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Timing is everything: different approaches to the relevant date for determining COMI in cross-border recognition proceedings

KEY POINTS

- Cross-border recognition of insolvency proceedings under the UNCITRAL Model Law (or its national equivalents) requires an assessment of whether the proceedings are foreign main or non-main proceedings in the relevant jurisdiction.
- Foreign proceedings can only be recognised as 'foreign main proceedings' if they are taking place in the jurisdiction where the entity has its centre of main interests or COMI. This requires consideration of COMI at a particular point in time.
- Traditionally the UK and the US have differed in their opinion of when COMI should be assessed. A recent flurry of UK and overseas cases has sparked further debate on this issue.
- This article considers the position in the UK, compared to the US, Australia and Singapore.

INTRODUCTION

The UNCITRAL Model Law on Cross-Border Insolvency was built on a model of modified universalism. It was designed to ensure a consistent approach to cross-border insolvencies, coordinated via the main insolvency proceeding taking place where the debtor's COMI is located. As the UNCITRAL Guide to Enactment and Interpretation of the Model Law makes clear, one of the aims of the Model Law was to 'facilitate and promote a uniform approach to cross-border insolvency'.

While the twin concepts of modified universalism and COMI have gained traction internationally, it remains to be seen whether the Model Law has managed to achieve the objective of uniformity in approach. Indeed, one current hotspot of debate is the question: at which point in time is the COMI analysis undertaken?

The approaches have traditionally differed across the US, UK, and Australia. However, recent decisions of the Singapore and English courts have emerged and added renewed impetus to the debate over timing.

WHY DOES TIMING MATTER?

The analysis of COMI is multi-faceted and involves a consideration of a variety of factors and circumstances. As a result, the point at which COMI is analysed may determine the factors which are permitted to be considered. For instance, do the insolvency activities taking place in connection with the foreign insolvency proceedings matter? They may matter to a court which considers COMI as at a point in time occurring after the commencement of the foreign proceedings. However, those activities would be completely irrelevant to a court which determines COMI as at the commencement of the foreign proceedings.

The absence of a uniform approach regarding timing is not simply a theoretical problem but one with real practical consequences. Different approaches on timing may lead to contradictory outcomes regarding COMI, with the potential of dampening the objectives of the Model Law.

THE DIFFERENT APPROACHES

The absence of uniformity of approach to timing may be attributed to the lack of

guidance from UNCITRAL prior to 2014. The first edition of the UNCITRAL Guide to Enactment (1997) was silent on the issue of timing, leaving national courts free to make their own decision.

Three approaches have since emerged in answer to the question: at which point in time COMI should be determined? Either:

1. upon commencement of the foreign insolvency proceeding ('the European approach');
2. upon filing of the recognition application in respect of the foreign insolvency proceeding ('the US approach'); or
3. upon the hearing of the recognition application ('the Australian approach').

The European approach

The courts of Europe led the way in first addressing the timing question. Much turns on the wording of Article 3(1) of the Recast European Insolvency Regulation. Article 3(1) of the Recast EIR is a jurisdiction-conferring provision and prescribes that the courts of the member state in which the debtor's COMI is situated retains jurisdiction to open main insolvency proceedings. There is a presumption that an entity's COMI is in the place of its registered office, but this presumption can be rebutted by factors that are both objective and ascertainable by third parties. However, the EIR does not provide guidance as to *when* the COMI should be determined.

In *Susanne Staubitz-Schreiber Case C-1/04* [2006] ECR I-701, the European Court of Justice was faced with the issue of interpreting Article 3(1) in the context of a debtor which had shifted its COMI after the filing of the

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request to open insolvency proceedings, but before the proceedings had actually been opened. The ECJ clarified that the relevant date for determining jurisdiction under Article 3(1) of the Recast EIR should be the date when the request to open insolvency proceedings is lodged (ie the date of commencement of the purported main proceeding). This position was followed in the seminal COMI case of *Interedil Srl* Case C-369/09, [2011] ECR I-9939.

In 2014, the updated UNCITRAL Guide to Enactment first addressed the issue of timing in relation to recognition of existing insolvency proceedings. The UNCITRAL Secretariat recommended that the date of the commencement of the purported main foreign proceeding should be the date at which COMI is determined:

‘With respect to the date at which the centre of main interests should be determined, having regard to the evidence required to accompany an application for recognition under Article 15 and the relevance accorded the decision commencing the foreign proceeding and appointing the foreign representative, *the date of commencement of that proceeding is the appropriate date.*’

The reason for this suggested approach is that the business activity of the debtor would have ceased upon the commencement of the foreign insolvency proceeding, and all that may exist thereafter is the foreign insolvency proceeding and the activity of the foreign representative in administering the insolvent estate.

The orthodox UK position does not diverge from that of Europe. In *Re Videology Ltd* [2018] EWHC 2186 (Ch), on a recognition application under the Cross-Border Insolvency Regulations (which implement the Model Law in the UK), the court held that COMI for recognition purposes was indeed determined by reference to the date when the request to open the insolvency proceedings the subject of the recognition application is first made. The judge was largely guided by the jurisprudence on the Recast EIR (citing *Interedil* in particular), although the UNCITRAL Guide to Enactment was cited.

The English court’s endorsement of the position set out in the Recast EIR jurisprudence for Model Law recognition purposes may soon be susceptible to further review, if and when Brexit occurs. In the meantime, a more recent decision of the English court (see below) suggests there may already be a judicial shift away from UNCITRAL’s recommended approach.

Upon filing of the recognition application/petition: the US approach

The position under US law is the main countervailing force to the European/UNCITRAL approach on the issue of timing. The US Court of Appeal for the Fifth Circuit decided *In re Ran* 607 F 3d 1017 (5th Cir, 2010) that the relevant date for determining COMI is as at the filing of the recognition application. The court reached that view for the following reasons:

- The court first engaged in an exercise of statutory interpretation in relation to the definition of ‘foreign main proceeding’ in US Bankruptcy Code §1502, which is ‘a proceeding in the country where the debtor has the center of its main interests’. The court held that the use of the present tense indicates that the COMI inquiry must be undertaken in the present.
- The court was also of the view that undertaking the COMI inquiry at the time of the filing of the recognition petition favoured consistency in recognition outcomes across jurisdictions. If COMI were construed through a look-back period with reference to the debtor’s operational history, it would increase the likelihood of conflicting COMI determinations by different courts.

In re Ran has been consistently applied in US jurisprudence and followed in the prominent later decision of *In re Fairfield Sentry Ltd* 714 F3d 127 (2nd Cir, 2013).

It is worth noting that because the US court determines COMI as at a later point in time compared to the European approach, the US court will additionally consider the location where the foreign representative has operated from to be a relevant factor in the COMI

analysis. This is potentially controversial as an obvious concern is that the consideration of the foreign representative’s operations may encourage forum shopping practices and facilitate illegitimate COMI shifting.

When the recognition petition/application is decided: the Australian approach

The Australian position is different to, but closely aligned with, the US approach.

Under Australian law, the relevant point to determine COMI is at the time of the court’s decision on the recognition application. Regard may be had to historical facts which led to the position at the time. This principle was first stated in the case of *Australian Equity Investors* [2012] FCA 1002 but not accompanied by detailed reasoning on the issue of timing. *Australian Equity Investors* was cited and applied in the subsequent cases of *Legend International Holdings Inc* [2016] VSC 308 and *Wood v Astra Resources Ltd* [2016] FCA 1192.

This approach was also confirmed in a paper recently presented by the Honourable Justice Julie Ward of the New South Wales Supreme Court in September 2018, where the judge confirmed that ‘the relevant time for weighing up the relevant factors as to COMI is the time of the court’s determination.’

The Australian courts do not (yet) appear to have considered the European and US approaches, nor provided a detailed rationale for their slightly different answer to the question.

RECENT JURISPRUDENCE CONSIDERING ALL THREE APPROACHES

Two recent cases show a growing preference for the US approach as regards the relevant date for determining COMI.

Singapore

In the recent decision of *Re Zetta Jet Pte Ltd* [2019] SGHC 53, the Honourable Justice Aedit Abdullah surveyed the various different approaches to the relevant date for determining COMI and decided in favour of the US approach, but with a slight twist.

The court considered and decided not to follow the European approach and the UK approach in *Re Videology*. It observed

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that both were influenced by the wording of the Recast EIR which uses COMI to determine which EU member state the main proceedings may be commenced in. This contrasts with COMI under the Model Law which is the means of determining the relief to be granted to the relevant foreign proceedings, if recognised.

The court in *Zetta Jet* decided in favour of the US position and cited the following reasons:

- The wording of the Singapore Model Law uses the present tense, indicating that what matters is the COMI at the time of the application for recognition. (This mirrors the US court's reasoning.)
- The postponement of the COMI analysis to the date of the filing of the recognition application allows due consideration to be given to legitimate shifting of the debtor's COMI. This recognises the debtor's autonomy in choosing an appropriate forum to seek reorganisation. However, the court was cautious to point out that it would not condone COMI shifting for illegitimate purposes, for instance to evade criminal liability, or to cause prejudice to creditors.
- While expressing support for the US approach, the Singapore court clarified that it would not be proper to consider liquidation and administration activities in determining COMI. This is a point of difference between the Singapore and US approaches.
- Although the court noted that in practice there may not be any difference in result between the Australian and US positions, it nevertheless took the opportunity to also address the Australian approach. The court declined to follow the Australian approach and took the view that this would leave the date of ascertainment of the debtor's COMI uncertain, and that a bright-line rule (in favour of the US approach) would be preferable.

UK

A very recent decision of the English court (*Re Toisa Ltd*) has emerged which appears to move away from the approach in *Re Videology*, and towards the US approach.

In this (as yet) unreported decision, ICC

Judge Burton held that the appropriate date on which COMI should be determined was the date of the recognition application. *Toisa* was the subject of Chapter 11 proceedings during which time the company had been managed from New York. It was clear that following the initiation of insolvency proceedings, *Toisa's* COMI was in the US. However *Toisa's* registered office remained in Bermuda, and as a business it had assets and employees all over the world. Accordingly, there appeared to be some doubt whether the company's COMI was in the US at the commencement of the Chapter 11 proceedings.

Commentary on the decision suggests that a number of arguments were put forward to counter the position set out in UNCITRAL's revised Guide to Enactment of the Model Law. It was pointed out that it is not unusual for insolvency proceedings to be started in a country other than where the debtor maintains its COMI, particularly in Chapter 11 proceedings where the existence of a bank account in the US is sufficient to establish jurisdiction. In such circumstances the entity might have neither its COMI nor indeed an establishment (for the purposes of establishing foreign non-main proceedings) in the US prior to the Chapter 11 filing. If the traditional UK approach to timing was followed, the UK courts would not be able to recognise such Chapter 11 proceedings as either foreign main or non-main proceedings, which could not have been the intention behind the UK regulations as drafted. The regulations in this instance would only make sense if COMI were assessed at the time of the recognition proceedings.

Further arguments based on the grammatical tense of the regulations (similar to the US perspective) and their international nature, which expressly must be taken into account when interpreting the text, backed up this analysis. Weighing up the arguments, the Judge found that the appropriate time to determine COMI was the date of the recognition application, and not the time at which the underlying insolvency proceedings were commenced.

CONCLUSION

In the absence of a formal reported judgment in *Toisa*, there is still significant

divergence between the European (and UK), US and Australian approaches to the timing of the COMI determination on a Model Law recognition application. Is there a 'right' answer? Well, there is certainly a lively debate in the US over this issue between the National Bankruptcy Conference and a group of insolvency practitioners and law firms practicing in offshore jurisdictions. The former proposes the alignment of Chapter 15 with the UNCITRAL Guide to Enactment, whilst the latter is strongly resistant on the basis that a number of offshore insolvencies may never be able to achieve recognition in the US if 'post-insolvency' activity was not taken into account when determining COMI.

Commercial and practical considerations obviously play a part here in justifying the ability of the US courts to accept recognition in such cases, which arguably may produce a better overall outcome for creditors. However, it is also fair to say that a reasonably minded creditor of any insolvent debtor could probably be forgiven for thinking it strange that the law would attribute life to that debtor of a kind capable of supporting a term such as 'centre of main interests'. This is particularly so in circumstances where, in most jurisdictions, to that same reasonably minded creditor, a liquidation is anything but life sustaining.

It will be interesting to see whether the UK courts do start to converge with the US and Singaporean approaches, particularly if the UK is obliged to rely more heavily on the Model Law as a gateway to the recognition of foreign insolvencies after Brexit. The clock will continue to run on the question of timing. ■

Further reading

- Remodelling the Model Law: the Model Law on recognition and enforcement of insolvency-related judgments – (2018) 6 CRI 195
- *Videology Ltd* and the Cross-Border Insolvency Regulations 2006: a matter of discretion – (2018) 5 CRI 161
- LexisPSL: Dispute resolution: Overview: International enforcement guides