

THE INSOLVENCY (CROSS BORDER INSOLVENCIES) REGULATIONS 2014

Introduction

1. The Insolvency (Cross Border Insolvencies) Regulations 2014 (“the Regulations”) entered into force on 1 November 2014. They were made pursuant to sub-section 495 (2) (ii), (iii) and (iv) of the Insolvency Act 2011 (“the 2011 Act”). Part 3 of the Regulations gives effect in Gibraltar to the UNCITRAL Model Law on cross-border insolvency (“the Model Law”). The purpose of this talk is to consider the background to the Regulations, their basic structure, and to explain how they should simplify the recognition of foreign insolvency proceedings and the grant of relief in Gibraltar to foreign insolvency officers. This talk and the accompanying notes do not constitute legal advice on any particular fact or matter.
2. “Cross border” indicates the obvious point that we are dealing with cases involving more than one jurisdiction, for example a US bankruptcy trustee wishing to claim property in Gibraltar for the benefit of the bankruptcy estate, or seeking information and oral evidence from directors domiciled in Gibraltar. The Regulations apply equally to corporate and personal insolvency.
3. Cross-border co-operation has proved difficult in the past. There appeared, at times, a degree of hostility on the part of English judges to formal collaboration with foreign insolvency proceedings and officers. In *Levy International Resources Limited*, 8 March 1973 (unrep.), Lord Denning stated:

“This is an English company registered in England...It is not subject to the bankruptcy laws of the United States. If it owes money and cannot pay, it must be put into liquidation in England, and not in the United States. The winding up is subject to the jurisdiction of the English courts, and not the American courts. I do not think that we can recognise a law by which the property of this company is transferred to a [US] trustee irreparably with a view to reorganization: because that would interfere irreparably with any English winding-up.”

4. The difficulties caused by the lack of international mechanisms to deal with large scale cross-border insolvencies became increasingly clear in the 1980s and 1990s, leading to judicial observations to the contrary. See, e.g:
 - a. *Re Bank of Credit and Commerce International SA* [1992] BCC 83 ChD where Browne-Wilkinson V-C expressed “*profound regret*” that there was no international convention governing insolvency.
 - b. Nicholls V-C stated that there was a “*crying need*” for such a convention in *Re Paramount Airways Limited* [1993] Ch 223, 229 (CA).
 - c. In the Maxwell litigation Hoffmann J said that “*the only satisfactory solution to the possibility of jurisdictional conflicts in cross-border insolvencies would be an international convention*”: *Barclays Bank v. Holman* [1992] BCC 757, 766 (CA).
5. There are various means by which the courts of Gibraltar can assist foreign insolvency proceedings and officers:
 - a. If you are dealing with an insolvency proceeding or officer emanating from a Member State of the EU, EC Regulation 1346/2000 on Insolvency Proceedings (“the EC Insolvency Regulation”) will apply. The EC Insolvency Regulation sets out detailed rules for the allocation of jurisdiction, the recognition of foreign proceedings and the availability of relief to insolvency officers.
 - b. There was a statutory jurisdiction to assist British and other EC courts under section 98 of the Bankruptcy Act 1934. Section 495 (2) (iii) of the 2011 Act provides a power to make rules to provide for co-operation between courts exercising jurisdiction in relation to insolvency in any specified country. See regulations 25 to 33 of the Regulations. The English jurisdiction to assist foreign courts – section 426 of the Insolvency Act 1986 – has diminished in importance following the introduction of the Cross-Border Insolvency Regulations 2006 (“the CBIR”).

- c. There exists a common law jurisdiction to recognize foreign insolvency proceedings and to assist their officeholders, as a matter of commercial necessity. Its limits have been the subject of intense debate, generating several decisions of the Privy Council and Supreme Court, including one with a contribution from Gibraltar: *Picard v. Vizcaya Partners Ltd* in *Rubin & Anor v. Eurofinance SA & Ors* [2012] UKSC 46, [2013] 1 AC 236. The present last word on this subject is *Singularis Holdings Ltd. v. PwC* [2014] UKPC 36, [2015] 2 WLR 971. Lord Sumption's leading judgment recognized the existence of the common law jurisdiction, but made clear that it was not available to permit the foreign officer to obtain relief in England which he or she could not obtain under the law by which they were appointed.

6. I turn now to the Regulations, which apply in non-EU cases.

Origins

7. The Regulations implement the Model Law in Gibraltar. UNCITRAL undertook a lengthy period of consultation and negotiation with a view to producing an international convention on insolvency to promote the following objectives:
 - a. To facilitate the recognition in one jurisdiction of insolvency proceedings that have been instituted in another and similarly the recognition of the authority of the office-holder in such proceedings.
 - b. To give foreign creditors access to local courts, allowing them to participate in local insolvency procedures.
 - c. To establish an orderly regime between insolvency proceedings concerning the same persons or entities in more than one jurisdiction.
 - d. To encourage co-operation between courts, office-holders and competent authorities involved in cross-border insolvencies.
8. The Regulations have the following basic structure:

- a. Part 1 (regulations 1 and 2) deals with commencement and definitions.
- b. Part 2 (regulations 3 and 4) deals with the inter-relationship between the EC Insolvency Regulation and the Model Law.
- c. Part 3 (regulations 5 to 33) implements the Model Law itself.

Parts 1 and 2

9. The most important definitions are as follows:

- a. *“‘foreign proceeding’ means a collective judicial or administrative proceeding in a designated foreign country, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization, liquidation or bankruptcy.”*

Note the core elements: *“collective”*, for the benefit of all creditors; *“judicial or administrative”*; *“under the control or supervision of the court”*. Proceedings will be *“main”* or *“ancillary”* depending on the place where the debtor’s centre of main interests is located. COMI is of course a concept with which we are familiar from the EC Insolvency Regulation.

- b. *“‘foreign representative’ means a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor’s property or affairs or to act as a representative of the foreign proceeding.”*

This means the insolvency officer, who must be authorized in the foreign proceeding to administer the debtor’s property or affairs by way of reorganization, liquidation or bankruptcy.

- c. There is a definition of *“Gibraltar insolvency proceeding”*, which is broadly consistent with the core components of the definition of *“foreign proceeding”*.
- d. *“‘insolvency law’, in relation to a specified country or territory, means so much of the law of the part of the specified country or territory that*

corresponds to provisions falling within the Act and any subsidiary legislation made under that Act”.

- e. “*insolvency officer*” means the Official Receiver, when acting as liquidator, provisional liquidator, interim receiver, bankruptcy trustee, supervisor or interim supervisor, and a person acting as an insolvency practitioner, but not administrative receivers.

10. Regulation 5 (5) in Part 3: the court shall have regard to the international origin of the Model Law and to the need to promote an application of Part 3 which is consistent with the application of similar laws adopted by foreign jurisdictions. Cf. the equivalent English provision, Article 8 of Schedule 1 to the CBIR 2006. Regard may be had to the UNCITRAL document, any documents of UNCITRAL and its working group, and the Guide to Enactment of May 1997. These definitions are therefore to be construed in an international context and not solely by reference to the law of Gibraltar. Many of them and the underlying concepts are used in the EC Insolvency Regulation, to which you should also have regard.

11. Part 2, regulation 3 makes clear that for all purposes connected with the operation of the EC Insolvency Regulation and its application to the 2011 Act, Gibraltar and the UK are to be treated as separate EEA states. Regulation 4 provides that if the 2011 Act or any subsidiary legislation, including the Regulations, conflicts with an obligation of Gibraltar under the EC Insolvency Regulation, the latter will prevail.

Part 3

12. Regulation 5 (1) states that Part 3 gives effect to the Model Law in Gibraltar, as modified by that Part.

13. Regulation 5 (2) sets out the objectives of the Model Law as implemented in Gibraltar, namely to provide effective mechanisms for dealing with cross-border insolvency cases so as to promote:

- a. Co-operation between the court and insolvency officers of Gibraltar and the courts and competent authorities of foreign countries involved in cross-border cases.
- b. Greater legal certainty for trade and investment.
- c. Fair and efficient administration of cross-border insolvencies so as to protect the interests of creditors, interested persons and the debtor.
- d. The protection and maximisation of the value of the debtor's assets.
- e. The facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

14. Regulation 5 (3) explains the situations where the Regulations apply, namely:

- a. Where assistance is sought in Gibraltar by a foreign court or representative in connection with a foreign proceeding.
- b. Where assistance is sought in a foreign country in connection with a Gibraltar insolvency proceeding.
- c. Where a foreign proceeding and a Gibraltar insolvency proceeding are taking place concurrently in respect of the same debtor.
- d. Where creditors or other interested persons in a designated foreign country have an interest in requesting the commencement of or participating in a Gibraltar insolvency proceeding.
- e. Regulation 5 (4) contains a specific exemption for Authorized persons holding a prescribed financial services licence of a type designated by the Minister for the purposes of the Regulations by Notice published in the Gazette.

15. Nothing prevents the court from refusing to take an action governed by this Part if the action would be contrary to the public policy of Gibraltar: regulation 6.

16. The prohibition under section 476 of the 2011 Act on acting as an insolvency practitioner without a licence does not apply to anything done by a foreign representative under or by virtue of Part 3 or in relation to relief, co-operation or co-ordination provided under Part 3.
17. Nothing in Part 3 limits the power of the court or the insolvency officer to provide additional assistance to a foreign representative where the 2011 Act, any other enactment or a rule of law so permits: regulation 8.

Recognition applications: preliminary matters

18. By regulation 9, any application should be made in accordance with the Insolvency Rules 2014.
19. By regulation 10, the court may authorize an insolvency officer to act in a foreign country on behalf of a Gibraltar insolvency proceeding as permitted by the applicable foreign law.
20. As to the access of foreign representatives and creditors to courts in Gibraltar, see regulations 11 to 15.
21. Regulation 11, the foreign representative's right of direct access to the court of Gibraltar:
 - a. Regulation 11 (1) confirms the right of a foreign representative to apply to the court under regulation 16 for recognition of the foreign proceeding in which he is appointed.
 - b. Regulation 11 (2) makes clear that a foreign representative may not be granted comity or co-operation by the court unless the foreign proceeding in respect of which he has been appointed has been granted recognition by the court.
 - c. Regulation 11 (3) establishes that upon the grant of recognition, the foreign representative may apply directly to the court for comity or co-operation or for any other relief under Part 3.

22. Regulation 12 confirms that making a recognition application does not subject the foreign representative to the jurisdiction of the court for any other purpose. There might be a host of legal issues affecting the property or affairs of the debtor in dispute. Without the protection afforded by regulation 12, the foreign representative might find himself or herself subject to the jurisdiction of Gibraltar unless he expressly objects. Regulation 12 does away with the need for that precautionary step.
23. Regulation 13 permits a foreign representative, upon recognition of the foreign proceeding, to apply to commence Gibraltar insolvency proceedings, if the conditions are otherwise met, and to participate in any Gibraltar proceeding regarding the debtor.
24. Regulation 14 (1) establishes that foreign creditors have the same rights regarding the commencement of and participation in Gibraltar insolvency proceedings as creditors in Gibraltar. This does not affect the priority of claims or the exclusion of foreign penal, revenue and social security claims from such proceedings. The jurisdictional prohibition against enforcing a foreign revenue law arose in a European context in the Gibraltar case of *In re Widen* [2010-12 Gib LR 267]. The Swedish Official Receiver, appointed over the insolvent estate of the deceased Mr Widen, sought to claim assets held by Gibraltar companies, to satisfy Swedish tax liabilities. At common law the Gibraltar court had no jurisdiction to enforce a foreign tax law. Chief Justice Dudley held that the case was governed by the EC Insolvency Regulation, Article 39 of which abrogated the public policy objection to enforcing foreign tax laws. He granted the relief sought by the Swedish Official Receiver. European cases will continue to be governed by the EC Insolvency Regulation and the 2014 Regulations will not change the position. But in non-EU cases, Gibraltar law maintains the jurisdictional prohibition against penal, revenue and social security claims. Compare the position in England and Wales: Article 13 (3) of the Model Law at Schedule 1 to the CBIR displaces the jurisdictional prohibition, but states that the possibility that foreign tax and social security claims constitute penalties, or are to be rejected in accordance with British insolvency law, is preserved.

25. Regulation 15 provides for the provision of information to foreign creditors of a Gibraltar insolvency proceeding. For creditors whose addresses are not known, the court may order “*appropriate steps*” to be taken, such as newspaper advertisements: regulation 15 (2). If the addresses are known, foreign creditors should be notified individually, unless the court considers that, under the circumstances, some other form of notification would be appropriate: regulation 15 (3). There is considerable flexibility.

Recognition applications: detailed requirements

26. Regulation 16:

- a. A foreign representative may apply for recognition of foreign proceedings: regulation 16 (1).
- b. There are strict requirements for what an application for recognition must contain: a certified copy of the decision commencing the foreign proceeding and appointing the representative, or a certificate from the court confirming the existence of the proceeding and the appointment, or such other evidence as the court considers acceptable: regulation 16 (2).
- c. The recognition application must also be accompanied by a statement identifying all foreign proceedings in respect of the debtor that are known to the foreign representative: regulation 16 (3). This is required so that the court knows that it is not clashing with the approach of other courts.
- d. Translations of any foreign language documents must also be provided: regulation 16 (4).
- e. I drafted a Practice Note issued by Registrar Nicholls in the first London High Court recognition application (*Re Rajapakse* [2007] BPIR 99), which expands on the equivalent procedural requirements in England under Article 15 of Schedule 1 to the CBIR. It will be

interesting to see whether this further guidance is considered helpful in Gibraltar.

- f. The Model Law allows the recognition of foreign proceedings that are commenced extra-judicially. Examples of such foreign proceedings recognized in England include the administration of a statutory compensation fund, the special administration of an investment bank, and a Hong Kong creditors' voluntary winding-up. There will not be a court decision as such. You should submit either copies of relevant resolutions or a certificate from the foreign court in whose jurisdiction the proceedings originated, to establish the existence of the proceedings and the appointment. Proceedings might be commenced by electronic filing. If so, submit a certified copy of the filing with an explanation of the process in the evidence.

27. By regulation 17, the court is entitled to presume that the foreign proceeding and representative are what they purport to be in accordance with the decision or certificate submitted under regulation 16. The court is entitled to presume that the documents are authentic. The debtor's COMI is presumed to be its registered office (for a company) or habitual residence (for an individual), in the absence of proof to the contrary.

28. Regulation 18 deals with the court's decision to recognize a foreign proceeding:

- a. If the foreign proceeding and representative come within the definitions in regulation 2, the procedural requirements of regulation 16 (2) are met, and the application is made in accordance with Part 3 and the Insolvency Rules, the foreign proceeding shall be recognized: regulation 18 (1).
- b. If the foreign proceeding takes place where the debtor has its COMI, it shall be a foreign main proceeding. If not, and if it takes place where the debtor has an establishment only, it shall be a foreign ancillary proceeding: regulation 18 (2). If the debtor only has assets here and no "*establishment*", there cannot be a recognition order.

- c. Recognition applications shall be decided at the earliest possible time: regulation 18 (3).
 - d. Recognition may be modified or terminated if the grounds were in fact fully or partially lacking or have ceased to exist: regulation 18 (4).
 - e. The foreign representative has a duty to bring subsequent information to the court's attention: regulation 19.
29. Interim relief before recognition: regulation 20 provides the court with power to grant relief to the foreign representative on an urgent basis pending the hearing of the recognition application.
30. Regulation 21 describes the effects of recognizing a foreign main proceeding:
- a. There is an automatic stay of actions or proceedings concerning the debtor's property within Gibraltar, and his rights obligations or liabilities. Likewise there is a stay of execution against the debtor's property in Gibraltar and a suspension of the right to transfer, encumber or otherwise dispose of any property within Gibraltar. See regulation 21 (1).
 - b. The court is empowered to order that the stay or suspension should not apply on the application of any creditor or interested person, on such terms as it considers appropriate: regulations 21 (2), (3).
31. Regulation 21 (1) does not affect the right to bring actions or proceedings to preserve a claim against the debtor, or to request the commencement of Gibraltar insolvency proceedings or to file claims in such proceedings: regulation 21 (4), (5).

Relief following recognition

32. Regulation 22 provides for the relief that may be granted upon recognition of a foreign proceeding:

- a. The court may grant “*any appropriate relief*” on application of the foreign representative, in main and ancillary proceedings, where necessary to protect the debtor’s property or creditors’ interests.
- b. Regulation 22 (1) sets out non-exhaustive examples:
 - i. A stay of actions or proceedings, to the extent not already stayed.
 - ii. Staying execution.
 - iii. Suspending the right to transfer, encumber or dispose of the debtor’s property in Gibraltar.
 - iv. The examination of witnesses, the taking of evidence, the delivery of information concerning the debtor’s assets, affairs, rights, obligations or liabilities.
 - v. Entrusting the administration or realization of the debtor’s assets located in Gibraltar to the foreign representative or other person designated by the court.
 - vi. Extending relief granted on an interim basis.
- c. By regulation 22 (2), if the court recognizes a foreign proceeding, whether main or ancillary, the court may entrust the distribution of all or part of the debtor’s property located in Gibraltar to the foreign representative or other person designated by the court, provided that the court is satisfied that the interests of creditors in Gibraltar are adequately protected.
- d. By regulation 22 (3), where the court grants relief in a foreign ancillary proceeding, it must be satisfied that the relief relates to property that under the law of Gibraltar should be administered in that proceeding or concerns information required in that proceeding.
- e. Some practical points arise from the corresponding provision in England, Article 21 of Schedule 1 to the CBIR:

- i. Article 21 (1) authorizes relief to be given from the date of recognition, but it can be given in respect of any rights arising from the start of the foreign proceeding: *Larsen v. Navios International Inc.* [2011] EWHC 878 (Ch).
 - ii. Article 21 (1) (g) permits the foreign representative to apply for any relief available to a British office-holder. There is no equivalent provision in the Regulations for Gibraltar. The English provision has been interpreted as setting minimum standards. The foreign representative may apply for any relief available to him or her in the home jurisdiction: *Re Chesterfield United* [2012] EWHC 244 (Ch).
 - iii. Article 21 (2) permits the court to entrust the distribution of assets to the foreign representative, with safeguards if necessary. In the *Re Rajapakse* litigation, pension receivables, funds in bank accounts, and a freehold house were handed over to a US trustee in bankruptcy.
33. Regulation 23 provides touchstones by which the court ensures that the relief it grants is appropriate:
 - a. The court must be satisfied that the interests of creditors and any other interested persons, including the debtor, are adequately protected: regulation 23 (1).
 - b. The court can subject relief to conditions, including the giving of security or the filing of any bond: regulation 23 (2).
 - c. The court may on application or by its own motion modify or terminate the relief: regulation 23 (3).
34. Voidable transactions: Regulation 24 makes clear that when a foreign proceeding has been recognized, the foreign representative has standing to issue avoidance claims under sections 253 and 438 of the 2011 Act. If you have a situation where a foreign representative wants to challenge an unfair

preference, an undervalue transaction, a voidable general assignment of book debts or a voidable floating charge, or an extortionate credit transaction, please note that:

- a. The court must be satisfied that the foreign representative has roles and functions that are equivalent or broadly similar to a liquidator or bankruptcy trustee, as appropriate.
- b. Where the foreign proceeding is ancillary, the court must be satisfied that the action relates to property that under the law of Gibraltar should be administered in the foreign ancillary proceeding.

35. Intervention in proceedings in Gibraltar: Regulation 25 allows the foreign representative to intervene in any proceedings in Gibraltar in which the debtor is a party, after recognition, provided that the requirements of the law of Gibraltar are met. What proceedings does this regulation have in mind? It obviously covers court proceedings, but the English equivalent provision extends to extra-judicial proceedings concerning the debtor and third parties: Article 24 of Schedule 1 to the CBIR. Most proceedings will have been stayed under Regulations 21 and 22, so this provision is a catch-all.

36. Further matters:

- a. Regulations 26 to 28: co-operation with foreign courts and foreign representatives.
- b. Regulations 29 to 33: concurrent proceedings.

Conclusion

37. The 2014 Regulations are to be welcomed. They provide a streamlined mechanism for recognizing the existence of foreign proceedings and the appointment of foreign representatives. They set out a wide range of relief, which will assist the handling of cross-border insolvencies to the benefit of creditors, debtors and other constituencies. They reduce the potential for an unseemly race to open proceedings or seize assets. They are part of a wide-

ranging renewal of insolvency law and practice in Gibraltar, which indicates the international importance of the territory's commercial life.

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