International Corporate Rescue

Published by:
Chase Cambria Company (Publishing) Ltd
4 Winifred Close
Barnet, Arkley
Hertfordshire EN5 3LR
United Kingdom

www.chasecambria.com

Annual Subscriptions:
Subscription prices 2017 (6 issues)
Print or electronic access:
EUR 730.00 / USD 890.00 / GBP 520.00
VAT will be charged on online subscriptions.
For 'electronic and print' prices or prices for single issues, please contact our sales department at:
+ 44 (0) 207 014 3061 / +44 (0) 7977 003627 or sales@chasecambria.com

International Corporate Rescue is published bimonthly.

ISSN: 1572-4638

ARTICLE

What Has the Judicial Insolvency Network Done for Cooperation between Courts in Multi-Jurisdiction Insolvencies?

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More corporate insolvencies than ever involve groups operating across multiple jurisdictions. We have seen a number of examples in recent times where closer cooperation between courts could have resulted in a simpler and less costly result for all estates involved. The courts in many jurisdictions including England and Wales have been willing to do all they can to assist insolvency proceedings in other jurisdictions and technology is helping to make long-distance communications easier. However, the necessarily adversarial nature of the litigation required and the risks faced by insolvency practitioners of inadvertently submitting to a foreign jurisdiction have meant that the process has often not been efficient and has always resulted in considerable cost to each estate.

The recent adoption by the High Court of the Judicial Insolvency Network ('JIN') guidelines for communication and cooperation between courts in cross-border insolvency matters (the 'Guidelines') (see below) has reignited the discussion about cooperation between courts in an international insolvency. In this article, we have looked at the development of cross-border insolvency cooperation and consider the impact the Guidelines will have in the future.

A bit of history

Cooperation between courts is not a novel concept. As far back as 1992, the courts in the UK and the USA developed a protocol to create harmonisation between the US Chapter 11 proceedings and the UK administration of Maxwell Communication Corporation. The first of its kind, the courts in the two jurisdictions worked together to facilitate a common system of distribution of all of the assets of the Maxwell companies so that creditors need only claim once across both jurisdictions. The courts and relevant insolvency appointees achieved this by implementing parallel processes: a scheme of arrangement under section 425 of the UK Companies Act 1985 and a plan of reorganisation under Chapter 11 of the US Bankruptcy Code. The protocol did not mean that the management of what was a highly complicated and emotive insolvency was without challenges[1] but it is likely that the number of disputes would have been much higher if the courts had not found a way to work together.

Since the Maxwell case, protocols have been put in place between many various jurisdictions with a view to establishing better cooperation, including in respect of the high-profile global insolvencies of Lehman Brothers and Bernard Madoff.

The development of guidelines for cross-border insolvency protocols

As mentioned above, the beginning of the 21st century has seen a growing number of insolvencies of corporate groups covering more than one jurisdiction, with assets located all over the world. In response to this, international organisations have looked to develop ways in which courts can cooperate with each other on a legal basis. This has resulted in the UNCITRAL Model Law on Cross-Border Insolvency (1997), the EC Regulation on Insolvency Proceedings 1346/2000 (now recast as the Regulation (EU) 848/2015 on insolvency proceedings (recast)) and Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) (the Brussels Regulation), among others.

In the UK, these international laws are supplemented by the ability to seek the court's assistance in a foreign insolvency process under section 426 Insolvency Act 1986, the court's inherent jurisdiction to recognise another court and the Foreign Judgments (Reciprocal Enforcement) Act 1933.

Alongside these legal codes, some international bodies have developed standard protocols and guidelines dealing with cross-border cooperation between courts

Notes

1 For example, there was a dispute about which jurisdiction's preference law would apply (see R*e Maxwell Communications Corp (No. 2)* [1992] BCC 757).

and insolvency practitioners. In 2000, the International Insolvency Institute (III) with the American Law Institute (ALI) produced the ALI/III Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases. The International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL) also published a Statement of Principles for a Global Approach to Multi-Creditor Workouts. There later followed UNCITRAL's Practice Guide on Cross-Border Insolvency Cooperation in 2009, the ALI's Global Principles for Cooperation in International Insolvency Cases in 2012 and the EU's Cross-Border Insolvency Court-to-Court Communications Guidelines in 2014.

Each of these protocols and guidelines advocates in various ways closer communication between courts and insolvency practitioners, the ability for insolvency practitioners to participate in meetings and/or hearings in foreign jurisdictions, recognition of court orders and notice of significant steps being taken in a foreign jurisdiction. However, the strength of the rights given to foreign courts and insolvency practitioners, the amount of access to be given and whether an insolvency practitioner is at risk of submitting to a foreign jurisdiction varies significantly between the different guidelines.

These and other protocols and guidelines are available to be adopted by parties to a cross-border insolvency on a voluntary basis and have been adopted successfully. For example, the protocol agreed by the courts in the Lehman insolvency adopted the ALI/III Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases. However, the amount of choice available may create an early sticking point in discussions between courts as to which guidelines should apply.

The Judicial Insolvency Network's new guidelines

This difficulty may be alleviated to an extent by the creation of the Guidelines. JIN was established in October 2016 by a group of judges from England and Wales, Australia, Bermuda, British Virgin Islands, Canada, Cayman Islands, Singapore and the USA with the sole aim of formulating the Guidelines.

Similarly to the earlier protocols and guidelines, the key aim of the Guidelines is to encourage communication and cooperation between courts overseeing parallel insolvency proceedings with a view to improving efficiency and reducing cost for all proceedings concerned. They establish key areas where courts may seek to cooperate in parallel proceedings and to ensure that all stakeholders' interests are respected, many of which derive from the protocols and guidelines formulated by other organisations. Those key areas are as follows:

1. the courts in each of the parallel proceedings may correspond with each other to share orders, judgments, reasons or other documents relating to the proceedings;
2. a court can direct that notice of proceedings in its jurisdiction be given to parties in proceedings in other jurisdictions and that court may permit a person resident in another jurisdiction to appear in front of it or be heard by it without that person submitting to the court's jurisdiction;
3. a court can recognise orders, laws or regulations of the courts in other jurisdictions without further proof (except where there is a proper objection on valid grounds); and
4. the courts in parallel proceedings may hold joint hearings where appropriate.

As with other guidelines, the intended result is closer cooperation and collaboration between courts, recognising that the only people who lose out when there is a conflict between parallel proceedings are the creditors.

The difference between the Guidelines and those protocols and guidelines preceding them is that they are intended to be and are being adopted into legal systems and court processes. The JIN and the Guidelines were incorporated into law in England and Wales on 5 May 2017 through an amendment to the Chancery Guide. They have also been adopted so far by Singapore, Delaware, the Southern District of New York, the British Virgin Islands and Bermuda.

This should mean that it is more likely that they will be followed in a cross-border insolvency: the Guidelines themselves provide that they should be considered by the courts in a cross-border insolvency 'at the earliest practicable opportunity' so it is hoped that the question as to whether the cooperation protocols under the Guidelines should be espoused will be considered at an early stage in every cross-border insolvency affecting the JIN members. Equally as importantly, the Guidelines provide consistency so that the JIN jurisdictions will be starting from the same position when it comes to deciding how to establish such a protocol.

Insolvency practitioners in the UK are likely to feel the impact of the Guidelines most in two ways. First, it is more likely that the court will request that a Guidelines protocol is used in insolvency proceedings, so the insolvency practitioner is more likely to find that he or she will need to work with the court to develop workable and efficient ways to design and implement that protocol, which may result in additional costs up front. However, it is to be hoped that, once established, the protocol would result in reduced costs for the insolvent estate in the long term. Secondly, the use of the Guidelines may remove many of the risks of the insolvency practitioner inadvertently submitting to a foreign jurisdiction in respect of parallel proceedings thus helping the insolvency practitioner retain control

and open up ways in which the insolvency practitioner can participate in and potentially influence foreign parallel proceedings.

Can closer cooperation between courts result in closer similarities between laws?

The Guidelines and the preceding protocols and guidelines are designed to help to facilitate cooperation between courts, but they do not seek to override national law – this is explicit in Guideline 4 of the Guidelines. While the law has progressed to provide closer coordination of insolvency processes, for example through the UNCITRAL Model Law and the EC Regulation, we do not have a global legal system for insolvency. The Guidelines are supplemental to the law in each jurisdiction and are designed to address the practical elements of closer cooperation rather than substantive issues of the extent to which court decisions may impact on and bind parties in other jurisdictions. It is always open to courts to agree more substantive ways to cooperate, as was done by the US and UK Courts in the Maxwell insolvency, but the Guidelines will not achieve this on their own.

Nor will the Guidelines create an automatically-seamless set of principles to apply in all situations. They are a starting point only, to be adapted as appropriate for each set of circumstances. Further, as they have not been adopted universally, it will still be necessary sometimes for courts to have the initial discussion about which guidelines or protocol a cooperation agreement should apply, if any. However, it is to be hoped that, as they are used more frequently in practice, the Guidelines will be seen as good practice in an increasing number of jurisdictions.

Even between the JIN members where the Guidelines have been adopted, disputes may arise about their use, including whether it is appropriate to create a cooperation protocol in a particular cross-border insolvency. The Guidelines are a voluntary set of principles so no court is bound to cooperate with another.

The future

Insolvencies of multi-national corporate groups are unlikely to become less common and closer cooperation between courts in such insolvencies is likely to reduce costs for creditors, who are often the losers when an insolvency is complicated or becomes contentious. The Guidelines and other protocols may become increasingly prevalent as a result.

Notably, the Guidelines were formulated by judges from each of the JIN members, including Dame Elizabeth Gloster on behalf of England and Wales. This is likely to lend credibility to the Guidelines as they are born from practical experience of cross-border insolvencies and consequential cooperation between courts, or lack thereof.

Time will tell whether the Guidelines will become the preeminent starting point for cooperation agreements or if they will achieve their aim but, in the authors' opinion, they have a good chance to help to create a better outcome for creditors. And that has to be a good result for everyone.

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