

BANKRUPTCY CONVENTION

read with MEMO 5A
Memo 5
Memo 5B

Enforceability of Foreign Revenue Claims

Reference is made to the following authorities:

- Dicey (8th Edition 1967) "Conflict of Laws";
- Cheshire (8th Edition 1971) "Private International Law";
- British Institute of International and Comparative Law Journal (1967) Vol. 16 Part III page 663 (The Enforcement of Foreign Non-Criminal Penal and Revenue Judgments in England and the United States", by Thomas B. Stoel, junior) (a copy of that issue is herewith).

Dicey, Rule 21 (page 160) states: "The Court has no jurisdiction to entertain an action - (1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state; or (2) founded upon an Act of State.

It consequently follows that by Rule 167, (p.1012) "A foreign judgment (other than a Scottish or Northern Irish judgment extended to England under the Judgments Extension Act 1868) is impeachable on the ground that its enforcement or, as the case may be, recognition would be contrary to public policy." This rule is examined at page 1012 in relation to the Administration of Justice Act, 1920, and the Foreign Judgment (Reciprocal Enforcement) Act, 1933, both of which refer to "reasons of public policy or some other similar reason" which preclude the registration or enforcement of foreign judgments. Both Acts do not in so many words preclude the enforcement of foreign judgments for taxes and the other specified categories.

The case histories in the United Kingdom and the United States are well summarised and examined in Stoel's article cited above (16 B.I.I.C.L.J., supra, page 663).

Having regard therefore to the expressed intention of the Convention, under Articles 17, 21 and 42, read with the Report and the Proceedings, to make "foreign" tax and analogous claims, including social security and parastatal obligations enforceable in another State as a necessary consequence of a Community bankruptcy administration, it is plain that this represents not only for the United Kingdom but also for all other countries which are not in bankruptcy treaty with one another, a major departure in the field of private international law. The law in this respect, i.e. as to the enforceability of foreign tax claims, is the same in France as it is in England, see the citation in Government of India v. Taylor (1955) A.C. 491, (cited in Memo 5 at page 8) in the speech of Lord Somervell at page 515, from Pillet's "Traité de Droit International Privé", which appears to state the law in exactly the same terms as may be deduced from Dicey.

To the Government of India v. Taylor decision cited above, may be added the more recent decisions in Metal Industries (Salvage) Limited v. Owners of S.T. "Harle" (1962) S.L.T. 114, (where the Scottish Outer House refused to permit the French Government to recover in Scotland for unpaid contributions to a National Health Plan), and Rossano v. Manufacturers' Life Insurance Co. (1963) 2 Q.B. 352, a case between an Egyptian subject and a Canadian Insurance Company, where the Egyptian Government's tax enactments were not enforced.

The traditional arguments in favour of not recognising foreign tax claims which are to be found in Dicey and in the decisions quoted apply, in my opinion, with equal force to the position contemplated by the draft Convention, in that as drafted the Court of the State of the bankruptcy is not to be in any position to adjudicate upon or in any way to control or verify the quantum of the other State's claim to tax (or other)

claims or its preferential or secured status.

In the Proceedings this question was canvassed inter alios by Professor Micheli, Professor of Law at Rome University, at pages 91-2; I quote (my translation) from page 92: "We know well what difficulty we encounter, particularly practitioners like myself, with the preferential debts owed to the State, to Social Security, etc. Here one sees this preferential position being extended even beyond the frontiers of the country where are to be found the assets against which such public institutions commonly have their preferential rights and rights of lien or security. In the draft, such (public) creditors acquire an unsecured debt which can be satisfied, if they have not received their due in full, outside the country over which they exercise their State powers. This seems to me to be somewhat oppressive, and I think that we shall need to reduce preferences of this kind. This right is itself a kind of preference, since in all cases the public body is going to have an unsecured creditor's right outside that State in which it has the means of satisfying itself and where it exercises its powers."

I myself referred to the same subject in my speech at pages 103-4, and Professor Hirsch, Professor of Law at the University of Geneva, spoke to the same effect at Proceedings, pages 111-112. In particular, Professor Hirsch said at page 112, (my translation) "After all, in the majority of bankruptcies, we are well aware that only the preferential (or secured) creditors receive any substantial dividend. In very many cases, the unsecured creditors received nothing or practically nothing. Accordingly, the fundamental issue at stake in the winding up is to discover whether a creditor is preferential or not. Well now, the very concept of (i.e. the draft Convention) involves this question"

determined on the basis of each national law, so far as concerns the assets located in the State in question.

We therefore ask ourselves whether it would not be preferable, at least in certain cases, to withhold the jurisdiction of the courts of the country where the assets are situated; one must not forget after all that the principles of unity and universality of the bankruptcy are constituted for the purpose of satisfying the rights of the creditors in the most practical and the most expeditious manner possible. The interests of the creditors constitute the essential touchstone for the Convention"; Professor Hirsch continued further to the same effect. (see also "Cahiers du droit européen", 1970, p.50)