

# *Bond Law Review*

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*Volume 14, Issue 2*

2002

*Article 5*

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## Developments in Cross-Border Insolvency Practice in the United Kingdom

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# Developments in Cross-Border Insolvency Practice in the United Kingdom

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## **Abstract**

[extract] International insolvency has aroused a great deal of interest in recent years, owing to the spectacular rise in cases of the collapse of banks and multinational companies situated in a variety of jurisdictions. There has been considerable progress in England and Wales from the traditional common law methods of asserting jurisdiction and their statutory equivalents, which lead inevitably to the winding up of the company, towards procedures for reciprocal assistance, which allow domestic procedures to be extended to the foreign company. This often has the effect of allowing the company to attempt to consolidate its economic future through the judicious use of those rescue regimes available in domestic law. The history in the United Kingdom for co-operation has been good, with many of the cases leading the way in developing the principle that domestic courts should allow the most efficient result to obtain for the benefit of creditors and other participants in the process as a whole. Often, this requires domestic courts to extend jurisdiction and the rules in the United Kingdom are framed widely, so as to allow for very wide bases for asserting jurisdiction, where there is a conceivable benefit from doing so.

**KEYWORDS:** insolvency, jurisdiction, United Kingdom

# DEVELOPMENTS IN CROSS-BORDER INSOLVENCY PRACTICE IN THE UNITED KINGDOM

*Paul J Omar\**

## **Introduction**

The law relating to both personal and corporate insolvency is currently contained in the *Insolvency Act 1986*.<sup>1</sup> The treatment of both areas of insolvency in one statute has not always been the case. Personal insolvency, or bankruptcy, has had statutory recognition since early times. Although not the earliest of measures, one of the first extensive laws was the Statute of Bankrupts 1542, enacted in the reign of Henry VIII. The law relating to corporate bodies was introduced by the *Joint Stock Companies Act 1844* although corporate insolvency itself only makes a proper appearance in the inclusion of the institution of winding up in the *Joint Stock Companies Act 1848*. Since this time, both personal and corporate insolvency have been the subject of many consolidations and re-enactments. The 1986 enactment, resulting from the Cork Report,<sup>2</sup> appointed to look into the reform of insolvency law, brought together the subjects in one statute and at the same time effected a radical reconstruction of the law relating to both personal and corporate insolvency, which included the introduction of the concept of rescue through the use of procedures titled 'corporate voluntary arrangements' and 'administration'. There have been few occasions for reforms over the years, although two statutes were passed effecting minor changes in 1994.<sup>3</sup> Further reforms have since been effected, including to aspects of the law relating to the impact of insolvency on small and medium enterprises as well as the law relating to the disqualification of directors that were the subject of an Act adopted by Parliament in 2000.<sup>4</sup> More recent proposals, published as part of an *Enterprise Act in 2002*,<sup>5</sup> have pointed towards restricting the use of the institution of administrative receivership, an

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1 Readers will not need reminding that the United Kingdom is divided into a number of separate jurisdictions, each with its own history and legal tradition. This article will deal with the law as applied in England and Wales, although, where appropriate, reference will be made to Scots and Northern Irish laws or caselaw.

2 Report of the Review Committee into Insolvency Law and Practice 1982 (Cmnd 8558). The committee was chaired by Mr (later Sir) Kenneth Cork and is referred to by his name.

3 *The Insolvency (Amendment) Act 1994* and *Insolvency (Amendment) (No 2) Act 1994*.

4 *The Insolvency Act 2000*.

5 This Act received Royal Assent on 7 November 2002.

institution also imported into the 1986 consolidation based on the private law procedure of receivership. The import of these proposals is major, effectively because they change the focus of insolvency towards the use of collective proceedings in the form of administration and other rescue measures away from private debt recovery measures.

## **Jurisdiction Principles in Company Law**

An examination of the jurisdiction rules in company law is necessary because, generally, a company is required to have assigned to it a connection with a particular country in order for rights and obligations to which it is subjected to be capable of determination by the appropriate law. Traditionally, the tests used to enable the allocation of a jurisdiction include presence, often used to determine whether a company is present for the purposes of litigation, residence, of major significance in determining whether a company is subject to tax, domicil, often governing questions of status of the incorporated body, and nationality, referring most often to the location of incorporation. The tests are confusing and often overlap in their definition. This is because of the difficulty involved in adapting for the purpose of legal persons the principles ordinarily applicable to natural persons.<sup>6</sup> The process of determining the appropriate law is further refined through the identification of other factors establishing a connection. These include whether business is being carried out within the jurisdiction, whether there is a registered office, branch or other presence, whether management or control is exercised from the jurisdiction and whether assets or obligations are present.

As a rule, the law in England and Wales adheres to the 'state of incorporation' doctrine, according to which the applicable law is that of the jurisdiction where the company was incorporated. In England and Wales, the domicil and nationality tests both rely on the state of incorporation doctrine. The domicil test is commonly used as the jurisdictional basis in civil and commercial treaties and, for that reason, acquires a particular importance, although the precise definition may depend on the wording of the text that defines the extent of the jurisdiction.<sup>7</sup> Only where residence is at issue is there a difference. Here, place of incorporation is only one of the evidentiary factors to be considered when ascertaining where control of the company, defined as the seat and directing power of the affairs of the company, resides and thus where the company itself is to be regarded as resident.<sup>8</sup> This difference is justified in the case law by the need to subject the activities of the company to taxation where the exercise of management properly occurs and

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6 See North and Fawcett, *Cheshire and North's Private International Law* (13th ed, 1999) 171.

7 Ibid 175.

8 The rule in *Cesena Sulphur Co v Nicholson* (1876) 1 Ex D 428. This test bears similarities to the real seat (siège reel/Sitztheorie) rule often found in civil law systems.

the real business of the company is carried out.<sup>9</sup> The advantage in company law of the state of incorporation rule is that the choice of incorporation determines the applicable law and is thus susceptible to prior selection by promoters of the company, including its would-be directors and shareholders. A free choice would normally allow for incorporation in a favourable legal jurisdiction, from where the company may seek to carry on business elsewhere.<sup>10</sup>

### **Jurisdiction principles in insolvency**

Deriving from the principles outlined above, it is a general principle of law that the law of the state of incorporation of the company governs its status from creation to dissolution.<sup>11</sup> This is irrespective of the fact that the company may well operate principally or exclusively in another jurisdiction. It is also a general principle that the dissolution of a company by the law of its place of incorporation will be recognised by the courts in England and Wales.<sup>12</sup> This principle would of necessity require recognition of a foreign liquidation order that has been granted in the home jurisdiction, or domicile, of the company and includes recognition of the authority of a liquidator appointed by virtue of any order.<sup>13</sup> In addition, orders pronounced by courts in other jurisdictions may also be recognised, provided that the basis on which jurisdiction has been taken approximates to grounds normally accepted by the local court. The consequences in insolvency are that the courts, when confronted with a foreign company conducting business within their jurisdiction, must face a choice between the application of the foreign law of the state of incorporation and domestic law to the facts of its dissolution.

Arguably, policy is one of the determining factors in this analysis. For that reason, the recognition of foreign orders has long been subject to certain common law exceptions based on whether foreign proceedings are final in nature, whether they comply with perceived notions of natural justice, whether jurisdiction has been exercised validly and whether recognition would offend public order rules.<sup>14</sup> One of the more problematic areas has been the position of foreign revenue claims in insolvency owing to judicial views that to allow collection of such claims would offend public policy.<sup>15</sup> The traditional common law doctrine is that a foreign order,

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9 The rule in *De Beers Consolidated Mines Limited v Howe* [1906] AC 455.

10 See *Centros Ltd v Erhvervs- og Selskabsstyrelsen* (C-212/97) [1999] I ECR 1459; [1999] 2 CMLR 551 for a situation bringing the incorporation and real seat rules into conflict.

11 See North and Fawcett, above n 6, 897 (in 12th edition, material omitted from 13th edition).

12 *Lazard Bros & Co v Midland Bank Ltd* [1933] AC 283.

13 *Macaulay v Guaranty Trust Company of New York* (1927) 40 TLR 99. See also Marks, *The Rights and Reliefs for Foreign Liquidators in England* (1995/96) 1 *RALQ* 37.

14 Wood, *Principles of International Insolvency* (1995) 250 (para 5-13).

15 *Government of India v Taylor* [1955] AC 491. See Miller, 'Bankruptcy and Foreign Revenue Claims' (1991) *JBL* 144. For an interesting view contra, see Dawson, 'An Extraterritorial Dichotomy?' [2000] 2 *Insolv L* 81, 83-85.

although creating an obligation that is actionable within the legal jurisdiction, cannot be enforced without the institution of fresh legal proceedings. This is said to be on grounds that courts recognise the limitation of their own power, if making an order in similar circumstances, to affect assets of a company abroad without the express consent of the foreign court to initiate and assist proceedings. Recognition is thus not tantamount to enforcement of the foreign order within the jurisdiction. Nevertheless, although a foreign liquidation order is not directly enforceable, it can be assisted by the recognition of the appointment of the foreign liquidator and allowing him capacity to act in certain instances.<sup>16</sup>

The recognition of the subjection of a foreign company to a foreign law does not necessarily mean the domestic courts will not assume some jurisdiction over the issues in contention. This may be effected through rules requiring foreign companies conducting business within the country to comply with such rules as enable the courts to have jurisdiction when these companies engage in transactions.<sup>17</sup> Difficulties arise where the company is by its nature hybrid and appertains to more than one jurisdiction, as where a company formed under Belgian law was ordered nevertheless to be wound up on the application of one of the English shareholders.<sup>18</sup> What is clear is that the courts have had to take account of the existence of companies operating within the country that have subsequently become insolvent. There is a long tradition in England and Wales of courts extending aid for the collection of assets located in the jurisdiction of the courts that belong to foreign debtors.<sup>19</sup> The precept of assistance, first located within the law of bankruptcy, derives from the doctrine relating to the law of personalty or movable property, by which personal assets were deemed to have no locality but were subject to the law governing the person of the owner.<sup>20</sup> There were difficulties, however, in relation to persons who had not committed acts of bankruptcy within the jurisdiction.<sup>21</sup> Furthermore, the situation of real property was one where the courts often declined to assume jurisdiction, holding that the proper law was that of the location.<sup>22</sup> Nevertheless, the opening of proceedings

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16 See North and Fawcett, above n 6, 407.

17 See the definition of an 'oversea company' in s 744, *Companies Act* that requires that a company incorporated outside the United Kingdom have a place of business within the United Kingdom for the purposes of Part XXIII of that Act.

18 *Re Dendre Valley Railway and Canal Company* (1850) 19 LJ Ch 474.

19 *Solomons v Ross* (1764) 1 Hy Bl 131 n; 126 ER 79. See Nadelmann, 'Solomons v Ross and International Bankruptcy Law' (1947) 9 *Mod LR* 154. For an extensive survey of this development, see Blom-Cooper, 'Bankruptcy in English Private International Law' (in 3 parts) (1954) 3 *ICLQ* 604, (1955) 4 *ICLQ* 1, (1955) 4 *ICLQ* 170. See also Lipstein, 'Jurisdiction in Bankruptcy' (1949) 12 *MLR* 454; Graveson, *Conflict of Laws* (1974) 543-567.

20 *Sill v Worswick* (1781) 1 H Bl 665 per Lord Loughborough at 690.

21 See Topham, 'A Defect in Our Law of International Bankruptcy' (1903) 14 *LQR* 295.

22 *British South Africa Company v Companhia de Mocambique* [1893] AC 602; *Re Trepeca Mines* [1960] 3 All ER 304.

involving foreign debtors began to be a regular feature in the case law, although, despite the doctrine mentioned above requiring courts to recognise orders dissolving the company in its home jurisdiction, the courts were not inclined to give effect to foreign judgments in all cases.<sup>23</sup>

### The ancillary assistance doctrine

The development of the ancillary nature of assistance emerges in the case law at an early stage. According to this doctrine, the nature of proceedings taking place within the jurisdiction of the court is described as ancillary to main proceedings being undertaken in the home jurisdiction of the company. The case law developed in response to the growing problem of insolvencies of institutions with operations in England and Wales and the then Dominions. In *Re Matheson*,<sup>24</sup> which concerned a winding up petition presented by a creditor against a company already in liquidation in New Zealand, the proposition was stated thus by Mr Justice Kay:

The mere existence of a winding up order made by a foreign court does not take away the rights of a court of this country to make a winding up order here, though it would no doubt exercise an influence upon this court...<sup>25</sup>

The affirmation of this jurisdiction was prompted by the need to secure assets in England to protect the rights of creditors and third parties present within the jurisdiction. The judge in fact continues to state that care would be taken to ensure there would be no conflict between the courts and that costs would be kept down while the interests of all creditors would be looked after. In *Re Commercial Bank of South Australia*,<sup>26</sup> on the suspension of a bank incorporated in South Australia followed by a winding up order, the creditors were held entitled to a winding up order in England, the nature of which was described by the judge as being ancillary to the winding up in Australia.<sup>27</sup> The extension of this jurisdiction often involves determining the precise application of provisions of company legislation to foreign companies. In *Re Mercantile Bank of Australia*,<sup>28</sup> the power to appoint a receiver<sup>29</sup> and to require security to be given by a liquidator<sup>30</sup> was held applicable to a company incorporated in Victoria but conducting business in

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23 *Tharsis Ltd v La Société des Métaux* (1889) 58 LJ QB 435; *Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399.

24 *Re Matheson Brothers Ltd* (1884) 27 Ch D 225.

25 *Ibid* 230.

26 *Re Commercial Bank of South Australia* (1886) 33 Ch D 174.

27 *Ibid* 178. See the converse situation in *North Australian Territory Co v Goldsborough Mort & Co* (1890) 61 LT 716.

28 *Re Mercantile Bank of Australia* [1892] 2 Ch 204.

29 Section 4, *Companies (Winding up) Act 1890*. See also s 135, *Insolvency Act 1986*.

30 Rule 67, *Companies (Winding up) Rules 1890*. See Rule 4.28, *Insolvency Rules 1986* (SI 1986/1925).

London. In this same case, an ancillary order was stated as being a desirable outcome although the granting of the order was to be postponed until the outcome of shareholder negotiations in Australia was known.

The fact that issues of jurisdiction may arise in many different contexts can be illustrated by the case of *Re English, Scottish and Australian Chartered Bank*,<sup>31</sup> in which a company incorporated in England, whose principal business was in Australia, was due to be wound up in England. The relationship of various classes of creditors standing to gain or lose by the winding up process influenced the decision of the English court, where from the facts it was clear that the scheme of reconstruction that was proposed needed the assent of a meeting of the creditors and shareholders. Proxies were obtained from Australian creditors for a meeting in London, at which the resolutions were carried with the support of these proxies. The resolutions were subsequently sanctioned by order of court. British creditors appealed stating that, but for inclusion of the Australian proxies, the scheme would not have met with the approval of British creditors. It was held that there was nothing unreasonable or unfair in the scheme as between the treatment of the different classes of creditors and that the scheme should go ahead. In this case, Mr Justice Vaughan Williams pronounced that:

One knows that where there is a liquidation the general principle is: ascertain what is the domicile ... let the court of the country of domicile act as the principal court ... and let the other courts act as ancillary ... to the principal liquidation.<sup>32</sup>

A court may be keen to ensure that the priorities between proceedings occurring in different jurisdictions are firmly set to ensure that any disparity in rights available to creditors acting before different courts do not affect the overall settlement of the liquidation. A court may grant the enforcement of rights acquired in priority to the beginning of insolvency proceedings where it appears equitable to do so, as where a garnishee order obtained by judgment creditor was held to have priority over sequestration of judgment debtor's assets.<sup>33</sup> There has long been a discretion available to common law courts to stay the continuance of process in order to allow claims to be tried more properly in another jurisdiction.<sup>34</sup>

In light of the *Re English, Scottish and Australian Chartered Bank* observation with regard to equality between creditors, it has been held that a great disparity in the treatment of creditors would prompt the court to restrain one class of creditors from exercising rights available in another jurisdiction. This was evident in the case of *Re Vocalion (Foreign) Ltd*,<sup>35</sup> where a company registered in England

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31 *Re English, Scottish and Australian Chartered Bank* [1893] 3 Ch 385.

32 *Ibid* 394.

33 *Galbraith v Grimshaw* [1910] AC 508.

34 *Re Queensland Mercantile Agency* (1888) 58 LT 878.

35 *Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196.



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was also registered in Victoria as a foreign company. The Bank of New South Wales claimed a sum owing for commission on banking work as well as for sums lent to the company and, in a separate action, for specific performance by the company and its registered agent in Victoria, of an undertaking by the agent to give security for the company to the bank, both of which actions were before the courts of Victoria. On the liquidation of the company in England, the Official Receiver sought an order restraining the Bank of New South Wales from proceeding with its action in Victoria. It was held in that case that a court may in the exercise of its equitable jurisdiction restrain a party from proceeding with an action on liability incurred abroad brought in a foreign court.

Nevertheless, there is also a point to be made about the appropriateness of the foreign forum to hear cases, especially where there is a more substantial connection with that forum. Emerging from the same judgment in the above case is the recognition that, where a company is domiciled abroad by registration as a foreign company, substantial justice is more likely to be attained by allowing the foreign proceedings to continue. In this case, Mr Justice Maugham stated:

It must be remembered that foreign creditors ... can not be restrained from taking such proceedings ... in their own country; ... the only result of such an injunction ... may be to benefit other foreign creditors without in any way increasing the amount of the assets ... distributable in the liquidation in this country.<sup>36</sup>

The costs of an ancillary liquidation may well amount to the equivalent of a full liquidation, particularly if decisions of liquidators are contested in several jurisdictions. The increase in costs is a factor that often motivates courts in deciding whether to permit further litigation as, from a practical standpoint, the result can only be to the detriment of creditors. The discretion to permit proceedings is also influenced by the just merits of the creditors' claims and the unfair result on their position especially where the company concerned, as in the case of *Re Suidair*,<sup>37</sup> had acted to the detriment of creditors in one jurisdiction. The case involved a company incorporated in South Africa with an office in London, which defaulted on payments for goods sold by an English creditor, whereupon the latter commenced proceedings and obtained judgment in default. At the same time, a winding up petition was presented by a creditor in South Africa and a provisional liquidator appointed. On discovering this, the English creditor issued writs of fieri facias on goods of the company. The South African liquidation being final, the liquidator claimed the goods, at which point another creditor in England also presented a winding up petition. The first English creditor sought the benefit of their judgment against the liquidator in England. It was held that it was entitled to benefit from the judgment obtained, which but for

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<sup>36</sup> Ibid 205.

<sup>37</sup> *Re Suidair International Airways Ltd* [1951] 1 Ch 165.

the conduct of the company, in allowing other creditors to come in, would already have been met. The rule stated in *Re English, Scottish and Australian Chartered Bank*, by which ancillary proceedings would largely act in aid to main proceedings, did not mean that issues in the ancillary winding up would be decided by rules of the main procedure nor that the ancillary jurisdiction would be bound to give effect to decisions of the other court on points of law or procedure. In *Re Suidair*, the effect of adhering to the rules of the main procedure would have meant that the South African liquidator would have been entitled to the assets in England at the expense of the creditor.

The ability of foreign liquidators appointed in the main liquidation to operate in the ancillary jurisdiction is of considerable advantage but not without some degree of difficulty. Apart from the question of recognition of the liquidator's qualification to act, there is the question of the degree of responsibility the liquidator may owe to the court in the main jurisdiction, which may lead to conflict between courts exercising jurisdiction in the same insolvency. This subject was treated in the case of *Schemmer*,<sup>38</sup> where in the course of an investigation by the US Securities Exchange Commission into the affairs of a company incorporated in the Bahamas, an action was brought in the US District Court in the Southern District of New York which resulted in the appointment of a receiver over assets, including the shares and assets of another company (also a Bahamian company) and its subsidiaries, controlled for the most part by the first company. The receiver sought to be appointed receiver of the company and its subsidiaries in the United Kingdom and requested injunctions against three banks holding money for the company. The company then applied for the discharge of the order granting leave to serve the writ.

It was held that before the English courts would recognise the title of a foreign receiver to assets in the jurisdiction or direct the establishment of ancillary receivership proceedings, the courts would have to be satisfied of the nexus between the defendant companies and the jurisdiction in which the receiver was appointed. Had the receiver been appointed in the Bahamas, as opposed to the actual fact of appointment by the United States court, there might well have been a sufficient connexion arising by the fact of the location of incorporation of the companies and the jurisdiction of the Bahamian courts. A particular result of the development of case law in this field is that the courts have not been slow to entertain the institution of ancillary proceedings where these are deemed appropriate. There is, however, a question of whether the ancillary jurisdiction may take a lead in the proceedings, especially where the connexion of the foreign company is greater with the ancillary jurisdiction.

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38 *Schemmer and Others v Property Resources Ltd and Others* [1975] 1 Ch 273.

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An example of this is the case of *Re A Company (1987)*,<sup>39</sup> in which a company registered in Liberia operated mainly through London shipping agents. It defaulted on payments due under an agreement for the construction of a vessel subject to a mortgage given to International Westminster Bank. The bank declared the whole indebtedness to be due under the loan agreement and obtained judgment for that amount. The bank subsequently presented a petition for the winding up of the company. For a court to make a winding up order against a foreign corporation, it was held not necessary to show that the company had assets within the jurisdiction but that there was a close link with the jurisdiction, which on the facts showing that company management, bank accounts and the main business of the company were situated within the jurisdiction, made the courts in England the most appropriate to deal with the matter. As there was conceivably an advantage to the creditors in having a winding up in England, an order would be made.

The precise role to be played by the ancillary jurisdiction in cases where proceedings are at an advanced stage in the main jurisdiction is often a point of contention between the courts. It may be that the ancillary jurisdiction would prefer a winding up to be instituted while the main jurisdiction has in mind preservation proceedings, enabling the company to continue its operations in a restricted form, with appropriate court supervision. These issues were the subject of the leading case of *Felixstowe*,<sup>40</sup> where United States Lines, a company incorporated in the United States, was registered as an oversea company in England. It entered a moratorium on payments under American bankruptcy law.<sup>41</sup> The plaintiffs instituted actions on debts owed in England by the American company and obtained Mareva injunctions,<sup>42</sup> the effect of which was to require the company to retain sufficient assets within the jurisdiction to meet any judgments against them.

The American company, which wanted to hive down its operations in Europe, applied to have the injunctions set aside, arguing that an English court should recognise the procedures being followed in the United States, under which a restraining order had been granted against any suit outside the United States. The maintenance of the injunction would serve to prevent administration according to United States procedures by a United States court and would have the effect of granting the plaintiffs priority over other creditors. The proper

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39 *Re A Company (No 00359 of 1987)* [1988] 1 Ch 210.

40 *Felixstowe Dock and Railway Co v United States Lines* [1988] 2 All ER 77. This decision has been strongly criticised as an example of a lack of judicial restraint in Millett, 'Cross-Border Insolvency: The Judicial Approach' (1997) 6 *IIR* 99. For a view to the contrary, see Crystal, 'The Company Lawyer Lecture 1997 - Judicial Attitudes to Insolvency Law' (1998) 19 *Co Law* 49.

41 Chapter 11, United States Bankruptcy Code.

42 Named after the case of *Mareva Compania Naviera SA v International Bulkcarriers SA, The Mareva* [1975] 2 Lloyd's Rep 509.

approach of an English court was to regard the courts of the country of incorporation as the appropriate legal forum for controlling the winding up of that company. Where that company had assets in England, so the argument advanced on behalf of the company went, the normal procedure was to carry out an ancillary winding up in harmony with the main court. However, as is clear from the judgment of the English court, a United States restraining order that required assets to be moved outside the jurisdiction could have no effect in England without the English court accepting it was bound to come in aid of the American proceedings. It was noted that, as the English practice was in harmony with certain provisions of the United States Bankruptcy Code,<sup>43</sup> and, on the balance of convenience test, the American company suffered no material prejudice as the assets remained preserved with no garnishee orders being permitted, the injunctions would be continued. The judge noted:

Counsel [for the Plaintiffs] submit that [*Re Commercial Bank of South Australia, Re English, Scottish and Australian Chartered Bank, Re Vocalion and Re Suidair*] show that the English practice is to regard the courts of the country of incorporation as the appropriate legal forum for controlling the winding up of a company but that, insofar as that company had assets here, the usual practice is to carry out an ancillary winding up in accordance with our own rules, while working in harmony with the foreign courts. ...In my judgment, counsel are right in their interpretation.<sup>44</sup>

It is interesting that Mr Justice Hirst could conceive of English practice as being in harmony with that of the American courts while denying the validity of the restraining order. While it is undoubtedly correct to assert that the orders of a foreign court have no effect within the jurisdiction of the domestic court without the orders being recognised or adopted as those of the domestic court, it is nevertheless also true that denial of recognition would lead to some prejudice being suffered by the lack of consistency in the treatment of the assets concerned. This has an effect insofar as ancillary practice consists largely of the use of winding up procedures, thus having an impact on the rescue intended to have an impact over the totality of the assets of the company.

The case-law makes it clear that the courts retain a substantial discretion, particularly over whether to permit ancillary winding up proceedings as in the case of *Re Wallace Smith Group Ltd*.<sup>45</sup> The company in question, incorporated in Ontario, was an authorised institution under the Banking Act 1987 and had been

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43 Section 304, United States Bankruptcy Code (11 USC s304), for the operation of which see *Re Banco Ambrosiano Overseas Ltd* (1982) 25 BR 621; *Interpool Ltd v KKL* and others (1988) 102 BR 373; *Lindner Fund Inc v Polly Peck International PLC* (1992) 143 BR 807.

44 *Felixstowe Dock and Railway Co v United States Lines* [1988] 2 All ER 77 at 93-4 per Hirst J.

45 *Re Wallace Smith Group Ltd* [1992] BCLC 989.

wound up on the application of the Bank of England. Further to this, four other companies, all members of the same group of companies, were the subject of winding up petitions by the liquidators of the company. The petition relating to one of these other companies alleged substantial indebtedness arising out of the employment of two members of the staff whose employment had been for the purposes of the inter-company accounts attributed to that company. On the facts, the court held that the petition would be dismissed in order not to prejudice concurrent proceedings on the same issue being heard before the courts in Ontario. The court was of the view that, although indebtedness might be shown, together with a connexion with the jurisdiction and the possibility of benefit to creditors within the jurisdiction, an ancillary winding up order is not an automatic outcome to any petition. The courts retained a discretion to refuse a petition, one of the chief factors being whether there was a more appropriate jurisdiction before which the claim might be heard. In a similar context, it has also been held that where the connexion with the ancillary jurisdiction was fortuitous and the transfer of assets to the main jurisdiction could be effected without substantial cost, no purpose would be served by the granting of an ancillary winding up order.<sup>46</sup>

It is to be noted that the common law continues to develop rules to meet the inevitable challenges occasioned by the competing interests of the courts of several jurisdictions concerned with the activities of the same insolvent company. Many of these rules tend to qualify the nature of the interests that may legitimately be taken into account for the court to consider whether to exercise jurisdiction or, in appropriate cases, whether to decline jurisdiction in favour of another court. However, these principles have to a greater or lesser extent been supplemented or supplanted by statutory provisions that are the subject of the following sections dealing, respectively, with the phenomenon of statutory ancillary jurisdiction and the topic of co-operation measures. Nevertheless, as will be seen, common law principles continue to influence and dictate the extent of the judicial discretion that is exercised in the course of applying these statutory provisions.

### **Winding up of foreign companies by statute**

Foreign companies that establish a place of business in England and Wales, or in Scotland, may register with the Registrar of Companies.<sup>47</sup> The courts in these countries may, by virtue of this registration, entertain winding up proceedings involving these companies.<sup>48</sup> A jurisdiction conferred by statute has long existed in England and Wales for the winding up of unregistered companies, which

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46 *Re Wallace Smith & Co* [1992] BCLC 970.

47 Section 691, *Companies Act 1985*.

48 Sections 117, 120, *Insolvency Act 1986*.

definition has also been held to include foreign corporations.<sup>49</sup> An early inclusion in the Joint Stock Companies Act 1848 sought to define, by reference to the location of the registered place of business or head office, the allocation of jurisdiction between Irish and English courts over the winding up of companies.<sup>50</sup> A more sophisticated section in 1862 legislation saw the introduction of statutory authority for the winding up of any unregistered company in the part or parts of Great Britain, meaning England and Wales or Scotland, where it has a principal place of business.<sup>51</sup> This section was repeated in the 1908 consolidation.<sup>52</sup>

The application of this provision to companies in existence and operating within the jurisdiction was not in doubt, the definition of unregistered company including the foreign company by default.<sup>53</sup> However, this was not thought to be the case where the company had ceased to exist in accordance with a regular judgment or process in its jurisdiction of origin. This issue arose in cases before the courts in England because of the consequences of the 1917 October Revolution, following which the nationalisation of all Russian banks was decreed. The effect on creditors in England became apparent in the 1920s as various suits against banks established in Moscow with operations in London were struck out as wanting.<sup>54</sup> A provision was introduced into the Companies Act of 1928 to provide for the winding up of an unregistered company and was extended to cover the situation where a company, which though operating within the jurisdiction through a branch or other office, had been dissolved in its place of incorporation. The same provision was substantially enhanced in the 1929 legislative consolidation.<sup>55</sup>

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49 *Re Commercial Bank of India* (1868) LR 6 Eq 517. See also s 32(3), *Companies (Winding up) Act 1890* applying the Act to companies without a registered office within the jurisdiction and *Re Federal Bank of Australia* (1893) 62 LJ Ch 56.

50 Section 117, *Joint Stock Companies Act 1848*.

51 Section 199, *Companies Act 1862*.

52 Section 268, *Companies (Consolidation) Act 1908*.

53 *Re Jarvis* (1895) 11 TLR 373 (Missouri company); *Re Syria Ottoman Railway Company* (1904) 20 TLR 217 (Turkish company). This definition is wide and also includes the situation of Northern Irish companies operating in England as decided in *Re A Company* (No 007946 of 1993) [1994] 2 WLR 438. See Smart, 'Jurisdiction to Wind Up Companies Incorporated in Northern Ireland' (1996) 45 *ICLQ* 177.

54 *Banque Internationale de Commerce de Petrograd v Goukassow* [1923] 2 KB 682; *Russian Commercial and Industrial Bank v Comptoir d'Escompte de Mulhouse* [1925] AC 112; *Sedgwick Collins & Co v Rossia Insurance Company of Petrograd* [1926] 1 KB 1; *Lazard Brothers & Co v Midland Bank Ltd* [1933] AC 283.

55 See s 338(2), *Companies Act 1929* which reads:

Where a company incorporated outside Great Britain which has been carrying on business in Great Britain ceases to carry on business in Great Britain, it may be wound up as an unregistered company under this part of this Act, notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country in which it was incorporated.

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In cases then coming before the courts, the operation of the provision was not without some difficulty. For example, it was not thought that it could extend to the situation where a company had ceased to exist before the passing of the Act. Judicial intervention putting an end to the question of the remit of the provision arrived in the shape of the case of the *Russian and English Bank*,<sup>56</sup> which followed the situation where the Russian Ministry of Agriculture purchased seed from a Danish firm and requested the bank, incorporated in the form of a company in St. Petersburg, to pay the sum due under the contract through its London branch. Reimbursement was then sought through payment, on instructions given by the Ministry of Finance, by moneys held at Barings to the bank. Barings failed to pay, prompting the bank to sue. It was discovered that the bank had been dissolved by Soviet legislation, and the suit was stayed for the commencement of winding up proceedings. An action was then brought in the bank's name against Barings, which the latter sought to have struck out on grounds that the bank was a dissolved corporation.

It was held in the case that a foreign company may, notwithstanding its dissolution in its place of origin, be wound up as an unregistered company in England, when an action may be brought in its name to recover moneys due and unpaid at the time of its dissolution. Lord Atkin, one of the members of the panel, opined:

I think it is a necessary implication [of the provisions of the Companies Act] that the dissolved foreign company is to be wound up as though it had not been dissolved and therefore continued in existence.<sup>57</sup>

This extension of jurisdiction was confirmed in *Re Russian Bank for Foreign Trade*,<sup>58</sup> which concluded that the impossibility of a branch continuing to function when its main office had ceased to exist according to its statutes of incorporation was ample reason to order a winding up. The consequences of the Russian Revolution were to haunt the law reports for many years after and provide much material for commentaries.<sup>59</sup> Nevertheless, in the later case of *Re Banque des Marchands de Moscou (Koupetschetsky)*,<sup>60</sup> proceedings under a similar provision in later legislation,<sup>61</sup> the revival of the company for the purposes of winding up was

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56 *Russian and English Bank v Baring Bros & Co* [1936] AC 405.

57 *Ibid* 427.

58 *Re Russian Bank for Foreign Trade* [1933] 1 Ch 745. See also *Re Tea Trading Company* [1933] 1 Ch 647.

59 See Wortley, 'The Dissolution of Private Corporations in Private International Law in light of the Russian Bank Cases' (1933) 14 *BYBIL* 1; Lipstein, 'Jurisdiction to Wind Up Foreign Companies' (1952) 11 *Camb LJ* 198; Mann, 'The Dissolved Foreign Corporation' (1955) 18 *MLR* 8.

60 *Re Banque des Marchands de Moscou (Koupetschetsky) (Royal Exchange Assurance v Liquidator)* [1952] 1 *All ER* 1269; *Ouchkoff v Liquidator* [1954] 2 *All ER* 746.

61 Section 399, *Companies Act 1948*.

not held conditional on the fact of the company having conducted business within the jurisdiction, but could rest on the presence of assets. In any event, the claims of various creditors were held subject to Russian law with the effect that claims barred by the nationalisation decree could not be revived. It is instructive, though, that the court in one of a series of conjoined cases couched its acceptance of jurisdiction subject to its discretion to decline that jurisdiction where another appropriate forum existed.<sup>62</sup> Sir Raymond Evershed MR (as he then was) stated:

As a matter of general principle, our courts would not assume and Parliament should not be taken to have intended to confer jurisdiction over matters which naturally and properly lie within the competence of the courts of other countries. There must be assets here to administer and persons subject, or at least submitting, to the jurisdiction who are concerned or interested in the proper distribution of the assets. And when these conditions are present, the exercise of the jurisdiction remains discretionary.<sup>63</sup>

The situation of confiscatory legislation, which over the years was encountered in a number of different instances, has been generally held not to operate so as to remove those obligations that the company had acquired within the jurisdiction where proceedings were being instituted, whether this company was the subject of liquidation proceedings or proceedings for the enforcement of debt. This was the case in *Metliss*,<sup>64</sup> where a Greek decree of 1949 enforced a moratorium on the National Mortgage Bank of Greece, which was subsequently dissolved in 1953 and amalgamated to form a new bank. The plaintiff sued this bank on certain bonds, disputes about which were expressed as being subject to arbitration in London according to English law. It was held that, although Greek law had to be examined to ascertain the nature of the juridical body being created by the decree, the succession of this body to obligations acquired by its predecessor and expressed as being subject to English law must be examined by principles of English law. In the instant case, following the principle of rational justice, the courts could not admit the bank's status as a justiciable person without requiring it to admit its liability for acts entered into by its predecessor.

Part of the consideration for exercising jurisdiction has been to look at the nature of the obligations situated within the jurisdiction. Although an early case subordinated this question to the existence of a branch office in the country, later cases have relaxed the requirements by pointing to other material factors.<sup>65</sup> In *Re Compania Merabello*,<sup>66</sup> involving a claim in respect of a contract of carriage of cargo, subrogated by insurers, against a creditor of the company with view to

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62 This may be taken as an early appearance of the doctrine of forum non conveniens in the insolvency context.

63 *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] Ch 112 at 125.

64 *Metliss v National Bank of Greece and Athens SA* [1958] AC 509.

65 *Re Lloyd Generale Italiano* (1885) 29 Ch D 219.

66 *Re Compania Merabello San Nicholas SA* [1973] 1 Ch 75.



vesting the claim under the Third Parties (Rights against Insurers) Act 1930, it was stated that normally the Companies Act envisaged no need to establish that the company had a place of business or that it had carried out business in the jurisdiction, but required a connexion with the jurisdiction and the presence of some assets of benefit to creditors. The question of establishing what constituted a place of business was, in any event, open to interpretation by the courts on the strength of the evidence presented to them. This was, for example, the case where the management of the company was conducted from a North London hotel, a fact deemed by the court sufficient to ground jurisdiction.<sup>67</sup>

The early requirement for assets sufficient to provide some benefit to creditors has been considerably relaxed. Now, even the nature of these assets might be intangible, such as a right of action, the success of which need not be proved to obtain a winding up order, as was the case in *Re Allobrogia*,<sup>68</sup> where a claim by owners of a cargo against another person resulting from a contract of carriage, insured in England and Wales, which would allow that person to sue for recovery of that sum assured, was held a sufficient asset to found winding up procedure. The asset might even consist of a potential claim against a statutory scheme, as in *Re Eloc*, where the possibility of a payment from a statutory fund for employee redundancy contingent on the company being wound up was held a sufficient benefit for an order to be made.<sup>69</sup> Courts would be careful to exercise their discretion widely in these cases where there was some tangible benefit and would not restrict any order made to fetter the actions of officials acting under the direction of the court.<sup>70</sup> A further qualification on whether the presence of assets is even necessary was decided in the case of *Okeanos*,<sup>71</sup> where the tangible benefit consisted of the connection of the company with the jurisdiction and the likelihood that the creditors would obtain some benefit from the winding up being carried out in the jurisdiction.<sup>72</sup> Nevertheless, the issue of benefit remains of importance and continues to govern the case law. It was reiterated and summarised in the case of *Real Estate Development*,<sup>73</sup> where the requirements are for courts to determine the existence of a sufficient connection with the jurisdiction, a qualification that need not necessarily consist of assets, the existence of a reasonable prospect of benefit to those applying for the winding up order and that one of the individuals concerned must be a person (natural or legal) over whom the court could take jurisdiction. Nevertheless, there remains the question of the

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67 *Re Tovarishestvo Manufactur Liudvig-Rabenek* [1944] 1 Ch 404. See Smart, 'Carrying on Business as a Basis of Recognition of Foreign Bankruptcies in English Private International Law' (1989) 9 *OJLS* 557.

68 *Re Allobrogia Steamship Corporation* [1978] 3 All ER 425.

69 *Re Eloc Electro-Optieck & Communicatie BV* [1982] 1 Ch 43. See Campbell, 'When British Courts have jurisdiction to wind up foreign companies' (1981) 2 *Co Law* 277.

70 *Re Hibernian Merchants Ltd* [1957] 3 All ER 97.

71 *International Westminster Bank plc v Okeanos Maritime Corp* [1987] BCLC 450.

72 See Dine, 'Jurisdiction to Wind Up a Foreign Company' (1988) 9 *Co Law* 30.

73 *Re Real Estate Development Co* [1991] BCLC 210.

appropriate action to take in cases where the assets at first sight appear intangible. In fact, the case of *Re Latreefers*<sup>74</sup> is treated as authority for the proposition that even the summary of the jurisdictional requirements in *Real Estate Development* are not to be treated as preconditions for the exercise of jurisdiction.<sup>75</sup> Nevertheless, courts will not accede to an order for ancillary liquidation, where there is doubt as to whether substantial assets located in the jurisdiction do in fact have a connection to the company in question and that proceedings already in progress in the company's home jurisdiction would be competent to determine this question.<sup>76</sup>

### Co-operation between courts

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 have a long history.

The history of the present provision in England and Wales is largely that of the development of co-operation measures in the context of personal insolvency. These can be traced to 19th century provisions on enforcement of orders given by court within the United Kingdom and a requirement of assistance to other British courts.<sup>77</sup> The latter reciprocal assistance provisions were embodied in bankruptcy legislation as a response to the growing numbers of insolvencies of persons and

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74 *Re Latreefers Inc* [1999] 1 BCLC 271, on appeal sub nom *Stocznia Gdanska SA v Latreefers Inc* [2000] EWCA Civ 36 (9 February 2000). See Dawson, 'Jurisdiction to Wind Up a Foreign Company and Cross-Claims: *Re Latreefers Inc*' (1999) 20 *Co Law* 304.

75 See paragraph 30 of the judgment (electronic version available at <www.bailii.org>).

76 *New Hampshire Insurance Co v Rush & Tompkins Group plc and another* [1998] 2 BCLC 471.

77 Section 220, *Bankruptcy Act 1849*; ss 73-74, *Bankruptcy Act 1869*; ss 117-118, *Bankruptcy Act 1883*.

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.<sup>78</sup> Nevertheless, an early instance of their use saw an English 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.<sup>79</sup>

The latest consolidation of these provisions saw their re-enactment in the *Bankruptcy Act 1914*.<sup>80</sup> 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. Apart from the use of the word 'British' as part of the definition, which prompted enquiries in a number of cases as to whether particular courts were included,<sup>81</sup> the remit and purpose of the section were considered in *Re A Debtor*,<sup>82</sup> 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 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.

### Merger of the systems

The present provision in England and Wales relating to reciprocal assistance is contained in the *Insolvency Act 1986*.<sup>83</sup> Owing to the consolidation of provisions

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

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

80 Section 122, *Bankruptcy Act 1914*.

81 *Re Maundy Gregory* (1934) 103 LJ Ch 267 (Jerusalem District Court included); *Re James* [1977] 1 All ER 364 (post-UDI Rhodesian courts excluded).

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

83 Section 426, *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.
- (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.

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.<sup>84</sup> 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.<sup>85</sup> 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.<sup>86</sup> 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.<sup>87</sup>

The number of countries to which the rules on assistance apply at present is limited, the category being constituted predominantly of Commonwealth countries.<sup>88</sup> 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*.<sup>89</sup> *Dallhold Investments*, itself in liquidation, had applied

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- (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.

- 84 For an early view of this section, see Woloniecki, 'Co-Operation between National Courts in International Insolvencies: Recent United Kingdom Legislation' (1986) 35 *ICLQ* 644. See also Smart, 'International Insolvency: Ancillary Winding Up and the Foreign Corporation' (1990) 39 *ICLQ* 827 for a discussion on the impact of s 426 on the ancillary winding up regime.
- 85 Chapter 49, paras 1902-1913.
- 86 *Ibid* para 1902.
- 87 *Ibid* paras 1909-1911.
- 88 The 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.
- 89 *Re Dallhold Investments Pty Ltd and Re Dallhold Estates (UK) Pty Ltd* (1991) 6 ACSR 378, (1991) 10 ACLC 1374 (Australia); *Re Dallhold Estates (UK) Pty Ltd* [1992] BCLC 621 (UK).

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 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 pre-conditions in s8 for the granting of an administration order were satisfied, the court was able to grant the remedy sought. 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 judge at the hearing, 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 court ... the 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 ...<sup>90</sup>

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90 Ibid 398-399.

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.<sup>91</sup> This wide definition of domestic rules as interpreted by the judge allowed the extension of administration, not hitherto considered as available in the case of foreign companies subject to proceedings in England and Wales. This was favourably commented on as being an innovative order that allowed for the flexible treatment of foreign companies using all the means available under domestic legislation.<sup>92</sup> 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*,<sup>93</sup> 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. The judge 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....<sup>94</sup>

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.<sup>95</sup> In *Re Focus*,<sup>96</sup> it was held that

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91 See *Re BCCI International (Overseas) Ltd* [1988] 1 WLR 708 (Application made by liquidator of a bank in Cayman Islands claiming relief under ss 212-4 and s 238, IA 1986).

92 See 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.

93 *Re BCCI* [1993] BCC 787.

94 *Ibid* 801-802 per Rattee J.

95 *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 (stay on set-off effective in Ireland given effect in England).

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 England and Wales 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*,<sup>97</sup> where it was authoritatively stated that, unless good grounds existed for not making an order, 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 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.<sup>98</sup> 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.<sup>99</sup> 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.<sup>100</sup> 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.<sup>101</sup>

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

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

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

98 *Hughes & others v Hannover Ruckversicherungs-AG* [1997] 1 BCLC 497. See 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.

99 *Re JN Taylor Finance Pty Ltd* [1999] 2 BCLC 256; *Re Southern Equities Corporation Ltd* [2000] 2 BCLC 21. See Nolan, 'International Insolvency Assistance' (1999) 20 *Co Law* 336.

100 *England 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.

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

be brought.<sup>102</sup> 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.<sup>103</sup> 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. This is amply illustrated by one of the many BCCI cases dealing with the issue of set-off where the case revealed that the practice in the United Kingdom was very different to that in the other jurisdictions involved and where the decision was, for a number of reasons, amply criticised by the commentators.<sup>104</sup> There remain also a few doubts about the interplay between legal systems within the United Kingdom, especially where insolvency provisions may differ in consequence of the different legal histories of these jurisdictions.<sup>105</sup>

## International developments

The United Kingdom has been active in the negotiation and conclusion of a number of international projects in the insolvency field. The European Insolvency Convention 1995 was a project that received much attention from commentators and practitioners in the United Kingdom. This project, which began in the early 1960s, stemmed in part from the work on the Brussels Convention with the first draft convention being produced in the early 1970s. Work within the European Community was suspended in 1985 apparently after a failure to agree a consensus on the second draft of the convention. A fresh impetus seems to have been given by the production of a Council of Europe text, later adopted in 1990 as the Istanbul Convention,<sup>106</sup> although the working group was not reformed until 1989. A final discussion draft of the European Community text was produced in 1994, which formed the basis for the version that the Council of Ministers were to approve in 1995. The influence of the Council of Europe text on this document was

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

103 *The 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.

104 *Re BCCI (No 10)* [1996] 4 All ER 796 [1996] BCC 980. See Turing, above n 95; 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.

105 See 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.

106 This Convention remains without force due to insufficient ratifications.



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palpable, with commentators stating that the differences between early European Community drafts and the Convention represented 'a dramatic retreat from the universalism principle' inherent in previous drafts.<sup>107</sup> A comparison between the European Community and Council of Europe texts revealed similarities including the division between primary and secondary jurisdiction criteria, with the use of the 'centre of the debtor's main interests' to justify primary assumption of jurisdiction, although there were important differences in the later definitions used to develop the concepts. Differences, however, included the addition of uniform choice of law provisions, although some commentators regretted the territorial nature of some of these provisions.<sup>108</sup> The instrument, however, failed to enter into force because of a requirement for unanimity and the United Kingdom failed, for extraneous political reasons, to adhere in time.<sup>109</sup> The European Regulation on Insolvency Proceedings 2000, which revived this project without major amendment to its provisions, was adopted following a proposal co-authored by Germany and Finland in 1999. This Regulation entered directly into force on 31 May 2002 in all of the member states in the European Union subject to Title IV of the EC Treaty.<sup>110</sup>

Another international project in which there has been some interest in the United Kingdom is the UNCITRAL Model Law on Cross-Border Insolvency 1997.<sup>111</sup> The Model Law contains four key areas outlining the scope of the Model Law itself and rules for access by representatives of foreign insolvency proceedings, including those governing the treatment of foreign creditors. It also covers the effects of domestic recognition of foreign procedures and, most importantly, rules for co-operation and for co-ordination of simultaneous proceedings in several jurisdictions over the same debtor. The text represents essentially a compromise between different legislative traditions and is accompanied by a Guide to Enactment, which was produced in order to assist legislative draftsmen in adapting the Model Law to local conditions. In the United Kingdom, express recognition to the Model Law has been given through the Insolvency Act 2000, which includes a provision allowing the Secretary of State to adopt regulations giving effect to the Model Law.<sup>112</sup> 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.<sup>113</sup>

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107 See Trautman et al, 'Four Models for International Bankruptcy' (1993) 41 *AJCL* 573, 602.

108 *Ibid* 604.

109 See Fletcher, 'The European Community Convention on Insolvency Proceedings: An Overview and Comment, with US Interest in Mind' (1997) 23 *BJIL* 25.

110 These are all the member states apart from Denmark, which secured, under the Treaty of Maastricht, a complete opt-out from all texts produced under this Title.

111 (1997) 36 *ILM* 1386 with an Introductory Note by Burman and Westbrook.

112 Section 14(1), *Insolvency Act 2000*. This Act applies to Scotland as well as to England and Wales, but not to Northern Ireland.

113 *Ibid* s 14(2).

## Summary

International insolvency has aroused a great deal of interest in recent years, owing to the spectacular rise in cases of the collapse of banks and multinational companies situated in a variety of jurisdictions. There has been considerable progress in England and Wales from the traditional common law methods of asserting jurisdiction and their statutory equivalents, which lead inevitably to the winding up of the company, towards procedures for reciprocal assistance, which allow domestic procedures to be extended to the foreign company. This often has the effect of allowing the company to attempt to consolidate its economic future through the judicious use of those rescue regimes available in domestic law. The history in the United Kingdom for co-operation has been good, with many of the cases leading the way in developing the principle that domestic courts should allow the most efficient result to obtain for the benefit of creditors and other participants in the process as a whole. Often, this requires domestic courts to extend jurisdiction and the rules in the United Kingdom are framed widely, so as to allow for very wide bases for asserting jurisdiction, where there is a conceivable benefit from doing so. However, judicial restraint is also a strong feature of this process and the case law makes it clear that the benefit for creditors and the company may sometimes mean that courts must decline jurisdiction. The development of the s426 co-operation provision, one of the earliest of its type, has, together with the continued development of the case law, allowed courts in the United Kingdom to use the necessary tools in relation to the facts of the cases before them. Tailoring the remedies that may be suited to each case. This has done much to develop the reputation of the United Kingdom as a jurisdiction within the universalist tradition of the debate around co-operation in international insolvency.

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. 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.<sup>114</sup> The adoption of the Insolvency Act 2000 allows for the use of the protocol developed by UNCITRAL as part of the Model Law on Cross-Border Insolvency 1997. Although only applying at present to

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

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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.