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Co-Operation between Courts: The Common Law Legacy

by
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Introduction

There has been, in the common law, a gradual progress away from the traditional methods of asserting jurisdiction and their statutory equivalents towards procedures for reciprocal assistance and co-operation, a fact situation replicated in many nations within the Commonwealth. The principles governing assertion of jurisdiction have an old and rich history, some of the earliest cited instances going back to the early 18th century. At an early stage, the result was to promote the pre-eminence of winding up as an institution permitting the collection, liquidation and distribution of assets. The development of statutory equivalents to common-law assertion of jurisdiction did not largely change this position. Nevertheless, the trend towards automatic liquidation that may be seen as arising from the lack of alternative procedures was tempered by the early development of judicial restraint through the principles of ancillary assistance, the case-law revealing that pressure grew on the courts to deal with fact situations consequent on expansion of overseas trade in the Victorian era, largely, but not exclusively between the United Kingdom and the colonies and territories later to become Commonwealth nations. The ancillary assistance rules allowed courts to effectively control the conditions in which they will accede to requests for the opening of insolvency proceedings where there are other courts involved in the management of an insolvency affecting the same or a related debtor. The same principles also allowed courts to effectively create an embryonic system foreshadowing later statutory developments allowing for co-operation between courts and have allowed for the continued development of principles supplementing these statutory provisions.

The move away from statutory jurisdiction of the ancillary type to more complex co-operation measures seems to have been initiated largely because of the perceived inadequacy of submitting a foreign company to domestic jurisdiction without necessarily involving the consent of the jurisdiction of origin. The development of the doctrine of comity, requiring courts to have regard for the decisions given by courts of comparable status and to enforce them, further stimulated progress towards co-operation by inviting courts to make contact with each other and to develop working relationships, so as to be able to ascertain what outcome was feasible within the context of proceedings involving matters of joint concern. Furthermore, the development and expansion of corporate rescue measures meant that ancillary jurisdiction, geared as it was towards the liquidation of assets, was inadequate to deal with the problems of the preservation and continuing exploitation of assets necessary for ensuring the survival of businesses in financial difficulties. In these instances, co-operation was vital to allow corporate rescue measures to have effect. As will be seen below, co-operation measures in the

Commonwealth have a long history. It is the purpose of this article to examine the paradigm represented by the s122 Bankruptcy Act 1914 model in a number of Commonwealth jurisdictions in which this statutory provision has served as the basis of co-operation provisions and to chart the separate fates of the legislative descendants of this provision.

Early History of the Co-Operation Provision

The history of the provision is largely that of the development of co-operation measures in the context of the bankruptcy of individuals. These can be traced to 19th century provisions on enforcement of orders given by courts within the United Kingdom and a requirement of assistance to other British courts.¹ The reciprocal assistance provisions were embodied in bankruptcy legislation as a response to the growing numbers of insolvencies of persons and partnerships affecting assets located in a number of Commonwealth jurisdictions. An early case qualified the courts included within the definition by emphasising that the scope of the law was limited to courts that had jurisdiction in bankruptcy.² Nevertheless, an early instance of their use saw a British court give effect to a pooling arrangement for creditors of a firm pursuant to a request from an Indian court despite the lack of express provision in the 1883 Act to give effect to such a scheme.³ The latest consolidation of these provisions, from which the measures under study here descend, occurred in 1914. The provisions of this Act were designed to co-ordinate proceedings and enabled the courts within the Commonwealth to request other courts to assist in the management of bankruptcy proceedings within their own jurisdiction. The making of an order seeking the aid of another court was deemed sufficient authority to enable the other court to exercise the jurisdiction it would if the matter were before it for consideration. The use of the word 'British' as part of the definition prompted enquiries in the United Kingdom in a number of cases as to whether particular courts were included.⁴ The same enquiry was put before a number of Commonwealth courts as to whether they fell within the definition.⁵ Furthermore, the remit and purpose of the section were considered in *Re: A Debtor*,⁶ in which it was held that the definition of 'bankruptcy' referred to the judicial process dealing with insolvent persons and was to be construed in a wide sense as the section was designed to produce co-operation between courts acting under different systems of law. Once an English court was satisfied the request for aid fell within the ambit of the provision, there was no

¹s220, Bankruptcy Act 1849; ss73-74, Bankruptcy Act 1869; ss117-118, Bankruptcy Act 1883. See Graham, *Cross-Border Insolvency* [1989] CLP 217 at 225 and *Galbraith v Grimshaw* [1910] AC 508 for a cross-border instance (England-Scotland) under the Bankruptcy Act 1883.

²*Callender Sykes & Co v Colonial Secretary of Lagos* [1891] AC 460.

³*Re: P. MacFadyen & Co, ex parte Vizianagaram Company Limited* [1908] 1 KB 675.

⁴*Re: Maundy Gregory* (1934) 103 LJ Ch 267 (Jerusalem District Court included); *Re: Osborn* [1931-32] B&CR 189 (Manx Court included); *Re: James* [1977] 1 All ER 364 (post-UDI Rhodesian courts excluded); *Re: A Debtor* [1981] Ch 384 (Jersey Court included).

⁵*Contra: Re: Graham* [1928] 4 DLR 375 (Saskatchewan); *Pro: Re: Nall* (1899) 20 NSW 25, *Re: Greenaway* (1910) WN (NSW) 112 (New South Wales); *Re: Fogarty* (1904) QWN 67 (Queensland) and see *Clunies-Ross v Totterdell* (1988) 98 ALR 245, where the Australian court held that the definition applied to the Cocos Keeling Islands for the purpose of assistance to an Australian court.

⁶*Re: A Debtor (ex parte the Viscount of the Royal Court of Jersey)* [1980] 3 All ER 665.

general duty to scrutinise anterior proceedings unless it could be shown that they were defective under the proper law of the court or that they offended against public policy, thus setting a favourable trend for co-operation measures. This did not mean, however, that courts would not set conditions on the assistance given, particularly where there were interests within the jurisdiction that could potentially come into conflict.⁷ Particular difficulties exist where the foreign bankruptcy contains a sizeable revenue debt.⁸ As the nations constituting the Commonwealth became responsible for their own legislation, a situation given effective recognition by the Statute of Westminster 1931, the efficacy of judicial assistance depended wholly on courts recognising the similarities of the procedures each system evolved to deal with insolvency practice within their own jurisdiction. Legislation by Commonwealth countries departing from the 1914 Act was not long delayed: Canada legislated in 1949, Australia in 1966, Malaysia and New Zealand in 1967. In the United Kingdom, the 1914 Act was consolidated, together with measures dealing with corporate insolvency, in the Insolvency Act 1985, itself repealed and replaced by the Insolvency Act 1986.

Australia

The survival of the provision in Australia owes its genesis to the continuation of the paradigm in the Bankruptcy Act,⁹ which preserved the operation of s122 Bankruptcy Act 1914 until its repeal in 1980.¹⁰ The provision meant that bankruptcy administrators has available to them wider relief by being able to access overseas courts than would otherwise be the case. The same section laid down a duty on courts and officials in charge of matters under the law to act in aid of each other and provide auxiliary assistance.¹¹ The 1980 amendments ensured that mandatory assistance would be forthcoming to the courts of Australia's external territories and those of prescribed countries, while discretionary assistance would be provided to courts in other jurisdictions.¹² A letter of request emanating from a court in an Australian external territory or prescribed country would allow an Australian court to exercise powers in the matter as if the case had arisen within its own jurisdiction.¹³ Similarly, an Australian court could issue a letter of request to courts elsewhere with jurisdiction in comparable matters so as to elicit aid and auxiliary assistance.¹⁴ A number of countries have been prescribed, either by the section itself or as a result of an order being made.¹⁵ Although the section

⁷Re: Osborne (1931-32) 15 B & CR 189; Re: Jackson (1973) NILR 67. See also Re: Gibbons (1960) Irish Jurist 60, where a discretion was made against granting aid under the equivalent Irish provision: s.71, Bankruptcy (Ireland) Act 1872.

⁸Government of India v Taylor [1955] AC 491.

⁹Former s29(2), Bankruptcy Act 1966-1973 ('BAA').

¹⁰s18, Bankruptcy Amendment Act 1980 (No. 12 of 1980).

¹¹s29(1), BAA. This provision was designed to allow for inter-state assistance in the Australian federal system.

¹²New s29(2), BAA.

¹³s29(3), BAA..

¹⁴s29(4), BAA..

¹⁵Countries prescribed in s29(5), BAA include the United Kingdom, Canada and New Zealand. Regulation 3.01 of the Bankruptcy Regulations 1996 further prescribes Jersey, Malaysia, Papua New Guinea, Singapore, Switzerland and the United States.

is couched in mandatory terms for countries that are prescribed, it has been held that the nature and extent of the aid remain a matter for the discretion of the court.¹⁶

In cases of corporate insolvency, a number of statutory measures are available to the court to afford assistance under the Corporations Act 2001.¹⁷ Apart from jurisdiction measures to wind up foreign companies,¹⁸ measures exist that are specifically geared to providing to and requesting assistance from foreign court. In this context, law reform proposals highlighting the increased significance of cross-border elements in insolvency proceedings were the genesis of these provisions allowing for co-operation between Australian and foreign courts in external administration matters. These provisions were modelled on those in the Bankruptcy Act and use similar language in the drafting. The provisions have been applied in a number of instances, including proceedings involving the Bank of Commerce and Credit International.¹⁹ Where the court of any state or territory has jurisdiction in any matter arising under the Corporations Act, the judges of that court and any of its officers are required to act in aid of, and be auxiliary to each other and to all courts, as well as judges and officers of those courts, that have jurisdiction under corresponding laws in all external administration matters.²⁰ The court is required to afford mandatory assistance and auxiliary help to the courts of Australian states and territories as well as prescribed countries. Assistance at the discretion of the court may be given to the courts of other countries that have jurisdiction in external administration matters.²¹ The mandatory assistance provision is further underlined in instances of co-operation between Australian courts by a separate provision later in the Act dealing with inter-state matters.²² On receipt of a letter of request from a court in an Australian territory or other country, a court may exercise such powers with respect to the matter as it could exercise if the matter had arisen within its own jurisdiction.²³ A court may also issue a letter of request to other courts, including courts in an Australian territory or other country, with jurisdiction in comparable matters to act in aid of, and be auxiliary to the Australian court.²⁴

The leading case in Australian with respect to co-operation measures is *Re: Dallhold*.²⁵ The court in that case noted the effect of the provision was to permit the court to request a foreign court to act in aid of the Australian court

¹⁶Ayres v Evans (1981) 56 FLR 235.

¹⁷The Corporations Act 2001 ('CA') that came into force on 15 July 2001 replaces the Corporations Act 1989 (retitled Corporations Law by the Corporations Legislation Amendment Act 1990).

¹⁸s582 (general jurisdiction) and s601CL (specific jurisdiction), CA.

¹⁹Harmer, An Overview of Recent Developments and Future Prospects in Australia, Chapter 4 in Ziegel (ed.), Current Developments in International and Comparative Corporate Insolvency Law (1994) OUP at paragraph 6.5.3, citing Australian Law Reform Commission Report No. 45 (1988) at paragraph 383.

²⁰s581(1), CA. The same countries are prescribed as for s29, BAA.

²¹s581(2), CA.

²²s1337G, CA.

²³s581(3), CA.

²⁴s581(4), CA.

²⁵*Re: Dallhold Investments Pty. Ltd. and Re: Dallhold Estates (UK) Pty. Ltd.* (1991) 6 ACSR 378, (1991) 10 ACLC 1374.

in an external administration matter, a phrase defined in this context to include matters relating to the winding up of Dallhold Investments. The court accepted the submission by Dallhold Investments, also the principal creditor of Dallhold Estates, that an administration offered the possibility that the value of an agricultural lease owned by the subsidiary might be preserved for the benefit of the creditors as a whole through administration proceedings. This would not be achieved by the making of a winding up order either in Australia or in England. The court also accepted advice given by English solicitors that there were significant doubts as to whether an administration order may be made except at the request of this Court under the co-operation measures and concluded that was desirable that the best possible realisation of the assets of Dallhold Estates be achieved for the benefit of all its creditors. The court made a declaration that it was desirable to request the assistance of the English Courts and ordered the issue of a letter of request. On the issue of the language of the section, a court considering a letter of request received from the High Court in London held that, because of the mandatory language of this section, it was appropriate to reinstate an Australian company to the register in order to effect a transfer of property to the liquidator acting in the case.²⁶ It has also been held in Australia that, following the principle of the English High Court enunciated in *Re: Dallhold*, assistance should be given unless there are imperative reasons militating against it.²⁷ Nevertheless, it has been held that the Australian courts retain a residual discretion to forego assistance, particularly where it is deemed that the Australian court would be the more appropriate forum for proceedings.²⁸

Malaysia and Singapore

Malaysia and Singapore are, though now separate nations within the Commonwealth, two jurisdictions with a shared legal and political history. In both countries, bankruptcy legislation contains provisions relating to the reciprocal recognition and enforcement of bankruptcy judgments and orders of other countries.²⁹ The reconsolidation of bankruptcy law in Singapore in 1995 saw the re-enactment of the corresponding provision with some textual amendments. The sections are principally designed to ensure close cooperation between Singapore and Malaysian courts, given the close historical links between the two countries as they permit the mutual recognition of acts by the Official Assignee without further formality.³⁰ The sections permit the High Court of each jurisdiction to act in aid of and be auxiliary to the courts of the other jurisdiction as well as the courts of any other designated country with jurisdiction in bankruptcy and insolvency matters, provided that these courts are required to act in aid of and be

²⁶Smith v Australian Securities Commission (1995) 13 ACLC 511.

²⁷Re: New Cap Reinsurance Corporation Holdings Ltd (1999) NSWSC 536.

²⁸Rolfe v Transworld Marine Agency Co NV [1998] 532 FCA.

²⁹Malaysia: Bankruptcy Act 1960 (Act 360) ('BAM'); Singapore: Bankruptcy Act 1995 (Act No. 15 of 1995) ('BAS').

³⁰s104, BAM; s151, BAS. See *Amos William Dawe v Development and Commercial Bank* [1981] MLJ 230 where even at the time no such order had been made leaving the respondent without an effective remedy.

auxiliary to the courts in either Malaysia or Singapore.³¹ Countries may be designated by the respective authorities through notification in the official Gazette of Malaysia or Singapore.³² Although there are powers in the sections to permit the designation of countries whose courts may be assisted by the courts in Malaysia and Singapore, no orders are known to have been made, leading to requests for the enforcement of judgments in insolvency to be made under other enabling legislation.³³ An order of any such court seeking aid through a request to the High Court is deemed sufficient to allow the High Court to exercise jurisdiction in respect of the matter. This jurisdiction may be that which the High Court or the other court could exercise in comparable matters within their respective jurisdictions.³⁴ One notable difference between the legislation in Malaysia and Singapore is the inclusion in the Malaysian Act of an extra sub-section stating that any discretion exercised by the High Court in matters of aid must have regard to the rules of private international law.³⁵ In relation to the work of the Official Assignee, the provisions in Malaysia and Singapore require notification in the Gazette that the respective Governments have entered into an agreement for the mutual recognition of each other's Official Assignee.³⁶ Recognition would automatically allow property in any jurisdiction to be vested in the Official Assignee appointed in the other jurisdiction where proceedings have been opened in respect of the debtor in that other jurisdiction.³⁷ An exception is made for property in any jurisdiction where there are pending proceedings in that jurisdiction until and unless those proceedings have been withdrawn or dismissed.³⁸ To facilitate recognition, the production by courts in either jurisdiction of an order of bankruptcy is deemed conclusive proof in the courts in the other jurisdiction of the order having been made.³⁹ Furthermore, the Official Assignees of either jurisdiction may sue in their own titles in the courts of the other jurisdiction.⁴⁰

The position with regard to corporate insolvency is very different from that in bankruptcy law. The law relating to corporate insolvency, contained in the Companies Acts of Malaysia and Singapore,⁴¹ is derived in part from the Australian Uniform Companies Act of 1961. In parallel with the Australian legislation, both the Malaysian and Singapore Acts contain two separate sets

³¹s104(1), BAM; s151(1), BAS. The use of the words 'bankruptcy and insolvency' in both texts suggest, if the ordinary meaning of the words are followed, that corporate insolvency is included in the definition, although s121, BAM excludes the possibility of receiving orders being made against companies and the language of s104(3)-(6), BAM only speaks of the Official Assignee in Bankruptcy, leading one to assume from the absence of express mention that it was not intended that companies should be covered by this provision.

³²s104(7), BAM; s151(3), BAS.

³³In Singapore, through the Reciprocal Enforcement of Commonwealth Judgments Act (Cap 264) and the Reciprocal Enforcement of Foreign Judgments Act (Cap 265). See *Re: Tan Patrick, ex parte Walter Peak Resorts Ltd. (in receivership)* [1994] 2 SLR 728.

³⁴s104(2), BAM; s151(2), BAS.

³⁵s104(2A), BAM.

³⁶s104(3), BAM; s152(1), BAS.

³⁷s104(4), BAM; s152(2), BAS.

³⁸s104(4), BAM; s152(3), BAS.

³⁹s104(5), BAM; s152(4), BAS.

⁴⁰s104(6), BAM; s152(5), BAS.

⁴¹Malaysia: Companies Act 1965 (Act 125) ('CAM'); Singapore: Companies Act 1967 (Cap. 50) ('CAS').

of provisions dealing with jurisdiction over a foreign company where registered and unregistered respectively.⁴² There are no co-operation provisions comparable to those in the Bankruptcy Acts. It is nevertheless noteworthy that Part XIII of the former Companies Ordinance, one of the predecessors to the Companies Acts of both Malaysia and Singapore, contained provisions by which a winding up order made by one of the jurisdictions over a company incorporated in that jurisdiction had effect in the other jurisdiction without the necessity for formal winding up proceedings.⁴³ These provisions were stated as applying on the basis of reciprocity and would allow for Official Receivers or other officials appointed in either jurisdiction to act in the other without further formality.⁴⁴ Courts would be able to take judicial notice of authenticating documents issued under the seal of signatures of court officials in the other jurisdiction.⁴⁵ The powers contained in the provisions were expressed as being in addition to any other remedies created by legislation or made available by the courts.⁴⁶ The courts were empowered to transmit winding up orders to the other court for action and aid in enforcing the order through the making of an ancillary winding up order.⁴⁷ Nevertheless, creditors were still permitted to apply for a stay before the ancillary order was given.⁴⁸ The effect of an ancillary order was to render any attachment, distress or execution against the assets of the company void.⁴⁹ No further action or proceeding would be permitted to commence or proceed without the leave of the court.⁵⁰ The Official Receiver in the jurisdiction where the ancillary order was made would assume the role of an ancillary liquidator and may exercise all the powers of the Official Receiver to take possession of property, get in and realise assets, carry on the business of the company, pay claims and take proceedings on behalf of the company.⁵¹ The courts also enjoyed the power to compel discovery and information about the affairs of the company.⁵² The courts were also empowered to transmit cases between the principal and ancillary jurisdiction for the determination of a particular issue.⁵³ Unfortunately, these reciprocal provisions did not survive the redrafting of legislation, perhaps because it was felt that the statutory jurisdiction model outlined in the previous section was adequate to deal with the phenomenon of ancillary proceedings in the case of a foreign company.

⁴²s314, CAM and s350, CAS (general jurisdiction); s340, CAM and s377, CAS (specific jurisdiction).

⁴³Part XIII, ss342-356, Malayan Union Companies Ordinance 1946 (MU 13 of 1946) ('CO'). The consolidated text reflected both the position in the Malayan Union and the Straits Settlements, of which Singapore was a part, contained in the case of the latter in the Companies Ordinance 1940 (SS 49 of 1940).

⁴⁴s342, CO.

⁴⁵s343, CO. Similar treatment was accorded to a record of evidence taken by the other court under s356, CO.

⁴⁶s344, CO.

⁴⁷s345, CO. Applications could also be made for the opening of ancillary proceedings under s353, CO. Power was also given for the appointment of a provisional ancillary liquidator under s355, CO in anticipation of a request being made.

⁴⁸s346, CO.

⁴⁹s347, CO.

⁵⁰s349, CO.

⁵¹s350, CO.

⁵²s351, CO.

⁵³s352, CO.

Nevertheless, they are a useful example of an early type of co-operation provision, albeit limited to a bilateral model, as they only applied to relations between Malaysia and Singapore. It may well be appropriate for consideration to be given as to whether it is desirable to re-enact these or similar provisions based on the model of the Bankruptcy Act described earlier or to adopt a model based on the experience of the same paradigm in other jurisdictions.

New Zealand

In New Zealand, the provisions for bankruptcy are as a whole more developed than those in corporate insolvency, where the nature of assistance is limited. The history of the assistance provision in New Zealand in bankruptcy is directly related to the developments in the United Kingdom. Despite the fact that a number of Commonwealth jurisdictions were divided over whether the United Kingdom Parliament could legislate in this way for the Dominions, the extra-territorial effect of this provision was recognised in New Zealand in a decision of the Supreme Court in Auckland.⁵⁴ This decision has come to be doubted, albeit in a decision of the High Court.⁵⁵ By then, the question was somewhat academic as the provision had been replaced by a domestic enactment.⁵⁶ The Insolvency Act 1967 provision requires the High Court of New Zealand to assist the courts of any Commonwealth country, as defined in the same Act,⁵⁷ where these courts have jurisdiction in matters of bankruptcy. In this context, an order of a court of a Commonwealth country requesting aid is sufficient to enable the High Court of New Zealand to exercise such powers as it might have exercised in respect of the matter specified in the order had the same matter arisen within the jurisdiction of the courts of New Zealand.⁵⁸ The language of this section, although mandatory in style, has been interpreted as directory, an approach taken by the courts in the United Kingdom with regard to the comparable provision. This allows the courts in New Zealand to retain a discretion to refuse aid on public policy grounds.⁵⁹ The same discretion is in fact available when aid is sought at the request of a court of any jurisdiction that is not a country within the Commonwealth.⁶⁰ The same section does not provide, however, any specific powers to enable New Zealand courts to act so as to obtain aid from courts overseas, unlike the comparable provisions in Australia. The practice has arisen of making a request to the court to use its inherent jurisdiction for the issue of a letter of request, following which a separate application is made in the overseas court for assistance.⁶¹ In any event, the section has not been the subject of very many judgments, for the most part unreported and the law may be said to be less than fully developed in this area.⁶²

⁵⁴Re: Peebles (8 May 1973) (unreported judgment).

⁵⁵Re: Beadle (1 September 1980) (unreported judgment).

⁵⁶s135, Insolvency Act 1967 ('IA').

⁵⁷s2(1), IA.

⁵⁸Is135(1), IA.

⁵⁹Re: Beadle (see above).

⁶⁰s135(2), IA.

⁶¹Law Commission of New Zealand Report No. 52 (1999) 'Cross-Border Insolvency: Should New Zealand adopt the UNCITRAL Model Law on Cross-Border Insolvency' ('NZLC Report No. 52') at paragraph 40.

⁶²Ibid. at paragraph 41.

Companies' legislation does not contain any assistance provision comparable to that applicable in the case of personal insolvency. An application may nevertheless be made to the High Court for the liquidation of the assets of an overseas company.⁶³ This provision, akin to many others in the Commonwealth, applies even though the company may not have been registered and irrespective of the status of the company in its home jurisdiction and allows for a liquidation in New Zealand although the company has been dissolved in its jurisdiction of origin.⁶⁴ The overall purpose of the section has been described by the courts as being to permit a concurrent liquidation of an ancillary nature to any overseas liquidation. This ancillary type liquidation, however, remains subject to the principle that New Zealand creditors will retain any positive benefit, derived by creditors under the law in New Zealand.⁶⁵ As a result of the paucity of statutory provision, co-operation is based on the rules of comity, which may be described as being the natural extension of assistance by one court to another with view to furthering international trust and allowing judgments regularly obtained in one jurisdiction to be recognised and enforced in another. The case law in New Zealand in this area relating to insolvency is sparse, with two decisions in recent years with a maritime theme field highlighting how application of the principles might lead to very different results. In the first of these, comity was used to deny an application for transfer of a vessel to the jurisdiction of a foreign court.⁶⁶ The reasoning in this case relied on the fact that a local claim was potentially outside the protection regime within the insolvency taking place in another jurisdiction, thus disadvantaging local creditors. A further reason relied on the special nature of the lien enjoyed by creditors in maritime law that would be better dealt with before the New Zealand courts. The second decision reached the opposite conclusion based on an understanding of comity being a compelling principle requiring assistance in the absence of a substantial factor militating against this approach.⁶⁷ In this case, the view taken was that comity required the recognition of the liquidation taking place in another jurisdiction and the appointment and capacity of the liquidator appointed to act by the foreign court. The factors that would avoid the application of comity were the traditional common law exceptions, including where the foreign judgment was not final in nature, where it was obtained in breach of natural justice rules or where recognition and enforcement would offend against the rules of public policy in force in New Zealand.

United Kingdom

The present provision in the United Kingdom relating to reciprocal assistance is contained in the Insolvency Act 1986.⁶⁸ Owing to the consolidation of

⁶³s342, Companies Act 1993.

⁶⁴Ibid. s342(2).

⁶⁵Gavigan v Australasian Memory Pty Limited (In Liquidation) (1997) 8 NZCLC 261,449.

⁶⁶Fournier v The Ship "Margaret Z" [1997] 1 NZLR 629.

⁶⁷Turners & Growers Exporters Limited v The Ship "Cornelis Verolme" [1997] 2 NZLR 110.

⁶⁸s426, Insolvency Act 1986, the relevant parts of which read as follows:

"(4)The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.

provisions relating to the insolvency of individuals and the insolvency procedures applicable to companies and other legal persons in the same Act, section 426 applies to both types of insolvencies.⁶⁹ Part of the reasoning behind this merger comes from the observations in the Cork Report in its chapter on extra-territorial aspects of insolvency law.⁷⁰ The report noted the aim of extra-territorial jurisdiction as being the avoidance of conflict and confusion in cases of concurrent jurisdiction, the obtaining of recognition and enforcement by other courts of orders as well as reciprocity in recognition and enforcement where this would not be repugnant to domestic concepts of public policy.⁷¹ The statutory provisions then in existence were criticised insofar as they were ill fitted by their use of outmoded definitions to modern commercial reality, although the co-operation provisions were highlighted as affording a flexible framework for assistance. It was desirable, according to the report, that this assistance should include the situation of corporate insolvency and be extended as far as possible to other countries on the basis of reciprocity.⁷² As a result, the s122 paradigm was considerably extended and found its expression in the consolidation that occurred in 1985-86.

The number of countries to which the rules on assistance apply at present is limited, the category being constituted predominantly of Commonwealth countries.⁷³ This section has, however, been considered in a number of leading cases, not least in the growing number of international banking insolvencies. The leading case in both Australian and English law with respect to co-operation measures is *Re: Dallhold*.⁷⁴ *Dallhold Investments*, itself in liquidation, had applied for an order for the winding up of its wholly owned subsidiary *Dallhold Estates*. *Dallhold Investments*, with the support of the Australian provisional liquidator of *Dallhold Estates* also sought the issue of a Letter of Request addressed to the High Court of Justice in London seeking

(5) For the purposes of subsection (4), a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country or territory is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.

(11) In this section "relevant country or territory" means-

(a) any of the Channel Islands or the Isle of Man, or

(b) any country or territory designated for the purposes of this section by the Secretary of State by order made by statutory instrument."

This section was a re-enactment of s213, Insolvency Act 1985, the short-lived predecessor to the 1986 Act.

⁶⁹See Woloniecki, *Co-Operation between National Courts in International Insolvencies: Recent United Kingdom Legislation* (1986) 35 ICLQ 644; Smart, *International Insolvency: Ancillary Winding Up and the Foreign Corporation* (1990) 39 ICLQ 827.

⁷⁰Chapter 49, paragraphs 1902-1913.

⁷¹*Ibid.* at paragraph 1902.

⁷²*Ibid.* at paragraphs 1909-1911.

⁷³The Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order (SI1986/2123) lists Anguilla, Australia, The Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Eire, Montserrat, New Zealand, St. Helena, Turks & Caicos Islands, Tuvalu and the Virgin Islands. The Co-operation of Insolvency Courts (Designation of Relevant Countries) Order 1996 (SI 1996/253) designates Malaysia and South Africa with effect on 1 March 1996. A similarly titled order (SI 1998/2766) added Brunei to the list effective 11 December 1998.

⁷⁴*Re: Dallhold Estates (UK) Pty. Ltd.* [1992] BCLC 621.

assistance by the making of an administration order in respect of the latter under Part II of the United Kingdom Insolvency Act. Other creditors opposed that course and sought to be substituted as applicants in lieu of Dallhold Investments and for a winding up order pursuant to the original application to be made in respect of Dallhold Estates.

The court noted the effect of the provision was to permit the court to request a foreign court to act in aid of the Australian court in an 'external administration matter,' a phrase defined to include matters relating to the winding up of Dallhold Investments. The court accepted the submission by Dallhold Investments, also the principal creditor of Dallhold Estates, that an administration offered the possibility that the value of an agricultural lease owned by the subsidiary might be preserved for the benefit of the creditors as a whole through administration proceedings. This would not be achieved by the making of a winding up order either in Australia or in England. The court also accepted advice given by English solicitors that there were significant doubts as to whether an administration order may be made except at the request of this Court under the co-operation measures and concluded that was desirable that the best possible realisation of the assets of Dallhold Estates be achieved for the benefit of all its creditors. The court made a declaration that it is desirable to request the assistance of the English Courts and ordered the issue of a Letter of Request.

When the case was brought in England, it was held that the effect of s426 was to confer on the English courts a jurisdiction to apply any domestic remedy. As the conditions in s8 were satisfied, an administration order would be made. The discretion in s426(5) extended solely to the granting of the request and not the application of the rules of insolvency law to a request that, once granted, was mandatory. The trial judge, Mr Justice Chadwick, held:

"It appears ... that the purpose of s426(5) ... is to give to the requested court a jurisdiction that it might not otherwise have in order that it can give the assistance to the requesting courtthe scheme of subsection (5) appears to be this. The first step is to identify the matters specified in the request. Secondly, the domestic court should ask itself what would be the relevant insolvency law applicable by [it] to comparable matters falling within its jurisdiction. Thirdly, it should then apply that insolvency law to the matters specified in the request The result is that an English court can act on a request by the Federal Court by applying to the matters specified in the request provisions of English insolvency law, including the provisions of s8 ... "⁷⁵

Following this case, it was reasonably clear that once a request for assistance is granted, it naturally follows that a court will apply all of the rules of insolvency law that would apply to a domestic insolvency subject to any exercise of discretion in the application of these rules that would feature in a domestic case.⁷⁶ This wide definition of domestic rules as interpreted by the

⁷⁵Ibid. at 398-399.

⁷⁶Re: BCCI International (Overseas) Ltd. [1988] 1 WLR 708.

judge allowed the extension of administration, not hitherto considered as available in the case of foreign companies subject to proceedings in the United Kingdom. This was favourably commented on as being an innovative order that allowed for flexible treatment of foreign companies using all the means available under domestic legislation.⁷⁷ The case is also notable for expressing the nature of the assistance given under provisions as being mandatory, leading to the assumption that, as in *Re: A Debtor*, courts were not bound to examine too closely the proceedings leading up to the request unless they would be manifestly contrary to public policy, because of the imperative terms in which the section is drafted. Later cases have, however, raised serious questions about whether mandatory means mandatory in all situations.

Consideration of whether courts had a particular choice as to what rules to apply came in *Re: BCCI*,⁷⁸ where the liquidators in England and the Cayman Islands sought to commence proceedings against a former director of the bank and associated companies to recover the deficiency in the assets. Mr Justice Rattee noted that:

“... the effect of s.426 is to give [the] court a discretion... as to whether it should apply English insolvency law whether ‘procedural’ or ‘substantive’ or the law of the requesting court...”⁷⁹

In this case, it was clear that once a request for assistance was granted, it naturally followed that a court, where it chooses to apply domestic law, will apply all of the rules of insolvency law that would apply to a domestic insolvency subject to any exercise of discretion in the application of these rules that would feature in a domestic case. The question remained, however, as to what foreign law rules the domestic court might choose to apply or disapply.⁸⁰ In *Re: Focus*,⁸¹ it was held that assistance would not be forthcoming where this would be contrary to the conduct of proceedings already on foot within the jurisdiction. The courts took the view that the United Kingdom was the proper forum for disclosure of the subject of the request relating to assets held outside Bermuda.

A possible alternative formulation for the views of the courts may be seen in *Re: Business City Express*,⁸² where it was authoritatively stated that, unless good grounds existed for not making an order, that the domestic courts should accede to the request emanating from the foreign court, in this case the Irish High Court seeking to bind creditors in England through a scheme of

⁷⁷See Bannister, *The Co-Operative Court - The Decision of Chadwick J in Re: Dallhold Estates (UK) Pty Ltd* (1992) 8 IL&P 31 (Casenote); Stallworthy, *The Application of the Administration Provisions of the Insolvency Act to Overseas Companies* [1992] 9 ICCLR 319; Rajak, *Cross-Border Insolvency: UK Style* (1996) 24 IBL 246; Smart, *Administration Orders and Foreign Companies* (1997) 13 IL&P 186.

⁷⁸*Re: BCCI* [1993] BCC 787.

⁷⁹*Ibid.* at 801-802.

⁸⁰*Re: Bell Lines Ltd.* (unreported) 6 February 1997, cited in Turing, *Set-Off and Netting: Developments in 1996 affecting Banks* (1997) 4 JIBFL 155 at 158.

⁸¹*Re: Focus Insurance Co Ltd* [1997] 1 BCLC 219.

⁸²*Re: Business City Express* [1997] BCC 826, [1997] 2 BCLC 510.

composition. It has also been held that the definition of insolvency contained in s426 should be given as wide an interpretation as possible so as not to fetter the exercise of the court's equitable discretion.⁸³ The limits of the assistance possible have been canvassed in two cases where orders were sought by a foreign court for the public examination of persons in connection with insolvency. The first instance courts refused the orders, drawing the analogy between the likelihood of refusal in the context of an exclusively domestic case.⁸⁴ In any event, the Court of Appeal qualified the question of whether oppression was a valid ground for refusal of the request by looking to the overall policy of the co-operation section. This was held to include the acceptance and, where appropriate, application of the foreign law, even where the results might have a different effect than the corresponding domestic provisions.⁸⁵ Extending the co-operation element further, a recent case has extended the ambit of assistance under s426 to ordering corporate voluntary arrangements in the case of a foreign company.⁸⁶

The continuing evolution of co-operation is being seen in other proceedings in the context of insolvency, where application for injunctions and stays of process have been denied on the grounds that an English court should not interfere with foreign proceedings where proceedings are legitimately brought and maintained in the other jurisdiction. It has also been held that courts in this situation should not take the view that there is only one natural forum in which all proceedings must be brought.⁸⁷ The application of rules has also been enhanced later by the availability of interim measures to assist preservation and recovery of assets in aid of legal proceedings elsewhere.⁸⁸ This must be seen as a remarkable step in the arena of co-operation. Nevertheless, the question of conflict of laws remains a current theme in international co-operation as another of the BCCI cases illustrated dealing with set-off, the practice here being wholly different from the other jurisdictions involved and where the decision has been criticised by commentators.⁸⁹ There remain also a few doubts about the interplay between legal systems

⁸³Hughes & others v Hannover Ruckversicherungs-AG [1997] 1 BCLC 497. See Obank, International Co-operation and Foreign Insolvencies: 1997 Update (1997) 6 JIBFL 259; Dawson, The Extent of the Jurisdiction under Section 426 Re: Emlico (1998) 22 Ins Law 14; Smart, English Courts and International Insolvency (1998) 114 LQR 46.

⁸⁴Re: JN Taylor Finance Pty Ltd [1999] 2 BCLC 256; Re: Southern Equities Corporation Ltd. [1999] BPIR 589. See Nolan, International Insolvency Assistance (1999) 20 Co Law 336.

⁸⁵England v Smith [2000] 2 BCLC 21. See Scott, Public Policy and International Co-Operation between Courts exercising Insolvency Jurisdiction: Section 426 Insolvency Act 1986 (2000) 1 RALQ 1.

⁸⁶Re: Television Trade Rentals Ltd. [2002] EWHC 211 (Ch) (19 February 2002).

⁸⁷Re: Maxwell Communications Corporation [1992] BCC 757; Barclays Bank v Homan [1993] BCLC 680. See Smart, Forum Non Conveniens in Bankruptcy Proceedings (1989) JBL 126.

⁸⁸The Civil Jurisdiction and Judgments Act 1982 (Interim Relief) Order 1997 (SI 1997/302) allows for extension of interim relief in aid of legal proceedings elsewhere (including non-convention countries) to areas of law not otherwise covered by the Brussels Convention 1968, including insolvency. See Smart, Insolvency Proceedings and the Civil Jurisdiction and Judgments Act 1982 (1998) 17 CJQ 149.

⁸⁹Re: BCCI (No 10) [1996] 4 All ER 796 [1996] BCC 980. See Turing, *op. cit.*; Whiteson, Cross-Border Insolvency: Conflict of Laws Re Bank of Credit and Commerce International SA (in liquidation) ('No 10') (1997) 13 IL&P 26 (Casenote); Fletcher, International Insolvency Issues: Recent Cases [1997] JBL 471; Shandro, Judicial Co-Operation in Cross-Border Insolvency - The English Court Takes a Step Backwards in BCCI (No 10) (1998) 7 IIR 63.

within the United Kingdom, especially where insolvency provisions may differ in consequence of the different legal histories of these jurisdictions.⁹⁰

Future of the Provision: International Developments

From the above outline, it may be stated that the same provision has known different successes depending on the jurisdiction where it has survived. In Australia, the original bankruptcy provisions served as the model for a similar framework in corporate insolvency. This has not been the case in Malaysia, Singapore or New Zealand. In the case of both Malaysia and Singapore, there appears to be no method for co-operation in corporate insolvency outside the ancillary assistance rules, a clear disadvantage as these only designate winding up as the permissible procedure. As for bankruptcy, assistance is largely figurative as the provisions have not been extended to many jurisdictions and those allowing for assistance between both countries appear deficient. In New Zealand, bankruptcy jurisdiction is much as in the other countries examined, but, in the context of corporate insolvency, only the rules of comity permit some assistance, subject to traditional doctrines that largely reflect the interest of domestic creditors. Nevertheless, the available case law is sparse and does not create any trends in practice that would entitle an observer to state with certainty what the position will be in the event of an international insolvency. In the United Kingdom, the successor provision covers both bankruptcy and corporate insolvency and, as a result of the evolution of the paradigm, represents quite a developed version of the model. It nevertheless applies to a restricted number of countries, a limitation that is common to all the provisions examined here, which do not operate the open system inherent in the United States model,⁹¹ but rely on incremental recognition through the making of orders under subsidiary legislation. In any event, the effectiveness of domestic co-operation measures overall is debatable, with some systems experiencing better success than others. As a result, there have been calls for a long time for an insolvency treaty or convention reaching beyond national boundaries and avoiding the perils of conflicts of laws and differences in the co-operation rates evident from the above outline.⁹²

Of particular interest, as the first truly global measure and thus potentially of application to all the jurisdictions examined here, is the UNCITRAL Model Law on Cross-Border Insolvency, which was adopted in May 1997.⁹³ Since its production, the Model Law has only been adopted by a limited number of countries: Eritrea, Japan, Mexico, South Africa and Montenegro.⁹⁴ As part of a general report into insolvency law, a recommendation was made that Australia should actively promote multilateral treaties with respect to the

⁹⁰See Sellar, *The Insolvency Act 1986 and Cross-Border Winding Up* (1995) 40 JLS 102; Aird, *Winding Up Across the Legal Borders of the UK - and Beyond* (1997) SLT 241.

⁹¹s304, United States Bankruptcy Code (11 USC s304).

⁹²See Nadelman, *An International Bankruptcy Code: New Thoughts on an Old Idea* (1961) 10 ICLQ 70; Graham, *Cross-Border Insolvency* [1989] CLP 217; Trautman et al., *Four Models for International Bankruptcy* (1993) 41 AJCL 573.

⁹³(1997) 36 ILM 1386; <www.un.or.at/uncitral/english/texts/insolven/mlinsolv.htm>.

⁹⁴Information from the Status of Texts section at the UNCITRAL Website (as at 31 October 2002).

adoption by nations of common elements of insolvency law and mutual recognition of insolvency laws.⁹⁵ This was said to have been prompted by talks then proceeding between Australia and New Zealand for closer co-operation in insolvency matters, including adoption of common legal provisions dealing with insolvency administrations as well as automatic reciprocity and recognition of insolvency orders.⁹⁶ A recommendation in the general report was made to the effect that a high priority be given to Australia's participation in the UNCITRAL Working Group on Insolvency, then working on the Model Law.⁹⁷ A recent report has now considered whether Australia should adopt the Model Law as part of domestic law and has made a clear recommendation in favour, while retaining the existing framework to cover assistance that might otherwise fall outside the scope of the Model Law, including instances when its provisions might not be invoked.⁹⁸ Furthermore, in light of the global financial crises in the late 1990s, the Australian Government has been active in promoting within UNCITRAL work in the insolvency field seeking to develop proposals towards encouraging the adoption of an ideal corporate insolvency law. A draft legislative guide on insolvency law has now been produced with the aim of complementing the production of a comprehensive statement of key objectives and core features for a strong insolvency regime that would also feature out of court restructurings, which would form a template for states wishing to update their insolvency laws in line with internationally accepted criteria and it is likely that these proposals will bear fruit in due course.⁹⁹

The views of the Malaysian Government have also been expressed on the Model Law. Noh Omar, a representative at the United Nations, is quoted as saying:

“Malaysia is pleased at the successful conclusion of the work and adoption of the Model Law on Cross-Border Insolvency. This achievement will, no doubt, further enhance the flow of international trade. ...However, like many others, we believe that a legislative text on international co-operation requires a high degree of uniformity and will have to include a requirement of reciprocity, which could only be achieved through a treaty. But before we could attain this we should, in the words of the Commission, evaluate the impact of the implementation of the Model Law”.¹⁰⁰

It remains to be seen, however, whether a sufficient number of the nations with whom Malaysia and Singapore have strong trading links will adopt the text, thus making a strong case for both nations to do so. Turning to New Zealand, the Law Commission has recommended that the UNCITRAL Model Law be adopted with reasons including the need to develop effective laws on

⁹⁵Harmer, *op. cit.* at paragraph 6.5.3, citing ALRC Report No. 45 at paragraph 387.

⁹⁶Harmer, *op. cit.* at paragraph 7.

⁹⁷Australian Law Reform Commission Report No. 80 (1996) at paragraphs 4.50-4.51.

⁹⁸Corporate Law Economic Reform Program Proposals for Reform: Paper No. 8 (2002).

⁹⁹Provisional Agenda, Twenty Sixth Session of the Working Group on Insolvency Law (New York, 13-17 May 2002) at paragraphs 7-14.

¹⁰⁰<www.undp.org/missions/malaysia/uncitral.htm>.

the global market to which New Zealand belongs and for these laws to reflect trading conditions on the international market. The fact that the favourable drafting of the text reflects genuine concerns over the intrusion of foreign proceedings into local systems and the inadequacy of present domestic law is viewed as a positive factor for its adoption. Nevertheless, it is intended that legislation incorporating the Model Law will not be brought into effect until the New Zealand Government is satisfied that countries, with which there are major trading relationships, are in the process of adopting the text.¹⁰¹ In this context, a later study paper released by the Law Commission of New Zealand discussing the terms for overall reform of insolvency law in New Zealand concludes that a revised statute codifying insolvency should also include a dedicated Part IX governing Cross-border insolvency. This is stated as being in essence the incorporation of the Model Law as adopted in the recommendations made by the Commission in its 1999 report.¹⁰²

In the United Kingdom as a whole, the rules relating to jurisdiction, recognition and enforcement rules are likely to undergo change, insofar as the other member states in the European Community are concerned, with the passing of the European Regulation on Insolvency Proceedings 2000.¹⁰³ This Regulation will do much to promote the culture of co-operation within the European Single Market, allowing for the protection of the interests of participants wherever they may be located within the Community. Nevertheless, the Regulation is not designed to affect existing arrangements with parties outside Europe, a category that includes Commonwealth countries with which there are long-standing arrangements for dealing with cross-border insolvencies. There is commentary strongly suggesting that the United Kingdom Government should endeavour to develop an international protocol for these insolvencies.¹⁰⁴ Furthermore, following the Insolvency Act 2000 being enacted, a provision is now available allowing the Secretary of State to adopt regulations giving effect to the Model Law.¹⁰⁵ The provisions also allow for amendment of the co-operation provisions of the Insolvency Act 1986 and for the modification of the application of insolvency law to foreign proceedings.¹⁰⁶ Although only applying at present to two of the jurisdictions within the United Kingdom, it is likely that if the Model Law is brought into use for the United Kingdom, it will be of some considerable utility. This is provided that there is sufficient consensus that will prompt the adoption by those states with which the United Kingdom has strong trading links.

Summary

In the final analysis, the search for an international solution has come a long way since first the problem of cross-border insolvencies was diagnosed and

¹⁰¹NZLC Report No. 52 at paragraphs 112-113.

¹⁰²New Zealand Law Commission Study Paper No 11 (2001): 'Insolvency Law Reform: Promoting Trust and Confidence' at paragraph 352.

¹⁰³Council Regulation (EC) No 1346/2000 of 29 May 2000 OJ 2000 L160/1 ('Regulation').

¹⁰⁴See Morris, *Lessons learnt from the Collapse of BCCI* (1994) 1 RALQ 5.

¹⁰⁵s14(1), Insolvency Act 2000. This Act applies to Scotland as well as to England and Wales, but not apparently to Northern Ireland.

¹⁰⁶Ibid. s14(2).

attempts made at effecting a cure. There is very little doubt that the further development of insolvency, even at the domestic level, is tied to an international outlook. High profile failures and financial difficulties in corporate, commercial and banking sectors have created a need for urgent remedies and long-term solutions. They have also been the source of domestic anxieties about the effectiveness of domestic rules in seeking to contain insolvencies of this nature. The focus on co-operation initiated in a number of advanced commercial nations has provided a partial solution to the problems posed by strict adherence to traditional rules. Many co-operation measures have been created and exist as domestic assistance provisions or in the form of bilateral and multilateral treaties. These are not, however, necessarily an effective substitute for proper international agreement on meeting the needs for the organisation of insolvencies across frontiers. The model represented by the s122 Bankruptcy Act paradigm has known some success in its time. It has been productive, leaving traces in successor legislation worldwide, and generally facilitated co-operation between courts. It may rightly be said as having been novel for its time and very much in advance of the other models then available. An overall impression of the co-operation framework would recognise that it was forward looking for its time and allowed for decisions to be taken as procedures evolve. It has, however, been largely overtaken by newer legislative forms that presage co-operation on a greater scale. It may well, for that reason, end up being a historical curiosity and reminder of an age when co-operation in insolvency was an ideal to which many aspired.

31 October 2002