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IF WE WERE DOING IT AGAIN: REFLECTIONS ON IMPROVING CHAPTER 11 AND CONTRASTING INTERNATIONAL EXPERIENCES

An Introduction to the Administration procedure in England

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Chapter 11 and International Contrasts

An Introduction to the Administration Procedure in England

This brief introduction is intended as background for the panel discussion on Monday 7 June 2010 at the Tenth Annual International Insolvency Institute Conference in Rome.

Background to legislative change

In the mid to late 1970's a number of countries in the Anglo-Saxon legal family were actively considering insolvency law reform[1]. In 1977 the British government appointed a committee to review insolvency law and practice in England and Wales and make recommendations for reform. The chairman of the committee was Sir Kenneth Cork[2]. The Cork committee reported in 1982. Its report is colloquially known as "the Cork Report"[3]. The Cork Report contained the first comprehensive review of the law of insolvency in England and Wales in more than a century.

The need for a rescue regime in England

The Cork committee was satisfied that in a significant number of cases companies had been forced into bankruptcy[4] and potentially viable businesses capable of being rescued had been closed down for want of a suitable mechanism which could be used in all cases[5].

The Cork Report proposed that there should be introduced a new procedure involving the appointment of an 'administrator' under which the Court could appoint a suitably qualified third-party as a fiduciary to consider the reorganisation of a company and its management with a view to restoring profitability or maintaining employment, to ascertain whether a company of doubtful solvency could be restored to profitability and/or to make proposals for the most profitable realisation of assets for the benefit of creditors and shareholders.

This proposal was, in substance, accepted by the Government and in 1986 the administration procedure came into force. The principal provisions concerning administration are contained in the Insolvency Act 1986, and the Insolvency Rules 1986, both as amended by subsequent primary and secondary legislation. With some important subsequent legislative changes the administration procedure has been in existence for nearly 25 years.

The Cork Report contained no international comparison of the pros and cons of any foreign restructuring or rehabilitation regime. There was no specific discussion of Chapter 11. The Report simply referred, in passing, to new insolvency codes then recently introduced or proposed in the United States, France and the Federal Republic of Germany.

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[1] These included the United States, Canada, Australia and New Zealand.

[2] Sir Kenneth Cork was an accountant and City figure. He was the most well-known insolvency practitioner of his day. The majority of his committee were judges and lawyers.

[3] "Insolvency Law and Practice: Report of the Review Committee June 1982". Cmmd 8558.

[4] Known in England as 'liquidation' or 'winding-up'. A convenient brief description of this procedure can be found in *Re T & N Ltd* [2005] 2BCLC 488, 512, per Mr. Justice David Richards.

[5] Previously this had only been possible where a creditor holding security including 'a floating charge' had been given power to appoint a receiver and manager of the whole property and undertaking of the company.

The fundamentals of administration

Under the administration procedure the administrators are officers of the Court and therefore fiduciaries. They have the express right to seek the directions of the Court. Their statutory duty is to take control and manage the business and assets of the company. They have wide powers to realise assets. The exercise of those powers, and other powers associated with the management of the company's business, are regarded by the Court as matters for the commercial judgment of the administrators rather than as appropriate matters for directions by the Court[6].

Between 1986 and 15 September 2003 an administrator could only be appointed by the Court. Since then, he can be appointed either by the Court or out of Court[7]. Notwithstanding appointment out of Court, the administrator remains a fiduciary who has an express right to seek the directions of the Court.

In 2009 there were 4161 administrations. The most substantial proportion of these will have arisen from out of Court appointments.

Some brief contrasts with Chapter 11

Although UK politicians and the media have at times described the administration procedure as the UK's Chapter 11, it is different in many of its fundamentals[8]. A number of these are mentioned below.

Administration is essentially an out of Court proceeding

Although the Court can give directions or determine points arising during the course of the Administration, the English legislation essentially provides for an out of Court proceeding under the control of a licenced insolvency practitioner, usually an accountant, as a fiduciary. The process is not lawyer-driven. In many administrations, the Court has no substantial involvement at all. It is, culturally, different from the lawyer-driven judge-supervised Chapter 11 proceeding.

There is no debtor in possession concept

The administration procedure does not recognise the concept of a debtor in possession as a fiduciary. One of the essential features of administration is the almost invariable director/management displacement on appointment of the administrator. The integrity and transparency of the administration procedure is designed by the legislation, in large part, to be ensured through third-party professional control of the company and the replacement of existing management.

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[6] *Re T & N Ltd* [2005] 2BCLC 488, 512- 513 discussing the legislation in force pre September 2003.

[7] Including appointment by the company or its directors.

[8] In the first case in the Court of Appeal on the administration procedure, (*Bristol Airport plc v Powdrill* [1990] Ch 744), counsel for the administrators (this author) invited the Court to gain assistance from considering Chapter 11. Whilst emphasising the importance of the administration procedure as a rescue regime, the Court of Appeal declined to do so. A limited comparison between administration and Chapter 11 was undertaken in *Felixstowe Dock Co v US Lines* [1989] QB 360. That case has given rise to controversy, see e.g. *"Judicial Attitudes to Insolvency Law"* Crystal (1998) Company Lawyer vol. 19, 49 at 53.

No specialist bankruptcy judges

No specialist bankruptcy judges are appointed to deal with administrations. Unlike the Chapter 11 regime with its cadre of specialist judges, legal issues concerning administration are dealt with in London and in the provinces by a cadre of Chancery judges who have no necessary bankruptcy expertise. And, save in all but exceptional cases, there is no docket system.

No extra-territorial effect to the automatic stay.

Unlike the position in the United States, the automatic stay which is an essential feature of the administration procedure is not regarded in England as having immediate extra-territorial effect[9]. This has, on occasion, given rise to tension between administrators of a company and the self-same company as debtor in possession in Chapter 11 proceedings[10].

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[9] Cf *Harms Offshore v Bloom* [2009] 2BCLC 473, 478 – 481 per Lord Justice Burnton.

[10] These tensions have invariably been worked out with considerable good sense and tact by the judiciary in England and in the United States.