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Cross-border insolvency: recognition and enforcement between the UK and EU

Raj Arumugam, 5 Stone Buildings
Alice Lithgow, Fletcher Day
Adam Cole, Walkers

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Introduction

- 11-month Brexit transition period/implementation period ended on 31 December 2020 at 11pm
- Lugano Convention
- Brussels Regulation (Reg 44/2001) (pre 10 Jan 2015)
- Brussels Recast Regulation (Reg 1215/2012) (from 10 Jan 2015) (the "Judgments Regulation")
- EU Insolvency Regulation (2015/848)

1. EU Insolvency Regulation (2015/848)

- Continues to apply for insolvencies opened upto 31 Dec 2020
- Jurisdiction – main/secondary proceedings
- Applicable law
- Recognition and enforcement
- Amended from 11pm on 31 Dec 2020 by the Insolvency (Amendment) (EU Exit) Regulations 2019 (SI 2019/146)
- Implications for inbound and outbound recognition

2. Brussels Recast Regulation (1215/2012) + Lugano Convention

- Schemes of Arrangement – Part 26, Companies Act 2006
- Restructuring Plans – Part 26A, Companies Act 2006

3. CPR Part 6 – service out of the jurisdiction

- CPR r.6.33 – service outside the jurisdiction without permission:
  - Brussels Recast Regulation (Judgments Regulation) (1215/2012)
  - Brussels Convention or Lugano Convention
  - 2005 Hague Convention on choice of court (into force 1 Oct 2015?)
- New CPR r.6.33(2B) – Civil Procedure (Amendment) Rules 2021 (SI 2021 no. 117) – 6 April 2021

3. CPR Part 6 – service out of the jurisdiction

- CPR r.6.36 – service outside the jurisdiction with permission:
  - Good arguable case claim falls within one of the common law jurisdictional "gateways" – see PD6B, para 3.1
  - Serious issue to be tried on the merits
  - England is clearly or distinctly the appropriate forum + court should exercise its discretion to permit service out

Workarounds

1. Winding up a foreign company - Section 221, Insolvency Act 1986
   - Sufficient connection with Eng & Wales
   - Reasonable possibility of benefit to those applying for winding up
   - Court can exercise jurisdiction over one of more persons interested in distribution of assets of the Company
2. Appoint administrator over foreign company – Sched B1, Insolvency Act 1986, para 2 + 111
3. Common law jurisdiction – *Singularis Holdings Ltd v. PwC* [2015] AC 1675

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Cross-Border Insolvency Regulations 2006 (SI 2006/1030) (CBIR)

- UNCITRAL Model Law on Cross Border Insolvency – May 1997
- Adopted in 49 states worldwide, including 4 EU member states
- Adopted into UK law by CBIR 2006

Cross-Border Insolvency Regulations 2006 (CBIR)

- 4 elements
  - Access
  - Recognition
  - Relief
  - Co-operation and co-ordination
- Does not depend upon reciprocity
- No choice of law provisions

Cross-Border Insolvency Regulations 2006 (CBIR)

- Consequences of recognition (if "foreign main proceedings")
  - Stay over commencement of proceedings v. debtor
  - Stay of execution over debtor's assets
  - Suspension of debtor's rights to dispose assets
  - Rebuttable presumption of debtor's insolvency
  - Foreign creditors have same rights of access to English courts as local creditors
- Court has discretion to grant further relief including
  - Examine witnesses before court, receive information about debtor's affairs
  - Right to apply to challenge fraudulent or preferential transactions

Cross-Border Insolvency Regulations 2006 (CBIR)

- *Antony Gibbs & Sons v. Société Industriele et Commerciale des Metaux* (1890) 25 QBD 399
- *Re OJSC International Bank of Azerbaijan* [2018] EWHC 59 (Ch) per Hildyard J (upheld on appeal [2018] EWCA Civ 2802):

> "there is … no real doubt that the fact of foreign insolvency, even one recognised formally in this jurisdiction, is not of itself a gateway for the application of foreign insolvency laws or rules or for giving them 'overriding effect' over ordinary principles of English contract law."

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Section 426 & Outbound recognition

Alice Lithgow
alice@fletcherday.co.uk

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www.5sblaw.com

Section 426 Insolvency Act 1986

- Provides for officeholders in certain countries to make a request to UK Courts for assistance
  - S426(4) states, "The Courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the Courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory".
  - This includes the Channel Islands and Isle of Man
  - Designated countries comprise mostly Commonwealth countries outside of the EU.
  - The Republic of Ireland is, however a designated country and so is Gibraltar (nb Gibraltar is a British Overseas Territory and no longer part of the EU)

What assistance is available?

Assistance under s426 is wide-ranging and can include:-

- An order for an injunction
- A declaration recognising the rights of a foreign insolvency representative
- The making of an Administration Order.

NB s426 Insolvency Act 1986 will not be used to enforce foreign judgments.

Which law will the Court apply?

- S426(5) Insolvency Act 1986 permits the English Court to apply the insolvency law of England or the law of the requesting Court.
- So, an officeholder in Ireland (for example) could apply to the English Court for assistance applying substantive Irish law or English law.
- This has the practical effect of widening the powers of officeholders so that they are not restricted to English law as would be the case with making an application for a Recognition Order.

How to make an application

It is a two stage process:-

- An application must be made to the Court in the requesting jurisdiction for a letter of request for assistance from the English Court and for an order giving an effect to the letter of request.
- An application must then be made in the English Court requesting assistance.

In practice, the application will be carefully scrutinised by the requesting Court and so the English Court will usually grant the assistance requested unless there are powerful reasons not to do so.

Outbound provisions

- There is currently no active provision in Irish law for the equivalent of a s426 Request.
- Guernsey does have a similar incoming provision.

As an aside, it remains to be seen whether s426 will be expanded to include other designated countries (eg all EU Member States) and whether EU countries will introduce reciprocal measures.

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Recognition in EU States of English Insolvency Proceedings

- From 11pm on 31st December 2020, English officeholders can no longer rely on Recast Insolvency Regulation (Regulation EU 2015/848) for automatic Recognition Orders (unless proceedings issued before this cut-off time).

- From this deadline, the question of recognition will depend on the private law of the country where recognition is sought and it will be necessary to seek advice from local lawyers. NB the Foreign, Commonwealth and Development Office provides a list of English speaking lawyers in various countries.

- Insolvency Service has produced a booklet which is online and entitled, "Cross-border Insolvencies: Recognition and Enforcement in EU Member States from 1st January 2021"

Overview of position in EU Member States - Part 1

- Four countries in the EU have implemented the UNICTRAL Model Law which means that it is possible to apply for a Recognition Order in the following countries:-
  - Greece
  - Poland
  - Romania
  - Slovenia
- As with incoming applications for Recognition Orders, the relevant Court will assess the insolvent's "Centre of Main Interest" and "Establishment" to assess whether an Order can be granted.

Overview of position in EU Member States - Part 2

Broadly speaking, other countries fall into four categories:-

- Concept of “automatic recognition” similar to that in the EU Insolvency Regulation (EU 2015/848) – office holders can proceed without making further applications to the Court
- Jurisdictions where it is necessary to make a similar application to the Court as that for a Recognition Order.
- Jurisdictions where there is a hybrid of “automatic recognition” and the need to make an application
- Countries where foreign insolvency proceedings are not recognised and it may be necessary to commence fresh local proceedings

France

- UK officeholders have some degree of recognition in France and an office holder can, for example represent a debtor in Court or realise funds from a bank account without obtaining a Court order.
- An officeholder can apply for an "exequatur" which is a formal order recognising their appointment (this term is also used in other EU countries). Until this is obtained, the debtor will retain all its powers to deal with the company's assets and creditors will be able to bring legal proceedings in France.
- An application for an "exequatur" is made by an office holder filing a writ of summons against the French Public Prosecutor and this will need to be filed with an official translation of the originating order for the insolvency proceedings. The process can take approximately 6 weeks.
- Once the "exequatur" is obtained, then it needs to be published in a French official legal announcement.
- Normally, French Courts will apply foreign law rather than opening local insolvency proceedings.

Germany

- UK insolvency proceedings are automatically recognised in Germany under the German Insolvency Code.
- S343 of the German Insolvency Code provides for the automatic recognition of foreign insolvency proceedings as long as:-
  - the Court of the originating country have jurisdiction in accordance with German law; and
  - Recognition does not violate German public policy.
- In practical terms, a UK officeholder will usually apply for official recognition in spite of the above because it formalises the recognition and enables third parties to grant access to assets.

Hungary

- Necessity for there to be reciprocity of recognition with the state from where proceedings originated – this is currently untested with the UK and no formal treaty.
- It is thought that Hungarian law would not recognise UK proceedings and that parallel proceedings would need to be commenced.

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Enforcement of UK judgments in EU Member States – Part 1

As at 11pm on 31st December 2020, the Recast Brussels Regulation, the 2001 Brussels Regulation and the 2007 Lugano Convention have ceased to apply with two exceptions:

- Proceedings instituted before 11pm on 31st December 2020; and
- Where the Hague Convention on Choice of Court Agreement applies – the UK is now a contracting State and this applies to a Court designated in an exclusive choice of Court agreement.

Enforcement of UK judgments in EU Member States – Part 2

The position is otherwise as follows:-

- The position has been finalised between England and Norway by a Treaty signed by the two countries on 13th October 2020.
- There are other bilateral treaties between the UK and Austria, Belgium, France, Germany, Italy, the Netherlands, Cyprus and Malta but these were superceded by the European regime. It is unclear whether these will be revived and they are also limited in scope:-
  - only apply to money judgments; and
  - only apply where the Court has jurisdiction on a limited basis (broadly speaking on territorial or consensual grounds; and
  - there is a necessity to obtain a declaration of enforceability which adds to the expense.
- Enforcement under local law – if the above don't apply, then need to obtain local advice eg in France it is necessary to file a claim for an exequatur.

NB The UK has applied to accede to the Lugano Convention. The EU will need to agree to this and it remains to be seen if the application is granted.

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A Channel Islands Perspective

Adam Cole

adam.cole@walkersglobal.com

WALKERS

19 March 2021

www.5sblaw.com

A Channel Islands perspective

- **What affect do the changes cause for insolvency recognition?**
  - No change to the pre-existing position
  - Channel Islands not part of EU
  - Section 426 IA 1986 extended to Guernsey and Jersey
  - Common law route for non-UK, CI or IoM

A Channel Islands perspective

- **Assistance for UK officeholders from the Guernsey courts**
  - Requests for assistance invariably granted unless offend public policy
  - Court has flexibility to apply English or Guernsey insolvency law (*cf* common law recognition)
  - Section 426 permits for greater powers than may be available under local law
  - Creates for potential for uncertainty…to be resolved by impending changes to Guernsey's insolvency regime

A Channel Islands perspective

- **Current position for Guernsey officeholders seeking assistance from UK courts:**
  - Section 426 works both ways
  - Mirror process
  - May enable Guernsey officeholders to access greater powers

A Channel Islands perspective

- **Beyond Brexit…**
  - CIGA, 2020 and Part 26A restructuring plans
  - Outside scope of section 426
  - "sufficient connection" test for Guernsey or Jersey company
  - Nature of compromised rights relevant to inbound recognition:
    - E&W law or foreign law rights?
    - Have all creditors participated?

Restructurings

- **Beyond Brexit…**
  - CIGA, 2020 and Part 26A restructuring plans
  - Outside scope of section 426
  - "sufficient connection" test for Guernsey or Jersey company
  - Nature of compromised rights relevant to inbound recognition:
    - E&W law or foreign law rights?
    - Have all creditors participated?

Restructuring

- Brussels Recast Regulation (1215/2012) + Lugano Convention
- Schemes of Arrangement – Part 26, Companies Act 2006
- Restructuring Plans – Part 26A, Companies Act 2006
- *Re gategroup Guarantee Ltd* [2021] EWHC 304 (Ch) – Zacaroli J, 17 February 2021

What next?

- Model Law (inbound) and local jurisdictions (outbound) …?
- More EU states adopt the Model Law …?
- UK joins Lugano Convention …?

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