



# Enterprise

CHAMBERS

## **BANKRUPTCY PETITIONS FOUNDED ON FOREIGN JUDGMENTS: POINTS TO CONSIDER**

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*A discussion of the issues which can arise where bankruptcy proceedings are presented on the basis of a foreign judgment debt and a review of the relevant case law.*

1. It is not uncommon for a creditor to have a judgment debt against an individual in a foreign jurisdiction, but for an English court to have jurisdiction to make a bankruptcy order against that individual. In those circumstances the creditor can petition for that individual's bankruptcy in England. I discuss below the main points to consider when petitioning for bankruptcy on the basis of a foreign judgment, including those issues discussed in the recent cases of *Islandsbanki HF v Stanford* [2020] EWCA Civ 480 and *State Bank of India v Mallya* [2020] EWHC 96 (Ch).

### **Registration of a foreign judgment**

2. It is possible, where a final judgment is made for a sum of money in a foreign jurisdiction, to bring a claim at common law on the basis of that foreign judgment. In *State Bank of India v Mallya*, Chief Insolvency and Companies Court Judge Briggs cited with approval Rule 48 from *Dicey, Morris and Collins* (15<sup>th</sup> edition 2018) and held that a foreign judgment could not be impeached for any error of fact or law where a judgment (i) is final on its merits (ii) is a judgment of a foreign court of competent

jurisdiction (iii) where the parties are clearly identified and (iv) where the judgment concerns the same facts or issues that are being adjudicated.

3. However, a more straightforward method of enforcing a foreign judgment is by making an application for registration of that judgment pursuant to CPR Part 74. In general, in order for a foreign judgment to be enforceable in England it must be registered under one of the following (see generally *Dicey, Morris and Collins*, chapter 14):
  - a. the Administration of Justice Act 1920, in respect of certain Commonwealth states;
  - b. the Foreign Judgments (Reciprocal Enforcement) Act 1933 ("the 1933 Act"), in respect of Commonwealth states and other foreign countries;
  - c. the Lugano Convention (2007) and the Brussels Regulation 44/2001 in respect of European countries;
  - d. the Hague Convention on Choice of Court Agreements (2005);
  - e. Parts II and IV of the Civil Jurisdiction and Judgments Act 1982 ("the 1982 Act"), in respect of judgments in Scotland and Northern Ireland.
4. The result of registering a foreign judgment is generally that it is enforceable in England as if it was a judgment of an English court.
5. It is not necessary to register judgments for sums of money originating from Scotland and Northern Ireland (1982 Act, section 18). In respect of judgments made in EU Member States commenced after 10 January 2015, the Brussels (Recast) Regulation 1215/2012 now provides that a judgment creditor can go directly to the enforcement agency in another Member State, without any need for registration.
6. All of the above is subject to change following the UK's exit from the EU, which is due to complete on 31 December 2020. After this point, the UK will have to accede separately to conventions such as the Lugano

Convention and the Hague Convention, and agree a new relationship with the EU itself.

### **Jurisdiction to make a bankruptcy order**

7. The English court will have jurisdiction to make a bankruptcy order against an individual under section 265 of the Insolvency Act 1986 (“IA 1986”) where either:
  - a. the debtor’s centre of main interests is in England and Wales; or
  - b. the debtor’s centre of main interests is not in a Member State subject to the EU Regulation on Insolvency Proceedings (Recast), but the debtor is domiciled in England and Wales, or has been resident or has a place of business in England and Wales in the last three years.
8. Again, the above is subject to change as a result of the UK’s exit from the EU on 31 December 2020.
9. If the requirements of section 265 are met, the creditor may present bankruptcy proceedings against the debtor. In accordance with section 268 IA 1986, a debtor will be “unable to pay” where:
  - a. the petitioning creditor has served on the debtor a statutory demand which, after a period of three weeks, has neither been complied with nor has there been an application to set it aside (section 268(1)(a)); or
  - b. execution or other process issued in respect of the debtor on a judgment or order of any court in favour of the petitioning creditor, or one or more of the petitioning creditors to whom the debt is owed, has been returned unsatisfied in whole or in part (section 268(1)(b)).
10. Accordingly, a creditor with the benefit of a foreign judgment may petition on either of the above bases, which will now be considered in turn.

## Ground (a): Unsatisfied statutory demand

11. The key question which arises when seeking to serve a statutory demand against a debtor in respect of a foreign judgment is whether that judgment should be registered prior to bankruptcy proceedings being initiated.
12. In the case of *In Re A Judgment Debtor (No 2176 of 1938)* [1939] Ch 601, decided under the Bankruptcy Act 1914, the Court of Appeal considered the question of whether a judgment not registered under the Foreign Judgments (Reciprocal Enforcement) Act 1933 could still form the basis of bankruptcy proceedings. Sir Wilfred Greene MR stated that a bankruptcy notice was caught by the wording of section 6 of the 1933 Act, which provided that “no proceedings for the recovery of a sum payable under a foreign judgment” may be brought where a judgment to which the 1933 Act applies was not registered.
13. The above conclusion is, however, unattractive in the current legal framework whereby a creditor does not generally need a judgment of an English court before being entitled to present a statutory demand and bankruptcy petition against a debtor. This is the conclusion that was drawn by District Judge Musgrave in *Sun Legend Investments v Ho* [2013] BPIR 533, where a debtor opposed the making of a bankruptcy order on the basis of a judgment of the Court of Appeal of Hong Kong, which had not been registered under the 1933 Act. The debtor argued that registration was a pre-requisite to presentation of a bankruptcy petition, relying on *In Re A Judgment Debtor* and various Commonwealth authorities. Having satisfied himself that the Hong Kong court had held jurisdiction over the debtor as a matter of English private international law, District Judge Musgrave held that (at [27] and [28]):

*“As to Re a Debtor it seems to me that this is a case directly based on the Bankruptcy Act 1914 and I fail to see how it applies under the Insolvency Act 1986 which does not require a creditor to obtain a judgment before proceeding with a statutory demand and petition. The Commonwealth cases to which I was referred are of no real assistance as it is not clear what the underlying requirements were of the insolvency*

*laws applicable in each case and the extent to which they are consistent with the bankruptcy provisions in the Insolvency Act 1986.*

*I agree with Mr Weaver's basic submission that Sun Legend has a cause of action and is in a position no different from any other creditor who seeks to pursue bankruptcy without holding an English judgment. Mrs Ho is perfectly entitled to oppose the petition on substantive grounds but she has chosen not to do so nor did she apply to set aside the statutory demand. If she had any point in relation to recognition there is no reason why it should not have been raised. I also accept the submission that a bankruptcy petition does not constitute enforcement of the Hong Kong judgment. The bankruptcy jurisdiction since 1986 is a separate jurisdiction involving a class remedy. There is no requirement for an English judgment as a precondition to proceeding with a petition. There is in my view a debt due to Sun Legend which satisfies the requirements of the Insolvency Act 1986."*

14. Whilst only a decision of the County Court, District Judge Musgrave's analysis is compelling and is likely to be followed. As far as I am aware, there is no other recent reported case on this point.
15. Therefore, it is relatively clear that it is open to parties to serve a statutory demand on the basis of a foreign judgment without obtaining registration of that judgment in advance. It is worth noting that the Lugano Convention, the Recast Brussels Regulation and the Hague Convention all prohibit contracting states from reconsidering the merits of any foreign judgment (similar to the principles of common law stated above). Accordingly, the ability of a debtor to challenge the foreign judgment debt will in any event be limited.
16. However, it would be open to a party to argue that the foreign judgment does not constitute a debt upon which a bankruptcy order could be made. For example, in *Cartwright v Cartwright* [2002] EWCA Civ 931 it was held that a maintenance order made in Hong Kong, which could not be registered in England given that it provided for variable periodic payments, was not a provable debt in a bankruptcy. Clearly in order to form the basis of a petition, the foreign judgment debt is still required to

be a liquidated debt under English law. The judgment of District Judge Musgrave also suggests that a debtor could challenge the foreign court's jurisdiction as a matter of private international law.

17. Furthermore, it may be advisable to register a foreign judgment prior to commencing bankruptcy proceedings in case the relevant foreign court suspends execution. It is not clear whether a statutory demand based on a foreign judgment which had not been registered would be effective if, for example, a court of the foreign jurisdiction suspended execution of the foreign judgment (and particularly if that execution, according to the law of that jurisdiction, included insolvency proceedings). In *Re A Debtor (No 11 of 1939)* [1939] 2 All ER 400, Sir Wilfred Greene MR, sitting in the Court of Appeal, held that a receiving order under the Bankruptcy Act 1914 was valid where it was based on a French judgment which had been registered under the 1933 Act, notwithstanding that the debtor had entered an *opposition* in the Court of Appeal in Paris, and the judgment could not be enforced by execution in France. It therefore appears that a registered judgment (at least under the 1933 Act) remains capable of founding bankruptcy proceedings regardless of the enforceability of the foreign judgment.
18. However, despite the above, the case of *State Bank of India v Mallya* makes clear that an adjournment of any bankruptcy petition is likely where the foreign judgment upon which it is founded is under appeal. In that case, a bankruptcy petition was presented in respect of a foreign judgment debt registered in England under the 1933 Act. The debt was based upon a personal guarantee that the debtor had entered into in relation to various loans owed by companies controlled by him. The first ground of resistance to the petition was that the petitioners are secured creditors, which the petition failed to state. The second ground of resistance, which is pertinent to the matters in discussion, was that there was a reasonable prospect that the foreign judgment would be compromised by virtue of various proceedings in India within a reasonable period of time. Chief Insolvency and Companies Court Judge Briggs held that in the circumstances it was appropriate to exercise his discretion to adjourn the petition (at [56]):  
  
*"In my judgment the following factors weigh heavily in favour of an adjournment for a period of time sufficient to permit the petitions to the Supreme Court, and the settlement proposal before the Karnataka High*

*Court to be determined. First, apart from the high rate of interest, Dr Mallya is not contesting that [the company] owes substantial money to the Banks. He does contest the validity of the [personal guarantee]. The [personal guarantee] contest is yet to be finally determined. Secondly, although the petition to the Supreme Court and proposal before the Karnataka High Court are not guaranteed to succeed, they are genuine. The evidence supports the view that the petitions stand a reasonable prospect of success. Thirdly, if Dr Mallya is right in his contention that the proposal before the Karnataka High Court, if sanctioned, is likely to see the [the company's] debt paid in full, there will be no liability under the [personal guarantee]. Fourthly, if the Supreme Court were to accede to the compromise petition, the Bank will be bound. Lastly, if the Banks decide to continue with the petition they are required to amend."*

#### **Ground (b): Unsatisfied execution and Islandsbanki**

19. With regard to reliance on ground (b), the Court of Appeal's decision in *Islandsbanki* contains some useful guidance. In that case, Islandsbanki HF ("IB") had presented a petition against the debtor in respect of a judgment given against the debtor in the Reykjanes District Court in Iceland on 26 June 2013 for the equivalent of approximately £1.5 million. IB appealed against a decision of Mr Justice Fancourt, who dismissed an appeal against the order of Insolvency and Companies Court Judge Jones, who had dismissed IB's petition and granted HMRC's later petition.
20. The Icelandic judgment had been registered on 23 March 2016 pursuant to the Lugano Convention. The registration order included a provision that the debtor had one month to appeal against the registration and that execution on the judgment would not issue until the expiration of that period or until after the appeal had been determined. This provision in the order replicates the provisions of the Lugano Convention. Article 43(5) of that Convention provides that an appeal against registration is to be lodged within one month of service thereof. Article 47 provides that:  
*"During the time specified for an appeal pursuant to Article 43(5) against the declaration of enforceability and until any such appeal has been*

*determined, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought.”*

21. In spite of the above, a writ of control was issued on 30 March 2016 which, according to the certification of the High Court Enforcement Officer on 14 February 2017, was “unsatisfied in whole”. IB issued bankruptcy proceedings on the basis of unsatisfied execution.
22. IB argued that in spite of the premature issuing of bankruptcy proceedings, it was open to the court to waive the defect pursuant to CPR 3.10 or rule 12.64 of the Insolvency Rules 2016. IB argued that the issue of a writ of control earlier than permitted was a mere procedural failure relating to execution, which was a matter for the domestic court. Alternatively, IB argued that section 268(1)(b) was nevertheless satisfied because the writ fell within the phrase “other process” in that section.
23. On the first argument, the Lady Justice Asplin stated that *“it does not assist [IB] that it is clear that measures of enforcement/the details of execution are matters for the particular national jurisdiction in which the foreign judgment is declared enforceable/is registered. That does not mean that the manner of enforcement in a particular jurisdiction can derogate from the overarching provisions of the Convention”*. It was held that the Lugano Convention and section 4A of the 1982 Act were clear as to when a registered judgment may be enforced and there was no room for derogation therefrom.
24. Further, the Court of Appeal held that the general words of CPR 3.10 could not be used to rectify the defect in the writ of control so as to override CPR 74.9(2), which makes clear that no steps may be taken to enforce the judgment during the period for appealing the registration order. Nor could rule CPR 3.10 be used “to avoid the consequences of statute”.
25. With regard to second limb of IB’s argument, the Court of Appeal held that it was not possible for the defective writ to fall within the meaning of “other process” for the purposes of section 268(1)(b). Lady Justice Asplin stated that (at [62]):



*"The defect in the execution in this case, if it can be called a defect, was fundamental. As the Judge put it, the Writ of Control was unlawful. It could be set aside ex debito justitiae, that is without having to advance any substantive case on the merits. It was liable to be set aside at any time by the debtor or by the court of its own motion because it had been unlawfully issued. In effect, that was what the ICC Judge did when he refused to accept that section 268(1)(b) had been satisfied for the purposes of the bankruptcy procedure. The defect was not of the nature or magnitude of the irregularity which was under consideration in the Skarzynski case [[2001] BPIR 673]. It was not a mere technicality or a formal defect which might be rectified pursuant to what is now Rule 12.64 of the Insolvency Rules 2016. It went to the heart of the execution process. There are no express provisions in Article 47, section 4A of the 1982 Act or CPR 74.9 which enable the prohibition upon execution to be waived. Furthermore, as I have already decided, there is nothing in the CPR which would enable the fundamental defect in the Writ of Control to be remedied and the execution itself to be cured."*

26. This case clearly demonstrates the limits of relying on CPR 3.10 or rule 12.64 of the Insolvency Rules to cure defects in bankruptcy proceedings and the dangers of assuming that a court will waive what may be considered a minor procedural error.

## **Conclusion**

27. The above summarises the most pertinent points which have arisen from the case law in respect of bankruptcy proceedings founded on foreign judgments. Perhaps surprisingly, there is little case law in this area and uncertainties remain. However, the recent cases of *Islandsbanki* and *Mallya* serve to remind a petitioner that he will not be able to obtain a bankruptcy order where a minor procedural error places him in breach of primary legislation, nor can he ignore proceedings in a foreign jurisdiction even once the relevant foreign judgment has been registered.



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