

# South Square Articles 2015

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## *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36; *PricewaterhouseCoopers v Saad Investments Co. Ltd* [2014] UKPC 35; [2014] 1 WLR 4482

Robert Amey, Barrister, and Andrew Shaw, Barrister, South Square, London, UK

### Introduction

Two recent appeals to the Privy Council from the Bermuda Court of Appeal have made an important contribution to the development of the law on cross-border insolvency. These two appeals, which were heard together, concerned attempts by the Cayman liquidators of companies in the Saad Group to obtain documents from the companies' former auditors, PwC. In *Singularis Holdings Ltd v PwC*<sup>1</sup> (the '*Singularis Appeal*'), the Board considered the doctrine of modified universalism, and the majority held that there was a common law power to assist a foreign insolvency, but that the power could not be used to enable foreign liquidators to do something which they could not do under the law of the liquidation. In *PwC v Saad Investments Co. Ltd*<sup>2</sup> (the '*Saad Appeal*') the Board considered whether the Supreme Court of Bermuda had jurisdiction to wind up the company, and whether a stranger to the liquidation could challenge the winding up order after it had been made, holding that in exceptional circumstances, a stranger could challenge the winding up order, and that on the facts of the case the winding up should be stayed.

### 1. Factual background

Saad Investments Co. Ltd ('*Saad*') was incorporated in 1990 in the Cayman Islands. By the time of its winding up, its authorised capital was USD 4 billion, of which USD 3.15 billion had been issued, almost all of it held by another Cayman Islands-based company, Saad Group Ltd. *Singularis Holdings Ltd* ('*Singularis*'), another member of the Saad group, was also incorporated in the Cayman Islands.

In May 2009, the Saudi Arabian monetary authorities froze the Saudi assets of certain companies within the Saad group. As a result, the credit ratings of companies within the group, including Saad, were

downgraded. This constituted an event of default under a facility agreement which had been granted to Saad by various banks. Consequently, repayment of all sums outstanding under the facility agreement was accelerated, and Saad became liable for a sum in excess of USD 2.8 billion. On 30 July 2009, a winding up petition was presented to the Cayman Grand Court by a creditor bank, based on Saad's default in failing to pay this sum. On 5 August 2009, the Cayman Grand Court appointed Hugh Dickson, Stephen Akers and Mark Byers, of Grant Thornton Specialist Services (Cayman) Ltd (the '*Liquidators*') as joint provisional liquidators of Saad. Six weeks later, they were appointed joint official liquidators when Saad was ordered by the Grand Court to be wound up.

The Liquidators claimed that upon investigating Saad's records, they encountered what was 'a significant amount of uncertainty due in part to the complexity of its affairs, the position of the wider Saad group, and [certain] litigation'. However, they said that they were satisfied that 'there is a very significant deficiency, running into billions of US dollars, as regards creditors in the winding up of [Saad]'. They also described the liquidation as 'not only large but ... complex', and requiring investigations 'in multiple jurisdictions including the Cayman Islands, the United Kingdom, Saudi Arabia, Bahrain, Switzerland, Bermuda' and many other countries, including the United States, France and the Channel Islands.

Prior to Saad's liquidation, PricewaterhouseCoopers ('PwC'), which is registered in Bermuda but carries on business from an office of Dubai, was the auditor of Saad, *Singularis* and of six other companies in the Saad group, and also provided other accountancy services to those eight companies. Following their appointment, the Liquidators believed that PwC had in its possession, either in Bermuda or Dubai, 'information and documentation pertaining to [Saad] that ought to be turned over to [the Liquidators]'. Accordingly,

### Notes

1 [2014] UKPC 36.

2 [2014] UKPC 35; [2014] 1 WLR 4482.

the Liquidators ‘made numerous attempts to obtain information and documents relating to the affairs’ of Saad and Singularis from PwC in Bermuda and in the Dubai office. Eventually, in early September 2010, the Liquidators obtained an order from the Cayman Grand Court for delivery up of PwC’s working files relating to every aspect of Saad’s business, including its annual audited accounts, its statutory records, its tax affairs, its bank statements, and records and notes relating to all other aspects of its business.

However, the Liquidators were still not satisfied, claiming that many of the documents which PwC provided were heavily and unjustifiably redacted. They therefore sought further relief from the Supreme Court of Bermuda (ie, the jurisdiction in which PwC was incorporated). Under Cayman law, the court could order auditors to hand over ‘documents belonging to the company’, but under the equivalent Bermuda provisions, the court could order former auditors to hand over ‘any books or papers ... relating to the company’.

In the case of Saad, the Liquidators obtained a winding up order from the Supreme Court of Bermuda with a view then to obtaining an order for production of documents and information about Saad. In the case of Singularis, the Liquidators did not apply for winding up in Bermuda, but simply asked the Supreme Court of Bermuda to exercise its common law power to assist a foreign liquidator by ordering production of documents and information.

## 2. The Saad appeal

Once the Liquidators had obtained a winding up order from the Supreme Court of Bermuda, they applied under section 195(1) of the Bermudan Companies Act 1981 for an order requiring PwC to attend for examination and to produce all documents in their possession relating to the affairs of Saad. Kawaley CJ granted the application, and the Court of Appeal of Bermuda (Zacca P, Auld JA and Bell AJA) upheld the decision.

On appeal to the Privy Council, PwC argued that the Bermuda court did not have jurisdiction to wind up Saad, and so should not have made an order under section 195. The Liquidators had two arguments in response. First, it was argued that the Bermuda court did have jurisdiction to make a winding up order. Secondly, it was argued that PwC did not have standing to challenge the winding up order in any event, because it did not have standing (not being a creditor or contributory) and could not mount a collateral attack on a subsisting winding up order as an answer to a section 195 application.

In a short judgment, the Board disagreed with both arguments, and allowed PwC’s appeal. On the first point, the Board overruled a line of Bermudan first instance decisions in which the Supreme Court of Bermuda had assumed jurisdiction to wind up companies incorporated outside of Bermuda. On the Board’s reading of the relevant statute, such a jurisdiction did not exist. Although relevant to practitioners in Bermuda, this aspect of the judgment will be of limited interest elsewhere.

The Board’s decision on the second point is more interesting, and of potential relevance to insolvency proceedings throughout the common law world. The Board was content with the first limb of the Liquidators’ argument: that the winding up order in respect of Saad was an order made by the Supreme Court, a court of unlimited jurisdiction, and was therefore effective unless properly challenged. The second limb of the Liquidators’ argument, that PwC did not have standing properly to challenge the order, failed.

The Liquidators had advanced a number of reasons why PwC should not be entitled to challenge the order, each of which was rejected by the Board. Most of the objections were procedural or fact specific, but there was one argument, dealt with in some detail by the Board, which is of general interest.

The Liquidators argued that it was impermissible as a matter of principle for PwC, as a stranger to the liquidation (that is, anybody other than the company itself, the Official Receiver, the liquidators, contributories or creditors) to challenge the order, or that if they could, they could only do so as *amicus curiae* with no right of appeal. The Board accepted that there was authority to support this proposition (in particular, *In re Mid East Trading Ltd*<sup>3</sup>), which was correct as a ‘general proposition’. However, the Board held that this was a ‘sensible and practical general rule’ rather than an ‘immutable principle’. On the facts of the present case, the Board held that it would not apply, since PwC was only a stranger to the winding up ‘in the most technical sense’ and the ground of opposition to the winding up order was ‘based purely on jurisdiction’.

It is not clear why the Board felt compelled to create this exception to an acknowledged general rule. The fact that an order has been made in excess of jurisdiction does not, in ordinary civil litigation, prevent the strict rules of *res judicata* applying (see *Watt v Ahsan*<sup>4</sup>) and it is unclear why any different principle should apply in insolvency proceedings. As for the finding that PwC is a stranger only ‘in the most technical sense’, it is unclear when a stranger will be considered sufficiently disinterested in the liquidation to render him a true stranger. Anybody wishing to challenge a winding up

### Notes

3 [1998] BCC 726.

4 [2008] 1 AC 696.

order will have some interest in the outcome. The prejudice to PwC of the order being made was minimal: PwC was merely ordered to produce copies of documents in its possession, and was entitled to be reimbursed for its costs of doing so.

A more convincing reason is found at para. 37 of the judgment, namely, that ‘the sole ground for making the winding up order was to obtain relief against PwC’. As the Board made clear at paras 36-38, the present case was ‘exceptional’ and ‘very unusual’, and ‘the mere fact that a person rightly anticipates that his or her rights will be detrimentally affected as a result of the winding up order would normally be quite insufficient to justify that person being added as a party’. Since, in the Board’s view, PwC had not been given notice of the hearing of the petition (the Board did not explain why a letter from the Liquidators to PwC, followed by advertisement of the petition in the national press was not sufficient) PwC should be entitled to raise the matter on appeal.

Once it was established that PwC had standing to appear on the petition and therefore standing to appeal against the winding up order, it also followed that the order would be stayed altogether (and effectively rescinded). Interestingly, the Board noted that PwC (being a stranger to the winding up) would not have standing to apply for an order staying the winding up, but since the Liquidators did have standing, and were officers of the court, they could be directed by the court to make such an application.<sup>5</sup> The Board also added, for good measure, that even if the petition were not stayed, it would be appropriate for PwC to argue, in response to an application under section 195, that the winding up order ought not to have been made.

### 3. The Singularis appeal

In the case of *Singularis*, the Liquidators took a different approach. Rather than attempt to get a winding-up order in Bermuda, the Liquidators sought recognition at common law. The Liquidators argued that upon recognition the Bermudan court could provide assistance at common law to compel PwC to provide information. Such assistance would be analogous to that which could be provided under section 195 of the Companies Act if a company were being wound up in Bermuda.

At first instance the Liquidators succeeded and obtained an order against PwC for production of the same documents as could have been made under section 195. The order also required that PwC made

available for oral examination a person acceptable to the Liquidators.

The Bermudan Court of Appeal set aside the order made at first instance. The primary basis on which the appeal was determined was that no such order could have been made by the Cayman court; it was not appropriate for assistance to be provided at common law in Bermuda which would not have been available to in the jurisdiction where the insolvency was being administered. The Court of Appeal regarded the claim of the Liquidators as ‘unjustifiable forum-shopping’<sup>6</sup> and expressed doubts as to whether a section 195 order could be made at common law when that statutory decision did not apply.

The Liquidators consequently appealed to the Privy Council, which addressed two issues, the first of which had only been developed in argument before the Board:

- (a) could the Bermudan court order the production of information by way of assistance at common law to a foreign insolvency where it had no power to wind up an overseas company such as *Singularis* and the statutory powers to order production of information only applied to companies being wound-up? and
- (b) if the Bermudan court did have such a power, could it be exercised where the court in the jurisdiction where the liquidation was taking place had no power to make an equivalent order?

#### 3.1 The decision

The Board was unanimous in holding against the Liquidators in relation to the second issue but split on the first issue, with a majority (Lord Sumption, Lord Collins and Lord Clarke) holding that there was a power at common law to compel production of information by way of assistance to a foreign insolvency.

The Board also agreed that the principle of modified universalism, whereby a court will give such assistance as it can to foreign insolvency proceedings, consistent with local law and local public policy, to ensure that a company’s assets are distributed under a single system, was a part of English common law. Indeed, this was the only proposition for which *Cambridge Gas Transportation Corp v Official Committee of Unsecured Creditors of Navigator Holdings Plc*<sup>7</sup> (‘*Cambridge Gas*’) was still good law.

On the basis of the principle of modified universalism, Lord Sumption identified a power at common law to assist a foreign insolvency by ordering, ‘the production

#### Notes

<sup>5</sup> *Saad Appeal* at [34].

<sup>6</sup> *Singularis Appeal* at [7].

<sup>7</sup> [2007] 1 AC 508.

of information in oral or documentary form which is necessary for the administration of a foreign winding up.<sup>8</sup>

The justification of this power lay in the ability of the common law to develop powers to compel the production of information, as opposed to evidence, ‘when it is necessary to give effect to a recognised legal principle’.<sup>9</sup> Lord Sumption considered that the decision in *Norwich Pharmacal Co. v Customs and Excise Commissioners*<sup>10</sup> exemplified this power. The legal principle given recognition in *Singularis* was obviously modified universalism.

Lord Sumption identified a number of limitations to the exercise of this power:

- it would only be available to assist the officers of a foreign court of insolvency jurisdiction or equivalent public officers;
- it would not be available to enable such officers to do something which they could not do under the law by which they were appointed;
- it would only be available when necessary for the performance of the office-holder’s functions;
- the exercise of this power must be consistent with the substantive law and public policy of the assisting court, for example it would not be available for obtaining material in support of actual or anticipated litigation;
- the exercise of the power would be conditional on the applicant being prepared to pay reasonable costs of compliance.

Lord Collins agreed that the Bermudan court had a power at common law, ‘to make an order against people subject to its personal jurisdiction in favour of foreign liquidators for production of information of identifying and locating assets of that company’.<sup>11</sup> He was, however, more concerned to address the arguments of the liquidators, primarily adopted at first instance and in the Court of Appeal, that assistance to a foreign insolvency at common law could be by application of powers in the international context analogous to those available by statute for solely domestic application in the jurisdiction of the assisting court.

In Lord Collins’s view, the court had no common law power to assist a foreign insolvency through the exercise of powers analogous to those contained in

otherwise inapplicable legislation. For a court to do so would be to trespass on ground that was properly that of a legislature. In consequence, Lord Hoffmann had been wrong in *Cambridge Gas* when he had held that the existence of a power under Manx law to approve a scheme of arrangement meant that the Manx court had an analogous power to give effect to a plan produced under Chapter 11 of the US Bankruptcy Code. Subsequent decisions which had followed this approach were wrong; *Re Phoenix Kapitaldienst GmbH*<sup>12</sup> and the first instance decision in *Picard v Primeo Fund*<sup>13</sup> were specifically overruled.

Lord Mance disagreed that there was a common law power to order production of information in support of a foreign insolvency, regarding this power as substantially different from the enforcement of the company in liquidation’s rights to its identifiable assets. He foresaw great difficulty in distinguishing between information and evidence and, further, could not see any principled reason for restricting the power to foreign insolvencies. He also differed from Lord Sumption on the genesis of such a power; in Lord Mance’s view, the courts had been careful to restrict the circumstances in which a draconian power to compel production of information could be applied.

Lord Neuberger agreed with Lord Mance. He considered that the ‘radical’<sup>14</sup> development of a new common law power was at odds with the trend in the approach of the English courts to universalism, as demonstrated by the decision in *Rubin v Eurofinance SA*.<sup>15</sup> He also foresaw problems with the interpretation of the limits to the power and questioned, for example, why it should be applicable in court-ordered liquidations but not in voluntary liquidations. In these circumstances, and since it was unnecessary in *Singularis* to decide the point, he considered that no new common law power should be recognised.

### 3.2 Implications

*Singularis* has quashed any lingering hope that the expansive approach taken by Lord Hoffmann in *Cambridge Gas* towards providing assistance at common law could be preserved outside the field of recognition and enforcement of foreign judgments, where it was rejected in *Rubin v Eurofinance SA*. Henceforth, *Cambridge Gas* is only good authority for the relatively uncontroversial

#### Notes

8 *Singularis Appeal* at [25].

9 *Ibid.* at [23].

10 [1974] AC 133.

11 *Singularis Appeal* at [33].

12 [2013] Ch 61.

13 Jones J, 14 January 2013.

14 *Singularis Appeal* at [160].

15 [2013] 1 AC 236.

proposition that the principle of modified universalism forms part of English common law. The Privy Council has done little to define the limits to the assistance which may be provided at common law to a foreign insolvency though, save that for any assistance to be given, such assistance must be available in the jurisdiction where the insolvency is taking place.

Certain forms of assistance may clearly be provided at common law, for example the stay of proceedings or enforcement of judgments against the company in a foreign insolvency procedure, or the use of an ancillary liquidation in support of a foreign winding up. Beyond this, the extent of any assistance which may be provided at common law is unclear.

In inventing a new common law power to compel the production of information, the majority has recognised that this is an essential power for a liquidator if he or she is to be able to fulfil his or her principal task of realising assets for distribution, especially in large, multinational insolvencies. It is less clear if the majority envisage the further development of other common law powers of assistance covering different areas or whether the new power described in outline in *Singularis* is to be the high water-mark.

The ambit of the power is unclear. For example, there is potentially a substantial difference between the information necessary to assist in the administration of a foreign insolvency (per Lord Sumption) and that necessary to locate and identify assets (per Lord Collins). As the minority pointed out, there are also likely to be significant practical difficulties in defining the limits of

this new power; in this respect, there is force in Lord Neuberger's view that such a power should only have been considered in circumstances where it was necessary to do so and there were concrete facts against which to define the scope of the power.

#### 4. Conclusions

The law on cross-border insolvency has come a long way since Lord Hoffmann's seminal judgment in *Cambridge Gas*. In that case, the Privy Council had introduced the concept of modified universalism to the common law, boldly developing the law in a manner helpful to foreign officeholders. In the Saad Appeal, the Privy Council confirmed that the court's power to wind up companies is purely statutory, and even where the statute is open to varying interpretations, it will not be possible to wind up foreign companies except where the statute expressly permits it. In the *Singularis* Appeal, the Privy Council severely curtailed the doctrine of modified universalism. One thing that is certain is that these two appeals will not be the last word on cross-border insolvency. While many jurisdictions are now signatories to the numerous international conventions which govern cross-border insolvency, the British Overseas Territories generally still lack a codified scheme for dealing with cross-border assistance, relying entirely on the common law. As the dissenting opinions in the *Singularis* Appeal demonstrate, this is a controversial and still developing area of law.

### *Re ARM Asset Backed Securities S.A. (No. 2)* [2014] EWHC 1097 (Ch)

Charlotte Cooke, Barrister, South Square, London, UK

#### Introduction

The directors of Arm Asset Backed Securities S.A. ('the Company') presented a petition to the English Court for an order winding up the Company. At the same time the directors made an application for provisional liquidators to be appointed in respect of the Company. The Court, on that application, appointed provisional liquidators (see *Re ARM Asset Backed Securities S.A.* [2013] EWHC 3351), with the appointment being made on the basis that the English provisional liquidation proceedings were main proceedings within the meaning of Article 3(1) of the EC Insolvency Regulation as the Company's centre of main interests was in England. In this regard, Mr Justice David Richards considered that the Company's main director was based in London, from where, for the most part, decisions in relation to the Company were taken, this being known to third parties dealing with the Company.

Following the provisional liquidator's appointment, the Luxembourg public prosecutor, to whom notice of the provisional liquidation application and order had been given, applied to the Luxembourg Court to commence liquidation proceedings in Luxembourg under the Luxembourg Securitisation Law. Prior to the provisional liquidator's appointment, an appeal by the Company against the Luxembourg regulator's refusal to grant a licence required for the Company to carry on a business raising funds through the issue of bonds and investing those funds in US life insurance policies has been refused.

Faced with the prospect of such proceedings in Luxembourg, the Company's English provisional liquidators made an application to the English Court for an order that, by virtue of their appointment, a stay on any action or proceeding against the Company or its property was imposed by Section 130(2) of the English Insolvency Act 1986 and that the stay extended to the public prosecutor's application in Luxembourg, which was therefore in breach of the stay as the permission of the English Court to commence that application had not been obtained.

The provisional liquidators also indicated that, if permission to commence the Luxembourg proceedings was sought from the English Court, they would oppose permission being given on the grounds that the Luxembourg proceedings would be unnecessarily duplicative,

waste time and resources and lead to unnecessary complications.

For the reasons discussed below, Mr Justice Nugee made an order to the effect that the Luxembourg proceedings were caught by the stay imposed by Section 130(2) of the Insolvency Act 1986. The judgment thus provides a useful reminder of the scope of the EC Insolvency Regulation and the potential reach of certain provisions of the English Insolvency Act 1986 as a consequence of the EC Insolvency Regulation's broad scope in some cases.

#### Scope and effect of the EC Insolvency Regulation generally

As noted above, the appointment of the provisional liquidators in England in relation to the Company constituted the opening of main proceedings within the meaning of Article 3(1) of the EC Insolvency Regulation. It would not be open to the Luxembourg Court to go behind that decision. Article 16(1) of the EC Insolvency Regulation provides that 'Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings' and, as such, the provisional liquidators' appointment must be recognised by all Member States, including Luxembourg.

As to what exactly this amounts to, Article 17(1) of the EC Insolvency Regulation provides that a judgment opening main proceedings in a Member State shall, with no further formalities being required, produce the same effects in any other Member State as under the law of the Member State where the proceedings were opened, provided no secondary proceedings within the meaning of Article 3(2) and there is no provision to the contrary in the EC Insolvency Regulation.

The EC Insolvency Regulation at Article 4(1) further provides that 'the law applicable to insolvency proceedings and their effects be that of the Member State within the territory of which such proceedings are opened' (subject to various exceptions irrelevant to the facts in issue in the *ARM Asset Backed Securities* case). In a similar vein, pursuant to Article 4(2) of the EC Insolvency Regulation 'the law of the State of the



opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct, and their closure.’

## Scope and effect of the EC Insolvency Regulation on the facts

Section 130(2) of the English Insolvency Act 1986 provides that when a provisional liquidator (or a liquidator where appropriate) has been appointed, no ‘action or proceeding’ shall be commenced or continued against the company or its property, except with the permission of the Court and then subject to any terms the Court imposes in the event permission is given. The provisional liquidators contended that the Luxembourg public prosecutor’s application in Luxembourg was impermissible in view of that stay, which by Article 17(1) of the EC Insolvency Regulation is effective outside England in other EU Member States, including Luxembourg.

Mr Justice Nugee agreed with the provisional liquidator’s position that the Luxembourg proceedings would come within the scope of the stay, there being ample authority that the words ‘action or proceeding’ in Section 130(2) of the Insolvency Act 1986 are to be construed widely. For example, criminal and quasi-criminal proceedings (see *Briton Medical & General Life Assurance Association* (1886) 32 Ch D 503), interpleader proceedings (see *Eastern Holdings Establishment of Vaduz v Singer & Friedlander Ltd* [1967] 1 WLR 1017) and proceedings on indictment (see *R v Dickson* [1991] BCC 719) all come within the meaning of the words ‘action or proceedings’ in that section.

Having concluded that the Luxembourg proceedings would plainly be an ‘action or proceedings’ within the meaning of those words in Section 130(2) of the Insolvency Act 1986, those proceedings, Mr Justice Nugee held, were automatically stayed. As explained above, the stay imposed by Section 130(2) is not only applicable in England, but also in other EU Member States, including Luxembourg, by virtue of Article 17(1) of the EC Insolvency Regulation and the other provisions of that Regulation as set out above.

In reaching the conclusion that the Luxembourg proceedings would indeed contravene the stay imposed by Section 130(2) of the Insolvency Act 1986, Mr Justice Nugee made reference to an earlier decision of the Chancellor in *Kaupthing HF v Kaupthing Singer & Friedlander* [2012] EWHC 2235 (Ch). In that case an argument to the effect that the equivalent of the stay imposed by Section 130(2) applicable in the context of an administration (see paragraph 43 of Schedule B1 to

the Insolvency Act 1986) only had the effect of requiring permission for actions or proceedings in England was rejected. The Chancellor held that Article 10 of the Directive on the Reorganisation and Winding Up of Credit Institutions had the effect that English law determined the effect of the insolvency proceedings where the Directive applied, which included Iceland and therefore the stay applied to proceedings not just in England but proceedings everywhere the Directive applied. As a consequence, proceedings in Iceland could not be commenced without the permission of the English Court. Mr Justice Nugee in the *ARM Asset Backed Securities* case did not consider that there was a relevant distinction to be drawn between the provisions of the Directive engaged in the *Kaupthing* case and the provisions of the EC Insolvency Regulation engaged in the case before him and he therefore considered that the *Kaupthing* case supported his decision to grant the relief sought by the Company’s provisional liquidators.

Finally, it should also be noted that the Luxembourg proceedings would not have amounted to insolvency proceedings for the purposes of the EC Insolvency Regulation because such proceedings do not fall within the scope of the definition of ‘secondary proceedings’ as set out in Annex B of the EC Insolvency Regulation. The provisional liquidators had further suggested in this regard that it would not in any event have been possible for secondary proceedings to be opened in Luxembourg on the basis that the Company did not have the required establishment in Luxembourg, it only being possible to open secondary proceedings in a Member state where a company has an establishment.

## Conclusion

As explained above, and as recognised by Mr Justice Nugee in his judgment, in light of Article 17(1) of the EC Insolvency Regulation and the other provisions of that Regulation as set out above, the provisional liquidators having been appointed in England in respect of the Company, the stay imposed by section 130(2) of the English Insolvency Act 1986 took effect throughout the EU’s Member States, including Luxembourg.

The judgment in this case therefore serves as a useful reminder of the scope of the EC Insolvency Regulation and the potential reach of certain provisions of the English Insolvency Act 1986 as a result. The decision is also plainly in keeping with the aim of improving the efficiency and effectiveness of insolvency proceedings with cross border elements.

**C-327/13 *Burgo Group SpA v Illochroma SA* (in liquidation)**

Robert Amey, Barrister, South Square, London, UK

**Introduction**

Readers familiar with the operation of Council Regulation (EC) No. 1346/2000 (the 'Insolvency Regulation') will know that main insolvency proceedings may be opened only in the member state where a company has its centre of main interests (COMI). A company's COMI will often be where it has its registered office, but need not be. It will occasionally be necessary to open proceedings in another member state. These proceedings cannot be main proceedings, and are known either as territorial proceedings (if there are no main proceedings elsewhere) or secondary proceedings (if main proceedings have already been commenced in another state).

It is often thought that the right to seek the opening of secondary proceedings is given to 'local creditors ... in order to protect local interests': Moss, Fletcher & Isaacs, *The EC Regulation on Insolvency Proceedings* (2nd edn, OUP, Oxford, 2009) para.8.352. However, the recent decision of the First Chamber of the European Court of Justice (the 'ECJ') in the case of *Burgo Group SpA v Illochroma SA* (Case C-327/13) handed down on 4 September 2014, shows that it is not just 'local creditors' who seek to take advantage of secondary proceedings.

**Background**

Illochroma SA had its registered office in Brussels in Belgium. It owned a building in Belgium, employed staff in Belgium, and bought and sold goods there. Its centre of main interests, however, was in France, where it was put into *redressement judiciaire* (broadly equivalent to an English administration) in April 2008. On 4 November 2008, Burgo Group (an Italian company) presented the administrator with a claim for EUR 359,778.48, which was rejected for being out of time.

Presumably considering that it could circumvent any time bar by opening fresh insolvency proceedings, on 15 January 2009, Burgo Group applied to the *Tribunal*

*de commerce de Bruxelles* (Brussels Commercial Court) to open secondary proceedings. The French liquidator of Illochroma SA argued that it would not make sense to open secondary proceedings in the jurisdiction where the debtor has its registered office. Secondary proceedings can only be opened where there is an 'establishment'. An 'establishment', it was argued, could not have legal personality. Furthermore, it was alleged that under Belgian domestic law, secondary proceedings could only be opened by a creditor residing or having its registered office in Belgium.<sup>1</sup> It was argued that secondary proceedings exist for the benefit of local creditors, and an Italian creditor therefore ought not to be allowed to commence secondary proceedings in Belgium.

The liquidator's arguments succeeded before the *Tribunal de commerce*. The application was dismissed, and Burgo Group appealed to the *Cour d'appel de Bruxelles* (Brussels Court of Appeal). The Brussels Court of Appeal stayed its proceedings and referred the following questions to the ECJ:

'Must [the Insolvency Regulation] and, in particular, Articles 3, 16 and 27 to 29 thereof, be interpreted to the effect that:

1. "establishment", as referred to in Article 3(2), must be understood as referring to a branch of the debtor against which main insolvency proceedings have been opened and precludes, in the context of the concurrent winding-up of a number of companies belonging to a single group, secondary proceedings from being brought against those companies in the Member State in which their registered office is situated, on the ground that they possess legal personality?

2. the person or authority empowered to request the opening of secondary proceedings must reside or have its registered office in the territory of the Member State of the court before which the action seeking the opening of secondary proceedings has been brought or must all European Union citizens

**Notes**

1 A curious aspect of the case is that the Belgian court disagreed with this submission in the domestic proceedings, but Illochroma persisted with it in the ECJ, despite accepting that the ECJ had no jurisdiction to interpret domestic law.

have that right of action, provided that they can demonstrate a legal link to the establishment concerned? and

3. in so far as main ... proceedings are winding-up proceedings, the opening of secondary ... proceedings against an establishment is possible only if they meet the criteria as to appropriateness, which lie within the discretion of the court ... before which the action seeking the opening of secondary proceedings has been brought?’

### Should main proceedings have been opened in France in the first place?

A number of member states intervened in the case before the ECJ. Most notable was the submission of the Belgian government, which argued that main proceedings should never have been opened in France in the first place, since Illochroma’s COMI was in Belgium. This submission was strongly resisted not only by Burgo Group, but by the European Commission, and the governments of Germany, Greece, Spain and Poland. The ECJ noted that under Article 16, the judgment of the French court that it had jurisdiction to open main proceedings (and that Illochroma’s COMI was therefore in France) had to be ‘recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings’. It was therefore held that it was not open to a party to challenge the opening of main proceedings in another member state. The ECJ was plainly correct in this finding. The philosophy underlying the Insolvency Regulation, as well as the better-known Council Regulation (EC) No 44/2001 (the ‘Judgments Regulation’) is that once the court of a member state is seised of a matter, it is for that court to determine the question of jurisdiction. Any challenge to the opening of main proceedings in France should therefore have been challenged in the French proceedings.

### Can there be secondary proceedings in the state where a company has its registered office?

The ECJ considered in some detail the nature of secondary proceedings under the Insolvency Regulation. It was noted that prior to the opening of main proceedings, recital 17 of the preamble to the Insolvency Regulation limits the right to request the opening of ‘territorial’ proceedings to ‘local creditors and creditors of the local establishment or to cases where main proceedings cannot be opened’. However, recital 18 provides that once main proceedings have been opened elsewhere, ‘the right to request the opening of insolvency proceedings in a Member State where the

debtor has an establishment is not restricted by this Regulation’. Article 2(h) defines establishment as ‘any place of operations where the debtor carries out a non-transitory economic activity with human means and goods’. There is nothing in the Insolvency Regulation that prevents a company having an ‘establishment’ in the member state where it has its registered office. The ECJ therefore concluded that:

‘where winding-up proceedings are opened in respect of a company in a Member State other than that in which it has its registered office, secondary insolvency proceedings may also be opened in respect of that company in the other Member State in which its registered office is situated and in which it possesses legal personality’.

### What restrictions can domestic law place on the opening of secondary proceedings?

The ECJ then examined whether the court considering whether to open secondary proceedings is entitled to discriminate against residents of other EU member states. This is a more difficult question, since Article 29 provides that:

The opening of secondary proceedings may be requested by:

- (a) the liquidator in the main proceedings;
- (b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested.

As Illochroma correctly argued, the ECJ does not have jurisdiction to interpret the provisions of Belgian law. On the face of it, therefore, the wording of Article 29(b) provides that if Burgo Group, as an Italian company, does not have standing under Belgian law, it may not request the opening of secondary proceedings in Belgium. However, the ECJ took a teleological approach, deciding that such a prohibition would be contrary to the general scheme of the Insolvency Regulation, and would result in indirect discrimination on grounds of nationality. The judgment therefore held that, although domestic law determines who has the right to seek the opening of secondary proceedings, that right:

‘cannot, however, be restricted to creditors who have their domicile or registered office within the Member State in whose territory the relevant establishment is situated, or to creditors whose claims arise from the operation of that establishment.’

Finally, the ECJ considered whether the court considering the application to open secondary proceedings has a discretion to consider whether such proceedings are

appropriate. The ECJ considered that since domestic law governed the opening of secondary proceedings, a national court would have such discretion as domestic law afforded it, but that as above, domestic law could not discriminate on grounds of nationality.

## Analysis

Those familiar with EU law will find nothing unexpected in the judgment. Ultimately, the ECJ's interpretation of the Insolvency Regulation is uncontroversial, and the principle that the domestic law of member states may not discriminate between citizens of that state and citizens of another EU member state has been deeply ingrained in the law of the common market since its foundation.

For those who feel that the European courts engage in too much judicial law-making, the most concerning part of the judgment is the finding that, although standing to apply for the opening of secondary proceedings is expressed by the Insolvency Regulation itself to be governed by domestic law (over which the ECJ has no jurisdiction), that domestic law cannot restrict standing to creditors based in that member state or whose claims arose in that member state. It is worth reminding critics of this part of the ECJ's judgment of what Lord Denning MR said of the ECJ's method of reasoning over 35 years ago in *James Buchanan & Co. Ltd. v Babco Forwarding & Shipping (UK) Ltd* [1977] QB 208, 213-214:

‘They adopt a method which they call in English by strange words – at any rate they were strange to me – the “schematic and teleological” method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit – but not the letter – of the legislation, they solve the problem by looking at the design and purpose of the legislature – at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? They lay down the law accordingly. If you study the decisions of the European Court, you will see that they do it every day. To our eyes – shortsighted by tradition – it is legislation,

pure and simple. But, to their eyes, it is fulfilling the true role of the courts. They are giving effect to what the legislature intended, or may be presumed to have intended. I see nothing wrong in this. Quite the contrary. It is a method of interpretation which I advocated long ago’

An inability to open secondary proceedings in the state where a debtor has its registered office would potentially discriminate against creditors in that state, while a requirement that creditors applying to open secondary proceedings have their registered office in that state would discriminate against everybody else. The prohibition on both direct and indirect discrimination based on nationality has a long history in EU law. For example, in *Commission v Italy* C-388/01 [2003] 1 CMLR 40, the ECJ held that the Italian government had unlawfully discriminated against non-Italians by offering free museum entry for residents of Italy. Although foreigners resident in Italy could gain free entry, the policy was likely to result in the majority of Italians gaining free entry while the majority of foreign nationals would not. It is a natural extension of this reasoning to hold that standing to open secondary insolvency proceedings cannot depend on residence in the relevant jurisdiction.

## Conclusion

This judgment is a valuable reminder of the ECJ's approach to the interpretation of the Insolvency Regulation, and is entirely in keeping with EU law's disdain for national law measures which seek to distinguish between domestic and EU creditors. It is also an unusual example of secondary proceedings being used not to protect local creditors (who consider that the local rules for priority are more advantageous) but to protect a creditor who has no connection with the place where secondary proceedings were to be opened. Secondary proceedings for the protection of local creditors will become less common if current proposals for reform of the Insolvency Regulation are adopted. It is proposed to amend the Insolvency Regulation to enable the insolvency practitioner in the main proceedings to apply the law of a foreign jurisdiction to assets in that foreign jurisdiction. Such a reform would, in many cases, obviate the need for secondary proceedings. There will, however, remain cases like *Illochroma*, where there is some advantage to be secured by a creditor in secondary proceedings that could not be obtained in main proceedings.

### *Re Pan Ocean* [2014] EWHC 2124

Matthew Abraham, Barrister, South Square, London, UK

#### Introduction

As more and more companies have an international presence the English Courts have had to deal with crucial cross-border issues in the context of insolvency. The international insolvency arena has developed considerably over the past few decades such that it is no longer necessary to have individual liquidations in every country that international companies operate in. The most significant advancement in this area was the development of the UNCITRAL Model law (the 'Model Law') which is implemented in England and Wales through the Insolvency (Cross-Border) Regulations 2006 ('CBIR').

In *Pan Ocean* Morgan J was asked to determine the breath of the relief that would be granted by the English Courts upon recognition of a foreign insolvency proceeding. In this regard the Court had to grapple with the interpretation and application of the CBIR. In particular, Morgan J had to determine the scope of the relief that may be granted by the English Courts under Article 21 on the recognition of a foreign insolvency proceeding.

#### Factual background

Pan Ocean is a shipping company incorporated under the laws of the Republic of Korea (the 'Company'). On 25 June 2013, the Company went into an insolvency process known as rehabilitation in Korea. The rehabilitation proceedings were recognised in England as the 'foreign main proceeding' under Article 17 of Schedule 1 to CBIR by Warren J. The administrator was the 'foreign representative' pursuant to CBIR (the 'Administrator').

Prior to entry into the rehabilitation process the Company had entered into a contract with Fibria Celulose S/A ('Fibria') a Brazilian company for the carriage of goods (the 'Contract'). The contract is governed by English law. By clause 28 of the Contract Fibria had the right to terminate the contract by reason of the Korean insolvency process in relation to the Company (i.e. an *ipso facto* clause) Clause 28 is valid and enforceable under English law (see *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] AC 383) but not under the law of Korea and other laws, for example

in the United States. The Company had terminated other contracts with Fibria but did not wish to terminate the Contract.

#### Issues that the Court had to deal with

The Court had to deal with two issues: (1) whether the power under Article 21(1)(a) enabled the Court to restrain Fibria from serving a notice of termination pursuant to Clause 28 of the Contract; and (2) whether, by virtue of the phrase 'any appropriate relief' in Article 21, the Court was in any event empowered to make an order restraining Fibria from serving such notice as a result of the application of Korean law to invalidate Clause 28.

##### *(1) The Article 21(1)(a) issue*

Article 21(1)(a) states: 'staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1(a) of article 20'.

The Administrator contended that the service by Fibria of a notice to terminate under Clause 28 would be within the wording in Article 21(1)(a). In particular, the service of the notice would amount to the commencement or continuation of an individual action or proceeding.

Morgan J accepted that the words 'action' and 'proceedings' in Article 21 did not have the same meaning as the words in s.130(2) of the Insolvency Act 1986 and as a result he had to start with an analysis of the Model Law and any relevant authorities. To this extent Morgan J reviewed the UNCITRAL *Guide to Enactment* in particular paragraphs 145, 146 and 155.

Morgan J was taken to the line of authorities in relation to the moratorium that arises under s.11 of the Insolvency Act 1986 as a way of assisting in the interpretation of Article 21(1)(a). In particular, Morgan J reviewed the cases of *Bristol Airport plc v Powdrill* [1990] Ch 744 and *Re Olympia & York Canary Wharf Ltd* [1993] BCLC 453. In *Bristol Airport plc v Powdrill* Sir Nicolas Browne-Wilkinson V-C at 765 stated that 'the use of the word "proceedings" in the plural

together with the words “commence” and “continue” are far more appropriate to legal proceedings (which are normally so described) than to the doing of some act of a more general nature.’ In *Re Olympia & York Canary Wharf Ltd* Millet J in at 457 stated: ‘the phrase is not apt to describe the taking of non-judicial steps such as the service of a contractual notice in order to crystallise the liability of the party on whom the notice is served.’

At paragraph 75 of his judgment Morgan J concluded that the discussions in both *Bristol Airport plc v Powdrill* and *Re Olympia & York Canary Wharf Ltd* as to the ordinary and well understood meaning of a phrase such as ‘the commencement or continuation of individual actions or individual proceedings’ were considerably helpful. Although Counsel for the Administrator drew the Court’s attention to various Canadian authorities that reviewed similar wording, Morgan J held that those authorities did not attempt to define the meaning of the word ‘proceedings’ and so their persuasive force was greatly diminished.

As a result of Morgan J’s reliance on the English authorities set out above he rejected the Administrator’s claim that the Court had the power under Article 21(1)(a) to restrain Fibria from serving a termination notice under Clause 28.

## (2) The ‘any appropriate relief’ issue

Although discussed first in this case comment, the Article 21(1)(a) issue was in fact an alternative argument that was raised by the Administrator. The primary and wider argument was that based on the words ‘any appropriate relief’ in Article 21(1).

Article 21(1) of CBIR states: ‘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 [a list of possible relief is set out in Article 21(a)–(g)].’

It was argued by the Administrator that notwithstanding the position under English law in relation to *ipso facto* clauses, as set out above, the Court could prevent Fibria from relying on Clause 28 as this would be appropriate relief which was justified in all the circumstances. The effect of this argument was that the Court was said to have the power to apply provisions of foreign law despite such relief not being available under English law.

Morgan J accepted that the phrase ‘any appropriate relief’ was not cut down by the heads of relief specified in paragraphs (a)–(g) of article 21(1) and therefore could include the power to grant relief which it would not be able to grant in a domestic insolvency. Despite accepting the potential width of the phrase, Morgan J raised concern with the fact that the significant relief

sought in the present case was not referred to in the list (especially in light of article 21(1)(g) which deliberately limits relief under that sub-paragraph to relief which would be available to a British insolvency office holder under the law of Great Britain). In particular, at paragraph 79 Morgan J noted that ‘whilst some of these examples [of relief that could be order] are more fanciful than others, they do indicate that the administrator’s submissions result in the English court having the widest possible power to do whatever it thinks fit, whether its order is in accordance with the law of the foreign insolvency proceedings or not’.

Aside from the concerns with a literal interpretation of Article 21, as set out above, Morgan J found that the working group reports, relating to the preparation of the Model Law, did not support the Administrator’s submissions. Article 2 of CBIR provides that, for the purpose of ascertaining the meaning and effect of the CBIR, the court may consider certain documents in particular the working group reports. At paragraph 87, having reviewed the various working group reports, Morgan J stated that ‘it seems improbable that the working group, having deleted (from what is now article 21(1)(g)) a power for the recognising court to apply the law of the foreign proceeding, intended to bring back in such a power under the general wording which refers to “any appropriate relief”.’

Morgan J also referred to the comments of Lord Collins in *Rubin v Eurofinance SA* [2013] 1 AC 236. In particular, Morgan J referred to paragraphs 141–143 of that judgment and relied on the comments of Lord Collins for the proposition that the relief under Article 21 is of a procedural nature and that the article should be given a wide interpretation in relation to matters of procedure. To this extent Morgan J found, at paragraph 111, that the relief sought by the Administrator ‘goes well beyond matters of procedure and affects the substance of the parties’ rights and obligations under the contract’. Morgan J further found that, as a result of the parties having chosen English law to govern the Contract, it was unlikely that they would have expected the English Courts to apply Korean law rather than English law to govern the Contract.

As a result of the above, Morgan J concluded that it was not possible to grant the relief sought by the Administrator. Morgan J considered a series of US and Canadian decisions in which the opposite decision was reached however he rejected the approach taken by them. In particular, he refused to follow the decision of the US Court of Appeals (5th Circuit) in *Re Condor Insurance Ltd* 601 F 3d 319 (2010) in which the US Court appears to support an interpretation of the model law which allows the recognising court to give effect to an order of the court of the foreign proceedings even if the recognising court could not itself have made such an order in its own domestic proceedings. At paragraph 106 Morgan J stated:

I recognise that article 8 of the CBIR directs the Companies Court to have regard to the need to promote uniformity in the application of the Model Law. However, I have concerns about applying the decision in *In re Condor Insurance Ltd* to article 21 of the CBIR for two separate reasons. The first is that, with respect to the judges in that case, I do not think that their description of the various reports of the working group on the Model Law was accurate. Secondly, their reasoning relied on the position which pertained under section 304 of the former US Bankruptcy Code before the implementation of the Model Law. I can see that if the position under section 304 of the former Code was that the US court could grant “any appropriate relief” and that it had been established that those words allowed the US court to apply the law of the foreign proceedings, then the same words should have the same effect in section 1521 of the Bankruptcy Code, which implemented the Model Law. However, there is no

comparable legislative history in Great Britain and it is open to me to conclude that the United States have implemented the Model Law in a way which is not identical to the way in which it has been implemented in Great Britain.’

## Conclusion

The effect of Morgan J’s decision is that it would appear that the English Courts are not willing to use the Model Law to apply substantive provisions of foreign law. This approach has set the English Courts on a different track to their US and Canadian counterparts. To this extent the English Courts appear to be taking a step back from fully embracing modified universalism. Only time will tell whether the English Courts will continue down this road or whether future decisions will explain away the decision of Morgan J and adopt an approach closer to those followed by other Model Law countries.

## CASE REVIEW SECTION

### *Apcoa Parking Holdings GmbH & Ors* [2014] EWHC 3849 (Ch)

Charlotte Cooke, Barrister, South Square, and Crispin Daly, Associate, Proskauer Rose (UK) LLP, London, UK

#### Introduction

An important decision on a cross border restructuring, *Apcoa Parking Holdings GmbH & Ors* [2014] EWHC 3849 (Ch) is notable for there being opposition to proposed schemes of arrangement at both the convening and sanction hearings. In the face of such opposition, the Court had to look in some detail at certain aspects of the proposed schemes, exploring some of the boundaries of the court's jurisdiction to sanction schemes of arrangement in the process.

The Apcoa group is a leading car park operator, with operations across Europe and this was not the first time the group had utilised schemes of arrangement. Earlier in 2014, in *Apcoa Parking Holdings GmbH & Ors* [2014] EWHC 997 (Ch), the court sanctioned schemes of arrangement in respect of nine Apcoa group companies, with schemes of arrangement being used on that occasion to extend the maturity of senior facilities, without the need to obtain the unanimous consent of lenders. Seven of the nine companies were not incorporated in England and did not have their centre of main interests in the jurisdiction. That being the case, the first Apcoa judgment is in itself interesting in that, in order to establish a sufficient connection with England to found the court's jurisdiction to sanction a scheme, governing law and jurisdiction clauses were amended to refer to English law and the English courts. The court accepted this constituted a sufficient connection, though, on that occasion, the schemes were not opposed.

The original schemes of arrangement having been sanctioned, the Apcoa group companies endeavoured to agree a debt restructuring with its lenders. As it proved impossible to obtain the consent of all lenders, however, the group again sought to put schemes of arrangement in place.

#### Opposing and supporting parties

As noted above, the schemes were opposed throughout by certain creditors of the group companies, principally FMS WertmanagementAnstalt öffentlichen Rechts ('FMS'), operating under the supervision and control of an agency of the German Government. Centerbridge Partners ('Centerbridge'), the largest creditor of the

Apcoa group, also appeared at both stages of the court process in support of the schemes.

Hildyard J notes (at [22]) that FMS depicted Centerbridge throughout the proceedings as a 'loan to own culture' who in fact were masterminding the process of the schemes in pursuit of its own commercial objectives. He likewise observed that Centerbridge sought to portray FMS as a 'hold-out creditor', relying on FMS' own website descriptions of itself as an expert on accelerating the unwinding of portfolios, particularly where a borrower is under pressure.

In his judgment, Hildyard J states (at [25]) that neither contestant probably had an interest in the long-term investment in the Apcoa group and that it is instructive to note that class issues needed to be objectively tested by reference to legal rights and legitimate interests. We consider the key aspects of Hildyard J's decision in the case below.

#### The court's role

Hildyard J's judgment covers his decisions at both the convening and sanction hearings.

At the convening hearing Hildyard J explained (at [42]):

'The principal jurisdiction question at the Convening Hearing is normally the identification of the appropriate classes for the purpose of convening meetings to vote upon the scheme proposals; but other matters going to the jurisdiction of the court may also be raised, and it is obviously optimal that any such matters be adjudicated, if possible, since if the court lacks jurisdiction there is no point in any class meetings at all.'

The principles the court must apply when considering whether to sanction a scheme of arrangement are well established and, in this regard, Hildyard J referred to a frequently cited passage from Buckley on the Companies Acts, approved by Plowman J in *Re National Bank Ltd* [1966] 1 WLR 819, 829:

'In exercising its power of sanction the court will see, first, that the provisions of the statute have been complied with, second, that the class was fairly represented by those who attended the meeting and that



the statutory majority were acting bona fide and are not coercing the minority in order to promote interests adverse to those of the class whom they purport to represent and thirdly, that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve. The court does not sit merely to see that the majority are acting bona fide and thereupon to register the decision of the meeting, but, at the same time, the court will be slow to differ from the meeting, unless either the class has not been properly consulted, or the meeting has not considered the matter with a view to the interests of the class which it is empowered to bind, or some blot is found in the scheme.'

### Sufficient connection to the jurisdiction

The English courts will only sanction a scheme of arrangement proposed by a foreign company if there is a sufficient connection to England. As demonstrated by *Rodenstock GmbH* [2011] EWHC 1104, a sufficient connection can exist where the rights of scheme creditors are governed by English law and they have submitted to the jurisdiction of the English courts.

As noted above, in this case governing law and jurisdiction clauses were amended to refer to English law and the English courts (having previously referred to German law and the courts of Frankfurt), such amendments only requiring the consent of lenders representing two thirds of the principal amount of the debt. In the earlier Apcoa case, the court held that this constituted a sufficient connection between the scheme companies and England for the English court to have jurisdiction. In the more recent case, the court reached the same conclusion, for the same reasons, notwithstanding FMS' argument that the court did not have jurisdiction to sanction the schemes. The Judge noted, in particular, in this regard that such amendments were permitted and, indeed, there was evidence that the amendments were effective as a matter of German law. Further, the purpose of the amendments had been explained at the time creditor consent was sought and no creditors had sought to challenge the amendments.

### Class issues

The test for identifying classes is well established, Hildyard J on this point citing J (at [47]) Chadwick LJ's statement in *Re Hawk Insurance Co Ltd* [2001] EWCA Civ 241 that a class 'must be confined to those persons whose rights are not so dissimilar as to make it impossible for them to consult together with a view to their common interest', going on to explain the starting point is to identify the differences in legal rights as against the company, not interests, and then to determine whether,

if there are differences in rights, they are such as to make impossible sensible discussion with a view to the common interest of all concerned (citing *Re Telewest Communications Plc (No 1)* [2005] 1 BCLC 752 at [19] in this regard).

Back in 2013 Apcoa had liquidity issues, but could not obtain the unanimous consent required in order to put in place a new super-senior facility. Apcoa therefore instead entered into a new unsecured facility, with certain senior lenders agreeing to turn over certain recoveries under the senior facilities to the new lenders. At the convening hearing FMS argued that those who had taken part in the turnover agreement should be in a different class to those who had not done so. Hildyard J, however, disagreed; the turnover arrangement did not substantively change the rights of the lenders who had taken part in that arrangement as against the Apcoa companies themselves. Moreover, in any event, any value that might pass under the turnover arrangement was insignificant compared with the senior and subordinated facilities, such that the creditors could, he held, 'unite in a common cause' (at [117]).

### New obligations

The proposed schemes of arrangement involved a change in the bank issuing a guarantee facility, with provisions for the new bank to be indemnified by the lenders that participated in the original guarantee facility. FMS objected to such new obligations being imposed. Ultimately it was not, however, necessary for the Judge to decide this issue as the schemes were amended such the taking on of the new obligations was not mandatory.

It is worth noting for future cases though that the Judge did express concerns in this regard, commenting (at [164]) that the imposition of a new obligation to third parties is 'very different from the release in whole or in part of an obligation to such third parties.' He went on to say that, more generally, he was not persuaded that obligations may be imposed under a scheme of arrangement as the jurisdiction insofar as creditors' schemes are concerned appears likely to exist for the purpose of varying the rights of creditors in their capacity as such, rather than imposing new obligations on creditors. He was, however, careful to note (at [167]) that he did not wish to cast doubt on mere extensions or the rolling over of existing facilities involving no new contract or more extensive obligations, such as may be the case in a revolving credit facility.

### Class manipulation

FMS submitted that, by terminating the original turnover agreement and entering into a new turnover agreement without binding the Apcoa companies

(thereby robbing the new agreement of any real meaning), the parties to the new turnover agreement were cynically manipulating the classes to force FMS and other dissenting creditors to vote in the same class. FMS pleaded that this amounted to a licence to cram down dissenters.

Hildyard J accepted generally that the court needed to be alive to the prospect of class manipulation in order to avoid gerrymandering, but considered that the authorities which were cited in relation to this issue were off-point. He considered that the answer to the issue had already been addressed in his judgment on the class composition issues (as summarised above).

### Non-representative vote

Hildyard J turned next to the issue of whether the approval of the schemes at the class meetings amounted to a reliable indication of commercial soundness. He identified and dealt with three principal requirements of which the first, that the provisions of the relevant statute have been complied with and the requisite majorities achieved, he deemed satisfied.

In relation to the second requirement, that each class was fairly represented at the meeting and that the minority was not coerced by a majority to advance their own interests, the judge observed that the meetings were held on a 100% turnout and that the majorities in favour of the proposals were substantial (86.9 – 97.3%). He added that each member of each relevant class is treated under the schemes in exactly the same way as every other member of that relevant class, with identical rights against the scheme companies both pre and post scheme. Furthermore he stated that sophisticated commercial parties present and voting are recognised by the courts to be in the best position to assess the commercial merits of the scheme.

FMS contended that the economic position of the consenting lenders (in having effectively subordinated their rights under a lockup agreement) was so different from the dissenters (who had not so divested themselves of their rights) as to fail to represent the true interests of the class as a whole and should not therefore be binding on the class. This could be seen as an alternative to the class composition argument and Hildyard J dismissed it in much the same way, noting the similarity of interests of both consenters and dissenters in avoid the Apcoa group's insolvency and the comparatively minor value of the turnover obligations on which FMS exclusively focussed.

The third requirement, 'that the arrangement is such as an intelligent and honest man, a member of the class concerned and acting in respect of his interest, might reasonably approve' prompted Hildyard J to hold that all scheme creditors were experienced commercial parties and there was credible evidence that they had acted in a rational and reasonable manner,

as would an honest intelligent member of the classes. He noted that the consenting lenders, who had effectively subordinated themselves, had done so to secure new monies urgently required by Apoca in November 2013. This position was in contrast to that of FMS, who, whilst maintaining that the threat of insolvency was contrived, refused to share the burden of further advances of money, whilst benefitting from the avoidance of insolvency.

Hildyard J observed that FMS' primary motivation for refusing to facilitate the injection of new money was disapproval of Centerbridge's 'loan to own' strategy and added that, it was difficult not to conclude that FMS had sought to use the circumstances as leverage to seek unequal treatment of its own debt. Such a result would have been obviously unfair in favour of FMS.

### German law intercreditor agreement

As part of the restructuring proposals relating to the new facility, the existing German law intercreditor-agreement ('ICA') was due to be terminated and replaced by a new English law inter-creditor agreement with new priorities set out therein. FMS submitted that the schemes should not be sanctioned as the release of security envisaged would result in a breach of German law. Expert evidence was adduced to show that:

FMS submitted the following points of German law to support this argument:

1. As a matter of construction, the obligations of the ICA would continue, even after discharge;
2. The ICA (or the existing senior facility agreement ('SFA'), or a combination) created a civil law partnership (*Gesellschaft bürgerlichen Rechts* – 'GBR') between all existing senior facility lenders;
3. A GBR if in existence would create a conflict for SFA lenders who were also new facility agreement lenders who would be unable to vote on the proposals;
4. Purported instruction to release security under the schemes would not be recognised by the German court.

Hildyard J also heard expert evidence on the point from the scheme companies, who contested each of these four contentions. It was common ground that the English court did not need to finally determine the question of German law in order to sanction the schemes, but Hildyard J was clear that he needed to satisfy himself that such sanction would not constitute or necessarily result in a breach of German law.

The judge found that, as with English law, under German law the intentions of the parties would be examined. He found that there was insufficient evidence that the ICA would be of relevance of the release of

security and that, this point aside: (i) there was no real evidence that a GBR was intended by the parties or that one should be imposed unless expressly excluded; (ii) it is the SFA rather than the ICA which governs the relevant relationships regarding security and the SFA's governing law was agreed to have been changed to English law; and (iii) he was persuaded that the relevant provisions of German law in relation to recognition of the schemes would not be engaged.

He concluded that he was satisfied that the German law arguments of FMS did not provide a sufficient basis to prevent the sanction of the schemes.

### **Recognition and enforcement**

As is always the case in the context of a cross border scheme of arrangement, Hildyard J needed to consider issues of recognition and enforcement, but he could see no reason to doubt that the scheme would be recognised and enforced in the relevant EU jurisdictions

and that the court, in sanctioning the proposed schemes, would not be acting in vain. Relevant foreign law experts had concluded that the local court in the applicable jurisdiction would recognise and give effect to the schemes.

### **Conclusion**

In view of his conclusions on all the issues discussed above, Hildyard J sanctioned the Apcoa schemes of arrangement.

The impact of the case, however, extends far beyond Apcoa's creditors. The case, being heavily contested, has given the court the opportunity to explore the boundaries of its jurisdiction to sanction schemes of arrangement. Though a flexible way of achieving restructurings, schemes plainly have limits and this case addresses important issues in that regard and as such will be relevant to both cross border and domestic future schemes of arrangement.

## Reform to the European Insolvency Regulation

Robert Amey, Barrister, South Square, London, UK

### Introduction

Following two years of negotiation and consultation, the European Council and the European Parliament have finally reached a 'political agreement' on the proposed amendment to the European Insolvency Regulation. On 12 March 2015, the European Council adopted its first 'reading position'. The new regulation should be enacted by summer 2015, to come into force in summer 2017.

The explanatory memorandum accompanying the proposed changes highlighted five difficulties with the existing regime:

- The existing regulation does not cover many types of proceedings, such as pre-insolvency restructurings and debtor-in-possession proceedings, despite such proceedings existing in many member states and often being highly effective ways of rescuing a business.
- Determining a debtor's centre of main interests (COMI) is sometimes difficult, and the existing regulation does too little to combat abusive forum-shopping.
- The opening of secondary proceedings can hamper the efficient administration of the debtor's estate. Moreover, secondary proceedings currently have to be winding-up proceedings, which precludes a rescue of the business.
- There is currently no EU-wide register of insolvency proceedings, making it difficult for small businesses and courts in other member states to know when proceedings have been commenced.
- The current regulation contains no specific rules dealing with the insolvency of corporate groups with entities in different member states.

The proposed changes aim to deal with each of these five difficulties.

### Types of proceedings covered

The new regulation has a much wider definition of insolvency proceedings, covering proceedings 'for the purpose of rescue, adjustment of debt, reorganisation or liquidation'. Reflecting this broadening of scope, the

new draft now refers to an 'insolvency practitioner' rather than a liquidator. The proceedings must, however, be public, collective, and based on a law relating to insolvency. The proceedings must also fit into one of three categories:

- (a) the debtor must be totally or partially divested of his assets and an insolvency practitioner (IP) appointed;
- (b) the assets and affairs of the debtor must be subject to the control or supervision of the court; or
- (c) there must be a temporary stay of individual enforcement proceedings granted by a court or by operation of law in order to allow negotiations between the debtor and his creditors.

There was concern that Schemes of Arrangement under the UK Companies Act 2006 might be brought within the new regulation, which would mean that proceedings could only be opened if the debtor's COMI was within the jurisdiction. Schemes of Arrangement, of course, are available under general company law to entities which are not in financial difficulty, although one of their most powerful (and controversial) applications is to restructure the distressed debt of foreign companies which would not be liable to winding up in England. As is the case under the existing regulation, the requirement for insolvency proceedings to be based on a law relating to insolvency in the proposal will ensure that Schemes of Arrangement fall outside the scope of the new regulation and will instead be recognised throughout the EU under the Judgments Regulation.

The agreed text provides that a proceeding listed in Annex A cannot be challenged on the basis that it does not fall within the definition of insolvency proceedings. Although the statutory definition of insolvency proceedings has been loosened, there are no stricter controls over the types of proceedings to be listed in Annex A. The proposal does, however, introduce a procedure by which the Commission scrutinises whether a national insolvency procedure notified actually fulfils the conditions of the revised definition.

Company Voluntary Arrangements (CVAs) are currently included in Annex A. This is so, even though there may not be a divestment of assets under a CVA, the assets and affairs of the debtor will not usually be subject to control or supervision by a court and there

is no statutory provision for a temporary stay of enforcement action to enable negotiations to take place (although the court has a discretion under general law to impose a stay).

## COMI

Thankfully, the agreed text accepts the difference between good and bad forum-shopping. The recitals refer to debtors 'seeking to obtain a more favourable legal position to the detriment of the general body of creditors' and the desirability of 'safeguards aimed at preventing fraudulent or abusive forum shopping'. The European Parliament had previously sought to prevent debtors changing their COMI by imposing an arbitrary time limit on COMI shifts. A sensible compromise has been reached, to the effect that the usual presumption of the COMI being the place of registered office only applies if the registered office has not moved to another member state less than three months prior to the request for the opening of insolvency proceedings. Since this presumption is very rarely relied upon in COMI-shifting cases anyway (since moving a registered office is normally much more difficult than simply moving the business's administrative function) this change is likely to have little effect in practice.

There is also a new presumption in respect of individuals exercising an independent business or professional activity. For the first time, it will be presumed that the individual's principal place of business will be his COMI, and as with bodies corporate, the presumption will only apply where the COMI has not moved to a different member state within a period of three months prior to the request for the opening of insolvency proceedings. In addition, a presumption will apply in the case of individuals not exercising an independent business or professional activity based on the individual's habitual residence. Here, however, there has been a greater fear of so-called 'bankruptcy tourism', and so the presumption will not apply if the habitual residence has moved to another member state within a period of six months prior to the request for the opening of proceedings.

It has long been the practice of the English courts, at the commencement of proceedings, to examine of their own motion whether a debtor's COMI is in England, and to allow, relatively easily, creditors to challenge the opening of proceedings on the ground of jurisdiction. This has not always been the case in other member states. The new regulation expressly obliges national courts (or IPs, where proceedings are opened without a court order) to examine whether the COMI is in their jurisdiction, and to allow any debtor or creditor to challenge the opening of main proceedings on the grounds of lack of international jurisdiction. Furthermore, the practice of the English bankruptcy registrars in requiring further evidence on COMI and notice to creditors to

give them an opportunity to object in dubious cases is expressly adopted in the new recital 31.

## Main proceedings and secondary proceedings

When the new regulation comes into force, a court seised with a request to open secondary proceedings will be obliged to hear the IP in the main proceedings prior to taking its decision. This will ensure that the court considering opening secondary proceedings is fully aware of any rescue or reorganisation options and is properly able to assess the consequences of the opening of secondary proceedings. The IP in the main proceedings will also have the right to challenge the opening of secondary proceedings.

In the *Collins & Aikman*, *MG Rover* and *Nortel* cases, the English court pioneered a mechanism which has become known as the 'virtual' or 'synthetic' secondary. Instead of secondary proceedings being opened in another jurisdiction for the purpose of distributing assets in that jurisdiction according to local rules of priority, the IP in the main proceeding undertakes to deal with any assets in the other jurisdiction in accordance with that jurisdiction's law of distribution. Synthetic secondaries are currently unavailable under the law of many member states, but will be introduced in the new regulation.

The new regulation contains another notable provision to prevent proceedings unnecessarily being brought in an inconvenient forum. Existing ECJ jurisprudence provides that the place where insolvency proceedings are pending has exclusive jurisdiction in relation to insolvency-related claims, such as avoidance actions (see *Seagon* [2009] 1 WLR 2168). This rule will be codified in the new regulation, but an important exception will be added. If there is a related civil or commercial claim which is not within the scope of the insolvency proceedings themselves but could usefully be brought together with an insolvency remedy, both claims can be brought in the defendant's domicile instead of the insolvency claim having to be brought in the place where the insolvency proceedings are pending.

Another complication which has been cured by the new draft is the problem which arises when a main proceeding is opened in respect of a company in a place other than the jurisdiction of incorporation, and secondary proceedings in the jurisdiction of incorporation then dissolve the company. The new draft provides that the debtor will be kept alive in such circumstances, to avoid a situation where the IP in the main proceeding is left with a non-existent debtor.

## Publicity of insolvency proceedings and lodging of claims

The new regulation provides for information relating to insolvency proceedings to be published in an electronic

register available to the public free of charge via the internet. The information will include the court opening the insolvency proceedings, the date of opening and closing of proceedings, the type of proceedings, the debtor, the IP appointed, the decision opening proceedings, the decision appointing the IP and the deadline for lodging claims. The obligation to publish this information will be limited to companies and self-employed persons, but not consumers. Information from national registers will be compiled in a single register which will be accessed via the European e-justice portal.

The proposal also provides help for creditors lodging claims in another member state, especially individuals and SMEs, which typically find it very onerous to prove their comparatively small debts in another jurisdiction. First, two standard forms will be introduced by way of implementing act, one for the notice to be sent to creditors and the other for the lodging of claims. These will be available in all official languages of the EU. Secondly, foreign creditors will have at least 45 days following publication of the notice of the opening of proceedings in the insolvency register to lodge their claims (time limits under the laws of some member states are currently much shorter than this). Thirdly, there will be no requirement to be legally represented in the foreign proceedings.

## Groups

One of the most interesting changes in the proposed text is the part dealing with the insolvency of members of a group of companies. The new regulation will introduce an obligation to coordinate insolvency proceedings relating to different members of the same group by obliging the IPs and the courts involved to cooperate with each other. IPs will be required to exchange relevant information and cooperate in the elaboration of a rescue or reorganisation plan where appropriate. Courts will be required to cooperate, in particular, by exchanging information, coordinating, where appropriate, the appointment of IPs who can cooperate with each other, and approving protocols put before them by IPs.

Each IP will have standing in proceedings concerning another member of the same group. In particular, they will have a right to be heard in these other proceedings, to attend creditors' meetings, to request a stay and to propose a reorganisation plan in a way which would enable the relevant creditors' committee or court to consider it.

## Conclusion

There have been mercifully few concessions to the politically-driven demands of the European Parliament, and the text remains largely that of the Commission and Council, guided by the extensive data collected from consultations with experts, and research by a consortium of universities and independent consultants. The new definition of insolvency proceedings is to be welcomed, ensuring that more flexible restructuring proceedings will be effective throughout Europe, without damaging the success of UK Schemes of Arrangement, which will continue to be effective under the Judgments Regulation instead.

The changes to the rules on COMI are unlikely to make much difference to proceedings in England, where the court already scrutinises insolvencies with a foreign connection to ensure that the English court has jurisdiction. The new regulation will, however, ensure that other EU member states follow suit. The provisions for synthetic secondaries will have the same effect.

The new rules for publicity and lodging of claims should make life easier for individuals and SMEs with small debts, who currently face real difficulty proving in a foreign insolvency. It remains to be seen how onerous this will be on officeholders though. Similarly, the new provisions for group insolvencies appear promising on paper, but it is impossible to know at this stage how useful they will be in practice. There will inevitably be some additional cost, and if local IPs are able simply to opt out of the group regime then its utility will be limited.

## CASE REVIEW SECTION

### *Stephen John Akers v Samba Financial Group* [2014] EWCA Civ 1516; [2015] 2 WLR 1281

Andrew Shaw, Barrister, South Square, London, UK

#### Introduction

In *Stephen John Akers v Samba Financial Group* [2014] EWCA Civ 1516, the joint official liquidators ('the JOLs') of Saad Investments Company Limited ('SICL') appealed against a decision of the Chancellor to stay avoidance proceedings under section 127 of the Insolvency Act 1986 on the ground that the courts of the Saudi Arabia were the more appropriate forum for such a claim. The avoidance proceedings related to various transfers of shares by Maan Al-Sanea to the Samba Financial Group ('Samba') after the presentation of winding up petition against SICL in the Cayman Islands. The JOLs maintained that Mr Al-Sanea held the shares on trust for SICL and so the transfers to Samba were void.

The Chancellor held that Saudi Arabian or Bahraini law governed each of the relevant trusts. Key to the Chancellor's decision was the applicability and effect of the Hague Convention on the Law Applicable to Trusts and their Recognition ('the Hague Convention'), and in particular Article 4. The Court of Appeal considered that Article 4 of the Hague Convention had a narrower scope than that contended by Samba and consequently, it was arguable that the trusts were governed by Cayman Islands law. Accordingly, the Court of Appeal lifted the stay imposed by the Chancellor which stay, as Lord Justice Vos pointed out, had effectively disposed of the JOLs avoidance claim because there was no equivalent action in Saudi Arabia.

#### Factual background

The shares in question ('the Shares') were in a number of Saudi Arabian banks, of which Samba was one. The Shares had all originally been registered in Mr Al-Sanea's name. It was undisputed that SICL had bought the Shares from Mr Al-Sanea in six transactions between 17 December 2002 and 16 October 2008. In order to comply with certain requirements of Saudi Arabian law, under which the Shares could not be held by a foreign entity, in each instance Mr Al-Sanea was to hold the Shares on trust as nominee for SICL. The first two transactions contained choice of law clauses

that explicitly applied Bahraini and Saudi Arabian law respectively. The declarations of trust arising out of the latter transactions were executed separately from the other transaction documents and did not contain explicit choice of law clauses. On 16 September 2009, Mr Al-Sanea transferred the Shares to Samba in consideration for the discharge of his indebtedness to Samba.

#### The Hague Convention

The Hague Convention is given the force of law in England by section 1 of the Recognition of Trusts Act 1987 ('the RTA'). The relevant provisions of the Hague Convention are as follows:

##### Article 4

The Convention does not apply to preliminary issues relating to the validity of wills or of other acts by virtue of which assets are transferred to the trustee.

##### Article 5

The Convention does not apply to the extent that the law specified by Chapter II does not provide for trusts or the category of trusts involved.

#### Chapter II Applicable Law

##### Article 6

A trust shall be governed by the law chosen by the settlor. The choice must be express or be implied in the terms of the instrument creating or the writing evidencing the trust, interpreted, if necessary, in the light of the circumstances of the case.

Where the law chosen under the previous paragraph does not provide for trusts or the category of trust involved, the choice shall not be effective and the law specified in Article 7 shall apply.

##### Article 7

Where no applicable law has been chosen, a trust shall be governed by the law with which it is most closely connected.

In ascertaining the law with which a trust is most closely connected reference shall be made in particular to

- (a) the place of administration of the trust designated by the settlor;
- (b) the situs of the assets of the trust;
- (c) the place of residence or business of the trustee;
- (d) the objects of the trust and the places where they are to be fulfilled.

...

#### Chapter IV General Clauses

##### Article 15

The Convention does not prevent the application of provisions of the law designated by the conflicts rules of the forum, in so far as those provisions cannot be derogated from by voluntary act, relating in particular to the following matters –

- (a) the protection of minors and incapable parties;
- (b) the personal and proprietary effects of marriage;
- (c) succession rights, testate and intestate, especially the indefeasible shares of spouses and relatives;
- (d) the transfer of title to property and security interests in property;
- (e) the protection of creditors in matters of insolvency;
- (f) the protection, in other respects, of third parties acting in good faith.

If recognition of a trust is prevented by application of the preceding paragraph, the court shall try to give effect to the objects of the trust by other means.

### The Chancellor's decision

The JOLs asserted that SICL had a beneficial interest in the Shares, under trusts governed by Cayman Islands law, at the time of their transfer to Samba by Mr Al-Sanea. The Chancellor considered that, as all of the Shares were in companies incorporated in Saudi Arabia, at common law the ownership of the Shares was governed by Saudi Arabian law. Section 1(3) of the RTA provides,

‘In accordance with Articles 15 and 16 such provisions of the law as are there mentioned shall, to the extent there specified, apply to the exclusion of the other provisions of the Convention.’

The transfer of the beneficial interest in the Shares to SICL by Mr Al-Sanea fell within Article 15(d) of the

Hague Convention. Thus Saudi Arabian law applied to the six transactions.

The Chancellor further considered that even if the declarations of trust by Mr Al-Sanea resulted in the creation, as opposed to transfer, of a beneficial interest in the shares, the result would be the same by virtue of Articles 6 to 8 of the Hague Convention. While he was not prepared to reach a firm conclusion whether an express or implied choice of law had been made for the trusts, the Chancellor took the view that under Article 7, the governing law of the relevant transactions was Saudi Arabian law. On this basis, the JOLs' avoidance action would fail because Saudi Arabian law did not recognize a division between legal and beneficial ownership and so SICL did not have a proprietary interest in the shares at the time of the transfer to Samba. The Chancellor also held that if he had found that it was reasonably arguable that the governing law of the trusts was the law of the Cayman Islands, he would have refused a stay.

### The appeal

The principal issue on appeal was whether Article 4 of the Hague Convention applied to the declarations of trust by Mr Al-Sanea, and so excluded the other Hague Convention provisions. Samba contended that even if it were arguable that Cayman Islands law governed the trusts settled by Mr Al-Sanea, the effect of Article 4 was that the prior question of whether an equitable interest in assets may be alienated was governed by the *lex situs* of the trust property and not the law governing in the trust. In the case of the Shares, the *lex situs* was Saudi Arabian law.

The JOLs' argued that Article 4 only applied to the validity of the transfer of assets to the trustee and that any subsequent alienation of the beneficial interest in those assets by the trustee was governed by the applicable law of the trust as identified by the Hague Convention.

The Court of Appeal identified the critical question was the stage at which the provisions of the Hague Convention 'kicked in'. In examining this issue, it considered the decision in *Joint Administrators of Rangers Football Club plc* 2012 SLT 599, which was the only recent authority on the effect of Article 4. In this case Lord Hodge had to determine the effect of agreements between Rangers Football Club and a ticket agency which were governed by English law. By these agreements, the Club had forward sold tickets to the ticket agency and had agreed to act as the ticket agency's agent in selling these tickets. Under English law, the effect of the agreements was to give the ticket agency a proprietary interest but Lord Hodge held that under Scottish law, such proprietary rights were governed by the *lex situs* not the governing law of a trust, as



specified by Articles 6 to 8 of the Hague Convention. He concluded in relation to Article 4 that:

'I am therefore persuaded that the Recognition of Trusts Act 1987 does not have the effect of making the law chosen by the settlor the governing law of the steps needed to create the trust. Were it otherwise, the results would be startling as a settlor would be able to alienate property which he could not dispose of under the *lex situs*.'

Although at first blush, this would appear to support Samba's position, the Court of Appeal reached a different conclusion. Lord Justice Vos examined various academic views on the operation of Article 4, including the *travaux préparatoires* of the Hague Convention, which consist of a report by Professor Alfred E von Overbeck. He concluded that Article 4 was concerned with 'preliminary issues' that is acts by which assets are transferred to the trustee before any declaration of trust. On a purposive construction, the *lex situs* would apply to any transfer of assets to the trustee. Since a declaration of trust did not involve any such transfer, it would be governed by the governing law of the trust as specified by the Hague Convention. As Mr Al-Sanea already owned the Shares, the alienation of his beneficial interests in the Shares could not be described as, 'acts by virtue of which assets are transferred to the trustee.' The JOLs position was therefore the correct one.

This conclusion was consistent with the decision of Lord Hodge in the Rangers case, because the capacity of Rangers to alienate future receipts was a preliminary act necessary to constitute the trust argued for by the ticket agency. Article 4 therefore applied so that Scottish law, which prohibited the alienation of future property, governed the transfer.

There were various other issues considered; in particular the question of the actual governing law of the trusts as specified by the Hague Convention. The Court of Appeal held that it was inappropriate to decide these on a stay application. Its finding on the effect of Article 4 was thus determinative of the appeal.

## Conclusion

The Court of Appeal's decision provides valuable guidance on the law to be applied in determining how assets are held and will be of particular assistance to office-holders dealing with complicated cross-border insolvencies. However, it might not be the final word on the effect of Article 4. Permission to appeal has been granted to Samba by the Supreme Court, and the case is due to be heard in April 2016.

### *Re Lehman Brothers International (Europe) (in administration)* [2015] EWCA Civ 485

Charlotte Cooke, Barrister, South Square, London, UK

#### Introduction

Following the collapse of Lehman Brothers in September 2008, it now turns out that Lehman Brothers' main trading company in Europe, Lehman Brothers International (Europe) (in administration) ('LBIE') is able to pay the proved debts of all external creditors in full. This has given rise to a number of novel issues as to the distribution of the surplus, particularly given that, somewhat unusually, LBIE is an unlimited company (its members being LB Holdings Intermediate 2 Limited ('LBHI2') and Lehman Brothers Limited ('LBL')). The administrators of the various Lehman entities sought directions from the Court and a number of these issues have now been addressed by the Court of Appeal in its judgment on the appeal against the first instance decision of David Richards J on the so-called 'waterfall' application.

The administrators' application has come to be known as the 'waterfall' application as it concerns the order of priority of payment out of the assets of a company in a distributing administration or liquidation, the order of priority often being referred to as the 'waterfall'. The order of priority, or waterfall, was summarised by Lord Neuberger in *Re Nortel GmhB* [2013] UKSC 52 as follows:

- (1) Fixed charge creditors
- (2) Expenses of the insolvency proceedings
- (3) Preferential creditors
- (4) Floating charge creditors
- (5) Unsecured provable debts
- (6) Statutory interest
- (7) Non-provable liabilities
- (8) Shareholders

The issues which the Court of Appeal has been called on to address primarily concern what happens to a surplus in the event that unsecured provable debts (i.e. category (5) of Lord Neuberger's list) are paid in full.

#### Subordinated debt

The first issue raised in the appeal concerns the ranking in the administration (and any subsequent liquidation) of the subordinated debt owed by LBIE to LBHI2, that debt being some USD 2.225 billion in respect of which a claim for GBP 1,254,165,598.48 has been lodged in LBIE's administration. In short, the question for the Court of Appeal was whether that debt, which formed part of LBIE's regulatory capital, was subordinated only to unsecured provable debts, or whether it was also subordinated to statutory interest and non-provable liabilities.

The extent of the subordination turns on the interpretation of the relevant provisions of the loan agreement, Clause 5 of which provided:

'(1) Notwithstanding the provisions of paragraph 4, the rights of the Lender in respect of the Subordinated Liabilities are subordinated to the Senior Liabilities and accordingly payment of any amount (whether principal, interest or otherwise) of the Subordinated Liabilities is conditional upon –

...

- (b) the Borrower being "solvent" at the time of, and immediately after, the payment by the Borrower and accordingly no such amount which would otherwise fall due for payment shall be payable except to the extent that the Borrower could make such payment and still be "solvent".
- (2) For the purposes of sub-paragraph (1)(b) above, the Borrower shall be "solvent" if it is able to pay its Liabilities (other than the Subordinated Liabilities) in full disregarding –
  - (a) obligations which are not payable or capable of being established or determined in the Insolvency of the Borrower, and
  - (b) the Excluded Liabilities.'

The Court of Appeal held that the subordinated debt ranked after statutory interest and non-provable liabilities. In so holding the Court rejected an argument that statutory interest fell outside the contractual definition of 'Liabilities' (being 'all present and future sums, liabilities and obligations payable or owing by the

Borrower in the course of the Borrower's insolvency') because the relevant provision of the Insolvency Rules 1986 ('the Rules') merely provided a direction to the administrator which did not result in an amount being 'payable or owing by the Borrower'. The Court of Appeal considered that the relevant provision was not a direction to the office holder *per se*, but is a statutory statement as to how the fund is to be dealt with (see Lewison LJ at [46]). It was further noted that legal title to the assets which constitute the surplus remains vested in the company and interest will be paid out of the company's bank account, such that the interest is in fact paid by the Borrower. Given that the loan agreement was intended for use across many jurisdictions, it was not considered appropriate to adopt the narrow interpretation of the words put forward by the subordinated lenders.

The subordinated lenders had also argued that both statutory interest and non-provable claims could be disregarded because neither species of 'Liability' was 'payable or capable of being established or determined in the Insolvency of the Borrower' (see Clause 5(2) (a)). In this regard, the Court of Appeal did not see any problem insofar as statutory interest is concerned, reasoning that statutory interest is only payable because of section 189 of the Insolvency Act 1986 ('the Act') or rule 2.88 of the Rules and therefore forms part of the insolvency code and is 'payable or capable of being established or determined in the Insolvency of the Borrower' (see Lewison LJ at [57]).

Whilst the position insofar as non-provable claims is concerned was considered to be a little more complex (see Lewison LJ at [60]), the Court of Appeal concluded that non-provable claims, once established outside the insolvency of the Borrower, are nevertheless payable within it. It was emphasised in this regard that a liquidator must discharge the company's liabilities as defined by rule 13.13(4) of the Rules before making a distribution to members, thus doing so in the insolvency itself. The definition of 'liabilities' in rule 13.12(4) expressly includes a liability in tort and, unlike rule 13.12(1), which defines 'debt', does not contain any temporal restriction on when the liability arises.

Notwithstanding these conclusions, the Court of Appeal did consider that the subordinated debt was provable in LBIE's administration as a contingent liability (the contingency being the payment of statutory interest and non-provable liabilities, as well as provable debts) as there was nothing in the contractual documentation which prohibited the creditor from proving for the subordinated debt, nor did the regulatory rules prohibit a subordinated creditor from doing so.

## Currency conversion claims

Many of LBIE's creditors were owed debts payable in foreign currencies. Rule 2.86(1) of the Rules applies in

respect of those debts, providing that 'for the purpose of proving...' the amounts of those debts are to be converted into sterling. A surplus having arisen in LBIE's insolvency, a question, however, arises as to whether, if a creditor receives less in sterling on its proved debt than it would have received in the foreign currency in which its claim was originally denominated, the company is liable to pay the shortfall.

Lewison LJ gave a dissenting judgment on this issue, expressing the view that 'it is impossible to suppose that when rule 2.86(1) and rule 4.91(1) were introduced Parliament intended to split a unitary obligation to pay a sum in a foreign currency into two claims, one of which was provable and the other of which was not' (at [100]).

The majority (Briggs and Moore-Bick LJJ), however, upheld David Richards J's decision that, in the event of a surplus after all unsecured creditors have received 100p in the £ on their proved debts plus statutory interest, creditors are entitled to be paid their currency losses before anything is distributed to shareholders. In contrast to Lewison LJ's view, Briggs LJ concluded that 'there is nothing in the Act or in the rules which prevents the foreign currency creditor reverting to his contractual rights, once the process of proof (and payment of statutory interest) has run its course, if there is then a surplus.' In this regard he noted the following statement of Lord Hoffman in *Wight v Eckhardt Marine G.m.b.H* [2003] UKPC 37:

'The winding up leaves the debts of the creditors untouched. It only affects the way in which they can be enforced ... The winding up does not either create new substantive rights in the creditors or destroy the old ones. Their debts, if they are owing, remain debts throughout. 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.'

## Statutory interest

The Court of Appeal also considered what happens, in the event that the administration of LBIE is immediately followed by liquidation, to an entitlement to statutory interest in respect of the period of the administration which has not been paid before the commencement of the subsequent liquidation.

There seems to be a tension in this regard between rule 2.88(7) of the Rules (which concerns statutory interest in administration) and section 189 of the Act (which concerns statutory interest in liquidation). The former provides:

'Any surplus remaining after payment of the debts proved shall, before being applied for any purpose, be applied in paying interest on those debts in respect of

the periods during which they have been outstanding since the company entered administration’,

And the latter states:

‘Any surplus remaining after the payment of the debts proved in a winding up shall, before being applied for any other purpose, be applied in paying interest on those debts in respect of the periods during which they have been outstanding since the company went into liquidation’.

On this issue, although he was unable to identify a policy reason to justify the conclusion, David Richards J felt compelled to conclude, on the basis of the drafting of the legislation, that there was a lacuna which meant that creditors would not, in this situation, receive any accrued, but unpaid, interest in relation to the period from when the company went into administration until the date on which it went into liquidation (save to the extent it is payable as a non-provable liability). He considered that such an entitlement would not be provable in the liquidation, nor would it be payable as statutory interest in the liquidation (though it would be payable as a non-provable claim).

The Court of Appeal took a different view, concluding that rule 2.88(7) of the Rules contains a statutory instruction to apply any surplus, following payment in full of all provable debts, in paying statutory interest and that this instruction attaches to any surplus passing from an administrator to a liquidator. Lewison LJ preferred not to ‘become bogged down in selecting a suitable private law label by which to describe this statutory instruction’ (at [107]), whereas Briggs LJ favoured a *Quistclose*-type trust analysis.

As the Court of Appeal noted, this is, however, only a partial solution. There will be circumstances where no surplus comes up in the administration to which 2.88(7) of the Rules attaches, but there is a gap between the end of the period in which contractual interest can be proved and the beginning of the period for which statutory interest is payable. A more complete solution would, however, seem to require legislative amendment.

### Extent of contributories’ liability

As noted above, LBIE is, somewhat unusually, an unlimited company. This fact has given rise to further unprecedented issues which the Court of Appeal has addressed. The first of these issues concerns the scope of section 74(1) of the Act, which provides as follows:

‘When a company is wound up, every present and past member is liable to contribute to its assets to any amount sufficient for payment of its debts and liabilities, and the expenses of the winding up, and for the adjustment of the rights of contributories among themselves.’

The issue for the Court of Appeal was whether ‘debts and liabilities’ in this context means only provable debts, or also includes statutory interest and non-provable liabilities.

The Court of Appeal considered that it would be anomalous for section 74(1) to contemplate that a call could be made on members to contribute ‘for the adjustment of the rights of contributories among themselves’ (i.e. category (7) of Lord Neuberger’s list in *Nortel*) but not statutory interest and non-provable claims (i.e. categories (5) and (6) of that list).

It had been argued that a call on members to create a surplus out of which statutory interest might be paid amounts to a ‘boot straps’ position; a surplus might only arise where a call was made and would not otherwise. Briggs LJ did not, however, consider this to be the case. The right to make calls was, he said, itself an asset of the company and, where the aggregation of that right with the other assets of the company disclosed a surplus, the making of the call and the payment by contributories in response to it simply enabled the payment of statutory interest, rather than creating the surplus in the first place.

### Proving in a contributory’s insolvency proceedings

The next issue, whether LBIE, by its administrators, can prove in the administration of LBL (and in the administration of LBHI2 if and when it becomes a distributing administration) in respect of contingent liabilities under section 74(1) of the Act, was described by Lewison LJ (at [122]) as a ‘exceptionally difficult issue’ on which he had changed his mind more than once.

As to the relevant provisions, Rule 13.12(1)(b) of the Rules provides that a ‘debt’ includes ‘any debt or liability to which the company may become subject after that date by reason of any obligation incurred before that date’.

Lord Neuberger in *Nortel* at [77] explained:

‘... at least normally, in order for a company to have incurred a relevant “obligation” under rule 13.12(1)(b), it must have taken, or been subjected to, come step or combination or steps which (a) had some legal effect (such as putting it under some legal duty or into some legal relationship), and which (b) resulted in it being vulnerable to the specific liability in question, such that there would be a real prospect of that liability being incurred. If there two requirements are satisfied, it is also, I think, relevant to consider (c) whether it would be consistent with the regime under which the liability is imposed to conclude that the step or combination of steps gave rise to an obligation under rule 13.12(1)(b).’

Applying this test, the Court of Appeal agreed with David Richards J that LBIE, acting by its administrators,

should be entitled to lodge a proof in respect of section 74(1) liabilities in a distributing administration or a liquidation of LBL or LBHI2.

### The contributory rule

The final issue addressed by the Court of Appeal concerns the contributory rule, which prevents a contributory from recovering anything in a liquidation until he has fully discharged his liability. The question for the Court of Appeal was whether the contributory rule also applies in a liquidation.

The Court of Appeal decided that it would be unjust if a solvent contributory was prevented from ever proving in a distributing administration as, in the absence of a call, there was nothing which he could pay to

free himself from the impact of the contributory rule. In reaching this conclusion the Court rejected the submission that, unless the contributory rule applied in administration, the *pari passu* principle would be undermined; this consequence, it was suggested, could be avoided by putting the company into liquidation.

### Conclusion

On each of these novel issues the Court of Appeal has therefore provided important guidance as to what happens in the event of a surplus in an insolvency. However, this may not be the end of the story. At the time of writing, it remains to be seen whether there will be a further appeal to the Supreme Court.

## CASE REVIEW SECTION

### *C-557/12 Hermann Lutz v Elke Bäuerle*

Robert Amey, Barrister, South Square, London, UK

#### Introduction

In this case, the ECJ considered the interplay between Articles 4 and 13 of the Insolvency Regulation. Article 4 provides that the law applicable to insolvency proceedings shall be the law of the place where those proceedings are opened. This law shall govern all matters, including 'the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.' Article 13 provides, however, that this will not be the case where 'the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and that law does not allow any means of challenging that act in the relevant case.'

#### Facts

Mr Lutz, an Austrian resident, had purchased a car from an Austrian company, ECZ. ECZ turned out to be a fraudulent operation, and did not deliver the car. Mr Lutz therefore obtained judgment against ECZ in Austria in March 2008 for the sum of EUR 9,566 plus interest.

In April 2008, ECZ applied to the German court to open bankruptcy proceedings. While that application was pending, in May 2008 the Austrian court attached the Austrian bank accounts of ECZ by way of enforcement of the March 2008 judgment obtained by Mr Lutz.

Main proceedings were subsequently opened in August 2008 respect of ECZ in Germany. On 10 March 2009 the liquidator wrote to ECZ's Austrian bank giving notice that he reserved the right to challenge, in connection with the insolvency, any payment made in favour of ECZ's creditors. However, on 17 March 2009, ECZ's bank paid Mr Lutz EUR 11,778.48 pursuant to his lien over ECZ's account. Ms Bäuerle was subsequently appointed as liquidator, and in October 2009, she brought an action against Mr Lutz, seeking to set aside the payment to him.

Ms Bäuerle was successful at first instance. Mr Lutz, however, appealed on the basis that his relationship with ECZ was governed by Austrian law, which had a one year limitation period, commencing with the opening of insolvency proceedings. Ms Bäuerle's

application was issued just over a year after the commencement of insolvency proceedings (the relevant period under German law was three years). Mr Lutz therefore argued that Austrian law 'does not allow any means of challenging' the security within the Article 13 sense. Ms Bäuerle argued that Article 13 could not apply where the payment to Mr Lutz was made after her appointment, and that in any event, Austrian law did allow a means of challenging such a payment, but simply would have imposed a procedural time bar in that particular case. The matter eventually reached the German Supreme Court, which referred the matter to the ECJ.

#### The reference

The German Supreme Court asked the following questions:

- '(1) Is Article 13 of Regulation [1346/2000] applicable if the payment challenged by the insolvency administrator of a sum attached before the opening of the insolvency proceedings was made only after the opening of the proceedings?
- '(2) If the reply to the first question is in the affirmative: does the defence under Article 13 of Regulation [1346/2000] also apply to limitation periods or other time-bars relating to actions to set aside transactions under the law which governs the dispute concerning the contested legal transaction (*lex causae*)?
- '(3) If the reply to the second question is in the affirmative: are the relevant procedural requirements for asserting a claim for the purpose of Article 13 of Regulation [1346/2000] also to be determined according to the *lex causae* or by the *lex fori concursus*?'

In view of the importance of the matter, the ECJ heard submissions not only from the parties, but from the European Commission and four member states.

#### Judgment

In answer to the first question, the ECJ held that the Article 13 exception would not generally apply to acts

which took place after the opening of insolvency proceedings. Although the wording of Article 13 did not contain any restriction limiting its scope according to the date on which the detrimental act concerned took place, it should nonetheless be interpreted so that it did not go beyond what was necessary to achieve its objective. That objective was to protect legitimate expectations and the certainty of transactions in other member states. It was not necessary, to achieve that objective, to apply Article 13 to acts which took place after the opening of proceedings.

However, although Mr Lutz was only paid after the commencement of the German proceedings, he was paid pursuant to a lien which had been conferred before the opening of the German proceedings. The ECJ noted that Article 5 of the Insolvency Regulation provides as follows:

- ‘1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets – both specific assets and collections of indefinite assets as a whole which change from time to time – belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.
2. The rights referred to in paragraph 1 shall in particular mean:
  - (a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
  - (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
- ...
4. Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).’

It therefore did not matter that Mr Lutz had only been paid after the commencement of the German proceedings. Ordinarily it would, but Mr Lutz’ security had been conferred before the commencement of proceedings, it was therefore protected under Article 5, and the payment was simply a realisation of that security. The ECJ therefore reasoned that although Article 13 generally only applied to acts which took place before the opening of proceedings, an exception would apply where a payment was made after the opening of proceedings pursuant to security conferred before the opening of proceedings.

The ECJ then went on to consider the second and third questions.

In respect of the second question, the ECJ noted that Article 13 drew no distinction between substantive and procedural provisions and did not contain any way of categorising a provision as either substantive or procedural. It would be wrong to allow national legal systems to determine how to categorise provisions, since this would lead to arbitrary differences based on the legal theories of different member states. Accordingly, it therefore did not matter that the Austrian law time bar could potentially be characterised as procedural rather than substantive: the Regulation simply required that the action brought in Germany must also be capable of being brought in Austria. It follows, according to the ECJ, that the Regulation requires not only that the *lex fori concursus* and the *lex causae* both have a means of challenging the relevant transaction, but that the relevant transaction could in fact be attacked under both systems of law.

Finally, in relation to the third question, the ECJ held that since Article 13 drew no distinction between substantive and procedural provisions (and it would be wrong to allow national courts to draw such a distinction) the relevant procedural requirements for the exercise of an action to set a transaction aside are to be determined according to the *lex causae*.

## Conclusion

The ECJ’s decision in this case is undoubtedly correct. In the Virgós-Schmit Report at para. 137, it is stated (in relation to Article 13) that ‘the act must not be capable of being challenged using either rules on insolvency or general rules of the national law applicable to the act’, and that the formulation:

“‘In the relevant case” means that the act should not be capable of being challenged in fact i.e. after taking into account all the concrete circumstances of the case. It is not sufficient to determine whether it can be challenged in the abstract.’

This is consistent with the commentary to Article 13 contained in Moss, Fletcher & Isaacs, *The EC Regulation on Insolvency Proceedings* (2nd edn) at para. 8.227. There, the learned authors note that ‘the act must actually be capable of being challenged in fact in the particular case and not just as a matter of principle; this is indicated by the reference in Article 13 to “in the relevant case”’. The ECJ’s judgment in Lutz is welcome clarification that the question whether Article 13 applies will not depend on subtle distinctions between procedural and substantive requirements, but will rely on the simple test of whether the relevant detrimental act is actually capable of being challenged both under the *lex causae* and the *lex fori concursus*.

## CASE REVIEW SECTION

# *Olympic Airlines SA Pension and Life Assurance Scheme Trustees v Olympic Airlines SA* [2015] UKSC 27

Matthew Abraham, Barrister, South Square, London, UK

### Introduction

The determination of a person's centre of main interest ('COMI'), for the purpose of Council Regulation (EC) No 1346/2000 (the 'Regulation'), has been before the Courts on various occasions in the context of both corporate and personal insolvency.

The position is different, however, in relation to the determination of whether a company or person has an 'establishment' in England for the purpose of the Regulation. It is this determination that was the focus of the appeal in the present case before the Supreme Court. In particular, the Supreme Court focused on the meaning of 'economic activity' which forms part of the definition of 'establishment' for the purposes of the Regulation.

The clarity provided by the Supreme Court is extremely helpful given the increased number of cross-border insolvency cases involving companies with their COMI in another member state but with operations in England.

### Factual background

Olympic Airlines SA (the 'Company') was a Greek Company with an office in London where the majority of its employees were members of the Company's pension scheme. The pension scheme was called Olympic Airlines SA Pension and Life Assurance Scheme and was operated by trustees (the 'Scheme' and the 'Trustees').

On 2 October 2009, the Company was wound up in Greece and the main liquidation has been in progress there since. According to the rules of the Scheme it must be wound up upon the liquidation of the Company.

Upon the winding up of the Scheme it was ascertained that a deficit of GBP 16 million existed which the Company was bound to make good pursuant to s.75 of the Pensions Act 1995. Due to the size of the deficit it was understood that the Scheme was unlikely to recover much. However, if a winding up order was made against the Company in England, the Scheme would qualify for entry into the Pension Protection Fund under s.127 of the Pensions Act 2004.

As a result of this, on 20 July 2010, the Trustees presented a winding up petition against the Company

in England on the ground that it was unable to meet the liability to the Scheme.

The following five facts were identified by the lower courts and are of importance to the issues before the Supreme Court:

On 28 September 2008, prior to the winding up of the Company, the area manager of the Company was instructed that the Company would cease all commercial operations as of 00.01 on 29 September 2009.

On 17 June 2010, the Greek Liquidator informed the Trustees that the employment of the 27 staff in the UK would be terminated with effect from 14 July 2010. Following that date only the General Manager, Finance and Purchasing Manager and an accounts clerk were retained on short term *ad hoc* contracts.

The General Manager attended the Company's office three or four times a week to deal generally with anything requiring attention (this principally involved instructions and requests from the Greek liquidator).

The Finance and Purchasing Manager arranged the payment of the remaining salaries and general disbursements of the office for example electricity, cleaning etc. He also assisted the Greek liquidators where necessary with financial information about the Company.

The clerk was retained to assist both managers and took instructions from them.

### Legal framework

Pursuant to s.221 of the Insolvency Act 1986 ('IA86'), the English Court has jurisdiction under its domestic law to wind up a foreign company. In circumstances where a company has its centre of main interest ('COMI') in another member state of the EU, the exercise of this power is constrained by the Regulation.

Article 3(1) of the Regulation provides that '[t]he courts of the member state within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings.' Article 3(2) states that '[w]here the centre of a debtor's main interests is situated within the territory of a member state, the courts of another member state shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within



the territory of that other member state. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter member state.'

The definition of 'establishment' for the purpose of secondary insolvency proceedings is defined in Article 2(h) as 'any place of operations where the debtor carries out a non-transitory economic activity with human means and goods.'

## Issue

As set out above, the issue for the Supreme Court to determine was whether the Company had an 'establishment' in England. In this regard, the Court had to determine whether the Company carried out 'economic activity' in England.

## Decisions of the lower courts

At first instance Sir Andrew Morritt considered that to be 'economic' an activity did not have to amount to 'external market activity'. As a result of that, he found that the activities of the Company at the time of the winding up petition constituted 'non-transitory economic activities' for the purpose of the definition of 'establishment' and made the winding up order.

The Court of Appeal (Moore-Bick LJ, Sir Stephen Sedley and Sir Bernard Rix) overruled Sir Andrew Morritt. In summary, they were of the view that the relevant 'economic activity' had to consist of more than the activity involved in winding up a company's affairs. Their Lordships found that the remaining employees were clearly doing no more than assisting the Greek liquidators in the general winding up of the Company.

It is important to note that after the Court of Appeal's judgment there was a change in the statutory provisions relating to the definition of an 'insolvency event' for the purpose of the Pension Act 2004. In particular, the change was to apply only to cases in which insolvency proceedings had been commenced in another member state of the EU in respect of an employer whose COMI was located in that state, and secondary proceedings had been begun in the United Kingdom but had subsequently been set aside for want of jurisdiction. Despite the change in law, for reasons irrelevant to the issue on the appeal, it was still important for the Trustees to seek the winding up of the Company. If the Trustees were successfully the insolvency event would be the date of the winding up order (which was made in 29 May 2012) otherwise under the new law the event would only be deemed to have occurred on 2 October 2014 (5 years after the Greek winding up).

## Judgment

Lord Sumption provided the judgment on behalf of his fellow brethren. His Lordship placed great emphasis on the Virgos-Schmit report (in particular §71 of the Report) and noted at §10 that there was very limited help to be had from the decided cases. This was particularly in light of the fact that most decisions related to the meaning of COMI which is a different test and the fact that decisions on what constitutes 'establishment' can 'rarely be more than illustrative given the fact-sensitive nature of the inquiry'.

Having referred to the decision of the Court of Justice of the European Union in *Interedil Srl v Fallimento Interedil Srl* (Case C-396/09) [2012] Bus LR 1582 and the two English decisions of *Shierson v Vlieland-Boddy* [2005] 1 WLR 3966 and *Re Office Metro Ltd; Trillium (Nelson) Properties Ltd v Office Metro Ltd* [2012] BCC 829 his Lordship concluded that the definition in Article 2(h) must be read as a whole and not broken down into discrete elements.

At §13, his Lordship stated that what was envisaged was a fixed place of business where the activities being carried out include business dealings with third parties and 'not pure acts of internal administration'. In particular, his Lordship made it clear that accessibility to third parties related to the nature of the activities as opposed to whether a company was locatable or identifiable which would exist if the company merely had a 'brass plate on a door'.

At §14, his Lordship accepted that some activities which a company in liquidation might carry on may satisfy the definition for establishment (such as disposing of stock in trade on the market). However, he made it clear that: 'it is clearly not the case that the mere internal administration of [a company's] winding up will qualify. Such activity would not be "exercised on the market"; moreover, if it were enough to establish jurisdiction then the requirement for "economic activities" would add little or nothing to the rest of the definition.'

As a result, of the analysis above the Court found that the Company could not be said to have had an 'establishment' in the UK at the time of the winding up petition. This was especially in light of the fact that the Company had no external business with third parties that was conducted out of the London office.

## Conclusion

The decision of the Supreme Court has provided helpful clarity in relation to the meaning of 'establishment' for the purposes of the Regulation. However, as noted by Lord Sumption, any determination of 'establishment' is heavily fact dependent and to this extent only the broad principles set out by Lord Sumption at §9 – §14 are of assistance for future cases.

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