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Van Gansewinkel Groep B.V. schemes of arrangement

The fact that documents are governed by English law may not be enough, in itself, to allow a scheme to proceed

Executive Summary

The Van Gansewinkel Groep B.V. group of mainly Dutch and Belgian incorporated companies, which operate a waste management business primarily in the Benelux region, have recently implemented a restructuring using six inter-conditional English law schemes of arrangement under part 26 of the Companies Act 2006 (the "**VGG Schemes**"). Linklaters acted for the coordinating committee of secured creditors in connection with the restructuring.

The VGG companies did not have their centre of main interest, or an establishment, or any significant assets in England, but the liabilities being restructured were governed by English law.

Snowden J sanctioned the VGG Schemes, which were supported by an overwhelming majority of scheme creditors, on 14 July 2015. He subsequently handed down a written judgment containing both his reasons for sanctioning the VGG Schemes and practical guidance for future schemes.

Particular consideration was given to the impact of the EC Judgments Regulation (EU 1215/2012) (the "**Judgments Regulation**") on the English court's ability to sanction a scheme proposed by a foreign company. Crucially, Snowden J did not accept, on the assumption that the Judgments Regulation was applicable, that the English court could assume jurisdiction on the basis of a facility agreement governing law and submission to jurisdiction clause, in which the obligors submitted to the exclusive jurisdiction of the English court, but the creditors did not (despite the facility agreement being expressed to be governed by English law).

Faced with a "one-way" jurisdiction clause of this type, Snowden J considered that the English court should focus on the domicile of the scheme creditors, in order to establish whether there were a sufficient number domiciled in England to justify the court taking jurisdiction under Article 8 of the Judgments Regulation. In the case of the VGG Schemes, Snowden J was satisfied that the proportion of English domiciled scheme creditors was sufficient to allow the scheme to proceed.

It is worth noting that the current Loan Market Association (LMA) form of "Leveraged Facility Agreement" contains a jurisdiction clause which states that the "Parties agree that the courts of England are the most appropriate and convenient courts to settle Disputes and accordingly no Party will argue to the contrary". Given that the borrowers and the lenders are "Parties" for these purposes, the LMA jurisdiction clause appears to be broader in scope than the jurisdiction clause contained in the VGG facility agreement, which was originally entered into in 2006 and, notwithstanding numerous amendments since 2006, contained a number of features which may not be considered "market standard" in the current leveraged market.

The English court's approach to taking jurisdiction

Snowden J's judgment provides a useful reminder that "*the court does not act as a rubber stamp*" and that it will not approve a scheme simply on the basis of "*the support of an overwhelming majority of the creditors*". The court must also, where a company incorporated in a jurisdiction other than England and Wales wishes to propose a scheme, ask the following four questions before accepting jurisdiction:

- Does section 895(2)(b) of the Companies Act 2006 give the court the power to sanction a scheme proposed by that company?
- If so, is there "***sufficient connection***" between that company and England to justify the court exercising that power?
- If the company has its COMI in another EC Member State, is there anything in either EC Regulation No 1346/2000 on Insolvency Proceedings (the "**EIR**") or the Judgments Regulation to prevent the court from exercising that power? and
- If the company is incorporated, or has its COMI, in another jurisdiction, will the effect of the scheme be recognised in that jurisdiction?

In this case Snowden J was quickly satisfied that section 895(2)(b) gave the court the power to sanction the VGG Schemes, that there was "***sufficient connection***" with England to justify the court exercising that power (given that the documents in question were governed by English law) and that there was nothing in the EIR to prevent the court from exercising that power. He was also satisfied, having reviewed expert evidence from leading academics, that there was a realistic prospect of the VGG Schemes being recognised in Belgium and The Netherlands.

The impact of the Judgments Regulation

The remaining question was whether the Judgments Regulation was applicable and, if so, whether it had the effect of limiting or restricting the English court's jurisdiction to sanction a scheme proposed by a foreign company. Snowden J did not rule on whether the Judgments Regulation would be applicable, simply (and correctly) noting that "*this point is of some difficulty*".

Proceeding on the assumption that the Judgements Regulation did apply (an approach generally adopted in recent cases), he felt unable to accept jurisdiction on the basis of Article 25(1) of that Regulation which gives a court jurisdiction where the relevant parties have previously agreed that it should settle any disputes. In this case, his judgment was that, on a proper construction, only the VGG companies had previously submitted to the jurisdiction of the English courts. The creditors had not expressly done so, but neither had they expressly not done so.

If, therefore, the Judgments Regulation applied, the English court could only take jurisdiction if it could rely on Article 8(1) (or possibly Article 6) of that Regulation. Article 8(1) provides that a person domiciled in a Member State may be sued "*where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, provided that the claims are so closely connected that it is expedient to hear and determine them together*". In *Rodenstock*, Briggs J (as he then was) suggested that if the Judgments Regulation applied, schemes could fall within the scope of this Article, as scheme creditors, being entitled to appear and oppose the scheme, could be regarded as "defendants" for this purpose.

In *Rodenstock*, more than 50% of the scheme creditors were domiciled in England. In the VGG Schemes, 15 of the over 100 scheme creditors, with claims totalling c.€135 million out of c.€820 million in total, were domiciled in England. Snowden J commented that "*although this did not meet the 50% mentioned in Rodenstock, I cannot see that this makes any difference*". Article 8(1) could potentially be engaged as long as at least one of the scheme creditors was domiciled in England and it was expedient to hear the claims against all other scheme creditors at the same time. Snowden J was therefore satisfied that, if the Judgments Regulation did apply, Article 8(1) gave the English court the necessary jurisdiction to sanction the VGG Schemes.

Practical implications of the judgment – jurisdictional issues

- Given that Snowden J was not satisfied that a "one-way" English law jurisdictional clause was sufficient (on its own without taking into account other factors) to confer jurisdiction on the English court for the purposes of the Judgments Regulation, a foreign company may not wish to strictly rely on a provision of this nature.
- It should instead ensure that at least one (preferably more both in terms of number and in value) of its scheme creditors is English domiciled prior to launching the scheme process.
- It would also be prudent for a foreign company proposing a scheme to ensure that evidence regarding the domicile of the scheme creditors was available to be presented in evidence to the court as and when requested.

Practical implications of the judgment – procedural issues

- Snowden J observed that if, as is increasingly common, jurisdictional issues are intended to be addressed at the convening hearing, the practice statement letter sent to scheme creditors should, as well as providing them with details of the proposed class composition, also notify them of any jurisdictional issues to be addressed at the convening hearing, so as to give the "*fair warning of what is on the agenda*".
- Given that there may be different judges at the convening and the sanction hearings, Snowden J suggested that it may be advisable, where jurisdictional issues are considered at the convening hearing, to request a written judgment which can be provided to the judge at the sanction hearing, to demonstrate that jurisdictional issues had already been addressed.
- Snowden J also "*indicated for the future*" that, particularly where a scheme is being proposed as an alternative to a formal insolvency procedure, a company "*may be well advised*" to include in the explanatory statement a detailed explanation, with sufficient information to allow the creditors to make an informed assessment, of the possible alternatives to the scheme and the basis for any predicted outcomes from such alternative options. It should also explain in detail why the scheme represents a more advantageous outcome for scheme creditors than any identified alternative

Linklaters

Contacts

For further information please contact:

Yen Sum
Partner

(+44) 20 7456 4383

yen.sum@linklaters.com

Daniel Gendron
Partner

(+44) 20 7456 5299

daniel.gendron@linklaters.com

James Warboys
Managing Associate

(+44) 20 7456 5111

james.warboys@linklaters.com

Author: James Warboys, Yen Sum, Daniel Gendron

One Silk Street
London EC2Y 8HQ

Telephone (+44) 20 7456 2000
Facsimile (+44) 20 7456 2222
Linklaters.com