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The Centre of Main Interest and the Administration of Daisytek – An Update

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In issue 1 of this journal, we reported on the administrations of the Daisytek group of companies, which were the first cases where an insolvency appointment made under the EU Regulation on Insolvency Proceedings over a company registered in another jurisdiction had been challenged in the courts. In this case the English courts had appointed myself, Stephen Taylor and Ian Green of PricewaterhouseCoopers as joint administrators to three German companies and one French company, having concluded that their centres of main interest (COMI) were in England.

The EU Regulation states that the COMI is deemed to be the place where the debtor conducts the administration of its interests on a regular basis and such administration is therefore ascertainable by third parties, with a rebuttable presumption that this is at its registered office. In making the appointments, the judge took account of a number of factors demonstrating that the administration of the companies was carried out at the group's head offices in Bradford, but in particular that some 70% of the supply contracts for the French and German companies were negotiated from head office, such that the majority of creditors by value would regard Bradford as the place where the companies had their COMI.

In both France and Germany local proceedings were instigated that purported to be main proceedings under the EU Regulation; each company thus had two sets of purported main proceedings applying to their worldwide assets – something that the EU Regulation was designed to prevent. Recital 22 of the EU Regulation requires that the decision of the first court to open proceedings should be recognized in the other member states without those member states having the power to scrutinize that court's decision. Despite this, in both countries the courts' initial decisions went against the English administrators and we decided to appeal.

In Germany a dual track approach was taken: we took one action seeking to force the local company registrar to formally register our appointments over the companies, and a second action to appeal the opening of main proceedings in Germany. Both of these actions have now proved successful, and the proceedings instigated in Germany relegated to secondary proceedings limited to the assets in that country.

In France the situation remains fluid. On 4 September 2003, the French appeal court at Versailles overturned the appointment of a French administrator and recognized the English appointment, with the result that we were able to collect in the assets of the company and agree our proposals with its creditors. However, the French state has now served notice on the administrators of its intention to appeal the decision to the Cour de Cassation (supreme court) under article 26 of the EU Regulation, which allows member states to refuse to recognize the decision to initiate main proceedings where this would have some negative effect on its public order, or contravene fundamental principles of public policy. The specific grounds are:

1. That a decision initiating main proceedings can only be made in the territory where the COMI is and for a legal entity this is determined by its registered office. The Regulation was not designed to deal with difficulties of insolvencies of groups of companies and to determine the COMI, with regard to its parent company, is an abuse of procedure and breach of the peace.
2. That the appointment of administrators was made without consulting the works council. The hearing of staff representatives is a fundamental principle of right, the violation of which should be an obstacle to recognition of the proceedings in France.

Whilst this is not the place to debate points in detail, I can repeat that the administrators will be making vigorous counter-arguments.

In taking this approach the French state is following the grounds that were rejected by the Versailles court, and is taking a markedly different approach from that of the Italian courts in the case of Dutch and Irish subsidiaries of Parmalat SpA. In the case of the Dutch subsidiaries, the companies were used specifically for raising funding for the group through the issue of bonds and facilitating the flow of cash around the group. In determining that the companies had their

COMIs in Italy, the court not only took account of the fact that the companies carried out orders from the group's head office, but placed significance on the fact that the shares were wholly owned by Parmalat SpA and that their activities focussed entirely on the interests of the parent company. This would seem to expand the criteria for determining the COMI significantly further than the Daisytek case.

The appointments over the Dutch companies have not been challenged; however, in Ireland the courts have also opened main proceedings. The facts of this case are somewhat different in that a petition for the winding up of the company, Eurofood IFSC Limited (Eurofood) and a court order for a provisional liquidation were made in Ireland prior to the appointment of an extraordinary administrator to the company by the Italian government and the hearing of the Parma court to confirm the appointment.

In deciding that Eurofood's COMI was in Italy, the Parma court relied on the national law criterion of substance over form in relying on the correspondence between Eurofood and Parmalat rather than the test as set out in the EU Regulation. The Parma court also concluded that it was not barred from opening main proceedings since the interim nature of a provisional liquidation did not qualify as the formal opening of main proceedings under the EU Regulation, and critically the first Irish court order made no reference to COMI nor identified whether the procedure was a main proceeding under the EU Regulation. The Irish provisional liquidator received bare notice of the Parma hearing and no notice of the hearing was served on the company's creditors, even though the Irish court had stipulated that it should.

The Irish court subsequently gave judgment on the winding-up petition appointing a liquidator under main proceedings. In making this judgement, the judge concluded:

- The COMI was in Ireland. The company was registered in Ireland, its two remaining directors were Irish, all board meetings had been held in Ireland and, following the ruling in Daisytek, there was no evidence whatsoever that the company's creditors considered that the company was run from Italy.
- The appointment of a provisional liquidator was a judgment in relation to the opening of insolvency proceedings effective on the day it was made. Furthermore, under Irish law the effective date of liquidation was backdated to the date of presentation of the petition to wind up, and the court took the view that this was therefore the date on which proceedings were opened. Accordingly, main proceedings had first been opened in Ireland and the Italian courts had no jurisdiction to subsequently open main proceedings.
- As the creditors had no opportunity to be heard by the Parma court, this would give a further reason under article 26 to refuse to recognize the Italian judgment under public policy grounds.

This case too is going to appeal and it is clear that the definition of the COMI and the grounds on which a member state may refuse to recognize proceedings started in another member state remain to be clarified. In the meantime it may well be that the jurisdiction in which proceedings are first started will usually win the day.

But away from the courts, there are cases progressing unopposed and allowing insolvency practitioners to rescue and sell on businesses straddling international boundaries. In a recent case, one of my partners was appointed administrator to various companies in the Eurocare group by resolutions of the boards of directors. This included the appointment by the directors, after taking careful legal advice, of administrators over an Irish-registered company in the group. Having regard to the Daisytek case and considering that all the administration and management of the company was conducted from the group's head office, the directors concluded that its COMI was in England. The single appointment across the whole group allowed the administrator to complete a sale of the whole group's businesses to one party, safeguarding jobs and vital hospital contracts, whilst maximizing value for the creditors – a prime example of the EU Regulation doing what it was meant to do.

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