Centre of Main Interest (COMI)

The UK Perspective

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The European Regulation on Insolvency Proceedings, introduced the concept of a Centre of Main Interest ("COMI") into European and UK legislation in May 2002. The COMI concept is of course central to the Model Law on Cross Border Insolvency 1997 (UNCITRAL) and is the basis on which a foreign proceeding is recognised as a foreign main proceeding and thereby secures automatic assistance from the recognising jurisdiction.

This paper concentrates primarily on the application of the European Regulation on COMI, from the perspective of the UK Courts.

Article 3 of the Regulation states:

> *"The courts of the Member State within the territory of which the centre of a debtor's main interest is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of main interest in the absence of proof to the contrary".*

Recital 13 of the Regulation goes on to say:

> *"The centre of main interests 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".*

Since the introduction of the Regulation, there have been numerous attempts by companies and individuals to establish COMI in the UK to try to take advantage of what is perceived to be the UK's more flexible, and sometimes less onerous, insolvency regime. The Courts have had to adjudicate on numerous examples of "forum shopping" and a well-rehearsed pattern seems to have emerged.

In the corporate sector, the first leading case to challenge the rebuttable presumption that COMI is determined by a company's registered office, was heard by the European Court of Justice in 2006. The case involved Eurofood IFSC Limited, which was a company that had its registered office and conducted its trading operations in Ireland. Eurofood was a subsidiary of Parmalat, an Italian company which was the subject of insolvency proceedings in Italy. The Italian Court had argued that by virtue of its shareholding and power to appoint directors, Parmalat controlled Eurofood's policy and was therefore entitled to open up Main Proceedings in Italy. The ECUJ disagreed and held that Eurofood's COMI was in Ireland - the fact that a parent company is in a different member state and can or does control the economic choices of the subsidiary is not enough to rebut the presumption.

Further guidance on COMI was given in 2009 in the case of Hellas Telecommunications (Luxembourg) II SCA ("Hellas II"). Hellas II was the parent of a group of companies in Greece, but had no operational role. Hellas II successfully moved its COMI from Luxembourg to the UK in order to facilitate a restructuring and sale of shares to a new holding company, despite its registered office remaining in Luxembourg. The crucial factors in determining the rebuttal of the presumption that COMI was in Luxembourg were:

- Its head office and principal operating address had been moved to London
- Creditors had been notified of the change of address
- A press release had been issued that its operations were shifting to England
- It had opened a bank account in London and most payments were made to and from that account
- It had registered under the Companies Act 2006 as a UK establishment of an overseas company
- All restructuring negotiations between the company and its creditors had taken place in London

Further decisions on COMI have included:

- A Cypriot shipping group which operated through an agent in London had its COMI in England. The agent was critical to the groups' operations and any third party would be entitled to believe that they were dealing with companies in England.
  - *Re Northsea Base Investments Ltd*

- A company registered in Portugal but with its COMI in Brazil could be wound up as an unregistered company in the UK as the European Regulations did not apply. The winding up in the UK survived despite the subsequent dissolution of the company in Portugal.
  - *Re Agrenco Madeira Commercio International LDA*

- Having its sole director resident in the UK and having some administrative function there, was not sufficient to establish COMI in respect of a company registered in St Vincent & Grenadines.
  - *Re Buccament Bay Resorts Ltd*

- Simply having an office in the UK with a small number of employees carrying out internal administrative functions, was not sufficient to create an "Establishment" for the purposes of the European Regulation.
  - *Re Olympic Airways*

- A secured creditor appointed an Administrator over a BVI company whose main property asset was in England. However, the BVI liquidator challenged the appointment on the basis that the COMI was not in England. The directors all lived overseas and board decisions were made on the telephone. The presumption of COMI being at the registered office had not been rebutted.
  - *Mackellar v Griffin*

On the personal front, most of the Court's decisions have arisen from foreign nationals trying to establish COMI in the UK to take advantage of the fact that bankruptcy in the UK usually only lasts for 1 year. However, there was one early decision of a UK national who carried on business in the UK who then moved to Spain before the bankruptcy order was made. Although there were some doubts as to whether the move had been made to avoid the UK bankruptcy law (the individual was an Insolvency Practitioner!) he was given the benefit of the doubt and the bankruptcy order could not be made as it was established that his COMI was in Spain.

Perhaps the most important decision regarding a foreign national was in the matter of a German, Horst Konrad Benk. Mr Benk lived and practised in Germany, but claimed to have moved his COMI to the UK after being suspended as a notary.

He claimed to be working in the UK, had rented a flat and bought a car and to have no control of his property interests in Germany as they were subject to enforcement proceedings. He presented his own bankruptcy petition in June 2010, was declared bankrupt and received his discharge 12 months later. However, a creditor successfully applied for the bankruptcy order to be annulled on the basis that Mr Benk's COMI was not in England. In granting the annulment, the Court gave some useful guidelines on the principles determining COMI of an individual.

They are:

- A debtor can only have one COMI
- A debtor's COMI is where he can be contacted, usually his habitual place of residence
- A habitual residence is a settled permanent home where a person lives with their spouse and family, to which they return from business trips elsewhere
- In the case of a professional, the COMI may be their professional domicile, provided the profession is at the root of the insolvency
- The COMI must have an element of permanence
- It must be ascertainable by reasonably diligent third parties, in particular creditors and potential creditors – this would not normally require notification to the creditors but neither should it be hidden
- An individual can change his COMI even on the eve of insolvency, but the Court must determine whether this is substance or illusion
- The question of where an individual carries on the administration of his affairs is a subjective one
- In the European Regulation, the term "regular administration" means the management, organisation and control of the individual's interests, and the term "regular basis" indicates a quality of presence, a degree of continuity, an idea of normality, a stable link with the forum and a degree of permanence.

However, perhaps in contrast, in a further recent case, an annulment application was refused in respect of a Russian citizen who travelled to the UK for 4 days and presented his own bankruptcy petition. It was held that the bankruptcy purpose was not improper and not prejudicial to his creditors in Russia as it was unlikely to be recognised there. This decision was subsequently upheld by the Court of Appeal.

Back to the corporate arena, there have also been a whole raft of decisions regarding Schemes of Arrangement, which not strictly an insolvency matter, have been approved by the Courts on the basis that COMI has successfully established in the UK.

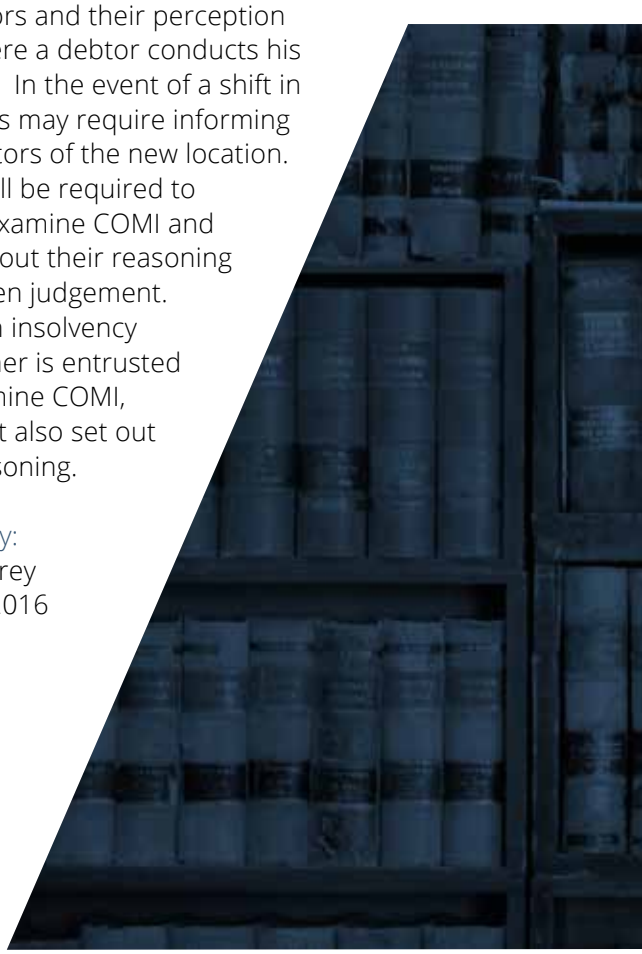
Schemes of Arrangement are a useful restructuring tool, usually in larger corporate structures, due to the ability to bind different classes of creditors to the Arrangement. The Courts have generally shown a flexibility in allowing companies incorporated outside England and Wales to enter into such schemes, generally where the overseas companies have taken positive action to obtain the jurisdiction of the English Court, usually by making the finance documents subject to English Law. However, as Schemes of Arrangement could justify a whole paper in their own right, I do not propose to consider them further here.

Finally, it should be noted that the rules on COMI are about to change. Regulation (EU) 2015/848 (commonly called the "Recast Regulation") came into force on 26 June 2015 and applies to relevant insolvency proceedings from 26 June 2017.

The new definition of COMI draws a 3 way distinction between:

- Companies and legal persons – where the registered office is presumed to be the COMI in the absence of proof to the contrary (however, the presumption will only apply if the registered office has not been moved to another member state within the 3 month period prior to the request to open proceedings)
- Individuals exercising an independent business or profession – where the place of the principal place of business is presumed to be the COMI in the absence of proof to the contrary (however, the presumption doesn't apply if the principal place of business is moved in the prior 3 months), and
- Any other individuals – where the COMI is presumed to be the individual's habitual residence in the absence of proof to the contrary (however, the presumption doesn't apply if the habitual residence is moved in the prior 6 months)

Special consideration is to be given to creditors and their perception as to where a debtor conducts his business. In the event of a shift in COMI, this may require informing the creditors of the new location. Courts will be required to actively examine COMI and must set out their reasoning in a written judgement. Where an insolvency practitioner is entrusted to determine COMI, they must also set out their reasoning.



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