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## *The Internationalization of Insolvency Law: An Anglo-French Comparison*

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# **The Internationalisation of Insolvency Law: An Anglo-French Comparison**

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## Introduction<sup>1</sup>

The economic and social importance of insolvency is an unavoidable fact. The major economies of the world have all regimes to deal with the economic necessities posed by insolvencies on a domestic, and increasingly often an international, scale. Many maturing economies are taking on board the need to craft new procedures to deal with novel problems. All these regimes are in constant re-examination as the practice reveals deficiencies or success stories. Many of these examinations are internationalist and comparative in scope and many legislative authorities will research and draw inspiration from disparate legal systems. Insolvency is a dynamic discipline and predictions tending to forecast the development of insolvency towards a more international outlook have increasingly been correct in their anticipation of the future development of this field of study. The two themes to emerge from the examination of insolvency at the end of the 20th century are the concentration on corporate rescue and international insolvency, both of which have an impact on each other, particularly given the close connexion between markets in separate jurisdictions and the close ties between trading nations. This is also important in the context of the creation of economic blocs, such as the European Union, where the creation of an internal market fosters and enhances trading across national boundaries. It is in this context that this article will look at the rules in two members of this particular trading bloc, France and the United Kingdom, and in relation to the latter principally the laws that apply in England and Wales. This examination will occur through the history and experience in the two jurisdictions under discussion of the crafting of a body of rules to deal with insolvencies having an international element or nature and considerations of the organisation of insolvencies with an international element and their subsequent impact on domestic law and practice. In light of this, a view may be taken of how the courts in these jurisdictions will accept the introduction of the international measures that are being introduced in this field, particularly the European Council Regulation on Insolvency Proceedings 2000 ('Regulation').<sup>2</sup>

## A - Dealing with International Insolvencies

As befits a subject of some importance, the impact of insolvency has been felt at an international level with a number of instances occurring over the centuries illustrating the complexities of those trading and commercial links

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<sup>1</sup>This article is based in part on material contained in Chapter 7 of Omar PJ, *European Insolvency Law* (Ashgate, Aldershot, 2004).

<sup>2</sup>Council Regulation (EC) No 1346/2000 on Insolvency Proceedings of 29 May 2000, OJ 2000 L160/1 (30 June 2000). This entered into effect in all the member states (with the exception of Denmark) on 31 May 2002.

that have long been important for the lifeblood of nations. The rise of international commerce and the ease of setting up in more than one jurisdiction have meant that many companies had little difficulty in gearing their economic expansion to a global scale. Interaction between economic entities located in different countries, as a by-product of globalisation and the increasing dependence on new and powerful technologies that effectively 'shrink' the world, have caused the delocalisation of business and the search for new markets to take companies throughout the world. Just as expansion has brought considerations of conflicts of law and choice of law in international contracts and litigation, so too the periodic downturns in the world economy have brought considerations of the rules in relation to insolvencies with an international dimension. The diversity of laws applicable to the transactions of a single company is nowhere more important than when their consequences are felt at the time of insolvency. For example, the company may have creditors pressing their claims in several jurisdictions. The laws applicable to these claims may raise issues of conflict of laws and the precise nature of the law applicable to the resolution of any dispute arising from the claim. These claims may be made more complex by the presence of qualifications, such as security, and the identity of the creditors may affect their treatment, with many national laws giving or refusing priority to certain categories of creditors. The priorities of these debts are also important, with the statutory ranking of creditors and guarantees of payment from the assets of the insolvent company being particularly important issues. Questions of how classes of creditors are to be treated fairly across all the jurisdictions where the insolvent company possesses assets are fundamental for efficient management of insolvency proceedings as are issues of efficiency and effectiveness of proceedings involving the company. All of these considerations have prompted courts from an early stage to develop rules to deal with insolvencies, wherever these had an international element with the possibility of conflict of laws.

## I - The United Kingdom

In the case of the United Kingdom, there has been a gradual progress away from the traditional common-law methods of asserting jurisdiction and their statutory equivalents towards procedures for reciprocal assistance and co-operation, a fact situation replicated in other nations of the Commonwealth. There is a long tradition in the United Kingdom of courts extending aid for the collection of assets located in the jurisdiction of the courts belonging to foreign debtors.<sup>3</sup> The precept of assistance, first located within the law of bankruptcy, derives from the doctrine relating to the law of personalty or movable property, by which personal assets were deemed to have no locality but were subject to the law governing the person of the owner.<sup>4</sup> Similarly, the principles governing assertion of jurisdiction have an old and rich history, some of the earliest cited instances going back to the early 18th century. If any theme emerges from the

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<sup>3</sup>Solomons v Ross (1764) 1 Hy. Bl. 131n; 126 ER 79. See Nadelmann K, Solomons v Ross and International Bankruptcy Law (1947) 9 Mod LR 154, Lipstein K, Jurisdiction in Bankruptcy (1949) 12 MLR 454, Blom-Cooper L, Bankruptcy in English Private International Law (in 3 parts) (1954) 3 ICLQ 604, (1955) 4 ICLQ 1, (1955) 4 ICLQ 170.

<sup>4</sup>Sill v Worswick (1781) 1 H. Bl. 665 per Lord Loughborough at 690.

pronouncements of the judges, it is their desire to use the courts to secure some benefit to those present within the jurisdiction, largely through dealing with assets under the supervision of the court or to which the court may acquire access. The net result at an early stage was to promote the pre-eminence of winding up as an institution permitting the collection, liquidation and distribution of assets. The development of statutory equivalents to common-law assertion of jurisdiction did not largely change this position.

Nevertheless, the trend towards automatic liquidation that may be seen as arising from the lack of alternative procedures was tempered by the early development of judicial restraint through the principles of ancillary assistance, the case-law revealing that pressure grew on the courts to deal with fact situations consequent on expansion of overseas trade in the Victorian era.<sup>5</sup> A particular result of the development of case-law in this field is that the courts have not been slow to entertain the institution of ancillary proceedings where these are deemed appropriate. The ancillary assistance rules have effectively allowed courts to control the conditions in which they will accede to requests for the opening of insolvency proceedings where there are other courts involved in the management of an insolvency affecting the same or a related debtor.<sup>6</sup> Nevertheless, the precise role to be played by the ancillary jurisdiction in cases where proceedings were at an advanced stage in the main jurisdiction is often a point of contention between the courts, especially if there are conflicting views about the direction of proceedings.<sup>7</sup> As a result, the case-law makes it clear that the courts retain a substantial discretion, particularly over whether to permit ancillary winding-up proceedings.<sup>8</sup> It is to be noted that the common-law continues to develop rules to meet the inevitable challenges occasioned by the competing interests of the courts of several jurisdictions concerned with the activities of the same insolvent company. Many of these rules tend to qualify the nature of the interests that may legitimately be taken into account for the court to consider whether to exercise jurisdiction or, in appropriate cases, whether to decline jurisdiction in favour of another court. The same principles have also allowed courts to effectively create an embryonic system foreshadowing later statutory developments allowing for co-operation between courts and have continued to allow for the development of principles supplementing these statutory provisions.

As examples of this statutory framework, there may be cited the jurisdiction conferred by statute that has long existed in the United Kingdom for the winding-up of unregistered companies, which definition has been held to

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<sup>5</sup>Re: Matheson Brothers Ltd. (1884) 27 Ch D. 225, Re: Commercial Bank of South Australia (1886) 33 Ch D. 174, Re: Mercantile Bank of Australia [1892] 2 Ch 204, Re: English, Scottish and Australian Chartered Bank [1893] 3 Ch 385.

<sup>6</sup>Re: Vocalion (Foreign) Ltd. [1932] 2 Ch 196, Re: Suidair International Airways Ltd. [1951] 1 Ch 165, Schemmer and Others v Property Resources Ltd. and Others [1975] 1 Ch 273.

<sup>7</sup>Felixstowe Dock and Railway Co. v United States Lines [1988] 2 All ER 77. This decision has been strongly criticised as an example of a lack of judicial restraint in Millett P, Cross-Border Insolvency: The Judicial Approach (1997) 6 IIR 99, contra, see Crystal M, The Company Lawyer Lecture 1997 - Judicial Attitudes to Insolvency Law (1998) 19 Co Law 49.

<sup>8</sup>Re: Wallace Smith Group Ltd. [1992] BCLC 989.

include foreign corporations.<sup>9</sup> An early inclusion in the Joint Stock Companies Act 1848 sought to define, by reference to the location of the registered place of business or head office, the allocation of jurisdiction between Irish and English courts over the winding up of companies.<sup>10</sup> A more sophisticated section in 1862 legislation saw the introduction of statutory authority for the winding up of any unregistered company in the part or parts of the United Kingdom where it has a principal place of business, a provision repeated in the 1908 consolidation.<sup>11</sup> Despite early difficulties occasioned by the question of whether the provision would apply where a company had ceased to exist in accordance with a regular judgment or process in its jurisdiction of origin, as happened in cases brought because of the consequences of the 1917 October Revolution, following which the nationalisation of all Russian banks was decreed and various suits against banks established in Moscow with operations in London were struck out as defective.<sup>12</sup> A provision was thus introduced into the Companies Act of 1928 to provide for the winding-up of an unregistered company and was extended to cover the situation where a company, which though operating within the jurisdiction through a branch or other office, had been dissolved in its place of incorporation. The same provision was substantially enhanced in the 1929 legislative consolidation and survives in the modern law of insolvency, where it continues to generate case law.<sup>13</sup> Qualifications have, however, been attached as to the bases on which courts will invoke jurisdiction, principally where there exists sufficient connection with the jurisdiction, a qualification that need not necessarily consist of assets, there is a reasonable prospect of benefit to those applying for the winding up order and that one of the individuals concerned must be a person (natural or legal) over whom the court could take jurisdiction.<sup>14</sup> Thus, the jurisdiction can be characterised as not being exorbitant in nature and courts will not accede to a petition where there is doubt as to whether substantial assets located in the jurisdiction do in fact have a connection to the company in question and that proceedings already in progress in the company's home jurisdiction would be competent to determine this question.<sup>15</sup>

The move away from statutory jurisdiction of the ancillary type to more complex co-operation measures seems to have been initiated largely because of the perceived inadequacy of submitting a foreign company to domestic jurisdiction without necessarily involving the consent of the jurisdiction of origin. This is despite the development of the doctrine of comity, which

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<sup>9</sup>Re: Commercial Bank of India (1868) LR 6 Eq 517, Re: Federal Bank of Australia (1893) 62 LJ Ch 56.

<sup>10</sup>s117, Joint Stock Companies Act 1848.

<sup>11</sup>s268, Companies (Consolidation) Act 1908, repeating s199, Companies Act 1862.

<sup>12</sup>Banque Internationale de Commerce de Petrograd v Goukassow [1923] 2 KB 682; Russian Commercial and Industrial Bank v Comptoir d'Escompte de Mulhouse [1925] AC 112; Sedgwick Collins & Co v Russia Insurance Company of Petrograd [1926] 1 KB 1; Lazard Brothers & Co. v Midland Bank Ltd. [1933] AC 283.

<sup>13</sup>s221, Insolvency Act 1986. For examples of case-law, see cases below and Re: Latreefers Inc [1999] 1 BCLC 271, on appeal sub. nom. Stoczniak Gdanska SA v Latreefers Inc. [2000] EWCA Civ 36 (9 February 2000).

<sup>14</sup>Real Estate Development Co [1991] BCLC 210.

<sup>15</sup>New Hampshire Insurance Co v Rush & Tompkins Group plc and another [1998] 2 BCLC 471.

stimulated progress towards co-operation by inviting courts to make contact with each other and develop working relationships within the context of proceedings involving matters of joint concern. Furthermore, the development and expansion of corporate rescue measures meant that ancillary jurisdiction, geared as it was towards the liquidation of assets, was inadequate to deal with the problems of preserving and continuing exploitation of assets necessary for ensuring the survival of businesses in financial difficulties. In these instances, co-operation was vital to allow corporate rescue measures to have effect, with the concomitant benefit that, as the introduction of pre-insolvency and insolvency measures widens the choice of procedure available to the courts, this has allowed for domestic procedures to be extended to the foreign company where these would permit the company to attempt to consolidate its economic future through the judicious use of one or more rescue-type regimes. The history of the present provision in the United Kingdom is largely that of the development of co-operation measures in the context of personal insolvency, which can be traced to 19th century provisions on enforcement of orders given by court within the United Kingdom and a requirement of assistance to other British courts.<sup>16</sup> The latter reciprocal assistance provisions were embodied in bankruptcy legislation as a response to the growing numbers of insolvencies of persons and partnerships affecting assets located in a number of Commonwealth jurisdictions. The latest consolidation saw the re-enactment of these rules in the Bankruptcy Act 1914, designed to co-ordinate proceedings and enable courts within the Commonwealth to request other courts to assist in the management of bankruptcy proceedings within their own jurisdiction. The making of an order seeking the aid of another court was deemed sufficient authority to enable the other court to exercise the jurisdiction it would if the matter were before it for consideration.<sup>17</sup> The present provision in the United Kingdom relating to reciprocal assistance is contained in section 426 of the Insolvency Act 1986.<sup>18</sup> Owing to the consolidation of provisions relating to the insolvency of individuals and the insolvency procedures applicable to companies and other legal persons in the same Act, section 426 applies to both types of insolvencies.<sup>19</sup> Part of the reasoning behind this merger comes from the observations in the Cork Report in its chapter on extra-territorial aspects of insolvency law.<sup>20</sup> The number of countries to which the rules on assistance apply at present is limited, the category being constituted predominantly of Commonwealth countries, although the section has been considered in a

<sup>16</sup>s220, Bankruptcy Act 1849; ss73-74, Bankruptcy Act 1869; ss117-118, Bankruptcy Act 1883.

<sup>17</sup>s122, Bankruptcy Act 1914.

<sup>18</sup>This section was a re-enactment of s213, Insolvency Act 1985, the short-lived predecessor to the 1986 Act.

<sup>19</sup>There is a rich seam of literature on this provision, for which see, inter alia, Woloniecki J, Co-Operation between National Courts in International Insolvencies: Recent United Kingdom Legislation (1986) 35 ICLQ 644, Smart P, International Insolvency: Ancillary Winding Up and the Foreign Corporation (1990) 39 ICLQ 827, Dawson K, The Extent of the Jurisdiction under Section 426 Re: Emlico (1998) 22 Ins Law 14; Smart P, English Courts and International Insolvency (1998) 114 LQR 46, Nolan R, International Insolvency Assistance (1999) 20 Co Law 336, Scott R, Public Policy and International Co-Operation between Courts exercising Insolvency Jurisdiction: Section 426 Insolvency Act 1986 (2000) 1 RALQ 1.

<sup>20</sup>Report of the Review Committee into Insolvency Law and Practice 1982 (Cmnd. 8558) in Chapter 49 at paragraphs 1902-1913.

number of leading cases, not least in the growing number of international banking insolvencies.<sup>21</sup> It has been held that the definition of insolvency contained in section 426 should be given as wide an interpretation as possible so as not to fetter the exercise of the court's equitable discretion.<sup>22</sup> The limits of the assistance possible have been canvassed in two cases where orders were sought by a foreign court for the public examination of persons in connection with insolvency. The first instance courts refused the orders, drawing the analogy between the likelihood of refusal in the context of an exclusively domestic case.<sup>23</sup> In any event, the Court of Appeal qualified the question of whether oppression was a valid ground for refusal of the request by looking to the overall policy of the co-operation section. This was held to include the acceptance and, where appropriate, application of the foreign law, even where the results might have a different effect than the corresponding domestic provisions.<sup>24</sup> Extending the co-operation element further, a recent case has extended the ambit of assistance under section 426 to ordering corporate voluntary arrangements in the case of a foreign company.<sup>25</sup>

## II - France

In the case of France, law and practice reveal a view that approaches strict territorialism. There are two statutory tests of jurisdiction, the first deriving from rules made under insolvency law<sup>26</sup> and the second, a form of default provision, from general civil law rules as well as jurisdiction rules contained in the Civil Code. Under the first, a French court is generally competent to exercise jurisdiction over businesses, whose business interests are located within the territorial jurisdiction of the court.<sup>27</sup> This would include those businesses whose seats are located outside French territory, the relevant definition being where that business has its principal interests in France. Where the business has only a branch or presence, an entity often without legal personality, a French court may still submit the business to insolvency proceedings in France.<sup>28</sup> In furtherance of the 'real seat' rule to which France adheres, proceedings would also be extended where a business, whether incorporated elsewhere or not, maintains the appearance of having its seat in another country but whose real presence and centre of interests is in France.<sup>29</sup> Where the business has no establishment or other operations in

<sup>21</sup>Re: BCCI International (Overseas) Ltd. [1988] 1 WLR 708, Re: Dallhold Estates (UK) Pty. Ltd. [1992] BCLC 621, Re: Focus Insurance Co Ltd [1997] 1 BCLC 219, Re: Business City Express [1997] BCC 826, [1997] 2 BCLC 510.

<sup>22</sup>Hughes & others v Hannover Ruckversicherungs-AG [1997] 1 BCLC 497.

<sup>23</sup>Re: JN Taylor Finance Pty Ltd [1999] 2 BCLC 256; Re: Southern Equities Corporation Ltd. [2000] 2 BCLC 21.

<sup>24</sup>England v Smith [2000] 2 BCLC 21.

<sup>25</sup>Re: Television Trade Rentals Ltd. [2002] EWHC 211 (Ch) (19 February 2002). See also Re: Drax Holdings Ltd. [2003] EWHC 2743 (Ch) (17 November 2003), which extended, by a process of reasoning and analogy, the co-operation framework explicit in the Insolvency Act 1986, to foreign companies so as to permit a scheme of arrangement under s425, Companies Act 1985.

<sup>26</sup>Law no. 85-98 of 25 January 1985 ('Law of 1985'), now codified in Book VI of the Commercial Code as of 18 September 2000.

<sup>27</sup>Art. 1, Decree no. 85-1388 of 27 December 1985 (awaiting codification).

<sup>28</sup>CA Paris, 8 July 1992 RJ Com. 1993.7.

<sup>29</sup>Cassation civile, 21 July 1987 D 1988.169.

France, creditors may still petition the court to apply insolvency proceedings to the debtor business. The creditors or, more often than not, the successful creditor who first institutes proceedings, may choose, in the absence of a link between the business and any particular territorial jurisdiction, any court in which to file their claim.<sup>30</sup>

The extension of this jurisdiction, under the second set of jurisdictional rules, is often called exorbitant jurisdiction and is firmly rooted in principles of 'ordre public.' These rules stem from the original enactment of the Civil Code in 1807 and are potentially very wide in their scope as, according to these rules, a foreign person may be cited before a French court to answer for any obligations pursuant to a contract with a French citizen, whether that contract was made in France or elsewhere.<sup>31</sup> Similarly, a French citizen may be answerable before French courts for obligations contracted outside France, whether with a French citizen or foreigner.<sup>32</sup> In cases where a French court declares itself competent to initiate insolvency proceedings, it will apply the *lex fori*, insolvency law being a law that governs commercial relations and is thus a law of supreme public interest. This is on the basis of the presence of the debtor within the jurisdiction or the exorbitant jurisdiction contained in the Civil Code. Nevertheless, there may be conflicts of laws relating to the personal status and liability of the debtor in insolvency proceedings. A judgment that establishes the liability of business partners or company directors for the repayment of business debts applies to these individuals, whether or not they may be foreign nationals.<sup>33</sup> In one instance under a similar provision in an earlier law,<sup>34</sup> the Supreme Court found a Swiss director liable for business debts, incurred by a company in France, the relevant bilateral treaty not having made provision for this eventuality.<sup>35</sup> In this context, it is worth noting that the exorbitant jurisdiction principles operate in the absence of specific provision being made in any relevant international treaty governing the same subject matter. In fact, France is a signatory to five such bilateral treaties dealing with insolvency, mostly with other states in Europe.<sup>36</sup>

A foreign judgment is generally acknowledged as having the authority of the state from which it emanates. Nevertheless, the foreign judgment is still subject to an examination by French courts, which must decide what authority to accord it within the domestic system. Despite this, the existence of foreign proceedings does not place any limits on a French court being able to conduct insolvency proceedings against a foreign or local business. Nevertheless, a foreign judgment may be registered in France and executed over assets of

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<sup>30</sup>Cassation commerciale, 19 March 1979 Rev. Sociétés 1979.567.

<sup>31</sup>Art. 14, Civil Code.

<sup>32</sup>Ibid., Art. 15.

<sup>33</sup>Art. 178, Law of 1985.

<sup>34</sup>Art. 99, Law no. 67-563 of 13 July 1967.

<sup>35</sup>Cassation commerciale, 16 July 1981 Bull. Civ. IV No. 212.

<sup>36</sup>Treaties with Switzerland (15 June 1869), Belgium (8 July 1899), Italy (3 June 1930), Monaco (13 September 1950) and Austria (27 February 1979). The treaty with Switzerland was revoked on 25 February 1992, following Switzerland's accession to the Lugano Convention 1988. The treaties with Belgium and Italy have been superseded as far as insolvency jurisdiction is concerned by the Regulation.

the debtor present within the jurisdiction.<sup>37</sup> Furthermore, the existence of the foreign judgment may be recognised by a French court as having a certain probative value, especially where the determination of personal status of a debtor is in question. Although insolvency would seem a case for the application of this rule, especially where the foreign judgment declares the insolvent status of the debtor, the courts in France have steadfastly refused to give effect to any foreign judgment in insolvency that has not gone through the requisite recognition process. This produces the effect that the rights of foreign trustees in bankruptcy or foreign liquidators to manage the insolvency process may well be recognised as valid but produce no effect on the debtor or assets in France. Similarly, creditors in France may still exercise any rights against the debtor, including suing for payment, seizing property or requesting the opening of insolvency proceedings, despite the existence of a foreign judgment affecting these acts. Furthermore, in the absence of legal recognition, a foreign judgment may not be enforced if it is contrary to the rules of private international law.

The procedure for the recognition of a foreign judgment follows ordinary rules of civil procedure. It involves an application to the court by any interested party, which term may include the foreign liquidator. The debtor must be cited to appear even if the foreign judgment was obtained *ex parte*.<sup>38</sup> The court hearing the application must content itself with an examination of the regularity of the foreign judgment and that the public interest and legal system in France would not be offended by the recognition of the judgment. If the foreign judgment is recognised, the court will order that it receive an 'exéquatur,' the formal stamp of recognition. Once this is obtained, the foreign judgment carries the same authority as a judgment obtained in a French court and is *res judicata*. The 'exéquatur' must be advertised in the same manner as any domestic judgment in the same area. The effect of the 'exéquatur' is to render the judgment capable of being executed in France. Concurrent insolvency proceedings in France against the debtor the subject of the judgment may not be initiated. The relevant official under foreign insolvency legislation may take any steps he is permitted, by virtue of this legislation, to effect any act in France, excepting those which involve property, usually real property, to which the *lex rei sitae* will normally apply. Nevertheless, a French court still retains the discretion to supervise the relevant official in the exercise of his functions and may decide not to accord the official automatic recognition of all his acts.<sup>39</sup>

## Comparisons

It may be said that the position illustrated by the system in the United Kingdom represents a transition from a purely territorial approach seeking to preserve the benefit of domestic proceedings for a largely domestic audience to a position consonant with a universalist perspective. The law of the United Kingdom has long recognised the principle of equal treatment of creditors and has not sought to discriminate against the interests of creditors present

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<sup>37</sup> Art. 509, New Code of Civil Procedure.

<sup>38</sup> Cassation civile, 12 November 1986 Bull. Civ. I No. 257.

<sup>39</sup> Cassation civile, 25 February 1986 JCP éd E 1987 No. 14969.

elsewhere from taking part in the insolvency process. The ancillary assistance principles were invoked in fact to allow foreign creditors to conduct foreign proceedings without undue restrictions being applied and also to allow for foreign entities to be sued in the courts of the United Kingdom for the benefit of creditors, whether foreign or local. The case-law delimiting the precise relationship between ancillary and main proceedings may also be seen as indicative of an overall acceptance of the universalist principle with respect to the management of insolvency, in that a single court should wherever possible deal with the issues arising from the insolvency. Nevertheless, this is tempered with the desire to act effectively so as to assist the overall management of the process through the opening of local proceedings dealing with assets within the jurisdiction. A later stage is the recognition by the courts and the legislature of the benefits of co-operation in insolvency matters and an acceptance of a form of modified universality given the need to promote comity between states. The development of statutory assistance may be said to continue the tradition of co-operation inherent in the ancillary assistance paradigm and places on a firm footing the modified form of the universality principle through allowing for co-operation schemes. It remains the case that assistance may be still be given under the statutory ancillary rules and common-law principles that have themselves undergone change, but which continue to allow for some forms of co-operation to be rendered.

These common law rules have also influenced the development of the complex co-operation paradigm represented by section 426. An overall impression of this framework is that it is forward looking and allows for decisions to be taken as procedures evolve. Evidence for this may be seen in the way the framework has expanded to allow for the extension of domestic procedures that might be beneficial for the debtor. This often has the effect of allowing the company to attempt to consolidate its economic future through the judicious use of those rescue regimes available in domestic law. The history in the United Kingdom for co-operation has been good, with many of the cases leading the way in developing the principle that domestic courts should allow the most efficient result to obtain for the benefit of creditors and other participants in the process as a whole. Often, this requires domestic courts to extend jurisdiction and the rules in the United Kingdom are framed widely, so as to allow for very wide bases for asserting jurisdiction, where there is a conceivable benefit from doing so. However, judicial restraint is also a strong feature of this process and the case law makes it clear that the benefit for creditors and the company may sometimes mean that courts must decline jurisdiction. The development of the section 426 co-operation provision, one of the earliest of its type, has, together with the continued development of the case law, allowed courts in the United Kingdom to use the necessary tools in relation to the facts of the cases before them, tailoring the remedies that may be suited to each case. This is of considerable benefit given that the needs of the insolvent debtor and participants in the process may change and the procedures themselves may need to adapt to these needs, for example by switching between rescue and liquidation proceedings and vice versa. A flexible system that is both responsive and pro-active in this way and that also deals with other courts in an open manner can better achieve the goals of corporate rehabilitation in a way that a purely territorial

approach cannot. Overall, this has done much to develop the reputation of the United Kingdom as a jurisdiction within the universalist tradition of the debate around co-operation in international insolvency, although it remains true that overall the framework continues to remain restricted by the limited number of countries to which it potentially applies.

The experience in France reveals a stricter and more territorial approach to insolvencies with an international dimension. France possesses a lengthy canon of private international law rules, in which the stamp of 'ordre public' is marked. Unlike the situation in the United Kingdom, where the common-law developed early on the necessary principles permitting ancillary liquidations of foreign companies and the full application of foreign insolvency decisions, France has remained wedded to the distinction between the recognition of a foreign judgment, which out of comity is always possible, and its enforcement, which entails a procedure that is highly technical and full of unwary traps for the uninitiated. In fact, the law and practice in France reveal a very strict territorial methodology in insolvency with the aim of the law being to determine the conditions in which the courts in France must open proceedings. The factors allowing for the exercise of jurisdiction are as wide, if not wider, than those prevailing on the other side of the Channel. In most instances, domicile or the presence of an establishment determines jurisdiction. Furthermore, the priorities in insolvency law on preservation of business and employment lend the subject economic and political importance, resulting in the provisions of the law on insolvency being considered mandatory under 'ordre public' rules. In this situation, courts are very reluctant to turn down the opportunity to seize jurisdiction and are not free to exercise restraint or discretion in any meaningful way. Other traditional rules on nationality and presence of assets or business interests can also attract the exorbitant jurisdiction rules of the Civil Code, which are often invoked as an ancillary source of jurisdiction by French courts. This very wide jurisdictional capacity allows in fact for French courts to contemplate jurisdiction in any case with a French element. Furthermore, the nature of the interests in the cause is a strong incentive for courts to investigate whether there is reason to open proceedings where there is any evidence of a tangible benefit for local creditors. The overall impression is that courts are very willing to use these rules to satisfy themselves when conducting an examination with view to grounding or asserting jurisdiction, the sole exception being where an international instrument, such as a bilateral or multilateral treaty provides other rules for the conduct of insolvencies, to which French courts are bound to defer given the monist hierarchy of French law in which international law is superior to domestic rules.

As has been said, the logical application of the territorial rules is nevertheless conditional on there not being a foreign judgment whose recognition according to France's conflict of laws rules is mandatory. In practice, however, although some flexibility has been noted by commentators with respect to court practice, many foreign judgments do not get to the examination stage because they fall at the recognition hurdle (as they are subject to an examination as to their regularity and compliance with 'ordre public' rules) or are later in time than a judgment given by a French court. In fact, although it

may be said that the French system is a reactive one that depends on the existence of a judgment, it is not evident how far co-operation may be assisted where orders need to be taken during the currency of proceedings and these remain subject to the recognition process. This is always assuming that the initial foreign judgment has been recognised and that no parallel proceedings have been invoked before a French court. Given the wide powers for taking jurisdiction, it is likely that in any case with a significant French element, a French court will have pronounced on the matter, thus reducing the likelihood of co-operation unless the domestic court is persuaded of the desirability of this step. In this respect, the territorial nature of this jurisdiction may seem to run counter to attempts at achieving an international consensus on treatment of cross-border issues and the creation of supranational insolvency rules may be difficult to envisage. It is, however, an imperative given the close economic unit that the European Union has become and given the prevailing economic climate, in which insolvencies continue to be an ever increasing statistic.

## B – International to Domestic

The stark contrast that may be made between the two schools of philosophy in insolvency, territorialism and universality, means that work on many international initiatives has had to take account of strong national interests of this type. The resulting measures have often attempted to justify their outcomes by reference to the need to reconcile these very divergent views. With regard to the territorialism-universality debate, civil law traditions are most often closely associated with the territorial paradigm of jurisdiction, although there are some limited exceptions to this rule. Conversely, the common law tradition is most often closely associated with the universalist paradigm of jurisdiction. This seemingly simplistic division is not without its difficulties, given that there are often limited exceptions to the absolute application of any one paradigm given that courts will have concerns for the interests in insolvency that may prompt exceptions qualified as 'ordre public' in nature. Nevertheless, the experience in all jurisdictions illustrates that, whether the rules develop from the civil or common-law traditions, there is a common perception that insolvency is of prime interest to the creditors. Courts in all jurisdictions seek to preserve assets, define the interests at stake and regulate procedure. This has the effect frequently of also defining the relationship between domestic and foreign participants in insolvency. An element of discretion present in most jurisdictions allows courts to determine the extent to which assistance is given to other courts and insolvency participants from other jurisdictions as well as the articulation between the domestic procedure and any parallel foreign proceedings.

There is, nevertheless, a measure of consensus internationally for equality of treatment for creditors and assistance is often given only in instances where there exists substantial reciprocity of treatment for creditors. Nevertheless, the difficulties placed in the path of creditors seeking to obtain remedies in jurisdictions unfamiliar to them cannot be underestimated. The common problems of any international litigation are well known: differences in language, laws and procedure and legal culture as well as the problems of

time, distance and cost. To these must be added those peculiar to insolvency, not the least of which is that this is an area of law where courts have traditionally been slowest to develop principles of co-operation. A clear conclusion that may be drawn from the experience of the systems that have been outlined is that the international harmonisation of rules in the field of insolvency is certainly a desirable objective. Despite a long history of early insolvency initiatives, largely on a bilateral basis, the experience of international insolvency organisation appears to be a history of occasional advances and reversals of fortune. Comparative scholarship has, despite being rare as a discipline, done much to foster understanding and appreciation of other legal systems. Nevertheless, the search for an international text to regulate insolvency has continued and the end of the 20th century particularly has been one of the most productive periods for initiatives in this field. Progressive judicial attitudes at domestic level have also done much to accelerate the process towards the creation of an efficient system for the management of international insolvencies. It has also fostered a climate in which co-operation is seen as a natural end for many proceedings, leading to the possibility for the use of rescue procedures across national boundaries.

#### I - The Advent of the Regulation

In Europe, the struggle towards getting a text and the experiences in this area have been taken as an illustration of the difficulties inherent in achieving consensus, especially among nations with developed legal orders and traditions. The Regulation began its life as a proposal for a convention to supplement the treaty framework creating a common legal system within Europe following the foundation of the European Community in 1957. The progress, however, towards the enactment of the final Regulation has seen a number of different drafts and periodic versions as well as the interventions of two separate supranational bodies, the European Community and the Council of Europe. The work on all these drafts used the talents of many jurists and advisors of international stature. Commentators are agreed that recognition of strong national interests has influenced the approaches at European level towards constructing instruments with the aim being to attempt to reconcile apparently conflicting views on territoriality and universalism.<sup>40</sup> Their contributions shaped developments at the various stages of the drafts, especially given that the histories of the legal systems of the member states meant that each draft had to attempt the reconciliation of diverse and occasionally opposing principles and philosophies. To a great extent, the sterling work of the contributors to the text managed largely to overcome these problems. Nevertheless, the resulting texts were often rejected by the member states, especially in the European Community, for reasons more political in nature. Despite this, the parallel work of both institutions in the late 1980s and early 1990s, may be said to have created a climate of competition and eventual acceptance of the need for an instrument in Europe. This ultimately resulted in the enactment of the Regulation nearly four decades after work first began, perhaps creating a record for a project with an international dimension. Despite apparent shortcomings in the text and some

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<sup>40</sup>See Bogdan M, *The EU Bankruptcy Convention* (1997) 6 IIR 114.

notable omissions from its remit, the advent of the Regulation has met with a welcome and relief that an instrument now exists for the management within the Single Market for the insolvency of undertakings.<sup>41</sup>

It may be said with some conviction that the Regulation is an important part of the long history of international insolvency initiatives. As the most important of all the initiatives thus far, the Regulation may be seen as especially deserving of success, perhaps because of the very fate of its predecessors, the European Insolvency Convention 1995<sup>42</sup> and the related Council of Europe Convention adopted in 1990.<sup>43</sup> Together with related initiatives dealing with cross-border insolvencies in the financial and insurance sectors and other likely proposals,<sup>44</sup> the Regulation is said to mark the beginnings of a comprehensive European legal order in insolvency law. Although this legal order is still at an early stage of development, it is likely that the lead given by the Regulation and its provisions will influence many of future proposals in this field. This may well lead to more acceptance for similar proposals elsewhere if the Regulation demonstrates success at an early stage. Furthermore, the continued articulation and relationship between the Regulation and the new text in this field,<sup>45</sup> which is designed to replace the Brussels Convention 1968,<sup>46</sup> will ensure that the cross-border framework for the recognition and enforcement of the most important forms of commercial judgments, those arising from litigation over debt and related insolvencies, will do much to secure cross-border trade and allow creditors to properly estimate the risks inherent in commercial transactions. It is perhaps worthwhile, nevertheless, recalling that insolvency has remained an area of law where agreement has been long in the obtaining and instances of success few and far between. The willingness of nations to abandon short-term self-interest for a long-term solution at the international level may be said to be a precondition for the success of international texts of this type. Whether this occurs in practice will have to be observed, although existing trends in judicial practice have played a part in the acceptance of co-operation by demonstrating that efficiency and

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<sup>41</sup>See Steiner K, *European Cross-Border Insolvency in the Millennium* (1999) 15 *IL&P* 207, Rajak H, *Bankruptcy Agreement in the EU – Eventually* (editorial) (2000) 16 *IL&P* 125, Fletcher IF and Anderson H, *The Insolvency Issues*, Chapter 14 in Bridge M and Stevens R (eds.), *Cross-Border Security and Insolvency* (OUP, Oxford, 2001) at 283-286.

<sup>42</sup>There is a rich seam of literature devoted to this convention, for which see, inter alia, Aminoff L, *The EEC Draft Bankruptcy Convention - An Exercise in Harmonising Private International Law* (1990) 1 *LIEI* 121, Dine J, *Proposals for an EC Bankruptcy Convention* (1992) 8 *IL&P* 178, Trautman D et al., *Four Models for International Bankruptcy* (1993) 41 *AJCL* 573, Balz M, *The European Community* (1995) 4 *IIR* 60, Balz M, *The European Union Convention on Insolvency Proceedings* (1996) 70 *ABLJ* 485.

<sup>43</sup>See Lowry J, *The Harmonisation of Bankruptcy Law in Europe: The Role of the Council of Europe* (1985) *JBL* 73, Bottiau A, *La Convention Européenne sur certains aspects internationaux de la faillite*, *RPC* 1990.2.97.

<sup>44</sup>Directive 2001/17/EC of 19 March 2001, *OJ* 2001 L110/28 (20 April 2001) and Directive 2001/24/EC of 4 April 2002, *OJ* 2001 L125/15 (5 May 2001) on insurance undertakings and credit institutions respectively.

<sup>45</sup>Council Regulation (EC) No. 44/2001 of 22 December 2000, *OJ* 2001 L12/1 (16 January 2001).

<sup>46</sup>Convention on the Mutual Recognition and Enforcement of Judgments of 27 September 1968, consolidated version published in *OJ* 1998 C27/1 (26 January 1998).

effectiveness can be successfully achieved with benefits for local and foreign interests.

## II – Impact on Domestic Methodologies

In this context, the question may be asked whether the Regulation will meet the criteria evolved by the courts of the two jurisdictions concerned in providing an effective framework for the allocation of jurisdiction in insolvency matters. In this, one has to bear in mind that the overall philosophies of both insolvency systems are very different. The law in the United Kingdom may be taken as illustrative of a paradigm where the market largely determines the outcome of the process, the most important of interests here being those of the secured creditors. Insofar as the pursuit of private remedies is excluded by the Regulation, subject to an exception for third party rights,<sup>47</sup> collective proceedings are nevertheless designed so as to promote the most productive use of assets for the participants whose interests are recognised and delineated by the provisions on the hierarchy of distribution. The courts provide a limited supervisory role and allow practitioners and creditors to administer the process. At the end of the day, the allocation of risk and loss is made between debtor and creditor and insolvency functions in order to maximise the outcome for the creditors. This is irrespective of stakeholding arguments in company law that seek a greater role for other categories of participants, especially employees, in the corporate process, including when corporate debtors face insolvency. In any event, the fact that a system is classified as market-oriented does not mean that it excludes these stakeholders, although generally, the needs of these categories of participant are dealt with by other legislation that may embody elements of social priority. The position in France could not be any different, where the priorities of the insolvency law are firmly set as being a mix of the social and economic. This is set against a background of dirigiste economic behaviour by the Government that imposes a social cost on the formation and continuation of business often regarded as disproportionate to the intended outcome of wealth-creation for the purposes of distributive justice. The French system views insolvency as a collective procedure designed to distribute loss amongst all the participants in the process, subject to the proper hierarchy of loss-avoidance mechanisms inherent in distribution arrangements that privilege in some instances employees above creditors. The precise balance between creditors' rights and employees' rights has been a notable feature of attempts at insolvency law reform in France for the past decade. Nevertheless, the chief features of the French system are that the courts are far more interventionist and provide close supervision at all stages of the insolvency process, which itself may be a protracted procedure when compared to its British counterpart.

In the United Kingdom, the rules relating to jurisdiction, recognition and enforcement rules are likely to undergo profound change, insofar as Britain's partners in the European Community are concerned, with the passing of the Regulation. The practical impact of the regulation has already been felt, with

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<sup>47</sup> Article 5.

the adoption of detailed practice rules that take into account the structure of the Regulation in adapting practice conditions in line with its advent.<sup>48</sup> The paradigm adopted by the Regulation has resonances with existing practice in the United Kingdom, particularly its jurisdiction provisions and those concerning active co-operation between personnel and courts in different jurisdictions. However, although the United Kingdom was an active participant in the conclusion of the convention preceding the Regulation, one prevailing view by Gabriel Moss, an eminent QC, is that the Regulation is 'written in a language and contains concepts largely alien to lawyers and judges from the common law world...'<sup>49</sup> One regret that has been expressed is that the Regulation does not cover schemes of arrangement or administrative receivership,<sup>50</sup> thus potentially reducing the attractiveness of the Regulation as an instrument and reducing the range of flexible practices available to insolvency practitioners seeking a debtor-focused solution. The omissions are highlighted as particularly important, particularly the lack of express provision for groups of companies.<sup>51</sup> Of especial interest will be consideration of where the 'centre of main interests,' the Article 3(1) definition grounding jurisdiction, of the debtor will be crucial,<sup>52</sup> a consequence that may be problematic if there is a conflict between states partial to the 'state of incorporation' and 'real seat' rules. The definitional problems do not stop there as there is a conflict between English and French texts in respect of the definition of an establishment, which uses the English term 'goods', a term much narrower than the equivalent in French: 'biens.'<sup>53</sup>

Similarly, of interest to lenders in the United Kingdom is whether the Article 5(2) definition of rights in rem would also include rights in relation to specified assets as well as collections of assets, as would be the case with the creation of a floating charge. Professor Virgos, co-author of a commentary that accompanied the 1995 predecessor convention, has stated explicitly that floating charges of the type recognised in the United Kingdom would qualify as rights in rem.<sup>54</sup> The assumption is made by Maître Dahan that, despite the omission of the institutions of receivership from the ambit of the convention, a fact situation replicated in its successor Regulation, the holder of a floating charge will continue to enjoy a right over assets that would be recognised under the *lex rei sitae* and which were located in that jurisdiction. Nevertheless, any effect the charge purports to have over assets located elsewhere would continue to be governed by recognition rules applied by the jurisdiction in question. Therefore, if France were the location of principal proceedings, the floating charge holder would be required to prove the debt in

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<sup>48</sup> Although regulations are under European law directly applicable in and form part of the law of member states, in practice member states often pass subsidiary legislation to effect alterations to existing law in light of changes brought in by regulations. Six statutory instruments were adopted in 2002-3 to deal with these changes in the United Kingdom.

<sup>49</sup> See Moss G, *The Impact of the EU Regulation on UK Insolvency Proceedings*, paper presented at the ILA Conference (Brussels, 16 March 2002) at paragraph 3.

<sup>50</sup> *Ibid.*, at paragraph 8.

<sup>51</sup> *Ibid.*, at paragraph 14.

<sup>52</sup> *Ibid.*, at paragraph 15.

<sup>53</sup> *Ibid.*, at paragraph 19.

<sup>54</sup> See Virgos M, *The 1995 European Community Convention on Insolvency Proceedings: An Insider's View*, *Forum Internationale* No. 25, The Hague, March 1998 at paragraph 40.

these proceedings and could not exercise the charge over assets in France that would be subject to these proceedings, thus the floating charge would effectively be limited to assets within the United Kingdom.<sup>55</sup> Moss also furnishes the observation that 'much attention will be devoted to the location of assets both in a legal and physical sense.'<sup>56</sup> Also highlighted as crucial for United Kingdom practitioners are the provisions fostering co-operation between office-holders in different countries.<sup>57</sup> The issue of language does, however, raise question about whether fees will be usefully spent on translation requirements in the context of proceedings, especially as far as communications by office-holders to creditors are concerned.<sup>58</sup> A contrast is made in that the ancillary assistance provisions in domestic law usually results in assets and claims being passed to principal proceedings, while the Regulation would engender dealings with claims locally, excepting any surplus which would be transferred for the benefit of main proceedings.<sup>59</sup> On the positive side, the Regulation will make it more certain for practitioners as to what assets they may deal with, the rules for secondary proceedings in particular being quite clear, and, where companies are organised through branches, the deficit in the Regulation with respect to groups of companies is rendered nugatory, co-ordination between main and secondary proceedings will allow for effective control over the debtor's assets.<sup>60</sup> Furthermore, on the issue of competing claims, the same hierarchy between main and secondary proceedings will, it is claimed, assist determination of the rules that will apply.<sup>61</sup>

The Regulation is, nevertheless, not designed to affect existing arrangements with parties outside the European Community, a category that will include Commonwealth countries with which there are long-standing arrangements for dealing with cross-border insolvencies and for which there is continuing pressure on the Government in the United Kingdom to develop an international protocol.<sup>62</sup> In fact, the Insolvency Act 2000 also contains powers allowing for the UNCITRAL Model Law on Cross-Border Insolvency 1997<sup>63</sup> to be brought into use for the United Kingdom in relation to these external obligations and for amendments to be made to the current scheme for cross-border assistance represented by section 426. Powers are also provided for the introduction of any necessary and expedient provision designed to assist the introduction of any new framework.<sup>64</sup> The adoption of any such provisions would necessarily enhance the availability of cross-border provisions and

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<sup>55</sup>See Dahan F, *La Floating Charge: Reconnaissance en France d'une sûreté anglaise* (1996) 2 JDI 381 at 402-3, Gaines K, *Applying the May 2002 European Regulation on Insolvency Proceedings* [2001] *Insolv L* 201 at 204.

<sup>56</sup>See Moss, *op. cit.* at paragraph 29.

<sup>57</sup>*Ibid.*, at paragraph 50.

<sup>58</sup>*Ibid.*, at paragraph 57.

<sup>59</sup>*Ibid.*, at paragraphs 64-65.

<sup>60</sup>See Gaines K, *op. cit.* at 206. Gaines makes the point by providing an illustration from *Re: BCCI (No. 10)* [1996] BCC 980 with respect to certainty over the set-off issue were the fact situation one covered by the Regulation.

<sup>61</sup>*Ibid.*, at 207.

<sup>62</sup>See Morris C, *Lessons learnt from the Collapse of BCCI* (1994) 1 RALQ 5.

<sup>63</sup>(1997) 36 ILM 1386 prefaced with an Introductory Note by Burman H and Westbrook JL.

<sup>64</sup>s14, Insolvency Act 2000.

complement the introduction of the Regulation. However, because the Regulation is self-executing in European law, Gabriel Moss makes the valid point that statutory provisions may be implicitly overruled without physical amendments appearing on the face of the texts, thus leading to difficulties in ascertaining the precise extent of the rules and whether particular provisions remain of application.<sup>65</sup> Nevertheless, an overall conclusion is that the Regulation is an improvement on the previous situation and could well work in harmony with domestic law through judges and practitioners displaying 'liberal and imaginative interpretation, forsaking any parochial concerns,' thus potentially setting an example, through the 'high esteem' enjoyed in the European Union by the courts in the United Kingdom, in the application of the Regulation.<sup>66</sup> A similar view is expressed to the effect that the Regulation framework will assist 'consistency and efficiency,' particularly by promoting mutual recognition in member states where practice has hitherto been inimical to comity.<sup>67</sup>

Initially, courts in the United Kingdom displayed an expansive attitude to petitions seeking to open proceedings under the Regulation. For example, in *Enron Directo*, Mr Justice Lightman made an administration order in respect of a company registered under Spanish law, where it was successfully argued by Counsel that, despite the company actually trading in Spain, the functions associated with a headquarters were carried out in the United Kingdom, thus locating the 'centre of main interests' for the purposes of making the order.<sup>68</sup> Nevertheless, in a number of cases heard later that year, caution was strongly in evidence. In *Telia*, Mr Justice Park granted an injunction restraining a creditor from presenting a winding up petition in the case of a Swedish company, holding that the business premises of its subsidiary could not constitute an establishment of the company for jurisdiction under Article 3(2).<sup>69</sup> Similarly, in *Skjevesland*, it was conceded that the debtor, a Norwegian, while ordinarily resident for the purposes of founding bankruptcy jurisdiction under domestic law, did not have his 'centre of main interests' within the European Union for the Regulation to apply. The case was interesting in that it involved a judgment debt, obtained in Norway and registered in England and Wales. With view to advantage in litigation, the petitioners argued that the 'centre of main interests' was to be found in the United Kingdom, while the debtor had put forward a case for Spain, both parties settling as an alternative for Switzerland. The court accepted this and accordingly, Mr Justice Howarth was able to dismiss the debtor's appeal against the Registrar's finding.<sup>70</sup> A very curious case was that of *Re: Marann*,<sup>71</sup> where Mr Justice Patten held, albeit obiter, in a case involving a

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<sup>65</sup>See Moss G, *op. cit.* at paragraph 74. Part of the problem has been cured by changes brought in by subsidiary legislation amending the Insolvency Act 1986, especially s221.

<sup>66</sup>*Ibid.*, at paragraph 78.

<sup>67</sup>See Gaines K, *op. cit.* at 205 and 207.

<sup>68</sup>*Re: Enron Directo Sociedad Limitada* (unreported) (4 July 2002). A note of the case was made by Gabriel Moss QC and may be seen at: <[www.iiiglobal.org/country/european\\_union/Enron\\_Directo\\_decision\\_of\\_Lightman\\_J.pdf](http://www.iiiglobal.org/country/european_union/Enron_Directo_decision_of_Lightman_J.pdf)>.

<sup>69</sup>*Telia v Hillcourt* [2002] EWHC 2377 (Ch); [2003] BCC 856 (16 October 2002).

<sup>70</sup>*Skjevesland v Gevevan Trading* [2002] EWHC 2898 (QB); [2003] BCC 209 and 391 (11 November 2002).

<sup>71</sup>*Re: Marann Brooks CSV Ltd* [2003] BCC 239 (4 December 2002).

public-interest petition for winding up brought by the Department of Trade and Industry, that he would consider this type of petition not to fall within the ambit of the Regulation. The rationale for this view rests on the fact that insolvency, although a pre-requisite for the Regulation, is not necessarily a qualification for action taken in the public interest to remove companies operating within the jurisdiction. This unfortunately exposes the possibility that some proceedings, although based on the debtor's insolvency and potentially requiring co-ordination because activities are carried out in Europe, may not achieve this, despite there being a clear benefit for creditors, because the petition is initiated by a public authority. By way of contrast, the Regulation has been extended by the courts to bodies it does not expressly name, such as incorporated associations. In *Re: Salvage Association*, jurisdiction was exercised to make an administration order in respect of an association incorporated by Royal Charter, the argument being accepted that the association was a legal person for the purposes of the Regulation.<sup>72</sup>

As judges became more familiar with the Regulation, a number of cases hinging on the definition of jurisdiction came before the courts which may be interpreted as being more favourable towards allowing proceedings to be opened. By far the most interesting case to emerge from what may be termed the jurisdiction debate is *Re: Brac*,<sup>73</sup> where purposive interpretation by the judge may be directly contrasted with the decisions in *Telia* and *Skjevesland*. The judgment reveals that, on the facts, the company, formed in Delaware, traded as an overseas company in the United Kingdom, where the operations were largely conducted and where the majority of employees were based. The company had been placed under the protection of Chapter 11 proceedings in the United States. In order to make an administration order, which was felt to be desirable, and in the absence of specific authority under the domestic co-operation provision in section 426, Mr Justice Lloyd was obliged to consider whether the paradigm in the Regulation dealing with the exercise of jurisdiction as between member states could be applied by analogy to the position of a debtor incorporated outside the European Union, where its 'centre of main interests' was clearly within a member state. The argument to the contrary relied on the proposition that European legislation should not be presumed to apply to entities incorporated overseas without express mention. Although the potential for an extra-territorial effect is not dealt with expressly in the commentary accompanying the predecessor Convention, the judge held that the commentary and Regulation were neutral on the point and accepted that they were not inconsistent with the argument put forward for jurisdiction, which relied on the fact that the only test in the Regulation for jurisdiction referred to the centre of main interests and that the absence of a specific exclusion for debtors formed outside the European Union tended towards allowing for jurisdiction to be exercised. The case may be regarded as being quite correct in that it makes clear that the fortuitous location of the incorporation should not prevent the exercise of jurisdiction,

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<sup>72</sup>*Re: Salvage Association* [2003] EWHC 1028 (Ch) (9 May 2003).

<sup>73</sup>*Re: Brac Rent-A-Car International Inc* [2003] EWHC 128 (Ch) (7 February 2003). See Dawson K, *The Jurisdiction of the English Courts under the EC Regulation on Insolvency Proceedings* [2003] *Insolv L* 226; Editorial, *The European Insolvency Regulation and the Global Rescue Culture* (2003) 24 *Co Law* 97.

thus avoiding what might have been a serious lacuna from developing. A similar case, involving a parent company located in the United States which had filed for Chapter 11 protection, featured an English court granting administration orders in respect of its English subsidiary, as well as other English and European companies, located in France and Germany, on grounds that the English company was not only the holding company for the European operations of the group but also provided management support and co-ordination of the group's activities.<sup>74</sup> It will, nevertheless, be instructive to see whether this extra-territorial effect represented by *Re: Brac and Daisytek-ISA* will be developed any further in later cases. An interesting by-product of the conditions under which the Regulation was adopted is that the extra-territorial principle can extend to Denmark, which did not opt in to the Regulation. In *Arena*,<sup>75</sup> the defendants sought to avoid a winding up petition based on sums owed by reason of evasion of excise duty by arguing that, although an Isle of Man company, their 'centre of main interests' was in Denmark, where insolvency proceedings were more appropriate. Mr Justice Lawrence Collins gave short shrift to this, holding that the expression 'member state' in the Regulation clearly does not apply to Denmark.

Turning to the position in France, the introduction of the Regulation will represent quite a significant change in the methodology of French courts in that a wider type of framework for co-operation will be instituted. With automatic recognition of judgments being one of the key features having an impact on French practice, it remains to be seen how French courts will adapt and give effect to this framework. A particular remark has been made about the criterion for primary jurisdiction based on the location of the statutory seat, which appears to represent quite a change in comparison with the operation of the 'real seat' rule in France, consequently requiring courts to adapt. However, the differences are said to be more apparent than real, as the criterion is itself merely a presumption that may be rebutted, thus bringing into play questions surrounding the 'centre of main interests' definition.<sup>76</sup> This is especially true as this definition has acquired in French usage a very liberal interpretation consonant with the view of the courts in that jurisdiction being territorial as regards insolvencies with a French element. It is likely that, in an insolvency with pronounced local interests for a French court, it will seek to take jurisdiction. Justification for this position is likely to be on the basis of its understanding of the jurisdictional bases of the Regulation as it interprets them in line with its practice. In any event, the construction of secondary proceedings, which operate on an exclusively territorial basis, is very reminiscent of French practice and should cause no problems for French courts seeking to assert jurisdiction over some aspects of the overall

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<sup>74</sup>*Re: Daisytek-ISA Limited and others* [2003] BCC 562. See below for a discussion relating to the French subsidiary. **A related Australian company, part of the worldwide group, is also the subject of insolvency proceedings before the courts, as glimpses in the AustLII reports reveal: In the matter of Daisytek Australia Pty Ltd (Administrators Appointed) [2003] FCA 768 (24 July 2003).**

<sup>75</sup>*Customs and Excise v Arena Corporation Ltd* [2003] EWHC 3032 (Ch) (12 December 2003).

<sup>76</sup>See Poillot-Peruzzetto A, *Le créancier et la «faillite européenne»: commentaire de la Convention des Communautés européennes relative aux procédures d'insolvabilité* (1997) 3 JDI 757 at 768.

insolvency. Nevertheless, the extent to which domestic procedures can be applied is circumscribed by the Regulation, a fact that may hinder the court's ambition.<sup>77</sup>

What is clear though is that French practitioners and academics are very aware that the exorbitant jurisdiction rules of the Civil Code no longer have a part to play in European insolvencies. The concomitant advantage, however, is that practitioners and creditors will be able to use the provisions allowing action abroad in defence of their interests with greater ease.<sup>78</sup> The issues of the reduction in costs and the attendant simplification of formalities are regarded as acceptable compromises faced with the insistence on universality in the overall conduct of proceedings. The result is clearly seen as being to offer to European companies a procedure tailored at the European level.<sup>79</sup> There nevertheless remain some concerns about the impact domestic procedure will play in determining matters such as time limits for proving debt and the extent to which the obligation for publication of legal notices will apply.<sup>80</sup> By contrast, in relation to certain types of debt, principally fiscal and administrative in origin, the point is made that the Regulation does not affect existing French rules, but that other member states will need to change their rules on the admissibility of these debts in proceedings.<sup>81</sup> On the whole, the view is taken that the introduction of the Regulation will have consequences in three domains especially, the requirement for closer co-operation between practitioners, issues of publication of legal notices and translations as well as a greater awareness of potential risks, especially where practitioners may inadvertently conceal transactions by delinquent management involving asset transfers by failing to make sufficient enquiries, where they also undertake enforcement measures that may be challenged under transactional avoidance rules and, finally, where they may risk personal liability for carrying out irregular acts or failing to recover available assets. The view is also that the Regulation will require a review of methods of managing procedures and necessitate closer co-operation between courts and practitioners than may have hitherto been the norm.<sup>82</sup>

Interestingly, the sole judgment to emerge in France thus far under the Regulation is one that involves a cross-border jurisdiction question in terms reminiscent of those in *Re: Brac and Enron Directo*. In the *Daisytek* case,<sup>83</sup> the facts concerned the French subsidiary of a British company, itself part of a group of companies placed under Chapter 11 protection in the United States. Orders were made in the United Kingdom placing the British company and other British and European subsidiaries under administration. The administrators appointed in British proceedings later opposed the opening of

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<sup>77</sup>Secondary proceedings are limited to liquidation-type proceedings by Article 3(3).

<sup>78</sup>See Vallens J-L, *Le droit européen de la faillite*, D.1995.chron.40.307 at 310

<sup>79</sup>See Richard D, *A entreprise européenne faillite européenne?* PA 1995.42.9 at 14.

<sup>80</sup>See Vallens J-L, *Le règlement no. 1346/2000 sur les procédures d'insolvabilité: son application en France*, paper published on the International Insolvency Institute website at: <[www.iiiglobal.org](http://www.iiiglobal.org)>, at section I.a.2.

<sup>81</sup>*Ibid.*, at section II.c.2.

<sup>82</sup>*Ibid.*, at section II.c.3.

<sup>83</sup>CA Versailles (24ème chambre), 4 September 2003 (Case RG No. 03/05038) (unreported). Transcript obtained from Maître Anker Sorensen, to whom thanks are due.

proceedings in France, where the Commercial Court in Pontoise placed the company under judicial rescue proceedings and appointed a judicial administrator and a creditors' representative. On appeal by the British administrators, the Court of Appeal in Versailles was concerned to examine the grounds the British court found for exercising jurisdiction over the French subsidiary. The reasons the court at first instance had found on which to base the opening of proceedings included the fact that, although the French company was indeed a subsidiary of the British company, the separate legal entity theory militated against according automatic jurisdiction over the subsidiaries of a company without further evidence of a connexion, which, on the facts, did not exist to permit either primary jurisdiction on the basis of a 'centre of main interests' nor secondary jurisdiction on the basis of an establishment within the jurisdiction. The Public Prosecutor supported this thesis in the appeal, stating that the Regulation did not cover the situation of groups and that there was no establishment, given that the subsidiary had separate legal personality, thus depriving the British court of competence under Article 3. The French insolvency practitioners were interested in having the judgment at first instance affirmed given that there was a rescue plan under discussion that could be adopted if the legitimacy of the French proceedings was upheld. In the end, the Court of Appeal accepted that the British court, in qualifying, following a thorough examination of the facts, a representative bureau in Bradford, where business was transacted in relation to the British company's European subsidiaries, as the 'centre of main interests' of the subsidiaries, had acted within the terms of the Regulation. Accordingly, the French court was acting unlawfully in opening proceedings, given that the existence of British proceedings, which should have acted as a bar to the opening of French proceedings under the terms of Article 16 (recognition principle) and 17 (effects of the judgment) of the Regulation.<sup>84</sup> The judgment, given its novelty, has yet to be commented upon, but it is likely to arouse much the same argument as in the *Re: Brac* case with regard to extra-territoriality, this time of an intra-Union nature. Although on the face of things, this is a correct decision, the case is surprising in that it appears to be a volte-face when viewed against previous French practice, especially with regard to exorbitant jurisdiction, and is likely to elicit much controversy when commentary eventually appears.<sup>85</sup>

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<sup>84</sup>Various other procedural arguments were also raised in relation to the alleged absence of notice, failure to summon the debtor and breach of 'ordre public' rules, but were dismissed by the court.

<sup>85</sup>Some preliminary views in the business press indicate that the availability of a single forum would generally benefit creditors, despite the common issues associated with litigation across borders (costs, unfamiliarity with other legal system etc.), for which see Sorensen A and Delorme T, *Un règlement européen destiné à améliorer et à accélérer les procédures collectives transfrontalières*, L'Agéfi (18 November 2003). *The same case has aroused, with respect to the company's German subsidiary, accusations by German commentators that the avowed pioneering by British lawyers of the use of the Regulation to base administration proceedings of European groups in the United Kingdom is a holdover from 'imperial' views of the extension of jurisdiction favoured by British courts, for which see Anon, "Germans and French oppose British use of Euro Regulation" Global Turnaround (issue no. 46) (November 2003); Paulus CG, "Zuständigkeitsfragen nach der Europäischen Insolvenzverordnung" (2003) 24 Zeitschrift für Wirtschaftsrecht 1725, copy published on the International Insolvency Institute website at: <[www.iiiglobal.org/country/germany/insolvenzverordnung.pdf](http://www.iiiglobal.org/country/germany/insolvenzverordnung.pdf)> (viewed 21 September 2004).*

## Summary

The differences between the approaches in both the United Kingdom and France are manifest, these being largely due to the differences in the character of the institutions which courts in both countries are called upon to apply to insolvency procedures. Emerging from the decisions of the courts, however, are clear principles governing the approach towards international insolvencies. This approach may be summarised as being a genuine desire to apply all methods available in domestic law to the foreign company so as to produce the best result, whether this means the continuation of the company in business or its liquidation. If any international text is to succeed, it must create legislative space for individual courts, applying domestic legislation, to achieve the reconciliation between the various interests in insolvency, those of the company, its creditors, employees and shareholders. The uniformity that is to be introduced by means of a text must relate to the co-operative aspects of the text, so as to permit the efficient management of insolvency procedures and allow courts to give their support to the individuals called upon to manage these procedures. An examination of how these two domestic systems will evolve must need be conducted through looking at the creation of domestic solutions to cross-border insolvency situations and the gradual evolution of these rules in light of the increasing pressure on domestic systems to deal with matters at an international level. From the above outline, it has been possible to see how the domestic courts in the jurisdictions concerned seek to achieve consensus and create methodologies to deal with insolvencies having a cross-border dimension and their treatment. Furthermore, as a solution is sought at the international level for the organisation of insolvencies with an international element, it has also been possible to give an outline of the possible impact on domestic law and practice. The issues that emerge from this discussion and the effect these have on the acceptance and exercise of jurisdiction by domestic courts can be noted, these issues generally being grouped under the rubrics of the treatment of participants in insolvency, the effect of court control over assets, claims related to assets and their satisfaction, and are useful in revealing how the views of the courts in these jurisdictions might affect the introduction of the Regulation.

The Regulation was designed to offer a partial solution to the conflict inherent in cases involving fact situations that might engender dispute between courts with very different philosophies of insolvency, not just those involving the administration of insolvency process but in the taking and exercise of jurisdiction. In this regard, the paradigm that results from the Regulation represents a compromise for all concerned, one that has been bitterly fought over for nearly forty years and through a considerable number of drafts. Although there are resonances for the courts of both jurisdictions concerned in elements of the framework, the co-operation and information provisions being cited as an example bearing similarities to British practice and the secondary jurisdiction provisions that accord with French practice, the overall framework will require the courts of both jurisdictions to lay aside existing views and preconceptions, arising for the most part from entrenchment of

domestic practices over a considerable period of time. One of the ways in which this may happen, as would apply when discussing the various paradigms for the creation of an international consensus for dealing with international insolvencies, would require courts to become more proactive in dealing with requests for assistance and to promote the right conditions for co-operation. This may also require new legislation in order for new procedures to be made available, but even under existing systems, there is a considerable capacity for courts to be more creative in the ways they choose to give effect to requests for the recognition of foreign judgments and orders and, especially, how they respond to calls for assistance. In this regard, restraint and judicial discretion also play a valuable part in determining whether the right courts are in charge of proceedings. A cautious note may be struck here to state that courts with a greater history of such ancillary assistance and co-operation will find it easier to reflect these principles in their practice, while courts without such a tradition may need longer to adjust.

In looking at the domestic rules applied in the two jurisdictions chosen, it may be seen that the very divergent philosophies in both of these jurisdictions stems partly from the importance of insolvency itself as a species of economic law with a great deal of state interest in its outcome. There is not much doubt, however, in either jurisdiction that the further development of insolvency is tied to this international outlook. The issues, however, governing the organisation of insolvencies at the international level raise complex and occasional perplexing questions that frequently involve references back to domestic law. It remains the case that some of the definitions in the Regulation will continue to be problematic because of the need to refer back to domestic rules on jurisdiction, thus potentially leading to differences in interpretation that may not be resolved until the European Court of Justice has had occasion to pronounce on matters.<sup>86</sup> This remains the case despite the fact that traditional rules based on jurisdictions adhering to either territorialism or universality as precepts have been increasingly seen as inadequate to deal with the rise in the number of international insolvencies. High profile failures and financial difficulties in corporate, commercial and banking sectors have created a need for urgent remedies and long-term solutions. They have also been the source of domestic anxieties about the effectiveness of domestic rules in seeking to contain insolvencies of this nature. The focus on co-operation initiated in a number of advanced commercial nations provides a partial solution to the problems posed by strict adherence to traditional rules. It is not, however, necessarily an effective substitute for proper international agreement on meeting the needs for the organisation of insolvencies across frontiers. Furthermore, further conditions for the success of international insolvency initiatives, such as the Regulation, have been determined as

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<sup>86</sup>Unfortunately, the terms of Title IV of the EC Treaty, under which the Regulation was adopted, stipulate that references to the European Court of Justice may only be made by courts from which there is no further appeal, in practice restricting the opportunity for references. That said, a recent Irish case: *Re Eurofood IFSC Ltd.* [2004] IEHC 54 (23 March 2004), in which Irish proceedings involving a company within the Parmalat group to which the Italian administrator objected were upheld, is likely to lead to such a reference with the consequence that a determination may be made on the permissible use of national criteria in interpreting the 'centre of main interests' definition.

including goodwill by courts and personnel involved, effective structures enhancing co-operation, effective structures in domestic law and an element of judicial restraint allowing for the best choices to be made about where insolvency proceedings should take place.

From the case law illustrating how the courts have chosen to view the Regulation thus far, it may be seen that, at least at the initial stage, the influence of the jurisdiction question is pervasive and that courts are concerned to ensure that debtors are fairly brought within the ambit of the Regulation wherever possible and that any exclusions are well-defined so as to avoid ambiguities in its application. Thus far, courts have had to deal with fact situations not provided for within the text of the Regulation, including issues relating to the extra-territorial effect of the text and the problems associated with groups of companies. If there is a consensus emerging, it is in the desire to steer a pragmatic course so as to ensure that insolvency practitioners are able to fulfil their functions and that creditors are not denied an effective remedy. In this, the practice is reflective of the discussions that have taken and are taking place at the international level in relation to the crafting of international insolvency texts, of which the Regulation is but one example, and where the desired goals are those of efficiency and effectiveness in insolvency proceedings for the benefit of all the participants involved. It remains to be seen, naturally, whether the Regulation will match these worthy aspirations. In this, the approach, outlook and determination that the courts continue to use in the issues brought before them for resolution will be of paramount importance.

**15 May 2004 (revised 13 January 2005)**