CROSS-BORDER INSOLVENCY UPDATE

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Introduction

1. This paper supports the talk which the author will give on Thursday 27 January 2011 at the Met Hotel in Leeds. As the title and length of the talk suggest, the purpose of this cross-border insolvency update is to provide the delegate with some simple take-home points arising out of recent developments in cross-border insolvency over the course of the last year or so. In fact, in an effort to ensure that this truly is an update, only significant events and cases which have occurred or been decided in the period January 2010 to January 2011 will be referred to in this paper.

2. As will be well-known to each delegate, not least as a result of the very nature of the topic, cross-border insolvency situations occur in a wide variety of circumstances; more often than not such situations give rise to complex questions relating to the interplay of competing legal systems. For that reason, the structure of this paper will involve, firstly, a consideration of the recent and significant cases which have vexed the English Courts, and secondly a review not so much of the cases which have been decided by the European Court of Justice (because there are in fact no such significant cases) but rather a review of the cases which are presently pending before that Court and which can, with an uncommon degree of confidence for a lawyer, be predicted to give rise to new jurisprudence in the coming twelve months. In that way, this paper will be both forward and backward looking.

3. Finally, no legal update on cross-border insolvency law would be complete without at least some mention of COMI. It is very likely that most practitioners, if they have come across a cross-border insolvency situation at all, will have been required to consider almost as a threshold question the location of an individual debtor or a corporate debtor's COMI. Further, since the EC Regulation 1346/2000 on Insolvency Proceedings came into force in England and Wales in May 2002 ("**the Regulation**") and, more recently, since the UNCITRAL Model Law on Cross-Border Insolvency was incorporated into English law by the Cross-Border Insolvency Regulations 2006 ("**the Model Law**"), COMI or centre of main interest has been the topic which has generated the most case law. For that reason, it is thought useful to include a few paragraphs on COMI just to make sure that delegates can be confident that they are appraised of the last developments on this topic.

The English Courts

4. The following cases (listed according to the date on which they were decided) which come within the criteria for this update identified in the introduction will be reviewed in this section of the paper:

   (1) Byers (2) Hosking (3) Akers (as liquidators of Madoff Securities International Limited) v (1) Yacht Bull Corporation (2) Financière Meeschaert S.A. [2010] EWHC 133 (Ch), The Chancellor, 1 February 2010;

   (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, Court of Appeal (Ward, Wilson LJJ, and Henderson J), 30 July 2010;

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

   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.

Yacht Bull

5. The Yacht Bull is a 23m Leopard Sports Yacht which is registered in the name of Yacht Bull Corporation, which is a Cayman Islands Company. Yacht Bull Corporation is owned by Ruth Madoff, the wife of the financier Bernard Madoff. The Yacht Bull was purchased with funds supplied by Madoff Securities International Limited a UK company; that company was owned by Bernard Madoff Investment Securities LLC which in turn was owned by Bernard Madoff. After the Ponzi fraud perpetrated by Bernard Madoff was brought to light in December 2008, the Yacht Bull very quickly became the subject of proceedings in various jurisdictions.

6. In France, a purported creditor of Bernard Madoff Investment Securities LLC, Financière Meeschaert (a French company) arrested the Yacht pursuant to an order made by the Commercial Court of Antibes. By December 2008, Madoff Securities International Limited was in provisional and then compulsory liquidation. The liquidators of that company sought a declaration of ownership of the yacht from the Grand Court of the Cayman Islands (that was opposed to by Financière Meeschaert). In addition they also arrested the Yacht Bull in Antibes thanks to an order made by the Commercial Court of Antibes. Finally, in England and Wales, the liquidators sought a declaration that the Yacht Bull was owned by Madoff Securities International Limited; Financière Meeschaert was a respondent to that application and in any event, it made its own application challenging the jurisdiction of the English Court to hear claims relating to the ownership of the Yacht Bull. It was that application which was decided by the Chancellor on 1 February 2010. It should be noted that the Chancellor allowed an application by the liquidator to add causes of action under section 238 and 239 of the Insolvency Act 1986; however, as he was later to point out, both the claims are premised on the assumption that the Yacht Bull is owned not by Madoff Securities International Limited (which was the liquidators' primary claim) but by Yacht Bull Corporation.

7. Financière Meeschaert put forward a number of grounds for asserting that the English Court either did not have jurisdiction to determine the ownership application, and that if it did have jurisdiction, it should nonetheless decline to hear the claim. Some of those grounds relied upon the Regulation; others were based on Council Regulation (E.C.) 44/2001 on Jurisdiction and the Recognition of Judgments in Civil and Commercial Matters ("**the Brussels Regulation**").

8. As regards Financière Meeschaert's arguments concerning the Brussels Regulation, essentially they asserted that the ownership claim did not fall within the Article 2(1) exception in the Brussels Regulation ("bankruptcy, proceedings relating to the winding-up of insolvency companies….. and analogous proceedings") so that the Brussels Regulation was engaged and it ought to follow therefrom that Yacht Bull Corporation should properly be sued in the Cayman Islands. For that purpose, Financière Meeschaert relied on *Gourdain v Nadler* (Case C-133/78) [1979] ECR 733, *Seagon v Deko Marty Belgium NV* (Case C-339/07) [2009] ECR I 767, *Ashurst v Pollard* [2001] Ch 595 and *Hayward (Deceased), Re* [1997] Ch 45.

9. The liquidators' argument was that the arrest of the Yacht Bull was a violation of s.130(2) of the Insolvency Act 1986, which, as is well known, imposes a stay and / or prohibition on legal proceedings against an insolvent company, or its assets. That claim was plainly an insolvency claim, and therefore fell within the Brussels Regulation so that the English Court had jurisdiction to hear it. It was then argued that, because the claim for a declaration of ownership was incidental to the s.130(2) claim, that the former also fell within the exception.

10. The Chancellor agreed with Financière Meeschaert. He stated:

> "[25] I do not accept these submissions. First, I do not accept that the application must be considered as a whole in the sense that dependent or alternative claims falling within the exception can change the nature of the claim on or to which they are dependent or alternative. In my view the submission of counsel for the JLs is contrary to the true analysis of the amended claim in this case. The principal claim is the declaration as to beneficial ownership, the other claims are either dependent, namely the application of s 130(2) to actions or proceedings against MSIL 'or its property', or alternative,

> namely the application of ss 238 and 423 of the Insolvency Act if the declaration of ownership is not made. It is necessary to consider whether the principal claim is within the exception, cf Re Hayward (Deceased) [1997] Ch 45, at 54C.
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> [26] Accordingly the relevant question is whether the claim for ownership is within the exception. In my judgment it is not. The claim is made by the JLs but the claim to ownership arises under the general law and, if well made, had accrued to MSIL before it was wound up. The link with either the Insolvency Act or the winding up of MSIL is neither direct nor close. I see no sensible distinction between this case and *Re Hayward*, *Ashurst v Pollard* or *German Graphics*. In my judgment, the exception contained in Art 1(2)(b) does not apply so as to exclude the application of the Judgments Regulation as a whole.
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> [27] Accordingly, Art 2 applies to that claim. It is necessarily made against both YBC and FM. YBC is not domiciled in another Member State but FM is domiciled in France and is entitled to be sued there in accordance with Art 2. In those circumstances I consider that I should, as asked by counsel for FM, declare that this court has no jurisdiction over FM in relation to the claim…."

11. As it happens therefore, it was unnecessary, strictly, for the Chancellor to then go on and express an opinion in respect of each sides' competing arguments on the Regulation. Nevertheless, the Chancellor did go one to consider those arguments. In reliance on Article 1(2) of the Regulation, which provides that the Regulation shall not apply to insolvency proceedings concerning "investment undertakings which provide services involving the holding of funds or securities for third parties…". Financière Meeschaert argued that it came within that exception on the grounds that Madoff Securities International Limited was such an "investment undertaking". The joint liquidators' argument in response was that Madoff Securities International Limited could only come within Article 1(2) of the Regulation if it was supplying the said services at the time that the insolvency proceedings were opened. In support of that submission, the joint liquidators relied upon evidence from their Forensic and Investigation Services Department which suggested that Madoff Securities International Limited did not supply such services to third parties at the relevant time nor did it hold funds for third parties. Counsel for Financière Meeschaert declined the opportunity of cross-examining the makers of the relevant witness statements on the grounds that Financière Meeschaert did not wish to submit to the jurisdiction of the English Courts.

12. The Chancellor concluded that the exception in Article 1(2) relates only to those services which involve "the holding of funds or securities for third parties", that in the absence of evidence to rebut the assertion made on behalf of the joint liquidators, the exception in Article 1(2) was not engaged and therefore the Regulation applied to the insolvency proceedings in England and Wales.

13. Financière Meeschaert had also sought to argue that its arrest of the Yacht Bull gave it rights *in rem* for the purposes of Article 5 of the Regulation. That however, was an issue which the Chancellor was not prepared to express a view on, although the Chancellor did point out that, on the facts, the arrest came too late anyway and that the joint liquidators had in any event sought to set aside the arrest by way of an appeal to the relevant Court in Antibes.

(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

14. This case concerned a trust known as the Consumers Trust which was set up by Eurofinance S.A. which was the settler. The trustees of the Consumers Trust were UK solicitors. The purpose of the trust was to create a "Cashable Voucher Programme" which was rolled out in the USA and Canada. That programme worked thus: a consumer would purchase an item or service from a merchant; as a means of attracting the consumer, the merchant would offer 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", 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.

15. The Consumers Trust was exposed as a scam as a result of action taken by the Attorney-General for the state of Missouri under Missouri's consumer protection legislation. The Trustees, in an agreed settlement were required to pay $1,650,000. The floodgates, however, had been opened. As a result, on 11 November 2005, Lewison J appointed Messrs Rubin and Lan as the joint receivers and managers of the Consumer Trust. In turn, Messrs Rubin and Lan sought the opening of proceedings under Chapter 11 in the United States Bankruptcy Court for the Southern District of New York. The proceedings were decided to be opened in the USA because the vast majority of the trust's creditors (customers) were based in the USA or Canada. Insolvency proceedings were duly opened in New York. The opening of insolvency proceedings was followed by the commencement of adversary proceedings in New York against Eurofinance, Messrs Roman and other seeking judgments by reference to the overall indebtedness of the trust ($160 million) and 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.

16. On 3 November 2008, Messrs Rubin and Lan applied to the Chancery Division for (a) orders recognising the New York proceedings as foreign proceedings under the Model Law, and (b) for enforcement of the summary judgments obtained in the New York adversary proceedings. Nicholas Strauss QC recognised the proceedings but declined to order enforcement. Both sides appealed to the Court of Appeal.

17. The judgment in the Court of Appeal was given by Ward LJ. He summarised the issue which he had to decide as follows:

> "47. … The critical decision I now have to take is to decide how far this reservation goes. Mr Staff does not dispute that a separate category in private international law exists for bankruptcy proceedings. The case turns now on what is meant by and what falls within "bankruptcy proceedings": if a judgment in personam is made in and as part of bankruptcy proceedings as those proceedings are to be properly characterised, then does r 36 still apply or does the special character of the bankruptcy proceedings prevail?"

18. By way of further explanation, the reference to r. 36 is a reference to Rule 36 of Dicey & Morris which relates to the circumstances in which the English Courts will enforce judgments *in personam* against entities. In summary, the English Court will not do so unless the defendant was present in the jurisdiction in which the case was tried (not the case here), if the defendant claimed or counterclaimed in that jurisdiction (not the case here) or if the defendant submitted to the foreign jurisdiction (not the case here).

19. Eurofinance and Messrs Roman argued that enforcement of the New York judgments could not be ordered in this jurisdiction: (a) the judgments were *in personam* judgments, but (b) none of the pre-requisites in rule 36 applied, so (c) rule 36 was not engaged and it was not possible to order enforcement. The appellants (Messrs Rubin and Lan) argued that "bankruptcy proceedings" are subject to different rules of private international law, based on comity and universalism, and that they can be enforced in this jurisdiction notwithstanding that they are *in personam* decisions where the rule 36 criteria are not met. That submission was based in large part on the decisions of the House of Lords and Privy Council in *HiH, McGrath v Riddell* [2008] UKHL 21 and *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] UKPC 26.

20. Returning to the judgment of Ward LJ, he stated:

> "[50] Thus the issue narrows down to whether these avoidance provisions which can only be brought by the representative of the bankruptcy in the bankruptcy court are to be characterised as part of the bankruptcy proceedings, i.e., part of the collective proceeding to enforce rights and not to establish them. The Appellants contend that the "mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established" (see 14) necessarily includes the mechanism for enabling recovery of assets which have been dissipated or dealt with prior to insolvency in a manner prejudicial to the interests of creditors (or a particular class of creditors), because provisions of this nature are invariably features of any developed system of insolvency. The Respondents contend that the purpose of the bankruptcy proceedings is to ensure that the debtor's assets are distributed to its creditors: the rights being enforced are those of the creditors against the bankrupt which exclude the enforcement of the bankrupt's rights against persons who are not creditors (which could result in a judgment in rem or in personam). The Respondents' case relying on para 15 of Cambridge Gas is that the Adversary Proceedings and the claims brought in them are "incidental procedural matters and not central to the purpose of the proceedings"."

21. After reviewing various textbooks and commentaries on insolvency legislation, as well as the jurisprudence which deals with whether and if so which insolvency proceedings are excluded from the scope of the Brussels Regulation (e.g. *Gourdain* and *Seagon*), Ward LJ came to the following conclusion:

> "[60] As I have set out above (see 24 and 25) Mr Nicholas Strauss QC was quite clear and emphatic that the Adversary Proceedings were part and parcel of the Ch 11 Insolvency Proceedings. In my judgment he was right for the reasons he gave… The striking similarities conceded by the Respondents between ss 238 and 239 of the Insolvency Act 1986 and ss 547 and 548 of the American Code, and thus between these aspects of our law and the equivalent parts of the American law, justify a harmonised interpretation. That satisfies me that the judge fell into no error in reaching the conclusion that the Adversary Proceedings are part and parcel of the insolvency proceedings."
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> "61… I am driven to conclude that:
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> (1) The ordinary rules for enforcing, or more precisely not enforcing, foreign judgments in personam do not apply to bankruptcy proceedings.
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> (2) Bankruptcy proceedings include 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.
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> (3) I am reinforced in my view that the orders with which we are concerned are part of the bankruptcy proceedings because in In re HIH Insurance Lord Hoffmann himself said in para 19 "Furthermore, the process of collection of assets will include, for example, the use of powers to set aside voidable dispositions, which may differ very considerably from those in the English statutory scheme."

> (4) Albeit that they have the indicia of judgments in personam, the judgments of the New York court made in the Adversary Proceedings, are nonetheless judgments in and for the purposes of the collective enforcement regime of the bankruptcy proceedings and as such are governed by the sui generis private international law rules relating to bankruptcy and are not subject to the ordinary private international law rules preventing enforcement of judgments because the Defendants were not subject to the jurisdiction of the foreign court. This is a desirable development of the common law founded on the principles of modified universalism. It does not require the court to enforce anything that it could not do, mutatis mutandis, in a domestic context.
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> (5) Whether viewed from an analysis of the United States Code and/or the Insolvency Act or as part of the matter of common law, the Adversary Proceedings must be recognised as a foreign main proceeding. Having been duly authorised in the foreign proceedings, the Appellants must be recognised as foreign representatives. I would dismiss the cross-appeal accordingly."

22. Ward LJ also went on to conclude that the judgments of the New York Court should be enforced in England and Wales. Messrs Rubin and Lan were successful. The Court of Appeal refused permission to appeal. It is not known though whether a petition has been presented to the Supreme Court.

European Directories

23. On 6 December 2010, HHJ Raynor QC gave judgment on an application by European Directories (DH6) BV for an administration order. Numerous parties appeared before HHJ Raynor QC including the company, the proposed administrators as well as various tiers of creditors. None of those parties opposed the making of an administration order. Nonetheless, HHJ Raynor QC held that it was still necessary for him to be satisfied that it was not a case of abuse of process of the Court and that the relevant statutory conditions were all met. The company was incorporated in the Netherlands. Having regard to the COMI presumption contained in Article 3(1) of the Regulation, that meant that it would be necessary to consider whether or not the presumption was rebutted. It follows that the decision of HHJ Raynor QC is relevant and within the scope of this paper.

24. The company was an intermediate holding company in a group of companies formed 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. Since 2006, the group's administrative headquarters has been at Building 10, Chiswick Building Park, Chiswick High Road, London. European Directories (DH6) BV was not a trading company; it sole assets were the shares in its subsidiary (DH7) which itself was the parent of the group's operating companies. Nonetheless, the company had substantial liabilities (as a guarantor).

25. HHJ Raynor QC was satisfied that the company was insolvent, that one of the purposes of administration could be achieved, and that, in the exercise of his discretion, he should make the order. As regards COMI, he stated:

> "39. In the present case the evidence before me may be summarised as follows. The company here acts as an intermediate holding company for the other companies within its group. It raises finance then made available to the operating subsidiaries within the group. It does not trade with third parties other than engaging legal and other advisors in connection with restructuring. Its assets mainly consist of intangible assets. It has no employees although of course the overall group has a large number of employees. The directors of the

company are Mr Briggs, resident in London, Mr Cook, resident in the United States, and Mr Perisat, also resident in London.

40. All decisions, I am satisfied, relating to the company's strategic and financial arrangements, and in particular those concerning its financial dealings and the proposed group restructuring, are made by directors from the Chiswick office. The company and its directors do not operate from any office in The Netherlands in relation to the company's affairs. It created a restructuring committee with the role of considering the potential restructuring and that meets in London. The vast majority of its creditors are based in England. The principal financing agreements are governed by English law. The senior facilities agreement contains an exclusive jurisdiction clause in favour of England and the mezzanine facility and intercreditor agreements provide that the courts of England are the most appropriate and convenient forum. All of the first lien debt, second lien debt and mezzanine debt are, as I understand it, traded on the London secondary debt market."

42. On 14 and 21 May the board resolved to take the necessary steps to confirm the location of the company's COMI in England, and on 20 May 2010 the company wrote to the senior co-ordinating committee to inform them of the steps the company would be undertaking to confirm the location of the COMI in England. Following that resolution a number of practical steps were taken with a view to confirming the COMI in England.

43. In summary, the company's business address registered at the Dutch Trade Registry has been designated as the Chiswick office. This address has been designated as the Head Office of the company, and the company does not have a business address in The Netherlands. It has a registered branch in England with the Registrar of Companies at Companies House. On 24 May of this year it wrote to its creditors and counterparties to notify them that the Chiswick address was the new address for correspondence. Its website lists the Chiswick office as the company's address and states, as is factually accurate now, that the company's operational headquarters is in London. The company has a bank account in London. The sole signatory to that is the chief financial officer who is based at the Chiswick office. Creditors communicate with the company and its advisors in London."

26. For all of those reasons, HHJ Raynor QC was satisfied that European Directories' COMI was situated in England and Wales. He made the administration order.

Alitalia

27. This case concerned a dispute between the officeholders appointed in respect of Alitalia Linee Aeree Italiane S.p.A in Italy and in England and Wales. The company Alitalia needs no introduction; it had been the Italian flag airline since 1946. Main proceedings under Article 3 of the Regulation were opened in Italy in August 2008 under a special extraordinary administration procedure. Secondary proceedings were opened in England and Wales also under Article 3 of the Regulation in January 2009 on a petition presented by the trustees of the Alitalia pension scheme on 27 November 2008.

28. Professor Fantozzi is the Italian Officeholder. Messrs Connock and Boyden were the English joint liquidators of Alitalia. Professor Fantozzi took the view, upon his appointment in August 2008, that the best result for the creditors of Alitalia was a sale of its business and assets to a newly formed company. In the events that happened, that newly formed company was

Compagnia Aerea Italia S.p.A; the price agreed with C.A.I was in excess of €1 billion. Alitalia was hopelessly insolvent; its debts were in excess of €2.8 billion.

29. The sale to C.A.I was made complicated as a result of the fact that the European Commission determined that Alitalia had received state aid, and that in order to ensure that the purchaser of Alitalia's business and assets was not, in the future, required to disgorge that state benefit, there had to be "economic discontinuity" between Alitalia and C.A.I. Amongst other things, that meant that all employees of Alitalia would have to be dismissed so as to avoid an automatic T.U.P.E transfer to C.A.I. In January 2009, the employees of Alitalia signed compromise agreements pursuant to which they would receive two payments as consideration for the employees waiving their rights to claim against Alitalia or C.A.I for any failure to consult under T.U.P.E. The employees were all dismissed in January 2009. The first payment was duly made in February 2009 (notwithstanding the making of the winding-up order on 22 January 2009). The second payment was due to be made in April 2009; by that point the official receiver had been appointed; he declined to make the payment. It was common ground that, at the time of the winding-up order, Alitalia's bank accounts in England and Wales held a sufficient balance which would enable the second tranche payment to be made.

30. The parties' rival contentions were as follows. So far as the English joint liquidators were concerned, the obligation to make the second tranche payment under the compromise agreements did not give rise to a secured or preferential debt, and thus ranked *pari passu* along with all other creditors. Pursuant to Article 4 of the Regulation, English law governed the distribution of Alitalia's assets (including sums standing to the credit of Alitalia's UK bank accounts).

31. Professor Fantozzi raised a number of arguments, all intended to support his primary contention which was that the English joint liquidators should distribute the funds which they held to the employees by applying Italian law, namely a principle known as *prededuzione*, by which the employees' claim ranked preferentially to all other creditors.

32. Firstly, it was argued that the sums standing to the credit of Alitalia's UK bank account were subject to a trust; Newey J rejected that argument on the grounds that the indicia of a trust were not present.

33. Secondly, it was also argued that, as a result of Article 31 of the Regulation, the officeholders should co-operate with one another, and that that meant, in the circumstances, that the English joint liquidators should make the second tranche payment to the employees out of the funds which they held in order to give effect to the *prededuzione* which prevailed under Italian law. Article 31 is in the following terms:

> "… 2. Subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate with each other."

34. Newey J also rejected that argument, he stated:

> "42. The essential difficulty with Miss Hilliard's argument on co-operation is to be found, as Mr Ramel submitted, in the terms of the Insolvency Regulation itself. Article 31(2) of the Regulation, which is the source of the duty of co-operation, opens with the words, "Subject to the rules applicable to each of the proceedings", and other Articles of the Regulation envisage that assets within the scope of secondary proceedings will be distributed in accordance with the local law. Article 28 states in terms that the law applicable to secondary proceedings is to be "that of the Member State within the territory of which the secondary proceedings are opened". Article 4 likewise provides for insolvency proceedings opened in a Member State to be governed by that State's law (including in relation to "the distribution of proceeds from the realisation of assets"). Further, a judgment

> opening main proceedings is to produce the same effects in another Member State only "as long as no proceedings referred to in Article 3(2) [i.e. secondary proceedings] are opened in that other Member State" (Article 17), and a liquidator in main proceedings is to be able to exercise his powers in another Member State only "as long as no other insolvency proceedings have been opened there" (Article 18).
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> 43. While, therefore, proceedings opened in the Member State of a debtor's COMI are regarded as the "main" proceedings (as their name indicates), the Insolvency Regulation provides for assets within the scope of secondary proceedings to be disposed of in accordance with that Member State's law. What Miss Hilliard is suggesting is thus that the duty of co-operation extends to requiring the Liquidators to apply assets in a manner different from that for which the Regulation itself provides. I do not think that that can be right, especially when the duty of co-operation is expressly subject "to the rules applicable to each of the proceedings".

35. Thirdly, it was also argued that the principle in *Ex Parte James* was engaged on the basis that it would be unfair on the employees if the second tranche payment was not made out of the funds held in the UK bank account, not least on the basis that the same would give a windfall to other creditors in circumstances where Professor Fantozzi had always intended to make the payment out of funds in the UK. It was suggested that the English officeholders should give effect to the plain intention of a fellow officeholder. However, Newey J concluded that the principle was not engaged. He stated:

> "47. I have not, however, been persuaded that the principle in Ex parte James is applicable in the present case. My reasons include these:
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> i) The principle in Ex parte James is "anomalous" (as Slade LJ said in T. H. Knitwear), and the Courts should be cautious about extending it;
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> ii) In Ex parte James itself, the trustee in bankruptcy had received money to which the estate was not in law entitled. That is not the case here;
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> iii) The fact that the sums standing to the credit of the Barclays accounts are within the scope of the English liquidation does not arise either from any conduct on the part of the Liquidators or from events subsequent to the making of the winding-up order;
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> iv) The evidence suggests that the English employees will be paid in full regardless of the outcome of these proceedings (see paragraph 13 above). On that basis, the question is whether money in the Barclays accounts is distributed (a) to unsecured creditors (in accordance with English law) or (b) to creditors with priority under Italian law (as to the identity of whom, there is no evidence). There is no reason to regard the former possibility as inherently inequitable;
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> v) The Liquidators are doing no more than contend for the application of the Insolvency Regulation according to its terms;
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> vi) I cannot see, in all the circumstances, that there is any question of the Liquidators behaving "in a dishonourable manner". Miss Hilliard fairly said that she was not accusing the Liquidators of so behaving."

36. Finally, Professor Fantozzi argued that, consistently with *HIH* and *Cambridge Gas*, it was open to the English Courts to order that assets be remitted to Italy to be distributed according to the

Italian insolvency law, not least because, in respect of Alitalia, the English proceedings were ancillary proceedings. Newey J made the following findings on this aspect of the case:

> "54. In the circumstances, the *HIH Casualty and General Insurance* case cannot be taken as authority for the proposition that there is a common law power to order an English liquidator to remit assets to a foreign liquidator even where they will then be distributed otherwise than in accordance with English rules. The decision shows the breadth of the discretion conferred by section 426 of the Insolvency Act, but that provision is inapplicable in the present case.
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> 56. Standing back from the detail, I can see attractions in the outcome for which Miss Hilliard contended. It would involve assets being applied in accordance with the law of the country in which Alitalia was incorporated and in which it had its COMI. It would mean that assets were used in the manner that the liquidator in the main proceedings had intended when entering into arrangements to facilitate a sale in the overall interests of creditors of Alitalia. It would be in keeping with the inclination of English Courts to favour a "principle of (modified) universalism". It would not involve any creditor with preferential status under English law going unpaid.
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> 57. None the less, I have not been persuaded that the law relating to ancillary liquidations entitles Miss Hilliard to the relief she seeks. Had the views expressed by Lord Hoffmann in HIH Casualty and General Insurance received wider support from the House of Lords, Miss Hilliard could have argued that the law to be applied to the English proceedings pursuant to Articles 4 and 28 of the Insolvency Regulation included an inherent power to remit assets to a foreign office-holder even if that meant that the assets would be distributed otherwise than in accordance with domestic insolvency law. Given, however, the division of opinion in the House of Lords, I think I should follow the decision of Scott V-C in the BCCI case and so proceed on the basis that there is no such power at common law; in fact, I did not understand Miss Hilliard to argue that I should prefer Lord Hoffmann's views to Lord Scott's. On that basis, the law which the Insolvency Regulation requires to be applied to the distribution of assets within the scope of the English liquidation must be domestic law (in particular, the Insolvency Act 1986)."

The European Court of Justice

37. It is possible to state, on the basis of the publically available records of the European Court of Justice, that the following cases (listed in the order in which the reference was lodged) are currently pending before the Court:

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;

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;

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

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

Interedil

38. 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.

39. 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.

40. 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.

Zaza Retail

41. 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.

42. 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

43. 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.

44. 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.

45. 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

46. 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*.

47. 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.

48. 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?

Centre of Main Interests

49. The leading case of the ECJ on the question of COMI remains *Re Eurofood IFSC Ltd* (Case C-341/04) [2006] Ch 508. The ECJ's key findings in *Eurofood* were that:

- the expression "centre of main interests" is to be given an autonomous and uniform meeting;
- in a corporate context, where the debtor is a member of a group of companies, it is necessary to assess the debtor's COMI separately from the COMI of other groups companies;
- in order to displace the presumption which arises in favour of the place of the registered office, it is necessary to identify and rely on matters which are both objective and ascertainable;
- in a corporate context, it is necessary to identify the place where the head office functions of the company are performed (this will not necessarily be the place where the head office is actually situated).

50. The leading decision of the English Courts on COMI is *Stanford International Bank Limited and others* [2009] EWHC 1441 (Ch) (Lewison J) and *Stanford International Bank Limited and others* [2010] EWCA Civ 137 (Court of Appeal). Stanford is a case which relates to the Mode Law.

51. Lewison J found as follows on COMI:

> "[61] … Simply to look at the place where head office functions are actually carried out, without considering whether the location of those functions is ascertainable by third parties, is the wrong test. The way in which the ECJ approached recital (13) was not to apply the factual assumption underlying it but to apply its rationale. I accept this submission. To the extent that I considered and applied the head office functions test in Lennox Holdings on the basis accepted by Jacobs A-G in § 114, I now consider that I was wrong to do so. Pre-Eurofood decisions by English courts should no longer be followed in this respect…"
>
> "[70] I hold therefore that:
>
> i) The relevant COMI is the COMI of SIB;
>
> ii) Since its registered office is in Antigua, it is presumed in the absence of proof to the contrary, that its COMI is in Antigua;
>
> iii) The burden of rebutting the presumption lies on the Receiver;
>
> iv) The presumption will only be rebutted by factors that are objective;
>
> v) But objective factors will not count unless they are also ascertainable by third parties;
>
> vi) What is ascertainable by third parties is what is in the public domain, and what they would learn in the ordinary course of business with the company."

52. Lewison J went on to conclude that Stanford International Bank Limited's COMI was situated in Antigua. He took into account the fact that it was registered there, its physical headquarters were located in Antigua, the vast majority of its employees were based there, it was regulated by Antiguan regulators, and its accounts were prepared by Antiguan auditors. It had been argued on behalf of the American receiver that the principal directors of Stanford were located in America (e.g. Sir Allen Stanford), that board meetings of the board of directors did not take place in Antigua, but rather they took place by telephone and that the majority of the bank's assets were situated outside Antigua. Lewison J rejected those submissions, to a large extent on the basis that they would not have been ascertainable to 3rd parties.

53. Lewison J was substantially upheld in the Court of Appeal. In particular, the Chancellor was satisfied that a Court should endeavour to interpret COMI under the Model Law and COMI under the EC Regulation in as consistent a manner as possible. He concluded that, in order to rebut the presumption, it was necessary to establish factors that were both objective and ascertainable by third parties. In this context, "ascertainable by third parties" means matters already in the public domain or matters which a third party might learn from dealing with the company; it does not include factors which might be ascertained on enquiry (para. 56). The Chancellor, in agreement with Lewison J, appears to reject the previous "head office" functions test. Curiously however, Arden LJ, in her judgment, appears to endorse the "head office functions" (para. 113). Hughes LJ agreed with the Chancellor (para. 159).

54. In the case of Kaupthing Capital Partners II Master LP Inc., which is reported as *Pillar Securitisation SARL v Spicer* [2010] EWHC 836 (Ch), which is a decision of Proudman J dated 1 April 2010, the judge was required to consider a challenge made to the appointment of the administrators of Kaupthing, which is a limited liability partnership established under the laws of

Guernsey. The challenge was made on a number of grounds, one of which was that Kaupthing's COMI was alleged to be in Guernsey and not England and Wales, so that it was not possible to appoint UK administrators over Kaupthing. Proudman J set out the following principles which she derived from Eurofood and the Court of Appeal's decision in Stanford:

- There is a presumption that the body's COMI is in the state where its registered office is located.

- The presumption can be rebutted only by factors which are both objective and ascertainable by third parties. Thus the court is to have regard to factors already in the public domain, or which would be apparent to a typical third party doing business with the body, excluding such matters as might only be ascertained on inquiry.

- Accordingly, the place where the body's head office functions are carried out is only relevant if so ascertainable by third parties.

- Each body or individual has its own COMI, there is no COMI constituted by an aggregation of bodies or individuals."

55. In *Kaupthing*, the entity's business was to hold a fund of investments in its own name. The management of the investments was vested in a separate entity. The Judge identified two key groups of third parties, namely investors and creditors. She considered that, so far as both groups were concerned, such documentation as would be available to them would have shown that Kaupthing's affairs were being conducted in London through various other entities. She concluded therefore that Kaupthing's COMI was in England and Wales.

56. Insofar as personal insolvency law is concerned, the test for COMI is still considered to be accurately summarised in the decision of Registrar Jaques in *Stojevic v Official Receiver* [2007] BPIR 141. A bankruptcy order was made by Registrar Derrett on 27 March 2003 against Mr Stojevic. The order was made on the basis that Mr Stojevic's COMI was in England and Wales. Somewhat surprisingly, the Austrian court then also made a bankruptcy order against Mr Stojevic on the basis that Mr Stojevic's COMI was situated in Austria. Thereafter, Mr Stojevic applied for an annulment of that bankruptcy order in England and Wales.

57. In the course of his judgment, Registrar Jaques identified as follows what he considered to be the relevant test which the petitioning creditor ought to have satisfied:

> "[58] In my judgment, the debtor's centre of main interests, at the date when the petition was presented to this court, was located in the place where he habitually resided. I accept the submission of Mr Moss and Mr Fuller on this point…
>
> [59] The two concepts, habitual residence and ordinary residence, are very different and must not be confused. The difference is easier to ascertain, than it is to explain. Essentially, however, a man's habitual residence is his settled, permanent home, the place where he lives with his wife and family, until, in the case of the younger members of the family, they grow up and leave home, the place to which he returns from business trips elsewhere or abroad. A man's ordinary residence is a place where he lives, which is not his settled, permanent home, the place where he lives, when away from home on business or on holiday with his wife and family. Depending on the nature of his work, a man may well live away from his settled, permanent home for a greater number of days in any given year than he spends there with his wife and family.
>
> [60] I find as a fact, on the evidence before me, that the debtor's habitual residence on 16 December 2002, when the petition on which the bankruptcy order was made was presented to this court, was in Austria at Am Heidjochl 5a Haus 1, 1220 Vienna, the address he

gave to the Official Receiver shortly after Registrar Derrett made the bankruptcy order. The following facts have led me to that conclusion."

58. The Registrar then went on to list a large number of factors which led him to the conclusion that Mr Stojevic's habitual residence was in Austria. Those factors included that Mr Stojevic had moved to Austria with his wife in 1988; his wife's habitual residence was unquestionably in Austria, and the Registrar accepted the submission made on behalf of Mr Stojevic that it would be odd if a man and wife who remain a couple had different habitual residences. Mr Stojevic was registered in Austria, not England for tax purposes. Mr Stojevic only had an Austrian driving license, not an English driving license. He was also a member of several clubs in Austria, not in England. After business trips, Mr Stojevic would always return to Austria.

59. Mr Vitus Mitterfellner presented a debtor's bankruptcy petition to the Hastings County Court on 17 January 2008. On the same date, District Judge Lamdin made a bankruptcy order on that petition. The Official Receiver made an application under sections 282(1)(a) and 375(1) of the Insolvency Act 1986 to challenge the making of that bankruptcy order. The basis of the challenge was that Mr Mitterfellner's COMI was not in England and Wales at the relevant time.

60. The annulment application in *Official Receiver v Mitterfellner* [2009] BPIR 1075 was heard by Chief Bankruptcy Registrar Baister. In a reserved judgment handed down on 10 June 2009, the Chief Bankruptcy Registrar set out a very useful summary of the law on COMI as it applies to individuals. He said as follows:

> "[5] I can set out the remaining propositions of law relevant to this application quite shortly; indeed I can take them almost directly from counsels' skeleton arguments. Mr Caddick relies on the following propositions derived from, the judgment of Chadwick LJ in *Shierson v Vlieland-Boddy* [2005] EWCA Civ 974, [2005] 1 WLR 3966, [2005] BPIR 1170 (para 6 of his skeleton):
>
> > (a) A debtor's centre of main interests is, in the case of natural persons, the place of his habitual residence (para 47).
> >
> > (b) In determining a person's centre of main interests one looks at the choices made by the person concerned; however, the test is objective (para 43).
> >
> > (c) The date on which the centre of main interests is to be established is the date when insolvency proceedings were opened (para 55), in this case 17 January 2008.
> >
> > (d) Evidence as to Mr Mitterfellner's activities at other times may, however, be significant to the extent that they cast light on the truth or otherwise of his claim to have had his centre of main interests in this country at the relevant time (para 55).
> >
> > (e) A person's centre of main interests is something that must be discernible to third parties, especially creditors and potential creditors (paras 47 and 55).
> >
> > (f) A person's centre of main interests has to have a degree of permanence (para 55).
> >
> > (g) Subject to this, a person is free to choose his centre of main interests, even if it is for a self-serving purpose, although this may lead the court to scrutinise the facts with care to ensure that there is the required degree of permanence (para 55).
>
> [6] Mr Pringle says (see para 9 of his skeleton argument):

(a) According to the Virgos-Schmidt Report (revised form 8 July 1996) a debtor can only have one centre of main interests.

(b) A debtor's centre of main interests is the place where he can be contacted. In the case of a natural person, that would be the place where he is 'habitually resident' (*Geveran Trading Co Ltd v Skjevesland* [2003] BPIR 73), which has been taken to mean the place where he is most often to be found (*Official Receiver v Eichler* [2007] BPIR 1636).

(c) Regard must be had to the need for the centre of main interests to be ascertainable by third parties, in particular creditors and potential creditors (*Shierson v Vlieland-Boddy* [2005] EWCA Civ 974, [2005] 1 WLR 3966, [2005] BPIR 1170, per Chadwick LJ at para [55]).

(d) The centre of main interests is to be determined in the light of the facts as they are at the relevant time for determination, but these facts include historical facts which have led to the position as it is at the relevant time for determination (*Shierson v Vlieland-Boddy*).

(e) There is no principle of 'immutability'. The debtor must be free to choose where he carries on the activities that fall within the concept of 'administration of interests'. He is free to re-locate his home and his business. Further, he may do so for a self-serving purpose, in particular at a time when insolvency threatens. If he relocates in the face of potential insolvency, the court must scrutinise the facts said to give rise to a change in the centre of main interests, and decide whether the change in the place of the 'administration of interests' is based on substance, or is an illusion (*Shierson v Vlieland-Boddy*).

(f) There must be an element of permanence (*Shierson v Vlieland-Boddy*); however, the fact that the residence is only temporary is not necessarily decisive; there is no authority specifying a minimum period of time for the purposes of establishing a centre of main interests (*Official Receiver v Eichler*).

(g) The country in which the debtor's debts have been incurred is not a relevant factor for the purposes of deciding what is his centre of main interests, nor is it relevant which country would be more convenient for the official receiver/trustee, e.g. with regard to potential anti-avoidance litigation (*Shierson v Vlieland-Boddy*).

(h) The relevant time for assessing the centre of main interests is the time at which the court decides to open insolvency proceedings, in the case of a bankruptcy petition the date of hearing of the petition (*Shierson v Vlieland-Boddy again*). (This is not an issue in this case as it concerns a debtor's petition and the date of presentation and the date of the hearing were the same.)"

61. Ultimately though, as the Chief Bankruptcy Registrar made clear, the law was not in dispute between the parties; rather the case would turn on the facts. Mr Mitterfellner owned a café in Germany between 1998 and 2001. Later, in 2007, Mr Mitterfellner claims to have come to England, in particular Hastings. He claimed to have initially lived in a B&B, and thereafter claimed to have stayed in a small guest room in Hastings. The Court heard fairly detailed

evidence as to the size and contents of the room which Mr Mitterfellner occupied and also evidence as to Mr Mitterfellner's knowledge of the Hastings area (e.g. where shops are located). Mr Mitterfellner was also questioned about the job which he claimed to have in England and Wales. It transpired in fact that Mr Mitterfellner had never in fact worked in England and Wales, despite claiming his petition and in an interview with the Official Receiver that he had. Further, Mr Mitterfellner had also opened bank accounts in England with HSBC, albeit that he did so in Brighton, not in Hastings. In addition, although Mr Mitterfellner claims that rent was paid from his HSBC account, HSBC confirmed that no bank statement had ever been issued and that no funds were ever deposited in the accounts. The Court also received evidence from Air Berlin to the effect that Mr Mitterfellner had made 3 short (i.e. less than 2 days) visits to England in the period November 2007 to February 2008. The visits coincided with the date on which Mr Mitterfellner opened his HSBC account, the date on which he presented his own petition and the date on which he attended on the Official Receiver; in other words, he did not actually appear to be living either at the B&B or the guest room.

62. The Chief Bankruptcy Registrar concluded that Mr Mitterfellner's COMI was not in England and Wales. Although plainly Mr Mitterfellner had lived for periods of time in Hastings, his evidence in relation to his offer of a job in England was not accepted by the Court, and further, the opening of a bank account in Brighton and not hasting was also artificial and unreal. There was no satisfactory explanation as to why it was necessary from Mr Mitterfellner to make special trips to England to open a bank account or present a bankruptcy petition if he was already living in England.

Stefan Ramel
Guildhall Chambers
January 2011