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ARTICLE

Cross-Border Restructurings and English Debts

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> 'Those creditors whose claims are governed by English law will not, as a matter of English law, be bound by a compromise contained in a Plan confirmed under Chapter 11 [of the United States Bankruptcy Code].' (*Per* David Richards J in *Re T & N Ltd* (2004).)[1]

It is self-evident that in most restructurings, in which the continuation of the corporation as a going concern is envisaged, it will be crucial for interested parties to be able to predict with certainty whether the corporation will be able, once it has emerged from the restructuring process, to carry on trading free from its old debts.[2] An old debt which, unbeknown to the corporation and its advisers, has not been compromised or discharged by the restructuring plan may be likened to a submerged rock upon which the newly refloated corporation may subsequently founder. Perhaps more importantly, at the negotiation stage of a cross-border restructuring, the possibility that there may be liabilities which are not regarded in some countries as compromised or discharged may be a serious obstacle to putting together an effective re-financing package in the first place.

In this area English law has, at least until recently, been confounded by two inconsistent rules. First, an English scheme of arrangement or other statutory rescue plan would, as far as the English court was concerned, discharge all debts regardless of whether they arose under a contract governed by a foreign proper law.[3] Secondly, however, in relation to an in-bound cross-border restructuring, no foreign discharge would be given effect in England in respect of contractual debts governed by English law:[4] such debts might only be discharged by a concurrent English scheme, with the trouble and expense that would inevitably be involved.[5] Fortunately, this old proper law approach to in-bound restructurings has been obliterated when it comes to European cases. Thus a discharge in main proceedings in Germany will be given due effect in England.[6] Nevertheless, the old approach, it is submitted, still represents the common law, despite arguments to the contrary arising out of *Cambridge Gas Transportation Corpn v Official Committee of the Unsecured Creditors of Navigator Holdings plc* ('*Cambridge Gas*').[7] Moreover, the old approach may yet cast its shadow over the application of the Cross-Border Insolvency Regulations 2006 (the 'Regulations')[8] which implemented the UNCITRAL Model Law on Cross-Border Insolvency in Great Britain. For, perhaps surprisingly, the question of a foreign discharge is not expressly addressed in the Model Law or the Regulations. The purpose of this article, after reviewing the current state of the common law, is to propose solutions as to how cases brought under the Regulations ought to be tackled.

Notes

1 [2004] EWHC 2361 (Ch), [2005] 2 BCLC 488, at 121, citing *New Zealand Loan and Mercantile Agency Co Ltd v Morrison* [1898] AC 349.
2 See, for example, Segal, 'Corporate Recovery and Rescue – Mastering the Key Strategies Necessary for Successful Cross-Border Workouts – Part 2' (2000) 13 *Insol Int* 25 at 51: 'The practical point here is that it is necessary to ensure that dissenting creditors are unable, following the approval of the reorganization in the chosen jurisdiction, to obtain judgments and attach assets abroad or to commence insolvency or reorganization proceedings against the debtor. Such action could obviously stabilize [*sic*] or completely undermine the reorganization.' Note, also, Philip Wood, *Principles of International Insolvency* (2nd edn, 2007) at pp. 882-883.
3 Dicey, Morris and Collins, *The Conflict of Laws* (14th edn, 2006), Collins (ed.) at p. 1512, Rule 194.
4 Dicey, Morris and Collins, at p. 1523, Rule 200.
5 Thus, see *Re T & N Ltd*, note 1 above, it has been necessary to have, in addition to a US Chapter 11, a UK scheme of arrangement in order to discharge English debts: see text to note 16 below. See also Dicker and Segal, 'Cross-Border Insolvencies and Rescues: The English Perspective' (1999) 8 *Int Insol Rev* 127, at 136-137.
6 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings, Article 4. Note Virgos and Garcimartin, *The European Insolvency Regulation: Law and Practice* (2004) p. 80.
7 [2006] UKPC 26, [2007] 1 AC 508, discussed below.
8 2006 SI 1030. Bringing into effect (as from 4 April 2006) in Great Britain, pursuant to s. 14 of the Insolvency Act 2000, the 1997 *UNCITRAL Model Law on Cross-Border Insolvency*, as set out in Schedule 1 to the Regulations.

A. The common law

(i) Pre-2006

The common law position, that no foreign insolvency could discharge an English debt, was well-established in personal bankruptcy cases by 1800.[9] The same approach was applied, seemingly without hesitation, to corporate insolvency cases from the 1890s onwards.[10] Of course, in respect of corporate cases, questions concerning discharge will typically only be relevant where there is a restructuring and the corporation is expected to continue trading. For where a corporation is liquidated, it normally matters not whether there is any foreign discharge, since the corporation will be dissolved and there will be no entity which creditors can later sue.[11]

The rigidity of the common law approach can be seen from the consideration that a foreign discharge would not be given effect in respect of English debts, even though the insolvency in question was entitled to recognition in England. Thus, in relation to an individual debtor, a foreign trustee in bankruptcy could recover all the debtor's movable property in England for distribution amongst the creditors, yet the debtor, despite the presence of a discharge under the foreign law, would be left unprotected from subsequent attachments by English creditors (after the close of the foreign proceedings).[12] The reason behind this seeming contradiction partly stemmed from the manner in which the English judges characterised the issues. Whereas the recognition of a foreign trustee's title to movables was regarded as governed by the principles of private international law applicable to insolvencies, discharge was treated as a contract matter – governed by the proper law of the contract.[13] This disconnect was judicially noted – and condemned as 'monstrous' – as long ago as 1851.[14] However, as demonstrated by the above quote from the judgment of David Richards J in 2004 in *Re T & N Ltd*,[15] the protection afforded to English creditors remained intact into the twenty-first century. Thus, as noted by David Richards J, English creditors would not be bound by a Chapter 11 Plan and a compromise of their claims might 'be achieved only by the collective mechanisms under English law provided by CVAs and schemes of arrangement'.[16]

It is fair to say that the common law 'ring-fenced' English creditors, i.e. creditors whose debts arose under a contract governed by English law. The notion that a foreign insolvency could discharge an English debt was dismissed, in *Gibbs v Société Industrielle et Commerciale des Métaux*, as 'a principle for which there is no foundation in law or reason'.[17] Nevertheless, this commentator has maintained elsewhere[18] that there was an important exception to the common law doctrine; namely, where an English creditor had consented to the foreign insolvency by genuinely participating in the foreign proceedings. For there is a collection of Commonwealth and English authorities which, although somewhat ancient, can be taken as strongly supporting the commonsense principle that active participation in a foreign restructuring – such as voting for or against the restructuring plan – is to be taken as amounting to giving consent to the foreign process.

(ii) Expectations of the parties

One further justification for the restrictive approach taken by the English judges appears to have been the 'expectations' of the parties. For instance, in *Wight v Eckhardt Marine GmbH* Lord Hoffmann observed:[19] 'Ordinarily, looking to the proper law on questions of discharge would give effect to the expectations of the parties.' Interestingly, the US Supreme Court long ago took a different view. In *Canada Southern Railway Co v Gebhard*[20] the Supreme Court gave effect to a compromise under a Canadian scheme of arrangement, entered into

Notes

9 See *Smith v Buchanan* (1800) 1 East 6 and *Gibbs v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399.
10 *New Zealand Loan and Mercantile Agency Co Ltd v Morrison*, note 1 above.
11 *Wight v Eckhardt Marine GmbH* [2003] UKPC 37, [2004] 1 AC 147, at 27 *per* Lord Hoffmann: 'The winding up leaves the debts of creditors untouched ... They are discharged by the winding up only to the extent that they are paid out of dividends. But when the process of distribution is complete, there are no further assets against which they can be enforced. There is no equivalent of the discharge of a personal bankrupt which extinguishes his debts. When the company is dissolved, there is no longer an entity which the creditor can sue.'
12 See Smart, *Cross-Border Insolvency* (2nd edn, 1998) pp. 225-226.
13 See also *Wight v Eckhardt Marine GmbH*, note 11 above.
14 *Shepherd v Beresford* (1851) 1 Mac & H 251, 254.
15 Note 1 above.
16 *Ibid.*
17 See note 9 above, at 406.
18 See Smart, note 12 above, at pp. 261-266 citing, *inter alia*, *Rose v M'Leod* (1825) 4 S 311, *Nicholson v Binks* (1832) 11 S 153 (both Scottish decisions), *Glass v Keogh* (1867) 4 WW & A'B (L) 189 (Australia). In *Seligman v Huth* (1875) Bitt Prac Cas 64 (an English decision) Quain J commented: 'It was decided in *Phillips v Allan* [(1828) 8 B & C 477] that proving for an English debt under bankruptcy proceedings abroad operated as a discharge.' There is, unfortunately, no modern English case law on this important issue, but this commentator's opinion has received support in the literature: see, e.g., Wood, note 2 above, at p. 885.
19 Note 11 above, at 12.
20 109 US 527 (1883).

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by a Canadian company with support of the statutory majority of creditors, in relation to non-assenting creditors whose debts were governed by New York law. The majority judgment stressed that anyone who dealt with a foreign corporation impliedly subjected himself, and his contracts, to that foreign government in so far as its laws might affect the corporation.[21] It followed that:[22]

> '... anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere.'

As Professor Westbrook has commented:[23]

> '... parties entering into these international transactions should expect and understand that they were not lending money to the corner grocer, so to speak. Thus, their reasonable expectation should include the possibility that the laws of the issuer's home country might affect their legal rights.'

It may also be noted that in *Gebhard* there was a dissenting judgment: Harlan J declined to grant comity to the Canadian scheme, relying expressly upon a line of English case law which made it abundantly clear that no English court would have given effect to an American scheme discharging an English debt.[24]

The general thrust of the majority view in *Gebhard*, namely that those who deal with a foreign corporation should do so with their eyes open, has received some support from English judges from time to time. Thus in *Firswood v Petra Bank* Schiemann LJ, dealing with a Jordanian company in liquidation in Jordan, commented:[25]

> '... the creditor has chosen to contract with a company whose domicile is Jordan and therefore has to take Jordanian law as governing the priorities in the distribution of the company's assets; the system of priorities contains nothing surprising or at odds with English public policy; the creditor has in fact claimed in the liquidation in Jordan and that claim has been accepted in the liquidation proceedings; ... and it would be wrong to permit separate parallel proceedings in England whose only substantial purpose would be to obtain an English judgment with the aid of which it is hoped to deprive the liquidator of assets for distribution to the general body of creditors.'

Whilst in *Felixstowe Dock and Rly Co v United States Lines Inc* Hirst J described the majority judgment in *Gebhard* as 'a very important statement of general principle'.[26] Yet, as far as this commentator is aware, none of these cases has concerned the discharge of an English contract debt.

(iii) Post Cambridge Gas

The observation of David Richards J in *Re T & N Ltd*, quoted at the beginning of this article, was made prior to *Cambridge Gas*,[27] in which the Privy Council lent assistance at common law to a plan of reorganisation under Chapter 11. Of course, the facts in *Cambridge Gas* concerned a shareholder in, rather than a creditor of, the company undergoing reorganisation. Moreover, the shareholder's argument that it had not consented to the Chapter 11 proceedings, although technically correct, was regarded by their Lordships as without merit[28] – since the shareholder (Cambridge Gas) had no economic interest in the outcome of the proceedings and the Chapter 11 proceedings had been initiated by its subsidiary (Navigator Holdings plc), whilst the ultimate parent (Vela Energy Holdings Ltd) had fully participated in the Chapter 11. However, Lord Hoffmann (delivering the judgment of the Privy Council) made some potentially far reaching comments concerning the scope of assistance at common law:[29]

> '... the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign officeholder or the

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21 *Ibid*, at 537-538 *per* Waite CJ: '... it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting the powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy which binds those in like situation with himself, who are subjects of the government, in respect to the operation and effect of their contracts with the corporation, will necessarily bind him.'

22 *Ibid*, at 538.

23 Westbrook, 'Chapter 15 and Discharge', 13 *Am Bank Inst L Rev* 503 (2005) at 508.

24 Harlan J cited, *inter alia*, *Smith v Buchanan*, note 9 above, and *Bartley v Hodges* (1861) 1 B & S 375.

25 [1996] CLC 608 at 618.

26 [1989] QB 360 at 380 (although *Gebhard* was not relevant to the facts before Hirst J).

27 Note 7 above. See also Moss (2006) 19 *Insol Int* 123.

28 *Ibid*, at 6: 'Although it must be accepted that Cambridge did not technically submit to the jurisdiction in New York, it had no economic interest in the proceedings and ample opportunity to participate if it wished to do so. It would not therefore be unfair for the plan to be carried into effect.'

29 *Ibid*, at 22. Having concluded that a parallel scheme of arrangement might have been proposed and carried through pursuant to the Companies Act 1931 of the Isle of Man, Lord Hoffmann commented (at 25): 'Why, therefore, should the Manx court not provide assistance by giving effect to the [US Chapter 11] plan without requiring the creditors to go to the trouble of parallel insolvency proceedings in the Isle of Man?'

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creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum.'

The relevance of this last sentence to a situation otherwise requiring a parallel scheme of arrangement to discharge an English debt is self-evident. Nevertheless, despite Lord Hoffmann's comments, and his Lordship's subsequent endorsement of what Professor Westbrook has termed 'modified universalism',[30] this commentator does not believe that it can simply be assumed that the proper law approach to matters of discharge would no longer be followed.[31] First, *Cambridge Gas* can be easily distinguished from the situation of an English creditor who has not participated (in substance) in the foreign restructuring.[32] Second, on the facts before the Privy Council, Lord Hoffmann commented that as 'there is no suggestion of prejudice to any [local] creditor … there can be no discretionary reason for withholding … assistance'.[33] Thus it is left open to an English creditor who does not participate to argue that, because of the expectations of the parties to an English contract, there would be prejudice in permitting a foreign restructuring to discharge an English debt. Third, *Cambridge Gas* was not a case on discharge and does not refer to any of the existing case law on discharge. The proper law approach has not only been applied many times by the highest courts,[34] but also Lord Hoffmann himself was in seeming approval in 2003 in *Wight v Eckhardt Marine GmbH*.[35] Finally, the expansive approach contained in *Cambridge Gas* to the role of the common law in a cross-border insolvency is in stark contrast to the attitude of the Privy Council (again including Lord Hoffmann himself) as recently as 2005 in *Al-Sabah v Groupo Torras SA*.[36]

In *Al-Sabah* the issue was whether the courts of the Cayman Islands could lend assistance to a Bahamian bankruptcy court. The Bahamian court had requested that the court in the Cayman Islands exercise its power to set aside two trusts established by the debtor. There was no local bankruptcy in the Caymans but, if such proceedings had taken place in the domestic forum, the court would have had power to set aside the trusts under s. 107 of the Bankruptcy Law of the Cayman Islands. Far from holding that the Cayman Islands court might, at common law, 'provide assistance by doing whatever it could have done in the case of a domestic insolvency',[37] the Privy Council held that the local court could not exercise its s. 107 power – as such power was not brought into play merely by a request for assistance from the Bahamian court. In *Al-Sabah* the 'limited'[38] nature of common law assistance was stressed. On the facts, it was held that the Cayman Islands court could only exercise its s. 107 power – and, one inevitably assumes, the other powers it would have had in a domestic insolvency – if there were in force a statutory provision for mutual assistance between the two courts.[39] The contradiction between *Al-Sabah* and Lord Hoffmann's dicta in *Cambridge Gas* is not lessened by the consideration that his Lordship was on the Panel in both cases (as was Lord Rodger of Earlsferry), yet did not mention *Al-Sabah* in his later judgment.[40]

Very recently, Lord Hoffmann has again returned to the role and scope of common law assistance in cross-border insolvency cases. In *McGrath v Riddell*, with reference to the development of what became known at common law as ancillary winding up, his Lordship observed:[41]

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30 See *McGrath v Riddell* [2008] UKHL 21 at 7, and Westbrook, 'A Global Solution to Multinational Default' 98 *Mich L Rev* 2276 (2000): see further text to note 41 below.

31 As Lord Hoffmann himself recognised in *McGrath v Riddell*, note 30 above, modified universalism is perhaps best described as an 'aspiration', rather than a rule, and is 'heavily qualified by exceptions on pragmatic grounds' (*per* Lord Hoffmann, [2008] UKHL 21 at 7). *McGrath v Riddell* was, of course, a case on statutory assistance under s. 426 of the Insolvency Act 1986 in which no issue relating to the discharge of an English contract debt was raised.

32 The common law already provides, it is submitted, for creditors who do (in substance) participate in a foreign restructuring: see note 18 above and authorities cited therein.

33 Note 7 above, at 21.

34 *Gibbs*, note 9 above, was approved in the House of Lords in *Adams v National Bank of Greece* [1961] AC 255 and by the Privy Council in *New Zealand Loan and Mercantile Agency Co Ltd v Morrison*, note 1 above. Note also *Société Eram Shipping Co Ltd v Cie Internationale de Navigation* [2003] UKHL 30, [2004] 1 AC 260, at 16.

35 Note 11 above; although, on the facts in *Wight*, there was a discharge under the proper law (the law of Bangladesh), see Smart & Booth (2004) 20 *Ins L & P* 162.

36 [2005] UKPC 1, [2005] 2 AC 333.

37 As Lord Hoffmann later put it in *Cambridge Gas*, see text to note 29 above.

38 Note 36 above, at 35: 'If the Grand Court [of the Cayman Islands] had no statutory jurisdiction to act in aid of a foreign bankruptcy it might have had some limited inherent power to do so. But it cannot have had inherent jurisdiction to exercise the extraordinary powers conferred by s. 107 of its Bankruptcy Law in circumstances not falling within the terms of that section. *The non-statutory principles on which British courts have recognized foreign bankruptcy jurisdiction are more limited in their scope* … and the inherent jurisdiction of the Grand Court cannot be wider.' (*Per* Lord Walker of Gestingthorpe, emphasis added.)

39 On the facts, the Privy Council held that there was such a statutory provision, since s. 122 of the Bankruptcy Act 1914 was not repealed outside the United Kingdom by the Insolvency Act 1985.

40 *Al-Sabah* was cited by counsel before the Privy Council in *Cambridge Gas*, see [2007] 1 AC at 512.

41 Note 30 above.

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'6. Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives world-wide recognition and it should apply universally to all the bankrupt's assets.

7. This was very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds; elsewhere I have described it as an aspiration: see *Cambridge Gas* at para 17 ... Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one.'

Thus it is plain that Lord Hoffmann was not unaware of the limitations which the common law placed upon the principle that has been described as 'modified universalism'. In short, it is exceedingly difficult to maintain that the current common law position in relation to a foreign discharge – supported by more than two centuries of English case law – has been reversed merely as a result of the dicta in *Cambridge Gas*.[42]

B. Foreign discharge and the Regulations

If, as suggested by this commentator, the common law has yet to break free from the proper law, one must ascertain whether statute provides an approach better suited to the modern rescue culture. Unfortunately, neither the UNCITRAL Model Law, or the *Guide to Enactment*,[43] deals specifically with the issue of a foreign discharge. This may seem a little surprising when it is recalled that one of the stated objectives of the Model Law is the '[f]acilitation of the rescue of financially troubled businesses';[44] and it is obvious that unless a debtor can enforce a discharge in all jurisdictions any rescue may be seriously impeded. It may also be noted that, prior to the Model Law being adopted, Committee J's *Cross-Border Insolvency Concordat*[45] provided in Principle 2(f) that: 'A discharge granted by the main forum should be recognized in any forum'. Commentators, such as Philip Wood, have noted the gap in the Model Law, but have not gone beyond stating that the old common law approach '*may* now be affected by the British implementation of the UNCITRAL Model Law'.[46]

Such an apparent omission from the Model Law is troublesome. However, there may be an underlying conceptual issue which ought briefly to be noted. The basic structure of the Model Law is predicated upon the local court – i.e. the court from which assistance is sought – applying local law. For instance, under the Model Law, the local court does not apply the foreign stay: the local court recognises the foreign proceedings (as main or non-main) and applies its own stay provisions.[47] This is true in relation to both mandatory and discretionary assistance under the Model Law. The Model Law does not operate in such a way as to require or expect the local court to apply the provisions of foreign law. Yet perhaps the simplest way, it is submitted, for a requested court to deal with a foreign discharge or compromise would be to accord recognition and give it direct effect, so as to terminate or modify the substantive obligation in question. This can indeed be achieved by the English court acting pursuant to s. 426 of the Insolvency Act 1986, as s. 426 allows either English insolvency law or the foreign insolvency law to be applied.[48] That option, however, is not available under the Model Law or the Regulations. Nevertheless, it is suggested that two types of solution – procedural and substantive – are available under the Regulations.

(i) Procedural solution: foreign representative applies for relief

In situations where a restructuring is on foot in the foreign jurisdiction, the foreign representative can seek recognition in England pursuant to Article 15 of the Regulations.[49] (One is obviously dealing with a situation where the foreign representative does not wish

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42 That is not to say, however, that a common law court in a Commonwealth or sister jurisdiction ought not to decline to follow the old proper law approach. This commentator would hope that, in a suitable case, such a course might be adopted after full consideration of the issues.

43 See, generally, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment*; available at <www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html>.

44 Model Law, Preamble (e).

45 For general discussion of the *Concordat*, see Leonard (1997) 6 *Int Insol Rev* 127 and Barratt (1996) 24 *Int Bus Law* 208.

46 Note 2 above, p. 884 (emphasis added). See also Look Chan Ho, 'Overview', *Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law* (2006, Look Chan Ho, ed.).

47 See Model Law, Article 20 (main proceedings) and Article 21 (main or non-main proceedings).

48 Thus a foreign restructuring law may be extended to apply to English creditors: see e.g. *Re Business City Express Ltd* [1997] BCC 826 (although there may be some technical difficulties with this decision on its facts, see Smart, note 12 above, at pp. 414-415. For the scope of s. 426 in general, see *McGrath v Riddell*, note 30 above.

49 Article 15(1) provides: 'A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.'

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to proceed with a parallel scheme of arrangement in England and creditors have not sought to invoke the English court's insolvency jurisdiction.)[50] Provided the foreign representative was appointed in foreign main proceedings, i.e. where the debtor has the centre of its main interests,[51] the mandatory consequences of recognition include, under Article 20(1), the staying of both creditor actions and executions against the debtor's assets:

> '1. Upon recognition of a foreign proceeding that is a foreign main proceeding, subject to paragraph 2 of this Article –
>
> (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed;
>
> (b) execution against the debtor's assets is stayed; and
>
> (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended.'

Article 20(2)(a) informs us that the nature of the stay shall be:

> 'the same in scope and effect as if the debtor,… in the case of a debtor other than an individual, had been made the subject of a winding-up order under the Insolvency Act 1986'.

Hence the foreign representative can stymie a hold-out creditor who might be minded to ignore the foreign restructuring and proceed instead to bring an action or to seek to execute in England, relying upon a debt that arose under an English contract.[52] By applying for a stay the foreign representative may not have to deal, at least not immediately, with the substantive question of whether the English debt will ultimately be discharged by the foreign proceedings.

However, the application of Article 20 in respect of a foreign restructuring is not wholly free from complexity.[53] The reference in Article 20(2)(a) to 'as if' a winding-up order had been made raises some uncertainty. For there is, of course, no discharge in a winding up. Thus one may ask: what will happen in England in respect of the stay once the foreign restructuring plan has been approved, the corporation resumes trading outside bankruptcy protection and the foreign proceedings are formally closed by the foreign court?[54]

For example, in January 2008, a US corporation, with its centre of main interests in New York, goes into Chapter 11. In March 2008, the 'foreign representative'[55] applies under the Regulations for recognition of the foreign main proceedings and obtains an order from the English court staying Creditor X from executing against any assets in England. (Creditor X is an unsecured creditor whose debt arose under an English contract and who has chosen not to participate in the Chapter 11 process.) In late 2008, a plan is approved in the Chapter 11 proceedings which, *inter alia*, discharges or compromises all old unsecured debts. The US corporation emerges from bankruptcy protection and, in due course, a final decree is entered closing the Chapter 11 case. However, in 2011, Creditor X seeks to execute in England in respect of the old debt against assets that have recently been brought into the jurisdiction.

It would be difficult to argue that, in this example, the English stay should automatically terminate when the Chapter 11 case is closed, for such an outcome would defeat the reason behind granting recognition in England in the first place. Nor is there anything in Article 20 to indicate that the stay should so terminate. This commentator's opinion is that the better view is that the English court's stay against Creditor X remains in force indefinitely. Such an approach facilitates the rescue of financially troubled businesses.

Recalling that the English court does not directly apply the US (or any other foreign) stay provision, in an actual case where a foreign representative conducting a restructuring seeks recognition in England pursuant to the Regulations and a stay of creditor actions, the English court's order may need to be carefully drawn up, so as to apply to all relevant debts; i.e. debts which fall within the foreign restructuring process. In such a way it may be made crystal clear that the English court's stay order will not apply to: (i) debts which are not covered by the restructuring (for instance, if the restructuring

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50 An application for recognition under the Regulations does not preclude, for instance, a creditor petitioning to have the corporation wound up in England: see Article 20(5).

51 Article 2(g).

52 At common law, provided the foreign restructuring is entitled to recognition in England, as the equivalent of a 'process of universal distribution' (*per* Lord Dunedin in *Galbraith v Grimshaw* [1910] AC 508 at 513), creditor attachments and executions will not be permitted: see *Banque Indosuez SA v Ferromet Resources Inc* [1993] BCLC 112 and *Hong Kong Institute of Education v Aoki Corpn* [2004] 2 HKC 397 and Smart (2004) 1(4) *Int Corp Res* 1. This common law rule applies to a foreign restructuring as long as such reorganisation is on-going and has not been concluded: see Smart, *ibid*.

53 Although Article 20(3)(a) makes it clear that the stay will not affect secured creditors.

54 See *Re Oversight and Control Commission of Avanzit SA*, 2008 Bankr LEXIS 1094 (Bankr SDNY, April 18, 2008) as an illustration of when foreign proceedings remain on-going (i.e. are not closed) for several years after the confirmation of the restructuring plan.

55 See Article 2(j) for the broad definition of a 'foreign representative'.

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related only to certain types of finance creditors);[56] and specifically (ii) new debts (e.g. loans made to the corporation after it has emerged from bankruptcy protection). But for relevant debts, the stay remains in force and does not lapse.

(ii) A substantive discharge

This commentator's view, above, is that solutions to the threat of an English creditor undermining a foreign reorganisation can readily be found by employing the stay provisions set out in the Regulations. No broad brush reasoning is required. Nevertheless, it will also be argued that the English court, without doing any violence to the terms and scheme of the Regulations, ought to conclude that a foreign reorganisation may now result in a substantive discharge of an English contract debt. In this regard, reference may be made to the discretionary relief available under Article 21(1):

> 'Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including –
>
> …
>
> (g) granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain….'

Any 'appropriate relief' in Article 21(1) is unrestricted; and any 'additional relief' under Article 21(1)(g) is not limited to relief specifically available to a liquidator in a winding up. The word 'relief' should not be construed in a narrow, technical way so as to be restricted to, for instance, those applications for discretionary relief which an officeholder may bring before the English court. As Article 8 states:

> 'In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.'

Moreover, it will be recalled that facilitating the rescue of financially troubled businesses is one of the objectives set out in the Preamble to the Model Law.[57] 'Relief', it is suggested, should be constructed as including the automatic benefits and advantages flowing directly from the UK insolvency legislation in a domestic case: including, in particular, the binding effect an all creditors, pursuant to s. 5(2) of the 1986 Act, of a duly approved composition or scheme. Thus, in effect, the English court should be able to say: 'Just as an English voluntary arrangement is by s. 5(2) made binding on all creditors, regardless of the governing law of their contracts, so too the court is given a discretionary power by Article 21(1) of the Regulations to confer the same benefit in respect of a foreign scheme, following receipt of an application by a foreign representative.' In any event, even if 'relief' in Article 21(1) were to be interpreted narrowly, a discharge should still be available: for, in a domestic case, an English officeholder may seek declaratory relief to the effect that a specified creditor is bound by the terms of a CVA.[58]

Of course, as the Regulations do not countenance the direct application of the foreign insolvency law, the exercise of the English court's discretionary power under Article 21(1) in respect of a discharge would need to be carefully framed. For instance, under the Insolvency Act 1986, a voluntary arrangement is effective regardless of whether notice of the insolvency proceedings has actually been received by a creditor;[59] yet a foreign rescue law may not be as extensive. Hence, where appropriate, following a request from the foreign representative, the English court may exercise its discretionary power under Article 21(1) to apply the English discharge provision to all the corporation's unsecured creditors except those who had no notice of the foreign proceedings.

(iii) Foreign court requests assistance

In most instances one would reasonably expect a foreign insolvency practitioner, conducting a cross-border insolvency, to appreciate the need to make an application in England under the Regulations if the corporation owes debts arising under an English contract. But a situation might arise in which the foreign insolvency practitioner was unaware of the debt in question or did not appreciate that, as a matter of English private international law, the debt arose under an English contract. The following scenario might arise.

The English debt owed to Creditor Y was contracted in 2005. The foreign restructuring commenced in 2007 and was successfully implemented in 2008. In 2009 the foreign process was closed and the foreign representative ceased to hold office. In 2012 Creditor Y, who did not participate in the foreign process,[60] attaches property in England.

Notes

56 Or, for instance, if the foreign compromise or discharge only purports to bind those creditors whose debts are listed in a schedule to the reorganisation plan.

57 See text to note 44 above.

58 See, for example, *Re TBL Realizations plc* [2004] BCC 81 at 91.

59 Insolvency Act 1986, s. 5(2)(b) (as amended).

60 For a creditor who has genuinely participated in the foreign restructuring, see note 18 above.

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It may be that, under the foreign law, the foreign court may be able to re-open the restructuring proceedings,[61] re-appoint the foreign representative and authorise the representative to make an application before the English court for a stay of Creditor Y's attachment proceedings. In which case, the matter presents no major difficulty. However, under the foreign law it might be that it is no longer possible for the foreign court to re-appoint a foreign representative. The issue appears relevant since Chapter III ('Recognition of a Foreign Proceeding and Relief') of the Regulations assumes an application for recognition being made in England by a foreign representative. Thus Article 15(1) and (2) provide:

> '1. A foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed.'
>
> 2. An application for recognition shall be accompanied by –
>
> (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or
>
> (b) a certificate from the foreign court affirming the existence of the foreign proceeding and the appointment of the foreign representative; or
>
> (c) in the absence of evidence referred to in sub-paragraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative.'

Nevertheless, it cannot be maintained that the granting of assistance under the Regulations is restricted to cases where there is an application by a foreign representative. For Article 1(1)(a) provides:

> 'This Law applies where –
>
> (a) assistance is sought in Great Britain by a foreign court or a foreign representative in connection with a foreign proceeding….'

Thus it would appear that a request from a foreign representative is not a sine qua non for the granting of assistance. However, the question remains as to what type of assistance can be given upon the request of the foreign court itself.

Chapter IV of the Regulations is headed: 'Cooperation with Foreign Courts and Foreign Representatives'. Article 25 states:

> '1. In matters referred to in paragraph 1 of Article 1, the court may cooperate to the maximum extent possible with foreign courts or foreign representatives, either directly or through a British insolvency officeholder.
>
> 2. The court is entitled to communicate directly with, or request information or assistance directly from, foreign courts or foreign representatives.'

Whilst it is clear that Article 25, and the rest of Chapter IV, is directed primarily to communication between courts and officeholders (local and foreign), as well as the coordination of concurrent proceedings in general, nothing in Article 25 or Chapter IV indicates that the measures which may be granted at the request of a foreign representative may not likewise be granted at the direct request of a foreign court which is exercising supervisory jurisdiction over a foreign restructuring. Indeed, particular assistance may here be derived from the *Guide to Enactment*, to which the English court is specifically referred by the Regulations.[62] In para. 59 of the *Guide*, details are provided as to the scope of Article 1 and the assistance that may be granted to a foreign court or a foreign representative.

> '"Assistance" in paragraph 1 … is meant to cover various situations, dealt with in the Model Law, in which a court or an insolvency administrator in one State may make a request directed to a court or an insolvency administrator in another State for taking a measure encompassed in the Model Law. Some of those measures the Law specifies (e.g. article 19, subparagraphs (1) (a) and (b); article 21, subparagraphs (a)-(f) and paragraph 2; and article 27, subparagraphs (a)-(e)), while other possible measures are covered by a broader formulation (such as the one in article 21, subparagraph 1(g)).'

This strongly suggests that it was intended that the measures which the English court shall or may take, such as ordering a stay,[63] at the request of a foreign representative, might also be granted following a direct request from the foreign court. Moreover, it would be rather odd if the English court could grant a stay where the foreign court instructed or authorised the foreign representative to make such an application, yet the English court was powerless similarly to assist if the application came directly from the foreign court itself.

In summary, although a request for assistance will usually be made by a foreign representative, if, for whatever reason, there is no foreign representative, the

Notes

61 The foreign restructuring may not actually be terminated upon the confirmation of the plan, as for example where distributions continue to be made for several years thereafter: see *Re Oversight and Control Commission of Avanzit SA* note 54 above.

62 See para. 2(2)(c) of the Regulations.

63 A discretionary stay falls within Article 21(a) and (b).

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English court may stay a creditor's attempt at execution upon receiving a request from the court conducting or supervising the foreign proceeding.[64]

(iv) Public policy

Finally, the question whether a creditor with an English debt might successfully invoke public policy must be addressed. Article 6 of the Regulations provides:

> 'Nothing in this Law prevents the court from refusing to take an action governed by this Law if the action would be manifestly contrary to the public policy of Great Britain or any part of it.'

An English creditor might (conceivably) argue that the common law approach to a foreign discharge amounts, in effect, to a mandatory rule from which there can be no departure. Any such contention can, it is suggested, be given short shrift.

Firstly, public policy is to be narrowly confined and invoked only in the most exceptional of circumstances – as is made very clear in the *Guide to Enactment*.[65] The restrictive scope of public policy has also recently been underlined by the decision of the House of Lords in *McGrath v Riddell*,[66] a case under s. 426 of the Insolvency Act 1986. Second, although the common law approach can be dressed up in terms of the 'expectations' of the parties, it must not be forgotten that the English court has had no hesitation in departing from any such expectations when approving English schemes of arrangement. In any event, any expectation of an English creditor is now plainly subject to very significant exceptions – as foreign discharges will be given effect under the EC Regulation and may be directly applied pursuant to s. 426 of the Insolvency Act – thus undermining any possible suggestion of a mandatory rule. Third, it must be observed that the effect of the common law rule is only to protect English creditors in a procedural sense. In that, the debts of English creditors of a foreign corporation might still be compromised or discharged, but only upon the implementation of a scheme of arrangement satisfying the requirements of English law. If a foreign reorganisation meets requirements of fairness and due process, there surely can be no good reason to invoke public policy merely to insist upon the implementation of a parallel English scheme. Fourth, international experience strongly suggests that public policy should not preclude giving (indirect) effect to a foreign discharge. For under the old §304 of the Bankruptcy Code, the US courts, on several occasions,[67] granted a stay where a foreign corporation had been undergoing reorganisation in its home State and a creditor's debt arose under a contract governed by US law or by the law of a country other than the home State. Whilst the judgments in the US Bankruptcy Court have not contained a detailed discussion of the question whether the creditor's debt will ultimately be discharged by the foreign restructuring, the judges have frequently followed the guidance given by the US Supreme Court in *Canada Southern Railway Co v Gebhard*.[68] Thus it can scarcely be argued that the US judges have acted in ignorance of the discharge issue. The replacement of §304 by Chapter 15[69] will not, it suggested, lead to a change in direction in this regard.[70] For if US courts were willing to grant recognition and assistance to a foreign reorganisation pursuant to §304, under which comity was only one of the factors that the courts were instructed to consider, the position should be *a fortiori* under Chapter 15, since Chapter 15 makes provision for mandatory assistance to be given to main proceedings.[71]

C. Conclusion

Although the restrictive attitude of the common law to the matter of a foreign discharge has an ancient pedigree, and has not been subject to adverse comment in

Notes

64 A 'foreign proceeding' is defined in Article 2(i) as 'a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.' See also note 61 above.

65 Note 43 above, at para. 89: '... public policy exceptions should be interpreted restrictively and that Article 6 is only intended to be invoked under *exceptional circumstances concerning matters of fundamental importance for the enacting State*' (emphasis added).

66 Note 30 above. The consideration that the Australian rules on preferential creditors differed from the equivalent English rules, did not mean that fairness required the rejection of the possibility of applying the Australian rules under s. 426, see *ibid*, at 80-81.

67 See, e.g., *Re Board of Directors of Hopewell International Insurance Ltd* 238 BR 25 (Bankr SDNY, 1999), affirmed 275 BR 699 (SDNY, 2002), *Re Board of Directors of Multicanal SA* 314 BR 486 (Bankr SDNY, 2004) and *Re Board of Directors of Telecom Argentina SA* 2006 Bankr LEXIS 483 (Bankr SDNY, Feb 24 2006), affirmed *Argo Fund Ltd v Board of Directors of Telecom Argentina SA* 2006 US Dist LEXIS 85274 (SDNY, Nov 17 2006). See also *Cunard SS Co v Salen Reefer Services AB* 773 F 2d 452, 458 (2nd Cir, 1985). Note also *Re Cavell Insurance Co Ltd* (2006) 8 OR (3d) 500 (recognition of solvent UK scheme of arrangement in Ontario).

68 Note 20 above. See also Westbrook, note 23 above.

69 Which, of course, implements the UNCITRAL Model Law in the US.

70 See also *Re Ho Seok Lee as Court-Appointed Manager of Young Chang Co Ltd* 348 BR 799 (Bankr WDWash, 2006) (court granted permanent injunction pursuant to Chapter 15 to prevent creditor attachments, relying on §304 case law).

71 There is no requirement under Chapter 15 (as there was under the old law) for the US court to analyse whether the foreign bankruptcy law is sufficiently similar to US bankruptcy law.

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any modern English or Commonwealth case law, this commentator's view is that the proper law approach has long been an anachronism. There is no policy reason why the discharge or compromise of an English debt ought to be treated differently from other issues pertaining to the effect to be given to foreign insolvency proceedings. The governing law of the contract – or, more precisely, the fact that English law is the governing law of the contract – ought not to trump the normal recognition rules. Moreover, such recognition rules already contain the necessary creditor safeguards in terms of fairness and due process.[72] It is to be hoped that in the near future a common law appellate court will have the opportunity to consider whether the old proper law approach, first laid down decades before principles of modern corporate laws (let alone corporate rescue laws) were formulated, should be finally abandoned. In the meantime, however, English law has been liberated from the strictures of the common law by the coming into force of the Regulations. Admittedly, it is unfortunate that the Regulations do not explicitly address the important question of the effect to be given to a foreign compromise or discharge.[73] Nevertheless, it is suggested that two distinct solutions are available under the Regulations. A mandatory,[74] or where appropriate, discretionary,[75] stay can be tailored to prevent an unsecured creditor from being able to evade the consequences of a discharge pursuant to a foreign restructuring plan. In addition, and perhaps somewhat more boldly, the English court, upon granting recognition under the Regulations, can now make provision for the substantive discharge of an English contract debt. Accordingly, in this commentator's opinion, an unnecessary obstacle to efficient cross-border restructuring has at last been removed from English law.

Notes

72 This is also, of course, the case for recognition under the Model Law and the Regulations.
73 See text to note 43 above.
74 Pursuant to Article 20(1), text to note 51 above.
75 Pursuant to Article 21(1), text to notes 56-57 above.

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