Approved Judgment
Mr Justice Rajah

IN THE HIGH COURT OF JUSTICE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES INSOLVENCY AND COMPANIES COURT (ChD)

BR-2022-000548
[2023] EWHC 923 (Ch)

19 April 2023

Rolls Building
Court 3

BEFORE:
Mr Justice Rajah

IN THE MATTER OF CIMOLAI SPA AND LUIGI CIMOLAI HOLDING SPA AND IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006

Felicity Toube KC, Adam Al-Attar and Lottie Pyper, instructed by Quinn Emanuel Urquhart & Sullivan UK LLP for the Applicants
Barry Isaacs KC and Donald Lilly, instructed by Eversheds Sutherland (International) LLP for the JB Drax (Honore) DIFC Limited
Kirkland & Ellis acting for the Applicants in respect of the English restructuring proposal.

JUDGMENT
(Approved)

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(Official Shorthand Writers to the Court)

1. **MR JUSTICE RAJAH:** I have two recognition applications under Article 17 of schedule 1 to the cross-border insolvency regulations 2006. They are brought by Patrizia Paier as Foreign Representative in respect of two Italian companies, Cimolai SpA ('Cimolai') and Luigi Cimolai Holdings SpA ('Luigi', together the 'Companies'). The recognition applications seek recognition of Italian insolvency proceedings started under Article 44(1) of Royal Decree Number 267 of 1942 (Italy) (Regulation of bankruptcy arrangement with creditors, receivership and compulsory administrative liquidation). This is commonly referred to as the 'Crisis Code'.

2. There are a number of interested parties: Ballinger & Co Limited; Deutsche Bank AG; Ebury Partners (Belgium) NV/SA; GPS Capital Markets Limited; JB Drax; Macquarie Bank Europe DAC; Natixis SA and NatWest Markets PLC, and by subsequent agreement with the companies, Morgan Stanley and Company International Plc.

3. The companies and the interested parties, save for JB Drax ('The Non-JB Drax Interested Parties') have reached agreement on the terms of the draft orders. Those orders provide in summary for final recognition under Article 17 of Schedule 1 to the CBIR at this hearing, and that the automatic stay should be lifted if either the Concordato Proposals or the Restructuring Plans are approved by the Italian or English Court (as applicable), or they have been rendered incapable of approval. The Non-JB Drax Interested Parties either agree or do not oppose the terms of those draft orders.

4. JB Drax is in a different position from the Non-JB Drax Interested Parties, because it seems, the Concordato Proposals and Restructuring Plans contemplate that the claim made by JB Drax against the Companies should be litigated before JB Drax can receive any distribution under the restructuring. It is agreed between the Companies and JB Drax that the stay of the proceedings commenced by JB Drax in England (the 'JB Drax Proceedings) should be lifted. However, as at the date of this hearing the companies and JB Drax have been unable to agree when the stay of the JB Drax proceedings should be lifted. The Companies are content for the stay to be lifted two months from the date of any order made at this hearing whereas JB Drax maintain that the stay should be lifted immediately; and there is also disagreement on costs in relation to the Recognition Applications.

5. The issues regarding JB Drax are the only disputed issues at this hearing.

Recognition – the law

6. Dealing with recognition first, and looking at the law, stage 1 is the granting of recognition as governed by Article 17 of Schedule 1 to the CBIR:

    a. Article 17(1) provides: "[s]*ubject to Article* 6 [the public policy exception], *a foreign proceeding shall be recognised if– (a) it is a foreign proceeding within the meaning of sub-paragraph (i) of article 2; (b) the foreign representative applying for recognition is a person or body within the meaning of sub-paragraph (j) of article 2; (c) the application meets the requirements of sub-paragraphs 2 and 3 of article 15; and (d) the application has been submitted to the court referred to in article 4*".

7. Recognition is mandatory if these requirements are satisfied.

8. Article 2 of schedule 1 to the CBIR contains a number of definitions which are relevant to Article 17:

    a. The term "*foreign proceeding*" is defined in sub-paragraph (i) to mean a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation.

    b. The term "*foreign representative*" is defined in sub-paragraph (j) to mean a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding.

9. As for the requirements of sub-paragraphs 2 and 3 of article 15:

a. Article 15(1) of Schedule 1 to the CBIR provides: "[a] *foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed*".

b. Article 15(2) of Schedule 1 to the CBIR provides: "[a]*n application for recognition shall be accompanied by: (a) a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; or (b) a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or (c) in the absence of evidence referred to in sub-paragraphs (a) and (b), any other evidence acceptable to the court of the existence of the foreign proceeding and of the appointment of the foreign representative*".

c. Article 15(3) of Schedule 1 to the CBIR provides: "[a]*n application for recognition shall also be accompanied by a statement identifying all foreign proceedings, proceedings under British insolvency law and section 426 requests in respect of the debtor that are known to the foreign representative*".

10. Article 4(1) of Schedule 1 to the CBIR requires recognition applications to be made in the Chancery Division of the High Court.

Stage 2

11. If foreign proceedings are to be recognised, they must be recognised as either foreign main proceedings or foreign non-main proceedings. Article 17(2) of Schedule 1 to the CBIR deals with the distinction between main and non-main proceedings: "[t]*he foreign proceeding shall be recognised– (a) as a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or (b) as a foreign non-main proceeding if the debtor has an establishment … in the foreign State*".

12. Sir Andrew Morritt in Re: Stanford International Bank Limited [2011] Chancery 33, said at [23]:

a. *"It is clear from the origin and objective of UNCITRAL, article 8 thereof and the UNCITRAL Guide that UNCITRAL should not be construed by reference to any particular national system of law. It is intended to embrace all systems of law which satisfy the conditions described in the definitions contained in article 2(i) to (j) so as to provide for reciprocity between all the states which may incorporate UNCITRAL into their domestic law. Further the definition of foreign proceeding contained in article 2(i) contains a number of factors, namely "collective … proceeding", "pursuant to a law relating to insolvency", "control or supervision" of "the assets and affairs of the debtor" by a foreign court, "for the purpose of reorganisation or liquidation". Whilst each factor has to be considered, the definition must be read as a whole."*

13. He went on to say at [24]:

a. "*I would start with the phrase "pursuant to a law relating to insolvency" for this governs all the other factors. It is contended that such law does not have to be statutory. I agree. It is submitted that it does not have to relate exclusively to insolvency. I agree with that submission in broad terms too. But the first step must be to identify the relevant law. The law of England and Wales relates to insolvency in the sense that it includes the Insolvency Act but unless the proceeding in question is taken under that Act (or some similar jurisdiction) it cannot sensibly be described as "pursuant to a law relating to insolvency". So it is necessary, in my view, to start by identifying the law, whether statutory or not, under or pursuant to which the relevant proceeding was brought and is being pursued. Having done so it is then necessary to consider whether that law relates to insolvency and whether the other factors to which the definition refers can be regarded as being brought about "pursuant" to that law."*

14. There is no opposition to the claimant's application for recognition. I am satisfied on the unchallenged evidence of Ugo Giordano that the Italian proceedings come within the definition of "foreign proceedings" for the following reasons:

a. The Italian Proceedings are taking place under Article 44(1) of the Crisis Code. The Crisis Code is a central part of Italian bankruptcy law, and the procedure under Article 44(1) is only available to debtors who have demonstrated that they are in a "*state of crisis or insolvency"*, where crisis is defined as "*the state of the debtor which makes insolvency likely and which is manifested by the inadequacy of prospective cash flows to meet obligations in the next twelve months"*: see Article 2(1)(a) of the Crisis Code, quoted in Giordano 1 at [23(c)].

b. The Italian Proceedings are collective proceeding in which all of the Companies' assets will be dealt with and all of the Companies' creditors are subject to the supervision of the Italian Bankruptcy Court: Giordano 1 at [29] and [40].

c. The Italian Proceedings are subject to the judicial control of the Italian Bankruptcy Court. Although the Companies' management remains in control of their day-to-day operations, the Companies must file management, financial and economic reports with the Italian bankruptcy court at least monthly. The Italian Bankruptcy Court and appointed judicial commissioner oversees the Companies and their approval is required for certain actions, such as the payment of liabilities which accrued before the commencement of the Article 44(1) proceedings; and certain transactions not in the ordinary course of business (see Giordano 1 at [25]. I keep in mind that in In re Agrokor dd [2018] Bus LR 64, HH Judge Paul Matthews, sitting as a High Court judge, concluded that the assets of the debtor are "*subject to control or supervision by a foreign court*" if the control or supervision is potential or actual, direct or indirect: [78]-[79].

d. The purpose of proceedings under Article 44(1) of the Crisis Code is to enable the debtor to restructure their liabilities and resume trading as a going concern, in this case via the Concordato Applications. The Italian bankruptcy court admitted the Companies to the second stage of the Italian Proceedings on 24 March 2023, which will enable the creditors to vote on the Concordato in due course. The aim of the Concordato Applications is to enable the companies to emerge from the proceedings having addressed their current financial difficulties: Giordano 1 at [34]-[40].

15. I have been told that the U.S. Bankruptcy Court recognised the Italian Proceedings as foreign main proceedings under Chapter 15 of the U.S. Bankruptcy Code on 31 March 2023: and a copy of the recognition order in the Southern District of Texas is in the bundles. The recognition granted by other courts in relation to this type of Italian proceedings is relevant to this Court in light of Article 8 of Schedule 1 to the CBIR, which expressly encourages the court to have regard to the international origin of the Model Law "*and to the need to promote uniformity in its application and the observance of good faith*."

Foreign main proceedings

16. In In re Stanford International Bank [2010] Bus LR 1270, the Court of Appeal held that COMI in the context of the CBIR had the same meaning as under the EU Insolvency Regulation (in that case EC Regulation 1346/2000 but now recast in the form of EU Regulation 2015/848 ('the **Recast Insolvency Regulation**')). In the Recast Insolvency Regulation, COMI is defined in Article 3(1) as "*the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties*". This definition is expanded in Recitals (28) to (30) of the Recast Insolvency Regulation, which make clear that there is a rebuttable presumption that the registered office, the principal place of business and the habitual residence are the centre of main interests. See also Article 16(3) of Schedule 1 to the CBIR.

17. The Companies rely on a number of matters to establish Italy as the Centre of Main Interest:

    a. the location of the Companies' registered offices is in Rome giving rise to the presumption that their COMI is in Italy;

    b. The Companies unchallenged evidence (Paier 1 at 48) that Cimolai's centre of management, administration and control is located at its head office in Porcia, Italy; all of its directors are Italian citizens and permanently reside there and all of the board meetings take place in Italy; most of Cimolai's employees work in Italy; the key places where Cimolai conducts business and/or holds assets are located in three provinces in Italy: Pordenone, Udine and Gorizia;

the place where Cimolai's accounts are kept and where its books and records are kept is in Italy; the vast majority of Cimolai's design and production takes place in factories located in Italy; and the majority of Cimolai's business (by value) is undertaken in Italy. Although Cimolai has operations around the globe, it is said, I think fairly, that these are outposts of a company that is managed and operates primarily from Italy (Paier 1, [48]); and

c. The Companies unchallenged evidence is that Luigi's bookkeeping and maintenance of relations with banking institutions takes place in Italy, and most of its employees work there. Luigi's functions are limited to acting as the ultimate parent of the Group and, in particular, preparing consolidated group accounts (Paier 1, [49].

18. I will therefore recognise the Italian Proceedings as foreign main proceedings in respect of the Companies.

Discretionary relief

19. The next question is whether discretionary relief should be granted to extend the consequences of recognition.

20. The automatic consequences of recognition under Article 20 of Schedule 1 to the CBIR do not by themselves prevent the commencement of English insolvency proceedings.

21. However:

a. The Court has a discretion to impose a stay on the commencement of English insolvency proceedings under Article 21 of Schedule 1 to the CBIR;

b. In previous cases involving foreign rescue cases the court has frequently prevented the commencement of further proceedings by imposing the moratorium which applies in English administration under schedule B(1).

22. Ms Paier's unopposed evidence sets out why she considers that the interests of the Companies and their creditors will be not be adequately protected unless the discretionary relief sought under Article 21 of Schedule 1 to the CBIR is granted.

    a. Firstly, in the case of both Luigi and Cimolai, this discretionary relief is essential in order to prevent any of the counter-parties to the Derivative Contracts from petitioning to commence insolvency proceedings in respect of either of the Companies in England.

    b. Secondly, at this stage a formal UK insolvency process would likely be disruptive to the Italian Proceedings, without any clear attendant benefit for their creditors as a whole, and even the presentation of a winding-up petition could have serious and immediate consequences for the Companies.

    c. Thirdly, unless agreement with the English Claimants can be reached, the Companies are preparing to propose parallel UK restructuring plans under Part 26(a) of the Companies Act 2006; a claim form for which was issued on 16 March 2023.

23. As the purpose of the Italian main proceedings is to rescue the company by restructuring its debts, it seems to me to be right to confer on the company protection equivalent to that granted to an English company in administration but with two caveats:

    a. Firstly, that extended protection will be subject to liberty to any person to apply to lift or vary the stay; and

    b. secondly, it does not deal with the position of JB Drax which I will consider separately shortly.

Stay of the Drax proceedings

24. Turning to the issues which have been in substantive dispute today. That is the question of the Drax stay, the background to which can be shortly stated.

25. Drax commenced proceedings in the Commercial Court on 2 November 2022 in relation to the Companies' disputed obligations under derivatives. On 20 December 2022 an extension was agreed between the parties for service of the defence to 7 February 2023. However, on 28 December 2022 the Companies issued this application for recognition, and made an application for an interim stay. Very little notice was given to the interested parties. The recognition proceedings were adjourned by agreement in February, pending formulation of the concordato proposals.

26. On 9 March 2023 those proposals were served on Drax. Under those proposals, Drax's claim is not admitted and will need to be litigated. It is proposed that Drax is not admitted to voting in the Italian proceedings. In the concordato proposals the Companies have indicated that they have a counterclaim against Drax for some 81.5 million euro.

27. On 16 March 2023 the Companies issued their Part 26A claim in England to institute a parallel restructuring proposal under English law which mirrors the concordato proposals. There has subsequently been correspondence between the companies and Drax as to the timetable for reviving the Commercial Court litigation, but there has been no agreement. The Companies' position is that there should be a two month stay, thereafter they should have 40 days to file their defence and counterclaim. Drax's position is that the stay should be lifted immediately, so that the 40 days for the Companies to file their pleadings begins immediately.

28. Drax's submissions in summary are firstly that there is no jurisdiction to grant a stay, because Drax has not submitted to the jurisdiction of the Italian court. Secondly, if there is jurisdiction, Drax says that there is no basis to grant a stay in circumstances when the concordato proposals themselves require litigation of the Drax claim in the Commercial Court. Thirdly, Drax says that there is no application for a case management stay and in any event such a stay would be inappropriate because the Drax claim is not before me, it is in the Commercial Court, and it is therefore a matter for the Commercial Court and there are in any event no grounds for such a stay.

29. The Companies' response is that there is jurisdiction, and that a short stay is appropriate to support the Italian process by preventing resources being diverted from

developing the concordato proposals for the benefit of all the other creditors, apart, perhaps, from Drax, and to allow pre-action correspondence to narrow the issue.

30. Drax submits that its debt cannot be extinguished by the Italian proceedings and the concordato proposals, because it has not submitted to the jurisdiction of the Italian court. This is because of the common law rule in Gibbs. The rule in Gibbs is that a creditor's claims are not extinguished by a foreign insolvency process unless that is the effect according to the proper law of the debt in question. In this case, the proper law of Drax's debt is English law. Drax has not submitted to the jurisdiction of the Italian courts and therefore Drax says, in the eyes of English law the debt has not been extinguished. It seems to me that that is correct, but that is not an end of the matter. Drax relies on a number of cases for the proposition that in such circumstances there is no jurisdiction on the part of the court to grant a stay, either to vary the automatic stay under Article 20 or to grant a stay under Article 21.

31. The first case relied on is *Re OGX Petróleo e Gás S.A*, [2017] 2 All ER 217. There it was said by Mr Justice Snowden that the stay under the model law was not intended to protect people who stood outside the collective proceedings. The objective of the model law, as explained in that case, was to prevent one unsecured creditor from obtaining an illegitimate advantage over the other unsecured creditors. Drax points to that case and says that it is in a similar position, as standing outside the Italian proceedings, because they have not submitted to jurisdiction of the Italian courts. Drax also relies on *Chang v Cosco Shpping (Qidong) Offshore Ltd* [2002] BCC 176 in which the court approved statements by Mr Justice Snowden in *Re OGX* and came to the conclusion that in that case there should be no stay under Article 21, or a variation under Article 20, if a Singapore restructuring was to be recognised by the Scottish court.

32. In both of those cases, however, it seems to me clear that the court accepted that there was jurisdiction but was simply considering whether or not it should exercise its discretion, whether under Article 20 (6), or under Article 21. In *OGX* the issue which was before the court was whether there had been a failure to make full and frank disclosure to the court on an earlier occasion, and the question the court was considering was whether the information which had been put before the court, or had

not been put before the court, was relevant to the discretion under Article 20(6). In *Chang v Cosco*, as the headnote itself makes clear, and is made even clearer by paragraphs 43 and 45, there was no issue in that case as to recognition. The issue was one of how the court should exercise its discretion under Articles 20 and 21 as to the consequences of recognition. The relief sought by the companies in paragraphs 6 and 7 included the restraint of legal proceedings, or enforcement against the company. In paragraphs 63 and 64 the court said:

> "63. As the purpose of the moratoria was to provide a breathing space to bind dissenting creditors by means of the schemes, then it is highly pertinent to the current petitions that, for the reasons set out above, as a matter of English law, Cosco will not be bound by the schemes and the schemes will not extinguish the liabilities of PRPL and Prosafe under the seller's credit guarantee. Those liabilities do not, as far as English law is concerned, form part of the restructuring. Pursuing them will not, as far as English law is concerned, disrupt the implementation of the restructuring as they do not form part of that restructuring. Cosco is entitled to enforce its rights under English law, and is entitled to do so before or after the implementation of the scheme.
>
> "64. For the reasons set out above, in my opinion the liabilities under the seller's credit and the guarantee stand outside the collective insolvency process of which the moratoria are an integral part. That is sufficient for me to refuse to grant, in respect of these liabilities, the remedies sought in paragraphs 6 and 7 of the prayer in each petition. However, for completeness I shall go on to consider whether, in any event, the test for granting these remedies is met."

33. In that case the court did not think that Cosco should be restrained from enforcing its rights under English law while the Singapore restructuring proceeded. That was an exercise of its discretion in the circumstances of that case. In this case there is no dispute that Drax should be able to litigate its claims against the companies, notwithstanding the Italian restructuring. The only question is whether a breathing space of two months should be given to it before that litigation recommences, and that is a matter, it seems to me, of discretion on the facts of this case.

34. Turning to that discretion, the Companies are clear that they are not seeking a case management stay under the CPR. They are not seeking a stay pending their Part 26A application. They are seeking a stay under the CBIR, which must therefore be a stay which is in the interests of the creditors and other interested parties. Often that stay will be to ensure the equal treatment of all creditors, and often that stay will be so that no advantage is gained by one creditor over the other creditors in the restructuring.

35. The companies say that the need for a stay is driven by the fact that at the current stage of the concordato the Companies are about to enter a stage where there will be some to-ing and fro-ing in relation to the proposal. There is some evidence that has been filed in relation to that, by Ugo Giordano and by Giorgio Corno, which suggests that there may be comments or proposals or counter proposals which are made by creditors, and the companies may have to respond to those proposals, and therefore management time may be taken up. The Companies also say that the Part 26A restructuring plans are going on as well, but this carries little weight as no stay is sought pending the Part 26A restructuring.

36. The points which are made by Drax include the fact that there is no evidence which has been specifically filed by the Companies to say why they cannot file a defence and counterclaim within the 40 days which they currently have, why they need a stay, or what comments they are expecting to receive in respect of the concordato, how intensive the work will be in relation to that, or why it might prevent them from dealing with the pleading. The evidence is that the comments will come in between now and 10 July and the toing and froing will continue until 18 July, whereas the stay which is being proposed is until June. In fairness to the company, it is difficult to predict what might happen in relation to the proposal in the future. It is difficult to predict how likely it is that comments or counter proposals will be received, and what work or response they might require, until they actually arrive.

37. The starting point, it seems to me, is that Drax should be allowed to continue their proceedings, not least because the concordato proposals envisage and require that to happen. It seems to me in the end there is clearly a jurisdiction here to grant a stay in support of the Italian proceedings, if indeed there is a genuine reason why a stay is required for the purposes of the Italian proceedings. It is right that there has been no

evidence filed specifically on this point by the companies. However, I have been taken to the correspondence on 3 April and 11 April, and while the Companies initially sought a longer stay, the Companies have consistently said that they are relying on the fact that management time will be expended and will have to be spent on dealing with the English proceedings at a time when they want to be concentrating on the concordato proposals, and the to-ing and fro-ing which has been referred to. No evidence has been filed by Drax as to any prejudice which they are going to suffer in relation to that two month period. There is not a lot in it on this issue. It seems to me that if what was being proposed by the company was that there should be a permanent stay preventing Drax from continuing with its Commercial Court litigation, then many of the very important principles which were enunciated in Chang and in OGX and indeed in OJSC, the Bank of Azerbaijan case which was canvassed in submissions but on which Drax does not rely, would come into play. But we are simply dealing with a situation where the question I have to decide is whether a two month stay is one which, if it is not granted, might impede the insolvency process occurring in Italy. It seems to me there is evidence that there are steps which need to be taken by the Companies between now and July in relation to the concordato and no evidence has been filed by Drax to explain why it might be unfair to Drax or Drax might suffer some prejudice if that two month stay is given. So in such circumstances I am minded to grant that stay for two months.

38. This says nothing on the question of costs which I make clear is completely at large.

Approved Judgment
Mr Justice Rajah

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