EU COMMISSION CONSULTATION ON THE FUTURE OF EUROPEAN INSOLVENCY LAW

Response of the Judges of the Chancery Division of the High Court of Justice of England and Wales

INTRODUCTION

The High Court is the highest first instance court in England and Wales and its Judges also hear appeals from many, but not all, decisions of lower courts. The High Court comprises 108 Judges divided into three Divisions.

Insolvency cases may proceed either in the county courts or in the High Court. Those in the High Court are assigned to the Chancery Division which comprises the Chancellor (Head of Division) and, currently, 17 High Court Judges. The Judges also hear a wide range of other business and property cases. They hear the more significant insolvency cases together with appeals from 5 specialist insolvency judges called Registrars who are also part of the Chancery Division. The Judges and Registrars have wide experience of cross-border insolvency cases, including but not limited to those governed by the EC Insolvency Regulation.

This response to the Commission's consultation is made on behalf of the Judges of the Chancery Division, with the benefit of contributions also from the Chief Registrar. It is based exclusively on experience gained in a judicial capacity. Responses are not provided to a considerable number of the questions, where there is no relevant experience on which to draw.

This document sets out in bold the questions to which responses are given, followed by the response.

I General Assessment

1. **In your view, does the Insolvency Regulation operate effectively and efficiently to coordinate cross-border insolvency proceedings? If so, which main problems have you faced or noticed?**

   See detailed comments below.

2. **Which principal changes, if any, would you suggest to improve the existing legal framework for cross-border insolvency in the EU?**

   See detailed comments below.

II Scope of the Insolvency Regulation

3. **In your view, has it created problems that the Insolvency Regulation does not, in principle, apply to pre-insolvency or hybrid proceedings and that the effects of such proceedings are therefore not recognised EU-wide? If so, please give examples of cases where problems have arisen or could arise.**

   In our experience, this has not created problems.

4. **…**

5. **Should the Insolvency Regulation be applicable to over-indebted private individuals and self-employed persons? If so, how could the Insolvency Regulation be amended to accommodate the recognition and co-ordination of civil bankruptcy procedure in different Member States?**

   UK law includes provisions for insolvency protection for individuals with very low incomes and negligible assets, called debt relief orders. Because of the very low thresholds for the making of such orders, we do not consider that it is necessary or appropriate to bring them within the Insolvency Regulation.

6. **In your view, has it created problems in practice that the Insolvency Regulation does not contain provisions for the recognition of insolvency proceedings outside the EU or the coordination between proceedings inside and outside the EU? If so, should the Regulation be amended to address these problems?**

   We do not think that it has created problems in practice. The UK courts have been able to use longstanding common law powers of recognition of foreign insolvency proceedings as well as the statutory provisions of section 426 of the Insolvency Act 1986 which apply to some but not all foreign states. More recently, by the Cross-Border Insolvency Regulation 2006 (SI 2006/1030), the UK has incorporated the UNCITRAL Model Law on Cross-Border Insolvency. It would promote consistency on a worldwide basis if other Member States were also to incorporate the UNCITRAL Model Law into their own domestic law.

   The Insolvency Regulation could however be amended to deal with the situation where a company with its COMI outside the EU operates or has assets within more than one Member State. In such a case, it would be helpful if there was co-ordination between the insolvency proceedings in the Member States involved. One possibility would be to identify the Member State having the closest connection with the company and to provide that the lead Insolvency Proceedings within the EU should be in that Member States, while keeping open the possibility of secondary proceedings where it can be shown that they are necessary.

III. Competent court to open insolvency proceedings

7. **In your view, is it appropriate that jurisdiction for opening main insolvency proceedings is determined by the location of the debtor's centre of its main interests ("COMI")? If so, how should it be amended?**

COMI works satisfactorily as a concept in relation to corporate insolvencies. The court can generally rely on the presumption that a debtor's COMI is its registered office, but the case law has now developed to produce a workable test to enable the company's COMI to be determined in cases where the presumption is rebutted.

More significant problems arise in the case of individuals in an increasingly mobile world, where the problems are exacerbated by the well-known phenomenon of bankruptcy tourism. Where jurisdiction is contested, the court is often compelled to embark on an extensive enquiry into the facts in order to establish where the debtor was conducting the administration of his affairs at the relevant time. While case law has provided considerable assistance in identifying the issues to be considered in determining that question (for example, the decision of the English Court of Appeal in ***Shierson v Vlieland-Boddy*** [2006] 2 BCLC 9), these principles have to be applied to the facts of each individual case and this can be and frequently is a complex and time consuming exercise. Examples of such cases in the UK courts can be found in ***Stojevic v Official Receiver*** [2007] BPIR 141, ***Official Receiver v Mitterfellner*** [2009] BPIR 1075, ***Re Hagemeister*** [2010] BPIR 1093, ***Loy v O'Sullivan*** [2011] BPIR 181. ***Re Hiwa Hick*** [2011] 702, ***Re Korffer*** **[**2011] BPIR 786, ***Steinhardt v Eichler*** [2011] BPIR 1293 and ***Irish Bank Resolution Corporation Ltd v Quinn*** [2012] NICh 1. Some of those cases took a day or more. The case of ***Steinhardt v Eichler*** lasted eight days.

A simpler definition applicable to individual debtors would be welcomed to avoid the need for such lengthy enquiry and the consequential costs. We do not at this stage propose a definition, which might, we accept, be difficult by reason of the need to accommodate existing definitions applicable in a wide range of domestic EU jurisdictions. Tentatively we would suggest that a definition could be reached by, say, reference to the debtor carrying on business or residing in a Member State for a specified period, for example, six months before the commencement of the proceedings or six months within a period before the commencement of the proceedings.

8. **Does the interpretation of the term "COMI" by case-law cause any practical problems? If so, please describe these problems.**

See the answer to Q.7

9. **Is there any evidence of abusive relocation of "COMI" by the debtor to obtain a more favourable insolvency regime? If so, please give examples, and suggest how such abuse could be prevented.**

There is considerable experience in the UK of German citizens seeking to relocate to the UK in order to enable them to apply for their own bankruptcy in the UK. There is some more recent experience of citizens of the Republic of Ireland doing the same.

10. Are there problems with the interaction of the Insolvency Regulation with the Brussels I Regulation which have not been solved satisfactorily by case-law? If so, how should the Regulation be amended?

This issue has been considered in a number of cases and a fairly clear and sensible line seems to have been established between the Regulations. We do not consider that there is any significant problem with the interaction between them. There are bound to be a few borderline cases, but they can be resolved on a case by case basis.

IV. Group of companies

11. In your view, does the Insolvency Regulation work efficiently and effectively for the insolvency of a multinational group of companies? If so, how could the insolvency of a multinational group of companies be dealt with in the Insolvency Regulation?

The Insolvency Regulation works efficiently and effectively where the COMI of all of the companies in the group can be shown to be in single jurisdiction. Where different companies in the same group have their COMIs in different States, the potential problems are thought to be overcome by the use of protocols between the office holders in the insolvency proceedings in the different States.

V. Coordination between Main and Secondary proceedings

12. Has the system of secondary proceedings in general been helpful to protect the interests of local creditors or to facilitate the administration of complex cases? If so, how could it be changed?

Secondary proceedings are generally opened in order to protect the interests of local creditors and appear to be effective for that purpose. However, that can frustrate, rather than facilitate, the administration of complex cases. In some cases where the main proceedings have been in the UK the problems have been lessened by permitting the office holder in the UK main proceedings to recognise local priorities in those States where secondary proceedings have been opened.

13. Does the coordination between main and secondary proceedings work satisfactorily overall? If so, how could it be improved?

It does not always operate satisfactorily. Because of Article 3.3 the secondary proceedings must be winding-up proceedings. This can frustrate the objective of main proceedings which have been opened for the purpose of rescuing the company. This can and has in some cases enabled groups of creditors in one jurisdiction to impair the attainment of the principal objective in the main proceedings. There are also increasingly complex issues arising as to what assets are situated in the territory of a Member State opening secondary proceedings.

14. Does the duty to cooperate between insolvency practitioners work efficiently and effectively? Is so, how could the cooperation be improved?

Problems seem to arise because of the different roles and expectations of office holders in different Member States. In some Member States office holders are used to take far reaching commercial decisions whereas in other States office holders tend to refer far more decisions to the supervising court.

15. Has it created any problems that the Insolvency Regulation does not contain a duty of cooperation between the insolvency practitioners and the foreign court or between the relevant courts themselves? If so, on which issues and how should communication take place?

Problems have arisen in some cases. For example, in the insolvency proceedings relating to companies in the MGR Rover Group, there were problems of co-ordination between the insolvency proceedings in the UK and in Germany. A duty to cooperate between the relevant courts would assist in such cases.

VI. Applicable Law

There are no responses to the questions in this part.

VII. Recognition and enforcement

20. Are there any problems of recognition of the decision opening the proceedings or with the recognition and enforcement of further decisions during the proceedings?

Article 16 and 17 of the Regulation provide for the recognition of any judgment opening proceedings "with no further formalities". In practice the courts of a number of Member States ask for a certificate proving the authenticity of the judgment or order. This creates unnecessary administrative burdens and adds to costs. Moreover, courts in England are often asked to certify that there is no outstanding appeal against an order. Two points arise here. First, subject to the terms of the order itself, an English order is effective when it is made and is not stayed by the simple fact of lodging an appeal. Secondly, whether an appeal has been lodged is a matter within the knowledge of the party who may wish to appeal, rather than the court which made the order.

It would be helpful to provide expressly for the recognition of other kinds of order in insolvency proceedings without formality.

21. Are you aware of cases where a Member State has refused to recognise insolvency proceedings or to enforce a decision on the grounds of public policy?

No.

22. Should the definition of the decision "opening insolvency proceedings" be amended to take into account national legal regimes where there is not or not always an actual court decision opening the proceedings?

Yes. A further difficulty appear to arise as a result of the tension between the definition of the "time of the opening of proceedings" in Article 2(f) of the Regulation and the decision in ***Re Staubitz-Schreiber*** (C-1/104) in which it was held that Article 3(1) was to be interpreted by reference to the time when the request to open proceedings was filed. It is suggested that consideration be given to adopting the latter position in the Regulation in order achieve clarity and to avoid problems of the kind which have arisen in a number of cases where during the currency of the proceedings the debtor has moved his COMI by the time of the final hearing.

VIII. Publication of insolvency proceedings and the lodging of claims

IX. Differences in national insolvency laws

X. Cost of Proceedings

There are no responses to the questions in these parts.

London
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