Feature

KEY POINTS

- The Cross-Border Insolvency Regulations ('CBIR') provide a useful procedural mechanism to obtain speedy recognition of foreign insolvency and related proceedings.
- Practitioners need to consider whether the out of the box stay is suitable and further relief is appropriate.
- The courts in other jurisdictions, as well as Great Britain, are exploring the thorny issue of whether and the extent to which they may give effect in their own jurisdiction to insolvency law which differs from their own insolvency law provisions whether through the Model Law or otherwise.

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Navigating the Cross-Border Insolvency Regulations 2006

Although it cannot fairly be described as a stampede, a steady stream of applications have now been heard before the English courts under the Cross-Border Insolvency Regulations 2006 ('CBIR') bringing some clarity to aspects of their operation. In this article, after setting out the context in which the CBIR operate, the authors consider some of the practical issues which can arise and highlight some significant areas in which uncertainties concerning the operation of the CBIR remain.

THE OPERATIONAL CONTEXT

The CBIR implement, in the slightly modified form set out in its Sch 1, the UNCITRAL Model Law on Cross-border Insolvency. The CBIR essentially cover three key areas: (i) recognition of representatives of foreign insolvency proceedings and locus for them to access local courts; (ii) relief to assist foreign proceedings; and (iii) provisions aimed at facilitating cooperation among the courts of the jurisdictions in which the debtor's assets are located to enable an effective co-ordination of proceedings.

THE PRESERVATION OF THE EXISTING STATUTORY AND COMMON LAW FRAMEWORK

The CBIR do nothing to limit the pre-existing powers of the court, as is evident from art 7 of Sch 1 which provides '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'. The effect is that the pre-existing statutory patchwork of cross-border provisions continue to apply, subject to their respective eligibility criteria. The mandatory provisions of the EC Insolvency Regulation override the provisions of the CBIR, where in conflict. In the case of s 426 Insolvency Act 1986 ('IA'), a foreign representative from a s 426-designated territory can potentially request assistance under either s 426 or the CBIR. By invoking s 426, a foreign representative can elect whether to request that the English court applies English or the relevant foreign insolvency law.

The existing private international rules on cross-border insolvency also continue to co-exist with the CBIR and will apply in cases where the CBIR can have no application, for example, where the relevant foreign proceeding is not a collective proceeding, or where it cannot be characterised as an insolvency proceeding. As appears further below, one of the key unresolved issues is whether and the extent to which the CBIR provides an extension of the common law.

APPLYING FOR RECOGNITION

Our experience of using the CBIR is that the regulations provide an efficient, streamlined procedure for the recognition of foreign insolvency representatives. An application for recognition is made on a form ML1, supported by an affidavit identifying, with supporting evidence, whether the representative is appointed in main or non-main proceedings and whether any other foreign proceedings or s 426 IA requests exist. Original certified copies of the decision commencing the foreign proceedings must be filed in court, where applicable, translated into English. The application process is generally straightforward and cost-effective. Where the criteria for recognition are satisfied, except to the extent that a narrowly framed public policy exception can be invoked, the English court is required to recognise a foreign representative. This brings a welcome predictability to the recognition process.

WHO CAN BE RECOGNISED?

Foreign representatives of 'foreign main' and 'foreign non-main proceedings' can be recognised. These are concepts which are similar to concepts in the EC Insolvency Regulation. Accordingly, a main proceeding is defined as a foreign proceeding where a corporate debtor has its 'centre of main interests' ('COMI'). As is the case under the EC Insolvency Regulation, COMI is not defined under the Model Law, but is presumed to correspond with the debtor's registered office, in the absence of proof to the contrary. A foreign 'non-main' proceeding is defined as a 'foreign proceeding other than a foreign main proceeding, taking place where the debtor has an establishment', with the definition of establishment varying only marginally from the definition in the EC Insolvency Regulation. Helpfully, from the point of view of consistency, the Court of Appeal has also recently confirmed in *Re Stanford International Bank Ltd* [2010] EWCA Civ 137 that the same approach to ascertaining COMI should apply whether an application is made under the CBIR or the EC Insolvency Regulation (so that the registered office presumption can be rebutted if it can be shown that the head office functions are carried out elsewhere and that this is ascertainable by third parties).

The CBIR are, however, wider in scope than the EC Insolvency Regulation in a number of respects. Applications can be made under the CBIR by foreign representatives from any territory and there

is also no requirement for reciprocity, so that whether the state of the applicant foreign representative has also implemented the Model Law is irrelevant for the purposes of their application before the British courts. Recognition under the CBIR also extends to debtor in possession models of insolvency proceedings. Further, there is no equivalent list to the annexes to the EC Insolvency Regulation which are determinative of whether a form of proceedings is within its scope. Instead, a foreign proceeding is defined at art 2, Sch 1 as:

> 'a collective judicial or administrative proceeding in a foreign state, including an interim proceeding, pursuant to a law relating to insolvency, in which proceeding the assets and affairs of the debtor are subject to the control or supervision by a foreign court, for the purpose of reorganisation or liquidation.'

In practical terms this means that the court is required to assess every CBIR recognition case in the light of the evidence filed and the CBIR requirements and then to determine whether the proceedings satisfy the qualifying criteria. From reported decisions and commentary to date it appears that the English courts have readily recognised a wide range of insolvency and related procedures and officeholders under the CBIR.

By way of illustration, in March 2009 the High Court granted recognition of the US trustee appointed to Bernard L Madoff Investment Securities LLC by the US Bankruptcy Court pursuant to the provisions of the US Securities Investor Protection Act 1970 ('SIPA'), as the representative of foreign main proceedings. A SIPA trustee can be appointed when an Securities Investor Protection Corporation member brokerage firm fails and their role is to work to transfer the failed brokerage accounts to a different brokerage firm, to assess claims and to liquidate any other assets of the insolvent firm for the benefit of creditors.

In *Bud-Bank Leasing SP.ZO.O* (2009) Ch D (Companies Ct) (Registrar Baister) (29/6/2009) the High Court recognised the appointment of compensation administrators appointed by creditors pursuant to the terms of the Polish Compensation Proceedings Act 2008 as foreign representatives of foreign main proceedings. The Polish compensation legislation had been put in place to rescue and restructure the businesses of two Polish shipyards which had been found by the European Commission to be unlawfully in receipt of state aid. Registrar Baister was careful to consider very closely whether the proceedings qualified as ones which fell within the scope of the CBIR.

In contrast, in *Re Stanford International Bank Ltd* [2010] EWCA Civ 137 the Court of Appeal refused to recognise a receiver of a foreign bank appointed by a US Court because it was not satisfied the appointment in this case was a collective insolvency proceeding. Rather, having carefully analysed the receiver's role, the Appeal Court agreed with the High Court and concluded that the receiver had been appointed to prevent dissipation and waste and not to liquidate or reorganise the debtor's estate and that its purpose was to act for the protection of investors and not for a wider class of creditors. In other cases an analysis of the powers and duties of the appointed receiver might lead the court to conclude that the appointment did in fact fall within the scope of the CBIR.

In *Stanford* the High Court had also refused to recognise the receiver at common law as an alternative to recognition under the CBIR. Lewison J accepted the submissions of Counsel for the Antiguan liquidators that the common law was there 'to supplement the Regulations; not to trump them'. The facts of the case in *Stanford* were, however, relatively unusual in that the court was faced with competing claims for recognition, so that the court's decision was influenced by a concern that recognising the receivers could cause interference with the role of Antiguan liquidators, whose appointment as foreign representatives of main proceedings had been recognised. Lewison J also agreed with counsel's submissions that refusing to recognise the appointment of the receivers at common law was consistent with the general policy of universalism expounded in *Cambridge Gas Transport Corporation v The Official Committee of Unsecured Creditors (of Navigator Holding)* [2006] UKPC 26 namely that there should be one collective proceeding in which creditors are entitled to participate irrespective of where they are located. On this issue Arden LJ held that to the extent that the receivers had not abandoned their argument for recognition at common law she agreed with Lewison J's decision.

On a separate issue, in *Rubin v Eurofinance* [2009] EWHC 2129 (Ch) the High Court held that foreign proceedings could be recognised under the CBIR in respect of a debtor entity which would not be capable of being the subject of insolvency proceedings in England. In that case, chapter 11 proceedings had been initiated by a trust fund which under US law was classified as a business trust, but which under English law had no separate legal personality. The court held that the word *'debtor'* in the relevant provisions of the CBIR must be given the meaning they would be given by the court in the foreign proceedings and not an English domestic law meaning. This issue was not pursued on appeal.

A POTENTIAL GAP IN THE SCOPE TO RECOGNISE UNDER THE CBIR?

Potentially, there could be difficulty in obtaining recognition of proceedings analogous to the UK Companies Act schemes of arrangement under the CBIR and this arises because of the slightly restrictive definition of 'foreign proceeding' and its specific linking to the law relating to insolvency. The equivalent US provisions under chapter 15 US Bankruptcy Code lend themselves more readily to a wider interpretation as the relevant definition there has been extended to encompass not just proceedings under the law relating insolvency, but also to those relating to 'the adjustment of debt'. Since chapter 15 was implemented in October 2005 there have been many instances in which UK schemes of arrangement have been recognised by the US Bankruptcy Courts. If the English courts were to hold that foreign equivalents of schemes of arrangement were not

capable of recognition under the CBIR, however, it is envisaged that the common law would ordinarily step in and provide a jurisdictional basis for recognition of the proceedings as a further example of the manner in which the common law is able to supplement the provisions of the CBIR.

OBTAINING RELIEF: IS THE OUT OF THE BOX RELIEF THE APPROPRIATE REMEDY?

Where the court recognises a representative of a foreign main proceeding the limited form of stay provided for in art 20, Sch 1 automatically takes effect without the need for a court order. In the case of companies this stay is the same in scope and effect as if the debtor had been the subject of a winding up order so that:

'(a) the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;

(b) execution against the debtor's assets is stayed; and

(c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.'

It will be readily noted that this stay is not as extensive as the moratorium which applies when administration proceedings are initiated (and it is expressly provided that the automatic stay does not affect any right to take steps to enforce security, to repossess goods which are the subject of hire-purchase agreements, to commence civil proceedings (to the extent necessary to preserve a claim) or criminal proceedings and to exercise rights of set off.)

The art 20 stay, however, may not necessarily be appropriate in all cases, perhaps particularly where the foreign proceedings take the form of rescue proceedings rather than liquidation. Putting this another way, it is important to ensure that the relief being sought in Great Britain coordinates effectively with the foreign proceedings and that appropriate primacy is respected to the foreign proceedings so that they can be effectively pursued.

By way of illustration, when Lehman Brothers Special Financing Inc, which was in chapter 11 proceedings, sought CBIR recognition as its own foreign representative of foreign main proceedings the court was asked to vary the art 20 stay to provide an express acknowledgement that the stay and suspension would not apply to ongoing litigation and further that it would not affect or inhibit in any way its rights to transfer, encumber or otherwise dispose of or deal with any of its own assets as 'debtor in possession' subject to the provisions of chapter 11 of the US Bankruptcy Code.

In other cases, foreign representatives have obtained orders under art 21 CBIR providing for a more extensive stay than the out of the box automatic stay at art 20. Article 21 is a very widely framed discretionary power permitting the court to grant *'any appropriate relief'* and the article goes on to provide a non-exhaustive listing of the permissible relief culminating in (g) 'any additional relief that may be available to a British insolvency office holder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule *B1*.' Also listed as a permissible power at art 21, para 2 is power to order a turnover of assets in Great Britain to the foreign representative *'provided the court is satisfied that the interests of UK creditors are adequately protected*.'

Granting relief permitting a turnover of assets has proven to be relatively uncontroversial to date with the court readily making a turnover order for example in *In Re Swissair Schweizerische Luftverkehra ktiengessellschaft* [2009] EWHC 2099. In that case, admittedly, the Swiss liquidation proceedings provided for a pari passu distribution to creditors so that an order could alternatively have been given under existing common law principles.

There have been a number of examples of the English Court granting discretionary orders under art 21 to extend the automatic stay to mirror the scope of the administration stay at para 43 Sch B1 administration stay. In *Samsun Logix Corp v DEF* [2009] EWHC 576 (Ch) the court-appointed receiver of Samsun applied for recognition as the foreign representative of Korean rehabilitation proceedings and the English court granted recognition of those proceedings as a foreign main proceeding. The automatic stay under art 20 which would immediately come into play would have the effect of automatically staying a pending arbitration concerning the debtor, but Samsun also wished to ensure that steps could not be taken by counterparties to an English law-governed charterparty to enforce contractual liens against it whilst it pursued a restructuring in Korea and the court granted an extended stay pursuant to art 21 CBIR. A similar extended stay order was made in *Pan Oceanic Maritime* Inc [2010] EWCH 1734.

Other discretionary orders which have been obtained pursuant to art 21 include ones requiring the delivery up to the foreign representative of third party documents to enable the foreign representative to carry out necessary investigations into the debtor's dealings (See for example the order granted to the SIPA trustee in *In the Matter of Bernard L Madoff Investment Securities LLC* [2010] EWHC 1299 (Ch)).

WHAT ARE THE LIMITS TO THE ASSISTANCE WHICH THE COURT CAN GIVE UNDER THE COMMON LAW AND THE CBIR?

The English court has not yet been asked to rule determinatively on the question of the extent and outer limits to which either at common law or under the CBIR it has power to give effect to foreign insolvency law where s 426 IA 86 does not apply. It will be recalled that in *McGrath v Riddell* [2008] UKHL 21 (aka *HIH Insurance*) the Law Lords were divided as to whether the court had jurisdiction under common law to give effect to a foreign insolvency law, where the foreign insolvency law differed from English insolvency. The court in that case side-stepped the issue by deciding the case on the basis of their powers under s 426 IA rather than the common law. The CBIR did not come into play in that case, which preceded their implementation, so that the court was not required to scrutinise the extent of its powers under art 21 Sch 1 CBIR.

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Other common law jurisdictions and jurisdictions which have implemented the Model Law are grappling with this issue. For example, in the case of *Metcalfe & Mansfield Alternative Investments, et al* Case No. 09-16709 (MG) the US Bankruptcy Court recently gave effect to a Canadian restructuring plan that affected third party rights in a manner that (the objecting party argued) went beyond provisions of US bankruptcy law that the Bankruptcy Court would have jurisdiction to implement. It is important to note, however, that States are free to implement the Model Law with such modifications as they wish and, whilst art 8 of the Model Law includes a provision referring to the need to promote uniformity in its application, this is far from a requirement compelling different jurisdictions to arrive at the same view given their freedom to enact the Model Law as they wish.

In *Rubin and Ors v Eurofinance* SA [2010] EWCA Civ 895 the Court of Appeal considered it unnecessary to reach a conclusion on the extent of their powers under art 21 CBIR. Instead the court concluded that it had power under existing common law principles to enforce a US judgment obtained pursuant to transaction avoidance provisions in the US Bankruptcy Code as a judgment of the English court. The court in *Eurofinance* held that it could in its discretion give effect to a foreign insolvency judgment, albeit that the parties accepted that the relevant US transaction avoidance provisions were 'generally equivalent' to English transaction avoidance provisions. The Court of Appeal in *Eurofinance*, however, appears to have endorsed the line of cross-border insolvency jurisprudence championed by Lord Hoffmann in *HIH Insurance* in which he commented:

> 'The primary rule of private international law … is the principle of (modified) universalism which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, cooperate with the courts of the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution.'

In endorsing Hoffmann's reasoning the Appeal Court appears implicitly to have acknowledged that its jurisdiction to recognise and give effect to foreign insolvency proceedings is not limited to those cases in which a similar outcome could have been obtained under English domestic insolvency law provisions, but rather was a power that the court had a broader discretion to apply. The issue will hopefully be revisited at length and authoritatively by the Supreme Court in 2011 when it hears the appeal in *Eurofinance*.

The provisions of the CBIR provide a few markers as to the extent to which the English court can implement orders which differ from English domestic insolvency law. Regulation 3(2) of CBIR provides that the provisions of the Model Law are to take precedence if there is conflict between its provisions and the provisions of English domestic insolvency law, and art 2(q) Sch 1 provides that 'references to the law of Great Britain include a reference to the law of either part of Great Britain (including its rules of private international law'.) Beyond this broad sign-posting, certain other provisions of English insolvency law enjoy a specially protected or elevated status, it being specifically provided for in particular at para 4, art 1, Sch 1 CBIR that the English court has no power to grant relief under the CBIR which would modify the provisions of Pt 3 of the Financial Collateral Arrangements (No 2) Regulations 2003. The absence of more general reservations appears to leave the door open for the CBIR to be applied in the court's discretion to give effect to foreign insolvency law. The common law of cross-border insolvency appears to be headed in the same direction. ■