



# CROSS-BORDER INSOLVENCY UPDATE

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## Introduction

1. This paper supports the talks which the author will give on 26 January 2012 and 8 February 2012 at the Met Hotel in Leeds and the Malmaison Hotel in Birmingham. The talks will focus on cross-border insolvency law, and in particular on (i) some recent decisions of the Court of Justice of the European Union and (ii) the phenomenon that is bankruptcy tourism and in particular the recent decision of Chief Bankruptcy Registrar in *Official Receiver v Eichler* (No 2). In this paper, Council Regulation (EC) No 1346/2000 on insolvency proceedings will be referred to as the Regulation; the UNCITRAL Model Law on Cross-Border Insolvency which was incorporated into English law by the Cross-Border Insolvency Regulations 2006 will be referred to as the Model Law.

## Recent decisions of the CJEU

2. In the last few months, there has been a series of judgments from the CJEU on cross-border insolvency and on the Regulation, including:
  - 2.1 *Interedil Srl,(in liquidation) v Fallimento Interedil Srl, Banca Intesa Gestione Crediti Spa*, Case C-396/09, Tribunale Ordinario di Bari, lodged on 12 October 2009 and judgment on 20 October 2011;
  - 2.2 *Procureur-Generaal bij het Hof van Beroep te Antwerpen v Zaza Retail BV and Others*, Case C-112/10, Hof van Cassatie van België, lodged on 1 March 2010 and judgment on 17 November 2011;
  - 2.3 *Rastelli Davide et C v Jean-Claude Hidoux, as liquidator of Médiasucre International*, Case C-191/10, lodged on 19 April 2010 and judgment on 15 December 2011.
3. For future reference, the following cases which raise issues regarding cross-border insolvency and the Regulation are currently pending before the Court:
  - 3.1 *F-Tex SIA v Lietuvos-Anglijos UAB “Jadecloud Vilma”*, Case C-213/10, Lietuvos Aukščiausiasis Teismas (Lithuania), lodged on 4 May 2010;
  - 3.2 *ERSTE Bank Hungary Nyrt v Magyar Állam, B.C.L Trading GmbH, ERSTE Befektetési Zrt.*, Case C-527/10, Magyar Köztársaság Legfelsőbb Bírósága (Hungary), lodged on 15 November 2010;
  - 3.3 *Bank Handlowy, Ryszard Adamiak, Christianapol sp. z o. o.*, Case C-116/11, Sąd Rejonowy Poznań (Republic of Poland) lodged on 7 March 2011.

## *Interedil*

4. Interedil srl was a company incorporated in Italy as a “società a responsabilità limitata”. Its initial registered office was situated in Monopoli, in Italy. On 18 July 2001, Interedil transferred its registered office to London; at the same time, it also registered as a foreign corporation under the British Companies Act 1985 and de-registered from the register of companies of Italy.
5. At or around the same time, Interedil sold its undertaking to a British company known as Canopus; the sale was by way of a business transfer. So, for instance, Interedil transferred properties which it owned in Italy at Taranto to a British company known as Windowmist Limited. In July 2002, after Interedil had sold its undertaking, it appears that it was removed from the register of companies of England and Wales. By this point Interedil had already de-registered in Italy; it would seem therefore as though Interedil no longer had a registered office with the companies register of any Member State.



6. The CJEU's judgment isn't clear as to whether Interedil continued to exist as a "società a responsabilità limitata"; it must be presumed that it did. Moreover, it is also suggested in the CJEU's judgment that Interedil retained immovable property in Italy. Furthermore, and in respect of two hotel complexes, Interedil had concluded lease agreements with another company (it is not clear whether that other company was registered in Italy, or even whether the lease agreements were governed by Italian law). In addition, Interedil also had an agreement with a financial institution (again, it is not clear which financial institution and whether that agreement was governed by Italian law). Those assets will be referred to in this part of this paper as the retained assets.
7. On 28 October 2003, Intessa Gestione Crediti SpA filed a petition with the *Tribunale Ordinario di Bari* seeking the opening of Italian insolvency proceedings (*fallimento*). Interedil challenged the Italian's court's jurisdiction to hear the petition and sought a reference from the Italian *Corta di Cassazione*. The first instance tribunal did not, however, wait for the *Corta di Cassazione* to issue a ruling and went ahead and made an order on 24 May 2004 placing Interedil in *fallimento*. Interedil appealed that decision to the *Corta di Cassazione* on 18 June 2004.
8. On 20 May 2005, the *Corta di Cassazione* ruled on the jurisdiction issue which had been referred by Interedil (i.e. not on the appeal). It found that the Regulation was engaged. It purported to apply article 3(1) of the Regulation and held, according to the CJEU's judgment, that the registered office presumption was rebutted as a result of the assets apparently retained by Interedil in Italy after it de-registered there and after it sold its undertaking to Canopus. At first blush, this appears to ignore the fact that, as at 28 October 2003, it seems that Interedil did not actually have a registered office.
9. The next step in the confused Italian procedural sequence was that, despite the *Corta di Cassazione*'s ruling, the first instance tribunal decided to stay the proceedings in relation to Interedil and to refer various questions to the CJEU. The basis for that was that by that point, the ECJ had rendered its decision in Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813. The questions most relevant for the purposes of this paper were:
  - “1. Is the term “the centre of a debtor’s main interests” in Article 3(1) of [the] Regulation ... to be interpreted in accordance with Community law or national law, and, if the former, how is that term to be defined and what are the decisive factors or considerations for the purpose of identifying the “centre of main interests”?”
  2. Can the presumption laid down in Article 3(1) of [the] Regulation ..., according to which “[i]n the case of a company ... the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary”, be rebutted if it is established that the company carries on genuine business activity in a State other than that in which it has its registered office, or is it necessary, in order for the presumption to be deemed rebutted, to establish that the company has not carried on any business activity in the State in which it has its registered office?
  3. If a company has, in a Member State other than that in which it has its registered office, immovable property, a lease agreement concluded by the debtor company with another company in respect of two hotel complexes, and a contract with a banking institution, are these sufficient factors or considerations to rebut the presumption laid down in Article 3(1) of [the] Regulation ... that the place of the company's “registered office” is the centre of its main interests and are such circumstances sufficient for the company to be regarded as having an “establishment” in that Member State within the meaning of Article 3(2) of [the] Regulation ...?’



10. In the light of the ECJ's decision in Case C-341/04 *Eurofood IFSC* [2006] ECR I-3813 the answer to the first part of the first question asked by the *Tribunale Ordinario di Bari* was never really in doubt. The expression "COMI" is to be interpreted in accordance with European law, and not national law. The CJEU held in *Interedil* that COMI was peculiar to the Regulation and was to have "an autonomous meaning, and must therefore be interpreted in a uniform way, independently of national legislation." (para. 43).
11. The balance of the first question had the potential to give rise to more interesting jurisprudence; indeed, the *Tribunale Ordinario di Bari* asked for a (i) definition and (ii) the decisive factors or considerations in relation to COMI. The second question sought to link the ability to rebut the registered office presumption to whether (iii) *Interedil* carried on some genuine business activity in a non-registered office Member State or whether (iv) it was necessary to demonstrate that *Interedil* carried out no genuine business activity in the state where it had its registered office. It will be apparent therefore that the second question was very much focused on "genuine business activity" as the litmus test for determining where *Interedil*'s COMI was located. By the third question, the CJEU was asked whether the retained assets were sufficient to (v) rebut the registered office presumption, or in the alternative to (vi) amount to an establishment.
12. The CJEU drew on the wording of Article 3(1) and recital 13 of the Regulation in order to express the view that, when it comes to determining the centre of a debtor's main interests, the "European Union legislature's intention" was "to attach greater importance to the place in which the company has its central administration as the criterion for jurisdiction" (para. 48). The CJEU reminded itself that the registered office presumption can only be rebutted by factors which are both objective and ascertainable by third parties; in this context, the CJEU held that the latter meant that the factors had "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" (para. 49).
13. The next step in the CJEU's reasoning was to observe that where "the bodies responsible for the management and supervision of a company" are located in the same place as its registered office, that the presumption was fully engaged and couldn't be rebutted (para. 50). However, in those cases where that is not the case, then it is permissible to take into account other objective factors, such as "the places in which the debtor company pursues economic activities and all those in which it holds assets", provided that those factors are ascertainable by third parties.
14. The existence of the retained assets were objective factors which could, in principle, be taken into account in determining *Interedil*'s COMI. The CJEU also held that they were likely to be in the public domain. However, the court also concluded that, unless a comprehensive assessment of all the relevant factors was undertaken, it was not possible, by reference solely to the remaining assets, to conclude that *Interedil*'s COMI was in Italy. In this case, it was necessary for the CJEU to determine *Interedil*'s COMI as at the date at which *Intessa* had made the request to open the proceedings; as at date, *Interedil*'s last known registered office had been in England and Wales. It followed that the Italian Courts did not have jurisdiction to open insolvency proceedings in respect of *Interedil* (para. 58).
15. The CJEU's formal answer to those questions was as follows:

"a debtor company's main centre of interests must be determined by attaching greater importance to the place of the company's central administration, as may be established by objective factors which are ascertainable by third parties. 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 that provision cannot be rebutted. Where a company's central administration is not in the same place as its registered office, 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 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.”

16. It can be supposed that, in *Interedil*, the CJEU was seeking to draw a distinction between, on the one hand, a debtor's administrative activities, and on the other hand, a debtor's business activities. This is apparent from the explicit reference by the CJEU to the “the bodies responsible for the management and supervision of a company”, which connotes administrative rather than business activities. A debtor's COMI is to be found at the place where it conducts its administrative activities and not its business activities. At a theoretical level, that view is sound. It is rather more difficult to apply it at a practical level (e.g. what would be the position if a board of directors of a company holds virtual meetings at which all the directors are physically located in different countries). It is also a little odd that the CJEU then went on to conclude that, in principle, places where the debtor conducts economic activities might be relevant in ascertaining the location of a debtor's COMI.
17. The final relevant matter which the CJEU determined in *Interedil* was in relation to whether *Interedil* had an establishment in Italy. The term establishment is defined in the Regulation as being “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods” (Article 2(h)). The CJEU took the view that the link in the definition between “economic activity” and “human means” meant that a minimum level of organisation and stability is required; the presence of assets is insufficient. *Interedil* did not have an establishment in Italy. Finally, the CJEU added a gloss by pointing out that, as with COMI, an establishment must be determined by reference to factors which are both objective and ascertainable by third parties.

#### *Zaza Retail*

18. *Zaza Retail* is a case about the difference between secondary proceedings and territorial proceedings. In either case, before the proceedings can be opened, it is necessary for the debtor to have an establishment in the relevant country.
19. Territorial proceedings under Article 3(4) of the Regulation can be opened before the opening of main proceedings under Article 3(1). They can be opened where:
  - “(a) [Main proceedings] cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or
  - (b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.”
20. Conversely, and pursuant to Article 3(3), where main proceedings have already been opened, any proceedings opened subsequently in a Member State where the debtor has an establishment are secondary proceedings and they can only be winding-up proceedings. Pursuant to Article 29 of the Regulation:
  - “The opening of secondary proceedings may be requested by:
    - (a) the liquidator in the main proceedings;
    - (b) any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within



the territory of which the opening of secondary proceedings is requested.”

21. It will be obvious from comparing the terms of Articles 3(4)(b) and 29(b) of the Regulation that there are differences in the categories of persons or entities that can request non-main proceedings in the case of secondary proceedings and territorial proceedings. *Zaza Retail* is a case about that distinction. If *Zaza Retail* was an English case, the best analogy to what the Belgian Public Procurator was seeking to do would be a public interest winding-up petition presented by the Secretary of State under s.124A of the Insolvency Act 1986.
22. *Zaza Retail BV* was a company incorporated in the Netherlands. Its COMI was also in the Netherlands. *Zaza Retail* also had an establishment in Belgium. On 14 November 2006, the *Procureur des Konings* (Public Prosecutor) made a request to the *Rechtbank van eerste aanleg te Tongeren* (Court of First Instance, Tongeren) for the opening of insolvency proceedings against *Zaza Retail*. At the time of the request in Belgium, there were no ongoing main proceedings in the Netherlands. In due course, main insolvency proceedings were opened against *Zaza Retail* on 8 July 2008 by the *Rechtbank te Amsterdam* (District Court, Amsterdam).
23. On 4 February 2008, the Belgian first instance court declared *Zaza Retail* to be insolvent. That decision was reversed on 9 October 2008 by the *Hof van beroep te Antwerpen* (Court of Appeal, Antwerp). That decision was appealed to the *Hof van Cassatie van België* which is the Belgium Supreme Court which in turn referred a number of questions to the CJEU as follows:
  - ‘1. Does the term “the conditions laid down” in Article 3(4)(a) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings also cover conditions relating to the capacity or the interest of a person – such as the public prosecution service of another Member State – to request the opening of insolvency proceedings, or do those conditions relate only to the substantive conditions for being made subject to such proceedings?
  2. Can the term “creditor” in Article 3(4)(b) of Regulation No 1346/2000 be interpreted broadly to mean that a national authority which, under the law of the Member State to which it belongs, has power to request the opening of insolvency proceedings and acts in the public interest and as the representative of all the creditors, may also, in the present case, validly request the opening of territorial insolvency proceedings pursuant to Article 3(4)(b) of that regulation?
  3. If the term “creditor” can also refer to a national authority with the power to request the opening of insolvency proceedings, does the application of Article 3(4)(b) of Regulation No 1346/2000 require that national authority to demonstrate that it is acting in the interests of creditors who themselves have their domicile, habitual residence or registered office in the country of that national authority?’
24. The first question referred by the Belgian Supreme Court relates to the phrase “the conditions laid down” in Article 3(4)(a) and in particular as to whether those conditions refer to substantive conditions (e.g. whether the debtor is insolvent) or to procedural conditions (e.g. as to the identity of the petitioner). The CJEU noted that Article 3(4)(a) referred to a situation where proceedings “cannot be opened”; for the purposes of foreseeability it was necessary for the conditions to be objective conditions. Further, the CJEU also concluded from the provisions of Article 3(4)(a) meant that the opening of territorial proceedings should be kept to those situations where it is “absolutely necessary” (although the distinction between “absolutely necessary” and “necessary” is bound to introduce an element of subjectivism). In the case of *Zaza Retail*, the reason for which the Belgian Public Procurator could not open proceedings in the Netherlands was because it wasn’t an eligible petitioner; a creditor of *Zaza Retail* could have petitioned in the Netherlands to open proceedings. The CJEU effectively concluded





therefore that Article 3(4)(a) of the Regulation wasn't engaged so as to enable proceedings to be opened in Belgium in respect of the establishment of Zaza Retail in Belgium.

25. The second question relates to the definition of the term "creditor" in the Regulation and in particular Article 3(4)(b); the obvious starting point is that the Regulation does not expressly define a creditor. In line with its answer to the first question, the CJEU took the view that Article 3(4) should be interpreted narrowly. It was common ground that the Belgian Public Procurator would not be in a position to lodge a proof of debt in the liquidation of Zaza Retail; the CJEU concluded from that fact that the Belgian Public Procurator was not therefore a creditor within the usual meaning of that term in an insolvency context. Again, it was common ground that, whilst a winding-up sought by the Belgian Public Procurator's office may be in the interests of the creditors, the Belgian Public Procurator's office did not act on behalf of all the creditors in a representative capacity. For those reasons, the CJEU concluded that the Belgian Public Procurator was not a creditor and so could not rely on Article 3(4)(b) to seek the opening of territorial proceedings against Zaza Retail in Belgium. In the light of that answer to the second question, the third question became redundant.

#### *Rastelli / Mediasucre*

26. Article L. 621-2 of the French Commercial Code provides as follows:

"The competent court will be the Tribunal de commerce (Commercial Court) if the debtor is a trader or he is registered with the craftsmen's register. The Tribunal de grande instance (High Court) shall be competent in other cases.

One or more other persons may be joined to opened proceedings where their property is intermixed with that of the debtor or where the legal entity is a sham. The court that has opened the initial proceedings shall remain competent for this purpose."

27. *Rastelli* was a case which concerned the latter part of Article L 621-2. Médiasucre International had its COMI in Marseilles in France. On 7 May 2007, the Tribunal de Commerce de Marseilles made an order placing Médiasucre in liquidation. Jean-Charles Hidoux was appointed as the liquidator of Médiasucre.
28. *Rastelli* was a company incorporated in Italy and which had its registered office in Robbio in Italy (there was, apparently, no suggestion of *Rastelli* having an establishment in France). Mr Hidoux made a request to the Tribunal de Commerce de Marseilles to open insolvency proceedings against *Rastelli* on the basis that the property of *Rastelli* and Médiasucre was intermixed. The Tribunal declined jurisdiction on 19 May 2008. The Cour d'appel d'Aix-en-Provence (Court of Appeal, Aix-en-Provence), by a judgment of 12 February 2009, overturned the first instance decision and held that the Tribunal de Commerce de Marseilles did have jurisdiction (the distinction being that it wasn't sought to open proceedings against *Rastelli* but rather to join *Rastelli* to the existing proceedings). The matter was appealed to the French Cour de Cassation which referred the following two questions:

'(1) Where a court in a Member State opens the main insolvency proceedings in respect of a debtor, on the view that the centre of the debtor's main interests is situated in the territory of that Member State, does [the Regulation] preclude the application, by that court, of a rule of national law conferring upon it jurisdiction to join to those proceedings a company whose registered office is in another Member State solely on the basis of a finding that the property of the debtor and the property of that company have been intermixed?

(2) If the action for joinder falls to be categorised as the opening of new insolvency proceedings in respect of which the jurisdiction of the court of the Member State first seised is conditional on proof that the company to be joined has the centre of its main interests in that



Member State, can such proof be inferred solely from the finding that the property of the two companies has been intermixed?

29. The Regulation does not contain a provision which is similar in scope or effect to Article L621-2 of the French Commercial Code. The CJEU noted that, pursuant to Article 4 of the Regulation, the law which governs the proceedings is the law of the state of the opening of proceedings. Moreover, following the decision of the CJEU in Case C-339/07 *Seagon* [2009] ECR I-767, the Courts of the state of the opening of the main proceedings also have jurisdiction to hear actions which derive directly from the initial insolvency proceedings and which are closely connected with them. In turn, that gave rise to the question as to whether the application under Article L621-2 of the French Commercial Code was such a related action.
30. The CJEU decided that it was not. Indeed, the CJEU considered that the effect of making an order under Article L621-2 was to subject the other company (in this case, *Rastelli*) to the effects of insolvency proceedings. The CJEU had previously held in *Eurofood* that each separate entity in a group of companies has a different COMI and that it is necessary for a Court seeking to open insolvency proceedings in respect of one company in the group to satisfy itself as to the location of that company's COMI. By the same token, the French Court could only have made an order under Article 621-2 if the criteria in Article 3 of the Regulation had been met. The jurisdiction conferred by Article 3 is exclusive; the French courts did not have such jurisdiction.
31. As to the second question, the CJEU began by reminding itself of the previous decisions of the CJEU in *Eurofood* and *Interedil*, thus apparently endorsing the decisions in those cases. It went on to note that Article 621-2 allows for the opening of proceedings against a separate entity on the intermixing ground if either "the existence of intermingled accounts and from abnormal financial relations between the companies, such as the deliberate organisation of transfers of assets without consideration" (para. 37). The CJEU accepted submissions that those sorts of factors would not be easy to ascertain for a third party; it is also worth noting that those factors are unlikely to be considered as being objective. Intermixing of assets was not a sufficient basis for inferring that *Rastelli's* COMI was in France. The French Courts did not have jurisdiction to open proceedings against *Rastelli*.

### **Bankruptcy Tourism**

32. Bankruptcy Tourism refers to the process by which a debtor seeks to re-locate its COMI to a different Member State from the one in which it is situated. In personal insolvency, it is common for such a COMI shift to be undertaken in order to enable the debtor to avoid the draconian consequences of bankruptcy in the debtor's own jurisdiction. By contrast, in corporate insolvency, a COMI shift tends to be undertaken by a debtor in order to take advantage of the flexibility offered by the restructuring system in another Member State. On the whole, corporate COMI migration tends to be well received (see, e.g. *Wind Hellas* and *DH6*). Conversely, bankruptcy tourism is now viewed by the Courts with barely concealed suspicion.
33. The last few years have seen the development of an industry in various European countries whereby individual debtors can access advice to enable them to achieve a COMI migration. There is more than a hint of a suggestion in the reported cases that the evidence which supports the subsequent bankruptcy petition is much less than candid / accurate. As a result, there has been a spate of recent challenges to bankruptcy orders by way of annulment applications made by the Official Receiver or even creditors:
  - 33.1 *Official Receiver v Eichler* [2007] BPIR 1636 & *Eichler 2* decided on 30 June 2011;
  - 33.2 *Official Receiver v Mitterfellner* [2009] BPIR 1075;
  - 33.3 *Official Receiver v Hiwa Huck* [2011] BPIR 702;
  - 33.4 *Sparkasse Hannover v OR & Korffer* [2011] BPIR 768;
  - 33.5 *In Re Mehmet Armutcu* (31 August 2011).



34. Perhaps the most significant of those was *Eichler 2*. Mr Eichler had successfully fended off the challenge of the Official Receiver in *Eichler 1* but could not resist a 2<sup>nd</sup> bite at the cherry by a creditor (Dr Helga Steinhardt). Mr Eichler presented his own petition to the High Court of Justice on 1 February 2007 and was made bankrupt on the same day by Registrar Derrett. On 22 February 2007, the Official Receiver had sought an order annulling the bankruptcy on the grounds that Mr Eichler's COMI was in Germany. The Chief Bankruptcy Registrar dismissed the Official Receiver's application and concluded, albeit on what he had described as "very thin evidence and very limited submissions as to the law", that Mr Eichler's COMI was in England and Wales.
35. On 17 July 2009, Dr Steinhardt, who was Mr Eichler's major creditor in Germany, made an application under s.282(1)(a) of the Insolvency Act 1986 annulling the bankruptcy order, or in the alternative, an order under s.375 rescinding the bankruptcy order (she also made an alternative claim based on s.423). Mr Eichler had made various cross-applications with a view to halting actions which Dr Steinhardt was undertaking in Germany. Mr Eichler's trustee in bankruptcy took not active part in the proceedings. The applications were heard before Chief Bankruptcy Registrar Baister, it would seem, over 9 days in May 2011. Judgment was handed down on 30 June 2011.
36. The Chief Bankruptcy Registrar made the following comments in respect of the two witnesses that he had heard (Mr Pel, a German lawyer, for the Applicant, and Mr Eichler):

"[27] At first I thought it curious that the applicant had given her evidence through her lawyer rather than herself, but Mr Pel's conduct of the proceedings on her behalf meant that no difficulty arose in testing the evidence relied on by the applicant. I found Mr Pel to be an honest and truthful witness. He did his best to assist the court. When Mr Briggs criticised parts of his evidence on the basis that they were speculative or sought to draw conclusions that were not properly founded he readily accepted the criticism, thereby demonstrating a level of objectivity consistent with the professionalism to be expected of a lawyer practising in a respected jurisdiction. I do not agree with everything that Mr Pel has put forward, but the areas where I disagree with his evidence are comparatively minor and do not undermine the broad thrust of the case he puts forward on his client's behalf. Although English is not Mr Pel's first language his command was more than sufficient to enable him to cope with cross-examination.

[28] The first respondent also has an excellent grasp of English. He is a man of considerable presence and education who thinks about what he does and what he says very carefully. It is with regret, therefore, that I say that I agree with Mr Boardman that he was a thoroughly unreliable witness who would say anything to suit his purpose (I made a note at one point while he was giving evidence: 'He will say anything'). At times he was casual about the truthfulness of his evidence; on other occasions he has changed the nature of his case to seek to avoid difficulties in his case, and both in his written and oral evidence he has told outright lies. He was constrained on a number of occasions to accept that he had been untruthful."

37. In his judgment, which ran to 191 paragraphs over 91 pages, the Chief Bankruptcy Registrar ultimately concluded that Mr Eichler's COMI was in fact in Germany at the material times. He therefore allowed Dr Steinhardt's application and dismissed Mr Eichler's applications. He took into account the following factors:

"[147] The following factors point to the first respondent's having conducted the administration of his interests in this country up to and including the date on which the bankruptcy order was made:





- (1) he received a salary here;
- (2) he paid rent and other essentials here;
- (3) he made tax returns here;
- (4) he operated a bank account;
- (5) he used a credit card (albeit a company one);
- (6) he had a certain amount of social contact (see his second witness statement);
- (7) he deregistered from his German address (6F/1736);
- (8) he registered with relevant professional bodies in order to practise here.

[148] As against that he conducted the administration of the following activities in Germany:

- (1) he actually expended most of his salary there (through the second respondent); he paid outgoings and other essentials for both himself and his wife;
- (2) he appears to have made tax returns in Germany too;
- (3) he paid local property tax there;
- (4) he paid for rubbish collection there;
- (5) he maintained house contents insurance there;
- (6) he paid car insurance and maintained a car there;
- (7) he operated, either directly or indirectly, several bank accounts there;
- (8) he continued to use a personal credit card;
- (9) he kept a safe deposit box at a bank there;
- (10) he maintained his pension there;
- (11) he maintained disability insurance;
- (12) he maintained family medical insurance;
- (13) he received post there (see the bank statements and documentation regarding the above and para [118] above);
- (14) he maintained an office in the basement of his house from which he continued to administer his affairs by computer and, presumably by other means;
- (15) in reality, notwithstanding the disposal of his interests in them, he maintained property interests there (in the sense that the transfers he entered into were always susceptible of attack)."



38. Finally, he also added a very important postscript in relation to bankruptcy tourism of which all practitioners should be aware:

“[190] This is one of a number of cases in which the courts have annulled bankruptcy orders made on petitions presented by German debtors where it has been established that the court had no jurisdiction to open the proceedings. The scope of the inquiries the court can make when faced with a debtor’s bankruptcy petition and doubts about the truth of what a debtor says about where his centre of main interests is situated is limited, not least of all because there is an understandable reluctance to depart from the long established principle that evidence given on oath (or nowadays in a witness statement verified by a statement of truth) should not be disbelieved unless it is properly challenged or is inherently incredible.

[191] In the light of persistent abuse of its jurisdiction, however, this court has now developed two practices when dealing with petitions where it has doubts about its jurisdiction. Before a bankruptcy order is made, a debtor may be required to file more detailed evidence than is required by rr 6.38 and 6.41 of the Insolvency Rules in order to establish that his centre of main interests really is in this country, exhibiting documentary evidence in support of his claim that it is situated here; and/or the court may adjourn the petition and require that notice of the hearing be given to the debtor’s creditors so that they can appear and make representations at that stage in opposition to the making of the order instead of having to apply after the order has been made. It is hoped that in future those steps (and perhaps others which may develop in the future) will ensure that bankruptcy orders founded on sham claims as to jurisdiction or supported by a false statement of affairs are not made in the future.”

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January 2012**