THE VIRGIN ACTIVE RESTRUCTURING: CROSS-BORDER RECOGNITION

Philip Wells
Allen & Overy LLP
UK

"Virgin Active is a global gym and leisure business with operations in England, Italy, Spain, Australia, Singapore, Thailand and South Africa. The group was significantly impacted by the Covid-19 pandemic and…amassed an unsustainable amount of leasehold liabilities/ rental arrears given the government imposed lock-downs"

Overview

Virgin Active, which undertook a holistic leasehold and financial restructuring in 2021, was the first ever contested cross-class cram-down under an English restructuring plan[1]. As such, it was heralded as a landmark decision in England and Wales and is an essential source of precedent for the English restructuring community. While the jurisprudence regarding cross-class cram-down is of the utmost importance, the case also provided a helpful insight into where and on what basis an English restructuring plan would be recognised by other relevant jurisdictions. The purpose of this article is to consider the cross-border elements of the Virgin Active transaction and to highlight the importance of the location of a company's COMI in assessing whether a restructuring plan will be recognised in other jurisdictions.

Background

Virgin Active is a global gym and leisure business with operations in England, Italy, Spain, Australia, Singapore, Thailand and South Africa. The group was significantly impacted by the Covid-19 pandemic and, like many businesses in that sector, amassed an unsustainable amount of leasehold liabilities/rental arrears given the government imposed lock-downs. In 2021, the group undertook a restructuring, which was implemented through three separate but inter-conditional restructuring plans under Part 26A of the English Companies Act 2006. The restructuring plans (along with various bilateral arrangements) implemented a holistic leasehold and financial restructuring of the European and Asia Pacific Group.

The companies that proposed the restructuring plans were all incorporated under the laws of England and Wales and had their COMI located there. Despite this, there were two key cross-border elements:

- while the vast majority of the compromised claims were governed by English law, the plan companies had provided guarantees in respect of certain properties located in the Iberian peninsula, which were governed by Spanish and Portuguese law (as applicable); and
- the group had guarantors of its English law governed facilities agreement that were incorporated in Italy, Australia and Singapore.

Notwithstanding the foreign nexus, Virgin Active attempted to (and did successfully) compromise all relevant claims under its English restructuring plan process. Absent this holistic approach, it would have had to undertake separate restructuring processes in each of the above jurisdictions, which would have been disproportionately and prohibitively costly.

According to expert evidence presented to the English Courts as part of the Virgin Active restructuring process, each relevant jurisdiction would likely recognise and give effect to the restructuring plans on the following basis:

Jurisdictions in which a guarantor is incorporated

- **Australia**: the restructuring plans would be recognised, by the Federal Court of Australia and the Supreme Courts of the states and territories of the Commonwealth of Australia, as foreign main proceedings under the Cross-Border Insolvency Act 2008 (the Australian domestic legislation implementing the UNCITRAL Model Law). Such recognition would give rise to automatic relief and allow the Federal Court to enter orders enforcing and supporting the implementing of the restructuring plans in Australia (including as against Australian creditors).
- **Singapore**: the restructuring plans would be recognised as foreign main proceedings under the Insolvency, Restructuring and Dissolution Act 2018 (the Singapore domestic legislation which, among other things, implements the UNCITRAL Model Law). Recognition would be upon application to the Singaporean High Court, following which the Singaporean courts would be permitted to enforce the restructuring plans and any third party releases or compromises sought thereunder.
- **Italy**: given Italy has not implemented the UNCITRAL Model Law, the analysis was different from that of Singapore and Australia above. Here the expert advised that the English court order pursuant to which the restructuring plans were sanctioned in England and Wales would be recognised by an Italian court as a judgment in insolvency proceedings under both (i) the Convention between the UK and Italy for the reciprocal

1 *Virgin Active Holdings Ltd & Ors, Re [2021] EWHC 1246 (Ch) (12 May 2021).*

recognition and enforcement of judgments in civil and commercial matters, signed in Rome on 7 February 1964 and (ii) Law 31 May 1995, No 218 reforming the Italian system of private international law (Law No 218/95). Recognition under Law No 218/95 would be automatic and implies giving the English order full effect, including its *res judicata* effects that prevent parties pursuing the matter further in the Italian courts.

Jurisdictions that governed a law of a compromised claim

Perhaps of more interest to the international restructuring community is the fact that the English restructuring plans also compromised non-English law governed claims. Using an English process to compromise foreign law governed claims is not itself uncommon (it has been accepted before in the context of both schemes of arrangements and restructuring plans)[2]. However, Virgin Active was the first attempt to use an English restructuring plan to compromise claims governed by the laws of an EU Member State after the expiry of the Brexit transition arrangements.

- **Spain**: the English court order pursuant to which the restructuring plans were sanctioned in England and Wales would be recognised as a judgment for the purpose of Spanish rules on the recognition and enforcement of foreign judgements (under Law 29/2015 on International Legal Cooperation in Civil Matters and Book II of the Consolidated Text of Spanish Insolvency Law adopted by Royal Legislative Decree 1/2020 of 5 May).
- **Portugal**: the English court order pursuant to which the restructuring plans were sanctioned in England and Wales would be analogous to a decision rendered in Portuguese insolvency proceedings and therefore subject to Articles 288 et seq of the Code of Insolvency and Recovery of Companies. As such, the order should be recognised as a foreign judgment. The order would only be recognised after review and confirmation by the Portuguese Court of Appeal.

In respect of the expert evidence from each jurisdiction, the location of the plan companies' COMI (being in this case England and Wales) was pivotal to the conclusion that the restructuring plan would be recognised and given effect to.

The importance of COMI

The location of COMI was clearly key to enable Virgin Active to obtain positive recognition opinions in the relevant jurisdictions. However, it is important to reflect on whether that will (or even should) be the case in all situations.

There are instances where the governing law of the compromised claim will trump the location of the company's COMI. For example, under the infamous rule in *Gibbs*[3], as a matter of English law, only an English proceeding (or one that is recognised in England) can successfully vary or discharge an English law governed obligation. If a company (irrespective of where it is incorporated or the location of its COMI) attempted to compromise an English claim with a non-English process then that compromise (at least as a matter of English law) would be invalid, unless the relevant counterparty submitted to the jurisdiction[4].

The importance of the location of a company's COMI will also depend on whether the relevant restructuring process is categorised as an insolvency proceeding. Jurisdiction to commence insolvency proceedings is likely to be available in the jurisdiction where COMI is located (as was the case under the European framework which the UK was previously a party to). That is not necessarily the same when considering a corporate procedure or the recognition of a judgment.

It is not always clear how a restructuring proceeding should be classified. For example, when the English restructuring plan was introduced through the Corporate Insolvency and Governance Act 2020, many were unsure as to how the procedure would be viewed. Some argued that, given its similarity to the English scheme of arrangement (which is recognised as a corporate procedure rather than an insolvency procedure), the restructuring plan would follow the same route. Others concluded that, given various restructuring focused characteristics (for example, the fact it can only be used by a company in financial distress) it would instead be determined to be an insolvency proceeding. In *Re Gategroup*[5] it was concluded that (for the purpose of bankruptcy exemption under the Lugano Convention) it is an insolvency proceeding. However, it remains to be seen whether that decision applies more widely or was limited to the interpretation of the Lugano Convention only. Also, the analysis of whether, from an English perspective, a process is a corporate or insolvency proceeding is at best informative (and no way determinative) of how a foreign jurisdiction views the proceeding.

If the restructuring plan is considered an insolvency proceeding (whereby location of COMI will be an important aspect) then there will be an uneasy tension with the rule in *Gibbs*. For example, a company (irrespective of the location of its COMI) will need, subject to certain exceptions, to use an English process to compromise its English law governed obligations. If such a process were classified as an insolvency proceeding then that would raise material questions as to whether that English process (which would amount to a foreign insolvency proceeding) would be recognised in the jurisdiction in which the company has its COMI. This issue can be solved with a COMI shift. However, despite being a well-tested route, COMI shifting takes time and can result in unwelcomed complications if proper analysis and due diligence is not undertaken beforehand. Equally, the situation could be resolved by the company in question using an English scheme of arrangement (i.e. a corporate rather than insolvency proceeding) but that means the company would not have the benefit of cross-class cram-down (as that is a feature of the restructuring plan, not a scheme).

2 *See Re Avanti Communications Group Plc [2018] EWHC 653 (Ch) and Re Noble Group [2019] BCC 349 in relation to an English scheme of arrangement compromising New York law governed obligations. See Gategroup Guarantee Ltd, Re [2021] EWHC 304 (Ch) (17 February 2021) in the context of a restructuring plan.*

3 *Antony Gibbs & Sons v La Société Industrielle et Commerciale des Métaux (1890) LR 25 QBD 399).*

4 A further possible exception might be if the foreign compromise of a "relevant jurisdiction" was effective in England under section 426 of the Insolvency Act 1986.

5 *Gategroup Guarantee Ltd, Re [2021] EWHC 304 (Ch) (17 February 2021).*

While helpful for companies with their COMI in England and Wales (as was the case in Virgin Active), the conclusion that a restructuring plan is an insolvency proceeding could make obtaining recognition in situations where the COMI is elsewhere more challenging.

There has to date been only two instances of non-English companies using an English restructuring plan[6] (these being the cases of *Smile Telecoms*[7] and *China Fisheries Group*[8]), both of which were heard after Virgin Active. *Smile Telecoms* concerned a company incorporated in Mauritius (albeit with its COMI in England and Wales) who sought to compromise both English and South African law governed law claims pursuant to its restructuring plan. The ongoing case of *China Fisheries Group* (where the company is Peruvian incorporated and had its COMI there) concerns only English law governed claims. Given the limited number of cases, the full ambit of the English restructuring plan remains untested and therefore is an area of interest for the wider restructuring community. The true test will come if/when a company with its COMI outside of England and Wales purports to use a restructuring plan (an English process) to compromise non-English law governed claims.

As Virgin Active reminds us, COMI is clearly a central aspect of any recognition analysis. However, it is only part of the puzzle. The governing law of the compromised claims and classification of the restructuring process are likely to have equally as important a role to play. Overall, the Virgin Active restructuring serves a helpful reminder of importance of COMI in assessing cross-border recognition. It also demonstrates that post-Brexit the English restructuring plan can still validly compromise non-English law governed claims and therefore showcases its flexibility and efficiency as a holistic restructuring tool.

6 *For these purposes, we have intentionally omitted the Scottish restructuring plan proposed by Premier Oil.*
7 *Smile Telecoms Holdings Ltd, Re (Part 26a of the Companies Act 2006) [2022] EWHC 740 (Ch) (30 March 2022).*
8 *CFG Investments SAC, Re [2021] EWHC 2780 (Ch).*