

# INTERNATIONAL JURISDICTION TO OPEN INSOLVENCY PROCEEDINGS IN EUROPE, IN PARTICULAR AGAINST (GROUPS OF) COMPANIES

Bob Wessels<sup>1</sup>

## 1. The judgment to open insolvency proceedings

Art. 3(1) and (2) EU Insolvency Regulation (InsReg) form the basis for a judgment to open insolvency proceedings in the EC.<sup>2</sup> Art. 3(1) InsReg provides that the courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. Aforementioned debtor can be a private person, whatever the nature of his or her dealings are, or a company or legal person.<sup>3</sup> In the case of a company or legal person art. 3(1), first sentence InsReg, contains the following presumption: 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. The latter words are clear: this presumption can be rebutted. If all the ingredients of art. 3(1) are fulfilled, the courts of another Member State only have limited jurisdiction: where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that same debtor too, but only if he possesses an establishment within the territory of that other Member State, see art. 3(2) InsReg. Art. 2 InsReg provides, for the purposes of the EU Insolvency Regulation, several definitions, one of which is the one under (h), saying that an 'establishment' shall mean '..... any place of operations where the debtor carries out a non-transitory economic activity with human means and goods'. The latter proceeding, finding its basis in art. 3(2), is commonly referred to as secondary proceeding. The proceedings referred to in art. 3(1) are known as main proceedings or main insolvency proceedings.<sup>4</sup>

In the following article I will try to analyse the basic notions of the aforementioned terms 'centre of main interest' (COMI), and 'establishment', and the way courts in several European countries (UK, France, Germany, The Netherlands and Belgium) until now (Mid November 2003) have interpreted the facts to qualify these as 'COMI' or as 'establishment' in specific cases.

To demonstrate the impact of the judgment of opening insolvency proceedings as mentioned, let me briefly outline what the consequences are of this 'opening' according to the system of the EU Insolvency Regulation:

1. These insolvency proceedings and their effects will be determined by the law of the Member State within the territory of which such proceedings are opened, see art. 4(1) InsReg,

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<sup>1</sup> Partner Holland Van Gijzen Attorneys at law, Rotterdam, The Netherlands; Professor Business Law 'Vrije' University, Amsterdam; Commerzbank Foundation Visiting Professor Institute for Law and Finance, Johann Wolfgang Goethe University, Frankfurt, Germany. This article is compiled from a public lecture at aforementioned institute, which I gave on this topic in Frankfurt, November 25, 2003.

<sup>2</sup> Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, Official Journal L 160, June 30, 2000. It came into effect May, 31, 2002. The Regulation applies to fourteen Member States. Denmark is not bound by it nor subject to its application, which is in accordance with Art. 1 and Art. 2 Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community.

<sup>3</sup> Not being a financial institution as meant in art. 1(2), which institutions are excluded from the scope of the Insolvency Regulation, but subjected to separate EU Directives with regard to winding-up or liquidation, see (for insurance undertakings) Directive (EC) no. 2001/17, Official Journal L 110 of April 20, 2001, and (credit institutions) Directive (EC) 2001/24, Official Journal L 125 of May 5, 2001.

<sup>4</sup> 'Secondary insolvency proceedings' is the heading of Chapter III of the Insolvency Regulation. The words 'main (insolvency) proceedings' appear in the Recitals 12, 16 – 20, 22, 23 and 25, and e.g. in art. 3(4), 27, 29(a), 31, 32, 34, 35 and 37 InsReg.

and the conditions for the opening of those proceedings, their conduct and their closure shall be determined (too) by this law, see art. 4(2) InsReg, opening words. In legal jargon, the law of the State where the insolvency proceeding is opened is called ‘lex concursus’ or ‘lex forum concursus’;

2. The judgment opening insolvency proceedings handed down by a court of a Member State, which has jurisdiction pursuant to art. 3, shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of the proceedings, see art. 16 InsReg;

3. The judgment opening main proceedings, as referred to in art. 3(1), shall in principle, without any further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings (art. 17). However (3a) recognition of the main proceedings shall not preclude the opening against the same debtor of secondary insolvency proceedings – based on the presence of an ‘establishment’ – by a court in another Member State (art. 16), the effects of which proceedings however shall be restricted to the assets of the debtor situated in the territory of the latter Member State, see art. 3(2), 2<sup>nd</sup> sentence. Furthermore (3b) the opening of main insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immovable assets, belonging to the debtor, which are situated within the territory of another Member State at the time of the opening of these proceedings (art. 5), nor will they affect third party’s right to set-off (art. 6) or certain reservations of title (art. 7);<sup>5</sup>

4. The liquidator who is appointed by the court in the main proceedings may in principle exercise all the powers conferred on him by the lex concursus, as long as no other insolvency proceedings have been opened in the other Member State, nor any preservation measure to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State; the liquidator may remove the debtor’s assets from the territory of the Member State in which they are situated, subject to art. 5 and art. 7 (art. 18); the liquidator may request that notice of the judgment<sup>6</sup> opening main insolvency proceedings and, where appropriate, the decision appointing him, be published in any other Member State in accordance with the publication procedures provided for in that State.<sup>7</sup> The publication shall specify the liquidator who is appointed and whether the jurisdiction rule applied is that pursuant to art. 3(1) or art. 3(2) (art. 21). He may, likewise, request that the judgment opening the main proceedings be registered in the land or the trade register and any other public register kept in the other Member States (art. 22);<sup>8</sup>

5. The judgment re opening of insolvency proceedings results in the decisive date to apply the transitional provision of art. 43. The Regulation shall apply only to insolvency proceedings opened after its entry into force, being 31 May 2002.

This transitional provision has been subject of interpretation by the Court of Lodi (Italy) 27 September 2002 in a case in which an insolvency proceeding had been started in the Netherlands prior to 31 May 2002 against the Dutch company *Borgward Industrials BV*. The company owns an establishment (*DAM Italia Di Borgward Industrials BV*) in S. Giuliano Milanese. According to the Italian court the transitional provision would not exclude the opening of secondary proceedings in Italy: ‘.....indeed, if the regulation is read in its entirety,

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<sup>5</sup> See: Wessels, The Secured Creditor in Cross-border Finance Transactions Under the EU Insolvency Regulation, in: Journal of International Banking Law and Regulation, Volume 18, Issue 3, 2003, p. 135.

<sup>6</sup> The English text of the Regulation seems more broad (‘notice of the judgment’ be published) than the German (‘der Wesentlichen Inhalt’), French (‘le continue essentiel’) or the Dutch (‘de hoofdzaken van’) text, referring to the ‘essential content’ or ‘the main points’ of the judgement opening insolvency proceedings.

<sup>7</sup> See for some details re publication: Wessels, Realisation of the EU Insolvency Regulation in Germany, France and the Netherlands, Paper presented to Insol International Academics meeting on ‘Multinational Insolvency Proceedings – Cooperation among Nations’, Las Vegas, Nevada, USA, 20/21 September 2003 (forthcoming in: European Business Law Review).

<sup>8</sup> The publication elsewhere of the judgement opening insolvency proceedings is decisive with regard to the question whether a debtor of the insolvent debtor, who honors an obligation towards the latter shall be deemed to have discharged it. After such publication has been effected, the person honouring the obligation shall be presumed, in the absence of proof to the contrary, to have been aware of the opening of proceedings, see art. 24(2) InsReg.

including therefore the introduction and the single provisions, there can be no mistake as to the intention of the Community lawmaker: he has indeed thought of the two proceedings, main and secondary, and has treated them as to the extent that he has even addressed the matter of their coordination (reference to recital 8 .... And recital 12..., and, more specifically, also articles 31-35). Therefore, the fact that proceedings have already been opened abroad, proceedings that with the entry into force of the new regulation are defined as ‘main’, does not prohibit the opening of secondary proceedings under art. 3 of the regulation,....<sup>9</sup>

## 2. The scope of opening insolvency proceedings

It should be noted that art. 3(1) InsReg, although providing a norm to determine that courts of a certain Member State have jurisdiction to open main insolvency proceedings in relation to a certain debtor, the provision itself does not determine the width of that jurisdiction. The scope of ‘opening’ insolvency proceedings and all other types of related actions commenced within the context of an insolvency is determined by other provisions too. Art. 1(2)(b) EC Regulation on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters (the former Brussels Convention of 1968), states that it does not apply to: ‘..... bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.’ Given this exclusion, it is logical to assume that when insolvency proceedings are commenced in a Member State, the jurisdiction of that State to open those proceedings is governed by the EU Insolvency Regulation. However, other proceedings arising within these insolvency proceedings will only also be excluded from the scope of the EC Regulation on Civil Jurisdiction and Judgments 2002 by art. 1(2)(b) if they derive directly from the bankruptcy or winding-up and are closely connected with the insolvency proceedings<sup>10</sup>, like an action of a liquidator to recover debts due to the insolvent debtor. Within the system of the Insolvency Regulation all judgments of another nature than ‘opening insolvency proceedings’ can be detected, see art. 25 InsReg, which creates in addition to art. 16 InsReg a system of recognition of judgments which concern (i) the course and closure of insolvency proceedings, (ii) compositions approved by the foreign court, (iii) judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court, (iv) judgments relating to preservation measures taken after the request for the opening of insolvency proceedings, and (v) other judgments. For details I refer to literature.<sup>11</sup>

Art. 3 InsReg provides the norm with regard to opening insolvency proceedings as meant in art. 1(1) InsReg, being collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator, which are the proceedings listed in Annex A to the Regulation. Art. 3(1) determines that jurisdiction is given to ‘(t)he courts of

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<sup>9</sup> Court of Lodi 27 September 2002 (Gen. Reg. No. 1144/02; No. 222/02 civil law judgement; Index No. 1349; File No. 958 Cron.) (on file with author). The court’s interpretation contradicts the way art. 43 generally is interpreted in literature, see e.g. Wessels, *Internationaal Insolventierecht* (International Insolvency Law), series Polak/Wessels, Volume X (2003), par. 10702 ff.

<sup>10</sup> European Court of Justice (ECJ) 22 February 1979, Netherlands Jurisprudence 1979, 564, commented by Schultz (Jur. 1979, p. 733; [1979] ECR 733 (Gourdain v. Nadler).

<sup>11</sup> See Moss, Fletcher, Isaacs (eds.), *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide*, 2002, p. 208; Wessels, *Internationaal Insolventierecht* (International Insolvency Law), series Polak/Wessels, Volume X (2003), par. 10590. I agree with those authors that submit that the system of recognition of judgments re insolvency is too complicated, see e.g. Eidenmüller, *Europäische Verordnung über Insolvenzverfahren und zukünftiges deutsches internationales Insolvenzrecht* (European Insolvency Regulation and future German International Insolvency Law), IPRax 2001, p. 9, and Haubold, *Europäisches Zivilverfahrensrecht und Anspruch im Zusammenhang mit Insolvenzverfahren* (European Procedural Law and Claims in relation to insolvency proceedings), IPRax 2002, p. 159.

the Member State within the territory of which' the center of a debtor's main interest is situated. Which national court within the territory of that Member State this is, is to be determined by the national law of the Member State concerned.<sup>12</sup> Although in literature it has been submitted<sup>13</sup> that the international jurisdiction of a specific court in a specific Member State has not been provided for specifically enough in the Insolvency Regulation, I consider the international jurisdiction of an individual court, may it be through a non-specific reference to 'courts' in a Member State, as a solid enough base.<sup>14</sup> It would have had my preference however to add to the words 'to open' words aiming at creating jurisdiction with regard to the conduct and the closure of these proceedings, as art. 4(2) InsReg presupposes.

### 3. The concept of 'centre of main interests'

The base to open insolvency proceedings by a court in a Member State is captured by, as we will come to understand, magic words: the center of a debtor's main interests (in short: COMI). The proceedings opened are the main proceedings, which in principle have universal scope and encompass all of the debtor's assets wherever located within the EU (with the exception of Denmark).

The Regulation does not define this concept of 'main interests' as meant in art. 3(1) InsReg, and the way to a final interpretation is narrow.<sup>15</sup> Interpretative tools are limited and in a certain extent quite general or vague.<sup>16</sup> Presently courts base their interpretation mainly on the following two elements:

1. the 33 recitals, which serve as a preamble or statement of reasons, see art. 253 EC Treaty. With regard to these recitals the High Court of Justice (Ch D) (Justice Lloyd) 7 February 2003 (*Re BRAC Rent-A-Car International Inc*)<sup>17</sup> holds: 'The context of the Regulation is described in its 33 recitals. These .... help to cast light on some of the substantive provisions'.<sup>18</sup> We will see that several courts refer to some of the recitals;

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<sup>12</sup> See Recital 15.

<sup>13</sup> See Trunk, *Regelungsschwerpunkte eines Ausführungsgesetzes zum Europäischen Insolvenzübereinkommen* (Main points for an Act to execute the European Insolvency Convention), in: Stoll, *Vorschläge und Gutachten zur Umsetzung des EU – Übereinkommens über Insolvenzverfahren im Deutschen Recht, Im Auftrag der Sonderkommission 'Internationales Insolvenz' des Deutschen Rates für Internationales Privatrecht, vorgelegt von Hans Stoll*, Tübingen: Mohr, 1997, p. 239, and Lüke, *Das Europäische Internationale Insolvenzrecht* (The European International Insolvency Law), in: *Zeitschrift für Zivilprozessrecht (ZZP)* 1998, p. 291.

<sup>14</sup> In Germany, on March 20, 2003, art. 102 Insolvenzordnung has been drastically changed, including provisions to tailor domestic law better to the contents of the Regulation. In France the Ministry of Justice has issued in March 2003 a *Circulaire* which provides 'clarifications' with regard to the Regulation's width, while in the Netherlands a separate Act has come into force 15 November 2003. In the UK already before 31 May 2002, statutory instruments have been adopted to ensure compatibility between UK law and practice and the Regulation, see Moss et al, p. 332. See in more detail: Wessels, Realisation (note reference above).

<sup>15</sup> The Insolvency Regulation is a community measure under Title IV EC Treaty. Only national courts or tribunals from whose judgments no further appeal of judicial remedy under national law is available (Hoge Raad der Nederlanden, Court de Cassation, Bundesgerichtshof, etc.) are authorised to seek preliminary ruling by the European Court of Justice.

<sup>16</sup> I am referring to elements like the system of Title IV of the EC Treaty, which forms the general context of EC Community private international law or general community principles, like the principle of legal certainty or the principle of equal treatment or non-discrimination. See: Wessels, *International Jurisdiction To Open Main Insolvency Proceedings in Europe Against Private Individuals* (forthcoming).

<sup>17</sup> [2003] EWHC (Ch) 128, [2003] 2 All E.R. 201; [2003] BCC, Lloyd J. See for comments among others: Wessels, *Rechtspersonen met zetel buiten de EU kunnen onderworpen zijn aan een insolventieprocedure in de EU* (Legal persons outside the EU can be subjected to an insolvency proceeding in the EU), WPNR 6534 (2003), the 'Comment' in; *The Company Lawyer* 2003, p. 97, the '*Kurzcommentar*' (Short Commentary) of Sabel and Schlegel in *EWiR* 2003/8, p. 367; Herchen, *ZInsO* 2003, p. 742; Schmid, *DZWIR* 2003, p. 397 ff. See also De La Peña, in: *Global Restructuring & Insolvency Review* 2003, p. 26, Shandro, in: *INSOL World – Second Quarter* 2003, p. 32, Baird and Tett, *ABI Journal* May 2003, p. 14.

<sup>18</sup> See para. 10, adding in para 26 that in cases of inconsistency the text of articles prevails over those of the recitals in Community legislation.

2. and the Report Virgós/Schmit (1996)<sup>19</sup>. To the Report Virgós/Schmit Lloyd J in the Brac Inc.-case considers: ‘I am not altogether clear as to the status of the Report ..... However it seemed to me that I ought to take some account of its contents’.<sup>20</sup>

Well, in this Report, nr. 75, it is said that the concept of ‘centre of main interests’ must be interpreted ‘..... as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties’. This description carries a ‘law and economics’ dimension, in that the reporters argue that ‘..... insolvency is a foreseeable risk. It is therefore important that international jurisdiction (which ..... entails the application of the insolvency laws of that ..... State) be based on a place known to the debtor’s potential creditors. This enables the legal risks which would have to be assumed in the case of insolvency to be calculated.’<sup>21</sup> In the recitals, preceding the Insolvency Regulation, too the point of view of third parties is prevailing. Recital 13 says: ‘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.’ These words mirror the words, just quoted from the Report Virgós/Schmit. Although it seems that the accent lies on interests of an economic nature, conducted out of a place (‘centre’) which is ascertainable by third parties (especially potential creditors), it is important to stress that the use of the term ‘interests’ is intended to express a wide spread of activities. Report Virgós/Schmit (1996), nr. 75, says: ‘By using the term ‘interests’, the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers).’ The concept of a debtor’s centre of main interests therefore applies equally to private individuals who do not engage in an economic or commercial activity as it does to corporate entities engaged in trade.

What is the meaning of ‘main’ in the wording ‘main interests’? Here again Report Virgós/Schmit (1996), nr. 75, may help. It continues: ‘The expression ‘main’ serves as a criterion for the cases where these interests include activities of different types which are run from different centres.’ The word ‘centers’ in this quotation however seems misleading to me, as it suggests that it would be possible to locate at least two centers of main interests, which would give room for opening of two main insolvency proceedings. Presumably, it is to be read as that ‘main’ offers the opportunity to choose between two (or more) ‘economic centres’, although there can legally only be one ‘centre’. An illustration is a case where a debtor is domiciled in The Netherlands, but his centre of main interests is located in another Member State, e.g., a private individual has his permanent home in Rotterdam, but spends the major part of the week working in Brussels.

Quite rightly it has been submitted that the answer to the question where this COMI is ‘..... will always be a question of fact’.<sup>22</sup> With regard to the point of departure that (future)

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<sup>19</sup> This report has been issued by Professor Miguel Virgós and Mr Etienne Schmit, to serve as an interpretative guide to the Insolvency Convention of 1995, which five years later has been altered to the Insolvency Regulation, with nearly the same content as the Convention. Although the Report Virgós/Schmit never has been finalized or approved by the EC Ministers of Justice, both in literature as in court decisions (see hereunder) it is seen as an unofficial guide to interpretation. The Recitals, preceding the Regulation, contain an unsystematical selection of several parts of the Report Virgós/Schmit, in several cases (quite) literary, which seems to affirm the interpretative value of the Report. In several court cases judges have found interpretive guidance in Report Virgós/Schmit, the cases of BRAC Rent-A-Car (mentioned in the text), Gevevan Trading and The Salvage Association (sources to follow). In the Netherlands already in 1996 a court made references to the report, see Court of Haarlem 17 September 1996, Netherlands International Private law (NIPR) 1996, 438. See further: Wessels, Anticipation and Application of the EU Insolvency Regulation in the Netherlands (forthcoming in: *Insolvency Law & Practice*).

<sup>20</sup> In applying the Insolvency Regulation regard is to be had to the statement Portugal made with regard to the interpretation of art. 37 InsReg, see Official Journal 2000 C 183/1.

<sup>21</sup> See too Virgós, The 1995 European Community Convention on Insolvency Proceedings: an Insider’s View, in: *Forum Internationale*, no. 25, March 1998, p. 13, referring to ‘..... the place where the debtor conducts the effective administration of his interests on a regular basis’.

<sup>22</sup> See Smart, *Cross-Border Insolvency*, 2<sup>nd</sup> ed., London: Butterworths 1998, p. 162.

creditors should be able to calculate possible insolvency risks, Virgós<sup>23</sup> notes: ‘The place where the debtor conducts the administration of his business and centralizes the management of his affairs (e.g., contractual and economic activities with third parties) satisfies this requirement; not the place where the assets, whatever their value, are located, not the place where the goods are manufactured (e.g., the place of the industrial establishment, etc.)’. Jurisprudence indeed proves that COMI is ‘... a fact intensive requirement’, as Felsenfeld puts it.<sup>24</sup> It is therefore helpful that for the case that the debtor is a company or legal person the place of the registered office the regulation presumes this registered office to be the centre of its main interests in the absence of proof to the contrary, art. 3(1) InsReg. The rationale for the choice of coupling international jurisdiction to ‘COMI’ has been described as the result of a balancing act between the chance of a less suitable apportionment of jurisdiction against the chance that a debtor with doubtful and pettifogger arguments could deny the court’s international jurisdiction.<sup>25</sup> It should be noted here that art. 3(1) InsReg enables the court having jurisdiction to open the main insolvency proceedings to order provisional and protective measures already as from the time of the request to open these proceedings.<sup>26</sup>

When the centre of main interest of a debtor cannot be located in the territory of a Member State, the Insolvency Regulation does not provide a base for international jurisdiction of courts in a Member State to open main insolvency proceedings. Art. 3(1) InsReg presupposes that this centre is within the EC Community. Recital 13, too, is clear: ‘This Regulation applies only to proceedings where the centre of the debtor’s main interests is located in the Community.’ In a case like this, it is up to the national law (including its private international law) to determine the international jurisdiction of its own domestic courts. The legal consequences of an opening judgment therefore are not determined by the Insolvency Regulation, but by the contents of each Member State’s domestic laws. In the Netherlands for instance a company or legal person with registered office outside the Member States is subjected to an insolvency opening in this country when in the Netherlands there is an commercial activity or the debtor keeps offices. This is the outcome of a proceeding, on appeal, called *Geveran Trading Co. Ltd v. Kjell Tore Skjevesland*<sup>27</sup> regarding a debtor (referring to himself as a ‘Swiss banker’), who is a Norwegian citizen, domiciled in England during a period of three years prior to his petitioning, and domiciled too in Spain and in Switzerland. He tried to defend himself against a creditor that petitioned for his insolvency in the UK. The debtor tried to proof that all his relevant connections were with Switzerland or Spain, but not the UK. The High Court did not locate his COMI in Spain (what would have resulted in applying the Regulation, but only through the international jurisdiction of a Spanish court), but in Switzerland. Therefore the Insolvency Regulation does not apply (Switzerland is not an EU Member State) and, by consequence, the English court could apply its domestic jurisdiction rule (section 265 Insolvency Act 1986), leading to its jurisdictional authority based on the debtor’s previous residence in England for a period within the preceding three years.

#### **4. Center of main interest of a natural person**

In cases of personal insolvency to which the Regulation applies too, the Regulation does not contain a presumption that can be rebutted. For the Dutch court in Assen<sup>28</sup> a debtor has

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<sup>23</sup> Virgós (1998), p. 13,

<sup>24</sup> See Felsenfeld, *International Insolvency*, New York, Juris Publishing 2000, p. 5-11.

<sup>25</sup> See Berends, *Grensoverschrijdende insolventie* (Cross-border insolvency), Amsterdam, 1999, p. 116.

<sup>26</sup> Report Virgós/Schmit (1996), nr. 77, and equally Recital 16.

<sup>27</sup> First instance: [2002] EWHC 2898 (Ch), [2003] BCC 209 (Registrar Jacques); on appeal High Court 11 November 2002 [2003] BCC 391 (Judge Howard).

<sup>28</sup> Court of Assen 5 June 2002, *Schuldsanering* 2002/6, nr. 164.

requested on 30 May 2002 for ‘*schuldsaneringsregeling*’ (a private person fresh start proceeding) for a debts position of over € 16 million (sic!). The Court considers that the applicant officially lives in Hungary, and therefore outside of the Netherlands, whilst Hungary is not an EU Member-State. The address the applicant has given is a post address of an office from an enterprise that he established. In fact applicant has given the information that he stays the major part of the year in several hotels in Hungary and for the rest of his time in the Netherlands. In the Netherlands the applicant has had, just before the hearings, a treatment in a hospital. Furthermore, his wife lives in the matrimonial home in H, in the Northern part of the Netherlands, which is also the last domicile from the applicant before the calling to Budapest. Under these circumstances the court concludes that the centre of the debtor’s main interest still is in the Netherlands, so that according to art. 3(1) InsReg international jurisdiction is given to the Dutch court.

Cases like these too can bring headaches. What if, in the above illustration, an individual lives in Amsterdam and works for 2, sometimes 3, and once in a while 4 days a week in Frankfurt. Literature, although stressing that general answers cannot be provided, struggles. Some authors prefer a choice for the place of residence,<sup>29</sup> where I – with others<sup>30</sup> – would try to apply the norm provided in recital (13) (‘.... as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties’), leading to the place of living or professional/business domicile (‘woonplaats’) to be the aforementioned centre of main interest.

In the aforementioned UK case with regard to the Norwegian-born ‘Swiss banker’ living in England, Spain and Switzerland (*Geveran Trading Co. Ltd v. Kjell Tore Skjevesland*), the High Court considered that in a case of a non-professional usually his COMI is where the debtor habitually resides, but in the case of a professional the decisive factor would be the place of his ‘professional domicile’, as this location constitutes ‘....somewhere where he can be located, the centre which is ascertainable by third parties’. It will be interesting to see whether this distinction will be followed by other courts. The court, although implicitly, denies the possibility of having, under the application of the Insolvency Regulation, two or more ‘centres’ of main interests, which I hold as correct.<sup>31</sup>

In a German case and a Dutch case the facts seem quite similar, but the courts hand down different judgments.

The Country Court of Wuppertal 14 August 2002<sup>32</sup> determines that the COMI of a German debtor-natural person is Spain ‘.... because the debtor, according to her own statement, has moved to Spain on April 1, 2002, and considers herself that her Spanish domicile is her centre of main interest, because she wants to live and work there’.

The Court of Appeal Amsterdam 17 June 2003<sup>33</sup> had to decide in a similar case where the Dutch debtor obviously has finished her professional activities and moved to Longueville, France, a year prior to her insolvency. The sole fact of moving to another country, according to the court, does not lead inevitably to the conclusion that main proceedings solely can be opened in France. It too does not lead to the conclusion that the debtor’s COMI is not anymore in the Netherlands. By giving the answer to the question where the debtor’s COMI is, the court holds as important that she has exercised her (professional) activities in the Netherlands, from which activities the claims derive. These claims are connected with a

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<sup>29</sup> Taupitz, *Das (zukünftige) Europäische Internationale Insolvenzrecht – insbesondere aus international-privatrechtlicher Sicht* (The (future) European International Insolvency Law – especially within the private international law context), in: ZJP 1998, p. 315; Berends (1999), p. 117

<sup>30</sup> See for instance Balz, *Das neue Europäische Insolvenzübereinkommen* (The New European Insolvency Convention), in: Zeitschrift für Wirtschaftsrecht (ZIP) 1996, p. 949; Lücke (1998), p. 287, und Kolmann, *Kooperationsmodelle im Internationalen Insolvenzrecht. Empfiehlt sich für das Deutsche internationale Insolvenzrecht eine Neuorientierung?* (Models of Cooperation in International Insolvency Law. Is A New Orientation Recommended?) Schriften zum Deutschen und Europäischen Zivil-, Handels- und Prozessrecht, Bielefeld: Verlag Ernst und Werner Gieseking (2001), p. 286.

<sup>31</sup> See for further comments my forthcoming article mentioned under footnote 16.

<sup>32</sup> ZinsO-Rechtsprechungsreport 22/2002, p. 1099.

<sup>33</sup> Court of Appeal Amsterdam 17 June 2003, JOR 2003/186, commented by Spinath.

Dutch BV (in which the debtor owned shares) and with the husband of the debtor, and both the BV and the husband are subject to Dutch insolvency proceedings. Given these facts and in the absence of a decisive point of departure with France, the Amsterdam Court of Appeal decides that the debtor's COMI (still) is located in the Netherlands.

Although the reasoning of the Wuppertal court excites sympathy, the COMI-facts in a certain case should be of an objective, rather than of a subjective nature. Nevertheless the outcome of the Wuppertal judgment seems correct. I disagree with the Amsterdam Court of Appeal decision as the court denies putting weight on the circumstances at the time of its decision of (non-)opening of the proceedings. Moreover, the court seems to overlook the norm that the COMI is the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties, by merely looking at the origine and the nature of the debts.

## **5. Center of main interest of a company: registered office in other EU Member State**

The Regulation assumes<sup>34</sup> that the registered office of a company is the centre of main interests (in the absence of proof to the contrary). The idea is that most commonly such a place corresponds to the actual head office. Report Virgós/Schmit (1996), nr. 75, is very brief on this important topic: '..... Where companies and legal persons are concerned, the [now] Regulation presumes, unless proved to the contrary, that the debtor's centre of main interests is the place of his registered office. This place normally corresponds to the debtor's head office.' Although in many cases this presumption may seem correct, in practice the actual situation can vary enormously. In some countries for instance, like in the UK, it is quite common for the registered office to be somewhere else (abroad) than the actual operational headquarters of the company.

One of the first cases that deals with the situation of the 'actual head office' is a case in which a creditor of *Enron Directo Sociedad Limitada*, a Spanish incorporated company forming a part of the troubled Enron group, wished for the opening of 'administration' (a UK proceeding) as the main proceedings in the UK. The court in London<sup>35</sup> accepted evidence that, although the registered office was in Spain, the head office was in England, as the entire principal executive, strategic and administrative decisions in relation to the financials and activities of the company were conducted in London. The court therefore decided it had jurisdiction to make an administration order as main proceedings, for *Enron Directo* had the centre of main interest in England. If this reasoning has been issued (the judgement is unreported) it is submitted that this approach too overlooks the norm that the COMI is the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. To have this norm apply I do not think that the fact that strategic decision are made in London carries enough weight. The approach is the third party perception approach and where the third party is seen as a (potential) creditor, this perception will be much more operations oriented.

## **6. Centre of main interest of a company: registered office outside the EU**

Is it possible to apply the Insolvency Regulation when the registered office is located outside the EU, e.g. Cayman Islands, Hong Kong or Delaware (USA)? In an earlier publication I have assumed that in a case like that (registered office outside EU, an economic center as COMI

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34 See art. 3(1), 2nd sentence.

35 June 4, 2002 (unreported). See Moss et al, p. 169.

within the EU) the Regulation indeed is applicable.<sup>36</sup> In February 2003 an English court has decided on this question affirmatively in *Re BRAC Rent-A-Car International Inc.*<sup>37</sup> This company ('BRAC Inc') was incorporated in the State of Delaware (USA), with a registered address in the US, but it in fact never traded there. Its commercial operations were almost entirely done in the UK, where the company for some time had been registered as an overseas company according to the English Company Act 1985. BRAC Inc formerly was a part of the Budget Group of car rental companies, in which BRAC Inc was responsible for EMEA.<sup>38</sup> In many European countries BRAC Inc either had subsidiaries, which had in turn agreements with franchisees, or it was directly party to a franchise agreement with these franchisees. All its employees work in the UK, with employment contracts governed by English law, as this was the choice of law too in the franchising contracts.

BRAC Inc was, with other (former) members in the Budget group, subject to Chapter 11 proceedings in the US. In the UK BRAC Inc petitioned for its own administration as it was felt necessary to obtain protection from its creditors in the UK, since the Chapter 11 moratorium does not have direct effect in the UK. The creditors did have the benefit of an Italian arbitration award exceeding one million UK pounds and already had obtained an interim charging order over BRAC Inc's property in England. The creditors objected to the petition in the UK on the basis that the Court did not have jurisdiction.

The EU Insolvency Regulation is silent on the subject of its applicability to debtor-companies that are incorporated elsewhere, be it a Member State or a non-Member State, like in this case the USA. The court analyses quite extensively several recitals of the Regulation. Following the general reference in recital 21, first sentence ('Every creditor, who has his habitual residence, domicile or registered office in the Community, should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets') Lloyd J considers that the location within a Member State of the habitual residence, domicile of registered office of a creditor is mentioned in articles 3.(4)(b), 39, 40 and 42(2), while by contrast art. 32, dealing with the general question of the exercise of creditors' rights, par. 1 says 'Any creditor may lodge his claim in the main proceedings and in any secondary proceedings'. None of these, nor other articles, according to the court, '..... casts any light on the fundamental question, whether the debtors in relation to whom insolvency proceedings governed by the regulation may be taken are (in the case of legal persons) limited to those incorporated in the Community, or are not so limited'. Finally, given a textual interpretation of art. 3(1) the court decides that the Regulation gives jurisdiction to the courts of a Member State to open insolvency proceedings in relation to a company incorporated outside the Community, solely based on the words that the centre of the company's main interests is in that State. For this result the statement in recital 14 ('This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community') works affirmatively. The court holds that, according to a literary reading of the Regulation '.....the only test for the application of the regulation in relation to a given debtor is whether the centre of the debtor's main interest is in a relevant Member State, and not where a debtor which is a legal person is incorporated.'

Furthermore, the court has its decision supported by what the court calls a 'purposive interpretation' in which a narrow interpretation (application of the Regulation only to those legal persons which are incorporated in a Member State) '.....would prevent the Regulation from achieving some of the purposes which are described in the recitals and would leave it open to avoidance, providing an incentive for artificial operations as regards the status of debtors comparable to those which, according to recital (4), it is part of the purpose of the Regulation to avoid'. It seems that the court embraces the prevailing idea of having the

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<sup>36</sup> Wessels (2003), par. 10405. See too: Haubold, *Europäisches Zivilverfahrensrecht und Anspruch im Zusammenhang mit Insolvenzverfahren* (European procedural law and claims in relation to insolvency proceedings), in: IPRax 2002, p. 157 e.v.

<sup>37</sup> See footnote 17.

<sup>38</sup> Operations in Europe, Middle East and Africa.

Regulation applied in a manner that seeks to avoid competition, as the quote continues: ‘It would allow those who use corporate bodies to arrange that, although their business, assets and operations are based in a Member State, the relevant corporate body is incorporated outside the Community, so that the provisions of the Regulation would not apply to it or its assets. That would be inconsistent with the aim described in recital (3), and such an incentive for manipulation would be at least as inconsistent with the objectives of the Regulation as the examples of forum-shopping among Member States mentioned in recital (4). This is particularly the case since the Regulation contains no provisions dealing with affiliated companies or groups of companies, so that each debtor must be considered separately’.

The court, quite rightly I think, bans any attempts to escape the application of the Insolvency Regulation. Although the rationale of preventing abuse, founded by a purposive interpretation<sup>39</sup>, seems correct, the court obviously supports a broad vision to the purpose of the Regulation. After all, its ideas are based in the spirit of recitals 3 and 4, but it should be noted that these recitals are literally concerning themselves to the functioning of the ‘internal market’ (words explicitly mentioned in recitals 2, 3 and 4). On the other hand, the material base for the court’s decision may be found in art. 65(b) EC Treaty, which allows for the harmonization of conflict of laws-rules and conflicts of (international) jurisdiction in Member States, without taking regard to the possibility that a non-Member State is involved.<sup>40</sup>

The decision itself, although surprising, has been welcomed by authors (most of them coming from the UK). From the decision one can derive that courts in a Member State will have international jurisdiction with regard to a debtor-company that is incorporated in a non-EU State, whenever it can be established that its COMI is in that Member State. In the cases *Norse Irish Ferries* and *Cenargo Navigation Limited* this approach has been followed by the English High Court making administration orders over an asset holding company registered in Hong Kong (owning two ferries, but not operating them) and an Isle of Man company, which operated the ferries across the Irish Sea.<sup>41</sup> In this line of reasoning too is the decision with regard to the COMI of the debtor in the case *Salvage Association*.<sup>42</sup>

In the specific circumstances of the BRAC Inc case, it should be remembered however that BRAC Inc already was subjected to a US Chapter 11 proceeding. A clash of proceedings, or at least an attempt to find a balance between the two, did not occur as the Creditor’s Committee in the US supported BRAC’s petition. Future court cases can surely be expected, especially when the facts are not so self-evident (COMI in EU) or when a Creditor’s Committee in the US would indeed oppose to the petition.

## 7. Concept of ‘establishment’

In addition to the main insolvency proceedings, art. 3(2) InsReg gives the courts of another Member State, in which the debtor does not have his centre of main interests but possesses an ‘establishment’, jurisdiction to open insolvency proceedings in relation to that debtor. A secondary proceeding, opened based on art. 3(2), does not have a universal effect, as the effects are restricted to the assets of the debtor situated in the territory of that particular Member State.<sup>43</sup> The definition of ‘establishment’ is, as indicated, set out in art. 2(h) InsReg, which defines an ‘establishment’ as any place of operations where the debtor carries out a

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<sup>39</sup> To the notion of purposive interpretation of a community measure, see Isaacs and Brent, in: Moss et al (2002), p. 17.

<sup>40</sup> See: Herchen, ZinsO 2003, p. 746.

<sup>41</sup> Derived from a short case published in PLC July 2003, p. 79.

<sup>42</sup> [2003] EWHC 1028 (Ch); [2003] BCC 504. See for specifics of English domestic insolvency law: Moss, 16 Insolvency Intelligence 2003, p. 54, the ‘Editorial’, in: Insolvency Law & Practice 2003/3, p. 85, and the short case description in PLC June 2003, p. 77.

<sup>43</sup> The proceeding itself only can be a liquidation proceeding, see art. 27 InsReg.

non-transitory economic activity with human means and goods. The idea is that in principle there is no limit on the number of secondary proceedings which may be opened. If a debtor has a number of establishments in different Member States then a corresponding number of secondary insolvency proceedings can be opened in each of those States.

There must be a place of operations within that State in order for the courts of that State to have jurisdiction to open secondary proceedings.<sup>44</sup> An ‘establishment’ requires any ‘place’ of ‘operations’ where the ‘debtor’ carries out ‘a non-transitory economic activity with human means and goods’. I will give some illustrations.

The availability of only some assets (a 50 eurocent-coin or just a suitcase in a locker at a railwaystation) within that Member State is insufficient for a debtor to have an ‘establishment’ within that Member State. The possession of only a bank account in the UK does not constitute a ‘place’, nor ‘operations’ for a Greek company, which owns the account. A lorry or truck, operated by a German company and on its way through France to Spain does not seem to constitute a ‘place’ or may probably be seen as not constituting a ‘non-transitory’ activity<sup>45</sup>, as a mobile caravan from the same company, which is placed for two months in Venice to support contract-negotiations with sales management of a North-Italian company would be considered a ‘place’, but probably would not qualify as a place of ‘operations’. Also the storage of raw material from a Finnish company, located/stored near Valencia for making end products by a Spanish company will not qualify as a ‘place’. Report Virgós/Schmit (1996), nr. 70, indicates that in order for a debtor to have an ‘establishment’ there must be a certain level of organisation and stability; a purely occasional place of operations will not constitute an ‘establishment’. An office or a shop will qualify as an establishment, not an incidental storage in a warehouse.

A holiday home in Majorca leased, time-shared or owned by an individual debtor from Sweden or Ireland does not constitute an establishment since this is not (generally) a place where economic activity is carried on. As in the case of ‘centre of main interest’ the word ‘establishment’ is fact-specific. A real estate investment abroad with the occasional two or three times vacation or weekend-stays a year will most probably not result in qualifying these facts as establishment. Another answer is possible when in the Member State concerned the debtor has an interest-earning bank account (economic activity with ‘goods’), a regular housekeeper or a gardener, where it is submitted that ‘human’ means referred to in art.2(h) InsReg is to be understood as referring to activities conducted by persons for whom the debtor is legally responsible, either as employer or as principal.<sup>46</sup>

If there is no establishment, but one can find a few assets in Member State B, belonging to debtor in Member State A, art. 3(2) does not provide for an international jurisdiction. There will be no secondary proceeding in B and the assets consequently belong the estate of the main insolvency proceedings, conducted in A. The ‘bank account only’ case, does not constitute an establishment, and the account – given the universal effect of the main proceeding within the Community – is therefore an asset within the estate of the main proceedings.

In several Belgian court cases<sup>47</sup> the meaning of ‘establishment’ has been determined. In a case of a Belgium branch of a UK Ltd (*V Management Ltd*) the Commercial court opens proceedings based on its Belgian establishment ex art. 3(2), adding that the debtor is a company incorporated under English law.<sup>48</sup> In another case an establishment is located in

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<sup>44</sup> If main insolvency proceedings have not yet been commenced in relation to the debtor, then art. 3(4) InsReg provides that proceedings opened in accordance with art. 3(2) only may be opened when the conditions of art. 3(4) are met, see Moss et al, p. 176.

<sup>45</sup> An establishment presumes a certain stability. The element ‘non-transitory’ aims to avoid minimum time requirements, see Report Virgós/Schmit (1996), nr. 71.

<sup>46</sup> See Fletcher, in: Moss et al, p. 166.

<sup>47</sup> These cases (in Flemish, with very short classification of issues in English) are posted on the following website: <<www.law.kuleuven.ac.be/int/tradelaw/euprocedure/insolventie>>.

<sup>48</sup> Commercial Court Tongeren 9 September 2002 (Case nr. A.R. A/02/2587). For the determination of ‘establishment’ in this case, the Court did not find it necessary that the establishment should have a registration in the Belgian Trade Registers.

Belgium of a debtor who is incorporated in the Netherlands.<sup>49</sup> In a third case the Commercial Court Tongeren determines that the debtor is a company incorporated in Luxembourg and has been declared insolvent in that Member State. Applicants however have provided sufficient evidence of the fact that the debtor in fact possesses an establishment in Belgium and the Belgian court opens secondary proceedings to which Belgium law applies.<sup>50</sup> A general remark to these cases is that the grounds to have the facts qualify as ‘establishment’ seem quite limited or even the enumeration of facts leading to the legal term establishment (pointing – or not – at ‘place of operations’, ‘a non-transitory economic activity’, ‘human means’, ‘goods’) seems incomplete.

## 8. Reference date

Both fact-intensive concepts (‘centre of main interest’ and ‘establishment’) have to be present at a certain moment in time. This reference date is for instance not the date of presenting the petitioning, according to the judgment in appeal in the aforementioned case of *Geveran Trading Co. Ltd v. Kjell Tore Skjevesland*.<sup>51</sup> The ‘centre’ should be there at the moment the court decides to open (or not) the main proceedings. In case the court has determined its international jurisdiction (by opening main proceedings), then the legal effect of this decision (universal effect within the Community; application of the *lex concursus* elsewhere; universal power of the liquidator within the Community) can not be influenced by – taken it would be legally possible – a decision of the debtor to close down all activities, to ‘transfer’ the centre to another Member State or a country outside of the EU and/or to limit ‘centre’ activities to a level that would qualify as a place of operations (‘establishment’).<sup>52</sup> The Regulation should be interpreted so as to prevent any easy evasion of jurisdiction under the Regulation, see recital 4 (avoid ‘forum shopping’). I agree with Moss, who submits: ‘The courts should, in a case of undesirable forum shopping of that kind, ignore the steps taken purely to avoid the appropriate jurisdiction’.<sup>53</sup> This view can be supported by Community principles like (i) the principle of equal treatment or non-discrimination (between insolvent debtors), and (ii) the principle of legal certainty for creditors (the fixed or ‘frozen’ facts at a certain time – reference date – which include the perspective of ascertainability by potential creditors).

Also an ‘establishment’ must be able to be determined on the day the court is opening secondary proceedings. Unsufficient ground for establishing international jurisdiction seems to me that, e.g., until a month ago there was a place of operations (‘establishment’), but now – at the day of the opening decision – there are only a few assets, that do not make up an establishment. Towards the debtor that flit into the moonlight no secondary proceedings can be opened. Moss has submitted that according to English law there raises a complication in that a person who has carried on business in England is treated as continuing the business for the purposes of bankruptcy jurisdiction until he has made arrangements to settle his business debts.<sup>54</sup> This type of fiction, Moss opines, will have to give way when it conflicts with the Regulation. Indeed, in France, the *Circulaire* of March 2003 takes quite rightly the view that

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<sup>49</sup> Commercial Court Tongeren 31 March 2003 (Case nr. A.R. A/03/1126). As the COMI of the debtor is in the Netherlands and in this country no (main) insolvency proceedings have been opened, the Court based its opening decision on art. 3(4)(b) InsReg. In this case the applicant-creditor was the Belgian tax authority (for some € 700 for VAT).

<sup>50</sup> Commercial Court Tongeren 20 February 2003 (Case nr. A.R. A/02/04259).

<sup>51</sup> First instance: [2002] EWHC 2898 (Ch), [2003] BCC 209 (Registrar Jacques); on appeal High Court 11 November 2002 [2003] BCC 391 (Judge Howard). In this regard too: Fletcher, *The Law of Insolvency* (2002), p. 839; Dicey and Morris on *Conflicts of Law* (Third Cumulative Supplement to the thirteenth edition, 2003), nr. 31-090.

<sup>52</sup> In this way too with regard to the jurisdiction ex art. 3(2) InsReg Justice Lightman, in: Moss et al, p. 173.

<sup>53</sup> See Moss et al, p. 171.

<sup>54</sup> See Moss et al, p. 170, referring to *Re a Debtor* (No. 784 of 1991) [1992] Ch. 554; *Theophile v. Solicitor-General* [1950] A.C. 186 (H.L.).

the fiction in French insolvency law (whenever the registered offices is transferred within six months prior to the opening, jurisdiction can be applied by the court of the previous registered office) can not be maintained in cross-border cases to which the EU Insolvency Regulation applies.<sup>55</sup>

## 9. Proof of the contrary

The assumption that the registered office of a company shall be the centre of main interests can be rebutted, see the words ‘in the absence of proof to the contrary’ in art. 3(1) InsReg. The Insolvency Regulation<sup>56</sup> does not provide any indication with regard to the question who carries the burden of proof and what should be the contents of this proof to succeed in having the presumption rebutted. The rationale of the provision – aiming to determine jurisdiction and the general interest to fix jurisdiction with the consequence of giving unilateral effect to the *lex concursus* within the Community – results in my opinion in the principle that the onus is laying on the person that aims to convince the court that the COMI is situated in the territory of another Member State than the State where the filing for opening took place. Given this ratio Justice Lightman submits ‘... a duty may be imposed on the creditor to make all proper inquiries and to act in the utmost good faith, disclosing all relevant information (whether or not supporting his case) to the court’. I have doubt whether – at least within the Dutch context – an extended obligation of assembling and disclosing information (also the data that do not support the case of the one who is authorised to file<sup>57</sup>) will hold. Does the aforementioned obligation too contain that one has to submit facts and data that the presumption is right?<sup>58</sup>

In the (unreported) case mentioned earlier, regarding *Enron Directo Sociedad Limitada*, the London court accepts the evidence that, although the registered office is in Spain, the head office is in England, as all of the principal executive, strategic and administrative decisions in relation to the financials and activities of the company were conducted in London. For this reason, the court decides it has authority to open main insolvency proceedings, because Enron Directo possesses its COMI in England.

The Court of Appeal The Hague 8 April 2003<sup>59</sup> had to decide with regard to a creditor, which had requested in the Netherlands the liquidation (‘faillissement’) of the UK company *Interrexx Enterprises Ltd*, that claimed his seat was in Cardiff, UK. The lower court in Rotterdam opened the proceedings; the Court of Appeal dealt with the request of Interrexx to reverse the Rotterdam judgment. Interrexx claims that its COMI is not in the Netherlands, but in the UK. The Court of Appeal considers: ‘Interrexx indicates that its statutory seat is Cardiff. In the request for liquidation, a Company Report of The Netherlands British Chamber of Commerce is attached, mentioning Folkestone as registered office. The liquidator of Interrexx has explained to the Court that Companies House in Cardiff serves as central register for corporations in the UK and therefore Cardiff cannot act as the center of main interests. In the Company Report, Interrexx is mentioned as an extra-territorial organisation, and its statutory director and the company secretary, both holding all the shares, live or lived in the Netherlands. Furthermore the liquidator has indicated that Interrexx probably does not exist anymore, and therefore has no statutory seat, since a search in the digital database of Companies House resulted in the information that the company has closed down per 3 July

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<sup>55</sup> See in more detail: Wessels, Realisation (note reference above).

<sup>56</sup> Nor the recitals, nor Report Virgós/Schmit.

<sup>57</sup> Which could be a creditor, but also the debtor himself.

<sup>58</sup> Art. 4(4) Dutch Realization Act (see Wessels, Realisation, note reference above) just states the the petition contains ‘such data’ that the court can assess whether it has international jurisdiction according to the EC Insolvency Regulation. This ‘obligation’ can be qualified as a legal duty to notify, although not sanctioned.

<sup>59</sup> Not published (on file with author).

(or 7 March) 2001. Now the appeal has been initiated by X, the director of Interrexx in the Netherlands with full authority and living in the Netherlands, Interrexx has not succeeded in proving that its center of main interest is in the UK.<sup>60</sup>

In a comparable case the Hamburg court<sup>61</sup> has to determine the COMI of an English Limited Liability Company, with a capital of 100 UK pounds and registered in Cardiff, which company only has commercial operations in Hamburg, where its manager was located too. Given the fact that operations and management exclusively are in Germany, the Hamburg court decided it had international jurisdiction. Opposite to the Dutch case, where the facts were uncertain, in the Hamburg case it is a given fact that the company in October 2001 was fully liquidated. The German author Brenner makes the observation that at the point of time of opening the proceedings the company was liquidated and the management was untraceable, for which reasons the court – by the lack of proof of the contrary – should have referred to the UK courts. She submits that where one cannot determine the presence of a factual seat ('Inlandsitz'), the question with regard to international jurisdiction of a company incorporated abroad does not occur. If I see this correctly, her approach is based on the recent developments with regard to the law that is applicable to companies with their registered seat in another country, in its core resulting in the rule that a foreign company may not be deprived of its rights and its right to establish itself in another country should not be hampered.<sup>62</sup> When the legal competence of a company can be derived from the State where the company has been established, she suggests that the jurisdiction re insolvency proceedings should be aligned with the former idea. I would argue that the fact-specific criteria, like COMI, is a norm in itself, which has to be applied unrelated to concepts of (European) company law, but based of objective facts, being the place – as the recital says – where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. Another question is whether it is desirable to have EU derived company law and EU insolvency law develop itself in an autonomous way, quite unaligned with each other. It is easy to presume that a system which would allow for a norm to decide on questions of company law and another norm which is decisive to determine applicable law in insolvency proceedings (lex concursus) in practice may easily lead to a combination of 'societas shopping' and 'forum shopping'.

## 10. Mutual trust

The crucial point in time to have art. 3 InsReg apply is, as we have seen, the moment of opening of the proceedings. Recital 22 focuses on the automatic and immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings: 'Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States. Recognition of judgments delivered by the courts of the Member States should be based on *the principle of mutual trust*.' (italics made by me, Wess.). I would hold that the ethereal 'principle of mutual trust' finds its basis in the principle of loyalty as meant in art. 10 EC Treaty, that incites not only Member States but judges of these States too to be guided by aim and purpose of a given community measure (regulation, directive, etc.).<sup>63</sup> This is stressed by the idea behind art. 10(2) EC Treaty, prescribing member

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<sup>60</sup> For internet search with regard to UK companies, see <<www.companieshouse.gov.uk>>.

<sup>61</sup> Court Hamburg 14 May 2003, ZIP 22/2003, p. 1008 (commented by Schmidt); NZI 8/2003, p. 442 (commented by Mock and Schildt); EWIR 18/2003, p. 925 (commented by Brenner).

<sup>62</sup> The famous cases of *Centros*, *Überseering* and *Inspire Art* (ECJ 30 September 2003 – Case C-167/01), see: Ebke, in: *The International Lawyer*, Fall 2002, Vol. 36, no. 3, p. 1015; Eidenmüller, ZIP 2002, p. 2233 and (with regard to *Inspire Art*) EWIR 2003, p. 1029 (commented by Drygala); JOR 2003/249 (commented by Vossestein).

<sup>63</sup> See *Von Colson and Kamann v. Land Nordrhein Westfalen*, Jur 14/83, [1984] ECR, 1891.

States to abstain from any measures that might endanger the realization of the goals of the Treaty. The principle of ‘mutual trust’ is seen to be fundamental to ensure the goals of the Insolvency Regulation ‘.....in a way which is fair, and lacking in oppressive side-effects’.<sup>64</sup> In its core, the ‘principle of mutual trust’ is decisive with regard to the way the court, opening the main insolvency proceedings, expresses its jurisdictional authority in its opening judgment, and with regard to the question what will happen in a case in which within a few days two courts of two Member States both open main proceedings. I will deal with these two questions now.

## **11. Judgment opening insolvency proceedings: explicitly mentioning the type of proceedings?**

Whether, and if yes, to what extent, should the court opening the insolvency proceedings in his judgement explicitly account for the type of proceeding it has opened (main or secondary proceedings)? In Dutch literature this has been a hot debated question. Originally in the Netherlands the draft-legislator, aiming to introduce some provision to make the Regulation compatible with Dutch (insolvency procedural) law, took the view that it was not necessary for the court to expressly provide any information referring to its international jurisdiction supporting his decision, laid down in the judgment which opened an insolvency proceeding. This judgement would be allowed to have the type of proceedings (main or secondary) unmentioned. The position was taken that the Insolvency Regulation would not allow for the recognition of a judgement in another Member State by making it dependent of the stipulation that the judgement expressly disclosed the type of proceeding. Quite rightly in literature it has been stated that a duty to account for certain specifics in a judgement can derive of a country’s Constitution. Furthermore, it has been brought forward that the presumption of the Regulation most probably is that a judge *ex officio* has to verify whether the Insolvency Regulation applies and what type of proceeding is opened. In support of this approach several quotes from Report Virgós/Schmit can (indirectly) help. For instance, the presumption that – in order to apply the [now] Regulation – Member States should be required ‘..... their courts or competent bodies to specify clearly the grounds on which the decision to open proceedings is based, so that these can then be used as an identification ‘label’ (Report, nr. 49). See too Report, nr. 47, stating that because of the binding nature of the [now] Regulation ‘....., the provisions of which, including the rules on conflicts of law, should be applied by the court on its own motion even if they are not invoked by the parties concerned’. See furthermore Virgós (1998), p. 13, arguing: ‘The judge must control *ex officio* (italics in the quotation; Wess.) the application of Art. 3’. Generally in literature this approach is taken.<sup>65</sup> This presumption one recognises too in the provisions with regard to publication and registration in a public register (art. 21 and art. 22 InsReg).<sup>66</sup>

Although the Dutch Minister of Justice is not convinced by these arguments, the renewed art. 6 lid 4 of the Realisation Act in the Netherlands now has amended the draft provision. When a Dutch judge derives its international jurisdiction from the Insolvency Regulation, the judgment opening the insolvency proceedings should state whether it concerns main or secondary proceedings. The provision as it reads now has been introduced to clarify – also (to judges) in other countries – the consequences of a judgment of a Dutch court, because these consequences are so different (main proceedings with ‘universal’ effect; secondary

<sup>64</sup> See Fletcher, in: Moss et al, p. 171.

<sup>65</sup> See Gottwald, P., *Grenzüberschreitende Insolvenzen* (Cross-border insolvencies), in: Schriften der Juristischen Studiengesellschaft Regensburg e.V., München: C.H. Beck (1997), p. 20 e.v.; Kayser, A Study of the European Convention on Insolvency Proceedings, in: International Insolvency Review (IIR) 1998, p. 115; Kolmann (2001), p. 285; Duursma-Kepplinger/Duursma/Chalupsky, *Europäische Insolvenzverordnung. Kommentar* (European Insolvency Regulation. Commentary), Wien, New York, 2002, p. 134; Wessels (2003), par. 10416.

<sup>66</sup> See Wessels (2003), par. 10415.

proceedings only with ‘territorial’ effect). The provision, too, aims to prevent that a court in another Member State has to do research into what a Dutch court actually has decided.<sup>67</sup>

The reference to ‘mutual trust’ should, I think, be seen in the light of the central role a court has, while exercising its jurisdiction and, likewise, the approach of a court in another Member State to abstain itself. I would argue: (a) that because of the subordinate character of the secondary proceeding there should not be any doubt about the type of insolvency proceedings that have been opened, and (b) that in principle the legal effect attached to the main proceedings is that of having the *lex concursus* applied within the whole of the Community, the thrust to which effect should be unambiguously, like (c) it should be clear from the start which type of obligations have to be fulfilled by the liquidator (see, e.g., art. 31(1) and 31(3) InsReg). All these items too are relevant (i) for the publication abroad of the liquidator’s appointment (art. 19 InsReg), (ii) towards the creditor, e.g. with regard to return what he has received from the debtor in satisfaction of his claim, and (iii) for the foreign court, e.g. with regard to the question whether it can open main insolvency proceedings or the question whether it can allow a stay of liquidation, which only can be allowed at the request of the liquidator in the main proceedings (art. 33(1) InsReg).

In the UK, Germany and France the above mentioned approach has been introduced too. For instance, art. 102 § 2 *Insolvenzordnung* (InsO) says: when it can be assumed that assets of the debtor are located in another Member State (than Germany), the judgment with regard to opening of the insolvency proceedings should summarily deal with the actual facts and the judicial considerations that lead to the international jurisdiction of the German court according to art. 3 InsReg. The French *Circulaire* stresses the importance of describing expressly the bases of the court’s international jurisdiction (main of secondary). It holds as the ideal situation that the jurisdictional criteria will be discussed and argued during the hearing.<sup>68</sup>

## 12. Conflict of international jurisprudence

The Insolvency Regulation is silent on the topic of conflict of jurisdiction. It does not contain a specific provision with regard to the question what needs to be done if and when two different courts in two different Member States both (have the pretention to) open main insolvency proceedings, both equally convinced that the centre of main interest of the debtor is in their respective territory. Report Virgós/Schmit (1996), nr. 79, takes the point of view that such a conflict of jurisdiction ‘..... must be an exception, given the necessarily uniform nature of the criteria of jurisdiction used’. It suggests that, where disputes do arise, the courts could take into account the following rules:

1. the system of the [now] Regulation, according to which: (i) each court is obliged to verify its own international jurisdiction in accordance with the Regulation, and (ii) ‘the principle of Community trust’, according to which once the first court of a Member State has adopted a decision, the other Member States are required to recognize it (art. 16 InsReg);
2. the possibility to request a preliminary ruling of the European Court of Justice, which would guarantee the uniformity of the contents of the criteria for international jurisdiction and its appropriate interpretation in the given case<sup>69</sup>, and
3. the ‘general principles of procedural law’ which are valid in all Member States, to which the reporters add that these principles include those derived from other Community measures, such as the [now] 2002 Brussels Regulation.

<sup>67</sup> *Uitvoeringswet EG-insolventieverordening* (Realisation Act EC Insolvency Regulation), Stbl. (Official Gazette) 2003, 444, entered into force 15 November 2003.

<sup>68</sup> See further: Wessels, Realization (note reference above).

<sup>69</sup> Where the Convention has been converted into a Regulation, which in principle only gives a ‘Supreme Court’ of a Member State the authority to address the ECJ (besides the possibility laid down in art. 68(3) EC Treaty) this factor carries hardly any weight anymore.

In the context of art. 3(2) InsReg the reporters state, quite firmly, that in cases where the debtor's COMI is located in the territory of a Member State, the courts of other States '..... have no power to open main insolvency proceedings' (but are allowed to open secondary proceeding, when the debtor has an 'establishment' in that State).

Several legislators of Member States have had an eye for the possibility of conflict of jurisdiction. As the system of the Regulation only allows one COMI of a debtor the Dutch Minister for instance – during Parliamentary discussions with regard to the Realisation Act – has referred to recital 22 of the Regulation that '..... recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open the main insolvency proceedings. 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'. Virgós (1998), p. 14, derives from the principle of 'Community trust' a 'first in time' rule. The court of a Member State that chronologically was the first one to open main insolvency proceedings based on art. 3(1) InsReg was authorized to do so. The Dutch Minister of Justice holds that the cited recital makes clear that the judgement of a court in another Member State, opening an insolvency proceeding, may not be tested: every other judge in a Member State has to abstain from opening (a 'second') 'main' insolvency proceedings.<sup>70</sup>

Although I agree with this result, I would submit that it would be better to found this principle of 'first in time' with a reference to the system of the Insolvency Regulation itself. If I understand correctly, recital 22 links 'trust' to the system of (automatic) recognition of judgments. I would not couple the distinction of the international jurisdiction of a court with a rule with regard to recognition, but only with a rule with regard of the international jurisdiction of a court itself. The nature of art. 3(1) InsReg itself allows for full and unlimited international jurisdiction at the point in time (reference date) of the judgment opening the main proceedings. As of that time the assets in the main proceeding are secured within the context of these proceedings and an appointed liquidator will have all powers. Within this system the 'second' courts receives a request for filing of insolvency proceedings, which as proceeding can not qualify as 'main' proceedings.<sup>71</sup>

Germany introduced in March 2003 a material provision in art. 102 § 3 InsO, under the heading: To prevent conflict of jurisdiction. The German legislator aims to provide more precision to the 'principle of mutual trust'. Art. 102 § 3 seeks to prevent two main categories of conflict of jurisdiction, positive conflict (section 1) and negative conflict (section 2). Art. 102 § 3(1) determines that in case a court of another Member State has opened main proceedings, a request to open such main proceedings for a German court is to be disallowed, as long as the main proceedings in the other Member State are pending. The German legislator strongly stresses that German courts have to respect the judgement which opens the insolvency proceeding without materially testing this judgement. In case the German court is unaware of the opening of main proceedings in another member state, art. 102 § 3(1) continues to determine that main proceedings opened in Germany will not be continued. § 3(1) furthermore authorizes the foreign liquidator to claim before the German court the priority of his proceedings. Art. 102 § 3(2) seeks to avoid a negative conflict of jurisdiction by providing that in case a court of a Member State has denied its international jurisdiction according to art. 3 InsReg, because courts in Germany will have jurisdiction, the German court is not allowed to reject the opening of the insolvency proceedings on the grounds that a court in another Member State has jurisdiction. The German court will of course be allowed

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<sup>70</sup> See Wessels, Realization (note reference above).

<sup>71</sup> Kolmann (2001), p. 287, submits that in case of concurrence of international jurisdiction not the time of opening but the time of first filing should be decisive. As long as the first request has not been denied, the second should in his opinion be seen as 'schwebend unwirksam' (pending inactive).

to deny its jurisdiction because another court of another member State seems to be the court with international jurisdiction.

In case the German court – unaware of the opening of main proceedings in another Member State – has opened main proceedings and according to art. 102 § 3(1) is not allowed to continue these proceedings, the German court ex officio institutes the proceeding in the favour of the foreign court, after having heard the German liquidator and the debtor. Will indeed these proceedings be set up, every creditor has the right to object (art. 102 § 4(1)). The objection could be that instituting proceedings abroad influences the right to start secondary proceedings in Germany. The German legislator recognises that this method of instituting proceedings elsewhere does not have retroactive effect and harmonises the (unilateral legal) effects of the foreign main proceedings with the fall of the German proceeding. Art. 102 § 4(2) states that legal effects of the German proceeding, already in force and not limited to the duration of the proceedings, will stay in force when they conflict with legal effects of the foreign main proceeding as far as they influence Germany. This rule also applies to legal acts of the German liquidator or acts from third parties against him. Rather unique seems to me art. 102 § 4(3) in creating a duty for the German court to communicate with the court in the other Member State. Before the aforementioned method of instituting of proceedings the German court informs the foreign court, which supervises the main proceedings. The information should contain (i) the way the proceeding to be instituted has become known, (ii) which publications and registrations already have been made, and (iii) who the liquidator is. The decision contains a reference to the foreign court, which has to be named. This court will receive a transcript. This arrangement has been put in place to secure the position of the foreign liquidator (to take measures that can not wait) and to safeguard that the debtor will not be reinstated in his rights to manage and dispose of his assets in Germany. The German liquidator has to handover these assets to the foreign liquidator or to secure these on his behalf.

### **13. Multinational groups of companies: the rules**

The Report Virgós/Schmit (1996), nr. 76, is very frank in admitting that the EU Insolvency Regulation ‘..... offers no rule for groups of affiliated companies (parent-subsidiary schemes)’. It explains in short that the general rule to open or to consolidate insolvency proceedings against any of the related companies as a principal or jointly liable debtor indeed is that international jurisdiction according to the Regulation must exist for each of the concerned debtors with a separate legal entity.<sup>72</sup> The approach to companies in the Regulation is, therefore, build on strictly legal notions.<sup>73</sup> In literature, the lack of provisions re multinational groupings of companies is been seen as an omission. Not all critics take into account that the subject of cross-border insolvency within Europe has been discussed for over forty years, before it resulted in the Regulation. The discussion in itself dealt with quite complex problems, and politically and practically it may have been seen as best to postpone ‘group insolvencies’ to a later date. Presently, still in several European countries it is undecided what the founding principles are of a system of insolvency law (equal treatment of creditors, and if yes, to what extend, or e.g. protection of employment and with it the continuity of business, just to name a dilemma). In addition there has been hardly given any thought on the place of ‘corporate insolvency law’ in its relation to corporate law, e.g. the

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<sup>72</sup> The Report hints that the drawing up of an European norm on associated companies may affect this answer.

<sup>73</sup> For some considerations re Multinational Groups of Companies: Ashton, Loconci and Cebik, in: *International Business Lawyer* September 2002, p. 350.

‘punishing’ effect of insolvency law and the functioning of corporate governance and topics like (cross-border) director’s liability.<sup>74</sup>

In one situation there seems to be an exclusion to the rule to only pay attention to the legal entity of the debtor, namely in a case ‘..... where the estate of the debtor is too complex to administer as a unit or where differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening to the other States where the assets are located’, see recital 19. In that case, the recital continues, the liquidator in the main proceedings may request the opening of secondary proceedings ‘..... when the efficient administration of the estate so requires’. I read this recital as that it may, under certain circumstances, provide ground to request for a secondary proceeding of e.g. a wholly owned subsidiary in another Member State, when the financial and commercial administration, the IT-platform, etc. are shared with the debtor. The exclusion may under circumstances too apply to sister-companies.

It should, however, be noted again that within the territory that is subjected to the Insolvency Regulation only one main insolvency proceeding can be opened, see Report Virgós/Schmit (1996), nr. 73. Kolmann however seems to take another stance. He argues that a concern (group of companies) can have centers in several Member States. I would agree with this author under the condition that his opinion is that of every separate individual debtor-company one has to determine its COMI.<sup>75</sup>

From the history of the Regulation it can be taken that a majority of Member States did not approve of adopting the same concept of ‘establishment’ in the Insolvency Regulation as had been given by the European Court of Justice in its interpretation of art. 5(5) of the 1968 Brussels Convention, which article provides that the courts of a contracting state have jurisdiction to determine disputes arising out of the operations of a branch, agency or other establishment situated within that state.<sup>76</sup> In 1978 the European Court of Justice held that the concept of an establishment implies a place of business which has the appearance of permanency so that third parties do not have to deal directly with the parent body.<sup>77</sup> A consequence of this definition has been that subsidiaries of a parent company have been held to be establishments of the parent.<sup>78</sup> Aforementioned majority however preferred for insolvency matters an independent concept to be developed<sup>79</sup>, which would take into account that the definition of ‘establishment’ for the purposes of the Insolvency Regulation would be similar to that developed for said art. 5(5), save that separate subsidiary companies will not be considered to be establishments of the parent.<sup>80</sup> Such a broad definition would interfere with the general jurisdictional rules, which treat all companies as separate entities.

Dutch authors recently have submitted that in certain exceptional circumstances it would be possible to apply that the presumption of the registered office (as being the centre of main interest of the subsidiary) should make way for and be replaced by the registered office of the parent company ‘...in the case the subsidiary is fully controlled by the parent’ (*‘.....als de dochter geheel door de moeder wordt aangestuurd’*). They bring forward that in even more exceptional circumstances the subsidiary in the State of the registered office can be seen as establishment ex art. 2(h) InsReg of the parent.<sup>81</sup> This last submission is clearly against the

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<sup>74</sup> See for a start Skeel Jr. and David, *An Evolutionary Theory of Corporate Law and Corporate Bankruptcy*, in: 51 *Vanderbilt Law Review* 1998, p. 1348, and Grossfeld, *Loss of Distance: Global Corporate Actors and Global Corporate Governance – Internet v. Geography*, in: 34 *The International Lawyer*, Fall 2000, No. 3, p. 963, who concludes quite rightly: ‘Given these interdependencies, a real international bankruptcy law has few, if any, chances, although the need for it is particularly urgent’.

<sup>75</sup> Kolmann (2001), p. 284

<sup>76</sup> Art. 5(5) Brussels Regulation on Civil Judgments and Jurisdiction 2002 contains the same provision.

<sup>77</sup> *Somafer SA v Saar-Ferngas AG*, Jur/Case 33/78 [1978] ECR 2183.

<sup>78</sup> See *Schotte v Parfums Rothschild*, Jur/Case 218/86 [1987] ECR 4905; *Netherlands Jurisprudence* 1989, 750, commented by Schultz.

<sup>79</sup> See Report Virgós/Schmit (1996), nr. 70.

<sup>80</sup> See Moss et al, p. 166.

<sup>81</sup> Koppenol and Kramer, *Internationaal privaatrecht 1998-2002 (deel II)* (Private International Law 1998-2002 (Part II)), NTBR (Dutch Review of Civil Law) 2003, p. 267.

aforementioned historic interpretation of ‘establishment’. In an English court case<sup>82</sup> the court denied any force to the submission of a creditor that business premises of the Swedish company Telia’s UK subsidiary company can rank as ‘establishment’ for the purposes of art. 3(2) InsReg. In this decision one may with good reason read that an economic activity in England by a subsidiary does not constitute in law an economic activity by a (Swedish) parent company. A subsidiary company is to be treated as a separate legal person.

### **13. Multinational groups of companies: an awakening judicial practice in the UK.**

So far the theory.<sup>83</sup> In 2003 courts in UK, Germany and France have been involved in certain matters of the Daisytek group, which started off with a UK court decision regarding a co-ordinated administration order in relation to 14 companies: 10 in the UK, 3 in Germany and one in France.<sup>84</sup>

The corporate structure of Daisytek is a US parent (Daisytek Inc), which filed for itself and its subsidiaries for a Chapter 11 reorganisation in the US on 7 May 2003. A subsidiary is Daisytek International Corporation, which is the parent for the UK subsidiary, called Daisytek-ISA Ltd, which is a pan-European business that for 50% operates as a reseller and wholesale distributor of electronic office supplies to retailers, and for the other 50 % sells to end users. Daisytek-ISA serves as a holding company for all the other European companies, one of which is ISA International plc (‘ISA International’), which performs the head office function for the European group. All 14 companies have petitioned, in the words of the court ‘.....for an administration order to be made in order to achieve a more advantageous realization of its assets than would be achieved in a winding-up or its survival or the survival of the whole or part of its undertaking as a going concern’.<sup>85</sup> The court makes administration orders in respect of 10 UK companies, including the main trading company (ISA Wholesale plc), which employs 450 people. The court too makes administration orders in respect of a sub of Daisytek-ISA Ltd, the German company PAR Beteiligungs GmbH (‘PAR’), and its two subsidiaries ISA Deutschland GmbH (‘ISA Deutschland’) and Supplies Team GmbH (‘Supplies Team’), and in respect of the French company ISA Daisytek SAS, a company employing some 150 people.

The court takes from the evidence presented that the trading companies in the group are managed to a large extent from the UK (Bradford) and that they are managed and controlled as a group, so that the activities of the group of companies throughout Europe are coordinated by the head office in Bradford. ISA International negotiated contracts with suppliers and gave guarantees, including a guarantee of the outstanding balances due from the French ISA Daisytek. ISA International too guaranteed amounts due to trade creditors of the German company PAR Beteiligung. Regarding its international jurisdiction the Leeds court refers to the presence of a COMI of the German and the French company, applying recital 13 (‘ascertainability’ by third parties). Given the presumption of the registered office, being in

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<sup>82</sup> High Court of Justice Chancery Division 16 October 2002, *Telia v. Hillcourt*, No. 6394 of 2002, 2002 WL 31523284 (Ch D), [2002] EWHC 2377.

<sup>83</sup> I leave aside a recent proposal with regard to the treatment of groups of companies under the Insolvency Regulation, see Van Galen, *The European Insolvency Regulation and Groups of Companies*, Insol Europe Annual Congress, Cork, Ireland, 16-18 October 2003, available through <<www.insol-europe.org>>. For another approach (‘substantive consolidation’), see (in Dutch) Reumers, *Het geconsolideerde faillissement* (Consolidated Bankruptcy), in: *Onderneming & Financiering* nr. 56/juli 2003, p. 57 ff.; Medina, *Substantive Consolidation*, in: Norton 2003 Annual Survey of Bankruptcy Law – 363 ff., and Baird, *Substantive Consolidation of Corporations*, Paper presented at US National Bankruptcy Conference Annual Meeting, Washington, D.C., October 2003, available through <<www.iiiglobal.org>>.

<sup>84</sup> Two other companies were incorporated in Scotland and Northern Ireland respectively, but counsel for the petitioner requested adjournment of the petitions of those two companies.

<sup>85</sup> High Court of Justice (Ch D) Leeds 16 May 2003 [Claim Nos. 861 – 876 of 2003] (on file with author).

either Germany or France, the court considers that the petitioner ‘..... must provide sufficient proof that its centre of main interests is in England to rebut the presumption in Article 3(1)’.

The court considers that the three German companies have their registered office in Neuss, Germany, that they conduct their business from three other premises in Germany, but that evidence shows that the majority of the administration of the German companies is conducted from the Bradford office of ISA International. In particular the Leeds court (nr. 13) refers to eight elements:

1. although the German companies have separate bank accounts in Germany, the finance function is operated from Bradford. The business is funded by a sub of Daisytek-ISA through an UK bank, by a factoring agreement through an UK bank, while their finance function is in accordance with English accounting principles, and reviewed and approved by ISA International;
2. the German companies require ISA International’s approval for any buying in excess of € 5000;
3. all senior employees in Germany are recruited in consultation with ISA International;
4. all information technology and support is run from the Bradford office;
5. all pan-European customers are serviced by ISA International; 15 % of the sales of the German companies flows from contracts negotiated by and entered into by ISA International;
6. 70% of the purchases are under contracts negotiated and dealt with from Bradford;
7. all corporate identity and branding are run from Bradford, and
8. the business of the German companies flows from the CEO’s strategy plan, who visits Germany two days a month and spends 30% of his time (mainly in Bradford) on the management of the German companies.

Where recital 13 (‘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’) and art. 3(1) refer to the centre of the debtor’s ‘main’ interest, the court considers that ‘..... the identification of ‘the debtors main interests’ requires the court to consider both the scale of the interests administered at a particular place and their importance and then consider the scale and importance of its interests administered at any other place which may be regarded as its centre of main interest, whether as a result of the presumption in Article 3(1) or otherwise’. The court does hold the criterion that the place (where the debtor conducts the administration of his interests on a regular basis) must be ascertainable by third parties as ‘very important’.<sup>86</sup>

Until here, two questions have been addressed, being: (1) the scope of the evidence of facts to rebut the presumption that the registered office qualifies as COMI (the court determines that it should be ‘sufficient’), and (2) the lines along which interpretation can be given to COMI (the court provides for a balance between ‘scale and place of interests administered’ and any other place that may be seen as COMI, to which scales the decisive needle is: ‘ascertainability’ of this place by third parties). In its judgment the court is satisfied that Bradford is the COMI of each of the German companies on the following ground: ‘third parties’ in recital 13 are the potential creditors. Where the debtor is a trading company, the court holds that the most important groups of potential creditors are likely to be its financiers and its trade suppliers, given the factoring agreement (element 1) and the volume of supplied goods to the German companies contracted through Bradford (element 6). The Judge: ‘It appears that a large majority of potential creditors by value (which I regard as the relevant criterion) know that Bradford is where many important functions of the German companies are carried out. It is clear that the functions carried out in Bradford are important and that the scale of those functions is very significant’. The court applies a test of comparison, as it holds that the ‘local functions’ of the German companies in Germany is limited, referring to (i) element 2, (ii) the additional (?) element that only 30% of stock purchases are negotiated locally, which involve

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<sup>86</sup> Citing the Gevevan Trading (first instance) case and the comment in Report Virgós/Schmit (1996), nr. 75, concerning the need to be able to calculate legal risks by reference to the application on insolvency laws based on a place known to the debtor’s potential creditors.

potential creditors, and (iii) the fact that 85% of sales are negotiated by the German companies, but ‘those activities carry less weight as customers are normally debtors than creditors’.

Here (3) a third question is addressed: how to assess this third parties’ perspective: what is the decisive direction of the needle in the scale? In its nature the Leeds court judgment provides further guidance for the interpretation of COMI, not – like in *Brac Inc* – the geographic location of a COMI, but the qualifying elements that result in the presence of COMI in a Member State. It is interesting to see that in addition to the suggested approach (‘scale and place of interests administered’ and ‘ascertainability’ of this place by third parties), the court takes as point of departure the nature of a company (trading company) and stresses the fact of a large majority of potential creditors, taken by value. Would this mean that for a company that does not do trading (but performs management functions, or is a production company) the court’s approach would not hold? Should the ‘large majority’ (how large?) only be taken by value? Only future court cases may confirm that a reasoning along the lines of the nature of the business of a debtor (here: trading) and the nature (value), not the number (of creditors) will prove to be valid.

Regarding the French company, the court considers that ISA Daisytek SAS trades from premises, which are also its registered office, but for the similar reasons as set out for the German companies its COMI is in Bradford. The court opens main insolvency proceedings.<sup>87</sup>

#### 14. The reactions in Germany

In Germany commentators have reacted with surprise and – to say the least – with anger. Professor Paulus<sup>88</sup> expresses two sources of ‘Irritation’: (i) save for the fact that Daisytek-ISA Ltd is the parent of the German holding company PAR Beteiligung, in England hardly any activity of the three German companies has been determined, and (ii) the court has qualified the facts as COMI with a fossilized shortness (‘formelhafter Kürze’).<sup>89</sup> The latter method, Paulus submits, is built on individual self-persuasion and breaches the ‘office nobile’ of the judge and his duty not to convince, but at least to inform the foreign victims. This approach undermines the principle of mutual trust. Nevertheless, Paulus adds, the system of the Regulation results in the recognition in Germany of the courts judgment opening main proceedings. Only art. 26 InsReg, containing the public order defence<sup>90</sup>, may be applied. To the given facts in the Daisytek case Paulus adds that of the holding PAR Beteiligung the two directors were an English national (husband) B and his German wife P, but for both ISA Deutschland and Supplies Team miss P was the sole director, and that she has no knowledge whatsoever of petitioning for opening of insolvency proceedings in the UK. Although Paulus admits that the law applicable to the insolvency proceeding and their effects is English law,

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<sup>87</sup> Fletcher, *The Challenges of Change: First Experiences of Life under the EC Regulation in the UK*, Paper presented to the Academics’ Meeting of Insol International, ‘Comparative Approaches to Insolvency’, Las Vegas, Nevada, USA, 20/21 September 2003 (forthcoming) refers to a case of the Crisscross Telecommunications group, a group composed of companies formed under several laws, including Swiss law, in which the High Court in London on 20 May 2003 (unreported) made administration orders, including appointments of the same insolvency practitioners as joint administrators, where a likewise COMI interpretation was exercised. Van Galen (footnote above) mentions a similar approach in the Cirio Del Monte case, where the Italian court decided that two Italian companies and a Dutch subsidiary all had their COMI in Rome.

<sup>88</sup> EWIR 2003, p. 709.

<sup>89</sup> Reading these comments it should be noted that Paulus’ comments are most probably based on the judgment of the High Court of Justice Leeds, as reproduced in ZIP 30/2003, p. 1362, which indeed seems very short. My analyses are based on the Court’s Judgment of 8 pages, carrying a stamp date of 6 June 2003 (on file with author).

<sup>90</sup> ‘Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State’s public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual.’

the applicable term of ‘director’ (having power to file in England) in his opinion hardly can be interpreted with the result that it will exclude the one (miss P) who according to German company law is the sole person qualified to represent both German companies.<sup>91</sup>

A few months later Paulus<sup>92</sup> has noted that the exact facts seem unclear<sup>93</sup>, and that the English tradition of given an Order based on the presented evidence, followed a few weeks later with a description of the reasons for the order, does not take into account that the English administrators, appointed on Friday 16 May 2003, have informed miss P on Monday 19 May of her duty (according to Section 64(1) Handelsgesetz) to petition on behalf of the three German companies.<sup>94</sup>

In three nearly similar judgments of 6 June 2003 AG Düsseldorf<sup>95</sup> considers that the court is aware that the Leeds judgment has to be respected, because it was first in time. Then follows: ‘The decision does not bring forward any legal effect towards the debtor-company. For the aforementioned decision has not mentioned and not respected the provisions of the Regulation. It is therefore rectified that the judgment of May 16 has its limits there, were the provisions of the German Insolvenzordnung have their own rules and insofar limit these effects to the preservation measures according to the decision of 19.5.2003.’<sup>96</sup>

Professor Mankowski<sup>97</sup> criticizes severely that English courts provide a remarkable broad interpretation of the COMI concept in art. 3(1) InsReg and nearly always confirm their international jurisdiction, and ignore the rebuttable presumption with regard to the registered office.<sup>98</sup> He submits that a foreign court would have the possibility to test the jurisdiction of the court that opened main proceedings by applying art. 16(1), first sentence (‘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 that it becomes effective in the State of the opening of proceedings’). According to the text, Mankowski submits, the recognition of art. 16 presupposes that according to art. 3 InsReg a duly authorized court, with ‘international jurisdiction’, has opened the main proceedings.<sup>99</sup> I would submit that this masterly example of literary reading does not find any support in the system of the legal framework of the Regulation or e.g. in the Report Virgós/Schmit.<sup>100</sup>

## 15. The reaction in France

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<sup>91</sup> According to his knowledge of the facts Paulus is of the opinion that art. 6 European Convention of Human Rights (the right to be heard) is violated, which would result in applying art. 26 InsReg.

<sup>92</sup> Paulus, *Zuständigkeitsfragen nach der Europäischen Insolvenzverordnung* (Questions of jurisdiction according to the European Insolvency Regulation), ZIP 38/2003, p. 1725, and Paulus, *Bedding Down of Changes*, Paper presented at INSOL Europe Annual Congress, Cork, Ireland, 16-18 October 2003, available through <<www.insol-europe.org>>.

<sup>93</sup> It is argued that Miss P has given an oral power of attorney to B to petition for both German subs of Holding PAR Beteiligung.

<sup>94</sup> The UK administrators have published the judgment of Leeds and their appointment in the German journal *Rheinische Post* of 11 June 2003.

<sup>95</sup> AG Düsseldorf 6 June 2003 (502 IN 126/03), ZIP 30/2003, p. 1363.

<sup>96</sup> ‘Diese Entscheidung entfaltet aber keine Rechtswirkung für das schuldnerische Unternehmen. Den die vorgenannte Entscheidung hat die Vorschriften der EuInsVo weder erwähnt noch beachtet. Es wird deshalb klargestellt, das die Entscheidung von 16.5.2003 seine Grenzen dort hat, wo die Vorschriften der Deutschen Insolvenzordnung eine Regelung getroffen haben und soweit die von hier getroffenen Sicherungsmassnahmen laut Beschluss vom 19.5.2003 Wirkungen entfalten.’

<sup>97</sup> *EwiR* 2003, p. 1767.

<sup>98</sup> Mankowsky attacks this interpretation, which he calls too broad and too aggressive focusing on self interest. The sole example the author refers to is the *Daisytek* case.

<sup>99</sup> Mankowsky denies that recital 22 (see earlier in the text) is specific enough to conclude that his reading is excluded.

<sup>100</sup> The author has been informed that the Düsseldorf judgments have been appealed and that the PAR Beteiligungs proceedings have been ‘converted’ in secondary proceedings.

In France the Tribunal de Commerce of Pontoise (Commercial court) on 26 May 2003 was even more outspoken than the Düsseldorf court. It did put the French company ISA Daisytek SAS into ‘redressement judiciaire’, which is an Annex A proceeding under the Insolvency Regulation and not a liquidation proceeding (the nature of secondary proceedings). Its main reason was that the fact that the French company is a subsidiary of the English company Daisytek ISA Ltd ‘..... did not give international jurisdiction to open insolvency proceedings towards the French company, because the notion of ‘group’ does not have legal standing and that every legal person of the group has a corporate legal standing in its own right; that the decision of the court denies the separate legal existence of companies and could not lead to the application of the European Regulation; that the High Court in Leeds could not base its jurisdiction on the fact that SAS ISA Daisytek has an establishment within its jurisdiction, because an establishment is not a separate corporation.....’.<sup>101</sup>

In appeal the Appeal Court of Versailles by judgement of 4 September 2003<sup>102</sup> extensively reflects the Court of Leeds’ way of reasoning that resulted in the Court’s declaration that it did have jurisdiction over SAS ISA Daisytek, considering that its COMI was in Bradford, England, ending its considerations with: ‘....it is untrue to argue that the High Court in Leeds founded its decision on the notion of establishment, group of companies or subsidiary;’

In addition the Appeal Court decides that art. 16 InsReg results in recognition of the judgment opening the proceedings pursuant to art. 3 InsReg and the administration order relating to SAS ISA Daisytek should be recognized, and that art. 17 InsReg means that this administration order produces, with no further formalities, the same effects in France as under English law. According to the Appeal Court the commercial court of Pontoise did not have power to open main proceedings in France and therefore violates the Insolvency Regulation. The Court overturns the commercial court’s decision.<sup>103</sup> In essence, this is the right approach.<sup>104</sup>

## 16. Concluding remarks

It is interesting to see that in a case of a natural person some courts seem to apply a division between a private person acting as a non-professional (COMI is habitual residence) or acting as professional (COMI is professional domicile). The approach to distinct between a non-professional and a professional debtor has been suggested in literature.<sup>105</sup> Presently courts seem to apply this division, be it with different outcomes. Courts seem furthermore to give different weight to the (subjective) desire of a natural person to have its centre of main interest elsewhere, and act accordingly. Where some authors stress the meaning of subjective factors, like the debtors’ declaration ‘where his emotional ties are’<sup>106</sup>, I would be much more reluctant, because forum shopping awaits in the ambush.

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<sup>101</sup> ‘..... ne donne pas compétence à cette juridiction pour ouvrir une procédure d’insolvabilité à son égard, dans la mesure où la notion de ‘groupe’ n’a pas de portée juridique, et que chaque société du group dispose de la personnalité morale à part entière; que cette décision revient à nier la notion de personnalité morale des sociétés, et ne saurait entraîner l’application du Règlement Communautaire; que la Haute Court de Justice de Leeds ne pouvait pas plus se fonder sur le fait que la SAS ISA Daisytek aurait eu un établissement sur son ressort, car l’établissement est dénué de la personnalité morale.....’.

<sup>102</sup> Court d’Appel de Versailles, 24ème chambre, arrêt no. 12 du 04 septembre 2003 (R.G. No. 03/05038) (on file with author).

<sup>103</sup> In the French newsletter GRIP 21 (Revue de Presse du GRIP 21, Septembre 2003, p. 15), a press clipping of Les Echos is mentioned, referring to the very heavy blow that the judgement of the Leeds court does not provide a criterion re ‘main interests’. It is suggested that the Appeal court’s decision will be brought to the Court de Cassation. It cites the representative of the English administrators confirming that to the employment contracts of some 150 French employees French law will apply (see art. 10 InsReg).

<sup>104</sup> Compare: Moss, The Triumph of ‘fraternité’, ISA Daisytek SAS, available through <<www.iiiglobal.org>>.

<sup>105</sup> See e.g. Moss et al (2002), p. 169.

<sup>106</sup> See Dicey and Morris, Third Cum. Suppl. (2003), nr. 31-090.

With regard to the question whether the Insolvency Regulation applies when the centre of the debtor's main interests is within the Community, but its registered office is outside of the EU, the leading jurisprudence (all in UK cases) presently seem to be that courts in a Member State will have international jurisdiction with regard to a debtor-company that is incorporated in a non-EU State, but will have its COMI within the EU. The Regulation therefore certainly has global impact, as this approach has been taken towards companies incorporated e.g. in Delaware (US), Hong Kong and the Isle of Man.

The most interesting decisions are made in the *Daisytek* cases. The High Court in Leeds, opening main proceedings against three German companies and one French company, provides plenty food for thought with regard to the determination of COMI. In addition: in weighing the balance, suggested by this court ('scale and place of interests administered' and 'ascertainability' of this place by third parties), the court takes as point of departure the nature of a company (trading company) and stresses the fact of a large majority of potential creditors, taken by value. Here, as analysed, a lot of questions remain open: would this mean that for a company that is not involved in trading (but performs management functions, or is a production company) the approach needs to be a different one? Should the 'large majority' (how large?) only be taken by value?

It is evident that it is too early to draw any bold conclusions, but my first observation is that the way the Regulation arranges for the concept of 'the center of main interest' provides a fact intensive standard with quite some room for interpretation, which in its core is contrary to the desire of business life to provide predictability. It should furthermore be born in mind that in interpreting these vague notions (centre of main interest, establishment) regard is to be taken to the general principles of Community law, e.g. (i) the principle of equal treatment or non-discrimination or (ii) the principle of legal certainty. The reasoning the High Court in Leeds provides, nevertheless, seems sustainable, as is certainly the case with the judgment in Appeal from the Versailles court.

For those who will be conscious of the impact of judgments like this for day-to-day business life and the encouragement of providing information with regard to the EU Insolvency Regulation, it is hoped that in the very near future a central source of publication of judgements from courts in Member States will be available. It should be a challenge for e.g. a professional organization of insolvency practitioners to create a database, in which (translated) court judgments and decisions (and relevant texts and literature) would be made available for those who are advising clients or deciding individual cases and for all others who may take an interest in furthering the harmonization of European insolvency law.

Finally, a lesson might be drawn from the *Daisytek* case, in that the first formal declaration of a court opening proceedings should provide information which in itself is specific enough with regard to the courts international jurisdiction. The administration orders from the High Court of Leeds, dated 16 May 2003, has aroused suspicion abroad. The reaction is justified where these orders do not contain any information – in the foreign perspective – of applying the rebuttable presumption with regard to the registered office. One only finds a general reference to art. 3 InsReg. The principle of mutual trust in this way appeals in the most strongest way to someone's empathy. Initiating parties, their counsel, but most certainly judges should bear in mind the need to have all information available. In practice, time constraints will limit the time to get the information on the table. In an unopposed petition to open main proceedings, I would argue, that the principle of mutual trust should make the judge very conscious of the position of the foreign debtor and his proper representation. As a central aim of the Regulation is to avoid incentives for parties seeking to obtain a more favourable legal position (forum shopping), judges may wish for more than 'sufficient' proof for rebutting the presumption, leaving it to petitioners and their counsel to provide an even better case, which leaves without any reasonable doubt that the request for an opening decision for this specific court indeed is not a sham or a tactical manoeuvre.