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Videology Ltd and the Cross-Border Insolvency Regulations 2006: a matter of discretion

KEY POINTS

- This matter concerned a company (incorporated in England and Wales) subject to Chapter 11 proceedings in the United States, and applying for recognition in Great Britain under the Cross-Border Insolvency Regulations 2006.
- Different consequences flow, particularly as regards a stay, from foreign proceedings being recognised as foreign main proceedings or foreign non-main proceedings, but the court has the power to grant discretionary relief.
- In considering COMI, greater weight should be given to day-to-day creditor interactions than overarching strategic decisions and/or the location of board meetings which may not be visible to or ascertainable by creditors.
- Care should be taken in giving COMI representations in finance (or other) documents. Such statements will not be regarded as simply 'boilerplate'.

On 13 June 2018 Snowden J refused to recognise proceedings under Chapter 11 of the US Bankruptcy Code ('Chapter 11') in relation to Videology Ltd (the 'Company') as a foreign main proceeding under Art 17 of the UNCITRAL Model Law on Cross-Border Insolvency as incorporated into English law in Sch 1 to the Cross-Border Insolvency Regulations 2006 (the 'CBIR'), saying that he was not satisfied the centre of main interests ('COMI') of the Company was in the US. He did, however, grant recognition of the Chapter 11 proceedings as a foreign non-main proceeding, and granted discretionary relief under Art 21(1)(g) Sch 1 CBIR equivalent to the moratorium against actions by individual creditors that would be provided to a company in administration under para 43 Sch B1 Insolvency Act 1986, and imposed a moratorium on applications for the commencement of collective insolvency proceedings in the UK without leave of the court.

BACKGROUND

The Company is incorporated and has its registered office in England. It is a wholly owned subsidiary of Videology Inc ('Inc'), a Delaware corporation. The Company is part of a larger corporate group ('Group')

of which Inc is the parent. The sole director of the Company is a Mr Scott Ferber ('Mr Ferber'). Mr Ferber is also the co-founder and CEO of Inc.

The Group provides video advertising software which connects television and video viewing to media behaviour information. The Company was formed to establish and increase the Group's business in the UK and in Europe, the Middle East and Africa, and operates from leasehold premises in London. The Company generates a substantial proportion of the Group's revenue.

From 2015 the Group had endeavoured to widen its services and offering, utilising substantial capital resources to do so. The Group struggled to secure necessary further funding, which led to its largest creditor placing a hold on payments. This caused the Group's secured lenders to take control of the Group's operating accounts. This had a serious adverse effect on the Group, and on 10 May 2018, Inc and certain of its subsidiaries, including the Company, filed voluntary petitions under Chapter 11 in the US. The purpose of the Chapter 11 proceedings was for the companies concerned to obtain protection and to effect a coordinated sale of the Group's business and assets.

On 5 May 2018 a counterparty entered into

an asset purchase agreement with the Group. This was a 'stalking horse' bid, and in effect provided a backstop to the competitive auction process which would take place if other bidders submitted bids in the Chapter 11 proceedings. That auction process required bids to be submitted by 11 July 2018. In order to continue trading through the auction process and to discharge its existing secured debt, the Group obtained debtor-in-possession financing.

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Different consequences follow foreign proceedings being recognised as foreign main proceedings or foreign non-main proceedings.

Upon recognition of a foreign proceeding that is a foreign main proceeding: (a) commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities is stayed; (b) execution against the debtor's assets is stayed; and (c) the right to transfer, encumber or otherwise dispose of any assets of the debtor is suspended (Art 20(1) Sch 1 CBIR). That stay and suspension has the same scope and effect as if the debtor had been made the subject of a winding-up order under the Insolvency Act 1986 (Art 20(2) Sch 1 CBIR), but does not affect the right to request or otherwise initiate the commencement of a proceeding under British insolvency law or the right to file claims in such a proceeding (Art 20(5) Sch 1 CBIR). Art 20(6) Sch 1 CBIR makes clear that in addition to and without prejudice to any powers of the court under or by virtue of Art 20(2) Sch 1 CBIR, the court may... modify... such stay and suspension or any part of it, either altogether or for a limited time, on such terms and conditions as the court thinks fit.

Upon recognition of a foreign proceeding that is a foreign non-main proceeding, no

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consequences automatically follow, and the foreign representative must apply for discretionary relief.

Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including (a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under Art 20(1)(a) Sch 1 CBIR..., (b) staying execution against the debtor's assets to the extent it has not been stayed under Art 20(1)(b) Sch 1 CBIR..., (c) entrusting the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court..., (d) granting any additional relief that may be available to a British insolvency officeholder...including any relief provided under para 43 of Sch B1 Insolvency Act 1986.

In very broad terms, one might expect the nature and extent of any discretionary relief granted to depend on whether the foreign proceedings are foreign main proceedings or foreign non-main proceedings, and the nature and purpose of the underlying proceedings to which they relate.

COMI

The concept of COMI, and the presumption that it is in the place of the registered office in the absence of proof to the contrary, appears in the original EC Insolvency Regulation (1346/2000) and has been retained in the Recast EU Insolvency Regulation (EU 2015/848) (the 'Recast EIR'). In his judgment Snowden J referred to both *Eurofood IFSC Ltd* (Case C-341/04) [2006] Ch 508 and *Interedil Srl v Fallimento Interedil Srl* (Case C-396/09) [2012] Bus LR 1582, extracting from those cases the tests and principles upon which COMI should be assessed.

Counsel for the Company argued that in the case of the Company the presumption should be displaced because: (i) the sole director and senior management of the Company were all based in the US; (ii) third

parties dealing with the Company on a regular basis would be aware that all strategic decisions in relation to the Company were made by the director and senior management in the US; (iii) the Company was dependent upon the technology owned by Inc and did not have a distinct brand identity from Inc; and (iv) recent meetings with creditors and others as regards the financial problems of the Company have taken place in the US.

Snowden J noted that the definition of COMI in the Recast EIR refers to the place in which the debtor 'conducts the administration of its interests', and that the natural meaning of that expression suggests a broader concept of administration than just the place of strategic decision-making by the board of directors or senior management. He further noted that Recital (30) to the Recast EIR refers to the presumption being capable of being rebutted if it can be shown that the 'central administration' of the debtor is in another member state. He said that expression naturally requires the consideration of a wider range of factors in addition to where the board or senior management act. Finally he noted that in *Interedil*, the ECJ had concluded that the presumption would not be rebutted unless a comprehensive assessment of all relevant factors established, in a manner ascertainable by third parties, that the company's 'actual centre of management and supervision and of the management of its interests' is located in the other member state.

EVIDENCE

Trade creditors

Mr Ferber's evidence was that the Company conducts the majority of its business with its customers and with its trade creditors from its registered office in London using local employees. This was distinguished from the overall strategic management function.

Management function

It was submitted that Mr Ferber, the Company's sole director, is a US citizen who is permanently resident in the US, that the Company's 'senior management team' is in the US, and that 'all board meetings are held and conducted within the US'. The companies within the Group are presented

to the outside world on their website and in terms of corporate branding as a combined enterprise operating under the 'Videology' brand. The court found that although it was correct that the senior management team was resident in the US, that was not evident from the Group's website or any stationery. Nor was it evident that those persons had a role with the Company that was distinct from their broader, overarching role for the Group. Snowden J concluded that the members of the senior management team were simply officers of Inc who provide high-level supervision of the affairs of the Company as part of their management of the Group as a collective whole.

Finance documents

The Company's principal loan agreement (the 'UK Loan Agreement') was negotiated in the US between Inc and a number of US lawyers, and is governed by the laws of the State of California. The UK Loan Agreement contained the following express warranty and representation as to the COMI of the Company:

'9.1.28 Centre of Main Interests For the purposes of the Council of the European Union Regulation No. 1346/2000 on Insolvency Proceedings ('the Regulation') Videology UK's centre of main interest (as that term is used in Article 3(1) of the Regulation) is situated in England and it has no 'establishment' (as that term is used in Article 2(h) of the Regulation) in any other jurisdiction.'

Mr Ferber submitted this was simply boilerplate. Snowden J disagreed, saying:

'The inclusion in an agreement predominantly between US parties, governed by US law, of a clause expressly referring to the EIR and identifying the COMI of the Company as being in England for that purpose would seem to me to be very far from 'boilerplate'... in my judgment the inclusion of such express representations in the financing documents provides strong support to the presumption that the COMI of the Company is in England.'

Biog box

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Critical discussions

Whilst it was noted that recent default notices pertaining to the Group's finance documents had been delivered in the US, Snowden J took very little guidance from these 'recent, and very specific, events'.

In concluding that the Company's COMI is in the United Kingdom, Snowden J said:

'In addition to being the place of its registered office, the UK is where the Company's trading premises and staff are located, where its customer and creditor relationships are established, where it administers its relations with its trade creditors on a day-to-day basis using those premises and local staff, and where its main assets (the receivables and cash at bank) are located. All of those factors will be visible and immediately ascertainable by the customers, and in particular by the trade creditors, of the Company. The UK is also, importantly, where representations were made to the Company's main finance creditor that its COMI was situated... The facts that strategic management decisions are taken for the Company and some high-level issues have been dealt with on behalf of the Company by the senior management of Inc. in the US is relevant, but these factors did not in my judgment carry sufficient weight to displace the other factors, especially given the evidence which showed some understandable lack of differentiation in the minds of creditors between the management of the Company and that of Inc. and the wider Group.'

Discretionary relief

As regards Inc (subject to foreign main proceedings), the court made an order under Arts 20(6) and 21(1) Sch 1 CBIR imposing a modified regime providing for a stay and suspension of individual actions, proceedings and execution against Inc except with the permission of the court. This effectively replicated the moratorium which is applicable in administrations in the UK by virtue of para 43 Sch B1. He also imposed a bar on the presentation of any winding-up petition or the appointment of an administrator in

respect of Inc, except with the permission of the court. In explaining his reasons for doing so, and recognising the restructuring purpose of the Chapter 11 proceedings, Snowden J referred to the judgment of Hildyard J in *International Bank of Azerbaijan v Sberbank of Russia* [2018] EWHC 59 (Ch), who said that:

'97. Where a foreign liquidation is recognised by the English court as a foreign main proceeding under the CBIR, the debtor benefits from an automatic stay in England: see art. 20(1) of Sch. 1. The stay is imposed in the same terms as if the debtor had entered into an analogous insolvency proceeding in England, namely a winding-up under the 1986 Act... The automatic stay under art. 20 is primarily designed for foreign liquidations.

'98. This is to be contrasted with a foreign restructuring which does not involve liquidation. In such a foreign restructuring (particularly where the debtor continues to trade), the automatic stay is normally replaced with an administration moratorium in the terms of para. 43 of Sch. B1 to the 1986 Act: see *Re 19 Entertainment Ltd* [2017] BCC 347 at [20]–[22].'

As regards the Company (subject to foreign non-main proceedings), it was noted that where the COMI of a company is in the UK the general assumption is that the main insolvency proceedings relating to that company should also be in the UK. That assumption can be displaced but there should be very good reasons to restrict or prohibit creditors of a company with its COMI in the UK from seeking to commence main insolvency proceedings in the UK, and instead to entrust the restructuring of the business or the liquidation of the assets and winding up of the affairs of the debtor company to a foreign insolvency proceeding. Snowden J said that there must be obvious benefits for the creditors as a whole, coupled with appropriate protections.

Mr Ferber's evidence was that there would be clear benefits to all creditors of the Company from allowing the business and

assets of the Company to be sold as part of a single and coordinated sales process, and that an administration of the Company would add unnecessary costs and delay.

Expert evidence was presented that the division and distribution of the sale proceeds of the Group's business would be fair, and not prejudice the Company's creditors' interests, and that their voice would be represented on the Chapter 11 proceedings' unsecured creditors' committee. In addition, the court had received various letters and indications of support from UK creditors. On that basis, the court granted the same relief afforded to Inc, and permitted the sale of the Company's assets and the distribution of the proceeds to take place under the Chapter 11 proceedings.

COMMENT

This case is interesting, both in illuminating the considerations that should go to the discretionary relief granted under CBIR in foreign main and non-main proceedings, but also in augmenting the *acquis* on COMI (*Eurofood* and *Interedil*). It shows that the location of day-to-day creditor interactions is likely to be given greater weight than the location of overarching, strategic management decisions and/or where board meetings are held, particularly where those strategic decisions are fungible across a broader group. It also underlines that very careful consideration should be given where debtors are making representations as to COMI in their finance documents. ■

Further reading

- LexisPSL Restructuring and Insolvency: Judgment Alert: *Re Videology Ltd*
- LexisPSL Restructuring and Insolvency: International Restructuring and Insolvency: UNCITRAL Model law and Cross Border Insolvency: Recognition and other applications under the Cross-Border Insolvency Regulations; and Table of differences between main and non-main proceedings under the Cross-Border Insolvency Regulations 2006