CA on appeal from Mr Justice Knox, before Roch LJ; Morritt LJ; Thorpe LJ. 28th January 1997.

MORRITT LJ:

Insolvency Act 1986 s.426 provides, so far as relevant, that

(4) The courts having jurisdiction in relation to insolvency law in any part of the United Kingdom shall assist the courts having the corresponding jurisdiction in any other part of the United Kingdom or any relevant country or territory.

(5) For the purposes of subsection (4) a request made to a court in any part of the United Kingdom by a court in any other part of the United Kingdom or in a relevant country is authority for the court to which the request is made to apply, in relation to any matters specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction.

In exercising its discretion under this subsection, a court shall have regard in particular to the rules of private international law.

(10) In this section "insolvency law" means-

(a)in relation to England and Wales, provision made by or under this Act or sections 6 to 10, 12, 15, 19(c) and 20(with Schedule 1) of the Company Directors Disqualification Act 1986 and extending to England and Wales; .....

(d)in relation to any relevant country or territory, so much of the law of that country or territory as corresponds to provisions falling within any of the foregoing paragraphs;

Bermuda is a relevant territory (The Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 S.I. 1986/2123) and the Supreme Court of Bermuda has jurisdiction in relation to insolvency law in Bermuda corresponding to that of the High Court in England and Wales. By a Letter of Request dated 9th February 1996 the Supreme Court of Bermuda, in the exercise of its inherent jurisdiction, requested the High Court of Justice in England pursuant to the provisions of Section 426 Insolvency Act 1986 to assist it by

"*(1) recognising the right and title of David E.W.Lines, Peter C.B.Mitchell and Christopher J.Hughes, when acting within the jurisdiction of the High Court of Justice in England, to represent and to act for and on behalf of [Electric Mutual Liability Insurance Company Ltd] as its Joint Provisional Liquidators for the purposes of restraining any actions or proceedings issued by [Hannover Ruckversicherungs-Aktiengesellschaft] in England and in any and all jurisdictions*

(2) ordering that:-

(a) the continuation or commencement of any actions and proceedings brought by Hannover Re or any of its associated or subsidiary companies against the Company within the jurisdiction of the High Court of Justice in England and in any and all jurisdictions

(b) the putting in force of any attachment, sequestration, distress or execution within the jurisdiction of the High Court of Justice in England and in any and all jurisdictions by Hannover Re or any of its associated or subsidiary companies against the estate or effects of the company be restrained subject, in each case, to the leave of this court;"

Earlier in the letter it had been recited that a petition to wind up the company referred to had been presented to and the joint provisional liquidators appointed by that Court on 20th October 1995 and that "*it has been shown to the satisfaction of this Court that it is necessary for the purposes of justice and to assist the Joint Provisional Liquidators in the performance of their duties..*" that, in effect, such orders should be made.

On 9th and 15th February 1996 Harman J made orders in terms of the Request pending the full hearing of the application for such relief made by the Joint Provisional Liquidators of Electric Mutual Liability Insurance Co.Ltd. ("the Company"). By his order made on 3rd April 1996 following such hearing Knox J declined to continue the injunctive relief in respect of "any and all jurisdictions" outside England and Wales as sought in the Letter of Request. As the Joint Provisional Liquidators were not concerned to obtain such relief confined to England and Wales Knox J dismissed their application. This appeal of the Joint Provisional Liquidators from that order is brought with the leave of the judge.

The Company was incorporated in the State of Massachusetts in 1927 on the initiative of interests connected with General Electric Company, a company incorporated in New York. It was formed to carry on business as a mutual property/casualty insurance company and as such issued, amongst others, comprehensive general liability policies covering risks arising in the United States and Puerto Rica to, principally, General Electric and its associated companies. The Company does not now and never did have any place of business in the United Kingdom.

One of the reinsurers of the Company was the Defendant, Hannover Ruckversicherungs-Aktiengesellschaft ("Hannover Re"), which at all material times had and still has a place of business in Fountain House, 130 Fenchurch Street, London, EC3 and in Chicago, Illinois, USA but none in Bermuda. This reinsurance, though effected through brokers in London, was accepted by Hannover Re through its office in Germany. Each of the eight contracts of reinsurance between the Company and Hannover Re in force at the material time contained an arbitration clause in common form which, so far as relevant, provided that

"*Should any difference of opinion arise between the Reinsurers and the Company which cannot be resolved in the normal course of business with respect to the interpretation of this Agreement or the performance of the respective obligations of the parties under this Agreement, the difference shall be submitted to arbitration. .....*

The arbitrators and umpire shall be officials of insurance or reinsurance companies authorised to transact business in one or more states of the United States of America and writing the kind of business about which the difference has arisen. The arbitrators and umpire are relieved from all judicial formalities and may abstain from following the strict rules of law and they shall make their award with a view to effecting the general purpose of this Agreement rather than in accordance with the literal interpretation of the language and the decision of the majority shall be final and binding upon the parties under this Agreement. .....

The arbitration shall be held at the times and place agreed upon by the arbitrators and umpire. The laws of the State of Massachusetts shall govern the arbitration."

From 1991 onwards the Company faced very substantial claims from General Electric which the latter contends are covered by the comprehensive general liability policies issued to it by the Company. Those claims are in respect of the cost of cleaning up toxic waste dumps in the United States used for many years by General Electric and in respect of persons alleged to have contracted asbestos related diseases from asbestos products manufactured by General Electric. The evidence suggests that there are now some 600 of such sites and 75,000 such asbestosis claims.

In 1995 the Company reorganised its business. The reorganisation involved two principal steps. The first was to hive down to a wholly owned subsidiary, Electric Insurance Company, the more profitable insurance business of the Company and assets worth about US$75m. The effect of this step was to leave General Electric as the only creditor of substance of the Company in respect of the claims relating to toxic waste and asbestosis. The shares in Electric Insurance Company were transferred to Wilmington Trust Company as the trustee of a Delaware Guarantor Trust of which the Company was and is the beneficiary. The second principal step was to "redomesticate" itself to Bermuda. This step involved transferring its domicile as permitted by s.49A Massachusetts Insurance Code and being "continued" into Bermuda as an "exempted Company" in accordance with Part XA Bermudian Companies Act 1981.

The Reorganisation and therefore both these steps required the approval of the Commissioner of the Massachusetts Division of Insurance pursuant to Massachusetts General Laws Chapter 175 paragraph 206B. Application for approval was made on 7th June 1995 and, following a public hearing held on 20th June, was granted on 28th June 1995. On 1st July 1995 the Company was re-registered in Bermuda and thereby continued as a exempted company.

On 20th October 1995 the Company presented a petition to the Supreme Court in Bermuda for its winding up by that Court on the grounds that it was insolvent. On the same day the Joint Provisional Liquidators were appointed. The Company contended that its reserves, stated in the accounts for the periods ended 31st December 1994 and 30th June 1995 to be some US$250m., were non-existent and that its liabilities exceeded its assets by US$500m.

By a letter addressed to the Company dated 9th January 1996 Hannover Re demanded arbitration under the various reinsurance contracts then subsisting between them. The relief sought was "rescission of the Treaties from inception". In the alternative Hannover Re sought, but has since abandoned, an order "to withdraw its Bermudian winding up petition as fraudulently filed and redomesticate back in Massachusetts under the regulatory oversight of the Massachusetts Division of Insurance". The grounds set out in the letter alleged fraud in the reorganisation which was described as "a carefully devised scheme to extract more money from Hannover Re...than it was rightfully owed" and alleged that the Company had "engaged in serious breaches of contract and other actionable conduct in connection with.... its redomestication and its filing of the winding-up petition".

The Letter of Request with which this appeal is concerned was issued a month later on 9th February 1996. Orders giving effect to the request in accordance with its terms were made ex parte and on a temporary basis by Harman J on that day and on 15th February. On the latter date he gave directions as to the evidence to be filed. The application was heard by Knox J in mid-March. Before referring to the reasons for the order of Knox J contained in the judgment he gave on 3rd April it is convenient to indicate certain relevant matters which have occurred subsequently.

On 9th April 1996 Kemper Re, another of the reinsurers of the Company, sought leave to intervene on the hearing of the winding up petition, gave notice of its intention to apply to the Supreme Court in Bermuda for leave to commence proceedings for judicial review of the decisions of the Minister of Finance and the Registrar of Companies in Bermuda which enabled the redomestication of the Company and served an arbitration demand on the Company. On 8th May 1996 the Supreme Court in Bermuda restrained Kemper Re from proceeding with the arbitration pending the hearing of both the winding up petition and the judicial review proceedings which had been issued on 18th April in accordance with leave granted on 16th April. On 18th May certain London reinsurers of the Company made demands for arbitration. On 26th July 1996 Ground J ordered that the Company should be wound up by the Court, in consequence of which the Joint Provisional Liquidators were appointed Joint Liquidators of the Company on 12th September 1996. Between 8th and 22nd October 1996 Wade J heard the application of the Company dated 9th May to set aside the leave to issue the proceedings for judicial review granted to Kemper Re on 16th April 1996. Wade J delivered her reserved judgment on 18th December. She concluded that leave to move for an order of judicial review and an extension of time for that purpose should not be granted. Accordingly she set aside the leave and extension of time granted by Ground J to Kemper Re on 16th April 1996 primarily on the ground that *"arbitration proceedings will provide the most appropriate vehicle to secure, fully and directly, the relief they [sc.Kemper Re] seek"*.

In his judgment Knox J recorded the relevant facts. He noted that there was no evidence that any step in the arbitration demanded by Hannover Re was threatened or intended to be taken in this jurisdiction with which the only connection was that Hannover Re has a presence and had been duly served here. He considered that it would be inappropriate for him to go into the merits of the issues in the arbitration but observed that "there is a real issue which if determined in favour of Hannover Re would lead to reinsurance treaties being rescinded". He described the nature of the application before him in these terms *"It is not suggested the reinsurance treaties have any connection with this jurisdiction. Nor is relief within this jurisdiction sought otherwise as than as a peg on which to hang a worldwide injunction against Hannover Re. It was made clear during argument that an order limited to this jurisdiction would be of no utility to the Joint Provisional Liquidators and was not desired. In this respect, there is so far as I am aware no precedent in reported cases of an extra-territorial order being made by the court pursuant to a request under section 426(4) of the Insolvency Act 1986, when no relief within the jurisdiction is being sought.*"

He referred to the availability in the United States under s.304 of the Bankruptcy Code of a procedure whereby an injunction may be obtained in proceedings ancillary to a Bermudian liquidation to restrain the continuation of proceedings against the company in liquidation. That procedure was not thought by the Joint Provisional Liquidators to be as appropriate or as cheap as obtaining an injunction from the High Court in England.

Knox J rejected the submission for Hannover Re that the application before him was not one in which the Court was being asked to apply "insolvency law" as referred to in s.426(4) Insolvency Act 1986. In that context he said *"I do not accept that submission which seems to me to involve much too strict adherence to the letter rather the evident intention of the legislation. Even on a purely literal approach, the authority conferred by subsection (5) is authority to apply in relation to England and Wales provision made by or under the Insolvency Act 1986 and extending to England and Wales or in relation to Bermuda so much of the law of Bermuda as corresponds to provisions made by or under the Insolvency Act 1986. As Mr Hildyard, for the Joint Provisional Liquidators, pointed out there is no article, whether definite or indefinite, preceding the word "provision" and the expression is capable of referring to the scheme of insolvency law provided by the Insolvency Act 1986 and to embrace ancillary jurisdictions of the Court, such as the grant of injunctions to prevent abuse of or interference with the processes of liquidation. Such ancillary provisions even on a technical linguistic level can properly be regarded as provisions made under the Insolvency Act 1986 because Insolvency Rules 7.51 provides for the rules of the Supreme Court in the practice in the High Court to apply insolvency proceedings except so far as is inconsistent with the Insolvency Rules and RSC Order 29, Rule 1 provides for the grant of injunctions. Quite apart from such verbal justifications for the existence of a jurisdiction under section 426 to grant an injunction in aid of a liquidation process I am of the opinion that the section should be construed so as to include the Court's ancillary jurisdiction where it exists in connection with the protection of the processes of liquidation even though the remedy derives from the Court's general power to grant injunctions under section 37(1) of the Supreme Court Act 1981. A common example in the Companies Court is the grant of an injunction to restrain presentation or advertisement of a winding-up petition where there is a genuine dispute as to the status of the petitioner as a creditor. The granting of the injunction is technically an exercise of the Court's power to restrain abuses of its processes and as such not specifically authorised by any particular section of the Insolvency Act or of the Rules although the petition itself, if and when heard, would be dismissed because the petitioner was not a creditor within and did not therefore have a debt within section 123 of the Insolvency Act 1986.*"

He then considered the submission for Hannover Re that there was no "*subject matter*" jurisdiction in relation to the matters in dispute and the rival submission for the Joint Provisional Liquidators that the word "*shall*" in s.426(4) required the Court, subject only to principles of public policy and a discretion as to the way in which the assistance might be provided, to do all that it could to assist. After referring to a number of authorities including ***Re Paramount Airways Ltd*** (1992) BCLC 710, ***Mackinnon v Donaldson, Lufkin and Jenrette Securities Corporation*** (1986) Ch. 482 and ***Barclays Bank PLC v Homan (***1993) BCLC 680 he continued.

"*In my judgment there is jurisdiction in this Court to make an extra-territorial order in personam upon a person properly served here. The decisions in Paramount, MacKinnon, and Barclays Bank v Homan seem to me to support that. But they equally support the view that as a matter of discretion extra-territorial orders against foreign bodies need to be justified by a relevant link with this jurisdiction. There is no such link in this case before me. It is not suggested that the London branch of Hannover Re had any connection with the reinsurance. I have no doubt therefore that but for the Letter of Request and section 426(4) this court would not make the worldwide order asked for on this application if it was asked to do so. The issue therefore narrows itself as to whether the Letter of Request either effectively compels and should tip the scales of discretion in favour of the making of the order sought. I have come to the conclusion that it does not. My reasons are as follows:*

First, as I have already indicated, I am content to accept for the purposes of this judgment that in the circumstances I should be prepared to grant the injunction asked for within this jurisdiction. That seems to me to satisfy the obligation made upon the court to assist. I am not refusing to assist because if asked for it I would grant assistance within the jurisdiction and it is only because it is not asked for that I do not grant that [relief] to that extent.

Secondly, section 426(10) in its definition of insolvency law appears to me to give some guidance about the ambit of the relevant law in its final words "and extending to England and Wales" .

Thirdly, where this Court is being asked to act extra-territorially it seems to me incumbent upon the applicant for such an order to show affirmatively why this, rather than the court which has the most connection with the subject matter of the proceedings, should give assistance. I can conceive of circumstances where in that court which has the closest connection with the subject matter of the proceedings there might be a lack of available remedies and that that could justify a request for extra-territorial action by this Court. But that is not this case where the only reasoned criticism of the United States jurisdiction under section 304 of the Federal Code is that it is more expensive. That seems to me to be an inadequate reason.

Fourthly, I consider that the inclusion in the Letter of Request of a request for an order within this jurisdiction should be disregarded in testing this question because it is not what is wanted. The request to this court should be understood as a request to act entirely and exclusively extra-territorially in a matter with no connecting factors with this jurisdiction other than the existence of a London office of a German organisation with a very wide, if not strictly worldwide trade. To make such an order, would, in my view, be contrary to established principles of private international law.

Fifthly, I consider that there is no doubt whatever but that the country which has the closest connection with the arbitration treaties and the proposed arbitration thereunder is the United States of America. I have not, of course, forgotten that one of the provisions in the article which I have quoted is one to the effect that the arbitration can take place where the Arbitrators decide."

After referring to and rejecting a number of further points made by Counsel for the Joint Provisional Liquidators he concluded that the temporary order made by Harman J should be discharged.

The Joint Liquidators submit that Knox J was wrong. They ask this Court to make orders against Hannover Re in the form set out in the Letter of Request. They contend that the Court in England is mandated by s.426(4) to assist the Supreme Court in Bermuda and, given that a world-wide injunction is the only possible or effective means of assisting, it is not entitled to exercise its own discretion and consider whether or not to grant an injunction of the type sought in the Request. In the alternative, they submit, if this court is entitled to exercise its own discretion it should do so in favour of assisting the Supreme Court in Bermuda by making the orders it has requested.

For Hannover Re it is submitted that the orders sought by the Letter of Request do not come within s.426(4) at all for to grant them would involve an exercise of the Court's general equitable jurisdiction and not the application of insolvency law as defined in s.426(10). In the alternative it submits that the proper construction of s.426 requires the Court in England to entertain the application by the foreign applicant notwithstanding its lack of jurisdiction apart from the section, to consider the relevant insolvency law and the subject matter of the request and if and to the extent that it thinks fit to grant the relief sought. It recognises that this approach may be thought to be contrary to the first instance decisions in ***Re Dallhold*** (1992) BCLC 621; ***Re BCCI No.9*** (1994) 2 BCLC 636 and ***Re Focus Insurance Co. Ltd*** (1996) BCC 659 and asks that to that extent they be overruled.

Hannover Re submits that the relief sought should be refused. It justifies this outcome on one or other of two bases. The first is that if the Court in England has the general discretion for which it contends then it should be exercised so as to refuse the relief sought. The second is that if the Court in England has the more limited discretion indicated in ***Re Dallhold , Re BCCI No.9*** and ***Re Focus Insurance ,*** namely that it should do what is requested unless there is a good or compelling reason to the contrary, the absence of any connection with England and the existence of appropriate remedies in the United States with which the dispute is connected are sufficient reasons to refuse the orders sought. In the last resort it submits that the Letter of Request should not be complied with further than to grant an injunction restraining proceedings etc. in England only, leaving the Joint Liquidators to apply in the United States for comparable relief there. Hannover Re also seeks, though faintly, to justify the withholding of relief on the grounds that the Joint Liquidators failed to disclose to Harman J the existence in the United States of the jurisdiction under s.304 Bankruptcy Code or of other proceedings pending against the Company as elaborated in the affidavit of the principal deponent for Hannover Re.

In these circumstances it appears to me that the submissions should be dealt with under two broad headings, namely the construction of s.426(4),(5) and (10) and the application of those provisions so construed to the facts of this case. Each of those broad headings comprehends a number of separate issues which have to be resolved. I will deal first with the question of construction.

The issues which arise under this heading are

(1) What is comprised in the words "Insolvency Law" as defined in subsection (10)?

(2) In the light of the answer to that question what is the inter-relationship between subsections (4) and (5) with regard to the ability of the Courts in England to assist the courts of the other parts of the United Kingdom or of the relevant countries or territories?

(3) In the light of the answers to both those questions what is the nature and extent of the obligation imposed by subsection (4)?

Before seeking to resolve those issues it is convenient to trace the legislative history of what is now s.426(4), (5) and (10) and consider such authorities on the construction of those provisions and their predecessors as exist.

Provisions for co-operation between the courts of England and Wales and the courts of other places in connection with the bankruptcy of individuals have existed since at least 1869. The provisions of s.74 Bankruptcy Act 1869, s.118 Bankruptcy Act 1883 and s.122 Bankruptcy Act 1914 are for present purposes in identical terms so that it is only necessary to set out the terms of the last such provision before the enactment of Insolvency Act 1985 which with other legislation was consolidated into Insolvency Act 1986. S.122 Bankruptcy Act 1914 provided as follows *"The High Court, the County Courts, the Courts having jurisdiction in bankruptcy in Scotland and Ireland, and every British Court elsewhere having jurisdiction in bankruptcy or insolvency, and the officers of those Courts respectively, shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of the Court seeking aid, with a request to another of the said Courts, shall be deemed sufficient to enable the latter Court to exercise, in regard to the matters directed by the order, such jurisdiction as either the Court which made the request, or the Court to which the request is made, could exercise in regard to similar matters within their respective jurisdictions."*

There appear to have been only four reported decisions of courts in England and one in Northern Ireland concerning the construction or application of any of the statutory predecessors of s.426(4) and (5) which bear on any of the issues we have to decide.

The first is ***Re Levy's Trusts*** (1885) 30 Ch.D.119. That case concerned the question whether the bankruptcy of the life tenant in New South Wales caused a forfeiture of his interest. Kay J decided that it did for the trustee in bankruptcy in New South Wales might have sought an order in aid under s.74 Bankruptcy Act 1869 requiring the trustees of the settlement to pay the income to the trustee in bankruptcy. He considered that had he done so such an order would have been made "*as a matter of course*". There is no indication whether this was because of the lack of arguable defence or because of the requirement of the section that the courts in England "shall severally act in aid of" every British Court elsewhere.

The second is ***Galbraith v Grimshaw*** (1910) AC 508. In that case a bankruptcy order was made in Scotland after the making of a garnishee order nisi in England. The issue was which of the trustee in bankruptcy or the judgment creditor was entitled to the debt. The House of Lords, in agreement with the Court of Appeal, decided in favour of the judgment creditor because the court in Scotland had had no power to interfere with the claim of the judgment creditor. At page 512 Lord Macnaghten said, in reference to s.118 Bankruptcy Act 1883, *"The Act does not say that a Scotch sequestration shall have effect in England as if it were an English bankruptcy of the same date. It only says that the Courts of the different parts of the United Kingdom shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy. The English Court, no doubt, is bound to carry out the orders of the Scottish Court, but in the absence of special enactment the Scottish Court can only claim the free assets of the bankrupt."*

Again, because of the circumstances of that case, it is not clear whether the English Court was so bound because of the provision of the Act or because of the absence of any reasonable alternative.

The third case is ***Re Osborn*** (1931-2) B & CR 189. In that case a bankruptcy order had been made in the Isle of Man pursuant to which the trustee sought to recover real and personal property of the bankrupt in England. For that purpose the trustee sought and obtained from the court in the Isle of Man an order that a request be made to the High Court in England for declarations that the whole of the real and personal estate of the bankrupt situate in England "became vested in the trustee" on the date of the bankruptcy order or that such property should vest in the trustee from the date of the declaration or for such other declarations as the court thought fit. The trustee applied to the court in England for declarations that certain specified real and personal property of the bankrupt had so vested, for the appointment of a receiver, for a vesting order and for such other orders as the court thought fit for the purpose of enabling the trustee to obtain possession and control of the specified property. During the course of argument Farwell J indicated that the court had a discretion. Counsel for the applicant disputed this and relied on the terms of s.122 Bankruptcy Act 1914. In his judgment, at page 194, after describing the facts of the case, Farwell J said *"I think it is clear that I am bound in a proper case under section 122 to assist the Court in the Isle of Man in the bankruptcy which is the bankruptcy under that jurisdiction. I think under the section it is plain that this Court must give such assistance as it can, but subject of course, to the considerations which would arise if there was also a bankruptcy in this country, as to the rights of the creditors and other persons in this country. There not being any such conflict, I think this Court is bound to give all the assistance that it can. On the other hand, it is in my judgment, a matter of discretion in this Court as to what assistance it ought to give in each case, and I think I am therefore certainly entitled to impose conditions in any order which I think it right to make in aid of the bankruptcy in the Isle of Man."*

The judge concluded that he could not make the declaration or vesting order sought but that he could and should appoint a receiver for otherwise it would not be possible to assist the bankruptcy in the Isle of Man "which I think that I am bound to do if I can". He decided to impose conditions on the appointment including one that the trustee should submit to the jurisdiction and abide by the decisions of the court in England on any question arising in respect of property in England.

A leading textbook on bankruptcy, namely Williams on Bankruptcy, in the eighteenth edition published in 1968 noted under s.122 that the High Court was bound to give assistance but had a discretion as to what assistance it ought to give. This note was plainly in accordance with the then reported authorities, in particular ***Re Osborn .***

The fourth case is the decision of Lord Lowry, then Lord Chief Justice of Northern Ireland, in **In re Jackson** (1973) N,I.67. In that case the bankrupt had carried on business in the Republic where he was made bankrupt. The day before the order to that effect he gave a cheque to solicitors in Northern Ireland with instructions to use the money in the purchase of a house for his wife. The court in the Republic made an order for a request to be made of the court in Northern Ireland for an order declaring that the real and personal estate of the bankrupt situate in Northern Ireland had vested in the trustee in bankruptcy. Lord Lowry considered that s.122 Bankruptcy Act 1914 applied. He adverted to the question which had arisen concerning the exercise of the discretion by the court requested to act in aid. He considered that the terms of the statutory provision was mandatory in form and that in general the intention was that once the necessary conditions were satisfied it was the duty of the court to give such assistance as it can. He referred to the judgment of Farwell J in ***Re Osborn*** and continued, at page 72,

"There appears, with respect, to be a conflict between the duty of a court to give "all the assistance that it can" and its discretion to decide what assistance it ought to give in each case, since the exercise of discretion may result in the courts' giving less assistance than it can.

While there may be examples which have not occurred to me, I consider that, except in cases of conflicting bankruptcies and those where the applicant seeks to enforce another country's revenue laws, this court is bound to give under the relevant provisions every assistance in its power. To impose, as Farwell J. did and as I intend to do, conditions designed to uphold the bankruptcy jurisdiction of this court while acting in aid is not the same thing as exercising discretion to refuse aid."

In the event he made an order declaring that the real and personal estate of the bankrupt had vested in the trustee in bankruptcy appointed by the court in the Republic but on substantially the same conditions as Farwell J had imposed in ***Re Osborn .***

In the nineteenth edition of Williams on Bankruptcy, published in 1979, the note to s.122 was changed. At page 475 it was stated that orders under the section were known as "*orders in aid*" and that they were discretionary. No authority was cited for the latter proposition and none was suggested to us during the course of the hearing. I can only assume that the note reflected the editors' reassessment of the effect of the decisions to which I have referred. As the note has probably been the source for other similar statements (see for example Dicey & Morris The Conflict of Laws 11th Edition page 1106) it is of some importance to identify its origin.

The fifth case is ***Re a Debtor, ex parte the Viscount of the Royal Court of Jersey*** (1981) Ch.384. In that case sequestration proceedings similar to bankruptcy proceedings had been commenced in Jersey in respect of the movable property of an English solicitor. The court in Jersey made a request to the High Court in England for an order enabling the Viscount to discharge the duties conferred on him by the court in Jersey and to appoint him receiver of the movable property in England of the solicitor with authority to take all such steps as might be necessary. In relation to this request Goulding J, at page 402, said *"I do not think that this court, when requested for aid under section 122 of the Act of 1914, has any general duty to scrutinise the requesting court's transactions once it is satisfied that the case falls within the scope of the section. Farwell J. said, in* ***In re Osborn*** *[1931-32] B. & C.R 189, 194: "There not being any such conflict," i.e. conflict with a current English bankruptcy, "I think this court is bound to give all the assistance it can." Lord Lowry L.C.J. took the same view of the section in In re Jackson [1973] N.I. 67, preferring it to that expressed by Walsh J. in the Southern Irish case of* ***In re Gibbons*** *[1960] Ir.Jur Rep. 60, where he thought such provisions to be merely enabling and discretionary. I respectfully agree with Farwell J. and Lord Lowry, while recognising that the court might have to refuse aid if it were proved that the anterior proceedings were hopelessly bad under their own proper law, or that they offended against some overriding principle of English public policy."*

Like Farwell J and Lord Lowry before him Goulding J imposed similar conditions on his order appointing the Viscount receiver of all the movable property of the solicitor in England.

In the course of the submissions for the Joint Liquidators it was suggested that s.426 was obscure, ambiguous and, on one construction, might lead to absurdity. On that view and in accordance with the decision of the House of Lords in ***Pepper v Hart*** (1993) AC 593 we were invited to and did look at the report in Hansard of the introduction into the Insolvency Bill 1985 of the new clause which subsequently became s.213 Insolvency Act 1985 and was re-enacted as s.426 Insolvency Act 1986 as part of the consolidation carried out by the latter Act. The Report in Hansard for 18th July 1985 columns 550 and 551 shows in the speech of the responsible minister that the purpose of the new clause was to give effect to the recommendations of the Cork Committee contained in Chapter 49 of their report. It was reported as the view of the minister that the clause created a complete intra-United Kingdom system of reciprocal enforcement in respect of bankruptcy, winding-up, receivership and the new administration order procedure.

Chapter 49 of the Report of the Cork Committee (Cmmd. 8558) was concerned with Extra-territorial Aspects of Insolvency Law. In paragraph 1909 it referred to s.122 Bankruptcy Act 1914 which, in paragraph 1910, it described as conferring powers "*which are discretionary only*". I infer that the source for that statement was the note in Williams on Bankruptcy 19th Edition page 475. The recommendations were that the mutual aid provisions suitably remodelled should be applicable in winding up proceedings (para.1911) and that provision should be made for the reciprocal enlargement of such remodelled provisions particularly within the Commonwealth (para.1912).

It is evident that these recommendations were carried out. S.426(4) and (5) extended the mutual aid provisions to insolvency generally and replaced the somewhat outdated references to "*every British Court*" with references to, amongst others, the courts of relevant countries and territories, being those specified by the Secretary of State pursuant to subsection (11)(b). This enabled recognition of other countries or territories on a reciprocal basis which has been carried out by The Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Orders 1986 S.I.1986/2123 and 1996 S.I.1996/253. But the introduction into s.426 as a whole of criteria by reference to "*insolvency law*" and the definition of those words in subsection (10) was new. No problem arises therefrom in connection with the reciprocal enforcement of judgments throughout the United Kingdom under s.426(1) for by the same Act s.18(3) Civil Jurisdiction and Judgments Act 1982 was amended. The effect of the amendment was to except from the reciprocal enforcement of judgments under that section only those for which reciprocal enforcement was provided by s.426. This was achieved by using the same definition of insolvency law. Thus, contrary to the argument of counsel for the Joint Liquidators, there can be no gap in the provisions for reciprocal enforcement if one rather than another construction of those words is adopted.

The provisions of s.426 have been considered in three reported cases two of which were decided before and considered in the judgment of Knox J now under appeal. The first is the decision of Chadwick J in ***Re Dallhold*** (1992) BCLC 621. In that case a company incorporated and in liquidation in Australia ("Investments") petitioned in Australia for the winding up of its wholly owned subsidiary also incorporated in Australia ("Estates") and obtained the appointment of a provisional liquidator. Estates was the tenant of land in England under a lease terminable on bankruptcy or winding up. In the light of advice received from solicitors in England Investments, instead of pressing for a winding-up order in respect of Estates, sought from the Court in Australia an order that a request should be made to the Court in England for the making of an administration order under s.8 Insolvency Act 1986. Gummow J acceded to that application and made a declaration that it was desirable to request the assistance of the English Courts; that assistance might be provided by the making of an administration order if the English Court having charge of the matter thought fit so to order; or by the making of such further or other order as it might consider appropriate. The application for an administration order in respect of Estates was made to the High Court in England by Estates, acting by its provisional liquidator appointed by the Court in Australia, and by Investments. It was opposed by two creditors one of which was the landlord under the lease to Estates. The problem, as explained by Chadwick J on page 623 was that s.8 Insolvency Act 1986 only applied to a company registered in England. Accordingly he could only provide the assistance sought by the Court in Australia if, pursuant to s.426(5), he could apply the insolvency law of England to a company incorporated in Australia. He analysed the two subsections in a passage which should be cited in full. At page 626 he said

"*For the purposes of those two subsections, insolvency law in England and Wales means or includes any provision made by or under the Insolvency Act 1986 (see s. 426(10). It is common ground that Australia is a relevant country or territory for the purposes of those subsections by virtue of an order made by statutory instrument, and the definition in sub-s (11).*

The two subsections (4) and (5), read together, envisage that assistance will be requested by a foreign court from the English Court. If the English court were intended only to exercise the jurisdiction which it would have under domestic insolvency law in relation to the assistance requested, there would be no need for the provisions of sub-s (5).

It appears to me clear that the purpose of s 426(5) of the Insolvency Act 1986 is to give to the requested court a jurisdiction that it might not otherwise have under domestic insolvency law in order that it can give the assistance to the requesting court which, by sub-s(4), it is directed to give.

The scheme of sub-s(5) appears to me to be this. The first step is to identify the matters specified in the request. Secondly, the domestic court should ask itself what would be the relevant insolvency law applicable by the domestic court to comparable matters falling within its jurisdiction. Thirdly, it should then apply that insolvency law to the matters specified in the request, notwithstanding that on this hypothesis, those are matters which would not, or might not, otherwise fall within its jurisdiction by reason of some foreign element.

Also, of course, the domestic court is authorised to apply those provisions of the foreign insolvency law which the foreign court could apply to comparable matters falling within the jurisdiction of the foreign court; but that is not an issue in this case.

The result is that the English court can act on a request by the Federal Court by applying to the matters specified in the request provisions of English insolvency law, including the provisions of s 8 of the 1986 Act, which the English court could apply to comparable matters falling within the jurisdiction of the English court. Comparable matters for this purpose must, in my view, include matters in which all the facts were the same as those specified in the request, save that the company concerned was a company incorporated in England rather than a company incorporated in Western Australia.

I should perhaps add that it is my view that the proviso to sub-s (5) is directed towards the only discretion that can be exercised under sub-s(5), namely, the discretion of the requesting court in deciding whether or not to make a request. There is nothing in sub-s(5) which confers a discretion on the requested court."

Then he passed to a consideration of the provisions of s.8 Insolvency Act and, at page 627, continued

"*In a purely domestic case, if conditions (a) and (b) of s 8(1) are satisfied, the court has a discretion whether or not to make an administration order: that must be the effect of the use of the word 'may' in the final line of that subsection. However in circumstances where jurisdiction is conferred by s 426, it appears to me that the position may well be different. Section 426(4) provides, as I have already indicated, that the requested court shall assist the courts having corresponding jurisdiction in the foreign country.*

Those are mandatory words. It appears to me that their effect is such that, if the conditions set out in paras (a) and (b) of s 8(1) of the 1986 Act are satisfied, then this court ought to make an administration order - and so give the assistance required - unless there is some compelling reason why that should [not] be done."

After quoting from the judgments of Farwell J in ***Re Osborn*** and Goulding J in ***Re a Debtor*** he returned to the point at page 628 where he said

"*In those circumstances it seems to me that the English court, faced with a request, is required to satisfy itself that condition (a) and (b) in s 8(1) have been fulfilled; but once satisfied of that it should ordinarily make the administration order sought by the foreign court as a matter of course, so giving effect to the mandatory requirements of s 426(4) of the 1986 Act.*

In the present case, condition 1(a) of s 8 is clearly satisfied. There is no dispute that Dallhold Estates is or likely to become unable to pay its debts.

In relation to condition 1(b) I must consider whether the making of an administration order would be likely to achieve a more advantageous realisation of the company's assets than would be effected on a winding up. And I must consider that having regard only to the matters specified in the request which confers jurisdiction upon the English court. It is not open to this court, when giving assistance in response to a request under s 426 of the 1986 Act, to engage in a far-ranging inquiry which goes beyond the matters specified in the request."

The second case is the decision of Rattee J in ***Re Bank of Credit and Commerce International SA (No.9)*** (1994) 2 BCLC 636. Though the case went to appeal the Court of Appeal was not concerned with the construction or application of s.426. The material facts for the purposes of this appeal are those relating to BCCI Overseas. That company was incorporated in the Cayman Islands and was being wound up there. The liquidator obtained from the court in the Cayman Islands an order that a request be made to the High Court in England under s.426 to assist that court by making orders against a former director and employee under ss.212, 213, 214, and 238 Insolvency Act 1986 substantially in the form sought "*if and insofar as the High Court considers it just and appropriate that such orders be made*". Armed with this request the Liquidator obtained leave in England to serve out of the jurisdiction on those former directors or employees applications under ss.212, 213, 214 and 238 Insolvency Act 1986 seeking relief under those statutory jurisdictions for misfeasance, fraudulent or wrongful trading and in respect of transactions at an undervalue. In support of and to protect those claims they applied for and were granted world-wide mareva injunctions to restrain the respondents from dissipating or secreting their assets. When served the respondents applied for the applications and injunctions to be set aside. They contended that s.426(5) limited the English law applicable to the procedural as opposed to the substantive law, and that the Letter of Request was not a request within that subsection. Rattee J referred to s.426 and its statutory predecessors and the earlier cases to which I have referred. He agreed with the analysis of the section given by Chadwick J in ***Re Dallhold*** save that he considered that subsection (5) did confer on the court in England a discretion as to which of the two possible insolvency laws to apply. He rejected the submission that such laws were limited to procedural laws. He then posed the question whether the court should exercise the jurisdiction conferred by s.426(5) and continued *"Section 426(4) of the 1986 Act imposes an obligation on this court to assist the Grand Court. As I have said, this court none the less does have a discretion as to how it should give assistance (cf the similar approach of Farwell J. To the application of S 122 of the Bankruptcy Act 1914 in the passage from his judgment in* ***Re Osborn, ex p the trustee***

[1931-32] B & CR 189 which I have quoted earlier in this judgment. In my judgment, this court should exercise its discretion in favour of giving the particular assistance requested by the Grand Court unless there is some good reason for not doing so. As the concluding words of s 426(5) make it clear, one such reason could in some cases be found in the rules of private international law, such as where the request is such to comply with it would infringe the rule enforcing another country's tax claims."

The third case on s.426 is the decision of Sir Richard Scott V-C in ***Re Focus Insurance Company*** (1996) BCC 659. The company Focus had been incorporated in Bermuda and was in the course of being wound up there. Focus had obtained judgment in Bermuda for a substantial sum against a former director and an order for his examination there as to his assets. In addition Focus had obtained a bankruptcy order against him in England. A letter of request from the Supreme Court of Bermuda asked the High Court to make orders against the former director designed to secure his examination in England as to his assets. The application before the Court was that of the liquidator of Focus seeking orders in terms of those referred to in the Letter of Request. It was opposed by the former director. After referring to the terms of s.426 and the decisions of Chadwick J and Rattee J the Vice-Chancellor continued at page 665

"So there I have two very similar approaches - Chadwick J: do what you are asked unless there is a compelling reason not to do so; Rattee J: do what you are asked unless there is some good reason for not doing so.

I am content to accept that guidance as to the manner in which an application under s. 426(4) should be approached by the court."

After considering the various objections of the former director he concluded at page 668

"So, I am faced with the question as to the propriety of making an order to assist foreign liquidators to obtain assets of an English bankruptcy and in circumstances in which the foreign liquidators were the petitioning creditors in the bankruptcy, and, moreover, in circumstances in which what would be required of Mr Hardy under the proposed order could, as I see it, be required of him by his trustee in bankruptcy in this country at any time.

There is, so far as I know, no authority on this point. The circumstances are, perhaps, too peculiar to make that a matter of any surprise. There is, however, plainly some element of discretion vested in me as to whether I should or should not accede to the originating application pursuant to the letter of request notwithstanding that subs. (4) of s 426 uses the word 'shall assist'. It seems to me the inconsistency between what is now sought by the joint liquidators and the status of Focus as a creditor in an English bankruptcy does constitute good reason why I should not make the order that is sought. There is, moreover, I think, an element of oppression - I do not put this as a very strong point but I think it is there as a point - in that whatever order may be made pursuant to the originating application, obliging Mr Hardy to provide information, documents and so forth to the joint liquidators for the purposes of the Bermudian liquidation, Mr Hardy could be asked by the trustee in bankruptcy to repeat the process for the purposes of the English bankruptcy. It would seem to me oppressive that that should happen twice. The proper forum for the information and documents to be sought and supplied seems to me to be the English bankruptcy."

The Vice-Chancellor concluded, at page 669, that it would not be proper to provide the Bermudian Court with the assistance it sought for the purpose for which it sought it. In the later case of ***Re BCCI (No.10)*** (1996) 4 AER 796 at page 828 the Vice-Chancellor commented that the letters of request in that case required him to assist the Manx and Scottish Courts, but that he had a discretion as to the nature of the assistance to be provided.

In my view this historical survey of the authorities and statutory predecessors of s.426 reveals a number of material propositions. First, in all the earlier cases the assistance afforded to the requesting court was the result of the exercise of this court's general equitable jurisdiction. Thus receivers were appointed in ***Re Osborn , Re Jackson*** and ***Re a Debtor*** so as to give control over the assets here of the person made bankrupt in the other jurisdiction. There was no suggestion in either the earlier statutory provisions nor in the cases that the courts here were somehow limited in their jurisdiction to afford assistance to what they were entitled to do under the express provisions of the Bankruptcy Act then in force. Second the orders made in each of those cases recognised in the conditions imposed that issues between the trustee in bankruptcy and third parties would have to be determined by due process of law. Thus the trustee was required to submit to the jurisdiction and to abide by the decision of the court here in all matters concerning the assets of the Bankrupt in England. Third it was not the intention of Parliament when enacting s.426 Insolvency Act 1986 and its predecessor in the Insolvency Act 1985 to restrict the jurisdiction or ability of the Courts in England to afford assistance to the courts of the other parts of the United Kingdom or of the other relevant countries or territories. Fourth, whereas the cases decided under the earlier legislation are all ones in which the Court exercised its general jurisdiction all those decided under s.426 in which the assistance sought has been given are examples of the court exercising a jurisdiction conferred specifically by Insolvency Act (***Re Dallhold***) or of its general powers as ancillary to such jurisdiction (***BCCI No.9***). Fifth, in all the cases in which assistance was actually being sought, that is in all those to which I have referred except ***Re Levy*** and ***Galbraith v Grimshaw,*** the judge concerned has recognised that the requesting court was not entitled to assistance as of right but that there was some discretion in the courts here to determine whether and if so in what terms assistance should be given. This reservation has been variously expressed as shown by the passages in the judgments I have quoted.

As I indicated earlier the first issue arises in connection with s.426(10). For Hannover Re it was submitted that the definition in paragraph (a) and thence in (d) was clear and limited what was embraced by those words to the specific statutory provisions referred to and the subordinate legislation authorised by and made under them. It was argued that Knox J was wrong to have reached the different conclusion I have already quoted. For the Joint Liquidators it was submitted with force that there is no reason to attribute to Parliament any intention to restrict the field over which or the way in which the courts in England and Wales might give assistance. In particular it would be absurd to limit insolvency

law to the substantive provisions contained in the legislation, primary or subordinate, to the exclusion of the power of the courts to make those provisions effective by the grant of injunctions and the enforcement of such orders by contempt proceedings. Counsel for Hannover Re accepted that such ancillary powers must be included in the words "*insolvency law*" but maintained that those words still could not embrace final injunctions granted in exercise of the jurisdiction of the court which is either inherent or conferred by or under some other statute.

It seems to me that the wording of subsection (10) is such as to supply a complete definition. Thus it states what the words "*insolvency law*" mean, not what they include. Further the words "*provision made by or under this Act*" do not in their normal meaning include provision made by some quite different Act such as the general power to grant injunctions under s.37 Supreme Court Act 1981. I am unimpressed by the absence of any article, definite or indefinite, before the word "*provision*". But, like Knox J, I would seek to give to the definition as wide an ambit as I could if that was the only way of preserving to the court the general jurisdiction it can be seen to have been exercising in ***Re Osborn , Re Jackson*** and ***Re a Debtor .*** But I do not think that it is necessary to do so.

The earlier statutory provisions referred to the request of the other court as being "*sufficient to enable [the English] Court to exercise....such jurisdiction as [it] could exercise in regard to similar matters within [its] jurisdiction*". The earlier references to "*jurisdiction in bankruptcy*" and "*jurisdiction in bankruptcy and insolvency*" were used to identify the courts to which reference was being made. But the jurisdiction which might be exercised was not so limited. Thus on a request to the High Court in England for assistance in a form it could not give did not inhibit it from exercising its general equitable jurisdiction to appoint a receiver. The fact that the jurisdiction to do so did not arise under the Bankruptcy Act for the time being in force was immaterial.

In my view the position is the same under s.426. The reference to "*insolvency law*" in subsection (4) serves to identify the courts in any part of the United Kingdom on which the obligation to assist is cast. Those courts have their usual jurisdiction and powers as such courts; in England they are the High Court and certain County Courts. There is nothing in s.426 to exclude the general jurisdiction and powers vested in those courts as such under the laws of England and Wales. The purpose of subsection (5) is not to reduce that jurisdiction or those powers but for the purposes of subsection (4) only to extend them. Thus the court in England, faced with a request from a relevant country may in respect of the matters specified in the request apply either the insolvency law of the relevant country concerned or its own insolvency law. By itself this would not be of much help for the courts of the relevant country would not normally see much point in making a request to the courts of England in preference to applying its own insolvency law; and if it could not do so it would be unlikely that the court in England could. Moreover the court in England would not require the further authority of subsection (5) to apply all the provisions of the Insolvency Act 1986 in accordance with their terms. Consequently the concluding words of subsection (5) introduce the hypothesis that the matters specified in the request fall within the jurisdiction of the court applying the insolvency law under consideration in so far as "comparable matters" would do so. I agree with the analysis of Chadwick J in ***Re Dallhold*** (1992) BCLC 621 at page 626 which I have already quoted. Thus there is available to the Court in England when asked for assistance by the court of a relevant country under s.426 (a) its own general jurisdiction and powers and either (b) the insolvency law of England and Wales as provided for in the Insolvency Act 1986, the specified sections of the Company Directors Disqualification Act and the subordinate legislation made under any of those provisions or (c) so much of the law of the relevant country as corresponds to that comprised in (b). In the case of (b) and (c) but not (a) the court in England is entitled to apply such law on the hypothesis as to jurisdiction concerning the matters specified in the request to which I have referred. Thus in Re Dallhold Chadwick J applied (b) and in ***Re BCCI (No.9)*** Rattee J applied (a) and (b). In each of the three earlier cases the judge in question applied (a). It seems to me that on this construction the evident intention of Parliament is given effect to without distorting the language of subsection (10). Accordingly I disagree with Knox J as to the proper construction of subsection (10) but that may not lead to any different result as to the outcome of the request in this case.

That conclusion largely disposes of the second issue also. The purpose of subsection (5) is to extend the jurisdiction of the Court. This is achieved in two ways. First by enabling certain assumptions as to jurisdiction to be made in the application of the insolvency law of England and second by enabling the court in England to apply the insolvency law of the country the court of which made the request again on an assumption as to jurisdiction to enable that to be done. The request has a dual effect. First it informs the Court here what assistance is sought for the purposes of subsection (4). Second it is the trigger to the enlarged jurisdiction for which subsection (5) provides. But there is nothing in either subsection which requires the Court in England merely to grant the assistance sought for subsection (4) does not refer to the request and subsection (5) does not require assistance to be given by reference to the request.

It is in those circumstances that the third issue arises. The obligation to assist is imposed on a court not some executive agency. It would in my view require very clear words to justify a conclusion that the court in England was not intended by Parliament to perform its normal function of seeking to do justice in accordance with the law. There is no such indication. Accordingly the function of the court under s.426 must be to consider whether in accordance with the three sources of law I earlier identified as (a), (b) and (c) the assistance may properly be granted. If it may then it should be, thereby discharging the statutory duty imposed by s.426. But if it may not be properly granted then it should be withheld for it must be implicit in the fact that the duty is cast on a court that the duty is qualified by reference to what the court may properly do as a court. Of course if the court in England cannot do exactly what is sought then it should consider whether it can properly assist in some other way in accordance with any of the available systems of law. Thus the reasons for withholding assistance either as sought or in any other way are not limited to reasons of public policy. Of course public policy is a reason why assistance may be impossible under (a) or (b). But it is by no means the only reason. Further public policy might prevent assistance being given under (c) if the provision of the insolvency law of the country the court of which requested the assistance were contrary to the public policy recognised by the court in England. In my view the court

must consider in all cases whether the assistance sought or any other comparable assistance may be properly granted in accordance with the laws the court is authorised to apply on the hypotheses likewise permitted.

In some cases the assistance sought is, in accordance with the system law (sc. (a), (b) and (c)) under which it is available, discretionary. Obviously the fact of the request for assistance is a weighty factor to be taken into account. Further the court in England may be expected, as Knox J did in this case, to accept without further investigation the views of the requesting court as to what was required for the proper conduct of the bankruptcy or winding-up. But I do not think that the request can ever be conclusive as to the manner in which the discretion of the court should be exercised. It would be incompatible with the principle of the law which was being applied that the decision was one for the discretion of the court if the fact of the request was anything more than a factor however weighty. In my view this is the justification for the reservations expressed, in various ways, by all the judges who have been faced by requests for assistance under s.426 or its statutory predecessors.

In summary therefore I would reject the submission of counsel for the joint liquidators that the only ground on which a request for assistance may be refused is public policy or that the only discretion of the court is to decide which system of law made available under subsection (5) to apply and how, as opposed to whether, the assistance is to be rendered. But I would also reject the submission of counsel for Hannover Re that the only obligation of the Court in England is to entertain the application for assistance. The assistance should be given if, in accordance with the law to be applied, the relief sought may properly be granted. In cases requiring the exercise of a discretion the fact of the request is a weighty matter to be taken into account but it cannot outweigh all others. In my view, having regard to the circumstances of the individual cases, in none of ***Re Dallhold , Re BCCI (No.9)*** and ***Re Focus Insurance Co.Ltd*** did the judge adopt an approach not warranted by the section; contrary to the submission of counsel for Hannover Re, I would approve rather than overrule them.

I pass then to consider the application of s.426(4), (5) and (10) so construed to the facts of this case. The first question is whether any of the three systems of law to which I have referred as (a), (b) and (c) enable the court in England to grant injunctions in the form sought by the Supreme Court in Bermuda, in the case of (b) and (c) on the hypothesis required by subsection (5).

It is common ground in this court that the insolvency law of Bermuda and the insolvency law of England entitles the courts of those respective countries to grant in respect of the company being wound up or its assets within their jurisdiction injunctions to restrain actions or proceedings being commenced or proceeded with or executions being put into force within that jurisdiction. In England the jurisdiction is conferred by s.130(2) Insolvency Act 1986. S.167(4) Bermuda Companies Act 1981 is in the same terms. It was suggested by counsel for the Joint Liquidators that the territorial limitation under both provisions might be ignored because of the hypothesis required by s.426(5). That hypothesis would enable the court in England to apply s.130(2) Insolvency Act 1986 notwithstanding that the Company was not incorporated in England and is not being wound up here but would not entitle it to disregard the territorial limits to the relief it might give for that could not be a comparable matter falling within its jurisdiction. Similarly in the case of s.167(4) Bermuda Companies Act 1981 the court here could grant an injunction to restrain proceedings etc in England for that would be the comparable matter to that which is within the jurisdiction of the court in Bermuda. But it would not be entitled to ignore the limit on the jurisdiction of that court. In short it is not open to the court in England under s.426(5) to ignore the territorial limitation common to the relevant provision in the insolvency law of each of them.

Accordingly the only system of law under which the assistance sought may properly be given is that which I have earlier identified as (a), namely the general jurisdiction of the court in England. It is common ground that the court in England may grant an injunction against a person properly served in accordance with the law of England restraining him from commencing or prosecuting an action or other proceeding, including any process of execution, anywhere in the world. The issue is whether such an injunction should be granted in this case.

It is convenient at this stage to note submissions for each party as to the proper exercise of that jurisdiction albeit made in connection with the different point of whether on the true construction of s.426 Knox J was entitled to refuse to grant the relief which the Letter of Request sought. The Joint Liquidators criticised the reliance of Knox J on ***Mackinnon v Donaldson, Lufkin and Jenrette Securities Corporation (***1986) Ch.482, ***Re Paramount Airways Ltd*** (1992) BCLC 710 and ***Barclays Bank v Homan*** (1993) BCLC 680 as justification for his refusal. This was in connection with their submission on the proper construction of s.426 that in cases where it applied the Request was mandatory. I have already rejected that submission. But I did not understand the Joint Liquidators to contend that if that submission was rejected the test propounded by Knox J in the passage at page 35 of his judgment which I have already quoted was inapposite. That test was that "as a matter of discretion extra-territorial orders against foreign bodies need to be justified by a relevant link with this jurisdiction". It was contended that the Letter of Request and hence the application of s.426, even if it did not exclude all discretion as to whether or not to grant the relief sought, made all the difference to the exercise of such discretion as does exist.

For Hannover Re we were referred to a line of authority which demonstrated the willingness of courts in England to restrain foreign proceedings by a creditor who has or is entitled to prove in an insolvency in England from seeking to obtain for himself alone the assets of the insolvent situate abroad. The line consisted of ***The Carron Iron Company v Maclaren*** (1855) 5 HLC 415; ***Re South Eastern Portugal Railway Co.*** (1869) 17 WR 982; ***Re Oriental Inland Steam Co.*** (1874) 9 Ch.A 557; ***Re International Pulp and Paper Co.*** (1876) 3 Ch.D.594; ***Re The North Carolina Estate Co.*** (1889) 5 TLR 328; ***Flack's Case*** (1894) 1 Ch. 369; ***Re Belfast Shipowners Co.*** (1894) 1 Ch.321 and ***Re Vocalian*** (1932) Ch.196. These cases were relied on to show that the jurisdiction to restrain foreign proceedings in connection with an English insolvency arose under the general jurisdiction of the court and not a provision which could have been treated as insolvency law as

defined in s.426(10). This point does not arise because of the view I have formed as to the proper construction of s.426. But they were also relied on to show that the general jurisdiction to grant such injunctions in connection with insolvencies were limited to cases concerning creditors of the company seeking to obtain an advantage at the expense of the general body of creditors. Thus, it was contended, they could have no relevance to a case such as the present where it is sought to restrain, not a creditor, but a debtor. That submission is right if the basis for those decisions is only that referred to in ***Flack's Case ;*** namely that the creditor has notice of the statutory trust affecting all assets of the company being wound-up in England with the consequence that he is accountable to the liquidators for any asset so subject which he obtains abroad. That principle cannot apply to a debtor seeking to establish that he is not liable to the insolvent at all.

However, as indicated by the advice of the Privy Council in ***S.N.Industrielle Aerospatiale v Lee Kui Jak*** (1987) AC 871, 892/3 this line of cases is merely one category which illustrates the much wider basis on which the courts in England will restrain a person served in England from commencing or pursuing proceedings abroad. It is that basis which applies in this case, which, as indicated in that advice (pages 892-893), is dependent on four basic principles. First, the jurisdiction is to be exercised when the ends of justice so require. Second, the injunction is directed to the person enjoined not the foreign court. Third, the person to be enjoined must be amenable to the jurisdiction of the English court so that the remedy may be effective. Fourth, the jurisdiction must be exercised with caution. As stated by Hoffmann J ***in Barclays Bank v Homan*** (1993) BCLC 680 at page 687 *"both comity and common sense suggest that the foreign judge is usually the best person to decide whether in his own court he should accept or decline jurisdiction, stay proceedings or allow them to continue."*

Hannover Re relies on the fact that there is available in the United States a procedure under s.304 Federal Bankruptcy Code whereby the Joint Liquidators might obtain injunctions restraining the continuation of the arbitration proceedings in any of the state courts. It is contended that the first principle laid down in ***S.N.Industrielle Aerospatiale v Lee Kui Jak*** is not, therefore, satisfied.

The evidence includes affidavits from lawyers qualified to practice in the United States concerning the jurisdiction and powers of the Federal Court under that section. It does not appear to be disputed that it is open to the Joint Liquidators to apply under that provision for an injunction to restrain proceedings, including arbitration proceedings, in the courts of any of the states. Such an application is ancillary to the foreign insolvency. The injunction may be granted so as to restrain any action against a debtor, for example the Company, with respect to property involved in the foreign insolvency or the enforcement of an order concerning such property. The section sets out the considerations the court is to have in mind when considering whether to exercise that jurisdiction; they include "comity".

The evidence sworn since the judgment of Knox J discloses that the Joint Provisional Liquidators applied to the court in Bermuda for directions whether to make an application under s.304. On 10th June 1996 the court in Bermuda directed them to make such an application. Subsequently they were authorised to defer the application until the appointment of Joint Liquidators consequent on the winding-up order made on 26th July 1996. The Joint Provisional Liquidators were appointed Joint Liquidators on 12th September 1996 and the order to that end specifically conferred power on them to make the application directed by the order of 10th June. As at 29th November 1996 no definite decision had been taken by the Joint Liquidators about whether or when to apply for relief pursuant to s.304 Federal Bankruptcy Code. It is not disputed that Hannover Re may be sued in Chicago, Illinois, USA as it has a place of business there. Accordingly there does not appear to be any impediment to an application by the Joint Liquidators for a nationwide injunction restraining Hannover Re from commencing or proceeding with any action or other proceeding against the Company.

The Joint Liquidators contend that a successful application under s.304 would not be as efficacious as a world-wide injunction granted by the court in England pursuant to the Letter of Request. They point out that an injunction granted under s.304 might not be effective outside any of the United States and that it would be up to the arbitrators, not the parties, to decide where to conduct the arbitration. This is countered by Hannover Re offering an undertaking to this court that if the Federal Court grants an injunction under s.304 it would not commence or proceed with any action or arbitration outside the United States. It is suggested that it is inconceivable that the arbitrators would proceed with an arbitration outside the United States contrary to the wish of one of the parties and in the face of an injunction restraining the other.

In considering whether and if so how this court should exercise the jurisdiction to restrain proceedings abroad it is also necessary to consider matters occurring since the letter of request was signed by the Chief Justice of Bermuda. The letter stated that it was necessary for the purposes of justice and to assist the Joint Provisional Liquidators for the relief sought to be granted. But that was signed on 9th February 1996 and much has happened since. Normally it would not be appropriate for the court in England to inquire into the basis for the views expressed by the court of the country making the request. But there is no reason of comity or justice to prevent it from considering subsequent events.

In the affidavit of Mr Hughes, one of the Joint Liquidators, sworn on 12th February 1996 he stated that the demand for arbitration made by Hannover Re on 10th January 1996 challenged the entire process of the liquidation and the existence of the Company as a Bermudian corporation, the basis for any Scheme of Arrangement which the Joint Liquidator might formulate and appeared to be an attempt by Hannover Re "to derail the .. liquidation in Bermuda and to frustrate the orderly achievement of the objects of the .. liquidation". He indicated that the assistance of the court in England was sought because Hannover Re might be sued here but could not be sued in Bermuda. This view is readily understandable in the light of the fact that at that time the demand for arbitration sought as one alternative an order that the Company withdraw its winding-up petition and redomesticate back in Massachusetts. But that claim has now been abandoned. Accordingly the only relief now sought in the arbitration is that the reinsurance treaties be rescinded from their inception.

In an affidavit sworn by Mr Mitchell, another of the Joint Liquidators, on 7th May 1996 for the purpose, amongst others, of the application for injunctions to restrain Kemper Re, another of the Company's reinsurers, from instituting arbitration proceedings he deposed in paragraphs 11 to 17 why it was premature and oppressive for Kemper Re to seek arbitration at that stage. But he accepted that the allegations made by Kemper Re would have to be the subject-matter of arbitration at some time the only issue was when. It was suggested that it should not proceed before the winding-up petition had been determined when it would be known where the Company was to be wound up and who were its joint liquidators. These objections were, of course, overtaken by events when Ground J ordered the winding up of the Company on 26th July 1996. It was also suggested that the arbitration would be premature even if a winding-up order had been made for to deal with the issues raised in the arbitration then would interfere with "the discrete steps in the orderly administration of the affairs of an insurance company in liquidation". In summary those steps are the admission or otherwise of the proofs of creditors, the allocation of their debts to the appropriate reinsurance treaties and demanding payment by the reinsurers of the sums so allocated and the enforcement of such claims against the reinsurers.

Hannover Re submits that the issue raised by its demand for arbitration does not interfere with those steps or any of them. It submits that the issue to be resolved is the "*threshhold issue*" whether Hannover Re is entitled to rescind the reinsurance treaties from their inception. As the principal deponent for Hannover Re, Herr Kunze, stated in his affidavit sworn on 6th December 1996 *"If rescission is ordered, the question of the extent of GE's claims against EMLICO will not be relevant to Hannover Re and the question of the allocation of those liabilities to Hannover Re under those treaties will not arise.*"

Prima facie this would indicate not that the arbitration should be deferred but rather that it should be accelerated.

There is no indication in the evidence for the Joint Liquidators whether the Court in Bermuda has reconsidered the Letter of Request in the light of the substantially changed circumstances I have mentioned. All that Mr Hughes said in his last affidavit, sworn on 29th November 1996, was that the Joint Liquidators had kept the Bermudian Court informed of developments relating to the liquidation of the Company including, most recently, the then current status of this appeal. On 21st November 1996 the court in Bermuda confirmed that the Joint Liquidators were at liberty to pursue the appeal.

In my judgment the combination of the change of circumstances, which, prima facie, removed the reasons for the Letter of Request when first made, coupled with the absence of any clear evidence that the Letter of Request has been reconsidered by the Court in the light of those changed circumstances entitles this court to reduce the weight it would otherwise attach to the Letter of Request.

Thus in seeking to persuade this court to disagree with the conclusion of Knox J and grant the world-wide relief they want the Joint Liquidators face three formidable obstacles. The first is that if the liquidation of the Company was taking place in England there would not appear to be any reason to make an order in England restraining the prosecution of the arbitration in Massachusetts. The proper law of each of the reinsurance treaties and of any arbitration is the law of that State. The arbitrators and the umpire are to be officials of authorised insurers in one or more of the United States and writing comparable business. Likewise there is no reason to restrain an arbitration outside the United States. If Hannover Re were enjoined by the Federal Court under s.304 Federal Bankruptcy Code from proceeding with the arbitration anywhere in the United States and gave the undertaking I have mentioned not to sue or arbitrate outside the United States it is most unlikely that the arbitrators would of their own motion and contrary to the wishes of the Joint Liquidators determine to proceed with the arbitration outside the United States.

Second, given the procedure under s.304 Federal Bankruptcy Code, there is no reason why the Federal Court should not consider whether the arbitration should proceed in Massachusetts. The dispute and the agreed method of its determination have the closest connection with the United States and none with England. The fact that the Company is being wound up in Bermuda does not mean that the issue to be arbitrated is connected with Bermuda for Hannover Re is not a creditor of the Company but a debtor. Thus, in principle, the case is to be viewed as one in which a third party, Hannover Re, is denying the claim of the Joint Liquidators to recover property of the Company situate in Massachusetts.

Third, for the reasons I have already given, the weight which may properly be put on the request of the Supreme Court in Bermuda is seriously reduced by the matters occurring since it was sent. This obstacle is not one on which Hannover Re could have relied before Knox J but is one which in this court the Joint Liquidators must surmount if they are to satisfy this court not only that Knox J was wrong but that an injunction should be granted now.

The Joint Liquidators rely on a number of factors. They submit that there is a sufficient connection with England because that with which there must be the connection is the winding up and the court in England is only asked to act as an ancillary jurisdiction in relation to that winding up. I do not agree. Hannover Re is not a creditor of the Company. In substance the property in question and the dispute is in Massachusetts with which the Court in England has no connection.

Then it is said that the remedy under s.304 Federal Bankruptcy Code may not be so all embracing as a world-wide injunction granted by the court in England. In theory that may be true. But for reasons I have already given I do not accept that the theory represents the practical situation in this case. In any event that would not of itself be a justification for the court in England granting the relief sought.

The Joint Liquidators are concerned that Hannover Re should be put in the same position as Kemper Re. The injunction granted by the court in Bermuda restrained Kemper Re from proceeding with its demand for arbitration made on 8th April 1996 until the final hearing of the winding up petition and the final determination of the judicial review proceedings it had instituted to challenge the validity of the continuation of the Company into Bermuda. The same points were raised in both those proceedings as well as in the arbitration proceedings. Thus there was good reason to enjoin Kemper Re on the conventional ground of multiplicity of proceedings. No such ground exists in the case of Hannover Re.

In any event, the judicial review proceedings in Bermuda have been terminated, subject to any appeal or further application which may be available there, by the order of Wade J made on 18th December 1996. It has been agreed by the solicitors for Kemper Re and the Joint Liquidators that the injunction should remain in force until the time for applying for leave to appeal from the judgment of Wade J has expired or if such an application is made in time until it or, if leave is granted, the substantive appeal has been finally disposed of. Subject to that agreement the injunction will cease to operate.

The Joint Liquidators also submitted that Hannover Re should be required to raise its objections to the grant of the relief sought in Bermuda not by opposing in England the assistance requested from the court in England. I do not agree. Whilst in certain circumstances that might be the appropriate course to take in respect of one who is concerned in the liquidation as a creditor or contributory I do not see how it could be right in the case of a debtor to the insolvent. Such a person is not concerned with the insolvency.

In the course of a very wide ranging argument other factors were relied on. I have mentioned those which appear to me to be the most significant and have reread the skeleton arguments for the Joint Liquidators and my notes of the oral submissions made by their counsel. My conclusion is that Knox J was right to refuse to grant the relief sought in the Letter of Request. For the reasons I have sought to explain, it was not then and is not now a proper case in which to grant the relief sought. Further I agree with him that it is not a proper case in which to grant the more limited relief of an injunction in the terms sought but confined in its operation to England and Wales. That is not what the Supreme Court in Bermuda requested and I can see no threat or other conduct of Hannover Re such as would justify it.

For all these reasons I would dismiss this appeal.

Thorpe LJ. I agree.

Roch LJ. I also agree.

ORDER: Appeal dismissed, with costs of the Respondent's notice. Application for leave to appeal to the House of Lords refused. Injunction continued for 14 days pending petition of the House of Lords for leave to appeal, and to continue thereafter until the petition is disposed of.

MR G MOSS QC & MISS S PREVEZER (Instructed by Messrs Freshfields, London EC4) appeared on behalf of the Appellant
MR H PASCOE (Instructed by Messrs Lovell, White & Durrant, London EC1) appeared on behalf of the Respondent