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ARTICLE

The UNCITRAL Model Law on Cross-Border Insolvency: Interaction with the English Courts

Paul J. Omar, Barrister, Gray's Inn, London, UK

Introduction

The management of cross-border insolvency instances has a long pedigree in the United Kingdom, especially within the jurisdiction of the courts of England and Wales, which, as early as the 18th century,[1] began offering the courts of other countries assistance in the administration of cases involving debtors trading or with assets in both jurisdictions.[2] Progressively, the means of assistance have acquired legislative support, firstly through mutual aid provisions, first seen in the Bankruptcy Act 1861,[3] and later the 'aid and auxiliary' doctrine set out in section 74 of the Bankruptcy Act 1869 and its legislative successors: section 122 of the Bankruptcy Act 1914 and section 426 of the Insolvency Act 1986,[4] the latter also extending the provision to corporate insolvencies. Alongside this, as a parallel to the bankruptcy provisions, ancillary winding up, as now seen in section 221 of the Insolvency Act 1986, became the preferred co-operation mechanism for corporate debtors potentially subject to procedures in more than one jurisdiction. Membership of international organisations taking an interest in insolvency matters has resulted in the application of the European Regulation on Insolvency Proceedings 2000,[5] while the initiative launched by UNCITRAL, which brought about the adoption of the UNCITRAL Model Law on Cross-Border Insolvency 1997,[6] has also recently been given legislative effect in 2006.[7] The Model Law is an innovative document that places co-operation and assistance at the heart of the text, particularly in Chapter IV (Articles 25-27), whose provisions are based on the ideal of co-operation between insolvency courts and representatives.

The richness of the landscape now in international insolvency matters is quite evident in the United Kingdom.[8] By and large, the countries that may take advantage of provisions such as section 426 and the Insolvency Regulation are, largely for historical and political reasons, divided into different groups. However, given its wider international remit, the Model Law appears potentially to offer the widest scope for application. Despite this, although there is a rich pedigree in the common law with many cases illustrating the workings of section 426 and the application of the Insolvency Regulation, the Model Law, as the most recent introduction to this landscape, has not had as extensive coverage within the case law as other statutory systems governing international co-operation. Nonetheless, a cursory search of the BAILII[9] website reveals there have been a number of cases mentioning the Model Law, even prior to its incorporation into domestic law in 2006. *Mazur Media*[10] noted the then lack of amendments to domestic law occasioned by section 14 of the Insolvency Act 2000, whose purpose was to incorporate the Model Law into domestic law, which left no scope for the court to exercise discretion to refuse to give effect to proceedings taking place in Germany. The early stages of the *HIH* litigation contained an incidental comparative discussion on types of assistance forthcoming under the Model Law and the Insolvency Regulation within the context of a

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1 See, for an early example, *Solomons v Ross* (1764) 1 Hy. Bl. 131n; 126 ER 79.
2 The common law continues to generate principles in jurisdictions where statutory support is not available.
3 In particular, sections 216-220.
4 Referred to below as 'section 426'.
5 Council Regulation (EC) No. 1346/2000 of 29 May 2000 (referred to below as the 'Insolvency Regulation').
6 Referred to below as the 'Model Law'.
7 SI 2006/1030 (in force 4 April 2006).
8 See, by this author, Cross-Border Insolvency Law in the United Kingdom: An Embarrassment of Riches (2006) 22 IL&P 132.
9 British and Irish Legal Information Institute: <www.bailii.org>. The cases mentioned in this article are all accessible via this website.
10 *Mazur Media Ltd & Anor v Mazur Media GmbH & Ors* [2004] EWHC 1566 (Ch) (07 July 2004).

section 426 application.[11] Post-incorporation in 2006, *Cambridge Gas*[12] contains a brief mention of the non-application of the Model Law to the facts of the case in question, as does the appeal in *HIH*.[13] *Millhouse Capital*,[14] although decided on other grounds, contains two statements about the Model Law: firstly, the entitlement of the foreign liquidator to recognition under Article 9 of his status to commence proceedings in the United Kingdom and, second, the willingness of the courts to consider an ancillary winding up as one of the forms of assistance under Chapter IV of the Model Law. Passing reference to the duty of the court to co-operate under Article 31 of the Insolvency Regulation and a comparison with the position under the Model Law appears in *Re Nortel*,[15] while *Perpetual Trustee*[16] refers to the general policy of the courts to co-operate under international texts governing cross-border insolvency. Lastly, a dispute over which of two parallel overseas proceedings merited recognition under the Model Law is the subject of *Re Stanford International*.[17]

Apart from the above cases, there was until recently little information as to how the English courts would interpret requests for assistance under the Model Law, particularly in light of domestic policy and practice that inform applications under the common law and, to a certain extent, section 426.[18] Of the limited selection of cases available, only three point the way to how English courts might, within the tradition of co-operation, give effect to the Model Law. The first of these cases, *Warner*,[19] a judgment of the Chancery Division of the High Court, illustrates how human rights principles might apply to a request for assistance and relief under the Model Law. The second case, *Harms Offshore*,[20] a judgment of the Court of Appeal, has provided elucidation in particular on how domestic practice relating to anti-suit injunctions may have an impact on the conduct of a case in another jurisdiction and, incidentally, makes note of how English courts should ideally interact with the courts of states also applying the Model Law. The third and final case, *Eurofinance SA*,[21] a decision of the Commercial Court, illustrates how English courts can take a purposive approach and creatively interpret domestic enabling rules so as to further the use of the Model Law, but will also draw on principles of private international law to delimit how far this assistance can be forthcoming in the context of litigation related to insolvency proceedings.

I. Warner

The facts

The applicant was the Australian trustee in bankruptcy of the estate of the late Rene Rivkin, in which a substantial claim for back taxes in the order of some AUD 30 million was filed by the Australian Taxation Office. On 18 May 2007, the Chancery Division made an order recognising the proceedings as foreign main proceedings under the Model Law as applied in the United Kingdom. On 17 August 2007, the trustee applied under the relief provision of the Model Law for an order under Article 21(1)(d) to require the respondent company disclose copies of documents relating to dealings with the deceased bankrupt. As the order was drafted in consultation with the respondents, the trustee did not anticipate any objection to the disclosure. Nonetheless, an application was made on 31 October 2007 by Benno Hafner, a Swiss lawyer, and the firm he represented sought to be added to proceedings as intervening parties, claiming to fall within Article 22 of the Model Law as 'interested persons' affected by relief the court was being asked to give and whose interests the court was duty bound to consider. In essence, the interveners were objecting to disclosure on the grounds of breach of confidentiality and an unjustified infringement of their and their clients' rights to respect for their private life and correspondence under Article 8

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11 *McMahon & Ors v McGrath & Ors* [2005] EWHC 2125 (Ch) (07 October 2005).
12 *Cambridge Gas Transport Corp v. Official Committee of Unsecured Creditors (of Navigator Holdings PLC and others)* (Isle of Man) [2006] UKPC 26 (16 May 2006).
13 *HIH Casualty & General Insurance Ltd & Ors v McMahon & Ors* [2006] EWCA Civ 732 (09 June 2006). Similarly, *ETI Euro Telecom International NV v Republic of Bolivia & Anor* [2008] EWCA Civ 880 (28 July 2008) and *Syska v Vivendi Universal SA & Ors* [2008] EWHC 2155 (Comm) (02 October 2008) both contain passing references to the definition of proceedings in the UNCITRAL Model Law as encompassing the arbitration procedures at issue in those cases.
14 *Millhouse Capital UK Ltd & Anor v Sibir Energy Plc & Ors* [2008] EWHC 2614 (Ch) (29 October 2008).
15 *Re Nortel Networks SA & Ors* [2009] EWHC 206 (Ch) (11 February 2009).
16 *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd & Anor* [2009] EWHC 1912 (Ch) (28 July 2009).
17 *Stanford International Bank Ltd & Ors, Re* [2009] EWHC 1441 (Ch) (03 July 2009).
18 Arguably, it is debatable whether English courts have much discretion under the Insolvency Regulation, which because a European instrument is a text directly applicable in the United Kingdom, although its Article 26 does give some scope for a public policy exception to the automatic recognition enshrined in Articles 3 and 16. It is likely that the European Court of Justice will, as it has done in the case of many other European texts, strictly construe this exception.
19 *Warner v Verfides (Hafner et al intervening)* [2008] EWHC 2609 (Ch) (29 October 2008).
20 *Harms Offshore AHT 'Taurus' GmbH & Co KG v Bloom & Ors* [2009] EWCA Civ 632 (26 June 2009).
21 *Rubin & Anor v Eurofinance SA & Ors* [2009] EWHC B16 (Comm) (31 July 2009).

of the European Convention of Human Rights.[22] Part of the third parties' case was that the instant proceedings should be stayed until the outcome of separate proceedings brought by the Australian Securities and Investment Commission ('ASIC') in reliance on the Crime (International Co-Operation) Act 2003 seeking disclosure of documents in connexion with an investigation into the affairs of the deceased bankrupt was known. Their argument was that there was a substantial overlap in the categories of documents being sought in both proceedings and that production in the instant proceedings of documents that could eventually be disclosed to the ASIC should be subject to the third parties' right to object. In fact, the third parties' were accorded the status of interveners on 17 January 2008. Subsequent to an order by the Registrar on 27 May 2008, the respondents were instructed to deposit the documents in court upon which the judge examined, in light of confidential submissions, certain documents objected to by the interveners, coming to the conclusion that, independently of any view of the rights of the interveners to object, material in those documents fell outside the disclosure order sought. The judge also issued an order that those documents, even once edited, should not be disclosed to the ASIC without prior leave of the court being given.

The judgment

The present judgment arose in the context of the decision on the costs of the interveners' application and intervention. The trial judge was of the view that the award of costs depended on whether the interveners had a sufficient interest in the proceedings to justify their intervention. It is here that the application of Article 8 was most cogently argued by the interveners, perhaps comforted by the fact that the same rights had been accorded due weight in their intervention in the proceedings brought by ASIC, subsequent to a judgment of the Divisional Court on 5 March 2008. Three things resulted from that judgment: (i) business correspondence is capable of attracting the protection of Article 8;[23] (ii) the fact that disclosure is sought in proceedings not involving the interveners does not exclude the protection of Article 8;[24] and (iii) Article 8 applies to all stages of the process by which public authorities obtain documents by compulsion (including collection, storage and use).[25] The trustee in bankruptcy, who was not bound by the decision of the Divisional Court, contended that the documents did not constitute 'correspondence' under Article 8, as the documents had already reached the addressee.[26] Furthermore, the trustee in bankruptcy argued that the application of Article 8 would unduly inhibit the production or disclosure of documents in proceedings if the interests of parties who had authored the documents were to be taken into account.

The trial judge was of the view that the construction of the term 'correspondence' did not invite a restriction to letters still in the writer's hands or in the course of being transmitted. The cases cited by the trustee in bankruptcy, which were determinations made by the European Human Rights Commission,[27] could not stand with the interpretation by the European Court of Human Rights in *Niemietz*, in which the search of a lawyer's office involved the examination of filing cabinets containing client data and files. The trial judge considered that, in *Niemietz*, the European Court of Human Rights apparently gave a wide definition to the term 'correspondence' to cover a wide range of documents. The trial judge was also of the view that documents in the possession of the addressee did not cease to be 'correspondence' for the purposes of attracting the protection of Article 8. Referring to the further objection raised by the trustee in bankruptcy, the trial judge was of the view that the exception in Article 8(2), also referred to in *Niemietz*, would afford in many instances a defence to the claim of a breach of the right to privacy, given that the courts would, in all likelihood, acknowledge that the interests of the trustee in bankruptcy outweighed the collective interests of the other parties and that interference was thus justified. Finally, on the costs issue, for reasons related to the conduct of proceedings, the trial judge ordered that the parties should bear their own costs.

Analysis

The trial judge's robust perspective on the application of Article 8 is tempered by the acknowledgment that the exception in Article 8(2) would justify the courts in treating the trustee in bankruptcy's interest as paramount in cases involving the conflict between an individual's right to privacy and the public interest in there being disclosure in insolvency law cases, particularly where the trustee in bankruptcy

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22 Given effect in the United Kingdom through the Human Rights Act 1998.
23 Citing *Funke v France* (1993) EHRR 297; *Niemietz v Germany* (1992) 16 EHRR 97.
24 Citing *Z v Finland* (1997) 25 EHRR 371.
25 Citing *Amann v Switzerland* (2000) 30 EHRR 843.
26 Citing *G, S and M v Austria* (Application 9614/81) and *AD v Netherlands* (Application 21962/93).
27 Determinations on admissibility prior to the cases being argued before the European Court of Human Rights.

(or insolvency administrator, nominee or liquidator) is seeking to recover funds for the benefit of creditors as a whole. However, early arguments surrounding the use of compulsion in insolvency examinations as potentially breaching the Article 6 right to a fair trial and the privilege against self-incrimination, decided in *Saunders*,[28] may also have a part to play here. Where the exception in Article 8(2) is successfully employed, the consequence would not be limited to the loss of control over the information, but could potentially lead to the use of that information to found civil and/or criminal proceedings, as plainly was the interveners' concern with the potential transmission of information to the ASIC. In the instant case, this worry was palliated by the judge's decision to subject disclosure to the requirement to seek the leave of the court, a decision that would permit a further opportunity to the party concerned to present any Article 6-related arguments. However, this protective jurisdiction might not be exercised in every case. The concern will be that information legitimately sought by a trustee in bankruptcy for the purposes of the efficient administration of proceedings will be, once in the public domain, utilised by investigative agencies to the prejudice of potential defendants.

II. Harms Offshore

The facts

The facts arise from the insolvency of Oilexco North Sea Limited, which was placed into administration under Schedule B1 of the Insolvency Act 1986 by Mr Justice Patten on 7 January 2009. Administrators, who together with the company were the respondents to this application, were appointed and authorised to enter into loan agreements with specified lenders so as to be able to draw funds to meet post-administration liabilities, thus permitting the company to continue to trade in order to permit either the sale of the company or its business as a going concern. The appellant companies, one-ship companies incorporated in Germany, were pre-administration creditors of the company, whose liability arose from time charterparties of two offshore service vessels amounting to nearly GBP 1.2 million. Despite notice of the existence of the administration proceedings, the appellants applied to the United States Bankruptcy Court (Southern District of New York) on 16 January 2009 for attachments and/or garnishments of the company's assets to meet their claims. The application did not mention the existence of the administration nor of the arbitration clauses under the charterparties to which they were subject. On 21 and 26 January 2009, *ex parte* orders were granted by the American court attaching the property of the company and a summons was issued joining the company as a defendant to proceedings and notifying some 19 banks as potential holders of company assets. As the administrators remained in ignorance of the attachments, notice of the American proceedings and orders not having been served till 24 March 2009, a payment of USD 2 million to a supplier's account at a bank in New York, made on 19 March 2009, designed to pay part of an outstanding bill of some USD 3.3 million, was attached in favour of the appellants.

In the meantime, the administrators, acting pursuant to the administration order, had agreed a sale of the company's shares conditional on a compromise of the company's liabilities, the whole to be effected by means of a corporate voluntary arrangement under Part I of the Insolvency Act 1986 under the umbrella of the administration order. The creditors, including the appellants, who submitted voting/proxy forms on 9 April 2009, had also approved the corporate voluntary arrangement, subject to the administrators' appointment ceasing to have effect. On 7 May 2009, the administrators brought proceedings in the American court seeking to vacate the attachments obtained by the appellants. On 15 May 2009, following an application by the administrators, Mr Justice Englehart granted an injunction requiring the appellants to use their best efforts to procure the release of the attachment/garnishment orders and gave permission to appeal, without, however, staying the order. As a matter of urgency, the Court of Appeal heard the appeal on 20 May 2009, given that the American court was due to pronounce on the application by the administrators later that same day. The Court of Appeal accepted the administrators' contention that the release of the attachments was necessary to enable them to vacate office and complete the sale of the company's shares and accordingly dismissed the appeal against the injunction. Although a brief summary of the court's reasons was given that day, including that it would be of assistance to the American court to know why the English courts had maintained the injunction, written reasons for the dismissal were subsequently published on 26 June 2009.

The judgment

In giving its judgment, the main consideration for the Court of Appeal was the interaction between the two sets of proceedings. For the appellants, counsel argued that the opening of American proceedings was not

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28 *Saunders v United Kingdom* (1996) 23 EHRR 313.

in breach of the statutory restriction against taking proceedings against a company in administration set out in Paragraph 43(6) of Schedule B1, given that the provision had no extra-territorial effect. Furthermore, there was arguably no trust issue that justified an anti-suit injunction prohibiting proceedings against assets of the debtor in another jurisdiction. As the American court had been properly seized of proceedings, comity required the English courts to abstain from interfering with those proceedings, especially given that the United States had also adopted the Model Law in Chapter 15 of the Bankruptcy Code and that the administrators were parties to those proceedings. For the respondents, counsel argued that the injunction was necessary, given that the conduct of the appellants in launching the American proceedings interfered substantially with the exercise by the administrators of functions granted them by the English order and that the subject matter of the American proceedings had, in any event, no connection with that court.

The Court of Appeal began by examining the extra-territorial application of insolvency provisions. In *Re Oriental*,[29] in which the liquidator had obtained an order requiring a creditor who had successfully obtained an attachment in India to return those assets to the liquidation, the court had taken the view that the winding up was 'necessarily confined to the country'.[30] Although the view had previously been taken that the courts could proceed as if there was an auxiliary winding up taking place in India, the Indian courts had declined to assist this course, thus limiting the strategy the English courts could adopt of extending the global reach of domestic insolvency proceedings with an international element.[31] The court, nonetheless, observed that if the assets of the debtor were 'liable to be torn to pieces by creditors', the collection and application of the debtor's assets according to the equitable and rateable distribution rules would be frustrated. The court stated that, if Parliament's intention was to be fulfilled, it was necessary to treat the assets as trust property. Accordingly, the property ceased to be that of the debtor's (being instead subject to a statutory trust to be dealt with in a particular way) and thus no longer fell subject to execution obtained by creditors. Although admittedly, problems might arise in being able to deal with the assets subject to the jurisdiction of other courts and in obtaining the co-operation of other courts, this could not prevent the English court from forming the proper view that a creditor, subject to knowledge of the trust over the debtor's assets created by virtue of the existence of insolvency proceedings, could not retain the advantage obtained as a result of execution over assets elsewhere,[32] but must repatriate the assets for distribution between fellow creditors within the collective proceedings. With this view, the Court of Appeal was entirely in agreement.

The Court of Appeal admitted, nonetheless, the difficulty with respect to the extra-territorial effect of the statutory provisions involved in this case, especially given the distinction that could be made between the position of a company subject to winding up, as in *Re Oriental*, and that of one in administration. Despite the administrators' contention that 'property' as defined in section 436 of the Insolvency Act 1986 applied to property 'wherever situated', the Court of Appeal was of the view that the prohibition against 'legal process' affecting such property in Paragraph 43(6) of Schedule B1 could not really be interpreted as applying to process outside the jurisdiction. The difficulty was compounded by the absence of any express extra-territorial intention in the formulation of the provision and by the judgement in *Mitchell*,[33] in which Mr Justice Blackburne decided that the section 183 of the Insolvency Act 1986 prohibition against levying execution or attachment after the commencement of winding up proceedings does not apply to foreign proceedings, his view being undisputed later before the Court of Appeal in the same case. Although seemingly, the extra-territorial effect of the provisions in contention could be doubted, the Court of Appeal did not feel it necessary to determine the issue, given that the line of authority offered by *Re Oriental* and other cases permitted the court to exercise a protective jurisdiction over assets belonging to a debtor and that any difference between the nature of administration and winding up proceedings mattered little in this context. This view was comforted by the use of this protective jurisdiction in *Re Polly Peck*,[34] involving a company in administration.

Whether the Court of Appeal felt bound to exercise this protective jurisdiction was, however, a different issue, which also involved considerations of comity. The Court of Appeal found very helpful the summary of the balance to be reached found in *Re Vocalion*,[35] where the

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29 *Re Oriental Inland Steam Company, ex parte Scinde Railway Company* (1874) LR 9 Ch App 557.
30 Ibid., at 558 (per James LJ).
31 It is interesting to note that the legislation in 1862 allowed English courts to wind up unregistered companies, albeit doubtful that it applied to foreign companies until the judgment in *Re: Jarvis* (1895) 11 TLR 373.
32 Subject of course to the temporality rule, which permits the benefit of execution obtained prior to the insolvency judgment to stand. However, even in this instance, if execution is not perfected prior to proceedings being opened, it may fall foul of any applicable moratorium.
33 *Mitchell v Carter* [1997] 1 BCLC 673.
34 *Re Polly Peck International plc (in administration) No 4* [1998] 2 BCLC 185.

in personam jurisdiction to restrain a defendant from pursuing proceedings had to be contained by the view as to whether substantial justice was more likely to be attained by allowing foreign proceedings to continue. In the instant case, although a *forum non conveniens* argument was effectively raised by the respondents, the Court of Appeal agreed with the Privy Council's view that the inconvenience of a forum was not in itself a sufficient justification for the grant of injunctive relief.[36] However, the view could also be taken, as it was before the Privy Council, that the purpose of an anti-suit injunction could be to protect the jurisdiction of the English court, despite the general view that 'comity demands a policy of non-intervention'.[37]

The Court of Appeal found it necessary, despite the very obvious experience of the American court in insolvency matters, to protect the ability of the administrators to exercise their statutory functions and to fulfil their statutory duties, particularly where the conduct of the creditors concerned could be characterised as oppressive, vexatious, unfair or improper. In reaching its decision, the Court of Appeal found a number of factors relevant, including the fact that the company was incorporated and subject to an administration in England, the appellants were neither incorporated nor carrying out business in the United States and had not informed the American court of the existence of the administration, despite the requirement for full and frank disclosure. Furthermore, the attachments could only operate on the basis of post-administration property coming into the jurisdiction of the American court and in fact operated on moneys that the administrators had transferred so as to pay off a post-commencement liability in ignorance of the attachment orders obtained, a situation the Court of Appeal considered interfered with the performance of the statutory functions and duties of the administrators. The result would also be to require the administrators, to avoid the consequences of the order, to seek the recognition of the English proceedings under the Model Law, a step that would necessarily engage the further costs involved in being represented and arguing a case before the American court. Accordingly, the unconscionable conduct of the appellants in bringing the American proceedings and keeping the administrators in ignorance of the orders for a three-month period brought this case within the exceptional category justifying injunctive relief.

Analysis

The case is very interesting in that it outlines an expansive view of comity, albeit subject to considerations of domestic policy. English courts have generally had a positive view of comity and the need to assist or avoid impeding proceedings before other courts. Nonetheless, the highs and lows of comity can be illustrated by cases such as, on the one hand, *Re Dallhold* and, on the other, *Felixstowe*.[38] This case is best characterised as one in which there were exceptional circumstances, occasioned largely by the appellants' conduct in beginning proceedings in the United States, undoubtedly as a strategy designed to secure the best outcome for the appellants by effectively promoting them from unsecured to secured creditors through the use of the attachment/garnishment orders. In the present case, the strategy also had the effect of impeding the ability of the administrators to discharge post-commencement liabilities as a prelude to effecting the sale of the company's shares, a measure that would have allowed for the maximum benefit obtainable in the circumstances to be distributed equitably amongst all entitled creditors. The Court of Appeal rightly accepted that a generous view of comity had to be taken, particularly between jurisdictions that subscribed to the same set of rules contained in the Model Law on cross-border assistance, and that considerations of whether substantial justice could be reached by permitting foreign proceedings to continue played a part in whether to grant or refuse injunctive relief to petitioners. This had to be tempered by the equally acceptable view that comity was not open-ended and that the behaviour of the parties played a part in determining whether courts were prepared to exercise their equitable jurisdiction, a jurisdiction in which principles of fairness and unconscionability sat alongside procedural/substantive considerations. In the present case, although in theory, the administrators could have obtained recognition under the Model Law of the English proceedings by the American court, this was a less acceptable strategy in terms of costs and outcomes as opposed to having those proceedings dismissed. Thus, the domestic policy concerns in securing a fair outcome for all creditors by enabling the administrators to fulfil their statutory functions and comply with their duties necessarily trumped considerations of comity.

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35 *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196.

36 *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] 1 AC 871.

37 *Mitchell v Carter* [1997] 1 BCLC 673 at 685 (per Millett LJ).

38 *Re Dallhold Estates (UK) Pty. Ltd.* [1992] BCLC 621; *Felixstowe Dock and Railway Co. v United States Lines* [1988] 2 All ER 77, the latter strongly criticised as an example of a lack of judicial restraint in P. Millett, Cross-Border Insolvency: The Judicial Approach (1997) 6 IIR 99.

III. Eurofinance SA

The facts

The facts arise from insolvency proceedings involving The Consumers' Trust, a trust scheme settled by Eurofinance SA, a company set up in the British Virgin Islands, and whose trustees were 4 English solicitors and accountants. The substance of the scheme carried out by the trust, whose operations took place largely in North America, involved participating retailers issuing vouchers to customers, who would then be required to undergo a complex series of procedures before obtaining what amounted to an effective refund of the sales price. The trust collected some 6% of the value of the products from the retailers, but, owing to the complex and difficult procedures resulting in a low success rate for claims, retained substantial amounts in bank accounts in the United States and Canada. Following a successful claim in Missouri by the state's Attorney-General under consumer protection legislation and the prospects of similar claims in other states/provinces where the trust operated their scheme, the settlor company applied in the United States for the opening of Chapter 11 proceedings over the trust for a number of practical reasons, including almost all creditors and assets being present in North America as well as the availability of bankruptcy protection for the debtor trust as a species of business trust.

On 14 November 2005, the applicants in the instant proceedings were appointed receivers and managers of the trust. In May/June 2007, the receivers settled potential claims against the solicitor trustees for some GBP 3.2 million. On 24 October 2007, the United States Bankruptcy Court approved a liquidation plan under Chapter 11 and authorised action to be brought against a number of defendants, including the respondents in the instant proceedings. Default summary judgment was obtained in subsequent adversarial proceedings on 23 July 2008 in the amount of approximately USD 160 million on the basis that the defendants were general partners in the trust business and had breached their fiduciary duties and/or were negligent. Default judgment was also entered against the settlor company and the present respondents on the basis of transfers of money made to them at a time when the trust was effectively insolvent. The October order also authorised the respondents to act as foreign representatives of the trust in order to seek recognition of the American proceedings in the United Kingdom and to enforce the various court orders against the respondents. The instant proceedings are the consequence of this order and were taken with view to: (i) recognise the American proceedings as foreign main proceedings accompanied by recognition of the applicants as foreign representatives; and (ii) an order under Article 25 of the Model Law enforcing the decision of the United States Bankruptcy Court holding the respondents liable for the debts of the trust as a judgment of the English courts.

The judgment

There were two principal considerations for the court, which were to firstly decide on whether recognition could be offered to the bankruptcy proceedings and, second, what assistance could be forthcoming, including whether or not the proceedings brought against, *inter alia*, the respondents could be enforced. The first issue related to whether the trust fulfilled the definition of a debtor required for recognition under Article 17 of the Model Law. In objection, counsel for the respondents, although admitting that the trust could under United States law be the subject of bankruptcy proceedings, argued that the word debtor should be given its ordinary meaning under English law, which did not recognise the separate legal existence of the trust as a possible subject of insolvency proceedings. The court gave short shrift to this argument, holding that Article 8 of the Model Law required that courts have regard to the international origins of the text in interpreting its provisions. A 'parochial' interpretation, the Court held, would result in the refusal of recognition to bona fide proceedings taking place in another jurisdiction. Although there might be some difficulty in applying the terms of the Model Law to a debtor whose legal entity status is unknown in English law, the court would apply a purposive interpretation to the assets of and proceedings involving the trust held by the trustees *qua* trustees. The Court was therefore prepared to recognise the Chapter 11 proceedings as foreign main proceedings under the Model Law.

As far as assistance was concerned, the main issue revolved around the enforcement of proceedings taken against the defendants, including the respondents in the instant case. Counsel for the respondents argued that the applicants were only entitled, if the recognition application was successful, for recognition in connection with the Chapter 11 proceedings and not the adversarial proceedings taken against the respondents, which were separate proceedings and, furthermore, unrelated to the collective proceedings for which recognition was being sought. The Court was unpersuaded by these arguments, holding that, although procedurally the adversarial proceedings had a separate case number, their existence was authorised by the October liquidation plan, which vested certain causes of action in the receivers/managers. Furthermore, the adversarial proceedings were seen as arising out of the Chapter 11 proceedings, being incidental to the process of collecting the bankrupt's assets with view to effecting a distribution to creditors. Furthermore, the Court was minded to give a purposive construction to the provisions, given their object to facilitate co-operation between various courts administering assets involving

the same debtor. The pursuit by trustees in bankruptcy of adversarial proceedings against persons connected with the debtor was not an unusual feature of insolvency cases and the Court would not construct the provisions in such a way so as to impede co-operation or assistance.

In this light, the applicants argued that the Court could use Articles 21(e) on the granting of appropriate relief and 25 on co-operation to the maximum extent possible to direct the enforcement of the adversarial judgments in England and Wales. However, the Court held that the effect of the bankruptcy order was not necessarily to provide authority for the Court to disregard normal rules of private international law, including those that governed the enforcement of judgments at common law. Under these rules, the adversarial judgment, although it arose out of the bankruptcy proceedings, was by nature a judgment *in personam* and so could not be treated automatically as an English judgment contrary to these rules (which included the need for the defendant to be present within or submit to the jurisdiction), albeit the court could authorise the trustees in bankruptcy to bring an action on the judgment or a fresh claim. Thus, Articles 21(e) and Article 25 could not be of assistance, as the Court could not disregard important provisions of its own legal system, although it could, within the law, search for practical means to give effect to the co-operation implicit in those provisions. The trial judge also held that, even if he were wrong on that point and that the provisions could authorise such a treatment, he would not exercise discretion to do so because of the violation of the principles of English private international law. Thus, the application was successful in part (recognition of the judgment and appointments), but failed in part (enforcement of the adversarial judgments).

Analysis

As the case reveals, an important impulse for the court is to be practical and to give pragmatic support to the use of the Model Law within the jurisdiction in the case of applications for recognition. Nonetheless, the generally positive view of comity and the need to assist or avoid impeding proceedings before other courts that motivates English courts remains to be tempered by rules of domestic law that are mandatory in nature (*ordre public*). In the instant case, the canon being violated was the prohibition against enforcement of a judgment obtained by default in the absence of the defendants (which category included the respondents) by means of the recognition of insolvency proceedings to which the adversarial action was incidental. This does not mean that ultimately the applicants will not be successful; recognition of the insolvency judgment was in fact obtained and orders could undoubtedly issue on the basis of the recognition of the capacity of the applicants/foreign representatives to preserve assets of the trust pending determination through fresh action on the litigation issue, i.e. whether through breach of fiduciary duty/negligence, the respondents remain liable for the debts of the trust. What is certain though is that the capacity of the English courts to be creative and to find ways of assisting and co-operating with other courts is not diminished by this judgment, which tempers the need to give effect to the Model Law with the application of canons of fairness and equity, preserving the discretion the courts have long enjoyed in similar requests for assistance under section 426.

Summary

Courts in the United Kingdom, especially those in England and Wales, have long had a tradition of co-operation, firstly at common law, then, second, through the various statutory mechanisms, to which the Model Law now adds. Nonetheless, the strict application of the law is often subject to caveat, most notably in how the courts preserve an element of discretion to accede to or refuse requests for assistance. This phenomenon has been seen in the case of requests for co-operation under section 426 and is now being extended to similar instances reliant on applications under the Model Law for assistance. Turning to the cases, Warner illustrates how human rights norms enshrined in domestic law can have an impact on requests for assistance, echoing the public policy exceptions contained in Article 6 of the Model Law and Article 26 of the Insolvency Regulation, the latter referring explicitly to 'fundamental principles or the constitutional rights and liberties of the individual' as permissible exceptions to recognition of proceedings taking place elsewhere. The second case, Harms Offshore, suggests that courts should be inclined to co-operate with other jurisdictions adopting the Model Law, but that, exceptionally, domestic practice relating to anti-suit injunctions can intervene if foreign proceedings have been procured by some unconscionable act on the part of one of the parties to the case. The final case, Eurofinance SA, demonstrates how elementary canons of fairness and equity, arising in this instance from a certain repugnance of private international law rules from enforcing judgments obtained by default of submission or appearance, may circumscribe the success of a recognition application. Together, these three cases form a useful and recent insight into the workings of the English courts, especially in respect of a hitherto unrepresented area in the conduct of international insolvency cases, namely the workings of the Model Law. Although the cases as a whole confirm the general desire of the courts to assist in cross-border matters, they also confirm that assistance is not automatic and that close scrutiny of the compatibility of recognition applications with

domestic rules will occur. A general conclusion that may be drawn here is that English courts will wherever possible further their tradition of assistance but not at the costs of the violation of fundamental principles that govern the administration of justice and the law, of which insolvency is a small part.

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