

RESEARCH ARTICLE

Extra-territoriality and the UK Insolvency Act 1986

Gerard McCormack* 

University of Leeds, Leeds, UK

*Author e-mail: g.mccormack@leeds.ac.uk

(Accepted 2 March 2023)

Abstract

This paper considers whether UK corporate insolvency law and the UK Insolvency Act 1986 have extra-territorial effect post-Brexit, and whether – and to what extent – it is for the courts or the legislature to extend any extra-territorial effect. It does not deal with ‘inward recognition’, ie the recognition of foreign judgments and orders in the UK.

Brexit has left something of a vacuum and provisions which might otherwise have applied extra-territorially, at least within the EU, may now have been deprived completely of extra-territorial effect. But all is not lost and Brexit here presents opportunities. There is room for clarifying that particular provisions which might otherwise have discriminated between EU application and application vis-à-vis the rest of the world can now be given a uniform global interpretation. Courts should, however, proceed incrementally in extending the extra-territorial scope of UK corporate insolvency law.

A bolder reform would be to enact legislation that specifies the exact extent to which the UK Insolvency Act applies extra-territorially. Legislation obviously depends on parliamentary time and requires detailed drafting but also provides the opportunity for the UK to showcase that it remains at the forefront of international insolvency developments.

Keywords: insolvency; extraterritoriality; Insolvency Act 1986

Introduction

This paper considers the extra-territorial application of the UK’s Insolvency Act 1986 and the extent to which a UK court will treat its decisions as having extra-territorial effect.¹ It is suggested that Brexit has left something of a vacuum and that provisions which might otherwise have applied extra-territorially, at least within the EU, may now have been deprived completely of extra-territorial effect. But all is not lost. Indeed, Brexit presents opportunities. There is room for clarifying that particular provisions that might otherwise have discriminated between EU-wide application and application vis-à-vis the rest of the world can now be given a uniform global interpretation. It is submitted that courts should proceed incrementally in extending the extra-territorial scope of UK corporate insolvency law.

A bolder reform would be to enact legislation that specifies the exact extent to which the Insolvency Act applies extra-territorially. Legislation obviously depends on parliamentary time and requires detailed drafting but it would also provide the opportunity for the UK to showcase that it remains at the forefront of international insolvency developments exemplifying global Britain. This is an aspiration dear to the heart of the UK Insolvency Service. The Insolvency Service has said:

¹The paper does not deal with ‘inbound’ issues, ie the extent to which foreign insolvency legislation and judgments or orders are given effect in the UK.

The UK's insolvency regime is highly respected internationally for its flexibility, efficiency and reliable outcomes, while our courts and legal and insolvency practitioners are valued for their professional expertise and experience. Global cooperation allows international businesses to choose to restructure in the UK, knowing that this will lead to the best result for their creditors, shareholders and management, with confidence that the outcome will be accepted both in their local courts and across the world. As Britain faces outward following its departure from the EU, we remain well-placed to continue to lead the way in this area.²

The paper consists of six parts. After this brief introduction, section 1 considers the extra-territoriality in general and the objectives of insolvency law. It addresses, in particular: the specific application of the insolvency and restructuring jurisdiction of UK courts to companies registered outside the UK; and ancillary liquidations. Section 1 is intended to frame the specific context by putting the paper in the overall context of extra-territoriality and what objectives insolvency law is designed to achieve. Section 2 considers the EU Insolvency Regulation and extra-territoriality. Section 3 addresses in particular how UK's departure from the EU pursuant to Brexit has affected the scope of the transactional avoidance and information gathering powers of insolvency practitioners (IPs). Section 4 considers a possible new presumption of general application on the extent of Insolvency Act provisions. The final section provides conclusions.

1. Extra-territoriality and the objectives of insolvency law

(a) *Extra-territorial application of legislation and judgments*

This paper considers whether UK corporate insolvency law and the UK Insolvency Act 1986 have extra-territorial effect post-Brexit and whether, and to what extent, is it for (i) the courts; or (ii) the legislature to extend any extra-territorial effect.

In the UK, because of the principle of national sovereignty there is, and was, a rule of construction that UK statutes are presumed not to have extra-territorial effect. Lord Hoffmann has remarked that:

the United Kingdom rarely purports to legislate for the whole world. Some international crimes, like torture, are an exception. But usually such an exorbitant exercise of legislative power would be both ineffectual and contrary to the comity of nations. This is why all the parties are agreed that the scope ... must have implied territorial limits. More difficult is to say exactly what they are.³

Much is said to depend on the context, however, and certain provisions of the UK Insolvency Act, for instance, have been given, in part at least, an extra-territorial effect. In principle, the territorial reach of a provision of a statute depends on the reach that the UK Parliament intended the relevant provision to have.⁴ Nevertheless, Parliament's intention (if it ever gave conscious thought to the question) may not be easy to discern.

The same considerations apply when it comes to the exercise of powers conferred by one state in another state as well as the enforcement/recognition distinction. Enforcement implies the exercise of coercive power by the authorities of a state. It can be contrasted with recognition, which need not be accompanied or followed by enforcement:

²See UK Insolvency Service 'Implementation of two Model Laws on Insolvency Consultation' (7 July 2022), <https://www.gov.uk/government/consultations/implementation-of-two-uncitral-model-laws-on-insolvency/implementation-of-two-uncitral-model-laws-on-insolvency-consultation#:~:>

³*Lawson v Serco Ltd* [2006] UKHL 3, [2006] ICR 250 at [6].

⁴*Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 2 AC 130; *Bilta (UK) Ltd v Nazir* [2015] UKSC 23, [2016] AC 1.

For example, if the court of origin held that the defendant did not owe any money to the plaintiff, the court of the requested State may simply recognise this finding by dismissing a subsequent claim on the same issue.⁵

The principle of exclusive territorial sovereignty precludes the direct exercise of a state's power within the territory of other states. This principle limits the direct application of coercive powers to the authorities of the state where the assets or persons to which the action relates are situated.

The distinction between recognition and enforcement is brought home in the Garcimartin-Saumier official explanatory report on the 2019 Hague Judgments Convention.⁶ In their words:

Enforcement means the application of legal procedures by the courts (or any other competent authority) of the requested State to ensure that the judgment debtor obeys the judgment given by the court of origin. Enforcement is usually needed when the foreign judgment rules that the defendant must pay a sum of money (monetary judgment) or must do or refrain from doing something (injunctive relief), and implies the exercise of the State's coercive power to ensure compliance.

The general international principle is that the enforcement of judgments is territorial. In other words, if a court in state A gives judgment against a defendant over whom it may exercise jurisdiction, it is up to that court to determine in compliance with its internal procedures the process of enforcement that may be available against assets within its jurisdiction. It is not, however, for a court in state A to seek to enforce its judgment against assets in state B, as that would interfere with the sovereignty of state B.⁷ The same applies to injunctive type relief, whether positive or negative, or other compulsive powers. In *Société Eram Shipping Co Ltd v Cie Internationale de Navigation*⁸ Lord Millett, for instance, said:

The near universal rule of international law is that sovereignty, both legislative and adjudicative, is territorial, that is to say it may be exercised only in relation to persons and things within the territory of the state concerned or in respect of its own nationals⁹

(b) Objectives of insolvency law

Traditionally, insolvency law is intended to provide for the orderly winding up of a debtor's affairs – a means for the more efficient collection of the debtor's assets and their distribution to creditors. In *Stichting Shell Pensioenfondsv Kryst*¹⁰ the Privy Council made reference to 'the broader public interest' in the court's ability to carry out an orderly winding up of a company's affairs. The court added: 'The alternative is a free-for-all in which the distribution of assets depends on the adventitious location of assets and the race to grab them is to the swiftest, and the best informed, best resourced or best lawyered'.

But it is now widely acknowledged that insolvency law may pursue objectives other than an orderly winding up. This objective may include a more convenient or better outcome for the company's creditors and members than could be achieved in an orderly winding up such as by restructuring the company's debts and other liabilities. As the World Bank has said: 'An efficient insolvency framework

⁵See the Garcimartin-Saumier official explanatory report on the 2019 Hague Judgments Convention para 117. The text of the Convention and explanatory report is available at <https://assets.hcch.net/docs/a1b0b0fc-95b1-4544-935b-b842534a120f.pdf>.

⁶Ibid.

⁷See *SAS Institute Inc v World Programming Ltd* [2020] EWCA Civ 599 at 64.

⁸[2003] UKHL 30, [2004] 1 AC 260.

⁹Ibid, at [80]

¹⁰[2014] UKPC 41, [2015] AC 616 at [24].

ensures that non-viable firms are quickly liquidated while viable firms are effectively restructured in a sustainable way'.¹¹

Moreover, as the European Bank for Reconstruction and Development (EBRD)'s Core Principles of an effective Insolvency System states in Principle 15 – 'Given the transnational nature of modern businesses, an effective insolvency system should facilitate the smooth conduct and resolution of cross-border insolvencies'.

(c) *Extra-territorial (universal) application of insolvency law*

A winding up in the eyes of the common law has worldwide or universal effect and applies to all assets of the company and irrespective of where those assets are situated in the world,¹² though of course there may be practical problems in securing recognition of the winding up in the foreign jurisdiction where the corporate assets are located. In one sense, this is but one aspect of a more general issue in a world of separate states, about achieving recognition outside the boundaries of the domestic forum for judicial orders and national legislation. Insolvency law is simply one manifestation of the much more general extra-territorial conundrum.¹³

Generally, it is not possible to have a liquidation that is limited to domestic or local assets of the debtor¹⁴ and, moreover, foreign creditors are entitled to submit claims and have their proofs adjudicated upon in an English liquidation. Lord Hoffmann in *Cambridge Gas Transport Corp v Official Committee of Unsecured Creditors (of Navigator Holdings plc)*¹⁵ described winding up/liquidation as a form of collective execution against the property of the debtor by creditors whose rights are admitted or established.¹⁶ This formal process minimises collection costs and also helps to maximise the overall pool of assets by stopping a series of individual executions of creditors against debtor assets that may deplete general asset values.¹⁷ In accordance with section 130(2) of the Insolvency Act 1986, where a winding up order has been made, no action or proceeding may be brought or proceeded with against the company or its property, except by leave of the court and subject to such terms as the court may impose. It has been held, however, that this 'stay' is not extraterritorial in that it does not extend to proceedings brought in foreign courts,¹⁸ although the courts may restrain a party properly served with notice of the proceedings in England from going ahead with an action in a foreign court.¹⁹

¹¹See World Bank 'Pre-concept note business enabling environment (BEE) February 4, 2022' at 53.

¹²See the comments of Wynn-Parry J in *Re Azoff-Don Commercial Bank* [1954] Ch 315 at 333 and Browne-Wilkinson VC in *Re Bank of Credit and Commerce International SA (No 2)* [1992] BCLC 570 at 577. See also Lord Neuberger in *Jetiva v Bilta (UK) Ltd* [2015] UKSC 23, [2016] AC 1 referring also to the judgment of the Court of Justice of the European Union in Case C-328/12 *Schmid v Hertel* [2014] 1 WLR 633.

¹³See for example S Miller 'Revisiting extraterritorial jurisdiction: a territorial justification for extraterritorial jurisdiction under the European Convention' (2009) 20 *European Journal of International Law* 1223.

¹⁴See *Banco Nacional de Cuba v Cosmos Trading Corp* [2000] BCC 910 at 915. Now under the UK Cross-Border Insolvency Regulations 2006, SI 2006/1030, Sch 1, Art 28, domestic insolvency proceedings opened up after foreign main proceedings have been recognised are limited to the domestic assets of the company.

¹⁵[2006] UKPC 26, [2007] 1 AC 508. See also Lord Hoffmann in *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at [30] referring to the principle of modified universalism as the 'golden thread' running through English cross-border insolvency law since the eighteenth century.

¹⁶*Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors (of Navigator Holdings plc)* [2006] UKPC 26, [2007] 1 AC 508 at [14]–[15].

¹⁷See generally TH Jackson *The Logic and Limits of Bankruptcy Law* (Cambridge, MA: Harvard University Press, 1986) pp 1–19, who sees bankruptcy as addressing a collective action problem, an 'over-fishing' or 'tragedy of the commons' problem as it were.

¹⁸See *Mazur Media Ltd v Mazur Media GmbH* [2004] EWHC 1566 (Ch), [2004] 1 WLR 2966 and *Bloom v Harms Offshore AHT* [2009] EWCA Civ 632, [2010] Ch 187.

¹⁹*Re Vocalion (Foreign) Ltd* [1932] 2 Ch 196, but where an injunction was refused see *Kemsley v Barclays Bank* [2013] EWHC 1274 (Ch)

The universality or otherwise of insolvency proceedings was discussed by the Privy Council in the *Cambridge Gas* case where Lord Hoffmann said:²⁰

The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated.²¹

(d) Winding up foreign registered companies and facilitating the restructuring of such companies

There are certain advantages for the UK in serving as a global insolvency and restructuring hub. The UK has an independent judiciary experienced in the fundamental precepts of insolvency law and capable of rendering commercially sound decisions. Having an extensive international insolvency and restructuring competence is mutually reinforcing in terms of these perceptions of judicial expertise and proficiency. While on the one hand, consuming court resources, serving as an internationally focal insolvency and restructuring jurisdiction, this means, on the other hand, more work for legal and restructuring experts based in the UK including bankers, accountants and other specialists in the field of insolvency and restructuring. This helps up to build up the knowledge base of the UK economy.²²

English courts have jurisdiction to wind up companies not registered under the Companies Acts (including foreign companies) under sections 221 and 225 of the Insolvency Act 1986.²³ Section 221(5) grants the court the authority to make a winding up order:

- (1) if the company is dissolved, or has ceased to carry on business, or is carrying on business only for the purpose of winding up its affairs; or
- (2) if the company is unable to pay its debts; or
- (3) if the court is of opinion that it is just and equitable that the company shall be wound up.²⁴

The matter is one of judicial discretion and some of the principles governing the exercise of the discretion were considered in *JSC Bank of Moscow v Kekhman*,²⁵ where the court said:²⁶

²⁰See [16] of the judgment. See also *Stichting Shell Pensioenfonds v Kryz* [2014] UKPC 41, [2015] AC 616.

²¹While Lord Collins in *Rubin v Eurofinance* [2012] UKSC 46, [2013] 1 AC 236 at para 92 hailed 'Lord Hoffmann's brilliantly expressed opinion in *Cambridge Gas* and his equally brilliant speech in *HIH*, the UK Supreme Court in *Rubin* held that Lord Hoffmann was wrong in *Cambridge Gas*. In *Rubin* it could be argued that the UK Supreme Court paid lip service to the principle of universalism, or modified universalism, as an underlying principle of international insolvency law, but effectively denuded the principle of much practical power. The court seemed to foreclose the possibility of further judicial developments in this field leaving the matter within the exclusive domain of the legislature and reciprocal arrangements with other countries. See also to the same effect the Privy Council in *Singularis Holdings v PricewaterhouseCoopers* [2014] UKPC 36, [2015] 1 AC 1675 where *Cambridge Gas* was further discredited and Lord Neuberger at para 157 referred to 'the extreme version' of the 'principle of universality', as propounded by Lord Hoffmann in *Cambridge Gas*. For more of a defence of the Lord Hoffmann position see I Mevorach 'Modified universalism as customary international law' (2018) 96 *Texas Law Review* 1403; I Mevorach *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (Oxford: Oxford University Press, 2018).

²²More cynically one might make the point that serving as a global insolvency and restructuring hub increases revenues in a service economy and, therefore, indirectly the tax 'take'.

²³See now on this jurisdiction *Re Yugraneft* [2008] EWHC 2614 (Ch), [2009] 1 BCLC 298. See also *Re Rodenstock GmbH* [2011] EWHC 1104 (Ch), [2011] Bus LR 1245. Scottish courts have similar jurisdiction and for a case governing the exercise of the jurisdiction see *Re HSBC Bank plc* [2009] CSOH 147, 2010 SLT 281.

²⁴See the general statement of Lord Collins, giving the judgment of the Supreme Court, in *Rubin v Eurofinance SA* [2012] UKSC 46, [2013] 1 AC 236 at [126] that there was no necessary connection between the exercise of jurisdiction by the English court and its recognition of the jurisdiction of foreign courts, or its expectation of the recognition of its judgments abroad.

²⁵[2014] BPIR 959.

²⁶See [106]. See also *Re Buccament Bay Ltd* [2014] EWHC 3130 (Ch) where the court held that in that particular case it was more that it was more appropriate and convenient to wind up a foreign registered company in its place of incorporation rather than in England.

the courts here will probably not exercise the discretion to wind up a foreign company or bankrupt a foreign individual where there are no assets, there is no connection to the jurisdiction and there is no purpose to be fulfilled (at one end of the scale); but they probably will if there is an obvious benefit, a strong connection and something to administer (at the other end of the scale). There is necessarily a wide spectrum between those two polarities.

Section 221 of the Insolvency Act 1986²⁷ gives the court jurisdiction to wind up companies not registered under the UK Companies Act. One should distinguish, however, between the existence of the statutory jurisdiction and the actual exercise of that jurisdiction in a particular case.

In relation to considering and sanctioning (approving) schemes of arrangement which often restructure the debt of financially distressed companies, the UK courts have also developed an extensive jurisprudence. The courts have jurisdiction to sanction a scheme of arrangement under Part 26 of the Companies Act 2006 in relation to a foreign registered company. That theoretical jurisdiction is co-existent with the power to wind up a foreign registered company under section 221 of the Insolvency Act 1986. There are now, however, well-developed principles that control and confine the exercise of that jurisdiction, including the company having a 'sufficient connection' with the UK and that sanctioning the scheme will provide benefits to stakeholders in the company and achieve appropriate recognition overseas.²⁸

The same general principles have been held to apply also to the new 'super scheme' or restructuring plan procedure under Part 26A of the Companies Act 2006.²⁹ The relevant principles were considered and applied by Trower J in *Re Smile Telecoms Holdings Ltd.*³⁰ He said:

The applicant will be a company if it is liable to be wound up under the Insolvency Act 1986. In the present case, the company is incorporated in Mauritius, but there is no doubt that, as a foreign company, it is capable of being wound up under the 1986 Act as an unregistered company. Whether the court will do so at any particular moment in time will depend, amongst other matters, on whether it has a sufficient connection to the jurisdiction. But that is a discretionary question which does not affect its liability to be wound up ...³¹

The extensive liquidation and corporate restructuring jurisdiction of the UK courts (which at least impliedly necessitates an Insolvency Act with extra-territorial reach) is not unique in the world.³² For instance, the US is another – and indeed is the leading global hub.³³ The US Bankruptcy Code contains a liquidation chapter in Chapter 7. Its main attractiveness, however, to foreign companies lies in

²⁷Section 225 supplements s 221 by providing that 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 notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated.

²⁸See generally LC Ho 'Making and enforcing international schemes of arrangement' (2011) 26 *Journal of International Banking Law and Regulation* 434; J Payne 'Cross-border schemes of arrangement and forum shopping' (2013) 14 *European Business Organization Law Review* 563. See also the full discussion of the relevant considerations by Trower J in *Re Lecta Paper UK Ltd* [2020] EWHC 382 (Ch).

²⁹Part 26A was introduced into the Companies Act by the Corporate Insolvency and Governance Act 2020. The Corporate Insolvency and Governance Act 2020 – Final Evaluation Report (November 2022) by Walton and Jacobs and commissioned by the UK Insolvency Service at p 52 canvassed the possibility of providing for restructuring measures with explicit extra territorial effect. At fn 51 it referred to European Bank for Reconstruction and Development (EBRD)'s Core Principles of an effective Insolvency System Principle 15. No definite conclusions were reached in the report, however.

³⁰Convening hearing [2021] EWHC 395 (Ch).

³¹[2021] EWHC 395 (Ch) at [25].

³²See generally N McCoy 'Will Singapore become an international centre of debt restructuring?', *INSOL International Special Report* (November 2018).

³³A Casey and J Macey 'Bankruptcy shopping: domestic venue races and global forum wars' (2021) 37 *Emory Bankruptcy Developments Journal* 463; J Ellias 'What drives bankruptcy forum shopping? Evidence from market data' (2018) 47 *Journal of Legal Studies* 119.

the restructuring provisions of Chapter 11, where the statutory goal is the preparation and confirmation of a reorganisation plan.³⁴ According to the US Supreme Court:³⁵

In proceedings under the reorganization provisions of the Bankruptcy Code, a troubled enterprise may be restructured to enable it to operate successfully in the future.

The US courts have inferred extraterritorial effect from the language of the Bankruptcy Code provisions and they have also held that the bankruptcy estate comprises property of the debtor wherever situated throughout the world.³⁶

In the US, the same (low) jurisdictional threshold applies in both liquidation and restructuring scenarios. Commentators have spoken of the tissue thin connection that suffices to found US Bankruptcy Code competence.³⁷ Section 109(a) of the US Bankruptcy Code provides that any person who ‘resides or has a domicile, a place of business, or property in the United States’ may be a debtor under the Code. It seems that US bankruptcy jurisdiction could be exercised on the basis of a single bank account in the US. The presence of a ‘dollar, a dime or a peppercorn’ provides a sufficient jurisdictional nexus and so too does a shareholding in a US-incorporated subsidiary company.³⁸ The US courts may decline jurisdiction, however, on discretionary grounds such as where a debtor is attempting to get around choice-of-forum clauses in its contracts with principal creditors.³⁹

A leading case is that of *Re Yukos*,⁴⁰ which involved a Russian oil company whose business operations, including exploration and refining, were based in Russia. A US bankruptcy filing was made essentially in an attempt to prevent a seizure of the company’s assets in Russia to satisfy a Russian tax debt. US bankruptcy jurisdiction was held to be established on the basis of a bank account in the US opened shortly before the bankruptcy filing and on the presence of the debtor’s chief financial officer in the US. The proceedings were later dismissed, however, on the basis of section 1112(b) of the US Bankruptcy Code, which allows dismissal of a case for cause, including the absence of a reasonable likelihood of achieving a corporate reorganisation.

There are also occasionally conflicting decisions on the application of particular US Bankruptcy Code provisions to particular transfers of property outside the US.⁴¹ It may be that questions about the global reach and width of particular legislative provisions are not simply about boosting the powers of national courts and expanding the boundaries of national insolvency jurisdiction so as to encompass more foreign located assets and also to attract more international business to the domestic forum.

³⁴*Bank of America v 203 North LaSalle Street Partnership* (1999) 526 US 434.

³⁵*US v Whiting Pools Inc* (1983) 462 US 198 at 203. See also HR Rep No 595, 95th Congress, 1st Sess 220 (1977).

³⁶See *Hong Kong & Shanghai Banking Corp v Simon (In re Simon)* (1998) 153 F 3d 991 at 996: ‘Congress intended extraterritorial application of the Bankruptcy Code as it applies to property of the estate’.

³⁷See generally A Walters ‘United States’ bankruptcy jurisdiction over foreign entities: exorbitant or congruent?’ (2017) 17 *Journal of Corporate Law Studies* 367; G McCormack ‘Bankruptcy forum shopping: the UK and US as venues of choice for foreign companies’ (2014) 63 *International and Comparative Law Quarterly* 815. See also E Healy ‘All’s fair in love and bankruptcy? Analysis of the property requirement for section 109 eligibility and its effect on foreign debtors filing in US bankruptcy courts’ (2004) 12 *American Bankruptcy Institute Law Review* 535.

³⁸See the statement in *In re Globo Comunicacoes E Participacoes SA* (2004) 317 BR 235 at 249 that ‘courts have required only nominal amounts of property to be located in the United States, and have noted that there is “virtually no formal barrier” to having federal courts adjudicate foreign debtors’ bankruptcy proceedings’.

³⁹See *In re Head* (1998) 223 BR 648 where the links with the US were quite slight and the foreign debtors were attempting to circumvent contractual liability to a UK based creditor – Lloyds of London.

⁴⁰*Re Yukos Oil Co* (2005) 321 BR 396.

⁴¹See for example *Societe Gen plc v. Maxwell Commc’n Corp plc (In re Maxwell Commc’n Corp plc)* 186 BR 807, 818–20 (SDNY 1995) (holding that Congress did not clearly express an intent that Bankruptcy Code s 547 dealing with avoidable preferences apply to foreign transfers); *Barclay v Swiss Fin Corp Ltd (In re Midland Euro Exch Inc)*, 347 BR 708 (Bankr CD Cal 2006) (holding that Congress did not intend that section 548 would apply extraterritorially), with *French v Liebmann (In re French)*, 440 F 3d 145, 151–52 (4th Cir 2006) (holding that Congress made manifest its intent that Bankruptcy Code s 548 dealing with fraudulent transfers apply to all property that, absent a prepetition transfer, would have been property of the estate, wherever that property is located).

It has been argued that duplicative and overreaching rules are not necessarily the result of regulatory competition in which egoistic states try to undercut the rules of others in order to improve their position. An equally pivotal problem is that of uncertainty about reach and scope.⁴²

(e) Ancillary liquidations and the UNCITRAL Model Law

Turning the spotlight back to the UK, while an English court may exercise a winding up jurisdiction in respect of foreign registered companies it can also play a subsidiary role. It may assist a foreign court by treating any liquidation in England as being ancillary to one that is taking place in the company's place of incorporation.⁴³ This means the powers of the English liquidator are limited to gathering the assets in this jurisdiction, paying off preferential and secured creditors and then remitting any remaining assets to the principal liquidation.⁴⁴ The relevant principles were summarised as follows by Scott VC in *Re Bank of Credit and Commerce International SA (No 10)*⁴⁵ who said inter alia:

- (1) Where a foreign company is in liquidation in its country of incorporation, a winding up order made in England will normally be regarded as giving rise to a winding up ancillary to that being conducted in the country of incorporation.
- (2) The winding up in England will be ancillary in the sense that it will not be within the power of the English liquidators to get in and realise all the assets of the company worldwide. They will necessarily have to concentrate on getting in and realising the English assets.

It was also made clear in *Re Bank of Credit and Commerce International SA (No 10)*, and this has been confirmed in *Re Alitalia*,⁴⁶ that the assets in the hands of English liquidators fall to be distributed between the worldwide creditors of the debtor; there is no question of the relevant creditors being limited to those in the home jurisdiction. As Scott V-C observed, 'Every creditor of the company, whether he may be resident and whatever may be the proper law of his debt, can prove in an English liquidation'.⁴⁷

The relevant facts in the *Bank of Credit and Commerce International* arose before the UNCITRAL Model Law on Cross Border Insolvency passed into international currency. The Model Law aims to achieve greater efficiencies in the administration of international insolvency cases.⁴⁸ It has obtained a measure of international acceptance with the US and UK among the implementing states as well as the other major common law jurisdictions of Canada and Australia.⁴⁹ In

⁴²See M Lehmann 'Legal fragmentation, extraterritoriality and uncertainty in global financial regulation' (2017) 37 Oxford Journal of Legal Studies 406.

⁴³On ancillary liquidations, see generally P St J Smart 'International insolvency: ancillary winding up and the foreign corporation' (1990) 39 International and Comparative Law Quarterly 827; CH Tham 'Ancillary liquidations and *pari passu* distribution in a winding-up by the court' (2009) Lloyd's Maritime and Commercial Law Quarterly 113.

⁴⁴See *Banco Nacional de Cuba v Cosmos Trading Corp* [2000] BCC 910 at 915. See also Lord Hoffmann in *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21, [2008] 1 WLR 852 at [19] and Lord Neuberger at [75].

⁴⁵[1997] Ch 213 at 239–240. This case is referred to in the Chancery reports as the No 10 case in the BCCI series, but on the Westlaw database as No 11.

⁴⁶[2011] EWHC 15 (Ch), [2011] 1 WLR 2049 at [60].

⁴⁷[1997] Ch 213 at 242.

⁴⁸The Model Law (1997) is available at the UNCITRAL website, www.uncitral.org/. For analyses of the Model Law by those involved in its drafting see A Berends 'UNCITRAL Model Law on Cross-Border Insolvency: a comprehensive overview' (1998) 6 Tulane Journal of International & Comparative Law 309; J Clift 'The UNCITRAL Model Law on Cross-Border Insolvency: a legislative framework to facilitate coordination and cooperation' (2004) 12 Tulane Journal of International & Comparative Law 307.

⁴⁹But for a somewhat different view see S Chandra Mohan 'Cross-border insolvency problems: is the UNCITRAL Model Law the answer?' (2012) 21 International Insolvency Review 199, who suggests that the belief that the adoption by the US and UK 'might encourage adoption by a wider circle of countries' has simply not materialised. For the current list of adoptions see the UNCITRAL website, www.uncitral.org/

the UK, the Model Law has been implemented through the Cross Border Insolvency Regulations (CBIR) 2006.⁵⁰

The Model Law adopts a ‘modified universalist’ principle.⁵¹ It allows for the opening of more than one set of insolvency proceedings in states where the debtor has a business presence, and aims for maximum cooperation and coordination among the various proceedings. To this end, the Model Law provides for four main elements in the conduct of cross-border insolvency cases: access, recognition, relief (assistance) and cooperation.⁵²

The underlying philosophy of the Model Law was expounded by the US court in *ABC Learning Centres Ltd*. It said:

The Model Law reflects a universalism approach to transnational insolvency. It treats the multinational bankruptcy as a single process in the foreign main proceeding, with other courts assisting in that single proceeding. In contrast, under a territorialism approach a debtor must initiate insolvency actions in each country where its property is found. This approach is the so-called ‘grab’ rule where each country seizes assets and distributes them according to each country’s insolvency proceedings.⁵³

The *ABC Learning* analysis has also been adopted by courts in other countries including the UK and Australia.⁵⁴ The Model Law distinguishes foreign ‘main’ and ‘non-main’ insolvency proceedings. It should be noted that now, under the UK Cross-Border Insolvency Regulations 2006, Schedule 1, Article 28,⁵⁵ UK insolvency proceedings that are opened up after foreign main insolvency proceedings have been recognised are limited to the UK assets of the debtor.

2. The EU Insolvency Regulation and extra-territoriality

When the UK was an EU member state it was subject both to the constraints of the (recast) Insolvency Regulation⁵⁶ and benefited from the powers conferred by that Regulation. The recast Regulation is essentially a private international law measure rather than a measure of substantive harmonisation. It deals with issues of jurisdiction to open insolvency proceedings, the applicable law in respect of such proceedings and recognition and enforcement of insolvency proceedings that have been opened in other EU member states.

The Regulation allocates jurisdiction to open insolvency proceedings and determines the applicable law in respect of such proceedings.⁵⁷ It also establishes, however, basic minimum European standards in respect of the treatment of foreign creditors and notification of proceedings and also, to a certain extent, on the powers and duties of insolvency practitioners.

⁵⁰SI 2006/1030. Reg 2 provides that ‘(1) The UNCITRAL Model Law shall have the force of law in Great Britain in the form set out in Schedule 1 to these Regulations (which contains the UNCITRAL Model Law with certain modifications to adapt it for application in Great Britain)’.

⁵¹See generally the works by Mevorach cited in n 21 above.

⁵²UNCITRAL *Guide to Enactment and Interpretation of the UNCITRAL Model Law on Cross-Border Insolvency* (2013) (Revised Guide) para 24.

⁵³*In re ABC Learning Centres Ltd* (2013) 728 F3d 301 at 307. The court cited A Guzman ‘International bankruptcy: in defense of universalism’ (2000) 98 Michigan Law Review 2177 at 2179. For the universalism versus territorialism debate see JL Westbrook ‘A global solution to multinational default’ (2000) 98 Michigan Law Review 2276; L Lo Pucki ‘The case for co-operative territoriality in international bankruptcy’ (2000) 98 Michigan Law Review 2216; L Lo Pucki ‘Universalism unravels’ (2005) 79 American Bankruptcy Law Journal 143; R Rasmussen ‘Where are all the transnational bankruptcies?: the puzzling case for universalism’ (2007) 22 Brooklyn Journal of International Law 983.

⁵⁴See generally G McCormack and A Hargovan ‘Australia and the international insolvency paradigm’ (2015) 37 Sydney Law Review 389.

⁵⁵SI 2006/1030.

⁵⁶Regulation (EU) 2015/848 recasting Regulation 1346/2000.

⁵⁷See Arts 3 and 7 in particular.

The preamble to the recast Regulation locates it in the context of creating a European area of freedom, security and justice.⁵⁸ It refers to the cross-border activities of business entities as European markets become more integrated and also to the need to prevent asset transfers or forum manipulation to the detriment of the general body of creditors.⁵⁹ Jurisdiction to open main insolvency proceedings is given to the state where a debtor has its centre of main interests (COMI), with jurisdiction to open secondary proceedings given to the state or states where the debtor has an ‘establishment’.

The recast Regulation was part of private international law measures that created a pan-European area of freedom, security and justice. Within that area it allocated jurisdiction to open insolvency proceedings, applicable law and enforcement of judgments across national frontiers. Within that area, the UK and other EU member states were constituent units of a supra-national entity, ie the EU itself. The Regulation, however, did not directly affect the EU’s relations with third countries. National private international law rules remained intact in this respect as did the scope of national insolvency law. The UK could continue to wind up or approve schemes and plans in respect of foreign companies so long as such companies did not have their COMI or an establishment within the EU.

In the UK, the exercise of an IP’s powers in other EU states (pre-Brexit) was an issue in some cases, including in *Re Carna Meats*.⁶⁰ In that case it was held that the liquidator of an insolvent company was entitled to an order under section 236 of the Insolvency Act 1986, requiring the company’s former bookkeeper, who was resident in the Republic of Ireland – an EU member state – to deliver up the books and records of the company in his possession or control. Reference was made to the recast EU Insolvency Regulation and the authority of a liquidator to exercise the powers conferred on him by UK domestic law in other EU member states. Moreover, the former bookkeeper was sufficiently connected with the UK for it to be just and proper to make an order despite the foreign element. He had been an important part of the company’s operations and if he had possession of the company’s books and records, he could not complain that an order requiring him to make those books and records available on a winding up involved any excess of jurisdiction by the English court. That court had an entirely legitimate interest in requiring the bookkeeper, even if abroad, to make such documents and information available to the liquidator.

The same result was reached on the basis of somewhat different reasoning in *Re Akkurate Ltd*.⁶¹ Chancellor Vos held that, according to the EU jurisprudence, the Regulation extended the territoriality of purely domestic insolvency provisions. Proceedings under section 236 of the UK’s Insolvency Act 1986 derived directly from, and were closely connected to, insolvency proceedings, and the aim of the EU Regulation was to confer jurisdiction on the courts of the EU state in which the insolvent entity had its COMI. Therefore, the Regulation conferred extra-territorial jurisdiction on the English court to make orders against EU-resident parties under section 236.

Reference was made to *Schmid v Hertel*,⁶² where the EU court said that the courts of the EU member state within the territory in which the centre of a debtor’s main interests is situated shall have jurisdiction to open main insolvency proceedings. Thus, the location of the debtor’s assets is irrelevant, except in so far as it may be a factor to be taken into account in determining where the centre of the debtor’s main interests is and/or whether secondary proceedings may be opened under other EU Insolvency Regulation provisions. The place of residence of any potential defendant to an action which might subsequently be brought within those proceedings by the IP to set a transaction aside and recover additional assets for the benefit of the creditors was likewise irrelevant to the question of which was the competent court to open proceedings. Such an action comes within the jurisdiction of the court that had (already) opened such proceedings because it was an action that derives directly from such proceedings and is closely connected to them.

⁵⁸Recital 2.

⁵⁹Recitals 3–5.

⁶⁰[2019] EWHC 2503 (Ch), [2019] BCC 1224.

⁶¹[2020] EWHC 1433 (Ch), [2021] Ch 73.

⁶²Case C-328/12 [2014] 1 WLR 633.

In *Re Akkurate Ltd* the IPs of a company that was in liquidation in England applied under section 236 of the Insolvency Act 1986 for orders requiring two companies incorporated in Italy to provide them with certain information and documentation. Such applications were made against a long history of discussions, negotiations and litigation between the parties, including litigation commenced in Italy.

The court held that the EU Insolvency Regulation extends the territorial force of purely domestic insolvency provisions such as section 236 and proceedings under that section were proceedings that derived directly from the underlying insolvency proceedings (ie the liquidation). A section 236 order could therefore be made against the Italian companies.

The court, however, was required to undertake a balancing exercise when considering whether to exercise its discretion under section 236: the reasonable requirements of the IP in seeking information about the assets of the debtor on the one hand, to be balanced against the protection of the respondent from burdensome, disruptive and time-consuming information demands on the other.

3. Extra-territorial application of insolvency laws in the wake of Brexit

At the beginning of 2021 the Brexit completion process came to an end and, therefore, there is no longer an EU-wide extension on the powers of UK IPs. Looking at it more positively, the UK is no longer subject to EU constraints and may give its national insolvency law whatever extra-territorial scope it deems appropriate including the assumption of insolvency jurisdiction in respect of companies with an EU COMI. The UK is no longer an EU state and is free to make its own laws in respect of insolvency and the scope of the Insolvency Act 1986. This includes specifying more precisely the information-gathering and transactional avoidance powers of insolvency practitioners. These are areas where extraterritorial scope has generated particular issues.

The quintessential powers of a liquidator or other IP involve collecting in the assets of the debtor with a view to administering and distributing them among creditors.⁶³ The powers of the IP also include challenging certain transfers or transactions entered into by the debtor before the commencement of the formal insolvency process which are either intended to, or have the effect, of putting certain creditors of the debtor in a more advantageous position than other creditors.⁶⁴ Typically such transactions have one or more of three questionable elements.⁶⁵ These comprise: first, transactions at an undervalue that have the effect of diminishing the value of the debtor's estate;⁶⁶ secondly, preferences that put one or more creditors in an advantageous position compared with others in the event of a debtor's insolvency liquidation;⁶⁷ and thirdly, transactions entered into with a view to putting assets beyond the reach of creditors.⁶⁸

The tasks of the IP cannot be performed, however, if the assets are secreted or kept hidden by a debtor company's directors or management. In most legal systems, therefore, including the UK, the debtor's directors or management become subject to a duty to make the assets available to the IP and to cooperate with the IP in the process of tracing and tracking down the assets. Persons who might be able to give useful information on the location of assets and to facilitate identification and recovery of the same may also become subject to a duty to provide such information and to facilitate the carrying out of the IP's task in the identification and recovery of assets.

⁶³See generally H Sims et al *Insolvency Practitioners Appointment, Duties, Powers and Liability* (Cheltenham: Edward Elgar, 2020) and also I Fletcher 'Juggling with the norms: the conflict between individual and collective rights under insolvency law' in R Cranston *Making Commercial Law* (Oxford: Clarendon Press, 1997) p 395; A Keay 'Insolvency law: a matter of public interest?' (2000) 51 Northern Ireland Legal Quarterly 509.

⁶⁴See generally S Wheeler 'Swelling the assets for distribution in corporate insolvency' (1993) *Journal of Business Law* 256.

⁶⁵For a general comparative overview see R Bork and M Veder (eds) *Harmonisation of Transactions Avoidance Laws* (Cambridge: Intersentia, 2022).

⁶⁶Insolvency Act 1986, s 238.

⁶⁷*Ibid*, s 239.

⁶⁸*Ibid*, s 423, which applies both inside and outside the formal insolvency process.

The question arises of how far an IP's information-gathering powers may be exercised outside the jurisdiction of the state that opens insolvency proceedings. In the UK, because of the principle of national sovereignty there is, and was, a rule of construction that UK statutes are presumed not to have extra-territorial effect. Much depends on the context, however, and certain provisions of the UK Insolvency Act, for instance, have been given, in part at least, an extra-territorial effect. In principle, the territorial reach of a provision of a statute depends on the reach that the UK Parliament intended the relevant provision to have.⁶⁹ Nevertheless and as already pointed out, the parliamentary intention may not be easily perceptible or partly invisible.

(a) *Transactional avoidance powers*

It has been held, however, in *Re Paramount Airways Ltd*,⁷⁰ that section 238 of the Insolvency Act 1986 – which enables an IP to apply for an order setting aside a transaction entered into by the company with ‘any person’ at an undervalue – applies to any person whether or not that person is resident in England, ie without any territorial limitation.⁷¹ There are two respects in which this apparently limitless jurisdiction may be confined. First, section 238(3) provides that the court shall make such order as it thinks fit for restoring the position to what it would have been if the company had not entered into the transaction. This discretion is of sufficient width to permit the court to make no order at all against the other party to the transaction. If a foreign element is involved, the court must be satisfied that the party against whom the order is to be made was sufficiently connected⁷² with England for it to be just and proper to make the order irrespective of the foreign element in the case.

Whether such a connection exists is to be assessed by reference to all the circumstances. Relevant for these purposes will be:⁷³ the residence and place of business of the party; that party's connection with the company; the purpose of the transaction which is being attacked; the nature and locality of the property involved; the circumstances in which the party became involved in the transaction, or received a benefit from it, or acquired the property in question; whether the party acted in good faith; and whether under any relevant foreign law the party acquired a title free of any claims even if the company had been wound up under that law. The weight to be attached to these factors will vary from case to case, and still further circumstances may be relevant. Overall the court will seek to ensure that it does not act oppressively or unreasonably in operating the very wide jurisdiction conferred upon it.⁷⁴

A further safeguard may be applied at an earlier stage, in that proceedings under the section are not to be brought against a person abroad unless the court grants leave for the proceedings to be served on that person abroad pursuant to the Insolvency Rules.⁷⁵ To decide whether it is a suitable case for

⁶⁹*Clark (Inspector of Taxes) v Oceanic Contractors Inc* [1983] 2 AC 130; *Bilta (UK) Ltd v Nazir* [2015] UKSC 23, [2016] AC 1.

⁷⁰[1993] Ch 223 (CA). On the principle behind s 238 see *Skandinaviska Enskilda Banken AB (Publ) v Conway* [2019] UKPC 36, [2020] AC 1111 at 1012.

⁷¹*Re Paramount Airways Ltd* [1993] Ch 223 at 239. See also *Banco Nacional de Cuba v Cosmos Trading Corp* [2000] 1 BCLC 813 at 819–820. On choice of law see LC Ho ‘Conflict of laws in insolvency transaction avoidance’ (2008) 20 Singapore Academy of Law Journal 343; G McCormack ‘Conflicts, avoidance and international insolvency 20 years on: a triple cocktail’ (2013) Journal of Business Law 141.

⁷²[1993] Ch 223 at 239–240.

⁷³*Ibid*, at 240.

⁷⁴The court suggested that any case might in theory have a sufficient connection with the UK. It said ([1993] Ch 223 at 239): ‘the solution to the question of statutory interpretation ... does not lie in retreating to a rigid and indefensible line. Trade takes place increasingly on an international basis. So does fraud. Money is transferred quickly and easily... [T]he considerations set out above and taken as a whole lead irresistibly to the conclusion that ... it is impossible to identify any particular limitation which can be said, with any degree of confidence, to represent the presumed intention of Parliament.’

⁷⁵[1993] Ch 223 at 240–241 (CA); Insolvency (England and Wales) Rules 2016, SI 2016/1024, Sch 4, para 1(4). On service out of the jurisdiction in cases under Insolvency Act 1986, s 423, see *Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd* [2018] EWCA Civ 1660, [2018] 1 WLR 4847.

leave to be granted where a foreign element is involved, the court will have particular regard to the strength or weakness of the plaintiff's claim that the defendant has a sufficient connection with England.⁷⁶

Subject to the same safeguards, it was also held in *Orexim Trading Ltd v Mahavir Port and Terminal Private Ltd*⁷⁷ that the same potential extra-territorial effect applies with respect to section 423 of the Insolvency Act 1986, which deals with transactions at an undervalue that were intended to defraud creditors. If the Court is satisfied that such a transaction was entered into for the purpose of putting assets beyond the reach of a person who is claiming against him, or otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make, then the Court has wide powers under that section to undo the transaction. The court was interpreted as having the power to make orders against persons or property abroad, subject to the Court being satisfied that there was a sufficiently close connection with the jurisdiction.

(b) *Fraudulent trading*

The same principles apply equally where it is alleged under section 213 of the Insolvency Act 1986 that the company has entered into a transaction with another person which defrauds creditors.⁷⁸ The court may declare that any persons who were knowingly parties to the carrying on of the business in the fraudulent manner to make such contributions (if any) to the company's assets as the court thinks proper. In *Bilta (UK) Ltd v Nazir (No 2)*⁷⁹ the UK Supreme Court held that section 213 had extra-territorial effect, at least to the extent of applying to individuals and corporations resident outside the UK. The court made the point that in the case of a company trading internationally, and in an increasingly globalised economy, it was difficult to see how the provisions of section 213 could achieve their object if their effect was confined to the UK. The ease of modern travel meant that people who committed fraud through the medium of a company (or otherwise) could readily abscond abroad. It would seriously handicap an efficient winding up if the jurisdiction of the court did not extend to people and corporate bodies resident overseas who had been involved in the carrying on of the company's business. It was also noted that the section contained no express limits on its territorial application.⁸⁰

The court endorsed the proposition⁸¹ that current patterns of cross-border business weaken the presumption against extra-territorial effect as applied to the exercise of the courts' powers in conducting the liquidation of a UK company. Moreover, the absence in the statute of any test for what would constitute presence in the UK made it unlikely that presence there was intended to be a condition of the exercise of the power. The absence, however, of a UK connection would be a factor in the exercise of the discretion to permit service out of proceedings as well in the discretion whether to grant the relief, which was enough to prevent injustice.

While the trend of the case law, and in line with the increased international tentacles of business, may favour extra-territorial application of provisions of the Insolvency Act 1986, the direction of travel is by no means all one way. There are decisions in both camps. *Re Seagull Manufacturing Co Ltd* on public examination of company officers might be contrasted, for instance, with *Re Tucker* on private examination.

⁷⁶[1993] Ch 223at 240–241 (CA). See also *Barclays Bank plc v Homan* [1993] BCLC 680.

⁷⁷[2018] EWCA Civ 1660, [2018] 1 WLR 4847.

⁷⁸[1993] Ch 223 at 234–235 (CA). While not specifically addressed in the case, the same general principles should also apply in respect of 'wrongful trading' which is regulated under the Insolvency Act 1986, s 214.

⁷⁹[2015] UKSC 23, [2016] AC 1.

⁸⁰*Ibid*, at 10, 53, 108–110, 213–214.

⁸¹Reference was made to *Re Paramount Airways Ltd (No 2)* [1993] Ch 223.

(c) Public examination of company officers

In *Re Seagull Manufacturing Co Ltd*⁸² it was held by the Court of Appeal that an order could be made against a former company officer who was outside the UK, so as to compel that person to come to the UK to be examined in a public examination pursuant to section 133 of the Insolvency Act 1986. The section was construed as intending to ensure that officers or other persons responsible for the formation and running of an English company which was being compulsorily wound up were liable to examination in public whether or not they were within the jurisdiction of the English courts. The section had no territorial limits and a company director was within the legislative grasp of the section notwithstanding his residence abroad.

Delivering the Court of Appeal judgment in *Seagull*, Peter Gibson J referred to *Clark v Oceanic Contractors Inc*,⁸³ where Lord Scarman articulated the general principle:

that, unless the contrary is expressly enacted or so plainly implied that the courts must give effect to it, United Kingdom legislation is applicable only to British subjects or to foreigners who by coming to the United Kingdom, whether for a short or a long time, have made themselves subject to British jurisdiction.

Peter Gibson J also emphasised, however, the need to consider whether the general presumption against extra-territorial effect was displaced by ‘the language of the legislation’ and ‘the policy of the legislature in enacting the section in question’.⁸⁴ In addressing displacement, he suggested that where a company had come to a calamitous end and was subject to compulsory liquidation, the obvious intention of section 133 was that those responsible for the company’s state of affairs should be subject to the possibility of a public process of investigation:

Parliament could not have intended that a person who had that responsibility could escape liability to investigation simply by not being within the jurisdiction. Indeed, if the section were to be construed as leaving out of its grasp anyone not within the jurisdiction, deliberate evasion by removing oneself out of the jurisdiction would suffice.⁸⁵

Section 133 had been enacted against the background of ‘public worry and concern over company failures on a large scale, and the need to safeguard the public against such failures.’

Reference was made to the fact that with modern methods of communication, English companies could be managed perfectly well by persons who need not set foot within the jurisdiction. The same applied *a fortiori* in respect of foreign registered companies who were also subject to the liquidation jurisdiction of the UK Insolvency Act. The court was concerned with the scope of the Act and not whether an order for public examination could be effectively enforced against a person out of the jurisdiction.⁸⁶

(d) Private examinations under the Insolvency Act 1986⁸⁷

The private examination of persons under the insolvency regime is likely to be less intrusive and invasive of privacy than public examination. Nevertheless, it has been given a more restricted

⁸²[1993] Ch 345.

⁸³[1983] 2 AC 130 at 145.

⁸⁴[1993] Ch 345 at 354.

⁸⁵*Ibid.*

⁸⁶It should be noted, however, that it is well established that in relation to the jurisdiction to approve schemes of arrangement and restructuring plans, the UK court does require some credible evidence that it will not be acting in vain: *Re van Gansewinkel Groep BV* [2015] Bus LR 1046 at [71] per Snowden J. This credible evidence must show that the scheme is ‘likely, or at least will have a real prospect, of having substantial effect’ or ‘at least a reasonable prospect that the scheme will be recognised and given effect’: *Re Codere Finance 2 (UK) Ltd* [2020] EWHC 2683 (Ch) at [34] per Falk J, *Re KCA Deutag UK Finance plc* [2020] EWHC 2977 (Ch) at [32] per Snowden J. See also *Re DTEK Energy* [2021] EWHC 1551 (Ch).

⁸⁷See generally G Moss ‘Getting at the truth – s 236 examinations’ (1998) 11 *Insolvency Intelligence* 41.

interpretation as not applying to persons outside the jurisdiction. This is despite the fact, as was recognised in *Seagull*, that private examinations as well as public examinations can have a significant role to play in the investigation of a company failure. In *Re Tucker*,⁸⁸ the Court of Appeal held that the court's power in personal bankruptcy under section 25 of the Bankruptcy Act 1914 to compel any person that might be capable of providing information as to the affairs of the debtor, could not be used to compel a person outside England to appear before the court in a private examination.

That case was, however, distinguished in *Re Seagull* on various grounds. For a start, the class of persons who could be brought before the court under section 25 was notably wider than the three categories under section 133 of the Insolvency Act 1986. It was not limited to the debtor but included anyone whom the court suspected might have relevant property or information, whereas the class of persons in section 133 was limited to persons who had responsibility for the company. In *Re Tucker*, emphasis was placed on section 25(6) of the 1914 Act whereby the court is given a power to order the examination out of England of 'any person who if in England would be liable to be brought before it under this section'. According to Dillon J in *Re Tucker*, this 'wording carries inevitably ... the connotation that if the person is not in England he is not liable to be brought before the English court under the section'.⁸⁹

According to *Re Seagull*, section 133 of the Insolvency Act 1986 was plainly distinguishable by reason of the absence from it, or neighbouring sections, of any provision corresponding to that in section 25(6), which was held to be so determinative in *Re Tucker*. In the provisions governing public examination there was no such statutory provision.

Re Tucker was a decision on the interpretation of section 25 of the Bankruptcy Act 1914. In the Insolvency Act 1986 regime, section 236 is a successor provision, and now the generally acceptable view is that section 236 should be construed as subject to the same territorial limitation given the presence of section 237(3), which is more or less the equivalent of section 25(6). There are, however, a number of inconsistent decisions.

In *Re MF Global*⁹⁰ David Richards J held that section 237(3) of the Insolvency Act 1986 was in effect a statutory re-enactment of section 25(6) of the Bankruptcy Act 1914, and that he was therefore bound by *Re Tucker* to hold that section 236 of the Insolvency Act 1986 did not have extraterritorial effect. He concluded that, in the absence of authority and what is now section 237(3), there would be a good deal to be said for concluding that section 236 was intended to have extraterritorial effect, leaving it to the discretion of the court to keep its use within reasonable bounds. But such an approach overlooked the authoritative standing of *Re Tucker*: the re-enactment of the earlier private examination provisions in substantially the same terms and the presence of section 237(3).

However, in *Re Omni Trustees*⁹¹ Judge Hodge held that section 236 of the Insolvency Act 1986 was sufficiently different from the Bankruptcy Act provision that *Re Tucker* did not need to be followed. In particular, he noted that the power to order the production of documents under section 25 of the Bankruptcy Act 1914 was 'merely ancillary to, and dependent upon' the power to summon a party to appear before court, whereas section 236 of the Insolvency Act 1986 contained a free-standing provision to this effect. Relying on this difference in drafting, Judge Hodge held that *Re Tucker* could be distinguished, as the thrust of the decision (namely that the court could not extraterritorially compel someone to attend before court) went to a wholly different issue from whether the court could compel the production of documents held abroad.

The deputy Judge in *Re Carna Meats*⁹² held similarly. While recognising that the presumption in favour of territorial application of provisions concerned with requiring attendance before the court was very strong, there was no absolute rule in favour of territorial application. The presumption had been

⁸⁸[1990] Ch 148.

⁸⁹*Ibid*, at 158.

⁹⁰*In re MF Global UK Ltd (No 7)* [2015] EWHC 2319 (Ch), [2016] Ch 325.

⁹¹[2015] EWHC 2697 (Ch), [2015] BCC 906.

⁹²Also reported as *Wallace v Wallace* [2019] EWHC 2503 (Ch), [2020] 1 WLR 1176.

subject to a number of exceptions in an insolvency context. In light of these authorities the deputy Judge concluded that *Re Tucker* could be distinguished, particularly where what was sought was the production of documents, not the attendance of a party before court

The inconsistent line of cases was thoroughly reviewed in *Re Akkurate Ltd*⁹³ by Chancellor Vos. He reached the ‘clear view’ that *Re Tucker* was binding authority on the High Court as to the proper interpretation of section 236 of the Insolvency Act 1986 and accordingly held that the section did not have extraterritorial effect. Chancellor Vos disagreed with the approach taken in *Omni* and *Carna Meats*, holding that the modernisation of the language and division between subsections in section 236 could not be seen as a substantive change from the position under section 25 of the Bankruptcy Act 1914. The fact the language in the Insolvency Act 1986 had been modernised and divided up into different sub-sections did not mean that Parliament’s intentions must be taken to have changed. The Chancellor also adverted to the important fact that *Re Tucker* has been considered in both the Court of Appeal and Supreme Court without disapproval, despite the general trend towards the extra-territoriality of the Insolvency Act 1986 reflected in various decisions.

Both David Richards J and Sir Geoffrey Vos in different cases saw merit in the suggestion that section 236 should be applied to persons resident abroad. Nevertheless, they saw section 237(3) as a stumbling block to a wide extra-territorial reading of section 236 since section 237(3) allowed the court to sanction the examination of a person abroad ‘if within the jurisdiction of the court would be liable to be summoned before it under section 236’. The interaction between the sections suggested that a person examined pursuant to section 237(3) could not be examined under section 236.

Nevertheless, the possibilities open to the UK Supreme Court are not precluded by such a restrictive interpretation. They could read the sections in an expansive way, permitting private examinations either in the UK or abroad and irrespective of where the relevant company officer etc happened to be residing.

In *Re Carna Meats*⁹⁴ and *Re Akkurate Ltd*⁹⁵ the operation of the EU Insolvency Regulation was construed as extending the ambit of an IP’s investigation and information-gathering powers under section 236 of the Insolvency Act 1986 from the UK to the entire territorial domain of the EU. But with Brexit this territorial expansion was brought to an end. It would need the UK Supreme Court to reinstate the broad sweep of section 236 and indeed to apply the section on a worldwide basis to persons within the intendment of the section who happen to be resident overseas. This would facilitate the collection of assets and the investigation of the causes of a company’s failure. It would be an evolutionary rather than a revolutionary step. It would enhance and expand the existing UK jurisprudence that has applied existing Insolvency Act provisions to persons, property and transactions located abroad provided there is deemed to be a sufficient connection with the UK. The criticisms of such an approach might focus on the increased uncertainty that a ‘sufficient connection’ test might bring and the absence of overarching statutory authority. It is suggested, however, that the Supreme Court should give extra-territorial width to section 236.

The paper now considers the case for a more general sweeping away of Insolvency Act limitations and the application of the Insolvency Act 1986 regime to all persons and activities abroad subject perhaps to a ‘sufficient connection with the UK’ discretionary constraint. It takes the view, however, that such an interpretation would be a step too far.

4. General extra-territorial application of Insolvency Act 1986 provisions

The application of a ‘sufficient connection’ test was recently considered by the UK Supreme Court in *R (on the application of KBR Inc) v Director of the Serious Fraud Office*.⁹⁶ The court rejected the extra-territorial application of the Criminal Justice Act 1987 subject to a ‘sufficient connection’ limitation.

⁹³[2020] EWHC 1433 (Ch), [2021] Ch 73.

⁹⁴[2019] EWHC 2503 (Ch), [2019] BCC 1224.

⁹⁵[2020] EWHC 1433 (Ch), [2021] Ch 73.

⁹⁶[2021] UKSC 2, [2022] AC 519 at [64], [65].

The 1987 Act deals with the investigation of serious fraud and brings into existence the Serious Fraud Office (SFO). The Supreme Court distinguished, however, between the Criminal Justice Act and Insolvency Act contexts and did not find a sufficiently close analogy between them.

In this particular case, the court was concerned with the application of section 2(3) of the Criminal Justice Act 1987. This provision empowers the Director of SFO to issue notices to parties requiring the production of documents relevant to SFO investigations, under threat of criminal sanction for non-compliance. The Supreme Court held that the power could not be exercised over a foreign company that had no fixed place of business in the UK and did not carry on business there, to compel production of material held by it outside the UK. Essentially the Supreme Court held that to interpret the 1987 Act in this way would extend the jurisdictional reach of the SFO far beyond the original intentions of Parliament and contravene well-established principles of international law and comity.

The court, however, was very mindful of the completely different legislative context and the evolutionary and incremental developments on extra-territorial effect in the insolvency space. It also highlighted the apparently ‘unlimited territorial application’ of section 221 of the Insolvency Act 1986, which gives UK courts the power to wind up overseas companies. Indeed, the courts have had to find ways to confine the exercise of this power by requiring a sufficient connection with the jurisdiction and a reasonable possibility of benefit for creditors from the winding up.

If the Supreme Court gave extra-territorial force to section 236 on private examinations this would seem to be another incremental step. Going further and bestowing extra-territorial power on the whole of the Insolvency Act regime, on the other hand, would seem a more appropriate step for legislative intervention.

In the *KBR Inc* case it was suggested that an intention on the part of Parliament to give extra-territorial effect to a statutory provision may be implied from the scheme, context and subject matter of the legislation. But the Supreme Court also entered the caveat that ‘while the intention behind a provision in a statute needs to be ascertained by looking at the statute as a whole, it does not follow that all provisions in a statute have the same territorial ambit’. The same is undoubtedly true of the Insolvency Act and even of those provisions which are of more recent provenance. Take, for instance, the provisions on executory contracts.⁹⁷

The Corporate Insolvency and Governance Act 2020 Act added a new section 233B to the Insolvency Act 1986 with a general set of provisions on termination and ipso facto clauses in contracts for the supply of goods and services.⁹⁸ The new provisions apply when a company becomes subject to a ‘relevant insolvency procedure’, which includes also two new procedures established by the 2020 Act, ie the statutory moratorium and the restructuring plan.⁹⁹

The provisions apply to any clause in a contract for goods and services that either automatically terminates the contract or entitles the supplier to terminate the contract upon a company becoming subject to a relevant insolvency procedure. The Act also attempts to prevent suppliers from doing ‘*any other thing*’ upon a company becoming subject to relevant insolvency procedure and the explanatory notes to the Act indicate that this is aimed at preventing suppliers from changing payment terms.¹⁰⁰

⁹⁷See para 5.97 of *Insolvency and Corporate Governance Government Response* available at <https://www.gov.uk/government/consultations/insolvency-and-corporate-governance> ‘the Government will legislate to prohibit the enforcement of ‘termination clauses’ by a supplier in contracts for the supply of goods and services where the clause allows a contract to be terminated on the ground that one of the parties to the contract has entered formal insolvency. This is an approach that is common among a number of other states with highly-ranked insolvency regimes’.

⁹⁸For a detailed analysis see generally F Toube QC and G Peters ‘Ipso facto reform’ *South Square Digest* special issue on Corporate Insolvency and Governance Act 2020 at p 54 and available at https://southsquare.com/wp-content/uploads/2020/07/Digest_Magazine_Mini_Digital-CIGA.pdf.

⁹⁹See also *Corporate Insolvency and Governance Act 2020 –Final Evaluation Report* (November 2022) by Walton and Jacobs and commissioned by the UK Insolvency Service.

¹⁰⁰See the explanatory notes available at <https://publications.parliament.uk/pa/bills/lbill/58-01/113/5801113en.pdf>, p 8 para 34 and also the statement ‘Where an event permitting the exercise of the right occurred before the restructuring or insolvency procedure commenced but the supplier had not exercised the right to terminate before the restructuring or insolvency event, the supplier will be unable to exercise it for the duration of the insolvency’.

There is an express provision that precludes the supplier from making the payment of pre-insolvency debt arrears a condition of continuing supply and that there is no mechanism whereby an insolvency practitioner could be held personally to guarantee the payment of ongoing supplies.¹⁰¹ This is in contrast to the provisions on ‘essential suppliers’, which enable a supplier to hold an office holder (insolvency practitioner) personally liable for the payment of ongoing supplies.¹⁰²

There are certain circumstances, however, in which the supplier is able to terminate the contract, including where the court is satisfied that continuation of the contract would cause the supplier hardship and grants permission.¹⁰³ Moreover, the restriction on termination provisions only applies upon a company becoming subject to a relevant insolvency procedure. The supplier still has the right to terminate the contract on other grounds, unless those grounds arose before the relevant procedure commenced. If, however, the supplier had not exercised the right to terminate before the relevant insolvency procedure commenced, the supplier will be unable to exercise it for the duration of the procedure.

It should be noted that the new regime does not apply to a large group of ‘exempted contracts’ including those in favour of financial services providers.¹⁰⁴ But what if the relevant supply contract is made overseas or is subject to a foreign law rather than English law? There is a long-established principle, the *Gibbs* rule,¹⁰⁵ that the modification of an English-law governed contract under a foreign insolvency law has no effect in England unless the relevant party or parties have submitted to the jurisdiction of the foreign court.¹⁰⁶ But what if the shoe is on the other foot and English insolvency law purports to modify foreign-law governed contracts? Should this approach be allowed to prevail? If one applies at face value the statement made by Lord Sumption, with the agreement of other members of the Supreme Court, in *Goldman Sachs International v Novo Banco SA*¹⁰⁷ then the answer should be in the negative and the provisions of the UK Insolvency Act 1986 regime should not be applied extra-territorially in this instance to contracts which have a different governing or ‘proper’ law. Lord Sumption said:

the discharge or modification of a contractual liability is treated in English law as being governed only by its proper law, so that measures taken under another law, such as that of a contracting party’s domicile, are normally disregarded.¹⁰⁸

The new provisions in the Insolvency Act 1986 make no statement on the matter, although legislative guidance would have been welcome. In the absence of such guidance, the courts are left to proceed incrementally in line with general pointers such as those articulated by the Supreme Court in the *KBR Inc* case¹⁰⁹ that the ‘more exorbitant the jurisdiction, the more is likely to be required of the statutory provisions in order to rebut the presumption against extra-territorial effect’. The Supreme Court

¹⁰¹See the new s 233B(7).

¹⁰²Insolvency Act 1986, s 233(2)(a).

¹⁰³New s 233B(8).

¹⁰⁴See the new s 233B(10) which inserts a new Sch 4ZZA into the Insolvency Act 1986 and which provides for exclusions from the operation of s 233B. The new schedule is set out in Sch 12 to the 2020 Corporate Insolvency and Governance Act. The exclusions cover financial contracts, meaning a contract for the provision of financial services consisting of: (i) lending (including the factoring and financing of commercial transactions); (ii) financial leasing; or (iii) providing guarantees or commitments.

¹⁰⁵See *Gibbs v La Société Industrielle et Commerciale des Métaux* (1890) LR 25 QBD 399.

¹⁰⁶The principle, while predating the *Gibbs* decision, is often known as the *Gibbs* rule. The principle was also acknowledged by the Privy Council in *New Zealand Loan and Mercantile Agency Company v Morrison* [1898] AC 349 and the House of Lords (now the UK Supreme Court) in *National Bank of Greece and Athens v Metliss* [1958] AC 509. See also the approval of the *Gibbs* principle by Lord Hope in *Joint Administrators of Heritable Bank plc v Winding up Board of Landsbanki Islands HF* [2013] UKSC 13, [2013] 1 WLR 725 at [44] and the statement by Lord Hoffmann in *Wight v Eckhardt Marine GmbH* [2003] UKPC 37, [2004] 1 AC 147 at [11] that the question whether an obligation has been extinguished is governed by its proper law.

¹⁰⁷[2018] UKSC 34, [2018] 1 WLR 3683.

¹⁰⁸*Ibid.*, at [12]. For general criticism see K Ramesh ‘The Gibbs principle’ (2017) 29 Singapore Academy of Law Journal 42 and R Mokal ‘Shopping and scheming, and the rule in Gibbs’ *South Square Digest*, March 2017, at 58–63.

¹⁰⁹[2022] AC 519.

has also adverted to the fact that the ‘impracticality of enforcement is a particularly relevant consideration when determining whether a statutory provision has extra-territorial scope’, referencing the comments of Lord Mance in *Masri v Consolidated Contractors International (UK) Ltd (No 4)*.¹¹⁰ If a supply contract is expected to be performed overseas, and is subject to a foreign governing law, then it does not seem reasonable to expect a statutory norm of UK insolvency law on contract modification to be applied to it.¹¹¹

Conclusion

On extra-territoriality and the Insolvency Act 1986, the highest courts in the UK have spoken with somewhat forked tongues. On the one hand, there is the general presumption against extra-territorial application of national law provisions encapsulated in the doctrines of national sovereignty, international law and international comity involving respect for the practical operation of the territorial domain of other nations. On the other hand, there is the pronouncement of the Privy Council in *AWH Fund Ltd v ZCM Asset Holding Co (Bermuda) Ltd*¹¹² that it was ‘now settled law that insolvency provisions can have extraterritorial effect’. It is also undoubtedly the case that the Insolvency Act 1986 permits a UK court to wind up a company that was brought into existence by a process of registration outside the UK. Provision to this effect is made expressly in the Insolvency Act. This means unequivocally that at least some of the Insolvency Act provisions apply to persons, bodies or things outside the UK, ie extra-territorially.

The existing case law, however, does not support complete or wholesale application of the entirety on the Insolvency Act provisions and in particular with reference to the information-gathering powers of insolvency practitioners. For instance, the court in *Akkurate*¹¹³ considered that section 236 of the Insolvency Act 1986 gave the court a power, at the request of an insolvency practitioner, to summon a person someone before it and to require them to produce documents but only so long as the person was within the territorial extent of the EU Insolvency Regulation insofar as it applied to the UK. Since Brexit, this EU territorial extension no longer applies. It was held that the earlier *Tucker*¹¹⁴ decision on an equivalent Bankruptcy Act provision also applied to the successor provisions in section 236 of the Insolvency Act 1986, even though the legislative language has been modernised and somewhat reconfigured.

This territorial limitation applies even though it was held in another Court of Appeal decision, *Re Seagull Manufacturing Co Ltd*,¹¹⁵ that the court has the power to make an order for public examination against a person wherever they happen to reside in the world. Superficially, a public examination is more invasive and intrusive than a private examination, yet has been held to have a wider geographical reach.

It may be that the Supreme Court will see fit to go further: remove this apparent anomaly and correct this downside of Brexit. The court should proceed incrementally and in a series of small steps. But in light of general principle there is much less room for bold revolutionary steps and applying all Insolvency Act provisions extra-territorially. Such an approach would also be out of step with the affirmation by the Supreme Court in *R (on the application of KBR Inc) v Director of the Serious Fraud Office*,¹¹⁶ that whether a purposive reading is capable of rebutting the presumption against extra-territorial application will depend on the provisions, purpose and context of particular provisions in a statute. This will depend on the wording, purpose and context of the specific provision

¹¹⁰[2010] 1 AC 90 at para 22.

¹¹¹See also *Kireeva v Bedzhamov* [2022] EWCA Civ 35 at para 91.

¹¹²[2019] UKPC 37 at 40.

¹¹³[2020] EWHC 1433 (Ch).

¹¹⁴[1990] Ch 148.

¹¹⁵[1993] Ch 345.

¹¹⁶[2021] UKSC 2, [2022] AC 519 at [64], [65].

when addressed in the context of domestic canons of construction and the general scheme of international law and international comity.

A bolder reform would be to enact new legislation that specifies the exact extent to which the Insolvency Act 1986 applies extra-territorially. Legislation obviously depends on parliamentary time and requires detailed drafting but it would also provide the opportunity for the UK to showcase that it remains at the forefront of international insolvency developments.