

IRELAND

Maples and Calder



John Breslin

Gap in international insolvency law

With just over 400 days until the UK is set to leave the EU, Irish law-makers, government, leading members of the judiciary, and practitioners have been assessing Ireland's readiness as a forum for the adjudication of international commercial disputes. A recent bankruptcy case highlights the deficiency of Ireland's legislative toolbox in the area of personal and corporate insolvency involving non-EU debtors.

In the case of *Official Assignee v Dunne* ([2018] IECA 7) the Court of Appeal addressed issues arising where parallel bankruptcy proceedings had been opened respectively in Ireland and the US. The bankrupt individual had been a property developer operating in Ireland with substantial liabilities to banks as a result of personal guarantees given by him for monies borrowed by his various companies. He left Ireland and filed for bankruptcy in the US. In brief, the bankrupt's spouse sought leave to cross-examine the US bankruptcy officer on his affidavit in the context of allegations (made respectively by the Irish and US bankruptcy officers) that some of the bankrupt's assets were improperly transferred to her. Leave was refused by the High Court but this decision was reversed on appeal. The Court of Appeal held that due process required that the bankrupt's spouse be allowed to cross-examine.

The court highlighted the unsatisfactory state of affairs arising from the facts of the case. In particular, the court was faced with a number of imponderable questions: would determinations by the Irish court (eg, that assets had not been transferred by the bankrupt to defraud his creditors) be binding on the US trustee in bankruptcy? Would an Irish court give effect to an order of a US court bearing in mind the broad extraterritorial reach of US bankruptcy laws?

The court concluded that these issues needed to be addressed by legislation. The court referred to Ireland's domestic

bankruptcy legislation (the Bankruptcy Act 1988). This allows the government to designate countries so that an Irish court can act in aid of bankruptcy proceedings taken in that other country. However, the statute is silent as to the precise steps which may or may not be taken where an Irish court assists an overseas proceeding.

There is in fact a more radical and effective solution – namely the UNCITRAL Model Law on Cross-Border Insolvency (1997). This provides an 'off the shelf' legislative solution for the resolution of private international law issues arising in international bankruptcies and international insolvencies. The UNCITRAL Model Law is closely based on the EU Insolvency Regulation (recast) ((EU) 2015/848) which applies in Ireland and other EU member states (apart from Denmark). However, there is a legislative vacuum where the EU Insolvency Regulation does not apply. The *Dunne* case highlights the need to implement the UNCITRAL Model Law as a matter of urgency. Unless and until it does so, Ireland's suitability as a forum for the resolution of international commercial disputes in this area lacks credibility.

Maples and Calder

75 St. Stephen's Green

Dublin 2, Ireland

T: +353 1 619 2000

E: john.breslin@maplesandcalder.com

W: www.maplesandcalder.com