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CROSS BORDER ASPECTS OF INSOLVENCY

Overview

EU law provides that the insolvency law of the country of the debtor's "centre of main interests" must be recognised and enforced by other EU countries. In the case of both an individual and a company, the State where he or it has his or its centre of main interests, will determine the insolvency law that applies. The "centre of main interests" is where the debtor conducts the administration of his interests on a regular basis. This will usually be where he carries out his business, profession or employment.

The law which applies to insolvency is of great significance in the case of Irish persons with English assets in view of the significant differences between Irish and English insolvency law. English bankruptcy law is significantly more favourable to the personal debtor than the corresponding Irish law. English insolvency law allows for a number of flexible possibilities that are not available under Irish insolvency law.

It is possible to have an Individual Voluntary Arrangement under English law by which 75% in value of creditors may agree a particular arrangement which is then binding on all creditors. Unlike the Irish equivalent, this can be undertaken out of court, under the supervision of an insolvency practitioner. The court is only involved to any significant extent, if a dissenting creditor takes the initiative to set it aside. While voluntary arrangements are possible under Irish insolvency law, court approval and supervision is necessary at several stages. Preferential creditors must usually be paid in full.

English bankruptcy law facilitates starting again much more quickly than Irish bankruptcy law, which has longer term consequences. Unless all debts and interest are paid off, the bankrupt may only apply to court after 12 years for release from

bankruptcy. The Court will discharge him from bankruptcy only if it is satisfied with various matters. In contrast, an English bankruptcy discharge is automatic after a period, usually as short as a year.

There are also significant divergences between Irish and England and Wales company insolvency law. The role of the office "administrator" was introduced in 1986 and extended in 2003, to allow for the possibility of rescue. As with personal insolvency, an administration can take place with limited court supervision under the auspices of an insolvency practitioner. Using a Company Voluntary Arrangement (CVA) 75% in value of creditors can agree an arrangement binding on them all, subject only to and a right of appeal to court for a dissatisfied creditor.

Centre of Main Interests

If a debtor resides in one country and trades in another, the country where the trade is carried out would generally be his centre of main interests. Where he does not carry on a profession or trade, the State where he habitually resides, will usually be the centre of main interests. In the case of a company, the registered office is presumed to be the centre of main interests in the absence of proof to the contrary. In determining the centre of main interests, the courts look at banking arrangements, tax regime and country where the debtor's home is.

An important point is that the test applies on the date of application for insolvency and not at the time the business was conducted. The location of the creditors and the country in which the debts are incurred are not material issues. It is possible for a debtor to change his or its centre of main interests for self serving reasons for example, to take advantage of a more favourable insolvency regime. The only test is that the relocation is real and must not be artificial for the purpose of the presentation of the petition.

Changing the Centre of Main Interests

In recent years there has been a rise in the number of bankruptcy petitions presented by German nationals in England and Wales. In most of those cases, the individuals had been resident for less than 12 months. In a significant number of cases, it was decided there was no centre of main interests in England and that the presentation was a sham to take advantage of more favourable insolvency legislation.

The English and Wales Insolvency service has stated that EU citizens who seek protection of bankruptcy court must generally have relocated to the UK. Provided the relocation is genuine, it is not relevant that the purpose of the move was to take advantage of more liberal insolvency legislation.

The Official Receiver in the UK examines bankruptcy proceedings closely where they are commenced by a debtor in England and Wales as main proceedings and where the debtor is a non UK national, has been resident outside the UK for more than 12 months or most of all debts disclosed are to creditors outside the UK. The Official Receiver makes investigations and is particularly suspicious of cases where the bankrupt returns to his home state shortly after the bankruptcy order.

The Official Receiver will seek evidence of the individual's domestic life in the UK. This may include household bills, rental arrangements, purchases and banking activity in the UK, car insurance etc. He will also seek evidence of employment. The Official Receiver makes enquiries of the debtor's creditors as to whether they were advised of the move to the UK. They may be asked as to whether they have any information to suggest the bankrupt is living and working outside the UK.

Where the debtor’s employer is a company and there has been a recent move to the UK, the Bankruptcy Service will seek information of the employer. They will be suspicious of cases where the employer is a company which has been incorporated in the UK shortly before the move or there is something else to suggest artificial arrangements.

The Official Receiver's practice is to make an application to Court for review of a bankruptcy order if it holds information that the relocation to the UK has been temporary or has not occurred at all. It will seek to nullify the order which it is invalid.

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Recognition of Bankruptcy

The EU Insolvency Regulation applies in Ireland and in the United Kingdom. It covers most type of insolvency proceedings but does not cover receivership. It covers UK administration which is the equivalent of company floating charge receivership in Ireland.

The Regulation provides that the Courts of the debtors' centre of main interests have the exclusive power to start insolvency proceedings. Other EU countries may only start proceedings where there is an "establishment" in that country. This would mean some kind of business base or substantial presence there.

EU countries must recognise and enforce the insolvency orders and proceedings of the Courts of the debtors' centre of main interests. This even applies where the type of proceedings could not have been brought in the other country. There are very limited grounds in which the insolvency proceedings may not be recognised and they would not generally be relevant in a practical context.

The insolvency law of the centre of main interest will apply throughout the whole EU, except if secondary proceedings are started (relating to a business base in another EU country) in which case, the law of that State will apply in relation to that aspect.

The COMI country's rules in relation to disabilities of the debtor, prohibitions on enforcement by creditors, inclusion of the debtor's assets in the State and the obligation to return what has been already obtained by creditors after insolvency starts, apply and must be recognized throughout the whole European Union.

The insolvency official, whether it is the Official Assignee or liquidator may exercise all the powers conferred on him by the State of centre of main interests in other States so long as no other proceedings have been started there nor any preservation measure to the contrary has been taken. The Official Assignee/Liquidator may remove the assets from the country in which they are situated subject to claims of retention of title etc. They must follow the general law of the State concerned in exercising these powers.

With the exception of secured creditors, a creditor who obtains any partial satisfaction of his claim other than through the bankruptcy or insolvency, in another EU State, is required to return it to the Official Assignee/Liquidator.

Creditors throughout the EU are entitled to lodge claims with the liquidator/assignee. This includes tax authorities. There is no requirement to advertise commencement of insolvency proceedings throughout the EU.

It is possible to register foreign bankruptcy proceedings with HM Land Registry. Once proceedings start, the liquidator or assignee has a duty to inform creditors based in other EU states of the circumstances and rules in which they can apply to claim. There are also rules regarding language.

Powers in cross border insolvency

The Official Assignee or liquidator may take action across borders throughout the EU. The assistance of other EU States courts is available where a borrower refuses to co-operate.

England and Wales courts have jurisdiction to wind up foreign companies. In order for a foreign company to be wound up by the Court, it must have sufficient connection with England and Wales such as a place of business or assets within the jurisdiction. The Court may also consider the position and presence of employees or debts within England and Wales. The Court must consider the winding up order to be for the benefit of the petitioner.

Irish liquidators and the Official Assignee can apply for an order to a court in another jurisdiction to give effect to their powers and their rights under the Regulations. They are entitled, for example to apply directly to the Courts in the UK for assistance. Where, for example, a creditor in another country has simply ignored the liquidator and taken the proceeds of an enforcement against certain goods of the debtor in that country, it may be necessary to exercise this power.

In the case of voluntary winding up outside of Court, a certificate may be obtained from the Irish Master of the High Court which enables it to be recognised across the EU under the cross border insolvency regulations. A Court appointment of the liquidator/Official Assignee is recognised throughout the European Union. A certified copy of the Court Order or confirmation certificate is sufficient proof for this purpose.

Primacy of COMI Rules

The insolvency rules of the debtor's COMI in respect of asset swelling, fraudulent preferences, improperly transferred property, proving of claims, assets, declarations of personal liability for fraudulent and reckless trading or failure to keep books and provision for examination of directors before courts are recognised under the Regulations.

The COMI rules in relation to the following are recognised throughout the EU;

- the treatments of assets and liabilities after commencement;
- the powers of debtor and liquidator;
- set off;
- effect on contracts;
- lodging and proving and admitting claims;
- effect on pending law suits;
- distribution of assets;
- ranking of claims and issues relating to secured creditors;
- rules regarding costs and expenses of the insolvency.

There are special rules in relation to security rights over assets. Issues concerning immoveable property are always governed by the country in which the property is situated. Employment contracts are governed by the law of the State where the employment is exercised.

The COMI State's laws govern the rules in relation to acts detrimental to creditors. However, this does not apply under certain circumstances.

Foreign revenue authorities are not preferential creditors. However, they are allowed as a general creditor.

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This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances.

This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken due care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.

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