*, *SAS Rover*, *Enron*, *Brac rent-a-car*, *Crisscross*, *Eurofood/Parmalat* cases. The Eurofood judgment of the ECJ decided that once a company employs personnel and develops an activity in the State where its statutory registered office is located, this State becomes its COMI providing the company regularly manages its interests in this location which is verifiable by third parties. On the other hand, if the registered office corresponds to a location where no activity is carried out, the presumption can be overturned.

This solution was adopted by the French jurisdictions, because the Paris Court of Appeal applied this solution to a controversial decision in which the court, in an application by Coeur Défense, a French registered company controlled by a Luxembourg holding company, declared itself competent to open rescue proceedings against the Luxembourg parent company because of corroborating indicators demonstrating that its COMI was in Paris<sup>4</sup>. At first, the Appeal Court followed the Eurofood Ruling<sup>5</sup> and specified that the statutory office of the Dame Company being located in Luxembourg, its COMI would presumably also be there. In a second time, equally referring itself to a CJEU ruling, the Interdil<sup>6</sup> Case the Court of Appeal deemed that the reversal of the presumption in Article 3-1 must be considered. This judgment was later appealed<sup>7</sup> to the Court of Cassation. Upon transfer after cassation, the Versailles Court of Appeal<sup>8</sup> confirmed the jurisdiction of the French Courts with regard to the Luxembourg holding company. The issue of defining the notion of COMI has therefore been settled as much by the CJEU as by the French courts.

On 15 February 2011, the Court of Cassation<sup>9</sup> considered whether to follow the principle set in the *Eurofood* Ruling and welcomed by the Court of Cassation in the *Daisytek*<sup>10</sup> decision, according to which Member States in virtue of Article 16 of the Regulation must recognise the opening decision and its effects without verifying the jurisdiction of the State of opening or whether we can challenge this principle under Article 6 of the European Convention on Human Rights concerning the right to access to a judge. The court found that “the impossibility of a creditor residing in a Member State other than the one of opening of the main insolvency proceedings to effectively contest within the State of opening the jurisdiction assumed by its courts” constitutes misreading of the law concerning the right to access to a judge justifying, on the grounds of effects contrary to public order, as stipulated in Article 26 of the EC Regulation No. 1346/2000, the refusal to recognise the opening decision in another Member State.

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<sup>4</sup> CA Paris, 25 Feb. 2010: D. 2010, P. 57, obs. R. Dammann and G. Podeur.

<sup>5</sup> CJEU, 2 May 2006, aff. C-341/04 : Rec. CJEU 2006, I, P. 3813.

<sup>6</sup> CJUE, 20 Oct. 2011, aff. C-396/09.

<sup>7</sup> Cass. Ch. Com., 08.03.2011, n°10-13988.

<sup>8</sup> Com. 8 mars 2011, n° 10-13.988, Bull. civ. IV, n° 33.

<sup>9</sup> Cass. com., 15 févr. 2011, n° 09-71.436 : JurisData n° 2011-001685 ; Act. proc. coll. 2011, repère 115, Th. Mastrullo ; Rev. sociétés 2011, P. 443, note Th. Mastrullo ; Bull. Joly sociétés, § 177, P. 426, note L. d'Avout.

<sup>10</sup> Cass. com., 27 juin 2006, n° 03-19.863 : JurisData n° 2006-034272 ; JCP G 2006, II, 10147, note M. Menjucq ; RJDA 2007/1, n° 82 ; Banque et droit 2006/109, P. 73, note R. Dammann et G. Podeur.

This decision falls in line with the Eurotunnel<sup>11</sup> judgments by which the Court of Cassation had censured, under Article 6 of the European Convention of Human Rights and Regulation No. 1346/2000, the Paris Court of Appeal<sup>12</sup>, for violation of the right to access to a judge because it had declared inadmissible the third party opposition by the creditors residing outside the French territory, and had in this way deprived them of all remedies at law.

The decision implies that the way for Member States to refuse to recognise the decision of another Member State opening insolvency proceedings is to suggest that there was a national breach of the peace. In France, such an hypothesis does not raise any difficulties when it comes to determining the competent court. Article L. 621-2 of the Commercial Code allows that proceedings opened against a debtor can be extended to other persons in the case of comingling of assets and “*to this end, the court having opened the initial proceedings remains competent*”. The court can order an extension of the proceedings in the case of fictitiousness or comingling of assets (that is to say abnormal financial relationships or the existence of an abnormal financial flow).

Following an interlocutory question formulated by the Court of Cassation<sup>13</sup>, the CJEU ruling of 15 December 2011<sup>14</sup> considered the conditions of the implementation of the Regulation (CE) No. 1346/2000 of 29 May 2000 relating to insolvency proceedings when in different Member States. Liquidation proceedings had been opened in Marseille with regard to a French registered company but the liquidator advised the court that a comingling of assets existed between it and a company having its registered office in Italy. The CJEU maintains that jurisdiction belongs to the courts of the State where the individual’s COMI is located, which corresponds in principle to the statutory registered office for legal entities.

There are therefore four possible structures for cross-border cases available in France.

### ***Co-operation proceedings***

There may be several “main” proceedings with different procedural systems which will conflict. This intermingling of proceedings will give rise to contradictions between the different jurisprudence of the courts of the different states, hence the interest and the necessity of implementing a coordination and harmonisation of the cross-border insolvency proceedings. This should not occur in the EU.

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<sup>11</sup> Cass. com., 30 juin 2009, n° 08-15.712 : JurisData n° 2009-049188 ; Rev. proc. coll. 2009, étude 16, concl. av. gén. R. Bonhomme ; M. Menjuq, Affaire Eurotunnel : une cassation bienvenue ! : Rev. proc. coll. 2009.

<sup>12</sup> CA Paris, 3e ch., sect. B, 29 nov. 2007, cinq arrêts : JCP E 2008, 1087, note E. Scholastique.

<sup>13</sup> Cass. com., 13 avr. 2010, n° 09-12.642 : JurisData n° 2010-003932 ; JCP G 2010, doct. 958, n° 3, obs. Ph. Pétel ; JCP E 2010, 1535 ; Bull. Joly Sociétés 2010, P. 571, note J.-L. Vallens ; Rev. proc. coll. 2010, repère 4, obs. M. Menjuq ; Rev. sociétés 2010, P. 592, note T. Mastrullo.

<sup>14</sup> JCP E 2012, 1088, note Y. Paclot et D. Poracchia ; Europe 2012, comm. 114, note L. Idot ; Act. proc. coll. 2012, comm. 17, note J. Vallansan ; Rev. proc. coll. 2012, étude 2, M. Menjuq.

### ***Liquidation proceedings***

To avoid this difficulty at least on a European level, the Regulation allows the opening of a main proceeding and other secondary proceedings. These different proceedings will have different systems but a hierarchy operates between the systems of the main proceedings and the secondary proceedings although this presents a definite inconvenience. The Regulation subordinates the secondary proceedings to the main, and the secondary proceedings must be liquidation proceedings as indicated in Appendix B of the Regulation.

### ***Reorganisation proceedings***

In order to bypass this difficulty the Nanterre Commercial Court opened as many main insolvency proceedings as the number of legally independent and autonomous companies in an insolvent group, having the same systems. This solution presents the advantage several reorganisation proceedings can be managed nevertheless it appears contrary to the legislation, unless one gives a very wide almost erroneous interpretation to the Regulation. Further this situation generates material conflicts between the different structures and between the various players in the proceedings themselves.

### ***Transaction proceedings***

Finally it is possible to have a main proceeding and other preventive proceedings as well (such as conciliation – *ad hoc* mandate). In this case there would be a strong hierarchical organisation and protocols could be agreed.

It would appear that the opening of several main proceedings with the same professionals would be the solution which presents the least inconvenience apart from the fact that it has a “too flexible” interpretation of the Regulation.

## **4. Examples**

### **Eurotunnel jurisprudence**

#### ***(i) Commercial Court Paris, 2 August 2006, n° 2006047554, Sté Eurotunnel PLC***

The Paris Commercial Court was seized with an application to open Rescue proceedings emanating from each of the 17 French, English, Spanish, Dutch, Belgian and German Companies of the Eurotunnel Group. The Court considered that from the moment that a series of corroborating indicators which are verifiable by third parties establish that the COMI of a group's companies established in several Member States of the European Union is in France, there are then grounds to retain the jurisdiction of the French Courts.

**(ii) Court of Cassation, Commercial Division 30 June 2009, FS-P+B+R, n° 08-11.902**

Question asked before the Court of Cassation on the admissibility of third party opposition from foreign creditors against the opening judgment of the Rescue proceedings. The Court of Cassation maintained that the creditors residing in a Member State other than that of the court which opened the main proceedings cannot be deprived of the possibility to effectively contest the jurisdiction held by this court.

**Belvédère jurisprudence**

**(iii) Court of Cassation, Commercial Division, 13 September. 2011, n° 10-25.533, JurisData n° 2011-018623**

The Belvedere judgment is qualified by doctrine as the “*1st box office success of the French jurisprudence*”.

Without rehashing this authentic courthouse soap opera, it is necessary to take note of the decision’s two important contributions to the rights of creditors. The Cassation Court maintained that first and foremost the competent law in qualifying a creditor is the law of the source of the debt and not the law of the insolvency proceedings.

The question concerned whether a trustee had the capacity to declare a claim in the rescue proceedings opened with regard to the Belvedere Company. The law of the State of New York had been contemplated to address this question, while the French law was consulted to simply determine the claims filing terms.

The judgment then informs us that a safe-keeping agent or a trustee can possess the quality of creditor and in this way is competent to file a claim. In the case in point, the trustee, the guaranty agent, was invested with rights against the Belvedere Company by virtue of a non accessory agreement. He therefore had the right to lodge his claim and receive payment.

## Chapter 17

# GERMANY

### 1. General law

German law recognises foreign insolvency proceedings. The basis for recognition of cases from EU member states (except Denmark) is the European Regulation on Insolvency Proceedings (“the EU Regulation”) and for all non EU member states and Denmark, the international part of the German Insolvency Code (Sec. 335 to 358 *Insolvenzordnung*, “*InsO*”). Furthermore Art. 102 of the Introductory Act to the Insolvency Code (*Einführungsgesetz zur Insolvenzordnung*, “*EGInsO*”) contains German execution rules for the EU Regulation.

The EU Regulation came into force on 31 May 2002 and the separate international chapter of the German Insolvency Code became effective on 20 March 2003. The rules of the EU Regulation and the international chapter of the German Insolvency Code are similar in most respects but there are differences, particularly with regard to the formalities governing reciprocal recognition and enforcement of court decisions in insolvency proceedings. The German rules are in some aspects not as co-operative as the EU Regulation. The legislators’ argument was that the EU Regulation applies for an economic area tightly connected with transparent legal systems and a wider application of the rules may result in problems.

The UNCITRAL Model Law on Cross-Border Insolvency has not been adopted by Germany. Nevertheless there is some relevance in cross-border cases involving states who have adopted the Model Law.

The insolvency and restructuring of financial institutions is governed by a separate law and it is not covered by this chapter.

### ***International jurisdiction / competent court***

The EU Regulation explicitly defines the competent court to open insolvency proceedings as the court within the territory where the debtor has its' centre of main interest ("COMI"). It is assumed that COMI is where the registered office is until proof to the contrary is provided. According to the European Court of Justice ("ECJ") for such proof, these activities must be objective and ascertainable by third parties<sup>1</sup>.

The rules of German international insolvency law in contrast do not address international competence. International competence to open insolvency proceedings is, according to Sec. 343 German Insolvency Code, subject to examination by the German court. The test being, whether or not the court applying German rules, would have had the required competence. As a consequence, Sec. 3 of the German Insolvency Code applies and competence is with the court where the debtor has the "centre of his main business interests", in other words COMI.

### ***Recognition of foreign proceedings***

According to Art. 16 of the EU Regulation, there is automatic recognition for insolvency proceedings ordered by a competent court that have effect in the jurisdiction where the proceedings were opened. Annex A to the EU Regulation contains a list of the insolvency proceedings in the member states. Decisions by courts in member states are not subject to review: more specifically, the competence of the court opening proceedings is not subject to review. The only limitation is contained in Art. 26 of the EU Regulation whereby proceedings or orders in conflict with national ordre public are not to be recognised.

While German international insolvency law also automatically recognises foreign proceedings, the recognition is subject to a case by case review. Automatic recognition is limited to cases where:

- The foreign proceedings qualify as insolvency proceedings in accordance with German law. Generally, the proceedings must provide some form of collective procedure, usually, but not exclusively, by way of liquidation and distribution of assets;
- The courts where the proceedings were commenced have jurisdiction over the debtor under German international insolvency law; and
- Recognition of foreign proceedings does not lead to a result that is incompatible with significant principles of German law, included but not limited to incompatibility with German constitutional rights.

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<sup>1</sup> Eurofood IFSC Ltd. ECJ, 2 May 2006, case C-341/04.

If the aforementioned conditions for recognition are met, the foreign insolvency decisions are automatically recognised. No further formalities are required. With such recognition, all substantive and procedural legal consequences of foreign insolvency proceedings are determined by the foreign insolvency law. As a consequence, the foreign office holder is able to take action in respect of all assets of the debtor in Germany.

### ***Enforcement of foreign proceedings***

The automatic recognition of foreign insolvency orders does not automatically lead to the enforceability of these orders in Germany: a court ruling for such enforcement is required. Only if the foreign insolvency order is declared enforceable, is the foreign insolvency administrator entitled to take compulsory enforcement measures based on the order in Germany.

Sec. 353 of the German Insolvency Code adopts the general rules of recognition and enforcement of foreign judgments as set out in the Code of Civil Procedure (*Zivilprozessordnung*, “ZPO”) Sec. 722 and 723. The German Court will only refuse to enforce the foreign insolvency order:

- if the court where the order was rendered has no jurisdiction under German international insolvency law; or
- to the extent that the enforcement of the foreign order would lead to a result that is obviously incompatible with significant principles of German law, including but not limited to, incompatibility with constitutional rights.

## **2. Assisting legislation**

### ***Public announcement***

The EU Regulation (Art. 21) as well as German International Insolvency Law (Sec. 345) defines rules for public announcement. The rules are without relevance for the recognition and the ability of the foreign office holder to exercise rights. They solely serve to protect legal relations. The public announcement limits good faith transactions. Subject to the announcement is the essence of the insolvency order. For properties an entry into the land register is made.

### ***Co-operation***

The reform of the German Insolvency Code enacted on 1 March 2012 closed a gap in German international insolvency law, addressing the co-operation of courts in cross-border cases. The introduction of Sec. 348 para. 2 of the German Insolvency Code stipulates that in matters of recognition of foreign proceedings, the German court may communicate with a foreign court and exchange information.

### ***Secondary proceedings***

In the event of main proceedings initiated in foreign jurisdictions, the debtor or a creditor may apply for the opening of secondary proceedings in Germany. In the secondary proceedings, German law will apply and secondary proceedings will be limited to the estate situated in Germany (Art. 27 EU Regulation and Sec. 356 German Insolvency Code). If foreign insolvency proceedings have already been commenced against the debtor, proof of illiquidity (*Zahlungsunfähigkeit*) or over-indebtedness (*Überschuldung*) is not required for the commencement of German insolvency proceedings. The opening of foreign main proceedings leads to an irrefutable presumption of the facts necessary to open proceedings under German law.

### ***Territorial proceedings***

In the event that the foreign law does not allow insolvency proceedings to be opened, German creditors or the debtor may still apply for German insolvency proceedings to be opened which are subject to German law and limited to the estate situated in Germany (Sec. 354 German Insolvency Code). If the debtor has no branch in Germany, an application to open an independent territorial insolvency proceeding will only succeed in cases of special legal interest.

### ***Application of foreign insolvency law***

In foreign proceedings recognised in Germany, as a general rule, foreign insolvency law applies. There are however some limitations, explained below:

#### *Set-off*

The right to set-off is governed by the law that the claim of the debtor is subject to at the time insolvency proceedings commenced (Art. 6 EU Regulation and Sec. 338 German Insolvency Code).

#### *Avoidance*

Avoidance rules are governed by the laws of the state where insolvency proceedings have been initiated unless the said act is subject to the law of a state other than the opening state and that this law does not allow challenging the transaction in question (Art. 4 in connection with Art. 13 EU Regulation and Sec. 339 German Insolvency Code).

#### *Labour law*

Employment contracts and all human resource related matters are subject to the laws of the jurisdiction where the employee is working unless agreed differently between the parties (Art. 10 EU Regulation and Sec. 337 German Insolvency Code).

#### *Immovable property*

For immovable property related contracts (e.g. lease, rent, sale & purchase) the law of the state where the property is situated does apply (Art. 8 EU Regulation and Sec. 336 German Insolvency Code).

### 3. Insolvency practice

In German insolvency practice, the EU Regulation has been tested in quite a number of cases over the years. As a consequence there is sufficient experience in its application by both the insolvency practitioners and the courts. German International Insolvency Law although in force for now almost a decade has only been tested in a very limited number of cases and it therefore remains to be seen still how these rules are applied and developed by case law and insolvency practice in the future.

It will also have to be considered that the German Insolvency Code underwent a significant reform that became effective on 1 March 2012. As part of the reform, the rules for the choice of IP, the introduction of the debt-for-equity-swap, the reduction of minority rights and the strengthening of the debtor-in-possession (DIP, *Eigenverwaltung*) are new and therefore remain to be tested in their practical application and in inevitably resulting litigation. From experience, it will take a couple of years until the genius of the stakeholders and the wisdom of the courts develop precise rules and predictable applications.

### 4. Examples

During the last decade Germany has seen a limited number of cases where German entities have been subject to insolvency proceedings governed by foreign law, predominantly English law. In these cases, COMI had been shifted to England or the applicants successfully established that COMI had always been in England. In these cases, English insolvency law was applied. In several cases, creditors or the debtor have, in addition, initiated German secondary insolvency proceedings. To optimise the co-ordination between the main English proceedings and the local secondary proceedings in some of the cases, DIP was applied for (Automold, Collins & Aikman etc.) and the English administrators were able to also drive the local German proceedings.

In addition the German restructuring practice has seen a few financial restructurings by way of schemes of arrangement under English company law where there was an English angle to the case or where the loan agreements were governed by English law (Rodestock, Tele Columbus, PrimaCom). While the effect of an English scheme of arrangement for a German legal entity is still disputed by a minority of opinions in literature, it has been successfully applied (except in the case of an English insurance company where the Federal Supreme Court BGH found that it does not have effect as insurance specific rules need to be applied<sup>2</sup>).

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<sup>2</sup> BGH, 15 February 2012, case IV ZR 194/09.

The insolvency issue taken to court most predominantly in German international insolvency matters is the question of COMI, despite some clarification by the European Court of Justice in the Eurofood matter. As a rule, German courts have to accept the findings of a court in another European jurisdiction if the court has assumed competence in the matter based on the rules of the EU Regulation<sup>3</sup>. However this does not hold in exceptional cases. In the Brochier case<sup>4</sup>, the local court in Nuremberg found that the German court may still be competent, despite main insolvency proceedings being opened by an insolvency court in England if the English court based its decision on unsubstantiated representation by the applicants where such representation was based on incorrect facts.

Other matters dealt with by the courts were as to when the COMI test had to be performed. According to the German Federal Supreme Court, the COMI test has to be made at the date of the filing. For deceased debtors the COMI test has to be applied at the point in time when the debtor deceased<sup>5</sup>. The COMI has to be ascertainable for third parties.

In the event that trading has already ceased, the COMI test has to be based on where the centre of main interest was at the time trading was discontinued<sup>6</sup>.

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<sup>3</sup> OLG Nürnberg/Nuremberg Court of Appeal, 15 December 2011, case 1 U 2/11.

<sup>4</sup> AG Nürnberg/Local Court Nuremberg, 1 October 2006, case 8034 IN 1326/06.

<sup>5</sup> AG Köln/Local Court Cologne, 19 January 2012, case 74 IN 108/10.

<sup>6</sup> BGH, 1 December 2011, case IX ZB 232/10.

## Chapter 18

# THE BAILIWICK OF GUERNSEY

### **1. General law**

The Courts of the Bailiwick of Guernsey (being the Royal Court of Guernsey, the Court of Alderney and the Court of the Seneschal of Sark) are generally prepared to recognise a foreign insolvency or bankruptcy. Thus, on the basis of international comity, liquidators, trustees in bankruptcy and similar office holders in a foreign insolvency have all been recognised as having sufficient rights to assert title to property situated within the Bailiwick of Guernsey. In some cases this takes the form of the foreign insolvency office holder issuing proceedings before the Courts of the Bailiwick for the recovery of specific property, which they claim to own under the law of the jurisdiction governing their appointment. Alternatively, the Courts of the Bailiwick will recognise the foreign insolvency office holder as having the right to pursue a particular right of action.

The Courts of the Bailiwick have been prepared to recognise a wide variety of foreign office holders from a number of different jurisdictions. However, recognition is not automatic and the Court retains a discretion in the matter. The Courts of the Bailiwick will generally regard the law of a company's state of incorporation as of prime importance in answering questions about a company's status and legal personality. A foreign insolvency office holder appointed in a jurisdiction other than that of the company's state of incorporation may not be recognised, at least if the appointment would not be recognised by the law of the state of incorporation.

The Courts of the Bailiwick have more limited powers to entertain substantive insolvency proceedings involving a foreign debtor. The power to wind-up companies is limited to companies incorporated under the laws of Guernsey and Alderney distinctly in each of those jurisdictions (companies cannot be incorporated under the Law of Sark). There is no power vested in any of the Courts of the Bailiwick to wind-up a foreign company as is to be found, for example, in the United Kingdom's Insolvency Act 1986 section 221.

Guernsey "*desastre*" proceedings can be initiated against a debtor, including individuals and incorporated entities, whenever there is a Bailiwick judgment outstanding against a debtor whose assets are insufficient to meet his known liabilities (whether based on judgments or otherwise). This procedure can be invoked wherever the debtor may be situated provided that assets are present in the Bailiwick and there is at least one Bailiwick judgment entered against the debtor. However, the *desastre* procedure amounts to no more than a pro rata distribution of the debtor's Bailiwick assets amongst his creditors, subject to certain preferred claims. The procedure has no other consequences for the debtor.

Individual debtors may also be subject to a declaration of insolvency ("*declaration de faillite*"). This procedure can lead to the discharge of the debtor's unpaid liabilities ("*le benefice de la Renonciation*"). This procedure is very rarely used and more often a creditor will use *desastre* proceedings or, if real property is involved; *saisi* proceedings; the method by which secured creditors recover loans in the event of a default.

The Courts of the Bailiwick have not had to rule on the jurisdiction of the Court to grant a declaration of insolvency in respect of a non-resident debtor. However, it is unlikely that the Courts of the Bailiwick would be prepared to grant such a declaration if the defendant were not subject to the jurisdiction of the Court.

Neither the EC Regulation No.1346/2000 on Insolvency Proceedings or the UK's Cross-Border Insolvency Regulations 2006 (enacting the UNCITRAL Model Law) applies to the Bailiwick of Guernsey.

## 2. Assisting legislation

In addition to the common law, The UK Insolvency Act 1986, ('the Act') Section 426, has been extended in part to the Bailiwick of Guernsey pursuant to the Insolvency Act 1986 (Guernsey) Order 1989 (SI 1989/2409). This Order extends sub-sections 4, 5, 10 and 11 of Section 426 of the 1986 Act to the Bailiwick of Guernsey. The 1989 Order thus provides for statutory assistance within the Bailiwick of Guernsey in favour of insolvencies commenced in the United Kingdom, the Bailiwick of Jersey and the Isle of Man.

Section 426(4) of the Act, as extended to the Bailiwick of Guernsey, establishes a general requirement that the Courts in the Bailiwick of Guernsey give assistance to foreign insolvencies as and when so requested to do so.

Section 426(5) of the Act provides that in rendering such assistance, the Courts of the Bailiwick may apply the insolvency law of the requesting Court or that of the Bailiwick of Guernsey. The Guernsey Courts must have regard to the rules of private international law in exercising their discretion under this section.

In considering any request for assistance under section 426 of the Act, the Courts of the Bailiwick will be guided by decisions of the Courts of the United Kingdom both as to the nature of the assistance that is available and also as to when the Court should exercise its discretion to give the assistance requested by the foreign Court.

### **3. Insolvency practice**

Because of its role as an offshore financial centre, most significant failures involving the Guernsey jurisdiction are connected to businesses that are the subject of proceedings in other jurisdictions. Insolvency practice therefore tends to understand the need for and accommodate co-operation with practitioners from other jurisdictions.

As Guernsey is only party to the co-operative regime established by section 426 of the UK Insolvency Act 1986 (which operates chiefly as between the UK and Guernsey), the Courts in Guernsey are often obliged to rely on common law principles when ascertaining whether assistance can be afforded to a foreign office holder.

### **4. Examples**

#### ***Viscount of Jersey v Osmond Clifford Gallienne, (4 November 1982)***

The Royal Court of Guernsey recognised the Viscount of Jersey's title to pursue a claim in Guernsey in circumstances where the Royal Court of Guernsey accepted that, as a matter of Jersey law, the Viscount had become the owner of a right of action as a result of *desastre* proceedings in Jersey which, in that jurisdiction, had the effect of sequestrating all moveable assets of the debtor, wherever situate.

#### ***Re Seagull Manufacturing Co. Limited (Guernsey Court of Appeal, 5th August 1991)***

The Guernsey Court of Appeal upheld an application for an order in aid issued by the Court in England under section 426 of the Insolvency Act 1986 seeking the power to examine former directors of the company concerned who had always been resident in Alderney and to receive the production of the company's books of account and other records. Under the Law of Alderney there was no power under the local companies legislation to compel such an examination as under section 236 of the Insolvency Act 1986. However, the Court of Appeal was prepared to order that the examination should go ahead.

***Colin Graham Bird v Norman Meader, (Guernsey Court of Appeal  
6th February 1989)***

The Guernsey Court of Appeal upheld an application for an order in aid under section 122 of the Bankruptcy Act 1914 seeking an order for the examination of the Defendant a partner in a local firm of accountants about the affairs of the bankrupt. The Guernsey Court of Appeal upheld the order even though the largest, if not the only, creditor in the bankruptcy was likely to be the United Kingdom Revenue and that there existed no local power comparable to section 25(1) of the Bankruptcy Act 1914 to require a person to be examined about the affairs of a bankrupt.

***Re Bre-X Minerals Ltd (22 October 2000)***

A Canadian court had appointed a trustee in bankruptcy in respect of a company, which had funds in a bank account in Guernsey. The Trustee claimed ownership of the monies in a bank account. The Canadian court made an order declaring that the Trustee owned the monies in the bank account. The Royal Court of Guernsey gave effect to the bankruptcy and made an order recognising the Trustee's title to the monies in the bank account.

***A BVI recognition case***

A more recent case is an application by a foreign office holder to examine directors and ex-employees of a corporate director and trust company based in the Bailiwick. The application was brought by Joint Liquidators of British Virgin Island ("BVI") companies. Once it was established that the BVI Liquidators could not use section 426 of the 1986 Act as it did not operate as between the BVI and Guernsey, the Court did accept, albeit on an ex-parte basis, that it was able to recognise the appointment of the BVI Liquidators on the basis of comity. However, at the preliminary stage, the Court was of the view that the Liquidators would only be able to use the powers available to them under Guernsey legislation and not necessarily all of the powers given to them in the BVI.

## Chapter 19

# HUNGARY

### 1. General law

After World War II, there was no need in Hungary for a bankruptcy law, because the state enterprises had no real contact with the market. Their results depended on reaching or failing the centrally prescribed parameters of the central state rules. Directives issued by the Ministry of Finance regulated the means of solving financial problems. The economic organisation took good care to keep their results solvent.

To meet the new needs of business life and economic structures in Central-Eastern Europe, a high level rule on bankruptcy came into force in 1986. Despite several attempts, the bankruptcy law was too abbreviated and did not contain rules on substantive law or practice. There was no real need for rules on cross-border insolvency.

By 1991, the Hungarian economy was in transition, with the state economy declining and the market economy developing. The Act XLIX of 1991 on Bankruptcy Proceedings, Liquidation Proceedings and Members' Voluntary Dissolution (hereinafter referred to as the 'Bankruptcy Act') was the first modern insolvency regulation in Hungary. It has been amended more than 500 times since then and some fundamental modifications have been introduced. Because of foreign investments and the privatisation of Hungarian companies, many foreign companies came to Hungary but the Bankruptcy Act had no provisions to handle cross-border insolvency cases. Indeed, Hungary was not involved in any international agreements dealing with cross-border insolvencies until 2004 when

Hungary became a member of the European Union, with the result that the Council Regulation 1346/2000/EC came into force and the Bankruptcy Act was amended to contain similar regulations.

The subject of insolvency proceeding can be a co-operative society, private or public company, certain other legal entities, water company (except for the water utility company), forest management company, voluntary mutual insurance fund and private pension fund, sports clubs and sports associations. Since 2004, all business organisations from European Union member states were added to the list against which main or territorial insolvency proceedings can be initiated according to the EC Insolvency Regulation.

Consumer bankruptcy (or private bankruptcy) is not known in Hungarian law; in such cross-border cases, the Hungarian Courts use the analogy of the proceedings against companies.

## 2. Assisting legislation

There are no bilateral treaties of recognition or enforcement between Hungary and other states, so the Hungarian courts use the principle of reciprocity to handle cases other than under the Insolvency Law.

The only relevant legal source is the Act CXXXII of 1997 on the Hungarian Branch Offices and Commercial Representative Offices of Foreign-Registered Companies. Based on that regulation any proceedings related to insolvency (bankruptcy, liquidation or other comparable proceedings) initiated against a foreign company shall be reported by the branch office to the Court of Registration within 10 days of the commencement of such proceedings, and simultaneously publication of such shall be initiated in the Company Gazette. Such publication shall provide information on the options available to creditors to enforce their claims abroad during the ongoing proceedings. Insolvency proceedings initiated against the foreign company abroad shall only apply to the Hungarian branch office:-

- under an international agreement (although there is no such agreement in force by this time);
- under a principle of reciprocity; or
- in accordance with Council Regulation 1346/2000/EC on insolvency proceedings.

If the branch office is not involved in the insolvency proceedings initiated against the foreign parent company abroad under the laws of that country due to the lack of any international agreement or state of reciprocity or if the provisions of Council Regulation 1346/2000/EC apply, the general court responsible where the branch office is registered shall order dissolution of the branch office on the basis of notification by the court of registry or on notification by the liquidator of the insolvency proceedings opened abroad pursuant to Council Regulation 1346/2000/EC.

The provisions of the Bankruptcy Act shall be applied to the dissolution of branch offices. Assets remaining after conclusion of the proceedings shall be at the disposal of the foreign company or the liquidator acting in the insolvency proceedings abroad, who is authorized to issue legal statements in connection with the company's assets.

In the event that a foreign company becomes insolvent in connection with business activities performed by its Hungarian branch office and there is no international treaty or state of reciprocity with the country of the foreign company in respect of insolvency proceedings, creditors may request dissolution of the branch office by the general court at which the branch office is registered. In such proceedings, the Bankruptcy Act shall be applied with minor differences.

The court shall cancel the liquidation proceedings if the foreign company or the branch office guarantees the payment of the creditors' claims registered in the proceeding.

### **3. Insolvency practice**

“Forum shopping” is an existing problem, were some companies are starting the main insolvency process in another EU member state if there is evidence that the centre of main interests is not in Hungary.

### **4. Future reforms**

All governments plan a new insolvency regulation, and some publish plans for the fundamental reform of insolvency law, but only amendments and modifications tend to be introduced. A new law would be of great importance: including the introduction of unitary proceedings, better protection of the insolvency estate, creation of incentives for reorganisation and a more enforceable liability of executive officers.

At present, the Hungarian Government is proposing amendments to remedy the known deficiencies. Hopefully, this will provide additional structure to the system and develop into a fully effective part of economic life for the Hungarian business community.

There have been discussions over the need for a bankruptcy law of private individuals, supported by the EU and the IMF but no decisions have been made.

## 5. Examples

### ***Mliekotej s.r.o. Slovakia***

When the Italian-based Parmalat group collapsed, the group's Hungarian subsidiary was declared insolvent too. During this process, a regional procedure has been started against the Slovakian subsidiary, which was owned by the Hungarian company. The main controversial point of the procedure was the question: where is the "centre of main interests" – in Hungary or in Slovakia? Since the company's overall business activities in Slovakia was closely related to the Hungarian firm, the Hungarian Parmalat started the liquidation process at the Hungarian Court according to the 1346/2000/EC Article 3. The Court recognised the action and the process started in Hungary.

## Chapter 20

# IRELAND

### **1. General law**

The Brussels 1 Regulation contains rules governing the jurisdiction of EU courts in civil and commercial matters. A judgment given in an EU country is to be recognised without special proceedings, unless the recognition is contested. The Brussels 1 Regulations excludes from its application bankruptcy proceedings, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions or analogous proceedings. However, the fact that the plaintiff may be the subject of insolvency proceedings will not of itself alter the underlying nature of the proceedings for such purpose.

Once the conditions for recognition and enforcement of a judgment are satisfied a foreign plaintiff will be entitled to invoke all the normal enforcement remedies available under Irish law, including judgment orders, execution orders, Mareva injunctions, examination orders, garnishee orders and, where appropriate, judgment mortgages.

Judgments from the Courts of non-EU jurisdictions are not automatically or directly enforceable in Ireland. It is necessary for the judgment creditor to commence proceedings in the Irish courts for an order for recognition and enforcement. Such proceedings can be based either on the original substantive claim, which involves proving the merits, or they can be framed as an action simply for the enforcement of the foreign judgment. Enforcement of a judgment delivered by a court outside the EU must be effected using the summary summons procedure. This procedure is initiated by serving the summons on the defendant in accordance with the Rules

of the Superior Courts. If no appearance is entered, a plaintiff can enter judgment in default in the Central Office. Where an appearance is entered, or if the plaintiff so decides, a motion for judgment can be issued.

A matter that is contested before the Master is transferred to the Judge's List where it is heard by a High Court judge. The judge has discretion to grant judgment or to refuse the application. For an application to be successful, a plaintiff must show that:

- the judgment is for a definite sum;
- the defendant was properly served with the proceedings in the original claim;
- that the foreign court had jurisdiction in the first instance;
- that the foreign judgment is final and conclusive;
- that the foreign judgment was not obtained by means of fraud, breach of natural justice or on grounds that would offend Irish public policy; or
- that the foreign judgment did not consist of, or included, a sum for multiple damages (the penal nature of multiple damages would be a possible reason for a refusal to enforce) or be granted on the basis of a fine or other penalty.

The Supreme Court in *Flightlease (Irl) Ltd (In Vol Liq) & Cos Act [2012] IESC 12* accepted the test outlined in *Dicey, Morris and Collins on the Conflict of Laws, at Rule 36*, as being applicable in Ireland in determining whether or not a foreign court has jurisdiction over an Irish company. That authority provides that (subject to rules 37 to 39), a court of a foreign country has jurisdiction to give a judgment *in personam* capable of enforcement or recognition if the judgment debtor:

- was, at the time the proceedings were instituted, present in the foreign country;
- was the claimant, or counterclaimed in the proceedings in the foreign court;
- being a defendant in the foreign court, submitted to the jurisdiction of that court by voluntarily appearing in the proceedings; or
- being a defendant in the original court, had before the commencement of the proceedings agreed, in respect of the subject matter of the proceedings to submit to the jurisdiction of that court or of the courts of that country.

If the foreign plaintiff is subject to insolvency proceedings, those insolvency proceedings will not, as a matter of Irish law, affect the ability to maintain proceedings in Ireland, either by a substantive action or for enforcement of a foreign judgment. The precondition which arises is the requirement to demonstrate that the party giving instructions in the pursuit of the action is a party who has due authority for that purpose in accordance with the laws of the state in which he purports to have been appointed. Insofar as the insolvency office holder may supplant the power and authority of a board of directors, this power will generally be recognised for the purpose of such proceedings. A foreign plaintiff may be faced with an application by a defendant for security for costs.

A distinction between recognition and enforcement of foreign judgments was made by Ms Justice Finlay Geoghegan in *Fairfield Sentry (In Liq) & Anor v Citco Bank Nederland NV & Ors* [2012] IEHC 81. In this case the judge held that the plaintiffs were entitled to declarations of recognition of the orders of the High Court of Justice of the Eastern Caribbean Supreme Court winding up Fairfield and appointing the liquidator. Ms Justice Finlay Geoghegan noted that the plaintiffs had not pursued any application for the enforcement of orders of the High Court of Justice of the Eastern Caribbean Supreme Court, save insofar as they permitted the liquidator to maintain proceedings in the name of Fairfield in this jurisdiction, which she considered to be a matter of recognition rather than enforcement.

In *Mount Capital Fund Limited (In Liquidation) & Ors v Companies Act (2012) IEHC 97* Ms Justice Laffoy confirmed the existence of the inherent common law practice of Irish courts providing assistance to a foreign court in relation to insolvency proceedings, stating that:

*“... the Court does have an inherent jurisdiction to give recognition to insolvency proceedings in jurisdictions outside the European Union. However... in the exercise of that jurisdiction, the Court should be satisfied that recognition is being sought for a legitimate purpose.”*

## **2. Assisting legislation**

Ireland is a party to the EU Council Regulation No 1346/2000 of 29 May 2000 on Insolvency Proceedings (the “EU Insolvency Regulation” or “EIR”). In addition, the European Communities (Corporate Insolvency) Regulations, S.I. 333/2002 (the “Corporate Insolvency Regulations”), and the European Communities (Personal Insolvency) Regulations S.I. No. 334/2002 (the “Personal Insolvency Regulations”) have been introduced to assist the implementation of the EU Insolvency Regulation in Ireland and certain substantive amendments to Irish company law relating to the jurisdiction of the High Court.

The EIR provides for the recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with those insolvency proceedings. The EIR also provides that a liquidator appointed by the opening of main proceedings will have the legal powers and obligations provided pursuant to the laws of the state. There are important exceptions to these rules in the Regulation.

### ***Corporate insolvency***

A foreign liquidator (within the meaning of the EIR) appointed under the EIR who intends to request publication of notice of his appointment under Article 21 of the EIR or to take any other action in Ireland under the EIR must deliver to the Registrar of Companies for registration a certified copy of the judgment and, where appropriate, the decision appointing him.

The Corporate Insolvency Regulations contain a substantive amendment to the Companies Act, 1963, establishing a procedure whereby the Master of the High Court is granted jurisdiction to make an order confirming a creditors' voluntary winding up, thereby rendering it a procedure qualifying for the purpose of the EIR. Applications for enforcement in Ireland of an insolvency judgment under the provisions of the EIR must be made to the Master of the High Court. The jurisdiction of the Master of the High Court is expressly extended to include recognition of foreign orders for the preservation of assets.

The High Court has wide powers to make orders to secure and preserve a debtor's assets in Ireland pursuant to a request made under Article 38 of the EIR. The EIR stipulates that in any case where the court is of the view that it would not, apart from the EIR, have jurisdiction in relation to the subject matter of the proceedings, the court has discretion to refuse to grant the preservation measures sought where it considers that it is inexpedient.

With regard to non-EU insolvencies, Section 250 of the Companies Act 1963 provides that an order in aid can be made by an Irish court in respect of an Order of a Court of any country (prescribed by Ministerial Order for the purpose of that Section) made for or in the course of winding up a company and may be enforced by the High Court in the same manner in all respects as if the order has been made by the High Court itself. This statutory provision has no practical application as there is currently no country so prescribed.

The Companies (Amendment) Act 1990 established a system for court-assisted restructuring of insolvent companies through examinership. Section 36 of the 1990 Act provides that any order made by a court of any country prescribed by Ministerial Order and made for or in the course of the reorganisation or reconstruction of a company, may be enforced by the High Court in all respects as if the order had been made by the High Court. No Ministerial Order has been made designating any country for the purpose of this Section and therefore it is of no practical effect.

In cases where the EIR does not apply, Irish common law will govern rules on recognition and enforcement of foreign insolvency proceedings. As a general rule, the Irish courts are prepared to provide judicial assistance to recognise foreign insolvency appointments.

### ***Personal insolvency***

The Personal Insolvency Regulations contain provisions applicable to personal insolvencies that are broadly similar to those referred to above in connection with corporate insolvency. In Ireland, all bankruptcy proceedings are conducted under the supervision of the High Court and the estate of the bankrupt is administered by the Official Assignee in Bankruptcy, who is an Officer of the High Court in the full time employment of the Courts Service. The Personal Insolvency Regulations stipulates that any foreign liquidator who intends to make a request under Article 21 of the EIR or to take any other action in this State must deliver a copy of the judgment or order appointing him to the Official Assignee in Bankruptcy.

Again, in cases where the EIR does not apply, Irish common law will govern rules on recognition and enforcement of foreign personal insolvency proceedings.

Irish courts are prepared to grant orders in aid in personal insolvencies. The bankruptcy legislation provided that orders in aid could be made in respect of specified countries. The countries were mainly EU member states and the relevant provisions are now of no effect as a result of the introduction of the EIR and the Personal Insolvency Regulations.

It will always be necessary to examine the particular rules which apply to any jurisdiction where a foreign insolvency office holder seeks to be recognised in this jurisdiction. An application to the court for recognition or an order in aid is made *ex parte* on affidavit. The form of the order will depend on the nature of the relief sought, and on the circumstances of the case.

Ireland is not a signatory to the UNCITRAL Model Law on Cross-Border Insolvency.

### **3. Insolvency practice**

As a general rule the Irish courts are positively disposed towards applications by foreign insolvency office holders where it can be demonstrated that the appointment derives from an order of a court from a competent jurisdiction. See *Re Mount Capital Fund Limited*, *Re David K. Drumm* and the cases discussed below.

### **4. Future reforms**

Personal insolvency law in Ireland is due to undergo radical changes with the introduction of the Personal Insolvency Bill 2012. This Bill proposes legislation which will update Ireland's personal insolvency laws which are not commonly used in their current form. Under current Irish law, the discharge period from bankruptcy is twelve years. This has led to a number of debtors seeking to move their centre of main interests ("COMI") to England or Northern Ireland which have discharge periods of one year in order to avail of what are perceived to be more favourable personal insolvency laws.

In *Irish Bank Resolution Corporation Limited v Sean Quinn [2012] NICH 1* the High Court of Justice of Northern Ireland annulled a bankruptcy order obtained by the defendant on the ground that the Court did not have jurisdiction to make the order as the defendant's COMI was not in Northern Ireland, but in the Republic of Ireland, at the time of presenting the bankruptcy petition. Mr Quinn was subsequently declared a bankrupt in the Republic of Ireland by the Irish High Court.

David Drumm filed for bankruptcy in the United States in 2010. His attempts to be discharged from bankruptcy have been challenged by the court-appointed bankruptcy trustee and this is set to be determined by the US courts in 2013. In the meantime, the bankruptcy trustee in *Re David K. Drumm* successfully obtained an order from the High Court allowing the US bankruptcy to be recognised in Ireland.

## 5. Examples

### ***Fairfield Sentry (In Liq) & Anor v Citco Bank Nederland NV & Ors [2012] IEHC 81***

Fairfield was incorporated in the British Virgin Islands to operate as an investment fund. In 2009 an order was made that Fairfield be wound up by the High Court of Justice of the Eastern Caribbean Supreme Court.

Fairfield maintained a bank account at a branch of Citco located in Dublin, Ireland. Citco, the first defendant, is a Dutch bank incorporated under the laws of the Netherlands. The second and third defendants, namely Shell and Atlanta, invested significant monies with Fairfield. They both obtained from the Dutch courts conservatory garnishment orders in relation to the monies deposited by Fairfield with Citco in the Dublin account.

The Irish High Court considered, amongst other things, the following issues:

- (i) Whether the orders winding up Fairfield and appointing a liquidator should be recognised and enforced in Ireland; and
- (ii) Whether, as Fairfield contended, the Dutch orders of conservatory garnishment were not entitled to recognition in this jurisdiction.

In relation to (I), Ms Justice Finlay Geoghegan held that Fairfield was entitled to declarations of recognition of the orders of the High Court of Justice of the Eastern Caribbean Supreme Court winding up Fairfield and appointing the liquidator. The Court did not make any declaration in relation to enforcement.

In relation to (II), the Court found that Fairfield had failed to establish that the Dutch orders of conservatory garnishment were not to be recognised in Ireland on the ground that they are not judgments within the meaning of Article 32 of the Brussels 1 Regulation. The Court also rejected Fairfield's contention that under Article 34 of Brussels 1 Regulation, the Irish courts were precluded from recognition of the orders of conservatory garnishment on the grounds that the judgments were contrary to public policy in Ireland.

### ***In re Flightlease (Ireland) Ltd [2012] IESC 12***

In this case, the Supreme Court refused an application to develop common law conflict of law rules in line with the approach adopted by the Canadian courts in *Morguard Investments Limited v De Savoye (1990)*.

Swissair submitted a claim in the liquidation of Flightlease, which claim was rejected. Swissair instituted proceedings in the Swiss courts for recovery of the monies due to it. The joint liquidators of Flightlease then applied to the High Court, pursuant to the Companies Act, 1963, Section 280, seeking liberty to distribute the assets of Flightlease without reference to the claim of Swissair.

The issue before the Court was whether a judgment obtained in the Swiss proceedings would be recognised and enforced by the courts of this jurisdiction. This required the Court to answer two questions:

- (i) Whether the order sought would be excluded from enforcement under the common law as arising from a proceeding in bankruptcy or insolvency?
- (ii) Whether, under Irish rules of conflict of laws, the order of the Swiss court would be recognised on the basis of a “real and substantial connection” test (as contended for by the liquidator of Swissair), rather than the narrower test set out in Dicey Rule 36?

In relation to (i), the Court first had to determine whether the claim sought to be maintained in the Swiss proceedings was a claim in the liquidation or a claim in personam. If it was a claim in the liquidation then the order of the Swiss court would not be recognised and enforced in this jurisdiction. If it was a claim in personam, the issue was whether Dicey Rule 36 represents the law in Ireland and whether the Court should declare and/or develop the common law in Ireland in accordance with the contemporary approach adopted by the Canadian courts.

The Supreme Court found that the order was an order in personam. Mr Justice Finnegan stated that *“insolvency proceedings are concerned with collective execution. They are not concerned with establishing a liability. The nature of the Swiss proceedings is to establish a liability on Flightlease to repay monies.”* The Court therefore found that the judgment and order was not an order in an insolvency proceeding so as to prevent its enforcement in Ireland.

In relation to (ii) Swissair contended that Dicey Rule 36 is not a complete statement of Irish law and that it was open to the Court to apply a real and substantial connection test either instead of or in conjunction with the test in Dicey Rule 36, i.e. Swissair submitted that the Canadian jurisprudence in this area should be adopted. However, the Court refused to do so. In delivering his judgment, Mr Justice Finnegan stated that:

*“The common law develops to meet changing circumstances. However in many areas uniform development by international agreement is to be preferred. This is particularly so in the case of conflict of laws. Such uniform development is evident within the European Union and also in the UNCITRAL Model Law. The change contended for by Swissair is of such significance that it would in my opinion exceed the judicial function to re-state the common law in such a way. Such a change should be by legislation... In the case of conflicts of law it is preferable that developments should take place in the context of an international consensus by way of treaty or convention given effect to in national law by legislation.”*

***Mount Capital Fund Limited (In Liquidation) & Ors v Companies Act (2012)*  
IEHC 97**

In *Re Mount Capital Fund Limited*, Ms Justice Laffoy recognised the varying approaches in the Irish courts regarding enforcement and recognition of foreign judgments. She noted the approach of the Supreme Court in *Re Flightlease* where the liquidators sought to establish the liability to pay a sum based on a judgment of a foreign court in liquidation proceedings being conducted in this jurisdiction in accordance with Irish law.

Ms Justice Laffoy took the view that the High Court was not precluded from giving recognition to orders of the type made by the High Court of Justice of the British Virgin Islands in relation to the plaintiff companies. She granted orders to act in aid to the High Court of the British Virgin Islands and granted the liquidators liberty to apply for orders under Irish legislation on the basis of equivalent legislation in the British Virgin Islands.

***Re David K. Drumm, Unreported, 13/12/2010, Ms Justice Dunne, High Court***

The High Court held that it was open to the court under common law to grant an order in aid in circumstances where it was satisfied that the foreign court, in this case the Bankruptcy Court for the District of Massachusetts, requesting the order in aid operated a bankruptcy system which satisfied broad tests for recognition on grounds of reciprocity. The Irish High Court was satisfied that the affidavit as to US law, which was filed in the High Court, enabled the court to conclude that there was a degree of equivalence of jurisdiction and reciprocity between the bankruptcy code applicable in the US and that applicable in Ireland. The High Court stated that it had a common law discretion having regard to the principles of the comity of nations and having regard to the fact that it was undesirable in the case before it to have a multiplicity of proceedings in different jurisdictions.

***Re Eurofood IFSC Ltd (No 2) [2006] IESC 41***

The Irish Supreme Court referred a number of questions to the Court of Justice of the European Union (“ECJ”) for a preliminary ruling to resolve the issue of priority as between a set of Irish and Italian proceedings. The reference was made on an appeal to the Irish Supreme Court against a decision of the Irish High Court that Eurofood should be wound up in Ireland. The appeal was brought by the extraordinary administrator of Eurofood who had been appointed by the relevant authority in Italy. Prior to the appointment of the extraordinary administrator, the Irish High Court had appointed a provisional liquidator to Eurofood. The extraordinary administrator purported to open main insolvency proceedings in Italy at a time when it was contended by the provisional liquidator that such proceedings were already in being in Ireland.

The Supreme Court held that the preliminary rulings of the ECJ made it clear that the appointment of a provisional liquidator by an Irish court constituted a decision to open main insolvency proceedings within the meaning of the EIR. The Supreme Court held, in dismissing the appeal of the extraordinary administrator, that where a debtor is a subsidiary company whose registered office differs from that of its parent, the presumption that the COMI of that subsidiary is the place of its registered office can only be rebutted if objectively, it can be established that an actual situation exists which is different from that which the location of the registered office is deemed to reflect. Once the Irish court had opened main insolvency proceedings, it was entitled to determine the COMI of the company.

***In re Cedarlease [2005] IEHC 67***

In this case, the well-established common law rule, as stated in *Buchanan v McVey (1956) 90 I.L.T.R 121* and affirmed in *Bank of Ireland v Meenaghan (1995) 1 I.L.R.M. 96*, that Irish courts will not entertain proceedings, including enforcement of foreign judgments, where they relate to the revenue, penal or other public laws of a foreign state, was limited to non-EU countries and Denmark.

The High Court held that the common law principle was rendered inapplicable in the case of a revenue debt of an EU member state where the EIR was concerned. In this case the High Court held that the EIR conferred jurisdiction on it to wind up Cedarlease on the petition of the Commissioners of Customs & Excise for the United Kingdom.



## Chapter 21

# ITALY

### 1. General law

Insolvency is, first and foremost, a process and, as such, it is divided into a series of procedures through which creditors may enforce their rights on the insolvent party's assets.

The existence of multiple insolvencies in various countries and the fact that each of them may proceed independently of the other, or others – with the evident risk of conflicts – has led both the national and the European legislator to lay down rules to co-ordinate the proceedings, as due to the principle of exclusivity of legal systems they are unable to prevent their proliferation.

Prior to the enactment of Law no. 218/1995 (“Law 218”) – which reformed international private law in Italy – the recognition and enforceability of foreign judgments in Italy, including “foreign insolvency orders”, were subject pursuant to articles 796 and 797 of the Italian Code of Civil Procedure – which have now been repealed – to a declaration of effectiveness by the Court of Appeal of the place in which the judgment was to be implemented.

However, article 64 of Law 218 has introduced the principle whereby foreign judgments are automatically recognised where the following conditions occur:

- a) the court that issued the ruling was eligible to examine the case under the principles of jurisdiction in force in Italy;

- b) the writ of summons that introduced the proceedings was brought to the notice of the defendant in accordance with the law of the place in which the proceedings took place and no essential rights of the defendant were breached;
- c) the parties appeared before the court in accordance with the law of the place in which the proceedings took place or their absence was declared in accordance with such law;
- d) the judgment became *res judicata* in accordance with the law of the place in which it was handed down;
- e) it is not contrary to any other final judgment handed down by an Italian court;
- f) there are no proceedings pending before an Italian court with the same subject matter and between the same parties that started before the foreign proceedings commenced;
- g) its provisions do not produce effects contrary to public policy.

In reality, Law 218 does not contain an explicit provision on jurisdiction in insolvency cases, but paragraph 2 of article 3 provides that “*jurisdiction also exists on the basis of the criteria laid down for territorial competence*”. Therefore, it is clear that it is necessary to refer to the territorial competence criteria even with regard to the principles of international jurisdiction of Italian courts and such criteria in insolvency matters are contained in article 9 of Royal Decree no. 267 of March 1942 on Insolvency, Composition with Creditors and Compulsory Administrative Liquidation, as subsequently amended and supplemented (“Insolvency Act”).

At a European level, the principle of “mutual trust” has prevailed with regard to the circulation of judgments and all member states must adhere to this principle in their reciprocal dealings. In Council Regulation (EC) No 1346/2000 of 29 May 2000 (Regulation 1346/2000), the provisions of which are an expression of such principle, the Council of the European Union provided that the opening of insolvency proceedings in one member state is recognised in all member states of the Union.

The rules envisaged by the law of the member state that governs the first proceedings apply to: -

- (i) which debtors insolvency proceedings may be brought against;
- (ii) the assets that form part of the estate;
- (iii) the power of the bodies and the status of the debtor;
- (iv) the effects on pending agreements;

- (v) the formalities for lodging claims against the debtor's estate;
- (vi) the formation of the estate;
- (vii) the closure of the proceedings; and
- (viii) the voidness or unenforceability of legal acts detrimental to all the creditors.

Compared to the individual insolvency procedures envisaged by Italian law, the Regulation only applies to cases of *Insolvency, Arrangements with Creditors, Compulsory Administrative Liquidation, Extraordinary Administration and Judicial Moratorium* and only where such procedures are of a cross-border nature, as the regulation governs relations between members states and does not apply to merely internal cases.

The regulation does not apply to cases of insolvency of corporate groups. Therefore, for case law purposes, the insolvency of each company in the group must be addressed separately and autonomously.

The regulation deals with jurisdiction for the opening of insolvency proceedings, without dictating uniform connection criteria for actions and disputes that are connected to, derive from or are ancillary to such proceedings. In particular, it does not deal with jurisdiction for claw-back actions which remain subject to the internal law of the individual member states.

Furthermore, the Regulation does not apply to: -

- (i) insurance companies as defined by Directives 73/239/EEC and 79/267/EEC, as subsequently amended;
- (ii) credit institutions as referred to in Directive 77/780/EEC most recently amended by Directive 95/26/EC;
- (iii) investment undertakings as identified in Directive 93/22/EEC as subsequently amended; and
- (iv) collective investment undertakings as referred to in Directive 85/611/EEC, amended by Directive 95/26/EEC.

Finally, at a national level, in addition to the aforementioned Insolvency Act, (as amended on several occasions by Law no. 80/2005, Legislative Decree no. 5/2006 and Legislative Decree no. 168/2007), the following play a decisive role in the liquidation, restructuring and insolvency of corporate entities:

- Legislative Decree No. 270 of 8 July 1999, governing Extraordinary Administration (Law No. 270/1999) as amended and supplemented;
- Law No. 39 of 18 February 2004, governing the Extraordinary Administration of Large Enterprises as subsequently amended and supplemented (Law No. 39/2004);

- Legislative Decree No. 385 of 1 September 1993, which applies where banks and financial institutions are subject to compulsory administrative liquidation (the Banking Law);
- Law Decree no. 347 of 23 December on Extraordinary Measures for the Restructuring of Large Insolvent Enterprises (“Marzano Law”); and
- Law Decree no. 270 of 8 July 1999, “New Rules on the Extraordinary Administration of Large Insolvent Enterprises” (“Prodi *bis*”).

## 2. Assisting legislation

Pursuant to article 2221 of the Italian Civil Code, the following parties are subject to insolvency and scheme of arrangement procedures: “*entrepreneurs that carry on commercial activities, excluding public entities, small entrepreneurs (as defined by article 2083 of the Italian Civil Code) and agricultural entrepreneurs*”.

As for cross-border insolvency proceedings, whether they also involve, apart from Italy, countries of the European Union or whether they involve non-EU countries, article 9 of the Insolvency Act, which regulates jurisdiction, plays a significant role in determining the relevant jurisdiction.

In fact, in the case in which the insolvency proceedings are not subject to the Community legislation, article 3 of Law 218 establishes that the jurisdiction criteria laid down by article 9 of the Insolvency Act apply. Indeed, paragraph 1 provides that “*insolvency is declared by the court of the place in which the headquarters of the undertaking is located*”. In particular, in paragraph 3 of article 9, which has remained unchanged despite the numerous reforms of the Insolvency Act, the Italian legislator has expressly provided that “*undertakings whose headquarters are located abroad may be declared insolvent in Italy even where a declaration of insolvency has been made abroad*” although it states, in paragraph 4, that this is subject to “*international conventions and Community law*”. The nationalistic approach that is revealed by this article, which is a clear expression of the rules on foreign insolvency orders prior to Law 218, is in evident contrast to the universalistic spirit that inspired the entire reform of international private law.

Consequently, in cases not caught by Community law, there are two possible alternatives under Italian law:

- (i) the effects of the insolvency declared abroad may be extended to Italy where the liquidator or the creditors apply for recognition of the foreign declaratory judgment and of the order detailing the estate;
- (ii) the same parties may request an independent declaration of insolvency in Italy, with the risk that there may be conflicts and interferences between the two proceedings. Indeed, the liquidator and the creditors involved in the foreign insolvency proceedings could lodge any claims admitted abroad in the Italian proceedings if they first obtain interlocutory rulings recognising such orders. However, the foreign creditors, like the Italian creditors, could also

lodge independent claims in the Italian insolvency proceedings. Likewise, the Italian liquidator could lodge claims under the same terms against the estate in the foreign insolvency proceedings.

At a Community level, following the enactment of the regulation and within its scope of application, jurisdiction for the opening of insolvency proceedings is exclusively governed by the new EU rules, which override both the internal law of the member states and any other applicable conventions.

In particular, in insolvency proceedings subject to the Community legislation, the EU rules apply to debtors whose centre of main interests (“COMI”) is located in a member state. Pursuant to article 3, no. 1, of Regulation no. 1346/2000, the court of the member state in which the “*centre of a debtor’s main interests*” are located has jurisdiction to open, against such party, insolvency proceedings which are defined as the main proceedings as they tend to concern all the latter’s assets and property.

Moreover, if the liquidator’s COMI is located in a member state, it is possible to open secondary/territorial proceedings in any other member states in which the debtor has an “*establishment*” pursuant to article 3, no. 4 of Regulation 1346/2000, even before the opening of main proceedings, the effects of which are limited to any property of the debtor that is located in such country. In such cases, article 4 of Regulation 1346/2000 provides that both the secondary insolvency proceedings and its effects are regulated by the law of the member state in whose territory the proceedings have been opened. The objective of this provision, which states that the *lex concursus* applies to the determination of the “*conditions for the opening of those proceedings, their conduct and their closure*”, is clearly to establish uniform rules on conflicts of laws which, with regard to insolvency proceedings, replace the rules of international private law of the individual countries.

With regard to the aforementioned connection criteria, while *establishment* is defined by article 2, letter h of the Regulation as “*any place of operations where the debtor carries out a non-transitory economic activity with human means and goods*”, there is no definition of COMI. Despite the initial case-law tendency to define COMI as the debtor’s effective headquarters, the European Court of Justice has emphasised the autonomous nature of the concept of centre of interests adopted by the regulation, due to the need to provide uniform interpretations which are not influenced by the various national rules. Moreover, it has added that the presumption that the undertaking’s COMI corresponds to its registered office may only be rebutted if objective information that may be verified by third parties reveals that the real situation is different from that which appears to correspond to the location of the registered office.

As a result of the absence of provisions in Regulation 1346/2000 and in article 9 of the Insolvency Act regarding the rules on international jurisdiction in intra-group insolvency proceedings, article 3 of the Marzano Law and article 81 of Prodi bis take on particular importance.

In fact, the third paragraph of the first provision states that “*the extraordinary commissioner may ask the Minister for Productive Activities to admit other companies from the group to the proceedings and, at the same time, apply to the court that declared the insolvency of the undertaking to declare the insolvency [of the other companies]*”. Therefore, this provision is, albeit indirectly, a rule on jurisdiction.

On the other hand, article 81 extends the scope of application of the judicial moratorium to insolvent undertakings in the group, where such undertakings are subject to the rule on insolvency.

### 3. Insolvency practice

According to the new rules provided by the International Private Law, foreign insolvency judgments and orders are recognised by Italian Courts with immediate effect when the conditions for the automatic recognition of foreign judgment are met. However, a foreign insolvency declaration recognised in Italy may not produce further or different effects from those of a national insolvency declaration.

With the aim of simplifying the circulation and implementation of decisions in insolvency proceedings with the European Union, article 16 of Regulation 1346/2000 establishes the fundamental principle whereby a member state court’s decision to open main or secondary insolvency proceedings will be automatically recognised with no further formalities of any kind in all the other member states. In order for the judgment to be automatically recognised, the decision must have opened one of the insolvency proceedings to which the regulation applies, i.e., in Italy’s case, *Insolvency, Arrangement with Creditors, Compulsory Administrative Liquidation, Extraordinary Administration and Judicial Moratorium*. Instead, decisions that opened proceedings not listed in the annexes will be subject to the rules on recognition envisaged in each country in which recognition is required. A decision may be recognised even if it has not become final in its country of origin. Since the regulation only requires the decision to be enforceable, it is automatically recognised as soon as it produces its effects in the State of the opening of proceedings.

Every member state is obliged to recognise a decision handed down in other member states, even where it is issued against a debtor who, due to his personal qualities, would not be subject to insolvency proceedings in the requested state. Therefore, the decision will be recognised in any case; indeed, the requested state may only refuse recognition on the grounds of a manifest breach of public policy within the limits envisaged by article 26 of Regulation 1346/2000, even when the decision has opened proceedings against a party which would not have been subject to such proceedings in the requested state.

As mentioned, the requested state may refuse to recognise a decision that is manifestly contrary to public policy, especially when its effect is to restrict fundamental rights and freedoms, or on the grounds of public policy where the principles of due process have been breached (i.e. breach of defence rights and the principle of *audi alteram partem*; impartiality of the court).

Secondary territorial proceedings are, by definition, territorial in scope and, therefore, their effects are limited to the territory of the state in which they are opened. In any case, subject to these limits, other member states cannot oppose them. Thus, for example, the opening of territorial proceedings in Italy which are secondary to main proceedings in France will only have effects in Italy; however, a third country, such as Germany, may not (subject to the rights if the French liquidator to intervene) refuse to allow the Italian liquidator to operate in Germany after the opening of the proceedings. This also applies to any actions that the Italian liquidator may bring in Germany to recover claims relating to the operations of the Italian establishment subject to Italian territorial proceedings.

In main and secondary proceedings, the liquidator is appointed by the court having jurisdiction pursuant to paragraphs 1 and 2, article 3 of Regulation 1346/2000. In both cases, however, in light of the general principle of automatic recognition of insolvency proceedings, the liquidator may exercise his powers and prerogatives in a member state other than that in which he was appointed. Article 18 of Regulation 1346/2000 provides, among other things, that the liquidator may remove the debtor's assets from the territory of the Member State in which they are situated. Since the provision does not require such assets to be brought back to the state of the opening of proceedings, the liquidator may export the assets to any country he deems appropriate and advantageous to his needs. However, this power is subject to a series of restrictions, i) third-party rights *in rem* as recognised by article 5 of Regulation 1346/2000, ii) the seller's rights based on a reservation of title where insolvency proceedings have been opened against the purchaser if at the time of the opening of proceedings the asset is a state other than that in which proceedings were opened and iii) pending territorial proceedings, since only the liquidator in the secondary proceedings, and not the liquidator in the main proceedings, may operate in that territory.

For example, the liquidator in insolvency proceedings opened in Italy may certainly bring a legal action in Germany against a German party to recover the debtor's receivables either during the cognisance or the enforcement phase of the proceedings. In any case, the liquidator will always have to be authorised by the supervising judge pursuant to article 31 of the Insolvency Act, since the former may exercise the power granted to him under Italian law in any other member state, as it is the law of the state of the opening of proceedings. However, all the restrictions envisaged by such law also apply.

Under Italian law, the liquidator of another member state appointed in secondary proceedings may not dispose of assets located in Italy that were purchased by third parties in good faith. However, pursuant to paragraph 2 of article 18, the liquidator of secondary proceedings may always bring any claw-back action which is in the interests of the creditors: in other words, actions that are based on irregularities that occurred in the management of the local establishment subject to the secondary proceedings.

The presence of many proceedings would limit the efficiency of the insolvency if there were no co-ordination, which is based on two principles, the provision of reciprocal information and co-ordination obligations between liquidators and the recognition of the exclusive prerogatives of the liquidator in the main proceedings.

Therefore, the communication of information between liquidators of the main proceedings and those of the secondary proceedings must be based on the principle of mutual co-operation:

- Under article 31, liquidators shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and any measures aimed at terminating the proceedings.
- This general obligation is not supported by any procedural sanctions (unless such sanction is envisaged by national law). Moreover, it is striking that the Community provision prevails over any national provisions which may limit the communication of information or which may in some way affect the duty to co-operate.
- The objective of the rule contained in article 31 paragraph 3 is also co-operation. It provides that secondary liquidators must give the main liquidator an early opportunity to submit proposals on the liquidation (or any other use) of the assets in the second proceedings, by providing him with the data regarding the assets.

In order to address the absence of precise procedural rules regarding the obligations contained in article 31, it is worth mentioning the important progress made in the field of co-operation on 7 March with the signature of the Franco-Italian protocol by the *Consigliere Nazionale dei Dottori Commercialisti* and the *Conseil National des Administrateurs Judiciaires et des Mandataries Judiciaires* with the aim of promoting transparency and the exchange of information between parties involved in insolvency proceedings that affect various countries in the European Union.

In accordance with the EU Regulation, the liquidator may request that notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing him, be published in any other Member State in accordance with the publication procedures provided for in that State. Any Member State within the territory of which the debtor has an establishment may require mandatory publication. In such cases, the liquidator or any authority empowered to that effect in the Member State where the main proceedings are opened shall take all necessary measures to ensure such publication.

In reality, the precise provisions on jurisdiction in Regulation 1346/2000 have not entirely resolved the issue of Italian jurisdiction over insolvency proceedings. The issue is once again relevant as increasing numbers of debtors are transferring their headquarters abroad in order to escape Italian jurisdiction and, in the majority of cases they head for countries outside the European Union where it is more difficult to pursue them.

It is precisely with the aim of preventing forum shopping by insolvent entrepreneurs that the new second paragraph of article 9 of the Insolvency Act, introduced by the reform contained in Legislative Decree no. 5 of 9 January 2006, provides that “*any transfer of headquarters taking place in the year prior to the application for a declaration of insolvency will not be considered for the purposes of jurisdiction*”.

This provision is based on the consolidated approach adopted by Italian courts, which held that if the headquarters had been formally but not in effect transferred, the court of the place in which the original headquarters were located still had jurisdiction to declare insolvency or if the transfer had in effect taken place, the transfer was considered to be irrelevant if it took place after the insolvency had become apparent.

## **4. Examples**

### ***Cirio del Monte NV (Court of Rome, 14 August 2003)***

The Court of Rome, declared the insolvency of Cirio Del Monte NV, whose registered office was in Holland and which was a wholly-owned subsidiary of the Italian parent company which had already been declared insolvent, on the grounds that its operational and executive centre was situated in Italy, where all the Italian members of the board of directors were resident.

### ***Eurofood IFS Ltd. (Court of Parma, 20 February 2004)***

Within the wider context of the insolvency of the Parmalat group, the Court of Parma held that it had jurisdiction to declare the insolvency of Parmalat Neth. BV, a company of the group with its registered office in Holland, on the grounds that the executive activities and operational centre of the company were located in Collecchio, at the headquarters of the parent company Parmalat S.p.A., from where the directors of the latter operated. It concluded that the Dutch company was merely a vehicle for the financial policy of Parmalat S.p.A., which was created for the sole purpose of facilitating money flows within the group with a view to fiscal optimisation. The sole point of reference was the interests of the parent company, of which the subsidiary was merely a financial component.

### ***Giacomelli Sport España S.A. (Court of Rimini, 23 March 2004)***

The Court of Rimini, which had already been charged with the extraordinary administration of Giacomelli Sport Group S.p.A., received an application for a declaration of insolvency of the latter's subsidiary, Giacomelli Sport España, but held that it did not have jurisdiction as the fact that a foreign subsidiary is part of a group with an Italian parent company is not in itself sufficient for the centre of the subsidiary's main interests also to be located in Italy.

**Fallimento TGZ GmbH v/ Manifattura di Legnano  
(Court of Milan, 27 March 2007)**

The Court of Milan, applying German rules, recognised that the payment of a certain sum of money by the debtor in the three months preceding the application for the opening of insolvency proceedings, following the creditor's warning that it would submit the application in the event of a default, could be clawed back if the debtor was not in a position to fulfil its obligations.

**IT Holding Finance S.A. (Court of Isernia, 10 April 2009)**

The ministerial decree envisaged by article 3, paragraph 3, *Decreto Legge* no. 347/2003 constitutes a decision to open insolvency proceedings pursuant to article 2, first indent, letter e, EC Regulation no. 1346/2000, as any decision "*in relation to the opening of insolvency proceedings or the appointment of a liquidator*" may be defined as such. The ministerial decree in question fulfils both the aforementioned requirements, in articles 1 and 2 respectively: indeed, not only does the objective content of the ministerial decree mean that it is subject to the provisions of the regulation in question, but also the person who issues it, the Minister for Economic Development, is one of the public authorities of each member state to which the provisions of the regulation are addressed, so that he is considered to be a "*judge/court*". Therefore, the provisions of the regulation are not only directed at "*judicial bodies*", but also at any "*other relevant (authority) of a member state empowered to open insolvency proceedings or to take decisions during such proceedings*".

**O S.r.l. cl E. S.r.l. (Court of Terni, 7 February 2011)**

The following constituted evidence of the fictitious nature of the transfer of the debtor's undertaking abroad and thus confirmed the international jurisdiction of the Italian court to declare insolvency: (i) the fact that the alleged transfer took place shortly before the lodging of the insolvency application and when the insolvency already existed, (ii) the reasons for the transfer were only stated and not documented, (iii) the transfer was not recorded in the companies' register of the place to which the headquarters were apparently transferred, (iv) the foreign residence of the new director, (v) the insolvency application referred to claims that expired before the insolvency, (vi) the director of the debtor company was merely a clerical worker, (vii) the address of the new headquarters was a P.O. box.

## Chapter 22

# JAPAN

### 1. General law

In Japan, court procedures for insolvency are divided into two categories (i) liquidation procedures (which include bankruptcy and special liquidation proceedings) and (ii) restructuring procedures (which include civil rehabilitation and corporate reorganisation proceedings).

Each of these four proceedings has been promulgated by separate Japanese laws: bankruptcy proceedings by the Bankruptcy Act, special liquidation proceedings by a part of the Companies Act, civil rehabilitation proceedings by the Civil Rehabilitation Act, and corporate reorganisation proceedings by the Corporate Reorganisation Act. In civil rehabilitation proceedings, as a general rule, the debtor maintains the power to manage its business and assets after the rehabilitation proceedings commence and as they progress. On the other hand, in corporate reorganisation proceedings, as a general rule, the debtor's business is managed by a court-appointed trustee instead of the debtor. Recently, there are examples of the court appointing the debtor's previous management as the trustee. In such cases, the debtor's management continued to have the power to manage the business and assets as in civil rehabilitation proceedings (this is referred to as a DIP-type Corporate Reorganisation). Another difference between these two restructuring procedures is that corporate reorganisation proceedings may stay and impair both the claims of unsecured creditors and the claims of secured creditors, whereas civil rehabilitation proceedings may stay and impair only the claims of unsecured creditors.

The Bankruptcy Act, the Civil Rehabilitation Act and the Corporate Reorganisation Act (the “Insolvency Acts”) have been reformed to conform with international norms since 2000. The Insolvency Acts have adopted the idea of universalism with respect to the outbound effect of insolvency proceedings, providing clear provisions stipulating that a trustee or DIP will retain the power to manage and dispose of assets whether or not they are located within Japan. Moreover, these acts provide provisions to coordinate foreign and domestic proceedings, such as a cross-filing provision.

## 2. Assisting legislation

### ***Law on Recognition of and Assistance in Foreign Insolvency Proceedings (LRAF)***

This Act is based on the UNCITRAL Model Law on Cross-Border Insolvency and came into effect on April 1, 2001. Under the LRAF, the court may recognise foreign insolvency proceedings and give assistance for foreign insolvency proceedings.

The trustee and DIP of a foreign insolvency proceeding may file a petition with the Tokyo District Court for recognition of their foreign insolvency proceedings, provided that the debtor has domicile, a residence business office or another office in the country where the foreign insolvency proceedings were filed. The court will issue an order recognising the foreign insolvency proceedings, unless one of the following applies:

- the expenses for recognition and assistance proceedings are not prepaid;
- it is obvious that the effect of the foreign insolvency proceedings does not extend to the debtor’s property in Japan;
- it is contrary to public policy in Japan to give an assistance order for the foreign insolvency proceedings;
- it is obviously unnecessary to give an assistance order;
- the foreign trustee has violated the provisions of the LRAF; or
- it is obvious that the petition was not filed in good faith.

The key issue among the issues above is whether foreign insolvency proceedings can extend to a debtor’s property in Japan (universal effect), because Japanese courts do not always have sufficient knowledge of foreign insolvency proceedings and therefore the filing party bears the burden of sufficiently persuading the court that foreign insolvency proceedings have universal effect.

It should be noted that a “recognition” order is an order that merely announces that the Japanese court recognises the foreign insolvency proceedings in Japan, but it does not automatically grant a stay. This is a significant difference from the Model Law. The rationale of the Japanese legislature is that courts should not automatically give assistance to foreign insolvency proceedings, which may differ substantially from those in Japan and may be unknown to the Japanese court.

Therefore, if a DIP or a trustee of foreign proceedings wishes to obtain a stay order or other orders to preserve a debtor's assets located in Japan, the DIP or trustee must file for appropriate assistance order(s) together with a recognition order. The recognition order is the prerequisite for an assistance order; therefore, an assistance order cannot only be requested by itself.

The Tokyo District Court has exclusive jurisdiction for these orders regardless of the location of assets or offices in Japan.

An assistance order comprises one or more of the following:

- a temporary stay order against compulsory execution proceedings upon judgment, provisional attachment or provisional disposition, lawsuit or administrative proceedings with respect to the debtor's assets located in Japan;
- a stay order against the compulsory execution proceedings that have been suspended pursuant to the temporary suspension order mentioned above;
- an injunction prohibiting the debtor from disposing of either its business or assets and from repaying its debt and/or a possible order taking other appropriate measures;
- a temporary stay order against public auction proceedings aimed at enforcing a lien;
- an order prohibiting the commencement of compulsory execution proceedings against the debtor's assets by any creditor;
- an administration order through which the court appoints a "recognition trustee," who has the exclusive power to manage the debtor's business and to dispose of its assets located in Japan; or
- a provisional administration order where an interim trustee is appointed in relation to the debtor's business and assets located in Japan.

A dismissal order will be issued if the requirements for the recognition order are not met or if the foreign insolvency proceedings are terminated. The court may issue a dismissal order if the debtor or trustee disposes of or expatriates the debtor's assets located within Japan without court approval.

The LRAF does not recognise concurrent proceedings but adopts the principle that a debtor will be subject to only one insolvency proceeding in Japan. The priority of the proceedings is as follows:

- Domestic insolvency proceedings will prevail over the LRAF proceedings if the domestic proceedings have been commenced by the court. However, the court may issue a recognition order for foreign proceedings if it finds that:
  - the foreign proceedings are the main proceedings, that is, the debtor's COMI (Center Of Main Interest) is located in the country where the foreign proceedings are filed;

- taking assistance measures conforms to the general interests of creditors; and
- the interests of creditors in Japan are unlikely to be unreasonably prejudiced if the court grants assistance measures. If the court has granted assistance measures, the domestic insolvency proceedings must be suspended.
- If there is more than one application for recognition of foreign proceedings, the main proceedings will prevail over the other proceedings. The main proceeding is a foreign one that a debtor's COMI is located, but LRAF does not clearly provide how to decide COMI. If the main proceeding does not exist, the non-main proceedings that conform to the general interests of creditors will prevail over other non-main proceedings. Any assistance order that has been granted for a foreign proceeding that is not the main proceeding and was not given priority, will be suspended.

### ***Insolvency Acts***

Prior to April 2001, there were no laws in Japan that specifically addressed international jurisdiction over insolvency cases. Now the Insolvency Acts provide that a foreign debtor, regardless of whether it is under foreign insolvency proceedings, can file a petition to commence insolvency proceedings if the debtor has an address, residence, business office or assets within Japan.

In the case where a debtor is under foreign bankruptcy proceedings, while the LRAF provides a DIP or trustee under the foreign insolvency proceedings a measure to effectuate such proceedings in Japan, the Insolvency Acts allows them to be involved in bankruptcy proceedings in Japan in several ways. First, a DIP or a foreign trustee has standing to file a petition to commence insolvency proceedings in Japan. While they need to show cause for bankruptcy in order to commence insolvency proceedings, cause is deemed to exist if the debtor has commenced foreign bankruptcy proceedings. Second, a DIP or a foreign trustee can also attend local creditors' meetings. Third, to facilitate cross-filings of claims, a foreign trustee may file proofs of claim in the proceedings in Japan on behalf of creditors who have not filed in Japan but who are participating in the foreign proceedings, provided that the foreign trustee has the authority to do so, and *vice versa* for the trustee and DIP of the Japanese insolvency proceedings. Finally, if a Japanese trustee requests a foreign trustee or DIP to co-operate with the Japanese proceedings, the Japanese trustee is required to co-operate with the foreign trustee and share information as necessary to exercise appropriate measures.

In addition, while the Insolvency Acts are silent on the standing of foreign representatives to avoid preference and fraudulent conveyance in Japan, they do not deny foreign representatives the capability to exercise avoidance powers. Japanese courts are unlikely to dismiss avoidance cases brought by foreign representatives solely due to the lack of standing provisions, but the conflict of foreign law and domestic law will still continue to be controversial.

The Insolvency Acts do not provide for direct communication between Japanese and foreign courts, as set forth in the Model Law. However, the Insolvency Acts have been construed not to prohibit direct court-to-court communication.

Regarding distributions to creditors, the Insolvency Acts provide the “Hotchpot Rule,” which requires equal divisions among creditors. Creditors who have received a distribution in foreign proceedings may participate in Japanese insolvency proceedings but they may not receive a distribution from these proceedings until the other creditors have received a pro-rata portion of the aggregate distributions.

### **3. Insolvency practice**

Since the LRAF was enacted in 2001, there have been approximately 12 cases of filings seeking recognition for foreign insolvency proceedings up to 2011. Due to such limited precedent and since case documents for the proceedings are not publically disclosed, it is not easy to introduce a “standard” practice for filing for recognition under the LRAF. However, we note the following key issues for filing.

#### ***Schedule for filing***

While it is not a statutory requirement, in practice, the Tokyo District Court should be consulted with prior to formally making a filing. The timing of such consultation depends on the complexity of each case, whether sufficient documents have been prepared and the availability of the judge, and it would usually require several weeks prior to the formal filing. If the court finds, through the pre-filing consultation, that the petitioner has prepared sufficient documents and fulfills the statutory requirement for the filing, it will issue an order of recognition immediately after the official filing. It is not rare for the order of recognition to be issued on the same day as the official filing. It should be noted, however, that in a case where multiple foreign proceedings are filed and there is a heavy dispute such as which foreign proceedings constitute the “foreign main proceedings,” it could take several months until the court makes a decision on which proceedings will prevail.

#### ***Fees***

The LRAF requires the foreign trustee to prepay an amount designated by the court for expenses related to the recognition and assistance proceedings (Art 20-1). This amount will be used for relevant expenses incurred by the court and for a fee to be paid to a recognition trustee (other than the foreign trustee, whose fee will not be paid). The amount of the fee will be determined on a case-by-case basis, but in our experience, in a case where the foreign trustee becomes the recognition trustee, the amount is likely to be relatively small.

### ***Documents to be prepared***

The LRAF and Rules of Recognition of and Assistance for Foreign Insolvency Proceedings provide that the petition must include information such as the following:

- Name and address of the foreign trustee and its proxy.
- Address where the foreign trustee receives services (limited to a place in Japan).
- Name and address of the debtor and its proxy.
- Subject of the petition.
- Specific proof that the debtor owns its residence in the country where the foreign insolvency proceedings are filed.
- Outline of the foreign insolvency proceedings, their status and the expected schedule.
- Order under Section 3 of the LRAF that is expected to be necessary for the proceedings.
- Outline of the foreign law that governs the priority of the claims under the foreign proceedings.
- Term or limitation of or condition to the power of the foreign trustee, if any.
- Other legal proceedings regarding the debtor's assets in Japan known to the foreign trustee.
- If the debtor is an entity, the governing law for its incorporation.
- If the debtor conducts business in Japan, the name and address of the principal business office in Japan.
- Information regarding the labor union or the representative of the debtor's employees in Japan.
- If the debtor is an entity and a Japanese government official provides a license regarding the debtor's incorporation or its business, the name and address of such government official.
- If there are Japanese insolvency proceedings regarding the debtor known to the foreign trustee, an outline thereof and the facts relating to the conditions provided in Art 57-1 of the LRAF.
- If there are other recognition proceedings known to the foreign trustee, an outline thereof and the facts relating to the conditions provided in Art 62-1 of the LRAF.

In addition to the petition, the debtor (foreign trustee) must attach the following documents to the petition:

- A document proving that the person who filed for the proceedings is the foreign trustee.
- A document proving the address of the debtor.
- A document proving that the foreign proceedings are currently pending.
- A document proving that the foreign proceedings will govern the debtor's assets located in Japan.
- If a debtor is an entity and registered in Japan, a copy of such registration.
- If there are Japanese insolvency proceedings regarding the debtor known to the foreign trustee, a document proving the specific facts relating to the conditions provided in Art 57-1 of the LRAF.
- If there are other recognition proceedings known to the foreign trustee, documents proving the specific facts relating to the conditions provided in Art 62-1 of the LRAF.

In practice, it is important that the court correctly understands how the foreign proceedings are structured under the applicable foreign insolvency laws and the status of such proceedings. For such a purpose, a document such as a translation of the relevant foreign insolvency laws and a memorandum written by a foreign legal expert will be necessary and the time required for preparing such documents should be considered when scheduling the filing.

### ***Appointment of the recognition trustee***

It is expected that the recognised foreign representative will be appointed as the recognition trustee by the court in most cases. A provisional administration order is issued only where necessary to fulfill the purpose of the law, until a recognition order is issued.

### ***Discharge***

Neither recognition of the foreign proceedings themselves nor dispositions under the LRAF discharge the debtor's liabilities allowed under foreign proceedings in Japan. Therefore, if the debtor's liability in Japan may be discharged in the foreign proceedings, filing for recognition proceedings will be insufficient. There is a case where the debtor first filed for foreign recognition proceedings finally filed for corporate reorganisation proceedings to discharge debtor's liability, because an interested party wanted to confirm that the debtor is discharged.



## Chapter 23

# JERSEY

### 1. General law<sup>1</sup>

Prior to the implementation of the Bankruptcy (Désastre) (Jersey) Law 1990 ('the Bankruptcy Law'), the Royal Court of Jersey applied general principles of judicial comity in exercising its inherent jurisdiction to deal with applications by foreign insolvency office-holders for access and recognition. Comity remains an important principle for the Royal Court.

Subject to that which follows, a foreign claimant or insolvency office holder may gain access to, and the recognition of, the Royal Court by:

- registering the judgment of a superior court of a foreign jurisdiction in the Royal Court under the Judgments (Reciprocal Enforcement) (Jersey) Law 1960; or
- commencing proceedings in Jersey in the office holder's own name, essentially by way of the issue of an Order of Justice (Writ) through the intermediary of Jersey counsel; or
- requesting the Royal Court to exercise a residuary common law jurisdiction, broadly akin to the statutory form of assistance described below.

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<sup>1</sup> For a more detailed treatment of the topics below see Anthony Dessain & Michael Wilkins, Jersey Insolvency and Asset Tracking, Key Haven Publications plc.

Generally speaking, any country adhering to the rule of law whose insolvency laws are based on the principles of universality and equality, which is willing to grant reciprocal treatment to Jersey, will qualify for assistance.

## 2. Assisting legislation

Article 49 of the Bankruptcy Law, empowers the Royal Court to assist the courts of prescribed countries and territories in all matters relating to the insolvency of any person or company to the extent that it thinks fit. Rule 11(4) of the Bankruptcy (Désastre) (Jersey) Rules 1991, ("the Bankruptcy Rules") as amended, prescribes the countries for the purposes of Article 49. As at December 2011, the following territories had been so prescribed (by Ministerial Order):

- Australia;
- Guernsey;
- Finland;
- Isle of Man; and
- United Kingdom.

The assistance given by the Royal Court is discretionary and the Court will pay particular regard to the rules of private international law (Article 49(3) of the Bankruptcy Law). The Royal Court may also have regard to the extent that it considers appropriate to the prevailing provisions of the UNCITRAL Model Law on Cross-Border Insolvency (Article 49(1) of the Bankruptcy Law).

A Letter of Request is issued by the foreign court and presented by Jersey Counsel to the Royal Court, under Article 49(1) of the Bankruptcy Law, the Royal Court will exercise any jurisdiction it, or the requesting court, could exercise domestically including:

- endorsing and registering the appointment of the foreign office-holder;
- appointing the Viscount, the Royal Court's own executive officer, to render appropriate assistance to the foreign office-holder;
- making information available by discovery of documents or the examination of witnesses.

The limitations of Article 49 are:

- the Royal Court will not directly or indirectly enforce payment of foreign revenue debts as this is contrary to the rules of private international law;
- the scope of the assistance rendered will not offend the principles of universality and equality to which Jersey bankruptcy law conceptually subscribes; and
- there must be reciprocity from the foreign courts.

### 3. Insolvency practice

While Article 49 of the Bankruptcy Law envisages the availability of an ancillary jurisdiction, there are restrictions. If a debtor in a Jersey bankruptcy has carried on business in Jersey but has a principal place of business elsewhere, the Viscount would be primarily responsible for realising the debtor's assets, wherever situate, due to the application of the principle of universality set out in the Bankruptcy Law. This might bring the Viscount into conflict with insolvency procedures concurrently being undertaken in other jurisdictions. The Royal Court could offer an ancillary jurisdiction to a foreign office-holder provided the principle of equality of treatment of creditors is not prejudiced and the Viscount is not hindered in the conduct of the Jersey *désastre* and public policy considerations are not thereby prejudiced.

Countries which “ring fence” local assets for the benefit of local creditors or whose insolvency proceedings do not have extra-territorial effect would be unlikely to receive extensive ancillary assistance and may not qualify for prescription under Rule 11(4) of the Bankruptcy Rules.

### 4. Examples

#### ***Re Tucker (1987-1988) JLR 473***

On the request of an English Trustee in Bankruptcy, the English High Court requested that the Royal Court act in aid of, or be auxiliary to, it (as provided for under the then Bankruptcy Act 1914, Section 122) in ordering the production of documents by, and the private examination of, the bankrupt's representative in Jersey. The Trustee's action was funded by the Inland Revenue, which was the only effective creditor. The Royal Court could exercise its discretion and refuse to grant aid notwithstanding the mandatory wording of Section 122, because Section 122 operated subject to general public policy. The Jersey courts cannot enforce foreign revenue or penal laws, applying the rule set out in *Government of India v Taylor*, and the request for assistance amounted to an indirect attempt to enforce revenue laws, which the Royal Court had no jurisdiction to grant.

#### ***Government of India v Taylor (1955) AC 491***

#### ***In re State of Norway (1990) 1 AC 723***

#### ***Re Royco Investment Company Ltd 1 June 1989 (Unreported)***

The Royal Court consented to receive the declaration “en *désastre*” of the property of Royco upon the application of the English Provisional Liquidator.

#### ***In re Walkers Advertising Associates Ltd 21 December 1992 (Unreported)***

#### ***In re R v Charlton and others (1993) JLR 360***

***In the Matter of Bomford (2002) JLR N 34***

In this case, the Royal Court clarified the rule in *Government of India v Taylor* in that it found it unfair to refuse assistance to the court of the English jurisdiction merely because the Inland Revenue was the most substantial of a number of creditors.

***In re H Ltd (in Liquidation) 8 June 2004 (Unreported)***

In this case, the Royal Court granted assistance to an English liquidator in complex circumstances (including that Section 386 of the UK Insolvency Act 1986 had been amended to repeal the preferential status of revenue and customs' debts in an insolvency there) notwithstanding that over 99% of the claims had been filed on behalf of HM Customs and Excise and the Inland Revenue.

***Re First International Bank of Grenada Ltd 23 January 2002, (2002) JLR N7***

This case provides an example of the Royal Court remaining free – under general law at 1 above - to exercise an inherent jurisdiction to assist an application for assistance from a non-prescribed country and thus outside the application of Article 49 of the Bankruptcy Law (in this case, Grenada).

## **5. Further information**

The interested reader is referred to the text book 'Jersey Insolvency and Asset Tracking' published by Key Haven Publications plc for a more detailed treatment by the present authors of the above topics.

## Chapter 24

# LATVIA

### 1. General law

Recognition and enforcement of judgments of Member States of the European Union in Latvia is mainly governed by laws and regulations of the European Union. Recognition and enforcement of judgments of other Contracting Parties is governed by international treaties binding Latvia. In cases where international treaties or laws and regulations of the European Union do not apply, judgments of foreign courts may be recognised and enforced in Latvia in accordance with provisions set forth by Part F of the Civil Procedure Law.

The Civil Procedure Law provides that a foreign judgment (Section 637) will not be recognised if: -

- they were made without applying the law of the State the application of which is provided for by Latvian conflict-of-law rules;
- if they were made without providing for the competence of Latvian courts to resolve the dispute; or
- if the judgment is contrary to the Latvian public order, as well as in other cases.

The legislation of the European Union (regulations, directives, decisions, etc.) referring to the cross-border insolvency proceedings and the protection of employee rights in case of insolvency, including Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings (hereinafter referred to as European Insolvency Regulation (EC) No 1346/2000 or the EIR), have been applied in respect of cross-border insolvency proceedings in Latvia since 1 May 2004.

Regulation (EC) No 1346/2000 among other effects:

- co-ordinates the measures to be taken regarding an insolvent debtor's assets;
- improves the efficiency and effectiveness of insolvency proceedings having cross-border effects;
- defines international jurisdiction to open cross-border insolvency proceedings (i.e. designates the Member State of the European Union the courts or institutions of which may open insolvency proceedings);
- designates uniform rules on conflict of laws (i.e. designates the laws and regulations of which Member State of the European Union are applicable to the cross-border insolvency proceedings concerned); and
- provides for the procedure of recognition of judgments concerning the opening, conduct and closure of insolvency proceedings made in one Member State of the European Union, as well as judgments handed down in direct connection with such insolvency proceedings by other Member States of the European Union.

To ensure successful enforcement of the EIR, provisions concerning rights and obligations of the liquidator, data to be published in the Latvian Insolvency Register, as well as the procedure of lodging, verification and admission of claims by creditors were introduced into the Insolvency Law (in force from 1 November 2010) relating to the insolvency procedure set forth in Article 3(1) or 3(2) of the EIR.

## **2. Assisting legislation**

The most significant regulation of insolvency in Latvia is included in the Civil Procedure law (procedural provisions) and the Insolvency Law (substantive provisions). To ensure successful enforcement of the EIR, provisions were introduced into the above mentioned laws concerning co-operation of the administrator and the liquidator, information exchange and decisions: the most significant measures of co-operation and provision of information following the opening of cross-border insolvency proceedings are in Section 66 of the Insolvency Law.

The administrator is required within five working days of insolvency proceedings being opened to send to creditors whose place of residence or registered office is in another Member State a notice of the debtor's insolvency and lodging of the creditors' claim in accordance with the manner prescribed by the EIR.

The notice shall also include:

- i. the debtor's firm and registration number;
- ii. the court's name and the date on which the judgment is delivered;
- iii. the administrator's first name, last name, place of practice and phone number;
- iv. the type of the opened insolvency proceedings in accordance with Article 3(1) or 3(2) of EIR;
- v. the laws and regulations applicable to the opening, conduct and closure of the insolvency proceedings; and
- vi. whether the claim is secured.

If the main insolvency proceedings are opened against the debtor in another Member State, when performing the activities related to the recovery and alienation of the debtor's property, the person referred to in Article 22(2) of the EIR shall notify the respective public registers about the opening of insolvency proceedings against the debtor, attaching a duly certified duplicate of the decision on the opening of insolvency proceedings and the appointment of the liquidator, as well as a duly certified translation of this decision into the national language.

If the main insolvency proceedings are opened against the debtor in another Member State and the debtor owns an establishment in Latvia within the meaning of Article 2(h) of the EIR, the person referred to in Article 21(2) must submit an application to the insolvency register within five days from the day when the liquidator involved in the main insolvency proceedings has initiated the activities related to the recovery and alienation of the debtor's establishment's property.

The application shall include:

- i. the debtor's firm and registration number;
- ii. the court's name and the date on which the decision is made;
- iii. the first name, last name, place of practice and phone number of the liquidator involved in the insolvency proceedings referred to in Article 3(1) of the EIR;
- iv. the fact that the insolvency proceedings referred to in Article 3(1) of the EIR have been opened;
- v. the Member State laws and regulations of which are applicable to the opening, conduct and closure of the insolvency proceedings.

The above mentioned application may also be submitted to the insolvency register by the person referred to in Article 21(1) of the EIR if the debtor has no establishment in Latvia.

If secondary insolvency proceedings are opened against a debtor in Latvia, the administrator is required to co-operate with the liquidator involved in the main insolvency proceedings, upon the liquidator's request provide the information required to administer the insolvency proceedings, including information about the debtor's property located in Latvia, about the action to recover or alienate property, about the creditors' claims including admitted and unadmitted creditors' claims and complaints concerning claims, grouping of creditors, creditors' meetings, and about the secondary insolvency proceedings generally, property division and surplus cash.

If main insolvency proceedings are opened against a debtor in Latvia, the administrator follows the course of secondary insolvency proceedings opened against the debtor in the other Member State and requests information from the liquidator involved in the secondary insolvency proceedings, informs the liquidator about other secondary insolvency proceedings opened against the debtor and other significant aspects of these proceedings.

The Civil Procedure Law Section 46 provides for:

- jurisdiction of the case (main insolvency proceedings are determined according to the location of the debtor's centre of main interests<sup>1</sup> and secondary insolvency proceedings, according to the location of the debtor's establishment<sup>2</sup>;
- the content of and documents to be attached to the application for opening of insolvency proceedings submitted to the court by the debtor, the creditor and the liquidator of the main proceedings<sup>3</sup>;
- issues to be resolved within the framework of the insolvency proceedings (the court may decide to stay the process of liquidation<sup>4</sup> and to terminate the stay<sup>5</sup>; and
- the right of the court to request information from the liquidator<sup>6</sup>.

### 3. Insolvency practice

There are not many cross-border insolvency proceedings in the Latvian practice. In view of the limited experience in these matters, no unified approach to the examination of cross-border insolvency proceedings and the application of the provisions concerned has been established. The available information indicates that up to now, the practice of Latvia has been related to the opening of main insolvency proceedings or the refusal to open cross-border insolvency proceedings due to the inability to determine jurisdiction of the case or the centre of main interests.

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<sup>1</sup> In accordance with Section 363<sup>1</sup>(2) of the Civil Procedure Law.

<sup>2</sup> Within the meaning of Article 2(h) of Regulation (EC) No 1346/2000.

<sup>3</sup> Section 363.<sup>2</sup>, 363.<sup>3</sup> and 363.<sup>5</sup> of the Civil Procedure Law.

<sup>4</sup> Section 363.<sup>14</sup>(6) and 363.<sup>14</sup>(7) of the Civil Procedure Law and Article 33(1) of EIR.

<sup>5</sup> Article 33(2) of EIR.

<sup>6</sup> Section 363.<sup>14</sup>(13) of the Civil Procedure Law.

Based on the information available on opened cross-border insolvency proceedings, most cases in Latvia relate to opening of main insolvency proceedings of natural persons. This is probably due to favourable regulation for settling liabilities of natural persons included in the Insolvency Law. Currently there is information about one cross-border insolvency proceeding of a legal person.

## **4. Examples**

### ***Judgment of Ventspils Court of 21 June 2010 in Case No C40 0936 10***

The Ventspils Court upheld the application for insolvency proceedings of LLC “S 7”, a regional airline. The application was submitted, based on the facts that the scope of economic activity of LLC “S 7” significantly reduced in 2009 due to the economic situation in the State and that the reduction in business continued into 2010, with the result that the airline had problems in settling accounts with creditors, including a tax liability.

LLC “S 7” had a debtor in Lithuania and several creditors in Poland. The registered address of LLC “S 7” was in Ventspils, Latvia. No evidence was submitted to the court that LLC “S 7” regularly administered its interests in any other Member State of the European Union (Paragraph 13 of the Preamble to Regulation (EC) No 1346/2000) as opposed to Latvia or that the registered office of LLC “S 7” was not consistent with its actual centre of main interests.

The court therefore admitted that the centre of main interests of LLC “S 7” is Latvia and main insolvency proceedings should be opened against LLC “S 7”. Taking into account that LLC “S 7” actively operated in other Member States – Lithuania and Poland and registered offices of a range of creditors of LLC “S 7” were located in other Member States of the European Union, the court instructed the administrator to publish a notice about the insolvency proceedings of LLC “S 7” in the official gazettes of Lithuania and Poland specifying the information indicated in Article 20(1) of Regulation (EC) No 1346/2000.



## Chapter 25

# MALAYSIA

### 1. General law

In a country that adopts the common law system like Malaysia, a foreign judgment may be enforced by applying the rules of common law or by invoking the provisions in a statute, namely the Reciprocal Enforcement of Judgment Act 1958 (REJA). By and large, the common law principles on recognition and enforcement of foreign judgments have been codified in REJA. The enforcement of a foreign money judgment can be challenged on the following grounds, namely:

- (i) that the court in the original country that delivered the judgment had no jurisdiction in the circumstances of the case;
- (ii) that the money judgment obtained in the original court was not a final and conclusive judgment;
- (iii) fraud;
- (iv) breach of the rule of natural justice; and
- (v) public policy.

REJA provides for the enforcement of judgments of the reciprocating country of the original court and the First Schedule of REJA provides the list of countries that are classified as reciprocating countries.

Section 7 REJA provides as follows:

- (1) *Judgments which can be registered not to be enforceable otherwise “No proceedings for the recovery of a sum payable under a judgment of a superior court, being a judgment to which this Part applies, other than proceedings by way of registration of the judgment, shall be entertained by any court in Malaysia.”*

The issue to be determined is whether the word “proceedings” in s. 7 REJA includes the presentation of a winding-up petition. In this regard it is also pertinent to note the context of the word “proceedings” in subsection (2) of s. 4 REJA which sets out the effect of registration of a judgment as follows:

- (2) *Subject to the provisions of this Act with respect to the setting aside of registration:*
- (a) *a registered judgment shall, for the purposes of execution, be of the same force and effect;*
  - (b) *proceedings may be taken on a registered judgment;*
  - (c) *the sum for which a judgment is registered shall carry interest; and*
  - (d) *the registering court shall have the same control over the execution of a registered judgment;*
  - (e) *as if the judgment had been a judgment originally given in the registering court and entered on the date of registration:*

*Provided that execution shall not issue on the judgment so long as, under this Part and the rules of court made for the purposes thereof, it is competent for any party to make an application to have the registration of the judgment set aside, or, where such an application is made, until after the application has been finally determined.*

A domestic court will not apply, recognise and enforce a foreign law, judgment or order if the result of its application, recognition or enforcement would be contrary to the public policy of the country where the foreign judgment is to be enforced. The public policy of one country, even at the same point in time, may be different to that of another country and the public policy in a country may be different at different times. To predict which or what type of foreign judgment may be repugnant to a distinctive public policy of the local court is a hazardous task.

The High Court in Malaysia in the case of *The Ritz Hotel Casino Ltd v Datuk Seri Osu Haji Sukam* [2005] 6 Malayan Law Journal 760 rejected a foreign judgment on the ground that the enforcement of such a judgment would be contrary to the country’s public policy. In this case, The Ritz Hotel Casino Ltd had successfully sued and obtained judgment against Datuk Seri Osu Haji Sukam for approximately 1 million in the English High Court for a gambling debt. The judgment debtor successfully resisted the attempt by the judgment creditor to register and enforce the foreign judgment on the ground that enforcement of the judgment in Malaysia was contrary to public policy in Malaysia. The court found that anything that is

injurious to public welfare is against public policy. The adoption of such a test will be a great impediment to trading and commercial activities, both domestically and internationally.

### ***Enforcement of foreign non-money judgments***

Historically, non-money judgments, such as an order for specific performance or an order granting an injunction, have traditionally been regarded as unenforceable in private international law for reasons that are understandable: far more difficulties arise when a local court permits the enforcement of a foreign non-money judgment; the local court may have to supervise the enforcement process and rights of third parties may be affected by a foreign non-money judgment. However, there are compelling reasons for the courts to enforce some non-money judgments.

### ***Mareva injunctions and Anton Piller orders***

A Mareva injunction (a freezing order) and an Anton Piller (a searching order) are two types of interlocutory injunctions that were first granted by the English Courts in the 1970s. The Malaysian courts regarded these equitable remedies as draconian in nature and were extremely reluctant to grant these remedies. However, Malaysia has now accepted that these equitable remedies are appropriate and a necessity in the context of modern-day realities. Despite the readiness of the courts to grant these injunctions, major restrictions continued to apply until quite recently. The courts initially required that Mareva injunctions applied only to local defendants and that the assets or money were within the jurisdiction of the court. Anton Piller orders were originally limited to cases involving intellectual property rights. These restrictions have been removed. The English courts will grant Mareva injunctions even though the assets or account to be frozen are outside their jurisdiction.

The common law principle applied in Malaysia is that the Malaysian court may recognise foreign orders such as a dissolution order of a company granted by the law of its place of incorporation; a foreign liquidation order which has been granted in the home jurisdiction or domicile of the company; or an appointment of a foreign liquidator in the jurisdiction of the company. Such foreign orders are recognised provided the basis for exercising jurisdiction approximates to grounds normally accepted by the Malaysian court. The Malaysian court would consider the following in determining recognition of an order:

- whether the foreign proceedings are final in nature;
- whether the foreign proceedings comply with perceived notions of natural justice;
- whether jurisdiction has been exercised validly; and
- whether recognition of the foreign order would offend public order rules.

However recognition of a foreign order does not automatically grant enforcement of the said order in the Malaysian court. Fresh legal proceedings must be instituted in the Malaysian court to enforce the foreign order.

## 2. Assisting legislation

The Bankruptcy Act 1967 Section 104 facilitates the reciprocal recognition and enforcement of bankruptcy judgments and acts by the Official Assignee between Malaysia and Singapore as they relate only to insolvent individuals, not to corporate insolvency.

The Companies Act 1965 (the “Act”) contains two provisions; firstly in relation to a foreign company within the jurisdiction of Malaysia and secondly in relation to a company not registered under the Act.

The winding up of “unregistered companies” which is defined to include a foreign company is regulated by the Act, Part X Division 5. The provisions are not exclusive but are in addition to the other provisions in the Act with respect to winding up of companies by the Malaysian Court whereby the Malaysian Court and the liquidator may exercise any powers or do any act in the case of unregistered companies which might be exercised or done by court or the office holder in winding up registered companies.

Should a foreign company go into liquidation or be dissolved in its place of incorporation or origin, the liquidator appointed in the home jurisdiction shall have the powers and functions of a liquidator in Malaysia until such time as the Malaysian courts make an appointment (the Act, section 340(2)(b)).

## 3. Insolvency practice

Although Malaysian law does not provide for a foreign liquidation order to be directly enforceable in the Malaysian court, it is assisted by the recognition of the appointment of the foreign liquidator and allowing him capacity to act in certain, though limited, instances.

The liquidator, upon recovery and realisation of assets of the foreign company, must pay all Malaysian creditors first before any excess is transferred for the benefit of foreign proceedings. This is known as the local “grab rule” as set out in S. 340(3)(c) and based on the interpretation in *Tohru Motobayashi v Official Receiver & Anor* [2000] 4 SLR 529.

## 4. Examples

### ***Amos William Dawe v Development and Commercial Bank [1981] MLJ 230***

It was held that where a debtor is adjudged bankrupt in Singapore, all proceedings in Malaysia in respect of the same debtor must be discontinued in accordance with the Bankruptcy Act 1967, section 104.

***Re Griffin Securities Corp [1965] 2 MLJ 149***

It is not necessary for a foreign company to have a place of business in Malaysia. As long as there are assets within the jurisdiction or persons subject to the jurisdiction of the court interested in the proper distribution of the company's assets, a winding up order can be made.

***Tong Aik (Far East) Ltd v Eastern Minerals & Trading (1959) Ltd [1965] 2 MLJ 149***

The Malaysian court would take into account the presence or absence of assets within the jurisdiction in determining whether to make a winding up order. It was held that the proposed winding up in Singapore of a company incorporated in Malaysia could not by its nature affect assets within the jurisdiction of the court making the order and so would serve no useful purpose if there were no assets within the jurisdiction.

***Re Lim Szu Ang, ex p Kewangan Utama Bhd [2005] 7 CLJ 23***

The issue as to whether a bankruptcy proceeding is an enforcement of a judgment came up in this case in which the bankruptcy notice and creditor's petition were set aside on the ground that the judgment upon which the debt was claimed was statute barred.

***Re Cheah Theam Swee, ex p Equiticorp Finance Group Ltd & Anor [1996] 2 SLR 76***

In this case the judgment debtor applied to set aside a bankruptcy notice at the Singapore High Court. The bankruptcy notice was based on a judgment of the New Zealand High Court which had earlier been registered in the Singapore High Court under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264). It was contended, *inter alia*, that a judgment obtained in a Commonwealth country and registered in accordance with the said act could not form the basis of a bankruptcy notice. The Singapore High Court ruled that a bankruptcy notice could be founded upon a judgment registered under the said act.

In Malaysia the word "proceedings" is defined in the Companies (Winding-Up) Rules 1972 as the proceedings in the winding-up of a company under the Act. Such proceedings commence upon the presentation of the winding-up petition (see s. 219 of the Act). In the present case as the petition is made upon a statutory demand for a judgment debt the winding-up proceedings are made with the view of recovering the judgment debt. This is so even though it is not an enforcement within the meaning of O. 45 of the Rules of the High Court 1980.

The issue as to whether a bankruptcy proceeding is an enforcement of a judgment came up in *Re Lim Szu Ang, ex p Kewangan Utama Bhd [2005] 7 CLJ 23*. In that case the bankruptcy notice and creditor's petition were set aside on the ground that the judgment upon which the debt was claimed was statute barred. At p. 27 Abdul Aziz Rahim JC (now J) said:

*“Thus in my view the bankruptcy proceeding is an action on a judgment but not an enforcement of the judgment within the meaning of O. 45 r. 1 RHC 1980. An action on a judgment is not the same as enforcing a judgment. In enforcing a judgment a party in whose favour the judgment is given is taking a proceeding against the adjudged party in order to force that other party to satisfy the terms of the judgment in accordance with the rules relating to the enforcement of judgments. But in an action on a judgment the party that obtained the judgment is not enforcing the judgment as understood under the rules. Instead the party concerned is exercising his rights arising from the judgment, and given to him under the rules or a written law, by a separate and distinct action or proceedings. However the outcome of such action or proceedings may result in the satisfaction of the judgment by the party against whom the judgment is obtained.*

*... The word ‘suit’ is defined in s. 2 of the Sarawak Ordinance as ‘includes any action or proceedings’. To my mind the definition is non-exhaustive and the term ‘proceedings’ may and could include bankruptcy proceedings.”*

In the same manner an analogy may be drawn with the meaning of ‘proceedings’ in s. 176(10) of the Companies Act 1965. Under that provision the power to restrain ‘proceedings’ includes a restraint on winding-up proceedings. In *Intrakota Komposit Sdn Bhd & Anor v. Sogelease Advance (M) Sdn Bhd [2004] 8 CLJ 276* Abdul Malik Ishak J (now JCA) said at p. 287:

*“... , s. 176(10) of the Companies Act 1965 allows an application to be made in order to “restrain further proceedings” prior to the winding-up where a “compromise or arrangement has been proposed”. The court may be persuaded to adjourn a winding-up petition if the company can show solid evidence that a rescue attempt is under way. The court’s power to restrain proceedings is all encompassing. It extends to restraining the “proceedings in any action or matter” (*Re Artistic Color Printing Co [1880] 14 CH D 502, 504, 505.*)”*

Accordingly the court takes the view that the meaning of the word “proceedings” in s. 7 and subsection (2) (b) of s. 4 REJA is non-exhaustive and includes proceedings in any action or matter including winding-up proceedings.

In *Re Cheah Theam Swee, ex p Equiticorp Finance Group Ltd & Anor [1996] 2 SLR 76* the judgment debtor applied to set aside a bankruptcy notice at the Singapore High Court. The bankruptcy notice was based on a judgment of the New Zealand High Court which had earlier been registered in the Singapore High Court under the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264). It was contended, *inter alia*, that a judgment obtained in a Commonwealth country and registered in accordance with the said act could not form the basis of a bankruptcy notice. The Singapore High Court ruled that a bankruptcy notice could be founded upon a judgment registered under the said Act.

## Chapter 26

# MEXICO

### 1. General law

Provided it is not contrary to Mexican law, any foreign judgment may be recognised and enforced in Mexico, subject to any treaties and conventions to which Mexico is a party. Once certain formal requirements are satisfied, a foreign judgment will be recognised by a Mexican court and thereafter it may be enforced. The formal requirements are:

- the letter of request sent by the foreign court must be in accordance with formalities required by Mexican law;
- the foreign judgment must have originated from an action *in personam* and not an action *in rem*;
- the foreign court must have had jurisdiction to hear the case;
- the foreign proceedings should have been duly served on the debtor;
- the judgment should be final and conclusive;
- the cause of the action giving rise to the judgment is not the subject-matter of an action pending between the same parties in a Mexican court predating the date of the foreign action or the letter rogatory to serve the other party have not been processed and delivered to the Ministry of Foreign Affairs, or to the authorities of the state where the service process is to be effected;

- enforcement of the judgement should not be contrary to Mexican law or public policy; and
- the judgment should be properly authenticated.

The court will not look into the merits of the foreign judgment but retains discretion to grant enforcement, especially if it is proven that the requesting country does not grant reciprocity to Mexican judgments.

Mexico is a signatory to the following international conventions:

- Interamerican Convention on the Extraterritorial Effectiveness of Foreign Judgments and Arbitral Awards, Montevideo, Uruguay, 8 May 1979;
- Interamerican Convention on International Jurisdiction for the Extraterritorial Effectiveness of Foreign Judgments and Arbitral Awards, La Paz, Bolivia, 24 May 1984; and
- Agreement between the United Mexican States and the Kingdom of Spain on the recognition and enforcement of civil and commercial judgments and awards, Madrid, Spain, 17 April 1989.

None of these international compacts apply to the recognition and enforcement of foreign bankruptcy orders.

## 2. Assisting legislation

Mexico is the first country with a major economy to have incorporated into its insolvency legislation the provisions of the UNCITRAL Model Law on Cross-Border Insolvency. Pursuant to the relative provisions of the "Ley de Concursos Mercantiles" ("Commercial Insolvency Law" – hereinafter "LCM"), in order that a Mexican court recognises a foreign bankruptcy order, the relative application must include:

- a copy certified by the foreign court of the resolution which commenced the foreign proceeding, and whereby the foreign insolvency representative was appointed;
- a certificate issued by the foreign court that establishes the existence of the foreign proceeding and the appointment of the foreign representative; or
- in the absence of any evidence pursuant to the above two paragraphs, any other evidence admissible by the judge that proves the existence of the foreign proceeding and the appointment of the foreign representative;
- a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative must also be filed.

Any documents filed in a foreign language in support of the application for recognition must be accompanied with its translation into Spanish. Likewise, the debtor's address must be stated for the purpose that it be served with the application. The proceeding will be processed as an ancillary proceeding between the foreign representative and the debtor, with the participation, as the case may be, of the examiner, the conciliator or the "síndico" ("trustee").

One deviation from the text of the UNCITRAL Model Law is that the recognition of foreign insolvency orders is subject to reciprocity.

### **3. Insolvency practice**

Foreign creditors have the right to prove their claims in local bankruptcy proceedings.

A Mexican court has jurisdiction to make bankruptcy orders in respect of foreign individuals resident in Mexico and engaged in commercial activities or the branches of foreign companies carrying on business in Mexico. In the case of individuals, the Mexican bankruptcy order will affect all assets of the bankrupt individual wherever found, but in the case of a branch of a foreign incorporated entity, it will affect only those assets of the bankrupt that are situated in Mexico.

### **4. Examples**

#### ***Xacur, Jacobo, Felipe y José María***

As of June 2012, in the past ten years the LCM has been in force, only three foreign recognition cases have been brought under the cross-border recognition provisions of the LCM. This was the first case and was heard by the Fourth District Court in the Federal District for Civil Matters under docket number 29/2001.

#### ***IFS Financial Corporation***

This was the second case and is also being heard by the Fourth District Court in the Federal District for Civil Matters under docket number 206/2004.

#### ***Mark Allen Dennis***

This was the third case and is being heard by the Seventh District Court in the Federal District for Civil Matters under docket number 413/2011.

In all these cases, the courts granted recognition of the respective foreign proceedings (the first two from the United States of America and the third one from Canada).



## Chapter 27

# NEPAL

### **1. General law**

Nepal is not party to any international treaty for the recognition or enforcement of foreign judgments or orders except the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958. Specific provisions have been made under the Arbitration Act 1998 and the Rules made under the Act to give effect to the said Convention. Courts of Nepal shall enforce foreign arbitration awards on reciprocal basis. The process of enforcement should be initiated in Nepal within 90 days from the date of final award.

### **2. Assisting legislation**

The Insolvency Act 2006 is the relevant legislation but it does not deal with cross-border insolvency. It does not grant any authority to Nepal's court to recognise a foreign insolvency process in Nepal and thus a foreign insolvency representative is not able to be recognised under the said Act.

However, section 158 (6) of the Companies Act recognises a foreign insolvency process initiated against the parent company of a branch that is registered in Nepal. As required under this section, the authorised representative of such branch should inform the Office of the Company Registrar in writing about the said insolvency process. He should also publish the relevant information in a daily newspaper distributed at National level for public information. The business operations of the Nepal branch should cease if a relevant foreign court has issued a liquidation order against it. On the closure of the business operation, the Insolvency Act 2006 applies in respect of the business transactions carried out in Nepal by such a foreign company. This may mean that a fresh insolvency process can also be initiated in Nepal under the Insolvency Act 2006.

Foreign creditors can initiate an insolvency process in Nepal against an insolvent debtor company on the same footing as a domestic creditor. Foreign currency loans can be paid in convertible foreign currency out of the insolvency estate. The applicable exchange rate for conversion of claims is the rate published by Nepal's Central Bank prevailing on the date of the initiation of the insolvency process.

### **3. Insolvency practice**

Since 1990 Nepal has adopted the policy of free market economy and has liberalised certain sectors of the economy that were previously not opened for private investment such as banking insurance, telecommunication and aviation services. Substantial (i.e. up to 80%) foreign ownership is permitted in the telecommunication sector.

As a result of these policy changes, foreign banks and insurance companies can operate branches or wholly-owned subsidiaries with the approval of the Nepal government and its central bank under the Commercial Bank Act 2006 and Insurance Act 1992 (2049) respectively. Similarly, the Companies Act 2006 permits the registration of branches of a foreign company operating in Nepal, which was not possible before 1990. As a consequence of these reforms, inbound foreign investment is increasing day by day.

However, despite Nepal government's extensive effort to encourage cross-border investment, the existing laws are inadequate to deal effectively with the complicated cross frontier problems that may arise in the event of the insolvency of foreign companies having operations in Nepal.

## **4. Future reforms**

Important reform initiatives are under way. In 2010, the Chief Justice of Nepal formed a Working Committee to recommend an appropriate legal and institutional mechanism to address the problem arising due to the lack of appropriate laws for mutual judicial co-operation between foreign courts and courts of Nepal. The reforms are required to address matters related to enforcement of each other's judgments, service of process and recognition of foreign insolvency processes. The Working Committee has recommended the enactment of a law to deal with cross-border insolvency issues and this may be a part of the existing Insolvency Act 2006 or a separate law.

Similarly, the Committee has recommended a separate law for the recognition and enforcement of foreign courts' judgments in Nepal and other matters of judicial co-operation between the courts of Nepal and foreign courts.

Another high level Committee formed by the Nepal Government has also submitted a draft Civil Code which included a separate chapter on the recognition and enforcement of foreign courts' judgments and related judicial co-operation.

## **5. Examples**

There are currently no examples of co-operation in matters of cross-border insolvency.



## Chapter 28

# THE NETHERLANDS

### 1. General law

The EU Insolvency Regulation entered into force on 31 May 2002. It provides, in short, that the legal consequences of a formal insolvency declared by a Court of a Member State have to be recognized in all other Member States. With respect to insolvency proceedings that do not fall within the scope of the EU Insolvency Regulation the general rules of Dutch (private international) law remain applicable.

As the number of provisions on cross-border insolvencies is so limited, questions of international insolvency law are to be answered based on a limited and often ambiguous body of case law. According to case law of the Dutch Supreme Court prevailing prior to the entry into force of the EU Insolvency Regulation and prevalent, in determining the cross-border effects of insolvency proceedings, under Dutch law a distinction is made between insolvency proceedings opened in the Netherlands and insolvency proceedings opened outside of the Netherlands.

It follows from this case law that insolvency proceedings opened in the Netherlands encompass the entire estate of the debtor, including assets located outside of the Netherlands<sup>1</sup>.

Foreign insolvency proceedings are, in principle, recognised in the Netherlands. The powers of a foreign administrator are, for example, determined in accordance

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<sup>1</sup> Supreme Court 15 April 1955, *NJ* 1955, 542 (Kallir/Comfin).

with the foreign *lex concursus* and are, in principle, recognised in the Netherlands although the effects of such recognition are limited. Save for conventional provisions to the contrary, a foreign insolvency proceeding does not include assets of the debtor that are located in the Netherlands<sup>2</sup>. This interpretation of the principle of territoriality was confirmed by the Dutch Supreme Court relatively recently in the Yukos case<sup>3</sup>. In this ruling, which concerned the question whether the receiver of a foreign bankrupt entity can invoke the voting rights on shares in a Dutch company owned by that foreign entity, the Supreme Court confirmed its position that legal consequences following from the provisions applicable to a foreign insolvency proceedings (the *lex concursus*) cannot be invoked in the Netherlands if such would lead to a situation in which the creditors are no longer entitled to take recourse against the debtors' assets in the Netherlands.

In another interesting chapter in the 'Yukos saga', the Amsterdam District Court refused to recognize a Russian ruling in which the Russian entity Yukos Oil Company was declared bankrupt. The District Court, in short, ruled that recognition of the Russian ruling would be against Dutch public policy (*ordre public*) as the proceedings leading to that particular ruling did not meet standards of procedural fairness.<sup>4</sup> This ruling is subject to appeal proceedings in which, in an interlocutory decision, the Court of Appeal of Amsterdam ruled that the Russian receiver of Yukos Oil Company was not competent to sell the shares Yukos Oil Company owned in its Dutch subsidiary Yukos Finance would compromise the position of the creditors of Yukos Finance.<sup>5</sup>

This interlocutory verdict of the Amsterdam Court of Appeals was brought before the Supreme Court. The Supreme Court ruled that the complaint by the Russian receiver was inadmissible as the person in question had lost its capacity of receiver of Yukos Oil Company.<sup>6</sup> However, even if the Supreme Court would have ruled that the Amsterdam Court of Appeals incorrectly applied the principle of territoriality (as Veder argues in his note under the Court of Appeals decision), the case would have been referred back to the Court of Appeals in order to rule on that other principal issue of cross-border insolvency law: was the Amsterdam District Court correct in refusing to recognize the Russian bankruptcy verdict? This question is now yet again before the Amsterdam Court of Appeals. It seems safe to assume that this issue will be put before the Supreme Court in the (near) future.

Consequently, the recognition of a foreign bankruptcy does not prevent creditors from having recourse against the assets of the debtor located in the Netherlands, during or after the foreign insolvency proceedings. Attachment of these assets is possible, unless the assets at the time of the declaration of the foreign bankruptcy

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<sup>2</sup> Supreme Court 2 June 1967, *NJ* 1968, 16 (Hiret/Chiotakis) and HR 31 May 1996, *JOR* 1996, 75 (De Vleeschmeesters).

<sup>3</sup> Supreme Court 19 December 2008, *JOR* 2009, 94, with a note by P.M. Veder.

<sup>4</sup> Amsterdam District Court 31 October 2007 *JOR* 2008, 56, with a note by P.M. Veder.

<sup>5</sup> Amsterdam Court of Appeals 19 October 2010, *JOR* 2011, 27, with a critical note by P.M. Veder.

<sup>6</sup> See Supreme Court 29 June 2012, *NJ* 2012, 424.

were located in the foreign country, and have subsequently been brought to the Netherlands by the foreign administrator in the performance of his duties<sup>7</sup>.

## **2. Assisting legislation**

In The Netherlands, the number of specific statutory provisions with respect to cross-border insolvencies that fall outside the scope of the Insolvency Regulation is rather limited. The Dutch Bankruptcy Act (*Faillissementswet*, the “Bankruptcy Act”) contains only three articles providing for rules applicable in international insolvency proceedings. Underlying these sections 203 through 205 of the Dutch Bankruptcy Act are the principles of universality and territoriality. The former entails that all assets of the debtor, either located in The Netherlands or in any other (intra- or extra-EU) jurisdiction, are part of the bankrupt estate. Under the principle of territoriality, the assets of a foreign debtor located in The Netherlands, conversely, do not form part of the foreign bankruptcy estate. Due to the entry into force of the EU Insolvency Regulation, the latter is only applicable to insolvency proceedings commenced outside of the EU or in Denmark, where the EU Insolvency Regulation does not apply.

The approach in the Kallir case<sup>8</sup> corresponds with section 20 of the Bankruptcy Act, pursuant to which the bankruptcy encompasses all assets of the debtor, without distinguishing between assets located in and outside the Netherlands, and with sections 203 through 205 of the Bankruptcy Act.

Dutch law, in principle, does not distinguish between local and foreign creditors. Foreign creditors are entitled to file their claims with the administrator and in principle they rank equally with Dutch creditors of the same rank.

Sections 203 through 205 of the Bankruptcy Act only deal with the obligation of creditors to return the proceeds of recovery abroad to the Dutch estate. Pursuant to section 203, a creditor who has seized assets located outside of the Netherlands and belonging to a party that has been declared bankrupt in the Netherlands, has to pay the proceeds thereof to the bankrupt estate, unless the relevant assets are subject to a priority right in favour of the creditor.

## **3. Insolvency practice**

The general rules set out in the above pose questions that need to be resolved in practice. A number of these issues are briefly discussed below.

A bankruptcy of a debtor who has been declared bankrupt under foreign law does not affect legal proceedings pending in the Netherlands involving the debtor. Legal proceedings against a debtor who has been declared bankrupt under foreign law can be instituted in the Netherlands. As far as the foreign bankruptcy is pending in an EU Member State, the provisions of the EU Insolvency Regulation apply.

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<sup>7</sup> See footnote 6 *supra*.

<sup>8</sup> See footnote 1 *supra*.

There does not seem to be published case law on the right of a foreign administrator to obtain information or documents. The Hague Evidence Convention of 1970 may serve as a legal basis to obtain judicial co-operation.

It is uncertain which law, pursuant to Dutch private international law, applies to set-off in and outside of insolvency. Case law shows different solutions.

## 4. Examples

The most important decisions of the Supreme Court in cross-border insolvency cases are briefly described below. Many other examples can be found in case law of the lower courts but for reasons of brevity these are not set out here.

### ***Kallir/Comfin (Supreme Court 15 April 1955, NJ 1955, 542) and Aalburgse Banden Centrale (Supreme Court 11 January 1980, NJ 1980, 563)***

Insolvency proceedings that have been commenced in the Netherlands have universal effect. A Dutch bankruptcy encompasses the entire estate of the debtor, including assets located outside the Netherlands.

### ***Hiret/Chiotakis (Supreme Court 2 June 1967, NJ 1968, 16), De Vleeschmeesters (Supreme Court 31 May 1996, NJ 1998, 108) and Yukos (Supreme Court 19 December 2008, NJ 2009, 456)***

The limited nature of the recognition of foreign bankruptcy proceedings is reflected in the Supreme Court ruling that, save for conventional provisions to the contrary, foreign insolvency proceedings in principle only have territorial effect.

### ***Supreme Court 5 November 1915, NJ 1916, p.12-16 and Supreme Court 9 October 1914, NJ 1914, p.1351***

According to the Supreme Court, the provision of Dutch insolvency law concerning mutual agreements that have not or not fully been performed by both the debtor and the other party (Bankruptcy Act section 37) does not apply in the case of a foreign insolvency.

### ***Gustafsen q.q. Mosk 24 (Supreme Court 24 October 1997, NJ 1999, 316)***

The Supreme Court decided that the foreign *lex concursus* is applicable to an action instituted by an administrator in relation to the avoidance of antecedent transactions prejudicial to the general body of creditors. However, if the *lex concursus* does not coincide with the *lex causae* of the disputed legal act, the 'vulnerability' of the legal act must be determined in accordance with both the *lex concursus* and the *lex causae*. Consequently, in that case, avoidance of the legal act will only be possible in case the requirements of both the *lex causae* and the *lex concursus* have been met.

## Chapter 29

# NEW ZEALAND

### 1. General law

New Zealand law is based on English common law, although New Zealand Courts now commonly refer to decisions of the English, Australian and Canadian courts.

Where there is no specific statute governing the recognition and enforcement of judgments of a foreign country, such judgments may only be enforced under the common law rules. A New Zealand court will not enforce a foreign judgment based only on the principle of comity of nations. If a foreign judgement is to be enforced at common law, the foreign judgment creditor must sue on the foreign judgment in the New Zealand High Court: it cannot be directly enforced. If the action is successful, the Court will make an order whereby the judgment may be enforced as a local judgment against the judgment debtor and his property in New Zealand.

Where an enforcement action on a foreign judgment *in personam* has been filed, the New Zealand court must first be satisfied that the jurisdiction of the foreign court granting the judgment is recognised by New Zealand law. The judgment should be final and conclusive and for a debt or a definite sum of money.

If the foreign judgment in question is a judgment *in rem*, a New Zealand court will treat the judgment as final and conclusive and binding between parties.

If the aforesaid criteria are satisfied, a New Zealand court may make an order in favour of the foreign judgment creditor. The court will not re-examine the merits of the case or entertain a defence to the effect that the judgment was given as

a result of an error of fact or law. The only defences available to the defendant are that the foreign judgment was obtained by fraud or that its enforcement would be contrary to New Zealand public policy. In *NZ Marine Services Ltd v Bohon*, Barker ACJ noted that policy leans in favour of recognising the judgments of the courts of reciprocal countries (even if the New Zealand court may be unhappy about the basis of the judgment) (See Butterworths Current Law, October 1993).

Non-insolvency judgments of certain foreign countries will be enforced after they have been registered under the Reciprocal Enforcement of Judgments Act 1934 (REJ) or the Judicature Act 1980, section 56. The latter section will apply only in respect of judgments that are not enforceable under the provisions of the REJ.

## 2. Assisting legislation

### ***The Insolvency (Cross-border) Act 2006***

The Insolvency (Cross-border) Act was promulgated for the purposes of:

- implementing the Model Law on Cross-Border Insolvency adopted by the United Nations Commission on International Trade Law on 30 May 1997 and
- providing a framework for facilitating insolvency proceedings when-
  - a) a person (whether personal or corporate) subject to insolvency proceedings in one country, has assets or debts in another country; or
  - b) insolvency administrations have been commenced in more than one country in relation to a person.

A foreign insolvency practitioner acting in respect of a foreign insolvency may apply to the High Court for the recognition of the insolvency in New Zealand as a "foreign proceeding". Where the insolvency is a "foreign main proceeding", being an insolvency taking place in the State where the debtor has the centre of its main interests (COMI), there is an automatic stay of individual actions or execution against any assets the debtor may have in New Zealand.

The recognition of a foreign proceeding will entitle the foreign practitioner to apply to the High Court for certain relief, chiefly:

- staying individual proceedings or execution against the debtor's assets to the extent that they had not been automatically stayed;
- suspending the right to transfer, encumber, or otherwise dispose of any assets of the debtor to the extent that they had not been automatically suspended;
- providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
- entrusting the administration or realisation of the debtor's assets located in New Zealand to the foreign practitioner or another person designated by the Court.

### ***Trans-Tasman Proceedings Act 2010***

The Trans-Tasman Proceedings Act was introduced to streamline the process for resolving civil proceedings in New Zealand and Australia in order to reduce costs and improve efficiency of commercial litigation in both jurisdictions.

The Act facilitates:

- civil proceedings from one country to be served on a defendant in the other country;
- expanding the range and streamlining the process for the enforcement of civil court judgments in both countries;
- the introduction of a common statutory test to determine whether a Court in one country should decide a case or submit to the jurisdiction of a Court in the other country;
- the greater use of technology to enable parties and their lawyers to appear in proceedings in the other country; and
- the improvement of regulatory enforcement between the Trans-Tasman countries by allowing civil pecuniary penalties and certain criminal regulatory fines imposed in one country to be enforced in the other.

## **3. Insolvency practice**

The assistance and recognition which the New Zealand courts will give has been given greater certainty in the recent High Court decision of *Justice Heath – Williams v Simpson* (High Court Hamilton CIV -2010-419-1174, 12 October 2010). This was the first occasion on which the Insolvency (Cross-border) Act had been invoked in New Zealand and was used to facilitate insolvency proceedings where a person is subject to insolvency administration in one country, but has assets in another country.

Mr Simpson had been adjudicated bankrupt in England and Mr Williams was appointed Trustee. Mr Simpson disclosed his home address as being in New Zealand. Mr Simpson apparently had no known assets to satisfy his creditors in England, but there was a strong suspicion that he had assets in New Zealand. Mr Williams applied to the New Zealand High Court for an order recognising the English bankruptcy as a foreign main proceeding or alternatively as a foreign non main proceeding (a foreign proceeding taking place in the State where a debtor has a place of operations and carries out a non-transitory economic activity). In addition, the English High Court had issued a Letter of Request to the New Zealand High Court seeking assistance.

Although the High Court held that the English bankruptcy did not fall to be recognised as either a foreign main proceeding or a foreign non-main proceeding due to the facts of the case, the application was granted under section 8 of the Insolvency (Cross-border) Act which permits the High Court to act in aid of the overseas courts.

Current practice would now appear to be that if foreign bankruptcy proceedings are recognised by the New Zealand High Court, the foreign administrator will be accorded recognition and a New Zealand administrator may be appointed to assist. The New Zealand aspects of the foreign administration will then be vested in the New Zealand administrator. The foreign administrator will deal with the matter through the New Zealand administrator.

Foreign bankruptcy orders will be recognised in New Zealand provided that the orders are proved to have been made in the foreign jurisdiction and that the foreign jurisdiction was sufficiently connected with the insolvent person or company and properly exercised. The nature and extent of the aid will be governed by the provisions of the Insolvency (Cross-border) Act, subject to the discretion of the New Zealand High Court.

The *Williams v Simpson* case illustrates that the courts in New Zealand are likely to take an expansive approach to cross-border insolvency cases.

## 4. Examples

### ***Gordon Pacific Developments v Conlon (1993, 3 New Zealand Law Reports 765)***

The plaintiff sought to enforce a judgment of the District Court of Queensland, Australia, in New Zealand under the Judicature Act 1908. Since Australia is a Commonwealth country, Henry J ruled that the REJ was applicable. Enforcement was refused on the ground that, since the judgment was a judgment in *personam*, the jurisdictional requirements set out in section 6 of the Act were not satisfied. Therefore the jurisdiction of the Queensland Court could not be recognised.

### ***Sheahan HC AK CIV-2011-404-001623 20 May 2011***

The applicants were liquidators of three Australian companies within the Cedenco Group and applied for recognition that the liquidations be recognised as foreign main proceedings under the Insolvency (Cross-border) Act 2006. The applicants were also liquidators of two New Zealand companies within the same group and, as the business and banking companies of Cedenco were related, enquiries by the Cedenco liquidators as to the circumstances of the failure of the New Zealand companies were relevant to the Cedenco litigation. The Court was satisfied that the applicants were foreign representatives for the purpose of the Act and that the liquidation proceedings were foreign proceedings as set out in Article 17 of Schedule 1, Chapter 111 of the Act. The application was accordingly granted on recognition that the proceedings were foreign main proceedings pertaining to each company.

## Chapter 30

# NIGERIA

### 1. General law

Nigerian law is based on common law, precedents and local statute and, where there is a lacuna in the local law; the laws in England operate as persuasive authority to complement the Nigerian law. The recognition of foreign judgments is dealt with within the framework of the existing Nigerian laws; the Foreign Judgments (Reciprocal Enforcements) Act Cap 152, 1990 (FJRE) which provides for the enforcement of judgments given in foreign countries that accord reciprocal treatment to judgments given in Nigeria, and the Reciprocal Enforcement of Judgment Act 1922, Cap 175, Laws of the Federation and Lagos, 1958 (REJ).

The judgments that can be enforced in Nigeria are those to which Part 1 of the Act applies. The decision to confer reciprocal status to a foreign jurisdiction is based on the Minister being satisfied that substantial reciprocity of treatment will be assured as regards the enforcement of judgments given in superior courts in Nigeria.

The judgment of a superior court to which the Act, part 1 applies must be: -

- final and conclusive between the parties notwithstanding that an appeal may be pending against it or that it may still be subject to appeal in the courts of the foreign country; and
- one in which a sum of money is payable thereunder, not being a sum payable as taxes or other charges of a like nature, or in respect of a fine or other penalty.

An application to enforce a judgment must be made to a High Court in Nigeria within 6 years from the date of the judgment, or where there has been an appeal against the judgment, after the date of the last judgment given in the appeal. Section 4 FJRE however provides that a judgment will not be registered if at the date of the application the judgement:-

- a. has been wholly satisfied; or
- b. it could not be enforced by execution in the country of the original court.

It therefore follows that a Court can refuse to register a foreign judgment that has not complied with the conditions stated above.

Under Section 10 (a) FJRE and Section 3(1) REJ, a foreign judgment must be registered within 12 months or such longer period as may be allowed by a superior court in Nigeria. In *Marine & General Assurance Company Plc v Overseas Union Insurance Limited and others*,<sup>1</sup> the Supreme Court upheld the decision of the trial court that the respondents application was not filed within the statutory 12 months period from the date of the judgment and dismissed the respondent's petition.

On registration, the judgment has the same force and effect for the purposes of execution, and proceedings may be taken on it. The judgment debt carries interest and the registering High Court has the same control over the registered judgment as if the judgment was given in that High Court on the date of registration. In effect, the purpose of registering a foreign judgment in a Nigerian Court is to make such judgment a judgment of the Nigerian Court.

The judgment debtor may apply to the High Court to set aside the registration if: -

- the judgment is not a judgment to which Part 1 applies or that it was registered in contravention of the Act;
- the courts of the country of the original court had no jurisdiction in the circumstances of the case;
- the judgment debtor did not receive notice of those proceedings in sufficient time to enable him to defend the proceedings and did not appear;
- the judgment was obtained by fraud;
- the enforcement of the judgment would be contrary to public policy in Nigeria; or
- the rights under the judgment are not vested in the person by whom the application for registration was made.<sup>2</sup>

In cases where there is no reciprocal treatment of foreign judgments, the foreign creditor may use the judgment to procure another judgment in Nigeria by instituting a fresh action.

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<sup>1</sup> [2006] 4 NWLR Pt. 971 pg. 622 at pg. 647

<sup>2</sup> Section 6 (1) Foreign Judgments (Reciprocal Enforcement) Act Cap. F35, the Laws of the Federation of Nigeria 2004.

## **2. Assisting legislation**

There is no Insolvency Act in Nigeria. The laws relating to insolvency are included in the Companies and Allied Matters Act Cap 59 1990 (CAMA) which replaced the Companies Act, 1968. The rules governing the winding up of companies are contained in The Companies Winding-Up Rules 2001 (“the Rules”). The Winding Up Rules 2001 provide a detailed framework and procedure for the application of insolvency under CAMA.

There is no law in Nigeria dealing specifically with the recognition and enforcement of cross-border insolvencies or any authority specifically set up to deal with issues that arise out of cross-border insolvencies.

## **3. Insolvency practice**

In Nigeria, corporate insolvency matters are dealt with in the first instance by the Federal High Court which by virtue of Section 251 (1) of the Constitution of the Federal Republic of Nigeria 1999 is vested with exclusive jurisdiction to handle insolvency matters. This court which is sometimes known as the “business court”, is best suited to administer insolvency cases because it exercises exclusive jurisdiction in matters of such commercial nature.

Appeals may be made to the Court of Appeal and the Supreme Court of Nigeria. Since most insolvency cases arise from the issue of unpaid debts, both our legal practitioners and our courts treat them as being akin to debt recovery cases. The insolvency matters are dealt with in Nigeria only on the periphery based on general company law principles and laws relating to pre-emptive remedies, without adequate appreciation of the technicalities of insolvency.

There is a dearth of authorities in Nigeria regarding cross-border insolvencies but there have been various pronouncements by the courts regarding enforcement of foreign judgments. An issue of great concern to the courts in Nigeria in cases of registration of foreign judgments in Nigeria or the registration of Nigerian judgments abroad is ensuring that there is no conflict between the courts of the original jurisdiction and the registering court.

A Nigerian court can wind up a foreign company under CAMA Sections 407 which provides jurisdiction to the Federal High Court to wind up relevant companies whether registered or not, which have a registered office or head office within the jurisdiction of the court during the 6 months immediately preceding the presentation of the petition for winding up.

Such a company may be wound up as an unregistered company under CAMA section 532 if: -

- the company is dissolved, or has ceased to carry on business or is carrying on business only for the purpose of winding up its affairs.
- the company is unable to pay its debts.
- the court is of the opinion that it is just and equitable that it be wound up.

As regards companies that have been wound up outside Nigeria but with assets within Nigeria, it is advisable to institute an action under FJRE, Section 11 within the jurisdiction for an order to sell the relevant assets based on the foreign winding up order procured.

The Bankruptcy Act Cap 30, 1990 Section 53 provides that a bankrupt possessed of property outside Nigeria is required to join the trustee in selling such assets for the benefit of the creditors. It is noteworthy that the provisions of the Bankruptcy Act have hardly ever been used in Nigeria, except for the recent attempt to implement it as a debt recovery tool.

## 4. Future reforms

The Nigerian insolvency legal framework is not as technically developed as the insolvency regimes in many other foreign jurisdictions. The Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN) has been actively canvassing for a review of Nigerian insolvency laws and for its insolvency laws to be codified as the Nigerian Insolvency Law.

## 5. Examples

### ***Teleglobe America Inc. v 21st Century Technologies Limited***<sup>3</sup>

The Court of Appeal held that once a foreign judgment is submitted for registration, a trial Court must limit itself to the requirements of Section 4 FJRE.

### ***Shona-Jason Nigeria Limited v Omega Air Limited***<sup>4</sup>

The Court of Appeal set aside the decision of the lower court refusing to set aside the registration of the judgment of a High Court of England. The Court further held that although a High Court has the power to register a foreign judgment, such judgment can be set aside upon the application of a person against whom such judgment may be enforced if the registering court is satisfied that the conditions set out in Sections 6 (1)(a)-(b) FJRE have been satisfied.

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<sup>3</sup> [2008] 17 NWLR Pt 1115 Pg. 108.

<sup>4</sup> [2006] 1 NWLR Pt 960 at Pg. 1.

**Adwork Limited vs Nigeria Airways Limited Court of Appeal (2000) 2 NWLR (part 645)**

The Court found as follows: -

*“The original court that gave judgment does not lose its jurisdiction in relation to the execution process in the suit just because the judgment has been registered in a foreign country. But once it is recognized that a registering court has the same power with respect to execution as the original court, it becomes important to monitor closely what the registering court is doing in relation to the execution of a particular registered judgment in order to ensure that there is no conflict in the exercise of powers as to execution between the registering court and the court which originally gave the judgment”.*

*“The process of execution of a judgment may take different forms and may necessitate other ancillary proceedings. In the quest to eliminate any conflict of jurisdiction as to execution between the registering court and the original court, it is important for either of the court to discover what is being done or has been done by either of them at a particular time before either assumes jurisdiction. It boils down to the necessity for both courts to prevent an abuse of its execution process rather than in the proclamation of principles”.*

*“When a judgment has been pronounced and no appeal is brought by the parties, the execution of the judgment normally follows. All types of application may follow and these usually include stay of execution, installment payment, variation etc. It appears that applications other than those directed specifically at obtaining satisfaction of the judgment are properly brought before the court which originally gave the judgment even in cases where the judgment has been registered in a foreign court. On the other hand, applications arising out of execution of writs taken out in the registering court ought to be heard by the registering court. This is without prejudice to the power of the court which originally gave the judgment to enforce by execution its judgment even when the judgment has been registered in a foreign court. The way it works is that either court must satisfy itself that the execution power is not being exercised simultaneously in exercise of the concurrent jurisdiction in the original and the registering court”.*



## Chapter 31

# POLAND

### 1. General law

Before 2003, the Polish Insolvency Regulation of 1934 did not provide for the recognition and enforcement of an insolvency judgment issued by a foreign court. It was debatable whether such a judgment could have been easily recognised under the general provisions of the Polish Civil Procedure Code. This has changed with the introduction of the new insolvency statute of February 28, 2003 (the "Insolvency Law") that came into force on October 1, 2003.

Under the Polish Civil Procedure Code, enforcement against the debtor on the basis of rights enforceable in accordance with the laws of a foreign state may only be carried out after the Polish court determines the enforceability of the foreign enforcement proceedings once it has formally recognised foreign insolvency proceedings.

### 2. Assisting legislation

The Insolvency Law introduced a new chapter on cross-border insolvencies ("Cross Border Insolvency Chapter") which is theoretically based on the UNICITRAL Model Law on Cross-Border Insolvency although there appear to be some deviations. These provisions do not, however, apply if an international agreement to which Poland is a party or the law of an international organisation of which Poland is a member stipulate otherwise. Moreover, since Poland joined the European Union on May 1, 2004, the provisions of the EU Council Regulation on

Insolvency Proceedings dated May 29, 2000 (the “Regulation”) apply with respect to insolvency proceedings opened in another EU Member State. The Cross Border Insolvency Chapter therefore applies to proceedings for recognition of cross-border insolvency proceedings opened in non EU Member States (including insolvencies opened in Denmark) and any subsequent proceedings for setting aside or amending a decision on the recognition of such proceedings.

According to the Insolvency Law, a Polish court has exclusive jurisdiction to open the main insolvency proceedings if the debtor’s centre of main interest (“COMI”) is in Poland. Moreover, the fact that a foreign debtor has assets or conducts business activities in Poland is sufficient ground for the Polish courts to ascertain jurisdiction over the debtor’s insolvency pursuant to the Insolvency Law.

Under the Insolvency Law, foreign insolvency proceedings (proceedings commenced by a foreign court) are recognised by Polish courts as long as the following requirements are fulfilled:

- (i) the main commercial activity of the debtor must take place outside of Poland, beyond the scope of exclusive jurisdiction of Polish courts;
- (ii) the Polish courts only have non exclusive jurisdiction over a debtor which conducts its commercial activity and has its registered office or property within the territory of Poland;
- (iii) the recognition of foreign proceedings must not violate any fundamental principles of Polish law contained in the Constitution of 1997, the most significant of which are the rule of law, freedom of conducting business activities and a ban on discrimination.

The proceedings for recognition of foreign insolvency proceedings are commenced by a motion of the foreign insolvency administrator.

After the recognition of insolvency proceedings, a foreign administrator is entitled to file a petition for the declaration of insolvency and to participate in local insolvency proceedings conducted by a Polish court in the same way as a creditor. A Polish court may change or revoke a decision on the recognition of foreign insolvency proceedings at any time on a motion by any person concerned or *ex officio* if it is later discovered that there had been no grounds for recognition of such proceedings or such grounds ceased to exist.

As a result of recognition of foreign proceedings, the insolvent is deprived of the ability to dispose of its assets unless arrangement proceedings were initiated and the insolvent retained the rights to administer its estate. Also, any enforcement proceedings regarding the enterprise of the bankrupt are suspended by operation of law. On the foreign administrator’s petition, the court is entitled to secure any evidence and the insolvent’s assets.

After the recognition of cross-border insolvency proceedings, the foreign administrator prepares an inventory list and valuation with respect to the insolvent's assets located in Poland and included in the insolvency estate. The foreign administrator then files the inventory and the valuation with the Polish court deciding on the recognition of the case. Both the inventory and the valuation need to be publicised before disposal of the assets.

Subsequently, the foreign administrator files with the Polish court that recognised the foreign proceedings a plan of liquidation of the assets located in Poland and "general information on the envisaged method of satisfying creditors", including creditors domiciled in Poland. On this basis, the court may grant the foreign administrator (not earlier than after the lapse of the period within which exclusion from the bankruptcy estate can be demanded) permission to liquidate the bankrupt's assets located within the territory of Poland.

The Insolvency Law provides also for co-operation and direct communication between a Polish court and insolvency administrator and a foreign court and insolvency administrator with respect to the issues such as the main insolvency proceedings, insolvent's assets and satisfaction of the creditors' claims in order to facilitate both the main and secondary insolvency proceedings.

In principle, foreign creditors have the same rights as domestic creditors.

### **3. Insolvency practice**

In recent years, the number of motions filed with Polish courts to open secondary insolvency proceedings pursuant to the EU Regulation has increased. While deciding on commencing the secondary proceedings, Polish courts apply the Insolvency Law and the Regulation.

Since, there is no statutory definition of COMI in the Regulation, many examples of the insolvency proceedings involving Polish companies show that COMI has been creatively interpreted by Polish debtors some of whom happened to be successful in shifting it to a different jurisdiction. It is not uncommon that a company having its registered office in Poland opens the main insolvency proceedings in another EU Member State. In some of those cases, local creditors have attempted to open secondary insolvency proceedings in Poland at a later stage with or without success.

It remains to be seen what will be the outcome of the referral to ECJ in *Christianapol* since the ECJ's ruling should shed light on various areas in the application of the Insolvency Regulation in Poland.

## 4. Examples

### ***Bank of New York Mellon v. Fabryka Wódek Polmos Ła cut S.A.***

In one of its landmark decisions with respect to cross-border insolvency, the Polish Supreme Court by applying the Insolvency Law restricted the authority to file for the opening of secondary insolvency proceedings only to the local creditors.<sup>1</sup>

### ***EMTEC Consumer Media Sp. z o.o.***

A Polish based company was successful in arguing in a foreign court that its COMI was outside of Poland despite its registered seat being in Poland. However, its administrator successfully opened secondary proceedings in Poland.

EMTEC Consumer Media Sp. z o.o. was a member of a group of companies based in a number of European countries, although the COMI was found to be in France. Based on the COMI, the Commercial Tribunal in Nanterre (France) ascertained jurisdiction to open the insolvency proceedings regarding the Emtec group, including Emtec Consumer Media Sp. z o.o. The French administrator then filed a motion to open the secondary insolvency proceedings with respect to the Polish subsidiary in Poland. These proceedings were one of the first Polish insolvency proceedings conducted on the basis of the EU Regulation after Poland joined the EU. While the business of Emtec was for the most part sold in the framework of main proceedings, the French administrator filed for the secondary insolvency with a view to vesting the liquidation of the remaining assets of Emtec Polska Sp. z o.o. in the hands of a competent local administrator.

### ***Maflow Polska Sp. z o.o.***

On May 11, 2009, the court of Milan opened main insolvency proceedings against Maflow Polska Sp. z o.o. with the registered office in Tychy (Poland). Two months later, on the local creditors' motions, a Polish court opened the secondary insolvency proceedings with respect to the same company. Maflow cross-border insolvency case, although successfully conducted (with co-operation between administrators in both insolvency proceedings), showed some of the limitations of the EU Regulation with respect to the procedure for selling the insolvent's assets simultaneously by the administrators of various insolvent companies in the group. Potential buyers that expressed interest in buying the assets of Maflow Polska (the most profitable subsidiary of Maflow group) were also interested in purchasing the Italy-based parent company (Maflow SpA) and its subsidiaries in Spain, France, China, Japan and Brazil. The offer to purchase Maflow Polska's enterprise was conditional on the potential purchaser winning the bidding process to buy Maflow SpA. This case shows that selling the assets of the insolvent group (located in many EU jurisdictions) simultaneously within various parallel proceedings (with co-operation of administrators) is more efficient and effective for creditors than conducting single selling processes in each jurisdiction. Unfortunately, the Regulation does not provide for procedures to deal with the insolvencies of economic interest groups.

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<sup>1</sup> See also the discussion under the case example titled *Belvedere S.A.: Sobieski Sp. z o.o., Fabryka Wódek Polmos Ła cut S.A., Destylarnia Polmos w Krakowie S.A., Destylarnia Sobieski S.A., Domain Menada Sp. z o.o. and Sobieski Trade.*



**Christianapol Sp. z o.o. Fabryka Mebli Tapicerowanych**

The company's registered office was in Łowycy, Poland. On October 1, 2008, the Commercial Court of Meaux, France commenced *sauvegarde* proceedings in relation to Christianapol. In April 2009, a Polish bank filed a motion to open secondary insolvency proceedings in Poland. Another local creditor filed a motion to reject the bank's petition on the basis of Article 26 of the EU Regulation, arguing that the *sauvegarde* proceedings were opened in violation of Polish law and as contrary to Polish public policy should not have been recognised in Poland. In case the Court of Poznań had found the French proceedings contrary to Polish public policy, the bank filed a motion to declare Christianapol's insolvency based on the Insolvency Law as an alternative to the motion for opening of secondary insolvency proceedings.

Although, the Polish courts seldom rely on the provisions of Article 26 of the EU Regulation to refuse recognition of insolvency proceedings, surprisingly, the Poznań Court of Appeals found that *sauvegarde* proceedings are contrary to the fundamental principles of Polish Insolvency Law as Polish law does not provide for the possibility of declaring a company insolvent in case of insolvency or threat of insolvency of another entity other than the debtor. (Neither French nor Polish law provides for collective insolvency of a corporate group). In February 2011, the Supreme Court overturned the decision of the Poznań Court of Appeals ruling that since the public policy rule in Article 26 of the EU Regulation is an exception from the general rules expressed in Articles 16 and 17, Article 26 should be construed very narrowly and used only in an extraordinary situation, where a foreign judgment is contrary to the fundamental rights guaranteed by the Polish Constitution. But, a foreign judgment is not contrary to the Polish public policy if certain legal provisions are not regulated by the Polish legal system. The Supreme Court also ruled that application of the public policy clause did not allow the Polish Court to overturn the judgment of the Court of Meaux.

Other important issues appeared in the Christianapol case, including when and according to which criteria the main insolvency proceedings are deemed to have been closed and whether in case of main proceedings of restructuring nature (such as French *sauvegarde*) a court reviewing the motion for the opening of secondary insolvency proceedings is entitled to verify whether the debtor has indeed satisfied an insolvency test.

On March 7, 2011, the Court of Poznań made a referral to the European Court of Justice (Case C-116/11) submitting to the court three questions whether: (i) the term "closure of insolvency proceedings" used in Article 4(1) and (2)(j) of EU Regulation should be construed autonomously, independently of the rules applicable in the legal systems of the individual Member States, or is it solely for the national law of the State of the opening of proceedings to decide when closure of insolvency proceedings occurs, (ii) Article 27 of the EU Regulation should be construed as such that the national court dealing with a petition for the opening of secondary insolvency proceedings should never examine the insolvency of a debtor in respect of whom main insolvency proceedings have been opened in another State, or rather that the national court may in certain situations examine the existence of the debtor's

insolvency - particularly where the main proceedings are protective proceedings in which the court has established that the debtor is not insolvent (French *sauvegarde* proceedings), and (iii) interpretation of Article 27 of the EU Regulation permit secondary insolvency proceedings (the nature of which is specified in the second sentence of Article 3(3) of the regulation) to be opened in the Member State in which the whole of the assets of the insolvent person are situated, when the main proceedings, which are subject to automatic recognition, are of a protective nature (French *sauvegarde* proceedings), a scheme of payment has been accepted and confirmed in those proceedings, that scheme is being implemented by the debtor and the court has forbidden the disposal of the debtor's assets.

This case is still pending before the ECJ. Needless to say, the ECJ's ruling will be crucial for the outcome of not only the Christianapol case but also to many future cross-border insolvency proceedings<sup>2</sup>.

***Belvedere S.A.: Sobieski Sp. z o.o., Fabryka Wódek Polmos Ła cut S.A., Destylernia Polmos w Krakowie S.A., Destylernia Sobieski S.A., Domain Menada Sp. z o.o. and Sobieski Trade***

In light of a potential default by Belvedere S.A. in mid-July 2008, Belvedere S.A. and its Polish subsidiaries filed for court protection from creditors in France. The Commercial Court in Beaune, France initiated *sauvegarde* proceedings with respect to various companies in the Belvedere group. While the Polish subsidiaries had good financial standing in Poland, there were floating-rate notes ("FRNs") issued by Belvedere S.A. in 2006. Following the commencement of the *sauvegarde* proceedings, the Bank of New York Mellon, acting in the capacity of Trustee for FRNs, filed a petition to open the secondary insolvency proceedings against six Polish subsidiaries of a French holding company.

With respect to Fabryka Wódek Polmos Ła cut S.A., the court of Rzeszów dismissed the Bank of New York Mellon's motion stating that the bank did not have authority to file such motion pursuant to Article 407 of the Insolvency Law. While recognising an appeal against this decision, the court made a referral to the Supreme Court asking whether the reference in Article 29 "b" of the Regulation concerning the types of entities authorised to petition for the opening of the secondary proceedings is to Article 20 (general provision that grants authority to file an insolvency petition to each creditor) or Article 407 (restricting the number of entities authorised to file a petition for opening the secondary insolvency proceedings only to the local creditors) of the Insolvency Law.

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<sup>2</sup> Interestingly enough Advocate General in her opinion to ECJ in Christianopol case of 24 May 2012 proposed that the court should decide that it is exclusively the national law to determine when the insolvency proceedings are closed. She also proposed that the domestic court reviewing a motion for the commencement of secondary insolvency should be at a liberty to verify the insolvency of a debtor as long as the main insolvency proceedings are of a restructuring nature and that such court should be entitled to commence the secondary insolvency proceedings also when the main proceedings are of a protective or restructuring nature.

The Polish Supreme Court ruled that only a creditor having its registered office in Poland is authorised to petition for the opening of secondary insolvency proceedings pursuant to the Regulation. This outcome was by no means certain in that Article 407 is part of the Cross Border Insolvency Chapter and since the Regulation is in itself a body of law dealing with cross-border insolvencies and prevails over the Cross Border Insolvency Chapter in case of any discrepancies (in light of Article 378 of the Insolvency Law) the reference under Article 29 “b” of the Regulation could have well been to Article 20 of the Insolvency Law.

Other Polish courts also dismissed the Bank of New York Mellon’s petitions mostly on the same grounds as the court of Rzeszów, except for the court of Warsaw that declared the secondary insolvency of Domain Menada Sp. Z o.o. This ruling was subsequently overturned on appeal in light of the decision of the Polish Supreme Court.

### ***Betterware Poland Ltd***

The most recent insolvency case worthy of note concerns a company that has its registered office in England and Wales. That company fell into financial distress at the time when the UK companies of the group lost liquidity and filed for UK administration. Although the company was registered in the UK, substantially all of its operations and assets were in Poland. Therefore the company filed for the opening of primary proceedings with the bankruptcy court of Warsaw jointly with an alternative petition for the opening of ancillary proceedings should the court decide that the company’s COMI was in the UK.

The court of Warsaw ruled that the company had its COMI in Poland and declared its insolvency in April 2012. In order to rebut the presumption in favour of the registered office and determine the presence of COMI in Poland, the court of Warsaw considered the factors such as business relationships with clients, the law governing the company’s main contracts, company’s creditors, employees and general perception of company as the Polish company.



## Chapter 32

# ROMANIA

### 1. General law

The Romanian Insolvency law is regulated by Law no. 85/2006. From 2006 until now, this law has undergone a series of amendments including Government Emergency Ordinance no.86/2006, Government Emergency Ordinance no.173/2008, Law no.277/2009, Law no. 25/2010 and Law no. 169/2010. The predominant purpose of these amendments has been to improve the national provisions in the field of insolvency. Although Romania has been a member of the European Union since 2007, Law no. 85/2006 has not been submitted to significant changes that involve notions of cross-border insolvency.

In Law 85/2006, Chapter VI “Transitional and final provisions”, article 149 states that “the dispositions of the present law are completed, if possible, by those of the Civil Procedure Code, Civil Code, Commercial Code and of Regulation (EC) no. 1346/2000 on insolvency proceedings, published in the Official Journal of the European Communities no. L 160 of 30 June 2000”. This is the only reference in the Romanian law of insolvency which mentions cross-border insolvency by its referral to Regulation no. 1346/2000.

## 2. Assisting legislation

The provisions of the UNCITRAL Model Law have been taken and adapted in accordance with the Romanian national legislation through Law no. 637/2002. Law no. 637/2002 regulating the international private law relations concerning insolvency has been published in Romania's Official Journal no. 931 of December 19th 2006. This law has been modified by the Government Emergency Ordinance no. 119/2006 regarding some reforms necessary for the application of European insolvency regulations after Romania's accession to the European Union and published in Romania's Official Journal no. 1036 of December 28th, 2006.

While the UNCITRAL Model Law permits the amendment of the original text according to national requirements, it should be noted that the Romanian legislator has deviated from the model text on certain issues. Thus, the Romanian legislator has intervened in terms of the terminology used; in the matter of the recognition of foreign judicial decisions; in the procedure for the settlement of the claim recognition and in the effects of the judicial decision of recognition of the principal foreign proceedings<sup>1</sup>.

Firstly, the Romanian legislator has preferred the use of the term "secondary proceedings" in place of "non-principal proceedings", which is consistent with a term found in the European Insolvency Regulation no. 1346/2000, albeit that the purpose of the term is significantly different in the two pieces of legislation.

Secondly, the Romanian rules establish, in Law no. 105/1992 that the recognition of foreign judicial decisions depends on reciprocity as regards the effects of foreign judicial decisions between Romania and the state of the court which held the respective decision. In such circumstances, the Romanian legislator has changed the text of the Model Law, adapting it in accordance with the provisions of Law no. 105/1992 which demands the condition of the mutual recognition.

Thirdly, the Model Law has not established a procedure for the settlement of the claims regarding the recognition of foreign judicial decisions, allowing each state to settle claims in accordance with its own national law. In Law no. 637/2002, it is provided that the claim regarding the recognition of the foreign proceedings shall be settled with priority and urgency and that it shall be decided upon by the court as soon as the parties are summoned, although the final decision can be appealed.

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<sup>1</sup> D. Ungureanu, *Falimentul international*, Lumina Lex Publishing House, Bucharest, 2004, P. 154.

Finally, it must be emphasised that the Romanian legislator has extended the effects of the judicial decision of recognition of the principal foreign proceedings in the sense that besides the taking over of the effects established by the Model Law, it also included the suspension of the limitation period for claims and actions having an individual nature and regarding goods, rights and obligations of the debtor.

The European Insolvency Regulation no. 1346/2000, as stated above, regulates cross-border insolvency proceedings.

### **3. Insolvency practice**

Although Romania has been a member of the European Union since 2007, there is no available information regarding the manner of administration of any cross-border insolvency proceedings. The number of such cross-border insolvency proceedings administered by the Romanian courts is extremely low and have not yet been analysed by the books of authority in the field.



## Chapter 33

# RUSSIAN FEDERATION

### 1. General law

Russian state arbitrazh courts (“arbitrazh courts”) have exclusive jurisdiction in Russia over all issues relating to the bankruptcy of Russian companies<sup>1</sup>. Court proceedings to declare a Russian company bankrupt must be initiated in the arbitrazh court having jurisdiction in the place where the debtor Russian company is registered.

Foreign arbitral awards should be recognizable and enforceable in Russia as Russia is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.

Foreign state court decisions are recognizable and/or enforceable on the basis of mutual recognition of court decisions with other countries (“comity”) or in accordance with bilateral treaties. Unfortunately, Russia has entered into very few bilateral treaties on the recognition of court decisions: those are mainly with former Soviet bloc countries.

In addition to these obstacles, a foreign creditor may face other difficulties in enforcing foreign arbitral awards or court decisions if there are concurrent proceedings in Russia. For example, applications for the recognition of foreign awards and court decisions may be appealed to higher arbitrazh courts, including

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<sup>1</sup> Article 33 of the Arbitrazh Procedure Code.

the Supreme Arbitrazh Court. During the appeals process, a foreign creditor will be unable to exercise their rights as creditors participating in such creditors' meetings.

Russian courts sometimes give very broad application to the concept that they should not apply a foreign law if the result of its application would be "contrary to the public order". For example, a Russian court may refuse to enforce the foreign arbitral award if it determines that the penalty is disproportionate to the breach.

## 2. Assisting legislation

In 2002, the Federal Law "On Insolvency (Bankruptcy)" "No127-FZ (hereinafter, the "Bankruptcy Law") was introduced. This is the third attempt since the collapse of the Soviet Union to establish an effective bankruptcy regime in Russia. Since its adoption, the Bankruptcy Law has been substantially modified and it is envisaged that it will be subject to further modifications. Thus it is advisable to seek advice whenever it is necessary to rely on the provisions of the Bankruptcy Law.

The Bankruptcy Law establishes the regime for the conduct of bankruptcy proceedings in respect of certain types of Russian companies, including strategic companies (i.e. companies having strategic importance for the Russian economy), financial organizations, agricultural companies, development companies, "enterprises forming a company town" and certain natural monopolies. However, some state-owned companies are exempt from the Bankruptcy Law regime (e.g. Rostekhnologiyi, Russian Nanotechnology Corporation, Rosatom, and Vneshekonombank).

The Bankruptcy Law is also supported by the Federal Law "On Insolvency (Bankruptcy) of Credit Institutions", dated February 25, 1999 No 40-FZ (as amended), which applies to banks.

In order to petition for bankruptcy of a debtor Russian company under the Bankruptcy Law, a creditor must first submit a copy of an effective court award against the debtor (Article 7, section 2 of Article 39 of the Bankruptcy Law). Following the effective service of a petition for bankruptcy, there are several different procedures which may be applied by the arbitrazh courts. The court will appoint an arbitration manager (who may not be a foreign individual) who, depending on the type of proceedings involved, will perform different functions, including:

- in respect of a supervision: acting as a "temporary manager" in order to conduct the supervisory procedure;
- in respect of a financial recovery: acting as an "administrative manager" in order to supervise (in concert with the creditors' committee) the restructuring and repayment of debts;

- in respect of an external management: acting as an “external manager” in order to restore (if possible) the debtor’s creditworthiness. A number of different strategies may be adopted by the external manager, including altering the company’s business profile, terminating unprofitable product lines, liquidating accounts receivable, selling part of the debtor’s property, assigning the debtor’s claims to third parties, settling the debtor’s obligations, and/or selling the debtor’s business. Unfortunately court statistics show that in the majority of cases external management has resulted in bankruptcy proceedings being initiated; and
- in respect of a receivership and settlement: acting as a receiver in bankruptcy in order to conduct the receivership procedure.

The creditors may decide to enter into a settlement agreement at any stage of the bankruptcy proceedings (providing debts with first priority are paid (e.g. outstanding salaries, health benefits and royalty payments to employees)). A settlement agreement (if any) must be approved by the creditors’ committee and the court. A settlement agreement may be terminated by the court at the request of any interested party if the debtor fails to pay at least two-thirds of the total amount required of it before the deadline specified in the settlement agreement. Following termination of the settlement agreement, the creditors will have the right to claim for their original debt in full.

A foreign creditor intending to initiate bankruptcy proceedings against a Russian debtor company should:

- obtain either a foreign arbitral award or court decision against the Russian debtor (preferably, in a country having bilateral treaty with Russia);
- apply for recognition and enforcement of the foreign arbitral award court decision in the arbitrazh court having jurisdiction in the place where the debtor is registered; and
- if the application for recognition and enforcement of the foreign arbitral award court decision is successful, and has not been appealed within the prescribed one-month time limit (or, in case of appeal, upheld by the Appellate Court), file a petition to declare the debtor bankrupt with the arbitrazh court having jurisdiction in the place where the debtor is registered.

If a foreign entity only intends to file their claim, they should file an application to include the claim into the register of creditors to the arbitrazh court considering the bankruptcy case enclosing any foreign arbitration award or court decision (see section 3 of the Informational Letter of the Presidium of the RF Supreme Arbitrazh Court, dated December 22, 2005 No 96). As clarified by the RF Supreme Arbitrazh Court, which considered a specific case (see Resolution No. 7917/11, dated December 6, 2011), the application of a creditor for the recognition and enforcement of an award should be considered in bankruptcy proceedings. The opposite approach (i.e. examination of the application in separate proceedings) may affect the rights and interests of the other creditors. Meanwhile, as follows from the Resolution on the above case, considered by the RF Supreme Arbitrazh

Court and the Resolution of the Federal Arbitrazh Court for the Moscow District (court of cassation), dated March 9, 2007 on Case No. KG-A40/11729-06-A, a creditor's application for entering a claim in the register of creditors in a case where such claim has been recognized by an arbitration or a foreign court, should include a petition to recognize and enforce the relevant award or decision.

There is no other legislation assisting foreign creditors or foreign representatives obtain recognition.

The Bankruptcy Law provides for the possibility of invalidating transactions carried out by a debtor, even if such transactions are governed by a foreign law. For instance, a court may invalidate a transaction, by which a preference is conferred upon a creditor, if such transaction was concluded after or within a period of one month prior to the acceptance by an arbitrazh court of an application to declare the debtor bankrupt. Moreover, the Bankruptcy Law has extended such period to six months for transactions in which the counterparty knew or should have known of the insolvency of the debtor or the insufficiency of its assets. A claim to invalidate a debtor's transaction may be filed by an external manager or receiver made at his own initiative or at the decision of the debtor's creditors' meeting or the creditors' committee.

The Bankruptcy Law interprets "transactions" broadly. Actions taken by a party to a contract in performance of the contract or exercising its rights under an existing contract may be treated as separate "transactions" for the purposes of challenging any debtor's actions under the Bankruptcy Law. This may cause a risk of a claw back in respect of any payments or set-offs made to repay a debtor's debt if such debtor is insolvent and there is a threat of bankruptcy proceeding being initiated against the debtor.

### **3. Insolvency practice**

Under Russian law, foreign creditors enjoy the same treatment as Russian creditors, and they are therefore entitled to participate in bankruptcy proceedings in Russia.

All creditors' claims must be registered in an official register of creditors' claims, and they must be registered in Russian Rubles (Section 1 of Article 4 and Article 16 of the Bankruptcy Law). Any claims denominated in a foreign currency will be converted into Rubles at the official rate of the Central Bank of Russia on the date on which the court initiated the bankruptcy proceedings.

The Russian legal system does not recognize court precedents as a source of law. However, the Presidium of the Supreme Court may reverse the decisions of a lower arbitrazh court if they determine that the lower arbitrazh court has applied the law inconsistently.

In addition, the lower arbitrazh courts must apply and adhere to the summaries of court practice and interpretations and applications of law recommended by the Plenum of the Supreme Arbitrazh Court in their resolutions. The following resolutions would have a particular bearing on further court practices:

- the resolution of the Plenum of the RF Supreme Arbitrazh Court, dated July 23, 2009 No 60 “On several issues, relevant to the adoption of the Federal Law, dated December 30, 2008 No 296-FZ “On making amendments to the Federal Law “On Insolvency (Bankruptcy)””;
- the resolution of the Plenum of the RF Supreme Arbitrazh Court, dated December 17, 2009 No 91 “On Order on Redemption Charges on a Bankruptcy Case”; and
- the resolution of the Plenum of the RF Supreme Arbitrazh Court, dated July 23, 2009 No 63 “On Current Payments on Monetary Obligations in a Bankruptcy Case”.

## **4. Examples**

### ***Resolution of the Presidium of the RF Supreme Arbitrazh Court, dated October 4, 2011 No 6417/11***

The resolutions of the Presidium of the Supreme Arbitrazh Court can lead to the reconsideration of concluded court proceedings, if such resolutions express a new position in respect of the application of a specific legal provision, and such resolutions expressly state that they may be the basis for reconsideration of concluded court proceedings. For example, a foreign bank was recently successful in having its application reconsidered on this basis, whereupon its rights as a creditor were upheld in respect of bankruptcy proceedings of a large Russian department store.



## Chapter 34

# SCOTLAND

### 1. General law

Although Scotland is a separate jurisdiction from England and Wales and from Northern Ireland and has its own courts and Parliament, it is a part of the United Kingdom and its corporate insolvency regime is influenced by English case law to a material extent and the relevant legislation is mainly contained within Acts of the UK Parliament. The courts' attitude to comity is as recorded for England.

Foreign judgments may be enforced in Scotland through the use of various statutory procedures. The basis of these procedures is the registration of the foreign judgment in the court records, known as "The Books of Council and Session" which is part of the Court of Session (the highest civil court in Scotland), followed by enforcement as if it were a Scottish judgment. The problem of which judgments may be enforced can be complex. The common law procedure to enforce a foreign judgment is to seek a decree conform which is a procedure by way of summons. The case proceeds like an ordinary action for payment, but founded on the foreign judgment.

## 2. Assisting legislation

The EC Regulation on Insolvency Proceedings (Council Regulation (EC) 1346/2000) (the “Regulation”) applies in Scotland as it does in the rest of the UK in respect to insolvency proceedings (as defined) in the European Union. The result is that the recognition of EU insolvency appointments and the initiation of main and secondary insolvency proceedings are now subject to standard procedures. Receivership (the Scottish term for “administrative receivership”), however, is not regarded, for the purposes of the Regulation, as a “collective insolvency proceeding” (it is a method of a creditor enforcing its security) and so is not subject to the Regulation. What the Regulation does not do is affect the rules of jurisdiction within the UK.

The Cross-Border Insolvency Regulations 2006 (SI 2006/1030) provide that the UNCITRAL Model Law on Cross-Border Insolvency has effect in Great Britain. This is done by incorporating the Model Law into the current insolvency regime. In Scotland, the Court of Session has exclusive jurisdiction.

Courts having jurisdiction in relation to insolvency law in any part of the United Kingdom are obliged to assist courts having corresponding jurisdiction in the Channel Islands, the Isle of Man and any country or territory designated for this purpose by the Secretary of State in a statutory instrument (the Insolvency Act 1986 (the “1986 Act”), section 426). The countries and territories presently designated are Anguilla, Australia, The Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Republic of Ireland, Montserrat, New Zealand, St Helena, Turks and Caicos Islands, Tuvalu and Virgin Islands (Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 SI 1986/2123); Guernsey (Insolvency Act 1986 (Guernsey) Order 1989 SI 1989/2409); Malaysia and Republic of South Africa (Co-operation of Insolvency Courts (Designation of Relevant Countries) Order 1996 SI 1996/253); Brunei Darussalam (Co-operation of Insolvency Courts (Designation of Relevant Country) Order 1998 SI 1998/2766).

In the case of receivers, it is particularly provided (by section 72 of the 1986 Act) that a receiver appointed under the law of any part of the United Kingdom in respect of property comprised in a charge, which as created was a floating charge, may exercise his powers in any other part of the United Kingdom, so far as that exercise is not inconsistent with the law applicable there. There is no similar provision with regard to liquidators or administrators who must rely on the terms of section 426 of the 1986 Act for assistance in other jurisdictions within the UK.

The courts in England and Wales or in Scotland may refer the examination of witnesses in winding-up proceedings to another court in any part of the United Kingdom. Where an administration order has been made, a receiver has been appointed, the company has gone into liquidation or a provisional liquidator has been appointed, the court may order any person who appears to have in his possession any property of the company to be examined in any part of the United Kingdom where that person may be, or in a place outside the United Kingdom. A warrant issued in exercise of any jurisdiction in relation to insolvency law in any

part of the United Kingdom for the arrest of any person to be executed throughout the United Kingdom.

The Court of Session has jurisdiction in any action by a creditor of a Scottish company against its liquidator, notwithstanding the domicile of the liquidator or where the loss occurred.

In exercising its discretion to apply the law of either relevant jurisdiction, the Scottish courts will have regard to rules of private international law (Stair Memorial Encyclopaedia, vol 4 (Companies) Para. 945).

### **3. Insolvency practice**

Where a foreign company is in liquidation in the place of its domicile, the Scottish courts will recognise the title of the foreign administrator to deal with the assets of the company situated in Scotland, but will not (apart from the exercise of discretion in relevant cases) apply the insolvency law of the foreign territory so as to defeat the rights of the persons who have prior claims to those assets (*New Zealand Loan and Mercantile Agency Co v Morrison* [1898] AC 349, PC; *National Bank of Greece and Athens SA v Metliss* [1958] AC 509; [1957] 3 All E R 608 HL; *Felixstow Dock & Railway Company v United States Lines Inc* 1989 QB 360; [1988] 2 All E R 77).

The fact that an overseas company is in liquidation in the place of its domicile, or has been dissolved, is not a bar to winding-up by the Scottish court under the 1986 Act sections 221 and 225, but it must be in the interests of the creditors (*IRC v Highland Engineering Ltd* 1975 SLT 202). The court in Scotland must also have due regard to the interests of all the creditors of the company, not just those within Scotland (*Re Bank of Credit & Commerce International S.A.* [1992] BCL 83). It has been suggested, however, that the appointment of a judicial factor would be more appropriate in those circumstances. As a matter of Scottish law, a liquidator appointed by the Scottish courts in relation to an overseas company enjoys powers in relation to all the assets of the company, wherever situated, and is under a corresponding duty to administer those assets in accordance with his duty to all the creditors (*Re International Tin Council* [1987] Ch 419 at 446; [1987] 1 All E R 890 at 899), although the fact that other countries may not recognise the Scottish winding-up order imposes practical limitations on the consequences of the order.

Where the company is simultaneously being wound up in the country of incorporation, the Scottish court will take the view that the Scottish proceedings should only be allowed if they are in the interests of the creditors (*IRC, supra*) and will ensure that the winding-up is conducted as ancillary to the principal liquidation (*Marshall, Petitioner* (1895) 22 R 697). The court might authorise the liquidator to refrain from seeking to recover assets situated beyond the jurisdiction, thereby protecting him from any claim that he had been derelict in his duty (*Re International Tin Council, supra*). Whilst the English courts have been very unwilling to recognise liquidation orders made in a jurisdiction other than that of the place of incorporation of the company, the Scottish courts have recognised

the liquidation in England of a company incorporated in Australia (the English liquidation was stated to be ancillary to the liquidation in Australia) (*Queensland Mercantile Agency Co Ltd v Australasian Investments Co Ltd* (1888) 15 R 935).

A creditor of a Scottish company in liquidation in Scotland may be restrained by the court from enforcing his claim overseas if he is subject to the jurisdiction of the Scottish court (*Pacific Coast Mining Co Liquidators v Walker* (1886) 13 R 816; *California Redwood Company (In Liquidation) v Merchant Banking Co of London* (1886) 13 R 1202). Jurisdiction may exist by virtue of the creditor having lodged a claim in the liquidation. A restraining order may be made under the Insolvency Act 1986, section 130 (2) or at common law, although in England it has been held that this section does not apply to proceedings outside of Great Britain (*Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196).

## 4. Examples

### ***The Governor and Company of the Bank of England*** **(1991, 1992, 1996 & 2007 – unreported)**

This case followed the winding up of the Bank of Credit and Commerce International SA ("BCCI"), which was a Luxembourg registered company. The application in 1991 was by the Bank of England to the High Court seeking a request from the High Court to the Court of Session to appoint a provisional liquidator to the Scottish branch of BCCI. This appointment was made as a result of the request. The application in 1992 followed on the winding-up of BCCI in Luxembourg. At the same time as a winding-up order was sought in the English courts, an application was made for the High Court to request that the Scottish courts make a winding-up order and this order was made immediately after the winding-up order was granted in England.

The liquidation then, to all intents and purposes, proceeded in England, led by the English liquidators with the Scottish liquidators merely realising the Scottish assets of BCCI. In 1996 the Court of Session issued a letter of request to the High Court in England requesting that the High Court give the English liquidators the authority to treat the Scottish creditors as if they had been creditors in the English liquidation. The High Court granted the order and the Court of Session then authorised the Scottish liquidators to remit the realisations of the Scottish liquidation to the English liquidators to be distributed by them. These assets were then pooled with the English assets and with the assets of the Luxembourg liquidation and distributed, according to the agreed procedures. Finally, in 2006, the Court of Session authorised the dis-application of rules mandatory in a winding-up that required the calling of a final meeting of creditors. This approach was adopted by the Court on the basis that the liquidation was an ancillary liquidation and that mandatory procedural rules should not be applied if they served no useful purpose.

## Chapter 35

# THE REPUBLIC OF SERBIA

### 1. General law

In the last decade the Serbian insolvency legislation has undergone comprehensive reform. The new Law on Bankruptcy<sup>1</sup> was adopted at the end of 2009 and replaced the previous Law on Bankruptcy Procedure.<sup>2</sup> The 2004 Act had provisions that regulated and defined the rights of foreign courts and foreign creditors over the property of a bankruptcy debtor located in Serbia. The existence of these provisions and the lack of demand for their use was not enough to develop relevant court practice. The provisions are based on the UNCITRAL Model Law on Cross-Border Insolvency.

### 2. Assisting legislation

The Law on Bankruptcy provisions on cross-border insolvency applies where:

- a) assistance is sought in Serbia by a foreign court or other foreign body exercising control or supervision over assets or operations of the debtor, or by a foreign representative in connection with a foreign proceeding;

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<sup>1</sup> Official Gazette of RoS, nos. 104/2009, 99/2011 and 71/2012 – Constitutional Court decision.

<sup>2</sup> Official Gazette of RoS, nos. 84/2004 and 85/2005.

- b) assistance is sought in a foreign state by a court or a bankruptcy administrator in connection with a insolvency proceeding conducted according to the Law on Bankruptcy; and
- c) a foreign proceeding and an insolvency proceeding under this law in respect of the same debtor are taking place concurrently.

According to the current law, a foreign proceeding will mean a collective judicial or administrative proceeding in a foreign state. Such a proceeding would include an interim proceeding according to the law regulating the insolvency proceeding. The assets and affairs of the debtor are also subject to the control or supervision by a foreign court, or other appropriate body for the purpose of reorganisation, bankruptcy or liquidation.

The law of the state where the foreign proceedings were initiated shall govern the bankruptcy proceedings, unless otherwise stipulated by the Law on Bankruptcy. However, in case of recognition of a foreign proceeding, the Serbian law will apply to assets subject to excluding rights or secured assets located in the territory of Serbia. Serbian law also applies to the effects of bankruptcy proceedings on labour contracts. The law stipulates that upon implementation of provisions on cross-border insolvency, the competent court in Serbia will take into account their international character and the requirement to implement these provisions in a uniform manner in accordance with the good faith principle.

### ***Jurisdiction***

Recognition of a foreign procedure in Serbia and co-operation with foreign authorities running the foreign insolvency proceedings, is the responsibility of the Commercial Court of the area where the greatest part of the property of the bankruptcy debtor in Serbia is situated, or in the area of the court conducting the insolvency proceeding in Serbia (this is in cases when the insolvency proceeding is initiated in Serbia concurrently with foreign proceedings).

A foreign representative is a person or body, including the one appointed on an interim basis, authorised in a foreign proceeding to administer reorganisation, bankruptcy or liquidation of the bankruptcy debtor's assets or affairs, or to act as a representative of the foreign proceeding. The foreign representative:

- a) is entitled to approach directly to a court in Serbia. It is only necessary to produce to the court evidence and proof on the existence of the foreign proceeding and the foreign representative's appointment;
- b) is entitled to request commencement of the insolvency proceeding in Serbia, provided that conditions for that have been met according to the Law on Bankruptcy; and
- c) may request from the competent court in Serbia recognition of the foreign proceeding in which the foreign representative has been appointed. This request should be accompanied by a statement made by the foreign representative identifying all foreign proceedings in respect of the debtor that are known to the foreign representative.

The court in Serbia will consider that presumptions for recognition of foreign proceeding are fulfilled if the decision or certificate relative to the existence of the foreign proceeding and appointment of the foreign representative is sufficient to prove that:

- (i) a foreign proceeding has a character of collective judicial or administrative proceeding in a foreign state, (in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court or other appropriate body); and
- (ii) a foreign representative is a person or body authorised in a foreign proceeding to administer reorganisation, bankruptcy or liquidation of the bankruptcy debtor's property or affairs, or to act as a representative of the foreign proceeding.

The foreign proceeding shall be recognised in Serbia as a:

- a) foreign main proceeding - if it is taking place in the state where the debtor has the centre of its main interests (COMI) or
- b) foreign secondary proceeding - if the debtor has a permanent establishment in the foreign state.

A “foreign main proceeding” will be a foreign proceeding conducted in the state where the debtor has the centre of its main interests.

The definitions above are rather wide and do not necessarily establish the COMI of the bankruptcy debtor. This should be the place where the debtor usually administers its interests and that is verifiable by third parties. In the case of a company or legal person, this should be the place of the registered office, in the absence of proof to the contrary. In the case of a physical person, it should be the place where that persons work is domiciled or the place of their usual residence.

The centre of the main interest is most probably in the place of the registered office or place of residence, but the contrary could be proven.

A “foreign secondary proceeding” will be a foreign proceeding conducted in the state where the debtor has a permanent establishment. A permanent establishment is any permanent place of business where the debtor performs economic activity that is not transitory in character, by utilising human labour and goods or services.

The Serbian court should decide on the request for recognition in the fast track procedure. However, starting from the date of filing the request for recognition of a foreign proceeding until the decision is given, the Serbian court may, at the request of the foreign representative, provide assistance in order to protect the assets of the debtor or the interests of the creditors. This assistance includes different measures relative to the management and protection of the bankruptcy debtor's property in Serbia.

### ***Legal effects of recognition of a foreign main proceeding***

The consequences of recognition of a foreign proceeding relates to the bankruptcy debtor's property. After recognition it is prohibited to initiate a compulsory execution or any other procedure against such property. Further, any existing proceedings will be suspended and the court will take other measures to prevent transfer, encumbering or any other disposal of that property.

After recognition of a foreign proceeding, whether main or secondary, the court in Serbia may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in Serbia to the foreign representative, provided that the interests of creditors in Serbia are adequately protected. The adequate protection of creditors in Serbia is a precondition and presumption for recognition of a foreign procedure in Serbia.

Upon recognition of a foreign proceeding, the foreign representative may, in accordance with the law, intervene in any proceedings in which the bankruptcy debtor is a party including the right to challenge legal transactions of the debtor in accordance with the domestic regulation. The foreign representative is entitled to act in accordance with the law to maximise the value of the bankruptcy debtor's property in Serbia, and to achieve optimal collective enforcement over the property in order to protect the interest of the creditors.

### ***Relations between domestic and foreign insolvency proceedings***

After the opening of a domestic insolvency proceeding with respect to a debtor whose registered office is in Serbia, or whose COMI is in Serbia, a foreign proceeding may be recognised only as a foreign secondary proceeding.

After recognition of a foreign main proceeding, a domestic insolvency proceeding may be initiated only if the debtor has a property in Serbia. In such a case, the insolvency proceeding is conducted only with respect to the property located in Serbia and all other properties of the bankruptcy debtor should be administered in that bankruptcy proceeding according to the provisions of the Law on Bankruptcy. Thereafter, the foreign proceeding and domestic insolvency proceeding regarding the same debtor run concurrently. This requires co-operation and co-ordination between domestic and foreign courts and other competent authorities. The Law on Bankruptcy provides authority to the domestic court to protect the interest of creditors in Serbia and to ensure the requirements of the Law on Bankruptcy are satisfied.

## **3. Cases**

There are no relevant reported cases.

## Chapter 36

# SINGAPORE

### 1. General law

Singapore is a sovereign state with its roots as a British colony. It has its own independent judicial and legal system modelled after the English common law. As a result, English judicial decisions are not binding on our courts, but are persuasive in relation to common law principles that assist in the development of our jurisprudence. The strength of English authorities is further bolstered by the fact that Singapore's laws are largely adapted from a mix of Commonwealth jurisdictions such as England and Australia. For example, the Companies Act (Cap 50, 2006 Rev Ed) is largely modelled on the English Companies Act and Australian Corporations Act.

The insolvency law framework in Singapore is based on two statutes: the Companies Act and the Bankruptcy Act (Cap 20, 2009 Rev Ed). Singapore does not have a stand-alone corporate insolvency legislation and the law governing insolvency for companies is found in the Companies Act and certain provisions of the Bankruptcy Act that are imported by reference. For example, the avoidance provisions for transactions that give an unfair preference to certain creditors of a bankrupt individual that are found in the Bankruptcy Act are applied to companies by virtue of section 329 of the Companies Act which imports the application of section 99 of the Bankruptcy Act.

On its own, a foreign judgment has no direct legal effect outside the territorial jurisdiction in which they are pronounced, and thus has no direct operation

in Singapore. However, foreign judgments may be recognised and enforced either under statute or the common law. With regard to foreign insolvency orders or judgments, the Companies Act unfortunately does not provide for the recognition and enforcement of such orders. Singapore has neither adopted the UNCITRAL Model Law on Cross-Border Insolvency nor is party to any other international treaties on cross-border insolvency with other states. As a result, there is a dearth of legislation to deal with cross-border insolvency situations, and the recognition and enforcement of foreign insolvency orders have to be dealt with either under existing general statutes or the common law.

There are two statutes in Singapore that govern the enforcement of foreign judgments in Singapore on the basis of reciprocity. For these judgments to be enforced, they have to be registered under the relevant statute. The relevant statutes are:

- (a) The Reciprocal Enforcement of Commonwealth Judgments Act (Cap. 264). This provides for the enforcement of money judgments in civil actions rendered by a superior court of the United Kingdom of Great Britain and Northern Ireland. The Minister of Law has discretion to extend the application of this Act to judgments obtained in a superior court of any other Commonwealth country, and it now applies to the following countries: Australia, Brunei Darussalam, Sri Lanka, Hong Kong (for judgments obtained on or before 30th June 1997), India (except the State of Jammu and Kashmir), Malaysia, New Zealand, Pakistan, Papua New Guinea and the Windward Islands.
- (b) The Reciprocal Enforcement of Foreign Judgments Act (Cap. 265). This Act provides for the enforcement of judgments (made by a court in any civil proceedings, or made by a court in any criminal proceedings for the payment of a sum of money in respect of compensation or damages to an injured party) for the payment of compensation or damages where the judgments are given in a foreign country, which gives Singapore judgments reciprocal treatment. The Minister of Law should be satisfied that “substantial reciprocity will be assured” before extending the application of the Act to any country. This Act has, to date, been extended only to the Hong Kong Special Administrative Region of the People’s Republic of China.

These statutes do not apply to foreign insolvency orders as these statutes only provide for enforcement of foreign judgments for payments of sums of money.

A foreign judgment for a fixed or ascertainable sum of money which is final and conclusive and on the merits of the case may be enforced under the common law in Singapore, provided that it meets the following requirements:

- (a) the foreign court was internally competent;
- (b) the foreign court had international jurisdiction over the party sought to be bound; and
- (c) there are no relevant defences available under the rules of the private international law of Singapore.

These defences apply where the recognition and enforcement of the foreign judgment:

- (a) would conflict with an earlier judgment of Singapore or an earlier foreign judgment recognised in Singapore;
- (b) would be contrary to the fundamental public policy of the forum;
- (c) would amount to a direct or indirect enforcement of foreign penal, revenue or other public laws; and
- (d) would be giving effect to a judgment obtained by fraud.

## **2. Assisting legislation**

The current legislative scheme pertaining to bankruptcy and insolvency in Singapore also assists in certain situations where foreign bankruptcy or insolvency orders are involved.

Section 151 of the Bankruptcy Act provides for the Singapore High Court to give assistance to the courts in Malaysia in matters of bankruptcy and insolvency. It provides that “(the Singapore) High Court and the officers thereof shall, in all matters of bankruptcy and insolvency, act in aid of and be auxiliary to the courts of Malaysia or any designated country having jurisdiction in bankruptcy and insolvency so long as the law of Malaysia or the designated country requires its courts to act in aid of and be auxiliary to the courts of Singapore. There are no other countries that have been gazetted as a “designated country” to date.

Section 152 of the Bankruptcy Act provides that the government in Singapore will recognise the Official Assignee in bankruptcy appointed by Malaysia. This section also provides that when a person is adjudicated bankrupt in Malaysia, all of the bankrupt’s property situated in Singapore will vest in the Official Assignee of Malaysia and the Singapore courts will recognise the Official Assignee’s title to such property, unless a separate bankruptcy application has been made in Singapore against the bankrupt. In such a situation, the vesting and recognition of the Malaysian Official Assignee’s title will only be given effect after the application has been withdrawn or dismissed. Further, the Malaysian Official Assignee may sue or be sued in Singapore in its official name.

The Companies Act does not have any similar statutory provisions to those in the Bankruptcy Act. However, it does provide for the situation where a foreign company, which has a registered branch in Singapore, goes into liquidation in the place of its incorporation. Section 377(2) (b) of the Companies Act provides for the recognition of the foreign liquidator, who will have the powers and duties of a local liquidator until a liquidator for Singapore is appointed. The company’s property that is situated in Singapore can vest in the foreign liquidator when a vesting order is made by a Singapore court exercising its power under section 269 of the Companies Act. It should be noted, however, that section 377(2) (b) only contemplates the powers and functions necessary for a liquidator to collect and recover the assets of a foreign company in Singapore. It does not confer on the

foreign liquidator all the powers and functions of a liquidator appointed by the High Court pursuant to a company's winding-up petition, for example, the right to apply for examination of the officers of the company (*Official Receiver of Hong Kong v Kao Wei Tseng and others* [1990] 1 SLR(R) 315).

Section 377(3) (c) of the Companies Act then provides that after recovering and realising the assets of the foreign company in Singapore, the liquidator shall “pay the net amount so recovered and realised to the liquidator of that foreign company for the place where it was formed or incorporated after paying any debts and satisfying any liabilities incurred in Singapore by the foreign company.” It has been held that the liquidator is obliged to pay off the preferential debts as established in section 328(1) of the Companies and all debts and liabilities incurred by the foreign company in Singapore (*Tohru Motobayasahi v Official Receiver* [2000] 3 SLR(R) 435). Section 377(3) (c) has been characterised as a ‘ring-fencing’ mechanism that is territorial in nature. This provision has been the subject of academic criticism as having an adverse impact on trade and commerce in Singapore, particularly in the modern context of globalization and multinational corporations with cross-border operations. However, the reality is that such cases involving section 377(3) are few, and the impact on trade, commerce or investment is more imagined and discussed than actual.

### 3. Insolvency practice

The lack of dedicated insolvency legislation and cross-border treaties on international insolvency in Singapore has not hindered its growth as a regional economic power in the past. Since independence in 1965, Singapore has succeeded in attracting foreign investment as a result of a combination of political stability, excellent infrastructure, diligent workforce, well regulated financial and industrial sectors and economic policies geared towards promoting international free trade and investment.

The two established theories of international insolvency law are universalism and territorialism. Territorialism is the principle that a country will apply its own laws to insolvency situations and seize local assets for the benefit of local creditors, with little regard given to foreign insolvency proceedings and often at the detriment of foreign creditors of a group of companies. Universalism advocates the contrasting principle that in this globalised world, the insolvency of a company or individual should be governed and administered on a global basis with the assistance of courts in each affected country. Both theories have modified versions which seek to temper the strictness of each theory.

With a provision like section 377(3) (c) of the Companies Act, many commentators have observed that Singapore's laws appear territorial in nature. It was thus apposite that in 2011, the Chief Justice of Singapore delivered a keynote address at the “INSOL International Ninth Joint Multinational Judicial Colloquium on Insolvency” in Singapore that touched on this issue. The Honourable Chief Justice recognised that section 377(3)(c) is contrary to the principle of universalism but justified it on the ground that the territorial approach protects local creditors who

have contributed to the assets of the insolvent company against foreign creditors who have not so contributed. In the address, the Honourable Chief Justice also observed that the judiciary has shown “a willingness to assist with a foreign liquidation in whatever way it can” and “give effect to modified universalism at the expense of territorialism.” A final observation of the Honourable Chief Justice with regard to the recent English Court of Appeal decision in *Rubin v Eurofinance SA* [2010] EWCA Civ 895 (“*Rubin*”) is particularly pertinent in this context. The Honourable Chief Justice stated that “the decision in *Rubin* (that the court should recognise a foreign judgment in winding-up proceedings on the basis that it is a *sui generis* judgment) may receive a sympathetic reception (in Singapore) if it is not contrary to any other law in Singapore, e.g., the Limitation Act.”

## **4. Examples**

There have been a few cases decided in Singapore dealing with the subject of cross-border insolvency since the last edition of this book was published in 2003. These decisions are briefly summarised and highlighted for their key holdings.

### ***RBG Resources plc (in liquidation) v Credit Lyonnais* [2006] 2 SLR(R) 240**

RBG Resources plc (in liquidation) (“RBG”) was an English company which was placed in liquidation in England. RBG was an unregistered foreign company with assets in Singapore. The English liquidators successfully applied for a winding-up petition in Singapore and local liquidators were appointed. The liquidators then applied to transmit the recovered assets to the English Liquidation Estate. This application was challenged by Credit Lyonnais (“CL”), which was a foreign creditor who had filed a proof of debt in the Singapore liquidation. Essentially, CL argued that section 377(3)(c) of the Companies Act applied to RBG and therefore it was entitled to be paid from the Singapore assets without having to share *pari passu* in the English liquidation.

The High Court held that section 377(3) (c) of the Companies Act and the principle it espoused did not apply to non-registered foreign companies. Instead, the common law position as stated in the English decision of *In re Bank of Credit and Commerce International SA (No. 10)* [1997] Ch 213 would apply. In that case, the court held that in a winding-up of a company ancillary to the main proceedings in the country of incorporation, the assets of the company are to be transmitted to the main seat of liquidation in order to achieve a *pari passu* distribution of the assets. Therefore CL had to prove its debt in England along with the other creditors.

### ***Re Projector SA* [2009] 2 SLR(R) 151**

Projector SA was a Belize-incorporated company which was, until July 2008, registered as a foreign company in Singapore. The company had been wound up in Belize and provisional liquidators had been appointed. ING Belgium NV, a foreign company, with the agreement of the Belize liquidators, applied to wind up Projector SA under s 253(1) (b) of the Companies Act. This followed an earlier application to the Belize court to wind up Projector SA which was granted. Other creditors, namely Mitsui and Samsung Total Petrochemical Co Ltd, opposed the application on various grounds. One such ground was that the Singapore court

lacked jurisdiction to deal with the application as the only creditors who may wind up a foreign company in Singapore are Singapore creditors. The court dismissed this argument on the basis that the term “any creditor” in s 253(1) of the Companies Act did not distinguish between Singapore and foreign creditors and there was no reason to read such a distinction into s 253(1). Therefore, foreign creditors, and not just local creditors and the liquidator appointed in foreign liquidation proceedings, were entitled to apply for a foreign company registered in Singapore to be wound up.

Another jurisdiction objection was that Projector SA did not have assets in Singapore, and did not have a sufficient nexus or connection with Singapore. The court first noted that if the foreign company has assets in Singapore, it would evidently have a close connection with that jurisdiction. Nevertheless, the absence of assets within jurisdiction is not determinative of the lack of jurisdiction. As for nexus, the court held that because Projector SA had carried on business in Singapore for a long time, registered itself as a foreign company in Singapore and maintained its registration until July 2008, this demonstrated significant connection between Projector SA and Singapore. Finally, in considering whether a winding-up order was in the interests of all the parties, the court held that when all the interests are balanced, winding up appeared to be a better option. Two of the reasons it gave were first, that winding up would reinforce the insolvency regime which the Belize court had put in place, second, the Belize liquidators had already filed a separate application to wind up Projector SA and it was more beneficial for Singapore liquidators to control the winding up than foreign liquidators as the former had more extensive powers.

Interestingly, this case was quoted by the Honourable Chief Justice in the above-mentioned Address as a case where “the judge went out of his way to give effect to modified universalism at the expense of territorialism” because “the judge short-circuited the whole winding-up process by according *locus standi* to ING to wind up Projector SA even though ING really had no claim to the assets of the company in Singapore.”

### ***Re TPC Korea Co Ltd [2010] 2 SLR 617***

TPC Korea Co Ltd (“TPC Korea”) was a Korean company with no presence, representative office or assets in Singapore. However, it had five vessels that plied the ports of Singapore regularly. TPC Korea entered into a rehabilitation process in Korea similar to a Chapter 11 process in the US. To prevent creditors from taking action against any of the vessels that may have entered Singapore’s port which would jeopardise the rehabilitation process in Korea, TPC Korea applied for a pre-emptive restraining order against any such proceedings under section 210(10) of the Companies Act (this section provides the mechanism to apply for a Scheme of Arrangement which is a rehabilitative process). The High Court of Singapore recognised that such an order would have been beneficial or facilitative to the rehabilitation process in Korea, but eventually declined to make the order, *inter alia*, for lack of jurisdiction. The High Court based its decision on the fact that it only had jurisdiction to make such an order with regard to companies liable to be wound up in Singapore. As TPC Korea was a foreign company, it had to be shown that it

either had assets in Singapore or a sufficient nexus or connection with Singapore in order for it to be liable to be wound in Singapore. The five vessels that plied the ports were insufficient to meet the requirements. Further, the court observed that the Scheme of Arrangement proposed by TPC Korea was essentially to fold any potential Singapore creditors into the Korean rehabilitation process and subsume them within the wider group of all unsecured and secured creditors of the company. The court was mindful that this was “different from the statutory logic of enabling an orderly distribution of Singapore located assets in favour of eligible Singapore creditors regardless of events in the country of incorporation.”

## **5. Future reforms**

The Companies Act underwent a review in December 1999 by the Company Legislation and Regulatory Framework Committee (“CLRFC”), appointed by the Ministry of Finance, the Attorney-General’s Chambers and the Monetary Authority of Singapore. The purpose of the review was targeted at examining the legislative and regulatory framework governing companies and to recommend amendments and enactments which would keep Singapore competitive in the global economy.

In particular, the CLRFC recommended the enactment of an omnibus Insolvency Act and subsidiary legislation that would apply to both companies and individuals in its Final Report issued in October 2002. The proposed Insolvency Act will consolidate the insolvency provisions from both the Companies Act and the Bankruptcy Act, and largely be modelled after the UK Insolvency Act 1986. The recommendations were accepted by the Singapore Government on 22 October 2002.

In addition, the Ministry of Law commissioned the Insolvency Law Review Committee (“ILRC”) in December 2010, chaired by Senior Counsel Lee Eng Beng and comprising insolvency practitioners (lawyers and accountants), academia and the Attorney-General’s Chambers. The ILRC is currently reviewing Singapore’s laws on insolvency, including the proposal for omnibus insolvency legislation, as well as cross-border insolvency situations. The ILRC report is expected to be issued in the second quarter of 2012 for public consultation. The Ministry of Law will then consider the report and feedback.

It is hoped that these exciting new developments will enhance the ability of Singapore legislation to deal more effectively with cross-border insolvency situations, as well as update its current insolvency legislation to keep up with business and globalization.



## Chapter 37

# THE REPUBLIC OF SLOVENIA

### 1. General law

Cases of insolvency have more and more international implications and are increasingly being regulated at national and international level. Cross-border insolvency cases affect the proper functioning of the internal market of the EU, therefore EU regulation in this field is necessary to avoid conflicts between over two dozen different national solutions. Proper functioning of the internal market requires efficient and effective cross-border insolvency proceedings, for the achievement of which at the European level a regulation was adopted, falling within the scope of judicial co-operation in civil matters.<sup>1</sup>

### 2. Assisting legislation

In Slovenia, insolvency proceedings are regulated by the “*Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act*”<sup>2</sup> (“Insolvency Act”). The Insolvency Act does not implement the Regulation (EC) No 1346/2000 on Insolvency Proceedings (“EIR”) which is binding in its entirety and directly

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<sup>1</sup> See paragraph 2 of the preamble of the Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings, Official Journal L 160, 30/06/2000, p. 1-18.

<sup>2</sup> Zakon o finan nem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju (ZFPPIPP), Official Journal RS, No. 126/2007, 40/2009, 59/2009, 52/2010, 106/2010-ORZFPPIP21, 26/2011, 47/2011, 23/2012.

applicable in all Member States<sup>3</sup> since 31 May 2002. It embodies rules on intra-EU insolvency law, especially rules on jurisdiction, recognition and applicable law and provides for the co-ordination of insolvency proceedings opened in several Member States.

Slovenian Insolvency law for cross-border cases is laid down in the Insolvency Act section 8 (international insolvency procedures). The provisions of the UNCITRAL Model Law on Cross-Border Insolvency had great influence on the cross-border insolvency provisions found in subsections 8.1 to 8.5<sup>4</sup>. Under Article 446 of the Insolvency Act, rules on foreign insolvency proceedings apply to any court or administrative procedure which is conducted in another country for the joint account of all creditors of the debtor due to financial restructuring or liquidation of the debtor and in which the realisation of the assets and management of debtor's business is carried out under the supervision of a foreign court or an administrator appointed by a foreign court. The Insolvency Act furthermore distinguishes between the so called foreign main<sup>5</sup> proceedings and subsidiary proceedings. Foreign main insolvency proceedings are foreign proceedings conducted by the court of a foreign country in which the debtor has the centre of main interests (COMI). If the debtor is a legal entity, it shall be considered, if it is not proven otherwise, to have its COMI in the country in which his registered office is situated. Subsidiary proceedings are not main insolvency proceedings, and are conducted in the foreign country in which the debtor has his establishment (see paragraph 5 of Article 446 of the Insolvency Act).

The rules laid down in Chapter 8 of the Insolvency Act apply to the following proceedings unless otherwise provided by the law in respect of a particular case:<sup>6</sup>

- applications for assistance in the Republic of Slovenia by a foreign court or a foreign administrator in relation to foreign insolvency proceedings;
- applications for assistance in a foreign country by a court or an administrator in relation to domestic insolvency proceedings;
- where a debtor is at the same time subject to domestic and foreign insolvency proceedings; and
- where foreign creditors wish to petition for the initiation of domestic insolvency proceedings or take part in such proceedings.

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<sup>3</sup> In accordance with Article 288, paragraph 2 of the Treaty on the Functioning of the European Union (TFEU, ex Article 249 EC) all regulations as legal acts of the EU shall have general application and shall be binding in its entirety and directly applicable in all Member States.

<sup>4</sup> For more information see The National Assembly Reporter on the Purpose of the Financial Operations, Insolvency Proceedings and Compulsory Dissolution Act [*Poročevalc Državnega zbornice, Predlog Zakona o finančni nem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju – ZFPPIPP*], No. 00720-9/2007/21, Ljubljana (2007), p. 16.

<sup>5</sup> See paragraph 3 and paragraph 4 of Article 446 of the Insolvency Act.

<sup>6</sup> See paragraph 1 of Article 449 (application of chapter 8) of the Insolvency Act.

The rules do not apply in circumstances where international treaties concluded by the Republic of Slovenia with one or more foreign countries<sup>7</sup> apply. However, this exclusion concerns only non EU Member States for which special rules for insolvency proceedings to which the Regulation 1346/2000 is otherwise applicable are laid down in section 8.7, Articles 485 to 488 of the Insolvency Act.

Article 450 of the Insolvency Act governs the conduct of the domestic courts in international insolvency proceedings, the recognition of foreign insolvency proceedings and co-operation with foreign courts. Under Article 452 of the Insolvency Act, a domestic court may refuse to recognise a foreign insolvency proceeding or the request of a foreign court or insolvency administrator for assistance or co-operation if this could adversely affect the sovereignty, safety or public interest of the Republic of Slovenia.

The recognition of foreign insolvency proceedings is subject to the general rules on the recognition and implementation of foreign court rulings, provided for by the act governing international private law and procedure, unless otherwise provided for in Section 8.3 of the Insolvency Act.<sup>8</sup> If a foreign insolvency proceeding is recognised pursuant to Chapter 8.3 of the Insolvency Act and the debtor is also subject to domestic insolvency proceedings, the foreign administrator is entitled to intervene in the domestic insolvency proceedings and execute procedural acts in such proceedings for the purpose of protecting, realising and distributing the debtor's assets. The legal consequences of the recognition of foreign insolvency proceedings are contained in Articles 466 to 469 of the Insolvency Act, which serve as legal safeguards and guidelines.

In accordance with Article 465 of the Insolvency Act, the court may issue an interim decision on the consequences of foreign court insolvency proceedings in the Republic of Slovenia if such security is necessary for the protection of the debtor's assets or interests of creditors. If the request for recognition is filed wrongfully or the foreign insolvency administrator did not propose such measures, the court cannot make such an interim order on its own motion.

Moreover, in accordance with Article 468 of the Insolvency Act, the court may only, under Article 465 or 467, determine the legal consequences of foreign insolvency proceedings which adequately safeguard the interests of creditors and other persons, including the debtor, which are affected by such legal consequences, failing which the court may ex officio modify or disregard the legal consequences provided under Article 465 or 467.

Under Article 457 of the Insolvency Act, the ranking and the rights of foreign creditors in domestic insolvency proceedings are the same as those of domestic creditors.

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<sup>7</sup> See paragraph 2 of Article 449 (application of chapter 8) of the Insolvency Act.

<sup>8</sup> See Article 459 of the Insolvency Act.

Pursuant to Article 471 of the Insolvency Act, the domestic court has to co-operate in insolvency proceedings referred to in Article 449<sup>9</sup> of the Insolvency Act to the fullest extent possible with foreign courts and foreign administrators directly or through a domestic administrator. In such co-operation, the domestic court is entitled to exchange information directly with the foreign court or foreign administrator, request information or legal assistance directly from the foreign court or foreign administrator, and provide information or carry out acts of legal assistance based on a direct request from the foreign court or foreign administrator. The same obligation to co-operate with foreign courts and foreign administrators applies, under Article 472, to domestic administrators, who shall in the cases referred to in Article 449 para 1, pursuant to their skills and under the supervision of domestic court, co-operate to the fullest extent possible with foreign courts and foreign administrators. Domestic administrators are moreover entitled, under the supervision of a domestic court, to exchange information directly with the foreign court or foreign administrator. The co-operation under Articles 471 and 472 of the Insolvency Act may be executed in any form which serves the realisation and purpose of co-operation. Pursuant to this objective, a person or a body may be appointed to act in accordance with the rules of the court, to co-operate with the foreign court or foreign administrator; information may be provided by using any means which the court assesses as appropriate, management and supervision of assets of an insolvent debtor may be co-ordinated and operated, agreements which refer to the co-ordination of insolvency proceedings with foreign courts shall be concluded and carried out and parallel procedures against the same insolvent debtor may be co-ordinated.<sup>10</sup> In accordance with paragraph two of Article 473, the Supreme Court of the Republic of Slovenia may also conclude a direct and binding agreement, referred to above, with the court or another body of a foreign country which is, under law of such country, competent for direct conclusion and the implementation of such agreements.

The legal consequences of insolvency proceedings are generally subject to the law of the country in which such proceedings are conducted (*lex fori concursus*). However, the legal consequences of insolvency proceedings on contracts, regarding the use or acquisition of immovable property, are regulated by the law of the country within which such immovable property are situated (*lex rei sitae*).<sup>11</sup> The same applies for insolvent debtor's property rights to a ship or aircraft, registered in a public register. For the latter the rule is that the law of the country within the competence of which such register is kept is applicable. In accordance with Article 481 of the Insolvency Act, the legal consequences of insolvency proceedings and the exercise of rights of an insolvent debtor to securities or other financial means, are subject to the law of the country in which such central depository is kept, if these were acquired or transferred by entry into the system of a central depository, or the law of the country applicable to keeping accounts in such second level depository, if these were acquired or transferred by entry to the credit of the account kept in the second level depository.

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<sup>9</sup> The proceedings referred to, on basis of paragraph 1 of Article 449 of the Insolvency Act, are listed in the second paragraph of Chapter 2 of this Article.

<sup>10</sup> See paragraph 1 of Article 473 of the Insolvency Act.

<sup>11</sup> See Article 480 of the Insolvency Act.

Additionally, under Article 482 of the Insolvency Act, the law applicable to insolvency proceedings for the rights and liabilities of parties or participants in the payment system or financial market shall be the law of the country applicable to such payment system or financial market. This, however, does not exclude the right to challenge the legal actions of insolvent debtor if such acts are challengeable under the law of the country applicable to such payment system or financial market.

Special rules for insolvency proceedings containing an element of a Member State are laid down in subsection 8.7 – Articles 485 to 488 of the Insolvency Act and to which the EIR applies. These rules apply also to insolvency proceedings against banks and other financial institutions and insurance companies unless it is otherwise provided for by the act or by a regulation of another Member State governing insurance business.

The rules on recognition and co-operation do not apply to insolvency proceedings if the court decision initiating such proceedings has a direct legal effect in Slovenia without having to resort to the special recognition procedure under Articles 16 and 17 of EIR or under an act governing banking or insurance business. Such insolvency proceedings have the same effect in Slovenia as in the Member State in which such proceedings are conducted at the moment provided for by the law of the relevant Member State.<sup>12</sup>

In accordance with Article 488 of the Insolvency Act, challenging the debtor's action is not subject to the law of the Member State in which insolvency proceedings are conducted if the beneficiary of such action proves that the legal action is subject to the law of another Member State, and that the law of another Member State does not allow the challenging of such legal action. On the other side, the law of the Member State in which such proceedings are conducted determines the legal effects of insolvency proceedings on a procedure in which the property or rights are disposed by an insolvent debtor.

### **3. Cases**

Although the Insolvency Act entered into force in 2007, there is no relevant case law dealing with cross-border insolvency. There is no publicly available statistical data on the number of cross-border insolvency proceedings in progress or concluded by the courts of first instance.

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<sup>12</sup> See Article 446 of the Insolvency Act.



## Chapter 38

# SOUTH AFRICA

### 1. General law

South Africa has a mixed legal system because its common law – the Roman-Dutch law – has been significantly influenced by English law. Mercantile law, in particular insolvency and company law has a strong English character. South Africa is not a party to any international treaty regarding cross-border insolvencies.

The Insolvency Act 24 of 1936 remains the principal source of insolvency law but some provisions relating to corporate insolvency are to be found in Chapter XIV of the former Companies Act 61 of 1973 and the Close Corporations Act 69 of 1984. Although South Africa enacted a new Companies Act 71 of 2008 that became effective on 1 May 2011 and which includes a new business rescue procedure in Chapter 6, the corporate insolvency liquidation provisions of the 1973 Companies Act will remain in force until new insolvency legislation is introduced. The insolvency provisions of the Insolvency Act and the general law will nevertheless apply to corporate insolvency in the absence of a particular provision in the relevant legislation.

The term “sequestration” relates to a bankruptcy order granted in terms of the Insolvency Act, that includes amongst others the estates of individuals and partnerships, whilst “winding-up” and “liquidation” are the terms used for the initiation of winding-up of companies and close corporations in terms of corporate legislation. The local estate of a foreign natural person debtor may be sequestrated in South Africa.

In order to be recognised in South Africa, the foreign representative must apply to a local High Court for recognition and assistance. All third parties including local creditors affected by the application must be notified of the application.

The courts have expressed a preference for a single forum of administration where the main proceeding is directed by the forum domicilii. If an application for recognition fails, foreign creditors may apply for the opening of local proceedings. Under the Insolvency Act section 149, the South African court has a discretion to refuse, for instance on the principle of convenience, an application for a local proceeding in terms of this Act concerning a debtor from a non-designated country. The local court has no such discretion in the case of a foreign debtor from a designated country in terms of the Cross-Border Insolvency Act 42 of 2000.

## 2. Assisting legislation

There is effectively no legislation in force that deals with cross-border insolvency in South Africa at present, and the general law and precedent must be applied in this regard. A South African High Court may recognise the appointment of a foreign representative on the basis of comity, convenience and equity.

South Africa enacted the UNCITRAL Model Law on Cross-Border Insolvency as the Cross-Border Insolvency Act 42 of 2000 on 8 December 2000. However, since the requirement of reciprocity has been introduced by the South African Parliament, this Act will apply only to states designated by the Minister of Justice and Constitutional Development by notice in the Government Gazette. The minister may designate a state only if he or she is satisfied that the recognition accorded by the law of that state justifies the application of the Act to foreign proceedings in that state. However, no countries have been designated as yet and the Act is therefore not in operation in practical terms. When any countries are designated, the Cross-Border Insolvency Act will apply:

- where a foreign court or representative seeks South African assistance in a foreign proceeding; or, conversely,
- where such assistance is requested in a foreign court in a proceeding under the laws of the Republic relating to insolvency (a "local proceeding");
- where a foreign and a local insolvency proceeding run concurrently in respect of the same debtor; or
- where creditors or other interested (foreign) persons apply to commence or to participate in a local insolvency proceeding (s 2(1)).

The Cross-Border Insolvency Act will afford certain advantages to representatives and creditors from foreign jurisdictions of designated countries. These advantages include:

- direct and speedy access and recognition of foreign representatives (ss 13 – 15);
- clarity by ranking foreign creditors not lower than the non-preferential claims of local creditors (s 13(2));
- entitlement by foreign creditors to be notified together with local creditors (s 14);
- exclusion of the power of local courts to exercise their discretion to refuse a local sequestration/ liquidation order on the grounds of convenience.

A foreign representative may apply to the High Court for recognition of the foreign proceeding in which he or she has been appointed. This application must be accompanied by the relevant documentary evidence, including a statement of all foreign proceedings that the applicant knows relate to the debtor (s 15). After recognition is granted, the foreign representative may participate in local insolvency proceeding (ss 11 and 12) and may intervene in any other legal proceeding to which the debtor is a party (ss 11, 12 and 24). Upon recognition of a foreign insolvency proceeding, the foreign representative acquires standing to initiate legal action to set aside any disposition that is available to a South African representative (s 23).

As the principles of designation and reciprocity have been introduced into the Cross-Border Insolvency Act, South Africa will in due course follow a dual approach to the recognition of foreign bankruptcy orders. Representatives and proceedings from designated countries will follow the procedure of, and be subject to the Cross-Border Insolvency Act, whilst those from non-designated countries will still have to follow the general law route.

### **3. Insolvency practice**

Apart from property in the Republic, movable property of the insolvent in a foreign country will vest in the insolvent estate if the estate is sequestrated by the court where the insolvent is domiciled (*Viljoen v Venter* NO 1981 2 SA 152 (W)). In principle this means that the representative will be able to claim any property outside his or her jurisdiction without first obtaining such recognition. In practice, however, recognition will be required.

By a fiction of law all the insolvent's movable property is thus said to be considered to be situated at his or her domicile and sequestration elsewhere operates to transfer that movable property, wherever it is actually situated, to the representative when appointed. In *Ex parte LaMonica v In re Eastwind Development (SA Baltic Reefers Management Ltd intervening)* [2010] JOL 24783 (WCC) at para 17 the court expressed some doubt as to the application of the fiction today. With movable property, recognition is nevertheless said to be a mere formality: granting recognition to a foreign representative to deal with an insolvent's

immovable property in South Africa is within the local court's discretion. This discretion is absolute but recognition is usually granted in the interests of comity and convenience. The effect of recognition is that the local assets will be treated as if the foreign debtor is an insolvent in terms of South African law, although he or she will not formally have the status of an insolvent in terms of this jurisdiction.

Recognition in case of immovable property is an essential requirement. The courts have an absolute discretion to reject or approve such an application. (See for instance *Ex parte Palmer NO: In re Hahn* 1993 3 SA 359 (C).) The foreign representative of a juristic person must apply for recognition where he or she has to deal with either immovable or movable property situated in South Africa.

After recognition has been obtained the foreign representative may deal with local assets. A South African court may impose conditions on the foreign representative in order to safeguard the rights and interests of local creditors. If recognition is refused by a South African court, or not applied for, a foreign creditor may apply for the sequestration or liquidation of the estate in this jurisdiction. South African courts will protect the interests of local creditors and orders will sometimes state that "property can only be transferred once administration costs and local debts have been paid before assets may be transferred". However, a foreign creditor should receive preferential treatment if he or she holds a security acknowledged by the local forum.

The court will describe the mode of notice of the order to interested parties. The order should deal with the following:

- recognising the appointment of the foreign representative;
- the duration of the order;
- the general powers of the foreign representative;
- the security to be afforded by the foreign representative to the satisfaction of the Master of the High Court;
- the service of the order on relevant parties;
- supervision by the Master and practical arrangements regarding the administration of the order and the submission of estate accounts; and
- special conditions regarding meetings of creditors; proof, admission and rejection of claims; distribution plans and the rights and powers of the foreign representative.

The procedures to be incorporated in the court order, and that will apply subsequent to recognition are in practice gleaned from the Insolvency Act and the relevant corporate legislation. (See for instance *Ex parte Steyn* 1979 (2) SA 309 (O) in this regard; and *Moolman v Builders & Developers (Pty) Ltd* 1990 1 SA 954 (A) for an example of a standard order).

## 4. Examples

### ***Moolman v Builders & Developers (Pty) Ltd 1990 1 SA 954 (A)***

The appellant was the provisional liquidator (foreign representative) of a company incorporated in the Republic of Transkei and subsequently placed in provisional liquidation by the Supreme Court of Transkei. The appellant obtained an order from the Transkei court to appoint a commissioner to interrogate the sole director and major shareholder of the company in the Eastern Cape, but the director objected to interrogation, whereupon the appellant applied to the local court for an order recognising both his appointment as provisional liquidator and the order of the Transkei court relating to the appointment of the commissioner. The application was refused.

On appeal, reversing the lower court's decision, it was held that the court had a discretion whether or not to grant recognition and that the sole grounds for granting recognition were comity and convenience. The appeal court also held that the discretion in this case should have been exercised in the applicant's favour and granted the application for recognition.

### ***Clegg v Priestley 1985 3 SA 950 (W)***

The applicant was declared bankrupt by a court of competent jurisdiction in England and the respondent was appointed as the insolvency trustee of his property. The respondent, alleging that the applicant had assets in the Republic, brought an application *ex parte* for an order recognising his appointment and empowering the respondent to administer the estate within the Republic. The application was granted. The applicant applied for the rescission of the order because the application had been brought *ex parte*. The court accepted that the application had not complied with the Uniform Rules of the Court.

### ***Priestley v Clegg 1985 3 SA 955 (T)***

(Facts as above in *Clegg v Priestley*.) The respondent argued that, as the major creditor of his estate was the Inland Revenue in England, the application was in reality for the enforcement of the revenue laws of another country. The court held that the rule relied on by the respondent did not apply where a liquidator or an official assignee or the insolvency trustee of an insolvent's estate sought to obtain property which would in due course of administration benefit ordinary creditors as well as the Revenue.

### ***Ex parte Palmer NO: In re Hahn 1993 3 SA 359 (C)***

The applicant argued that a South African court may, on the basis of comity and convenience, grant recognition to a foreign representative regardless of any consideration given to the insolvent's domicile. Dismissing the application, the court rejected the "bold assertion" that recognition simply involves the exercise of discretion based on considerations of comity and convenience.

***Bekker NO v Kotzé and Another* 1996 4 SA 1287 (Nm); 1996 4 SA 1293 (Nm)**

These judgments by the Namibian High Court dealt with two separate applications concerning outward-bound requests by a local representative. The insolvents, married in community of property to each other, were domiciled in South Africa and their common estate was placed under provisional sequestration in this jurisdiction. The provisional insolvency trustee appointed in South Africa applied successfully for a recognition order in the Namibian High Court. The insolvents applied for the recognition order to be set aside since it was based on a provisional sequestration order. The court refused to set the order aside. Although the court could not enforce a foreign judgment unless it was final – a provisional order or judgment could be confirmed or be discharged on the return date – the court reasoned that the operative word was “enforce”. The application was therefore dismissed.

***Ward v Smit & Others: In re Gurr v Zambia Airways Corporation Ltd* 1998 3 SA 175 (SCA)**

Foreign representatives were appointed in Zambia to wind up the affairs of Zambia Airways, incorporated in Zambia and registered in South Africa as an external company in terms of the Companies Act. Thereafter, a South African employee of the company successfully applied for the provisional, and later the final, winding-up of the external branch in South Africa and a local representative was appointed. Six months after the granting of the provisional winding-up order, the foreign representatives applied for an order to set aside the local winding-up orders; recognising their appointment as liquidators of the company; declaring them to be empowered to administer the South African estate of the company; and directing the local representative to hand over the assets of the company to them. The court dismissed their claims.

The court held that although a collective bankruptcy proceeding was desirable, South African courts had the jurisdiction to grant a winding-up order of a branch of an external company, even though the foreign company was subject to winding-up in its country of incorporation. The application to set aside the local winding-up order and to recognise the foreign representatives was denied. The court confirmed that foreign representatives had no power to deal with assets of foreign companies situated in South Africa and that local creditors were entitled to attach these assets.

***Sackstein NO v Proudfoot (Pty) Ltd* 2003 2 All SA 59 (SCA)**

A Namibian company established a branch in South Africa which was registered as an external company in South Africa. Another South African company (the creditor) entered into a contract with the Namibian company in Namibia to render certain services to the Namibian company. The creditor received payment under the contract in its bank account in South Africa. The Namibian company was thereafter wound up; it subsequently entered into an arrangement with its creditors and the winding-up was set aside in Namibia. Meanwhile the South African branch in South Africa was also wound up. The South African liquidator sought to set the payment to the creditor aside as a voidable disposition and to recover it since the Namibian company and the South African branch were the same entity. The court of appeal accepted that the South African liquidator could attack the disposition.

## Chapter 39

# REPUBLIC OF SOUTH KOREA

### **1. General law**

In principle, a foreign creditor or a foreign administrator can bring actions in the Korean courts. In order for a judgment rendered by a foreign court to be recognised as effective in Korea, certain pre-requisites set out in the Korean Code of Civil Procedure (the “CCP”) Article 217 must be satisfied. The Korean Code of Civil Enforcement (the “CCE”) provides that a foreign judgment recognised as effective in Korea may be enforced in Korea by petitioning a Korean court for an enforcement order. However, the provisions of the CCP and the CCE are generally not applicable to judgments or decisions rendered by foreign courts in relation to the commencement or administration of bankruptcy proceedings and the recognition of such judgments and decisions is governed by a new consolidated insolvency law called the “Debtor Rehabilitation and Bankruptcy Law” (“DRBL”).

### **2. Assisting legislation**

The DRBL became effective in Korea on April 1, 2006. It sets forth procedures for the recognition of foreign insolvency proceedings by a Korean court and also clarifies the effect of an insolvency proceeding which has commenced in Korea on the debtor’s assets situated in a foreign country.

Before the DRBL became effective, three types of court-supervised insolvency proceedings were available in Korea to insolvent companies: corporate reorganisation proceedings under the Corporate Reorganisation Law, composition proceedings under the Composition Law, and bankruptcy proceedings under the Bankruptcy Law.

The DRBL repealed the above insolvency laws and consolidated the insolvency regime into the following two insolvency proceedings available to insolvent companies:

- (i) bankruptcy proceedings under Chapter 3 of the DRBL for the liquidation of insolvent business entities, which is a liquidation proceeding similar to Chapter 7 of the U.S. Bankruptcy Code; and
- (ii) rehabilitation proceedings under Chapter 2 of the DRBL primarily for the rehabilitation of insolvent corporations and other business entities pursuant to a rehabilitation plan approved by the creditors and the court, which proceeding is analogous in some respects to Chapter 11 of the U.S. Bankruptcy Code.

### **3. Insolvency practice**

Under the DRBL, the debtor company or a creditor or creditors (including foreign creditors) holding claims amounting to ten percent (10%) or more of the company's paid-in capital or shareholders holding ten percent (10%) or more of the debtor company's total issued and outstanding shares may file an application for commencement of the rehabilitation proceeding with respect to the debtor company which application should set forth sufficient grounds to substantiate that the debtor is bankrupt.

The DRBL generally does not distinguish between domestic and foreign creditors. Foreign creditors therefore have the same rights to initiate a rehabilitation proceeding or bankruptcy proceeding with respect to a Korean company as would domestic creditors.

Under the rehabilitation proceeding, secured and unsecured claims, including the claims of foreign creditors, which arose prior to the commencement of the rehabilitation proceeding can be paid only in accordance with the rehabilitation proceeding. The DRBL provides that claims not contained in the rehabilitation plan are discharged. Accordingly, foreign creditors need to ensure that their claims are reflected in the rehabilitation plan in a timely manner.

In the case of the bankruptcy proceeding, secured parties are free to exercise security interests at any time notwithstanding the commencement of the proceedings and their secured claims are not affected by the bankruptcy proceedings. Accordingly, a foreign secured creditor would not need to wait for the outcome of the bankruptcy proceeding but could exercise its security interest at any time.

Further, the DRBL includes new provisions in Chapter 5 which apply in the following cases:

- (a) A representative of a foreign insolvency proceeding seeks recognition of such foreign insolvency proceeding and relief in connection therewith from a Korean court;
- (b) A representative of a foreign insolvency proceeding submits a petition to a Korean court for commencement of a domestic insolvency proceeding or participates in a pending domestic insolvency proceeding;
- (c) a receiver, bankruptcy trustee, debtor or any other person approved by a Korean court acts in a foreign country in connection with a domestic insolvency proceeding by participating in the proceedings of a foreign court, seeking recognition or relief of a foreign court, etc.; and
- (d) Co-operation is required between domestic and foreign insolvency proceedings as they are administered concurrently in Korea and a foreign country.

These cases are further described below.

***(i) Recognition and enforcement of foreign insolvency proceedings***

From a Korean insolvency law perspective, an insolvency proceeding commenced in a foreign country will affect the debtor's assets located in Korea only when and to the extent such foreign insolvency proceeding is recognised and enforced in Korea by a recognition decision and relief orders granted by a Korean court pursuant to the provisions of the DRBL. Articles 630 and 631 of the DRBL provide that the petition for the recognition decision can be made only by a representative of the foreign insolvency proceeding. A foreign insolvency proceeding can be recognised if there is sufficient evidence of the foreign insolvency proceeding duly taking place and the recognition of such proceeding would not have an adverse effect on public order in Korea. The Korean court is required to make a decision on whether to grant recognition to the foreign insolvency proceeding within one month after the petition.

The recognition decision of the court is merely a basis for subsequently granting relief orders (such as an order for the suspension of pending litigation or enforcement over the assets of a debtor company located in Korea as well as a preservation order to prevent the debtor company from disposing its assets or paying its creditors), and therefore, the foreign insolvency proceeding would affect Korean business and assets only through relief orders issued by a Korean court upon the petition by an interested party (including the representative of the foreign insolvency proceeding) or at its discretion. The recognition decision and a relief order may be granted jointly or separately. The cross-border insolvency receiver appointed by such relief order of the Korean court shall have the exclusive authority and power to control and dispose of the debtor's business and assets in Korea (including the transfer of assets to a foreign country, disposition of assets and distribution) subject to the approval of the Korean court.

***(ii) Parallel cross-border insolvency proceedings***

Under the DRBL, it is possible for a domestic insolvency proceeding (either a rehabilitation proceeding or bankruptcy proceeding) to be commenced against the debtor, separately or in parallel with the foreign insolvency proceeding recognised in Korea, pursuant to the petition by the debtor, a creditor or any other qualified interested party. In the case where both domestic and recognised foreign insolvency proceedings are concurrently pending in Korea, the Korean court may proceed based mainly on the domestic proceeding and may revise or revoke the relief orders granted to such foreign insolvency proceeding.

***(iii) Outbound effect of Korean insolvency proceedings in foreign countries***

The DRBL has discarded the principle of territoriality that existed in the previous insolvency-related laws and as a result, at least for the purpose of Korean laws and Korean insolvency proceedings, an insolvency proceeding which has commenced in Korea will have an effect on the debtor's assets located in a foreign country. Whether and to what extent a Korean insolvency proceeding would, in reality, be recognised and enforced in a foreign country in which the debtor's assets are located depends upon the laws of that foreign country.

Article 640 of the DRBL, which follows Article 5 of the UNCITRAL Model Law, provides that a receiver, bankruptcy trustee or any other person approved by the court is authorised to act in a foreign country on behalf of a domestic insolvency proceeding to the extent permitted by the applicable foreign law. Thus, upon commencement of an insolvency proceeding in Korea, a representative of a Korean insolvency proceeding may petition a foreign court for recognition and enforcement of a Korean insolvency proceeding in the foreign country in which the debtor's assets are situated based on the authority granted under the above Article 640 of the DRBL. If a foreign court recognises and enforces a Korean insolvency proceeding, the resolution of the proceeding and payment out of the debtor's assets situated in a foreign country would be directly subject to, and governed by the Korean insolvency proceeding to the extent recognised and enforced by the foreign court.

In connection therewith, the exact effect of the recognition may vary from jurisdiction to jurisdiction. However, although the foreign jurisdiction's regulations concerning the effect of recognition will obviously be important, the procedures and protections afforded under the DRBL are typically quite relevant because the foreign court will often grant the same or similar protection as afforded under the Korean insolvency proceeding and maybe reluctant in principle to grant more protection in its jurisdiction than could be obtained under the Korean insolvency proceeding.

**(iv) Rule of payment adjustment in Korean insolvency proceedings  
(Hotchpot rule)**

Under the Hotchpot rule embodied in the DRBL, in case there is a domestic insolvency proceeding and one or more foreign insolvency proceedings with respect to the same debtor, a creditor who has received payment from a foreign insolvency proceeding or the debtor's assets located outside of Korea may not receive a dividend or payment in the domestic insolvency proceeding until other creditors belonging to the same class and ranking as that creditor in the domestic insolvency proceeding have received a proportionately similar payment.

The Hotchpot rule as incorporated in the DRBL is rather new in Korea and there have not yet been any court cases or court practices established with regard to the application of such rule in the Korean insolvency proceeding. It appears that the Hotchpot rule under the DRBL primarily addresses the payment made to a creditor in a concurrent foreign proceeding.

It is not entirely clear whether and to what extent the Hotchpot rule would be applied with respect to:-

- payments made from the debtor's overseas assets where there is no concurrent foreign insolvency proceeding; and
- payments received from the enforcement of security interests in the debtor's assets located in a foreign country.

## **4. Examples**

A number of Korean companies, with extensive assets in other jurisdictions, which have undergone insolvency proceedings in South Korea have sought bankruptcy protection in other jurisdictions in recent years. Daewoo Corporation sought recognition of its Korean bankruptcy proceeding in the U.S. courts, and Samsung Logix obtained recognition of its Korean rehabilitation proceeding in multiple jurisdictions, including the U.S., U.K., Australia, Singapore, and Belgium. Further, foreign companies have occasionally sought protection of their assets and interests in Korea through the recognition of their foreign insolvency proceedings by Korean courts. E.g., LG.Philips Displays Holding B.V., a Dutch company obtained the first recognition of a foreign insolvency proceeding by a Korean court.



## Chapter 40

# SPAIN

### **1. General law**

The multilateral and bilateral treaties to which Spain is a signatory specifically exclude insolvency matters.

There are two special laws for insurance companies and credit institutions, but they do not contain provisions for recognition of foreign resolutions opening insolvency proceedings: (i) Royal Legislative Decree 6/2004, 29 October, approving the revised text of the Private Insurance Supervisory Act and (ii) Law 6/2005, 22 April, regarding reorganisation and winding-up of credit institutions.

### **2. Assisting legislation**

The 1346/2000 European Regulation on Insolvency Proceedings (“the EIR”) came into effect on 31 May 2002. It applies to all EU member states except Denmark. As a regulation, it is automatically law in the relevant member states, overriding where necessary any conflicting provisions in national laws. The EIR provides the rules regarding intra-EU cross-border insolvency proceedings and also provides for the automatic recognition of individual member state insolvency proceedings within the European Union.

In cases which do not fall within the scope of the EIR or in a case where an insolvency proceeding has been opened in a Non-member state or Denmark, the general rules of Spanish law apply. On 9 July 2003, the Spanish Parliament approved a new insolvency Act (*Ley 22/2003 Concursal*, the “Insolvency Act”) which came into force on 1 September 2004 and replaced the previously archaic and dispersed insolvency regulation with a single consolidated insolvency law. Subsequently, the Insolvency Act has been subject to several amendments. The recent amendment, the law amending the Insolvency Act was approved on 22 September 2011 and entered into force on 1 January 2012. Title IX, section 199 and following of the Insolvency Act provides general rules of private international law which apply, amongst others, for recognition of foreign, non-member state insolvency proceedings where the EIR is not applicable.

Pursuant to section 220 Insolvency Act, foreign resolutions opening insolvency proceedings shall be recognised in Spain by way of the *exequatur* procedure regulated by section 951-958 of the Civil Procedural Act 1881, *Ley de Enjuiciamiento Civil*, (CPA 1881), provided that the following requirements are met:

- (i) the foreign resolution refers to collective proceedings based on insolvency of the debtor, by virtue of which his assets and activities are subject to control or supervision by a court or a foreign authority for the purposes of reorganisation or winding-up thereof;
- (ii) the resolution is final;
- (iii) the jurisdiction of the court or authority that has opened the insolvency proceeding is based on centre of main interest criteria or one of an equivalent nature;
- (iv) it is not a resolution in default or in contempt of court, and
- (v) the resolution is not contrary to Spanish public policy.

The *exequatur* is a declaration obtained from the relevant court stating that the foreign resolution is recognised and enforceable in Spain. According to section 955.1 CPA 1881, as a general rule, the First Instance Court is the competent court for the *exequatur* procedure. Nevertheless, under section 955.2 CPA 1881 in conjunction with section 86ter of the Organic Act on the Judiciary Branch, *Ley Organica del Poder Judicial*, the Commercial Courts have jurisdiction for insolvency matters. An application for recognition of the foreign resolution opening insolvency proceedings shall be therefore made to the Commercial Court located in the place of residence of the party against which the recognition is requested. The intervention of the Public Prosecutor (*Ministerio Fiscal*) in the *exequatur* procedure is compulsory.

Although the UNCITRAL Model Law on Cross-Border Insolvency has not been adopted by Spain, the procedure for recognition of foreign insolvency proceedings established in the Spanish Insolvency Act is based on the provisions of the UNCITRAL Model Law on Cross-Border Insolvency.

### 3. Insolvency practice

#### ***Under EIR***

Under the EIR insolvency proceedings are to be recognised immediately in other EU countries without further scrutiny. This rule was followed by the Commercial Court Málaga number 1 in its resolution on 9 February 2005. In this case the court ruled that it was clear that once evidence of the powers of the English liquidator, of his appointment and of the judgment opening the insolvency proceeding was provided, the insolvency proceeding had to be recognised with no further formalities in Spain.

Furthermore, the Court of Appeal Madrid in its resolution on 30 September 2011 noted that under the EIR a foreign judgment opening the insolvency proceedings handed down by a court of a member state is automatically recognised in Spain, with no further action for recognition required from a judicial body in Spain. In this particular case, the plaintiff, an insolvency administrator appointed by a German court, asked for an *exequatur* of the German judgment opening the insolvency proceeding. The court denied the *exequatur*, given that the German judgment fell within the scope of the EIR and therefore the *exequatur* procedure was not applicable.

However, in Spain in practice this recognition sometimes requires some effort on the part of the insolvency administrator, especially in cases of inscription of judgment opening insolvency proceedings to the Spanish land register. In a resolution of 5 June 2009, the registrar of the land register number 1 of San Javier denied the inscription of an English judgment opening insolvency proceedings, alleging that the judgment had not been declared enforceable in England as required pursuant to the Brussels Regulation.

#### ***Under Spanish private international law***

Since 1 January 2004 the First Instance Court has jurisdiction for the *exequatur* procedure (section 955.1 CPA 1881). But in insolvency matters, the Commercial Courts have to decide about the recognition of a foreign judgment (section 955.2 CPA 1881 in conjunction with section 86ter of the Organic Act on the Judiciary Branch, *Ley Organica del Poder Judicial*). Prior to this amendment the Spanish Supreme Court was the competent court for deciding about the *exequatur*. Although the law is clear in this regard, there are resolutions from the First Instance and from the Commercial Courts deciding about the *exequatur* in insolvency proceedings (e.g. First Instance Court number 49 of Barcelona, 16 September 2005; Commercial Court number 3 of Madrid, 4 June 2009).

According to Spanish private international law section 227 Insolvency Act contains the duty of reciprocal co-operation between the insolvency administrator in insolvency proceedings declared in Spain and the administrator of foreign insolvency proceedings related to the same debtor. Refusal to co-operate by the administrator, or the foreign court or authority, shall release the relevant Spanish bodies of that duty.

Pursuant to section 222 Insolvency Act, once the *exequatur* of the resolution opening the insolvency proceedings is obtained, any other resolution handed down in those insolvency proceedings that have their basis in the insolvency legislation shall be recognised in Spain, without the need for any formalities whatsoever, as long as such resolution fulfil the requirements stated in section 220.

## 4. Examples

### **General Department for Registries and Notaries, resolution 11 June 2010**

An English county court handed down two judgments opening insolvency proceedings against two individuals. These judgments were submitted for their inscription to the Spanish land register. The registrar denied the inscription alleging that the judgments had not been declared enforceable in England as required pursuant to the Brussels Regulation.

The competent body to decide in such cases, the General Department for Registries and Notaries, noted that legislation applicable to recognition of a judgment opening insolvency proceedings is not the Brussels Regulations, but the EIR. Article 16 EIR establishes the automatic recognition of judgments in a member state opening insolvency proceedings. Such a judgment must be recognised in the other member states *ex lege* without prior recognition requests being necessary.

Nevertheless, the automatic recognition process does not imply a total lack of control. On the contrary, Article 26 EIR allows the refusal to recognise insolvency proceedings opened in another member state or to enforce a judgment handed down in the context of such proceedings, where the effects of such recognition or enforcement would be manifestly contrary to the state's public policy. The EIR therefore demands that the registrar is proactive and assesses whether the foreign judgment falls within the scope of the EIR and whether a reason for refusal applies. The General Department revoked the registrar's decision and concluded that the English judgments must be registered with no further formalities in the Spanish land register.

### **Commercial Court no. 3, Madrid, 4 June 2009**

On 15 September 2008 the English High Court of Justice, Chancery Division, declared the opening of an administration proceeding of Lehman Brothers International Europe. The company asked the Commercial Court of Madrid for recognition of the English administration order under article 220 of the Spanish Insolvency Act and the *exequatur* procedure.

As a consequence, the Commercial Court recognised the English order and the administration proceeding as principal foreign insolvency proceeding. Furthermore, the Commercial Court recognised that the status as administrator of the foreign proceeding is held by the person or body that is empowered to administer or supervise the reorganisation or winding-up of the assets or activities of the debtor, or to act as representative of the proceeding.

In the case at hand, the application of the EIR was not discussed despite the fact that the administration proceeding was opened after the Regulation entered into force.

***Court of Appeal Barcelona, 7 February 2006***

The insolvency administrator of the Danish company Eurotell Scandinavia ApS asked the Spanish court for recognition of his capacity as administrator. The court denied his application, alleging that prior to recognition of his appointment, it would have been necessary to recognise the effectiveness of the insolvency proceeding. The Spanish court noted that the EIR is not applicable to Denmark and therefore the Danish insolvency proceeding cannot be recognised automatically. The administrator should according to section 220 of the Insolvency Act apply for the *exequatur* procedure regarding recognition of the resolution opening the insolvency proceeding in Denmark. Once the *exequatur* is obtained and the insolvency proceeding is recognised, the administrator may exercise the powers granted to him pursuant to the law of the state of opening.

***Supreme Court, 28 December 2004***

The liquidator of the French company Novestyle, S.A. requested the Spanish Supreme Court for recognition of the French resolution opening the judicial liquidation proceeding as well as appointment of the plaintiff as liquidator. The Spanish Court applied the *exequatur* procedure regulated by the CPA 1881 for the aforementioned recognition, given that the French resolution was dated on 28 June 2001 and the EIR did not come into force until 31 May 2002. After having received the approval of the Public Prosecutor and having analysed that all the requirements set in sections 951 and 954 CPA 1881 had been met, the Court granted the application of recognition/*exequatur* of the French resolution. In this case the Supreme Court still had jurisdiction to decide. By virtue of Law 62/2003, 30 December, section 955 CPA 1881 was amended, transferring the jurisdiction for deciding about the *exequatur* procedure to the First Instance or Commercial Courts.



## Chapter 41

# SWEDEN

### 1. General law

Foreign judgments including foreign bankruptcy judgments are not normally recognised or enforceable in Sweden without an order of the Swedish court. If a creditor or a foreign administrator wishes to gain access to property in Sweden, he must first obtain a Swedish judgment by issuing proceedings there.

The exceptions to this general rule are as follows:

- where the foreign creditor is from a country which is a party to a convention with Sweden regulating enforcement and recognition; and
- where the contract between the disputing parties determines the court that will adjudicate the dispute.

The EU Council Regulation No 1346/2000 of 29 May 2000 (“European Insolvency Regulation” or “EIR”) on Insolvency Proceedings makes exceptions for bankruptcy proceedings opened within the EU.

According to the Swedish Bankruptcy Act, a petition for bankruptcy should be made to the district court where the debtor should answer in a contentious case relating to liability to pay in general. The Swedish Code of Judicial Procedure 1942

chapter 10 sets out rules for determining the competent court in civil law cases. The residence of a natural person or the registered address of a legal entity will normally determine this. There are some alternative rules such as:

- where the debtor lives;
- where the debtor last resided (if the debtor is a Swedish national who is abroad);
- where the contract was signed; or
- where the assets are located or where the debt incurred. (The presence of any assets belonging to a debtor is sufficient for a Swedish Court to have jurisdiction notwithstanding that the assets may be of minimal value.)

A foreign claimant who is not exempt by any convention or regulation and who commences legal proceedings in Sweden may have to provide security in the form of a guarantee or bond if the debtor applies for security. Nationals of the following countries are, for example, exempted from these provisions:

- Denmark (including the Faeroe Islands and Greenland), Iceland and Japan;
- Member States of the Hague Convention of 17 July 1905 and 1 March 1954; and
- Member States of the European Convention on Establishment of 13 December 1955.

The Swedish Insolvency law consists basically of three parallel sets of regulations: The EIR which applies to all Member States except Denmark; The Nordic Multilateral Bankruptcy Convention (concerning Denmark, Finland, Iceland, Norway and Sweden); and non-statutory rules which apply to all other countries.

## 2. Assisting legislation

### ***The Nordic Multilateral Bankruptcy Convention of 7 September 1933***

Denmark, Finland, Iceland, Norway and Sweden signed the Nordic Multilateral Bankruptcy Convention of 7 September 1933. Sweden ratified the Convention on 6 April 1934. The convention has subsequently been revised. The Convention provides for full recognition of domestic bankruptcies opened in any signing state and these proceedings include assets in all signatory countries. However, proceedings in one country do not prevent the continuation of insolvency proceedings in another country if such proceedings have commenced earlier. In this instance, there are no rules concerning the co-operation between the two administrations. However, where insolvency proceedings are commenced in a signatory country, the Convention determines the assistance that should be given by the Courts in the other Nordic countries. No special *exequatur* is required and questions of law are referred to the courts of the state where insolvency proceedings were opened, save for issues involving preferences or securities which are resolved by the law of the state where the assets are situated.

The Convention does not apply to secondary insolvency proceedings. The effects of such bankruptcy proceedings are limited to the assets in that country and that proceeding does not prevent a new insolvency proceeding in another Nordic country.

The Convention does not contain any specific provisions governing bankruptcy jurisdiction; it is governed by Swedish civil law. The Swedish Bankruptcy Act (*Konkurslagen*) provides that a bankruptcy application must be filed with the court where the debtor can in general be sued for a debt. A similar rule for compositions is set out in the Swedish Company Reorganisation Act (*lagen om företagsrekonstruktion*).

### **The European Insolvency Regulation**

The EIR came into force on 31 May 2002 and is applicable in all European member states except Denmark. The EIR replaces, within its scope of application, national Swedish laws as well as The Nordic Multilateral Bankruptcy Convention (in relation to Finland). The EIR applies to insolvency proceedings, whether the debtor is a natural person or a legal person, a trader or an individual. It enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests (COMI). These proceedings have universal scope and aim to include all the debtor's assets. The EIR permits secondary proceedings to be opened in another Member State to run parallel with the main proceedings if the debtor possesses an establishment within the territory of that other Member State. The effects of such secondary proceedings are restricted to the assets in that latter Member State. According to Swedish law, a creditor in his petition for bankruptcy must state if the petition concerns only a secondary proceeding.

Sweden also has statutes regulating some issues in relation to insolvency of insurance companies and credit institutions with cross-border effects.

## **3. Insolvency practice**

Principles of strict territoriality apply when there are foreign insolvency proceedings and the country concerned is not a signatory to the Nordic Multilateral Bankruptcy Convention or a member of EU and, through this, embraced by the EIR. The foreign insolvency proceedings will, in principle, be ignored and will not prevent domestic insolvency proceedings being commenced in Sweden. The bankruptcy code does not contain reference to foreign proceedings and is based on the principle of territoriality for foreign insolvencies and universality for domestic insolvencies.

A foreign bankrupt estate is capable of having rights and obligations and can sue and be sued in Sweden, but the bankruptcy does not affect assets located in Sweden that remain at the disposal of the debtor. A foreign administrator has no power to deal with the debtor's assets in Sweden and proceedings for attachments, judgments, executions or even local bankruptcy in Sweden are still possible. The justification for this is apparently protection of Swedish creditors. Foreign creditors may also - irrespective of whether or not they have proved in the foreign bankruptcy - use these proceedings.

Surplus in the Swedish insolvency is not paid to a foreign administrator but returned to the debtor.

In a Swedish domestic insolvency, the rights of a foreign administrator will depend on foreign procedural law where assets are situated in other jurisdictions. The present interpretation of Swedish law is that the debtor is obliged to co-operate with his office holder to collect foreign assets. This is based on the Swedish Penal Code, which makes it a crime for a debtor to withhold assets from a Swedish administrator. This can be enforced by granting powers of attorney in favour of the administrator or by a transfer of ownership to the administrator.

The nationality or residence of a creditor is irrelevant for the purposes of Swedish insolvency jurisdiction: all creditors participate equally if their claims are enforceable in Sweden. Recoveries abroad are taken into consideration when calculating dividends and, in this instance, excess monies can be reclaimed from the creditor. Where there are parallel foreign and Swedish bankruptcy proceedings, the Swedish administrator will take into account receipts by creditors in other proceedings.

## 4. Examples

### Case 1

A Swedish administrator sold a yacht in Italy that belonged to a debtor in bankruptcy. The proceeds of the sale were due to be transferred from the Italian buyer to the administrator in Sweden. A broker obtained an attachment of the proceeds stating he was entitled to commission. The Swedish administrator was advised that he would find it difficult to vacate the attachment made by the Italian court since Italian law provides that the bankruptcy court should handle all disputes initiating from bankruptcy, which was the District Court of Stockholm. However, the Swedish administrator could not bring an action in the Swedish Court since the assets were in Italy and the court was not competent. This case was settled.

### Case 2

This case demonstrates the practical problems of obtaining information and bringing proceedings in other jurisdictions. A Swedish individual was declared bankrupt but left Sweden and, when traced, was living in luxury in Florida, United States. It was thought that the debtor in bankruptcy had taken a substantial amount of money and antiques when she left Sweden. The Swedish administrator sought to issue proceedings in a local American court to recover the assets and obtain information about her whereabouts and the extent of her assets. An order for extradition was obtained through diplomatic channels and the debtor was jailed until she could be returned to Sweden, but by this time her assets had been dissipated.

Case 3

A Swedish bankrupt owned shares in a Swiss Company. The debtor refused to give a power of attorney and the company refused to act on the authority of the Swedish administrator without written instructions from the debtor. A settlement was reached eventually.

Case 4

A Swedish administrator sought recovery of assets in Belgium. The debtor successfully argued that the request of the Swedish administrator could not be granted, as Belgian law requires reciprocity and a Swedish court would not recognise the same request from a Belgian administrator.

As from the 31 May 2002, the EIR is applicable in this situation. Consequently, the Swedish administrator would probably be successful today.

Case 5

According to Article 3 of the EIR, the courts of the Member State within the territory of which the centre of a debtor's COMI is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or a legal person, the place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary. Such rule of presumption does not exist for natural persons. The Swedish Supreme Court declared (in 2009) that a natural person has his COMI in Sweden if he has his civil registration in Sweden in the absence of proof to the contrary. In this case the debtor had his civil registration in Sweden but claimed he had moved to Spain before the petition for bankruptcy was filed. Even though the debtor had presented some evidence in his favour he had not been able to show that he had his COMI in Spain.

Case 6

A Swedish bankruptcy estate sued an Italian company for recovery. The respondent, who did not have its COMI in Sweden, disclaimed the jurisdiction of Swedish courts. The Swedish bankruptcy estate referred to chapter 10 of the Swedish Code of Judicial Procedure 1942 which sets out that the court within the territory where the assets are located shall have jurisdiction. The asset in this case consisted of a claim which the respondent had lodged proof of in the bankruptcy. The Swedish Supreme Court found that the respondent had not proved that the claim was of no value therefore the Swedish courts had jurisdiction.

Case 7

A Swedish bankruptcy estate sued a Danish company for recovery. The respondent did not have its COMI in Sweden. The bankruptcy estate claimed that Swedish courts had jurisdiction and referred to a prorogation clause provided for in the governing agreement between the debtor in bankruptcy and the respondent. That clause stated that any disputes in relation to the agreement should be settled by

Swedish courts. The Swedish Supreme Court found that Swedish courts did not have jurisdiction since a demand for recovery does not concern the contractual agreement between the debtor in bankruptcy and the respondent. A demand for recovery is rather a lawfully grounded claim, closer to a non-contractual claim. Thus the prorogation clause could not be invoked by the bankruptcy estate in this case.

#### Case 8

A Swedish bankruptcy estate sued a Norwegian company for recovery. The Swedish Court of Appeal found, with reference to the EIR, that Swedish courts had jurisdiction. Thus the court applied the EC Regulation even though Norway is not a Member of the EC. The judgment has been appealed and the case is to be tried by the Swedish Supreme Court (2012).

#### ***Cunard 773F, 2nd 452 ( 2nd CIR 1985)***

A Swedish shipping company was declared bankrupt in Sweden. A British creditor obtained an attachment order on a debt due to the Swedish company by an American debtor. The British creditor argued that the United States Bankruptcy Code, section 304 was the exclusive remedy of an administrator who wished to stay or enjoin creditor actions in the United States. The United States court vacated the attachment on the basis of comity to the Swedish courts. The Court of Appeal confirmed this. Whilst reciprocity is a factor to be considered, it is not a condition precedent to the granting of comity.

#### ***Banque de Commerce de l'Azow-Don and Stockholms Enskilda Bank (NJA 1945)***

A Russian bank was declared bankrupt by a court in France. The court based its jurisdiction on the presence of the directors carrying on business activities in France. The French bankruptcy estate, thereafter, sued a Swedish bank in Sweden for the recovery of assets that had been deposited by the Russian bank in Sweden before confiscation. The Swedish bank claimed that the French bankruptcy estate had no locus standi since its authority was territorially limited to France. The Swedish Supreme Court held that the French bankruptcy estate could be party to judicial proceedings in Sweden since it had legal capacity according to French law. However, the French bankruptcy could not affect the administration of the bankrupt's property in Sweden, which did not belong to the French estate and consequently could not be claimed by it. (Compare with the EIR.)

## Chapter 42

# SWITZERLAND

### **1. General law**

The underlying concept of the recognition of foreign insolvency orders and foreign administrators in Switzerland is territorial but one of “judicial assistance”. Swiss insolvency proceedings may be commenced in respect of an insolvent debtor but the liquidation process including the realisation of the debtor’s estate will be administered only by the Swiss authorities and only according to Swiss law. Any surplus will be paid to the foreign administrator.

Swiss law also requires reciprocity. At present, the Swiss courts consider that Belgium, Germany, Finland, France, Luxembourg, Italy and, possibly, Greece and Spain offer reciprocity to Swiss insolvency proceedings. Partial reciprocity (not for all proceedings) is considered given by the United Kingdom, Canada, the United States and Australia.

No reciprocity appears to be recognised in respect of the Netherlands, Portugal, Denmark, Sweden, Norway and Liechtenstein.

### **2. Assisting legislation**

The Swiss Federal Statute on Private International Law (PILS), articles 166-175 enforced on 1 January 1989, governs the recognition in Switzerland of foreign insolvency proceedings, including bankruptcies, foreign compositions and arrangements. Special rules apply for insolvent banks and insurance companies.

A foreign administrator, or a creditor in the foreign bankruptcy, may apply for the recognition of the foreign bankruptcy order and this shall be recognised pursuant to PILS, article 166 provided that:

- the bankruptcy order is enforceable in its country of origin;
- certain minimal procedural requirements have been complied with;
- there is reciprocity (see above for qualifying states);
- it does not conflict with Swiss policy; and
- the foreign court has jurisdiction to declare the debtor bankrupt according to Swiss Law i.e. the bankrupt was resident or had its statutory seat (not COMI) in the foreign country.

An application for recognition should be addressed to the relevant court where the assets sought are located. Note that Switzerland is divided into Cantons and it is important to commence proceedings in the correct Canton.

In addition, an order for protective measures can be sought prior to seeking the recognition of the bankruptcy order. If assets are spread throughout Switzerland, the first court to which an application is made will consider the question of recognition and will have jurisdiction in respect of all assets situated in Switzerland.

The competent court is usually determined by Cantonal law which also governs the relevant procedure. The Swiss Federal Court (Bundesgericht) decided on November 27, 1991 in an unpublished case, that the debtor is not entitled to be heard prior to the court deciding on recognition.

A Swiss judgment confirming the recognition of the foreign bankruptcy order has the same effect as a Swiss bankruptcy order. Effectively, the bankrupt's assets over the legally protected minimum vest in the local insolvency authority and the debtor is obliged to disclose the whereabouts of all assets to the Swiss administrator.

The Swiss administrator has to realise the assets in accordance with Swiss bankruptcy law. The assets realised will be used firstly to satisfy:

- claimants with pledges or mortgages on assets located in Switzerland; and
- claimants who are domiciled in Switzerland and whose claims are privileged under Swiss law.

Any surplus will be handed over to the administrator of the foreign main bankruptcy. This will happen only after the Swiss court has examined the schedule of claims in the foreign proceedings to ascertain whether creditors residing in Switzerland, but which are not privileged and have not been satisfied in the Swiss proceedings, have been given adequate consideration in the foreign main bankruptcy. The creditors concerned are entitled to be heard. If the foreign schedule of claims is not accepted by the court, the surplus is to be distributed

among the claimants who reside in Switzerland but are not privileged. As a practical result, the recognition of a foreign bankruptcy always leads to secondary proceedings. Exceptions may be allowed in the insolvency of a bank.

The PILS, article 175 provides that where there has been an agreement with creditors or some other form of reorganisation ratified by a foreign court, that agreement will be recognised in Switzerland and PILS, articles 166-170 will apply.

Without recognition, the foreign administrator has no power in Switzerland regarding the assets situated in Switzerland.

### **3. Insolvency practice**

The foreign administrator should submit details of the foreign insolvency proceedings and the assets claimed to the Swiss courts as soon as possible. If the details are not placed before the court or if the court does not recognise the foreign proceedings, any excess assets after payment of secured and preferential claims will be used to pay Swiss unsecured creditors, rather than the foreign administrator.

The most effective method for a foreign creditor or foreign administrator to pursue a debt or debts in Switzerland without commencing Swiss bankruptcy proceedings is to attach the debtor's assets. This can only be granted if there is a private law monetary claim against a debtor. In addition, one of the grounds for obtaining an attachment must be proved, for example:

- the debtor has no domicile in Switzerland, provided the claim has a sufficient connection with Switzerland or is based on recognition of debt in writing;
- there is evidence that the debtor is recovering assets from Switzerland; or
- the creditor has an enforceable court judgment against the debtor.

The risk is that the applicant may be liable for damages if the attachment is unjustified. A creditor can attach assets in Switzerland after a debtor is declared bankrupt abroad up to the time when the bankruptcy order is recognised. After the recognition of the foreign bankruptcy order, the attachment gives no privilege to the creditor.

### **4. Examples**

- Federal Tribunal 26 October 2011 (137 III 631): without recognition of the foreign insolvency decree, a foreign administrator cannot file an avoidance action in Switzerland.
- Federal Tribunal 21 September 2011 (137 III 570): if a foreign insolvency decree cannot be recognised in Switzerland due to lack of reciprocity, the former directors cannot dispose of the assets situated in Switzerland nor can a curator be appointed by the court.

- Federal Tribunal 11 July 2011 (137 III 374): the Swiss bankruptcy office may after recognition of the foreign insolvency decree assign a claim to the foreign administrator.
- Federal Tribunal 7 July 2009 (135 III 666): if the foreign insolvency decree has been recognised, the foreign administrator may file an avoidance action if the Swiss bankruptcy office and the Swiss privileged creditors renounce their claims.
- Federal Tribunal 30 September 2008 (135 III 127): Regarding the admittance of claims, only the competent Swiss court has jurisdiction: pending foreign litigation has no influence.
- Federal Tribunal 23 September 2008 (135 III 40): after the recognition of the foreign insolvency decree, only the Swiss bankruptcy office has power over the assets situated in Switzerland: the foreign administrator cannot file a claim in the bankruptcy of a debtor of the bankrupt person.
- Federal Tribunal 6 March 2008 (134 III 366): A foreign insolvency decree cannot be recognised only in a preliminary manner.
- Federal Tribunal 6 October 1999 (126 III 101): A foreign insolvency decree does not need to be final in order to become recognisable in Switzerland, enforceability is sufficient.

## Chapter 43

# THAILAND

### **1. General law**

Thailand has a civil law system with no system of binding precedent. Interpretation of relevant statutory provisions is, at least in theory, made each time a particular set of facts is considered by a Court, tribunal or relevant administrative body. As such, past Court rulings offer little more than guidance as to how a Court, faced with a similar factual scenario, will act in the future.

Whilst Thailand is not a signatory to any international treaties on insolvency or recognition of foreign judgments, it is generally accepted that a foreign judgment may form part of the evidence in a case brought in Thailand on the same subject matter, and be considered “best evidence” provided the judgment:

- is final and conclusive;
- is not contrary to Thai public policy; and
- has been given by a Court of competent jurisdiction.

## 2. Assisting legislation

All bankruptcies (both corporate and individual) and corporate reorganisations in Thailand are governed by the Bankruptcy Act B.E. 2483 (1940) (the “Act”) and fall within the jurisdiction of the Bankruptcy Court. The Act has been amended several times since its inception, most importantly by the Bankruptcy Act (No. 4) B.E. 2541 (1998), which introduced the concept of corporate reorganisation into Thai law and the Bankruptcy Act (No. 5) B.E. 2542 (1999), which ironed out several difficulties that were being encountered by corporations undergoing the reorganisation process.

In this chapter, unless otherwise stated, all references to sections are to sections of the Act.

The Act does not recognise foreign insolvency proceedings. Any bankruptcy or reorganisation order in Thailand under the Act does not purport to affect the debtor’s assets located outside Thailand (Section 177).

The Act does not contemplate the issue of ancillary insolvency proceedings.

Reorganisation proceedings may not be filed in respect of a foreign debtor.

Foreign creditors are permitted to file bankruptcy or business reorganisation petitions against a Thai debtor (Sections 9 and 90/2). Any foreign creditor who is not domiciled in Thailand is only permitted to file for debt repayment in bankruptcy or reorganisation proceedings if the foreign creditor (Section 178):

- can establish that Thai creditors are permitted to claim for payment of their claims in bankruptcy cases in the foreign creditor’s home jurisdiction; and
- declares whether they have received, or are entitled to receive, a dividend from the debtor’s assets located outside Thailand and, if so, the foreign creditor agrees to turnover such dividend to the debtor’s estate in Thailand.

## 3. Insolvency practice

With respect to ancillary insolvency proceedings that are not recognised in Thailand, the options available to a foreign administrator are limited and, subject to the foreign administrator proving his/her capacity, include:

- seeking to enforce foreign judgments in Thailand in the manner described above;
- commencing fresh civil proceedings in Thailand; or
- having a ‘friendly’ creditor file parallel insolvency proceedings.

Section 7 of the Act theoretically permits a bankruptcy order to be made against any debtor domiciled or engaged in business in Thailand. Therefore, to the extent that a foreign debtor engages in business in Thailand, it is possible that local bankruptcy proceedings may be commenced (by a creditor, the debtor not being permitted to file a debtor's bankruptcy petition) in parallel with foreign proceedings.

This is of limited benefit however. Control of a bankruptcy estate (in the case of bankruptcies as opposed to reorganisations) in Thailand passes to the Official Receiver, an officer of a Governmental agency. As the Official Receiver does not have the resources or flexibility to act with the speed or efficiency of professional insolvency administrators, the advantage of commencing parallel insolvency proceedings in Thailand is viewed as limited.

## **4. Examples**

### ***Supreme Court Decision no. 5945/2538 (1995)***

The period for the filing of a proof of claim for a creditor residing outside Thailand can be extended for up to 2 months.

### ***Supreme Court Decision no. 2110/2540***

The extension of the deadline for the filing of a proof of claim by a creditor residing outside Thailand is to be determined by the Official Receiver.

### ***Supreme Court Decision no. 1304/2501***

English creditors are entitled to file a proof of claim against Thai debtors.

### ***Supreme Court Decision no. 699/2503***

Creditors residing in the State of Texas, USA are entitled to file a proof of claim against Thai debtors.

### ***Supreme Court Decision no. 1473/2503***

Hong Kong creditors are entitled to file a proof of claim against Thai debtors.



## Chapter 44

# UNITED ARAB EMIRATES

The United Arab Emirates is a federation broadly similar to the United States, comprising seven Emirates, Abu Dhabi, Ajman, Dubai, Fujairah, Ras Al Khaimah, Sharjah and Umm Al Quwain. Like the United States, each Emirate is able to pass its own laws, but is subject to UAE Federal law. Further, a number of Emirates have created Free Zones which are often in turn able to make their own laws and regulations. The Dubai International Financial Centre, for example, has adopted a sophisticated insolvency régime, and many of the rules mentioned below do not apply there. Accordingly, while Federal law will generally be applicable in relation to insolvency, it is prudent to check the applicable state law in the Emirate and/or Free Zone in question.

What follows is largely a statement of the applicable UAE Federal statute law. However, save in the case of a few Free Zones, insolvency is not yet a developed area of UAE law and practice, while the courts (which do not have a system of binding precedent in any event) will not necessarily interpret the law in a predictable or consistent manner.

### **1. General law**

For a foreign judgment to be enforceable in the UAE, it is necessary to obtain a UAE Court Order for enforcement in the UAE.

Article 235 of the Civil Procedures Code (UAE Federal Law No. 11 of 1992) provides for the enforcements of judgments only if the following conditions are satisfied:-

- (a) The UAE courts have no competence over the matter in which the judgment or order was given and the foreign body issuing the judgment was competent according to international legal jurisdiction provided for in the foreign law.

Article 20 of the Civil Procedures Code provides that the UAE Courts shall have competence to hear any actions filed against UAE parties, including actions instituted against foreigners who have a domicile or a place of residence in the UAE. Accordingly, if a local party is a party to insolvency proceedings, the UAE court may consider itself to have jurisdiction over the matter.

In practice, it can be very difficult to overcome this hurdle. If the matter concerns the UAE and the order is challenged by a local party, the courts may regard any submission to foreign jurisdiction (or assumption by a foreign court of jurisdiction) as an ouster of the UAE court's jurisdiction.

- (b) The rulings issued by a competent court in accordance with the law of the foreign country in which it was issued.
- (c) The parties to the matter of the foreign ruling were served with due notice and were validly represented in the foreign proceedings.
- (d) The judgment is final according to the law of the court issuing the order.
- (e) The judgment is not contradictory to a judgment or order already issued by a UAE court and does not comprise anything which is in violation of the public policy of the UAE.

As a result of this, any attempt to enforce a foreign judgment or order is likely to lead to a virtual retrial of the matter in the UAE courts with the foreign award forming only part of the evidence. Such proceedings can realistically take a number of years to come to conclusion, due to appeal on issues of both fact and law, and since the appeals court may refer cases back to lower courts for reconsideration of key issues.

A further difficulty for a party seeking to enforce a foreign judgment or order in the UAE is that Article 235 of the Civil Procedures Code provides that enforcement of an award is only possible if a UAE award is equally enforceable in the country of origin of the award. The UAE courts have been known to take this point in relation to some overseas jurisdictions.

Dubai is an Islamic state and Article 7 of its Constitution provides that "the Islamic *Shari'a* shall be a main source of legislation in the union". Accordingly, *Shari'a* law forms part of the UAE legal system both expressly (through the incorporation of specific *Shari'a* law provisions into UAE law – mainly in respect of criminal and family law issues) and otherwise in terms of a UAE court having the ability to apply *Shari'a* principles to a particular issue.

## 2. Assisting legislation

There are two types of insolvency procedures under UAE law.

### *(i) Dissolution under the Companies Law*

In the insolvency context, the most important provision of the Companies Law (UAE Federal Law No. 8 of 1984) is Article 281(3), which provides that “a company shall be dissolved for any of the following reasons.... (3) depletion of all or most of the company assets that makes the beneficial investment of the remainder impossible.”

In addition to a court-ordered dissolution under the Companies Law, there are provisions enabling the shareholders to seek the dissolution of the company. While the mechanisms are slightly different depending on whether it is a public joint-stock company, a private joint-stock company or a limited liability company, the trigger level for shareholders to seek dissolution is that the company has lost half its capital.

The liquidation process is governed by Articles 291-312 of the Companies Law. A liquidator must be appointed pursuant to a shareholder’s resolution or, if it is a court-ordered liquidation, by the court (Article 294 of the Companies Law).

The authority of the Board terminates upon liquidation (Article 292 of the Companies Law). The liquidator is obliged to perform all the tasks required by the liquidation, and is authorised to sell the company’s assets (although a liquidator cannot sell the company’s assets “wholesale” without specific shareholder approval (Article 299 of the Companies Law)). The liquidator’s powers include the ability to raise or defend legal actions, the employment of advocates, the carrying out of a stock take of the company’s assets and liabilities, taking into possession the accounts and books of the company, paying debts, selling property of the company and in general taking and performing all steps necessary for the protection and preservation of the company’s assets and rights. The liquidator is liable to both the company and other parties for any “maladministration” of the company’s affairs during the liquidation (Article 311 of the Companies Law).

The liquidator must notify all the company’s creditors of the commencement of the liquidation of the company, requiring them to submit their claims within a period of not less than 45 days from the date of notice. Thereafter, the liquidator settles the company’s debts. If the company’s assets are insufficient to meet the debts, then the latter must be settled proportionally subject to the right of priority of secure creditors. Losses of shareholders in either a joint-stock company or a limited liability company are (generally) limited to the paid up value of their shareholdings.

Articles 302-308 of the Companies Law provide for the payment of costs of the liquidation in priority to other claims, a pro-rata distribution to creditors if there are insufficient assets to pay all claims, and, if there are surplus assets, payment to shareholders in accordance with their share in the profits of the company. At the conclusion of the liquidation, upon approval of the liquidator's final account by the shareholder's general meeting, the liquidation will be complete and the company dissolved.

**(ii) *Bankruptcy under the Commercial Code***

The Commercial Code contains articles applicable to the “bankruptcy” of traders. Under Article 11, both individuals “in trade” and commercial companies are “traders”. For the purposes of the Commercial Code, the majority of insolvencies in the UAE are therefore governed by the Commercial Code.

Part 5 (Articles 645-900) of the Commercial Code is the main legislative provision dealing with bankruptcy, and it deals with both bankruptcy and compensation. Article 645 of the Commercial Code sets out the basis for the issuance of the bankruptcy order by the court. It provides that any trader who is unable to pay his commercial debts on the due dates by reason of his “financial position” may be declared as “bankrupt”. Both the trader (Articles 647 and 649 of the Commercial Code) and the trader's creditors (articles 649 and 650) can seek bankruptcy orders. The courts on their own initiative can also order bankruptcy.

After a bankruptcy application is submitted, the court must take all necessary steps to preserve and protect the debtor's assets.

Upon satisfying the formal procedures, and where a bankruptcy petition is not rejected, the court will fix a date for a hearing and shall order that notice be given to all creditors to notify the court of any debts on or before a specific date. The court must resolve objections and disputes by interested parties (including creditors) during the proceedings and before delivering its judgment on the bankruptcy.

Where, after sufficient deliberation, the court is satisfied that sufficient grounds for bankruptcy exist, it makes an “order of adjudication” adjudicating the bankruptcy of the debtor, unless the debtor is able to propose any composition or scheme which is acceptable to two thirds of creditors. A creditor has the right to appeal against the ruling within 10 days of its publication.

The judge that issues the order also supervises the bankruptcy and passes any additional orders.

At the same time as making the bankruptcy order, the court appoints a bankruptcy trustee (article 668 of the Commercial Code). In general terms, the bankruptcy trustee's role is to:-

- (a) manage and preserve the debtor's property and money;
- (b) keep a record of the daily administration of the bankruptcy; and
- (c) institute, defend and represent the bankrupt in all claims brought for or against him.

Despite the bankruptcy trustee's powers to manage and direct the bankruptcy, it is the bankruptcy judge that is ultimately responsible for the administration of the bankruptcy. The bankruptcy trustee usually submits a periodical report advising the court of the status of the bankruptcy process.

One of the first tasks for the bankruptcy trustee is to publish a public notice inviting all creditors to come forward with proof of their debts. The bankruptcy trustee then conducts an investigation to verify and prove or disprove debts claimed, and will invite further submissions from creditors where required.

The bankruptcy trustee must submit to the court, within 60 days from the date of the adjudication order, a list of secured and unsecured creditors, the value of the debts and the securities maintained and enforceable. The debtor and any of the creditors may within 10 days object to any of the debts so listed. This period is extended to 30 days for creditors residing outside the UAE. After expiry of this time, the judge approves the final list. Creditors who failed to submit proof of their debts within the time limits may not participate in the approved distribution, but they may participate in any future distributions.

The court will ultimately pass an order declaring the termination of the state of bankruptcy after receiving a full report from the bankruptcy trustee concluding that this is an appropriate course of action.

### **3. Insolvency practice**

Article 653(2) of the Commercial Code specifically states that nothing may jeopardise the declaration of bankruptcy of a trader who has a branch, agency, or office in the UAE, even if adjudication of his bankruptcy has not been issued in a foreign country. Any reciprocity is most unlikely.

### **4. Future reforms**

Following the Dubai financial crisis of 2008, it was reported that a new bankruptcy law was under consideration. No details have so far been released, but it is contemplated that a revised bankruptcy law will be promulgated in due course.

## **5. Examples**

The UAE courts have no general system of judicial precedent whereby the decisions of the court in one case have any authority in another case. Accordingly, it would be unwise to rely upon any decision as being indicative of the law.

## Chapter 45

# UNITED STATES OF AMERICA

### 1. General law

Courts in the United States of America (US) are generally inclined to recognise judgments or orders of foreign courts pursuant to the doctrine of comity. There is a general presumption in favour of comity in that the party objecting to the enforcement of a foreign order bears the burden of proving impropriety or unfairness in the foreign action. There are a number of procedures that enable foreign claimants to pursue a US defendant including:

- Both State and Federal Courts recognise foreign judgments under the doctrine of comity. Foreign claimants with judgments in their own courts against US defendants may petition the State Court, or the Federal Court in the State where the defendants reside or carry on business, to recognise the foreign judgment and issue its own order for enforcement;
- Most US states have adopted the Uniform Foreign Money Judgments Recognition Act (UFMJRA), which sets out rules for the recognition and enforcement of foreign money judgments. These are generally enforceable in both state and Federal courts. The US court must be satisfied that the enforcement of the foreign judgment is fundamentally fair. They will not enforce a judgment if it appears that the foreign court did not have jurisdiction in that matter, the judgment was procured by fraud, the defendant did not have sufficient time to defend the proceedings, or enforcement would violate US public policy; or

- In the absence of a foreign judgment, foreign claimants may commence original proceedings against a US defendant in the State or Federal Court where the defendant is domiciled, pursuant to the doctrine of comity. Some states require the foreign claimant to be registered as doing business in the state prior to initiating proceedings in order that the foreign claimant is acknowledging that it is subject to suit in that state. These states maintain that as a matter of policy, a foreign claimant should not have access to their courts unless the claimants themselves can be sued in such courts. The matter will be adjudged on its merits and the final judgment of the court will be enforceable anywhere in the US.

## 2. Assisting legislation

### ***Pre Chapter 15 – Comity and Section 304 of the Bankruptcy Code***

Prior to the enactment of Chapter 15, the Code contained several provisions dealing with assistance to foreign administrators and foreign insolvency proceedings but did not constitute an exclusive remedy for foreign administrators, who were free to, and often did, pursue assistance in the State and non-bankruptcy Federal Courts pursuant to the doctrine of comity. *See, e.g., Hilton v. Guyot*, 159 U.S. 113 (1895) and *In re Granditote Country Club Co., Ltd.*, 252 F.3d 1146 (10th Cir. 2001). Now, although Chapter 15 constitutes an exclusive remedy for foreign representatives, the US Bankruptcy Court may provide assistance to the foreign representative under the Code or other US law as may be consistent with the principles of comity. § 1507.

### ***Chapter 15 – Introduction and purpose***

The US has uniform federal bankruptcy legislation in the form of the US Bankruptcy Code (11 U.S.C. §§ 101-1532, “the Code”) and virtually all bankruptcy cases are heard by the specialised Federal Bankruptcy Courts. By exception, US District Courts sometimes hear bankruptcy cases in circumstances where the US District Court has “withdrawn the reference” of bankruptcy cases to the US Bankruptcy Court. In 2005, the UNCITRAL Model Law on Cross-Border Insolvency was incorporated into the Code as Chapter 15, and the provisions of the Code previously relevant to foreign administrators and foreign insolvency proceedings were either amended (§§ 303, 305 and 306) or repealed (§ 304). Although Chapter 15 replaced § 304 as the Code’s operative provision for cross-border insolvencies, the underlying principles of comity and co-operation with foreign courts remain in effect. *In re Atlas Shipping A/S*, 404 B.R. 726, 738 (Bankr. S.D.N.Y. 2009).

The stated purpose of Chapter 15 is to provide effective mechanisms for dealing with cases of cross-border insolvency with the express objectives of (i) facilitating co-operation between courts and insolvency authorities in the United States and foreign countries, (ii) providing greater legal certainty and efficiency with respect to cross-border insolvency proceedings, and (iii) protecting investments and preserving employment by facilitating the rescue of financially troubled businesses and maximising the value of debtors’ assets. § 1501. A case under Chapter 15 is not a full-scale bankruptcy proceeding like Chapter 11. Instead, it is an “ancillary

proceeding” in aid of the relevant foreign insolvency proceeding generally controlled by the foreign representative. A case is commenced under Chapter 15 by the filing of a petition by a foreign representative in a US Bankruptcy Court for recognition of a foreign proceeding (§§ 1504, 1509, 1515), usually in order to protect the US-based assets of a foreign debtor.

## **Recognition under Chapter 15**

### ***Main v Non-main proceedings***

The effect of a Chapter 15 proceeding is largely driven by whether the foreign proceeding is a “foreign main proceeding” or a “foreign non-main proceeding,” which, in turn, is driven by whether the debtor’s “centre of main interests” (“COMI”) is in the jurisdiction where the foreign proceeding was commenced. § 1502(4), (5). There is a presumption that a debtor’s COMI is its place of incorporation, but the presumption is rebuttable, as discussed below. If the US Bankruptcy Court finds that a foreign debtor’s COMI is in the jurisdiction where its foreign proceeding was commenced, then the foreign proceeding constitutes a “foreign main proceeding” and a number of statutory protections are automatically triggered, including the automatic stay under § 362 of the Code with respect to property in the US.

Conversely, if the US Bankruptcy Court concludes that the foreign proceeding was commenced in a jurisdiction where the debtor has an “establishment” but is not the jurisdiction of the foreign debtor’s COMI, then the proceeding is a “foreign non-main proceeding” for which no automatic relief is granted in the US. Instead, the foreign representative in the foreign non-main proceeding must prove, among other things, that any relief requested is “necessary to effectuate the purposes of [Chapter 15] and to protect the assets of the debtor or the interests of creditors.” § 1521(a). If the foreign proceeding was commenced in a jurisdiction where the debtor does not have at least an “establishment,” a place where the debtor “carries out a nontransitory economic activity,” then recognition is not appropriate under Chapter 15.

COMI is not defined in the Code, but there is a rebuttable presumption that a corporate debtor’s registered office is its COMI. § 1516(c). Courts will consider several factors in determining a debtor’s COMI, including: (i) the location of the debtor’s headquarters; (ii) the location of those who actually manage the debtor; (iii) the location of the debtor’s primary assets; (iv) the location of the majority of the debtor’s creditors or of a majority of the creditors who would be affected by the proceeding; and/or (v) the jurisdiction whose law would apply to most disputes. *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006). Additionally, a debtor’s COMI is located in the jurisdiction in which the debtor “conduct[s] the administration of [its] interests on a regular basis and is therefore ascertainable by third parties.” *In re Bear Stearns*, 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007) (equating COMI to the “principal place of business” under US law).

### **Public policy exception**

Even if a foreign proceeding might otherwise be recognised (or not) as a main or nonmain proceeding, the court has discretion to refuse to take any action governed by Chapter 15 “if the action would be manifestly contrary to the public policy of the United States.” § 1506; see *In re Toft*, 453 B.R. 186 (Bankr. S.D.N.Y. 2011) and *In re Ashapura Minechem Ltd.*, No. 11-14668 JMP, 2011 Bankr. WL 5855475 (S.D.N.Y. Nov. 22, 2011). However, the public policy exception has been narrowly interpreted on a consistent basis and, “by virtue of the qualifier ‘manifestly,’ is limited only to the most fundamental policies of the United States.” *In re ABC Learning Centres Ltd.*, 445 B.R. 318, 335 (Bankr. D. Del. 2010); see also *In re Iida*, 377 B.R. 243, 259 (B.A.P. 9th Cir. 2007). A recent case established three principles to guide the application of the public policy exception under § 1506:

- the mere existence of conflict between foreign and US law, absent other considerations, is insufficient to support a public policy exception;
- deference should not be afforded to a foreign proceeding if fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections; and
- an action should not be taken in a Chapter 15 proceeding where it would frustrate a US court’s ability to administer the proceeding or would severely impinge a US constitutional or statutory right.

*In re Qimonda AG Bankr. Litig.*, 433 B.R. 547, 570 (E.D. Va. 2010).

### **Relief available under Chapter 15**

The US Bankruptcy Courts have authority and discretion to grant broad relief under Chapter 15, including provisional relief upon the filing of a petition for recognition under § 1519 and relief that may be granted upon recognition under § 1521. In addition, if a foreign proceeding is recognised as a foreign main proceeding, certain relief is automatically granted, including an automatic stay and post-petition sales and use restrictions with respect to the debtor’s US assets.

### **Provisional relief prior to recognition**

US Bankruptcy Courts have discretion to grant provisional relief upon the filing of a Chapter 15 petition but prior to recognition “where urgently needed to protect the assets of the debtor or interests of the creditors.” § 1519(a). Provisional relief is nearly co-existent with the relief available after recognition under section 1521. Most importantly, the foreign representative can seek injunctive relief staying execution against the debtor’s assets, or suspending the right to dispose of the debtor’s assets, prior to the court’s ruling on the petition for recognition. § 1519(a). Such provisional relief may also include entrusting the debtor’s US assets to the foreign representative or another person authorised by the court in order to preserve the value of assets that are “perishable, susceptible to devaluation or otherwise in jeopardy.” § 1519(a)(2); see *Atlas Shipping*, 404 B.R. at 730-31 (granting provisional relief requiring garnisheed funds to be turned over to the foreign representative’s U.S. counsel prior to recognition and pending

a determination of the parties' respective rights to those funds); *In re Grand Prix Assocs. Inc.*, No. 09-16545 (DHS), 2009 WL 1850966 (D.N.J. June 26, 2009) (imposing a stay with respect to the foreign debtors' assets when it appeared lenders would foreclose on collateral).

The enumerated provisional relief under § 1519 is not exhaustive, and the US Bankruptcy Courts retain significant discretion to grant appropriate relief to protect the debtor's US assets. See *In re Innua Can. Ltd.*, No. 09-16362 (DHS), 2009 WL 1025088 (Bankr. D.N.J. Mar. 25, 2009); *In re Vitro, S.A.B. de C.V.*, 455 B.R. 571, 579 (Bankr. N.D. Tex. 2011). In deciding whether provisional relief is warranted, courts employ the standards, procedures and limitations applicable to an injunction, requiring the foreign representative to demonstrate that (1) the applicant has a likelihood of success on the merits; (2) the applicant will suffer irreparable harm if the injunction is denied; (3) granting preliminary relief will not result in even greater harm to the respondent party; and (4) the public interest favours such relief. § 1519(e); *Innua Canada*, 2009 WL 1025088; but see *In re Pro-Fit Holdings, Ltd.*, 391 B.R. 850, 867 (Bankr. C.D. Cal. 2008) (holding that §§ 105 and 1519 provide sufficient authority to apply a stay under § 362 as provisional relief without satisfying the criteria for injunctive relief).

**Post-recognition relief: mandatory and discretionary**

Chapter 15 provides for both mandatory and discretionary relief upon the recognition of a foreign proceeding. If a foreign proceeding is recognised as a foreign main proceeding, Chapter 15 mandatorily imposes:

- an automatic stay on any action with respect to the debtor's assets located in the United States pursuant to § 362;
- restrictions on the transfer of the debtor's US property, including a requirement for court approval of all non-ordinary course transactions, such as the sale or lease of US assets; and
- the right of a foreign representative to avoid certain post-recognition transfers and security interests in the debtor's property created post-petition within the US. § 1520.

Other, discretionary relief is available to the foreign representative upon recognition, regardless of whether a foreign proceeding is main or nonmain, so long as such relief is "necessary to effectuate the purposes of [Chapter 15] and to protect the assets of the debtor or the interests of creditors." § 1521(a). Such relief is "exceedingly broad" and includes "any appropriate relief" that is aligned with the purposes of Chapter 15 and would protect the debtor's assets. *Atlas Shipping*, 404 B.R. at 739. As discussed above, the scope of post-recognition relief differs little from relief available provisionally, and includes:

- staying the commencement or continuation of an individual action or proceeding concerning the debtor's assets, rights, obligations or liabilities;
- staying execution against the debtor's assets;

- suspending the right to transfer, encumber or otherwise dispose of any assets of the debtor;
- providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
- entrusting the administration of the debtor's US assets to the foreign representative or another person authorised by the court;
- extending any provisional relief granted under section 1519(a); and
- granting any additional relief.

§ 1521. An important distinction between automatic and discretionary stay relief is that discretionary relief remains subject to periodic review so that a change in circumstances may warrant the lifting of a discretionary stay.

Although the court has broad discretion to provide relief under § 1519 and § 1521, such discretion is not unfettered. The court may only grant discretionary relief if the interests of parties, including the debtor and its creditors, are sufficiently protected, and the court may subject any discretionary relief to conditions it considers appropriate. § 1522(a) and (b). Moreover, The court may subsequently modify or terminate such relief by motion of an interested party or *sua sponte*. § 1522(c).

#### ***Additional assistance – § 1507***

Upon recognition, the US Bankruptcy Court may provide additional assistance to the foreign representative under the Code or under other US laws. Such additional assistance must be consistent with the principles of comity and reasonably assure:

- just treatment of all holders of claims against or interests in the debtor's property;
- protection of claim holders in the US against prejudice and inconvenience processing claims in the foreign proceeding;
- prevention of preferential or fraudulent dispositions of the debtor's property;
- distribution of proceeds of the debtor's property substantially in accordance with the order prescribed by the Code; and
- if the debtor is an individual, the provision of an opportunity for a fresh start.

#### ***Intervention by the foreign representative in US non-bankruptcy courts***

Finally, upon recognition of a foreign proceeding, whether main or nonmain, the foreign representative has authority to intervene not only in bankruptcy proceedings but to "intervene in any proceedings in a State or Federal court in the United States in which the debtor is a party." § 1524.

***Commencing a subsequent case under Chapter 7 or 11***

After recognition of a foreign main proceeding, as discussed further below, a liquidation (under Chapter 7) or a reorganisation (under Chapter 11) may be commenced by the foreign representative if the debtor has assets in the United States. § 1528. The foreign representative can file an involuntary bankruptcy petition upon recognition, whether the foreign proceeding is main or nonmain, and can file a voluntary bankruptcy petition if the foreign proceeding is a main proceeding. § 1511. Often, the foreign representative is content with the relief generally available under Chapter 15 and does not take the additional step of commencing a full-scale Chapter 11 case. A proceeding under Chapter 7 or 11 commenced by the foreign representative only affects assets of the debtor in the United States but may include all assets under the US Bankruptcy Court's jurisdiction that constitute a debtor's estate under § 541 "to the extent necessary to implement co-operation and co-ordination" in accordance with §§ 1525, 1526 and 1527, including dismissal of the case under § 305 of the Code if necessary §§ 1528 and 1529(4). However, jurisdiction over non-US assets is only permitted to the extent that they are not subject to the jurisdiction and control of a foreign proceeding recognised under Chapter 15 § 1528.

Although a foreign representative is not permitted under Chapter 15 to bring avoidance actions otherwise available in a case under Chapter 11, the foreign representative has standing under § 1523(a) to assert avoidance actions in a concurrent US bankruptcy proceeding. Any avoidance actions asserted in concurrent proceedings under Chapter 7 or 11 with respect to a foreign nonmain proceeding must relate to assets that, under US law, should be administered in the foreign nonmain proceeding. § 1523(b). Such actions include the avoidance of certain liens (§§ 544, 545 and 724(a)), preferential transfers (§ 547), fraudulent transfers (§ 548) and certain setoff transactions (§ 553).

***Deference to pending US bankruptcy cases under Chapter 7 or 11***

Chapter 15 generally requires the US Bankruptcy Court to give deference to a pending US bankruptcy case and to fashion relief that is consistent with such concurrent proceeding § 1529. If a foreign proceeding is pending concurrently with the US bankruptcy case, the court must seek co-operation and co-ordination between the US and foreign proceedings. While the court will generally defer to the orders for relief granted in a concurrent US bankruptcy proceeding, the effect on relief granted under Chapter 15 depends on whether a US bankruptcy case is pending when a Chapter 15 petition is filed.

If a US bankruptcy petition predates a Chapter 15 petition for the same debtor, then no automatic stay will be granted under Chapter 15, even if the foreign proceeding is recognised as a foreign main proceeding. Moreover, any other relief granted under Chapter 15, whether pre-recognition (provisional) or post-recognition, must be consistent with the relief granted in the pre-existing US bankruptcy case. § 1529(1).

However, if a US bankruptcy petition is filed *after* recognition or filing for recognition of a foreign proceeding under Chapter 15, then any relief in effect under the Chapter 15 proceeding will be modified or terminated after review by the court to make it consistent with the US bankruptcy case. § 1529(2).

### ***Deference to foreign main proceedings***

Where the debtor has more than one foreign proceeding pending, the US Bankruptcy Court must seek to fulfil its mandate of co-operation and co-ordination. Where a foreign main proceeding and a foreign nonmain proceeding are pending concurrently, the US Bankruptcy Court will defer to the foreign main proceeding in granting relief with respect to the nonmain proceeding, much in the same way that it would defer to a US bankruptcy case as described above. Thus:

- relief granted to a representative of a foreign nonmain proceeding after recognition of foreign main proceeding must be consistent with the foreign main proceeding (§ 1530(1));
- if a foreign main proceeding is recognised *after* recognition or filing for recognition of a foreign nonmain proceeding under Chapter 15, then any relief granted with respect to the foreign non-main proceeding will be modified or terminated after review by the court to make it consistent with the foreign main proceeding (§ 1530(2)); and
- where more than one foreign nonmain proceedings are recognised, relief must be granted, modified or terminated “for the purpose of facilitating co-ordination of the proceedings.” (§ 1530(3)).

## **3. Insolvency Practice**

### ***Filing a petition under Chapter 15***

A case is commenced under Chapter 15 by a foreign representative filing a petition in a US Bankruptcy Court for recognition of a foreign proceeding. §§ 1504, 1509, 1515. The petition must be accompanied by additional documentation certifying the commencement of such foreign proceeding and the appointment of the foreign representative in accordance with § 1515. A “foreign representative” is a person or body authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor’s assets or affairs or to act as a representative of such foreign proceeding. § 101(24). A “foreign proceeding” is “a collective judicial or administrative proceeding in a foreign country... under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation.” § 101(23). A case under Chapter 15 is not a full-scale bankruptcy proceeding like Chapter 11: instead, it is an “ancillary proceeding” in aid of the relevant foreign insolvency proceeding controlled by the foreign representative.

### **Termination of Chapter 15 proceedings**

A case under Chapter 15 may be closed when it is fully administered, or it may be closed sooner by the court terminating recognition of the foreign proceeding or by dismissal of the proceedings, whether by motion of the foreign representative or by the court on its own motion.

If the foreign representative's purpose for appearing in the US is completed (*i.e.*, because the case is fully administered), the foreign representative terminates a Chapter 15 proceeding by filing a final report with the United States trustee describing the nature and results of the representative's activities. §§ 350 and 1517(d); Fed. R. Bankr. P. 5009(c). The foreign representative must also give notice to all relevant parties, including the debtor, parties engaged in litigation with the debtor and other entities as the court directs. Fed. R. Bankr. P. 5009(c). Thirty days after filing a certificate with the court that such notice has been given, absent an objection from the United States trustee or a party in interest, the case is presumed fully administered.

A foreign representative may also request that the court (or the court may, *sua sponte*) dismiss or suspend a case under Chapter 15 at any time after recognition if the purposes of Chapter 15 would be best served thereby. §§ 305 and 1529(4). Such dismissal may only be granted after notice and a hearing and is not reviewable by appeal. § 305(a) and (c).

### **Termination of recognition**

The court may modify or terminate recognition where there is a showing that the grounds for granting recognition (1) were fully or partially lacking or (2) have ceased to exist. § 1517(d). However, courts are reluctant to exercise discretion to terminate recognition, which is an extraordinary equitable remedy, unless it is clear from the record that one of the two prongs under § 1517(d) has been satisfied. See *In re Loy*, 448 B.R. 420, 438-43 (Bankr. E.D. Va. 2011).

## **4. Examples**

- *Hilton v. Guyot*, 159 U.S. 113 (1895) (seminal comity case involving the recognition of a French judgment against a US citizen conducting business in France).
- *In re SPhinX, Ltd.*, 351 B.R. 103 (2006) (establishing criteria for determining a debtor's COMI).
- *In re Bear Stearns High Grade Structured Credit Strategies Master Fund Ltd.*, 374 B.R. 122, 126 (Bankr. S.D.N.Y. 2007), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2008) (establishing criteria for recognition under Chapter 15).
- *In re Pro-Fit Holdings, Ltd.*, 391 B.R. 850 (2008) (addressing the application of the interim automatic stay between the filing of a petition and its recognition under Chapter 15).

- *In re Atlas Shipping A/S*, 404 B.R. 726 (2009) (discussing the scope of relief available under Chapter 15).
- *In re Betcorp Ltd.*, 400 B.R. 266 (2009) (providing comparative analysis of the recognition of foreign proceedings under Chapter 15 and guidance and analysis concerning the meaning of “COMI” and “Establishment”).
- *In re British Am. Ins. Co. Ltd.*, 425 B.R. 884 (2010) (analysing the meaning and scope of a foreign main proceeding in connection with the determination of a debtor’s COMI).
- *In re Condor Ins. Ltd.*, 601 F.3d 319 (2010) (holding that a bankruptcy court has authority to provide relief pursuant to an avoidance action under foreign law in a proceeding under Chapter 15).
- *In re JSC BTA Bank*, 434 B.R. 334 (2010) (addressing the scope of the automatic stay arising under Chapter 15 upon recognition of a foreign main proceeding).
- *In re Loy*, 432 (B.R. 551 (2010) (addressing the concept of an individual debtor’s COMI).
- *In re Qimonda AG Bankr. Litig.*, 433 B.R. 547 (2010) (discussing the propriety of granting comity in cases under Chapter 15 and the limitation of the public policy exception).
- *In re Ran*, 607 F.3d 1017 (2010) (discussing the application of the COMI concept in detail, including the timing of determination of the COMI, the presumption of third parties and the determination of a foreign main proceeding versus a foreign nonmain proceeding).
- *In re Toft*, 453 B.R. 186 (2011) (applying the public policy exception under § 1506 after extensive discussion that it must be narrowly construed).

## Chapter 46

# VIETNAM

### 1. General law

Vietnam is not a signatory to any treaty on international insolvency. Under current laws, a foreign judgment, including a judgment on insolvency, may be recognised for enforcement in Vietnam only in the following circumstances:

- under a treaty: The foreign judgment is rendered in a country with which Vietnam has a treaty (whether unilateral or bilateral). To date, there are 16 countries with which Vietnam has signed an agreement for judicial assistance. Foreign judgments (with some exceptions as specifically provided for by law) made by the courts of these countries are recognised for enforcement in Vietnam if the relevant treaty specifically so provides (note that there are some treaties which only provide for judicial assistance in criminal matters); and
- under the principal of reciprocity: If there is no bilateral agreement between two countries, a foreign judgment may be recognised for enforcement in Vietnam on a reciprocal basis (i.e. the Vietnamese court may recognise a foreign judgment if a Vietnamese judgment has been recognised and enforced by that country).

Vietnamese law has no system of binding precedent. Interpretation of relevant statutory provisions is, at least in theory, made each time a particular set of facts is considered by a Court, tribunal or relevant administrative body. As such, past Court rulings – normally those of the Supreme People’s Court – offer little more than loose guidance as to how a Court, faced with a similar scenario, may act in the future.

The 2004 Civil Procedural Code (the “Civil Procedural Code”) is most relevant to the question of cross-border insolvency matters in Vietnam, as it provides for procedures for enforcement of foreign court judgments and foreign arbitral awards. The enforcement process of a foreign court judgment is time-consuming. The process is as follows:

- the petition requesting permission to enforce a decision of the foreign court must be submitted together with supporting documentation to the Ministry of Justice in Vietnam;
- once the Ministry of Justice is satisfied that all papers are in order, it will lodge the petition with the relevant court;
- the court will consider the petition and, within 4 months from the date of registration, make a decision to open a hearing or suspend the review of the case. A court will suspend review if: the judgment has been voluntarily enforced by the losing party; the losing party is an entity that has been declared bankrupt; the hearing does not fall within the court’s jurisdiction; or the address of the losing party cannot be identified;
- assuming the court accepts the case, a hearing will take place within one month from the date of the decision to open a hearing for recognition of the judgment;
- if the parties are located in a foreign country, the judgment shall be sent to the parties through the Ministry of Justice.

In principle, when the court considers a petition for enforcement of a foreign judgment, it expressly does not have the authority to review the dispute which has been resolved by the foreign court. It may only check and verify the judgment and the attached documents.

Nevertheless, the legislative principles guiding the court in determining whether or not to recognise a foreign judgment are broadly drafted. In practice, Vietnamese courts exercise a very wide discretion.

Once recognised for enforcement in Vietnam, the foreign judgment will have the same validity as a local judgment, and will be enforced in the same way. The judgment of the Vietnamese court may be appealed to the appeal court of the People’s Supreme Court.

To date, there has been no official/public record of the number of foreign judgments which have been recognised as enforceable judgments in Vietnam.

If an arbitration award is obtained offshore, the foreign creditor must apply to the Vietnamese court to recognise such an award for enforcement. Vietnam is a signatory to the 1958 New York Convention for the Recognition of Foreign Arbitration Awards. Under the 2011 Law on Commercial Arbitration, however, Vietnamese courts will not recognise an award if it is contrary to the basic principles of Vietnamese law. This has been construed to mean that if the foreign arbitration

award relies on foreign law to resolve an issue which Vietnamese law requires must be governed by Vietnamese law, then the award would not be recognised on the grounds that it is contrary to the basic principles of Vietnamese law.

As there is no guidance as to what constitutes “basic principles of the laws of Vietnam”, this can be broadly interpreted by the courts. To that extent, whether or not a remedy agreed by the parties would be contrary to a basic principle of Vietnamese law would be subject to the sole discretion of a Vietnamese court.

There are also various other circumstances where a foreign arbitral award is not recognised for enforcement in Vietnam, including:

- the foreign arbitral award does not fall within the terms of submission to arbitration or deals with the matters beyond the scope of submission to arbitration;
- the composition of the foreign arbitral tribunal or the arbitral procedures were not in accordance with the arbitral agreement or with the laws of the country where the arbitral award is made; or
- the arbitral award has not come into force.

To date, there has been no official/public record of the number of foreign arbitral awards which have been recognised for enforcement in Vietnam.

## **2. Assisting legislation**

Vietnam’s Law on Bankruptcy of Enterprises (the “Bankruptcy Law”) was enacted in 2004 and is the main legislation applicable to bankruptcies and reorganizations.

Although the Bankruptcy Law does not specifically regulate issues regarding cross-border insolvency, it expressly provides that it applies to the bankruptcy of all enterprises incorporated and operating in Vietnam, which includes foreign invested enterprises incorporated pursuant to the laws of Vietnam, unless otherwise provided for by an international treaty to which Vietnam is a party.

The Bankruptcy Law does not provide for any discrimination between foreign and domestic creditors and it is likely that foreign and domestic creditors are to be treated equally in bankruptcy proceedings.

Except for the provisions governing bankruptcy of credit institutions and businesses operating in the fields of national security, defense, public essential services, insurance and securities, there are no further guidelines on the implementation of the Bankruptcy Law. This is unusual, as normally in Vietnam implementation of a law is guided by a number of subordinate legal documents.

### **3. Insolvency practice**

As a matter of practice, some Vietnamese courts take the view that, as the subsidiary in Vietnam has a legal status independent from its parent company, the bankruptcy of the parent company does not affect the subsidiary in Vietnam.

Despite the fact the bankruptcy regulations have existed for nearly 20 years (since the first Law on Bankruptcy in 1993), the number of bankrupt businesses in Vietnam remains insignificant and does not reflect actual practice. According to newspaper reports, 30% of businesses registered in 2011 have disappeared, most commonly through dissolution or liquidation. However, very few have been declared bankrupt. Many reasons have been pointed out, including the time-consuming and complicated bankruptcy procedures, lack of specific guidelines, lack of public sympathy for bankrupt businesses and their directorship, and the reluctance of Vietnamese people to approach a court to initiate bankruptcy proceedings. As a matter of practice, Vietnamese businesses prefer quietly shutting down their companies to making a petition for bankruptcy. Most businesses in Vietnam share the view that the less involvement of the court the better. Consequently, it is very common to read in newspapers about liquidation or dissolution of a business rather than bankruptcy.

In recent years, offshore insolvency of companies with interests in Vietnamese entities (and established under the Investment Law and the Enterprise Law of Vietnam) have been handled by a change in ownership of the offshore investor or else an agreement by the offshore liquidator to sell the equity interest in the Vietnamese licensed venture. The uncertainties of the court process in Vietnam and the underdeveloped framework on insolvency law matters and court enforcement have meant that offshore creditors, liquidators and other interested parties have generally tried to resolve cross-border issues without recourse to the Vietnamese courts.

### **4. Examples**

There have not yet been any high profile cases in respect of which enforcement of foreign court orders or recognition of foreign insolvency practitioner appointments have been made in Vietnam. This may be due in part to the limited forms of investment vehicles which have been permitted in the past, a desire to avoid exposure to Vietnamese courts, as well as the lack of an official record or published statistics on enforcement of foreign court judgments/arbitral awards in Vietnam, and particularly of data on recognition of foreign insolvency practitioner appointments.



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