

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006

NIGEL BARNETT

Reconstruction and Insolvency Group

Denton Wilde Sapte

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 - Enactment

- S.14 Insolvency Act 2000 laid the groundwork for the introduction of the model law by way of statutory regulation.
- The Regulations finally came into force on 4 April 2006.
- The intent was to adopt the model law wholesale – only modifying the original text when thought to be absolutely necessary. Regulation 3 provides that in the case of any conflict between British Insolvency law and the Regulations, the Regulations shall prevail.

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 - Scope

- The Regulations apply to Scotland, England & Wales but not Northern Ireland.
- The Regulations govern both “inbound” requests for recognition, i.e. where a foreign court or foreign representative seeks assistance in connection with a foreign proceeding, and “outbound” requests where assistance is sought in a foreign state in connection with a proceeding under British insolvency law.

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 - Scope

- Credit Institutions, Insurance Companies and certain other parties are excluded from the scope of the Regulations.

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 - Scope

- The Regulations are not the sole route to recognition for a foreign representative.
- The EC Regulation on Insolvency Proceedings 2000 remains in force. In the event of conflict between the EC Regulation and the Regulations the EC Regulation shall prevail.
- The power of certain (principally Commonwealth) countries to seek relief by way of an application under s.426 Insolvency Act 1986 is also preserved.

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 - Definitions

- The definitions of “foreign main proceeding”, “foreign non-main proceeding” and “foreign proceeding” are adopted from the model law without amendment, i.e. the proceeding must be a proceeding under a law relating to insolvency. Unlike Chapter 15, the definition is not extended to include a proceeding under a law relating to adjustment of debt.

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 - Definitions

- A definition of “hire purchase agreement” is included which is expressed to include a conditional sale agreement, a chattel leasing agreement and a retention of title agreement.
- Administrative Receivers are excluded from the definition of British Insolvency officeholder.

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 – Venue and Procedure

- Jurisdiction is reserved to the Chancery Division of the High Court in London and specialist Chancery District Registries in the Provinces.
- In Scotland jurisdiction is reserved to the Court of Session in Edinburgh.

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 – Venue and Procedure

- An application for recognition shall be accompanied by:
 - a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative
 - a certificate from the foreign court affirming the existence of the foreign proceedings and the appointment of the foreign representation
 - in the absence of the above such other evidence as may be acceptable to the court

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 – Venue and Procedure

- The application itself must state certain prescribed matters including brief particulars of the foreign proceeding, the address of the Debtors COMI and where the Debtors COMI is not in the country where the foreign proceeding is taking place details of the Debtor's establishment in that country.

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 – Venue and Procedure

- The application must be supported with evidence in the form of an affidavit containing:
 - the certified copies referred to above
 - evidence of the Debtors COMI or establishment (as appropriate)
 - such other evidence as will be of assistance to the court

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 – Venue and Procedure

- The application must be served not less than 5 business days before the hearing on:
 - the foreign representative
 - the debtor
 - any British insolvency officeholder acting in relation to the debtor
 - any administrative receiver or receiver or manager of property of the debtor
 - any member state liquidator appointed in main proceedings in relation to the debtor

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 – Venue and Procedure

- any foreign representative appointed in any other foreign proceedings
- any petitioner for the winding up or bankruptcy of the debtor
- any person entitled to appoint an administrator of the debtor
- if the debtor is of interest to the Financial Services Authority on the Authority
- In cases of urgency the court can:
 - grant interim relief
 - abridge or even dispense with notice

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 – The Stay

- Automatic stay in the case of recognition of Foreign Main Proceedings. To be applied for in the case of a Foreign Non-Main Proceeding.
- Proceedings against the debtor's assets, rights, obligations or liabilities stayed.
- Execution against the debtor's assets stayed.
- The right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.
- The scope and effect of the stay is the same as if (in the case of an individual) a bankruptcy order had been made and (in the case of a corporate body) as if a winding up order had been made.

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 – The Stay

- The stay does not affect as a matter of course any right:
 - to take steps to enforce security over the debtor's property;
 - to take steps to repossess goods in the debtor's possession under a hire purchase agreement;
 - to take steps in respect of certain legislation governing financial contracts;
 - of a creditor to set off its claim against a claim of the debtor.

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 – The Stay

- **HOWEVER:** the Court can grant any additional relief that would otherwise be available to a British Insolvency Officeholder including the power to stay security enforcement.
- The stay does not bind a bona fide purchaser for value of a legal estate unless the purchaser has express notice of the stay.

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 – Recognition

- The Regulations provide that whilst the claims of a foreign tax or social security authority may not be challenged solely on that ground a claim may be challenged:
 - on the ground that it is wholly or in part a penalty;
or
 - on any other ground that a claim might be rejected in a proceeding under British Insolvency law.

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 – Co-operation

- The Court “may” co-operate with foreign courts either directly or through the British Insolvency Officeholder.
- Intra-court communication is authorised.
- A British insolvency office holder shall *to the extent consistent with his other duties under the law of Great Britain*, in the exercise of his functions and subject to the supervision of the Court, co-operate to the maximum extent possible with foreign courts and foreign representatives.

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 – Protection of Creditors

- Power to modify or terminate recognition.
- In deciding whether to grant, modify or terminate recognition the court must be satisfied that the interests of creditors, including secured creditors, parties to hire-purchase agreements and other interested persons are adequately protected.
- Court has power to impose conditions including bonding.

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 – Protection of Creditors

- The Regulations create the offence of misfeasance by a foreign representative.
- If a foreign representative (amongst other things) has breached a fiduciary or other duty in relation to the debtor he can be ordered to contribute a sum to the debtor's property by way of compensation.

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 – Avoidance provisions

- The avoidance provisions available in a “domestic” proceeding are extended to a recognised foreign proceeding, namely voidable preferences, transactions at an undervalue and avoidance of floating charges.
- The “onset of insolvency” for the purpose of the above provisions will be the date of opening the relevant foreign proceedings (as determined by the appropriate foreign law).

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 – Avoidance provisions

- If the foreign proceeding is a foreign non-main proceeding the court will have to be satisfied that the assets in question should be administered in the foreign non-main proceeding.
- If there is a concurrent British insolvency proceeding an avoidance application requires the permission of the court.

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006 – Avoidance provisions

- If an order is made on an avoidance application the court may give directions regarding the distribution of any proceeds of the claim by the foreign representative to ensure that the interests of creditors in Great Britain are adequately protected.

DentonWildeSapte...

The Cross-Border Insolvency Regulations 2006

NIGEL BARNETT

Reconstruction and Insolvency Group

Denton Wilde Sapte