NOTE

Re: International Insolvency In The New Millennium

Co-ordinating Multi-National Insolvancies and Re-organisations

Brief Paper On "Singer" And "Foreign Representatives"

Introduction

This paper considers how far English law and practice would recognise and assist "foreign representatives" in the sense in which the expression was used in the Singer re-organisation.

In the Singer case, some forty-six debtors, many incorporated in foreign jurisdictions, filed for Chapter 11 in the Southern District of New York. Judge Lifland was faced with the difficulty that it would be necessary to represent the interests of the US debtors in a number of court world-wide, some of which would have difficulty accepting the concept of "debtor in possession". Judge Lifland pioneered a new type of appointment by way of a first day order in appointing Messrs Flaschen and Gitlen as joint "Foreign Representatives" of the debtors. The mandate of these outgoing Foreign Representatives was "… to serve as the official United States Representatives of the Debtors' Estates in other countries and as [the Bankruptcy Court's] emissaries to other courts in order to seek to co-ordinate and harmonise any Relevant Foreign Proceeding". This paper examines how this new concept could be fitted into English law and practice, dealing with the recognition of and judicial assistance for Chapter 11 proceedings.

Concepts

Although both recognition and judicial assistance is sometimes referred to loosely "as recognition", I believe in English law we would favour a more precise usage whereby

"recognition" is confined to giving direct effect to a foreign statute or foreign appointment, whereas "judicial assistance" covers a situation where the foreign law or appointment is not directly recognised, but is indirectly given effect to by means of judicial procedures.

Chapter 11 has no direct effect in England

English law does not recognise a foreign statute as having direct effect in England. Thus, in *Banque Indosuez v Ferromet* [1993] BCLC 112, it was pointed out that the statutory stay created by a US Chapter 11 proceeding did not have any direct effect in England as a matter of English law. On the other hand, the Judge set out the general principle that the English courts would do their utmost to assist the US Bankruptcy Court in the administration of the Chapter 11 proceedings.

Recognition of Appointments

English courts do usually recognise the appointment and authority of a liquidator or trustee appointed by the court of the place of incorporation of a foreign corporate body. That is because English conflict of law regard the question of the identity and powers of a compulsory agent of this kind for a corporation to be a matter for the law of the place of incorporation. In addition, the English courts would probably (but not certainly) recognise the authority of the liquidator or trustee appointed by the US courts if that appointment in turn would be recognised by the courts of the place of incorporation of the corporate body. The rationale for this extension would probably be much the same.

Judicial Assistance

As can be seen by my reference above to the Ferromet case, English courts have no difficulty in principle in giving judicial assistance to a Chapter 11 proceeding, even where there is a debtor in possession and no person is appointed by the court as trustee, examiner or "foreign representative".

The case of *Felixstowe Dock v U.S. Lines* [1989] QB 360 is sometimes cited as an apparent authority to the contrary. In that case a creditor in England had obtained an

interim freezing order on the assets of the US Corporation. The US Corporation went into Chapter 11 and applied to have its assets released so that they could be repatriated to the US and used in the re-organisation. The Judge in England refused to allow this.

The Felixstowe case has sometimes been criticised on the grounds that it takes a narrow nationalistic approach. In reality, the case is best explained on a ground that will be familiar to US practitioners. The Judge in his reasoning regarded the reorganisation as being biased against European creditors and in favour of US creditors. Whether that was or was not a correct view of the facts, the view, if correct, would be a proper reason for a US court, in a converse situation, declining ancillary assistance under Section 304 of the US Bankruptcy Code and therefore it is not a breach of comity if an English declines assistance on similar grounds.

It should also be borne in mind that the Felixstowe case was a decision by a Judge not specialising or indeed normally dealing with insolvency law, whereas the statement in the Ferromet case that the English court will do its utmost to co-operate with US Bankruptcy Courts supervising a Chapter 11 proceeding was made by a Judge who has the highest possible standing in insolvency matters and is now a Judge in the highest appeal court in England. In the Ferromet case the court refused to grant an injunction which would have undermined the statutory stay under the Chapter 11 proceedings.

In accordance with the policy and practice of the English courts, therefore, I would expect the Singer type "Foreign Representatives" to receive judicial assistance in the same or better way than that which is accorded to debtors in possession. I would expect the English courts to do their utmost to co-operate with the Chapter 11 and therefore with the representations made by the Foreign Representatives on behalf of the debtors and the US Court.

Recognition of Appointments

While English law would not recognise the US Bankruptcy Code as having direct effect in England, English law does recognise appointments of liquidators and trustees. It follows logically that English law would recognise the appointment of "Foreign

Representatives" under US law and the powers and functions given to such Foreign Representatives by the US court.

Remedies for Foreign Representatives

The existing precedents of course do not cover this new type of appointment, but I would expect the English courts to proceed by way of analogy.

One well-established remedy is to appoint the Foreign Representative as a "Receiver" of the English court. Such an appointment would not strictly speaking constitute an insolvency proceeding under English law but is part of the general discretionary powers of the English courts. One advantage of this technical position is that such a Receiver would not need to specially authorised as an "insolvency practitioner" under English law. In insolvency proceedings, only such an authorised person can act as liquidator etc. Moreover, such a Receiver would be regarded as an officer of the English court, would have to submit to its jurisdiction, and any interference with him would be a contempt of court. The Receiver would have to act subject to the directions of the English Court.

In *re: Kooperman* [1928] WN 101 the bankrupt was a Russian national resident in France who had submitted to the bankruptcy jurisdiction of the courts of Belgium. The Belgian Curator was appointed by the English court as Receiver of Leasehold Properties in England with authorities to sell them.

In *Alivon v Furnival* {1834) 1 Cr M & R 277 a merchant had become bankrupt under French law. The evidence of French law suggested that the "syndics" who managed the bankrupt's affairs were not assignees of his property but acted as agents for the creditors. The English court permitted them to maintain an action in England despite the fact that they were not assignees of the property of the bankrupt under French law.

In *Macaulay v Guaranty Trust Co. of New York* (1927) 44 TLR 99, Receivers appointed by the Delaware State Court in respect of a Delaware Corporation in proceedings which were an analogous to an English liquidation were allowed to sue in their own names in England.

Accordingly, I would expect the English court to recognise the position of Singer type "foreign representatives" and allow them to act in their own name on behalf of the Chapter 11 debtor despite the fact that they are neither assignees nor trustees, nor indeed liquidators. I suspect that the precise nature of the assistance accorded by the English court will depend on whether there are parallel proceedings here and the nature of the assistance requested. I have no doubt, however, that if the purpose of the assistance which is sought is to further the co-ordination of a multi-jurisdictional insolvency, the English courts will do their utmost to assist and to harmonise the proceedings in different jurisdictions.