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THE ENGLISH COURT'S APPROACH TO COMI AND CROSS BORDER INSOLVENCY CO-OPERATION

By Devi Shah and Catherine Pedler

The Cross Border Insolvency Regulations 2006 (“CBIR”), which implement the UNCITRAL Model Law on Cross Border Insolvency in Great Britain, are becoming an increasingly important tool for insolvency practitioners appointed to foreign companies with a presence or assets in Great Britain. Following is an analysis of two recent cases decided under the CBIR.

Re Stanford International Bank Limited & Others [2009] EWHC 1441 (Ch)

In this case, the English High Court was faced with competing applications by insolvency practitioners appointed to Stanford International Bank Limited (“SIB”) and various companies for recognition of the proceedings to which they were appointed as “foreign main proceedings”.

The United States District Court for the Northern District of Texas appointed a receiver over the worldwide assets of SIB in connection with a complaint filed by the US Securities Exchange Commission against SIB alleging securities fraud and violations of the securities laws. In parallel with those actions, the Antiguan regulatory authorities were also taking action against SIB which eventually led to the Antiguan court making a winding up order and appointing liquidators to SIB.

The CBIR define a “foreign main proceeding”

as a foreign proceeding taking place in the State where the debtor has the centre of its main interests or COMI. The CBIR also provide that in the absence of proof to the contrary, the debtor’s registered office is presumed to be the centre of the debtor’s main interests.

In determining the location of SIB’s COMI, the Court applied the test laid down by the ECJ in the *Eurofood* case, which was agreed between the parties as being the correct approach. In *Eurofood*, the ECJ held that the presumption regarding COMI can only be rebutted if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from the COMI being located in the place of the registered office.

SIB’s registered office was located in Antigua and there were a number of other factors supporting a finding that its COMI was in Antigua. These included that it occupied a building there, a high proportion of its staff worked there, its contracts were largely governed by Antiguan law, its marketing material gave prominence to its presence in Antigua, cheques from depositors were sent to Antigua, private banking facilities were provided there, it was regulated by Antiguan regulators and its accounts were audited in Antigua. In attempting to rebut the presumption and establish that SIB’s COMI was located in the US, the US receivers relied on



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THE ENGLISH COURT'S APPROACH TO COMI AND CROSS BORDER INSOLVENCY CO-OPERATION

factors including that the principal movers of the alleged fraud were located in the US, SIB's clients were all residents and citizens of countries other than Antigua, the investments were managed outside Antigua (although this was done by management companies engaged by SIB rather than SIB itself) and the real management of SIB was performed in the US. The Court held that these factors were neither ascertainable to third parties nor, even when taken together, sufficient to rebut the presumption. Accordingly, the Court found that SIB's COMI was in Antigua and granted recognition of the Antiguan proceedings as foreign main proceedings.

The Court went on to consider whether the US proceedings could be afforded recognition as foreign non-main proceedings. To be afforded recognition under the CBIR, proceedings must be collective proceedings pursuant to a law relating to insolvency in which the assets and affairs of the debtor are subject to control or supervision by a foreign court for the purpose of reorganisation or liquidation. The Court noted that the appointment of the US receivers was made "to prevent waste and dissipation of the assets of the Defendants to the detriment of the investors" and was not made pursuant to insolvency law. Accordingly, the court held that the proceedings were not collective proceedings pursuant to insolvency law and, therefore, they were not given recognition as non-main proceedings.

Comment

An appeal against this decision has been lodged and is likely to be heard around the end of 2009.

Rubin & Anor v Eurofinance & Ors [2009] EWHC 2129 (Ch)

In this case, the Court considered an application, under the CBIR, by the joint receivers and managers of The Consumers Trust ("**TCT**") for recognition of the TCT bankruptcy proceedings as foreign main

proceedings and an order enforcing a default judgment of the US bankruptcy court, holding the respondents liable for the debts of TCT as a judgment of the English courts. The US bankruptcy proceedings could apply to TCT as if it were a separate legal entity pursuant to the "Business Trust" classification under US law.

The respondents argued that, for the proceedings to be given recognition under the CBIR, it had to be established that TCT was a "debtor" which, although not defined in the CBIR, had to be given its ordinary meaning under English law. In other words, a debtor would have to be a legal entity recognised by English law, which a business trust was not. In concluding that TCT could be regarded as a debtor for the purposes of the CBIR, the Court had regard to the international origins of the definitions in the Model Law, the fact that the CBIR provide that regard is to be had to that international origin and to the need to promote unity in its application. The Court held that these considerations would be disregarded if the court were to apply a definition of debtor that was recognised in its jurisdiction and, thereby, refused to provide recognition of a bona fide insolvency proceeding taking place in a foreign jurisdiction. As it was common ground that TCT's COMI was in New York, and the Court having found that TCT was a debtor subject to foreign insolvency proceedings, those proceedings were recognised as foreign main proceedings under the CBIR.

The Court was not, however, prepared to make an order enforcing the judgment against the respondents pursuant to the CBIR. Absent the insolvency of TCT, that judgment could only have been enforced by TCT at common law. A precondition to such enforcement is that the defendants have in some way submitted to the jurisdiction of the foreign court, which they had not done in this case. The Court held that its discretion to cooperate with foreign courts or foreign representatives should not be exercised in a manner that is inconsistent with the principles of its own legal system.

THE ENGLISH COURT'S APPROACH TO COMI AND CROSS BORDER INSOLVENCY CO-OPERATION

Accordingly, given that the judgment was unenforceable at common law, the court declined to make an order for enforcement under the CBIR.

Comment

It is clear that the court in this case did not want to exercise its discretion to provide assistance if that would effectively elevate the status of the judgment beyond what it would have enjoyed had TCT not been in insolvency proceedings. However, the decision appears to leave the creditors of TCT without remedy unless TCT's receivers can find jurisdiction to bring the claim again in England.