

## **European Restructuring and Insolvency**

This paper accompanies a presentation of the same name at TAGLaw's Insolvency Speciality Group Meeting on 12 May 2010 given by the author, Chris Laughton, a partner in Mercer & Hole and Deputy President of INSOL Europe.

Many businesses now have suppliers, customers, parent companies, subsidiaries and other counterparties abroad. This paper is a practical guide to the European cross-border restructuring and insolvency landscape.

The four parts of the guide are:

- Networking – its relevance and opportunities
- The European Insolvency Regulation and UNCITRAL Model Law
- COMI – “Centre of main Interests”
- Cultural Issues

### **Networking**

There are almost no insolvency practitioners with appropriate qualifications and experience to practice in another European jurisdiction, let alone all twenty-six of them. There are a few dual qualified lawyers, but most of them tend to practise in a single jurisdiction. Also, whereas most practising IPs in the UK and Ireland are accountants by trade, in most of the rest of Europe IPs are lawyers.

The short point is that it is almost impossible to practise insolvency in more than one jurisdiction. Turnaround and general business restructuring advice is far easier to import and export, but insolvency is inevitably bound tightly to the laws of each jurisdiction.

In consequence, those who seek to address cross-border insolvency problems will not be able to do so without cooperation between professionals on either side of those borders. Networking with fellow professionals from other European jurisdictions is therefore a prerequisite to cross-border insolvency practice.

Most continental European insolvency practitioners see themselves as operating in smaller practices. There are a few exceptions, for example in Germany where there are large boutique firms such as HWW or Schultze & Braun, and lawyers in some of the larger law firms in the Netherlands and Germany such as Simmons & Simmons and White & Case take insolvency appointments. Significantly, none of the large UK insolvency practices are able to operate across Europe in this discipline in the same way as they audit or give tax advice just about anywhere. One or two groupings of insolvency professionals have been developed recently, for example HWW's International Cooperation Partners (represented in the UK by the author) and Begbies Global Network. The majority of other relationships are bilateral and relatively informal.

There are relatively few European insolvency practitioners who have established strong pan-European links, although there are some, who for personal or practice reasons, have particular links with another European jurisdiction. Why should one bother with European networking?

The obvious objective is to win work from and through other European professionals. This certainly works for the author, some 40% of whose practice directly or indirectly derives from his connections across Europe. It simply provides another outlet for one's existing skills and services – a European network is an additional source of referrals.

The route to European networking is relatively straightforward for those of us in the TAGLaw Insolvency Speciality Group because of our members and their existing connections. It should not be surprising that networking in the cross-border insolvency and restructuring context relies heavily on personal, face to face meetings – at least in the first instance. Cultural issues are

discussed later in this paper, but there is no substitute to meeting the foreign professionals with whom you want to establish relationships.

INSOL Europe is the obvious organisation to turn to for those interested in European cross-border insolvency and restructuring practice. It is the pan-European insolvency body, with over 1000 members, some 40% of whom meet each year at the annual conference, which in 2010 is in Vienna from 13-17 October. INSOL Europe's website is at [www.insol-europe.org](http://www.insol-europe.org). INSOL Europe membership is open to qualified professional and other individuals with interests or experience in restructuring and/or insolvency, giving not only conference discounts and copies of the quarterly journal, Eurofenix, but access to a variety of technical information.

Of course, for those whose encounters with European restructuring and insolvency are insufficiently frequent to make it a key part of their practice, and who do not wish to engage in European networking, most of us who do would be happy to help you, even simply directing you to someone in another jurisdiction who can help you solve your problem.

### **European Insolvency Regulation and other international legislation**

Council Regulation (EC) No 1346/2000 of 29 May 2000 is commonly known as the European Insolvency Regulation ("the Regulation"). It is the key piece of legislation governing cross-border insolvency in Europe. More widely implementations of the UNCITRAL Model Law (Chapter 15 in the US; Cross-Border Insolvency Regulations 2006 in the UK; etc) have similar effects.

The Regulation is not designed to unify insolvency proceedings across the European Union, or even to harmonise them; rather its purpose is to establish rules about where insolvency proceedings are to be opened and what choice of law rules apply in cross-border matters.

Those who wish to study the Regulation in more detail should refer to "The EC Regulation on Insolvency Proceedings", edited by Gabriel Moss QC, Professor Ian Fletcher and Stuart Isaacs QC and published by Oxford University Press. Alternatively, European Cross-border Insolvency, edited by Jennifer Marshall and published by Thompson Sweet & Maxwell is a loose leaf subscription book, which not only covers the Regulation but summarises the insolvency law in the 27 European Union member states.

The key concepts in the Regulation are centre of main interests ("COMI") and secondary proceedings. COMI is discussed later in this paper in more detail, but it is essentially the mechanism by which the choice of law applicable to a debtor is determined.

The Regulation sees main insolvency proceedings as universal, having effect throughout the EU (with the exception of Denmark, which opted out of the regulation). However, the universality approach is modified through secondary or territorial insolvency proceedings, where an office-holder is appointed over the assets in a single jurisdiction in certain circumstances. Importantly, however, both main and secondary liquidators (as all office-holders are called in the Regulation) are responsible to all creditors from any European jurisdiction (and elsewhere). Although liquidators in secondary or territorial proceedings deal only with local assets, the liquidator in main insolvency proceedings deals with all assets other than those being dealt with in secondary proceedings.

One point to note is that assets may not be located where an onlooker might expect. An example (the author was directly involved in all the examples in this paper) is an English administration of an English company that had a branch in Paris. The administrator made the French employees redundant under French law (which is another story), but the French equivalent of the Redundancy Fund would not recognise the English administrator's appointment as effective for entitling the French employees to make a claim. Accordingly, the French employees initiated secondary insolvency proceedings in France. The French liquidator expected to fund the French proceedings out of a credit balance in the company's French bank account. However, the English administrator identified that the funds were with Barclays Bank Plc, Paris branch. Book debts under the Regulation are located at the centre of main interests

of the debtor, which in this case was in London (that being the location of Barclays' registered office), so the English administrator got the cash!

Complex cross-border cases do not need to be large. An example is the English administration of the German subsidiary of an English company, the only assets of which were the bank deposit, compulsory in Germany, representing the share capital of €25,000. The subsidiary had not begun operations, although it had been incorporated. It was wholly controlled by the English parent and its centre of main interests was in England. Accordingly, English insolvency law applied. Although the company had not traded, the management charges, relating to set up and other costs, exceeded its share capital. The English parent was also insolvent (and had no cash) so the only option was to put the German subsidiary into administration out of court. This is not something I would normally recommend in view of the risks to the English office-holder of not being recognised on an out of court appointment (whatever the law might say). Once the administration was effective and the funds were repatriated the administrator was able to make an application to the English court to recognise the subsequent liquidation. The result was that the insolvent English parent company recovered the assets after payment of the very small third party creditors and the costs of the exercise.

### **Centre of Main Interests**

COMI is famously not defined in the Regulation although article 3(1) states "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." That rebuttable presumption became the focus of legal attention as practitioners sought in the early years of the Regulation to argue in particular cases about where the COMI was. Recital 13 of the Regulation states that "the centre of main interests should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties". That recital is not, in law, a definition and it could clearly be open to subjective interpretation.

The European Court of Justice in *Eurofood IFSC Limited* (case C-341/04) sought to explain the rebuttable presumption by ruling that the presumption "can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at the registered office is deemed to reflect."

Of course, the fact that the presumption is rebuttable means that the location of a COMI may change from time to time. This inevitably gives rise to opportunities of forum shopping.

Forum shopping has acquired a questionable reputation, but it is facilitated by the construction of the Regulation. Even though recital 4 states that "it is necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets of judicial proceedings from one member state to another, seeking to obtain a more favourable legal position (forum shopping)" such activity (on the part of debtors) remains permissible, if somewhat constrained. In simple terms, forum shopping is allowed, but only if you do it properly.

It can be difficult for a corporate entity to satisfy objective tests and meet the requirement for ascertainability by third parties to enable its COMI to be moved easily. For an individual, however, little more is required than moving to live in a different jurisdiction. The rise of bankruptcy tourism, particularly German nationals (who cannot be released from German bankruptcy for seven years) coming to England to go bankrupt with a view to release within a year, is an interesting phenomenon, if of little value to English insolvency practitioners. Two contrary examples are worth mentioning. Firstly, a leading German businessman, who in fact ran the English subsidiary of a German company took significant practical and legal English advice about establishing his COMI in England, in order to go bankrupt and deal with a multi-million Euro liability to the German tax authorities. Again, there is another story about the effectiveness or otherwise of his approach, but the point is that it generated business for English professionals. The second example is the case of a German individual who was made bankrupt in England, but unfortunately, whilst he was on the way here, a court in Germany made him bankrupt there first. The German office-holder sought English assistance in having the English

order annulled, but the amusing point of the story is that the debtor in question had been promoting bankruptcy tourism through a German website. It's a shame he didn't get it right himself!

A more substantial corporate example of a case where the COMI was not successfully moved is re Hans Brochier Holdings Limited [2006] EWHC 2594(Ch). The company attempted to have English administrators appointed as it was an English company, but its COMI proved to be in Germany and, eventually, the administrators (and there are lots more stories in here about the appointment and reappointment of administrators) applied for a declaration that their appointment was invalid.

Hopefully case law has developed sufficiently so that, in most cases, a debtor's COMI is now sufficiently clear for practitioners and lawyers to be able to concern themselves with other aspects of the Regulation.

## **Cultural Issues**

It is not a special feature of insolvency practice that cultural issues are significant in cross-border matters. Doubtless, the typically robust style of insolvency practitioners, from whatever jurisdiction, does not lend itself to cooperation. Those who fail to recognise the need to tread delicately when dealing with insolvency professionals in other jurisdictions do so at some risk to the efficiency of their assignment. That is not to say that firmness or being fleet of foot or commerciality do not have their place, but the environment in which you are operating in cross-border matters is not the comfortable local law approach with which you are familiar.

Sometimes you will not be right and the argument will not be resolved in your local courts. For many IPs the last place they want to be in a normal case is in court, because of the cost and risk. Such cost and risk is magnified a hundredfold in a foreign court.

These thoughts bring us back to the first part of the paper, discussing networking. It is crucial to get good local advice on cross-border insolvency and restructuring matters. But that is not all – it is infinitely preferable to be instructing friends whom you have got to know, because then there is at least a chance, whatever the language or other cultural differences, that they understand what you really want and vice versa. Even the accepting of or giving a simple instruction between professionals for collection of a debt or tracing of a director can lead to difficulties if the expectations of the foreign counterparty are not clearly understood, both as to the ultimate objective and as to the nature of the professional services being rendered. This may be obvious to some, but it is surprising how frequently professionals encounter disappointment when instructing fellow professionals in another jurisdiction.

Finally, the European Insolvency Regulation does empower insolvency practitioners to act in other European jurisdictions. Any experienced cross-border practitioner would tell you that you should do so only through a trusted local practitioner either acting as your agent or as your close, on site, advisor. Otherwise you will fall foul of local law.

## **Conclusion**

European insolvency and restructuring practice offers plenty of opportunities for the interested professional. Networking is a vital tool to build the relationships to deliver work or to provide you with the resource to solve cross-border problems. If that opportunity appeals to you, the European Insolvency Regulation and related case law will make fascinating reading.

If you just need help from time to time on cross-border matters, make sure you find a way to access good local professionals.