EC regulations: innovations in restructuring

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From the UK side of the Atlantic the year 2002/2003 has indeed been a momentous year for cross border restructuring. The main cause of this momentousness? Council Regulation (EC) No. 1346/2000 – The European Regulation on Insolvency Proceedings (the "Regulation").

In May 2002, the Regulation came into force within the EC (save for Denmark). The Regulation was at first dismissed by restructuring and insolvency lawyers, but has since brought about a major revolution in cross border restructurings within the EC.

The Regulation is intended to regulate which Members States' courts would have primary and secondary insolvency jurisdiction over both bankrupt individuals and companies.

The legal test under the Regulation to determine whether a Member State court has jurisdiction to open a primary or 'main' insolvency proceeding is whether the debtor has the centre of his main interests ("COMI") within the relevant court's jurisdiction. The recitals to the Regulation provide that the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. In the case of a company, there is a rebuttable presumption that its COMI is the jurisdiction of its registered address.

The reason for the high degree of indifference toward the Regulation arose out of the fact that the Regulation made no provision for the restructuring of a corporate group i.e. that it focused on the COMI of each individual company and provided no mechanism to open a single bankruptcy proceeding in respect of a pan European corporate group. Given the prevalence of corporate groups in cross border restructurings this was indeed a significant criticism.

However, it has not taken long for the Regulation, largely with the English court's assistance, to meet this criticism head on.

In *Enron Directo*, a Spanish incorporated company was placed into UK administration (which has some similarities with Chapter 11) by the English Court on the grounds that the Spanish company had as its COMI the UK.

Then in *BRAC Rent-a-car* the issue arose as to whether the Regulation could apply to companies incorporated outside the EC. The English Court found that the application of the Regulation could apply to non EC. companies and duly found that it had jurisdiction to place Brac Rent-A-Car International, Inc., a US Delaware incorporated company, into administration on the grounds that the company had its COMI within the UK. The court found that company's business operations, despite its Delaware incorporation, were conducted almost entirely within the UK.

In *Crisscross* matters went a stage further again. In this case the English Court made administrations orders over the entire Crisscross corporate group, despite the fact that the group consisted of eight companies (with their own assets and creditors in their respective jurisdictions) registered in various EC jurisdictions and Switzerland. The group order was apparently made on the basis that each of the companies had its COMI within the UK. The rationale for this decision appears to be (the decision is unreported) that the companies effectively formed one business and that the management of this business was directed from the UK.

These cases clearly demonstrate that a major step towards a real pan-European restructuring process has been made. No doubt in 2003/2004 we will see further interesting developments arising out of the Regulation.

It will also be interesting to see if other Member States' courts will adopt the English court's enthusiasm for the Regulation. It is already clear that the French and German courts may not always be so willing to recognise the English court's group administration orders, where such orders have included companies which are incorporated within their own jurisdictions (as which see the *Daisytek-ISA* cases).

It has also been interesting this year to hear of the cooperation in the *Cenargo* case between Judge Drain (of the Southern District New York Courts) and Mr Justice Lightman (of the English Court).

In 16 January 2003, Cenargo (a company with a US Bond issue but no US assets or operations) filed for Chapter 11. On 28 January 2003 Lombard, an English secured creditor sought the appointment to Cenargo of provisional liquidators. Mr Justice Lightman acceded to this request, appointing Ernst & Young as provisional liquidators, and also granted the PLs an injunction against the directors of Cenargo from bringing contempt proceedings in the US. On the same day lawyers for the US Bondholders sought an order restraining Lombard and the PLs from taking further action.

Although the traditional comity between the US and English Courts appeared to have broken down, this all appears to have been addressed during a friendly conference call between Judge Drain and Mr Justice Lightman. The upshot of this call is, we understand, that Judge Drain has now effectively agreed that the UK is the most appropriate forum for a restructuring proceeding and the Chapter 11 proceeding has been stayed.

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