The Powers of English Courts in Support of Russian Insolvency Proceedings

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Legal Framework

The English legal framework governing cross-border insolvency proceedings essentially comprises:

- **Cross-Border Insolvency Regulations 2006** ("CBIR")
- **EU Recast Insolvency Regulation** (Regulations (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast)) [application is limited to EU member states]
- **Section 426 of the Insolvency Act 1986** [court-to-court assistance in relation to certain designated countries (mostly Commonwealth countries)]
- **Common law**

CBIR and **common law** are relevant in relation to **Russian insolvency proceedings**.

Cross-Border Insolvency Regulations 2006 ("CBIR")

The Regulations give effect to the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency 1997 in Great Britain.

Article 2 CBIR: **UNCITRAL Model Law to have force of law**: *"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 for application in Great Britain)"*

The **UNCITRAL Model Law on Cross-Border Insolvency**:

Purpose: to establish **simplified procedures for the recognition** of foreign insolvency proceedings, to co-ordinate concurrent proceedings and to promote the objectives of:

- **co-operation** between the courts and other competent authorities of this state and foreign states involved in cases of cross-border insolvency
- **greater legal certainty** for trade and investment
- fair and efficient administration of cross-border insolvencies that **protects the interests of all creditors** and other interested persons, including the debtor
- **protection and maximisation** of the value of the **debtor's assets**
- **facilitation of the rescue** of financially troubled businesses, thereby protecting investment and preserving employment

- UNCITRAL Model Law doesn't seek to harmonise laws and focuses on **procedure** rather than substance.
- Legislation based on the Model Law has been adopted in **43 states** including the US (not Russia).
- Those states which have adopted the UNCITRAL Model Law may be approached by courts or office-holders in non-adopting states across the world seeking recognition and assistance.

Applications under Cross-Border Insolvency Regulations 2006:

- recognition applications (art 15)
- interim relief applications (art 19)
- discretionary relief applications (art 21)
- applications to commence English insolvency proceedings (art 11)
- applications to participate in English insolvency proceedings (art 12)
- applications for access to English courts (art 9)
- applications to set aside antecedent transactions (art 23)

Recognition of Foreign Insolvency Proceedings under CBIR (art 15)

A **foreign representative** (a person or body authorised in a foreign proceeding to administer the reorganisation or liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceedings) **may apply to the English court for recognition** of the foreign proceedings in which he has been appointed.

CBIR provide for the recognition of **two types** of insolvency proceedings:

- **Foreign main proceedings** (proceedings that are taking place in the state in which the debtor has its *centre of main interests*; there is a rebuttable presumption that the debtor's registered office (or, in the case of an individual, his habitual residence) is the centre of the debtor's main interests (art 16(3))
- **Foreign non-main proceedings** (proceedings that are taking place in a state in which the debtor does not have its centre of main interests but has an *"establishment"* (any place of operations where the debtor carries out an economic activity with human means and assets or services, which is not of a temporary nature (art 2)

Effects of CBIR depend on whether the foreign proceedings are:

- foreign **main** proceedings: **automatic** reliefs (art 20), such as stays, are triggered + discretionary relief (art 21) is available

- foreign **non-main pr**oceedings: only **discretionary relief** (art 21) is available.

Types of Relief available:

- **Urgent (provisional) relief** (art 19) **– available from the time of filing an application** for recognition until the application is decided upon, where relief is urgently needed to protect the assets of the debtor or the interests of creditors. Examples of relief: a stay of execution against the debtor's assets, entrusting the administration/realisation of the debtor's assets in England which are perishable, devalued or in jeopardy to the foreign representative.
- **Automatic relief** (art 20) – **follows the recognition of proceeding as main proceedings** (i.e. after the recognitions application was heard). Examples of relief: automatic stay of enforcement and execution action against the debtor's assets, and suspending the debtors right to transfer, encumber or otherwise dispose of any of its assets.
- **Discretionary relief** (art 21) – **available for main or non-main proceedings** where necessary to protect the assets of the debtor or the interests of the creditors. Examples of relief: granting a stay against enforcement of security, suspending the debtor's right to transfer, encumber or otherwise dispose of its assets.

AUTOMATIC STAY (art 20)

Follows automatically from the English court's recognition of foreign proceedings that are foreign main proceedings.

Upon recognition:

- **commencement or continuation** of individual **actions** or individual **proceedings** concerning the debtor's assets, rights, obligations or liabilities is **stayed**
- **execution** against the debtor's assets is **stayed**, and
- the right to **transfer, encumber or otherwise dispose of any assets** of the debtor is **suspended**

The stay/suspension is subject to the same **exceptions/limitations** as would be the case in a wholly domestic (English) context: it does not affect -:
(a) the right of any secured creditor to enforce his security over the debtor's property
(b) to repossess goods in the debtor's possession under a hire-purchase agreement
(c) to exercise a right of set-off against a debtor's cross-claim.

AUTOMATIC STAY (art 20): examples

- ***Re OGX Petroleo e Gas SA Nordic Trustee A.S.A. v OGX Petroleo E Gas S.A.*** *[2016] EWHC 25 (Ch)*: when seeking recognition, **full and frank disclosure must be made to the court** in relation to the consequences that recognition of the foreign proceeding may have on third parties who are not before the court and, in particular, the court should be told of any points that could be raised in relation to the modification or termination of the automatic stay and suspension which will come into effect on recognition. Held: applicants should have disclosed that claims in an arbitration in England were not subject to the reorganisation plan under Brazilian Bankruptcy Law, for which recognition was sought. The sole purpose for which recognition of the Plan was sought under CBIR was to obtain a stay under art.20 so as to prevent the arbitration (and to frustrate arbitration proceedings under a contract that OGX had freely entered into after the approval of the Plan). This was inconsistent with the purpose of the Model Law and abuse of the process for recognition of a foreign proceeding.
- ***Re Kombinat Aluminjuma Podgorica A.D (In Bankruptcy) [2015] EWHC 750 (Ch)*: application made by the bank to lift the automatic stay was refused** as it had failed to demonstrate that the arbitration would be likely to benefit it or other creditors. Held: it could not be a proper exercise of discretion to allow large costs and considerable time to be incurred in circumstances where it could not be shown that benefit would or was likely to be achieved in practical terms, either for the bank or for any other creditors, by continuation of the arbitration.

AUTOMATIC STAY (art 20): examples

- ***Gardner v Lemma Europe Insurance Company Ltd (in liquidation) [2016] EWCA Civ 484****:* the Court of Appeal **refused to lift the automatic stay** and held that leave to commence proceedings is unlikely to be granted where the issue in the action could be dealt with as conveniently in the liquidation as in other proceedings. The choice was between a judge of the Gibraltar Court exercising a supervisory jurisdiction over the liquidation, and an arbitration in London under the terms of the policy. Held: had the contract in question been of a highly specialised or technical kind which could more efficiently have been dealt with by a specialist arbitrator, a London arbitration may have had more attraction. The need to preserve the estate for the benefit of creditors outweighed the contractual right of the insured to have his claim determined in England.
- ***Ronelp Marine Ltd, Restend Marine Ltd, Torlean Marine Ltd, Litmel Maritime Inc, Candep Maritime Ltd v STX Offshore & Shipbuilding Co Ltd and Mr Yoon Keung Jang (Administrator) [2016] EWHC 2228 (Ch)*****: automatic stay was lifted*** to permit the applicants to pursue their claims against the shipping company. Held: the English proceedings were well advanced and allowing them to proceed and resolve the difficult issue of English law would assist rather than impede the Korean rehabilitation proceedings.
- Generally the English courts may consider **applications to lift the stay** if the disputes are subject to English law and jurisdiction and particularly where the issues are so complex that it would be inappropriate for them to be decided in a foreign insolvency proceeding or on the basis of expert English law evidence. The courts are wary of allowing foreign representatives to abuse the recognition process and may allow the stay to be lifted in appropriate cases.

Discretionary Relief (art 21)

- For foreign **non-main** proceedings, **no automatic stay applies**, but appropriate **discretionary relief** may be granted to protect the assets of the debtor or the interests of creditors. The same discretionary relief may be granted in respect of foreign **main** proceedings, in addition to the automatic stay.
- The relief available under art 21 is more extensive and not restricted to a stay of actions/suspension of dealings with assets. The list of type of relief is indicative, not exhaustive.
- Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant **any appropriate relief**.
- In addition to the stay of actions/stay of execution/suspension of dealings with assets (as in art 20) discretionary relief expressly includes "**examination of witnesses, the taking of evidence or the delivery of information** concerning the debtor's assets, affairs, rights, obligations or liabilities; **entrusting the administration or realisation** of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court; **granting** any **additional relief** that may be available to a British insolvency office-holder under the law of Great Britain".
- It has been held that since art 21 is concerned with procedural matters, it should be given a purposive interpretation and should be widely construed in light of the objects of the UNCITRAL Model Law. However, it cannot be construed so widely as to extend to the recognition and enforcement of foreign judgments against third parties.

Discretionary Relief (art 21)

- The effect of art 21 is to enable foreign representatives to take advantage of the investigative powers ordinarily available to UK office-holders under Insolvency Act 1986 ss 235-236. ***Re Chesterfield United [2013] 1 BCLC 709***: held that art. 21 sets only minimum standards and that if the local law in England (IA 1986, s 236) provided for additional relief, a foreign representative could seek that under CBIR 2006.
- ***MacRae and Fisher (as joint official liquidators of Primeo Fund (in liquidation) v KPMG and David Yim [2016] EWHC 2432 (Ch)*:** the joint liquidators argued that there was no jurisdictional or discretional bar on seeking the documents/information for anticipated or extant litigation. The court confirmed they reasonably required the information requested from KPMG and another to carry out their functions (including pursuing claims in the Cayman court). It was not unfair even though the dominant/sole purpose was to advance their knowledge and information in the issues which arose in the Cayman litigation, even if they could not otherwise have obtained it.
- ***Re Peak Hotels and Resorts Ltd (in liquidation); Crumpler v Candey Ltd [2017] EWHC 1511 (Ch):*** held that s.245 Insolvency Act 1986 (avoidance of floating charges) applies following recognition of BVI liquidation proceedings as foreign main proceedings as the BVI liquidators were entitled to apply to the English courts for the same relief as if the liquidation were an English liquidation.
- ***Re Swissair [2009] EWHC 2099 (Ch)*:** order remitting assets realised by English liquidators to a Swiss liquidator in order to be administered as part of the Swiss (main) liquidation in circumstances where the company was in liquidation in both the UK and in Switzerland (i.e. the court's discretion extends to directing the turnover of assets to a foreign representative).

CBIR do not extend to allowing enforcement of judgments in personam

- ***Rubin and another v Eurofinance SA and others and New Cap Reinsurance Corporation (in liquidation) and another v Grant and others [2012] UKSC 46***: The Supreme Court held that CBIR do not extend to allow enforcement of foreign judgments against individuals given in foreign main or non-main proceedings. The ordinary common law principles on recognition and enforcement apply to foreign judgments *in personam*, regardless of whether the judgment is given in the context of insolvency proceedings. The Supreme Court refused to recognise an order made by the US Bankruptcy Court in proceedings in which the defendants did not participate and held that judgments given in insolvency proceedings do not form a separate category of judgment outside the common law rules of enforcement.

Other Applications under CBIR

- **Applications by foreign representative to commence proceedings under English insolvency law (art 11):** where the foreign representative is appointed in respect of main or non-main proceedings (e.g. a Russian office-holder could request the commencement of ancillary proceedings in England)
- **Applications by foreign representative to participate in English proceedings (art 12)**: once a foreign proceeding has been recognised, the foreign representative can participate in ongoing English proceedings, e.g. he can intervene in court proceedings by filing a petition submitting requests or making submissions
- **Applications by foreign representative for access to English courts (art 9)**: foreign representatives have the right to direct access to the English courts, without needing to obtain any licence to practice in England or consular approval

Other Applications under CBIR:

- **Applications by foreign representatives to set aside antecedent transactions (art 23):** upon recognition of a foreign proceeding, foreign representatives can apply to set aside:

  Corporate debtors:
  - transactions at an undervalue (IA 1986, s 238)
  - preferences (IA 1986, s 239)
  - extortionate credit transactions (IA 1986, s 244)
  - certain floating charges (IA 1986, s 245)
  - transactions defrauding creditors (IA 1986, s 423)

  Individual debtors adjudged bankrupt:
  - transactions at an undervalue (IA 1986, s 339)
  - preferences (IA 1986, s 340)
  - excessive pension contributions (IA 1986, s 342A)
  - extortionate credit transactions (IA 1986, s 343)
  - transactions defrauding creditors (IA 1986, s 423)

Russian Insolvency Proceedings

Setting aside the recognition of Russian insolvency proceeding for non-disclosure and public policy exception

Dalnyaya Step LCC (in liquidation); Cherkasov and others v Nogotkov (Official Receiver of Dalnyaya Step LCC (in liquidation)) **[2017] EWHC 3153 (Ch)**

FACTS:

- a long-running and high profile dispute between the Russian state and Hermitage Capital Management Ltd, an investment fund founded by William Browder. Ongoing criminal proceedings in Russia against Mr Browder; Home Office repeatedly rejected requests for assistance from the Russian authorities in relation to the criminal proceedings on the ground that to do so would prejudice sovereignty, security and public order of the UK.
- Applicants: Mr Browder, Mr Cherkasov and Mr Wrench (Hermitage parties)
- Danyaya Step LLC ("DS") - a former subsidiary of Hermitage
- Mr Nogotkov ("N") was appointed as DS's official receiver by the Russian court in November 2015 to investigate alleged asset-stripping of DS on the request of the creditor Federal Tax Service of Russia.

Russian Insolvency Proceedings

Dalnyaya Step LCC (in liquidation); Cherkasov and others v Nogotkov (Official Receiver of Dalnyaya Step LCC (in liquidation)) **[2017] EWHC 3153 (Ch)**

FACTS (continued):

- In July 2016 N obtained a **recognition order** in the Companies Court in England that DS's liquidation be recognised as a foreign main proceeding under CBIR (without notice application) and then **applied under s.236** Insolvency Act 1986 that Hermitage parties provide documents and information relating to DS's tax affairs.
- Hermitage parties **applied to set aside the recognition order ab initio** on the grounds of **non-disclosure** when obtaining the recognition order because N failed to tell the court: about criminal proceedings against Mr Browder and Mr Cherkasov in Russia; that N intended to make s.236 application against Hermitage parties; that Hermitage parties were likely to argue that public policy exception under art 6 CBIR was engaged; that the Home Office refused repeated requests for assistance in the criminal proceedings from the Russian authorities. [Art 6 CBIR allows recognition to be refused when it would be manifestly contrary to the public policy of GB]
- N made a competing **application to terminate the recognition** on the ground that he obtained a judgment in Russia against HSBC (for causing DS's insolvency by transferring monies out of DS's account in breach of banking regulations; for full amount of the debt) and further proceedings in England were unnecessary. Determination of whether N fulfilled his duty of FFD would be academic and serve no useful purpose. N offered to pay costs of proceedings (over £1m) on indemnity basis
- All three applications were due to be heard together by the Chancellor of the High Court.
- By the time of the hearing, the parties had substantially agreed the basis on which the three applications would be disposed of. The applicants still asked the court to determine the set-aside application because it was in the public interest to determine whether N breached his duty of FFD in order to expose his wrongdoing and prevent abuse of the English Court's procedures in the future.

Russian Insolvency Proceedings

Dalnyaya Step LCC (in liquidation); Cherkasov and others v Nogotkov (Official Receiver of Dalnyaya Step LCC (in liquidation)) **[2017] EWHC 3153 (Ch)**

Held:

- It was in the public interest to determine the set aside application as there were allegations against N of serious wrongdoing.
- Recognition order set aside ab initio. N breached his duty of full and frank disclosure when obtaining the recognition order. N's termination of proceedings application dismissed.
- N's duty of full and frank disclosure extended to making proper inquiries before making the application. The history of actions against Hermitage parties by the Russian authorities were material facts which ought to have been disclosed to the Companies Court.
- N knew or ought to have known of the UK government's position—he had obtained copies of files relating to the criminal investigations—but failed to inform the Companies Court of those public policy considerations.
- N failed to inform the Companies Court that his application for recognition was likely to raise issues which were highly political in nature.
- N had not given full and frank disclosure to the Companies Court as to the consequences for the applicants which would flow from the recognition order, i.e. that he intended to (and did) make the section 236 IA application against Hermitage parties shortly after obtaining recognition.

The court extended the principle in *Re OGX Petróleo e Gás SA Nordic Trustee A.S.* and clarified that not only should the consequences of the recognition order itself be disclosed, but also intended future applications enabled by the recognition order. Public policy exception to recognition of foreign insolvency proceedings (art 6 CBIR) considered.

Russian Insolvency Proceedings

JSC Mezhdunarodniy Promyshlenniy Bank and DIA v Pugachev

- In 1990s Mr Pugachev ("P") founded JSC Mezhdunarodniy Promyshlenniy Bank ("Bank") in Russia, which became one of Russia's largest privately owned commercial banking groups.
- On 4 October 2010 the Russian Central Bank revoked Bank's banking licence.
- On 30 November 2010 the Russian court declared Bank insolvent and appointed liquidator: State Corporation "Deposit Insurance Agency" ("DIA", primary purpose of DIA: to operate a deposit insurance scheme to protect individual depositors of failed Russian banks).
- The Bank and DIA are the two claimants.
- January 2011 - Pugachev fled Russia after criminal investigation opened and became resident principally in London (and France).

Russian Insolvency Proceedings

***JSC Mezhdunarodniy Promyshlenniy Bank and DIA v Pugachev* (continued)**

- In 2013 DIA issued proceedings against P in Russia under Article 14 of the Russian Federal Law on Insolvency of Financial Institutions alleging that, following receipt by the Bank of substantial loans from the Russian Central Bank in 2008, P carried out a scheme to extract over US$2 billion from the Bank for the benefit of himself and companies under his control (loans to "technical borrowers" (not genuine); release of share pledges re coal mining business, which secured technical loans.) Claimed that P ordered Bank's CEO to release share pledges. Had they not been released, the Bank would have been able to enforce against pledged assets and recover 80% - release of pledges is the main cause of its bankruptcy.
- Russian proceedings: claim to hold P subsidiarily liable for the Bank's debts. But: limited assets located in Russia. P did not actively participate in the proceedings.
- 11 July 2014 DLA obtained recognition order as a "foreign liquidator" under CBIR.
- 11 July 2014 worldwide freezing order granted by the English court in aid of the Russian insolvency proceedings under s.25 of the Civil Jurisdiction and Judgments Act 1982. Disclosure of assets by P ordered as part of the WFO.

Russian Insolvency Proceedings

***JSC Mezhdunarodniy Promyshlenniy Bank and DIA v Pugachev* (continued)**

- On 16 July 2014 claim was issued by the claimants in Ch D against P (P was based in England and assets were in England). Parallel proceedings on the same cause of action.
- P challenged the jurisdiction of the English court to determine the claims. The English proceedings were stayed pending determination of the Russian proceedings.
- Various orders made by the English Court in the policing the WFO and to enable investigation and clarification of the disclosure given: cross examination of P as to his assets; further information disclosure orders relating to trusts and eventually resulting is the "trust-busting" decision on 11 October 2017 that trusts set up by P were bare trusts for P or shams.
- 23 April 2015 the Russian Court gave judgment against P for about US $1bn which was upheld on appeal and became enforceable.
- 9 October 2015 claim issued in the English Court to enforce the Russian judgment.
- 22 February 2016 English default judgment issued in respect of the Russian judgment.
- Enforcement worldwide.