

The Burani Designer Holding Case

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On 11 February 2010 the Bankruptcy Court of Milan opened the insolvency proceeding¹ of Burani Designer Holding B.V. (“BDH”), a Dutch company with registered office in Amsterdam.

BDH is the parent company of the Mariella Burani group, an Italian fashion group holding a multitude of well known brands among which Mariella Burani, Mandarina Duck and Coccinelle.

The above decision has not yet been published and questions are currently being asked as to why the Italian Court has opened the insolvency proceeding in lieu of the Dutch Court, given that the registered office of BDH is located in The Netherlands.

The answer lies in the Council regulation (EC) No 1346/2000² (the “Regulation”) and in the developing interpretation of the concept of

“center of main interest” (“COMI”) set forth in under article 3(1) of the Regulation.

Based on the information on the BDH decision which have leaked to the press, the insolvency proceeding has been opened in Italy because the Milan Bankruptcy Court has stated the COMI of BDH to be located in Italy based on the following facts:

(a) in The Netherlands BDH had only a representative office with a local consultant assigned to the receipt of the mail and some bookkeeping;

(b) during the few BDH board of directors' meetings held in Amsterdam the top management of the company attended the meeting in video-conference from Italy, namely from the offices of the Mariella Burani group in Milan, Via Verri where many people used to work on the business management of BDH.

These facts (based on what is known sofar) have convinced the Italian Court that the place where BDH conducted the “administration of its interests on a regular basis”³ was Milan and thus, given the evident insolvency of the company, have lead to the opening of the insolvency proceeding in Italy.

With its decision the Court of Milan confirms the trend which is being developed among

¹ The insolvency proceeding is an Italian “fallimento” proceeding.

² The Council regulation (EC) No 1346/2000 of 29 May 2000 (the “Regulation”) on insolvency proceedings, which became effective as of 31 May 2002, governs material issues of cross-border insolvencies within the UE. It introduced the concept of “center of main interests” to establish the jurisdiction to open insolvency proceedings among the relevant EU courts. Indeed, according to article 3(1) of the Regulation “*the courts of the Member State within the territory of which the center 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 center of its main interests in the absence of proof to the contrary*”.

³ Recital 13 of the Regulation.

some national Courts as to the interpretation of COMI⁴.

Another Italian Precedent

On February 2009 another Italian Court (the Court of Isernia⁵) stated its jurisdiction (in lieu of the Luxembourg Court) to open the insolvency proceeding of IT Holding Finance SA (the “IT SA”), the parent company of the IT Holding group, an Italian fashion group owning, among others, the fashion houses Ferrè and Malo.

In that contest the judges extended to the Luxembourg company the same insolvency proceedings which they had opened with respect to the Italian companies of the IT Holding group.

The Court of Isernia deemed to state its jurisdiction ruling that the real COMI of IT SA was in Italy in lieu of Luxembourg on the basis of the following elements:

- (i) the entire share capital of the company was held by an Italian company (IT Holding S.p.A.),
- (ii) in the IT SA board of directors the only Luxembourg director did not have any operative power,
- (iii) the IT SA core business boiled down to the issue of a bond guaranteed by other companies of the IT Holding group.

In their reasoning the judges of Isernia harked back to the decision of the European Court of Justice (“ECJ”) in the Eurofood case, but like the Milan judges in the BDH case slightly

⁴ See among others Court of Rome 26 November 2003 (Cirio case), Court of Parma 20 February 2004 (Eurofood case), Supreme Administrative Court Rome 16 July 2004 (Eurofood case), Court of Monza 27 July 2007.

⁵ Court of Isernia 10 April 2009.

departed from the restrictive interpretation of COMI set out in such decision⁶.

The Eurofood Case

The Eurofood case is the first case which led to a decision of the ECJ on the concept of COMI.

The Eurofood case was submitted to the ECJ by the Irish Supreme Court following a prolonged battle between the Irish and the Italian Courts for jurisdiction to oversee the winding up of Eurofood IFSC Limited, a subsidiary of the Italian Parmalat group.

For the very first time, the high profile of the case focused on how to interpret the meaning of the expression “center of main interest” set forth in the Regulation.

In this case the ECJ affirmed the jurisdiction of the Irish Courts by giving a restrictive interpretation of COMI, despite evidence that Eurofood IFSC Limited was managed out of Italy.

Indeed, the ECJ ruled that “...*where a company carries on its business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to...*” exclude that its COMI is situated in the State where its registered office is located.

In practice, the ECJ decision tends to exclude the equation COMI = registered office only in extreme cases, for example when the company proves to be a “ghost company”, i.e. an empty box.

⁶ The same approach is shared by the Court of Paris in its decisions of 2 August 2006 on the Eurotunnel case.

Conclusions

The concept of COMI still lacks clear definition, but the recent decisions of the Italian Courts (last of which the one on the BDH case) seem to set a trend more incline to a flexible interpretation of COMI compared to the ruling of the ECJ on this subject.

For the time being it is difficult to predict whether this trend will continue, but it certainly will need to be taken into account whenever structuring a cross-border business with an Italian “pulsating heart”.

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