



## Cross-Border Case Study

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You are a professional working in a new multi-disciplinary practice (set up under Part 5 of the Legal Services Act 2007) called Total Insolvency Solutions, based at the Watershed in Bristol, which is made up of IPs, solicitors and counsel (and one Judge to hold the ring).

Your second engagement after a hearty and thought-provoking lunch spent in the company of your colleagues is a meeting with a new client, Mr Tony, who is a Swiss national and a keen Anglophile and who has, for insolvency-related reasons (see more below), recently received advice to relocate to England and Wales where he now owns a substantial property (in the Midlands) and various other assets. He also owns various assets overseas. He seeks your advice in respect of a number of developing problems.

### Enforcement of foreign judgment / proceedings

Mr Tony, although a nice chap, is a terrible businessman, so much so that his business ventures around the world are all being dragged, one by one, into insolvency processes.

#### Swiss company

His main business was run through a Swiss-registered Société à Responsabilité Limitée known as Dodgy & Gullible SARL ("**HoldCo**"), which is also the group parent company. Happily for him, because of the time which it takes Swiss Courts to undertake even the simplest procedural step, no creditor has yet fought their way through the procedural quagmire and succeeded in opening proceedings in Switzerland against HoldCo.

#### US company

Unfortunately for him, the US Courts are much more efficient. The American registered subsidiary ("**Inc**"), of which your client was a director, is in Chapter 11 and an officeholder has been appointed. It turns out that Inc had made various payments in the twilight period directly to your client for no apparent consideration, and moreover, that his conduct as a director fell some considerable distance short of the sort of conduct which is expected of a director by an American court.

The American officeholder now has a substantial judgment against him and has made alarming noises about enforcing it in England and Wales. Mr Tony didn't submit to the jurisdiction of the US court, he didn't enter an appearance in any of the proceedings over there, and he doesn't accept that the US court has any jurisdiction over him. He wants you to confirm that the American officeholder doesn't have a leg to stand on in this jurisdiction?

#### South Helvetican company

Even more unfortunately, his business in the rogue European state South Helvetica has also hit the buffers ("**Ltd**"). South Helvetica isn't a Member State of the EU and doesn't really do international treaties, although it does have an insolvency law. It isn't a relevant country or territory for the purposes of s.426 of the Insolvency Act 1986. In violation of all principles of comity, the South Helvetican Courts have opened insolvency proceedings against HoldCo (which isn't registered in South Helvetica and has no presence there) and have appointed an officeholder in respect of HoldCo.

The problem for the officeholder is that South Helvetica hasn't yet had the chance to implement any transaction avoidance provisions (so none of HoldCo's dubious transfers to Mr Tony can be unravelled under South Helvetican law). However, the officeholder has tracked your client down to the Midlands, has then instructed lawyers in England who are threatening proceedings against your client under s.423 of the Insolvency Act 1986. Your client wishes to receive advice about whether such proceedings are possible?



### French company

Finally, your client's company which is incorporated in France, Dodgy & Gullible SA ("SA"), is also in trouble and now finds itself in *liquidation judiciaire*. As with your client's previous companies, SA had also entered into a number of suspicious looking transactions with SA in the run up to the liquidation. This was to the detriment of your client's major rival in France, and creditor of SA, known to his friends as "French Tony".

After SA entered *liquidation judiciaire*, your client had held a number of discussions with the French prospective liquidator during which he reached an agreement (governed by French law) with the liquidator to purchase the transaction avoidance causes of action which arose. On his appointment, the *liquidateur*, apparently going back on his word and the agreement with your client, assigned the transaction avoidance causes of action to French Tony who is now threatening to sue your client in England and Wales. The terms of the assignment provide for the payment of a % of the realisation to the *liquidateur*. Your client wants to fend off French Tony and sue the *liquidateur* in this jurisdiction for breach of contract.

### **Foreign Assets**

Mr Tony has read in the newspapers and on the internet that Swiss Insolvency law has draconian transaction avoidance provisions, whereas those which apply under English law are much more debtor-friendly. He wants to avoid a Swiss insolvency at all costs, but will, if necessary, submit to an English bankruptcy order. He has already taken advice from a specialist, and completely unregulated COMI migration advisory service (How to Forum Shop Ltd) about how to move his COMI to England and so he doesn't need any further advice about that.

However, he is concerned about the extent to which an English trustee in bankruptcy will be able to realise the foreign assets which he and his wife have an interest in. Mr Tony's wife isn't such a keen Anglophile and has not moved to England and Wales; she divides her time between Spain and Switzerland. You should assume, in the first instance that she is not within the jurisdiction of the English Court.

### The Spanish villa

Until yesterday, Mr Tony and his wife had a joint interest in a stunning villa in an exotic Spanish resort. As of today, Mr Tony has transferred his interest in the villa to his wife (for no consideration, obviously). She appears as the sole registered proprietor at the Spanish Land Registry. He now wishes to know whether an English trustee in bankruptcy will be able to do anything about this asset.

### The Austrian ski chalet

The Austrian ski chalet is in the joint names of Mr Tony and his wife. Your client wants to know what an English trustee in bankruptcy will be able to do to realise his interest in it. This asset is presently unencumbered.

### **Suggested reading:**

#### Statutes

Insolvency Act 1986 (ss.283(1)(a), 423, 426 & 436)  
Insolvency Rules 1986 (r. 12A.16 *et seq*)  
CBIR and UNCITRAL Model Law (Articles 2 and 17)  
EC Insolvency Regulation 1346/2000 (Article 3)  
EC Judgments Regulation 22/2001 (Article 1)  
Practice Direction on Insolvency Proceedings



## Cases

*Gourdain v Nadler* (Case C-133/78) [1979] ECR 733

*In re Hayward, decd* [1997] Ch 45

*Ashurst v Pollard* [2001] Ch 595

*Telia AB v Hilcourt (Docklands) Ltd* [2002] EWHC 2377 (Ch) [2003] BCC 856

*Rubin v Eurofinance* [2010] EWCA Civ 895 [2011] BPIR 1110 (Court of Appeal) (July 2010)

*Re New Cap Reinsurance Corporation Ltd* [2011] EWCA Civ 971, [2011] All ER (D) 55 (August 2011)

*Interedil Srl v Fallimento Interedil Srl* (Case C-396-09) [2011] All ER (D) 195 (October 2011)

*Polymer Vision v Van Dooren* [2011] EWHC 2951 (Comm) [2011] All ER (D) 170 (November 2011)

*In the matter of Phoenix Kapitaldienst GmbH*; [2012] EWHC 62 (Ch) (Proudman J) (January 2012)

*Hornan v Baillie & Ors* [2012] EWHC 285 (Ch) (January 2012)

*F-Tex SiA v Lietuvos-Anglijos* (Case C-213/10) (CJEU) (April 2012)

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