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A Scottish take on modified universalism and charges over foreign assets?

Overview

The following propositions for cross-border security and insolvency law in Scotland have recently been supported at first instance in the Court of Session:

1. a floating charge need not be valid and enforceable under the law governing foreign assets charged in order to be considered valid and enforceable over such assets for the purposes of appointing an administrator out of court under the Insolvency Act 1986 (the IA);
2. a pre-existing or pending liquidation in a jurisdiction outside the European Union in which the business and assets of a Scottish company are located does not prevent administration in or out of court of that company taking place in Scotland under the IA; and
3. such a Scottish administration should be considered by the Scottish courts to be primary and such a liquidation ancillary relative to each other by virtue of the incorporation in Scotland of the company in question.

Extra-territorial effectiveness of English equitable securities was called into question under point (1) rather than supporting it and despite the primacy favoured in principle for a Scottish administration over a relevant foreign liquidation under point (3), the court held off (initially at least) from trying to enforce that primacy.

Facts

Titaghur PLC (Titaghur), The Victoria Jute Company Limited (Victoria) and The Samnuggar Jute Factory Limited (Samnuggar) were all incorporated in Scotland, with Titaghur being the holding company of the other two companies. All three companies carried on business solely in India and had their assets seized by order of the Employees' Provident Fund of India (the Indian EPF) in respect of unpaid pension contributions. Events then took place broadly as follows:

1990 Indian court order prohibiting Victoria and Samnuggar from charging or otherwise disposing of their assets.

From 1998 Businesses of Victoria and Samnuggar carried on by licensee of special managers appointed by Indian EPF.

2001 Floating charges granted by Victoria and Samnuggar purporting to charge all of their assets.

2005 Floating charges assigned to Hooley Limited ("Hooley").

2006 Indian court winding up of Titaghur.

October 2011 Administrators appointed out of court in Scottish form under IA to Victoria and Samnuggar by Hooley as holder of qualifying floating charges.

November 2011 Administrators agree to sell Victoria and Samnuggar businesses/assets to Hooley.

March 2012 Administrator appointed by Scottish court to Titaghur at instance of Hooley.

April 2012 Administrator agrees to sell Titaghur business/assets to Hooley.

Decision

Hooley sought a declarator that the administrators were entitled as a matter of Scots law to sell such interest as the three companies had in and could transfer in their businesses and assets and that as

a matter of Scots law it had acquired such of those interests as could be transferred by operation of the sale contracts.

The appointment of the administrators to Victoria and Samnuggar was challenged on the basis that Hooley was not a holder of qualifying floating charges entitled to appoint administrators out of court under the IA as the floating charges were not valid and enforceable under Indian law in respect of their Indian assets and that accordingly, no charge over all or substantially all of their assets existed at the relevant time entitling Hooley to appoint administrators out of court. The relevant provisions of the IA were held to contain "nothing .... to indicate that the inquiry .... need proceed further than examination of the terms of the instrument creating the charge".

The English courts might have come to the view that an English charge that was invalid and unenforceable under the law governing relevant foreign assets was nevertheless valid and enforceable in respect of such assets in equity. As equitable charges do not exist in Scots law, English cases on such effects of equitable charges were considered irrelevant. Indeed reference was made to doubts expressed in *Carse v Coppen* 1951 SC 233 that the leading English case here, *Re The Anchor Line (Henderson Brothers) Limited* [1937] Ch 483, had been correctly decided.

The argument against the declarator regarding Titaghur was based around the common law modified universalism doctrine in cross-border insolvency, which had not hitherto been discussed expressly in such terms in a reported Scottish court decision. It was argued that, even though Titaghur was incorporated in Scotland, it was appropriate under the modified universalism doctrine to recognise the Indian winding up of Titaghur as all of its business and assets were Indian and that the declarator should not be granted as it would hinder the Indian winding up. This argument was also made regarding the out of court administration of Samnuggar as an Indian winding up continued to be pending in respect of Samnuggar.

It was confirmed that the modified universalism doctrine was applicable in Scotland, but that it favoured proceedings under the jurisdiction of incorporation of a company over proceedings in another jurisdiction in which a company's business and assets may be located, it being noted that "any proceedings in India must .... be regarded as ancillary to insolvency proceedings in Scotland".

The formal declarators sought were not however then immediately granted, under explanation that "the best course is simply … to issue this opinion and put the case out by order .... as to what further procedure, if any, is necessary" and with clear consciousness of the effectiveness or otherwise in India of a Scottish court order that might be made.

Commentary

The "formal" approach taken to effectiveness and enforceability of a floating charge over foreign assets when appointing administrators out of court is most welcome - and probably something of a relief to practitioners who will largely have assumed this approach should be followed. A floating charge holder accordingly requires to review its finance documents to check that all assets are purported to be charged and that the charge is enforceable in accordance with the default and enforcement mechanisms contained in those finance documents under their governing laws. It is not necessary to go to the trouble and expense of verifying the location and governing law of a chargor's assets and the validity and enforceability of the floating charge under the laws disclosed before appointing an administrator. This does not mean that the administrator can easily realise foreign assets nor that the charge holder will be treated as secured over foreign assets purported to be charged.

While this may be an extreme case, given all assets were in a foreign jurisdiction where the charges and administrations may not be recognised, it seems preferable to let the administrators' appointments stand, for what they are otherwise worth. This seems equally to be the case for the court-appointed administrator to Titaghur, whose actions may not be recognised in India either. It again seems sensible that the initial appointment should be considered valid in itself under Scots law, with its effects being a separate matter.

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The decision on Titaghur proceeded on the basis that the court appointing the administrator to Titaghur was unaware of the pre-existing Indian winding up. The court did not really consider fully whether the appointment should have been made if the court had been so aware. Given the discretion generally inherent in court appointment of an administrator and the need to assess the likely achievement of administration objectives in making an appointment, it is difficult to see how pre-existing insolvency proceedings where the relevant business and assets are located and the likelihood of recognition there of an administrator cannot be relevant to an initial court decision to appoint the administrator. If, however, insolvency proceedings in the jurisdiction of incorporation should always be primary and those at the location of a company's business and assets therefore ancillary, perhaps an administrator would have been appointed to Titaghur even if the appointing court had then been aware of the pre-existing Indian winding up.

This automatic primacy of insolvency proceedings at the jurisdiction of incorporation is the critical issue in this context and the possible practical ineffectiveness of this supposed primacy appears to be the source of the court's reluctance simply to grant the declarators sought. Co-existence of multiple insolvency proceedings is much less of a problem than how they interact. The modified universalism doctrine in England is clearly becoming more asymmetrical with *Rubin v Eurofinance SA* [2013] *AC 236 and Singularis Holdings Limited v PricewaterhouseCoopers* [2015] AC 1675 (PC) following on from *HIH Casualty and General Insurance Limited* [2008] WLR 852, but it is suggested that the doctrine does not require the courts of the jurisdiction of incorporation of a company to seek to impose primacy of its insolvency proceedings over those at what would clearly be its "centre of main interests" were the UNCITRAL model law invoked under the Cross-Border Insolvency Regulations 2006. It is suggested that Court of Session went a little too far on this point.

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