Cross-border Assistance in the Common Law and International Insolvency Texts: An Update

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LT [Keywords to Follow]

Introduction

There are, at time of writing, three statutory systems for dealing with cross-border insolvencies in the United Kingdom and the legal jurisdictions into which the country is divided. In order of their introduction, they are s.426 of the Insolvency Act 1986,[1] the European Regulation on Insolvency Proceedings 2000[2] and the UNCITRAL Model Law on Cross-Border Insolvency 1997.[3] The countries to which they apply form for the most part discrete groups, albeit with some overlap, and the three systems are in theory applicable in different situations. Despite this, the Cross-Border Insolvency Regulations 2006,[4] which implement the Model Law, do determine the priorities between, on the one hand, this text and, on the other, the Insolvency Regulation and s.426.[5] Nonetheless, that does not mean that all conflicts are avoided. A further complicating factor exists in that the courts in England and Wales may also be called upon to resolve any conflict between the texts and other provisions of domestic insolvency law, given that the extent to which the statutory provisions are applied is traditionally subject to the interpretation of the courts and to the use of any common law principles, such as comity, that govern cross-border assistance.[6]

In the past year, three cases have provided an illustration of the interaction of domestic statutory provisions and case law with the Insolvency Regulation and the Model Law, the texts most likely to be invoked by the nations with which the United Kingdom has cross-border commercial relations. The cases have incidentally illuminated court practice with respect to cross-border instances and evidence, for the most part, the general desire to ensure that assistance is forthcoming wherever possible. The first of these cases, *Millhouse Capital*,[7] involved the High Court rendering judgment relating to the English court's statutory jurisdiction to declare a foreign company insolvent under s.221 of the Insolvency Act 1986, in which the issue was canvassed as to whether relief was better provided under the statute or by requiring the petitioner to request assistance and relief under the Model Law. Turning to the Insolvency Regulation, the second case, *Nortel, Re*,[8] has provided an interesting element in the context within which that text is intended to work. The judgment, also issued by the High Court, relates to how domestic practice on Letters of Request can be used to support proceedings taken under the Insolvency Regulation and further the principle of co-operation inherent in art.31 of the text. The third and final case, *Harms Offshore*,[9] is a very recent case where the judgment, handed down by the Court of Appeal, has provided elucidation in particular on how domestic practice relating to anti-suit injunctions may have an impact on the conduct of a case in another jurisdiction and, incidentally, makes note of how English courts should ideally interact with the courts of states also applying the Model Law.

1. Referred to below as s.426.
2. Council Regulation 1346/2000 of May 29, 2000 (the Insolvency Regulation).
3. Referred to below as the Model Law.
4. SI 2006/1030 (in force April 4, 2006); see especially reg.3 (s.426 Model Law) and art.3 Sch.1 (Insolvency Regulation—Model Law). The potential conflict between the Insolvency Regulation and s.426 is resolved in light of art.10 of the EC Treaty, which requires Member States to take all possible measures to ensure fulfilment of the obligations they have entered into under the treaty and thus confirming the paramount status of European legal instruments over domestic ones.
5. See, by this author, ''Cross-Border Insolvency Law in the United Kingdom: An Embarrassment of Riches'' (2006) 22 I.L. & P. 132.
6. In fact, the common law continues to generate principles in countries where none of these texts are available, such as in *Cambridge Gas Transportation Corp v Navigator Holdings Plc* [2006] UKPC 26 (an Isle of Man–US dispute).
7. *Millhouse Capital UK Ltd v Sibir Energy Plc* [2008] EWHC 2614 (Ch) (October 29, 2008), judgment available from the BAILII website at *http://www.bailii.org/ew/cases/EWHC/Ch/2008/2614.html* [Accessed August 14, 2009].
8. *Nortel Networks SA, Re* [2009] EWHC 206 (Ch) (February 11, 2009), judgment available from the BAILII website at *http://www.bailii.org/ew/cases/EWHC/Ch/2009/206.html* [Accessed August 14, 2009].
9. *Harms Offshore AHT ''Taurus'' GmbH & Co KG v Bloom* [2009] EWCA Civ 632 (June 26, 2009), judgment available from the BAILII website at *http://www.bailii.org/ew/cases/EWCA/Civ/2009/632.html* [Accessed August 14, 2009].

Millhouse Capital

The facts

The facts arise from the winding up of a company, OJSC ANK Yugraneft, by the Moscow Arbitrazh Court pursuant to a declaration on December 14, 2004 by the board of the company of its inability to meet outstanding liabilities. The board petitioned for the appointment of a temporary administrator on December 20, 2004 with the consequent order being granted on December 22, 2004, applying art.62 of the Russian Federal Law on Bankruptcy and opening a supervision procedure. On January 12, 2005, Mr Kotov was appointed interim administrator and was subsequently appointed external manager when an external management procedure was opened for 18 months commencing April 19, 2005. This procedure was extended on October 23, 2006 and was replaced by a bankruptcy procedure when the Moscow Arbitrazh Court declared the company insolvent on May 28, 2007, again with Mr Kotov as bankruptcy administrator, which appointment was further extended for a year on June 23, 2008. Some time in 2007, Mr Kotov instructed English solicitors to file for the appointment of a provisional liquidator over the company, to which effect an order was granted on November 14, 2007. Subsequently, Mr Kotov authorised the provisional liquidator to initiate claims in the Commercial Court against Millhouse Capital UK Ltd and Roman Abramovich, the applicants in the instant case. The trial judge, Mr Justice Clarke, also heard the claim applications and dismissed these, subject to a possible right to appeal. Nonetheless, the question of whether the court should, in any event, exercise jurisdiction so as to wind up the company, for which a petition had been due for hearing on March 12, 2008, remained to be determined in the instant proceedings.

The judgment

The trial judge's first consideration was the statutory jurisdiction afforded to the court to order insolvency proceedings over an unregistered foreign company under s.221 of the Insolvency Act 1986. Referring to the principle in *Drax, Re*,[10] which states that the courts will not wind up a foreign company where there is no legitimate interest on the basis that to do so would be to exercise exorbitant jurisdiction, the trial judge accepted the formulation on the extent of jurisdiction first seen in cases such as *Banque des Marchands des Moscou*,[11] which would decline to interfere with foreign insolvency proceedings by setting up domestic proceedings where the due administration of the insolvent's assets, wherever situated, could take place under the aegis of foreign proceedings. However, also arising from that case, a discretionary jurisdiction would exist where there were assets present in the jurisdiction or parties subject or submitting to the court interested in the proper distribution of the debtor's assets. Furthermore, a sufficient connection with the jurisdiction could be shown as an alternative to the presence of assets, provided there was a reasonable possibility of benefit to the creditors from the initiation of domestic proceedings, as the rule in *Okeanos*[12] also provided. The trial judge also made reference to the fact that, before the requirement for assets was finally removed in *Latreefers, Re*,[13] case law had been steadily diminishing its importance and allowing prospective claims to substitute, examples being provided by cases such as *Compania Merabello, Re*[14] and *Allobrogia, Re*,[15] where the existence of causes of action involving insurance claims was deemed sufficient to authorise orders for winding up proceedings.[16]

The issue of what constituted a sufficient connection was in *Real Estate Development Co, Re*[17] defined as ''[the establishment of] a link of genuine substance between the company and the country'', the assessment of which relied on three elements being shown: (1) a sufficient connection with the jurisdiction; (2) a reasonable possibility of benefit to those applying for winding up; and (3) some persons interested in the distribution of assets must be parties over whom the court could exercise jurisdiction. The trial judge was of the view that it was necessary to adduce evidence to establish the presence of the above elements, which had been accepted as applying in *Drax, Re*, in the instant case. The trial judge first accepted that the chose in action constituted by the Commercial Court claims was sufficiently important and was not an asset of tenuous character, such as that in *Real*

10. *Drax Holdings Ltd, Re* [2004] 1 W.L.R. 1049 Ch D.

11. *Banque des Marchands de Moscou (Koupetschesky) (In Liquidation) v Kindersley* [1951] Ch. 112 CA.

12. *International Westminster Bank Plc v Okeanos Maritime Corp* [1987] B.C.L.C. 450 Ch D.

13. *Latreefers Inc, Re (Stocznia Gdanska SA v Latreefers Inc)* [1999] 1 B.C.L.C. 271 Ch D.

14. *Compania Merabello San Nicholas SA, Re* [1973] 1 Ch. 75 Ch D.

15. *Allobrogia Steamship Corp, Re* [1978] 3 All E.R. 423 Ch D.

16. But not apparently in *Okeanos*, where a possible action for wrongful or fraudulent trading was deemed too remote a prospect to constitute an ''asset'' at the time the petition was heard.

17. *Real Estate Development Co, Re* [1991] B.C.L.C. 210 Ch D.

Estate Development Co, Re,[18] given that the claim, amounting to potentially US$2 billion, would be, if successful, of considerable importance to the insolvent company and therefore a sufficient link to the jurisdiction. Secondly, the presence of the applicants as persons in or subject to the jurisdiction was also established. Thirdly, the issue of benefit was to be determined by reference to the impact on the respondents, although the judge did say that if the benefit could be achieved by some other means other than a winding-up order, that fact might be grounds for denying the petition. In the instant case, the appointment of a provisional liquidator constituted a benefit by placing the superintendence of proceedings in the hands of a licensed insolvency practitioner accountable to the court and who could supervise the conduct of proceedings as ancillary to a liquidation in Russia. Particular concerns of the respondents that their position needed to be protected given juridical instability in Russia (the possibility of political interference with proceedings and challenges to Mr Kotov's appointment) were held to constitute a sufficient reason for recourse to a winding up, where only the decision of a court or a general meeting of creditors could affect the status of the insolvency practitioner and pursuit of proceedings. Finally, the fact that the foreign liquidator, the principal creditor and a majority shareholder (the last two being among the respondents in the instant case) were in support of winding up was held to be a determining factor in exercising jurisdiction.

The second, though incidental, concern of the judge was the interplay between the provisional winding up order and the possibility for assistance and relief under the Model Law. In deciding the jurisdictional point, the judge had also made mention of the policy inherent in instruments such as s.426 and the Cross-Border Insolvency Regulations 2006[19] to provide assistance to foreign representatives. In dealing, however, with the criticism by the applicants of the methodology by which Mr Kotov proceeded in front of the English courts, the judge agreed that, as a foreign representative, Mr Kotov could have applied at common law for recognition under the principle in *Cambridge Gas*.[20] Furthermore, as art.9 of the Model Law also provides, Mr Kotov could have given instructions for the commencement of the Commercial Court proceedings without needing to resort to the court's winding-up jurisdiction. Had he felt the need for formal recognition prior to commencing proceedings, resort to the procedure outlined in arts 11 and 24 of the Model Law was also available. Unfamiliarity with court procedure and language were in fact reasons proffered by Mr Kotov for not proceeding in this way. Although the trial judge did not feel the need to comment on whether these were cogent reasons, he did refer to the underlying policy of the statutory provisions cited by the respondents for extending assistance and also noted that arts 25 and 27 (in the co-operation chapter of the Model Law) provided that courts should ''co-operate to the maximum extent possible'' and that assistance could be forthcoming ''by any appropriate means''.

Analysis

This case is interesting for a number of reasons: even a cursory read reveals that it offers a fascinating glimpse into an aspect of the semi-opaque world of Russian finance and the matrix of influences on business and the judicial system in that jurisdiction. References to political pressures, threats, fears of defendants absconding and concerns that the foreign liquidator might be summarily removed are not the usual fare of insolvency judgments. In fact, although the issues in the case are adjudged in favour of the respondents, their petition for winding up is dismissed owing to serious non-disclosures in connection with their application for appointment of the provisional liquidator that are outlined by the trial judge at length in the judgment,[21] perhaps an unusual aspect of insolvency litigation, but one that is possibly a reflection of the tenebrous way in which Russian business is conducted.

That aside, the opportunity here for a comment on the statutory jurisdiction to wind up an unregistered company, present in the legislation since at least the Companies Act 1929, is welcome. Even if not explicit in the judgment, the acceptance by the trial judge that, where the conditions for applying s.221 of the Insolvency Act are met, as they were in the instant case, the opening of liquidation proceedings may be taken as one of the ways of fulfilling the policy inherent in the various co-operation provisions, as well as arts 25 and 27 of the Model Law. The use of liquidation proceedings would certainly be perfectly consonant with the rationale of the Model Law. In fact, when one looks at art.27, it contains a non-exhaustive list to which states adopting the Model Law are free to add. The provisions that are contained on this list

18. A limited amount of shares in a company located within the jurisdiction, a foreign judgment and a possible claim to avoid a share transfer (held not to have arisen at the time of the petition) not being deemed to amount to a sufficient connection.
19. See SI 2006/1030 (in force April 4, 2006); see especially reg.3 (s.426 Model Law) and art.3 Sch.1 (Insolvency Regulation—Model Law).
20. See *Cambridge Gas* [2006] UKPC 26.
21. *Millhouse Capital* [2008] EWHC 2614 (Ch) at [67]–[112].

do include the appointment of a person or body to act at the direction of the court, the communication of information by any means considered appropriate by the court, the co-ordination of the administration and supervision of the debtor's assets and affairs, the approval or implementation by courts of agreements concerning the co-ordination of proceedings as well as the co-ordination of concurrent proceedings regarding the same debtor, some of which can be considered to be pertinent to and of possible application in the instant case. Although the adoption of art.27 in the United Kingdom did not entail a wholesale revision to or extension of the text (as could have been the case), the creative application by the trial judge of the use of s.221 of the Insolvency Act so as to fulfil potentially the policy inherent in the co-operation provisions and, by extension, the Model Law is interesting. Its effect is to extend the scope of the Model Law a little further and to add to the list of appropriate forms of co-operation. The result is to permit more concentration to be placed on rescue as co-ordination of proceedings and the disposal of the debtor's assets across jurisdictional boundaries becomes a greater possibility through courts engaging in co-operative measures, thus fulfilling the principles outlined in the Preamble to the Model Law and ensuring the protection of the interests of both creditors and debtor alike.

Nortel, Re

The facts

The facts arise from the insolvency of the Nortel Group of companies, providers of telecommunications equipment operating in Europe, the Middle East and Africa. On January 14, 2009, the group's parent company filed for proceedings in Canada under the Companies Creditors Arrangement Act, while other members of the group filed for protection in the United States under Chapter 11 of the Bankruptcy Code. Other companies in the group operating in Europe also made a joint application to the English court for the opening of administration under Sch.B1 of the Insolvency Act 1986, an order for which was granted on the same day as the filings in Canada and the United States. The trial judge, Mr Justice Blackburne, was able to determine that, for the purposes of exercising jurisdiction under art.3 of the Insolvency Regulation to open main proceedings, the centre of main interests of all the companies concerned was located in the United Kingdom using the head office functions test referred to in the Opinion of the Advocate-General, Francis Jacobs Q.C., in the *Eurofood* case.[22] The trial judge was also able to use the principle, developed in *Collins and Aikman, Re*,[23] to authorise payments to creditors located in countries other than the United Kingdom under the priority rules that would be applicable if secondary proceedings were opened. The administrators were also authorised to apply to the courts in other Member States for assistance in carrying out their functions. The instant proceedings involved an application for Letters of Request to issue to courts in the European countries where the companies were located and where it was possible that secondary proceedings could be opened. The intention was to seek notification of any application for the opening of such proceedings by interested parties during the currency of negotiations by the administrators in main proceedings for the co-ordinated reorganisation of the group as a whole.

The judgment

The main consideration for the court was how to further the inherent jurisdiction the High Court possessed to issue Letters of Request and whether discretion to issue them should be exercised so as to enable the administrators to have notice of potential proceedings occurring elsewhere. For the trial judge in the instant proceedings, Mr Justice Patten, the Insolvency Regulation provided a possible basis for his decision in its art.31, which requires office-holders in any concurrent proceedings involving the same debtor to co-operate. Although framed in terms of office-holders, the trial judge held without any difficulty that the wording could be interpreted so as to apply to courts, as was also held in *Stojevic, Re*, a 2004 decision of the Vienna Higher Regional Court. For the trial judge, the co-operation envisaged by art.31 would allow for the issue of the Letters of Request. However, in order for the co-operation to be effective, the trial judge was of the view that it was desirable that courts presented with requests for the opening of secondary proceedings by interested parties have the opportunity to hear the administrators of the group so as to decide whether proceedings should be opened at all or opened and stayed in accordance with art.33(1) of the Insolvency Regulation. An example of the first option to refuse the opening of proceedings was referred to by the trial judge when citing with approval the practice of the Versailles Court of Appeal in the 2006 case of *Rover France SAS*,

22. *Eurofood IFSC Ltd, Re* (C-341/04) [2006] E.C.R. I-3813 (May 2, 2006).
23. *Collins & Aikman Europe SA, Collins, Re* [2006] EWHC 1343 (Ch) (June 9, 2006).

where the French court stated that the opening of secondary proceedings was only desirable if the applicant could demonstrate that it would be purposeful. The trial judge was firmly of the view that there would be no advantage in the instant case of having secondary proceedings, given that the liquidations they would necessarily involve would not allow for the continuation of trading the administrators saw as being essential for the rescue of the group. Accordingly, Letters of Request would issue.

Analysis

As the Insolvency Regulation reaches its seventh year since it came into force, the number of reported cases continues to increase. Many of these are on the jurisdictional paradigm contained in art.3 and the allocation of competences between courts. For a number of practitioners and scholars, the inconvenience of the jurisdictional paradigm in the text consist in the fact that secondary proceedings are permitted at all, a decision probably made at the inception of the drafting of the text because of issues of sovereignty and the economic importance of insolvency. The limitation of secondary proceedings to liquidation-type procedures is also seen as an impediment to the cross-border rescue of companies. A further problem exists in that the framework of the Insolvency Regulation deals effectively with single incorporations with multiple branches, but not the phenomenon of group companies, with cases such as *Eurofood* illustrating the complexities courts are faced with when determining the COMI of individual companies forming part of a group. The practice has arisen of the concentration of proceedings before a single court as occurred in *Collins and Aikman, Re*, perhaps the best-known example of the use of the head office functions test to allow for the COMI to be located at the headquarters of the parent company of the group. The advantage of this mechanism is chiefly in enabling rescue of the group as a whole as locating the COMI in a single place and opening main proceedings over all group companies would also permit the continuation of trading to better realise this purpose. The interest in this case consists in the steps courts might take to achieve this end by invoking domestic practice, such as the use of Letters of Request, to enhance the duty to co-operate the Insolvency Regulation contains. In particular, enabling the administrators to have notice of potential proceedings would palliate the difficulties, as at present, in obtaining information across the European Union in the absence of a supranational register of court filings and judgments in insolvency matters. It remains to be seen, however, whether courts in other European Union Member States would uniformly adopt the view of the Versailles Court of Appeal (and now the High Court) that secondary proceedings may not always be desirable.

Harms Offshore

The facts

The facts arise from the insolvency of Oilexco North Sea Ltd, which was placed into administration under Sch.B1 to the Insolvency Act 1986 by Mr Justice Patten on January 7, 2009. Administrators, who together with the company were the respondents to this application, were appointed and authorised to enter into loan agreements with specified lenders so as to be able to draw funds to meet post-administration liabilities, thus permitting the company to continue to trade in order to permit either the sale of the company or its business as a going concern. The appellant companies, one-ship companies incorporated in Germany, were pre-administration creditors of the company, whose liability arose from time charterparties of two offshore service vessels amounting to nearly £1.2 million. Despite notice of the existence of the administration proceedings, the appellants applied to the US Bankruptcy Court (Southern District of New York) on January 16, 2009 for attachments and/or garnishments of the company's assets to meet their claims. The application did not mention the existence of the administration nor of the arbitration clauses under the charterparties to which they were subject. On January 21 and 26, 2009, ex parte orders were granted by the American court attaching the property of the company and a summons was issued joining the company as a defendant to proceedings and notifying some 19 banks as potential holders of company assets. As the administrators remained in ignorance of the attachments, notice of the American proceedings and orders not having been served until March 24, 2009, a payment of $2 million to a supplier's account at a bank in New York, made on March 19, 2009, designed to pay part of an outstanding bill of some $3.3 million, was attached in favour of the appellants.

In the meantime, the administrators, acting pursuant to the administration order, had agreed a sale of the company's shares conditional on a compromise of the company's liabilities, the whole to be effected by means of a corporate voluntary arrangement under Pt I of the Insolvency Act 1986 under the umbrella of the administration order. The creditors, including the

appellants, who submitted voting/proxy forms on April 9, 2009, had also approved the corporate voluntary arrangement, subject to the administrators' appointment ceasing to have effect. On May 7, 2009, the administrators brought proceedings in the American court seeking to vacate the attachments obtained by the appellants. On May 15, 2009, following an application by the administrators, Mr Justice Englehart granted an injunction requiring the appellants to use their best efforts to procure the release of the attachment/garnishment orders and gave permission to appeal, without, however, staying the order. As a matter of urgency, the Court of Appeal heard the appeal on May 20, 2009, given that the American court was due to pronounce on the application by the administrators later that same day. The Court of Appeal accepted the administrators' contention that the release of the attachments was necessary to enable them to vacate office and complete the sale of the company's shares and accordingly dismissed the appeal against the injunction. Although a brief summary of the court's reasons was given that day, including that it would be of assistance to the American court to know why the English courts had maintained the injunction, written reasons for the dismissal were subsequently published on June 26, 2009.

The judgment

In giving its judgment, the main consideration for the Court of Appeal was the interaction between the two sets of proceedings. For the appellants, counsel argued that the opening of American proceedings was not in breach of the statutory restriction against taking proceedings against a company in administration set out in para.43(6) of Sch.B1, given that the provision had no extra-territorial effect. Furthermore, there was arguably no trust issue that justified an anti-suit injunction prohibiting proceedings against assets of the debtor in another jurisdiction. As the American court had been properly seised of proceedings, comity required the English courts to abstain from interfering with those proceedings, especially given that the United States had also adopted the Model Law in Chapter 15 of the Bankruptcy Code and that the administrators were parties to those proceedings. For the respondents, counsel argued that the injunction was necessary, given that the conduct of the appellants in launching the American proceedings interfered substantially with the exercise by the administrators of functions granted them by the English order and that the subject-matter of the American proceedings had, in any event, no connection with that court.

The Court of Appeal began by examining the extra-territorial application of insolvency provisions. In *Oriental, Re*,[24] in which the liquidator had obtained an order requiring a creditor who had successfully obtained an attachment in India to return those assets to the liquidation, the court had taken the view that the winding up was ''necessarily confined to the country''.[25] Although the view had previously been taken that the courts could proceed as if there was an auxiliary winding up taking place in India, the Indian courts had declined to assist this course, thus limiting the strategy the English courts could adopt of extending the global reach of domestic insolvency proceedings with an international element.[26] The court, nonetheless, observed that if the assets of the debtor were ''liable to be torn to pieces by creditors'', the collection and application of the debtor's assets according to the equitable and rateable distribution rules would be frustrated. The court stated that, if Parliament's intention was to be fulfilled, it was necessary to treat the assets as trust property. Accordingly, the property ceased to be that of the debtor's (being instead subject to a statutory trust to be dealt with in a particular way) and thus no longer fell subject to execution obtained by creditors. Although, admittedly, problems might arise in being able to deal with the assets subject to the jurisdiction of other courts and in obtaining the co-operation of other courts, this could not prevent the English court from forming the proper view that a creditor, subject to knowledge of the trust over the debtor's assets created by virtue of the existence of insolvency proceedings, could not retain the advantage obtained as a result of execution over assets elsewhere,[27] but must repatriate the assets for distribution between fellow creditors within the collective proceedings. With this view, the Court of Appeal was entirely in agreement.

The Court of Appeal admitted, nonetheless, the difficulty with respect to the extra-territorial effect of the statutory provisions involved in this case, especially given the distinction that could be made between the position of a company subject to winding up, as in *Oriental, Re*, and that of one in administration. Despite the administrators' contention that ''property'' as defined in s.436

24. *Oriental Inland Steam Co Ex p. Scinde Railway Co, Re* (1874) L.R. 9 Ch. App. 557 CA.
25. (1874) L.R. 9 Ch. App. 557 at 558 per James L.J.
26. It is interesting to note that the legislation in 1862 allowed English courts to wind up unregistered companies, albeit doubtful that it applied to foreign • companies until the judgment in *Jarvis, Re* (1895) 11 T.L.R. 373.
27. Subject of course to the temporality rule, which permits the benefit of execution obtained prior to the insolvency judgment to stand. However, even in this instance, if execution is not perfected prior to proceedings being opened, it may fall foul of any applicable moratorium.

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of the Insolvency Act 1986 applied to property ''wherever situated'', the Court of Appeal was of the view that the prohibition against ''legal process'' affecting such property in para.43(6) of Sch.B1 could not really be interpreted as applying to process outside the jurisdiction. The difficulty was compounded by the absence of any express extra-territorial intention in the formulation of the provision and by the judgment in *Mitchell*,[28] in which Mr Justice Blackburne decided that the s.183 of the Insolvency Act 1986 prohibition against levying execution or attachment after the commencement of winding-up proceedings does not apply to foreign proceedings, his view being undisputed later before the Court of Appeal in the same case. Although, seemingly, the extra-territorial effect of the provisions in contention could be doubted, the Court of Appeal did not feel it necessary to determine the issue, given that the line of authority offered by *Oriental, Re* and other cases permitted the court to exercise a protective jurisdiction over assets belonging to a debtor and that any difference between the nature of administration and winding-up proceedings mattered little in this context. This view was comforted by the use of this protective jurisdiction in*e Polly Peck, Re*,[29] involving a company in administration.

Whether the Court of Appeal felt bound to exercise this protective jurisdiction was, however, a different issue, which also involved considerations of comity. The Court of Appeal found very helpful the summary of the balance to be reached found in *Vocalion, Re*,[30] where the in personam jurisdiction to restrain a defendant from pursuing proceedings had to be contained by the view as to whether substantial justice was more likely to be attained by allowing foreign proceedings to continue. In the instant case, although a *forum non conveniens* argument was effectively raised by the respondents, the Court of Appeal agreed with the Privy Council's view that the inconvenience of a forum was not in itself a sufficient justification for the grant of injunctive relief.[31] However, the view could also be taken, as it was before the Privy Council, that the purpose of an anti-suit injunction could be to protect the jurisdiction of the English court, despite the general view that ''comity demands a policy of non-intervention''.[32]

The Court of Appeal found it necessary, despite the very obvious experience of the American court in insolvency matters, to protect the ability of the administrators to exercise their statutory functions and to fulfil their statutory duties, particularly where the conduct of the creditors concerned could be characterised as oppressive, vexatious, unfair or improper. In reaching its decision, the Court of Appeal found a number of factors relevant, including the fact that the company was incorporated and subject to an administration in England, the appellants were neither incorporated nor carrying out business in the United States and had not informed the American court of the existence of the administration, despite the requirement for full and frank disclosure. Furthermore, the attachments could only operate on the basis of post-administration property coming into the jurisdiction of the American court and in fact operated on moneys that the administrators had transferred so as to pay off a post-commencement liability in ignorance of the attachment orders obtained, a situation the Court of Appeal considered interfered with the performance of the statutory functions and duties of the administrators. The result would also be to require the administrators, to avoid the consequences of the order, to seek the recognition of the English proceedings under the Model Law, a step that would necessarily engage the further costs involved in being represented and arguing a case before the American court. Accordingly, the unconscionable conduct of the appellants in bringing the American proceedings and keeping the administrators in ignorance of the orders for a three-month period brought this case within the exceptional category justifying injunctive relief.

Analysis

The case is very interesting in that it outlines an expansive view of comity, albeit subject to considerations of domestic policy. English courts have generally had a positive view of comity and the need to assist or avoid impeding proceedings before other courts. Nonetheless, the highs and lows of comity can be illustrated by cases such as, on the one hand, *Dallhold, Re* and, on the other, *Felixstowe*.[33] This case is best characterised as one in which the exceptional circumstances, occasioned largely by the appellants' conduct in beginning proceedings in the United States, undoubtedly as a strategy designed to secure the best outcome for the

28. *Mitchell v Carter* [1997] 1 B.C.L.C. 673.
29. *Polly Peck International Plc (In Administration) (No.5), Re* [1998] 2 B.C.L.C. 185 CA (Civ Div).
30. *Vocalion (Foreign) Ltd, Re* [1932] 2 Ch. 196.
31. *Société Nationale Industrielle Aerospatiale v Lee Kui Jak* [1987] 1 A.C. 871 PC (Brunei).
32. *Mitchell v Carter* [1997] 1 B.C.L.C. 673 at 685 per Millett L.J.
33. *Dallhold Estates (UK) Pty Ltd, Re* [1992] B.C.L.C. 621 Ch D; *Felixstowe Dock and Railway Co v United States Lines* [1988] 2 All E.R. 77 QBD, the latter strongly criticised as an example of a lack of judicial restraint in P. Millett, ''Cross-Border Insolvency: The Judicial Approach'' (1997) 6 I.I.R. 99.

appellants by effectively promoting them from unsecured to secured creditors through the use of the attachment/garnishment orders. In the present case, the strategy also had the effect of impeding the ability of the administrators to discharge post-commencement liabilities as a prelude to effecting the sale of the company's shares, a measure that would have allowed for the maximum benefit obtainable in the circumstances to be distributed equitably among all entitled creditors. The Court of Appeal rightly accepted that a generous view of comity had to be taken, particularly between jurisdictions that subscribed to the same set of rules contained in the Model Law on cross-border assistance, and that considerations of whether substantial justice could be reached by permitting foreign proceedings to continue played a part in whether to grant/refuse injunctive relief to petitioners. This had to be tempered by the equally acceptable view that comity was not open-ended and that the behaviour of the parties played a part in determining whether courts were prepared to exercise their equitable jurisdiction, a jurisdiction in which principles of fairness and unconscionability sat alongside procedural/substantive considerations. In the present case, although in theory the administrators could have obtained recognition under the Model Law of the English proceedings by the American court, this was a less acceptable strategy in terms of costs and outcomes as opposed to having those proceedings dismissed. Thus the domestic policy concerns in securing a fair outcome for all creditors by enabling the administrators to fulfil their statutory functions and comply with their duties necessarily trumped considerations of comity.

Summary

English courts have had a long history of co-operating in insolvency matters. From the first developments in the common law, seen in cases like *Solomons*,[34] to the enlargement of powers for mutual aid in the Bankruptcy Act 1861[35] and later improvements represented by the ''aid and auxiliary'' doctrine seen in s.74 of the Bankruptcy Act 1869,[36] the English courts have enjoyed the ability to develop and extend common law principles to govern insolvencies with an international element and to govern the use and application of statutory provisions on assistance in both personal and corporate insolvencies.[37] Turning to the cases, *Millhouse Capital* illustrates how the use of the domestic statutory jurisdiction to wind up companies may in fact become a method of furthering the co-operation inherent in arts 25–27 of the Model Law. *Nortel, Re* follows this up by showing how a creative use of the Letters of Request facility seen in domestic insolvency practice, mostly in connection with cases under s.426, can assist the co-ordination of cases under the Insolvency Regulation and underpin the duty to co-operate in art.31. Undoubtedly, the same would be true of the Model Law and Letters of Request could also issue in appropriate cases. The final case, *Harms Offshore*, suggests that courts should be inclined to co-operate with other jurisdictions adopting the Model Law, but that, exceptionally, domestic practice relating to anti-suit injunctions can intervene if foreign proceedings have been procured by some unconscionable act on the part of one of the parties to the case. This echoes the public policy exceptions contained in art.26 of the Insolvency Regulation and art.6 of the Model Law, permitting courts to refuse recognition of cases pending in other jurisdictions. Together, these three cases form a useful and recent insight into the workings of the English courts. They confirm the general desire to assist in cross-border matters that has long been a feature of court practice in the jurisdiction. Despite the highs and lows of such co-operation, the general conclusion that may be drawn here is that English courts continue to find creative ways of furthering that assistance and that, consequently, cross-border insolvency cases involving the jurisdiction of English courts will be well served by resourceful practitioners presenting arguments to the courts that will inspire judicial ingenuity in finding a resolution to these often complex matters.

AQ2

34. *Solomons v Ross* • (1764) 1 Hy. Bl. 131n; 126 E.R. 79.

35. See, in particular, ss.216–220. Certain provisions of the Bankruptcy Act 1849, such as ss.75, 110–111 and 239, featured embryonic forms of co-operation later developed in successor legislation.

36. And, of course, its successors, s.122 Bankruptcy Act 1914 and s.426 Insolvency Act 1986, the latter extending the provision to corporate insolvencies.

37. The equivalent provision in corporate insolvency, until the extension in s.426, was that authorising the winding up of unregistered and foreign companies under what is now s.221 Insolvency Act 1986, as used in *Millhouse Capital* (above).

THOMSON

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