

## Key Takeaways From Recent UK Insolvency Disputes

By **Gordon McAllister, Edmund Northcott and Emily Cox** (May 23, 2023, 1:03 PM BST)

The global economy continues to tiptoe on the cliff edge of recession. Governments are trying to battle inflation, yet insolvencies continue to skyrocket. We are not just talking about the blockbuster collapses of SVB Financial Group, Credit Suisse Group AG and FTX US either.

In the U.K., the monthly insolvency statistics for March show that registered company insolvencies are up 16% on last year and the same statistics for December 2022 showed that the insolvencies were 76% higher than pre-pandemic levels in December 2019.[1]

This article aims to provide companies and their trusted advisers with key updates from English cases concerning insolvencies and a guide on how insolvency disputes interact with arbitration.

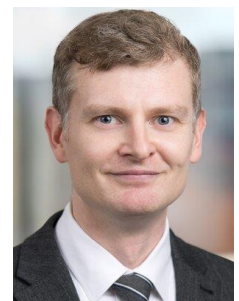
With insolvencies on the rise, this area of law is being regularly tested in the courts and in arbitration. Being aware of these changes and having a strong basis of how insolvency disputes operate is more important now than it has ever been.

### **The High Court makes a landmark post-Brexit ruling on Irish cross-border restructurings.**

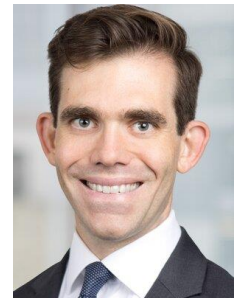
Re Silver Pail Dairy Ireland Unlimited Company[2] concerned an Irish scheme of arrangement to restructure Silver Pail Dairy, Ireland's largest icecream manufacturer that went into an Irish examinership in December 2022.

Silver Pail had creditors, and supplied to parties that were based in England and Wales. Therefore, when the High Court of Ireland confirmed the scheme and issued a letter of request to the High Court of England and Wales, Judge Peter Roth had to decide whether to provide the assistance sought under Section 426 of the Insolvency Act 1986; ordering that Irish law be applied to the company's creditors in England and Wales.

Judge Roth did make such an order on April 5, thereby clarifying how Irish cross-border restructurings are likely to be dealt with post-Brexit.



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Before Brexit, such orders were recognized automatically under European regulations, so the courts have not had to address this issue since 1997 in the case of *Re Business City Express Ltd.*[3]

Under Section 426(4) of the act, courts in the U.K. or any relevant country can seek assistance from the courts of England and Wales in relation to insolvencies, in this case enforcing the scheme against creditors.

Critically for the Republic of Ireland, it is a relevant country pursuant to the Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986, making it the only European Union member state to be so. In his decision, Judge Roth applied *Re Business* as the facts were almost identical, where Judge Donald Rattee stated:

There is no provision of English law which would enable me to make the scheme of arrangement binding on English creditors as the Irish court desires. What I am asked to do is to apply to English creditors Irish law as to the binding effect on creditors of a scheme of arrangement approved by the court.[4]

With the options for effective cross-border cooperation for insolvencies concerning the U.K. significantly reduced after Brexit, *Re Silverpail* serves as a timely reminder that this previously dormant jurisdictional gateway is an important one to have in any arsenal.

### **The U.K. Supreme Court rules solicitors can lose their priority ranking to their fees in an insolvency.**

In *Candey Ltd. v. Crumpler & Or*[5] the U.K. Supreme Court considered when a solicitor's equitable lien is waived or surrendered.

Candey was a law firm that was representing Peak Hotels & Resorts Group Ltd. in litigation that included a case in the High Court of Justice in London. Candey renegotiated its retainer with its then-solvent client to a fixed fee arrangement.

Once Peak Hotels entered liquidation this triggered the terms of the fixed fee arrangement, making Candey's fee payable. The litigation also settled and Candey sought to recover its fees, £4 million (\$4.97 million), from the settlement payment.

The liquidators of Peak Hotels challenged Candey's claim on the basis that Candey had waived its right to the equitable lien over its fees by entering into the fixed fee arrangement. The Court of Appeal agreed in January 2020 and so did the U.K. Supreme Court in December 2022 on appeal, meaning that Candey lost its priority ranking that solicitors typically enjoy in the case of recovering fees from an insolvent company.

### **Insolvencies and Arbitrations**

With arbitrations often conducted behind closed doors, e.g., Clause 38.12 of the FTX user terms requires disputes to be resolved through arbitration governed by the Singapore International Arbitration Centre, getting an insight into how insolvencies are dealt with in arbitration is more difficult.

Here is a useful refresher on how an insolvency can affect a prospective, or live, arbitration.

In most jurisdictions, a company going insolvent can affect an arbitration at any point in the

proceedings. If there are any arbitral claims in the offing, ongoing, or there is an enforceable award, it is critical to consider how such claims interact with the domestic courts and local insolvency rules.

### ***Prospective Arbitration***

In England and Wales, the Insolvency Act 1986 governs how the licensed insolvency practitioner is to manage and distribute the assets of the distressed company. Where the company is in "insolvent liquidation," the focus is on distributing the assets, versus "company administration" where the insolvency practitioner is looking to recover the company.

If ongoing claims concern a creditor, the insolvency practitioner will seek to reach an agreement through arbitration. If not, the creditor may have to submit a claim through the formal insolvency process, thereby lifting the veil of confidentiality over the original dispute.

Once a business enters insolvent liquidation or company administration, there is an immediate freeze on any legal proceedings brought against the business — meaning a prospective arbitral claim from a creditor could be shut out absent permission from the court or the administrator.

It is also important to note that insolvency of a prospective respondent does not necessarily mean the end of the road for a would-be claimant.

In England and Wales, the Third Parties (Rights Against Insurers) Act 2010 permits a third party to make a claim against an insurer directly under a liability policy if the insured is insolvent.

When considering claims from the standpoint of the insolvent company, pursuant to the Insolvency Act 1986, the insolvency practitioner has the power to bring or defend proceedings on behalf of the company, which includes arbitration claims.

### ***Arbitrations That Are on Foot***

For arbitrations that are already ongoing in England and Wales, there is an automatic stay of proceedings when insolvency commences. Parties must seek permission from the courts to lift the stay. In England and Wales, the burden is on the creditor to demonstrate that the leave would not hamper the administration of the insolvent company.

### ***Enforcement of Arbitral Awards***

The insolvency of a party may give rise to grounds to set aside the award.

In the U.S., an award can be set aside if the tribunal failed to stay proceedings once the insolvency commenced. Be aware of cross-border effects of insolvency laws too: Where a company goes into insolvency in England and Wales, the courts may decide that arbitral proceedings seated outside these jurisdictions are nevertheless subject to their domestic insolvency laws.

Where a foreign-seated tribunal fails to stay the proceedings, this could be a ground to set aside the award. In short, read up on local insolvency regulations, even if your arbitration is seated in another jurisdiction.

With insolvencies and insolvency-related disputes on the rise, together with a shifting legal landscape

post-Brexit, staying up to date on developments in law, which could impact businesses' ability to restructure or creditors' ability to recover what they are owed, is more important than ever.

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[1] "Commentary – Monthly Insolvency Statistics March 2023", The Insolvency Service, England & Wales, published 18 April 2023); "Commentary – Monthly Insolvency Statistics December 2022", The Insolvency Service, England & Wales, published 17 January 2023).

[2] Re Silverpail Dairy Ireland Unlimited Company [2023] EWHC 895.

[3] Re Business City Express Ltd. [1997] 2 BCLC 510

[4] Re Business, at 513.

[5] Candey Ltd. v. Crumpler & Or [2022] UKSC 35.