Litigation Alert

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Galapagos—The Long and Winding Road to Winding-Up

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On 30 June 2022, the English court handed down judgment and made a winding-up order in respect of Galapagos S.A., marking an important milestone in an almost three-year cross-border insolvency battle involving the English, German and European courts.

The decision also provides helpful guidance on the application of the Recast European Insolvency Regulation post-Brexit, as well as the extent to which pre-Brexit jurisprudence should still be considered retained in, or relevant to, English law.

Galapagos: The Facts

The Galapagos restructuring story began in the summer of 2019. Preparations were being made for a restructuring of the heat-exchange manufacturer's financial indebtedness, which primarily consisted of credit and guarantee facilities, senior secured notes and subordinated high-yield notes. On 22 August 2019, in order to effect the proposed restructuring, Galapagos S.A. (Galapagos) made an application for an administration order on the basis that it was or was likely to become unable to pay its debts. Prior to this point, Galapagos, a Luxembourg-incorporated company, had taken a number of steps to move its centre of main interests (COMI) to England.

The hearing of the administration application was listed for 23 August 2019, but before the judge was able to make the order sought, the high-yield noteholders exercised their voting rights pursuant to a pledge over Galapagos' shares and replaced the English directors with a German director, who, ex parte, applied to a Düsseldorf court for, and obtained, a preliminary insolvency order and informed the English court that the administration application which had been made by the previous directors was being withdrawn. The English court granted a short adjournment to the administration application (which was converted into an application by certain holders of the senior secured notes (the Applicants)) to allow the position to be investigated. Although the initial German proceedings were set aside shortly thereafter (on the basis that Galapagos' COMI was not in Germany), a second preliminary insolvency order was swiftly sought by certain high-yield noteholders and the German insolvency administrator reinstated. The stay of the English administration application continued

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whilst challenges to this decision proceeded in Germany, and ultimately to the Court of Justice of the European Union (the CJEU).

The jurisdictional battle that ensued (which we consider more fully below) was but one component of a complex and contentious sequence of events involving the English, German, Luxembourg and New York courts. In October 2019, the restructuring was implemented. In proceedings anticipated to be before the English court in early 2023 and in the face of opposition from Signal Credit Opportunities (Signal), a high-yield noteholder, a Galapagos group company (Galapagos Bidco (Bidco)) is seeking a declaration that the 2019 restructuring complied with the provisions of the Intercreditor Agreement. Signal has issued mirror proceedings before the State Court of New York, claiming that the 2019 restructuring was unlawful, and Galapagos, through the German insolvency administrator, has also commenced proceedings in Luxembourg and Germany (where it alleges that the restructuring was a fraud and seeks rescission of the transfer of the shares in Bidco as part of the restructuring).

The Jurisdictional Battle

Back to the battle of the COMIs. In late 2019, when the events unfolded in England and Düsseldorf, the Recast European Insolvency Regulation[1] (REUIR) still applied in England. The REUIR provides that the Member State in which a company's COMI is located shall have jurisdiction to open "main proceedings" in relation to that company and that other Member States shall automatically recognise and give effect to those proceedings. The English administration application had been made on the basis that Galapagos' COMI was in England. Subsequent to the appointment of a German director, the high-yield noteholders had attempted to shift the company's COMI to Germany—within a matter of an hour or so—and engage the German court's REUIR jurisdiction. If the English court had made an administration order in respect of the company **before** the purported COMI shift to Germany, English main proceedings would have been in effect and the German court would not have had jurisdiction to open proceedings. But that was not the case. No administration order had yet been made at the time of the application to the Düsseldorf court, and so there was a question: notwithstanding that the Düsseldorf court had appointed an insolvency administrator to the company, which court **actually** had jurisdiction to open proceedings in respect of Galapagos?

On 24 March 2022, the CJEU answered that question[2]. Referencing a decision of the European Court of Justice that was handed down in connection with the REUIR's predecessor[3], the European Insolvency Regulation[4], the CJEU concluded that the court of the Member State in which a debtor's COMI is located at the time of the initial request to open insolvency proceedings will retain jurisdiction **even if** the debtor moves its COMI to another Member State prior to the actual opening of proceedings. Only if the first court declines jurisdiction will the courts of the second-relevant Member State be entitled to open proceedings. Applying that to the facts in this case, the CJEU concluded that, at least prior to the end of the Brexit transition period on 31 December 2020, the effect of the pending administration application before the English court and the REUIR was to prohibit the Düsseldorf court from declaring jurisdiction to open main insolvency proceedings unless and until the English court relinquished jurisdiction. As that decision was made by way of a referral from the German Federal Supreme Court, the matter is now back before that German court to take the appropriate steps.

Galapagos: The Issues Before the Court

With the CJEU judgment in hand, the Applicants sought to lift the stay on the English proceedings and convert the administration application to a winding-up application, as the purpose of the administration had fallen away with the completion of the restructuring in October 2019. Over two days in late May 2022, the court had to consider:

- Whether the REUIR applied to the sequence of events. The question here was whether the (second) German proceedings—which were opened in September 2019, before the Brexit transition period ended—should be considered "main proceedings" for the purposes of the REUIR.
- If the REUIR did not apply and the German proceedings were not "main proceedings", whether the English court had jurisdiction to make a winding-up order in respect of Galapagos (and if so, the basis of that jurisdiction).
- Assuming it had jurisdiction, whether the English court should exercise its discretion to make a winding-up order.
- Whether it was necessary or appropriate for the English court to wait for the German Federal Supreme Court to take steps in light of the CJEU judgment.

Galapagos: The Judgment

The court made a winding-up order in relation to Galapagos. In doing so, it found that the REUIR did not apply and that the English court had jurisdiction under the Insolvency (Amendment) (EU Exit) Regulations 2019 (the UK Regulations). The judgment brings welcome clarity for the Applicants and the Galapagos group, but also provides valuable guidance on a number of jurisdictional and technical matters for European restructuring professionals.

The REUIR and the Post-Brexit World

As we've discussed, the CJEU judgment was clear that where the REUIR applies, the court first seised of proceedings should retain jurisdiction to open "main proceedings", and a court in another Member State is prohibited from opening those proceedings until such time as the first court declines jurisdiction. Of itself, this is helpful guidance from the European court, confirming that case law developed in connection with the regulation that preceded the REUIR remains applicable to the REUIR.

The Galapagos situation was, of course, complicated by the fact that the United Kingdom (UK) left the European Union during the period of the jurisdictional battle. As a result, the English court had to consider the extent to which the REUIR applied in this case. The Withdrawal Agreement[5] provides that, after 31 December 2020, the REUIR will apply in the UK if "main proceedings" have been commenced (in the UK or an EU Member State) **before** the end of the transition period. If no such proceedings have been commenced before the end of the transition period, the REUIR will not apply.

The parties agreed that, because the English administration proceedings remained stayed as at 31 December 2020, it could not be said that any English "main proceedings" had been commenced before the end of the transition period. But what about the German proceedings? They had clearly been opened before the end of the

transition period, in September 2019, but should they be considered “main proceedings” for the purposes of the Withdrawal Agreement?

No, said the court. Consistent with the position taken by the CJEU, the court concluded that, prior to the end of the transition period and under the REUIR, the English court had retained exclusive jurisdiction to open main proceedings in respect of Galapagos. So, even though the German proceedings had purportedly been opened before the end of the transition period, those proceedings could not be “main proceedings” and as a result, there were no “main proceedings” opened (in Germany or England) before the end of the transition period. Under the Withdrawal Agreement therefore, the REUIR fell away entirely. In reaching this conclusion, the court demonstrated that, even in the post-Brexit world, the English court will have regard to, and apply, the jurisprudence of the European courts where appropriate. This may become less relevant as we move further away from the transition period and the likelihood of proceedings straddling the pre- and post-transition period abates, but is useful guidance nonetheless. Further, the judge concluded that the English court was not obliged to, and should not, take into account the steps which the German court may now take in light of the judgment of the CJEU.

Clarifying COMI Under the UK Regulations

So, the REUIR did not apply. On what basis then could the English court make a winding-up order in respect of a foreign company? Under the UK Regulations, the court held.

For insolvency proceedings commenced after the end of the transition period, the REUIR no longer applies. The UK Regulations are now relevant to determining, in particular, whether the English court has jurisdiction to open insolvency proceedings. The UK Regulations are not the same as the REUIR—they do not, for example, provide for automatic recognition of foreign insolvency proceedings as the REUIR does—but they do retain the concept of COMI as the jurisdictional basis for commencing proceedings in England.

With the REUIR rendered irrelevant, the court had to consider whether it had jurisdiction to make a winding-up order under the UK Regulations and again, it looked to the jurisprudence of the European court for guidance. Under the UK Regulations (as under the REUIR), a company’s COMI is presumed to be located at the place of its registered office. In the *Interedil* case[6], the CJEU held that the presumption was rebuttable where it was evident to third parties that the company’s central administration was conducted from a different place. Under applicable EU jurisprudence, the date for testing the location of COMI was the date of the making of the relevant application to court. The English court saw no reason why that same test should not be applied for the purposes of the UK Regulations and thus looked to the steps that had been taken to shift Galapagos’ COMI to England. Satisfied on the facts before it that the company’s COMI was in England at the date the original administration application had been made, the court considered it had jurisdiction to make a winding-up order. Challenging the suggestion that COMI was in England, Signal drew the court’s attention to the facts that Galapagos’ main asset was the equity in Bidco, a Luxembourg company, and that the remote board meetings should be deemed to have taken place in Luxembourg, as that was what was provided for in the company’s constitutional documents. Emphasising that what is key when determining COMI is the objectively ascertainable location of the centre of

management and administration of the company's interests, the court dismissed Signal's suggestions. In doing so, the court demonstrated that the well-known indicators of COMI established under the REUIR translate to the UK Regulations: helpful guidance for the future.

Judicial Discretion in a Winding-Up Petition

Finally, having established jurisdiction, the court had to consider whether it should exercise its discretion to make a winding-up order. It held it should.

First, the court held that Galapagos was sufficiently connected to England on the basis of Bidco's pending proceedings for declaratory relief in respect of the Intercreditor Agreement, an English law governed agreement, subject to the exclusive jurisdiction of the English court. Second, in considering whether, if the winding-up order were made, there was a reasonable possibility of a benefit being conferred on the Applicants, the court emphasised that the appointment of an English liquidator would be beneficial in the pending Bidco proceedings. Referencing the German and Luxembourg proceedings that had been commenced by the German insolvency administrator, the court took the view that there would be clear practical benefit to the Applicants if an independent liquidator directed Galapagos' involvement in the Bidco proceedings, as opposed to "**the current state of affairs in which** [Galapagos] **is being represented by an insolvency practitioner whose interests are opposed to those of the Applicants**[7]". Finally, in light of its conclusions, the English court did not consider it was necessary or appropriate for it to await any further steps being taken by the German court in light of the CJEU's judgment.

Conclusions

Mrs Justice Bacon's 26-page judgment is valuable for a number of reasons.

For the Applicants, resolution has, at least as a matter of English law and, it is to be hoped, as a matter of German law too, been reached on where Galapagos' affairs should be wound down.

For the wider European restructuring community, there is now clear guidance on the extent to which the REUIR continues to apply in England, the interpretation of the UK Regulations and indicators of COMI. The Galapagos story is not yet over, but with this judgment, there are welcome clarifications. We would be happy to discuss this judgment and its implications further with interested clients.

[1] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.

[2] Case C-723/20 *Galapagos* EU: C:2022:209.

[3] Case C-1/04 *Staubitz-Schreiber* EU: C:2006:39.

[4] Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.

[5] Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community 2019/C 384 I/01.

[6] Case C-396/09 *Interedil* EU: C: 2011:671

[7] At 102.