ARTICLE

Cross-Border Aspects of the New Administration Regime

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On 31 May 2002 Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings ("the EC Regulation") came into force in Member States of the European Union. On 15 September 2003, those parts of the Enterprise Act 2002 dealing with the administration of companies came into force, creating a new administration regime. This article considers certain cross-border issues which arise in the context of the new administration regime and the EC Regulation. These issues are considered under the following headings:

(1) the appointment of administrators;
(2) the process of administration;
(3) the termination of the administration.

(1) The appointment of administrators

(i) To what entities does the new administration regime apply?

Although the EC Regulation has direct effect in Member States (except Denmark), the domestic law of the Member State concerned determines the circumstances in which proceedings can be opened. Hence, in England, English law determines whether the conditions for the opening of proceedings are satisfied or not[1].

Under Part II of the Insolvency Act 1986 ("the 1986 Act"), an administration order could only be made in relation to a "company": see section 8(1) of the 1986 Act. Prior to the coming into force of the EC Regulation, the definition of "company" was incorporated in the 1986 Act from section 735 of Part XXVI of the Companies Act 1985, and (unless a contrary intention appeared) meant, in brief, a company incorporated under that Act or any of its predecessors[2]. Whilst that definition continues to apply, with effect from 31st May 2002 a new inclusive definition of "company" was added to Part II of the 1986 Act through section 8(7), which provides that "In this Part a reference to a company includes a reference to a company in relation to which an administration order may be made by virtue of Article 3 of the EC Regulation." This new definition has been carried forward to the new administration regime[3].

Article 3(1) of the EC Regulation provides:

> "The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary."

Thus, an entity may now enter administration in England if:

(i) it is a company or legal person; and
(ii) it has its centre of main interests in England.

The first of these criteria is plainly very broad. It appears to exclude only individuals, and any entity which does not have a legal personality. It is clear that as a result of this new definition, the class of entities which may enter administration is broader than that which fell within the former definition adopted from the Companies Act 1985. Thus, in *Re The Salvage Association* [2003] 2 BCLC 333, an association of members established by Royal Charter, with its own legal personality, was placed into administration and in *Re BRAC Rent-A-Car International Inc.* [2003] 1 WLR 1421, Lloyd J. held that he had jurisdiction to make an administration order in respect of a US Corporation incorporated in the State of Delaware. In both cases it was plain that the centre of main interests was in England. It follows that the debate[4] as to whether the English courts have jurisdiction to

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1 See Article 4(2) of the EC Regulation; and *Re the Salvage Association* [2003] 2 BCLC 333 (Blackburne J.) at para.13; and Recital (15): "Territorial jurisdiction within [the] Member State must be established by the national law of the Member State concerned.".

2 See the 1986 Act, section 251.

3 Para.111(1) of Schedule B1 to the 1986 Act.

4 See Lightman and Moss, *The Law of Receivers and Administrators of Companies* (3rd ed., 2000) paras.25-044–25-048; Philip Smart, *Cross-Border Insolvency* (2nd ed., 1998) at pp.130–136; *Re The Salvage Association*, supra, para.7.

make an administration order in respect of a foreign incorporated company (i.e. one not incorporated under the Companies Act 1985 or its predecessors) has now been overtaken by the new definition. The debate will only continue to be of relevance where the centre of main interests is neither in England, nor in any other Member State.

Turning then to the second of these criteria, the concept of a company's centre of main interests is somewhat opaque. It is not defined in the text of the EC Regulation itself, which merely provides for a rebuttable presumption that the centre of main interests is to be the place of the registered office in the absence of proof to the contrary. Recital (13) of the preamble, however, provides that "the centre of main interests" should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties." The Report on the Convention on Insolvency Proceedings by Miguel Virgos and Etienne Schmit (at paragraph 75) explained the rationale of the wording now contained in Recital (13) of the EC Regulation as being that "Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated." That report, which is a report not on the text of the EC Regulation itself, but on a similarly worded Convention which never came into force and hence is not a direct authority on the interpretation of the EC Regulation itself, suggests, in line with the closing words of Recital (13), that the key to the assessment of the centre of main interests is the question of where third parties believe the company's centre of main interests to be. The particular third parties whose belief (presumably to be ascertained objectively) is significant is that of creditors, since it is the creditors who run the risk of the company's insolvency.

In *Re Daisytek-ISA Limited & Ors.* [2003] BCC 562, His Honour Judge McGonigal was asked to make administration orders in respect of several English companies, and also in respect of three German and one French incorporated subsidiaries. The Judge proceeded on the basis that there could be only one centre of main interests[5], and decided that the identification of that centre required the court to consider both the scale of the interests administered at a particular place and their importance and then consider the scale and importance of its interests administered at any other place which may be regarded as its centre of main interests. The Judge referred to the passage from the Virgos–Schmit report quoted above, and held that the most important "third parties" referred to in Recital (13) were the potential creditors of the company, and that it was their knowledge and perception of where the company's assets were being administered (as compared to others dealing with the company, such as customers, who were more likely to be debtors than creditors) that was most significant.

In this regard, the Judge quoted from a decision of Mr Registrar Jacques, in *Geveran Trading Co Ltd. v Skjevesland* [2003] BCC 209[6]: "It is the need for third parties to ascertain the centre of a debtor's main interests that is paramount, because, if there are to be insolvency proceedings, the creditors need to know where to go to contact the debtor. That is why with a company there is a rebuttable presumption that the centre of main interests is where the registered office is located." The Registrar went on to emphasise the importance of the place of contact, given the need to serve court documents on a debtor. The Registrar also relied on the Virgos-Schmit report, although the rationale for the concentration on the knowledge and perception of third party creditors as stated in that report is rather different. According to Virgos-Schmit, since it is the centre of main interests which dictates which system of law applies to the insolvency proceedings (see Article 4(1) of the EC Regulation), it is important for third parties to know which system of law will be applied to such insolvency proceedings, so that they are in a position to calculate the insolvency risks knowing which system of law will apply. Hence, a creditor who knows that he is dealing with a company which administers its interests in country X will be able to predict that it is the laws of country X which will apply to determine his rights in any insolvency; provided that his knowledge and perception is accurate.

In *Daisytek*, the potential creditors consisted largely of financiers and trade suppliers. Since the financing of the foreign subsidiaries was under a factoring agreement arranged for the foreign subsidiaries by an English parent, and a large majority of the suppliers by value were said to have known that England was the place where many important functions of the subsidiaries were carried out, as opposed to the limited functions carried out in Germany and France, the Judge held that the centre of main interests of each of the foreign subsidiaries was in England. In considering the knowledge and perception of potential creditors, the Judge decided that the value of the debts

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5 In line with the decision of Lloyd J. in *Re BRAC Rent-A-Car International Inc.*, supra, at para.23.

6 The decision of the Registrar was unsuccessfully appealed: see *Skjevesland v Geveran Trading Co. Ltd.* [2003] BCC 391 (HH Judge Howarth).

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owed by a company to those potential creditors was the relevant criterion. According to this reasoning, it seems that if one creditor of a company is owed a very substantial sum by the company, then that creditor's knowledge and perception of where the company administers its assets will be given more weight than the knowledge and perception of a larger number of creditors whose combined debts are of lesser value.

(ii) Recognition of the administration process by foreign Member States

The most significant procedural change under the new regime is that a company can now enter administration without any application or petition being heard by the court. All that is required is the filing of the requisite documentation. Although the option of making an application to court is available in all cases where a company can also enter into administration without court order, it is likely that applications to court for an administration order will become the exception rather than the rule, in any event where the company only trades and has assets in England. There are, however, good reasons why, in cases with a cross-border element, it will often be appropriate or even necessary to initiate the process by application to the court.

Under the new administration regime, appointment can be made by the company or its directors, or by a qualifying floating charge holder, out of court[7]. The language of Schedule B1 makes plain that the appointment is actually made by that person, not by the court, even though the appointment does not take effect until the appointor has filed with the court a notice of appointment and statutory declaration in prescribed form[8], which the court must seal and endorse with the date and time of filing. Whilst filing with the court is thus a pre-requisite to an effective appointment, the involvement of the court is minimal and ministerial. Certainly, no order is made by the court.

Two issues arise from this. First, will the courts of other Member States recognize the appointment of an administrator out of court as the opening of insolvency proceedings under Article 3(1), in accordance with Article 16, and thus will the consequences of appointment under Article 3(1) (that the administration order automatically produces the same effects in other Member States as in England under Article 17) be recognized by other Member States? Secondly and more specifically, will the appointment be recognized in the case of a company with its registered office outside the UK, but its centre of main interests in the UK, where the appointment of administrators has been made out of court?

(a) Recognition generally

Article 16(1) provides, inter alia:

> "Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognized in all the other Member States from the time that it becomes effective in the State of the opening of proceedings."

Will other Member States construe an out of court appointment, where the only involvement of the English courts is ministerial, as a "judgment handed down by a court of a Member State" for the purposes of Article 16(1)? At first glance, the language of Article 16 would seem to be inapplicable to the out of court appointment of an administrator.

Article 2(e) gives an inclusive definition of "judgment" as follows: " 'judgment' in relation to the opening of insolvency proceedings or the appointment of a liquidator shall include the decision of any court empowered to open such proceedings or to appoint a liquidator."

Article 2(d) states that " 'court' shall mean the judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings."

It is immediately apparent from this definition that the word "court" should be given a meaning which extends far beyond what one would ordinarily understand it to include. Thus, in the context of voluntary arrangements, unless "court" is acknowledged to include the meeting of creditors entitled to vote on the proposals, then the approval of a voluntary arrangement cannot constitute the opening of main proceedings under Article 3(1). Since "voluntary arrangements under insolvency legislation" are listed in Appendix A as one form of United Kingdom "insolvency proceedings" for the purposes of the EC Regulation, it is only by extending the definition of "court" to include a meeting of creditors that a nonsensical result is avoided.

This wide interpretation of "court" derives support from Recital (10) of the Regulation, which provides, inter alia, that "Insolvency proceedings do not necessarily involve the intervention of a judicial authority; the expression 'court' in this Regulation should be taken in a very broad sense and include a person or

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7 See Schedule B1, paras.14(1) (qualifying floating charge holder) and para.22(1) (appointment by the company) and 22(2) (appointment by the directors).

8 See para.19 (appointment by qualifying floating charge-holder) and para.30 (appointment by the company or its directors).

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body empowered by national law to open insolvency proceedings."[9] In *Re The Salvage Association* (supra), Blackburne J. made an administration order in respect of a legal person, one of the purposes of the administration being the approval of a voluntary arrangement under Part I of the 1986 Act. Counsel for the petitioner pointed out that the source of the jurisdiction for a voluntary arrangement in respect of the Association derived from section 1(4) of the 1986 Act, under which the definition of "company" was extended to a company in relation to which a proposal for a voluntary arrangement could be made by virtue of Article 3(1) of the EC Regulation[10]. But under Article 3(1), the jurisdiction established was granted to "the courts of the Member State" within which the company's centre of main interests lay. Hence, Article 3(1) seemed to assume that it covered proceedings opened by a court of a Member State, whereas a company voluntary arrangement need not involve a court at all. Blackburne J. stated that the answer in his view lay in avoiding a too-literal approach to the definition of "court" in the Regulation, and understanding the reference to "other competent body of a Member State" in the definition in Article 2(e) as applying not merely to some organ of the Member State but, more widely, to "any body recognized by that Member State to resolve upon (i.e. 'open') the insolvency proceedings in question"[11].

If "court" is given a wide, non-literal interpretation, then it must follow that the inclusive definition of "judgment" be given a similarly wide interpretation. In the context of voluntary arrangements, the resolution of the meetings of creditors and members must be a "judgment" within the meaning of Article 2(e). In the context of the new administration regime, the approach of Blackburne J. would presumably produce the result that an appointment out of court would constitute a "judgment". It may also be the case that an appointment out of court becomes the "judgment" opening the proceedings from the moment in time at which it is sealed by the court and endorsed with the date and time or filing.

Neither of these arguments sits very easily with the wording of the Convention and the violence which the Blackburne J. approach does to, in particular, the wording of Article 16(1) is marked[12]. Whilst one might hope and expect that the courts of other Member States will conclude that an out of court appointment does indeed constitute a "judgment opening insolvency proceedings handed down by a court of a Member State", and hence that it is entitled to recognition pursuant to Article 16(1) (with the consequence that it produces the same effects in those states as it does in England), this cannot be taken for granted. There is little doubt that in any case in which cross-border issues can be foreseen, the safer course is to make an application to court for the making of an administration order, rather than relying on an out of court appointment. In any event, it might perhaps be anticipated that an administrator seeking recognition of his status, rights and powers in a foreign Member State will be in a stronger position if he has been appointed by judicial order than if he has merely been appointed by decision of a qualifying floating charge holder, or the company or its directors[13].

(b) Recognition of administrators appointed out of Court by the Courts of other Member States where the registered office of the company is outside the United Kingdom

The second issue may arise where the company in respect of which the administrator is appointed has its registered office outside England and Wales, but the presumption under Article 3(1) has been rebutted and the centre of main interests is in fact in England and Wales.

We consider first the position where the court makes the appointment. In such a case, evidence, often detailed, will be filed in support of the administration application evidencing the basis upon which the petitioner contends that the centre of main interests is in England and Wales, notwithstanding the company's place of incorporation[14]. The court will thus be in a position to decide whether the presump-

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9 See also the similarly worded Virgos–Schmit Report, para.66.

10 Section 1(4) provides that: "In this Part a reference to a company includes a reference to a company in relation to which a proposal for a voluntary arrangement may be made by virtue of Article 3 of the EC Regulation." (i.e. tracking the same form of words used in relation to administration: para 111(1) of Schedule B1 to the 1986 Act.

11 Supra, para.21.

12 See in particular the expression "handed down".

13 See further Article 19, headed "Proof of liquidator's appointment", which provides, inter alia, that "The liquidator's appointment shall be evidenced by a certified copy of the original decision appointing him or by any other certificate issued by the court which has jurisdiction". A "liquidator" here includes, of course, an administrator by reason of the definition in Article 2(b). It is not wholly clear what document could constitute a certified copy of the decision, or other certificate issued by the court, for the purposes of this Article. The best that would be available in the context of an out of court appointment is a copy of the filed notice of appointment, sealed by the Court: see rule 2.17 (appointment by qualifying floating charge holder) and 2.26 (appointment by company or directors).

14 As in the *Daisytek* case, supra.

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tion under Article 3(1) has been rebutted by "proof to the contrary" on the basis of the filed evidence. Where the English court has reached a decision on the issue of the location of the centre of main interests, then it is to be expected that this decision should ordinarily be recognized in other Member States pursuant to Article 16(1)[15].

Notwithstanding that expectation, the position is not entirely clear cut. The wording of Article 16(1), quoted above, obliges other Member States to recognize any judgment of a Member State "which has jurisdiction pursuant to Article 3". In a case where an administration order is made by an English court in respect of a foreign incorporated company, it has been suggested that it is open to the courts of another Member State not to recognize such a judgment if it is of the opinion, on the evidence before it, that the English court lacked jurisdiction because the centre of main interests was not, according to that evidence, situated in England and Wales. Article 16(1), so it is suggested, mandates recognition only where the relevant Member State court which made the order has jurisdiction under Article 3: the Regulation itself makes no provision to the effect that the decision of that Member State on whether it had jurisdiction at all is in any way final or binding on any other Member State.

In our view, however, this approach is wrong and the courts of other Member States should respect the decision of the court which handed down the relevant judgment as to its own jurisdiction, without further argument. Such a conclusion is supported by recital (22), which provides, inter alia, that "The decision of the first court to open proceedings should be recognized in the other Member States without those Member States having the power to scrutinise the court's decision." The recitals do not have binding legal force[16], but the clear policy aim of the EC Regulation was for decisions on the opening of proceedings to be recognized automatically.

In one recent decision, however, the court of another Member State has considered itself competent to scrutinise the English court's decision on jurisdiction under Article 3(1), at least to a limited extent. The decision of HH Judge McGonigal to make an administration order in respect of three German companies and one French company in the *Daisytek* case has been discussed above. Notwithstanding the opening of main proceedings in England, the Tribunal de Commerce of Pontoise in France saw fit to open main proceedings in France some 10 days later, by the French process of "redressement judiciaire"[17]. The English administrators challenged that decision before the Pontoise Tribunal de Commerce, unsuccessfully, and then appealed to the Versailles Court of Appeal.

Before the Court of Appeal, the French liquidators apparently argued, surprisingly, that HH Judge McGonigal had assumed jurisdiction to make an administration order in respect of the French company by reason of the fact that the French company was an associate of the thirteen English companies, and hence was part of a group whereas, the French liquidators argued, the notion of a "group" was not recognized at law. They further argued that HH Judge McGonigal could not have properly founded jurisdiction on the presence of an establishment in England, since this would have given jurisdiction only to open secondary proceedings.

The "Ministere Public" also addressed arguments to the Appeal Court, arguing that under Article 16 of the EC Regulation, recognition was only to be granted to the judgment of the court opening the main proceedings if that court in fact had jurisdiction under Article 3(1). This is the argument raised above, based on the actual wording of Article 16(1). He then argued, similarly to the French liquidators, that jurisdiction could not be founded on the fact that the French company was part of a group, nor on the existence of any establishment in England.

The Versailles Court of Appeal rejected these arguments, and set aside the "redressement judiciaire". Its reasons involved an examination of the judgment of HH Judge McGonigal. It recorded that jurisdiction under Article 3(1) was vested in the court where the centre of main interests is situated. It rejected the argument that HH Judge McGonigal had sought to found jurisdiction on the fact that the French company was a member of a group, or on the presence of any establishment in England. It briefly summarised the reasoning of HH Judge McGonigal as to the reasons why the centre of main interests was in England. It found that the English court had declared that it had jurisdiction because it considered that it

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15 Save where that foreign Member State refuses recognition under Article 26 on the basis that recognition would be "manifestly contrary to that State's public policy". The use of the word "manifestly" makes clear that Article 26 will apply only very exceptionally: compare the similar wording in Council Regulation (EC) No.44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 34(1).

16 See Gabriel Moss QC, Ian Fletcher and Stuart Isaacs QC (eds), *The EC Regulation on Insolvency Proceedings* (2002), para.2.26; Len Sealy and David Milman (eds), *Annotated Guide to the Insolvency Legislation* (6th ed., 2003), pp.651–652.

17 The French Courts were perfectly entitled to open secondary proceedings in France under Article 3(2), provided that the French company had an "establishment" in France, as defined in Article 2(h).

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had been sufficiently demonstrated that the centre of main interests was in England, and considered therefore that the English court appeared competent under Article 3(1) of the Regulation. Hence, the administration order was entitled to recognition in France, and the purported French main proceedings should be set aside.

It is not entirely clear from the judgment to what extent the Versailles Court of Appeal considered that it had power to scrutinise the decision of the English court, contrary to the indications in Recital (22). Had the French court considered that it had no power of scrutiny, then it is difficult to see on what basis it considered the reasoning of the English court at all, or why it saw fit even to consider, before rejecting, the arguments of the French liquidators and the Ministere Public that jurisdiction had in fact been founded on the concept of a "group" of companies, or the existence of an establishment in England. Had the Versailles court adopted the policy of Recital (22), then it might simply have reasoned that since the English court thought that it had jurisdiction, the French courts could do no more than recognize the English court's order. On the other hand, the Versailles court did not consider whether, on a detailed consideration of the factual connections between the French company and England, the English court's decision as to the location of the centre of main interests was correct. Whether this reflects a reluctance on the part of the Versailles court to subject the decision to detailed scrutiny, or whether it simply reflects the ambit of the arguments addressed to them, is unclear. It seems likely, though not certain, that the Versailles court adopted something of a half-way house on the question of recognition and scrutiny of a foreign court's judgment. It seems that had the French court concluded that the English court had made a manifest error by basing its jurisdiction on some concept of a group of companies, or else on the presence of an establishment, then recognition of the English orders might well have been refused; but having found that there was no such manifest error, and that the English court had at least addressed itself to the correct issues, the Versailles court was unwilling to consider whether the English court had correctly decided that the centre of main interests was in England. Although this was not expressed in the reasoning, it may be that such an approach would have been justified as part of the process of ensuring that the order of the English court was not contrary to French public policy; if it had been a refusal to recognise would have been justified under Article 26.

We now return to consider the case of an out of court appointment. What would the response of the French courts have been if an appointment of an administrator been made out of court under the new administration regime? In such a case, there would of course have been no decision by any judicial or quasi-judicial body on the issue of the centre of main interests. Jurisdiction would merely have been established by virtue of the notice of appointment filed with the court stating that the centre of main interests was in England[18]. Any evidence contained in the relevant form, or, in the case of an appointment by a qualifying floating charge holder, in a statement in that person's possession, may be very limited, and will have been subject to no judicial scrutiny. Indeed, it is difficult to see how any "proof" that the centre of main interests is in fact in England, within the meaning of Article 3(1), could have been provided in the absence of any court decision on the point.

In such circumstances, it seems inevitable that the courts of other Member States will place little if any reliance on the fact of administration in England, and may well not consider themselves obliged to recognize the "judgment" opening insolvency proceedings. As we have seen, the wording of Article 16(1), both in its references to a judgment being handed down by a court of a Member State, and in its reference to a court having jurisdiction pursuant to Article 3, is sufficiently open to enable the courts of Member States to take this route.

As matters presently stand, therefore, the advice to any would be appointor of an administrator seeking to appoint out of court in respect of a foreign registered company where the centre of main interests is considered to be in England and Wales is to make an administration application to court.

(2) The process of administration

Generally speaking, the effect of the EC Regulation should be to make the administrator's task in a case involving significant inter-Community issues consid-

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18 In the case of a notice of appointment filed by the holder of a qualifying floating charge, the appointor is obliged in such circumstances to state that the proceedings will be main proceedings as defined in Article 3(1) of the EC Regulation. It seems that the reasons for this statement are to be set out in a statement to be retained in the possession of the appointor: see Form 2.7B. The notice of appointment is a Statutory Declaration under the Statutory Declarations Act 1835. In the case of appointment by the company or directors, which is similarly a Statutory Declaration, and similarly involves the assertion that the proceedings are main proceedings under Article 3(1) (where appropriate), it is not clear whether any reasons at all have to be given as to why the proceedings are the main proceedings, though reasons do have to be given as to why the EC Regulation is considered to apply or not apply: see Form 2.8B. The space on the form allotted for this purpose is remarkably small, perhaps indicating that no more is expected than a statement to the effect that the centre of main interests is located in England and Wales.

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erably simpler than hitherto. In particular, the law applicable to insolvency proceedings and their effects will generally be that of the State of the opening of proceedings (Article 4(1)); the judgment opening the proceedings will generally produce the same effects in any other Member State as under the law of the State of the opening of proceedings (Art.17(1)); and the "liquidator" (hence, administrator) will generally have the same powers in a foreign Member State as in the State of the opening of proceedings (Art.18).

One aspect of the EC Regulation which might appear, at first sight, to cause problems for an English administrator seeking to achieve the statutory purposes under the new Regime (or, for that matter, under the old regime) when dealing with the affairs of a company or companies with significant assets in another EU Member State lies in the fact that the relevant company or companies might be subject to secondary proceedings under Article 3(2) of the EC Regulation. Article 3(2) and (3) provide as follows:

> "(2) where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.
>
> "(3) Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings."

Where secondary proceedings are opened, the law applicable to those proceedings will be the law of the State where those secondary proceedings are opened (Art.28). The judgment in the main proceedings will not produce the same effects as in the country of the opening of the proceedings (Art.17(1)); and the "liquidator" in the main proceedings will not have the same powers as in the main proceedings (Art.18(1)).

Under Article 29, the opening of secondary proceedings may be requested by the liquidator in the main proceedings, and also "any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary proceedings is requested."[19] Under Article 27, the court of the Member State in which the secondary proceedings are requested to be opened would not need to examine the debtor's insolvency and, under Article 28, the law applicable to these secondary proceedings would ordinarily be the law of the Member State in which the secondary proceedings are opened.

The opening of secondary proceedings might, prima facie, cause problems for the administrator in seeking to achieve the purpose of administration (i.e. the achievement of one or more of the statutory objectives listed in paragraph 3(1) of Schedule B1). For example, if his plan is to sell the business of the company as a going concern, he will find that the assets of the company located in the other Member State are outwith his control, and any sale would need the consent of the foreign liquidator. Furthermore, since secondary proceedings are necessarily winding-up proceedings (which expression does not include administration or any similar foreign process), whereas the achievement of the purpose might require the administrator to allow the company to continue trading (whether in view of a going concern sale, or whilst the company is returned to solvency), secondary winding-up proceedings might necessarily involve cessation of trade, and the liquidation and distribution of the assets located in the foreign jurisdiction.

The problems which might be caused by the commencement of secondary proceedings are ameliorated by the duties of co-operation and communication of information in Article 31. Article 31 provides that the liquidators in the main and secondary proceedings are duty bound to communicate information to each other, and are obliged immediately to communicate any information which may be relevant to the other proceedings. They are also duty bound to co-operate with each other, though such duty is made subject to the rules applicable to each of the proceedings. The liquidator in the secondary proceedings is also bound to give the liquidator in the main proceedings an early opportunity of submitting proposals on the liquidation or use of assets in the secondary proceedings[20].

The provisions of Article 31 should therefore assist an English administrator in ensuring that his plans for the company, perhaps to trade it on to solvency, or with a view to a voluntary arrangement, or to trade it

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19 See also Recital (18).

20 As to the communication of information, see also rule 2.133(5) of the Insolvency Rules 1986, as amended by the Insolvency (Amendment) Rules 2003, which provides that where an Administrator is obliged to give notice to, or provide a copy of a court document (including an order of the court) to the court, the registrar of companies or the official receiver, the administrator shall also give notice or provide copies, as the case may be, to the member state liquidator.

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on pending a going concern sale, are achieved. This reflects the policy set out in Recital (20). Whether they are necessarily sufficient to ensure this is doubtful. If, for example, the rules of the foreign liquidation prevent continued trading, or if the liquidator in the secondary proceedings takes a different view on the benefits of the course proposed by the English administrator, the purpose of the administration may be stymied.

In any such case, the trump card of the administrator is to exercise his power to make an application for a stay under Article 33, although this power is a blunt instrument in cases in which a secondary liquidation is desirable as a matter of principle, but the main proceedings (in our example an English administration) are being adversely affected by a dispute with the secondary liquidator. Article 33(1) provides that:

> "The court, which opened the secondary proceedings, shall stay the process of liquidation in whole or in part on receipt of a request from the liquidator in the main proceedings, provided that in that event it may require the liquidator in the main proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors. Such a request from the liquidator may be rejected only if it is manifestly of no interest to the creditors in the main proceedings. Such a stay of the process of liquidation may be ordered for up to three months. It may be continued or renewed for similar periods."

Hence, an administrator in dispute with the office holder in control of the company's assets situated in another Member State can apply for a stay to ensure that no step occurs which is adverse to the interests of the administration. It is not clear whether the imposition of a stay means that those assets revert to the control of the administrator (as liquidator in the main proceedings), nor whether the administrator could proceed to realise such assets[21]. In England, one might expect that a stay of secondary proceedings would have the consequence that the control of the assets would revert to the liquidator in the main proceedings: as the management powers of a company in winding-up are revived by the imposition of a stay, at least where the stay is permanent.

If an administrator, as liquidator in the main proceedings, requests a stay of the secondary proceedings, the language of Article 33(1) makes clear that the court of the Member State of the secondary proceedings must grant such a stay unless it is manifestly of no interest to the creditors in the main proceedings. However, that court is empowered to require the liquidator in the main proceedings to take "any suitable measure" to guarantee the interests of the creditors in the secondary proceedings and of individual classes of creditors. It may therefore be that the almost absolute obligation to grant a stay is more apparent than real. The conditions imposed by the court on the grant of a stay might in practice render it impossible for the administrator, as liquidator in the main proceedings, to satisfy such conditions, at least without harming the prospects of his achieving the statutory purposes.

Administrators may also have some influence on the conduct of insolvency proceedings in other Member States by reason of Article 32, which provides for the lodging of claims by one Member State liquidator in other proceedings in respect of the same company, and empowers one liquidator to participate in other proceedings on the same basis as a creditor, in particular by attending creditors' meetings. Under rule 2.133(2) of the Insolvency Rules 1986, as amended by the Insolvency (Amendment) Rules 2003, a Member State liquidator is deemed to be a creditor for the purposes of the rules specified in rule 2.133(3). The latter sub-rule covers a variety of matters, including the right to notice of creditors' meetings, voting at meetings and the appointment of a creditors' committee. Hence, depending on the circumstances, by the exercise of his voting power, an English administrator might exert influence on secondary proceedings in another Member State, and a Member State liquidator in secondary proceedings might exert influence on English administration proceedings.

Whilst the EC Regulation makes adequate provision for co-operation and co-ordination of main and secondary proceedings, no similar provisions exist in the context of groups of companies. Groups of companies operating across the Community sometimes operate what is essentially a single business, or at least interdependent businesses. If the centre of main interests of each of the companies happens to be in a single Member State, then a single Member State liquidator can be appointed (as in *Daisytek*, supra) so that the affairs of the companies can be co-ordinated and will be subject to common management. Where the centres of main interest are scattered across the Community, then not only will each company's affairs be under the control of a different liquidator, but those liquidators will be under no obligation to co-operate or

Notes

21 It appears to be the view of one of the contributors to Gabriel Moss QC, Ian Fletcher and Stuart Isaacs QC (eds), *The EC Regulation on Insolvency Proceedings* (2002) that, whilst the imposition of a stay in the secondary proceedings stops the liquidation of assets in those proceedings, it does not entitle the liquidator in the main proceedings to dispose of those assets: para.8.249.

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exchange information under the Regulation. In such circumstances, without significant voluntary co-operation between the liquidators, the possibility of a rescue or co-ordinated going concern sale is remote.

(3) Termination of the administration process

Where an English administrator is the sole Member State liquidator appointed in respect of a company, termination of the administration process should not cause any particular issues for the administrator. Under Article 4(2), the law of the State of the opening of proceedings is to determine the conditions for, inter alia, their closure. That law is to determine, in particular, the conditions for and the effects of closure of insolvency proceedings, in particular by composition: Article 4(2)(j). Termination of an administration should therefore be conducted in accordance with, and its effects be determined by, English law.

Issues may emerge where secondary proceedings have been commenced in another Member State. The method of terminating the various Member State proceedings will, of course, depend on what the administrator has managed to achieve. If the administration has failed, or in any event if distribution of realisations alone is contemplated, the secondary proceedings can proceed to their normal conclusion. In the event that a rescue plan, composition or comparable measure has been proposed or is to be proposed in England, then the administrator is also empowered to propose such a measure himself in the secondary proceedings where the law applicable to those secondary proceedings allows for such proceedings to be closed without liquidation. Hence, depending on the provisions of the law of the other Member State, it may be that an administrator who intends to propose a corporate voluntary arrangement to the creditors, or a plan whereby the company will continue to trade under its previous management outside administration, will be able to make such proposals in the secondary proceedings, and hence achieve closure of those proceedings. If a stay under Article 33 is in force, then the administrator will alone have power to propose such a composition or plan. If it is not in force, then the administrator remains empowered to submit proposals in the secondary proceedings: see Article 31(3). Alternatively, the liquidator in the secondary proceedings could himself submit the proposals. The duty to co-operate under Article 31(2) suggests that the liquidator in secondary proceedings would at least be bound to consider whether to submit such proposals.

Where the law of the secondary proceedings does not allow for closure of the proceedings by a rescue plan, composition or comparable measure, or the administrator in the main proceedings makes no such proposals, but intends simply to return the company to its former management to trade outside administration, the administrator will need closely to co-ordinate the termination of the administration proceedings with the termination of the secondary proceedings. Save in exceptional circumstances, a company could not be returned to its management if a part of its assets remained subject to secondary insolvency proceedings. How the administrator will achieve a co-ordinated termination of the various proceedings will depend upon the provisions of foreign law applicable to the secondary proceedings. The duty to co-operate in Article 31(2) should help to ensure that the liquidators in each set of proceedings co-operate with each other to achieve a co-ordinated termination.

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