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Bankruptcy law update 2021

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265. Creditor's petition: debtors against whom the court may make a bankruptcy order.

- (1) A bankruptcy petition may be presented to the Court under Section 264(1)(a) only if -
- (a) the centre of the debtor's main interests is in England and Wales, or
 - (ab) the centre of the debtor's main interests is in a member state (other than Denmark) and the debtor has an establishment in England and Wales, or
 - (b) [the centre of the debtor's main interests is not in a member state of the European Union which has adopted the EU Regulation but] the test in subsection (2) is met.

- (2) The test is that –
- (a) the debtor is domiciled in England and Wales, or
 - (b) at any time in the period of three years ending with the day on which the petition is presented, the debtor –
 - (i) has been ordinarily resident, or has had a place of residence, in England and Wales, or
 - (ii) has carried on business in England and Wales.

The s.265 questions: first, does s.265(1)(b) apply?

- To engage s.265(1)(b), one of the following three criteria must apply:
 - (a) is the Debtor domiciled in England and Wales? or
 - (b) “*at any time*” in the three years ending with the date of the Petition
 - (i) has the Debtor “*been ordinarily resident, or had a place of residence, in England and Wales*” or (ii) has the Debtor “*carried on business in England or Wales*”?

The s.265 questions: if s.265(1)(b) does not apply, what about s.265(1)(a) or (ab) (COMI)?

If either of the three s.265(1)(b) limbs is not, met then s.265(1)(a) and (ab) are in issue and the following questions then arise:

- (a) For s.265(1)(a) purposes, is the Debtor's COMI in England and Wales? (Determination of debtor's COMI undertaken at the time of the presentation of the bankruptcy petition: ***Revenue and Customs Commissioners v Stayton* [2018] EWHC 3183 (Ch) (Mr Terence Mowschenson QC), *Melars Group Limited (in liquidation) v East-West Logistics LLP* [2021] EWHC 1523 (Ch) at [61] (Miles J)**). If so, the Court may make a bankruptcy order against the Debtor.
- (b) For s.265(1)(ab) purposes, if the Debtor's COMI is not in England and Wales, is the Debtor's COMI in a Member State other than Denmark? If so, does the Debtor have an establishment in England and Wales? If so, the Court may make a bankruptcy order against the Debtor.

Section 265(2)(a): “The debtor is domiciled in England and Wales”

The leading authorities on domicile remain the Court of Appeal’s decisions in *Re Bird* [1962] 1 WLR 686 and *Re Brauch (a debtor)* [1978] Ch 316; the judgment of Arden LJ in *Barlow Clowes International Ltd v Henwood* [2008] EWCA Civ 577, [2008] BPIR 778 at [8] (Waller and Moore-Bick LJJ agreeing) addresses the term in the present context.

Section 265(2)(b)(i): “ordinarily resident, or has had a place of residence, in England and Wales” in the last three years

- Chief Registrar Baister (as he was) considered the meaning of “*ordinarily resident*” (and the former “*having a place of residence*”) requirement in ***Reynolds Porter Chamberlain v Khan* [2016] BPIR 722 at [25] and [26]**.
- In ***Lakatamia Shipping Company Ltd v Su* [2021] EWHC 1866 (Ch)** Bacon J analysed the term “*has had a place of residence*” in s.265(2)(b)(i): note requirement for degree of substantiality, permanence and expectation of continuity connecting debtor with jurisdiction

265(2)(b)(ii): “has carried on business in England and Wales” in the last three years

The carrying on of business is an issue of fact, and even a single transaction to which the debtor is party is capable of constituting carrying on business for s.265 purposes: *Gate Gourmet Luxembourg IV Sarl v Morby* [2015] EWHC 1203 (Ch), [2015] BPIR 787 at [25] (Registrar Briggs, as he was)

Section 265(1)(a) and (ab): the authorities on the ascertainment of the Debtor's COMI

- The judgment of Miles J in *Melars Group Ltd (in liquidation) v. East-West Logistics LLP* [2021] EWHC 1523 (Ch) (handed down on 28 May 2021) provides a useful distillation of the authorities on the determination of COMI and itself provides very useful guidance.
- The Judge overturned on appeal the (winding-up) order of Deputy ICC Judge Baister who had concluded that the debtor company's COMI was in England and Wales, rather than Malta, where the company's registered office was located.

The court's common law jurisdiction to recognise foreign bankruptcy proceedings

- The English courts have a longstanding common law jurisdiction to recognise foreign insolvency proceedings
- That jurisdiction does not derive from the foreign bankruptcy or English statute. It is undeveloped and limited, notably as regards immovable property.
- ***Re Bedzhamov, Vneshprombank LLC v Bedzhamov* [2021] EWHC 2281 (Ch)**
(Snowden J)

271(3): the Court's approach to an offer to secure or compound a petition debt

- Acceptance of the offer must require dismissal of petition and offer must not be unreasonably refused
- Review of the authorities by Chief Registrar Baister in ***HMRC v Garwood* [2012] BPIR 575**, approved of by the Court of Appeal in ***Hughes v Howell* [2021] EWCA Civ 1431**
 - (Lewison LJ, Sir Geoffrey Vos MR and Coulson LJ agreeing)
- Note specific approval of “*A creditor is entitled to have regard to his own interests and is not obliged to take a chance or show patience or generosity*”

The Rule in *Ex parte James; In Re Condon* [1874] LR 9 Ch App 609 (Court of Chancery)

- What is the rule?
- The impact of the Supreme Court's judgment in *Bloom v Pensions Regulator* [2013] UKSC 52
- The view of the Court of Appeal in *Lehman Brothers Australia Ltd v Macnamara* [2020] EWCA Civ 321, [2020] BPIR 550 (Patten, David Richards and Newey LJ)
- Unconscionable or objectively unfair conduct?
- Nearly 150 years on, does the rule have any role to play in practice?

Thank you for your attendance.

Any questions?