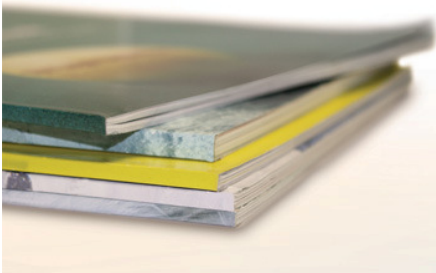


Can You Appoint an Administrator Over an Offshore Company?

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Appleby routinely advises in respect of international corporate finance transactions. In some cases, the security documents entered into by companies incorporated in the domiciles where Appleby operates may, contrary to their purported effect, not actually operate so as to effect the appointment of a UK administrator where the security is governed by English law.

In these circumstances, Appleby typically works alongside English Lawyers. The view expressed is that the provisions for the appointment of a UK administrator in the insolvency of an offshore company based in Bermuda, Cayman, the British Virgin Islands or the Isle of Man, pursuant to an English law governed “*qualifying floating charge*”, as defined in the **English Insolvency Act 1986** (the “Insolvency Act”), it will not be enforceable unless the offshore company itself has its “*centre of main interests*” (“COMI”) in a European Economic Area

(“EEA”) State (other than Denmark). However, this often will not be the case in an international finance structure. Accordingly, a floating charge governed by the laws of the jurisdiction of the offshore counterparty may be preferable, as such foreign law governed security is, in the view of English counsel, unlikely to be susceptible to the same English law enforcement restrictions with regard to the appointment of an administrator as the same security would be if governed by English law.

By way of background and example, we understand that under English law a person will hold a qualifying floating charge if he holds a debenture of the company secured by a (qualifying) floating charge which relates to the whole or substantially the whole of the company’s property. Further, a floating charge will “*qualify*” as such if it purports to empower the holder of the floating charge to appoint an administrator (see Schedule B1, paragraph 14 of the Insolvency Act).

Whilst this appears, *prima facie*, straightforward, the governing law issue arises by virtue of amendments made to the definition of “company” in the Insolvency Act by the Insolvency **Act 1986 (Amendment) Regulations 2005** (the “2005 Regulations”), which defines “company” as being a company registered in England and Wales or another EEA State, or having its COMI in an EEA State (other than Denmark): the holder of a qualifying floating charge in respect of a company’s property may only appoint an administrator to a company so defined. Thus, unless an offshore company has its COMI in an EEA State (other than Denmark), the secured lender will be precluded from appointing an administrator (as understood under English law) in its counterparty’s insolvency.

If it is therefore intended to use an English law floating charge and the lender is the holder of a “qualifying floating charge”, it would appear that it is critical to ask both the offshore and onshore lawyer whether the facts regarding the offshore company’s COMI can be judged as being domiciled in an EEA State (other than Denmark).

Our understanding of the Insolvency Act is that it provides guidance as to what constitutes a company’s COMI for the purposes of English legislation. Namely, a company’s COMI has the same meaning as in the EC Regulation and in the absence of proof to the contrary, is presumed to be the place of its registered office (within the meaning of that Regulation). We gather that the EC Regulation in question is **The Regulation on Insolvency**

Proceedings, which was adopted by the EU Council on 29 May 2000 and came into force on 31 May 2002 (the “Regulation”). This has direct effect in all member states of the European Union, with the exception of Denmark. For the purposes of the Regulation, the United Kingdom is comprised of England and Wales, Scotland, Northern Ireland and Gibraltar as a single state; none of the Crown Dependencies or Overseas territories, such as Bermuda, the Cayman Islands, the British Virgin Islands and the Isle of Man (and the other offshore “British” jurisdictions) are included.

Article 3, paragraph 1, of the Regulation states that:-

“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.”

Preamble (13) to the Regulation gives substance to this regulation, which 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.”

English case law has confirmed this objective assessment in **Re Stanford International Bank Ltd (in liquidation)** [2010] EWCA Civ 137, which held that the test is as set out by the European Court of Justice in **Re Eurofood 1 FSC Ltd** (C-341/04); [2006] All E.R. (EC) 1078. Accordingly, a

company's COMI is not a matter to be decided by the borrower, but is a question of fact that is objectively assessed.

Foreign Law General Floating Charge

If a company's COMI is therefore deemed to fall outside of the EEA, it is apparent that the appointment of a UK administrator will not be possible under a security document providing for a qualifying floating charge governed by English law. If dispensing with the administration regime would reduce the secured lender's enforcement rights, and the management of the undertaking of the company is necessary, along with the panoply of administrator's powers in order to maximise the market value of the debtor's assets, then onshore and offshore practitioners should explore the availability of a foreign law governed floating charge.

In common law offshore jurisdictions whose laws have not followed the more debtor-friendly rescue cultures, it is frequently possible to incorporate in the instrument creating the floating charge a provision for the appointment of a common law receiver untrammelled by any statutory objectives or constraints. Offshore jurisdictions, such as Bermuda, the British Virgin Islands, the Cayman Islands and

the Isle of Man generally remain creditor-friendly. Consequently, it remains possible for a mortgagee to appoint a receiver and to vest in him, via the instrument creating the floating charge, all the powers necessary to achieve the objectives of the secured lender.

For lenders who currently hold qualifying floating charges, it may not be too late to address the issue created by the 2005 Regulations, provided claw-backs do not prevent unnecessary risks, by substituting a foreign law governed floating charge. For those where the borrower is in default and administration is intended as an enforcement remedy, it may be possible to use section 426 of the Insolvency Act by means of a letter of request from the relevant court of the offshore jurisdiction. By virtue of this procedure, it may be possible to achieve by court intervention, the original remedies of the secured lender in drafting security as a qualifying floating charge as understood as a matter of English Law.

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