

### ***Daisytek-ISA Ltd.***

*In the Matter of Daisytek-ISA Limited ISA* [2003] 5 WLUK 491 [2003] BCC 562 [2004] BPIR 30 [2003] C.L.Y. 2394

16<sup>th</sup> May 2003

See also the French Court of Appeal Case: [03-19.863 Arrêt n° 923 du 27 juin 2006 Cour de cassation - Chambre commerciale](#)

England and Wales (also France, Germany, and the United States).

Leeds High Court (*Daisytek-Leeds* 2003 WL 21353254)

### **Key Words**

COMI; jurisdiction; third parties; creditors; subsidiaries; administration; group companies; forum determination; main proceedings; secondary proceedings.

### **Summary of Facts of the Case**

Daisytek was a group composed of 16 European subsidiaries, reselling electronic office supplies in Europe. In early 2003, Daisytek was in default of secured loans owed to Bank of America, which precipitated a significant downturn in liquidity and eventually led to the filing of insolvency proceedings in the United States, England, France, and Germany (Bufford 453).

The parent company of the European companies was located in the UK (Bradford) and performed the head office functions of the Group, while there were also operating branches in France and Germany (having their registered offices in such countries). The parent company was in charge of the negotiation of supply contracts with some major suppliers of the whole group and had also given important guarantees to the suppliers of the French and German companies.

The English proceedings were filed under the administration procedure (Insolvency Act 1986 section 8 and Schedule B1) with the aim of achieving a more advantageous realisation of the assets than would be achieved in a liquidation (Bufford 454-455). After the filing of 16 reorganization proceedings for members of the Daisytek group in England, it was necessary to determine where the COMI of the companies was located in order to establish which jurisdiction had the standing to open main proceedings for each of the companies under the EIR 2000.

Proceedings were also filed in both France and Germany with an argument that the COMI for their individual subsidiaries should be in their jurisdictions' courts. Initially, both first instance courts in



France and Germany found that the English High Court in Leeds lacked jurisdiction to open main proceedings in respect of their national subsidiaries.

In Germany, the business manager of the German subsidiaries filed under German insolvency law as a result of 'overindebtedness', but he failed to inform the court that main proceedings had already been filed in England. When this came to light later, the court issued an order finding that decisions of the Leeds court would have no effect. The English administrator then filed an extraordinary complaint in the German court on the basis that the correct application of Article 3 should mean that England had the jurisdiction in these circumstances. Further grounds were then taken to the District Court, which reversed the county courts' finding that denied relief to the English administrator and eventually found that the initial position rejecting the English main proceedings was incorrect under the EIR 2000 Article 3(1) in March 2004 (Bufford 463-464).

The French Court of Appeal of Versailles eventually also overturned the first instance judgment and approved of the insolvency proceedings opened in England, while withdrawing the filing of main proceedings in France. The final say followed the decision by the ECJ in *Eurofood* for which *the Cour de Cassation* waited before rendering its final decision on the matter (Squire Patton Boggs; Bufford 460-461).

On May 2003, Daisytek also filed eight voluntary Chapter 11 cases along with a filing in relation to the overall holding company, Daisytek the middle of 2003. However, the US proceedings did not include any of Daisytek's sixteen European subsidiaries.

*Samuel L Bufford, 'International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies' (2006) 12 Colum J Eur L 429.*

*Insolvency proceedings Regulation (EC Regulation 1346/2000): Eurofood and Isa Daisytek, two judgments for the price of one (Squire Patton Bogs 2006)*  
<[https://larevue.squirepattonboggs.com/insolvency-proceedings-regulation-ec-regulation-1346-2000-eurofood-and-isa-daisytek-two-judgments-for-the-price-of-one\\_a1018.html](https://larevue.squirepattonboggs.com/insolvency-proceedings-regulation-ec-regulation-1346-2000-eurofood-and-isa-daisytek-two-judgments-for-the-price-of-one_a1018.html)> accessed 9 October 2020.

### Cooperation and/ or Coordination Issue

The cooperation issue arising in this case surrounds the initial refusal of the German and French courts to cede jurisdiction and accept that the COMI of the subsidiaries registered in their jurisdictions was elsewhere.

In order to determine the COMI of the companies of the group, the judge had to apply the rules set by the EU Regulation and, therefore, identify the place in which the debtor conducts the administration of his interests on a regular basis and is ascertainable by third parties (see Recital 13 of the EU Regulation 1346/2000). The court also had to take into consideration the presumption, set by the EU Regulation, Article 3(1), that the COMI is located at the place of the company's registered office.

The difficulties in determining the COMI of some of the companies involved in this case highlighted the need for Regulation 1346/2000 to include a better definition of centre of main interest of a company and, missing a particular factor that should predominate in the COMI determination.

The findings in *Eurofood* and by extension *Daisytek* (applying the *Eurofood* judgment) are also potentially instructive for US law relating to international insolvencies as many of the same issues are present. Had all of the group cases in *Daisytek* been heard in Dallas, a very similar problem would have arisen there as well. This is particularly true due to the presence of a COMI test in the US implementation of the UNCITRAL Model Law in Chapter 15 of its Bankruptcy Code. In many

respects, the rules under Chapter 15 in relation to determining jurisdiction are similar to those under the EIR Recast (Bufford 433).

*Samuel L Bufford, 'International Insolvency Case Venue in the European Union: The Parmalat and Daisytek Controversies' (2006) 12 Colum J Eur L 429.*

### Resolution

Given the intense financial activity and complex nexus of guarantees of the English parent company in favour of its subsidiaries, the court determined that the COMI and therefore the jurisdiction to open main proceedings was in England and Wales.

### Applicability to Preventive Restructuring

A timely identification of the COMI in a preventive restructuring procedure is fundamental. The criterion set by the English court might prove as an effective tool to provide a fast answer in case of vast and complex groups of companies. It also helps to further establish the jurisprudence around the determination of COMI beginning with *Eurofood*, the reasoning of which has now been included in the EIR Recast.

### Applicability of Existing Rules and Guidelines

#### EIR Recast:

Under the EIR Recast, the solution of the case would have been the same.

In fact, pursuant to Article 3(1) of the EIR Recast, 'The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ("main insolvency proceedings").'

#### Guidelines and principles:

Pursuant to Principle 13.1 of the ALI-III Global Principles "[f]or the purposes of these Global Principles the courts or other authorities of a state should have jurisdiction to open an insolvency case in respect of a debtor when either:

- (i) the debtor's centre of main interests is situated within that state's territory; or
- (ii) the debtor has an establishment within that state's territory".

In addition, Principle 13.3(l) provides that "[f]or the purposes of these Global Principles: "Centre of main interests" means the place where the debtor conducts the administration of its interests on a regular basis, to be determined on the basis of objective factors which are known to or are readily ascertainable by third parties".

The Leeds High Court took into consideration the recognisability of the centre of main interests of the debtor by third parties which, in this case, was possible in light of the quantity and quality of the activity performed in the UK by the parent company of the EU subsidiaries of the group.