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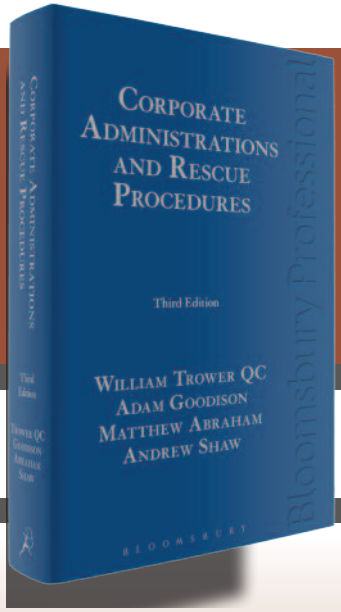

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FROM THE EDITOR

MARK ARNOLD QC

Full and by?

Welcome to the September edition of the South Square Digest.

We have had a shocking reminder, if one were needed, of the devastation that can be caused by natural phenomena. Irma, one of the most intense hurricanes ever experienced, has brought death and destruction to the Caribbean islands and Florida. The British Virgin Islands, Anguilla and the Turks and Caicos Islands, though by no means alone, have been particularly hard hit and the damage suffered has been catastrophic. At the same time, Mexico has suffered its strongest earthquake in a century. Our thoughts and prayers go out to all those affected.

JEAN-CLAUDE JUNKER: WE NEED ONE CAPTAIN

Great uncertainty hangs over what the regime in North Korea plans to do next, and what to do about it. Its seemingly relentless missile-testing prompted the President of the United States to state that the US would respond to any further provocations "*with fire and fury like the world has never seen*". The regime responded by saying it was conducting a careful examination of a possible strike on the Pacific island of Guam, host to a large American military base. Then it fired a long-range missile over Japan. And then it conducted an underground test of what it said was a hydrogen bomb. On 11 September, the UN Security Council unanimously resolved to impose further and more far-reaching sanctions (although less stringent than those the US had called for). As we go to press, another missile has been fired over Japan. We can but watch and wait to see how the situation will be resolved.

Meanwhile, with the wind back in the sails of flagship Europa, the President of the European Commission, master of all he surveys from the quarterdeck, has shared his vision of the future. It is one of ever closer union: a federalist vision of common EU policy, on tax, foreign policy and defence, determined by a qualified majority vote, using "passerelle clauses" to bypass the threat of veto. Acknowledging a bit of sea-mist, the European landscape would become clearer if Europa was steered by a single captain, says

the sailor from Luxembourg: President of the Commission and President of the Council should become one and the same. One wonders whether the view from the crow's nest might be even more revealing.

The interested observer, somewhere astern and with a watchful eye on the flagship's wake, may be forgiven for thinking that Brexit negotiations between the UK and the EU have entered choppy waters. In public at least, the EU's focus appears to be on the divorce arrangement including (but by no means confined to) the divorce bill. While acknowledging that the divorce arrangements must be addressed, the UK wants to look ahead and talk in addition about the "*deep and special relationship*" it seeks with the EU, including its future trading relationship. We know from experience that it is difficult to force parties to discuss something either or both of them have no wish to talk about. For those of us who engage in litigation, it is one reason why we have a job. In relations between sovereign states or unions of states (or even super states, if the President the European Commission's vision is to be realised) the process must surely be even less straightforward. As we watch how the negotiations develop, however, it is perhaps worth reminding ourselves that Art 50(2) requires the EU to "*negotiate and conclude an agreement with [the UK], setting out the arrangements for its withdrawal, taking account of the framework for its future relationship with the Union*".

Meanwhile, not without some rumbling, the Great Repeal Bill is making its way through Parliament. As we know, the principal aim of the Bill is to repeal the European Communities Act 1972, which currently gives primacy to European law – including the decisions of the CJEU – in the UK, while simultaneously adopting into UK domestic law existing EU law ("*retained EU law*") to ensure "maximum certainty as we leave the EU". As the Prime Minister herself said in her foreword to the white paper, "*it will then be for the democratically elected representatives in the UK to decide on any changes to that law, after full security and proper debate*". In her Lancaster House speech on 17 January 2017, the Prime Minister had specified, perhaps more precisely, that it would be for the *British Parliament* to decide on any changes.

At the time of writing, however, much criticism has been levelled at the so-called "Henry VIII clauses" currently included in the bill. For example, clause 7 of the bill provides that any Minister of the Crown may by regulations make such provision as s/he

THERESA MAY: SCRUTINY AND PROPER DEBATE

LORD JUDGE, FORMER LORD CHIEF JUSTICE

considers *appropriate* to prevent, remedy or mitigate any failure of retained EU law to operate effectively or any other deficiency in retained EU law, arising from the UK's withdrawal from the EU. The power would be exercisable for the period of two years following (Br)exit day and during that time such regulations as are made may make any provision that could be made by an Act of Parliament.

The concern about the use of such clauses is that they operate as something of a power-grab by the executive from the legislature: a minister may effectively amend, even overrule, primary legislation by means of such regulations, which constitute only secondary legislation. The use of such clauses has proliferated in recent years. Hang on, say those in Henry VIII's camp: it is Parliament itself that agrees to confer such powers on the executive, by voting through the bill. And any such regulations made by the Minister would be subject to scrutiny by Parliament and (in this case) by the devolved legislatures: see draft clause 16 and schedule 7. All true. The niggling concern for some, however, is whether they are really necessary and, assuming they are, just how much scrutiny they would receive.

The name "Henry VIII clause" is actually something of a misnomer, as the former Lord Chief Justice, Lord Judge, has explained.[1] It arises from the Statute of Proclamations of 1539, pursuant to which (according to its title) "*Proclamations made by the King shall be obeyed*". But this did not permit the use of executive power to override existing legislation.

1/. Ceding Power to the Executive: the Resurrection of Henry VIII, 12 April 2016, King's College, London. In his speech, Lord Judge also made reference to what he had said on the same subject when addressing the Lord Mayor of London on behalf of the Judiciary, in 2010. See too the Henry VIII clauses fact sheet prepared by Stephen Argument, Legal Adviser (Subordinate Legislation) to the Australian Standing Committee on Justice and Community Safety (2011)

In terms, the King's proclamations were to be obeyed and kept as though they were made by Act of Parliament, subject to one or two provisos. It did not mean that the King could, by his proclamation, deprive his subjects of their possessions, liberties or other rights. Nor did it mean that, by any proclamation made pursuant to the Act, any other statutes, common laws already in force or other "*lawful or laudable customs of this realm*" could be "*infringed, broken or subverted*". In other words, the King by his proclamation could not change existing laws nor interfere with existing rights. It will be recalled that the Chief Justice of the Common Pleas, Sir Edward Coke, subsequently said as much in the Case of Proclamations (1610), causing King James I and VI much consternation. By that time, of course, the Statute of Proclamations had already become history, hardly surviving Henry VIII's death in 1547; and its champion, Henry's loyal minister Thomas Cromwell, had lost his head in 1540, having been condemned to death without trial.

Doing our best to keep our heads, we focus in this edition on Brexit, its opportunities and potential consequences. Gabriel Moss QC introduces articles generously written and contributed by three acknowledged experts in the restructuring field, to all of whom we extend a very warm welcome. Professor Christoph Paulus of the Humbolt University, Berlin, considers the consequences for the world of restructuring. Howard Morris of Morrison & Foerster ponders on the goal of EU harmonisation as the UK opts to leave the orchestra. Professor Federico M Mucciarelli of the University of Modena writes on the impact on insolvency forum-shopping.

There are also articles by Ryan Perkins, who considers the authorities on the application of the Judgments Regulation to schemes of arrangement; and Toby Brown, who reports on the Cayman Islands Grand Court's recently delivered judgment dismissing Primeo's claim against two HSBC entities. As well as other regular features, we digest recent cases, introduced in this edition by Felicity Toube QC.

Finally, in this edition we bid a fond farewell from South Square to Simon Mortimore QC, who is retiring from full-time practice after 43 years at the Bar. As Simon disembarks, we welcome aboard Rose Lagram-Taylor who, having completed her pupillage, takes up her tenancy at South Square at the beginning of October.

HENRY VIII : HIS FLAGSHIP, GREAT HARRY, WAS TOP-HEAVY

We hope you enjoy this edition, whether you agree or disagree with what is written. Needless to say, the views expressed in the editorials and articles in this and every edition of the South Square Digest are those of the authors themselves. They are not to be taken necessarily to reflect the views of other members or of South Square generally.

No good exit from Brexit

Gabriel Moss QC introduces three articles in this issue contributed by two eminent EU academics and a leading UK solicitor, all experts insolvency and restructuring, dealing with the thorny subject of Brexit and its consequences for the world of restructuring and insolvency

This issue of the Digest is privileged to carry an article by Professor Christoph Paulus on 'Brexit and its consequences for the world of restructuring'. Professor Paulus is a leading German expert on cross-border insolvency law and is known not only for his excellent scholarship and wide knowledge but also for being outspoken on restructuring and insolvency matters.

Howard Morris is one of the most experienced and best known solicitors in the insolvency and restructuring area in the UK.

GABRIEL MOSS QC

His article picks up some of the key themes involved in Brexit for the restructuring and insolvency profession, such as the "power of sentiment" when we seek assistance from other EU Member States' courts and the importance of proposed harmonisation. Professor Mucciarelli teaches both at SOAS and the University of Modena and his article deals with COMI and forum shopping in the light of Brexit.

I should declare my own point of view: I am a fanatical Europhile. Europe was, prior to the EU, last united under Charlemagne. From his death in 814, until the founding of the European Communities, the countries that are now France, Germany, Italy, Belgium, Holland and Austria saw over 1,000 years of war, devastation and famine with intervals of peace and prosperity. The countries of the UK have frequently been drawn into these wars and have suffered vast casualties in both soldiers and civilians. Those 1,000 years of conflict, death and destruction have been replaced within the EU by a permanent era of peace, justice and prosperity.

The prosperity involves co-operating at many levels of business and financial law. An important part of that co-operation is the EU co-operation in the field of restructuring and insolvency. This is currently a win-win situation for all countries of the EU and in which the UK, and in particular English law and practice, is the market leader.

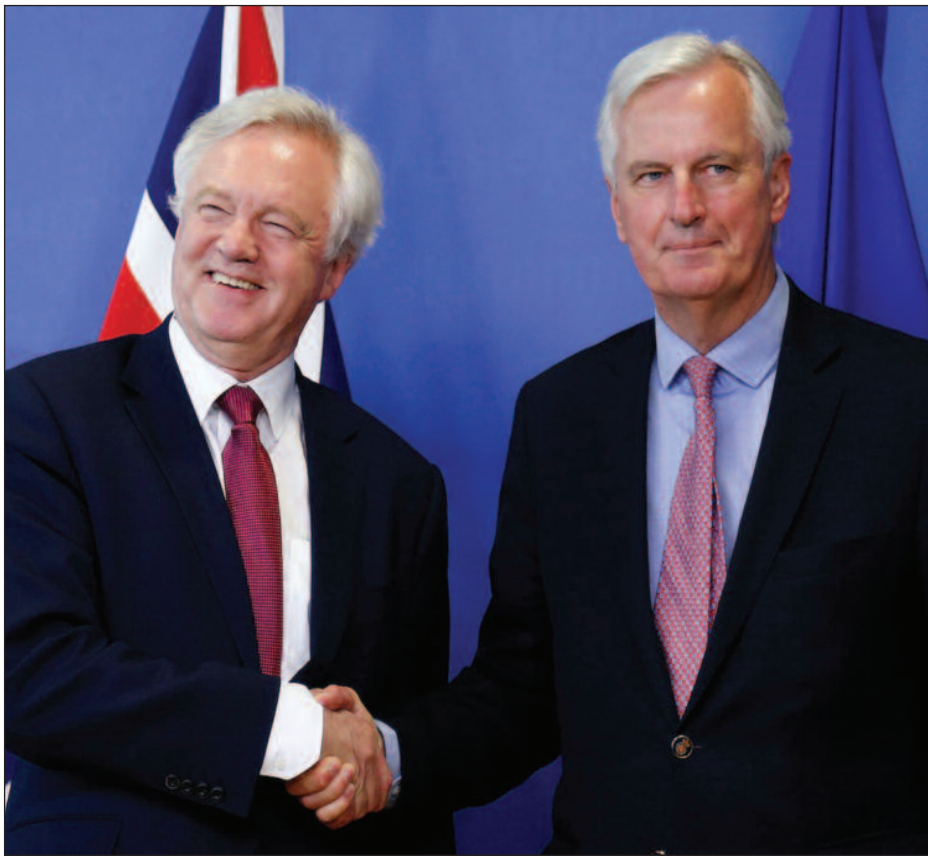
Professor Paulus has in his article identified two key innovations made by English

practitioners and courts in their interpretation of the Regulation on Insolvency Proceedings. The first innovation was the so-called "Group COMI" under which a group of companies registered in different EU Member States were held to have their COMI's in one jurisdiction, namely where the group headquarters functions were carried out. The second innovation was necessary to correct potential adverse consequences from "Group COMI", being the application of the law of the main proceeding throughout the EU unless local territorial proceedings are opened. In the practical world it is often undesirable and wasteful to have secondary proceedings and thus English law developed what the Commission now calls the "virtual secondary", i.e., an undertaking by the insolvency practitioner to local creditors in another EU Member State that if they do not request the opening of a secondary proceeding, the insolvency practitioner in the main proceeding will respect local law priorities.

Professor Paulus sets out six possible models for the exit from Brexit. My view is that all these potential outcomes are bad. In particular, if no deal is reached, because for example the UK is unwilling to pay to settle its existing obligations in the massive sums apparently required, we will lose the Recast Regulation on Insolvency Proceedings and the Directives dealing with the re-organisation and winding-up of banks, investment firms and insurance companies. In an EEA-type of deal, we would keep the Directives but lose the Regulation. If we had a customs union only, like Turkey, we would probably lose the Directives and the Regulation. Likewise in a Swiss-type solution and a bespoke solution. If we stayed in the EU on the Danish model, we would lose the Regulation, but could probably opt into it.

All these loss situations are, of course, subject to any treaty negotiated between the UK and the EU under which we stay in or re-enter some or all of these Instruments. Such a treaty would not necessarily involve accepting the Court of Justice of the European Union: the three EEA countries which are not Member States of the European Union (Norway, Iceland and Liechtenstein) are subject to the EFTA Court rather than the CJEU. The EFTA court of course is still an international court on which the UK judge would be in a minority.

In the unlikely event that politicians choose to be honest with the UK, they would accept that in the current negotiation, the 27 have the great majority of the bargaining power, that not getting a deal would be disastrous for the UK and that any deal that is obtained would be worse than the current deal, certainly for the UK and probably for the 27 as well.



CHIEF BREXIT NEGOTIATORS, DAVID DAVIES FOR THE UK (LEFT) AND MICHEL BARNIER FOR THE EU (RIGHT): NOT, PERHAPS, CURRENTLY THE BEST FRIENDS

Since any conceivable outcome of the negotiations is worse than the present situation and given that our Members of Parliament are elected to do their best for the country, it seems to me that the only sensible option is to stay in the EU. Whether or not we are able to do that depends on the agreement of the other 27 to the revocation of the Article 50 Notice or the CJEU holding that the Article 50 Notice is in fact unilaterally revocable. There is no domestic legal obstacle to staying in the EU: legally speaking the referendum was only advisory and Parliament did not bind itself to accept or act upon the result. However politically, it may require a second referendum for the UK Government to feel able to stay in the EU. This time it looks as if young people will vote in greater numbers and swing the vote in favour of Remain. Brutally, but realistically, the old Brexiters are dying out and young Remainers are reaching voting age.

Brexit and its consequences for the world of restructuring

Professor Christoph G. Paulus, of the Humbolt University, Berlin, considers what might happen with regard to cross-border insolvencies and/or insolvencies of British firms after Brexit

It has always been in the keenest interest of mankind to foresee the future. The Roman augurs watched to this end the flight of the birds, and Nostradamus compiled his collection of major, long-term predictions in his (in)famous prophecies ("Les Propheties"). Today, we want to know what happens with the markets when politician A wins the elections, and we make predictions about the UK's role in 2019 and onwards. All these efforts are as welcome as they are built on shaky grounds – suffice it to remind of the predictions about the last US-election or the one in the UK. The generally accepted right to fail with one's predictions makes participation in this business highly attractive so that it is no wonder that, as a consequence, the amount of writings alone about Brexit is exuberant and is likely to turn out to be entirely irrelevant when reading it again in the year, let's say, 2020. In Germany, one had the chance to experience a similar correlation between endless writings, discussions, and deliberations and the final outcome some 28 years ago when the re-unification fuelled the imaginations and created all sorts of proposals which, at the end of the day, in most cases turned out to be illusionary.

Given this, it should be appropriate to begin with a few observations which we can, as of today, take for granted (or, in other words, are allowed to accept as facts) and which might have an impact on or which might stem from Brexit.[1] It needs, however, to be borne in mind throughout that – even within the field of private law (being itself only a small part of the whole problem[2] to be solved) – the topic of restructuring is just a tiny little piece of a huge jigsaw puzzle that the politicians are supposed to set together for the time after. It is, thus, not an unlikely scenario that the restructuring world has to live for quite a while with uncertainty and reduced predictability.

I. Facts

The interpretation of the European Insolvency Regulation in its new version (EU 2015/848 - EIR Recast) is likely to suffer from lacking imagination and what one might call stress-tests. Looking back to the beginnings of the then (2002) new EIR the most innovative and heavily disputed actions and decisions were made by English practitioners. It was they who have – in clear contradiction to the quite explicit legislative intent[3] - introduced a way to handle group insolvencies by means of an understanding of the COMI (Centre of Main Interests) concept which, in the beginning, was strongly opposed on the continent[4] but soon later eagerly copied. Even the European Court

1/. A parallel to this scenario is dawning on the other side of the Atlantic when and if the termination of the NAFTA agreement stands to discussion.
2/. Much more burning probably problems such as the membership questions around European Common Aviation Area; i.e. in case of "no contract" (as opposed to a bad contract) it could happen that all British planes cannot fly over the continent.
3/. Just cf. Virgós/Schmit-Report, marg. No. 76.
4/. Including, i.a., the present author.

THE CJEU FIRST USED THE TERM 'CENTRE OF MAIN INTERESTS' IN ITS JUDGEMENT OF 20 OCTOBER 2011, INTERDIL SRL, IN LIQUIDATION V FALLIMENTO INTERDIT SRL AND INTESA GESTIONE CREDITI SPA

of Justice's attempt to suppress this interpretation in its Eurofood decision (and later ones) was bound to fail – not so much in terms of verbal disagreement but in terms of factual circumvention.

Another example is the ingenuity to establish a virtual secondary proceeding in order to gain a win-win-situation. The Collins & Aikman case was a teaching hour for continental Europe as to how to achieve the best possible result. And it was a sort of childish know-it-all attitude of practitioners from this side of the Channel when they afterwards wrote articles under the title: we could also have done it.

Needless to point out that both examples have made it into the EIR Recast – however, in a way that defies the Institutional Agreement between the European Parliament, the European Union and the European Commission on Better Law-Making from April 13, 2016.[5] Both set of rules in artt. 36 ff. and 61 ff. are so overly bureaucratic and complicated – metaphorically: the flexibility of the case law-approach has been put in the Procrustes bed of general applicability – that it is quite justified to predict that we will not see many cases (if any) in which they play a role.

Whereas fact no.1 brings a disadvantage to the continent, fact no.2 is negative (or at least: demanding) for the UK In her relationship with the U.S.A., the UK had the competitive advantage of automatic recognition of most (if not all) of its restructuring decisions. The European Judgment Regulation and the Rome I-Regulation worked very well as a supporter of the British restructuring and insolvency

5/. Cf. ABl. EU L 123, 1.

Some critics have seen the UK turning into a brothel of Europe

industry. Critics have seen it turning even into a brothel of Europe. This advantage is likely to fall apart after the Brexit.[6] The USA, in contrast can still offer their huge advantage – namely the effective stand-still of interfering actions worldwide thanks to its powerful global economic position.

But not only this is unfavourable to the UK. At the same time, in the far East, Singapore is increasingly and powerfully advancing itself as a restructuring hub for Asia. By enacting highly attractive restructuring tools (a mixture between the English scheme of arrangement and the U.S. Chapter 11[7]) and by setting up a "consumer-friendly" infrastructure for the professionals it is working hard on its visibility and to improve its global positioning. But since "decorating the show-case" is one thing, Singapore is very well aware that the other main trigger for the international success of its insolvency regime and hence of the state as an attractive and powerful business location is the recognisability of their courts' decisions. And here Singapore might get into direct competition with the UK. Officials are already intensely examining the possibilities – beginning with Bilateral Investment Treaties and ending at a multilateral agreement. It is fair to assume that Singapore would not mind too much if her services would also be asked for by Europeans, even if they are from the continent.

There is another twist to this competition issue, though. By an almost ironic coincidence, the member states of the European Union are confronted with the need to transform into national legislation a Directive which is, as of now, still a draft but which is very likely to get enacted rather soon. This new instrument can be described as a mixture of the French procédure de sauvegarde and the English scheme of arrangement. It introduces EU-wide a restructuring tool which is on purpose designed to avoid judge involvement to the highest degree possible. And, funnily enough, it is supposedly applicable to debtors for whom no requirement whatsoever is set up as to their centre of main interest. In other words, it can be applied to anybody no matter where this anybody is domiciled or seated. Up to now, it appears as if the continental lawyers have not yet discovered the potential of this legislative omission – at least, as far as I can see, no one has so far openly discussed this issue. However, it is to be assumed that rather sooner than later somebody will jump on the enormous potential which is connected with this instrument's openness and then the UK is in direct competition not only with Singapore and the US, but also with the member states of the EU.

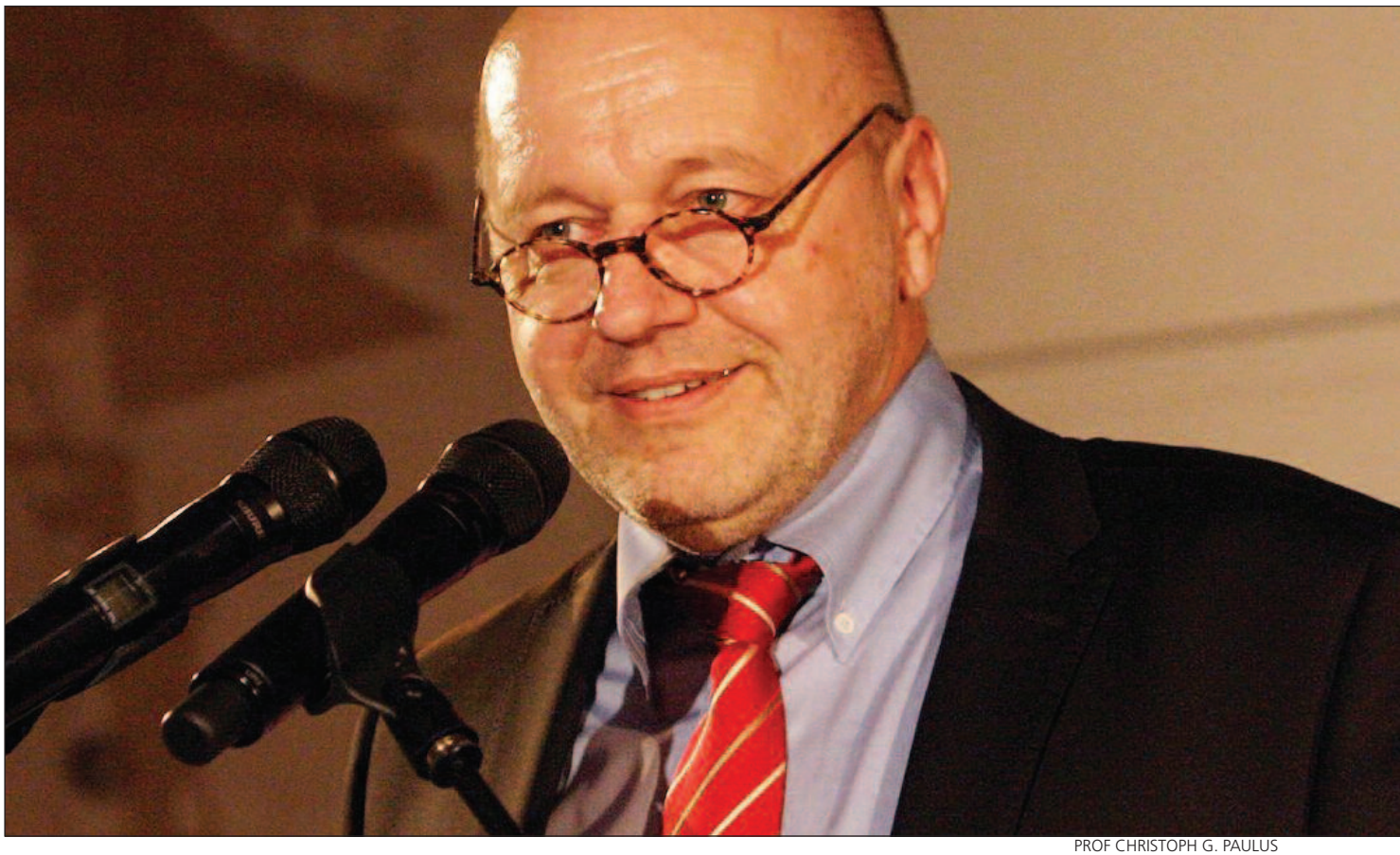
II. Choosing the right way

What will happen with regard to cross-border insolvencies and/or insolvencies of British firms after a possible Brexit? The latter observations have lead us already into the realm of prediction. Accordingly, let us see which options seem to exist from the somewhat limited perspective of a German academic; what are the goals that the UK is likely to go for? – seen from the limited horizon of restructuring and insolvency law; and, finally, which of the options described before would serve best the purpose.

1/. The options

The EIR will cease to stay in force in the UK, and British insolvency proceedings/judgments will not automatically be recognized in the EU member states pursuant to the EIR. Hence, something has to be done. Following the nice and comprehensive listing, for instance, Mankowski's,[8] one can distinguish between the

6/. Cf. Burton, Insolvency and Brexit, International Insolvency & Restructuring Report 2017/18, p. 30.
7/. Cf. Sec. 211A ff. of the Companies (Amendment) Bill, Bill No. 13/2017.
8/. Mankowski, Brexit and European Insolvency Law, Hamburg Law Review 2017 (to appear in the next issue).



PROF CHRISTOPH G. PAULUS

"EEA" version, the "Swiss model", the "Danish model", the "Turkish model", the "Canadian model", and a tailor-made solution.

a) The "EEA" model[9] implies that the UK accedes the European Economic Area. The EEA is an extension of the Single Market to the EFTA countries Iceland, Liechtenstein, and Norway; accordingly, what would be needed is the UK also entering the EFTA group. This option carries with it the advantage of having quite unrestricted access to the European Market but comes at the price of, i.a., accepting the right to free movement.

b) The Swiss model[10] is insofar separate from the previous one as Switzerland has not joined the EEA but is a member of EFTA. However, she has not (yet) agreed to fall under the supervision of the EFTA Surveillance Authority and the EFTA Court. Instead, her relationship with the EU is based on a large number of bilateral agreements.

c) Denmark has opted out from participation in the area of judicial cooperation. Nevertheless, the EU and Denmark have entered agreements in 2005 by which an extension of the Brussels I-Regulation and the Service Regulation was agreed upon. Someway, somehow other instruments do also reach out to the northern peninsula, not, however, the European Insolvency Regulation. It is to be noted, though, that

9/. Also called "Norway model", cf. D. Paulus, Der "Brexit" als Störung der "politischen" Geschäftsgrundlage?, in: Kramme/Baldus/Schmidt-Kessel (eds.), Brexit und die juristischen Folgen, 2016, p. 101 ff.

10/. From the overboarding literature, cf. just Epiney, Die Beziehungen Schweiz – EU als Modell für die Gestaltung des Verhältnisses Großbritanniens zur EU?, in: Kramme/Baldus/Schmidt-Kessel (eds.), Brexit und die juristischen Folgen, 2016, p. 77 ff.

The high attractivity of London as a major economic hub relies to a great extent on the reliability of British law

Denmark is a member state of the Union.
d) The Turkish model (irrespective of its chances for further realisation) is based on Association Agreements. They do not include, however, any cooperation or alleviations regarding insolvency law but are more or less a basic tariff union.[11]
e) The Canadian model would echo the CETA bilateral free trade relationship; similar efforts are underway with Korea and Japan. These instruments, however, do not include judicial cooperation along the lines of the Brussels I- and the Insolvency Regulation.
f) A tailor-made solution could be designed as a mix of the abovementioned models or as something entirely innovative. Such innovations would have to take into account what goals the UK politics is striving for.

2/. The goals

Assuming that the UK's political will continues to be, i.a., strengthening the service and jurisdictional industry within and outside the country, recognition of decisions is key. The consequence of Brexit is that the UK is no longer a member state of the Brussels-I and the European Insolvency Regulation, thereby cutting off the recognition automatism of those two instruments within the EU. The, so far, high attractivity of, especially, London as a major economic hub relies to a great extent on the reliability of the British law (also: insolvency) system and its effects and their recognition outside of the UK, especially the EU.

This applies both to companies (and individuals) founded and registered within the UK with activities in other member states, as well as those high number of companies founded and registered in the UK but being seated in another member state where they pursue their economic activities.

What is needed, therefore, is a mechanism as close as possible – and tolerable (for both sides) – to full membership or recognisability of court decisions. And, indeed, something like that does exist.

a) To begin with the (insofar) most attractive one, the Lugano Convention 2007 has the lead – at least with regard to judgments outside of the insolvency realm. It parallels to a high degree the Brussels I-Regulation including the automatic recognition. However, access to the Convention is granted primarily in combination with either EU membership or EFTA membership. To accede EFTA (which is precondition for acceding EEA), unanimous consent is required from the existing member states (Iceland, Liechtenstein, Switzerland, and Norway), artt. 56, 43 par. 5 of the EFTA Convention.[12] It should be borne in mind that Norway is not entirely happy about such prospect, for the somewhat banal reason that she would, thereby, lose her leadership role in this group.[13] Even though this sentiment would probably not be the final word in the process, the incident reminds us that politics is not just unemotional, cool reason in progress! Once, the UK were an EFTA member, it could accede the Lugano Convention according to art. 70 par. 1 a), 71 Lugano Convention.
There is, though, another road to Lugano which, however, is thornier as it requires consent from all The Contracting Parties, artt. 70 par. 1 c), 72 par. 3 Lugano Convention. The Contracting Party is the EU, not the member states. It would take, thus, the consent of the EU to allow the UK access to the Lugano Convention. Even if that were to be granted – a step which would not be easy to explain domestic voters in a number of EU member

11/. Cf. Mayer/Manz, Der Brexit und seine Folgen auf den Rechtsverkehr zwischen der EU und dem Vereinigten Königreich, BB 2016, 1731 ff.
12/. Consolidated version, last amended on July 1, 2013.
13/. Cf. Baudenbacher, After Brexit: is the EEA an option for the United Kingdom?, European Law Reporter 2016, 134, 137.

states – the EU would still be in the position to opt out, as it were, from being bound by the access: art. 72 par. 4 allows the Contracting Parties to object the accession – with the consequence that, in relation to the EU, the Convention does not enter into force. This is a threat which is hard to imagine that the UK government would want to be confronted with.

b) On the insolvency side, the UNCITRAL Model Law could be helpful. After all, the UK has adopted it and it will be applicable with regard to the previous fellow member states of the EU since Brexit means exit also from the EIR.[14] The Model Law does not provide for automatic recognition but yet, it is based on the assumption that there is, globally speaking, just one main proceeding and that non-main proceedings are permissible but with territorial limitations.

Precondition for this somewhat improved recognition mechanism is, as a matter of fact, that there is indeed an insolvency proceeding at stake. And the question is whether this is the case at all when it comes to the British law "export hit", the scheme of arrangement. It is well known that the UK has fought fiercely[15] to get it acknowledged by the EIR Recast that it is not an insolvency proceeding[16] The somewhat delicately construed compromise in art. 1 of the Recast EIR according to which an insolvency proceeding has to be based on a "law relating to insolvency" is the badge of victory for this fight. In commentaries, we are now writing that the scheme is not covered by the EIR since it is based on the Companies Act 2006.[17] The huge advantage for the UK restructuring industry is that the scheme is applicable for entities with their COMI outside of England.

Well, under the given circumstances it is to be assumed that one judge or another will be inclined to rethink this position and to have a closer look at the elements of an insolvency proceeding as defined in art. 1 EIR Recast: there is no need of insolvency, there is no need of an all-creditors-encompassing proceeding, there is no need for any liquidation option as a last resort, etc. There is, at the end of close inspection, only this basement-requirement. But if this were the only distinguishing element – what should we say about the French insolvency law which no one ever, so far, has disputed to be a "real" insolvency tool in the sense of the EIR? It is regulated in the Code de Commerce! Shall we, therefore, save the scheme exception and give it justification post mortem (post Brexit), as it were, and tell the French that they are outside the applicability of the Regulation? Of course not! Therefore, again – it is to be feared that some may think that the time would be ripe for characterising the scheme differently from before.

However, even if we do so and accept the scheme to be an insolvency proceeding, the UNCITRAL Model Law would help only insofar as other states have also adopted it. This is strongly promoted all over the globe; but – at least with regard to the EU and for the time being – there are only few member states who have done so: Greece, Poland, Romania, and Slovenia. Therefore, the Model Law is only of limited help.

c) Some argue that the UK still is contractually bound and connected with other EU member states by the Brussels Convention 1968.[18] If this is the case, two things are to be concluded: Firstly, insolvency

14/.It is hereby supposed that the EU member states do not qualify as "relevant country" under sec. 426 par. 4 of the English Insolvency Act.

15/.Not entirely tongue-in-cheek, Prof. Ian Fletcher once, at a conference in Paris, stated that it could be seen as a justification for a Brexit if a scheme would be declared an insolvency proceeding by the Brussels authorities.

16/. Cf. Rinze/Lehmann, Brexit – Mögliche Auswirkungen auf Restrukturierungen und Insolvenzverfahren in Deutschland und dem Vereinigten Königreich, DB 2016, 2946, 2950.

17/. Advocating for recognisability also after Brexit Sax/Swierczork, The Recognition of an English Scheme of Arrangement in Germany Post Brexit: The Same But Different?, ICR 2017, 38.

18/. Ungerer, Brexit von Brüssel und den anderen IZVR-/IPR-Verordnungen, in: Kramme/Baldus/Schmidt-Kessel (eds.), Brexit und die juristischen Folgen, 2016, p. 297, 299 ff.; Lehmann/Zetsche, Die Auswirkungen des Brexit auf das Zivil- und Wirtschaftsrecht, JZ 2017, 62, 70. Opposing Hess, Back to the Past: Brexit und das deutsche europäische internationale Privat- und Verfahrensrecht, IPRax 2016, 409, 413.

matters are excluded; the Gourdain/Nadler decision of the ECJ[19] from 1979 indicated how far reaching this is. Secondly, apart from the UK contracting parties to the Convention are those states which acceded the then Community before 2002, thereby reducing the number of convention parties to 14. As a consequence of this limitation, the Convention has to be applied in its shape of 2002; the amendments and extensions of her successor Regulations cannot be attributed to the Convention. Nevertheless, with regard to the scheme of arrangement, the struggle for its non-insolvency-nature might continue in this regard.

d) A further recognition tool are bilateral agreements. Many of them do already exist – also with member states of the EU. It is very doubtful, though, whether they have "survived" the period of common membership until the Brexit takes effect. Everything depends here on the interpretation of the word "replace" in art. 85 EIR (Recast) and "supersede" in art. 69 of the Judgment Regulation.[20] Irrespective of the fate of those pre-existing conventions, the UK will always have the option to negotiate bilaterally or multilaterally for recognition conventions.

e) As long and insofar as this is not (yet) the case the relationship will be built on the status of common WTO membership. The consequence would be that the UK would face the same tariffs with the EU as any third country with which the EU does not have a free trade agreement or a customs union. Also, all EU free trade agreements and customs unions would no longer apply to the UK. This would immediately raise the costs of both imports and exports in the UK and severely disrupt value chains.[21]

3/. Choice

At this point, when it comes to the question of which choice would be best, one is in immediate vicinity to the above-mentioned ancient Roman augurs; i.e. every statement is no more than mere guess-work.

Therefore, it must suffice to just name a few options – leaving it explicitly open that something entirely new and unforeseen might emerge from the negotiations of the coming (less than) two years. Quite interesting ideas exist and are proposed – for instance, CANZUK which would comprise a Union between Canada, Australia, New Zealand, and the UK; alternatively, a "new NAFTA" which would be the old one (assuming thereby, that it survives the present U.S. administration) plus UK; or the Continental Partnership Agreement (CPA)[22] as developed and described by the Brussels-based think tank Bruegel with very thought provoking ideas and ignoring traditional taboos.

If there is any consistency between the pre-referendum political statements and the future way to go, it seems to be precluded that the UK will join EFTA or even EEA. Irrespective of a number of quite convincing arguments and deliberations in favour of this option,[23] it is to be feared that it would be - as Allen & Overy puts it nicely in a research paper - a different name for (pretty much) the same game.[24]

With regards to schemes of arrangement the post Brexit status quo might save the day (i.e. recognition) at least with respect to 14 member states of the EU because of the so far dormant applicability of the Brussels Convention. However, a slight caveat comes from the scheme's qualification as possibly being an insolvency proceeding.

19/. From 22.2.1979 – Rs. 133/78, Neue Juristische Wochenschrift (NJW) 1979, 1771.
20/.On this, see Paulus, Europäische Insolvenzverordnung, Kommentar, 5th ed., 2017, Art. 85 marginal no. 4.
21/.On this, see, e.g, Mears/Paulus/Takagi, Global Supply Chains and Free Trade Agreements: A Suggested Vehicle for Harmonization of Insolvency and Contract-Enforcement Laws, Pratt's Journal of Bankruptcy Law 2015, 284 ff.
22/. Cf. http://bruegel.org/2016/08/europe-after-brexit-a-proposal-for-a-continental-partnership.
23/. Cf. Baudenbacher (fn. 10).
24/. Available at: http://www.allenovery.com/Brexit-Law/Documents/Macro/EU/AO_BrexitLaw_-_EEA_Membership_Jul_2016.PDF.

The UK opts to play solo while the EU aims to bring harmony from discord

Howard Morris, head of restructuring at Morrison & Foerster in London, considers whether the EU can achieve its stated harmonisation goal, and what that means for the restructuring business in the UK

Leaving the orchestra

Very quickly the legal profession got to grips with the likely consequences of Brexit for restructuring and insolvency. We published our briefings and our articles, all saying the same thing. And since then we've been trying to read the runes and urging government in its negotiations with the EU to pay attention to insolvency as the economy's plumbing but not expecting much[1]. No one I know in the restructuring business has expressed anything but regret that the UK will upon leaving the European Union no longer enjoy the recognition of its insolvency proceedings in the EU under the European Insolvency Regulation (EIR). I've not heard anyone suggest, either, that the UK should stop giving recognition to insolvency proceedings in the EU[2]. For restructurings, we comfort ourselves that the recognition and enforcement of schemes of arrangement in other countries ought not to be affected as this is a matter of private international law. But some do harbour a fear that the comparative ease and lack of controversy with which the English courts have until now been provided with suitable expert opinions that a scheme of arrangement will be recognised in another country might be affected by a change in sentiment among those European experts towards the UK. We may see challenges to the recognition and enforcement of schemes in EU states, a muscular resistance to the weakening grip of the UK on the European restructuring market.

In many areas and certainly in the development of an EU approach to insolvency and restructuring, the UK has played a significant role in debate and the decisions that have been made. If not a driving force, we have certainly been vocal in the counsels of the EU. At the EYES on Insolvency conference in Amsterdam in January this year, looking at the road ahead for EU insolvency development, distinguished speakers expressed regret that the EU will soon be without the voice of the UK.

When the UK leaves the EU, even if will is found in the negotiations to agree a multilateral treaty to recreate the EIR, that is not the end of the story by any means. The EU is looking to create a pan-European insolvency regime, a "framework", each member state meeting minimum standards that would bring them to a previously unimagined level of harmonisation and a restructuring environment with a distinctly Chapter 11 character[3] and out of the EU, the UK won't be a part. The subject of this article is whether the EU can achieve its harmonisation goal and, by implication, what that means for the restructuring business in the UK. The proposed Directive will

1/. The UK government's position in its paper "Providing a cross-border judicial cooperation framework" is that it wants, post-Brexit, "an agreement with the EU that allows for close and comprehensive cross-border civil judicial co-operation on a reciprocal basis, which reflects closely the substantive principles for cooperation under the current EU framework". The UK has identified the EIR as falling within the scope of that framework. https://www.gov.uk/government/publications/providing-a-cross-border-civil-judicial-cooperation-framework-a-future-partnership-paper.

2/. This may now be moot. The effect of the European Union (Withdrawal) Bill (EUWB), if enacted as drafted, will be to repeal the European Communities Act 1972 (ECA) thus, in effect, repealing the EIR as it automatically became UK law by virtue of S.2(1) of the ECA, and then immediately to enact it as UK law, again, by clause 4 of the EUWB. However, dissatisfied that the EU's Member States will no longer be obliged to recognize UK proceedings, the UK government might use its so-called "Henry VIII" power (clause 7, EUWB) to repeal that rump of the EIR. The reasoning would be that with the Model Law and the common law, recognition of insolvency proceedings in Member States can be acquired in the UK exactly as for any other country. If the EIR is to be restored in any shape or form it would be better that it is mutual.

3/. Proposal for a Directive of the European Parliament and of the Council on preventative restructuring frameworks, second change and measures to increase the efficiency of restructuring, insolvency and discharge and amending Directive 2017/30/EU COM(2016)723 http://ec.europa.eu/information_society/newsroom/image/document/2016-48/proposal_40046.pdf

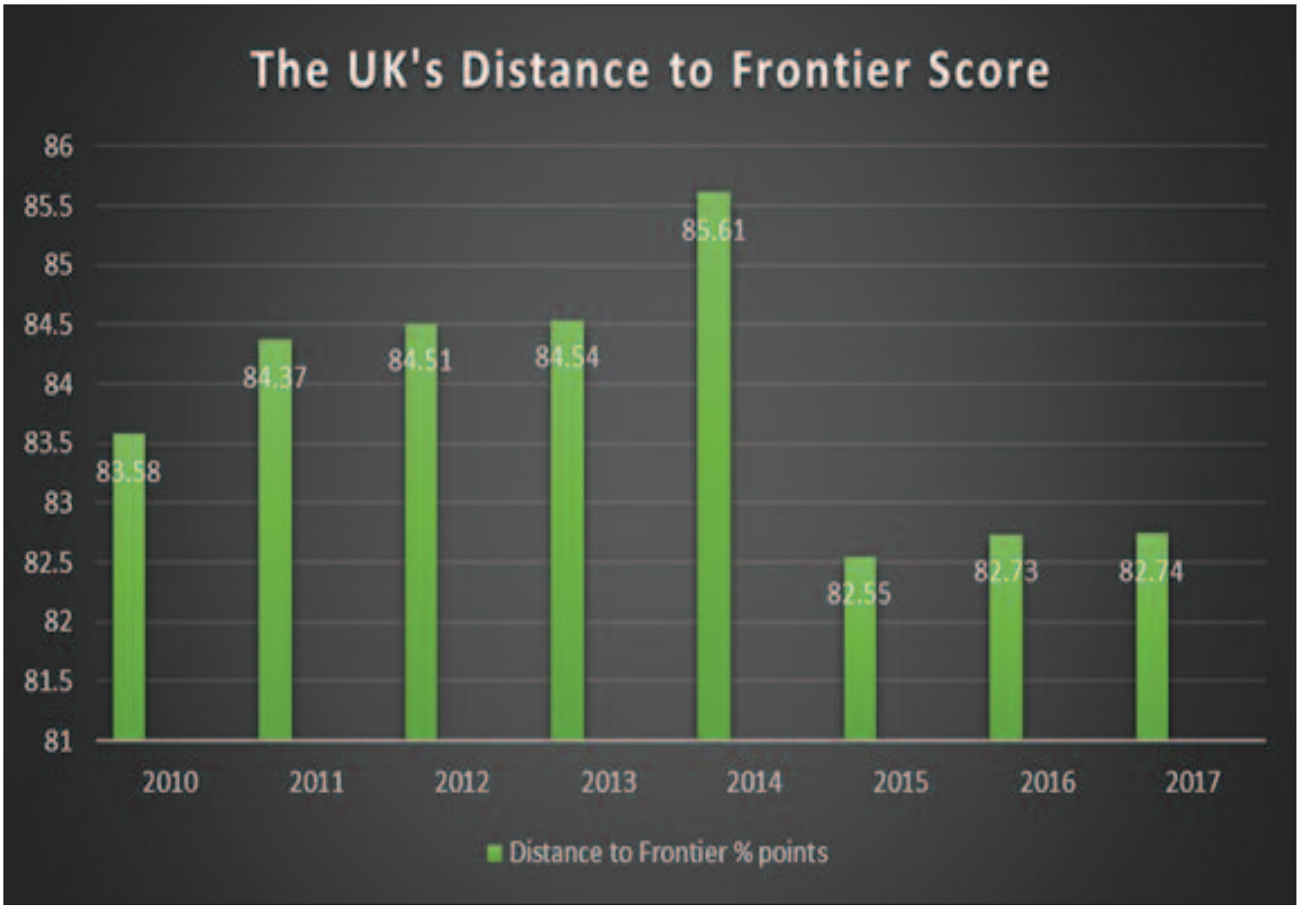
mandate the harmonisation of substantive insolvency laws across the Union. The UK may even still be a member when the Directive comes into force.

We, too, were set on significant reforms[4], a new moratorium with the debtor in possession, a plan of reorganisation permitting cross-class cram down and a species of ipso facto rule. The idea of super priority DIP financing was dropped during the extended consultation (as it was when last canvassed in 2009). Now it seems that with so much legislative business focused on Brexit and the government weakened by the general election, the prospect of introducing those reforms has grown distant.

When commercial deals are made the thinking as to what law should be used to solve a restructuring problem, insofar as careful thought is given to the issue, is wrapped up in the decision on governing law and forum. We must not underestimate the power of sentiment in making these decisions. Sentiment is not simply irrational emotion but an intuitive response to political, cultural, social and psychological factors including what is "market", what is common or usual or, even, the fashion for that type of deal. And these factors, sentiment, influence decision making by individuals, businesses and courts. At conferences across Europe our competitor lawyers are now suggesting that English law is broken in consequence of the vote to leave the EU. With Paris and Frankfurt and Berlin holding trials in English as a means of attracting legal business, along with broader government initiatives to tempt business from the UK, the country is in a ferocious contest to retain its primacy as a legal centre and our disproportionate share of complex, international restructurings.

The World Bank chimes in

The insolvency system the proposed Directive contemplates and our own proposed reforms are eerily similar. Both sets of reform proposals are intended to meet the best practice principles on which the World Bank has, since 2015, based its vision of an efficient insolvency system, its "resolving insolvency" analysis. It was then that the World Bank changed its measures and the UK, which had for so long, done ever so well in the insolvency rankings of the World Bank, took a dive. That's because the World Bank changed its metrics to



DATA: THE WORLD BANK

4/.https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/525523/A_Review_of_the_Corporate_Insolvency_Framework.pdf.

SAJID JAVID, IN INTRODUCING THE UK'S PROPOSED INSOLVENCY REFORMS IN MAY 2016, WAS FRANK IN WANTING THE UK TO MOVE UP THE WORLD BANK'S RANKINGS FOR DOING BUSINESS.

embrace an approach to insolvency much more like Chapter 11[5] and the UK's system is light on those features.

The World Bank uses a mathematical expression for a nation's overall performance, "distance to frontier", meaning the distance to the "best performance across all economies in the Doing Business sample since 2005". The UK's resolving insolvency distance to frontier, applying the new measures, fell from 95.33 to 82.04. The Secretary of State for Business, Sajid Javid, in introducing the UK's proposed insolvency reforms in May 2016, was frank in wanting the UK to move up the World Bank's rankings for Doing Business. It may seem juvenile for countries to be in cut-throat competition for places on this league table – do international commercial deals really depend on a World Bank ranking? – but in restructuring there is a powerful reason for aiming to reduce that distance to frontier. And if the UK doesn't reform we could become, in the eyes of investors, a backward outlier unable to respond to all the voices in increasingly complex and atomised capital structures.

Flourishing by becoming familiar

James Peck and I in our article *Flourishing by Becoming Familiar*[6] argued that capital market investors will feel at home if the insolvency system is efficient and familiar. The more those conditions are met, the cheaper insolvency risk will be priced. In short if US investors, and most hedge funds and specialist investors in distressed corporate debt, actors that are now key to the international restructuring industry, are either US based or are culturally strongly American in character and personnel, feel familiar with how a debtor can be restructured and the role and influence they can have as an investor in debt or equity, the more willing they will be to invest. So an efficient system that looks like Chapter 11 is going to be more attractive to international capital. Philosophically we might pick holes in Chapter 11 and variations on its themes but economically and pragmatically, it is the global direction of travel.

The European Commission is of this opinion. The purpose of the EU Commission's ambitious insolvency harmonisation plan, something never before attempted, is an important part of creating Europe's single capital market. The "Five Presidents Report"[7] of June 2015 lists 'insolvency law among the most important bottlenecks preventing the integration of capital markets in the euro and beyond.' Advantage will be gained by the EU, it believes, by having a homogenous approach to restructuring and insolvency. If that approach looks like Chapter 11 then the hedge fund and other investors will be more comfortable.

The European Commission's theme

The EC's proposed Directive is not a

5/. See the World Bank's "Creditor Rights and Insolvency Standard" http://siteresources.worldbank.org/GILD/Resources/FINAL-ICRStandard-March2009.pdf and the World Bank's "Principles for effective insolvency and creditor and debtor regimes" http://documents.worldbank.org/curated/en/518861467086038847/pdf/106399-WP-REVISED-PUBLIC-ICR-Principle-Final-Hyperlinks-revised-Latest.pdf.
6/. https://media2.mofo.com/documents/160727brexitrestructuringinvestors.pdf.
7/. The Five Presidents' Report: Completing European Economic and Monetary Union https://ec.europa.eu/commission/publications/five-presidents-report-completing-europes-economic-and-monetary-union_en.

diabolical scheme to undermine the post-Brexit UK robbing it of its restructuring business. Far from it. The genesis of the proposed Directive goes back at least seven years and during that time, right up to the Brexit vote, the UK was an important player in the process of deciding upon and pursuing this ambitious reform agenda.

In 2010 INSOL, at the instance of the European Parliament's Committee on Legal Affairs, produced a report[8] that showed the widely differing approaches to restructuring across the Union, the encouragement the different systems give to forum shopping and the obstacles this creates to the recognition of cross-border restructurings and reorganisations. The European Parliament accepted the conclusions in November 2011, the key role of the law in enabling corporate rescue recommended harmonisation of insolvency laws. Tasked with this mission the European Commission a year later set itself the goal of introducing "modern insolvency laws that help basically sound companies to survive".

Over the next two years, through the financial crisis and no doubt informed by its effects, the EC developed its thinking. It gauged the public attitude through consultations and in March 2014 published its Recommendation[9] calling for member states to reform and align their insolvency laws. The proposed Directive goes farther than the Recommendation not just in mandating reform and harmonisation but in specifying deeper reforms than in the Recommendation. In so doing the Commission makes its task of getting all member states to introduce the minimum standards for insolvency laws more difficult. But before we look at this, it is worth considering the broader difficulty the EU encounters in harmonising laws.

The proposed 2017 Directive goes further than the 2014 Recommendation

At the heart of the proposed Directive is the harmonisation of laws in two areas; restructuring and giving a second chance to bankrupt entrepreneurs. There will also be improvement to the associated insolvency rules and processes and the collection and publication of data on insolvencies.

The EC believes that viable businesses are being liquidated because there is no accessible means for their restructuring. With an eye to the continuing heavy weight carried by European banks, the Commission considers that a more efficient and consistent means of restructuring will reduce the problem of accumulated non-performing loans. A central goal of the insolvency framework is the introduction of a debtor in possession reorganisation process, compassed about by a moratorium on hostile creditor action, with access to new credit and protection from the termination of executory contracts.

"A well-functioning EU single market requires a coherent restructuring and second chance framework capable of addressing the cross-border dimensions of firms, as interaction between companies located in different Member States has become increasingly common. EU action will therefore add value by facilitating cross-border investing in the EU, ensuring that viable businesses in financial difficulty, wherever they are located in the single market, will be able to benefit from a wider range of

HOWARD MORRIS

8/. Harmonisation of insolvency law at EU level
http://www.europarl.europa.eu/meetdocs/2009_2014/documents/empl/dv/empl_study_insolvencyproceedings_/empl_study_insolvencyproceedings_en.pdf.
9/. Commission Recommendation on a new approach to business failure and insolvency C(2014)1500 final
http://ec.europa.eu/justice/civil/files/c_2014_1500_3n.pdf.

accessible tools to prevent their insolvency. At the same time, entrepreneurs will benefit from being able to use reasonable discharge periods in their Member States. This could not realistically be achieved by the Member States acting alone. In addition, ensuring that cross-border creditors and investors involved in such a restructuring process have at their disposal appropriate safeguards will have positive economic effects. The proposed rules will create legal certainty for creditors and investors who want to lend in other Member States; the necessary information will be available so that they can take informed decisions."[10]

Fugue

This article is not a critique of the proposed EU framework but it is worth noting issues that will make the harmonisation harder. First, the EC wants to keep court involvement in restructuring minimal. But, in a reorganisation process that divides creditors into classes, permits cram down of classes (so long as the absolute priority rule is applied) almost inevitably, therefore, threatens arguments about valuation (anticipated by Article 13 of the Draft Directive). Chapter 11 is a court-driven process, relying on specialist judges in a specialist bankruptcy court. To picture a similar regime without access to sufficient judicial and professional infrastructure is naïve.

Secondly, the EC is fixed on its reorganisation plan as the means of restructuring, it does not allow for the pre-pack sale, the quick business disposal that has become so efficient albeit not without a share of criticism in the UK. Thirdly, the EC has in mind some early-warning tools to alert debtors to trouble ahead. What can they be?

But, as I said, my purpose is not to identify flaws in the detail but to look at whether constructing this framework of minimum standards and lifting it into place across the whole EU is likely, in practice, to be a successful reality.

One of the aspects of the EU loathed by some is the perceived homogenisation of law by harmonisation. The UK has been far from alone in resisting changes to its laws to achieve harmonisation. Harmonisation has in fact proved extremely difficult to achieve. The harmonisation of laws isn't itself a central goal of the EU but rather a tool to establish and implement the Four Freedoms.

Originally harmonisation of laws required unanimity among EU member states. This changed with the Single European Act from 1987 followed by the Maastricht, Amsterdam and Nice treaties introducing and expanding qualified majority decisions.[11]

Much of the harmonisation that has been achieved has been by decisions of the EU Court, ruling against laws as being discriminatory or in breach of the Union's fundamental rights. The best -known decision was in 1979 in the *Cassis de Dijon* case obliging EU member states to accept most standards set by other EU states. This compelled member states to accept compromise on harmonisation to avoid the lowest standard being the general law.

In 1985 the EC published a White Paper on a "new approach" to harmonisation. A pragmatic and rather more subtle method of harmonisation was posited and it is this new approach that the proposed Directive on insolvency adopts. The new approach focuses only on the essentials, the core rules that must be changed while all else is a matter of mutual recognition.

The current state of the EU's insolvency and restructuring laws is best described as the product of regulatory competition, another means of harmonising laws. In harmonisation by regulatory competition each state decides on its own laws and business flows to the state with the regulatory climate that best suits the business. Other countries follow suit. Look at Delaware in the US; through regulatory competition it has become the preferred location for incorporation of substantial businesses and, as we know, for Chapter 11 filings. Delaware also demonstrates that business doesn't necessarily flow to the jurisdiction with the weakest rule of law or most lax regulation. Reputational and political factors see to this.

To arrest the flow of business elsewhere states change their regulation to adopt the standards of the winner in the regulatory competition and we have indeed in recent years seen European countries reform and develop their insolvency laws to provide means of restructuring to avoid their companies going to London. And yet regulatory competition has not seen Member States adopting consistent insolvency laws.

Harmonisation of the standards of physical products is one thing but harmonisation of rights and responsibilities, entitlements and obligations is quite different and it is in this area that EU harmonisation has made the least progress.

Simon Deakin[12] describes how harmonisation of corporate law "has stalled, above all, on the question of

10/. See footnote 1.
11/. Article 95 of the Treaty Establishing the European Community as amended by the Maastricht Treaty, introduced qualified majority voting for the majority for most of the directives to create the single market.
12/. Regulatory Competition Versus Harmonisation in European Company Law https://ideas.repec.org/p/cbr/cbrwps/wp163.html.

how to treat stakeholder groups, in particular employees." The failure, he says, reflects a fundamentally different philosophical outlook between member states on corporate governance.

In insolvency and restructuring the challenge to harmonisation is another set of local interests informed by the culture of the member states and the expectations of local stakeholders and actors as described by Professor Federico Mucciarelli[13], who calls them the "distributional rules", like the different rankings of creditors, treatment of shareholders' set-offs and the termination of executory contracts. Professor Mucciarelli argues that there is an intrinsic difficulty in harmonising the law in these areas. "These distributional rules" affect equal treatment of creditors in the distribution of a debtor's assets and are a highly-sensitive matter as they embody a specific balance of values and interests. Reform of distributional rules therefore requires a high level of political legitimacy and consensus."

"Another defining element of harmonisation is the object to be harmonised. On a macro-level it seems to be the legal orders that converge as a whole due to the process of harmonisation even though it is quite clear that the result will not be a uniform law within Europe. Yet, the actual object of harmonisation is much smaller and subject to many debates. It is the "law". What is law? This is a moot question and the understanding of law diverges in the Member States and the various schools of thought, but for our purpose it suffices to state that law is more than rules, it is also the application and use of these rules by courts, administrative bodies and even sometimes private actors, i.e. the legal practice. Art 95 EC speaks of "laws, regulations or administrative provisions' referring primarily to approximation by the means of positive (statutory) law. This must, however, also include approximation at the level of application and interpretation. Negative harmonisation, on the contrary, affects any national measure at a broader scale, hence also administrative and judicial practice, and case-law. Indirectly, the approximation of laws means also an approximation of policies, as Member States are barred from enacting their own legislation once an area has been harmonized. Legislation is meant to govern the behaviour of individuals in order to attain the purpose of the norm. After harmonisation has taken place this is guaranteed at the European level, thus creating a common European policy".[14]

The shift from fugue to sonata is plagued with problems - composers have long wrestled with finding a way to reconcile these two ways of thinking

Sonata

The Recommendation fought shy of calling for the adjustment of distributional rules. But the proposed Directive is not so timid. To make its corporate reorganisation tool work there must be a priority given to DIP lending. Secondly it calls for the introduction of an ipso facto rule, barring the termination of executory contracts because of insolvency - contracts necessary for the debtor in restructuring proceedings to survive. The entire reorganisations process, leaving the debtor's management in control, suppressing creditor actions and, in the personal sphere, the discharge of bankrupts and the concept of giving debtors another chance, runs straight into the deeply held attitudes about how, whether corporate or individual, those who welch on their debts should be treated. I'd hazard that societal attitudes to debtors are rather more visceral than the rules around incorporation of companies, which have proved so difficult to harmonise.[15]

The proposed Directive calls for the training of judges and insolvency professionals. The EC sees that its harmonisation plan is not simply about rules but calls for radically changed attitudes, a new dispensation – the rescue culture. The UK knows from its own experience of the great reform of 1985/1986 that creating a rescue culture is not easy. The EU will find emplacing its insolvency framework and actuating it across the community with attitudes directed to the expressed ambitions of the EC, will take time, effort and investment. Will something short of the project's completion be a real threat to the UK's powerful position in restructuring? With the loss of the EIR and the wider consequences of Brexit, the UK is going to be less well-equipped to attract restructuring business. But we must be mindful of sentiment and an EU inspired by our rejection of the project, to bring itself, in time, into harmony.

13/. Not Just Efficiency: Insolvency Law in the EU and Its Political Dimension, European Business Organisation Law Review 14: 175-200 http://eprints.soas.ac.uk/16957/1/Not%20Just%20Efficiency%20EBOR%202013.pdf
14/. Professor E J Lohse on "The Meaning of Harmonisation" is the Context of European Community Law – a Process in Need of Definition" from the "Theory and Practice of Harmonisation" edited by M. Andersen and Camilla Bark Andersen.
15/. See Deakin, footnote 10 infra.

Brexit: its impact on insolvency forum and law shopping

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1. What is 'forum shopping'?

Forum shopping is one of the most debated policy issues in cross-border insolvency regimes and yet the contours of this phenomenon are not always clear. A preliminary definition could be found in the Insolvency Regulation, since one of its goals is avoiding 'incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the general body of creditors'.[1] Forum shopping, therefore, is the situation whereby a debtor relocates relevant factors from his or her original country to another, with the aim of shifting the competence to hear the insolvency case and applying insolvency rules of the new country. In order to shift the competence, a debtor should relocate the private international law connecting factor, namely its centre of main interests (hereinafter 'COMI') from one jurisdiction to another.[2] It is to be noted that, under the Insolvency Regulation recast 'forum shopping' is to be avoided only if detrimental for 'the general body of creditors'.

Assessing when a debtor has actually shifted its COMI is, however, far from being an easy task. Equally complex is assessing whether such a shift is detrimental for the general body of creditors. Until the United Kingdom eventually withdraws from the European Union, the answers to these questions are to be found by considering the Insolvency Regulation and by looking at case law of the European Court of Justice, while other sources of UK insolvency law (in particular the Insolvency Act 1986 and the conflict of law rules based on common law) only play an ancillary function.

As I have noted above, the Insolvency Regulation is based upon the debtor's COMI as choice-of-law and jurisdiction criterion for main proceedings having universal effects.[3] A debtor's COMI, in particular, is 'the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties'. Additionally, the insolvency regime of the Member State where a debtor's COMI is situated should apply.[4] The COMI is a fact-sensitive criterion, which could be uncertain in the eyes of creditors at the moment when debts were incurred. To increase the predictability of a company's COMI, the regulation presumes that it is situated in the place of a company' registered office.[5] Therefore, unless such presumption is not rebutted, the country of incorporation governs both company law issues and the insolvency proceeding. Regarding individuals exercising a business or a professional activity, the Insolvency Regulation Recast presumes that their COMI is where their 'principal place of business' is situated, unless the contrary is proven[6]. By contrast, the COMI of over-indebted private persons and consumers is presumed to be in the country of their habitual residence, unless the contrary is proven.

2. Companies' insolvency tourism

Due to EU freedom of establishment, companies and other legal entities can be incorporated in a Member State and

1/. Recital 5 Regulation (EU) 2015/848 of the European Parliament and the Council on insolvency proceedings (recast), hereinafter the 'Insolvency Regulation Recast'. See G Moss – Ian F Fletcher – S Isaac *The EU Regulation on Insolvency Proceedings* (Oxford: 2016); R Bork – R Mangano *European Cross-Border Insolvency Law* (Oxford: 2016).
2/. Article 3(1) Insolvency Regulation Recast.
3/. Article 3(1) Insolvency Regulation Recast.
4/. Article 7(1) Insolvency Regulation Recast.
5/. Article 3(1) Insolvency Regulation Recast.
6/. Insolvency Regulation Recast, article 3(1) sub-paragraph 3.

have all their assets, business and/or headquarters in any other Member State. For the purposes of this work, three main hypothetical cases are to be isolated: (a) Alpha plc, incorporated in England, having its headquarters and its business exclusively in another Member State (for instance in France); (b) Beta plc, incorporated in England, having its headquarters in France, but assets, plants and activities both in England and France; (c) Gamma plc, incorporated in France, having its headquarters in London, but assets, plants and activities both in England and France. All these companies might decide to relocate one of the relevant elements (registered office, assets, activities or headquarters) from one Member State to another. As a consequence, the question arises as to what extent such relocations are allowed under domestic rules and EU freedom of establishment.

COMPANIES INCORPORATED IN ANOTHER MEMBER STATE MIGHT DECIDE TO RELOCATE THEIR HEADQUARTERS, ASSETS OR ACTIVITIES ONTO THE BRITISH TERRITORY, WHILE KEEPING THEIR REGISTERED OFFICE IN THE COUNTRY OF ORIGIN

Pursuant to case law of the European Court of Justice of the last decade, Member States can not bar companies incorporated in other Member States from having their entire activities or their headquarters on their territory, providing, however, that the state of incorporation allows this.[7] The reason is that companies and other legal entities 'are creatures of the law and, in the present state of Community law, creatures of national law'[8], so that the jurisdiction of incorporation can restrict the outbound mobility of own companies' headquarters. Regarding the relocations of a company's registered office, which invariably leads to a change of applicable company law, case law of the Court of Justice is still partially uncertain. In the decision *Vale*, the Court has made clear that the country of arrival can not ban inbound reincorporations, unless such a ban is justified by overriding reasons in the public interest, is 'appropriate for ensuring the attainment of the objectives pursued and does not go beyond what is necessary to attain them'.[9] It is unclear, at least so far, whether the country of origin faces a duty to allow cross-border relocations of own companies registered offices: the *Cartesio* decision answers in the positive, and yet this statement is probably to be seen as a mere *obiter dictum* with uncertain binding force[10], so that a new decision, based upon a submission from a Polish court, is expected to clarify this issue.[11]

What is interesting, and quite ironic in light of the recent Brexit referendum, is that the United Kingdom has emerged as the winner of regulatory competition among Member States. In this regard, a recent research conducted for the European Commission shows (with reference to private companies only) that the UK is by far the most popular target country for incorporating pseudo-foreign companies (such as our case (a) above) and that the main reason is its adoption of a clear-cut incorporation theory under the conflict of law standpoint.[12] If we shift our attention to COMI relocations, we would also

7/. C-212/97, *Centros Ltd v Erhvervsog Selskabsstyrelsen* [1999] ECR I-1459; C-208/00, *Überseering BV v Nordic Construction Company Baumanagement GmbH* [2002] ECR I-9919; C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art*, [2003] ECR I-1095.
8/. C-81/87, *The Queen v HM Treasury and Commissioners for Inland Revenue, ex parte Daily Mail and General Trust plc* [1988] ECR 5483, at 19.
9/. C-378/10 *VALE Építési kft.* [2012] (ECLI:EU:C:2012:440) at 39.
10/. C-210/06 *Cartesio Oktato es Szolgaltato bt* [2008] ECR I-9641 (ECLI:EU:C:2008:723).
11/. Request for a preliminary ruling from the Sąd Najwyższy (Poland) lodged on 22 February 2016, C-106/16, *Polbud v Wykonawstwo sp. z.o.o* and the pinion of AG Kokott C-106/16 *Polbud v Wykonawstwo sp. z.o.o.*, 4 May 2017 (ECLI:EU:C:2017:351). See: C Gerner-Beuerle, F Mucciarelli, M Siems and E P Schuster, 'Cross-border reincorporations in the European Union: the case for comprehensive harmonisation' Journal of Corporate Law Studies (2017) 1-42.
12/. C Gerner-Beuerle, F Mucciarelli, M Siems and E P Schuster, *Study on the law applicable to companies* (2107) https://publications.europa.eu/en/publication-detail/-/publication/259a1dae-1a8c-11e7-808e-01aa75ed71a1.

In Eurofood, the ECJ dismissed the notion that a debtor's COMI is in the place of its central administration

expect the UK being a popular target country for insolvency tourism and forum shopping.

First of all, companies incorporated in another Member State might decide to relocate their headquarters, assets or activities onto the British territory, while keeping their registered office in the country of origin. This decision leads to a relocation of a company's COMI only by rebutting the presumption of coincidence with the company's registered office. In the *Eurofood* decision, the European Court of Justice addressed the case of whether the COMI of Eurofood, an Irish subsidiary of the Italian group Parmalat, was located in Ireland or in Italy. It was maintained, inter alia, that

in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.[13]

The decision is significant in that the ECJ dismissed the notion that a debtor's COMI is in the place of its central administration, where the internal head office functions are carried out on a regular basis.[14] The solution endorsed by the Eurofood decision, by contrast, grants a high degree of legal certainty as to the location of the COMI, since it becomes more burdensome overcoming the presumption that a company's COMI coincides with its registered office.

The *Eurofood* ruling, however, was not related to situations of *conflit mobile*, in which a shift of connecting factor also shifts applicable law. The CJEU addressed these cases some years later, in the decision rendered in the case *Interedil*, in which it provided an answer to the question of the factual elements that courts should consider in assessing a company's COMI after a cross-border relocation of its registered office. The facts of that case are revealing of the problems behind this question. An Italian company (*Interedil srl*) transferred its registered office to London and was henceforth removed from the local register.[15] Almost two years later, an important creditor filed for insolvency in Italy; the local court assessed that *Interedil* still owned assets and a bank account in Italy and concluded that its COMI was still in Italy. On *Interedil's* appeal, the Italian *Corte di Cassazione* referred to the CJEU for a preliminary ruling aiming at clarifying, among other things, which factual elements can rebut the presumption that a debtor's COMI coincides with a company's registered office in a situation where this registered office has been shifted from one country to another before the filing for insolvency. According to the European Court of Justice, in these cases, the presumption that a company's COMI coincides with the new registered office can be rebutted if

a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State.[16]

This evidence is still shrouded in uncertainties, as it has not been clarified yet which factual elements still existing in the country of origin are sufficiently objective and ascertainable by third parties to rebut the presumption that a company's COMI is in the country of its new registered office. When a company incorporated in another Member State shifts its headquarters or other physical elements onto the British territory, the question arises as to whether a British court would recognize that the presumption laid down in the Insolvency Regulation has been rebutted. In this regard, among other cases, we can mention two significant decisions.

In the first decision, a German company managed to convert into a British Ltd, to whom all the assets and activities of the former are transferred.[17] Shortly thereafter, the company became insolvent and insolvency proceedings were

13/. European Court of Justice, *Eurofood IFSC Ltd*, C-341/04 [2006] ECR-I 1078, at 34.

14/. This solution was however followed by some British decisions. See, for instance: *BRAC*, [2003] EWHC (Ch); *Daisytek-ISA* [2004] BPIR 30; *MG Rover* [2005] BWHC 874 (Ch); *Re Collins & Aikman Corp Group* [2005] EWHC 1754 (Ch); *Re Lennox Holdings Ltd* [2009] BCC 155.

15/. For a more detailed analysis of the facts (more complex than what seems at a first glance) See F. Mucciarelli 'The hidden voyage of a dying Italian company: from the Mediterranean See to Albion', 9 *European Company Financial law Review* (2012) 571.

16/. *Interedil* at paragraph 53. This language will become part of the new Recital 29 (see Insolvency Regulation Reform).

17/. *Hans Brochier Holding Ltd v. Exner* [2006] EWHC 2594. In theory, German companies can not convert into foreign entities; a strategy, however, exist to circumvent such prohibition: the German company converts into a partnership, a GmbH & Co KG, one of whose partners is a newly formed foreign corporation (a British company in the Brochier case); thereafter, all German partners withdraw from the partnership with the result that all assets of the partnership accrue to the foreign shareholder under §738 BGB (the German civil code).

simultaneously opened in Germany and in the UK. In that case, the British court recognized the COMI being still in Germany, on the basis of quite evident factual elements that still linked the debtor's activity to that country. In particular, the insolvent company still had creditors and employees only in Germany, its bank account was still in Germany and, most importantly, all contracts were written in German.

The opposite conclusion was reached in the case *Re Hellas Telecommunication*[18]. A Luxembourgish company transferred its head office and its principal operating office to London before filing for insolvency. Lewison J. considered the presumption of coincidence between registered office and COMI rebutted, on the basis that third parties could clearly ascertain that Hellas' COMI was in London. He maintained that creditors were aware that *Hellas'* head office functions were carried out in London for the following reasons: (a) creditors 'were notified of its change of address'; (b) 'an announcement was made by way of a press release that its activities were shifting to England'; (c) Hellas has opened a bank account in London 'and all payments are made into and from that bank account'; (d) Hellas 'has registered under the Companies Act in this country, although its registered office remains in Luxembourg and it may remain liable to pay tax in Luxembourg too'[19]; (e) 'all negotiations between the company and its creditors have taken place in London'.[20]

Eventually, we should address the question of whether foreign EU companies can transfer their registered office to the UK and convert into British companies. The current English conflict of law rule does not allow a 'domicile of choice' whether to domestic companies or to foreign entities. In the words of Judge Macnaughten '[t]he domicile of origin, or the domicile of birth, using with respect to a company a familiar metaphor, clings to it throughout its existence'.[21] From the standpoint of English conflict of laws rules, either a new company is incorporated in England or a company is registered in England as a foreign company having a 'place of business' in England. Such approach, however, when referred to inbound relocations of registered offices, is in breach of the freedom of establishment, as interpreted by the European Court of Justice in *Vale*, to the extent that it is applied to foreign companies incorporated in the EEA.[22] It is worth mentioning, however, that foreign companies can incorporate a 'shell' company in England and merge into it under the Cross-Border Merger Directive.

3. Individuals' bankruptcy tourism

Bankruptcy tourism of individual professionals is made more complex by the lack of any objective place of registration, such as companies' registered offices, and by the quite uncertain concept of 'residence' or 'place of business', which trigger the presumption of COMI under the Insolvency Regulation Recast. Much more importantly, natural persons can relocate their activities or residences more easily than companies and low-cost flights and fast transports throughout Europe allow Europeans to dissociate their main residence from

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the place where they work.

The seminal case *Shierson v Vlieland-Boddy* is to be addressed in the first place.[23] Mr Shierson divorced his wife and then moved from the UK to Spain; after his divorce, he maintained a property in the UK, where he came regularly to visit his children. After Mr Shierson's default, the question arose of whether English courts had jurisdiction regarding the main insolvency proceeding. The registrar stated that, 'in order to give effect to the policy of the [Insolvency Regulation], the court must, in my judgment, have regard to the time at which the debt is incurred because that is the time at which the creditors need to assess the risks of insolvency.' The registrar's opinion was coherently based upon creditors' request for predictability. This solution, however, is not compatible with the European Court of Justice case law[24] and, therefore, the Court of Appeal reversed this decision.[25] The Court of Appeal, however, also maintained that historical facts could be considered in assessing a debtors' COMI. Indeed,

18/. *Re Hellas Telecommunication (Luxembourg) II SCA* [2009] EWHC 3199 (Ch.)
19/. *Hellas* at paragraph 4.
20/. *Hellas* at paragraph 5.
21/. Gas*que v Inland revenue commissioners*[1940] 2 KB 80, 84. See also *National Trust Company v. Ebro Irrigation & Power Ltd.* [1954] DLR 326; *International Credit and Investment Co v. Adham* [1994] 1 BCLC 66.
22/. P Davies and S. Worthington, *Gower Principles of Modern Company Law* (Sweet and Maxwell 10th edn, 2016) 142.
23/. *Malcolm Brian Shierson v Clive Vlieland-Boddy* [2005] EWCA Civ 974.
24/. The reference date to assess the COMI is the filing for insolvency: C-1/04, *Staubitz-Schreiber* [2006] ECR-I 00701.

SEAN QUINN. BEFORE ITS BANKRUPTCY IN 2010 THE QUINN GROUP WAS HAILED BY FORBES AS ONE OF IRELAND'S MOST SUCCESSFUL COMPANIES

Chadwick L.J. concluded that, although the COMI 'is to be determined in the light of the facts as they are at the relevant time for determination [...] those facts include historical facts which have led to the position as it is at the time for determination' and that 'it is important [...] to have regard to the need, if the centre of main interests is to be ascertainable by third parties, for an element of permanence.'[26]
Therefore, in order to prove that the new administrative seat has become permanent and is, therefore, ascertainable by third parties, courts shall consider also historical facts, but only to the extent that these facts have produced the 'position' existing at the relevant time (the date of filing).

The second decision that deserves to be mentioned was rendered in the case *Irish Bank Resolution v Quinn*[27]. Mr Quinn, a professional resident in the Republic of Ireland, went bankrupt and claimed that his business was based in Northern Ireland, not far from the border with the Republic of Ireland. A court of Northern Ireland issued a bankruptcy order, which the High Court of Justice in Northern Ireland however reversed, recognizing that Mr Quinn's COMI was in the Republic of Ireland. The Court raised the question as to the circumstances under which a new head office is deemed 'sufficiently accessible' to creditors. The criterion that the location of the COMI must be ascertainable by third parties

"would indicate something different from being actually notified. If not made public it must be 'sufficiently accessible'. [...] It should be reasonably or sufficiently ascertainable or ascertainable by a reasonably diligent creditor[28]*".*

In the Court's view, in order to make the new head office ascertainable by third parties it is necessary

"...[t]o make the COMI available on the internet or through telephone directories or trade directories or otherwise generally available in the Member State in which he has established his centre of main interest would make it public[29]*."*

In that specific case, however, Mr Quinn did not publish his telephone number in a public directory or his web page, hence this location was not sufficiently ascertainable by third parties. In turn, had Mr Quinn made his place of business publicly available, through telephone directories or online, the Court would have probably reached a different conclusion.

4. Brexit: an uncertain future

What I have described so far is likely to become outdated as soon as the UK withdraws from the European Union. At the moment, the final result of the withdrawal negotiation is unpredictable; what is clear is only the intention of the British government not to accept the supremacy of the European Court of Justice and of EU law. Several scenarios might be imagined, ranging from a 'soft Brexit' at the one extreme, to a 'hard Brexit' at the other. A 'soft Brexit' scenario might

25/. The Court of Appeal denied competence to UK courts by stating that the relevant date to assess the COMI is the hearing date of the petition: *Shierson*, paragraph 55. This part of the decision has been clearly overruled by the CJEU decisions in the cases *Staubitz-Schreiber* and *Interedil*, which maintained that debtors' COMI is to be assessed at the date of the filing for insolvency: *Brian O'Donnell, Mary Patricia O'Donnell v The Governor and Company of the Bank of Ireland* [2012] EWHC 3749 (Ch) at paragraph 36. See: G Moss 'A very peculiar "establishment"', *Insolvency Intelligence* (2006) 20; D Petkovich 'The correct time to determine the debtor's COMI – case note and commentary on Staubitz-Schreiber and Vlieland-Boddy' *Ins. L. & Practice* (2006) 76 – 80.
26/. *Shierson*, paragraph 55.
27/. *Irish Bank Resolution Corp Ltd v Quinn* [2012] NICh 1 = [2012] B.C.C. 608.
28/. *Irish Bank* at paragraph 28.
29/. *Irish Bank* at paragraph 28.

mirror, for example, the special agreements between the EU, and the Member States, with certain third countries, such as Switzerland. At the moment, it is, however, still unclear whether the parties will include the Insolvency Regulation among the pieces of EU legislation that will continue to be applied in the UK and whether the freedom of establishment will be still valid *vis-à-vis* the UK.

Under the opposite 'hard Brexit' scenario, however, things are much more clear: both freedom of establishment (being an essential element of the single market) and the Insolvency Regulation will not apply to the UK anymore. The UK would be considered a 'third country' by EU Member States, which will apply own private international law rules *vis-à-vis* the UK with regard to both company law and insolvency regime. UK companies' private international law is based upon the 'incorporation' theory[30], hence not much will change regarding foreign EU companies: companies incorporated in an EU member State and having its assets or its headquarters in the British territory will continue being automatically recognised in the UK as a foreign entity governed by the law of the country of incorporation. The country of incorporation, however, could follow different private international law criterions towards extra-EU countries (such as the UK in a 'hard Brexit scenario), ranging from a pure incorporation theory at the one extreme to a pure real seat theory at the other. To simplify a complex matter, we can analyse these two opposite examples. If the country of origin follows the 'incorporation theory', a relocation of headquarters, assets or activities onto the British territory is perfectly acceptable and does not lead to the company's liquidation. By contrast, countries that follow the 'real seat theory' are more likely to consider a relocation of headquarters as a shift of the relevant connecting factor, which should lead to a change of applicable law or to the company's liquidation.

Under a 'hard Brexit' scenario both freedom of establishment and the Insolvency Regulation would no longer apply to the UK

The second issue that needs to be briefly addressed is how the hierarchy of sources will change in a 'hard Brexit' scenario regarding insolvency law. The Insolvency Regulation will not be applicable in the UK, with the consequence that insolvencies of debtors having a 'cross-border' relevance will be assisted by the Insolvency Act 1986, the UNCITRAL Model Law on Cross-Border Insolvency 2006[31] and the conflict of law rules based on common law. The Insolvency Act 1986 provides for a quasi-automatic recognition and enforcement of foreign insolvency proceedings only from a list of countries designated by the Secretary of State[32]; in practice, such designated countries are only Commonwealth countries, among which the only EU Member State is Ireland.[33] Unless all EU Member States will be designated by the Secretary of State, therefore, s. 486 of the Insolvency Act 1986 would not be of much help in sorting out cross-border insolvencies connected with other EU Member States. The Model Law, by contrast, seems to be a much more promising instrument to deal with cross-border insolvencies, mostly so because the UK provisions do not include a 'reciprocity clause', which would have paralysed its application due to the very limited implementation of the UNCITRAL model in other Member States.[34] The fundamental idea of the Model Law is that, similarly to the Insolvency Regulation, foreign main proceedings should be recognised and enforced based upon the criterion of COMI. Differently from the Insolvency Regulation, in the Model Law it is not mentioned that a debtor's COMI should be ascertainable by third parties; British courts, however, seem to follow this criterion also with regard to cases regulated by the Model Law.[35]

Just a final remark is needed. The economic and business connections of the UK with the rest of Europe are so deep that insolvencies with cross-border elements will continue to occur despite the UK withdrawal from the EU: companies will continue to trade and individuals will keep on travelling to and from Britain for business and work purposes. It is, therefore, rational to expect that the UK will strike a deal with the EU that will take into account these basic facts and that will mimic the present legal situation. Rationality, however, is not always what shapes human actions.

30/. See D Prentice, 'The incorporation theory – The United Kingdom' 14 *European Business Law Review* (2003) 1.
31/. Cross-Border Insolvency Regulation 2006 Sch. 1.
32/. S. 486 Insolvency Act 1986.
33/. See Co-operation of Insolvency Courts (Designation of relevant Countries and Territories) Order 1986 (SI 1986/2123); Co-operation of Insolvency Courts (Designation of relevant Countries and Territories) Order 1996 (SI 1996/253); Co-operation of Insolvency Courts (Designation of relevant Countries and Territories) Order 1998 (SI 1998/2766).
34/. The UNICTRAL Model Law was only implemented in Greece, Slovenia, Romania, Poland and the UK.
35/. R*e Stanford International Bank Ltd* [2010] 2 WLR 941.

Case Digests

FELICITY TOUBE QC

This edition of the Digest carries with it a plethora of interesting cases. Members of Chambers have been involved in numerous leading cases in the insolvency world, including two judgments of Hildyard J handed down at the end of July (relating to the settlement of the Waterfall III *Lehman* proceedings, and including approval of payments to members by directors in an administration), as well as judgments relating to *Nortel* (bar date for expenses), *Lemos* (extending the issues with privileged documents in bankruptcy even further than *Avonwick*), and *International Bank of Azerbaijan* (recognition application under CBIR).

In the general commercial arena, however, the most important decision is undoubtedly that of the Supreme Court in *Globalia Business Travel S.A.U. (formerly TravelPlan S.A.U.) of Spain (Respondent) -v- Fulton Shipping Inc of Panama* [2017] UKSC 43 in which the Supreme Court handed down a unanimous judgment about whether damages suffered by shipowners following acceptance of a charterers' repudiatory breach of charter should be reduced as a result of the avoidance of a fall in the capital value of the ship. The essential factual background to the case was that the ship (the "New Flamenco") was sold after acceptance of the charterers' repudiatory breach when values were higher than they would have been at the time of contractual redelivery. The Supreme Court held that this rise in value was irrelevant. The benefit gained by the owners was not caused by the breach and therefore should not be taken into account when considering damages. The Supreme Court emphasised 11 points derived from the authorities as set out by Popplewell J at first instance. They are worth setting out in full:

"(1) In order for a benefit to be taken into account in reducing the loss recoverable by the innocent party for a breach of contract, it is generally speaking a necessary condition that the benefit is caused by the breach.

(2) The causation test involves taking into account all the circumstances, including the nature and effects of the breach and the nature of the benefit and loss, the manner in which they occurred and any pre-existing, intervening or collateral factors which played a part in their occurrence.

(3) The test is whether the breach has caused the benefit; it is not sufficient if the breach has merely provided the occasion or context for the innocent party to obtain the benefit, or merely triggered his doing so. Nor is it sufficient merely that the benefit would not have been obtained but for the breach.

(4) In this respect it should make no

difference whether the question is approached as one of mitigation of loss, or measure of damage; although they are logically distinct approaches, the factual and legal inquiry and conclusion should be the same.

(5) The fact that a mitigating step, by way of action or inaction, may be a reasonable and sensible business decision with a view to reducing the impact of the breach, does not of itself render it one which is sufficiently caused by the breach. A step taken by the innocent party which is a reasonable response to the breach and designed to reduce losses caused thereby may be triggered by a breach but not legally caused by the breach.

(6) Whilst a mitigation analysis requires a sufficient causal connection between the breach and the mitigating step, it is not sufficient merely to show in two stages that there is: (a) a causative nexus between breach and mitigating step; and (b) a causative nexus between mitigating step and benefit. The inquiry is also for a direct causative connection between breach and benefit, in cases approached by a mitigation analysis no less than in cases adopting a measure of loss approach. Accordingly, benefits flowing from a step taken in reasonable mitigation of loss are to be taken into account only if and to the extent that they are caused by the breach.

(7) Where, and to the extent that, the benefit arises from a transaction of a kind which the innocent party would have been able to undertake for his own account irrespective of the breach, that is suggestive that the breach is not sufficiently causative of the benefit.

(8) There is no requirement that the benefit must be of the same kind as the loss being claimed or mitigated, but such a difference in kind may be indicative that the benefit is not legally caused by the breach. (In the opinion of the Supreme Court, this factor was of particular importance in the case of the New Flamenco.)

(9) Subject to these principles, whether a benefit is caused by a breach is a question of fact and degree which must be answered by considering all the relevant circumstances in order to form a common sense overall judgment on the sufficiency of the causal nexus between breach and benefit.

(10) Although causation between breach and benefit is generally a necessary requirement, it is not always sufficient. Considerations of justice, fairness and public policy have a role to play and may preclude a defendant from reducing his liability by reference to some types of benefits or in some circumstances even where the causation test is satisfied.

(11) In particular, benefits do not fall to be taken into account, even where caused by the breach, where it would be contrary to fairness and justice for the defendant wrongdoer to be allowed to appropriate them for his benefit because they are the fruits of something the innocent party has done or acquired for his own benefit."

Applying these factors, the Supreme Court found that the fall in the value of the vessel was irrelevant because the owners' interest in the capital value of the vessel was unrelated to the interest injured by the charterers' repudiation of the charterparty. There was not a sufficiently close link between the loss and the benefit. It mattered not that the loss and the benefit were similar in nature. The sale of the vessel was simply the exercise of the owners' property right which exists independently of the charterparty and its termination.

It is sometimes concerning when the Supreme Court hands down a judgment in which we are invited to "form a common sense overall judgment" in the light of a consideration of all the relevant circumstances. This usually introduces uncertainty and an element of "making it up as we go along". However, in this arena it is probably the only solution to the knotty questions of causation and mitigation. The good news is that it produces more tricky issues of construction for us to get our teeth into!

Felicity Toube QC

BANKING & FINANCE

Digested by TOBY BROWN


TOBY BROWN

Barclays Bank Plc, Re [2017] EWHC 1482 (Ch) (Sir Geoffrey Vos C, Snowden J, 26 May 2017)

Ring fencing transfer schemes – prospective directions under inherent jurisdiction

One of the reforms in response to the financial crisis is the ring-fencing of vital banking services from risks elsewhere in the financial system. Part VII of the Financial Services and Markets Act 2000 (FSMA) enables the Courts to make orders to facilitate transfers of a banking or insurance business. The Financial Services (Banking Reform) Act 2013 provided for an additional process known as Ring Fencing Transfer Schemes (RFTS). Banks with an average total of deposits from individuals or SMEs of more than £25bn are required to have a RFTS in place by 1 January 2019, and thus to isolate their retailing banking activity from their wholesale or investment banking activities. Barclays, HSBC, Lloyds, Santander and associated entities issued 4 separate claims in the Companies Court seeking prospective directions in advance of future applications to be made under s. 107 of FSMA to sanction RFTSs. The claims arose because the banks cannot make sanction applications without the consent of the PRA, but the PRA cannot give their consent until they have considered a scheme report prepared by a Skilled Person under s. 109A of FSMA.

Unusually, given the importance of the claims, the Chancellor directed that two judges hear them as the Divisional Court. On the question of whether the Court had jurisdiction to provide the prospective directions requested by the banks, the Chancellor (with whom Snowden J agreed) held that "the procedural innovation" was within the Court's inherent jurisdiction to regulate its own procedure.

On an application made under s. 107 of FSMA for sanction of a scheme, s. 110 provides that in addition to the PRA and FCA, "*any person…who alleges that [they] would be adversely affected by the carrying out of the scheme*" is entitled to be heard at the hearing. The directions sought by the banks principally concerned the notification to be given to such persons, together with case management directions.

The banks proposed different communication plans, which would be separately considered for approval by the Court. At present the Court was asked to approve the general principle that the banks were only obliged to consider giving notice to those persons who are likely to be adversely affected. The Chancellor held that the starting point must be that individual notice will need to be given to all customers and consumers as defined in section 1G of FSMA, because it had not yet been shown that any of them were not in the category of persons who "*might wish to allege that he would be adversely affected by the carrying out of the scheme*". The Chancellor also gave various other directions, including approving the use of electronic communication for notifications and the use of websites as the principal source of information.

Under s. 110(5), a person alleging to be adversely affected is not entitled to be heard unless they had filed and served a written statement of their representations. The Court was asked by the banks that when a timetable was set for the sanction application, it directed that such representations be served in sufficient time failing which the person would not be entitled to be heard without leave. Whilst approving directions for timetabling of the representations, the Chancellor refused to direct that a person would not be heard, as long as they had filed and served their representations before the hearing.

Finally, the Chancellor gave timetabling directions for the case management and hearing of the future applications to sanction the RFTSs, with various hearings scheduled to occur between November 2017 and June 2018.


TOM SMITH QC

African Export-Import Bank v Shebah Exploration and Production Co Ltd [2017] EWCA Civ 845 (Longmore LJ, Henderson LJ, 28 June 2017)

Syndicated loans – standard contracts – unfair terms

The 3 claimants were Egyptian and Nigerian financial institutions which acted as lenders under a $150m pre-export Facility Agreement. The first defendant, the borrower, was engaged in oil exploration and production in Africa. The second and third defendants were guarantors pursuant to the Facility Agreement and a Personal Guarantee. The claimants advanced $150m under

the Facility Agreement, however, the borrower defaulted on all its payment obligations other than making a $6.1m repayment. The claimants accelerated the entire debt and made demands under the guarantees. They issued proceedings to recover the outstanding sums, and at first instance Phillips J granted summary judgment.

The defendants appealed. First, they contended that they had counterclaims of c. $1bn to be set off against their liabilities under the Facility Agreement and Personal Guarantee. The claimants, however, asserted that both agreements contained clauses excluding any right of set off. The defendants attempted to counter this by relying on section 3 of the Unfair Contract Terms Act 1977 (UCTA), alleging that they were dealing with the claimants' written standard terms of business, and therefore the clauses could not be relied upon unless they satisfied the reasonableness test.

The Facility Agreement was based on the form of syndicated facility agreement recommended by the Loan Market Association (LMA) as a starting point for negotiation.

The key question for the Court of Appeal was the meaning of the requirement under section 3 that a party "*deals…on the other's written standard terms of business*".

Longmore LJ (with whom Henderson LJ agreed) reviewed the limited relevant case law. On the issue of whether the term was part of the other party's standard terms, Longmore LJ approved *British Fermentation Products Ltd v Compair Reavell Ltd* [1999] 2 All ER Comm 38 and held that it must be shown that the other party habitually uses the terms. It was essential that there was proof that the model form was invariably or at least usually used by the party in question, either by practice or by express statement by a contracting party.

As to the issue of whether the party was dealing on those terms, Longmore LJ held that it is relevant to inquire whether there have been more than insubstantial variations to the terms which may otherwise have been habitually used by the other party to the transaction. If there have been substantial variations, it is unlikely to be the case that the party relying on UCTA will have discharged the burden on them to show that the contract has been made "*on the other's written standard terms of business*".

In the present case, the Court of Appeal upheld the first instance decision that it was not arguable that the defendants were dealing with the claimants' standard terms. The defendants had the onus of proof, but had not filed any evidence to support their belief that the Facility Agreement was made on the claimants' standard terms. A party who wishes to contend that it is arguable that a deal is on standard business terms must produce some evidence that it is likely to have been so. In contrast, the claimants' evidence was that the Facility Agreement was not a standard form agreement, and that since the claimants entered into the transaction as a syndicate such documentation was negotiated and agreed on an individual basis.

Longmore LJ also rejected the defendants' argument that the complexity of the concept of standard business terms was relevant to whether summary judgment was granted. Once it was decided what were the terms of the contract, it was not difficult to decide whether the terms being relied on were standard business terms of that party.

In any event, Longmore LJ would uphold the judgment on the basis that there were in fact detailed negotiations in the present case which render it impossible to say that either the LMA model form was, or the terms ultimately agreed were, the claimants' "*standard terms of business*".

On their second ground of appeal, the defendants asserted that the present proceedings were brought in breach of an oral agreement not to commence proceedings pending the conclusion of negotiations to refinance the Facility Agreement. Longmore LJ upheld Phillips J's decision that this was not arguable. It was impossible to regard the discussions as giving rise to a binding agreement given they were subject to contract, and the claimants were entitled to withdraw from the negotiations and issue the present proceedings.

The appeal was therefore dismissed.

[Tom Smith QC, Ryan Perkins]

CIVIL PROCEDURE

Digested by ALEXANDER RIDDIFORD


ALEXANDER RIDDIFORD

Harrison v University Hospitals Coventry & Warwickshire NHS Trust [2017] EWCA Civ 792, (Court of Appeal, 21 June 2017)

Costs budgets – issue of proceedings – detailed assessment

This was an appeal raising issues of some general importance in the context of costs. In particular, the two principal issues were ones which concerned the relationship between costs budgeting and detailed assessment and which had attracted sharply divided views among those specialising in this area.

The two principal issues in relation to costs were, in essence, as follows:

1. Where a Costs Management Order approving a costs budget has been made in the course of civil proceedings, whether a costs judge on a subsequent detailed assessment is precluded from going below the budgeted amount unless satisfied that there is good reason for doing so; or whether there is an entitlement to do so without any prior requirement of good reason for going below the budgeted amount.

In relation to this issue, the Court of Appeal held that, where there was a proposed departure from a costs budget, be it upwards or downwards, the court on a detailed assessment could sanction such a departure only if satisfied that there was good reason for doing so. That was the natural and ordinary meaning of the words used in CPR r.3.18(b).

2. Whether, with regard to costs incurred prior to the budget, there is or is not a like requirement of good reason if a costs judge on a subsequent detailed assessment is to depart from the amount put forward at the relevant costs management hearing.

In relation to this issue, the Court of Appeal held that costs incurred prior to the budget would be the subject of detailed assessment in the usual way, without any added requirement of "good reason" for departure from the approved budget. CPR 3.18(b), in its then form, related to a departure from "the approved or agreed budget". But the costs incurred before the date of the budget were never agreed in the instant case, nor were they ever "approved" by the Costs Management Order.

The appeal also raised a discrete point as to when, for the purposes of the transitional provisions relating to proportionality contained in CPR 44.3(7), a case is to be treated as "*commenced*." As to this discrete point, the Court considered it to be plain that a case was "*commenced*" for the purposes of CPR 44.3(7)(a) when the relevant proceedings were issued by the Court.

Marsh v Ministry of Justice [2017] EWHC 1040 (QB) (Thirlwall LJ, 21 July 2017)

Application to strike out Defence – witness statements

The Claimant, a prison officer, claimed to have suffered psychiatric injury as a result of breaches of contract and duty of care by the Ministry of Justice in the course of its investigation into allegations of sexual misconduct against the Claimant. The allegations against the Claimant were eventually found to be unproved but the delay prolonged a depressive illness which the Claimant suffered from following his suspension and meant that he was ultimately unfit to return to work.

The Defendant asserted that, in all probability, the Claimant did misconduct himself, including by having sexual intercourse with the Complainant. At the end of the trial, the Claimant applied to strike out the Defence as an abuse of process in light of various alleged shortcomings in the Defendant's conduct of its case.

Thirlwall LJ held that, although the Claimant had raised a number of justified concerns about the Defendant's approach to the litigation (e.g. there were flaws in the way some of the statements had been drafted; witnesses had been interviewed but statements not drafted for months or years; one Defence witness had contacted the Claimant's legal team to complain about an inaccuracy in his statement), nonetheless the Defendant's solicitor had removed the relevant passages and no harm had been done to the Claimant's case. The Defendant's conduct had not prevented a fair trial. Accordingly, the Claimant's application to strike out was refused. However, on the substantive issues judgment was given in favour of the Claimant.

Caretech Community Services Ltd v Oakden & Ors[2017] EWHC 1944 (QB) (Master McCloud, 31 July 2017)

Claim forms – service – retrospective effect

The Claimant applied for directions that steps that had been taken to bring the claim form to the attention of one of the defendants (D) amounted to good service. In particular, the Claimant sought retrospective validation of service of the claim form by an alternative method under CPR r.6.15(2) on the basis that a copy of the claim form had been delivered by post and also by email to the solicitors who were advising D. The Master refused the application. When considering relief under CPR 6.15(2) it was a necessary, but not sufficient, condition that the claim form and its contents had come to the defendant's attention (*Abela v Baadarani* [2013] UKSC 44, [2013] 1 W.L.R. 2043 followed). However, relief would not be available under r.6.15(2) if the claim form had been delivered expressly on the basis that it was "for information only", and not for service (*Asia Pacific (HK) Ltd v Hanjin Shipping Co Ltd* [2005] 2 C.L.C. 747 applied; *Brown v Innovatorone Plc* [2010] 2 All E.R. (Comm) 80 considered). If that was wrong, a statement that a document was provided for information formed part of all the circumstances as to whether there was a good reason, or not, for validating service. The statement in the covering letter that the claim form was supplied for information, in the context that the solicitors were not instructed to accept service was inconsistent with the retrospective validation of those steps as good service. If that was wrong, there would be no good reason to permit documents expressly delivered on the basis that they were not being served, to be retrospectively validated as good service. When lawyers received documents which on their face were not being served, they should be able to rely on that indication.

Mott & Anor v Long & Anor [2017] EWHC 2130 (TCC) (HHJ David Grant, 2 August 2017)

Costs budgets – delay – relief from sanctions

This was a case where the Defendant's solicitors had filed their costs budget 10 days late and relief from sanctions was sought. The Court, applying the usual threefold *Denton* test, granted the application.
Of particular relevance in the present case was the fact that the Defendant's solicitors had served a costs budget and done so some time before the CMC. Moreover, the Court also gave directions at the CMC relating to expert opinion evidence and the estimated length of the trial which had given rise to the need for the Defendant to file and serve a revised costs budget in any event. As a result, the parties were now in precisely the same procedural position in which they would have been so far as the process of costs budgeting was concerned had the defendants served their costs budget in time. This was a highly significant circumstance in the present case.

COMMERCIAL LITIGATION

Digested by MADELEINE JONES


MADELEINE JONES

Ted Baker Plc, No Ordinary Designer Label Ltd v AXA Insurance UK Plc, Fusion Insurance Services Ltd, Tokio Marine Europe Insurance Ltd [2017] EWCA Civ 4097 (Court of Appeal - Lord Justice Treacy, Lord Justice David Richards and Sir Christopher Clarke, 11 August 2017)

Estoppel by silence - good faith - expert evidence

This appeal related to a claim under an insurance policy. The appellant retailer had wished to claim for loss of profit under its insurance policy when it discovered that one of its employees had been stealing stock over a lengthy period of time. The Court ruled in the appellant retailer's favour on liability (with Sir Christopher Clarke giving the judgment on this aspect) but in the respondent insurer's favour on quantum (with David Richards LJ giving the judgment on this aspect), meaning the appeal failed overall. When the retailer first notified the respondent insurers of the claim, the insurers asked for documents

relevant for the assessment of the quantum of the claim and falling into seven categories. The insurance policy made the provision of such information within a certain time a condition precedent to the making of a claim.

The policy contained a Professional Accountants Clause (PAC), by which the insurers would cover certain of an insured's costs of gathering information. However, the insurers indicated that they would not commit to paying costs under the PAC before they had determined liability. The retailer communicated to the insurers that it did not wish to incur the cost of gathering the requisite information, including documents in "Category 7" of the information requested, before the insurers admitted liability for the claim in principle. The insurer responded that it would take advice on liability. The retailer therefore understood the issue with the documents, including the Category 7 documents, to have been "parked", so that the insurer could not rely on the provision of these documents within the contractual timeframe as a condition precedent. The insurers contended that there had been no estoppel, or that if there had been it did not include the Category 7 documents.

Eder J had found there was an estoppel relating to the additional work required which would have been covered by the PAC, but that this had not covered the Category 7 documents. He had construed the PAC as excluding the costs of producing the Category 7 documents, which did not need to be produced by external accountants. However, Sir Christopher Clarke ruled that Eder J had erred in his construction of the PAC. This referred to documents which "*may be produced by professional accountants*." Thus, documents which did not need to be so produced were not necessarily excluded. Therefore, the Court of Appeal concluded, the question of producing Category 7 documents had also been "parked", and the retailer was not in breach of the condition precedent.

It had been open to Eder J, notwithstanding his construction of the PAC, to find the insurers were estopped from relying on the retailer's failure to provide the Category 7 documents. However, the judge declined to make this finding. On the facts, he concluded that it was clear that the insurer did not regard itself as in principle liable for the cost of producing the Category 7 documents under the PAC.

The retailer challenged this finding before the Court of Appeal. It argued that the failure to find an estoppel was a "*consequence of a finding of fact*" not a finding of fact itself. The Court of Appeal ruled that this distinction was misplaced.

However, the Court went on to consider whether the insurers had had a "duty to speak" – a positive duty to inform the retailer that they considered the retailer's duty to produce the Category 7 documents was still live. An insurer is, generally speaking, under no duty to warn an insured as to the need to comply with policy conditions. However, notwithstanding that there had been no representation about the Category 7 documents and that the judge had found that the insurers had not been deliberately silent on these through bad faith, nonetheless the insurers had created a situation in which it was reasonable for the retailer to assume the Category 7 documents had been parked, and in failing to make clear they had not been, they were estopped from relying on the provision of the Category 7 documents as a condition precedent.

An estoppel arises where a party stays silent where a reasonable person would expect him, acting honestly and responsibly, to bring the true facts to the attention of the other party known to him to be under a mistake as to their respective rights and obligations. The Court of Appeal's finding of a duty to speak in this case was not dependent upon the contract being one of *uberrimae fidei*, but the duty arises *a fortiori* in the circumstances described where, as with an insurance contract, the parties have a duty of good faith.

The Appeal was, however, dismissed, because the Court of Appeal agreed with Eder J's findings on quantum: the retailer failed to establish any loss under the policies.

There was an excess of £5,000 under the policies for each and every loss. The direct evidence for the actual thefts and hence the losses arising from them was limited, because the thefts had been going on for a long time before they were discovered. Both parties relied on expert accountancy evidence. David Richards LJ noted that the very experienced trial judge had found the expert evidence "*something of a swamp*", because of its volume and complexity, and he criticized this, noting that it had consequences not only at first instance but also for the analysis of a trial judge's findings on appeal. A judge's finding of fact may only be overturned where it is "*plainly wrong*" and David Richards LJ implied that an appeal court will be slower to find this where the evidence is confusing. David Richards LJ reviewed the judge's findings and concluded that he had been entitled to find that the retailer had not proved that its losses exceeded the excess on the policy. Accordingly, the retailer could not recover.

Globalia Business Travel S.A.U. (formerly TravelPlan S.A.U.) of Spain (Respondent) *v* Fulton Shipping Inc of Panama (Appellant) [2017] UKSC 43 (Supreme Court - Lord Neuberger PSC; Lord Mance JSC; Lord Clarke JSC; Lord Sumption JSC; Lord Hodge JSC, 28 June 2017)

Damages – mitigation - causation

The Supreme Court considered the assessment of the damages due to a shipowner (the Appellant, "Fulton") arising out of the repudiation of a charterparty by the charterer (the Respondent, "Globalia") of a cruise ship called the New Flamenco. Globalia had chartered the New Flamenco from Fulton under a charterparty which had been extended by agreement. However, Globalia had disputed the validity of the extension and redelivered the vessel as if the charterparty had not been extended. There was by this stage no dispute that this was an anticipatory breach of the contract. The Supreme Court considered the damages due to Fulton for this anticipatory breach. There had been no available market to charter the boat upon its redelivery. However, shortly before redelivery, Fulton had sold the vessel. If Globalia had redelivered the vessel two years later, after the global financial crisis had occurred, in accordance with the amended terms of the charterparty, the resale value of the ship would have been more than two thirds less than the amount it was in fact sold for: around USD 7m as against the USD 23.7m in fact achieved.

Should the benefit Fulton received by selling the ship two years earlier than it otherwise would have be taken into account in assessing the quantum of damages? When the issue was first arbitrated, the arbitrator had held that Globalia should be given a credit for the ship's depreciation in value. On appeal, Popplewell J held that there should be no such credit, "*because it was not a benefit which was legally caused by the breach*." The Court of Appeal had reversed this finding, on the basis that this was a mitigation of loss that should properly be taken into account in assessing the loss.

Lord Clarke gave the unanimous judgment of the Supreme Court. After examining the reasoning of both Popplewell J and the Court of Appeal, he concluded that "*the fall in value of the vessel was in my opinion irrelevant because the owners' interest in the capital value of the vessel had nothing to do with the interest injured by the charterers' repudiation of the charterparty*": [29].

Popplewell J had formulated 11 propositions about when a benefit should be taken into account as a mitigation of loss, which Lord Clarke cited in full at [16]. Lord Clarke confirmed the eighth of these "*in particular*" (implying his approval of the other propositions too), namely that in considering whether a benefit should be taken into account in assessing loss, "*[t]here is no requirement that the benefit must be of the same kind as the loss being claimed or mitigated… but such a difference in kind may be indicative that the benefit is not legally caused by the breach*."

Lord Clarke further said, at [30] that "*The essential question is whether there is a sufficiently close link between [the benefit and the loss] and not whether they are similar in nature. The relevant link is causation. The benefit to be brought into account must have been caused either by the breach of the charterparty or by a successful act of mitigation*." In this case, the causal link was absent, because "*there was nothing about the premature termination of the charterparty which made it necessary to sell the vessel, either at all or at any particular time*": [32]. If there had been an available market at the time of the breach, the loss would have been the difference between the actual charterparty rate and the assumed substitute contract rate. In the absence of such a market "*the measure of the loss is the difference between the contract rate and what was or ought reasonably to have been earned from employment of the vessel under shorter charterparties, as for example on the spot market*": [34]. The sale of the ship could not have mitigated the loss, because it was not mitigating the income stream achievable.

The sale of the vessel might be relevant in that it would shorten the period during which the owners could claim to have lost the income stream under the old charterparty and therefore the period during which there was a lost income stream to mitigate. Also, if the vessel achieved a lower price on sale than it would have done if the charterparty had been in place, the difference might be recoverable on the basis that the effect of the sale would have been to capitalise the value of a year's hire payments. However, this did not alter the fact that sale was irrelevant to questions of mitigation.

Blue v Ashley [2017] EWHC 1928 (Comm) (Leggatt J, 26 July 2017)

Oral contracts - intention to legally bind

Mr Justice Leggatt considered the legal implications of a conversation in January 2013 between Michael Ashley (D), the founder and majority shareholder of Sports Direct International Plc (the Company), the UK's largest retailer of sporting goods, and Jeffrey Blue (C), a strategic consultant to the Company. C and D met three investment bankers in a pub. The purpose of the meeting was informally to introduce D and the bankers prior to possible discussions about their bank acting as corporate broker to the Company. All the men except one of the bankers were drinking. In the course of the evening the men discussed sports and then the Company's share price. C and the bankers recalled D saying that if C could get the share price to double, he would pay him a large sum of money, which C recalled to be £15m. D could not remember making this offer, but said that if he did make it, it would have been clear that it was just banter, and not seriously meant.

C did not make any written record of the conversation and did not discuss it again with D, except indirectly almost a year later. The Company's share price did double in February 2014. C pointed this out to D but did not ask for the bonus. At the end of May 2014, D transferred £1m to C. C said this was in furtherance of the agreement; D said it was a different bonus. C resigned in December 2014, and in March 2015, during his notice period, he finally asked for the £15m bonus.

Leggatt J had to decide if there had been a contract. On the basis of various findings of fact and principle, he concluded that there had not been. He reiterated that a contract may be oral and that the basic requirements of a contract are that: (i) the parties have reached an agreement, which (ii) is intended to be legally binding, (iii) is supported by consideration, and (iv) is sufficiently certain and complete to be enforceable.

He found that there was no contract because there was no intention that the agreement be legally binding, and besides this, it was not sufficiently certain and complete.

He gave eight reasons for his conclusion that it was not legally binding:

(1) The conversation took place in a pub after the taking of alcohol.

(2) The conversation took place at an outward-facing occasion whose aim was to enable the bankers to meet D in an informal setting in order to build a commercial relationship with D and the Company. It was inherently unlikely that a matter personal to C would have been discussed, and this would have been completely extraneous to the serious purpose which the meeting had.

(3) The nature and tone of the conversation was informal and jocular.

(4) The bonus made no commercial sense. C was not particularly central to the Company's business and did not know D particularly well. It seemed D had been trying to make C seem important because he wanted him to be the main point of contact with the bankers.

(5) It did not seem likely that C was capable of influencing the share price in this way. No human being has such powers and certainly not one in C's role.

(6) The offer was too vague to be serious.

(7) The bankers had all considered that the conversation had not been serious.

(8) C himself had, on the evidence of one of the bankers, not taken the conversation seriously at first, but only some time later. The facts that C had not made a record of the conversation and waited a year before mentioning it to D made it wholly incredible that C had believed there was a binding oral agreement. C had done some work outside the scope of his contract, but Leggatt J found he had not done it as a result of the pub conversation.

Accordingly, no reasonable person would have considered that the offer was intended to be legally binding.

Leggatt J further said that the offer lacked an essential term, as it did not include a timeframe within which the share price was to be doubled. This made it too uncertain to be enforceable. He also noted that contracts hardly ever fail for lack of consideration and that D's submission on this point had been hopeless.

In making his findings of fact, Leggatt J quoted his own remarks in *Gestmin SGPS SA v Credit Suisse (UK) Limited [2013] EWHC 3560 (Comm)*, at paras 16-22, about the unreliability of human memory and giving the view that in a commercial trial it is best for a judge to place little, if any, reliance on witnesses' recollections and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. These remarks have been cited in several cases, and are likely to continue to be influential.

Deutsche Bank AG, London v CIMB Bank Berhad [2017] EWHC 1264 (Comm) (Blair J, 25 May 2017)

Letters of credit

Mr Justice Blair heard dispute under a series of letters of credit between the London branch of Deutsche Bank AG, the claimant confirming bank ("CB"), and Singapore branch of CIMB Bank Berhad, the defendant issuing bank ("IB"). The contract underlying the letters of credit contract concerned the sale of cotton by the beneficiary to a customer of IB.

IB sent CB a "Swift message MT 700" as to the issue of a documentary credit, stated to be irrevocable and subject to the Uniform Customs and Practice for Documentary Credits ("UPC") 600. The letters of credit stipulated the documents to be presented.

CB sent Swift messages to IB in the appropriate format, advising that it had paid the beneficiary under the letters of credit, and seeking reimbursement pursuant to IB's undertaking to reimburse a confirming bank which "*has honoured*" a complying presentation under UCP 600 art.7(c).

IB declined to make the payment on the basis that the transactions were shams. CB asserted that it had paid by way of setting off monies owed to it by the beneficiary. In principle this was an acceptable method of payment. IB put CB to proof in respect of its assertion that it paid the beneficiary.

CB sought to read into Art. 7(c) an obligation by IB to pay when the nominated bank *states that it* has honoured a complying presentation, so that IB was obliged to treat the CB's statement as conclusive. It argued this by analogy with Art. 13(b), which provides that an issuing bank will be responsible for loss of interest and expenses incurred "*if reimbursement is not provided on first demand by a reimbursing bank*", where reimbursement is to be obtained by the claiming bank (here the confirming bank) from a party other than the issuing bank (described as the "reimbursing bank").

Blair J found that this analogy was flawed. There is no reimbursing bank involved under Art. 7, and there is no reason why the same principles should apply as between issuing bank and confirming bank where no such bank is involved. Case law draws a close comparison between letters of credit and first demand bonds in the context of the bank's liability to pay the beneficiary – but this does not mean that an issuing bank's undertaking to reimburse a nominated or confirming bank is analogous to the payment obligation under a first demand bond.

Furthermore, CB's argument did not enjoy the support of any authorities, whereas IB had cited numerous authorities and textbooks in support of its position. The relevant operative words in Art. 7(c) of UCP 600 are that an "*issuing bank undertakes to reimburse a nominated bank that* has honoured *... a complying presentation*" (Blair J's emphasis). This supports the conclusion in *Fortis Bank SA/NV v Indian Overseas Bank* [2009] EWHC 2303 (Comm) that "*What matters is the fact of honouring or negotiating a complying presentation.*"

COMPANY LAW

Digested by **EDOARDO LUPI**


EDOARDO LUPI

Marcus Watson, Rob Hersov, Twysden Moore v Watchfinder.co.uk Limited [2017] EWHC 1275 (Comm) (HHJ Waksman QC, sitting as a Judge of the High Court, 25 May 2017)

Share Option Agreement – Directors' Discretion – Braganza v BP Shipping

The Claimants were the directors of a business consortium, who had entered into a share option agreement with the Defendant company. There was a further service agreement between the business consortium and the Defendant. The Claimants sought specific performance of the obligation to allot 5% of the Defendant's shares under the option agreement.

The Defendant primarily resisted the claim on the basis that a clause in the option agreement (Clause 3.1) provided that the option could only be exercised with the consent of a majority of the board of directors of the company. No such consent had been given. Further, the Defendant contended that, in substance, the Clause 3.1 discretion conferred on the board amounted to an "*unconditional veto*".

His Honour Judge Waksman QC (sitting as a Judge of the High Court) rejected the Defendant's construction of Clause 3.1 because the consequence would have been to render the grant of shares under the

option agreement entirely within the gift of the Defendant so as to put the Claimants in the position of any would-be purchaser of the Defendant's shares.

The next question was whether the discretion under Clause 3.1 had been exercised unreasonably, capriciously or arbitrarily. The Judge took into account the guidance of the Supreme Court in *Braganza v BP Shipping* [2015] 1 WLR 1661 and accepted that either as a result of the implication of a term or as a matter of construction, the Clause 3.1 discretion was subject to the limitations described in *Braganza*, which were akin to the approach taken in relation to decision-makers in public law.

The Judge observed that Clause 3.1 did not provide clear guidance on the 'target' of the discretion, that is to say what the decision-maker was supposed to be considering when deciding whether or not to exercise it. The Judge accepted, however, that the relevant target of the discretion was whether the Claimants had contributed to the growth of value or prospects of the Defendant in some significant way.

Having identified the focus of the discretion, the Judge then considered whether the discretion had been properly exercised in the circumstances. First, the Judge noted that there had barely been any considered exercise of the discretion at all. Second, there was insufficient evidence documenting the directors' reasons for exercising their discretion to refuse consent. Third, the Defendant's directors candidly admitted that they had been under the impression that they enjoyed an unconditional veto. Fourth, the directors had plainly placed undue emphasis on the Claimants' failure to obtain the investment in the Defendant by a third party investor. Accordingly, the Judge held that there had hardly been any real exercise of the discretion at all.

It was common ground that if the Defendant was found not to have complied with the duty set out in *Braganza*, the Court would have to proceed as if consent had been given by the Defendant's board to the exercise of the option. Accordingly, the Judge made the order for specific performance of the option agreement.

Cullen Investments Ltd v Brown [2017] EWHC 1586 (Ch) (Barling J, 5 July 2017)

Directors' duties – joint venture agreements – unlawful means conspiracy

The proceedings arose out of a breakdown of the relationship between the second claimant, E, and the first defendant, J. E was the founder of Cullen Investments Limited ("Cullen") and was a well-known New Zealand businessman. The third defendant, Kauri Investments Limited ("KIL") was incorporated as the corporate vehicle for a joint venture between E/Cullen and J. Cullen and J were 50:50 beneficial owners of KIL, whose directors were E, J and J's brother, Q (the second defendant). Barling J heard the consolidated claims of Cullen against J alone, and a derivative claim brought by Cullen on behalf of KIL against both J and Q.

In 2005, E and J agreed on a joint venture embodied in a document entitled "Draft Heads of Agreement" (the "HoA"), which was expressed to be between J and Cullen. The main purpose of the joint venture was to explore property investment opportunities in the UK and Europe using KIL as a vehicle to do so. Under the HoA, J was not to be prohibited from entering into UK and European property transactions in his personal capacity or otherwise as long as (i) KIL was given first right of refusal, KIL declined, and as long as the transaction concerned would not materially affect J's duties as KIL's CEO or result in a conflict with KIL, or (ii) with Cullen's prior written consent.

The breakdown in the relationship between E/Cullen and J arose out of J making a personal investment in a joint venture with a partner that involved the redevelopment of residential sites in Germany. This was referred to at trial as "the German opportunity". E and Cullen contended that J's personal investment in the German Opportunity was (i) impermissible under the HoA and/or (ii) a breach of J's and Q's obligations as directors of KIL and/or (iii) an unlawful means conspiracy by J and Q to injure KIL.

As to the claim for breach of the duties owed by J and Q to KIL, the defendants contended that provided their conduct as directors of KIL was in accordance with the overarching joint venture agreement then their conduct would not give rise to an actionable breach of duty claim. Further, distinguishing the line of authorities on the "no conflict" and "no profit" rule, the information concerning the German Opportunity had come to J pursuant to his contractual obligation under the HoA within the broader context of the joint venture agreement and had nothing to do with his position as director of KIL.

Barling J rejected the defendants' submission, noting that "*it is in my view a wrong analysis to regard [J's] day to day work in seeking out business opportunities, reviewing them, and if appropriate structuring and implementing them, as not carried out in his capacity of CEO of KIL, merely because those actions at the*

same time discharged his contractual obligations under the HoA." Further, there was nothing in the case law to support the disapplication of J's normal duties as a director simply because he was also appointed CEO under the HoA.

The German Opportunity had plainly been an opportunity for KIL in which J had made, without Cullen's consent, a personal investment which gave rise to a conflict of interest between himself and KIL. Accordingly, the breach of section 175 of the Companies Act 2006 (and corresponding common law duties) was made out as were breaches of section 172 and section 177 by reason of J's failure to disclose his interest. By reason of his own unauthorised personal interest in the German Opportunity, Q was in breach of his duty under section 175 of the Companies Act 2006, as well as section 176 and section 177.

The claims in contract against J for breaches of the HoA succeeded. The claim for unlawful means conspiracy against J and Q succeeded in part. Barling J accepted that there was a combination between J and Q for Q to have a personal financial interest in the German Opportunity, knowing that this created a potential conflict of interest for Q which, being unauthorised, resulted in a breach of Q's fiduciary and statutory duties to KIL as director. It follows that Barling J accepted that a breach of fiduciary duty could constitute unlawful means for the purpose of the tort. The intention to injure KIL was established but no actual injury or loss to KIL had, as yet, been proved and further argument was required.

Re BW Estates Limited [2017] EWCA Civ 1201 (Court of Appeal, 1 August 2017)

Directors' appointment of administrator – Duomatic principle – abuse of process

The Applicants were two creditors of BW Estates Limited (the "Company"). The Respondents were the Company's joint administrators.

The question before the Court of Appeal was whether the sole director of a company, whose articles required two directors for its board meeting to be quorate, could validly appoint administrators under paragraph 22 of Schedule B1 to the Insolvency Act 1986. The complicating factor was that, whilst the sole director held 75% of the shares in the company, the remaining 25% were held by a long-dissolved Manx Company.

The trial judge held that the joint administrators' appointment was valid because: (i) the articles of association had been informally varied by the members' informal course of conduct; (ii) the consent of the only existing registered shareholder was sufficient to trigger the *Duomatic* principle; (iii) all the relevant parties had acquiesced in the appointments; and (iv) in any event the Applicants' application was a *Henderson v Henderson* (1843) 3 Hare 100 abuse of process, because they had previously failed to challenge the appointment in the context of an earlier application. The judgment in the Court of Appeal was given by the Chancellor, Sir Geoffrey Vos, with whom Underhill and Henderson LJJ agreed.

First, the Chancellor considered that upon the dissolution of the Manx company, the Company did not automatically become a single member company because the Manx company remained on the Company's register.

Second, the Chancellor rejected the joint administrators' contention that para 22(2) of Schedule B1, which confers a power on the directors of a company to appoint directors, could not be constrained by the Company's articles of association, which in this case required a quorum of two directors. Approving Sir Andrew Morritt's reasoning in *Minmar (929) v Khalastchi* [2011] EWHC 1159 (Ch), the Chancellor agreed that there was no notion of informality imported by para 22(2) of Schedule B1.

Third, when considering the application of the *Duomatic* principle, it was important to note that those who must assent to the relevant matter are "*all shareholders who have a right to attend and vote at a general meeting of the company*". The Chancellor noted that, "*it seems to me that the Duomatic principle simply cannot apply in a situation where one of the registered shareholders is a corporation which does not exist, because it requires the consent of all the registered shareholders and one of them is incapable of consenting.* Duomatic *is a valuable principle, but it would be wrong to assume that it must always be capable of applying.*" The Manx company could not and did not assent. Further, its assent could not be inferred by looking to what those who may previously have had an interest in the Manx company subsequently thought about the appointment.

Fourth, the Judge was wrong to conclude for the same reasons that the articles of association had been amended by conduct given that this could only have taken effect by the *Duomatic* principle. Fifth, the Chancellor disagreed that the application before him smacked of abuse of process, or that the Applicants could be estopped by acquiescence from challenging the joint administrators' appointment.

Accordingly, the Court of Appeal held that the appointment of the joint administrators was invalid.

CORPORATE INSOLVENCY

Digested by RYAN PERKINS & RIZ MOKAL


RYAN PERKINS


RIZ MOKAL

Re OJSC International Bank of Azerbaijan [2017] EWHC 2075 (Ch) (Barling J, 6 June 2017)

Cross-Border Insolvency Regulations 2006 – administration moratorium

The foreign representative of a bank applied for the recognition of a restructuring in Azerbaijan as a foreign main proceeding under the Cross-Border Insolvency Regulations 2006. Article 20 of Schedule 1 to the Regulations provides that, upon the recognition of a foreign main proceeding, the debtor's ability to dispose of its assets is "suspended", and a stay equivalent to a winding-up order is imposed. Such a "suspension" would not have been appropriate in the present case, since the bank intended to continue trading throughout the restructuring in Azerbaijan. That being so, the foreign representative sought an order replacing the stay and suspension contemplated by Article 20 with an administration moratorium in the terms of paragraph 43 of Schedule B1 to the Insolvency Act 1986. This would ensure that the bank could continue to trade, whilst preventing hostile creditor action for the duration of the restructuring. Granting the relief sought, Barling J held that the stay and suspension imposed by Article 20 is not appropriate where the foreign proceeding is a debtor-in-possession restructuring rather than a terminal liquidation. Barling J referred to a number of cases in which a similar order was made in the past, and expressed his agreement with the approach adopted in those cases. Barling J noted that the Regulations specifically empower the Court to impose an administration moratorium (pursuant to Article 21(1) of Schedule 1 to the Regulations), and to disapply the automatic liquidation-style stay and suspension under Article 20.

[Ryan Perkins]

Re Nortel Networks UK Ltd [2017] BCC 325 (Snowden J, 16 June 2017)


WILLIAM TROWER QC

Administration expenses – bar date

The administrators of various companies in the Nortel Group applied under paragraph 63 of Schedule B1 to the Insolvency Act 1986 for directions in relation to the payment of administration expenses. The administrators had substantial funds available for distribution, but could not make any distribution to unsecured creditors until all expense claims had been ascertained and paid or reserved for. Although the Insolvency Rules 2016 set out a detailed regime for the filing of proofs and the payment of dividends in respect of unsecured claims, the Rules do not set out any regime for the payment of administration expenses. In those circumstances, the administrators proposed a series of directions for dealing with expense claims (modelled, to a significant extent, on the regime for unsecured claims in the Rules). Among other things, the directions imposed a "bar date" for the assertion of expense claims, with a view to enabling the administrators to make distributions to unsecured creditors after the prescribed bar date. Granting the relief sought by the administrators, Snowden J held that the imposition of a bar date for expense claims did not involve an impermissible attempt to modify the statutory waterfall. Directions could not be given which would illegitimately extinguish the rights of creditors, or vary the statutory waterfall or amount to judicial legislation. However, the directions sought did not purport to extinguish any legal rights or to vary the statutory waterfall. The directions affected the available fund from which any expense claims asserted after the bar date could be satisfied, because late expense claimants would not be able to disturb distributions that had already been made or provided for: but latecomers would still be entitled to assert their expense claims through subsequent distributions of any remaining assets. Prior to the end of the administration, expense claimants had no express statutory right to payment of their claims out of any particular assets, or at any particular time; and the imposition of a bar date fell within the discretion of the Court. On the facts, it was appropriate for the Court to exercise its discretion in the manner proposed by the administrators.

[William Trower QC, Alex Riddiford]

Re Peak Hotels and Resorts Ltd [2017] EWHC 1511 (Ch) (HHJ Davies-White QC (sitting as a Judge of the High Court), 23 June 2017)


STEPHEN ROBINS

Payment into court

This case considers the proprietary consequences of paying money into Court. The Court examined a number of authorities, some of which appear to be inconsistent, and reached the following conclusions. (1) Where money is paid into Court in the course of litigation, the Court does not hold the money on trust. (2) However, the parties to the litigation have a right to demand that the money is properly administered and applied. (3) This right, although falling short of a conventional beneficial interest, is capable of being charged as security for a debt owing to a third party.

[Stephen Robins]

Saw (SW) 2010 Ltd v Wilson [2017] EWCA Civ 1001 (Briggs and Arden LJJ, 25 July 2017)

Appointment of administrators – qualifying floating charges

The appellant, a shareholder and creditor of a company in administration, sought to argue that the company's administrators had been invalidly appointed. The administrators were appointed out-of-Court by a building society under a debenture, on the footing that the debenture gave the building society a "qualifying floating charge" over all or substantially all of the company's assets. The appellant contended that the debenture could not constitute a qualifying floating charge within paragraph 14 of Schedule B1 to the Insolvency Act 1986 because there was not, at the time of its purported creation, any property of the company to which it could attach, and the company had no power thereafter to acquire any property to which it could attach in future (due to the existence of a prior-ranking charge). The appellant further argued that the debenture was not enforceable at the time of the administrators' appointment because there remained no property to which it could attach. Dismissing the appeal, and affirming the validity of the administrators' appointment, Briggs LJ held as follows: (1) The validity of an instrument as a floating charge, at the time of its creation, does not depend on the existence of uncharged assets of the company creating it, or on a power in the company to acquire assets in the future, free from any fixed charge arising from the crystallisation of a prior charge. (2) A company might reasonably wish to grant a floating charge when setting itself up in business by borrowing working capital before it had any significant assets to which the charge could attach. (3) A prior fixed charge over all or part of the company's assets nonetheless left a subsequent floating charge to attach to the company's equity of redemption under the fixed charge. Briggs LJ referred to section 251 of the Insolvency Act 1986 (the "1986 Act"), which provides that the assessment of whether a charge is a floating charge is to be carried out at the time of its creation. Following consideration of *Re Yorkshire Woolcombers Association Limited* [1903] 2 Ch 284 and *Re Spectrum Plus Limited* [2005] 2 AC 680, he held that there was no support for the proposition at the heart of the appellants' case that the validity of an instrument as a floating charge at the time of its creation depended upon the existence of uncharged assets of the company creating it or upon the power of the company to acquire such assets in the future.

Indeed, this proposition was directly contradicted by *Re Croftbell Ltd* [1990] BCC 781. Briggs LJ therefore rejected the appellants' primary case. Arden LJ agreed with Briggs LJ on the outcome of the appeal, but for different reasons.

Officeserve Technologies Ltd (In Liquidation) v Anthony-Mike [2017] EWHC 1920 (Ch) (HH Judge Paul Matthews (sitting as a High Court Judge), 28 July 2017)

Settlement agreement – section 127 of the Insolvency Act 1986 – whether disposition of property – should the court validate?

Taking a robustly purposive approach to section 127 of the Insolvency Act 1986, HHJ Matthews held, obiter, that "disposition" includes any act with legal consequences by which identifiable property ceases to be in the ownership of the company in winding-up so as no longer to be available to its liquidator, with the result that value accrues to some other person even if that person does not become owner of that property. Accordingly, the release of a debt or other contractual right is capable of being a "disposition" and is thus susceptible to being avoided. So is a promise by the company not to sue on a debt. However, mere effluxion of time of a wasting asset would not fall within section 127, and nor would deliberate consumption or waste of assets by the company. In considering whether the court should validate a disposition avoided by section 127, HHJ Matthews held that events occurring after the disposition could be taken into account, with credit being given if the transaction of which the disposition formed part turned out to be of benefit to creditors. Should the transaction turn out badly, however, there was no policy justification for placing its costs on creditors.

Re Lehman Brothers Europe Ltd [2017] EWHC 2031 (Ch) (Hildyard J, 3 August 2017)


HANNAH THORNLEY

Administration – surplus – distribution to sole member – no statutory provision

The company in administration had a substantial surplus and the administrators proposed a strategy by which the company's sole member might be paid dividends and the company then dissolved without having to be wound up. There is no provision in the law governing administration enabling dividends to be paid to members, and a brief 2012 judgment by Briggs J confirming that administrators could not themselves pay such dividends. Members may receive dividends in winding-up, but placing the company in liquidation proceedings would, it was thought, have adverse tax consequences since the dividend would be treated as a distribution of capital for tax purposes and be susceptible to capital gains tax. A transition to winding-up might also create hurdles in the settlement of the so-called 'Waterfall III' proceedings. Against this background, the administrators proposed appointment of a director, who together with the company's member would be empowered by the administrators to implement a capital reduction under Part 17 of the Companies Act 2006. The proceeds would be paid over to the member and, it was suggested, treated for tax purposes as income rather than capital. Having required notifications to be given to the tax authorities and certain of the company's affiliates, Hildyard J permitted the administrators to proceed to implement their proposal. In doing so, they would be performing their functions as administrators and were thus bound to do so only in pursuit of that administration's purpose of providing better returns for creditors as a whole than would be possible in a winding-up. Implementation of the proposal would advance the administration's purpose by facilitating the Waterfall III settlement, and the Judge took comfort from the fact that no objection had been raised by the creditors, including the tax authorities.

[Felicity Toube QC; Hannah Thornley]

Re Lehman Brothers Europe Ltd [2017] EWHC 2032 (Ch) (Hildyard J, 3 August 2017)

Administration – connected companies – proposed settlement of inter-company claims – administrators' powers to settle – conflict management – rationality

The administrators of four Lehman Brothers group companies sought directions in respect of a proposed settlement of intra-group claims. Hildyard J confirmed that the court's role is not to determine whether a settlement proposed by administrators is the best available, but whether it was proper and rational for the administrators to have proposed it. On the facts, several administrators held office in relation to more than one of the companies involved, so an individual administrator had been

designated in relation to each company to take primary responsibility for negotiating the settlement on its behalf with a view to the interests of that company's creditors.
This was sufficient to mitigate the conflict of duties arising for administrators holding office for more than one company. As to rationality, the settlement would reduce the number of issues in continuing contention between the various parties and would enable distributions to unsecured creditors to be expedited. On these grounds, the administrators were permitted to proceed to commit the companies to the settlement.
[William Trower QC; Felicity Toube QC; Hannah Thornley; Alexander Riddiford]

Vinyls Italia SpA v Mediterranea di Navigazione SpA (C-54/16) (Court of Justice of the European Union, Fifth Chamber)

Italian company – Italian liquidation proceedings – Italian avoidance law action – English choice of law clause – whether English or Italian avoidance applies

The liquidators of an Italian company undergoing liquidation in Italy applied to set aside two payments made to another Italian company that were said to be avoidable under Italian insolvency law on the basis that they were detrimental to the company's creditors. The contract under which the payments were made had an English choice of law clause. The recipient of the payments resisted, invoking Article 13 of the EC Insolvency Regulation (predecessor to Article 16 of the Recast EU Insolvency Proceedings Regulation), on the basis that the recipient could prove that the challenged payments were governed by English law and were not susceptible to challenge under that law. The liquidators countered that the defence had not been raised within the time limits required by Italian law. On reference by the Italian Court, the Court of Justice of the European Union held, first, that the procedural laws of the forum, including those as to any time limits, applied to a defence under Article 13. Second, the defendant seeking to invoke Article 13 had to establish on the particular facts of the case that the it could retain the benefit of the challenged transaction under the relevant procedural and substantive provisions of the transaction's governing law. And third and abuse and fraud apart, the parties to a transaction were permitted to choose the law of a state with no other connexion to them or the transaction.
(see also EU/EEA Update p70)

PERSONAL INSOLVENCY

Digested by MATTHEW ABRAHAM


MATTHEW ABRAHAM

Frosdick v Fox [2017] EWHC 1737 (Ch) (Birss J, 11 July 2017)

Disclaimer of onerous property – causes of action – trustees in bankruptcy

A trustee in bankruptcy successfully applied for a claim brought against him by a former bankrupt to be struck out. The claim was brought against the trustee as a result of the trustee having disclaimed a cause of action that the former bankrupt had against a law firm.
The former bankrupt had sought to bring a claim against his former solicitors who had petitioned for his bankruptcy. Following his bankruptcy the former bankrupt wrote to the Official Receiver asking him to litigate or to assign back the alleged causes of action against his former solicitors. Following that letter the former bankrupt issued a claim against his former solicitors. After some time the OR appointed the trustee following a nomination by a majority of creditors. The former bankrupt wrote to the trustee seeking to acquire the cause of action against his former solicitors. Following that letter the trustee disclaimed any rights of action and claims against the former solicitors (which included an alleged claim for defamation).
The former bankrupt's claim against the trustee was based on the effect of s.316 of the Insolvency Act 1986 which provides that a trustee has a period of 28 days on the day when notice of interest in a property was given to elect whether to disclaim the property or not. The former bankrupt argued that his letter to the OR and/or the trustee amounted to notice under s.316 and that the 28 day period had expired without a notice of disclaimer having been made.
The issues were whether (1) the claim against the solicitors could constitute onerous property within s.315; and (2) the bankrupt could make an application under s.316 so as to start the 28-day period.
The Court struck out the claim.
In relation to issue (1), the Court found that the cause of action was part of the estate which vested in the trustee and was capable of falling within s.315 of the Insolvency Act 1986. The Court applied the cases of *Khan-Ghauri v Dunbar Bank Plc* [2001] B.P.I.R. 618 and *Young v Official*

Receiver [2010] EWHC 1591 (Ch), [2010] B.P.I.R. 1477 noting that a cause of action could be disclaimed by the trustee in appropriate circumstances.
As to issue (2), the Court held that the correct interpretation of s.316 was that the bankrupt could not make a valid application under the section in relation to property within the bankrupt's estate which had vested in the trustee. This was because the bankrupt was not a person interested in the property, as a result of the vesting of property in the trustee under s.306. In coming to this conclusion the Court held that s.315 was not there to protect bankrupts but to protect other persons who might have an interest in property which is subject to the insolvency.
The Court, in striking out the claim, noted that the only way the former bankrupt could bring an action against the trustee was to challenge the trustee's exercise of discretion in relation to the disclaimer. The Court also noted that there were no grounds which would justify granting permission to bring such a claim.

Leeds v Lemos [2017] EWHC 1825 (Ch) (HHJ Hodge QC, sitting as a Judge of the High Court, 17 July 2017)

Vesting of Legal Professional Privilege

An application was made for directions by trustees in bankruptcy in relation to the use that could be made of certain potentially privileged documents that they had obtained from the former solicitors of the first respondent (the bankrupt).
The first respondent was adjudged bankrupt on 11 March 2015 and he secured his discharge from bankruptcy on 12 March 2017. The trustees in bankruptcy had in their possession certain documents which they obtained from the first respondent's former solicitors in the course of the discharge of the trustees' functions. Some of those documents were said to potentially be subject to legal professional privilege belonging to the first respondent either alone or jointly with his wife. The trustees believed that a number of the documents were likely to be useful as evidence for the purposes of proceedings under section 423 of the Insolvency Act 1986 (the "1986 Act") relating to transactions defrauding creditors.
The issues dealt with by the Court were (1) the effect of the authorities in relation to whether privilege was property that vested in the trustee in bankruptcy; in particular, the parties disagreed about what the Court of Appeal had decided in *Shlosberg v Avonwick Holdings Ltd* [2016] EWCA Civ 1138; (2) whether s.333 and s.363 of the 1986 Act could be used to order the first respondent to waive his privilege in any documents released to the trustees.
In relation to issue (1), the Court considered that the Court of Appeal decision in *Avonwick* held that on the proper interpretation of the relevant provisions of the 1986 Act, privilege was not property of a bankrupt which vested in the trustee in bankruptcy. Further, that the bankrupt could only be deprived of privilege if the 1986 Act expressly so provided or if that was a necessary implication of the express language of its provisions. The Master of the Rolls found that all the relevant provisions in the 1986 Act were in general terms and did not expressly treat privilege as property of the bankrupt which automatically transferred from the bankrupt to the trustee, nor was that a necessary implication of the provisions. In explaining the decision of the Court of Appeal, the Court made it clear that as a result of the decision in *Avonwick*: (1) the principle expounded in *Crescent Farm (Sidcup) Sports v Sterling Offices* [1972] Ch. 553, namely that legal professional privilege enured for the benefit of a successor in title, had no continuing application in bankruptcy cases; and (2) Insofar as Peter Gibson J held in *Konigsberg (A Bankrupt), Re* [1989] 1 W.L.R. 1257 that the *Crescent Farm* principle did apply in the case of the passing of property to a trustee in bankruptcy, his decision was wrong. As a result the trustees in bankruptcy were not entitled to deploy the relevant documents in the s.423 proceedings.
As for issue (2), Court held that the right to privilege was such a fundamental principle that only an express statutory power to waive privilege would confer jurisdiction on the court to order such a waiver. The Court stated that: "*In my judgment, it is a matter going to jurisdiction rather simply than to discretion. But if I am wrong in that, it seems to me that, in principle, a very powerful case indeed would have to be made out before the court should properly order a bankrupt to waive legal professional privilege in relation to documents. As at present advised, I find I find it difficult, particularly in the light of the Derby Magistrates' Court case, to think of any circumstances in which it would be appropriate to make such an order.*"
[Felicity Toube QC]

Richards v Vivendi SA [2017] EWHC 1581 (Ch) (Morgan J, 27 June 2017)

Provision of new material on an annulment application and fair hearings

This case was an appeal by a bankrupt against the dismissal of his application for the annulment of a bankruptcy order made in relation to him.

The appellant was adjudged bankrupt in December 2014 on a creditor's petition. Almost two years later, his discharge having been suspended, the appellant applied for the annulment of the order on the basis that it had been made without jurisdiction because he was not domiciled in England and Wales. In written submissions and an unsworn affidavit he stated that he had never been ordinarily resident in England and Wales, that he had been in Geneva on the date the petition had been presented, and that he had not undertaken business in England in his own right in the three years before the petition was served. In a hearing that was only listed for 30 minutes the creditor persuaded the district judge neither to read the new material nor to adjourn the matter. Concluding that the bankrupt was effectively trying to appeal an order which had been made after consideration of all the jurisdictional issues, she dismissed his application.

The appellant argued that the district judge had been wrong to conclude that he had not provided new material in support of his application and that he had not had a fair hearing. The Court allowed the appeal holding that the District Judge had erred in concluding that there was no new material before her and that the appellant did not have a fair hearing.

The Court held that under s.282(1) of the Act, the court had a discretion to annul a bankruptcy order if satisfied that, on any grounds existing at the time the order was made, the order should not have been made. In asking what grounds existed when the order was made, the court was not restricted to the evidence before the court which made the order and could consider new material. In terms of the admission of fresh evidence the Court held that the *Ladd v Marshall* test had no bearing in the bankruptcy jurisdiction and the fact the new material could have been put before the court hearing the bankruptcy petition did not necessarily prevent its admission on an annulment application. In this regard the Court considered *Harvey v Dunbar Assets Plc* [2017] EWCA Civ 60, applied *Ahmed v Mogul Eastern Foods* [2005] EWHC 3532 (Ch), *Debtor (No.32/SD/1991) (No.1), Re* [1993] 1 W.L.R. 314 and *Mowbray (A Bankrupt), Re* [2015] EWHC 296 (Ch) and followed *Crammer v West Bromwich Building Society* [2012] EWCA Civ 517.

The Court held that on the face of it, the fresh submissions and draft affidavit produced by the appellant constituted new material. Had the district judge declined to admit that material after making an assessment of it, her decision could not have been challenged. However, she erred in that she did not read, assess or make findings about the material before ruling that it was insufficiently new and different to be admitted. As to the fairness of the hearing the Court held that the district judge had been unable to assess the nature and content of the new material. However, rather than excluding the material on the basis of its late submission or giving directions for a further hearing, she heard submissions from the creditor without giving the bankrupt any real opportunity to explain himself. As a result, the district judge's dismissal of the application without evaluating the new material was a serious procedural irregularity rendering her decision unjust within the meaning of CPR r.52.21(3). The Court, applying *Distri, Frey v Labrouche* [2012] EWCA Civ 881 and *Dunbar Assets Plc v Dorcas Holdings Ltd* [2013] EWCA Civ 864, held that giving both parties the opportunity of making submissions was fundamentally important in terms of the fairness of the hearing.

PROPERTY & TRUSTS

Digested by ANDREW SHAW

Midtown Acquisitions LP v Essar Global Fund Ltd (Blair J, 30 August 2017)


ANDREW SHAW

Aviation – enforcement - licences

The claimant obtained judgment against the first defendant in the New York courts for US$171,769,169. The claimant sought to enforce this judgment against a Boeing 747 fitted out as a private jet which was worth US$60 million (the "Aircraft"). The Aircraft was legally owned by the third defendant, which was a subsidiary of the second defendant, itself a subsidiary of the first defendant. A bank held a mortgage over the Aircraft which secured the sum of US$101 million.

The claimant contended that the third

defendant held the Aircraft on trust for the first defendant. Believing that the Aircraft was located at an airfield near Bolton and was due to depart for Portugal the following day, the claimant obtained a writ of control under CPR Part 83. A High Court enforcement officer subsequently obtained a warrant of entry pursuant to paragraph 15 of Part 2 of Schedule 12 to the Tribunals, Courts and Enforcement Act 2007 (the "Act").
While *en route* to Bolton, the enforcement officer discovered that the Aircraft was in fact at Stansted, where he took control of it. The next day, the enforcement officer obtained a warrant of entry correctly stating that the Aircraft was at Stansted.
The first defendant challenged the seizure of the Aircraft on the basis that the first warrant of entry was invalid because it specified that the Aircraft was at Bolton and, further, that it was wrong in principle to issue a warrant under Schedule 12 to the Act because the sale proceeds would all be payable to the mortgagee bank.
The claimant argued that the enforcement officer was lawfully able to take control of the Aircraft because staff at Stansted had given him a licence to enter the premises.
Blair J held that the power conferred by a writ of control was only exercisable under the procedure at Schedule 12 to the Act, paragraph 9 of which provides that an enforcement officer may only take control of goods if they are on a highway or on premises that he has a power to enter under Schedule 12. By paragraph 15, a warrant of entry would only be granted if, *inter alia*, there was reason to believe that there were goods on specified premises over which the enforcement power to take control would be exercisable. The enforcement officer could not rely on the writ of control where there was no warrant of entry granting access to the premises in question ie Stansted. It was to be inferred from the enforcement officer obtaining a second warrant of entry correctly specifying Stansted that he was aware that such a warrant was required. The enforcement officer did not have lawful authority to take control of the Aircraft under the writ of control in the absence of a valid warrant of entry.
Even if the enforcement officer had had power to enter Stansted, his application for the second warrant of entry stated that it was required to take control of the Aircraft. This was inconsistent with the claimant's position that control had already been taken.
Blair J agreed that the first defendant's obligations to the bank significantly exceeded the value of the Aircraft and thus that the claimant would not realise anything from the sale. Although enforcement should not be used to put pressure on a debtor to pay, he held that taking control of the Aircraft would not necessarily lead to a sale and it was not unreasonable for the claimant to take control of the Aircraft, which would otherwise likely leave the jurisdiction.

SPORT

Digested by **ROBERT AMEY**


ROBERT AMEY

Joseph Barton v The Football Association (Appeal Board of the Football Association, 25 July 2017)

FA Betting Rules – excessive penalty

The appellant, Joseph Barton, had a long history of gambling on a wide range of sports. Among the sporting events on which he placed wagers were professional football matches, including matches involving his own team. Since Mr Barton was a professional footballer, this was a breach of FA Rule E8.
Mr Barton pleaded guilty to placing 1260 bets on professional football matches over a 10-year period, and was sentenced to an 18-month ban. He appealed against his sentence on the ground that it was excessive.
The Appeal Board noted that there was no suggestion of Mr Barton having cheated, or having deliberately caused his team to lose a match. Mr Barton had never played in, nor was he in the match day squad, when he backed his team to lose. He had absolutely no influence at all on the results of those matches. There was nothing suspicious about the actual betting and returns from betting. He did not win money from the bets he placed and he did poorly when he bet on his own team, especially when he bet on his own team to lose. The bets Mr Barton had made on his own team had been made a long time ago. Some of these bets were relatively modest in size, though some were not. The bets formed a very small part of his betting rule breaches. It was rare for him to bet on his own team, and it was most exceptional for him to bet on his own team to lose. He never sought to conceal his identity when making the bets. He did so using his own name and account, such that he could have been (and was) quite easily identified.
Mr Barton first argued that an 18-month ban was excessive by reference to bans imposed in other, similar

cases. In addition, cases in which the offender had bet against his own team, but did not play in the relevant game, had never attracted a ban longer than 6 months. In addition, Mr Barton (who was in the later stages of his career) argued that the length of the ban effectively ended his career. This submission was rejected, the Appeal Board holding that every case turns on its own facts, and the precedents relied upon by Mr Barton involved gambling on a far less serious scale. As for the effect on Mr Barton of a ban at such a late stage in his career, the Board held that "the suspension must lie where it falls". The Commission had correctly had regard to the sentencing guidelines and had reached a conclusion which was open to it.

Mr Barton then complained that the Regulatory Commission had failed to give adequate weight to the expert evidence of a psychiatrist, who had given evidence as to the effect of Mr Barton's gambling addiction. On this point, the Appeal Board agreed. The evidence of Mr Barton's expert had effectively been unchallenged, and the Commission had effectively rejected part of that evidence without properly explaining why. This was sufficiently unreasonable that the Appeal Board was entitled to look at the matter afresh. Taking into account the expert evidence, Mr Barton's ban was reduced so that it would expire on 1 June 2018.

JOEY BARTON: IN BREACH OF FA RULE E8

Schemes of Arrangement and the Judgments Regulation: The New Authorities

Ryan Perkins considers the application of the Judgments Regulation in the light of the recent *DTEK* and *Global Garden* Judgments

This article explores the application of the Judgments Regulation to schemes of arrangement under Part 26 of the Companies Act 2006. The true scope of the Judgments Regulation is a notorious issue among restructuring lawyers, and has been debated in numerous cases over the years. The debate has been reinvigorated by a series of new cases, including *Re DTEK Finance plc* [2017] BCC 165 (Newey J) and *Re Global Garden Products Italy SpA* [2016] EWHC 1884 (Ch) (Snowden J). These cases consider, among other things, whether a scheme with only one UK-domiciled creditor is capable of falling within Article 8 of the Judgments Regulation; and whether an asymmetric English jurisdiction clause is capable of falling within Article 25 of the Judgments Regulation. It is respectfully suggested that some of the provisional views expressed in *Global Garden* should not be followed.

Introduction

The scheme of arrangement is a powerful restructuring tool. If a company proposes a scheme to restructure its debts, and the scheme is approved by a majority in number representing 75% of the creditors in each class, then the Court has the power to sanction the scheme such that it is binding on all creditors: see section 899 of the Companies Act 2006. However, before the Court sanctions the scheme, the Court must be satisfied that it has international jurisdiction to do so.

It is frequently the case that one or more scheme creditors are domiciled outside of the UK in another EU Member State. In those circumstances, the Court must consider whether its jurisdiction to sanction the scheme is affected by Regulation (EU) No. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the "**Judgments Regulation**", also known as the Brussels Regulation or Brussels I).[1]

The Judgments Regulation applies in "*civil and commercial matters*". Chapter II of the Judgments Regulation deals with jurisdiction, whereas Chapter III deals with the recognition of foreign judgments. The Judgments Regulation is something of a double-edged sword for scheme proponents. On the one hand, Chapter III has proven to be tremendously useful in persuading the English Court that schemes will be automatically recognised in other EU jurisdictions, and thereby achieve a substantial effect. On the other hand, Chapter II has proven to be something of a nuisance, and gives rise to a number of confusing jurisdictional issues.

The basic principle underlying Chapter II of the Judgments Regulation is that any person domiciled in an EU Member State must be sued in

1/. The Judgments Regulation is the successor of Regulation (EC) No. 44/2001, which contains many similar provisions.

the courts of that Member State (the "**Domicile Rule**"): see Article 4(1). It is unclear whether and, if so, how the Domicile Rule applies to schemes of arrangement. It has been suggested that scheme creditors could be treated as being "*sued*" by the scheme company for the purposes of the Domicile Rule. This analysis would entail that creditors domiciled in EU Member States other than the UK should not be included in schemes of arrangement unless one of the exceptions in Chapter II of the Judgments Regulation is found to be applicable. The correctness of this analysis is currently unresolved, and has been left open in a number of cases: see *Re Rodenstock GmbH* [2012] BCC 459 at [60] (Briggs J); *Re Seat Pagine Gialle SPA* [2012] EWHC 3686 (Ch) at [13] (David Richards J); *Re Primacom Holdings GmbH v Credit Agricole* [2013] BCC 201 at [11]-[13] (Hildyard J); *Re Nef Telecom BV* [2014] BCC 417 at [38]-[39] (Vos J); *Re Vietnam Shipbuilding Industry Group* [2014] BCC 433 at [10] (David Richards J); *Re Apcoa Parking Holdings GmbH*[2014] BCC 538 at [24]
(Hildyard J); *Re Magyar Telecom BV* [2014] BCC 448 at [28]-[31] (David Richards J) and *Re Van Gansewinkel Groep BV* [2015] Bus LR 1046 (Ch) at [41]-[45] (Snowden J), among others.

In order to avoid the need to resolve this issue, the Court has developed the practice of considering whether jurisdiction would exist under Chapter II of the Judgments Regulation on the assumption that it applies to schemes of arrangement. If jurisdiction can be found, it is not necessary to test that assumption. It is prudent to proceed, for present purposes, on the basis that Chapter II of the Judgments Regulation applies to schemes of arrangement.

Chapter II of the Judgments Regulation contains a number of exceptions to the Domicile Rule. An important task for any scheme proponent (where the scheme affects EU-domiciled creditors) is to identify which of those exceptions give the English Court jurisdiction to sanction the scheme. The most important exceptions, for present purposes, are set out in Articles 8 and 25.

Article 8 provides: "*A person domiciled in a Member State may ... be sued ... (1) where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings ...*" Article 8(1) has been invoked in many recent cases to establish that, where some of the scheme creditors are domiciled in the UK, the English Court has jurisdiction to sanction a scheme affecting the rights of creditors domiciled elsewhere in the EU. Since it is normally possible to identify at least a handful of UK-domiciled scheme creditors, this line of argument has proven to be a powerful tool in practice. Indeed, it is one of the key ways in which restructuring lawyers have been able to prevent the Judgments Regulation from limiting the scheme jurisdiction of the English Court.

SNOWDEN J'S JUDGMENT IN GLOBAL GARDEN IS PERHAPS PROBLEMATIC

The other key provision is Article 25, of which paragraph (1) provides: "*If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal*

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relationship, that court or those courts shall have jurisdiction ... Such jurisdiction shall be exclusive unless the parties have agreed otherwise." Article 25 is typically invoked where the underlying contracts between the scheme company and its creditors contain an English jurisdiction clause. In such cases, it has been argued that the English Court has jurisdiction to sanction the scheme irrespective of where the scheme creditors are domiciled, because the scheme creditors have contractually submitted to the jurisdiction of the English Court.

Thus far, every known scheme of arrangement has been held to fall within either Article 8 and/or Article 25 of the Judgments Regulation. However, if a future scheme does not fall within Article 8 or Article 25, and none of the other exceptions to the Domicile Rule are applicable, then the scheme company would have to argue that Chapter II of the Judgments Regulation does not apply to schemes at all. This would be a hard-fought argument, which would be fit for consideration by the Supreme Court and/or the European Court of Justice. Rather than engaging in such an argument, scheme companies have a strong incentive to find a way of establishing that their schemes fall within Article 8 and/or Article 25.

Two issues often arise in practice. The first issue is whether the existence of a single UK-domiciled creditor (potentially holding a very low proportion of the total scheme liabilities) is capable of bringing a scheme within Article 8. The second issue is whether an asymmetric jurisdiction clause is capable of falling within Article 25. These issues are considered below.

Article 8: how many UK creditors are required?

Pursuant to Article 8, the English Court has jurisdiction to sanction a scheme involving a creditor (C1) who is domiciled in an EU Member State other than the UK if two conditions are satisfied. The first condition is that at least one other scheme creditor (C2) is domiciled in the UK. The second condition is that the "*claims*" by the scheme company against C1 and C2 are so closely connected that it is "*expedient*" for the scheme to bind both creditors so as to "*avoid the risk of irreconcilable judgments resulting from separate proceedings*".

It has never been entirely clear how Article 8 operates in the scheme context. The reference to "*avoid[ing] the risk of irreconcilable judgments*" is particularly difficult to apply to a scheme, which is designed to restructure a company's debts rather than to avoid irreconcilable judgments. Questions of numerosity also arise. How many creditors should be domiciled in the UK (by number and value) in order for Article 8 to apply? Is one creditor enough? Or will the Court expect more?

The authorities do not provide consistent answers to this question. Some of the authorities indicate that Article 8 can be satisfied if a single scheme creditor is domiciled in the UK: see *Re NEF Telecom Co BV* [2014] BCC 417 at [43] (Vos J); *Re Zlomrex International Finance SA* [2014] BCC 440 at [15] (Mann J); and *Re Metinvest BV* [2016] EWHC 79 (Ch) at [32] (Proudman J). An

alternative view was espoused, at least to some degree, by Snowden J in *Re Van Gansewinkel Groep BV* [2015] Bus LR 1046 (Ch) at [51]:

"On the assumption that the recast Judgments Regulation applies, art.8(1) would be potentially engaged provided that at least one creditor is domiciled in England and it is expedient to hear the 'claims' against all other scheme creditors together with the 'claim' against him. In the instant case, the numbers and size of the scheme creditors domiciled in England were far from immaterial, and in my judgment they were sufficiently large that the test of expediency was satisfied. I therefore considered that I was entitled to regard all scheme creditors as coming within the jurisdiction of the English court under art.8(1) for the purposes of the exercise of the scheme jurisdiction in relation to them."

Snowden J thus looked at whether the numbers and size of the scheme creditors domiciled in England "*were sufficiently large that the test of expediency was satisfied*." Snowden J returned to this topic in his judgment in *Re Global Garden Products Italy SpA* [2016] EWHC 1884 (Ch) at [25]:

"In a number of cases, the courts have expressed the view that on the assumption that the recast Judgments Regulation applies to schemes, and treating the company as claimant which is suing the scheme creditors, provided that at least one such creditor is domiciled in the United Kingdom, art.8 is potentially engaged. The question will then be whether it would be expedient to hear and determine the application for sanction of the scheme as regards the other creditors to avoid inconsistent judgments from separate proceedings. On one view, this question will necessarily be answered in the affirmative because of the desirability of binding all scheme creditors to the same restructuring: see Re Metinvest BV [2016] EWHC 79 (Ch) at [33]. Alternatively, the answer may depend upon a consideration of the number and value of the creditors domiciled in the United Kingdom: see Re Van Gansewinkel Groep BV at [41]-[45]."

Snowden J went on to conclude (at [28]) that jurisdiction could be established under Article 8 "*on the basis that sufficient creditors by number and value are domiciled in the United Kingdom and that it is expedient to determine whether the scheme should bind the other scheme creditors in these proceedings in England*." Further, Snowden J specifically required the scheme company to adduce detailed evidence as to the number and value of UK creditors, and held that the original evidence was "*inadequate*" and "*unsubstantiated*": see the judgment at [27].

In Global Garden Snowden J specifically required the scheme company to adduce detailed evidence as to the number and value of UK creditors

The most recent and detailed consideration of this matter is to be found in the judgment of Newey J in *Re DTEK Finance plc*[2017] BCC 165 (convening hearing) , which adopts a rather different approach. In that case, only two scheme creditors holding less than one per cent of the total scheme liabilities (by value) were domiciled in the UK. Newey J held that Article 8 applied, such that the Court had jurisdiction to sanction the scheme. Moreover, Newey J expressed the "*provisional view*" that the Court would have had jurisdiction to sanction the scheme even if only one creditor, holding a very low proportion of the total scheme liabilities, had been domiciled in the UK. He referred to the authorities set out above, and said (at [17]-[18]):

"Article 8(1) of the recast Judgments Regulation does not in terms require more than "any one" defendant to be domiciled in the jurisdiction. The article goes on to make reference to whether "claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings", but again it is not said that the number of domiciled defendants determines whether it is "expedient" to hear and determine matters together. On the face of it, the focus is on how "closely connected" the claims are rather than where other defendants are domiciled. In the circumstances, it seems to me, at any rate provisionally, that assessing "expediency" in this context must involve more than merely looking at how many creditors beyond one are domiciled in the jurisdiction or the value of the debts that they

hold.

There is a persuasive argument that at least in the case of a company such as this one, which is incorporated in this jurisdiction and has its centre of main interests (or "COMI") in England, the existence of just one creditor with a domicile here will make it expedient for an English court to hear an application for a scheme of arrangement to be approved. In the case of an English incorporated company, with its COMI in the jurisdiction, there might be said to be a legitimate expectation on the part of creditors that any restructuring would occur either in this jurisdiction or, perhaps, in the jurisdiction of the law governing the debts. Creditors would seemingly have no expectation of a restructuring being the subject of proceedings in their own home jurisdictions, where those are different. In any case, the claim against the "defendant" domiciled here might be thought to be so "closely connected" to the claims against other "defendants" as to make it "expedient" for the claims to be dealt with together. As Snowden J noted [in Global Garden], the desirability of binding all scheme creditors to the same restructuring is, on one view, sufficient to establish the requisite expediency."

It is suggested that the provisional view expressed by Newey J is correct, and is preferable to the approach taken in *Van Gansewinkel*. The critical requirement under Article 8 is that at least one scheme creditor is domiciled in the UK. Beyond that, Article 8 does not impose any requirement for the Court to consider the number or value of UK-domiciled creditors, and the Court should not ordinarily need to consider this issue in detail.[2] The Court must, of course, be satisfied that it is "*expedient*" for all relevant creditors to be bound by the scheme in order to "*avoid the risk of irreconcilable judgments resulting from separate proceedings*". But this does not, or does not principally, involve any consideration of the precise number or value of UK-domiciled creditors. The better view is that, in the vast majority of cases, it is inherently expedient for all creditors in a given class to be bound by the scheme, because any creditors who were not so bound would be able to obtain judgment against the scheme company on the full amount of their claims, thereby undermining the restructuring. Although Newey J restricted his analysis to companies incorporated in the UK, the same analysis should logically apply to any foreign company which has a sufficient connection to the UK.[3] From that perspective, it should not be difficult to show that a scheme falls within Article 8.

At the *DTEK* sanction hearing, the judge (Norris J) adopted largely the same approach: see [2016] EWHC 3563 (Ch). He said (at [22]-[25]):

"The gateway to article 8 is opened by the presence of a single defendant within the English and Welsh jurisdiction. It would therefore seem odd if the test of "expediency" should somehow sub silentio require more than one defendant in the jurisdiction. What the proviso to me seems to focus upon is not the number of defendants who are present in England and Wales, but the number of defendants who are domiciled in other Member States, and upon the significance of the risk of an irreconcilable judgment in the courts of the domiciles of those other defendants ...

In the instant case it seems to me that an irreconcilable judgment in another Member State would be destructive of the scheme of arrangement as a whole ...

I therefore take the view that if there is one defendant in England and Wales who is a scheme creditor then the risk of some other scheme creditor proceeding in the courts of his own domicile to resist a claim that he be bound as a dissentient creditor is such that that risk of an irreconcilable judgment of itself satisfies the proviso."

It is suggested that, contrary to *Global Garden*, scheme companies should not be required to adduce detailed evidence as to the precise number and value of creditors domiciled in the UK. Such evidence is not ordinarily relevant to

2/. See also *Re Hibu Group Ltd* [2016] EWHC 1921 (Ch) at [67] (Warren J): "*When applying the test of expediency under Article 8(1), there is no basis for imposing a precise threshold on the number or value of creditors who are required to be domiciled in the UK.*

3/. As to the concept of sufficient connection, see *Re Magyar Telecom BV* [2014] BCC 448 at [14] (David Richards J).

determining whether Article 8 is engaged.

Article 25 and asymmetric jurisdiction clauses

In the rare case where no scheme creditor is domiciled in the UK, Article 8 will not apply, and the scheme company will need to rely on Article 25 instead. The paradigm case for the application of Article 25 is where the finance documents between the scheme company and the scheme creditors contain a conventional and straightforward exclusive jurisdiction clause in favour of the English Court. Article 25 will, in such cases, confer jurisdiction on the English Court to sanction the scheme.

However, many finance documents do not contain a straightforward exclusive jurisdiction clause. By way of example, the standard forms of syndicated facility agreements promulgated by the Loan Markets Association include the following asymmetric jurisdiction clause:

"(a) The courts of England have exclusive jurisdiction to settle any dispute arising out of or in connection with this Agreement (including a dispute relating to the existence, validity or termination of this Agreement or any non-contractual obligation arising out of this Agreement) (a "Dispute").

(b) The Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary.

(c) This Clause is for the benefit of the Finance Parties and Secured Parties only. As a result, no Finance Party or Secured Party shall be prevented from taking proceedings relating to a Dispute in any other courts with jurisdiction. To the extent allowed by law, the Finance Parties and Secured Parties may take concurrent proceedings in any number of jurisdictions."

This clause confers exclusive jurisdiction on the English Court, but it does so "*for the benefit*" of the finance parties (i.e. the scheme creditors) rather than the scheme company, and the finance parties are expressly permitted to commence proceedings against the scheme company in other jurisdictions. Having regard to the extensive use of the LMA's asymmetric jurisdiction clause in finance documents worldwide, it is important to determine whether the clause falls within Article 25 of the Judgments Regulation so as to confer jurisdiction on the English Court to sanction a scheme of arrangement between a company and any of its creditors who are bound by the clause.

IN RE VIETNAM SHIPBUIDING DAVID RICHARDS J HELD THAT ARTICLE 25 APPLIED

Four recent cases have considered this issue. The first case is *Re Vietnam Shipbuilding Industry Group*[2014] BCC 433 at [15]-[16], in which the scheme creditors were parties to a facility agreement modelled on one of the standard LMA forms. David Richards J held that the LMA's asymmetric jurisdiction clause fell within Article 25, such that the English Court had jurisdiction to sanction the scheme. He noted that non-exclusive jurisdiction clauses plainly fall within Article 25 (as is apparent from the second sentence of Article 25 itself); and that, in those circumstances, there is no reason why the LMA clause should fall outwith Article 25.

The second case is the decision of Snowden J in *Re Van Gansewinkel Groep BV*[2015] Bus LR 1046

(Ch). The jurisdiction clause in that case stated as follows: "*For the benefit of each of the finance parties, each obligor irrevocably submits to the exclusive jurisdiction of the courts of England for the purpose of hearing and determining any dispute arising out of this agreement and for the purpose of any enforcement of any judgment against its assets.*" Snowden J held that the clause fell outwith Article 25, such that the scheme company could not rely on that Article to establish jurisdiction under the Judgments Regulation. He stated (at [49]):

"***...*** *this was not a clause by which any of the scheme creditors submitted to the jurisdiction of the English court at all. It was a submission to the jurisdiction only by the scheme companies. But the scheme companies were voluntarily invoking the scheme jurisdiction of the English court in any event. In my view, the issue under article 25(1) whether the English court had jurisdiction over the scheme creditors. In that respect, the fact that the jurisdiction clause was for the benefit of the scheme creditors did not assist* ***...***"

It should be noted that the clause in *Van Gansewinkel* was rather different from the standard LMA asymmetric jurisdiction clause which featured in *Vietnam Shipbuilding*. The LMA clause states that the parties (including the finance parties) submit to the jurisdiction of the English Court; whereas the clause in *Van Gansewinkel* merely states that the obligors (not including the finance parties) submit to the jurisdiction of the English Court. It is suggested that this is an important distinction. Under the *Van Gansewinkel* clause, the finance parties are free to challenge the jurisdiction of the English Court if the company commences proceedings there. By contrast, under the LMA clause, the finance parties are not free to advance such a challenge. They are entitled to commence proceedings against the company outside of England, but they are not entitled to contest the jurisdiction of the English Court once it is seised (because they have submitted to its jurisdiction). Accordingly, *Van Gansewinkel* and *Vietnam Shipbuilding* should be regarded as consistent.

The third case is the convening judgment in *Re Hibu Group Ltd* [2016] EWHC 1921 (Ch), before Warren J. The finance documents contained the standard LMA asymmetric jurisdiction clause. Warren J held that the clause fell within Article 25, and cited *Vietnam Shipbuilding* in support of this conclusion. He said (at [71]) that "*paragraph (c) [of the LMA clause], whilst preserving a creditor's right to sue elsewhere, does not allow a challenge to the jurisdiction conferred by paragraph (a) when the company commences proceedings in this court*". Warren J accepted counsel's submission that the clause in *Van Gansewinkel* is distinguishable from the standard LMA clause.

The final and most problematic case is *Re Global Garden Products Italy SpA*[2016] EWHC 1884 (Ch), before Snowden J, in which the finance documents contained the standard LMA asymmetric jurisdiction clause. Snowden J suggested, *obiter*, that the clause did not fall within Article 25. He stated (at [31]):

"*I would, however, indicate that my provisional view was that the alternative source of jurisdiction suggested by Mr Dicker, namely Article 25 of the Recast Judgments Regulation, would not have given jurisdiction* ***...*** *The jurisdiction clause in the Facilities Agreement* ***...*** *was expressed to be for the benefit of the finance parties only and, hence, could not be relied upon by the Company against those finance parties: see (for a similar point) Re Van Gansewinkel Groep at paragraphs 46 to 49.*"

It is respectfully suggested that this provisional view is wrong, for three principal reasons.

First, Snowden J's provisional view is inconsistent with *Vietnam Shipbuilding* and the *Hibu* convening judgment.[4]

Second, *Van Gansewinkel* does not support the view that the LMA clause falls outwith Article 25. This is because the clause in *Van Gansewinkel* is drafted in different terms from the LMA clause: see above. Snowden J rightly observed that the LMA clause is expressed to be "*for the benefit*" of the finance parties: but this simply enables the

4/. The *Hibu* convening hearing took place shortly before the *Global Garden* judgment was released, but shortly after the *Global Garden* sanction hearing. In the *Hibu* sanction judgment, [2016] EWHC 2222 (Ch) at [6]-[7], Arnold J held that it was unnecessary (on the facts) to decide whether the provisional view expressed in *Global Garden* was correct.

finance parties to sue the obligors in other jurisdictions, and does not negate the finance parties' submission to the jurisdiction of the English Court. Were it otherwise, the first two paragraphs of the LMA clause would be very difficult to understand.

Third, the correct construction of the LMA clause has been considered by the Commercial Court in a number of cases, unrelated to schemes of arrangement, and the views expressed by the judges in those cases are inconsistent with the provisional view expressed in *Global Garden*. For example, in *Mauritius Commercial Bank Ltd v Hestia Holdings Ltd* [2013] 2 Lloyd's Rep 121 at [40], Popplewell J held that the LMA clause involves a submission to the jurisdiction of the English Court by the finance parties, even though the clause is expressed to be for their benefit:

"*Clause 24.1 [the LMA clause] is for the benefit of [the lender] in the sense that [the borrowers] are obliged to sue in England but [the lender] is not. But that does not disapply clause 24.1(a) to [the lender] completely. Where [the borrowers] bring suit against [the lender] in England, clause 24.1(a) is not disapplied by the operation of clause 24.1(c). [The lender] is thereby agreeing to be sued in England subject to the liberty conferred by clause 24.1(c). In those circumstances [the lender] has agreed to be subjected to the exclusive jurisdiction of the English courts, subject to its right to bring claims (which may overlap) abroad pursuant to clause 24.1(c). Were it otherwise, clause 24.1(a) would be superfluous: if clause 24.1(c) permitted [the lender] to insist on suing or being sued anywhere, or anywhere of competent jurisdiction, that would include England (given that this is an English law agreement and forum conveniens is conclusively determined by sub-clause (b)).*"

Popplewell J's remarks have been cited with approval by the Commercial Court in a number of other cases – including, most recently, *Commerzbank Aktiengesellschaft v Liquimar Tankers Management Inc* [2017] 1 Lloyd's Rep 273, in which Cranston J held, after considering a number of legislative materials and authorities, that the LMA clause falls squarely within Article 25 of the Judgments Regulation. *Mauritius Commercial Bank* is not cited in *Global Garden*, and *Commerzbank* was decided several months later.

On any view, the language used in Chapter II of the Judgments Regulation is ill-suited to schemes of arrangement

In conclusion, it is suggested that the LMA asymmetric jurisdiction clause falls within Article 25 of the Judgments Regulation, and confers jurisdiction on the English Court to sanction a scheme against any creditors who are bound by the clause. The same analysis may not apply to other bespoke clauses, e.g. the provision in *Van Gansewinkel*.

Conclusion

On any view, the language used in Chapter II of the Judgments Regulation is ill-suited to schemes of arrangement. The valiant attempts of practitioners and judges to bring schemes within Chapter II often lead to something of a parallel universe, in which words take on unexpected meanings.

However, unless and until the Court is required to determine whether Chapter II applies to schemes at all, the Court will be faced with the difficult task of shoehorning schemes into the various jurisdictional gateways set out therein. When approaching this task, it is hoped that the Court will not seek to impose unnecessary constraints which go beyond the text of the Judgments Regulation itself, so as to avoid the creation of artificial limitations on the scheme jurisdiction.

As matters stand, it is unclear how the Judgments Regulation will be affected by Brexit. In the absence of a convention for the enforcement of judgments and the allocation of civil jurisdiction between the UK and EU, the perennial jurisdictional debates about schemes of arrangement may finally be killed off: but so too would the UK restructuring market, which relies heavily on the automatic recognition of UK judgments throughout the EU. The difficult drafting of the Judgments Regulation may, on balance, be a low price to pay.

Primeo v HSBC: Madoff feeder fund claim dismissed by Cayman Court

Toby Brown reports on the Grand Court's decision in Primeo Fund (in Official Liquidation) v. Bank of Bermuda (Cayman) Ltd and HSBC Securities Services (Luxembourg) SA in which **Tom Smith QC**, **Richard Fisher**, **William Willson** and **Robert Amey** also appeared

On 23 August 2017 Mr Justice Andrew Jones QC of the Cayman Islands Grand Court delivered his judgment dismissing the claim brought by Primeo Fund against two HSBC entities, Bank of Bermuda (Cayman) Ltd ("**BBCL**") and HSBC Securities Services (Luxembourg) SA ("**HSSL**"). Primeo was a Cayman Islands fund that invested with Bernard L Madoff Investment Securities LLC ("**BLMIS**"), whilst BBCL and HSSL acted as Primeo's administrator and custodian. As explained below, whilst the Judge found that contractual duties had been breached, he found in favour of the Defendants on strict liability, causation, limitation, reflective loss, and contributory negligence (in relation to BBCL).

The Madoff fraud

On 11 December 2008, Bernard Madoff was arrested by the FBI and admitted carrying out what is now known to be one of the largest investment frauds in history. Over decades, Madoff accepted money from investment clients which he purported to invest in US equities and Treasury Bills, producing steady returns year after year. In fact, no investments were made; rather, it was a classic Ponzi scheme in which money from new investors was used to pay redeeming investors.

In their sophisticated enterprise, Madoff and his associates used computer systems to work out after the market had closed what trades should have been executed to produce the positive returns required for the numerous investment clients. Backdated individual trade slips and monthly statements were produced and mailed out or faxed to clients. Countless investors, sophisticated financial institutions and service providers were deceived. The scheme, and Madoff personally, were so convincing that neither the Securities and Exchange Commission or KPMG uncovered the fraud notwithstanding their on-site investigations at BLMIS' offices.

The fraud was facilitated by Madoff's insistence on BLMIS acting in a triple capacity as investment manager, executing broker and custodian of the assets (the so called "***Triple Function***"). Madoff also maintained a high level of secrecy regarding his purported

trading strategy. The risks associated with these aspects of the BLMIS business model were seemingly accepted by thousands of clients in return for being one of the lucky few clients of Madoff (so they thought).

Currently Madoff is serving a 150-year prison sentence, whilst a number of his associates have been convicted of involvement in the fraud. The combined estate of BLMIS and Madoff continues to be liquidated in the US, with substantial payments having been made to the investors who lost money. For those interested in Hollywood portrayals, Robert De Niro convincingly played Madoff (and Michelle Pfeiffer his wife) in HBO's recent film *The Wizard of Lies*, whilst Richard Dreyfuss and Blythe Danner starred in the recent ABC miniseries *Madoff*.

Primeo

Turning to the case at hand, Primeo was established by Bank Austria in 1993 as an open-ended investment fund. From inception, it invested with BLMIS, as well as making other investments. Over time, Primeo increased the amount and proportion of its investments with BLMIS, ultimately placing substantially all of its assets directly or indirectly with BLMIS. Primeo invested "indirectly" with BLMIS from 2003 via shareholdings in other Madoff feeder funds, first Alpha and later Herald, who placed their assets with BLMIS. In May 2007, Primeo switched all of its direct investments in BLMIS for a shareholding in Herald (the "***in specie transfer***"), and thereafter only invested through Herald and Alpha.

From 1996, BBCL acted as the Administrator of Primeo, and was required under an Administration Agreement (in very brief summary) to maintain the books and records of Primeo, and to calculate each month the Net Asset Value ("**NAV**") per share. From 1993, HSSL acted as the Custodian of Primeo pursuant to two successive Custodian Agreements, under which it was required to hold cash deposited in bank accounts and to safekeep securities delivered to it.

Soon after the collapse of BLMIS, Primeo entered liquidation. In 2013, acting through

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its official liquidators, Primeo issued a claim in the Grand Court of the Cayman Islands alleging BBCL and HSSL had breached their contractual duties under the 1996 Administration and Custodian Agreements respectively. It was claimed that if the Defendants had taken certain additional steps in relation to the BLMIS investments, Primeo would have withdrawn those investments prior to the fraud being uncovered, and profitably reinvested the monies elsewhere. On this basis Primeo claimed approximately US$ 2 billion in damages.

The trial was heard between November

The Primeo trial involved 10 factual witnesses and 17 expert witnesses

2016 and February 2017, and involved 10 factual witnesses and 17 expert witnesses including on various issues of foreign law.

Custody claim

Primeo alleged that HSSL was the custodian of the BLMIS investments from inception but failed to safekeep the assets, and that HSSL appointed BLMIS as sub-custodian under an unwritten sub-custody agreement from 1993 and then formally in 2002 under a written Sub-Custody Agreement. The 2002 Sub-Custody Agreement was governed by Luxembourg law, and the Court heard evidence from three different Luxembourg law expert witnesses in relation to the contested validity and effect of the agreement.

The Judge rejected the assertion that HSSL was custodian of the BLMIS investments prior to 2002, holding instead that BLMIS was custodian directly to Primeo from 1993 pursuant to the Brokerage Agreements in place between Primeo and BLMIS. However, the Judge held that the Sub-Custody Agreement executed by HSSL and BLMIS in 2002 was effective to constitute BLMIS as sub-custodian as part of an apparent "*implied tri-partite agreement*" between BLMIS, Primeo and HSSL.

Primeo alleged that HSSL breached its contractual obligations in relation to the appointment and ongoing monitoring of BLMIS as a sub-custodian. The Custodian Agreement in particular required that sub-custodians be required to implement the "*most effective safeguards*" to protect Primeo's assets. The key issue was whether a reasonably competent global custodian would have appointed and continued to appoint BLMIS as sub-custodian without requiring that BLMIS (a) establish a separate account with the Depository Trust Corporation ("**DTC**") in which Primeo's securities would be held, (b) use DTC's Institutional Delivery ("**ID**") System to provide independent information on trades, and/or (c) establish a separate account at Bank of New York ("**BNY**") in which Primeo's Treasury Bills would be held.

Preferring the views of Primeo's custody expert, the Judge held that these additional safeguards should have been recommended by HSSL to Primeo and therefore that HSSL breached its contractual duties. The Court acknowledged that none of these steps were standard commercial practice. The Defendants argued that none of the solutions were at the time recommended in any of the industry or regulatory materials as methods for asset protection (although the Judge found the solutions were "*readily available*"), nor have they been recommended since.

The Judge, however, held that the BLMIS structure was not addressed by normal commercially acceptable practices because of the unique Triple Function. He reasoned that the normal procedures were ineffective because the custodian did not reconcile information received from the manager or broker. Given the operational risks inherent in BLMIS, the Court held it was negligent not to look at procedures capable of producing the "*normal result*". However, as discussed below, the breach was not causative, in particular given Primeo knew of, and accepted, the risks inherent in investing with BLMIS.

In respect of the period after the May 2007 "*in specie transfer*", Primeo did not allege any breach of safekeeping duties in relation to its shares in Alpha and Herald but claimed that HSSL breached implied advisory and reporting duties. The Judge, however, accepted the Defendants' arguments that it would be contrary to the terms of the Custodian Agreement to imply such terms.

Strict liability

Primeo also claimed that HSSL was strictly liable pursuant to the Custodian Agreement for BLMIS' negligent or wilful breaches of duty. The Defendants argued that the parties did not intend HSSL to become guarantor for Primeo's

ROBERT DE NIRO AS BERNIE MADOFF IN HBO'S BIOPIC, RELEASED THIS YEAR, WIZARD OF LIES

multi-million dollar exposure to BLMIS, especially where Primeo had selected Madoff and initially appointed BLMIS. The Grand Court, however, considered that, as a matter of construction, the Custodian Agreement did impose strict liability.

Nonetheless, the strict liability claim was rejected on the basis that no loss was suffered from a breach of duty for which HSSL was liable (to be contrasted with the loss caused by Primeo's own decision to place funds with BLMIS for investment). In particular, BLMIS met its obligations as sub-custodian by returning cash to HSSL when requested from time to time, and in May 2007 by effecting the "*in specie transfer*" already mentioned. Accordingly, there was no default or loss for which HSSL was liable on or prior to 1 May 2007. Further, from May 2007, BLMIS was no longer sub-custodian of Primeo's assets.

The result of the "*in specie transfer*" was subsequently recognised by the BLMIS trustee when it reached a settlement with Primeo and Herald, under which Herald was entitled to make a customer claim in the BLMIS liquidation on the basis it acquired all of Primeo's rights. Indeed, the validity of the "*in specie transfer*" was upheld in other proceedings between Primeo and Herald's additional liquidator where the Grand Court held that Primeo had validly subscribed for shares in Herald valued as at 2 May 2007 at $465.8 million.

Administration claim

Primeo claimed that BBCL as Administrator (acting through HSSL as delegate) breached its duties in connection with the determination of

TOM SMITH QC

the NAV and in relation to the keeping of accounts and books and records. Under the terms of the Administration Agreement, BBCL would only be liable if it was grossly negligent or in wilful default of its duties.

The Judge stated that administrators are not expected to perform audit procedures, but are concerned to satisfy themselves that the published NAV is accurate. There was no criticism of BBCL in relation to the pricing of trades reported by BLMIS; rather it was alleged that a reasonably competent administrator would have satisfied itself about the existence of the BLMIS investments by reconciling information obtained from BLMIS to an independent source (so called "*independent confirmation*").

The Judge rejected the assertion it was an implied term of the Administration Agreement that the Administrator would confirm independently the correctness of the information received from BLMIS as to transactions and assets. The parties must have known that it would not be possible to verify this information as long as the BLMIS business model remained unchanged.

Yet the Judge found that the failure of BBCL to address the fact that there was only a single source of information in relation to the BLMIS investments was negligent. This was notwithstanding the evidence of the Defendants' administrator expert from his hands-on experience in Cayman that it was commonplace to rely upon single source reporting. The Judge decided that single source reporting for a Triple Function model such as BLMIS was unique, and the inherent high risk of fraud "*must have been manifestly obvious to all concerned, including the funds' promoters and investment managers/advisers*".

The Court found there was no gross negligence and therefore no liability until 2005. At this point HSSL as Custodian issued a "custody confirmation" to Primeo's auditors, Ernst & Young ("**E&Y**"). The Judge found that

RICHARD FISHER

E&Y (who did not give evidence at trial) were no longer willing to rely upon the work of BLMIS' auditors, Friehling & Horowitz. He held that BBCL could no longer rely upon E&Y's unqualified annual audit opinions because they were based to a material extent on custody confirmations issued by HSSL, who was unable to independently reconcile the BLMIS information. BBCL was therefore found to be grossly negligent in the preparation of the NAV from 2005.

As already stated, from May 2007, Primeo invested only in Alpha and Herald rather than directly with BLMIS. Ordinarily an administrator of a fund of funds will rely upon the NAVs published by the underlying funds and there will be no "*look through*" to recalculate their NAVs. However, the Judge found that BBCL was grossly negligent because HSSL's work as administrator of Herald and sub-administrator of Alpha was flawed for the same reasons, and that BBCL knew or ought to have known this.

WILLIAM WILLSON

ROBERT AMEY

The Judge, however, rejected Primeo's additional claims based on preparation by the Administrator of Primeo's books and records, and in relation to alleged "advisory and reporting" duties.

Causation

Primeo claimed that if the Defendants had properly discharged their duties, Primeo's directors would have decided to withdraw the assets managed directly or indirectly by BLMIS and would have invested them elsewhere. The Judge decided Primeo had not established that the breaches were an effective or dominant cause of the loss. Three key scenarios were analysed in the judgment.

First, in relation to the custody claim, the Court considered the position in 2002 if the Defendents had recommended to Primeo that BLMIS be required to put in place separate DTC and BNY accounts and the ID System. Primeo, however, had not tendered evidence from the

The Judge decided that "Primeo was, to a very substantial degree, the author of its own misfortune"

key decision makers in Primeo or its investment advisers, nor obtained documents from Bank Austria. Of the three Primeo directors that gave evidence, the Judge found the evidence of the director who commented on causation to have been "*unsatisfactory*" and that he was far removed from the decision-making process. In any event, the Judge stated that the circumstantial evidence pointed to the conclusion that the directors "*were firmly committed to Madoff*" and that they would have "*worked hard*" to avoid withdrawing from BLMIS.

Second, in relation to breaches in 2005, the Court considered a scenario in which "custody confirmations" had not been issued to E&Y. The Judge considered that Madoff might well instead have permitted E&Y to access BLMIS' books and records, given that one year later he did allow KPMG access to conduct a fraud review for HSBC. Even if Madoff had refused, the Judge decided that in all likelihood Primeo would still have continued with the same investment strategy by investing in other Madoff feeder funds.

Finally, the Court considered breaches in 2007 when the control of Primeo was soon to be transferred from BA Worldwide in Austria to Pioneer in Ireland, and therefore the decision regarding withdrawal from BLMIS would have been made by the new board. No evidence had been adduced from the new decision makers and if anything the causation analysis was "*even more speculative*" than that applicable to 2005. The Judge commented that an internal report showed that Pioneer was aware of the operational risks associated with BLMIS, and notwithstanding Pioneer must have had some concerns regarding the BLMIS model, it continued to maintain Primeo as a Madoff feeder fund to the very end.

Contributory negligence

In the event Primeo made out a causation case, the Defendants relied on a defence of contributory negligence under section 8 of the Torts (Reform) Law (1996 Revision). The Court held that the liability for breach of the Administration Agreement was the same and co-extensive with liability under the tort of negligence, and therefore a plea of contributory negligence was available to BBCL. However, the Judge held this was not the case with respect to HSSL in relation to the Custodian Agreement.

Based on his assessment of the evidence, the Judge decided that "*Primeo was, to a very substantial degree, the author of its own misfortune*". Primeo's directors were industry professionals, and decided to establish Primeo Select with BLMIS having the Triple Function even though the "*relatively high operational risks inherent in the BLMIS business model were obvious*". The directors accepted Madoff would not change his business model, even after the risk of single source reporting was brought to their attention. The Court accordingly would have reduced any award of damages against BBCL by 75 percent.

Limitation

The Defendants relied upon section 7 of the Limitation Law, which they contended barred causes of action that accrued prior to 20 February 2007 (i.e. 6 years before issue). Primeo's first response was that the Defendants were in continuous breach of their duties. Whilst the Judge held that certain duties were of a continuing nature in the sense of being performed periodically, there was no continuing breach in the sense it occurred on a daily basis. In any event, the principle of continuing breach could only enable Primeo to recover damage caused after 20 February 2007.

Primeo's second response was to allege deliberate concealment and deliberate breach of duty in order to extend the limitation period under section 37 of the Limitation Law. The Judge rejected Primeo's contention there was positive concealment on the facts, and

also rejected there was any concealment by omission, including because there was no duty to report matters to Primeo and given there was an "*equivalence of knowledge*" regarding the operational risks inherent in the BLMIS model.

Primeo argued that the Defendants recklessly breached their duties and that this was to be treated as deliberate concealment. Applying the House of Lord's decision in *Cave v Robinson Jarvis & Rolf* [2002] UKHL 18, the Judge held that deliberate rather than reckless breach was required, and that the Defendants had not deliberately breached their duties. Causes of action that accrued prior to 20 February 2007 were therefore statute barred.

Reflective loss

The Defendants relied on the rule against reflective loss on the basis that Alpha and Herald, the funds in which Primeo invested, were the proper parties to bring claims in relation to the loss claimed by Primeo. The rule is that a shareholder (Primeo) may not recover loss that is merely reflective of a loss suffered by the company (Herald/Alpha), i.e. loss which would be made good if the company enforced its rights in full against the defendant wrongdoer (HSSL). This principle stems from the Court of Appeal's decision in *Prudential Assurance Co Ltd v Newman Industries Ltd* (No. 2) [1982] Ch 204, subsequently considered by the House of Lords in *Johnson v Gore Wood* [2002] 2 AC 1.

The rule is designed to guard against double recovery and to ensure the company is able to prosecute its claims for the benefit of all its shareholders and creditors. The Judge accordingly held that the principle does not depend on the plaintiff being a shareholder at the time the cause of action arose. Rather, the rule must be applied to claims actually made in the shareholder's action that are reflective of the company's loss. Accordingly, the rule is capable of application to Primeo even though prior to May 2007, Primeo invested directly with BLMIS.

The principle requires the Court to consider the merits of the company's (i.e. Herald's and Alpha's) claims. The Judge rejected the suggestion that he must be satisfied on the balance of probabilities that the claims would succeed, as Primeo argued, holding rather that the claims needed to have "*a real prospect of success*", as the Defendants contended.

Shortly before the Digest went to press, Primeo filed a notice of appeal with the Cayman Islands Court of Appeal.

Herald in fact has an ongoing claim in Luxembourg for approximately US$ 2 billion against HSSL, who acted as its custodian and administrator. The parties' Luxembourg law experts agreed that Herald has a real prospect of success in relation to its breach of duty claim. Alpha has issued ongoing proceedings in Luxembourg against HSSL, who acted as its sub-custodian and sub-administrator, claiming US$ 346 million. Alpha has also issued cross-claims in the US Bankruptcy Court and proceedings in Bermuda in which HSSL is a defendant.

Having heard the evidence at trial, the Judge decided it was "*clear that the factual circumstances relating to the claims of Herald and Alpha (the company claims) are practically the same as those relating to Primeo's claim (the shareholder claim)*". Further, he decided that the merits of the claims of Primeo, Herald and Alpha are comparable even if they cannot be said to be identical. The Judge accordingly held that the claims of Herald and Alpha have a realistic prospect of success and therefore Primeo's claims are barred by the rule against reflective loss.

Conclusion

For the reasons summarised above, the Grand Court dismissed Primeo's claim. Shortly before the Digest went to press, Primeo filed a notice of appeal with the Cayman Islands Court of Appeal.

Required reading...

Hamish Anderson: The Framework of Corporate Insolvency Law, reviewed by Simon Mortimore QC

It is now more than thirty years since the Insolvency Act 1986 came into force. Hamish Anderson, like me, spent the first ten years or more of his practice as an insolvency lawyer having to contend with the old law about receivership of companies and liquidation, the essential features of which could be traced back to the Companies Act 1862 with little change. That law was to be found at the back of venerable text books on company law (*Palmer's Company Law* and *Gore-Browne on Companies*), in notes to the provisions of the Companies Acts (*Buckley on the Companies Acts*), in the winding-up volume of *Palmer's Company Precedents* or, for receivership, in *Kerr on Receivers*, which devoted most of its text to court appointments, rather than the more usual out of court appointments. For a more rounded guide to liquidation law and practice, it was often more profitable to turn to the outstanding Australian text book, *McPherson: The Law of Company Liquidation* (2nd ed, 1979).

The publication of the Cork Report on *Insolvency Law and Practice* (Cm 8558) in June 1982 was a watershed moment in the understanding of insolvency law. Not only did it recommend much needed reforms, many of which were enacted in the Insolvency Acts 1985 and 1986, but it also provided a clear and authoritative summary of the distinct structures of corporate and personal insolvency law as they then stood. That summary was extremely useful to practitioners, but the corporate insolvency landscape has changed dramatically since 1982. Apart from the reforms introduced by the 1986 Act and subsequent amendments to it, the growth in corporate insolvency work, often involving cases of vast scale and complexity (*BCCI, Maxwell, Barings, Enron, Lehman* etc), has led to numerous judgments, which have developed, refined or reassessed our understanding of corporate insolvency law. These developments have encouraged an exponential growth in books and articles about corporate insolvency law, including books that identify and discuss its principles (*Goode: Principles of Corporate Insolvency Law* (4th ed, 2011) and *Fletcher: The Law of Insolvency* (5th ed, 2017)).

Hamish Anderson's *The Framework of Corporate Insolvency Law* (OUP, July 2017) is different to all that post-1986 literature. As the author says in his preface, his book is neither a text book nor a reference book, but is intended to complement both. Instead, it is an authoritative, concise and clear exposition of the essential features of corporate insolvency law. Where it is possible to do so, the book identifies a rational explanation of the form that the rules and institutions of modern corporate insolvency law take or, where that cannot be done, it provides a historical explanation of the current state of the law. In this respect, the book fulfils a similar function to the summary of insolvency law in the *Cork Report*. Having understood the essential features of the subject, as described by Hamish, the practitioner may explore particular issues in more detail, without fear of taking a wrong turn or getting lost.

Hamish Anderson is well-qualified to provide this authoritative guidance. He has practiced in corporate insolvency law for more than forty years, first as a partner of Bond Pearce in Plymouth, where he was recognised as the best insolvency lawyer in the South West, and then at Norton Rose Fulbright in London, where he headed the insolvency and restructuring team until he retired as a partner in 2016. During this time, Hamish became a great friend of South Square, working with me and many other members of South Square on important cases, including *Re HIH Casualty and General Insurance Ltd*[1] in the House of Lords. He has put his exceptional understanding of corporate insolvency law to good use by assisting the Government on reform projects (including the Restated EC Insolvency Regulation and the Insolvency Rules 2016) and by writing about the subject.[2]

The first five chapters set the scene; describing the functions and objectives of insolvency law, the concept of insolvency proceedings, the meaning of insolvency and the sources of corporate insolvency law. In discussing the concept of insolvency proceedings, Hamish suggests that they have four defining characteristics, which distinguish them from other proceedings: (i) they are collective, (ii) they are premised on the actual or anticipated insolvency of the subject company, (iii) the purpose of the proceedings must be either terminal or reorganizational, and (iv) there must be some element of official control over the subject company. His discussion of actual and anticipated insolvency of the subject company highlights the fact that it is only in the last ten years or so that the courts have explored in detail what these concepts mean.[3] The next four chapters describe the types of insolvency

1/. [2008] 1 WLR 852, HL.
2/. E.g. as a joint editor of *Lightman & Moss: The Law of Administrators and Receivers of Companies* (6th ed, 2017).
3/. *Re Cheyne Finance plc* [2008] Bus LR 1562; *BNY Corporate Trustee Services Ltd v Eurosail-UK-3BL plc* [2013] 1 WLR 1408, SC; *Re Casa Estates (UK) Ltd* [2014] 2 BCLC 49, CA; *Evans v Jones* [2017] Ch 1, CA.

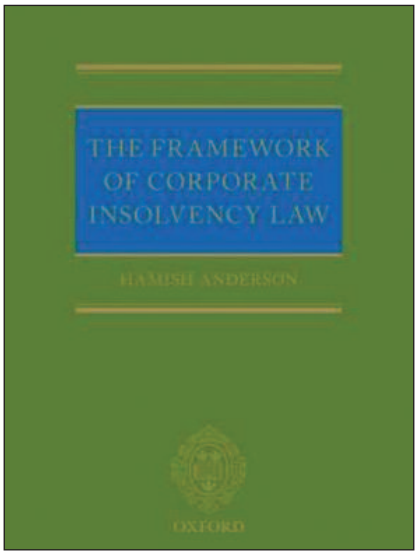
proceedings (liquidations, administrations and CVAs).

Chapter 10 explains that a consequence of proceedings being collective is that creditors' rights are a class remedy. This limitation on individual creditors' rights has often been overlooked in the past. For example, Hamish cites, as the leading case on the application of the class remedy principle to the power of creditors to requisition a meeting, *Re Barings plc (No 6)*,[4] where the majority creditors requisitioned a meeting in the confident expectation that it would resolve to remove the liquidators and replace them with persons of the majority creditors' choosing. They were thwarted by the class remedy principle, which led Sir Andrew Morritt V-C, relying on two old bankruptcy cases,[5] to direct the liquidators not to convene the meeting. If, in 2001, the majority creditors and their lawyers had been able to consult Hamish's book, they might have acted differently.

After three chapters discussing office-holders, the jurisdiction of the court and the regulation of insolvency practice, Hamish moves on to consider the insolvent estate, transaction avoidance, investigation and wrongdoing. Chapter 15 about transaction avoidance is particularly illuminating, in identifying three types of avoidance: (i) retentive avoidance (Section 127 of the Insolvency Act, the anti-deprivation and pari passu rules, etc); (ii) restorative avoidance (preferences at undervalue, transactions at undervalue or defrauding creditors etc); and (iii) dispositive avoidance (disclaimer). As David Richards LJ points out in his foreword, the unanimous decision of the Supreme Court in *Akers v Samba Financial Group*[6] was handed down after Hamish's book had been completed. It would be interesting know whether Hamish anticipated the Supreme Court's decision that Section 127 does not apply to the disposition by the legal owner of property beneficially owned by a company subject to a winding-up petition, or whether, like many if not most insolvency lawyers, he assumed that it did.

After a chapter devoted to phoenixism and pre-packing, Hamish moves on to discuss the distribution waterfall, including the transformative cases of *Toshoku Finance UK plc*,[7] about the mandatory nature of the rules about liquidation expenses, and *Re Nortel GmbH*,[8] about administration expenses and contingent claims, and *Jervis v Pillar Denton*, which restored orthodoxy in the application of the *Lundy Granite* principle.[9] The unexpected surplus of assets in the Lehman administration has raised many issues about priorities, subordination and claims to participate in the surplus. Hamish describes some of the conclusions reached in the Lehman cases, but, in view of the outstanding appeal to the Supreme Court, Hamish wisely avoided discussion about the range of non-provable claims. While it is now clear that a creditor cannot assert a non-provable claim for exchange rate loss between the administration or liquidation date and payment date, because the Insolvency Rules are a complete code for currency conversion claims,[10] the extent of the range remains unresolved.[11]

Hamish concludes with a well-organised chapter on cross-border insolvency in which he succeeds in making a difficult subject seem entirely logical and straightforward. He begins with a discussion of modified universalism, which he describes as the unilateral pursuit by a court of the goal of one set of insolvency proceedings, applicable to all the debtor's assets and liabilities, so far as possible, having regard to local laws. Since the courts' views on how far that goal is attainable have fluctuated, Hamish wisely



'A VALUABLE BOOK'

takes the cases chronologically, letting the judges speak for themselves by quoting key passages in the judgments.[12] Having described the underlying principle of modified universalism, Hamish describes the sources of cross-border insolvency law (the EU Insolvency Regulations, the Cross-Border Insolvency Regulation 2006, Section 426 of the Insolvency Act and the common law). This is followed by a discussion of co-operation and communication between courts, focusing on the trans-Atlantic telephone calls between David Richards J and US bankruptcy judges in the T&N and Lehman cases. Finally, there is a discussion about English proceedings in respect of foreign companies and the extra-territorial effects of English proceedings.

In short this is a valuable book, which all practitioners in corporate insolvency law should read and consult. I foresee that it will often be used in crafting written submissions to the court. As a result, Hamish's concise and accurate explanation of the law may become embedded in judgments and thus part of our corporate insolvency law.

4/. [2001] 2 BCLC 159.
5/. *Re Mansel* (1887) 19 QBD 679, CA; *Re Burn* [1932] 1 Ch 247, CA.
6/. [2017] UKSC 6.
7/. [2002] 1 WLR 671, HL.
8/. [2014] AC 209, HL.
9/. [2015] Ch 87, CA.
10/. *Joint Administrators of LB Holdings Intermediate 2 Ltd v Joint Administrators of Lehman Brothers International (Europe)* [2017] 2 WLR 1497, SC.
11/. Much turns on the difference of view, expressed obiter, between Lords Neuberger, Kerr and Reed on the one hand and Lords Clarke and Sumption on the other hand on the question of whether payment in full of the proved debt in effect discharges the contractual obligation and precludes any further non-provable claim under the contract.
12/. *Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc* [2007] AC 508, PC at [16], [22]; *Re HIH Casualty and General Insurance Ltd* [2008] 1 WLR 852, HL, at [30]; *Rubin v Eurofinance SA* [2013] 1 AC 236, SC, at [16]; *Singularis Holdings Ltd v PricewaterhouseCoopers* [2015] AC 1675, PC, at [19]; *Stichting Shell Pensioenfonds v Krys* [2015] AC 616, PC.

EU/EEA LAW UPDATE

GABRIEL MOSS QC

Gabriel Moss QC looks at Pre-pack cases in the European Economic Area

Pre-packs further unpacked

Federatie Nederlandse Vakvereniging v Smallsteps BV Case C-126/16, Judgment of the CJEU of 22 June 2017

In the South Square Digest issue for June 2017 at page 58 we carried a detailed summary of the Advocate General's Opinion in this case. His Opinion has been followed by the Court of Justice of the European Union, together with an extra reason which may be of significance in other types of case.

To summarise the case, the Dutch pre-pack method is to appoint both a proposed insolvency judge and a prospective insolvency administrator and also to prepare a pre-pack which is to come into force as soon as insolvency proceedings are filed. The question was whether such a proceeding fell within the insolvency exception in Directive 2001/23 on safeguarding employees' rights in the event of transfer of undertakings. The general rule is that employee contracts are transferred upon a transfer of the undertaking, but there is a special insolvency exception allowed by Article 5(1) of the Directive. The key requirements of Article 5(1) are that, for the insolvency exemption to apply, the transferor must be the subject of bankruptcy or an analogous insolvency proceedings, that these must have been instituted with a view to the liquidation of the assets of the transferor and that they must be under the supervision of a competent public authority.

In the Smallsteps case, the pre-pack involved the transfer of the viable parts of the business and the relevant employees into a new entity. The pre-pack having been prepared in accordance with Netherlands customary procedure, the debtor on 4th July 2014 filed an application for suspension of payments, which was amended on 5th July 2014 to an application for a declaration of insolvency, which was granted the same day. Also on 5th July 2014, the pre-pack was signed up as between the insolvency administrator and the Newco, Smallsteps. Under the terms of the pre-pack Smallsteps purchased 250 of the childcare centres operated by the transferor and undertook to offer employment to almost 2,600 employees of the transferor. On 7th July 2014, the insolvency administrator dismissed all the transferor's employees.

A union and four individual applicants who worked in childcare centres taken over by Smallsteps but who had not been offered new contracts of employment brought an action seeking a declaration that they were protected under Directive 2001/23 and should be regarded as working for Smallsteps.

The CJEU agreed with the Opinion of the Advocate General to the effect that the pre-pack was a procedure aimed at ensuring the continuation of the undertaking in question and therefore did not fall within the insolvency exception. The court cited with approval the distinction made by the Advocate General between proceedings instituted with a view to the liquidation of the assets of the transferor on the one hand, and procedures aimed at ensuring the continuation of the undertaking on the other:-

"**...** A procedure is aimed at ensuring the continuation of the undertaking where that procedure is designed to preserve the operational character of the undertaking or of its viable units. By contrast, a procedure focussing on the liquidation of assets is aimed at maximising satisfaction of creditors' collective claims. Although there may be some overlap of these two objectives within the aims of any given procedure, the primary objective of a procedure aimed at ensuring the continuation of the undertaking is, in any event, the safeguarding of the undertaking concerned."

The CJEU considered that in the case of the Smallsteps pre-pack the aim was to prepare the transfer of the undertaking "down to its every last detail" in order to enable a swift relaunch of the undertaking's viable units once insolvency was declared and to avoid the disruption that would result from an abrupt cessation of the undertaking's activities on the day of the declaration of insolvency. In these circumstances, the procedure "**...** is not ultimately aimed at liquidating the undertaking **...**". Accordingly, such a procedure cannot justify the loss of employment rights on the part of the employees. Moreover, the mere fact that the pre-pack may also be aimed at maximising satisfaction of the creditors' collective claims does not make this a procedure instituted with a view to the liquidation of the assets of the transferor within Article 5(1) of the Directive 2001/23. The "primary objective" is the safeguarding of the insolvent undertaking.

In addition to approving the Advocate General's reason for holding that the pre-pack did not qualify as an exception to the protection of employment rights, the CJEU also pointed out that the preparatory parts of the Netherlands pre-pack procedure, which preceeds the declaration of insolvency, has no basis in national legislation. To that extent, the pre-pack procedure is not carried out under the supervision of a court. Although the prospective insolvency administrator is appointed by a court, both he and the prospective supervisory judge have no formal powers. Accordingly, they're not supervised by a public authority. That constitutes a further reason why the Netherlands form of pre-pack procedure does not qualify for the Article 5(1) insolvency exception.

This additional reason gives rise to a question as to whether the English Creditors' Voluntary Liquidation qualifies for the insolvency exception in Article 5(1). The voluntary liquidator is not appointed by the court, although the CVL proceedings are regulated by statute and the liquidator has formal statutory powers.

SMALLSTEPS IS A CHAIN OF NURSERIES THAT EMERGED FROM THE ASHES OF THE ESTRO GROUP

The first point on this is that in order to be effective at the EU level a CVL requires confirmation by the court: see Annex A to Regulation (EU) 2015/848 of 20 May 2015 on Insolvency Proceedings (Recast). If confirmation by the court is obtained, then there will be supervision by a public authority.

Otherwise, if no confirmation by the court is obtained, the question will arise as to whether the potential supervision by the court under the court's powers in the Insolvency Act 1986 constitute supervision by public authority for this purpose. It may be relevant that in Recital (1) of Regulation 2015/848 it states in relation to "control or supervision of a court":-

"In this context, the term "control" should include situations where the court only intervenes on appeal by a creditor or other interested parties."

In this context, the use of the word "appeal" should not be restricted to the technical English meaning: the concept plainly refers to applications by a creditor or other interested parties. If that is right, for the purposes of the Directive 2001/23 a proceeding could be regarded as being supervised by a public authority if it is under the "control" of a court in the sense that a court will only intervene if an application is made by a creditor or another interested party.

Vinyls Italia SpA (in liquidation) v Mediterranea di Navigazione SpA (C-54/16)(CJEU, Fifth Chamber)

In this case, two Italian companies (Vinyls and Mediterranea) had entered into a contract governed by English law, for the transportation of goods aboard an Italian-flagged vessel. Vinyls made payments under the contract to Mediterranea, but then went into liquidation in Italy. Vinyls' liquidator alleged that certain payments made by Vinyls amounted to preferences under Italian insolvency law, and commenced proceedings in Italy against Mediterranea, seeking to claw back the relevant payments. Mediterranea argued, by way of defence, that the relevant payments were governed by English law (as the law governing the contract) and so the English law of preferences was applicable. Under English law, the relevant payments could not be clawed back (it appears that Italian law focussed on Mediterranea's state of mind when receiving the payments, whereas English law focussed on Vinyls' state of mind when making the payments).

The case was governed by the old Insolvency Regulation (1346/2000), although the relevant provisions are materially the same in the Recast Regulation (2015/848). Article 4(2)(m) (now Article 7(2)(m) of the Recast Regulation) provided that

"*The law of the State of the opening of proceedings shall determine … the rules relating to the voidness, nullity, voidability or unenforceability of legal acts detrimental to all the creditors*".

However, Article 13 (now Article 16 of the Recast Regulation) provided that

"*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 that law does not allow any means of challenging that act in the relevant case*".

Also said to be relevant was the Rome I Regulation, Article 3:

"(1) A contract shall be governed by the law chosen by the parties…

…

"(3) Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement."

The Italian court referred five questions to the CJEU:

1. Did it matter that Mediterranea had raised its Article 13 argument outside the time limits prescribed by Italian procedural law?
2. When deciding whether (under Article 13) the law applicable to the act "*does not allow any means of challenging that act in the relevant case*", is the focus on whether such acts are capable of being challenged in general, or whether the particular act in question is capable of being challenged on the specific facts of the case?
3. Does the Article 13 exception apply where two companies based in the same Member State have entered into a contract governed by the law of another Member State?
4. Did the present case involve a conflict of laws?
5. Does the exception in Article 3(3) of Rome I referring to "*provisions … which cannot be derogated from by agreement*" mean that the parties' choice of English law cannot override the operation of Italian insolvency law?

The CJEU held that the first question was a matter of Italian law, provided that Italian law observed the principles of equivalence (the law must not be any less favourable when exercising EU law rights than when exercising local law rights) and effectiveness (the law must not make it excessively difficult or impossible in practice to exercise the rights conferred by EU law).

In respect of the second question, the CJEU observed that it had already answered this question in *Nike European Operations Netherlands*, C-310/14 (see the March 2016 edition of the South Square Digest at p.82): the focus is on whether the particular act in question is capable of being challenged on the specific facts of the case. Any other construction would deprive Article 13 of its effectiveness, since any developed system of insolvency law provides a general mechanism for reversing unlawful preferences.

The third to fifth questions were more difficult, and were examined together. The contract was governed by the Rome Convention, not the Rome I Regulation, since it was concluded prior to 17 December 2009. But the CJEU does not have jurisdiction under the Rome Convention. The CJEU therefore considered what the answer would be if Rome I applied.

The third to fifth questions essentially asked whether, when two Italian companies enter into a contract, and all other elements of the contract and the parties' relationship point to Italy, Article 13 can be relied upon simply because the parties have chosen English law to govern their contract. The CJEU held that Article 3(3) of Rome I is irrelevant when considering whether Article 13 of the Insolvency Regulation applies. However, the Court also noted that EU law cannot be relied on for abusive or fraudulent ends.

In considering whether EU law is

being relied on for abusive or fraudulent ends, the Court observed that there is an objective and a subjective element to the test. It must be apparent that the purpose of the relevant EU rules has not been achieved, and that the essential aim of the relevant transactions was to obtain an undue advantage. Accordingly, Article 13 may only be disregarded in a situation where it would appear objectively that the objective pursued by that application, in this context, of ensuring the legitimate expectation of the parties in the applicability of specific legislation, has not been achieved, and that the contract was made subject to the law of a specific Member State artificially, that is to say, with the primary aim, not of actually making that contract subject to the legislation of the chosen Member State, but of relying on the law of that Member State in order to exempt the contract, or the acts which took place in the performance of the contract, from the application of Italian law.

The Court concluded by observing that the mere fact that the parties exercised the option to choose, in a situation such as that at issue in the main proceedings, the law of a Member State other than the Member State in which they are established does not create any presumption regarding an intention to circumvent the rules on insolvency for abusive or fraudulent ends. Accordingly, the answer to the third to fifth questions is that Article 13 of Regulation No 1346/2000 may be validly relied upon where the parties to a contract, who have their head offices in a single Member State on whose territory all the other elements relevant to the situation in question are located, have designated the law of another Member State as the law applicable to that contract, provided that those parties did not choose that law for abusive or fraudulent ends, that being a matter for the Italian court.

MEDITERRANEA DI NAVIGAZIONE SPA IS A FAMILY-RUN SHIPPING COMPANY ESTABLISHED IN 1910. THEIR VESSEL ROMAGNA WAS ALLEGEDLY THE FIRST IN EUROPE - AND PERHAPS THE WORLD - TO USE DIESEL RATHER THAN STEAM PROPULSION

Simon Mortimore QC retires from full-time practice

Simon Mortimore QC has announced his retirement from full time practice at the Bar, after a long and successful career spanning 43 years at South Square. Happily, Simon will not be leaving us completely. He will remain as an Associate Member of South Square and will continue to act, and to accept instructions to act, as an expert witness in litigation outside this jurisdiction.

Called to the Bar in 1972, Simon joined Chambers in 1974, when it operated as a comparatively small common law set from 3 Paper Buildings. He took silk in 1991.

As a Junior, Simon had the distinction of being involved in at least three legal firsts. As Andrew Morritt QC's junior, he sought and obtained the first extraterritorial Anton Pillar order, reported as *Cook Industries Inc v Galliher* [1979] Ch 439. As readers may recall, that was the case where a judgment creditor applied for an order for inspection of the Parisian apartment acquired by Mr Galliher in his own name but allegedly on behalf of a Mr Sarlie, a fraudster with a taste for the high life and an eye for Picasso, of whose paintings he owned twenty. The Picassos and other *objets d'art*, previously residing in New York with Mr Sarlie, had been removed to France in order to avoid creditors' claims, or so it was alleged. Whether the Picassos remained or had been sold and replaced was unknown, but it was believed that many, or their replacements, had found sanctuary in the Paris apartment. Hence the desire to see what was inside. Templeman J, being satisfied that he both could and should, ordered this Pandora's Box to be opened for inspection.

What was revealed is not to be found in the Chancery reports. Suspense can sometimes be cruel: it is often the case that, as barristers, we do not know what happened next. In this case, however, we can now disclose that, although of Picassos there was no sign, there was a valuable collection of tribal art; and that was sufficient.

The administration regime was introduced by the Insolvency Act 1986 when it came into force on 29 December 1986. Late in the afternoon on 16 January 1987, it was Simon who applied for and obtained from Vinelott J the first administration orders, in relation to members of the Charnley Davies group of companies.

Incidentally, it was while addressing Vinelott J, who was bed-bound with a bad back, that Simon found himself making submissions (this time in relation to the administration of British & Commonwealth) to a distinctly unusual, possibly unprecedented, tribunal comprising the Judge, well tucked-up beneath the bedclothes, and his faithful dog, a springer spaniel. There is a legend within Chambers that Simon found himself in competition with the bed-bound Judge's restless companion. Without pausing for breath in his submissions or for judicial intervention, all the while displaying the level of expertise generally to be expected of experienced Counsel but rarely witnessed in the court-room (and for which there is apparently no space on the current application form for silk), Simon grabbed the troublesome canine by the scruff of its neck and removed it without ceremony from the judicial bedchamber.

Colourful as this story is, however, Simon himself maintains that it is apocryphal. What

actually happened, as Simon recalls, is that Vinelott J's dog – evidently an uncommonly well-behaved springer – sat silently and respectfully on the pillow beside his master, and followed proceedings with rapt attention. Be that as it may, no law report currently available records the canine contribution to the administration of justice.

Finally, to revert to Simon's "firsts" as a Junior, this time with Anthony Clarke QC and Charles Haddon-Cave, Simon sought and obtained the first worldwide freezing order in *Babanaft International Co SA v Bassatne* [1990] Ch 13 (order varied on appeal).

Since taking silk, Simon has appeared in cases far too numerous to mention here by name. Records of many of them will survive long into the future for study by anyone with access to the law reports. As often as he has acted within this jurisdiction he has also done so in others, having been called to the Bar of the British Virgin Islands in 1991 and admitted to the Bars of Bermuda and the Cayman Islands for specific cases. He has provided expert evidence on English law for the courts of New York, Canada, Germany, Hong Kong, the Netherlands, South Korea and other jurisdictions, and will continue to do so.

While maintaining his busy practice, Simon has found time, both as consultant editor and as contributor, to create *Mortimore: Company Directors: Duties, Liabilities and Remedies* published by OUP, the third edition of which appeared earlier this year. It is widely recognised as a – if not the – leading practitioner's text in this area of law, in which few can match Simon's immense experience and expertise. Those of us who practice in this field are fortunate indeed that Simon will continue to be closely involved in the production of future editions of this work.

Simon has no plans for a quiet retirement. As already mentioned, he will continue to act as an expert witness, and to accept instructions as such. He is Chairman of the Peasmarsh Chamber Music Festival, which brings world-class chamber music to Peasmarsh and Rye every June. The 20th anniversary of its foundation as the Florestan Trio's Florestan Festival will be celebrated with a concert at the Wigmore Hall on 25 November next year. He is also a director of Opera Rara, which rediscovers, restores, records and performs rare 19th century operas, and of which Sir Mark Elder is artistic director. Its recent successes include winning Opera News' recording of the year in 2015 and 2016 for Offenbach's *Fantasio* and Donizetti's *Les Martyrs*. Plans for 2018 include concert performances at the Royal Opera House of Donizetti's *L'ange de Nisida* and, at the Royal Festival Hall, Puccini's *Le Villi*. And, without doubt, the golf course will continue to exercise its mysterious charms.

We wish Simon and his wife Fiona a long and happy (semi) retirement.

SIMON MORTIMORE QC WITH HIS DOG, FREYA

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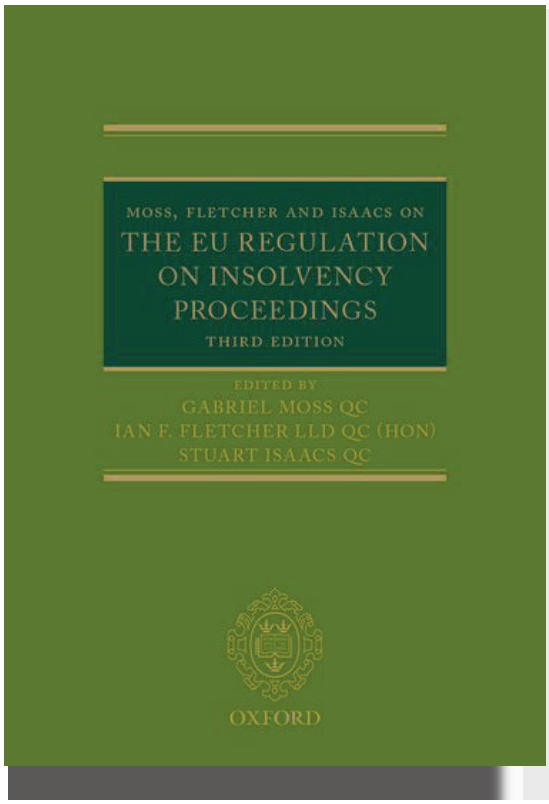

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New tenant at South Square

South Square is pleased to welcome Rose Lagram-Taylor as a new tenant from October 2017.

Prior to joining the Bar, Rose read History at King's College London obtaining a first class honours degree and being awarded the Elizabeth Levett Memorial Prize for the highest marked medieval dissertation which considered the impact of the Norman Conquest on St. Milburga's, a small religious establishment based in Much Wenlock, Shropshire dating back to the 7th century. Inspired by this, Rose continued to specialise in this period during her Master of Studies in Medieval History at Oxford University in which she was awarded a distinction and again achieved the highest marked dissertation in her cohort, which this time focused on the economic and tenurial changes in her home county of Shropshire between 1071 and 1094.

Following this, Rose then completed her Graduate Diploma in Law, being awarded a Benefactor's Scholarship and Blackstone Exhibition Award from Middle Temple, who also awarded her with the prestigious Queen Mother's Scholarship for her BPTC year.

Rose has also spent time working in the General Counsels' Office at American Express, in which she assisted the litigation team in preparing for claims brought under section 75 of the Consumer Credit Act 1974, and at Hausfeld law firm where she primarily worked on a LIBOR claim against RBS. Pro Bono work has also been important to Rose, and she has worked with Greenwich Housing Rights in representing tenants faced with applications for the re-possession of their homes.

During pupillage at South Square, Rose has been exposed to all chambers' core areas of practice, including cross-border and domestic insolvency, banking, company law, insurance, commercial litigation and offshore. She sat with Daniel Bayfield QC, Richard Fisher, Stephen Robins, William Willson, Georgina Peters, Adam Al-Attar, Charlotte Cooke and Henry Phillips. She gained extensive experience in drafting and advisory work with the notable cases she assisted on as a pupil including the various Waterfall applications both in the Court of Appeal and Supreme Court, Credit Suisse v Titan & Ors in the Court of Appeal and the ongoing Tchenguiz v Grant Thornton & Ors in the Commercial Court. She has particularly enjoyed assisting with restructuring work, as well as cases involving conspiracy and fraud claims.

ROSE LAGRAM-TAYLOR

In her spare time, Rose enjoys playing the piano, having achieved Grade 8 when she was younger, and is also an avid fan of Shakespearean theatre, with only the productions of Henry VIII and Timon of Athens left to see. She also enjoys travelling, having spent 6 months living in New Zealand whilst studying for her undergraduate degree.

Rose is immensely pleased and proud to have been offered tenancy at South Square, and she is now looking forward to getting started as a fully-fledged barrister.

NEWS in brief

Going Dutch

On 5 September 2017 the Dutch government published a new draft bill seeking to introduce pre-insolvency proceedings in the Netherlands. The draft is open for consultation until 1 December 2017.

Under the proposed bill, both the debtor and, under certain circumstances, a creditor can propose or initiate a restructuring plan and bears some similarities with the English scheme. For example, the restructuring plan can be implemented outside formal insolvency proceedings, and can bind all types of creditors and shareholders, need not include all but can be directed to only a subset of them.

However, unlike the English scheme, neither a convening hearing nor any creditors meetings are required. Voting can take place electronically and, subsequent to this, the court must confirm the plan for it to become binding for dissenting parties. The procedure features a Chapter 11-style cram down mechanism, which give the court the power to confirm the plan over the objections of dissenting classes.

Flanking measures are included in the proposals, such as a stay, the ability to set aside ipso facto clauses, the power to terminate onerous contracts and the right for the debtor to request the court to give binding early determinations on matters of dispute such as jurisdiction, class formation or valuation. The entire procedure is confidential until the confirmation decision has been delivered. It is designed to avoid unnecessary court involvement and to be as swift, efficient and flexible as possible.

Gold wins the Payment Race

The first ever 'Payments Race' was held in June this year for a Money 20/20 industry event in an effort to showcase that having a choice of payment methods is a positive thing. For the race, eight participants had to travel from Trafalgar Square in London to Copenhagen using only one form of payment each.

The payment types included a suitcase full of coins, credit cards which were one of swipe and sign, chip and pin and contactless, mobile technology, Bitcoin and gold. No advanced planning was allowed and every transaction had to be filmed.

The unlikely winner was gold – the oldest and most primitive payment method included. The winner walked into a jewellers and offered gold in exchange for flights being bought for him, and London Underground allowed him to travel to the airport free of charge as they don't accept gold as payment!

The most technologically advanced payment form, Bitcoin, failed to make it outside the M25 because the public have not adopted it as a payment method yet.

GOLD - CURRENTLY THE MOST SOLID CURRENCY

William Trower QC

William Trower QC has been appointed as a non-executive member of the Board of the Insolvency Service. The Board of the Insolvency Service is responsible for the long-term success of the agency.

This includes setting strategic aims and objectives; making sure that leadership and resources are in place to meet these aims; challenging and supporting management performance and reporting to the Department for Business Innovation and Skills. William continues his full-time practice at South Square.

WILLIAM TROWER QC

South Square Shortlisted for Awards

We are delighted that South Square has been nominated in the Company/Insolvency category for the 2017 Chambers UK Bar Awards. Not only is Chambers once again shortlisted for 'Set of the Year' but also two of our silks, Antony Zacaroli QC and David Allison QC, have been nominated for 'Silk of the Year' in the same category. Announcement of the winners and the award ceremony will be held at The London Hilton on Park Lane on Thursday, 26th October 2017. We thank all our clients for their support.

ANTONY ZACAROLI QC

DAVID ALLISON QC

Another first for historic Hale

On 2 October Baroness Hale will be officially sworn in as president of the UK's Supreme Court, along with three new justices – Lady Justice Black and Lords Justice Lloyd Jones and Briggs. She will be the first female president of the Supreme Court. This is not the first 'first' for the lady from Richmond. In 2004 she became the UK's first woman Law Lord and then, in 2009, the first woman Justice of the Supreme Court – and, incidentally, the first family law member to fill the post. Since 2013 she has been the court's Deputy President and she will succeed Lord Neuberger who retires in September.

Baroness Hale began her career teaching law at the University of Manchester, becoming Professor of Law in 1986. She was appointed to the Law Commission in 1984 and spent ten years re-defining the face of family law. She was made QC in 1989, and a High Court judge in 1994. Baroness Hale is an outspoken advocate of greater diversity in the judiciary and has criticised the judicial appointments system for self-selecting from a pool of predominantly white men from similar economic and academic backgrounds.

LADY HALE

On her appointment Lady Hale said: "I look forward to building upon (Lord Neuberger's) pioneering achievements, including developing closer links with each part of the United Kingdom, for example by sitting outside London, and improving the ways in which we communicate our work to the public. "Recent high-profile cases mean that more people than ever before have heard of the Supreme Court, and we hope that this will help to create a broader understanding of how the judiciary serves society."

Lord Neuberger said her appointment was "a fitting pinnacle to a truly ground-breaking career".

The robots are coming

The UK legal services market is worth almost £26bn a year, and growing. A joint report by Thomson Reuters and Legal Geek, published in July of this year, investigates how technology is making inroads into the way legal services might be delivered in the near future, and its potential to disrupt the current legal marketplace.

Demand for lawtech services is driven by the demand for faster and cheaper ways to provide legal services. As reported by the *Financial Times*, Joathan Brayne of Allen & Overy and head of its innovation centre, Fuse, has said "In the past, a legal team might have 20 lever arch files to sift through to find key evidence. Now that is 2m emails".

Advanced analytics programs can hunt for keywords and phrases in millions of documents. New US lawtech start-up Battea Class Action Services, searches companies' securities investments to spot losses resulting from false disclosure, manipulation or other forms of fraud. Lex Machina, part of the LexisNexis Group, analyses millions of court decisions for insights on how judges reach their decisions, those arguments which are most likely to be effective in court and also the weaknesses and strengths of the opposing legal team. Whilst it previously focused on patents and intellectual property disputes, Lex Machina announced over the summer that it is expanding into employment and commercial litigation.

It is currently the US that leads the way with lawtech start-ups, with US inventors filing more than 1000 lawtech patents over the last decade, ahead of China at 298, South Korea at 300, Australia at 154.

In comparison, the UK lawtech segment is relatively small. However, the Legal Geek/Thomson Reuters report has identified 64 lawtech startups operating in the UK and founded less than seven years ago. The 'Tube Map' they have created showing the firms and their market categories, is shown below.

BHS rumbles on....

Dominic Chappell, the former owner of BHS, is to be prosecuted by the pensions watchdog for failing to provide information for an investigation into its sale. Chappell was summonsed to appear at Brighton magistrates court on 20 September to face three charges of failing to comply with notices for information issued by the Pensions Regulator under s 72 of the Pension Act 2004. Failure to provide such information without a reasonable excuse is a criminal offence that can result in a fine.

Keir Greenaway, national officer for the GMB union which represented some BHS staff, said: "It's about time the Pensions Regulator realised it does have teeth and starts using them to protect the interests of working people. GMB hopes [the] decision by the Pensions Regulator to step up is not just motivated by the profile of this case but a sign of things to come."

The regulator has already agreed a £363m cash settlement with Green to rescue the BHS pension scheme and halted legal proceedings against the billionaire. However, it is understood to be seeking as much as £17m from Chappell and Retail Acquisitions in relation to the scheme.

The former bankrupt has previously pledged to fight that legal action, saying the black hole in the scheme was not his fault.

Frank Field MP, who led a parliamentary inquiry into the demise of BHS, said: "Act two was a long time coming and this play will get more exciting as it goes on. There are many further acts to be played before full justice is gained for the 11,000 people who lost their jobs and so that pensioners can rejoice."

CHAPPELL: FACING CHARGES

Florida Judge denies motion to delay case to witness eclipse

On 18 August 2017 US District Judge Steven Merryday denied a motion by an Assistant US Attorney to delay a case for eclipse-related reasons.

The Assistant Attorney had argued that a key government witness in the case United States of America v Joseph Bishop would be unavailable on the required day because, as it was put to the Court "Cruel fate has dictated that the August 21 eclipse will occur during the trial of an action in which the agent is a principal participant on behalf of the United States", or, rather more shortly, the witness had pre-paid for a ticket to visit an area in the path of totality.

Notwithstanding that Judge Merryday agreed that "[a] solar eclipse understandably occupies a provocative and luminous place in history and in art" - before continuing to reference Herodotus, Prince Igor's fight against the Polovtsians in 1185, an 1820 eclipse mentioned by Wordsworth and the 1972 song "You're So Vain" by Carly Simon – the learned judge was not persuaded by the argument.

In his view, "An eclipse is just another astral event, precisely predictable since the day the Babylonians discovered the governing formula (although some contend for an earlier discovery)." His view was that the witness had, in effect, laid a bet that the trial would not go forward as scheduled when pre-paying for the ticket.

Sadly for the witness, unlike the bet placed by Carly Simon's former suitor, whose "horse, naturally, won" his bet did not pay off and the motion was denied.

Crash landing

Air Berlin's frequent flyer programme filed for insolvency in August, bad news for members with points on their accounts, which they can no longer use.

The frequent flyer programme Top Bonus had already stopped members from using and collecting points amid uncertainty about its future after Air Berlin itself filed for insolvency.

"Because of the situation with Air Berlin and the direct connection with the frequent flyer programme, Top Bonus had no other choice than to take this step," Top Bonus said in a brief statement.

Air Berlin was forced to file for insolvency after major shareholder Etihad pulled the plug on further funding, although it is still flying thanks to a 150 million euro ($177 million)loan from the German government.

Etihad bought a 70 percent stake in Top Bonus for 184 million euros in 2012, and the proceeds helped Air Berlin turn a net profit that year, the only time it has done so over the past decade.

Bidders are currently jostling for the assets of Air Berlin, Germany's second largest carrier.

Scandal-ridden Bell Pottinger in administration

The UK entities of controversial public relations firm, Bell Pottinger, have been placed into administration as the firm struggled to recoup losses (thought to be in the region of £5m) whilst it haemorrhaged clients such as Waitrose, Investec, HSBC, TalkTalk and the Clydesdale Banking Group in the wake of its latest scandal.

Administrators, BDO, had unsuccessfully sought a buyer for the embattled company but on Tuesday 12 September made the following statement:

"Following an immediate assessment of the financial position, the administrators have made a number of redundancies. The administrators are now working with the remaining partners and employees to seek an orderly transfer of Bell Pottinger's clients to other firms in order to protect and realise value for creditors,"

Tuesday's announcement marks a bitter conclusion to the ignominious demise of one of the UK's most well-known public relations firms which, only the week before, had been stripped of its membership of the Public Relations and Communications Association (PRCA).

The PRCA had launched an investigation into Bell Pottinger – whose clients had ranged from multinational businesses to governments, public sector organisations, entrepreneurs and some of the world's richest individuals – following a complaint from South Africa's main opposition party, the Democratic Alliance (DA). The DA had complained that a campaign run by Bell Pottinger in South Africa for its client Oakbay Capital, sought to stir up anger about "white monopoly capital" and the "economic apartheid". Francis Ingham, director general of the PRCA said:

"Bell Pottinger has brought the PR and communications industry into disrepute with its actions and has received the harshest possible sanctions. The PRCA has never before passed down such a damning indictment of an agency's behaviour."

The PRCA said the Bell Pottinger campaign was "likely to inflame racial discord in South Africa".

The firm was certainly no stranger to controversy.

In a Newsnight interview for BBC Two in early September, Lord Bell (who resigned from Bell Pottinger in August 2016) said "As long as there is controversy about things there will be controversial characters. You can't spend your life regretting what you do."

Bell handled a string of controversial clients, including the Pinochet Foundation; Syria's first lady, Asma al-Assad; the governments of Bahrain and Egypt; Oscar Pistorius, after he was charged with murder; FW de Klerk, when he ran against Nelson Mandela for president; and Alexander Lukashenko, the Belarusian dictator. It also emerged last year that Bell Pottinger had been paid £500m to make propaganda videos in Iraq on behalf of the US government. They included short news segments made to look like Arabic news networks, and fake insurgent videos.

None of Bell Pottinger's subsidiaries in Asia and the Middle East are affected and are now in negotiations to be spun off and rebranded.

Women in the robing room

The all-male robing room at Southwark Crown Court has at last opened its doors to female barristers for the first time, following judicial intervention.

Until recently, Southwark — which handles some of London's most serious financial crime trials — had three robing rooms in the 1980s building, a large men-only one and two smaller ones just for women.

For those unfamiliar with the somewhat archaic terminology, robing rooms are essentially areas housed within a court building that allow barristers to change into their wig and gown, discuss cases and hide from clients!

Now, thanks to senior circuit judge Deborah Taylor, Southwark's testosterone-filled recreation room is no more. Explaining the rationale behind the decision, she told the Evening Standard:

"Firstly, the male robing room had better facilities including tables and chairs for working. It was unfair to the female barristers to be in cramped rooms. Secondly, there are now far more female barristers involved in fraud cases. Not being in the same robing room meant that they were sometimes excluded from conversations prior to court which took place between the male barristers. Some said that, as a result, agreements were made before they were consulted."

Her Honour Judge Taylor, who was appointed a senior circuit judge to the South London criminal court back in April, continued:

"[It] reinforces that gender should play no part in the role or status of a barrister."

SOUTH SQUARE CHALLENGE

Welcome to the South Square Challenge for September 2017. Your task this time is to correctly identify each of the individuals in the photographs below, and work out the connection betweenthem. Please send your answers to Kirsten by Friday 20 October, either by post to the address on the back page, or by e-mail to kirstendent@southsquare.com.
To the winner, drawn from the wig tin if necessary, will go a Magnum of Champagne and the ever-so-useful South Square umbrella.

David Alexander QC

1

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The connection is?

JUNE CHALLENGE

The correct answers to the June 2017 'Dog' Challenge are:
1/. Larkie and David Allison QC. 2/. Hobbes and Felicity Toube QC. 3/. Dylan and Gabriel Moss QC. 4/. Rum and Edoardo Lupi. 5/. Coco and Mark Phillips QC. 6/. Coby and John Briggs. 7/. Brucie and Martin Pascoe QC. 8/. Conchita and Glen Davis QC.
We had very many entries to this popular challenge, but no-one matched more than one dog and owner correctly. The winner, therefore, drawn from the wig tin, is Andrew McClay of BDO, to whom go not only our congratulations for correctly identifying Martin as Brucie's owner, but also a Magnum of Champagne and a South Square Umbrella. We have many more dog-owners in Chambers, so look out for round 2!

Diary Dates

Members of South Square will be attending, speaking at and/or chairing the following events:

South Square & Mourant Ozannes Joint Litigation Forum
27 September 2017 – 200 Aldersgate, St Paul's, London

INSOL Europe Annual Congress
5 October 2017 – Warsaw

IBA Annual Conference 2017
8 – 13 October 2017 – Sydney

Chancery Bar Association Gibraltar Conference
12 October 2017 – Sunborn Yacht Hotel, Gibraltar

R3 London & South East Region Ladies Lunch
13 October 2017 – The Grosvenor Hotel, London

13th International Insolvency & Restructuring Symposium
October 19 – 20 2017 – The Westin Dublin, Ireland

RISA Conference 2017 (In association with South Square)
20 November 2017 – Grand Cayman

Insol International Kuala Lumpur One Day Seminar
28 November 2017 – Hilton Hotel, Kuala Lumpur, Malaysia

ILA Academic Forum and Annual Conference 2018
20 – 21 April 2018, London

INSOL New York Annual Regional Conference
29th April – 1st May 2018, Grand Hyatt Hotel, New York

International Insolvency Institute 18th Annual Conference
23 – 25 September 2018 - New York

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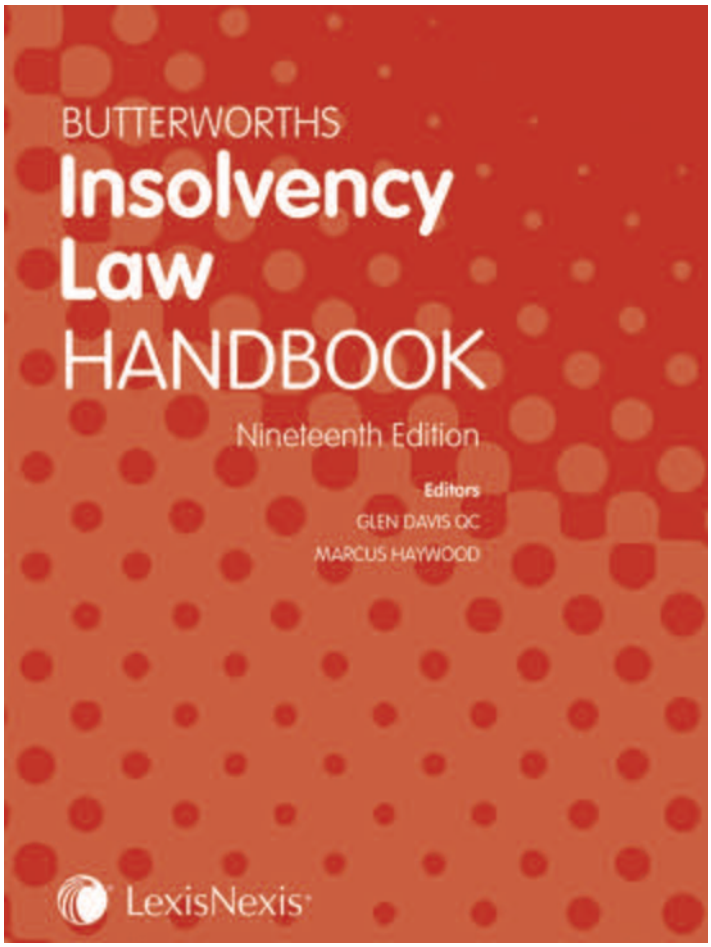

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