FOREIGN IMMOVABLE PROPERTY

How long is the reach of an English trustee in bankruptcy?

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THE RATE OF CHANGE SINCE 1986

1. As a matter of legal theory, an English trustee in bankruptcy has long been able to claim that foreign immovable property forms part of the English bankruptcy estate. This theory is part of a broader “universal” approach which endorses the concept of one proceeding for all assets of the debtor wherever situated. Under this theory, the proceeding is likely to take place in the state where the bankrupt is domiciled (usually the place of incorporation or the commercial seat). All matters are dealt with by the trustee in bankruptcy who collects the assets, wherever situated. Creditors must submit proofs to the one bankruptcy administration.

2. Of course, if there were uniform insolvency laws, then this would appear to be the most efficient method. Differences however in local laws may result in different outcomes (for example in the area of voidable transactions and in priority of distributions to creditors). Given that bankruptcy is principally concerned with “property” of one kind or another, one of the principal difficulties with the universal approach and the apparent long reach of the English trustee is the rule of private international law that the law of the place where immovable property is situate governs its ownership.

3. Shortly prior to the coming into force of the Insolvency Act 1986, the prospect of such a universal approach was distant. In paragraphs 1915-6 of their report in 1982, the Cork Committee examined the Bankruptcy Act 1914:

> "In conformity with what is known as 'the comity of nations', there is a limited degree of recognition as between States of the legal effects of bankruptcy, so that the ‘trustees in bankruptcy', under one form of title or another, may be able to obtain recognition of, and the enforcement of, their titles to the assets of their bankrupts situate abroad, in their capacity as assignees of the bankrupts' estates. But such recognition rarely extends to the bankrupt's immovable assets, and the claims of a foreign trustee or liquidator are often postponed to the prior payment of local creditors. ….The situation in any insolvency which extends beyond the frontiers of the United Kingdom is complex and obscure. Serious as this inevitably is to the commercial community, it is exceptionally illogical and frustrating when it exists in what is intended to be a single and unified trading area, such as the European Economic Community."

4. The Cork Report made it plain that the Committee looked forward to the day when, within the EEC, there would be "a single and universal bankruptcy proceeding in place of a considerable number of separate proceedings in each State where the debtor has assets" (para. 1919), but the Committee did not see that day as imminent.

5. The report was followed by the passing of the Insolvency Act 1986 which did not purport to make any substantial difference. Section 283(1)(a) of the Act provides (as did its predecessor) that the bankrupt's estate for bankruptcy purposes includes:

> "all property belonging to or vested in the bankrupt at the commencement of the bankruptcy."

6. "Property" is defined in section 436 as including:

> "…. money, goods, things in action, land and every description of property wherever situated …." (Emphasis supplied.)

7. Section 306 of the Act provides as follows (so far as material):

> "(1) The bankrupt's estate shall vest in the trustee immediately upon his appointment taking effect …..
>
> (2) Where any property which is …. comprised in the bankrupt's estate vests in the trustee …. it shall so vest without any conveyance, assignment or transfer."

8. Thus, the Insolvency Act 1986 reconfirmed that a bankrupt's foreign property forms part of his estate for English bankruptcy purposes and vests automatically in his trustee in bankruptcy, on the latter's appointment, without the need for any further formalities. However, in common with its predecessors, the vesting provisions of the Act do not effect a change in the foreign register of title, which continues to record the bankrupt as the owner of the property.

9. Despite the considerable (and increasing) rate of change since 1986 in the law relating to international insolvency, this fundamental hurdle facing a trustee in bankruptcy has not been removed. However, within the EU, the process by which the trustee's reach extends to the realisation of foreign property has been improved and made more efficient. In order to describe where we have reached in this respect, it is necessary to note the following developments in the jurisprudence affecting a trustee's jurisdiction over foreign property for the purposes of realising value for the bankrupt's estate:

   a. The Brussels Convention (1968):

      i. *Webb v Webb* [1994] QB 696;
      ii. *Re Hayward (deceased)* [1997] Ch 45;
      iii. *Ashurst v Pollard* [2001] Ch 595.

   b. Council Regulation (E.C.) 1346/2000 on Insolvency Proceedings (31 May 2002).

   c. UNCITRAL Model Law on Cross-Border Insolvency (6 April 2006).

THE BRUSSELS CONVENTION ("THE CONVENTION")[1]

10. Since the coming into force of Council Regulation (E.C.) 1346/2000 on Insolvency Proceedings ("the Insolvency Regulation") on 31 May 2002, the Convention has become largely irrelevant for bankruptcy purposes (save in the case of Denmark, to which the Insolvency Regulation does not apply). Nevertheless, it is necessary to understand how the Brussels Convention operated because, for present purposes, the jurisprudence developed under it forms the background to the present position under the Insolvency Regulation.

11. The Convention allocated exclusive jurisdiction in civil and commercial matters to the relevant local court in the country where the property is situate. Article 1 of the Convention provided that the Convention applied in civil and commercial matters, subject to a number of exceptions including:

> "bankruptcy, proceedings relating to the winding up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings."

[1] The Convention has to a large extent been superseded by Council Regulation (E.C.) 44/2001 on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters ("the Judgments Regulation"). Since 1 March 2002, the Judgments Regulation applies in all the Member States of the European Union with the exception of Denmark. The Judgements Regulation duplicates almost all the provisions of the Convention.

12. On the other hand, article 16 provided (so far as material):

> "The following courts shall have exclusive jurisdiction, regardless of domicile:
>
> (1)(a) in proceedings which have as their object rights in rem in immovable property ….. , the courts of the Contracting State in which the property is situated;
>
> (b) [exception in relation to certain tenancies of immovable property]
>
> (2)……
>
> (3) in proceedings which have as their object the validity of entries in public registers, the courts of the Contracting State in which the register is kept…"

13. In *Gourdain v Nadler* [1979] ECR 733, a claim was brought under French insolvency law to oblige a director of an insolvent company to contribute to the company's assets. The ECJ found that the terms of the bankruptcy exception in article 1 must bear an autonomous meaning and that:

> "..if decisions relating to bankruptcy and winding up are to be excluded from the scope of the Convention…they must derive directly from the bankruptcy or winding up and be closely connected with the proceedings for the 'liquidation des biens' or the 'règlement judicature'".

14. The ECJ decided that the case fell within the exclusion because the claim, though not for a bankruptcy order, followed directly from that order and that, under French law, the claim existed only under the law of bankruptcy. It would appear that this meant that the nature of the powers exercised was unique to the law of bankruptcy, not merely that the source of the power was contained in the relevant insolvency legislation.

15. During the 1990s, several cases would explore these themes further.

THE BRUSSELS CONVENTION: *WEBB v WEBB* [1994] QB 696

16. This was not a bankruptcy case. A son was the sole legal owner of land situated in France, the purchase price of which had been paid by his father. The father sought a declaration from the English court that the son held the flat on trust for him and that he should convey title to the flat to him. The son claimed that, by virtue of the Convention, the case could only be heard in France. The ECJ rejected this submission, holding that the jurisdiction which had been invoked was personal rather than proprietary, based on the prior fiduciary relationship between father and son.

17. In his opinion in *Webb*, Advocate-General Darmon identified the question on which a ruling was required (at p.705D):

> "[D]oes an action brought by a person against another person for a declaration that the other person holds immovable property as trustee and for an order requiring the other to execute such documents as should be required to vest the legal ownership in the plaintiff constitute an action *in rem* within the meaning of Article 16(1) of the Convention?"

18. In paragraph 11 of his opinion, the Advocate-General said:

> "Where Article 16 is concerned, it should be borne in mind that this provision …. determines which courts are to have jurisdiction where the principal subject matter of the claim relates to a matter mentioned therein."

19. In this way, he equated proceedings which have "as their object" rights *in rem* (see Article 16(1)) with proceedings where the "principal subject matter" of the claim relates to rights *in rem*. Later

in his opinion, after citing *Reichert*[2], and after summarising the opposing arguments, he said (in paragraphs 27 and 28):

> "The question is not an easy one and I have pondered on the correct approach to take, for the claim of ownership undeniably underlies the claim for the recognition of [a trust in favour of the father].
>
> However, the approach which looks at the actual aim pursued by the [father] is not supported by the relevant provision, by prevailing academic opinion or by the case law of the court. The jurisdiction *ratione materiae* of a court must necessarily be assessed in the light of the subject matter of the claim, as defined in the originating application, without looking at purpose …."

20. The Advocate-General noted the requirement of European case law for a restrictive interpretation of Article 16. He then turned to consider the nature of the father's claim, concluding (in paragraph 38) that by his claim the father was seeking to establish a right of ownership as against the son, as opposed to asserting an existing right of ownership, such that the claim was based on a purely personal relationship.

21. In paragraph 46 of his opinion the Advocate-General expressed the view that:

> "…. only actions bearing directly on "the extent, content or ownership of immovable property" fall within the scope of article 16(1)."

22. In paragraph 48 he stated:

> "The dividing line [between proceedings which fall within Article 16(1) and those which do not] therefore appears to lie between actions whose principal subject matter is a dispute over ownership between persons who do not claim inter se any fiduciary relationship and actions concerning a breach of fiduciary duty which, if found to have been committed, will have effects *in rem*. In such a case, the personal nature of the relations is, in my view, the overriding factor."

23. This was drawing a distinction between on the one hand an action in which an existing right of ownership is asserted against a stranger, and on the other hand an action in which one party seeks to establish a right of ownership against the other party as having arisen out of some personal relationship between them. In each case the action concerned a right of ownership, but whereas in the former case the "principal subject-matter" of the action is the assertion of an established right, in the latter case it is the personal relationship which is said to give rise to the right. In paragraph 62, the Advocate-General refers to the rationale of Article 16:

> "Finally, I would observe that the essential reason for conferring sole jurisdiction under article 16(1), as recognised by the court in the *Reichert* case, namely that the courts of the locus *rei sitae* are better placed to ascertain the facts satisfactorily and to apply the rules and practices of that locus, is irrelevant where, as in the instant case, the principal subject matter of the dispute is the possible existence of a fiduciary relationship between the parties."

24. In saying that the rationale of Article 16 was "irrelevant" on the facts of that case, the Advocate-General was making the point that the rationale did not apply in that case since the French courts were not in as good a position as the English courts to ascertain the relevant facts as to the existence or otherwise of a fiduciary relationship between father and son, nor did any question of French law and practice arise in relation to the determination of that issue. He regarded the fact that the issue in the case fell outside the rationale underlying Article 16 as a further ground for

[2] *Reichert v Dresdner Bank A.G.* [1990] E.C.R. I-27.

concluding that Article 16 did not apply. He concluded by proposing that the court should rule that an action brought by a person against another person for a declaration that the latter holds immovable property as trustee and for an order requiring the latter to execute such documents as should be required to vest the legal ownership in the plaintiff did not constitute an action *in rem* within the meaning of Article 16(1).

25. This was the basis of the Court's decision. In paragraphs 14 to 16 of its judgment, the Court stated:

> "Article 16 confers exclusive jurisdiction in the matter of rights *in rem* in immovable property on the court of the contracting state in which the property is situated. In the light of the court's judgment in *Reichert* …., where the court had to rule on the question whether the exclusive jurisdiction prescribed by that article applied in respect of an action by a creditor to have a disposition of immovable property declared ineffective as against him on the ground that it was made in fraud of his rights by his debtor, it follows that it is not sufficient, for article 16(1) to apply, that a right *in rem* in immovable property be involved in the action or that the action have a link with immovable property: the action must be based on a right *in rem* and not on a right *in personam*, save in the case of the exception concerning tenancies of immovable property. The aim of the proceedings before the national court is to obtain a declaration that the son holds the flat for the exclusive benefit of the father and that in that capacity he is under a duty to execute the documents necessary to convey the ownership of the flat to the father. The father does not claim that he already enjoys rights directly relating to the property which are enforceable against the whole world, but he seeks only to assert rights as against the son. Consequently, his action is not an action *in rem* within the meaning of article 16(1) of the Convention but an action *in personam*. Nor are considerations relating to the proper administration of justice underlying article 16(1) of the Convention applicable in this case."

26. The ECJ accordingly held that the action was not an action *in rem* within the meaning of Article 16(1). This approach would appear to encourage forum shopping by careful framing of the relief sought. The nature and extent of the relief sought was taken up in *Re Hayward* and *Ashurst v Pollard*.

THE BRUSSELS CONVENTION: *RE HAYWARD (DECEASED)* [1997] Ch 45

27. In *Re Hayward*, a trustee in bankruptcy applied to claw back title in immovable foreign property from a person who claimed to have acquired that title on the death of the bankrupt. The local land register in Minorca reflected this. Rattee J concluded that proceedings by a trustee in bankruptcy seeking a declaration as to the ownership of foreign land did not fall within the bankruptcy exception in Article 1 of the Convention, stating (at p.54B-D):

> "So far as the reference in article 1 of the Convention to bankruptcy is concerned, [counsel for the trustee] forcefully and attractively argued that the claim made by the originating application is a matter of bankruptcy, because that claim depends essentially on the bankruptcy of the late Mr Hayward. Only by virtue of that bankruptcy does the trustee have the claim which he seeks to assert in the proceedings. However, the nature of the claim made by the trustee in the proceedings, in my judgment, is not a matter of bankruptcy in the sense that any question of bankruptcy is the principal subject matter of the proceedings. The claim made in the proceedings is essentially a claim by the trustee to recover from a third party …. assets said to belong to the bankrupt's estate and, therefore, to be vested in the trustee."

28. In this way, he held that the source of the claim was immaterial where autonomously defined concepts were in issue and that an action to recover assets from a third party which allegedly vested in the trustee was not unique or special to bankruptcy. Instead, the claim was simply the

assertion of an ordinary property right such as any owner might bring. In other words, the manner by which the trustee had come to acquire his interest was of no importance to his claim.

29. This approach focuses on the nature of the relief claimed with the effect that few claims by a trustee in bankruptcy would come within the bankruptcy exception – a blow for universality and the long reach of the trustee from the English courts. It has been argued that the decision ignores the special, statutory cause of action provided to trustees in bankruptcy under (what is now) section 335A of the Insolvency Act 1986.

THE BRUSSELS CONVENTION: *ASHURST v POLLARD* [2001] Ch 595

30. Mr Pollard and his wife jointly owned a property in Portugal. On 26 October 1993 a bankruptcy order was made against Mr Pollard. On 31 August 1994 Mr Ashurst was appointed as trustee in bankruptcy. On 20 September 1999 the Trustee issued an application in the local bankruptcy court against Mr and Mrs Pollard for an order for the sale of the Portuguese property with vacant possession. On 4 October 1999 the district judge made the order.

31. Mr and Mrs Pollard appealed to the High Court judge on the grounds that by virtue of Article 16(1) of the Convention, the Portuguese courts had exclusive jurisdiction to hear and determine the Trustee's claim. Jacob J dismissed the appeal and Mr and Mrs Pollard appealed his decision to the Court of Appeal.

32. Two issues were raised before Jacob J. The first issue was whether (as the Trustee contended) the proceedings were excepted from the application of the Convention by virtue of the inclusion of "bankruptcy" among the exceptions in Article 1. The second and more substantial issue was whether (as Mr and Mrs Pollard contended) the Portuguese courts had exclusive jurisdiction to hear and determine the Trustee's claim. On this second issue, it was Mr and Mrs Pollard's case that Article 16(1) applied to the proceedings, alternatively that under domestic law the English court has no jurisdiction to make orders relating to trust property held abroad.

33. On the first issue, Jacob J held that the proceedings did not fall within the "bankruptcy" exception in Article 1 stating (in para. 13 of his judgment):

> "These are proceedings consequential upon the bankruptcy – not proceedings about whether or not the debtor should be made bankrupt. The question of bankruptcy has already been determined. Moreover, the claim is not a special bankruptcy remedy – it is just a property claim."

34. In support of that conclusion, Jacob J cited passages from the judgment of Rattee J in *Re Hayward* and of the ECJ in *Gourdain v. Nadler*. The judge held in favour of Mr and Mrs Pollard on the first issue. On the second issue, he concluded that the order for sale sought by the Trustee purported to have effect against all the world, and as such was precluded by Article 16(1). However, he went on to conclude, relying on the reasoning in *Webb* that the case did not turn on the form of the relief sought; and that where an English trust exists over land held abroad, Article 16(1) is no bar to enforcement of that trust. On that basis, he held that Article 16(1) did not prevent the bankrupt being compelled to complete the Trustee's title:

> "There is no doubt that English law regards the Portuguese landholding as vested in the trustee. To the extent that the trustee's title has not been perfected, the bankrupt is, by English law, holding it for the trustee. So the bankrupt can be compelled to complete the trustee's title or do any other act in relation to the land at the trustee's direction. Any such order, provided it is *in personam*, is an order which the English court can make having, as it does, jurisdiction over the bankrupt who is domiciled here."

35. The judge concluded that a personal order against Mr and Mrs Pollard directing them to sell the Portuguese property at the best price reasonably obtainable would not be within Article 16(1). He considered the possibility of an order being made against Mr Pollard directing him to convey the

property to the Trustee (i.e. in accordance with Portuguese law), commenting that if that were done the Trustee could effect his own sale in Portugal under Portuguese law.

36. The Judge considered whether the court had jurisdiction to make orders in relation to trust property held abroad. It had been argued that, although section 14 of the Trusts of Land and Appointment of Trustees Act 1996 confers jurisdiction on the court to regulate the performance by trustees of their functions, that Act extends only to England and Wales. The Judge concluded on this issue:

> "What the Act does not say is that the court cannot act in relation to trust property held abroad or that a similar order as can be made under the Act cannot be made by virtue of the court's jurisdiction over property held under an English trust."

37. The Trustee therefore succeeded on the second issue and Mr and Mrs Pollard's appeal was dismissed. In the Court of Appeal, all the relevant authorities were reviewed. Jonathan Parker LJ summarised their effect as follows:

> "53. In my judgment, the following factors appear from the authorities to which I have referred as being relevant to the question whether Article 16(1) applies in the instant case:
>
> 1. Given that its effect is to override the parties' choice of forum, Article 16 is to be given a restrictive interpretation (see *Reichert*).
>
> 2. The rationale underlying Article 16 is "the proper administration of justice", on the footing that the courts of the Contracting State in which the property is situated will be best placed to conduct any factual investigation which may be required, and to apply local law and practice (see *Sanders v. van der Putte* and paragraph 62 of the Advocate-General's opinion in *Webb*, quoted earlier).
>
> 3. In considering whether Article 16(1) applies in any particular case, it is material to have regard to whether that rationale applies: that is to say, whether the proceedings involve a factual investigation which is best carried out by the courts of the state in which the property is situated, and/or questions of local law and practice are raised (see paragraph 16 of the Court's judgment in *Webb*).
>
> 4. The expression "which have as their object …" in Article 16(1) is synonymous with "which have as their the principal subject matter…." (see paragraph 11 of the Advocate-General's opinion in *Webb*).
>
> 5. "Subject matter" in this context is not to be confused with "aim" or "purpose" (see ibid. paragraph 28)."

38. Applying these principles, the court concluded that in so far as the court should make orders *in personam* along the lines suggested by the Judge, the rationale underlying Article 16(1) could have no application, since no issue arose as to the factual situation in Portugal, nor did the proceedings involve any question of Portuguese law or practice. Furthermore, the proceedings issued by the Trustee did not seek to assert any property right against third parties. As in *Webb*, they raised personal issues as between the Trustee and Mr and Mrs Pollard. The fact that the Trustee's ultimate aim or purpose in the proceedings was to effect a change in the ownership of the property by achieving its sale was not material:

> "What has to be looked at is the subject matter of the proceedings. In the light of *Webb*, the fact that the resolution of a dispute as to personal rights (rights *in personam*) may impact upon property rights enforceable against third parties/strangers (rights *in rem*) does not in my judgment lead to the

> conclusion that the subject matter of the proceedings for the purposes of Article 16(1) is rights *in rem*."

39. The Court of Appeal distinguished *Re Hayward* on the grounds that the principal subject matter of the proceedings in that case had been the ownership of the Minorcan property. By contrast, Mr Ashurst's proceedings raised no issue as to title to land. He was not seeking to establish or protect, let alone perfect, his title to Mr Pollard's interest in the Portuguese property. On that basis, the trustee succeeded and the appeal by Mr and Mrs Pollard was dismissed. Under the Brussels Convention therefore, English courts did have jurisdiction to make orders in favour of a trustee in bankruptcy for possession and sale of real property that was located abroad.

IMMOVABLE PROPERTY AND COUNCIL REGULATION (E.C.) 1346/2000

40. The Insolvency Regulation was adopted by the EU Council on 29 May 2000 and came into force on 31 May 2002. It has direct effect in all the member states of the European Union, with the exception of Denmark, which has indicated that it will introduce parallel legislation.[3] The Insolvency Regulation was introduced to improve and speed up insolvency proceedings having cross-border effects. The Regulation applies only where a debtor has his centre of main interests (see recital 13) within the EU and deals only with jurisdiction within the EU. It is applicable to bankruptcy proceedings. The Insolvency Regulation sets down rules for determining both the proper forum and the law that will govern insolvency proceedings concerning EU debtors.

41. The applicable jurisdiction for bankruptcy proceedings, as provided by the Insolvency Regulation, is the court of the regulation state where the debtor's centre of main interests is located (Article 3(1)). The Insolvency Regulation provides for separate 'territorial'/'secondary' proceedings in certain restricted circumstances in countries other than the state in which the centre of main interests is located (Article 3(2)). The courts of regulation states have jurisdiction to open such secondary insolvency proceedings against the debtor only where the debtor is established within the territory of that other member state. Unlike the main proceedings, which (in the absence of secondary proceedings) have effect throughout the EU (other than Denmark), the secondary proceedings are restricted to the assets of the debtor situated in that specific regulation state and are limited to bankruptcy procedures (Article 3(2)).

42. The Insolvency Regulation imposes a unified code for choice of law rules which, in conjunction with the mandatory regime of jurisdiction rules, aims to enable those who have dealings with a debtor whose centre of main interests is within the European Union to identify with greater certainty the substantive legal provisions by which their rights will be determined in the event of the debtor's insolvency.

43. Importantly, the general choice of law rule is that the law applicable to the insolvency proceedings shall be the law of the regulation state within the territory of which such proceedings are opened (Article 4). In particular, Article 4(2) provides that the law of the state of opening of proceedings will determine:

> "(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."

44. The Insolvency Regulation does not contain a definition of the term "assets". It follows that the law of the state of opening of main proceedings will determine which "assets" vest in the trustee in bankruptcy. In England, the assets contemplated by article 4(2)(b) of the Insolvency Regulation will be the "property" which is referred to in sections 283 and 436 of the Insolvency Act 1986. *Prima facie*, the English trustee in bankruptcy's long reach has been preserved, possibly even strengthened in view of the provisions in the Insolvency Regulation that deal with recognition of main proceeding by other regulation states.

[3] The member states of the European Union in which the Insolvency Regulation has effect will be referred to herein as "regulation states".

45. However, true universality has not been achieved. The Insolvency Regulation recognises that there will be cases where strict adherence to the general choice of law rule will interfere with the rules under which transactions are carried out in other regulation states. It follows that the general rule is subject to a number of exceptions including rights '*in rem*', rights of set-off permitted by the law applicable to the insolvent debtor's claim, rights relating to immovable property, and rights arising out of pending lawsuits in other regulation states. The most important exceptions that arise in the context of immovable property will be considered below.

46. Article 5 of the Insolvency Regulation represents a potentially serious obstacle to the English trustee in bankruptcy's long reach. It is in the following terms:

> "(1) the opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets – both specific assets and collections of indefinite assets as a whole which change from time to time – belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings."

47. The crucial time for the purposes of article 5(1) is therefore the time of opening of the main proceedings. In the event that an asset was located in England at the time that a right *in rem* was acquired by a third party, but, by the time of opening of proceedings, the asset has been moved to another regulation state, it is possible that it is the laws of the latter regulation state that will govern the extent to which the third party can take steps to enforce its right *in rem*.

48. The Insolvency Regulation does contain some rules that assist in determining in which regulation state an asset is situated (Article 2(g)):

> "'the Member State in which the assets are situated' shall mean, in the case of:
>
> - tangible property, the Member State within the territory of which the property is situated,
>
> - property and rights of ownership of or entitlement to which must be entered in a public register, the Member state under the authority of which the register is kept,
>
> - claims, the Member State within the territory of which the third party required to meet them has the centre of his main interests, as determined in Article 3(1);"

49. The Insolvency Regulation supplies a non-exhaustive definition of a "right *in rem*". That definition contains the all-embracing phrase "a right *in rem* to the beneficial use of the assets" (Article 5(2)(d)). It is arguably the law of the state in which the asset is situated at the relevant time which will ultimately determine issues such as the characterisation of the right and other important matters such as whether the right has been perfected, for instance by registration.

50. In the context of an English bankrupt's immovable property located in another regulation state and over which the bankrupt has granted security to a third party, it is arguably the law of that other regulation state that will govern the enforceability of the security and thus the ability of an English trustee in bankruptcy to recover that asset for the benefit of the creditors in the English bankruptcy. It is important to note that article 5 preserves an English trustee in bankruptcy's ability to challenge the granting of such security, for instance by alleging that it was a transaction at an undervalue (Article 5(4)).[4]

51. Having said that, the ability to challenge the granting of security on the basis of the English transaction avoidance rules is itself curtailed by the operation of Article 13. That article must be

[4] See also in this respect, Article 11 – Effects on rights subject to registration.

read in the light of article 4(2)(m) the effect of which is that the law of the state of opening of main proceedings will determine:

> "the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all creditors."

52. Article 13 states:

> "Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:
>
> - the said act is subject to the law of a Member State other than that of the State of the opening of proceedings; and
>
> - that law does not allow any means of challenging that act in the relevant case."

53. Article 13 therefore represents a potentially significant impediment to an English trustee in bankruptcy's ability to realise foreign immovable property which the debtor disposed of shortly before the bankruptcy. The effect of Article 13 is to provide a potential defence to the transaction avoidance provisions that are available to an English trustee in bankruptcy. The defence would operate where the impugned act is governed by the law of another regulation state, and that other regulation state does not provide any means of challenging the act.

54. As an example, French law provides for several circumstances in which pre-bankruptcy transactions made during the 'période suspecte' can be challenged post-bankruptcy. The 'période suspecte' starts on the date of cessation of payments and ends on the date of opening of French insolvency proceedings. However, the 'période suspecte' cannot exceed 18 months.[5] In light of the time within which the impugned transaction must have taken place under French law, it is conceivable that circumstances could exist whereby an English trustee in bankruptcy would be able to challenge the granting of security in England under section 423, but that no equivalent procedure would be available in France, thus triggering the application of Article 13.

55. Finally, an English trustee in bankruptcy's long reach will also be affected by article 14 – Protection of Third-Party Purchasers. That article provides (so far as relevant):

> "Where, by an act concluded after the opening of insolvency proceedings, the debtor disposes, for consideration, of:
>
> - an immoveable asset; or …
>
> the validity of that act shall be governed by the law of the State within the territory of which the immoveable asset is situated …."

56. It is noteworthy that article 14 applies specifically and only to transactions concluded after the opening of insolvency proceedings – this is ordinarily a time at which a bankrupt ought to be unable to deal with his own assets, or at any rate his immoveable assets. It is surprising that article 14 refers only to the transaction being "for consideration", without expanding on whether the consideration must adequately reflect the value of the immovable asset. It would appear that, provided that the third party has given nominal consideration, the law of the state of opening of proceedings is displaced in favour of the law of the state where the immovable asset is located as regards determining the validity of the act of disposal.

UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY ("THE MODEL LAW")

57. This derives from the United Nations Commission on International Trade Law. The Model Law came into force in England on 6 April 2006 and applies in various situations including to English

[5] There exists a provision to extend the 'période suspecte' by an additional 6 months in certain circumstances.

bankruptcies in circumstances where the English office-holder seeks assistance in a foreign state. The Model Law has already been adopted by many nations, including the US, Canada, Japan, South Africa, Australia and New Zealand. The Model Law is overridden by the EC Regulation on Insolvency Proceedings wherever the two are in conflict.

58. The objective of the Model Law is to achieve faster recognition of insolvency proceedings between courts in different countries and also to facilitate co-operation between the courts of different countries in the management of the affairs of insolvent persons – this includes the protection and maximisation of a debtor's assets.

59. On the whole though, the Model Law, unlike the Insolvency Regulation, does not establish substantive rules as regards jurisdiction or the choice of law. Moreover, it is anticipated that the effect of the Model Law's implementation in England will principally be to facilitate the task of foreign insolvency office holders or creditors seeking recognition of foreign proceedings in England with a view to realising assets located in England. It is to a large extent "inward-looking" legislation. An English trustee in bankruptcy seeking to realise an asset held by a bankrupt in a foreign county would of course benefit from the terms of the Model Law, provided that that other country had adopted the provisions of the Model law into its domestic law.

CONCLUSION

60. As a result of the implementation in England and Wales of the Insolvency Regulation and the adoption in several countries of the Model Law, an English trustee in bankruptcy's ability to recover assets that are located in a foreign jurisdiction has been subjected to new and comprehensive laws. There are now several layers of rules that will operate in parallel and which will circumscribe an English trustee in bankruptcy's long reach. The sacrifice in simplicity has been matched by a gain in certainty. Significantly, where a debtor whose centre of main interest is located in England and Wales owns immovable property located in another regulation state, the position of an English trustee in bankruptcy has been consolidated as a result of the choice of law provisions that are contained in the Insolvency Regulation.

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April 2006