Case No: CR-2018-003870

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

IN THE MATTER OF VIDEOLOGY LIMITED

AND IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006

The Rolls Building
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Date: 16 August 2018

Before :

MR. JUSTICE SNOWDEN

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Between :

IN THE MATTER OF VIDEOLOGY LIMITED
- and -
IN THE MATTER OF THE CROSS-BORDER INSOLVENCY REGULATIONS 2006

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Robert Amey (instructed by **DWF LLP**) for the Applicant

Hearing dates: 11 May, 7 June and 13 June 2018

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Judgment

MR JUSTICE SNOWDEN:

Introduction

1. On 13 June 2018 I refused to recognise proceedings under Chapter 11 of the US Bankruptcy Code ("Chapter 11") in relation to Videology Ltd ("the Company") as a foreign main proceeding under Article 17 of the UNCITRAL Model Law on Cross-Border Insolvency ("the Model Law") as incorporated into English law in Schedule 1 to the Cross-Border Insolvency Regulations 2006 (the "CBIR"). I did so because I was not satisfied that the centre of main interests ("COMI") of the Company was in

the US where the Chapter 11 proceedings are taking place. I did, however, grant recognition of the Chapter 11 proceedings as a foreign non-main proceeding.

2. In addition, I granted discretionary relief under Article 21(1)(g) of the Model Law equivalent to the moratorium against actions by individual creditors that would be provided to a company in administration under paragraph 43 of Schedule B1 to the Insolvency Act 1986 ("the Insolvency Act"). I also imposed a moratorium on applications for the commencement of collective insolvency proceedings in the UK without leave of the court.

3. I indicated on 13 June 2018 that I would give reasons for my decisions in writing, which I now do.

Background

The Videology Group

4. The Company is incorporated and has its registered office in England and Wales. It is a wholly-owned subsidiary of Videology Inc. ("Inc."), a corporation incorporated in Delaware, United States. The Company forms part of a larger corporate group ("the Group") of which Inc. is the parent company. The sole director of the Company is Mr. Scott Ferber ("Mr. Ferber"), who is also the co-founder and CEO of Inc..

5. The Group provides video advertising software which connects television and video viewing to media behaviour information and thus provides insight to clients on how to improve the effectiveness of video advertising campaigns (the "Video Advertising Software"). The evidence suggested that this technology is unique to the Group and was developed by Inc. to fill a gap in the advertising and media market. The intellectual property rights in the Video Advertising Software are owned by Inc. and licensed to the Company. The Group as a whole has an extensive client base, with over 4,000 active users, including some of the biggest names on both the supply and demand side of the market.

6. The Company was formed to establish and increase the Group's business in the UK and in Europe, the Middle East and Africa. It operates from leased premises in London. The business conducted by the Company using the Video Advertising Software accounts for a substantial proportion of the Group's revenue and accounts receivable.

Events Leading to the Chapter 11 Proceedings

7. The advanced television market is still relatively new, and in the early days of its business, the Group required substantial resources to get the Video Advertising Software onto the market. Initially, the Group focussed on online video sales using third-party data (the "Legacy Business"). However, as time progressed, the Legacy Business faced substantial competition.

8. In 2015, the Group launched its 'Core Use' business, which enabled its clients to utilise the Group's technology for their advertising strategies (the "Core Use Business"). The Core Use Business has enjoyed strong growth since its launch, with 29% revenue growth in the first year, 27% in the second year and approximately 60% growth expected through the current year.

9. However, the transition from the Legacy Business to the Core Use Business utilised substantial capital resources. This led the Group to pursue additional funding and from about 2014 to engage LUMA Partners, an investment bank focused on digital media and marketing, to provide advice and assistance in finding potential partners and purchasers for its business. These efforts were increased in Spring 2017 when the Group's financial difficulties worsened. LUMA and the Group contacted 27 potential financing partners. Five of these potential partners progressed to the due diligence stage of negotiations with the Group, but the negotiations foundered at the end of 2017 and ultimately no transaction was concluded. One of the reasons cited for the failure of such negotiations was the complex capital and debt structure of the Group.

10. Earlier this year, the lack of available capital led to the Group's largest client placing a temporary hold on payments. In turn this caused the Group's secured lenders to call a default under the Group's loan agreements, to seize control of the Group's operating bank accounts and significantly to restrict the Group's access to cash. This had a serious adverse effect on the Company.

11. On 10 May 2018, Inc. and certain of its subsidiaries, including the Company, filed voluntary petitions under Chapter 11 in the United States Bankruptcy Court for the District of Delaware. The purpose of the Chapter 11 proceedings was for the companies concerned to obtain protection from action by individual creditors, to stabilise their current operations and thereby to preserve value, to restructure their balance sheets, and in due course to effect a co-ordinated sale of the Group's business and assets.

12. At the commencement of the Chapter 11 process, the Company's principal financial liabilities were as follows:

    i) <u>Secured Liabilities</u>

        a) In July 2017 the companies in the Group had entered into or become parties to three loan and security agreements ("the Finance Agreements") with Fast Pay Partners LLC ("Fast Pay") as agent for various lenders, conveniently referred to as the UK Loan Agreement, the US Loan Agreement and the Receivables Financing Agreement. The UK Loan Agreement and the US Loan Agreement were governed by Californian law; the Receivables Financing Agreement was governed by English law. At the commencement of the Chapter 11 process, about US$11.3 million was outstanding from the Company under the UK Loan Agreement.

        b) In connection with the Finance Agreements, the Company had also entered into a number of debentures and charges, all of which were subject to English law and some of which included a qualifying floating charge.

ii) Unsecured Liabilities At the commencement of the Chapter 11 process, the Company had unsecured (trade) creditors of about US$57.5 million, of which about 90% are overdue. As a result, the Company had been the subject of a number of county court proceedings and threats of insolvency proceedings from various trade creditors in the UK.

iii) Tax The Company had a liability to HMRC of about US$950,000 and penalties (which are disputed) had been levied for late filing of returns.

13. Prior to the commencement of the Chapter 11 process, two of the previously interested parties had expressed a renewed interest in purchasing the Group's business and assets, taking advantage of the simplification of the capital structure and the protections that would be available under a Chapter 11 process. One of those parties, Amobee Inc., entered into an Asset Purchase Agreement dated 5 May 2018 (the "APA"). This wa referred to as the "stalking horse" bid, and in effect provided a backstop to the competitive auction process which would take place if other qualified bidders submitted overbids in the Chapter 11 proceedings. That auction process required bids to be submitted by 11 July 2018 and the stated intention was that a sale would be completed shortly thereafter.

14. In order to be able to continue to trade during the period required for the business of the Group to be sold, debtor-in-possession ("DIP") financing was obtained from Draper Funder LLC (the "DIP Lender") and security granted by companies in the Group (including the Company) for such loans.

15. The evidence was that after completion, the proceeds of sale of the Group's business would be used to repay the DIP Lender, administrative expenses and other priority claims. The next step would be for the creditors' committee and the debtor companies to negotiate a Chapter 11 plan for distribution of those net proceeds. In that regard, one of the first issues would be to agree a proper allocation of the proceeds of sale between the Group companies, including, in particular between Inc. (as owner of the intellectual property rights) and the Company (as owner of a substantial proportion of the accounts receivable).

The Applications for Recognition

16. Although the filing of the proceedings under Chapter 11 by Inc. and the Company resulted in immediate protection from individual creditor action under US law, it was considered essential for similar protection to be obtained by both companies in the UK. To that end, on 11 May 2018, the day after the Chapter 11 proceedings were commenced, two urgent applications were made to me under the CBIR (i) by Inc. and Mr. Ferber, and (ii) by the Company and Mr. Ferber, for:

i) recognition of the Chapter 11 proceedings in relation to both Inc. and the Company as foreign main proceedings under Article 17 of the Model Law; and

ii) discretionary relief pursuant to Article 20(6) and/or Article 21(1) of the Model Law, substantially in the form of the administration moratorium under paragraph 43 of Schedule B1 to the Insolvency Act.

17. In respect of Inc., I was satisfied on the evidence that both Inc. and Mr Ferber were foreign representatives for the purposes of the Model Law, that the COMI of Inc. was in the US, and that the Chapter 11 proceedings in the Delaware Court were foreign main proceedings. I therefore made a final order recognising the Chapter 11 proceedings in relation to Inc. as foreign main proceedings.

18. In addition, as requested, I made an order under Articles 20(6) and 21(1) imposing a modified regime providing for a stay and suspension of individual actions, proceedings and execution against Inc. except with the permission of the court. This effectively replicated the moratorium which is applicable in administrations in the UK by virtue of paragraph 43 of Schedule B1. I also imposed a bar on the presentation of any winding-up petition or the appointment of an administrator in respect of Inc., except with the permission of the court.

19. My reasons for doing so reflected the approach explained by Hildyard J in International Bank of Azerbaijan v Sberbank of Russia [2018] EWHC 59 (Ch) at [97]-[98],

> "97. Where a foreign liquidation is recognised by the English court as a foreign main proceeding under the CBIR, the debtor benefits from an automatic stay in England: see art. 20(1) of Sch. 1. The stay is imposed in the same terms as if the debtor had entered into an analogous insolvency proceeding in England, namely a winding-up under the 1986 Act (the relevant provision under the 1986 Act is s.130(2), which stays all proceedings against the company (unless the court grants leave)). The scope of the stay imposed by art. 20(1) is set out in art 20(2). The automatic stay can be modified under art. 20(6). The automatic stay under art. 20 is primarily designed for foreign liquidations.
>
> 98. This is to be contrasted with a foreign restructuring which does not involve liquidation. In such a foreign restructuring (particularly where the debtor continues to trade), the automatic stay is normally replaced with an administration moratorium in the terms of para. 43 of Sch. B1 to the 1986 Act: see Re 19 Entertainment Ltd [2017] BCC 347 at [20]–[22]."

20. The addition of the restrictions in relation to the appointment of an administrator and the presentation of a winding up petition reflect those that would apply if the debtor was in administration here: see paragraph 7 of Schedule B1 and the decision in Re Arucana Limited [2009] EWHC 3838 (Ch) to the effect that paragraph 43(6) of Schedule B1 prevents the presentation of a winding-up petition without the permission of the court.

21. In respect of the Company, I was satisfied that the Company and Mr. Ferber were foreign representatives for the purposes of the Model Law, and that relief was urgently needed to protect the assets of the Company in the UK and the interests of its creditors. The evidence indicated that there were several court proceedings that had been commenced or threatened against the Company by creditors in the UK, and I was notified during the hearing that another creditor had just presented a winding up

petition. There was also concern that the landlord of the Company's trading premises in London might seek to exercise a right to forfeit its lease and re-enter the premises.

22. I was, however, not satisfied on the evidence that the location of the Company's COMI was in the US as alleged by the Company and Mr. Ferber. I was therefore not satisfied that it was appropriate to recognise the Chapter 11 proceedings as a foreign main proceeding, or to grant any ancillary relief on a final basis. Accordingly, I granted interim relief pursuant to Article 19(1) of the Model Law essentially in the same form as that granted in relation to Inc., and adjourned the hearing of the application for notice to be given to all interested parties (including the petitioner which had presented the winding up petition and the holders of the qualifying floating charges granted by the Company) and for further evidence to be filed.

23. The Company's application came before me again on 7 June 2018. At that hearing I was informed that an agreement had been reached with the petitioner and the winding up petition had been withdrawn. I was also informed that the secured lenders holding qualifying floating charges had been paid off using the finance provided by the DIP Lender.

24. For the reasons that I will summarise below, I was, however, still not satisfied on the evidence that the Company's COMI was in the US. I therefore requested further evidence concerning the protections available to the Company's creditors in the Chapter 11 process in order to assist me in the exercise of my discretion under Article 21 as to whether, assuming that I was prepared to recognise the Chapter 11 proceedings as foreign non-main proceedings, it would still be appropriate to grant relief under the Model Law preventing individual action by creditors or the commencement of insolvency proceedings in the UK. That evidence was provided to me prior to the hearing on 13 June 2018.

Recognition, COMI and an establishment

The legal framework

25. Under Article 2(i) of the Model Law, a foreign proceeding means,

> "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."

That plainly includes proceedings in the US under Chapter 11.

26. Article 17(2) of the Model Law provides that a 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 within the meaning of sub-paragraph (e) of article 2 in the foreign State."

27. The COMI of a debtor is not defined in the Model Law, but Article 16(3) provides that, in the absence of proof to the contrary, the place of the debtor's registered office is presumed to be its COMI. "Establishment" is defined in Article 2(e) as, "any place of operations where the debtor carries out a non-transitory economic activity with human means and assets or services."

28. The concept of COMI, and the presumption that it is in the place of the registered office in the absence of proof to the contrary, also appeared in the original EC Insolvency Regulation (1346/2000) ("the EIR") and has been retained in the Recast EU Insolvency Regulation (EU 2015/848) ("the Recast EIR"). In re Stanford International Bank Ltd [2011] Ch 33 ("Stanford") at [53]–[54], the Court of Appeal held that the approach of the English courts to the determination of a company's COMI under the CBIR/Model Law should be the same as under the EIR and that if there was any difference in the test promulgated by the ECJ in the Eurofood case (see below) and that applied by the US Courts, the court in England should apply the ECJ's test. That approach has been criticised by some commentators (see e.g. Look Chan Ho, *Cross-Border Insolvency: Principles and Practice* at 3-023 to 3-025). However, for so long as the UK remains a party to the Recast EIR, I can see no obvious basis upon which I should adopt any different approach in relation to the concept of COMI under the CBIR/Model Law and the Recast EIR, and Mr. Amey did not seek to persuade me to the contrary.

29. The original EIR did not contain a definition of COMI, but Recital (13) provided,

> "The 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties."

30. In the Recast EIR, this has been elevated to a definition under Article 3(1), which provides that the COMI of a debtor,

> "shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties."

31. In addition, Recitals (28) - (30) of the Preamble to the Recast EIR provide,

> "(28) When determining whether the centre of the debtor's main interests is ascertainable by third parties, special consideration should be given to the creditors and to their perception as to where a debtor conducts the administration of its interests. This may require, in the event of a shift of centre of main interests, informing creditors of the new location from which the debtor is carrying out its activities in due course, for example by drawing attention to the change of address in commercial correspondence, or by making the new location public through other appropriate means.

> (29) This Regulation should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping.
>
> (30) Accordingly, the presumptions that the registered office, the principal place of business and the habitual residence are the centre of main interests should be rebuttable, and the relevant court of a Member State should carefully assess whether the centre of the debtor's main interests is genuinely located in that Member State. In the case of a company, it should be possible to rebut this presumption where the company's central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State…."

32. Those Recitals were incorporated into the Recast EIR to reflect the decisions of the ECJ in <u>Re Eurofood IFSC Ltd</u> (Case C-341/04) [2006] Ch 508 ("<u>Eurofood</u>") and <u>Interedil Srl v Fallimento Interedil Srl</u> (Case C-396/09) [2012] Bus LR 1582 ("<u>Interedil</u>").

33. In <u>Eurofood</u> at [33] - [37], the ECJ emphasised that the COMI of companies within a group must be separately assessed, that factors relied upon to rebut the presumption as to the COMI being in the place of the registered office had to be both objective and ascertainable by third parties, and that the mere fact that a parent company in another Member State controlled the economic choices of a subsidiary was not enough to rebut the presumption. The ECJ concluded,

> "37. In those circumstances, the answer to the fourth question must be that, where a debtor is a subsidiary company whose registered office and that of its parent company are situated in two different Member States, the presumption laid down in the second sentence of Article 3(1) of the Regulation, whereby the centre of main interests of that subsidiary is situated in the Member State where its registered office is situated, can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect. That could be so in particular in the case of a company not carrying out any business in the territory of the Member State in which its registered office is situated. By contrast, 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 rebut the presumption laid down by the Regulation."

34. In <u>Interedil</u> at [49] – [53] the ECJ expanded upon this approach,

“49. … the Court also stated, at paragraph 33 of <u>Eurofood</u>, that the centre of a debtor's main interests must be identified by reference to criteria that are both objective and ascertainable by third parties, in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open the main insolvency proceedings. That requirement for objectivity and that possibility of ascertainment by third parties may be considered to be met where the material factors taken into account for the purpose of establishing the place in which the debtor company conducts the administration of its interests on a regular basis have been made public or, at the very least, made sufficiently accessible to enable third parties, that is to say in particular the company's creditors, to be aware of them.

50. It follows that, where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in the second sentence of Article 3(1) of the Regulation that the centre of the company's main interests is located in that place is wholly applicable. In such a case, as the Advocate General observed at point 69 of her Opinion, it is not possible that the centre of the debtor company's main interests is located elsewhere.

51. The presumption in the second sentence of Article 3(1) of the Regulation may be rebutted, however, where, from the viewpoint of third parties, the place in which a company's central administration is located is not the same as that of its registered office. As the Court held at paragraph 34 of <u>Eurofood</u>, the simple presumption laid down by the European Union legislature in favour of the registered office of that company can be rebutted if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.

52. The factors to be taken into account include, in particular, all the places in which the debtor company pursues economic activities and all those in which it holds assets, in so far as those places are ascertainable by third parties. As the Advocate General observed at point 70 of her Opinion, those factors must be assessed in a comprehensive manner, account being taken of the individual circumstances of each particular case.

53. In that context, the location, in a Member State other than that in which the registered office is situated, of immovable property owned by the debtor company, in respect of which the company has concluded lease agreements, and the

> existence in that Member State of a contract concluded with a financial institution - circumstances referred to by the referring court - may be regarded as objective factors and, in the light of the fact that they are likely to be matters in the public domain, as factors that are ascertainable by third parties. The fact nevertheless remains that the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption laid down by the European Union legislature unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State."

35. The reason for the emphasis upon factors that are ascertainable by third parties was given in the Virgós-Schmit Report on the draft Convention on Insolvency Proceedings that preceded the original EIR at paragraph [75],

> "The concept of "centre of main interests" must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.
>
> The rationale of this rule is not difficult to explain. Insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which, as we will see, entails the application of the insolvency laws of that Contracting State) be based on a place known to the debtor's potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated…"

36. The point was picked up expressly by the Advocate General in his Opinion in <u>Eurofood</u> at [118],

> "118. Although that definition makes no reference to the elements which constitute 'administration', important in the present case where control of policy has been argued to constitute 'administration', it has been suggested that the choice of 'centre of main interests' as the principal connecting factor determining the Member State with jurisdiction over an insolvent company is intended to provide a test in which the attributes of transparency and objective ascertainability are dominant. [Virgós-Schmit report, paragraph 75]. Those concepts seem to me to be wholly appropriate elements for determining jurisdiction in the context of insolvency, where it is clearly essential that potential creditors should be able to ascertain in advance the legal system which would resolve any insolvency affecting their interests. It is particularly important, it seems to me, in cross-border debt transactions (such as those

> involved in the main proceedings) that the relevant jurisdiction for determining the rights and remedies of creditors is clear to investors at the time they make their investment."

37. The point was also confirmed by the ECJ itself in Eurofood at paragraph [33],

> "…. That objectivity and that possibility of ascertainment by third parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings. That legal certainty and that foreseeability are all the more important in that, in accordance with Article 4(1) of the Regulation, determination of the court with jurisdiction entails determination of the law which is to apply."

The relevant factors

38. Against that background, I turn to consider the evidence as to the various factors that might be thought to be relevant to the location of the Company's COMI. As indicated above, the Company's registered office is located at leased premises in London. This gives rise to the presumption under the Model Law that the Company's COMI is in England.

39. Mr. Amey argued that this presumption should be displaced because (i) the sole director and senior management of the Company were all based in the US, (ii) third parties dealing with the Company on a regular basis would be aware that all strategic decisions in relation to the Company were made by the director and senior management in the US, (iii) the Company was dependent upon the technology owned by Inc. and did not have a distinct brand identity from Inc., which was obviously a US corporation, and (iv) recent meetings with creditors and others as regards the financial problems of the Company and the sales process to which I have referred have taken place in the US. Mr. Amey submitted that the Company would appear to third parties to be "essentially an American company, run by American management, based in America".

40. Before turning to the evidence in more detail, I would make two preliminary points.

41. The first arises from the fact that Mr. Amey supported his submissions relating to the location of the director and senior management and the place in which third parties would understand that strategic decisions relating to the Company are taken by reference to paragraphs 8.93 - 8.94 of *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings* (3rd ed.). In those paragraphs, the authors express the opinion that although the factors that have to be taken into account in determining the COMI include the places where the debtor pursues economic activities and where its assets are situated,

> "Ultimately, however, it is the 'company's actual centre of management and supervision' which is the critical criterion."

42. I do not consider, for the following reasons, that the decisions in Eurofood and Interedil focus attention quite as narrowly on, or attach such overriding importance to,

the location in which the directors and senior management act, as Mr. Amey submitted.

43. First, the definition of COMI in the Recast EIR refers to the place in which the debtor "conducts the administration of its interests". The natural meaning of that expression suggests a broader concept of administration than just the place of strategic decision-making by the board of directors or senior management.

44. Secondly, Recital (30) to the Recast EIR, which encapsulates the decision in Interedil, refers to the presumption being capable of being rebutted if it can be shown that the "central administration" of the debtor is in another Member State. That expression naturally requires the consideration of a wider range of factors in addition to where the board or senior management act. That is also consistent with how, having made that statement in paragraph [51] of its judgment, the ECJ in Interedil went on, in paragraph [52], to specify that the type of factors which should be taken into account include, "in particular", all the places in which the debtor company pursues economic activities and all those in which it holds assets, in so far as those places are ascertainable by third parties.

45. Finally, in paragraph [53] of Interedil, the ECJ went on to conclude that the presumption would not be rebutted unless a comprehensive assessment of all relevant factors established, in a manner ascertainable by third parties, that the company's "actual centre of management and supervision and of the management of its interests" is located in the other Member State (my emphasis). That formulation refers both to the centre "of management and supervision" and the centre "of the management of its interests". In my judgment, that is clearly intended to refer to a wider set of factors than just the location of the centre of "management and supervision" alone.

46. I should also indicate that I do not think that the position is any different if regard is had to the concept of the place in which a company carries out its "head office functions". That expression is not defined and does not appear in either the original EIR or the Recast EIR. Moreover, although it appears to have been introduced in argument and to have gained some traction with the Advocate General in paragraphs [110]-[112] of his opinion in Eurofood, it was not referred to in the judgment of the ECJ in either Eurofood or Interedil. It was, however, referred to by Arden LJ in paragraph [152] of her judgment in Stanford and has been treated in some commentaries as a convenient encapsulation of the concept of COMI. So, for example, the authors of *Moss, Fletcher and Isaacs* suggest in paragraphs 8.93 - 8.94 that the ECJ implicitly endorsed a "head office functions" test in Interedil, and they develop this thesis in relation to groups of companies in paragraph 8.103, where it is stated,

> "8.103 The ECJ in Eurofood emphasized that in the case of groups of companies it is necessary to examine the location of each company's COMI individually and that there can be no automatic assumption that the location of a subsidiary's COMI will be the same as that of its parent. Nevertheless, it may well be the case that this inquiry leads to the conclusion that the location of each company's COMI is in fact in the same place, by virtue of the head office functions test in Interedil. In many corporate structures, the head office functions for the entire

> group, consisting of the parent company and its subsidiaries, may be carried out from a single group head office. Applying Interedil, the COMI of each of the group companies may well be located at that head office…"

47. Whether or not it is correct to view the decision in Interedil as implicitly endorsing a "head office functions" test, it seems to me that such a concept must in any event include more than just the function of the board of directors or senior managers in deciding upon policy for the debtor company. Many other functions are likely to be carried on at and from a conventional "head office", such as the employment of staff, the placing of orders for goods and services, the sending of invoices, the making and collection of payments, and the operation of a company's bank account. By their very nature, those functions are also more likely to be ascertainable by third parties than the holding of board or management meetings.

48. The second preliminary point concerns the time at which COMI is to be determined, and the weight to be attached to dealings with creditors in the period immediately prior to the opening of insolvency proceedings.

49. Under the Model Law, a request for recognition may be made at any time after the commencement of the foreign proceedings. Accordingly, the court considering an application for recognition must determine whether the foreign proceedings for which recognition is sought are in the place that was the debtor's COMI when the proceedings commenced: see paragraph 141 of the Guide to Enactment and Interpretation of the Model Law (2013) ("the Guide to the Model Law"). Under the Recast EIR, the date at which the COMI of a company must be determined is that at which the request to open insolvency proceedings is made (see e.g. Interedil at paragraph [55]).

50. In this case, of course, there is no material difference between the date upon which the Chapter 11 proceedings were opened and the date upon which the application for recognition was made. However, what is or may be relevant is the extent to which regard can be had to where dealings with creditors took place in the period shortly before the making of the application to open insolvency proceedings.

51. Evidence of such matters has been taken into account in cases in the UK: see e.g. re Hellas Telecommunications (Luxembourg) II SCA [2010] BCC 295 and re European Directories (DH6) BV [2012] BCC 46. It is, however, clear that it may be significant whether there was any general notification to creditors of a change in venue in relation to such matters. That was a feature in both Hellas and European Directories and which is now reflected in the observations in Recital (28) to the Recast EIR. Moreover, particular care must be taken over the weight to be attached to such matters given the concerns over forum-shopping and COMI-migration which are now identified in Recitals (28)-(30) of the Recast EIR and which have led to the new suspension periods in Article 3 and the procedural requirements in Article 4 of the Recast EIR.

The Company's dealings with customers and trade creditors

52. The evidence of Mr. Ferber was that the Company conducts the majority of its business with its customers (the advertising agencies who place campaigns through

the Company's platform) and with its trade creditors (the publishers of advertising content) from its registered office in London using local employees.

53. Mr. Ferber stated that the Company's contracts are generally entered into in the UK and are subject to English law and jurisdiction clauses. The vast majority of accounts receivable generated by the Company's business are also the subject of invoices issued in sterling and provide for payment to a designated UK bank account of the Company in London.

54. Mr. Ferber also stated that the Company's contracts with publishers (i.e. creditors) "are managed locally in the UK and by Inc. on behalf of the Company through the Head Office". The term "Head Office" is not defined in the evidence, but from a corporate chart exhibited by Mr. Ferber, it is clear that this is a reference to the headquarters of Inc. in Baltimore, Maryland, US. I shall return to consider the involvement of Inc. in the management of the Company below, but at this juncture I simply note that this evidence at least makes it clear that the Company does manage its relationships with its substantial number of trade creditors in the UK.

The Company's senior management

55. As indicated above, Mr. Ferber, the Company's sole director, is a US citizen who is permanently resident in the US. His evidence stated that "all board meetings are held and conducted within the United States". Since Mr. Ferber is the only director, I take this to be an assertion that Mr. Ferber attends to the Company's business whilst he is in the US.

56. Mr. Ferber also referred to the location and activities of a number of persons who are not directors of the Company, who he described as "the Company's senior executive team". With one exception, those persons are also permanently resident in the US. Mr. Ferber's evidence was that,

> "The Company's strategic direction and leadership is almost all located in the United States and third parties are well aware of this. The Company's management team, which executes the board's directions and plans formulated and created in the United States is also based in the United States."

57. It is, however, clear from the website operated by the Group that the titles ascribed in the evidence to the members of the "senior executive team" (e.g. President, Chief Operating Officer, Chief Scientist and Chief Product Officer) in fact correspond to the positions held by those individuals at Inc. or within the Group as a whole. There is no suggestion that the individuals identified in the evidence as "the Company's senior executive team" are in fact separately employed by, or only hold their positions within, the Company.

58. The conclusion that I draw from this evidence is that Mr. Ferber's reference to the "strategic direction and leadership of the Company" is in reality a reference to himself and the other officers of Inc. who provide high-level supervision of the affairs of the Company as part of their management of the Group as a collective whole.

59. Initially, there was no specific evidence of what, if anything, creditors or other third parties might know of these activities carried on in relation to the Company in the US. This issue was addressed in some supplemental evidence. The Company procured a number of letters to be written by some of its larger creditors, most of whom were based in the US. The letters from two of those creditors (Group M and Spot X) followed a template which I was told was provided by the Company's solicitors, and were in identical form. The letters stated,

> "Pursuant to your request [Group M/Spot X] can confirm that it is aware that Videology UK's board of directors and senior management team are based in the United States. As such, [Group M/Spot X]'s business interactions with Videology UK's senior management, particularly with regard to high-level contractual issues and disputes, have routinely occurred in the United States."

60. That statement obviously does not reveal any detail as to what the creditors really understand of the workings of the Company's "board of directors" [sic] other than its physical location. It also lacks any real detail as to the nature of the "business interactions". Although there is a reference to such interactions having "routinely occurred" in the US, the emphasis on "high-level contractual issues and disputes" seems to me to suggest that the perception of the creditors is that only a limited range of matters are dealt with on behalf of the Company by the senior management team of Inc. in the US.

61. A similar picture appears from a letter from a third group of creditors headed by Oath Inc ("the Oath Creditors"), which departed from the standard template. The letter defined "Videology" collectively as, "Videology Inc., Videology Ltd, and various affiliated entities", and contained the following paragraph,

> "The Oath Creditors are informed that the director and senior management team (collectively "Videology Senior Management") of Videology (including without limitation Videology Ltd) are based in the United States. Further, even though some day-to-day, in-market issues with Videology Ltd have involved its office in the UK, the Oath Creditors have conducted business with Videology Senior Management in the United States with respect to significant contractual matters."

That letter does not suggest that the Oath Creditors draw any clear distinction between the management of the Company and that of Inc. or the other Group companies, and at most it suggests that the creditors believe that a particular category of high-level matters concerning the Company are dealt with by the senior management of "Videology" in the US.

Corporate branding and intellectual property

62. The companies within the Group are presented to the outside world on their website and in terms of corporate branding as a combined enterprise operating under the "Videology" name. There is no separate identification of the Company at all. I therefore find it difficult to discern what information, if any, a creditor might take

from this as to the location of the Company's COMI, and there was no evidence in this regard from any creditor.

63. A similar point can be made in relation to the fact that the Company is licensed to use the intellectual property which belongs to Inc.. I had no evidence as to what, if anything, creditors know of the licensing arrangements within the Group. Moreover, given the intangible nature of software, the fact that the Company conducts its business using programmes, the intellectual property in which is owned by a US corporation, provides no real guidance as to where the Company's own business or interests are centrally administered.

The arrangements and dealings with finance creditors

64. As indicated above, the UK Loan Agreement was the principal document under which finance was made available to the Company. The UK Loan Agreement was negotiated in the US between Inc. and a number of US lenders, and was governed by the laws of the State of California. Although not named as a main party to the agreement, the evidence stated that the Company was liable as a "primary guarantor" under the UK Loan Agreement.

65. The UK Loan Agreement contained the following express warranty and representation as to the COMI of the Company,

> "9.1.28 <u>Centre of Main Interests</u> For the purposes of the Council of the European Union Regulation No. 1346/2000 on Insolvency Proceedings ("the Regulation") Videology UK's centre of main interest (as that term is used in Article 3(1) of the Regulation) is situated in England and it has no "establishment" (as that term is used in Article 2(h) of the Regulation) in any other jurisdiction."

66. Similar representations were included in the qualifying floating charges granted by the Company to secure its liabilities under the UK Loan Agreement. There was no evidence that a change in the location of the Company's COMI had at any subsequent time been notified to the lenders or any other creditors as envisaged by Recital (28) to the Recast EIR.

67. Mr. Ferber's evidence as to the clauses in the loan and security documentation was as follows,

> "I now understand that these clauses were 'boilerplate' representations which I did not give any particular thought to at the time. I believe that they were given in order to provide certainty as to applicable law and jurisdiction of any insolvency proceedings. I do not believe that any COMI analysis was conducted at the time."

68. Whatever Mr. Ferber's own view might now be, I do not accept his characterisation of these clauses as mere "boilerplate". The inclusion in an agreement predominantly between US parties, governed by US law, of a clause expressly referring to the EIR

and identifying the COMI of the Company as being in England for that purpose would seem to me to be very far from "boilerplate".

69. Moreover, as Mr. Ferber himself acknowledges, the purpose of the inclusion of such a clause was to provide certainty to the lenders as to the jurisdiction in which any insolvency proceedings in relation to the Company would take place. Bearing in mind the underlying purpose of COMI, the observations of the Advocate General in Eurofood about the importance of identifying the COMI of the debtor at the inception of cross-border debt transactions, and the emphasis placed by the ECJ in the same case on legal certainty and foreseeability, in my judgment the inclusion of such express representations in the financing documents provides strong support to the presumption that the COMI of the Company is in England.

The restructuring discussions and sales process

70. The Company placed reliance upon the fact that notices of default were served by Fast Pay on the Company at the address of the Group headquarters in the US; that restructuring meetings with the main creditors such as Fast Pay concerning the amounts owing have been held in California and New York; and that negotiations concerning the possible sale of the Group's business and the APA have taken place in the US.

71. I consider, however, that these recent, and very specific, events provide very little guidance as to where the Company conducts the administration of its interests on a regular basis. They are not routine events and the place where meetings have taken place reflects the fact that the Group has been forced to go to its creditors to negotiate, rather than any voluntary choice by the Company of where to administer its own interests on a regular basis. The location of the negotiations for sale also reflect the fact that the sale is proposed of the Group's business as a whole, rather than just that of the Company, and that the potential buyer is American.

Conclusion on COMI

72. Taking all of these factors together, I was not persuaded that the presumption that the COMI of the Company is located in the place of its registered office had been displaced. In addition to being the place of its registered office, the UK is where the Company's trading premises and staff are located, where its customer and creditor relationships are established, where it administers its relations with its trade creditors on a day-to-day basis using those premises and local staff, and where its main assets (the receivables and cash at bank) are located. All of those factors will be visible and immediately ascertainable by the customers, and in particular by the trade creditors, of the Company. The UK is also, importantly, where representations were made to the Company's main finance creditor that its COMI was situated.

73. There has been no fundamental or obvious change to the Company's manner of doing business or any general communication to creditors to support the view that the location of its COMI might have changed. The facts that strategic management decisions are taken for the Company and some high-level issues have been dealt with on behalf of the Company by the senior management of Inc. in the US is relevant, but these factors did not in my judgment carry sufficient weight to displace the other factors, especially given the evidence which showed some understandable lack of

differentiation in the minds of creditors between the management of the Company and that of Inc. and the wider Group.

74. Accordingly, I concluded that the COMI of the Company is in the UK and not in the US.

75. In passing I would note that this conclusion does not give rise to any conflict with any decision of the US Bankruptcy Court. The jurisdictional requirements of Chapter 11 do not include a determination as to the COMI of the debtor, and I was told that the US Bankruptcy Court had neither been called upon to determine the COMI of the Company nor had expressed any views upon that question.

Recognition as a foreign non-main proceeding

76. Although I did not consider that the COMI of the Company is in the US so as to justify recognition of the Chapter 11 proceedings as a foreign main proceeding, I did consider that the Company's connections with the US were sufficient to justify recognition of those proceedings as foreign non-main proceedings.

77. Under Article 17(2)(b), such recognition follows from a finding that the debtor has an establishment in the foreign State. As defined in Article 2(e) of the Model Law, an establishment is any place of operations where the debtor carries out a non-transitory economic activity with human means and assets or services. That definition differs slightly from the definition in the original EIR (which referred to the carrying on of non-transitory economic activity "with human means and goods") and in the Recast EIR (which refers to the carrying on of non-transitory economic activity with human means and assets).

78. Paragraphs [88]-[90] of the Guide to the Model Law refers to paragraph [71] of the Virgós-Schmit Report in relation to the definition of establishment. That report states,

> "Place of operations means a place from which economic activities are exercised on the market (i.e. externally), whether the said activities are commercial, industrial or professional.
>
> The emphasis on an economic activity having to be carried out using human resources shows the need for a minimum level of organization. A purely occasional place of operations cannot be classified as an 'establishment'. A certain stability is required. The negative formula ('non-transitory') aims to avoid minimum time requirements. The decisive factor is how the activity appears externally, and not the intention of the debtor."

79. In Trustees of the Olympic Airlines SA Pension & Life Assurance Scheme v Olympic Airlines SA [2015] 1 WLR 2399, Lord Sumption referred to the Virgós-Schmit Report as "much the most useful source of guidance" in relation to the meaning of "establishment" under the original EC Insolvency Regulation, and continued, at paragraph [13],

> "The definition in article 2(h) must be read as a whole, not broken down into discrete elements, for each element colours

> the others. The relevant activities must be (i) "economic", (ii) "non-transitory", (iii) carried on from a "place of operations", and (iv) using the debtor's assets and human agents. This suggests that what is envisaged is a fixed place of business. The requirement that the activities should be carried on with the debtor's assets and human agents suggests a business activity consisting in dealings with third parties, and not pure acts of internal administration. As the Virgós-Schmit report suggests, the activities must be "exercised on the market (i.e. externally)". I am inclined to think that the same point was being made by the Court of Justice when it observed in the Interedil case [2012] Bus LR 1582, para 49, that the activities must be "sufficiently accessible to enable third parties, that is to say in particular the company's creditors, to be aware of them". I do not think that this can sensibly be read as requiring that the debtor should simply be locatable or identifiable by a brass plate on a door. It refers to the character of the economic activities. They must be activities which by their nature involve business dealings with third parties."

80. In my judgment, applying these principles, the Company has an "establishment" in the US. The evidence to which I have referred at paragraph 54, 59 and 61 above shows that the Company has regularly managed and conducted discussions concerning high-level aspects of its business relationships with a number of its publishing creditors from the Group's headquarters in Baltimore. Those activities are clearly economic in nature, they have been carried out through the human agency of the Company's director and with the services of the senior management of Inc. who are largely based at the Group's headquarters. They involve the Company's business dealings with third parties who perceive the Company as being associated with the Group's headquarters. In my view, they exhibit the necessary minimum level of organisation, stability and external business dealings to which the Virgós-Schmit Report and Lord Sumption referred.

The grant of discretionary relief

81. Recognition of the Company's Chapter 11 proceedings as foreign non-main proceedings does not bring about the same automatic stay on individual actions against the debtor as would be the case under Article 20 of the Model Law if the proceedings had been recognised as foreign main proceedings. However, Article 21 gives a recognising court a wide general power to grant any appropriate relief following recognition. Article 21(1) provides, in material part,

> "1. Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including -

> (a) staying the commencement or continuation of individual actions or individual proceedings concerning the debtor's assets, rights, obligations or liabilities, to the extent they have not been stayed under paragraph 1(a) of article 20;
>
> (b) staying execution against the debtor's assets to the extent it has not been stayed under paragraph 1(b) of article 20;
>
> ….
>
> (e) entrusting the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court;
>
> (f) extending relief granted under paragraph 1 of article 19 [interim relief], and
>
> (g) granting any additional relief that may be available to a British insolvency officeholder under the law of Great Britain, including any relief provided under paragraph 43 of Schedule B1 to the Insolvency Act 1986."

82. I have already indicated in paragraphs [19]-[20] above that where recognition is accorded to a foreign main proceeding which has as its purpose the restructuring of the debtor rather than its winding-up, the English courts have been willing to use their powers under Article 21(1) of the Model Law to replicate the moratorium against individual actions which is applicable in an administration under paragraph 43 of Schedule B1.

83. The extension of that moratorium to the prohibition of collective insolvency proceedings in the UK is not automatic, even where the foreign proceedings are recognised as foreign main proceedings under Article 20: see Article 20(5) of the Model Law. However, where the foreign main proceedings are debtor-in-possession proceedings under which the debtor's management will continue to exercise management functions in relation to the debtor's business whilst its affairs are restructured, particular difficulties might arise and unnecessary costs might well be incurred if the management were treated as having been displaced by administrators or liquidators in relation to dealings with any of the business and assets in the UK. That was so in relation to Inc., where there was no obvious purpose to be served by concurrent insolvency proceedings in the US and UK.

84. The issue raised by the instant case is whether, and if so, to what extent, it would be appropriate to extend the same considerations to the Company, whose COMI is in the UK, and which is subject only to a foreign non-main proceeding.

85. The different considerations that might arise in such a case are obvious. Where the COMI of a debtor is in the UK, for reasons that I have already explained, the general assumption is that the main insolvency proceedings in relation to that company should also be in the UK. That being so, there plainly should be very good reasons to restrict or prohibit creditors of a company with its COMI in the UK from seeking to commence main insolvency proceedings in the UK, and instead to entrust the

restructuring of the business or the liquidation of the assets and winding up of the affairs of the debtor company to a foreign insolvency proceeding. That foreign non-main proceeding would not be conducted in accordance with the law that creditors might have anticipated would govern the insolvency given the COMI of the debtor; it would not be under the ultimate control of the UK courts or under the supervision of a UK regulated insolvency practitioner; and it would be a proceeding in which the effective participation of creditors based in the UK would likely be more difficult and their level of engagement correspondingly reduced.

86. Given these issues, it is apparent that before such a regime could be contemplated, there must be obvious benefits to creditors as a whole, coupled with appropriate protections for creditors who would otherwise be entitled to participate in main insolvency proceedings in the UK. The later requirement is expressly addressed in Article 21(2) of the Model Law as incorporated into the CBIR,

> "2. Upon recognition of a foreign proceeding, whether main or non-main, the court may, at the request of the foreign representative, entrust the distribution of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court, provided that the court is satisfied that the interests of creditors in Great Britain are adequately protected."

87. In the instant case, the evidence of Mr. Ferber indicated that there would be likely to be clear benefits to all creditors of the Company, including those based in the UK, in allowing the business and assets of the Company to be sold as part of a coordinated sale of the business and assets of the Group pursuant to the Chapter 11 process in the US. The primary reason for this is that the Company's business is entirely dependent upon its ability to use the intellectual property owned by Inc., together with the ancillary support provided by other Group companies for that software. Although it would be possible for the Company and Inc., as the two main trading entities in the Group, to realise their other assets (primarily receivables) separately, it is obvious that a sale of the combined businesses, including the intellectual property rights, is likely to command a higher overall price.

88. The evidence suggested that the anticipated outcome of a co-ordinated sale of the business of the Group pursuant to the "stalking horse" bid from APA in the Chapter 11 process would be gross realisations of at least US$45 million. Assuming (for the sake of argument) a 50/50 split of the net realisations between the Company and APA, this was envisaged to equate to a dividend to creditors of the Company of about £0.07 per £1. In comparison, a stand-alone liquidation or administration of the Company and collection of its receivables would be expected to achieve a return of only about £0.01 per £1.

89. Of itself, the desirability of a coordinated sale would not justify an order restricting the commencement of administration proceedings for the Company in the UK. It would, for example, be perfectly possible for an administrator to apply for recognition under the Model Law in the US, to co-operate in the Chapter 11 process, and to execute a coordinated sale agreement on behalf of the Company. That course has been followed in many other cross-border insolvencies, especially where there might

be a variety of views as to how best to realise the business of a worldwide group: see e.g. the Nortel insolvencies.

90. However, the evidence suggested that there would be practical disadvantages to that course in the particular circumstances of the Group, especially given the advanced stage which the Chapter 11 sale process had reached. The first was that the appointment of administrators would necessarily incur additional costs and would result in some delay whilst the administrators came up to speed in the US process, but there was no indication that they would be likely to take any different view of the desirability of the existing sales process. The second was that, as indicated above, the main potential purchasers of the Group's business in the Chapter 11 process had been in extended negotiations with the existing management both before and after the Chapter 11 process. The belated intervention of administrators on behalf of the Company in that process would have introduced an uncertain and unfamiliar element to that process. The evidence expressed some concern that this might have disrupted the process and might even have deterred some potential bidders or caused them to reduce their bids to take account of what they might have seen as an increased transaction risk.

91. In reality, therefore, the main focus for ensuring the protection of the interests of creditors of the Company as a whole under Article 21 was to ensure that, after sale, there will be an appropriate allocation of the costs and subsequent division of the net proceeds of the combined sale of the Group's business between Inc. on the one hand, and the Company on the other.

92. In that regard, the evidence of Mr. Ferber was supplemented by evidence from Mr. Irving E. Walker, a bankruptcy specialist and managing partner of the Baltimore office of the Group's US lawyers, Cole Schotz P.C.. Mr. Walker's evidence explained the Chapter 11 process in some detail, and in relation to this issue stated,

> "After the closing on the sale, it is expected that the net proceeds will be placed in an account pending further order of the [US] Court and distribution under the terms of a Chapter 11 plan. [The DIP Lender], as secured creditor, will be paid in full, along with administrative expenses and other priority claims ahead of unsecured creditors. Once the funds available to unsecured creditors are identified, the next step in a typical case, and the one expected here, would be for the creditors' committee and debtors to negotiate the terms of a Chapter 11 plan. That plan must account separately for the unsecured creditors of each entity, including [the Company] and the parties will attempt to agree on a proper allocation between US and UK creditors for purposes of distribution. Absent such agreement, the US Court would be asked to make a specific ruling that the allocation proposed under a Chapter 11 plan is fair, and as part of that ruling, the court would have to consider the interests of US and UK creditors alike….
>
> The debtors intend to provide in any Chapter 11 plan for the payment of the general unsecured creditors of [the Company] based on the net proceeds of sale attributable to [the

> Company's] assets, with the payment of general unsecured creditors of the US debtors to be based on the net proceeds of sale attributable to the assets of the US debtors. The determination of such allocation should not be controversial … because the stalking horse purchase price is broken up into two cash components (the business assets in the US and accounts receivable base located in the UK)…. If it turns out that the allocation negotiation is controversial, however, the US court would be asked to rule whether the proposed allocation is fair to creditors, including [the Company's] creditors."

93. This evidence strongly supports a conclusion that the structure of the Chapter 11 process will provide protection for the interests of creditors of the Company in the division and distribution of the sale proceeds of the Group's business, and that, on the specific facts of this case, the all-important allocation of the proceeds should not prove controversial.

94. However, it was also readily apparent that in practice, the key to the protection available in the Chapter 11 process would be that the creditors of the Company should have an effective voice in the negotiations leading to the promulgation of the Chapter 11 plan and the division and distribution of the sale proceeds. As I saw it, the question, in essence, was whether it would be necessary or desirable to appoint an administrator of the Company in order to provide creditors of the Company with that voice.

95. In that regard, Mr. Walker's evidence identified the important role that the unsecured creditors' committee plays in the Chapter 11 process. Although there is only one unsecured creditors' committee for the jointly administered estates of all the Videology entities, Mr. Walker explained that each committee member owes a fiduciary duty to represent the interests of creditors as a whole rather than simply acting out of regard for its own commercial position. Having particular regard to the position of the unsecured creditors of the Company, Mr. Walker identified that of the seven members of the unsecured creditors' committee, three are among the largest unsecured creditors of the Company, and the chair of the committee is Group M, which is the largest unsecured creditor of the Company.

96. Mr. Walker described Group M as being "very influential on the committee" and I was provided with a detailed breakdown of Group M's claims and interests in the insolvencies of the Company and the other Group companies. This shows that Group M's claims against the Company amount to about US$36 million, which represents about 70% of the total pool of unsecured claims; and Group M's unsecured claims against Inc. amount to about US$5 million which is about 21% of the total pool of Inc.'s unsecured trade and revenue creditors. If some US$51 million of convertible debt issued by Inc. is taken into account, Group M's share of the total pool of unsecured claims of Inc. decreases to about 6.8%.

97. On these figures, it is readily apparent that, whilst doubtless mindful of its fiduciary obligations to creditors as a whole, Group M has a financial incentive to ensure that the interests of the Company and of its unsecured creditors are fully and properly represented in the negotiations in the Chapter 11 process. Group M is by far the largest single unsecured creditor in the pool of unsecured creditors of the Company,

and the quantum of its claim against the Company is broadly equivalent to its claims against the US companies in which it represents a much smaller proportion of the unsecured creditor pool. This evidence provided me with considerable reassurance that the presence of Group M on the creditors' committee meant that in practice the unsecured creditors of the Company will have an active and influential voice protecting their interests in the Chapter 11 process.

98. So far as the distribution of assets of the Company is concerned, apart from the replacement of the secured creditors of the Company by the DIP Lender as part of the Chapter 11 process, the evidence did not disclose any particular group of creditors who would receive any materially different treatment under Chapter 11 than in an administration or winding up in the UK. In particular, apart from the ordinary unsecured creditors, the debt owed to HMRC by the Company would not, so far as I am aware, qualify for priority payment in an administration, and nor is it a large proportion of the total unsecured claims.

99. In relation to the views of creditors, I received a number of letters and other indications of support from many of the largest unsecured creditors of the Company (some of which only have claims against the Company and not against the US entities). These communications supported the view that an administration of the Company would add nothing apart from costs and delay to the Chapter 11 process, and they urged me not to consider the appointment of an administrator to the Company. Although not decisive, when coupled with the fact that there was, at least after the first hearing, no outstanding winding up petition or application for an administration order from any other creditor, this provided me with additional comfort that the unsecured creditors were content that the insolvency of the Company should continue to be dealt with in the US Chapter 11 proceedings alone.

100. Finally, it should be appreciated that the relief which I granted under Article 21 is not designed to impose an absolute prohibition on an administration order or winding up order for all time. The order merely provides that no application for an administration order or petition for a winding up order should be capable of being presented in relation to the Company without the leave of the court. That means that if expectations are not met for the protection of creditors of the Company in the way that I have described, or if, for example, any particular creditor perceives that it will be treated materially less well under the US plan than would have been the case in a separate administration of the Company in the UK, it will still be possible for a creditor to bring this situation to the attention of this court and to seek the institution of main insolvency proceedings in the UK. That would also be the case if it were to transpire that there were issues relating to the conduct of the management of the Company prior to insolvency that required further investigation.

101. In that regard it is also worth noting Article 22(3) which provides,

> "3. The court may, at the request of the foreign representative or a person affected by relief granted under article 19 or 21, or of its own motion, modify or terminate such relief."

102. Taken together, these factors convinced me that, unusually, it was appropriate to grant the relief sought under Article 21, in effect entrusting the realisation and distribution

of the entirety of the assets of the Company to the Company and Mr. Ferber, subject to the control and supervision of the US court in the Chapter 11 process.

103. For completeness, I should mention Article 21(3) of the Model Law, which states,

> "3. In granting relief under this article to a representative of a foreign non-main proceeding, the court must be satisfied that the relief relates to assets that, under the law of Great Britain, should be administered in the foreign non-main proceeding or concerns information required in that proceeding."

104. The meaning of this rather obscurely worded provision is explained in paragraphs [193]-[194] of the Guide to the Model Law as follows,

> "193. One salient factor to be taken into account in tailoring the relief is whether it is for a foreign main or non-main proceeding. The interests and the authority of a representative of a foreign non-main proceeding are typically narrower than the interests and the authority of a representative of a foreign main proceeding, who normally seeks to gain control over all assets of the insolvent debtor. [Article 21(3)] reflects that idea by providing (a) that relief granted to a foreign non-main proceeding should be limited to assets that are to be administered in that non-main proceeding, and (b) that, if the foreign representative seeks information concerning the debtor's assets or affairs, the relief must concern information required in that non-main proceeding. The objective is to advise the court that relief in favour of a foreign non-main proceeding should not give unnecessarily broad powers to the foreign representative and that such relief should not interfere with the administration of another insolvency proceeding, in particular the main proceeding.
>
> 194. The proviso "under the law of [Great Britain]" reflects the principle underlying the Model law that recognition of a foreign proceeding does not mean extending the effects of the foreign proceeding as they may be prescribed by the law of the foreign State. Instead, recognition of a foreign proceeding entails attaching to the foreign proceedings consequences envisaged by the law of the enacting State."

105. Explained in this way, I do not understand Article 21(3) to prohibit or discourage the grant of the relief sought in the instant case. Article 21(3) is plainly directed at the normal situation in which there will be a main insolvency proceeding in the UK, and recognition is sought for a foreign non-main proceeding. In such a case it is important to ensure that the relief granted following recognition is limited to assets which the English court envisages should be dealt with in the foreign non-main proceedings. But where the English court has considered the alternatives and finds it advantageous and appropriate in the interests of creditors to permit all of the debtor's assets to be

administered in foreign insolvency proceedings, then there is no reason to consider any further limitation on the relief granted.

Conclusion

106. For the reasons which I have explained, I considered it appropriate to recognise the Chapter 11 proceedings in relation to the Company as foreign non-main proceedings, and also to grant relief under Article 21 protecting the Company from claims by creditors here and permitting the sale of the Company's assets and the distribution of the proceeds to take place under the Chapter 11 process.