



June 2005

BRIEFING

Global restructuring versus public policy

Summary

This briefing looks at the important French judgment in *Re SAS Rover France*, which tackled the issue of whether opening insolvency proceedings in one country could offend public policy in another.

Re SAS Rover France

[2005] EWHC 874 (Ch) (unrep); Tribunal de Commerce de Nanterre (France), 19 May 2005 (unrep)

SAS Rover France is incorporated in France and a member of the MG Rover group of companies. Its parent company MG Rover Overseas Holdings and ultimate parent MG Rover Group are both English companies and in administration in England. Its function was as a distribution company in France for cars manufactured by the MG Rover Group.

On 18 April 2005, on the application of the company, SAS Rover France was placed into administration by the High Court in Birmingham along with the MG Rover national sales companies in Germany, Ireland, Belgium, the Netherlands, Italy, Portugal and Spain. The court found that SAS Rover France had its centre of main interests (COMI) in England and that the administration was therefore main proceedings under article 3 of EC Regulation 1346/2000 on Insolvency Proceedings (the Regulation).

Ten days later, the French public prosecutor intervened in French proceedings as guardian of the French public interest and gave notice that, applying article 26 of the Regulation, France did not as a matter of public policy recognise the appointment of the English administrators, that they had no powers in France and that SAS Rover France should not be considered subject to any insolvency proceedings.

After hearing argument, the French commercial court in Nanterre considered that the English High Court was correct to find that the centre of main interests was in England and that there was no public policy reason not to recognise the proceedings.

COMI

Under article 3 of the Regulation, a company is presumed to have its COMI in the place where it has its registered office. Subsequent cases have shown that the presumption is easily rebutted. Recital 13 to the Regulation states that the COMI should correspond to the place where the debtor conducts the administration of its interests on a regular basis and is therefore ascertainable by third parties.

Three factors have emerged regularly in decisions of courts in various jurisdictions: objectively, the place where the management resides; subjectively, the place where creditors could foresee the company would have its COMI; and implicitly, the place where other group companies have their COMI, even though there is no basis in the legislation for this to be taken into account. Each factor was present in the SAS Rover France case, among others.

Judge Norris QC observed that the board constitution of each of the national sales companies invariably included at least one UK resident director, whereas by contrast there appeared to be no other nationalities common to their boards. Five of the national sales companies had a board with a UK resident majority. Clearly this objective factor was an important one for the judge: it was first in his list of factors pointing to an English COMI. Implicitly though, comparison between the various companies shows the importance he attached to the group COMI in determining the COMI of the individual companies.

The English judge also felt that the subjective test was met: he determined that creditors would look to England

rather than the individual national sales company for their debts due from the national sales companies to be dealt with. He agreed with the proposed administrators that all stakeholders in the MG Rover Group and the national sales companies were looking to Longbridge for solutions to the management of the collapse of the MG Rover Group.

Relevance of group COMI

The implicit importance of group COMI was referred to as a general consideration by Judge Norris QC:

‘the general overview is that the national sales companies clearly together form a subsidiary network within part of an international group structure. They are not individual discrete commercial undertakings. [...] In each individual case, the choice lies between England and the country of incorporation of the national sales company. I am satisfied that in each case their centre of main interests is in England and not in their countries of incorporation.’

The administrators elaborated on this group analysis before the French court. They submitted that the management of the affairs of SAS Rover France by the English administrators in the context of the global insolvency proceedings would allow restructuring over a longer period and co-ordination with other European distributors and therefore a better realisation of the assets.

The commercial court ruled that the MG Rover name was known around the world as attaching to cars made in England and that car dealers in France (the major creditors) knew they were part of an integrated network, because they placed their clients’ orders using the group’s IT network. Thus, it was established that third parties could have ascertained that the COMI of SAS Rover France was in England.

This contrasts with the first instance decisions of both the French and German courts in *SAS Isa Daisytek* ([2003] All ER 312), which ruled that the English court had gone too far in interpreting the notion of COMI when it found that the French and German subsidiaries were mere establishments of the English parent and that all 17 group companies had their COMI in England. Both decisions were overturned on appeal.

Public policy

The public prosecutor strongly resisted the finding of COMI in England before the French court, stating that SAS Rover France carried on its business in France; that its customers and employees were in France; that it complied with all French employment, tax and accounting rules; and that the source of capital for the business and the nationality of its principal supplier were not sufficient criteria to establish COMI elsewhere. He also indicated that the fact that no business address in England was apparent from the French companies register prevented third parties from ascertaining that the COMI of SAS Rover France was other the place of its registered office.

He submitted ‘in the name of France’ that this meant that the opening of main insolvency proceedings in England offended French public policy and that article 26 of the Regulation should be applied. That provision states:

‘any member state may refuse to recognise insolvency proceedings opened in another member state or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that state’s public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.’

The court disagreed, referring to the decision of the European Court of Justice in relation to the Brussels Convention in the case of *Krombach v Bamberski* (Case C-7/98), where it was held that:

‘recourse to the public policy clause [...] can be envisaged only where recognition or enforcement of the judgment delivered in another contracting state would be at variance to an unacceptable degree with the legal order of the state in which enforcement is sought inasmuch as it infringes a fundamental principle. In order for the prohibition of any review of the foreign judgment as to its substance to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the state in which enforcement is sought or of a right recognised as being fundamental within that legal order.’

Given that article 10 of the Regulation provides that the effects of insolvency proceedings on employment

contracts and relationships shall be governed solely by the law of the member state applicable to the contract of employment, and that the administrators had put in place measures to ensure that employees would be treated no differently than they would be in a French winding-up, the court considered that the recognition and enforcement of the English main proceedings was not capable of having effects manifestly contrary to French public policy.

The decision leaves open the possibility that there may be a case where the opening of main proceedings by a foreign court would be contrary to French public policy due to the basis on which the COMI had been determined. This is a particularly notable decision from the French commercial court, as the appeal on this very point of public policy is currently pending before the Cour de Cassation (France's highest court) in the *Isa Daisytek* case. The issue has even been raised in the French Parliament, resulting in a ministerial statement that while it was a matter for the courts, in the context of a group of companies, a finding that a subsidiary had a particular COMI because that was the COMI of its parent would be a misinterpretation of the Regulation and to recognise that decision would be contrary to French public policy. This may not be last we hear from the French public prosecutor.

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