

The Cross-Border Insolvency Regulations 2006: An Emerging Jurisprudence

Written by:

Sharif A. Shivji
4 Stone Buildings; London
s.shivji@4stonebuildings.com

Anton Smith
Geldards LLP; Nottingham, U.K.
anton.smith@geldards.co.uk

Adrian Walters
Nottingham Trent University; Nottingham, U.K.
adrian.walters@ntu.ac.uk

On April 4, 2006, Great Britain adopted the Cross-Border Insolvency Regulations 2006 (SI 2006/1030) (CBIR), which implements the United Nations Commission on International Trade Law (UNCITRAL) Model Law on cross-border insolvency (the Model Law) and is, in essence, the British version of chapter 15 of the U.S. Bankruptcy Code. The Model Law was also separately implemented in Northern Ireland with effect from April 12, 2007. Whilst the CBIR has only been in operation for just over a year, it is already clear that it offers an effective mechanism for foreign officeholders to obtain information and recover assets located in Great Britain.



Adrian Walters

The CBIR is particularly attractive to U.S. officeholders because the statutory regime places the U.S. trustee in the shoes of a British officeholder; thereby conferring a wealth of, previously unavailable, powers on the trustee. It is therefore no surprise that one of the first cases brought under the CBIR (*Re Rajapakse*, [2007] B.P.I.R. 99) involved a U.S. Trustee¹ who acted in relation to bankrupts resident in Chattanooga, Tenn. In addition, the two first named writers of this article have been acting in a case under the CBIR in the High Court in London for a U.S. Trustee of a debtor based in Miami (*Re Dotolo*, Case No. 6/REC/2007).

The philosophy behind the drafting of the CBIR was “to stay as close to the drafting in the Model Law as possible to try and ensure consistency, certainty and

¹ The first ever CBIR application is understood to have been made by a Norwegian trustee of a company on Aug. 8, 2006, although there has been very little publicity for it. See *Insolv. Int.* 2007, 20(9), 138-141.

About the Authors

Sharif Shivji is a barrister at 4 Stone Buildings in London, a set specializing in company and insolvency law. Anton Smith is a senior associate solicitor at Geldards LLP in Nottingham specialising in domestic and cross-border insolvency law. Adrian Walters is the Geldards LLP professor of corporate insolvency law at Nottingham Law School, Nottingham Trent University, where he leads a research group dedicated to the study of bankruptcy law.

harmonisation with other States enacting the Model Law and to provide a guide for other States who are considering enacting the law.”² The style of implementation was therefore broadly similar to that of chapter 15. One important way in which the CBIR and chapter 15 differ however is in the enactment of Article 7 of the

On an application for recognition under the CBIR the foreign representative is obliged to inform the court of any other applications or requests for assistance so that all relevant proceedings can be effectively coordinated. Article 7 also expressly leaves open the possibility that the foreign representative can obtain common law relief without the need for a CBIR recognition application. The recent decision in *Cambridge Gas Transport Corporation v. The Official Committee of Unsecured Creditors of Navigator Holdings*, [2006] UKPC 26, [2006] B.C.C. 962, in which the English Privy Council gave effect to a confirmed chapter 11 plan in the Isle of Man, is an illustration of the relief available at common law without recourse to the CBIR.⁴

The Recognition Application

Under the CBIR, the starting point is an application for recognition of the U.S.

The International Scene

Model Law. Whereas §1507 expressly limits and conditions the additional assistance that the bankruptcy court may give the foreign representative above and beyond that available under §§1520 and 1521, Article 7 of the CBIR provides that:

Nothing in this Law limits the power of a court or a British insolvency officeholder to provide additional assistance to a foreign representative under other laws of Great Britain.

It is clear from the legislative history that this formulation was purposely adopted to allow the CBIR to operate alongside or in tandem with the existing procedures in §426 of the Insolvency Act 1986 and to leave scope for further common law development. A foreign representative in one of the countries or territories designated for the purposes of §426 may therefore seek assistance either under §426,³ or under the CBIR, or both.

bankruptcy. The CBIR applies to both debtors-in-possession and U.S. Trustees in all their guises and, as a result, is available in both personal and corporate insolvencies, for trustees appointed under chapter 7 as well as chapter 11.⁵ For ease of reference, we will refer hereafter only to steps taken by trustees, although the same would be true for DIPs. Under Article 19 of the CBIR, once a recognition application is made and where urgently needed, the U.S. Trustee is entitled to apply for a wide range of interim relief, including (1) staying

⁴ One question that has arisen in the United States that, it is submitted, would not arise in Great Britain given the wording in Article 7 is whether the bankruptcy court has a residual common law discretion to grant relief to a foreign representative on comity grounds in the absence of recognition under chapter 15. The argument that chapter 15 is now the only source of relief appears to rest on a judicial statement in *United States v. JA Jones*, 333 B.R. 637, 639 (Bankr. E.D.N.Y. 2005), to the effect that the bankruptcy court has no authority to grant a stay in support of a foreign bankruptcy proceeding absent recognition under chapter 15. This has led to speculation that Judge Drain may have felt constrained in *In Re Sphinx Ltd.*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006), to reach the much-criticized conclusion that the Cayman liquidations were non-main proceedings based on an establishment for fear that the bankruptcy court would have no means of granting relief otherwise. See, e.g., Moss, Gabriel, “The Mystery of the Sphinx - COMI in the U.S.,” 20(1) *Insolvency Intelligence* 4-7 (2007).

⁵ A foreign representative is defined as “a person or body...authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor’s assets or affairs or to act as a representative of the foreign proceeding.” This clearly encompasses a chapter 11 debtor-in-possession and any other person authorized to act as a representative of the estate under U.S. bankruptcy law.

² Insolvency Service, Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain (August 2005), 21 available at www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/cbcondoc/consultation.pdf.

³ In which case the foreign representative must apply to his or her local court for the issue of a letter of request for assistance by the local court to the English court. See, e.g., *Re Southern Equities Corp. Ltd., England v Smith* [2001] Ch. 419.

execution against a debtor's assets, (2) entrusting the administration or realisation of assets in Great Britain, which are in jeopardy, to the U.S. trustee, (3) staying enforcement of any security over a debtor's property or the repossession goods in a debtor's possession, (4) staying any right of forfeiture in relation to a debtor's real estate and (5) staying any legal process brought against a debtor. As a consequence, in the appropriate case, a U.S. Trustee could apply to the Court under the CBIR and obtain interim relief on the same day.

Nevertheless, the recognition order remains the gateway to invoking the full armory of powers available under the CBIR. There are two forms of recognition order that the English Court may make. As is the case under chapter 15, these are premised on the concepts of "center of main interests" (COMI) and "establishment," which have already generated a great deal of case law in the context of European cross border insolvencies. COMI is not defined in the CBIR, but Article 16(3) states that in the absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the COMI.⁶ Where the

foreign proceeding is taking place in the country where the debtor has his or its COMI, the court will recognise it as a foreign main proceeding (Article 17(2)(a)). Where the foreign proceeding is taking place in the country where the debtor has a mere "establishment," the court will recognise it as a foreign non-main proceeding (Article 17(2)(b)). An "establishment" is defined in the CBIR as any place of operations where the debtor carries out a nontransitory economic activity with human means and assets or services (Article 2(e)). The court cannot, however, make a recognition order where the foreign proceedings are taking place in a country where the debtor does not have a COMI or an establishment (Article 17(2)(b), 2(e), 2(g), 2(h)) or where recognition would be manifestly contrary to the public policy of Great Britain or any part of it (Article 6).⁷

Subject to those restrictions, the English Court is obliged to make a recognition order where five criteria are satisfied: (1) the court hearing the application has jurisdiction; (2) the

⁶ See further *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, Case No. 07-12383 (BRL), (Bankr. S.D.N.Y. Aug. 30, 2007). It is not clear whether the presumption "in the absence of proof to the contrary" is any more difficult to rebut than the presumption "in the absence of evidence to the contrary" in §516(c).

foreign proceeding is a qualifying proceeding as defined by Article 2(i) (chapter 7 and 11 of the U.S. Bankruptcy Code fall within this definition); (3) the foreign officeholder is a foreign representative within the meaning of Article 2(j) (U.S. Trustees fall within this definition); (4) the application and supporting evidence address the prescribed issues; and (5) the prescribed documents are exhibited to the application.

In relation to jurisdiction, any application for recognition under the CBIR must satisfy the jurisdictional requirements of Article 4 (Article 17(1)(d)). For applications in England and Wales, only the Chancery Division of the High Court has jurisdiction to deal with recognition proceedings (Article 4(1)). The Chancery Division's jurisdiction is limited to four different circumstances: where the debtor has (1) a place of business in England and Wales or (2) a place of residence in England and Wales

⁷ The *Guide to Enactment* makes clear that the purpose of the expression "manifestly contrary" in Article 6 of the Model Law is to emphasize that public policy exceptions should be interpreted restrictively and invoked under exceptional circumstances concerning matters of fundamental importance to the enacting state. See, e.g., *In re Ephedra Products Liability Litigation*, 349 B.R. 333 (U.S. Dist. Ct. S.D.N.Y. 2006), and, on the identical expression as it appears in Article 26 of the EC Regulation on Insolvency Proceedings, Council Regulation (EC) No. 1346/2000 of May 29, 2000, Re Eurofood IFSC [2006] Ch. 508, 532-536, 546-547.

continued on page 68

The International Scene: Cross-Border Insolvency Regulations 2006

from page 41

or (3) assets in England and Wales or (4) the court considers, for any other reason, that it is the appropriate forum to consider the question or provide the assistance requested (Article 4(2)). When considering this latter issue, the court will consider the location of any court where British insolvency proceedings are taking place or are likely to take place in relation to the debtor (Article 4(3)). For applications in Scotland, only the Court of Session has jurisdiction to deal with recognition proceedings and the same limitations apply.

Consequences of the Recognition Application and a Recognition Order

The filing of the recognition application places the foreign representative under an obligation to notify the court if there is any substantial change in the status of the recognised foreign proceeding, his status as a foreign representative or if he becomes aware of any other foreign proceeding, proceeding under British insolvency law or a request under §426 of the Insolvency Act 1986 regarding the debtor (Article 18). If, after a recognition order has been made, it transpires that the grounds for granting it were lacking or have ceased to exist, the court may on the application of the foreign representative or a person affected by the recognition, or of its own motion, modify or terminate recognition on such terms and conditions as the court thinks fit (Article 17(4)).

The recognition of a foreign main proceeding has a number of automatic consequences including the stay of proceedings concerning the debtor's assets, rights, obligations or liabilities, the stay of execution against the debtor's assets and a suspension of the transfer of the debtor's assets (Article 20(1)). In contrast, on recognition of a foreign non-main proceeding, these benefits are only available at the discretion of the court (Article 21(1)). Any domestic insolvency proceedings commenced after the recognition of a foreign main proceeding are limited to assets located in Great Britain and, to the extent necessary to implement the cooperation and coordination requirements of the CBIR, to other assets of the debtor that, under the law of Great Britain, should be administered in that

proceeding (Article 28).

Where there is a pre-existing British insolvency proceeding concerning the debtor, on recognition, the U.S. Trustee is entitled to participate in these proceedings pursuant to Article 12. A reading of the Guide to Enactment alongside the legislative history in Great Britain⁸ suggests that this would give standing to the U.S. Trustee to participate in the insolvency proceeding to the same extent as a party in interest under British law. Moreover, it is clear that the term "participate" is not limited to intervention in actual court proceedings but is intended to allow participation in the insolvency process as a whole. Thus, for example, it would enable the foreign representative to attend a creditors' meeting convened by the office-holder in the British insolvency proceeding. It may conceivably enable the U.S. Trustee to lodge in the British proceedings claims that have already been lodged in the U.S. proceedings to the extent that U.S. creditors have not already lodged proofs directly in the British proceeding as they are entitled to do under Article 13(1) of the CBIR.⁹ In addition, where there is a pre-existing British insolvency proceeding, the U.S. Trustee is also entitled to intervene in any proceedings in Great Britain in which the debtor is a party (Article 24) and, with the permission of the court, may apply for orders under specified powers for the avoidance of transactions (Article 23(6)).

Relief Available on Recognition

Once a recognition order has been made, a foreign representative may apply to court for relief under Article 21 and 23 of the CBIR. The terms of Article 21 are ostensibly very wide, although in deciding whether to grant relief, the court must be satisfied that the interests of creditors in Great Britain are adequately protected (Article 22). Under the Article, the court is empowered to (1) stay the commencement or continuation of individual actions concerning the debtor's

assets, rights, obligations or liabilities, (2) stay execution against the debtor's assets to the extent that it has not been stayed under Article 20, (3) suspend the transfer of the debtor's assets to the extent that this right has not already been stayed under Article 20, (4) provide for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities, (5) entrust the foreign representative with the administration or realisation of the debtor's assets in Great Britain, (6) order a stay of proceedings or execution or the transfer of the debtor's property in a foreign non-main proceeding, and (7) grant "any additional relief that may be available to a British insolvency officeholder under the law of Great Britain...."

Thus, for example, under Article 21, a U.S. Trustee, like a British officeholder, is entitled to apply to court for the issue of a warrant for seizure of a bankrupt individual's assets or for an order requiring the search of specified premises for assets belonging to the bankrupt individual. These powers under Article 21 were used in *Re Dotolo* to force the debtor's former solicitors to disclose documents relating to the debtor and to answer questions relating to the debtor's affairs on oath. In addition, in that case, the High Court made a without-notice disclosure order against a business associate of the debtor to prevent that individual from destroying documents relating to the debtor's affairs.

Article 21 also gives the court the power to grant turnover relief, where the distribution of the debtor's assets located in Great Britain is entrusted to the U.S. Trustee (Article 21(2)). In practice, a U.S. Trustee will want to apply for such relief in almost every case since it means that he can then distribute recovered assets without further recourse to the British court. It should be noted, however, that a British court will not grant such relief unless it is satisfied that the interests of creditors in Great Britain are adequately protected. The court is, however, likely to take a pragmatic approach to this issue, for example, by balancing any loss of priority against an increase in the pool for distribution.¹⁰

Under Article 23, the U.S. Trustee, in a similar way to a British officeholder,

⁸ Insolvency Service, Implementation of UNCITRAL Model Law on Cross-Border Insolvency in Great Britain (August 2005), ¶46 available at www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_re_gister/cbcondoc/consultation.pdf.

⁹ The right of estate representatives to lodge claims in concurrent proceedings is expressly conferred by Article 32 of the EC Regulation on Insolvency Proceedings. It seems plausible to suggest that Article 12 of the CBIR could be read so that a U.S. Trustee would be afforded equivalent rights in a British insolvency proceeding.

has standing to apply to court to set aside certain types of transactions effected by the debtor, including (1) gifts or transactions at undervalue, (2) the early repayment of preferred creditors, (3) extortionate credit transactions, (4) certain floating charges, (5) excessive pension contributions by a bankrupt individual or (6) any transaction which is considered to defraud the debtor's creditors (Article 23(1)). However, the court will only exercise this jurisdiction in relation to a foreign non-main proceeding where it is satisfied that the application relates to assets which, under the law of Great Britain, should be administered in the foreign non-main proceeding (Article 23(5)).

Under English law, the transactions which fall into categories (1) and (2) above can only be set aside if they took place within a certain time period ending on the date of commencement of the insolvency proceedings. Under the CBIR, this time period is calculated by reference to the opening of the foreign insolvency proceedings under the law of that foreign state (Article 23(3), (4)). In the circumstances, the U.S. Trustee may need to adduce expert evidence in the British courts as to when the U.S. insolvency proceedings were started. If the court makes an order under Article 23, it is entitled to give directions as it thinks fit 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 (Article 23(7)).

Whilst the existence of the power under Article 23 is likely to be the principal attraction of the CBIR from the perspective of a foreign representative, it is notable that the court will not set aside a transaction where it was entered into before the CBIR came into effect (April 4, 2006) (Article 23(9)). In addition, where the debtor is already subject to British insolvency proceedings, a foreign representative may not make an application under Article 23 without the court's permission (Article 23(6)). However, there are other mechanisms under the British insolvency regime that could be used to impugn a disposition of assets or an antecedent transaction effected by the debtor prior to April 4, 2006. Thus, in the case of a transaction that defrauded the debtor's creditors,

a creditor could challenge that transaction under §423 of the Insolvency Act 1986. Alternatively, in cases where the court has jurisdiction under domestic law, a creditor could petition for winding-up of the company or bankruptcy of the individual based on the presumption of insolvency arising out of a recognition order (Article 31). If this latter approach is adopted, the transaction will still only be impeachable if it took place within the relevant time period, as calculated by reference to the presentation of the petition in Great Britain (§§240 and 341 of the Insolvency Act 1986).

Conclusion

It is clear that the CBIR is an extremely useful aid for any U.S. practitioner who wishes to recover information or assets or intervene in insolvency proceedings in Great Britain. It offers fast and cost-effective relief and permits the U.S. Trustee (or the debtor-in-possession) to control the proceedings without, in many cases, interference from a British officeholder. ■

Changed firms? Won an Award? Became a Judge?

Every month in the *ABI Journal*, we highlight the achievements and changes of our ABI members. Please inform us about the waves you or your firm are making—from being a guest speaker at an event to a promotion on the job—and we'll make sure we include it in our "Members in the News" section.

To submit information, please contact Tom Borak via phone at (703) 739-0800, ext. 123, or via e-mail at tborak@abiworld.org. You also can fax in your news to (703) 739-1060.

¹⁰ See for further examples, *Re: HHI Casualty and General Insurance* [2007] B.C.C. 335 at ¶41.