



Recognition of Gibraltar insolvency proceedings in English courts

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Overview

- Situation: you are acting for a Gibraltar insolvency officer seeking to exercise powers in England and Wales
- The legal framework –
 - the routes to recognition of insolvency proceedings
 - the procedure for each
 - choosing between them
- Case study
- How you can add value



Routes to recognition of insolvency proceedings by the courts of England and Wales

- EU Insolvency Regulation
- UNCITRAL Model Law
- Section 426 Insolvency Act 1986
- Common Law



1. EU Insolvency Regulation – brief recap

- EU legislation with direct effect
- Provides for mutual recognition of insolvency proceedings by the courts of EU member states
- Grants officeholders the full gamut of powers of the jurisdiction in which main proceedings are under way
- Officeholder may remove assets subject to secured claims and retention of title



1. EU Insolvency Regulation – which officeholders can use it?

- Extends to the whole of the EU, including Gibraltar
- For the purposes of the Regulation the United Kingdom is comprised of England, Wales, Scotland, Northern Ireland **and Gibraltar** as a single state: Art 299(4) TEU
- Regulation 15: territorial jurisdiction **within** a member state is governed by the national law of that state
- Section 3 of Gibraltar’s 2014 Insolvency Act legislates for Gibraltar, not UK: **Gibraltar office-holders cannot avail of it in UK**



1. EU Insolvency Regulation – which officeholders can use it?

- Does not apply to Isle of Man, Channel Islands
- Does not apply to British Overseas Territories
- Not Intra-UK (Scotland, Northern Ireland)

- Anomaly: mirroring legislation in UK required for s. 3



2. Cross-Border Insolvency Regulations (Great Britain)

- Implements Model Law in GB
- Caveat: **operation of Model Law varies from state to state**
- Benefits: Art 20 (stay); Arts 21 and 23 (powers)
- Route available to Gibraltar officeholders?
 - *Akers v Deutsche Bank* [2012]: BVI
 - *MG Engineering & Consultancy Ltd* [2014]: Gibraltar



2. Cross-Border Insolvency Regulations – how to apply

- Officeholders may apply directly to English court: Art 9
- Form ML1 application for recognition of proceedings
- Sworn affidavit
- Copies of the decision commencing foreign proceedings and appointing the foreign officeholder
- Registrar Nicholls' guidelines in *Re Rajapakse* (Note) [2007]
- Advertisement: Form ML8



Schedule 2,
Paragraph 2

Form ML 1

The CrossBorder Insolvency Regulations 2006

Recognition application

Name of Debtor Amalgamated Widgets Limited	Company number <i>where applicable</i>
In the High Court of Justice, Chancery Division [full name of court]	<i>For court use only</i> Court case number

(a) Insert full name(s) of applicant(s) 1. The application of (a) Joe Bloggs of Bloggs Doe (Gibraltar) LLP being the foreign representatives appointed in relation to the above named debtor in a foreign proceeding, in reliance on article 15 of the UNCITRAL Model Law on crossborder insolvency as set out in Schedule 1 to the CrossBorder Insolvency Regulations 2006 ("the Model Law").

(b) Insert full name of the debtor 2. The application is in respect of a foreign proceeding in relation to (b) Amalgamated Widgets Limited

(c) Insert name of country where the foreign proceeding the subject of the application is taking place ("the debtor") lately carrying on business in (c) Gibraltar

(d) Insert any trading name of the debtor if different from the full name given above and any former trading names in respect of any business in respect of which the debtor may have incurred debts or other liabilities still unsatisfied as (d) N/A



(m) Insert name of country where the foreign proceeding is taking place

6. The foreign proceeding in respect of which recognition is applied for is taking place in (m) Gibraltar

(n) Insert brief details of the foreign proceeding

The foreign proceeding is (n) the liquidation of the debtor.

7. The foreign proceeding in respect of which recognition is applied for is a proceeding within the meaning of article 2(i) of the Model Law,

and the applicant is the foreign representative of the debtor within the meaning of article 2(j) of the Model Law in relation to that proceeding,

and the evidence referred to in article 15(2) of the Model Law is contained in or exhibited to the affidavit in support attached to this application.



2. Cross-Border Insolvency Regulations – advantages and disadvantages

Advantages

- Relatively quick and easy
- Can apply directly
- Non-discretionary
- Dealt with by Registrar or Deputy Registrar
- No consular or FCO formalities
- English court has discretion to communicate with/assist courts as well as officeholders



2. Cross-Border Insolvency Regulations – advantages and disadvantages

Disadvantages

- Limited toolset when compared with s. 426 IA: relief under CBIR is that which is available to British officeholder
- Automatic stay does not affect any right to enforce security over the debtor's property



3. Section 426 Insolvency Act 1986

- Statutory obligation on the English courts to assist the courts of certain other jurisdictions
- Tools which can be granted are at the discretion of the English court (in practice, foreign or English toolset)
- English court may apply English or foreign insolvency law whether or not there are equivalents in either law
- Territorial scope: includes Gibraltar – designated as a “relevant country or territory” by the Secretary of State



3. Section 426 – how to apply

- No direct right for foreign officeholder
- Apply to court in own jurisdiction for letter of request
- Letter goes to FCO then to the High Court
- Form 7.1A Application
- Recognition not automatic – determined by a High Court judge



3. Section 426 – advantages and disadvantages

Advantages

- Both toolsets available: greater range of powers
- Dealt with by a High Court judge
- Detailed assistance

Disadvantages

- Might be slower
- Both recognition and the powers granted are at the discretion of the judge



4. The Common Law route

- Principle of comity
- Powers: those of an officeholder under the 1986 Act



4. The Common Law route – how to apply

- Engaged by ordinary application with evidence



4. The Common Law route – advantages and disadvantages

Advantages

- Full gamut of officeholders' powers under IA 1986 excepting powers not enjoyed by them under their domestic jurisdiction: *Singularis Holdings v PwC* [2014] PC

Disadvantages

- Uncertainty: recognition is discretionary (court will have regard to public policy, fraud/unfairness, natural justice)



How should you make the choice?

- Clients' objectives
- Time available and powers required
- Statutory order of priority in cases of conflict:
 - EU Insolvency Regulation
 - Cross-Border Insolvency Regulation
 - Section 426 IA
 - Common law



Case Study: Aer Arann

- Objective: keep the business going (examinership)
- Route selected: s 426 IA (rights in rem)
- Jurisdictions:
 - Ireland
 - IOM
 - Scotland
 - England and Wales
- Applications and outcome



How to add value to the process as Gibraltar counsel

- Understand the strategic objectives of the Gibraltar officeholder
- Guide and advise the English lawyers in their selection of route (and those in other jurisdictions)
- Ensure all of the formalities required under Gibraltar law are complied with (including obtaining sanction)
- Co-ordinate activities in own jurisdiction with those in others