

# INSOLVENCIES WITH AN ENGLISH OR FOREIGN ELEMENT

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## REGULATION ON INSOLVENCY (1346/2000)

Takes effect as direct and overriding law in all member States (excluding Denmark)  
- Watch “UK” – appears to exclude Channel Islands + Isle of Man but to include Gibraltar.

“English Language version bears little relationship to the language spoken in UK and definitions are such that no word really means what it is supposed to say”  
(Insolvency Intelligence)

As an EU Regulation the reader must put away all normal rules of interpretation. The words used must be given an “autonomous” meaning --- not dependent on domestic law --- “a liberal, purposive approach” to interpretation. (The Salvage Association [2003] EWHC 1028)

Since a number of key definitions are missing from the Regulation and for other Sources of interpretation recourse should particularly be made to Virgos–Schmit Report.

### **Summary of Regulation**

#### **Jurisdiction**

##### **Recital 14**

This Regulation applies only to proceedings where the centre of the debtors main interests is located in the Community.

No definition is given in the Regulations  
But a definition is contained in Recital 13

##### **Recital 13**

The centre of main interests (COMI) corresponds to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.

This is amplified by

### **Article 3**

1) The courts of the Member State within the territory of which the centre of a debtor's main interests "COMI" is situated shall have jurisdiction to open insolvency proceedings

In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2) The courts of another member state shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within their territory ...

- So the mere presence of assets is insufficient; Place of establishment really means a place of business but is elaborately defined in Article 2 (h)

"any place of operations where the debtor carries out a non transitory economic activity with human means and goods"

The effects of those proceedings (known as secondary proceedings or territorial proceedings) is restricted to assets of the debtor situated in the territory of the latter Member State

4) Territorial proceedings may only be opened before the main proceedings:

a) where the main proceedings are held up by legal condition there  
or

b) where requested by a creditor who has his domicile, residence, habitual residence or registered office in the Member state in which the allegedly insolvent establishment is situated or [only probably because of the Regulation's poor draftsmanship] is domiciled etc. in the Member State where the claim arises.

-- establishment really means place of business (Art 2 (h))

### **Conclusion**

To determine whether the Regulation applies at all and whether the proposed proceedings can be opened in the Country in question

**So first find COMI**

**But.....**

**Perfectly possible that different courts come up with a different view of COMI**

As soon as one COMI is established any other proceedings must be secondary or territorial:

Recital 22

...the decision of the first court to open proceedings shall be recognised in the other Member States without those Member States having the power to scrutinise the court's decision"

- Also the Regulation does not recognise the concept of groups of companies. The only rule is jurisdiction must exist according to the Regulation for each debtor who has a separate legal identity.

### **So get in FIRST**

But remember the Regulations are based on trust (see Recital 22)

### **The cases on finding COMI**

#### *The Enron Directo (un rep Ch.D July 2004)*

English administrators of Enron Power Ltd (an English Company) made an ex parte application for an administration order regarding an inter company debt. Of course by this time the majority of the Enron Group was in protective insolvency in USA. Their target was Enro Directo - a Spanish member of the group.

Enron Directo had numerous local creditors including the Spanish electricity regulator.

All principle executive strategic and administrative decisions were taken in Enron House in London. The court decided COMI was English. This had the effect that the administrative order became the main insolvency under the regulations. ---

But no notice to the Spanish creditors was made nor required and the forum was hardly convenient to them. However, England was COMI and the administration order was granted.

### **Deadlock!**

#### *The Eurofoods Case*

Both the Irish and Italian courts purported to open main proceedings over the same company - part of the Parmalat group. This member had its registered office in Ireland.

In neither case were other parties eg the creditors of other legal entities in the group heard. The Irish application was ex parte and procedures for intimation were not observed in the Italian proceedings.

The Irish Supreme Court affirmed the first instance decision that COMI was in Ireland where the registered office was located. There was insufficient to rebut this presumption.

The Italian court did not recognise the appointment of the Irish provisional liquidator and instead appointed their own official.

Interestingly, part of the reasoning of the Irish Supreme Court was that the tax benefits conferred by an Irish development regime in which the company had participated were a reason for COMI there. The Italian court decided on the basis the parent company controlled the group.

## **Rebutting the Presumption of the Situs of The Registered Office**

### Re Daisytec

It is for the petitioner to provide “sufficient evidence....to rebut the presumption”  
The court applied the “command and control” or “head office functions” test.  
“.....the identification of COMI requires the court to consider both the scale of the interests administered at a particular place and their importance and then [ditto] at any other place which may be regarded as its COMI, whether as a result of the presumption or otherwise.”

## **Followed in**

### The Crisscross Case

The group was composed of companies formed under several different national laws. But Board decisions were predominately taken in London, administration in London & suppliers were told to send bills to London. COMI for all in England.

### Re Ci4net.com

“There seems to be no reason to suppose that the presumption that a company has its COMI at the place of its Registered Office is a particularly strong one. It is, rather, just one of the factors to be taken into account with the whole of the evidence in reaching a conclusion as to the location of the COMI”

The COMI was found to be in England although one of the companies had a registered office in Delaware and the other in Jersey.

## **Going further the same Judge decided**

### Re Parkside Flexables

A Polish company with a Polish Registered Office – The presumption did not initiate the Judges approach. On the evidence of creditors as to where they thought COMI was it was found to be a finely balanced whether in England or Poland. - but England was just ahead - i.e. far less than the balance of probabilities but nevertheless the presumption was overturned and an administration order was granted.

## **Subject Matter Applicability**

### **Article 1**

Insolvency Proceedings which entail the partial or total divestment of a debtor and the Appointment of a liquidator.

They are listed for UK

- Winding Up
- Creditors Voluntary Winding Up
- Administration

- Voluntary arrangements under insolvency legislation
- Bankruptcy or Liquidation
  - Not everything is there - e.g. Administrative Receiverships

Also certain types of companies are excluded

- Insurance
- Financial Services
- Investment

## **APPLICABLE LAW**

### **Article 4**

The law of the State of Opening Proceedings

The law applicable to insolvency proceedings and their effects shall be that of the Member State where proceedings were opened

### **EXCEPT FOR**

#### **Articles 5-15**

The rights of third parties and creditors in rem to tangible, intangible, moveable or immovable property

Set Off

Reservation of Title and the sanctity of done deals - unless void, voidable or unenforceable

Rights to heritable property

Payments or settlement systems in connection with financial markets

Contracts of Employment

Rights to Land, Ships and Aircraft subject to a public register

Where an act which is detrimental to the body of creditors but is authorised and unchallengeable under the laws of another member state

Disposals by the debtor after the opening of insolvency proceedings of an immovable asset, a ship, aircraft or securities registered for legal effect are governed by the lex situs of the asset or register.

Pending lawsuits concerning an asset or right of the debtor

## **THE ABOLITION OF NOTORIOUS DELAYS**

### **THE PRINCIPLES OF RECOGNITION**

General Principles of Recognition

-The first pillar of the uneasy balance between the principle of universality and the principle of territoriality.

#### **Article 16**

..any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time it becomes effective in the law of the State of the opening of proceedings.

#### **Article 17**

The judgement opening proceedings shall with no further formalities produce the same effects as in the law of the State opening proceedings.

#### **Article 18**

The liquidator has all the powers of liquidators of the State opening proceedings

- assuming no other insolvency proceedings have been opened there.

He may remove the debtors assets from the territory in which they are situated

- where a “local” liquidator has been appointed he may go to court to claim moveable property was moved after the opening of the insolvency from the “main” state to the local state.

Despite his extensive powers the Liquidator must comply with lex loci.

- Follow their procedures in raising assets
- Not use “coercive” measures
- Not rule on legal disputes

Other Judgments are recognised

#### **Article 25**

Other judgments by the COMI court concerning the course and closure of insolvency proceedings and compositions approved shall also be recognised with no further formalities - as are those relating to the preservation of assets of the insolvency.

Public Policy

#### **Article 26**

Enforcement may be refused where manifestly contrary to that States public policy;

--“fundamental principles or constitutional rights and liberties of the individual”

- One area may be revenue law - many jurisdictions have rules of PIL against enforcing foreign Revenue Judgments (see *Government of India v Taylor* (1955 AC 491))

But this is now uncertain –Article 39: Any creditor may lodge claims “including the tax and social security authorities”

Information for Creditors and for proving claims

Any creditor whose habitual residence, domicile or registered office is in a Member State is entitled to prove his claim.

**Article 40**

... such creditors are to be given notice of the opening of proceedings and of any specific requirements or provisions of that court + a claim form + notice of time limits. (in all the official languages of EU)

**Secondary (or more accurately) Territorial Insolvency Proceedings**

Not necessarily the second insolvency proceedings to take place. It is readily possible for jurisdiction to arise for insolvency proceedings in a Member State

- where the debtor has an “establishment”

But where the debtor’s COMI is in another Member State. Reliance on the Regulations results in the main proceedings being in COMI and the earlier proceedings become “secondary”

The concept of secondary proceedings is the second pillar in the “uneasy balance” between the principle of universality and the principle of territorially.

- designed to deal with the “reasonably formed expectations of parties” who have dealings with a debtor that maintains a stable commercial presence within the local community despite having COMI in another Member State.

This is the common situation of many of the largest employers in the EU - and causes many publicised disputes which reach the political level.

**Article 27**

The opening of main proceedings permits a court with jurisdiction under Article 3(2) i.e. Where an establishment is possessed within the territory and restricted to assets there.

The type of proceedings is restricted to

- Winding up
- Creditors voluntary winding up
- Bankruptcy or Sequestration

And restricted to assets situated there.

**Article 28**

The law applicable is that of the territory in which secondary proceedings are opened

Lots of co-operation between the main and secondary liquidators.

**Article 31**

The liquidator in the main proceedings and liquidators in the secondary proceedings shall communicate any information relevant to the other – particularly progress with claims and measures aimed at terminating the proceedings.

They shall co-operate and proposals of the main liquidator shall be considered.

The main liquidator can stay the secondary proceedings

### **Article 33**

The main liquidator through his court can stay the secondary proceedings provided that if requested he makes suitable measures to guarantee the interests of creditors in the secondary liquidation.

A request for a stay may only be rejected if manifestly of no interest to creditors in the main proceedings.

A stay may be up to three months but may be continued

### *Possibilities of Conflict;-*

The court of the main liquidator may terminate the stay

- at the request of the main liquidator
- and if it appears no longer justified at the request of a creditor or the second liquidator

Compositions lifeboats and rescue plans?

### **Article 37**

Where law of secondary proceedings permits the process to be brought to an end without a liquidation and the main liquidator consents or the financial interests of the creditors in the main liquidation are not affected.

But only assets of the secondary proceedings are capable of compromise unless all creditors consent.

Distribution of surplus in secondary liquidations

### **Article 35**

If all claims are met the liquidator in the secondary proceedings immediately transfers the remaining funds to the main liquidator

## **The New Regime in Operation**

### *The Daisytec Case*

A multinational was controlled by Daisytec Inc. which filed for Ch.11 reorganisation in USA. There was also a group of 16 companies which constituted the European subdivision. Following current practice an administration order was sought in respect of these (see above). This was granted in respect of 14 companies which included 4 which were formed in Germany and 1 which was formed in France.

The effect was that the English proceedings became the main proceedings

In the case of the French company Tribunal De Commerce refused to accept the order declaring that the order was null and void and appointing an administrateur judiciaire.

Amtsgericht in Dusseldorf did likewise.

This was contrary to **Recital 22**

“The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court’s decision”

And any objection to the order must be raised before the courts of the main State unless and most improbably public policy is impinged.

However only 4 months later Cour d’Appel quashed the first instance decision. Another appeal has been taken to Court de Cassation.

Meanwhile in Germany, the Appeal court decided that in relation to 1 company the German proceedings be converted into secondary proceedings. In relation to 2 it was held the English proceedings contravened the fundamental principles of justice. Again the need to raise this in England was ignored.

## **England and Wales**

Within UK England and Wales are not Member States

- nor are Channel Islands & Isle of Man

But a closely connected Regime exists.

Key is

### **S. 426 Insolvency Act 1986**

Automatic recognition and enforcement of insolvency regimes in other parts of UK.

And mandatory assistance to courts of the other British Jurisdictions such as Channel Islands and Isle of Man and other jurisdictions which are designated

## **UNCITRAL MODEL LAW ON CROSS BORDER INSOLVENCY**

- May be given effect by Regulation
- Provides for assistance
- Includes the concept of main and non main proceedings
- Includes the concept of centre of main interests with similar definition to EU Regulation

## **PROTOCOLS AND CO-OPERATION AGREEMENTS**

Even where there is no International Regime Cross Border insolvencies have increasingly worked in tandem

USA and United Kingdom Courts - e.g. Cenargo

An English Registered Company with a US bond issue but no US assets or operations filed for Chapter 11 protection  
The threat of anti suit injunctions in UK and US introduced deadlock  
Mr. Justice Lightman telephoned Judge Drain and an amicable conversation ensued in which it was agreed UK was the most appropriate forum and Chapter 11 proceedings were stayed.

The high point - The Maxwell Insolvencies

Two insolvency proceedings threatened to create an expensive deadlock  
Judge Tina L Brozman appointed an examiner to harmonise proceedings  
The examiner and UK administrators produced the Maxwell Protocol which was approved by UK and US courts. In some respects UK proceedings were the main insolvency but consent of US courts were necessary to certain orders.

The low point - The Yukos Insolvency