international newsbrief

Discover what's new in the world of Stevens & Bolton LLP

Summer 2014

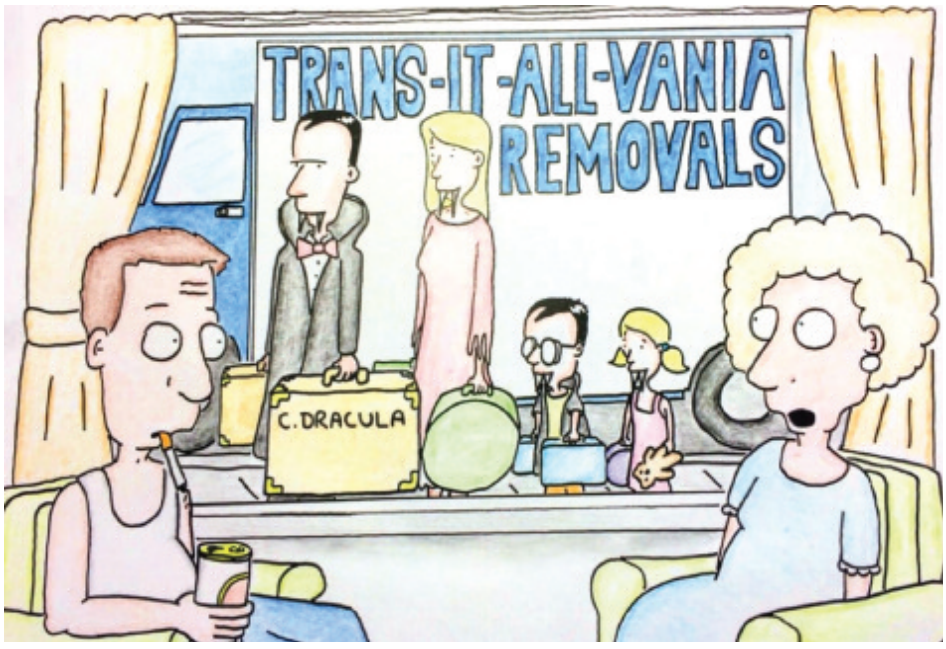
International Newsbrief contains reports and commentary on a selection of recent topical developments in England and Wales and is specifically targeted at lawyers and other business professionals outside the jurisdiction. We also include some news of recent developments at S&B.

If you or your clients would like any advice on the issues raised then please do not hesitate to contact the author of the relevant article or your usual S&B contact.

UKIP VICTORY

The UK Independence Party obtained the highest share of the vote in the recent EU elections. Led by charismatic beer-drinking, cigarette-smoking self-styled "ordinary bloke" Nigel Farage, UKIP's share of the vote rose from 16.5% in 2009 to 27.5% this time. Meanwhile the staunchly pro-European Liberal Democrats lost 50% of their share of the vote from last time and lost all but one of their 12 MEPs. Their strongly pro-EU leader, Nick Clegg, who met his Spanish wife at the College of Europe in Bruges, came under pressure to resign as a result.

UKIP is more of a pressure group than a mainstream political party, with its primary focus being on an exit from the EU and strict controls over immigration. Mr Farage, though generally suave and charming as an interviewee, has a particular pre-occupation with Bulgarian and Romanian migrants, and faced accusations of racism in the campaign after he said that British people should be wary of Romanians moving into their street. Following criticism he expanded: "any normal and fair-minded person would have a perfect right to be concerned if a group of Romanian people suddenly moved in next door. So far as I can see most of these media commentators objecting to this statement are people living in million pound houses for whom the prospect of such a turn of events is not a real one".



CONTENTS

But he is at pains to disassociate UKIP from the more extreme right-wingers in other EU countries and has said that UKIP will never sit with Marine Le Pen's Front Nationale, who of course are themselves not the most extreme representatives in the Parliament which now includes members of neo-nazi parties from Greece and Hungary.

UKIP's victory can be interpreted as an expression of hostility and disillusionment with the EU project (a "peasant's revolt" as London mayor Boris Johnson called it) but also a reflection of the low esteem in which the British public hold all the main political parties in the UK. Turnout for the election was 33% against an average across the EU of 43% and compared to 65% in the last general election. David Cameron, the

continued from page 1

Conservative prime minister and Ed Miliband, the Labour party leader of the opposition, have struggled to fire the imagination of voters, accused of being career politicians out of touch with ordinary people. They struggle to differentiate themselves. Comedian Stewart Lee described Cameron and Miliband as being as different as "two rats fighting over a courgette that has fallen down a urinal".*

The big question is how UKIP's victory affects the policies of the other parties and in particular the Conservative Party. Cameron is persisting with his strategy of pledging an in out referendum on the EU if the Conservatives are re-elected and to take place once Cameron has "re-negotiated the EU treaty". With 28 member states needing to approve any amendments, one worries about how easy this will be for him. He failed pretty spectacularly to prevent the appointment of Jean-Claude Juncker as the next President of the Commission, with only Hungary supporting the UK and the other 26 states opposing him. There may be a temptation for Cameron to steal UKIP's clothes and pledge a referendum more quickly and possibly even without the condition of obtaining vaguely-defined "concessions" from the EU.

Cameron certainly seems to be ruffled, taking a swipe at Farage on the day after the election and describing him as a consummate politician "with his expenses and his wife on the payroll and everything else" and that he does not accept the "he's a normal bloke down the pub" thing. Cameron described UKIP a few years ago as a bunch of "fruitcakes, loonies and closet racists" and promptly saw UKIP's popularity soar. Now those fruitcakes, loonies and closet racists have pushed his party into third place in an election for the first time in its history and just taken 30% of the national vote. Interesting times lie ahead.

** We in no way condone this gratuitously offensive imagery.*

FRANCHISING

UK FRANCHISING CONTINUES TO INSPIRE CONFIDENCE

Nicola Broadhurst
Partner,
Franchising

The results of the latest annual NatWest/British Franchise Association survey on the UK franchise industry are out and make for good reading. Not only does it reinforce the robustness of franchising as a method of business expansion in difficult economic conditions but as franchising crosses many business sectors it also provides a clear indication of business trends. Franchise systems offering personal services were the market leader for growth followed by hotel and catering franchise systems. Pure retail systems and transport systems fared less well.

Stevens & Bolton's franchise practice is equally diverse with clients including a celebrity cage fighter with a mixed martial arts gym business and a pawn broking business specializing in high end luxury goods, the success of which has spawned a mini TV documentary.

Give me a franchise

According to the survey, the UK franchise industry has grown by 11% since the start of the recession in 2008 where the rest of the economy has shrunk by approximately 2.5% and it now provides an overall contribution of £13.7 billion to the UK economy. This equates to just under 1% of GDP.

Interestingly, the vast majority (82% in total) of the franchise systems included in the survey are UK owned. This is very different to the position 25 years ago, where most of the franchise systems were imports from the US. Approximately 9% of the current UK franchise systems are owned by UK subsidiaries and a further 9% are owned by master licensees. As the UK, unlike other European countries, does not have any franchise specific laws and pre-contract disclosure is not compulsory (although recommended by the British Franchise Association) it is unlikely that regulation is a deterrent. Therefore perhaps the decline in the number of foreign owned franchise systems may simply be an indicator of the strength of home grown systems which has provided a greater competitive barrier to foreign imports, or instead it may be symptomatic of the difficulty in funding faced by international franchisors looking to expand beyond their domestic markets.

Expanding internationally can be a risky decision but it remains the fact that the UK is one of the easier markets to franchise in, it has one of the lowest corporation taxes in

continued from page 2

the G20 countries and a company can be established within 24 hours. In addition, there are a number of incentives on offer for overseas investors willing to establish their businesses in the UK. For example, UK Trade & Investment operates a Global Entrepeneur Program to assist overseas entrepreneurs and early stage technology businesses and start ups wishing to relocate to the UK. Free support is offered on a number of aspects of business establishment including access to experienced mentors and introductions to seed funds and investors. However, in order to qualify the business must set up its headquarters in the UK. Entrepreneur visas can be arranged with funding available. Therefore, the UK should be an attractive destination and it is clear that there is still an appetite for overseas brands, particularly those from the US. It remains to be seen whether the new found wariness of overseas franchisors continue.

Conversely it would appear that many more UK franchise systems are seeking to expand beyond the UK. The franchise practice at Stevens & Bolton has experienced an increase in such instructions advising a premium cupcake brand, a niche handbag restoration business and a heritage menswear business amongst others to expand internationally. According to the survey, over 26% of UK franchisors are now exporting internationally with over 14% of those not currently operating internationally considering doing so in the near future. Europe remains the prime destination followed by the US and Canada. Over the last 12 months, however, it has been the Middle East, South Africa and Asia which has attracted the majority of our franchise clients. It would appear that the UK franchise industry is a force to be reckoned with.

JULES RIMET - OÙ ÊTES-VOUS?

Joe Bedford
Partner,
Corporate

"It's coming home, it's coming home, it's coming, football's coming home!" As a young lawyer working in London in 1996 I sang those words loudly, proudly and almost endlessly throughout that year's UEFA European Football Championship. But it didn't come home, not then and not since then. Telephoning its friends has proved to be no help at all, as wherever football has gone it seems to have taken with it rugby, cricket, tennis, almost all winter sports and most summer events not involving a bicycle or a boat. Since 1966 every English child has been brought up to believe that the World Cup trophy is a loyal homing pigeon (probably called Jules), which has spent some time visiting other nations but ultimately, guided by the laws of nature, will return to its English birdhouse (probably Room A). Like other fundamental laws, however, this one seems not to apply when World Cup time comes around.

Laws suspended during this World Cup include:

(a) The Equivalence Principle (a key part of Albert Einstein's general theory of relativity) - which states that an acceleration is fundamentally indistinguishable from a gravitational field. This principle was disproved by Luis Suarez and his teeth accelerating past the English defence, which was clearly trapped in a very distinguishable gravitational field;

(b) Isaac Newton's first law of motion – the rule that a body will continue in its state of constant velocity unless it is acted upon by an external force. Arjen Robben demonstrates that there is no need for an external force to act upon a moving footballer whenever he enters the penalty box;

continued from page 3

(c) The Law of Averages – which dictates that, as a minimum, England are supposed to at least play averagely in major tournaments;

(d) Mach's Principle (devised by Ronald McDonald) – the principle that the inertia of any particular particle or particles of matter is attributable to the interaction between that piece of matter and the rest of the Universe. Olivier Giroud is just really really slow;

and finally:

(e) The Dilbert Principle (a theory put forward by Dilbert cartoonist Scott Adams) - suggesting that companies tend to systematically promote their least competent employees to management in order to limit the amount of damage they are capable of doing. Nice try English FA, but Roy Hodgson still did plenty of damage.

So World Cup 2014 appears to be a lawless place, at the same time blessed with some great footballing moments and cursed by bouts of phantom injury and blatant acts of cannibalism. Furthermore (and depending upon which translation you believe), Uruguayan president Jose Mujica believes it is being run by either (a) a collection of grey haired men born of unmarried parents, or (b) a group of the male children of a number of female dogs. Much like the main strands of the Copernican Principle (which suggested that the Sun, not the Earth, was the centre of the Universe) it is probable that neither of these is correct. It is statistically likely, however, that before the end of the tournament there will be more cosmos mocking twists of fate. Maybe England can still win it after all?

I will leave some bird seed out for Jules, just in case…

UK Trade & Investment

S&B works with UKTI to promote inward investment into the UK and UK exporting activity.

GUEST ARTICLE

DISCOVER GLOBAL GROWTH FROM A UK BASE

The UK is one of the leading business locations in the world and the number one destination for inward investment (Foreign Direct Investment) in Europe.

The UK has consistently attracted more foreign investments with HQ operations than any other location in Europe; a clear endorsement of our business-friendly regulations and thriving environment for innovation and growth.

Unlike most of its competitors, the UK isn't just an investment destination: rather, it is an investment multiplier, a springboard to international growth that upgrades the value of a company's investment. The UK, in itself, offers the best of international business. Companies don't do business in the UK just because they're interested in the prosperous UK market. They also come here to become global.

Setting up a business in the UK takes an average of 13 days, and it takes as little as 24 hours to register a company. The UK's internationally competitive corporate tax system, which will include 20 percent corporation tax in 2015 – the lowest in the G7 and joint lowest in the G20 – has always been and remains an increasingly valuable asset in attracting overseas European Headquarters (EHQ). Investors in the UK will find a highly skilled labour force, as well as an ever-increasing pool of industry talent. Alongside an advanced transport and technology infrastructure – a critical factor for attracting EHQ investment – and internationally recognised capabilities in a wide range of sectors, the UK undoubtedly offers a wealth of advantages for investors.

The UK is a world leader in knowledge-based, business and professional services. In 2012, business services accounted for 8 per cent of UK output (Gross Domestic Product). World-class firms specialise in accountancy, audit, legal services, information technology, property management, architecture, advertising, management consultancy and engineering, to name but a few. UK professional services firms are honing their skills in increasingly competitive world markets and can play a vital role supporting new investors' businesses.

Deciding where to locate your international business is often a long and involved process. It is UK Trade and Investment's (UKTI) job to know the UK's strengths and where investment opportunities exist. UKTI works with a range of professional advisors to support their overseas clients who are expanding to the UK, or that have already established UK operations. Clients' needs can be wide ranging and technical. Because of this, UKTI want to work together with companies to support their investment journey.

UKTI offers an unrivalled service dedicated to working with companies to bring their operations to the UK and to support existing investors in expanding their UK operations.

continued from page 4

To find out more about how UKTI can provide the tools to map companies' business ambitions in the UK, contact their expert team.

The UK is the leading global financial services centre and the most internationally focused marketplace in the world.

Financial services touch every aspect of our everyday lives. The sector provides finance and services that keep businesses working, and supports jobs and growth across the UK. The sector employs over one million people in the UK, and another million in the related professional services. With an innovative and business friendly environment, skilled workforce, competitive tax regime, advantageous time-zone, diverse language capability, a strong legal and regulatory environment, global links, excellent ICT infrastructure, there are many compelling reasons for investors to choose the UK.

Foreign companies invested a cumulative £40 billion in the UK financial services sector between 2008 and 2011 - close to a third of total foreign direct investment (FDI). The industry attracts more FDI into the UK than any other sector. Financial and related professional services contributed £174 billion to the UK economy in 2012 with around a third of this sum arising from exports to overseas clients.

Earlier this year UK Trade and Investment established the Financial Services Organisation (FSO), to help support UK business growth through high value FDI into the UK and international trade.

Through its bank of knowledge, extensive networks and teams of specialists, the UKTI FSO will identify and leverage potential opportunities for trade and investment.

The team is led by Sue Langley, Chief Executive who was previously Director of Market Development at Lloyd's of London. The FSO is working closely with private sector and academic experts, and with other government departments through offices across the UK and through UKTI's global network. The FSO will focus efforts where they can have most impact and is developing strategies for Investment Management, Back and Middle Office (BMO), Insurance and Financial Technology (Fintech). It also supports and delivers the work of the HM Treasury-led Financial Services Trade & Investment Board (FSTIB), a major cross Government initiative to champion the sector and ensure the UK remains the leading global hub for financial services.

Interested companies should contact the FSO or their local UKTI International Trade Advisor.

E: enquiries@ukti-invest.com
T: +44 (0)20 7333 5442
www.ukti.gov.uk

GREAT BRITAIN

IMMIGRATION

FURTHER CHANGE AHEAD FOR MIGRANTS TO THE UK AND THEIR EMPLOYERS

Jackie Penlington
Associate,
Immigration

Is Britain truly 'open for business'? It may not feel like it if you're an employer who sponsors migrants to work for your business in the UK or if you have clients looking to set up a business in the UK. With immigration still being such a hot political topic, the government can't leave this area alone. There are further changes ahead, which, while not on the face of it affecting employers directly, could well have an impact on them and their businesses.

The **Immigration Act 2014** received Royal Assent, officially becoming law, on 14 May 2014. This new Act will effect a number of significant changes, in particular limiting the appeal rights of migrants and their access to services in the UK. This is in line with the Home Office's aim to reduce net migration and prevent abuse of the immigration system. Indeed, the Home Secretary, Theresa May, has previously declared the government's intention to reduce net migration to the tens of thousands though recently has conceded this is a long-term aim. In practice, however, it may well make life more difficult for legitimate migrants and their employers.

Employers, or those with clients sponsoring skilled migrants under Tier 2 of the points based system, are advised to be aware of these forthcoming changes and to take any precautionary action that may be relevant.

Appeal rights

The number of immigration decisions that can be appealed has been reduced from 17 to 4. Essentially only applications involving asylum or human rights claims will still retain a right of appeal.

For other refusal decisions, there will be the administrative review process whereby an erroneous decision can be overturned by the visa post. However, administrative

continued from page 5

review does not equate to a full appeal and the chances of success are generally lower.

This change in appeal rights will mean a Tier 2 migrant who is refused an extension of leave or Indefinite Leave to Remain in the UK would not have a full right of appeal (unless their application involved any human rights element). If the administrative review process is not successful, it could mean Tier 2 employees having to return home permanently or be out of the UK for a period of time to rectify their immigration situation.

There has been no announcement of when these provisions will come into force. However, it may be advisable for employers to conduct a review of their employees' immigration status and, in conjunction with immigration advice, see whether any leave to remain or Indefinite Leave to Remain applications should be made now before the changes come into effect.

Landlord checks

As they have already done with employers, the Home Office now plan to outsource immigration checks to private landlords who will be required to make specified checks on new tenants to ensure they have the right to reside in the UK. This includes households taking in lodgers or sub-tenants. Landlords who fail to carry out the requisite checks will be subject to a civil penalty regime and may face a fine of up to £3,000 per migrant.

It is easy to see how these provisions may make it difficult for migrants to find rented accommodation in the UK, even though the Home Office assures us that anti-discrimination measures will be put in place.

Also, for employers offering accommodation to their staff in the UK, it is important that they ensure they are fully compliant with the checks once the scheme is operational. A pilot is due to be rolled out from October 2014.

NHS surcharge

In order for migrants to contribute to the costs of the NHS, a health surcharge will be introduced. This will require those migrants applying for leave in the UK of 6 months or more to pay a surcharge as part of the visa process in exchange for full access to NHS care (subject to some exceptions). The figure is expected to be approximately £200 (or £150 for students).

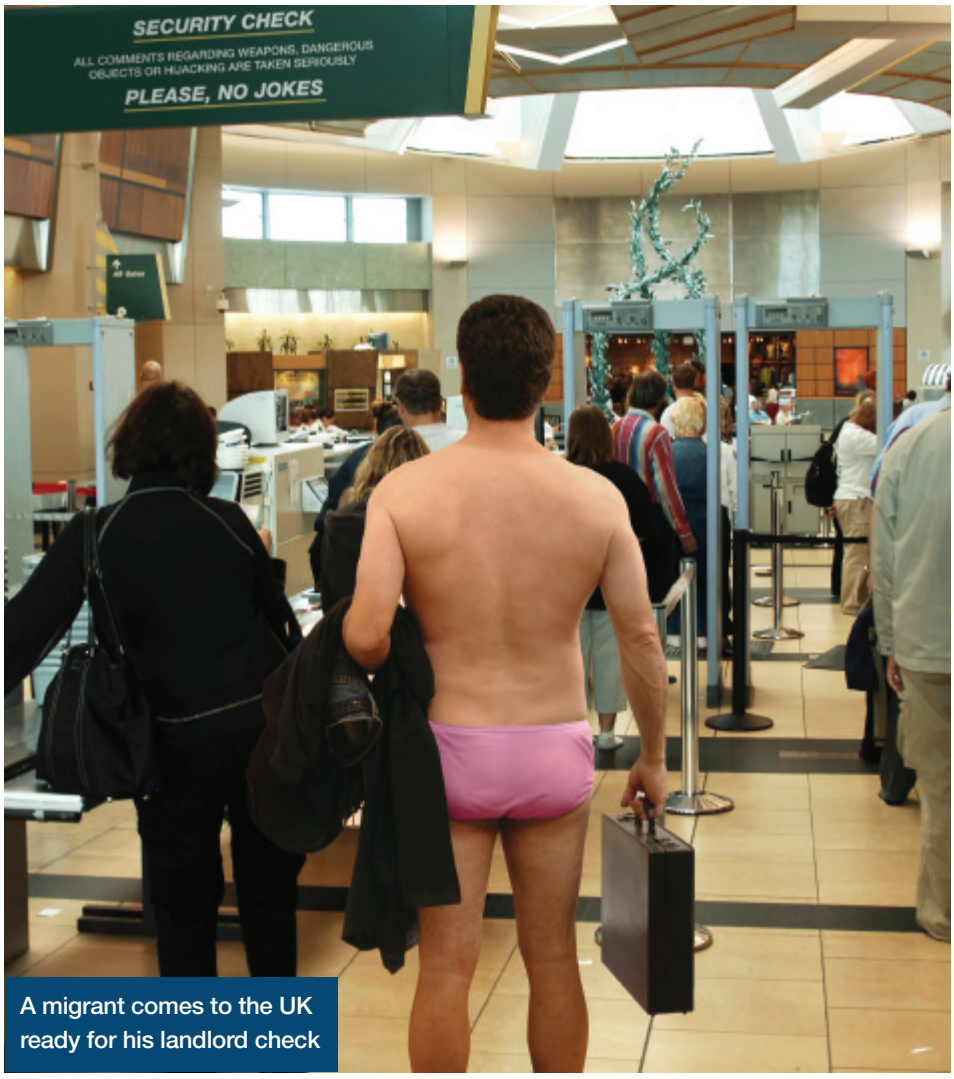
For employers who already bankroll their employee's Tier 2 applications, this may be an additional cost to bear.

Other recent changes

There have been other important changes recently, notably:

- the **right to work checks** that provide UK employers with a statutory defence against a civil penalty for employing an illegal worker. These were updated on 16 May 2014 and have increased the civil penalty from £10,000 to £20,000 per illegal worker. The initial right to work checks must still be made before the first day of work and subsequent checks on expiry of the migrant's leave in the UK. All UK employers are advised to urgently review their policies to ensure they are fully compliant;
- Tier 2 (General) and Tier 2 (Intra Company Transfer: Long Term) migrants can now choose to apply for a **5-year visa** (rather than an initial 3 year visa followed by a 2-year extension); and
- there have been slight increases in the **Tier 2 minimum salary thresholds** and changes to the **appropriate salary rates** for the Standard Occupational Classification ('SOC') codes. Employers should check they are using the appropriate SOC code before assigning a Certificate of Sponsorship.

It is likely that immigration will continue to be a pressing issue in the UK for the foreseeable future. As always, it is best to seek advice early if you or your clients will be affected by any of the changes outlined above.



A migrant comes to the UK ready for his landlord check

FROM LONDON TO LAND'S END

Richard Mumford
Partner, Aviation

There are occasions in life that provide the opportunity to look deep into one's soul and to ask the question as to what is in there. I have recently been provided with just such an opportunity while riding from London (capital of the UK, at least until the outcome of the Scottish Referendum) to Land's End (which is at the very tip of Cornwall and the UK mainland's most westerly point) in 24 hours.

Some statistics:

- 310 miles, or 500 kilometres.
- 6,200 vertical metres of climbing.
- 24 hour time limit, so covering the distance in one go with short food/water stops.

England may not boast the Passo dello Stelvio, the Alpe d'Huez or the Alto de l'Angliru, but neither does it possess the sweeping pan-flat roads of the Netherlands. It is a constant succession of hills, some long and shallow, others long and very steep, but rarely punctuated with periods of straight, flat pedal-friendly roads.

Riding a bike is a fusion of the physical and the mental. On the physical side, it is the utilisation of muscle, ligament and the supporting infrastructure to drive the bike forwards. That is to some extent controlled by feeding, so worked out OK, though it was incredibly painful for long periods. The real challenge was mental, marrying the need to focus on the road ahead (following the route and avoiding cars, bikes and potholes in both daylight and pitch dark) with maintaining the mental resolve to carry on, no matter how brutal things became.

The locals all came out to watch Richard

The ability to concentrate for long periods in granular detail is one that marks a strong lawyer. Avoiding a sheep that is asleep on the tarmac at 2am on Dartmoor similarly marks the ability of the ultra-long distance cyclist. Likewise, tenacity and resolve are features required in gaining our clients a competitive commercial advantage. I am not a natural cyclist, nor do I bask in the delights of the sort of equipment that might grace the professional peleton. But what I found out on those roads was the unbending will to carry on, to prove that I could do it. I set out the particulars of my case to myself, and found inside the will to pass a favourable judgment.

So, what did I discover inside? Belligerence, resolve and the unbending desire to prove 'em all wrong. In other words, the answer to why I became a lawyer, instead of pursuing my original passion for archaeology. Eureka!

I should add that I was riding to raise funds for Parkinson's UK, and the support of friends, colleagues and clients has been overwhelming, providing an unlimited source of fuel to fire the challenge. If you feel you wish to learn more, then follow this link: https://www.justgiving.com/richard-neill-ride24/. See you out on the roads!

FORUM SHOPPING AND COMI SHIFTING

Tim Carter
Partner,
Insolvency

Dawn Grocock
Associate,
Insolvency

What is Forum Shopping?

The term "forum shopping" broadly refers to the ability of a debtor (or other stakeholder) to take advantage of insolvency procedures in the jurisdiction which will best serve their interests. Debtor corporations are increasingly seeking to take advantage of the corporate insolvency procedures available in England, in particular administrations, as well as schemes of arrangement (see box below). In terms of personal insolvency, England has a bankruptcy regime which is considerably more debtor-friendly than those of our European neighbours and thus over recent years there has been an influx of debtors seeking to become bankrupt in England, a practice that has become known as "bankruptcy tourism".

Whilst forum shopping can be a positive thing (in certain cases it may result in the recovery of an insolvent entity or a better result for creditors than would otherwise be achieved) the English courts have been quick to clamp down on cases where forum shopping does not involve a genuine transfer of interests and prejudices creditors. The European Commission has proposed a number of reforms which, amongst other things, seeks to reduce abuse in forum shopping.

An understanding of forum shopping can assist debtors who may genuinely wish to take advantage of insolvency proceedings in another jurisdiction, as well as creditors seeking to challenge a debtor who has disingenuously sought to do so. In this article we briefly summarise the relevant law, examine why the English insolvency regime may be favourable to foreign corporations and individuals alike and consider what steps they should consider taking if they wish to take advantage of English insolvency procedures, together with the factors the English courts look at when deciding whether there has been a genuine shift.

The Law

Council Regulation (EC) No 1346/2000 on Insolvency Proceedings establishes which country's laws should govern insolvency proceedings within the EU. The regulation is based on the premise that the "main" insolvency proceedings should be commenced in the country in which a debtor has its centre of main interests (COMI). It should be noted that "secondary" proceedings can also be opened (in addition to the "main" proceedings), although a full discussion on such proceedings is beyond the scope of this article.

The preamble to the Regulation states that COMI should correspond to the place where the debtor (including a corporation or individual) conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. Article 3(1) provides that in the case of a company, the place of its registered office shall be presumed to be its COMI in the absence of proof to the contrary. However, no comprehensive definition of COMI is provided and the concept has therefore evolved through interpretation by the courts of the various member states and ultimately the European Court of Justice.

The European Commission has proposed amendments to the Regulation to clarify the concept of COMI (as well as amendments to the operation of secondary insolvency proceedings) in an effort to reduce complexity and costs. In a bid to eliminate forum shopping being abused, it has been proposed that a debtor (corporation or individual) should regularly conduct the administration of its interests in a particular jurisdiction for at least three months prior to the commencement of any insolvency proceedings in that jurisdiction.

Forum Shopping – Why?

Corporate Insolvency

There are numerous reasons why the insolvency regime of a particular jurisdiction may be attractive. In England, the reasons why corporate insolvency procedures are often attractive include:

- familiarity with and certainty of the process - many sophisticated global creditors are becoming increasingly familiar with the English administration procedure and schemes of arrangement;

George Best. Bankrupt in the UK. *"I spent 90pc of my money on women, drink and fast cars. The rest I wasted."*

continued from page 8

- availability of 'out of court' proceedings - English administration procedure allows an administrator to be appointed simply by filing documents at court and without any judicial scrutiny;
- flexibility – in some jurisdictions the commencement of local insolvency proceedings may trigger events of default under loan documentation;
- ability to choose the office holder – under the English administration procedure, certain secured creditors can appoint an administrator of their choosing whereas in many jurisdictions, the office holder is appointed by the court;
- availability of certain mechanisms such as pre-pack sales - where a sale of the insolvent entity's business and/or assets is negotiated and agreed prior to the appointment of an insolvency practitioner, and the sale takes place immediately following the appointment; and
- existence of a moratorium - a period in which creditors are prevented from taking any action against the insolvent entity when a corporation enters administration in England or Wales.

Personal Insolvency

In relation to personal insolvency, England and Wales has a bankruptcy regime which is considerably more debtor-friendly than those of our European neighbours, with a bankrupt automatically being discharged after a year compared to the until recently twelve year period under Irish law (which has now been reduced to three years) and at least six years under German law.

The scope of the discharge under English law also extends to the wiping of all debts (subject to a few exceptions), so that effectively the discharged bankrupt can start afresh, debt-free. Many other European jurisdictions are much less favourable. Therefore, it is not surprising that England has seen a steady stream of debtors from other European countries (in particular Germany and Ireland) coming to England to petition for their own bankruptcies.

It is noteworthy that the recommendation of the European Commission published in March 2014 suggests reverting to a maximum duration of three years in relation to the debts of "honest" bankrupts, in an attempt to harmonise laws across the European Union; such a recommendation is not currently legally binding and the one year discharge applies.

COMI shifting

The courts have recognised that a debtor may change its COMI to England, enabling it to take advantage of English insolvency procedures. However, the courts will not tolerate spurious attempts which are prejudicial to creditors.

Corporations

An increasing number of foreign corporations have shifted their COMI to England for the reasons outlined above. Shifting its COMI to take advantage of the insolvency procedures or schemes of arrangement available in England is therefore a realistic option potentially available to foreign corporations, provided that the COMI shift is genuine and therefore not an abuse of process.

The various steps which have been considered as successfully achieving a COMI migration to England have included:

- changing the registered office and registering it with Companies House;
- transferring head office and management functions;
- opening and using English bank accounts;
- informing creditors and suppliers of the change of location;
- conducting negotiations with creditors in England; and
- the transfer of the company's business and assets to England.

The challenge to any migration of a corporation's COMI will depend ultimately on the facts of the individual case and the extent to which all or some of the above have been undertaken. Where the shift is genuine, ascertainable by third parties and has some element of permanence, the courts have not looked to interfere. Factors which have been held to negate a COMI shift to England include: key functions not being carried out in England; location of employees and creditors outside of England; and the company not having traded in England. In practice, sometimes a shift in the corporation's COMI has been successfully achieved in a relatively short time frame i.e. around three months (see for example *Re Magyar Telecom BV [2013] EWHC 3800 (ch)).*

Individuals

In relation to an individual, the factors that the courts may consider in determining whether their COMI has moved to England include the location of their bank accounts and assets. Individuals will be required to produce evidence of that move, for example by producing payslips, bank statements, utility bills and tenancy agreements pertaining to England.

The courts will not, however, allow the system to be exploited and creditors to be unfairly prejudiced; evidence is rigorously examined and where there has been no genuine transfer of COMI, the case struck out. In *Re Eichler (A Bankrupt) [2011] B.P.I.R 1293* the court noted that, due to the persistent abuse of its jurisdiction, a debtor may be required to file detailed evidence in order to prove that his COMI genuinely was in England and/or the court could adjourn any bankruptcy hearing to allow notice to be given to creditors so that they have the opportunity to oppose the making of any bankruptcy order in this jurisdiction. This is a clear warning shot to the "bankruptcy tourist" without a genuine COMI claim that he/she will also face resistance from creditors (and not just the court).

continued from page 9

The recent case of *Schrade v Sparkasse Ludencheid ([2014] EWHC 1049 (ch))* is an example of the court's robust approach where the High Court (on appeal) ruled that the debtor's COMI had not transferred from Germany to England, even though the debtor had moved to England in May 2012 and petitioned for his own bankruptcy in January 2013, in circumstances where he had previously lived in Germany for his entire working life. The factors considered by the court to be against the debtor in this case included that: the debtor's family remained in Germany; his main bank account appeared to be based in Germany; he held stocks and shares in Germany; and he was involved in litigation in Germany. In addition, the debtor's creditors were almost entirely based in Germany. The court therefore was highly suspicious that the debtor's move to England was not in fact genuine and had all the hallmarks of forum shopping. In order for an individual successfully to shift their COMI to England, he/she will need to convince the court that it is genuine, for example, by:

- bringing their family to, and setting up a permanent home in, England;
- taking up employment in England; setting up an English bank account; and
- generally conducting their affairs in England.

In terms of timeframe, the court noted in *Official Receiver v Eichler* that although there was no minimum period of time required for an individual to have moved their COMI before petitioning for bankruptcy, a few days or even a few weeks would be unlikely to suffice. Such a short period would be at odds with conducting the administration of one's interests in a place "on a regular basis". As noted above, the proposed reform is to introduce a minimum period of at least three months.

It is also worth noting that a bankruptcy order can be challenged (on the grounds of the debtor's COMI) by a trustee in bankruptcy or his creditors after it is made in England pursuant to section 282 of the Insolvency Act 1986; a successful challenge would result in the annulment of the bankruptcy order on the basis that the English court did not have the requisite jurisdiction to make it in the first place.

COMI shifter? - likely
Bankruptcy? - less likely

Conclusion

Forum shopping is consistent with the principle of free movement within the EU and increases economic welfare, which must be considered a good thing.

While forum shopping is clearly open to abuse, the net is closing in on those seeking to abuse the system, with recent case law illustrating the robust approach of the English courts to sham cases. This means that genuine relocations of COMI for corporations or individuals alike will stand up to any challenge, whilst creditors of disingenuous debtors should be able successfully to rely on the courts to ensure that such debtors do not prejudice their interests.

Furthermore, the widespread promotion of "improper" forum shopping will not be tolerated - in January 2014, an English legal firm which had abused the system by offering bankruptcy relocation services to German nationals seeking to take advantage of the more favorable English bankruptcy regime had been the subject of an investigation by the Insolvency Service and was wound up by the High Court.

As above, reform of this area of law is imminent and it will be interesting to see which of the European Commission's recommendations are adopted; however, it is expected to be at least two years before any amendments to the Regulation come into force.

SPOTLIGHT: SCHEMES OF ARRANGEMENTS

Over recent years there has been a surge in foreign companies using English schemes of arrangement as a restructuring tool, for either solvent or insolvent companies. A scheme of arrangement is effectively a compromise between a company and its creditors or members (or any class of them) under Part 26 of the Companies Act 2006 and is required to be sanctioned by the court. A scheme of arrangement is potentially available to a company which is liable to be wound up under the Insolvency Act 1986, including foreign companies.

An English court will only sanction a scheme involving a foreign company if it is satisfied that there is a "sufficient connection" with England (which is a far less onerous test than under the COMI rules) (*Re Drax Holdings Ltd [2003] EWHC 2743 (ch)*). Perhaps the most clear cut example of "sufficient connection" is the location of assets within that jurisdiction, although other factors include the location of the company's COMI.

In the recent case of *Re Apcoa Parking Holdings GmbH and others [2014] EWHC 1867 (Ch)* the High Court sanctioned a scheme of arrangement in respect of a group of companies whose parent was incorporated in Germany in circumstances where English law had been adopted pursuant to a change of law clause in the relevant facilities agreement. The High Court found that there was a sufficient connection to England.

TALKING HEADS

In this edition of International Newsbrief we interview Gustaf Duhs, Head of Competition & Regulatory

So if you have a client engaging in anti-competitive activity how do you help them get away with it?

Ha ha - that's not a particularly easy opening question. Are you trying to get me into trouble? Of course we have professional obligations, and I am also well aware that professional advisers have previously been fined by regulators for facilitating cartel arrangements. We are in the business of preventing and mitigating risk on behalf of our clients but we certainly would not put ourselves on the wrong side of the law!

But there are some features of competition law that can assist with risk mitigation:

- In the UK there is now a defence to the criminal cartel offence if advice on the relevant arrangements has been sought from a lawyer. As yet there are no cases to explain if and how this new defence will work in practice - but as lawyers we would in any event encourage businesses to seek our advice!
- Readers may already be familiar with the leniency programmes and this has in the past been very effective in reducing risks where businesses find themselves on the wrong side of the line.
- Abstinence is the most effective form of contraception and an important part of our job is helping clients stay on the right side of the law.

So you're head of competition and regulatory law - just what does that mean in practice?

In short, I manage the competition and regulatory work at S&B.

In terms of competition law, our team does the full range, from core areas such as merger control and competition authority investigations to state aid, procurement law and EU law such as free movement issues.

In terms of the 'regulatory' aspect this broadly involves advising on legal obligations that can give rise to regulatory investigations - which is wide (and ever widening) in scope. Luckily we have talented cross departmental team at the firm that can assist. Areas covered include anti-bribery law, consumer law, data protection, fraud, health and safety and pharmaceutical regulation. We are well placed to respond quickly through our Regulatory Investigations Team.

In practice this means that I am busy with a very varied work load and with a lot of areas to stay on top of. "Variety's the very spice of life, that gives it all its flavour" seems apposite.

What proportion of your work is international?

A very large proportion. Competition law is inherently international - involving as it does the concurrent enforcement of UK and EU law, and with certain obligations that flow directly from the European Treaty. The fact that businesses and the economy are increasingly global in scope means that clients are interested in global not just local risks. One of the main recent developments in this area has been the rapid increase in regulatory enforcement in the emerging economies. It follows from this that having strong international relationships is a really important aspect of our work.

I would have thought this kind of work was the preserve of the larger 'City' firms

Not at all - as a firm we punch well above our weight in competition and regulatory areas with real experience gained within and working alongside the regulators. We deliver a first class client focussed service and that's the key aspect for our clients - but being able to offer that service at a rate city firms cannot match does not bother our clients too much either! The other thing that is worth emphasising is that S&B has a truly international focus. Although our competitors may try and pigeonhole us as 'regional' we really spend a lot of time ensuring that we have strong international capabilities and connections.

What's the most interesting work you have done so far in your career?

Much of the work we do has interesting aspects, and work can be interesting in different ways. Some cases may give rise to interesting issues from a technical legal perspective, sometimes clients will have particularly interesting businesses, we may be dealing with some particularly interesting individuals or indeed even though the matter is humdrum the way it develops or the job you are required to do on it can be interesting.

I like international work - it's enjoyable and invigorating learning about and dealing with different approaches and cultures. Of course stereotypes are unhelpful and can be deeply inappropriate - but co-ordinating a multi-jurisdictional merger filing can at times feel like an experiment in cultural differences, with some jurisdictions adopting an extremely rigorous and detailed approach and others an approach that is more 'laissez-faire'. That is interesting. But in terms of getting the pulse racing it's hard to beat the first few minutes of a dawn raid (although your pulse can subsequently slow down considerably as things progress…).

Does that answer the question? I could mention 'outdoor meetings' on the golf course, tennis pro-ams or karaoke evenings but many misguided people might not consider that work.

What next?

It's an exciting time for the firm. The firm is growing and the competition and regulatory team is expanding. The main priorities in this year's business plan are:

- developing our international relationships in key jurisdictions;
- focussing on our most important sectors; and
- staying on top of the recent changes to and developments in the UK competition regime.

But one of the most exciting things about the job is not really knowing the answer to that question.

Ken Woffenden - Managing Partner & Corporate
+44 (0)1483 401260
ken.woffenden@stevens-bolton.com

David Wilkinson - IP & IT
+44 (0)1483 401207
david.wilkinson@stevens-bolton.com

Jonathan Porteous - Banking
+44 (0)1483 401233
jonathan.porteous@stevens-bolton.com

Laura Hassall - Corporate (and Editor of IN)
+44 (0)1483 406973
laura.hassall@stevens-bolton.com

Stevens & Bolton LLP | Wey House, Farnham Road, Guildford, Surrey GU1 4YD
Tel +44 (0)1483 302264 | Fax +44 (0)1483 302254 | www.stevens-bolton.com

Stevens & Bolton LLP is a limited liability partnership registered in England
(registered number OC306955) and is regulated by the Solicitors Regulation Authority.