Solving Cross-Border Insolvency Problems – Can you ever have too many lawyers?

Introduction

1. It is becoming increasingly common that officeholders in England and Wales are having to deal with the realisation of assets abroad or having to consider the claims made by overseas entities to the apparent assets of an insolvent company or individual that are located in England and Wales. This may be either via the bankruptcy of an individual or because a company with operations abroad has fallen within the ambit of an English insolvency proceeding.

2. To the same extent that the frequency with which such situations occur has increased, so to have the sources of law with which to resolve those issues multiplied. Moreover, in seeking to identify not just the appropriate law to resolve a dispute (e.g. English law, the law of another country, European law or International law), but also the appropriate forum, it is necessary to have regard to whether the dispute concerns a matter that arises in the context of the management of an insolvency (e.g. a challenge by a creditor to the decision of an officeholder) or to the recovery or realisation of an asset (e.g. the sale of some real estate).

3. The plethora of different permutations which stem from the need to identify the appropriate forum for the hearing of a particular dispute and then the appropriate law to be used for the resolution of that dispute, having of course carefully considered the nature of the dispute, would at first blush seem to lead to the inevitable result that scores of lawyers, most likely in different jurisdictions, will be required to untangle cross-border problems with the necessary corollary that the cost of insolvencies and asset realisations will increase to the detriment of creditors. The risk that that particular outcome will become the norm in relation to all cross-border problems has been significantly reduced by the recent enactment in England and Wales of the harmonising laws made up of the EC Council Regulation 1346/2000 of 29 May 2000 on insolvency proceedings and also the 1997 United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency.

4. This paper will briefly consider the EC Insolvency Regulation and the UNCITRAL Model Law before attempting to set out a walkthrough in relation to two common problems that arise in cross-border insolvency situations, namely the difficulties associated with the realisation of an overseas asset, and the determination of competing claims in respect of goods that arise when sale contracts contain retention of title clauses.

The EC Insolvency Regulation

5. The EC Council Regulation 1346/2000 of 29 May 2000 came into force on 31st May 2002 and is commonly known as the European Insolvency Regulation. Geographically, the Regulation is directly applicable in the member states of the European Union, save in Denmark (although Denmark intends to introduce its own parallel and comparable laws). According to Article 43 of the Regulation, the provisions of the Regulation will apply only to insolvency proceedings opened after 31 May 2002. Moreover it is important to note that, pursuant to the same Article:

> "Acts done by a debtor before the entry into force of this Regulation shall continue to be governed by the law which was applicable to them at the time they were done"

6. Article 3 of the Insolvency Regulation envisages two types of insolvency procedure. The first we would call main proceedings which are opened in the member state in which the debtor has his centre of main interest. The secondary, territorial proceedings, are opened in the member state in which the debtor does not have his centre of main interest but where he does have an establishment. In the case of territorial proceedings, the effect of the Insolvency Regulation as regards those proceedings is that the insolvency order only gives power to the relevant officeholder to deal with assets within that jurisdiction.

7. The purpose of this paper is not to investigate the case law regarding the centre of main interest as by the time that the officeholder comes to consider the realisation of a foreign asset or the validity of a retention of title clause, the bankruptcy order or winding up order would necessarily already have been obtained. It is essential though to read the order opening proceedings to check that it contains a clause that the proceedings are considered as main proceedings for the Insolvency Regulation and are not merely territorial proceedings confined to the jurisdiction of England and Wales.

8. By Article 4 of the Insolvency Regulation, the general principle is that the law applicable to insolvency proceedings and their effects shall be that of the member state within the territory of which proceedings are opened. Accordingly the law of the State of the opening of proceedings determines matters such as (using the lettering in Article 4(2)):

   (b) The assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;

   (c) The respective powers of the debtor and the liquidator;

   (d) The conditions under which set-off can be invoked.

   (e) The effects of insolvency proceedings on current contracts to which the debtor is party;

   (f) The effects of insolvency proceedings on proceedings brought by individual creditors;

   (g) The claims which are to be lodged against the estate and the treatment of claims arising after the opening of insolvency proceedings;

   (l) Who is to bear the costs and expenses incurred in the insolvency proceedings.

   (m) The rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

9. Initially it would seem that the Insolvency Regulation makes the decision as to whether or not an asset falls within the estate a relatively easy one. Article 4 makes it quite clear that if main proceedings are opened in England and Wales, it would be English law which determines whether or not that asset forms part of the insolvency estate capable of being realised by a liquidator or administrator or vesting in the trustee in bankruptcy forming part of the bankruptcy estate.

10. In theory, therefore, if an application needs to be made to a court at all, the officeholder can apply to the Courts in England and Wales or the state in which the asset is situated invoking the Insolvency Act 1986 and the EC Regulation just as if the property were situated in England for the asset to be realised as part of the estate.

11. Article 16 of the Insolvency Regulation states that any judgment opening insolvency proceedings in one member state shall be recognised in all other member states, "from the time that it *becomes effective* in the State of opening of proceedings" (italics added). The expression "becomes effective" in Article 16 raises an interesting question in the context of some insolvency proceedings in England and Wales. On one view, the expression could be taken as meaning that the judgment becomes effective when all the formalities which are required to perfect the relevant order have been complied with, most obviously that the order has been impressed with the seal of the court.

12. In England and Wales, compulsory winding-up proceedings by the court commence not when the winding-up order is made, but rather are deemed to have commenced when the winding-up petition was presented (see section 129(2) of the Insolvency Act 1986). Bankruptcy proceedings or administration on the other hand by and large commence when the order is made (see section 278 of the Insolvency Act 1986 and paragraph 13(2) of Schedule B1). It is therefore open to question whether, for the purposes of Article 16 of the Insolvency Regulation, the winding-up order in a

compulsory winding-up in England and Wales "becomes effective" as at the date of presentation of the petition or on the date of the making of the order. If the former is the correct interpretation, this might mean that the winding-up order would operate retrospectively not just in England and Wales, but also in other regulation states. Practitioners should certainly be aware of this potential ambiguity.

13. By Article 25, judgments which concern the course and closure of the insolvency proceedings are given automatic recognition and enforceability in other member states. Those judgments and orders concerning other matters in the insolvency proceedings are stated in the Insolvency Regulation to be recognised and enforceable subject to the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. In fact, that Convention has now been replaced by Council Regulation (E.C.) 44/2001 on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters dated 22 December 2000 which came into force on 1 March 2002.

14. In theory, achieving recognition and enforceability in another member state should be a relatively straightforward matter. Indeed, Article 17(1) of the Insolvency Regulation states that "no further formalities" are required for the judgment opening proceedings to produce like effects in another member state to those that are produced in the state of opening of proceedings. In addition, an officeholder's appointment is only required to be evidenced by "a certified copy of the original decision appointing him" (see Article 19 of the Insolvency Regulation).

15. There can, however, in the authors' experience, be some practical difficulties in foreign Courts accepting the European Regulation and it is always wise to have a good local agent. It is also worthwhile providing the local Court with a translation of the European Regulation and the documents forming the Order opening the insolvency proceedings for the purposes of the regulation and the office holder's certificate of appointment so that the effect of those orders is quite clear to the foreign Court.

16. A good local selling agent will also need to be engaged who should be familiar with the property and be in a position to advise you on the marketability.

UNCITRAL Model Law on Insolvency Proceedings

17. If it is not possible to use the European Insolvency Regulation, the next port of call would be to ascertain whether the country has committed itself to judicial recognition of foreign insolvency process through the adoption of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency. To date this law has been adopted by the following countries:

> Colombia (2006), Eritrea, Japan (2000), Mexico (2000), New Zealand (2006), Poland (2003), Romania (2003), Montenegro (2002), Serbia (2004), South Africa (2000), Great Britain (2006), British Virgin Islands (2005), United States of America (2005).

18. The purpose of the UNCITRAL Model Law is to allow for judicial recognition of foreign insolvency processes and the law has been bought into effect in the UK by the Cross-Border Insolvency Regulations 2006 which came into force on 4 April 2007.

19. The Cross-Border Insolvency Regulations, of course, assist a foreign officeholder seeking to obtain judicial recognition in the UK. Where an officeholder in England and Wales seeks recognition in order to gain access to assets located in a jurisdiction which has adopted the Model Law, it will be necessary to look at the particular enabling legislation of that jurisdiction and also the terms of the Model Law as enacted in that jurisdiction.

20. It is important for any officeholder considering recognition in a relevant foreign jurisdiction pursuant to the terms of the Model Law to have regard at an early stage the impact of Article 23 of the Model Law which is intended to deal with transaction avoidance applications, such as challenges on the

basis of undervalues or preferences. Indeed, in the version of the Model Law that has been enacted in the UK, Article 23(9) would appear to restrict the ability of a foreign officeholder who has achieved recognition in England and Wales to challenge transactions that were entered into by the debtor before the time at which the Model Law was enacted.

21. By Article 5 of the Model Law, a foreign representative can apply for recognition for his appointment by providing a certified copy of the original petition commencing the foreign proceeding and appointing the foreign representative or a certificate from the foreign Court confirming the existence of the foreign proceeding and of the appointment of the foreign representative or any other evidence acceptable to the Court of the existence of the foreign proceeding. If necessary having regard to the official language of the target jurisdiction, the Model Law allows for the enactment of a requirement that the original documents should also be translated (see Article 15(4) of the Model Law).

22. An officeholder in this country seeking recognition for instance in the USA will, therefore, need to supply official office copy entries of the bankruptcy order and the officeholder's certificate of appointment. It is not necessary to have the documents legalised by the foreign office as, by Article 16 of the Model Law, the Court seised of the recognition application is entitled to presume that the documents submitted are authentic whether or not they have been legalised.

23. The Model Law draws a distinction between "foreign main proceedings" and "foreign non-main proceedings". According to the combined effect of Articles 2(g)-(h) and Article 17(2) of the Model Law, a foreign proceeding will be a "foreign main proceeding" if it is taking place in the state where the debtor has his centre of main interests. Although the Model Law does not supply a definition of COMI and there are few reported cases on this concept, Article 16(3) confirms 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 centre of the debtor's main interests".

24. An individual's "habitual residence" is not defined in the Model Law. Dicey & Morris have identified the following as being relevant settled principles of private international law on this topic: (i) "habitual residence" is not to be treated as a term of art but according to the ordinary and natural meaning of the words it contains; (ii) it is a question of fact to be decided by reference to the circumstances of each particular case; (iii) several factors are relevant, including the duration and continuity of the residence. It is likely that these principles would guide a court seised with a recognition application in which COMI was in doubt.

25. "Foreign main proceedings" and "foreign non-main proceedings" also differ in their substantive effect. By virtue of Article 20 of the Model Law, the recognition of a "foreign main proceeding" immediately produces substantive effects, such as suspending the debtor's ability to transfer or encumber his assets (Article 20(1)(c) of the Model Law) and prevents individual actions being commenced or continued insofar as they concern the debtor (Article 20(1)(a) of the Model Law).

26. It is worth noting that Registrar Nicholls has recently made available a Practice Note on recognition applications under the Model Law made to the courts in England and Wales: *Re Rajapakse (Note)* [2007] BPIR 99. After recognition was obtained in *Rajapake*, the foreign officeholder (C Brooks Thurmond III, a US trustee in bankruptcy) applied for and was awarded relief under the Model Law pursuant to Article 21 by Registrar Nicholls. That judgment will soon be reported in the BPIR.

27. In *Re Loy, Debtor in a Foreign Proceeding (case No 07-51040-SCS)* [2008] BPIR 111, is an example of a case where an English trustee in bankruptcy (Jeremiah O'Sullivan) successfully applied to the United States Bankruptcy Court, Eastern District of Virginia Newport News Decision using the provisions of the Model Law as that law has been enacted in the USA to obtain an order recognising a bankruptcy proceedings in England and Wales as a foreign main proceeding. The facts of the case also gave rise to some consideration of COMI in the context of the Model Law.

28. Once the foreign proceeding has been recognised, the Court may, at the request of the foreign representative, grant relief on a provisional basis to stay execution against the debtor's assets; entrust the administration or realisation of all or part of the debtor's assets located in the state to the

foreign representative or another person designated by the Court as to protect and preserve the value of the assets any other relief (Article 19 of the Model Law).

29. Whilst the Model Law assists in foreign recognition, it does not give automatic legal status to the English law or jurisdiction in relation to what forms the insolvency estate and the nature of the officeholder's right against that estate. Whilst the officeholder may make an application for English Law to apply, it is possible that any issues, therefore, in relation to the property itself would have to be dealt with in accordance with the law of the state in which the asset is to be dealt with.

The Realisation of an Overseas Asset

30. For a trustee in bankruptcy the starting point, of course, is that by section 283(1)(a) of the Insolvency Act 1986, a bankrupt's estate comprises all property belonging to or vested in the bankrupt at the commencement of the bankruptcy.

31. Whilst property does not vest in a liquidator or administrator of a company, the officeholder would want to make use of the powers contained in schedules 1 or 4 of the Insolvency Act 1986 to realise the company's property.

32. By Section 436, "Property" includes money, goods, things in action, land and every description of property wherever situated…

33. It follows from this that, as far as English law is concerned, any property which was owned by the bankrupt at commencement of the bankruptcy (ie on the making of the bankruptcy order – see section 278 of the Insolvency Act 1986) will vest in the trustee in bankruptcy even if that property is located abroad. Further any property of a company will fall within the ambit of the insolvency in England if that property is a company asset.

34. The two key variables that will usually require some consideration in assessing the prospects of a successful recovery against a foreign asset are usually the nature and geographical location of the asset and also the solvency and geographical location of the possessor or owner of the asset.

35. Indeed, difficulties can arise depending upon where the debtor currently lives. If he still is resident in England or Wales but the relevant asset is overseas, it would be possible to issue an application against him here for an order placing upon him and any co-owner an obligation to give up possession of the asset (where relevant) and then to sell the asset – this was the type of order successfully obtained in *Ashurst v Pollard* [2001] CH 595 in the context of real property. Once obtained, however, and in the event that the debtor and the other co-owner fail to comply with the order and that it is not possible to enforce compliance in England and Wales, then the proceedings would need to be transferred to the state in which the asset is located for the purposes of enforcement or alternatively the officeholder could seek to register the ongoing insolvency process in England and Wales in the other jurisdiction, for instance using the Model Law or the territorial proceedings provisions of the Insolvency Regulation. For instance, in the event that the asset is located in the USA, the relevant judgment would need to be transferred to the USA for enforcement in accordance with the Hague Convention. If the asset is located in a member state of the European Union, then any enforcement action on the judgment can be taken under Chapter III of Council Regulation (E.C.) 44/2001 on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters.

36. An officeholder should be aware that if at any time it become necessary to rely on the terms of the Insolvency Regulation it would be important to consider those provisions in the regulation that make specific provision for the determination of the state in which an asset is located – see Article 2(g) of the Insolvency Regulation which distinguishes between tangible assets, and asset which requires public registration (most obviously company charges or chattel mortgages under Bills of Sale Act type legislation) and finally causes of action. In addition, the Insolvency Regulation also contains a plethora of exceptions and reservations which will impact upon the ability of an officeholder to successfully realise an overseas asset, not least the protection that is afforded to Third Party Rights in Rem under Article 5.

37. If the particular asset is located in one of the jurisdictions which has implemented the Model Law, it may be that the most appropriate and simplest route for an officeholder to adopt would be to seek recognition of the ongoing England and Wales insolvency proceedings in the foreign jurisdiction and then to rely on Article 21(2) of the Model Law which makes specific provision for the foreign court to entrust the officeholder with the task of realising the assets in the foreign jurisdiction. Of course, this will mean that it would become necessary for the officeholder to retain the services of good lawyers and local agents in that jurisdiction.

Foreign Creditor Relying on a Retention of Title Clause

38. In a wholly English Insolvency, where no cross-border considerations are relevant, in the event that a creditor seeks to rely on a retention of title clause in respect of assets in the possession of the debtor, an office holder would normally proceed by considering whether, as a matter of contract law, the retention of title clause has been incorporated into the contract, whether the relevant assets can be appropriately identified, and whether the goods have changed in character. The position is not quite so straightforward where the creditor asserting the retention of title clause is situated in a foreign jurisdiction, or where the assets the subject of the clause are themselves situated abroad. The remainder of this paper will consider the former, which is the scenario that appears to recur more frequently in practice.

39. In a typical cross-border scenario, before it is possible for the officeholder to consider whether a particular group of assets are subject to a retention of title clause, it may first be necessary to consider and determine (i) the law that governs the particular contract and also (ii) whether the particular contract contains provisions the effect of which are to allocate jurisdiction to determine disputes on the interpretation of the contract a particular country.

40. At first blush the Model Law would not appear to contain any relevant provisions which would assist in determine the validity or otherwise of a retention of title clause.

41. The Insolvency Regulation, on the other hand, does contain some specific provisions that concern retention of title clauses. Article 4(2)(c) and (f) state that the law of the state of the opening of the insolvency proceedings will govern the rights of the creditor and the office holder. For example, this must mean that moratorium under schedule B1 would apply in the case of administration to prevent a retention of title creditor from enforcing their claim without either the consent of the office holder or the permission of the insolvency court, thus affording the relevant office holder some breathing space.

42. Article 7 of the Insolvency Regulation is titled “Reservation of Title” and is in the following terms:

> “(1) The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller’s rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of proceeding.
>
> (2) The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of opening of proceedings the asset sold is situated within the territory of a Member State other than the state of the opening of proceedings”

43. Article 5 of the Insolvency Regulation may also be relevant. The opening of insolvency proceedings does not affect the rights *in rem* of creditors or third parties in respect of tangible or intangible, movable or immovable assets belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings. The particular wording of Article 5(1) gives rise to a difficult question of construction insofar as it might be open to argument whether an asset subject to a retention of title clause “belongs” to the debtor. Insofar as it does “belong” to the debtor, the protected *in rem* rights are particularised in Article 5(2):

(a) the right to dispose of the assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage,

(b) the excusive right to have a claim met, in particular a right guaranteed by a lien or by assignment of the claim by way of a guarantee;

(c) the right to demand assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wish of the party so entitled;

(d) a right in rem to the beneficial use of the asset.

44. It follows, therefore, that the office holder's rights to the debtor's property within Europe and the applicability of English law does not mean that any third parties lose their right; they are entitled to reassert those rights in accordance with the law of the jurisdiction in which the particular property is situated.

45. It would seem that Article 5(2)(c) deals with precisely what we would consider to be a retention of title clause. The party with the benefit of such a clause has a right to demand the assets and to require restitution of them. If a third party asserts a retention of title over property, that will need to be assessed in accordance with the domestic law of the country in which the asset is situated. Despite what appears to be the wide ambit of Article 4, English Law will not assist in determining that issue unless the contracts between the parties provides that the arrangement is to construed in accordance with English Law.

46. It is clear though, that in a scenario where the insolvency process taking place in England and Wales is a main proceeding, and that the assets are situated in England and Wales, neither Articles 5 or 7 of the Insolvency Regulation would appear to be relevant.

(i) Identifying the Law of the Contract

47. In English private international law, the law governing contractual obligations is generally to be determined by reference to those provisions of the 1980 Rome Convention that have the force of law in England and Wales by virtue of the Contracts (Applicable Law) Act 1990.

48. By Article 3 of the Rome Convention, the first consideration is to be given as to whether or not the contract between the debtor and the creditor has stated that the law of one particular country is to apply. If so, that will be the law of the contract which will govern the manner in which the contract is to be construed, and for present purposes will also be relevant in determining whether a retention of title clause has been validly incorporated (see Article 10 of the Rome Convention). For a recent application of the Rome Convention, see *Halpern v Halpern* [2007] EWCA Civ, (2007) 3 WLR 849, (2007) 3 All ER 478.

49. It is not uncommon that contracting parties do not "expressly state" the law that is to govern the contract for the purposes of Article 3. However, it is possible for the agreement of the parties as to the applicable law to be demonstrable "with reasonable certainty by the terms of the contract or the circumstances of the case".

50. The Report on the Rome Convention by Professor Mario Giuliano and Professor Paul Lagarde, [O.J.1980 No.C282/1.], which the courts may use as an aid to interpretation of the Rome Convention, identifies a number of examples of situations where it might be appropriate to find that a choice of law can be determined with reasonable certainty from the terms of the agreement for the purposes of Article 3. Those examples include:

50.1 "in some cases the choice of a particular forum may show in no uncertain manner that the parties intend the contract to be governed by the law of that forum, but this must always be subject to the other terms of the contract and all the circumstances of the case"; and

50.2 “references in a contract to specific Articles of the French Civil Code may leave the court in no doubt that the parties have deliberately chosen French law, although there is no expressly stated choice of law”.

51. Article 4 of the Rome Convention establishes the rules that apply in the event that the parties to the contract have not made an express or an implied choice of law: the guiding principle is that the contract will be governed by the law of the country with which it is most closely connected. Article 4 then sets out a number of different rebuttable presumptions that can be applied with a view to determining with which country a contract is most closely connected – Article 4(2) is in the following terms:

> “*Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated”.*

52. The Guiliano-Lagarde Report does provide some guidance on identifying the obligation that is characteristic of the contract. The Report’s analysis starts by noting that the performance that must be carried out by one of the parties is usually the payment of money, the Guiliano-Lagarde Report then states: “this is not, of course, the characteristic performance of the contract”. It is therefore the obligation that gives rise to the obligation to pay money which is the characteristic obligation. In the context of a contract for the supply of goods, it is the obligation to supply the goods that is the obligation that is characteristic of the contract.

53. Article (4)5 of the Rome Convention disapplies Article 4(2) if the characteristic performance cannot be determined or if it appears from the circumstances that, as a whole, the contract is more closely connected with another country. According to Dicey & Morris, in order to displace the presumption (and the burden will be on the person asserting that the presumption should be displaced), it must be clearly shown that the contract has a closer connection with another country – it is not enough where the factors are evenly balanced.

54. In *Definitely Maybe (Touring) Ltd v Marek Lieberberg Konzertagentur GmbH* (2001) 1 WLR 1745, Morrison J coined the phrase “the centre of gravity of the dispute” which in that case he held was Germany, whereas the country arrived at by applying the Article 4(2) presumptions was England. Morrison J proceeded on the basis that, if “the centre of gravity of the dispute” was elsewhere than England, then Article 4(5) would displace the presumptions of Article 4(2).

55. The Court of Appeal has recently had the opportunity of considering the interrelation between Articles 4(2) and 4(5): *Samcrete Egypt Engineers and Contracts S.A.E. v Land Rover Exports Limited* [EWCA] Civ 2019 and *Ennstone Building Products Ltd v Stranger Ltd* [2002] EWCA Civ 916.

56. In *Samcrete*, which was a case concerning a guarantee, Potter LJ also appears to have sought to identify the “centre of gravity” of the dispute. He considered that the defining feature in that case was that the country in which the characteristic performance was to be performed was different to the country arrived at by applying the Article 4(2) presumption (at para. 47). The judge did not accept that the language in which the contractual document was written was a determinative factor (at para.46) or that the geographical location of the party receiving the performance was a determinative factor (at para. 46). As to the circumstances when it is possible to disregard the Article 4(2) presumption, he stated:

> "It should therefore only be disregarded in circumstances which clearly demonstrate the existence of connecting factors justifying the disregarding of the presumption in Article 4(2)." (para. 45)

57. In *Ennstone*, Keene LJ considered that the factors did not decisively point to one country rather than the other:

> "Applying that approach to the present case, one observes that there were here connecting factors both with Scotland and with England. The building experiencing the problem was in Scotland, the quarry from which the stone came was in England. It was anticipated that the investigatory work would be performed in Scotland, but the written advice given by the defendant to the claimant was to be received by the latter in England. That written advice was the vital part of the services to be provided by the defendant under the contract. Both companies were English companies, though it was the defendant's Scottish office which was in fact involved in doing the work. In these circumstances I cannot see that there was a sufficient linkage with Scotland for the presumption under Article 4(2) to be disregarded by virtue of Article 4(5). I conclude therefore that the proper law of this contract was that of England and that the judge was wrong on this aspect of the case." (at para. 42)

58. It is possible to further distil the analysis outlined above into a set of coherent principles which might guide an officeholder in seeking to form a preliminary view as to the law that will govern the relevant contract:

58.1 If the parties have by words in the contract expressly chosen a law, then that law will govern the contract (Article 3)

58.2 If a choice of law, although not express, can be implied from the terms of the contract or the surrounding circumstances, for instance because the contract specifically incorporates provisions of law of a particular country, then the law of that country is likely to govern the contract (Article 3);

58.3 If the parties have not expressly or impliedly chosen a governing law, the contract will be governed by the law of the country in which the contracting party who is supplying the service or the goods that underlie the contract has its habitual residence or possibly its principal place of business at the time that the contract is entered into (Article 4(2));

58.4 If, notwithstanding the presumptions in Article 4(2), the centre of gravity of the dispute is a country other than the country arrived by applying the Article 4(2) presumption, then the law that governs the contract will be the law of the country over which the centre of gravity of the dispute is located.

<u>Identifying the Correct Forum</u>

59. Determining the appropriate forum in which a dispute in relation to a contract, such as whether or not a retention of title clause has been validly incorporated and / or encompasses relevant goods in the possession of a debtor company would be done according to reasonably well settled principles.

60. Often, jurisdiction in civil and commercial matters is determined according to the Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (E.C.) 44/2001 which came into force on 1 March 2002. Jurisdiction will normally be determined according to one of the following rules:

60.1 the principal jurisdictional rule under the Regulation is that a person domiciled in a signatory state to the Regulation shall be sued in that Regulation state (Article 2(1) of the Regulation). A company is domiciled where it has (a) its statutory seat, or (b) its central administration or (c) its principal place of business (Article 60(1) of the Regulation).

60.2 In matters relating to a contract, a party may be sued in the country of the place of performance of the obligation in question, which in a contract for the sale of goods is presumed to be the place where the goods were delivered (article 5(1), Judgments Regulation).

60.3 Where the parties have included a jurisdiction clause in their agreement, in the courts of the place where the parties have agreed that disputes in relation to the case should be brought, provided that one of the parties is domiciled in a convention state and that the agreement is in writing (Article 23). In this case, certainly as regards the 2006 terms and conditions, it is arguable that Italy would be the proper forum.

Conclusion

61. Whilst the EC Regulation and UNCITRAL go some way to the harmonisation of laws and the easier recognition of foreign insolvency office-holders' appointment, there is no doubt that we cannot assume that claims or assets will be dealt with in the same manner as they would be in domestic law. Further, although the procedure for recognition may be more well defined than previously, it is still the case that obtaining assistance does take time and local assistance is inevitably always going to be required.

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