CROSS-BORDER UPDATE

Stefan Ramel, Guildhall Chambers

Introduction

1. This paper supports the talk which the author will give on Thursday 16 June 2011 during the Insolvency Seminar hosted by Guildhall Chambers at the Watershed in Bristol. The purpose of this paper and that talk is to provide a topical update on Cross-Border Insolvency.

2. In the first instance, this paper will identify and summarise the most significant recent decisions of the Courts in England and Wales on cross-border insolvency matters, as well as identifying the cross-border insolvency cases which are currently pending before the European Court of Justice. As will become clear below, it seems that there will shortly be another decision of the European court of Justice on COMI for practitioners to digest. Indeed, the Advocate General in *Interedil* filed her opinion in March 2011; it is likely that the full Court's decision will follow shortly. When this paper was in its planning stages, it had been thought that COMI merited separate consideration as a current "hot topic"; given that it seems inevitable that there will soon be new jurisprudence on COMI, rather than cover COMI as a separate topic, COMI will be mentioned by way of a case update in relation to *Interedil*.

3. Finally, this paper will also briefly discuss a current cross-border insolvency hot topic, namely the rebirth of the principle of "modified universalism" following the speeches of Lord Hoffmann in *Cambridge Gas* and *HIH*.

Recent Cases – England & Wales

(1) David Rubin (2) Henry Lan (as joint receivers of the Consumers Trust) v (1) Eurofinance SA (2) Adrian Roman (3) Justin roman (4) Nicholas Roman [2010] EWCA Civ 895

4. *Eurofinance* concerned a trust known as the Consumers Trust which was set up by Eurofinance S.A. The purpose of the trust was to create a "Cashable Voucher Programme" which was rolled out in the USA and Canada. As an additional means of attracting consumers, a merchant offered a cashable voucher under which, if, in 3 years time, the consumer filed a claim with the Consumers Trust and successfully navigated "a complex and obscure process involving both memory and comprehension tests" (per Nicholas Strauss QC at first instance), the relevant consumer could obtain a rebate of as much as 100% of the cash price of the relevant item or service. The merchant paid a % of the price of the item or service to the Consumers Trust; in turn, the trust retained a % of that %, and paid the rest to Eurofinance and or Messrs Roman.

5. The Trust was exposed as a result of action taken by the Attorney-General for the State of Missouri under Missouri's Consumer Protection Legislation. It was required to pay $1,650,000 in compensation. The floodgates were now open. On 11 November 2005, Lewison J appointed Messrs Rubin and Lan as the joint receivers and managers of the Consumer Trust. Chapter 11 proceedings in the United States Bankruptcy Court for the Southern District of New York followed. The opening of those proceedings was followed by the commencement of adversary proceedings in New York against Eurofinance, Messrs Roman and other seeking judgments by reference, on the one hand to the overall indebtedness of the trust, and on the other by reference to the sums actually received by Eurofinance and Messrs Roman. The Defendants to the adversary proceedings, on advice, did not submit to the jurisdiction of the New York Court. Summary judgments were entered against them.

6. Messrs Rubin and Lan then sought to recognise the New York insolvency proceedings and the New York adversary proceedings in England and Wales under the UNCITRAL Model Law (incorporated into English law by the Cross-Border Insolvency Regulations 2006) and then to enforce the adversary proceedings in this jurisdiction. That engaged a principle of English private international law to the effect that judgments *in personam* obtained against an individual in a foreign jurisdiction could not be enforced in England and Wales if that individual had not submitted to the foreign jurisdiction.

7. The Court of Appeal (Ward LJ) ultimately concluded that bankruptcy proceedings fell outwith that principle of English private international law. It considered that bankruptcy proceedings included the mechanisms provided by ss 238 and 239 of the Insolvency Act 1986 (and the equivalent provisions in the United States) which allow for the office holder/legal representative to bring actions against third parties for the collective benefit of all creditors. These mechanisms are integral to and are central to the collective nature of bankruptcy and are not merely incidental procedural matters. As a result, to the extent that the adversary proceedings were based on such provisions, then any judgment, despite being *in personam* and despite the defendants not submitting to the jurisdiction of the foreign court, could be enforced in this jurisdiction. Ward LJ specifically stated in his judgment that that result was: "*a desirable development of the common law founded on the principles of modified universalism*" which is a reference to the speech of Lord Hoffmann in *HIH*.

8. *Eurofinance* is an important decision on cross-border cooperation in an insolvency context. It is, effectively, an extension of the principle of modified universalism which was restated by Lord Hoffmann in *HIH*. Practitioners ought to be wary of advising clients that, by not submitting to a foreign jurisdiction, it will be possible to resist enforcement of any foreign judgment handed down in bankruptcy proceedings in this jurisdiction. Where the relevant foreign proceedings come within the scope of insolvency proceedings, recognition here, followed by enforcement, may well be granted.

In the matter of European Directories (DH6) BV, Judge Raynor QC, 6 December 2010;

9. European Directories (DH6) BV was an intermediate holding company in a group of companies formed in the Netherlands by Macquarie Capital Alliance in June 2005 for the purposes of acquiring the Yellow Brick Road Directory and Search business for the sum of about €1.8 billion. The company's registered office was in the Netherlands. However, since 2006, the group's administrative headquarters had been at Building 10, Chiswick Building Park, Chiswick High Road, London.

10. The company was not a trading company. Its sole assets were the shares in its subsidiary (DH7) which itself was the parent of the group's operating companies. The company had no employees. Nonetheless, European Directories (DH6) BV had substantial liabilities (mainly as a guarantor of the liabilities of DH7). The company applied for an administration order. The application was heard by His Honour Judge Raynor QC on 6 December 2010. Despite the fact that the application was not opposed by any of the company's creditors and in fact was supported by all those that attended the hearing, it was still necessary for the judge to be satisfied that it was appropriate to make an administration order. This involved, in addition to various other matters, an assessment of whether the company's COMI was in England and Wales.

11. On COMI, the Judge started by considering preamble 13 and Article 3.1 of the EC Insolvency Regulation under which there is a rebuttable presumption that a company's COMI is the place of its registered office. He considered that, in order to rebut the presumption, it was necessary for a Court to (i) review the particular facts of the case, including "*the scale of the interests administered at a particular place, and their importance and then consider the scale and importance of its interests administered at any other place which may be regarded as its COMI*", (ii) that, in a group situation, the position of each company within the group must be considered separately, (iii) the COMI must be identifiable by reference to criteria which are both objective and ascertainable by third parties, which is to ensure legal certainty and foreseeability". The Judge also concluded that COMI must be determined as at the date when the Court is considering whether to open the insolvency proceedings.

12. In the light of the evidence before him, the Judge was satisfied that the company's COMI was in England and Wales and he was also satisfied that it was appropriate to make an administration order. The judge placed reliance on the fact that the company did not trade with third parties (other than legal and professional advisors) and that it did not have employees. The company had three directors, two of whom were resident in England, the other being resident in America. Decisions relating to the company's strategic and financial arrangements

were made by those directors from the company's London office. Neither the company, nor the directors, operated from any office in the Netherlands. The vast majority of the company's creditors were based in England; the security and loan agreements were governed by English law. Furthermore, all discussions relating to the company's proposed restructuring and reorganisation took place in London.

13. In addition, in May 2010, the board of directors of the company had resolved to take the necessary steps to move its COMI to London; a number of practical steps were taken thereafter in order to effect the COMI shift: (i) the company's business address at the Dutch Trade Registry had been designated as the London address, (ii) the company had a registered branch in England, (iii) in May 2010, the company wrote to all creditors to notify them that the company's new address was in London, and (iv) the company had a bank account in London, and the sole signatory to that account was the chief financial officer who was based in London.

14. European Directories is a good example of a case where a company has shifted its COMI to England and Wales when a restructuring was looming. The judgment contains some useful practical pointers for practitioners who are advising a company or its directors on COMI matters and in particular COMI shifting, albeit that some of the matters taken into consideration by the Judge appear more relevant to the "head office functions" test which was in favour until the decisions of Lewison J and the Court of Appeal in *Stanford* but which has since then given ground to the need for ascertainability of objective factors by third parties.

In the matter of Alitalia Linee Aera S.p.A, (1) Connock (2) Boyden (as the English joint liquidators of Alitalia) -v- Fantozzi (as the Italian Administrator of Alitalia) [2011] EWHC 15, Newey J, 18 January 2011

15. *Alitalia* concerned a dispute between the officeholders appointed in respect of Alitalia Linee Aeree Italiane S.p.A in Italy and those appointed in England and Wales. Main proceedings under Article 3 of the EC Regulation were opened in Italy in August 2008. Secondary proceedings were opened in England and Wales in January 2009 on a petition presented by the trustees of the Alitalia pension scheme on 27 November 2008.

16. The Italian officeholder sold Alitalia's assets and business to Compagnia Aerea Italia S.p.A on terms which provided for no economic continuity between Alitalia and C.A.I. That was necessary to satisfy an EC Commission decision that Alitalia had received state aid and that a newco would be liable to pay back the state aid. This meant that all Alitalia's UK employees were dismissed in January 2009. As a result, those employees entered into compromise agreements pursuant to which they would receive 2 payments to compensate them. The first payment was duly made; the second payment, which was due to be made in April 2009, was not made because by then liquidators had been appointed in England and Wales. The question for the liquidators, and ultimately for the judge, was whether the second payment should be made from Alitalia's UK bank account in preference to other creditors, or whether it should rank *pari passu* with other creditors.

17. The Italian officeholder argued that the payment should be preferential on the basis that, according to Italian law, the obligation to make the second payment was preferential. He argued that the English liquidators were bound to cooperate with him and to give effect to that preferential status (Article 31 of the EC Insolvency Regulation), that the English common law allowed for the payment to be made preferentially in recognition of the fact that the English proceedings were ancillary (*HIH*, *Cambridge Gas*), alternatively that a trust had arisen over the funds standing to the credit of the bank account, or finally that, the principle in *Ex Parte James* was engaged and that it would be unfair for the English liquidators not to make the payment on a preferential basis out of the funds that they held.

18. The English liquidators argued that, pursuant to Article 4 of the EC Regulation, the law of England and Wales governed questions relating to the distribution of assets in the insolvency. Under English law, the 2nd payment due to the employees was not preferential and therefore fell to be made *pari passu*.

19. In a decision handed down on 18 January 2011, Newey J agreed with the English liquidators. He took the view that no trust had arisen over the sums standing to the credit of Alitalia's bank account in England and Wales. Further, the principle in *Ex Parte James* was not engaged, not least because the English liquidators had not undertaken any conduct which was open to criticism by the Court. He accepted that the duty of cooperation imposed by Article 31 did not require the English liquidators to ignore provisions of English law such as the *pari passu* principle. Finally, Newey J did not accept that the common law gave him the power to disapply provisions of English law in an ancillary liquidation; Newey J was not persuaded that Lord Hoffmann's speech in *HIH* was binding on him in this respect, given that it wasn't clear whether the House should be treated as having decided *HIH* on the grounds of the English courts' common law powers to assist foreign proceedings (as opposed to relying on s.426 of the Insolvency Act 1986 which formed the basis of the decisions of Lords Scott and Neuberger).

20. *Alitalia* is an important decision concerning the impact of the opening of secondary proceedings under the EC Insolvency Regulation on group restructurings. The decision contains some useful analysis of the extent of the duty of cooperation imposed on officeholders by Article 31 of the Regulation. In addition, *Alitalia* also clarifies the extent of the English court's common law powers when the proceedings in England are ancillary to the other proceedings.

Cosco Bulk Carrier Co Ltd v (1) Armada Shipping SA (2) STX Pan Ocean Co Ltd [2011] EWHC 216 (Ch), 11 February 2011, Briggs J

21. The underlying dispute in *Cosco* concerns shipping law. On 3 September 2009, Cosco chartered the Spar Sirius to Armada; in turn, Armada chartered the vessel to STX on 4 December 2009. Both charters were on NYPE 93 terms; each contained London arbitration clauses. In addition, each charter provided that they were to be governed by English law. On 28 December 2009, Armada made a voluntary filing for liquidation with the court of Fribourg in Switzerland; that was followed by a bankruptcy order pronounced by the Civil Court of the District of La Sarine on 11 January 2010.

22. On 28 January 2010, Cosco gave notice to both Armada and STX that it was claiming the sum of US$ 1,204,514.89 in respect of unpaid charter hire as well as other losses which Cosco had incurred as a result of the insolvency of Armada. STX accepted that it owed sub-charter hire to Armada; the dispute which arose was whether that sub-charter hire should be paid to Cosco or to Armada's insolvency officeholder. In order to protect itself, STX entered into an escrow agreement (itself governed by English law) with Cosco on 4 February 2010 the effect of which was to place the sum of US$ 915,119.27 into an escrow account.

23. Cosco claimed that, pursuant to the terms of its charter with Armada, it was able to assert a lien on the charter sub-hire due by STX to Armada. Further, it also alleged that the said lien operated as an equitable charge, thus giving Cosco proprietary rights which were not defeated by Armada's subsequent insolvency. With a view to determining the dispute, Cosco started arbitration proceedings in London against STX in February 2010. In response, and in order to avoid double jeopardy, STX commenced its own arbitration against Armada, also in London.

24. It is fair to say that Armada was an unwilling participant in that arbitration; indeed, Armada applied for a recognition order in England and Wales under the UNCITRAL Model Law on Cross-Border Insolvency. Recognition was duly granted on 19 May 2010. So far as Armada was concerned, the recognition order effectively stayed not only Armada's own arbitration with STX, but also the arbitration between STX and Cosco. The parties were unable to agree on this point. As a result, Cosco applied on 11 October 2010 for an order confirming that its arbitration with STX had not been stayed. That prompted Armada to cross-apply on 9 December 2010 for an order confirming that the Cosco arbitration had been stayed. The stance of Armada's officeholder was that the dispute between Armada and Cosco could best be resolved within the Swiss bankruptcy proceedings.

25. The applications came before Briggs J. He handed down judgment on 11 February 2011. In a lengthy judgment, Briggs J started by analysing the nuts and bolts of the dispute regarding the lien. He identified not less than 5 issues which were in dispute between Cosco and Armada, including the juridical nature of an owner's lien on sub-hire, the effect on such a lien on the

prohibition on assignment in the sub-charter between Armada and STX and finally the impact of such a lien in terms of priority in Armada's bankruptcy.

26. However, all participants to the dispute accepted that the English Court had a discretion under the Model Law to either order a stay or to lift a stay. Briggs J considered that the relevant provisions in the Model Law were contained in Articles 20 and 21. In particular, Article 20(1) imposes an automatic stay on continuation of individual proceedings concerning the debtor's assets, rights or obligations; as a result of Article 20(2), that stay was said to be akin to the stay imposed in the case of a winding-up order made under the Insolvency Act 1986. Pursuant to Article 21(1), a foreign representative can apply for a stay, "where necessary to protect the assets of the debtor or the interests of the creditors".

27. Briggs J concluded that, by its express terms, Article 20 cross-referred to the provisions of the Insolvency Act 1986 concerning liquidations as the "primary source of an understanding as to the effect of recognition of a foreign main proceeding both in terms of its immediate effect, and in terms of the court's powers in relation to the automatic stay" (para. 45). On the basis that the insolvency regime to which Armada was subject in Switzerland was similar to a liquidation, Briggs J concluded that the relevant section in the Insolvency Act 1986 was s.130(2). He was of the view that there was nothing in the Model Law which justified the Court in carrying out a different exercise to the one which an English Court would perform under s. 130(2).

28. After referring to a number of English authorities on s.130(2) (the most recent being: *Bourne v Charit-Email Technology Partnership LLP* [2010] 1 BCLC 210), Briggs J considered that the court is given "a free hand to do what is right and fair according to the circumstances of each case". Having said that, the starting point is that individual proceedings against a company in liquidation were not generally permitted since the same would detract from the orderly winding-up of the company and the resolution of all outstanding matters in the context of the liquidation for the benefit of creditors. Further, resolving disputes within the machinery of a liquidation would very likely be cheaper and faster than litigation through the Courts.

29. Ultimately though, Briggs J concluded that no stay should be imposed on the arbitration, and that if an automatic stay had come into play as a result of the recognition order, that it should be lifted (since it was unnecessary for him to do so, he did not express a concluded view as to whether an automatic stay had come into play). He declined to resolve any of the five issues which were likely to be live between the parties in respect of the underlying dispute; he proceeded on the basis that they were at least arguable. It appears that the decisive factor for Briggs J was the fact that the charter agreements were each governed by English law, and each contained a clear choice of jurisdiction in favour of England and Wales. He concluded that "the balance of fairness, convenience and justice" lay strongly in favour of arbitration. The majority of the disputed issues would need to be determined by reference to English law, save in relation to the impact of Armada's bankruptcy, which appeared to be a Swiss law issue, albeit one in respect of which the parties had not suggested any arguments which would cause Briggs J to consider that it should be resolved in the Swiss bankruptcy court.

30. Briggs J's decision is neatly summarised in the following passage in his judgment:

"61. *There is in my view an air of unreality in the submission that it would either be fair, just or convenient to visit upon a Swiss bankruptcy court the adjudication of an underlying dispute which is almost entirely governed by English law, concerns shipping matters and which is already the subject of two pending arbitrations before experienced tribunals pursuant to obligations in the contracts out of which the dispute has arisen. The Swiss court would be obliged to rely for the determination of most of the matters in issue upon expert evidence as to English law (whether from a single expert or competing experts) and its own relevant experience would be limited to Swiss insolvency law, as to which, despite having many months to do so, none of the parties have identified any specific issue to be decided.*"

(1) Lisa Bo Larsen (2) Michael Ziegler (foreign representatives of Atlas Bulk Shipping A/S) (2) Atlas Bulk Shipping A/S v Navios International Inc [2011] EWHC (Ch) 878, 13 April 2011, Norris J

31. *Atlas* is a dispute which, like *Cosco*, engaged provisions of the UNCITRAL Model Law on Cross-Border Insolvency. In March, June and July 2008, Atlas Bulk entered into freight forwarding agreements with Navios; each such agreement incorporated the International Swaps and Derivatives Association 1992 Master Agreement. Freight forwarding agreements are a form of derivative contract. In addition to the three FFAs which were entered into between Atlas Bulk and Navios, Navios had, in October 2007, also entered into an FFA with Atlas Shipping (an affiliate of Atlas Bulk). All of the FFAs in this case were, by their express terms, governed by English law, and moreover the Courts of England and Wales were given jurisdiction in relation to any disputes which arose.

32. On 17 December 2008, Atlas Bulk filed for bankruptcy in Denmark; a bankruptcy order was made the next day and Lisa Bo Larsen and Michael Ziegler were appointed as the company's bankruptcy trustees. The bankruptcy order gave rise to an event of default under the ISDA 1992 Master Agreement, the effect of which was to crystallize either a gain or a loss on the FFAs. As regards the FFAs between Atlas Bulk and Navios, the position was that, by reference to two of the agreements, Atlas Bulk had made a gain of US$4,230,742, but that, by reference to the third agreement, Atlas Bulk had made a loss of US$2,092.121, leaving a net balance in excess of US$2 million in favour of Atlas Bulk. The position as regards Atlas Shipping in respect of the single October 2007 FFA was that Atlas Shipping owed Navios the sum of US$1,516,994. It followed that, if a set-off was permitted, there would be a small balance in favour of Atlas companies. However, on 25 June 2010, Navios purchased the benefit of an FFA which had been entered into between Global Maritime Investments and Atlas Bulk in respect of which the position was that Atlas Bulk owed GMI the sum of US$2,020,088.

33. So far as Atlas Bulk and its officeholders were concerned, they were owed the sum of US$ 4,230,742 on the FFAs; as a result, on 9 March 2010, Atlas Bulk commenced proceedings in the Commercial Court in London seeking judgment against Navios. The proceedings had to be brought in England and Wales having regard to the choice of jurisdiction clauses contained in the FFAs. In response, Navios filed a defence and counterclaim by which it did not dispute liability or the quantum of Atlas Bulk's claim, subject to a set-off which it was argued arose in favour of Navios. In particular, Navios relied upon two separate set-off arguments.

34. Firstly, Navios relied upon a legal non-mutual set-off to the effect that Navios could set off against the sum which it owed to Atlas Bulk under the FFAs the sum which Atlas Shipping owed to Navios under the single FFA. That set-off was based on (i) a representation by conduct by Atlas Bulk and Atlas Shipping, (ii) a collateral contract, (iii) an estoppel by representation or convention, or (iv) a unilateral mistake. Secondly, Navios relied upon a post-insolvency assignment mutual set-off which was based on the debt which it had acquired from GMI on 25 June 2010. Neither set-off is a bankruptcy set-off. Norris J, who heard the case, was prepared to proceed on the basis that both set-offs were arguable.

35. Under Danish law, neither of the set-offs would be effective against Atlas Bulk; having said that, the proceedings were before the Commercial Court in England and Wales, and therefore not subject to Danish Law. Similarly, under English insolvency law, neither set-off could succeed (*British Eagle v Air France* [1975] 1 WLR 758 and rule 4.90 of the Insolvency Rules 1986); having said that, the proceedings did not concern a company which was the subject of any English insolvency proceedings. In effect therefore, the question in this case was whether the litigation fell between the stools constituted by the respective insolvency regimes of Denmark and England and Wales simply because the proceedings were in the Commercial Court in London and were based on FFAs with English choice of law clauses.

36. Lisa Bo Larsen and Michael Ziegler applied to the Chancery Division for recognition orders under the UNCITRAL Model Law, and thereafter for substantive relief under the Model Law. The effect of the recognition was to stay the counterclaim made by Navios; however that stay didn't of itself prevent reliance on a set-off. Therefore the officeholders sought orders that Navios should not be permitted to rely on either the legal non-mutual set-off or the post-insolvency assignment mutual set-off. They placed reliance on Article 21 of the Model Law.

37. Norris J held that he could grant the application if (a) he was satisfied that it was necessary to protect the assets of Atlas Bulk or the interests of the creditors, and (b) he was satisfied that the interests of the creditors and other interested persons are adequately protected.

38. Having said that, the real dispute between the parties in this case was a question of timing: was it appropriate for the English Court to give effect to the Danish winding-up order as from the date of that order (in which case neither set-off could be permitted), or as from the date of the application for recognition in this country (in which case the post-insolvency assignment legal mutual set-off would be engaged).

39. The judge resolved that question in favour of the Danish officeholders; he held that "the English Court has …. power to restrain or to undo the purported exercise of set-off rights after the commencement of the Danish insolvency". In other words, the Danish insolvency order produces effects in England and Wales immediately as from the date on which it is made, notwithstanding the fact that no recognition has taken place, and that no order has been applied for. Norris J was prepared to interpret his powers under the Model Law as being fully retrospective.

40. His reasoning was that such powers had to be exercised after all relevant interests are taken into account (including those of a party potentially prejudiced by the retrospectivity). The fact that the opening words of Article 21 are "upon recognition" only defines the date as from which the Court can grant relief; it does not affect the date as from which that relief should be treated as having effect. By analogy, Article 23 of the Model Law, which gives the foreign officeholder such transaction avoidance remedies as would be available to an English officeholder under the Insolvency Act 1986 but as if the relevant section referred to the commencement of the foreign proceedings strongly suggested that a similar rule should apply to set-offs.

41. The strongest objection raised by Navios was that, the construction of the Model Law preferred by Norris J had the effect of retrospectively altering the legal effect and consequences of the acquisition and exercise of rights of set-off which undeniably existed before the recognition was sought. The judge dealt with that argument by holding that the post-insolvency assignment legal mutual set-off rights were always "flawed" because they were subject to a potential application for recognition and relief under the Model Law, and secondly, that because the relief was discretionary, the English Court could tailor it in such a way as to ensure that no party was prejudiced. In this case, Navios was attempting to steal a march in the Danish insolvency; the English Court was not prepared to countenance that, not least because it was contrary to the general *pari passu* principle which is engaged on an insolvency as applied in both Denmark and England.

In the Matter of Eurodis Texim Electronics BV (in Administration) [2011] EWHC 1025 (Ch), 19 April 2011, Mann J

42. *Eurodis* is a good example of a case where, as a result of the actions of one party, the Insolvency Regulation has failed to ensure a universal and efficient insolvency process in respect of a corporate debtor. It also rather dramatically highlights a flaw in the insolvency system created by the Insolvency Regulation.

43. The company in question in this case was Eurodis Texim Electronics BV. Eurodis was part of a group of companies which all included the appellation Eurodis and which were incorporated in various jurisdictions. By 2005, the group was insolvent. On 26 July 2005, Rimer J made an administration order against all the companies in the group, including in respect of Eurodis Texim on the grounds that their COMI was in England and Wales (Eurodis was incorporated, and had its registered office in Belgium). The proceedings in England and Wales were thus main proceedings for the purposes of Article 3(1). Apparently, the major task for the administrators of the group was a marshalling exercise in relation to the security of one creditor who had charges over all group companies. By the time that this matter came before Mann J, that task was virtually complete.

44. Complications arose as a result of the conduct of the Belgian Crown Prosecutor. On 5 September 2008, he presented a winding-up petition to the Court in Belgium. On 23 September

2008, the Belgian Court made a winding-up order. That spurred the English administrators into action; through their Belgian lawyers, they sought in correspondence to challenge the winding-up order on the basis that, because Eurodis Texim did not have an establishment in Belgium, it was not possible for the Belgian Court to open secondary proceedings. Furthermore, the effect of the Regulation was that the English Court's order ought to be automatically recognised in Belgium. In riposte, the Belgian trustee argued that the English Court had no "competence" over Eurodis Texim. Ultimately, the English administrators sought a reassurance that the Belgian trustee recognised the English proceedings, and moreover they clarified that no assets would be remitted to the Belgian trustee. That produced an unintended consequence: the Belgian trustee applied to the Belgian court for an order that, because there were insufficient assets to pay the costs of the bankruptcy in Belgium, the Belgian insolvency should be closed, and the company dissolved. That order was granted on 29 January 2010. The administrators first learnt of that after May 2010. By then, Eurodis Texim no longer existed; all time limits to challenge the automatic dissolution had passed. At first blush, that does appear to be a flaw in the system; if main proceedings are afoot in one jurisdiction, it should not be possible for the Courts of another jurisdiction to ride roughshod over the principles of co-operation and comity upon which the Insolvency Regulation is constructed. It may be that some provision would need to be introduced at a regulation-level to ensure that automatic dissolution provisions in one Country cannot apply where proceedings are afoot in another country.

45. It was therefore necessary for the English administrators to apply to the English Court for directions. They sought alternatives orders. Firstly, they argued that, because the Belgian Court's winding-up order was effectively in breach of the Regulation, that the English Court should simply ignore the fact that the company no longer existed, and by order enable the administrators to continue to act as administrators as if the company still existed. In the alternative, they sought a winding-up order under s.221 of the Insolvency Act 1986, an order that they be appointed as liquidators and authorisation to pay the expenses of the remuneration of the administration as if they were an expense of the liquidation.

46. Not surprisingly, given the obvious negative consequences that it would have for comity between the British and Belgian Courts, Mann J declined to simply ignore the dissolution of Eurodis Texim. He held that, the Insolvency Regulation did not enable him to determine that an order made by a Court in another Member State was invalid and to act as if it had never been made. Mann J did not accept that the English Court could decline to recognise the order of the Belgian Court on the ground that it was not made in either main proceedings or secondary proceedings.

47. On the other hand, he was prepared to make an order under s.221(5)(a) of the Insolvency Act 1986; that is that a winding-up order should be made against Eurodis Texim in England and Wales (notwithstanding its dissolution). The administrators had presented a petition to that effect; they obtained an order. In addition, they were also appointed as liquidators of the Company and obtained permission to draw their remuneration as administrators as an expense of the liquidation.

Recent Cases (pending) - ECJ

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;

48. There is a possibility that *Interedil* could give rise to some new jurisprudence from the European Court of Justice on COMI for the purposes of the Regulation. That is because one of the questions which has been referred by the Tribunale Ordinario di Bari will potentially require the Court to consider whether (a) COMI is to be interpreted in accordance with Community law or national law, and (b) if Community law "how is that concept to be defined and what are the decisive factors or considerations?" It will be very interesting to see if the ECJ does decide to supply a list of decisive factors.

49. In addition, in *Interedil*, the ECJ has also been asked to supply an answer to a slightly narrower question on the issue of the presumption which applies in respect of a corporate debtor. It will be recalled that, pursuant to Article 3 of the Regulation, "the place of the registered office shall

be presumed to be [the company's COMI] in the absence of proof to the contrary". The Italian Court asks whether it is sufficient to rebut the presumption if "the company carries on genuine business activity in a State other than that in which it has its registered office". On the other hand, the same question is posed but from a different starting point: what if the corporate debtor undertakes no business activity in the State in which it has its registered office, is that sufficient to rebut the presumption? At first blush, the answer to the former ought to be "no, not necessarily", whereas the answer to the latter might more likely be "yes". We shall have to wait and see.

50. After setting out the two widest questions which have been referred to the ECJ, it is worth noting that the ECJ has also been asked to determine two much narrower questions one of which may give rise to relevant jurisprudence. If the company has, in a Member State which is not the Member State in which it has its registered office, (a) immovable property, (b) a lease agreement concluded with another company in respect of two hotel complexes and (c) a contract with a banking institution, are (a), (b) and (c) sufficient to rebut the registered office presumption? Further, are (a), (b) and (c) sufficient for the relevant company to be regarded as having an "establishment" in that other Member State?

51. On 10 March 2011, Advocate-General Julianne Kokott filed her opinion in respect of *Interedil*. The opinion is not yet available in English, although it is available in some other European languages, including French. The opinion fleshes out somewhat the relevant facts of *Interedil*. It would appear that Interedil Srl was originally incorporated in Italy. However, on 18 July 2001, it transferred its registered office to England and Wales and was incorporated at Companies House as a Foreign Company. At or around the same time, Interedil was removed from the Italian equivalent of Companies House. Once Interedil had been registered in England and Wales, it appears that it was acquired by an entity known as Canopus; furthermore, a few months thereafter, Interedil's assets in Italy (being buildings situated in Taranto) were transferred to Windowmist Limited. On 22 July 2002, Interedil Srl was dissolved and removed from the register of companies.

52. Some time later, in October 2003, Intesa Gestione Crediti SpA presented a winding-up petition against Interedil Srl to the Tribunale Ordinario di Bari. Interedil apparently opposed that petition. According to the opinion, one ground of opposition was the fact that, following the transfer of its registered office to England and Wales, the Italian Courts no longer had jurisdiction over Interedil; the company made an application to a higher Italian Court for a determination of that issue. However, without waiting for that determination, the Tribunale Ordinario di Bari made a winding-up order in May 2004. Interedil appealed. The Corte di Cassazione rejected the appeal on 20 May 2005. That Court held that the following factors were enough to displace the presumption in favour of the registered office: (a) immovable property in Italy, (b) a lease agreement concluded with another company in respect of two hotel complexes in Italy and (c) a contract with a banking institution.

53. The Advocate-General concluded, in line with the decision of the ECJ in *Eurofood*, that COMI should be interpreted as an "autonomous concept". In addition, on the unusual facts of *Interedil* (i.e. that the company had already been dissolved), she considered that the relevant COMI of the Company is the COMI which existed before the dissolution of the company. As regards when the registered office presumption contained in Article 3 can be rebutted, she expressed the opinion that, in order to rebut the presumption, again in line with *Eurofood*, it is necessary to identify factors which are both objective and ascertainable by third parties. She stressed the importance of considering the relevant factors from the perspective of creditors of the debtor.

54. Perhaps not surprisingly, she declined to endorse any form of checklist by reference to which COMI can be generically tested; each case must turn on its own facts, and in each case the Court must take into account all relevant circumstances. Having said that, she did observe that the location of the majority of the debtor's assets can be excluded from consideration: often, it will be difficult for a third party to determine the location of the majority of the debtor's assets. On the other hand, she took the view that it was also necessary to seek to determine what, if any activities, the debtor undertakes from its registered office which are ascertainable by third parties. The location of a debtor's assets will thus only become relevant if it can be shown, from the perspective of the debtor's creditors, that the debtor's central administration is not

undertaken from its registered office, and even then, additional objective factors ascertainable by creditors will be necessary; the location of assets will not be sufficient. In this case, it appeared that the liquidation activities of Interedil were undertaken from its registered office in London; it would not therefore be possible to rebut the COMI presumption.

55. In relation to the questions relating to the scope of the expression "establishment" for the purposes of the Insolvency Regulation, the Advocate General relied upon the drafting of the Convention of 23 November 1995. She was of the view that the presence of assets in a jurisdiction is not sufficient to be an establishment for the purposes of the Insolvency Regulation. The search must be for the presence of "human means" and a minimal level of activity. The fact that Interedil had (a) immovable property, (b) a lease agreement concluded with another company in respect of two hotel complexes and (c) a contract with a banking institution in Italy did not mean that Interedil had an establishment in Italy, unless Interedil also had a place of operations where Interedil carried out a non-transitory economic activity with human means and goods.

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;

56. The reference to the ECJ in *Zaza Retail* concerns Article 3(4) of the Regulation. That is not an article which has featured a great deal in the jurisprudence of the English Courts. It prescribes certain conditions in relation to the opening of territorial proceedings or secondary proceedings before main proceedings under Article 3(1) are opened. In particular, Article 3(4)(a) lays down a condition for the opening of territorial proceedings before the opening of main proceedings when main proceedings "cannot be opened because of the conditions laid down by the law of the Member State" within which the debtor's COMI is situated. Article 3(4)(b) lays down further conditions which relate to whether the claim arises from the operations of the establishment or whether the creditor has his "domicile, habitual residence or registered office" within the territory of which the establishment is situated.

57. The first question which has been referred requires consideration of whether the expression "conditions laid down" concerns (i) the capacity or interest of the person seeking the opening of proceedings (e.g. a public prosecution service) and / or (ii) only the substantive conditions for being made subject to proceedings. The second question relates to whether a "creditor" in Article 3(4)(b) can include a national authority which has power to seek the opening of proceedings and acts in the public interest and as a representative of all creditors. If the answer to the second question is "yes", is it also necessary for 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 the national authority.

Rastelli Davide et C v Jean-Claude Hidoux, as liquidator of Médiasucre International, Case C-191/10, lodged on 19 April 2010;

58. The case of *Rastelli Davide et C* concerns COMI and "main proceedings". In *Rastelli*, the French Cour de Cassation has referred questions which arise from a situation where two corporate entities' property has become intermixed, and proceedings have been opened in France against one of the two debtors on the grounds that that debtor's COMI is situated in France. The other debtor's seat is not situated in France. French insolvency law grants jurisdiction to the French Courts to open insolvency proceedings against that other debtor.

59. The first question which has been referred to the ECJ requires the ECJ to state whether or not the opening of a second set of proceedings in such circumstances is precluded by the operation of the Regulation. At first blush, that does seem to be an impossibly wide question seeking, in effect, some form of advance clearance under the Regulation. It will be interesting to see, in due course, what the European Court of Justice decides on that first question.

60. The second question which has been referred to the ECJ is based on the premise that the answer to the first question is that the second set of proceedings against the other corporate debtor will be new proceedings for the purposes of the Regulation, and thus that they can only be opened in the event that the debtor's COMI would be in France. The question requires the

ECJ to state whether the location of the other debtor's COMI can be inferred from the fact that the property of the two companies has become intermixed.

F-Tex SIA v Lietuvos-Anglijos UAB "Jadecloud Vilma", Case C-213/10, Lietuvos Auksciausiasis Teismas (Lithuania), lodged on 4 May 2010.

61. The Lithuanian Court has referred questions which, broadly, are a follow up to the decisions of the ECJ in Gourdain and Seagon on the interplay between the Regulation and the Brussels Regulation. In particular, the Lithuanian Court has posed questions relating to causes of action seeking the avoidance of fraudulent transfers to defeat creditors; the actio Pauliana.

62. Firstly, the ECJ is invited to consider whether the effect of Gourdain and Seagon is that (a) the court hearing insolvency proceedings has exclusive jurisdiction to hear an actio Pauliana which derives directly or is closely connected to the insolvency proceedings (the only exceptions being found in other provisions of the Regulation) and (b) an actio Pauliana brought by a sole creditor in a different state to the state in which the insolvency proceedings have been opened and which is based on a right which has been assigned to that creditor by the liquidator on the basis of an agreement for consideration which gives rise to no danger for other creditors is a "civil and commercial matter" under the Brussels Regulation.

63. Secondly, the ECJ is asked whether an applicant's right to judicial protection necessarily means that it is not possible for both the national courts with jurisdiction under Article 3(1) of the Regulation and Article 2(1) of the Brussels Regulation cannot both decline jurisdiction to hear the claim. If one of the two courts declines to hear the claim, can the other court find, of its own motion, that it has jurisdiction to hear the claim?

Dr Biner Bähr, in his capacity as liquidator in respect of the assets of Hertie GmbH v HIDD Hamburg-Bramfeld B.V.1, Case C-494/10, Landgericht Essen, lodged on 15 October 2010

64. The questions referred by the Landgericht Essen are relatively narrow in scope. They engage principles relating to transaction avoidance in an insolvency context and also the allocation of jurisdiction. The ECJ has already handed down one judgment on such issues: see *Seagon v Deko* (Case C-339/07 [2009] ECR I-00767). In this case, the German Court invites the ECJ to consider whether its previous reasoning in *Seagon* also applies to a case where the claim by the officeholder is a hybrid claim, seeking both to avoid a transaction under insolvency law, but also to enforce provisions relating to maintenance of capital for companies.

ERSTE Bank Hungary Nyrt v Magyar Állam, B.C.L Trading GmbH, ERSTE Befektetési Zrt., Case C-527/10, Magyar Köztársaság Legfelsőbb Bírósága, lodged on 15 November 2010

65. The reference to the ECJ in *ERSTE Bank Hungary* relates to Article 5 of the Regulation – Third Parties' Rights in Rem. The narrow question which has been raised is whether Article 5 is engaged where the relevant third party rights (in this case, security deposits) were created in a country which was not a Member State of the European Union at the time when insolvency proceedings were instituted in another Member State.

Bank Handlowy, Ryszard Adamiak, Christianapol sp. z o. o., Case C-116/11, Sąd Rejonowy Poznań, lodged on 7 March 2011

66. The Polish Court has referred three questions to the European Court of Justice. The first question concerns the interpretation of the expression "closure of insolvency proceedings" in Article 4(2)(j) of the Insolvency Regulation. In particular, the Polish Court asks whether that expression is to be taken as having an autonomous community meaning, or whether instead it should be interpreted differently in each Member State according to that Member States own law.

67. The second question relates to Article 27 of the Insolvency Regulation. On its face, the effect of that Article is that where it is sought to open secondary proceeding in a Member State, the Courts of that Member State, having recognised the main proceedings in another Member State, do not need to examine the debtor's insolvency. The Polish Court asks whether Article

27 means that the Court in which secondary proceedings are to be opened can never enquire into the solvency of the debtor, or whether, in some circumstances, it can enquire into the solvency of the debtor. The example given by the Polish Court is where the main proceedings are "protective proceedings" (French *sauvegarde* proceedings) in which the relevant other Court has in fact established that the debtor is solvent.

68. Finally, the referring Courts asks, again in relation to Article 27, whether that Article permits the opening of Secondary Proceedings in a state where the debtor has all of its assets, notwithstanding the fact that the main proceedings are protective proceedings, that a scheme of payment has been accepted and confirmed in those proceedings and the debtor is implementing the said scheme. In addition, it would seem that, in this particular case, the French court has also forbidden the debtor of disposing of its assets.

Hot Topic – Modified Universalism

69. In two recent cases, Lord Hoffmann has, virtually single-handedly, reinvigorated the common law on cross-border insolvency. This is a development which directly affects the scope of the English Court's ability to lend assistance to foreign officeholders. It is not entirely clear how those common law powers will co-exist with the various statutory rules which have been promulgated in the last decade in the field of cross-border insolvency, such as the UNCITRAL Model Law (2006) or the Insolvency Regulation (2002) (arguably even s.426 of the Insolvency Act 1986).

70. It is clear though that the so-called principle of "modified universalism" is popular with litigators and has featured in several recent decisions of the English Courts both at first instance and in the Court of Appeal, including in:

70.1 *In the matter of Swissair Schweizerische Luftverkehr Aktiengesellschaft* [2009] EWHC 2099 (Ch) [2010] BCC 667, (David Richards J);

70.2 *(1) David Rubin (2) Henry Lan (as joint receivers of the Consumers Trust) v (1) Eurofinance SA (2) Adrian Roman (3) Justin roman (4) Nicholas Roman* [2010] EWCA Civ 895, [2011] 2 WLR 121;

70.3 *In the matter of Alitalia Linee Aera S.p.A, (1) Connock (2) Boyden (as the English joint liquidators of Alitalia) -v- Fantozzi (as the Italian Administrator of Alitalia)* [2011] EWHC 15, Newey J, 18 January 2011;

70.4 *Schmitt v Deichmann* [2011] EWHC 294 (Ch) 9 February 2011, Sales J

70.5 *In the matter of New Cap Reinsurance Corporation Limited (in liquidation)*, Lewison J, 15 March 2011;

71. In order to understand modern "modified universalism", it is necessary to start with the actual statements made by Lord Hoffmann. The first of the two cases was the Privy Council's decision in *Cambridge Gas Transportation Corpn v. Official Committee of Unsecured Creditors of Navigator Holdings plc and others* [2006] UKPC 26 [2006] 3 WLR 689. In *Cambridge Gas*, Lord Hoffmann stated:

"16. The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated..."

"17. *... But universality of bankruptcy has long been an aspiration, if not always fully achieved, of United Kingdom law..."*

"19. The underdeveloped state of the common law means that unifying principles which apply to both personal and corporate insolvency have not been fully worked out..."

"22. What are the limits of the assistance which the court can give? In cases in which there is statutory authority for providing assistance, the statute specifies what the court may do. For example, section 426(5) of the Insolvency Act 1986 provides that a request from a foreign court shall be authority for an English court to apply "the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction". … The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."

72. The second and more significant case was the decision of the House of Lords in *Re HIH Casualty and General Insurance Ltd and other companies; McGrath and others v Riddell and another* [2008] UKHL 21 [2008] 3 All ER 869 [2008] 1 WLR 852. In *HIH*, Lord Hoffmann went into far more detail on the scope of the principle, and its limits:

"[6] Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives world-wide recognition and it should apply universally to all the bankrupt's assets."

"[7] This was very much a principle rather than a rule. It is heavily qualified by exceptions on pragmatic grounds; elsewhere I have described it as an aspiration: see Cambridge Gas Transportation Corpn v Official Committee of Unsecured Creditors of Navigator Holdings plc [2006] UKPC 26, [2007] 1 AC 508, 517 at para 17, [2006] 3 All ER 829. Professor Jay Westbrook, a distinguished American writer on international insolvency has called it a principle of "modified universalism": see also Professor Ian Fletcher, Insolvency in Private International Law (2nd ed 2005) at pp 15-17. Full universalism can be attained only by international treaty. Nevertheless, even in its modified and pragmatic form, the principle is a potent one."

"[8] In the late nineteenth century there developed a judicial practice, based upon the principle of universalism, by which the English winding up of a foreign company was treated as ancillary to a winding up by the court of its domicile…"

"[9] But the judicial practice which developed in such a case was to limit the powers and duties of the liquidator to collecting the English assets and settling a list of the creditors who sent in proofs. The court, so to speak, "disapplied" the statutory trusts and duties in relation to the foreign assets of foreign companies. This practice was based partly upon the pragmatic consideration that any foreign country which applied our own rules of private international law would not recognise the title of an English ancillary liquidator to the company's assets. But it was also based upon the principle of universalism…"

"[30]… The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the eighteenth century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution. That is the purpose of the power to direct remittal."

73. If one assumes that Lord Hoffmann's statements accurately represent the present state of the common law on cross-border insolvency, it would seem that the golden thread is made up of several strands:

73.1 an insolvency process in respect of a debtor should be unitary and universal;

73.2 by way of example, the winding-up in England and Wales of a foreign company which was also subject to winding-up proceedings in its jurisdiction of incorporation would be treated as ancillary; and

73.3 in order to ensure that an insolvency process in respect of a debtor can be unitary and universal, it is incumbent on the English Court, but presumably only in the context of an ancillary process, to co-operate with the Courts of the jurisdiction where the principal insolvency process is ongoing.

74. At first blush, Lord Hoffmann's principle of modified universalism seems a wide and all-encompassing concept. How extensive can the co-operation be? Does modified universalism only apply as a principle of last resort, where other statutory principles have failed? These are precisely the sort of issues which the Courts are presently having to grapple with.

75. It does seem however, that if the relevant strands are subjected to even a minimal amount of scrutiny, gaps begin to appear. At this stage, the most significant appear to be as follows:

75.1 Although in *Cambridge Gas*, there were no dissenting voices to oppose Lord Hoffmann's analysis of common law cross-border co-operation, the same is not true of *HIH*. Both Lords Scott and Neuberger disagreed that *HIH* should be decided on the basis of common law principles of cross-border co-operation. So far as they were concerned, *HIH* was a case in which s.426 of the Insolvency Act 1986 was engaged, and it should therefore be decided by reference to those statutory provision which they considered overrode the common law. At a more general level, the analysis relied upon by Lords Scott and Neuberger neatly raises the question whether modified universalism can ever apply when there is a statutory code in place, whether that code be the Insolvency Act 1986, the Model Law or the Insolvency Regulation. The fifth Law lord in *HIH* (Lord Phillips) was not entirely clear as to whether he aligned himself with Lord Hoffmann or with Lord Scott (Lord Walker supported Lord Hoffmann); in other words, although all the judges in the House of Lords in *HIH* all concurred in the result, it was a score-draw as to the route which needed to be taken in order to reach the relevant result.

75.2 It is also not clear whether, assuming that the principle of modified universalism is engaged in any particular case, it permits the English court to disapply provisions of English Insolvency Law in favour of the law of the jurisdiction in which the principal winding-up is taking place. The Court of Appeal in *Eurofinance* was prepared to alter English rules of private international law which had stood the test of time as a means of giving effect to modified universalism. On the contrary, Newey J in *Alitalia* was not prepared to make an order which would have the effect of disapplying the English *pari passu* principle by ensuring that the employees acquired Italian preferential status in England.

Stefan Ramel
Guildhall Chambers
June 2011