

International Corporate Rescue



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PIN Group: German Courts Take a Practical Approach to the Insolvency of a Group of German Companies with a Luxembourg Parent

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For an insolvency professional, the insolvency of a cross-border group of companies presents the challenge of coordinating the individual insolvencies of the group companies in order to achieve the best possible restructuring of the group as a whole. This task may be complicated by the involvement of several insolvency officers and the insolvency courts of multiple countries.

Recently, in the insolvencies of companies of the PIN Group, a mail delivery service provider, the Cologne Insolvency Court made some practical and pragmatic, albeit controversial, decisions regarding the question of which German insolvency court should have jurisdiction to open insolvency proceedings in respect of the German subsidiaries within the group.¹

The ultimate parent company of the PIN group of companies was PIN Group AG S.A. ('Parent'), a company incorporated in Luxembourg, which directly or indirectly owned more than 100 German subsidiaries (the 'Subsidiaries'). The first PIN Group members started to become insolvent towards the end of December 2007. Within a month, by deliberately implementing measures to effect the movement of the Parent's centre of main interests ('COMI') to Cologne, and similar steps to move the centres of independent business activities ('COIBA') of the German Subsidiaries to Cologne, it was possible to establish that the Cologne Insolvency Court had jurisdiction to place the entire PIN Group into insolvency proceedings.

Establishing German COMI for companies incorporated outside Germany

Article 3(1) EC Regulation on Insolvency Proceedings (EC 1346/2000) (the 'EC Regulation') provides that the court of the member state within the territory of which a debtor's COMI is situated shall have jurisdiction to open main insolvency proceedings which are automatically recognised across the EU (except Denmark, which is not subject to the EC Regulation). If the debtor is a company, its COMI is rebuttably presumed to be situated where the company has its registered office, although there is some uncertainty as to how easily the presumption may be rebutted and what is required to rebut it.

Parent filed an insolvency petition at the Cologne Insolvency Court on 25 January 2008. An expert (who was later appointed as insolvency administrator) was instructed by the court to examine the question where the Parent's COMI was located. Based on the findings of the expert, the Cologne Insolvency Court found that the Parent's COMI was in Cologne, Germany and made an order opening preliminary insolvency proceedings ('*vorläufiges Insolvenzerfahren*') and appointing a preliminary insolvency administrator.

Following the decision of the ECJ in *Susanne Staubitz-Schreiber*² the Cologne Insolvency Court held that in determining COMI, only the circumstances of the debtor before and at the time of filing the insolvency petition are relevant, while any change in the circumstances of the debtor in the period between the petition being filed and the court making an initial decision as to whether to grant the insolvency petition is not relevant to the determination of the debtor's COMI. The rationale behind this decision is to prevent a debtor

Notes

¹ *PIN Group AG SA*, AG Köln, 19 February 2008, 73 IE 1/08, ZIP 2008, 423.

² ECJ Case C-01/04, 17 January 2006.

from forum shopping once steps have been taken to commence proceedings.

Parent was a Société Anonyme registered in Luxembourg where its COMI was located until mid-December 2007. Parent was responsible for planning group policies, mergers and acquisitions strategy and was partially responsible for raising capital. The former management team was removed from office on 20 December 2007 after negotiations for a management buy-out failed. The membership of the Administrative Board of Parent, a body similar to the Executive Board of a German stock corporation, was reduced from fourteen to four, and two German insolvency practitioners became the new CEO and Chief Restructuring Officer ('CRO').

The Administrative Board decided to restructure PIN Group by moving the management of the group from Luxembourg to Cologne. The statutory books and records were moved to the Cologne offices of the Parent which were sublet from the CRO. The offices of the Regional Board members of the Parent and the Subsidiaries were also relocated to Cologne.

After 20 December 2007, decisions of the Administrative Board of the Parent and the newly created central steering committee (comprising the CEO, the CRO and, based on a system of rotation, some managing directors of the Subsidiaries) were taken in Cologne, as were decisions in respect to the management of the restructuring plan, the search for investors and the direction of the PIN Group. Payments, accounting, sales and purchase activities, business planning and press relations were handled in Cologne.

These facts were considered sufficient by the Cologne Insolvency Court to hold that the Parent's COMI had been situated in Cologne since January 2008 and that the German courts had jurisdiction to open main proceedings. The court held that the creditors, employees, business partners and, by press releases and advertising, the public had been adequately informed that the Parent now undertook its management, planning, purchasing, financial control, marketing, communications, restructuring efforts and the search for potential investors from Cologne.

Establishing jurisdiction of the Cologne Insolvency Court over a company incorporated within the jurisdiction of another German insolvency court

One of PIN Group's German Subsidiaries, PPD GmbH, a regional mail delivery service provider with its registered office and seat in Bremen, filed an insolvency petition with the Cologne Insolvency Court on 21 December

2007.³ The Cologne Insolvency Court considered both whether it had jurisdiction to open main proceedings under the EC Regulation on Insolvency Proceedings and whether it had jurisdiction to open German insolvency proceedings in respect of a company with its registered office and seat in the jurisdiction of another German insolvency court. Using *PPD GmbH* as a precedent, the court handed down a general order applying the same approach to each other Subsidiary and placing each into preliminary insolvency proceedings.

In determining whether it had local jurisdiction to open insolvency proceedings in respect of the German Subsidiaries, the Cologne Insolvency Court decided that any circumstances arising after the insolvency petition was filed should be considered, unlike when establishing jurisdiction under the EC Regulation where such circumstances would be ignored. The court held that when determining where the company takes major decisions relating to the operating of the business the relevant factors were the location of business premises, the location where employees carry out their duties, location and type of customers and creditors and the location from which the contractual relationships are managed.

It was held that the inability of any Subsidiary to operate independently of the others was significant in determining where jurisdiction lay for, although each German Subsidiary could collect its local customers' mail, it was unable to distribute that mail without the assistance of its sister companies.

From 20 December 2007, the board of PPD GmbH and the other Subsidiaries had effectively delegated their decision-making powers to the central steering committee, which met in Cologne. A clearing system for the intra-group provision of services and payments was established and operated in Cologne. Sales activities were directed by Regional Boards, meeting in Cologne, however, prices for the services of PPD GmbH were set in Bremen and financial and payroll accounting had been outsourced to a Bremen based provider. PPD GmbH had its main facility and six depots in Bremen, along with its material assets and all its employees. While PPD GmbH's principal bank account was held at a branch in Bremen, the insolvency trust account for PPD GmbH was held with a bank branch in Cologne.

On the basis that the day to day business of PPD GmbH and the other Subsidiaries had been directed from Cologne since the petition had been filed, the Cologne Insolvency Court found in this order and in the corresponding orders of the other proceedings that it had jurisdiction to commence insolvency proceedings in respect of all the Subsidiaries notwithstanding that the registered offices were variously located in the territorial jurisdictions of many other German insolvency

Notes

³ *PPD GmbH*, AG Köln, 1 February 2008, 73 IN 682/07, ZIP 2008, 982.

courts. The court further found that the creditors were sufficiently aware of their rights and the association of PPD GmbH and the other Subsidiaries with Cologne and, on the basis that the Parent was being put into insolvency proceedings in Cologne, it was the appropriate forum for the insolvency of the Subsidiaries as well.

Effects on forum shopping in insolvency cases

Within Germany

Prior to the decision of the Cologne Insolvency Court to place all of the Subsidiaries into insolvency proceedings it was generally thought that when a group of German companies went into insolvency proceedings this would be in several different insolvency courts and involve several different insolvency administrators. Accordingly, foreign creditors preferred to avoid using German courts for insolvency proceedings, instead devising elaborate schemes to migrate German companies to more creditor-friendly jurisdictions, usually England, as happened in the Schefenacker case. Following the decision, foreign creditors may be prepared to reconsider using German insolvency proceedings, providing there is sufficient time to restructure the management of the group to ensure each company has its COIBA in the jurisdiction of the same insolvency court.

Within the EU

The decision of the Cologne Insolvency Court to assert that the COMI of Parent was in Germany on the basis of one month of careful planning to shift the Parent's COMI from Luxembourg to Cologne is the first reported case of a company deliberately and successfully moving its COMI. Acceptance of this technique by the German courts should make Germany a more attractive forum for cross-border insolvencies and may allow the German insolvency courts to stem the loss of business to England.

Conclusion

The decision also shows that now both the French courts (in *EuroTunnel*⁴) and the German courts are prepared to be creative in working around the decision of the ECJ in *Eurofood IFSC*⁵ in which it was held that the presumption that a company's COMI is in the place of its registered office is hard to rebut. It would seem that the period when the English court frequently put entire cross-border groups of companies into English insolvency proceedings, a practice on which *Eurofood IFSC* cast doubt, is not over. Now, however, with the French and German courts ready and able to compete, the race to the court and the race to forum shop under the EC Regulation is back on in earnest. In the PIN Group case meticulous planning was used to deliberately move the Parent's COMI and the Subsidiaries' COIBAs, in *EuroTunnel* the French court managed to distinguish *Eurofood IFSC*. The question still remains: What are the minimum steps necessary to move a company's COMI between EU member states?

Notes

4 *EuroTunnel Finance Limited* (Tribunal de Commerce de Paris, 2 August 2006) (unreported).

5 ECJ Case C-341/04, 2 May 2006.

International Corporate Rescue

International Corporate Rescue addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

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- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
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