

Enactment of the UNCITRAL Model Law in Great Britain

**Presentation to VI Annual International Insolvency Conference
Fordham University School of Law
12 June 2006**

By

**Professor Ian F. Fletcher
Herbert Smith Professor of International Commercial Law
University College London
Barrister, 3-4 South Square, Gray's Inn**

OUTLINE

1. Principal points of reference:

- **The Cross-Border Insolvency Regulations 2006**, S.I. 2006/1030, in force from **4 April 2006**
- Consultation Paper issued on 22 August 2005, together with Summary of Responses and Government Reply, March 2006, can be viewed on the Insolvency service website: www.insolvency.gov.uk/insolvencyprofessionandlegislation/
- UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment, adopted May 1997 (“the original text”)
- Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (“the EC/EU Regulation”)
- Insolvency Act 1986 (c.45) (“the principal Act”)
- Insolvency Act 2000 (c.39); Enterprise Act 2002 (c.40), Part 10 (“the amending statutes”)

2. Scope of the 2006 enactment

- Great Britain only (i.e. England, Wales and Scotland): Reg. 2(1).
- Extension to Northern Ireland expected in due course.
- List of entities excluded from the scope of the Model Law in GB: Art.1(2) (13 categories).
- Explicit exclusion of interference with financial market contracts governed and regulated by primary and secondary legislation: Art.1(4).
- Interpretation: Art.2 (Definitions): (a) “British insolvency law”; (b) “British insolvency officeholder”; (c) “establishment”; (d) “foreign court”; (e) “foreign main proceeding”; (f) “foreign non-main proceeding”; (g) “foreign proceeding”; (h) “foreign representative”; (i) “security”; (j) “the law of Great Britain”.
- Aids to interpretation: Reg. 2(2) (“without prejudice to any practice of the courts as to matters which may be considered apart from this paragraph”).
- General approach to interpretation: Art.8.

3. Interaction with other bases of recognition and assistance

The jig-saw puzzle now consists of the following pieces:

- Principles developed at common law for the recognition of foreign insolvency proceedings and providing assistance to foreign office holders;
- The comprehensive regime of the EC Regulation, for cases to which it is applicable;
- The special statutory procedure under s.426 of the Insolvency Act 1986, for cases to which it is applicable;
- Recognition and assistance under the provisions of the Model Law as enacted for Great Britain.

Note: Art. 3 provides that to the extent that the Model Law conflicts with any UK obligation under the EC Regulation on Insolvency Proceedings, the latter shall prevail; Regulation 3(2) states that in the case of any conflict between any provision of British insolvency law and the Model Law, the latter shall prevail.

4. Recognition of foreign proceedings and “relief”

- Application for recognition must be made to the competent court: Arts.4, 15 (in England and Wales, the High Court, Chancery Division; in Scotland, the Court of Session). “Appropriate forum” concept: Art.4(2)(b), (3).
- An application for recognition “shall be decided upon at the earliest possible time”(Art.17(3)).
- Recognition as a foreign main proceeding: Art.20 – “automatic stay”, specially formulated for GB application to render it co-extensive with the stay which would arise in the case of an individual adjudicated bankrupt (or, in Scotland, had his estate sequestrated), or in the case of a corporate debtor made subject to a winding-up order under the Insolvency Act 1986 (Art.20(2)). Note that:
 - A number of rights are exempted from the effects of the automatic stay by Art.20(3): (a) secured creditors can enforce rights over debtor’s property; (b) repossession of goods subject to a hire purchase agreement (which includes conditional sale, chattel leasing and ROT); (c) rights under financial market contracts; (d) creditor’s rights of set-off.
 - Application can be made to court to lift, modify or terminate the stay (Art.20(6)). Court may act of its own motion.
 - Stay does not prevent the exercise of the right to request or initiate the commencement of an insolvency proceeding under British insolvency law or the right to file claims in such a proceeding (Art.20(5)).
- Discretionary relief (Art.21). Available at discretion of the court at the request of the foreign representative upon recognition of a foreign proceeding, whether as main or non-main. Note also:

- Power to order examination of witnesses (Art.21(1)(d)).
- Power to entrust administration or realisation of assets to foreign representative or another designated person (Art.21(1)(e)).
- Power to authorise turnover of assets located in GB to the foreign representative, provided the interests of creditors in GB are *adequately protected* (Art.21(2)).
- Power to enhance the scope and effects of the stay so that it equates with that which would be applicable in the case of a company in administration (Art.21(1)(g)). (Potential relevance in furtherance of multi-jurisdictional rescue of companies).

5. Treatment of claims

- General principle of equality of treatment: Art.13(1).
- Foreign revenue claims admissible unless subject to challenge on ground of penal characteristics, or on any ground generally applicable as a basis for the rejection of claims: Art.13(3).

6. Transaction avoidance: Article 23

- Greatly expanded provision compared to Art.23 of the original UNCITRAL text.
- Foreign representative has standing to invoke a number of specified statutory provisions for attacking prior transactions, including preferences, transactions at an undervalue, extortionate credit transactions, floating charges to secure past indebtedness, excessive pension contributions made by individual debtors, and transactions in fraud of creditors. Note:
 - Special formulation of the criteria for determining the time which is to be regarded as the “relevant time” for the purposes of any hardening off periods associated with avoidance provisions: “the date of the opening of the relevant foreign proceedings” (Art.23(3)), determined according to the rule fixed by Art.23(4): “in accordance with the law of the state in which the foreign insolvency proceeding is taking place, *including any rule by virtue of which the foreign proceeding is deemed to have opened at an earlier time.*”
 - On the significance of such “relation-back” rules of domestic insolvency law, see *Re Eurofood IFSC Ltd*, Case C-341/04, Judgment 2 May 2006 (ECJ); Opinion of Advocate-General Jacobs 27 September 2005.
 - Potential scope for forum-shopping by foreign representative? Note possibility that GB court may invoke doctrine of *forum non conveniens*, and the special significance of Arts.2(q), 23(5).
- Non-retrospective application of Article 23: the clawback remedies do not apply to any acts or transactions made or entered into before 4 April 2006.

- Note possibility of attacking pre-April 2006 transactions by opening a proceeding under British insolvency law: Arts. 20(5), 23(8) (but the “relevant time” will consequently move forward in line with the “normal” domestic rule, which may mean that the hardening off period has expired).
- Presumption of insolvency based on recognition of a foreign main proceeding (Art.31) can facilitate the opening of a proceeding under British insolvency law (but the overarching effects of the EC Regulation would preclude the opening of a proceeding in the case of a debtor whose COMI is in another EC Member State (other than Denmark) unless the debtor has an establishment in the UK).

7. Co-operation with foreign courts and foreign representatives

- Arts.25-27 follow the original text quite closely, BUT:

- Art.25 makes co-operation a matter of discretion for the British court (“*may* co-operate to the maximum extent possible with foreign courts or foreign representatives”);
- Art.26 makes co-operation obligatory for a British insolvency officeholder (“*shall* co-operate to the maximum extent possible with foreign courts or foreign representatives”), but inserts the vital proviso that this shall be “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”.

8. Commencement of a concurrent (territorial) proceeding after recognition of a foreign main proceeding

- Art.28 follows the original text in declaring that the effects of the British proceeding in relation to the same debtor “shall, insofar as the assets of the debtor are concerned, be restricted to assets that are located in Great Britain and, to the extent necessary to implement co-operation and co-ordination under articles 25, 26 and 27, to other assets of the debtor that, under the law of Great Britain, should be administered in that proceeding.”
- Note the omission of the precondition embedded in the original text of Art.28 (“...may be commenced only if the debtor has assets in this state ...”) – allowing the continued application of rules of jurisdiction based on “sufficient connection” with GB, short of a presence of assets (including rules of long-arm jurisdiction over individuals contained in s.265 of the Insolvency Act 1986, and the jurisdiction to wind up foreign companies as “unregistered companies” under Part V of the Act).

9. Practice and procedure

- Sched. 2 (Procedural matters), para.2: Recognition application (Form ML1, Sched. 5)
- Sched. 2, para 3: Form and content of application; para 4: contents of affidavit in support;

- Sched. 2, paras 7-11: Application for relief .

10. Closing comment

- The 2006 enactment by GB is the product of a prolonged, but necessary, process of assessment and consultation to determine the acceptable levels of implementation consistent with the maintenance of commercial certainty and established standards of judicial and professional practice. A positive step to improving international co-operation. But there are numerous divergences from the original UNCITRAL text:
Caveat lector!

© I.F. Fletcher 2006