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GROUP INSOLVENCY – FORUM – EC REGULATION AND MODEL LAW UNDER THE INFLUENCE OF ENGLISH PRAGMATISM REVISITED

*Gabriel Moss QC**

INTRODUCTION

A period of seven years is a good time to revisit my paper given in the symposium, Bankruptcy in the Global Village: The Second Decade, and published in 2007 as *Group Insolvency—Choice of Forum and Law: The European Experience Under The Influence of English Pragmatism*.¹

Choice of forum and law for group insolvencies has developed considerably since the publication of my paper, but I am glad to say that, at present, the triumph of English pragmatism is complete and has reached the highest judicial level—that of the European Court of Justice (ECJ).

The case law of the ECJ, sometimes more grandly and accurately referred to as the Court of Justice of the European Communities (CJEU), does not normally cite any national case law at all in its judgments. The ECJ normally only cites its own cases. However, while the judgments of the Court itself are usually quite brief and to the point, the Advocate General, who has no exact replica in a common law system, usually provides a longer and more detailed initial judgment. The Advocate General is a French law-based concept.² He reads the written submissions, attends the oral hearing, and writes an opinion for the Court to consider. In most cases, his opinion is accepted and his more detailed reasons can be treated as the justifications for the Court's brief decisions. If, however, the Court disagrees with the Advocate General, the Advocate General's opinion is sometimes said to be treated like a dissenting judgment.³

One very serious disadvantage of the ECJ is that, on the basis of my discussions with experts from other European Union countries, there was no judge or Advocate General of the court with any prior knowledge of

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1. See Gabriel Moss QC, *Group Insolvency—Choice of Forum and Law: The European Experience Under the Influence of English Pragmatism*, 32 BROOK. J. INT'L L. 1005 (2007).

2. See Stuart Isaacs QC & Richard Brent, *The Insolvency Regulation as a Community Legal Instrument*, in THE EC REGULATION ON INSOLVENCY PROCEEDINGS: A COMMENTARY AND ANNOTATED GUIDE ¶ 2.30 (Gabriel Moss et al. eds., 2d ed. 2009); Cyril Ritter, *A New Look at the Role and Impact of Advocates-General*, 12 COLUM. J. EUR. L. 751, 754 (2006).

3. Michal Bobek, *The Court of Justice of the EU*, (Dep't of Eur. Legal Studies, College of Europe, Research Paper), available at <https://www.coleurope.eu>.

insolvency law—at least when Regulation 1346/2000 on insolvency proceedings (the Regulation) came into force May 31, 2002. It would not be suitable for an English lawyer to complain too loudly, since England has a long tradition of the “amateur gentleman” approach to judging and only recently accepted the notion of judges having any specific specialisms. Even today, judicial expertise is limited to a few areas such as intellectual property and construction, with other specialisms being quite general, such as “Commercial,” “Chancery,” “Family,” or “Crime.”⁴

North American commentators tend to assume that the ECJ is a kind of Supreme Court for the European Union. That is not so in the technical sense. The ECJ does not decide cases,⁵ apart from a small minority of cases that actually relate to the internal workings of the European Communities.⁶ Instead, the ECJ addresses preliminary issues that are necessary for national courts to decide cases. The decisions of the ECJ are binding on national courts on legal points and do not purport to decide the outcome of any case; it is left to the national courts to decide cases by applying the legal rulings of the ECJ.⁷

I. THE TRIUMPH OF THE “HEAD OFFICE FUNCTIONS” TEST IN THE ECJ

One of the earliest issues encountered in relation to the Regulation was the question of how to locate “the centre of main interests” (COMI) of a subsidiary in a group registered in a different EU country from its parent.⁸ Under Article 3(1) of the Regulation, the location of COMI governs jurisdiction to open main proceedings within the EU.⁹ The question is where the COMI would be located if the subsidiary traded day-to-day in the country of registration but was run from group headquarters in a different EU country. The answer I developed, along with my colleague Felicity Toubé QC, was to consider COMI to be where the “head office functions” of the debtor were carried out.¹⁰ Accepted by the court in the case of *Enron Directo SA*, the court held the COMI of the Spanish registered subsidiary of Enron, under the operation of sub-group headquarters in England, was in

4. See THE ENGLISH LEGAL SYSTEM ch. 4 (Garry Slapper & David Kelly, 14th ed. 2014).

5. See Isaacs & Brent, *supra* note 2, ch. 2 § D.

6. See WYATT & DASHWOOD’S EU LAW ch. 7 (Alan Dashwood et al. eds., 6th ed. 2011).

7. *Id.*

8. See Council Regulation 2000/1346, 2000 O.J. (L 160) 1 (EC) [hereinafter EU Insolvency Regulation].

9. *Id.* art. 3(1).

10. The approach was first argued by us and accepted by the court in the case of *Enron Directo SA* (Lightman J., July 4, 2002—no written judgment given). A summary of the case can be found on the website of the International Insolvency Institute. Gabriel Moss, *Summary of Re Enron Directo Sociedad Limitada*, INT’L INSOLVENCY INST. (June 24, 2008, 4:51:13 PM), <http://www.iiiglobal.org/component/jdownloads/finish/39/401.html>.

the United Kingdom, enabling English courts to open insolvency proceedings.¹¹

The issue of whether to apply the “head office functions” approach arose in the first case on COMI referred to by the ECJ—*In re Eurofood IFSC Ltd*. The *Eurofood* Court had to determine the COMI of an Irish registered subsidiary of Parmalat, whose sole function was to raise finance for the Italian registered Parmalat.¹² The ECJ held that mere parental control did not rebut the statutory presumption that COMI was based on the location of the place of registration under the Regulation.¹³

Following the decision of the ECJ in the *Eurofood* case,¹⁴ there arose a short-lived heretical school that read the decision as having rejected the “head office functions” approach.¹⁵ In fact, the *Eurofood* judgment said nothing at all about the “head office functions” test.¹⁶ There were, however, some supportive statements in the Advocate General’s opinion for the “head office functions” approach.¹⁷

Nevertheless, the heretical view, based on a misunderstanding of both *Eurofood* and the previous national law case law,¹⁸ got a brief outing in the English Court of Appeal in *In re Stanford International Bank Ltd* case.¹⁹ This was a battle between Antiguan liquidators, appointed in the place of incorporation of the Ponzi scheme bank and U.S. receivers. At least one judge in the Court of Appeal seemed to think that the “head office functions” approach was inconsistent with *Eurofood* on the basis that it was not founded on “objective and ascertainable” criteria.²⁰ However, on a sensible reading, the “head office functions” approach has always assumed the use of objective and ascertainable criteria.²¹

In *Stanford*, all the overt criteria pointed to Antigua as the place of the “centre of main interests.”²² The fact that the Ponzi scheme may have operated out of the United States could not change this. Both the existence of the fraud and its centre were secret and could hardly be relevant to an ascertainment of COMI based on objective and ascertainable facts.

The English Court of Appeal also confirmed the assumption made in England that COMI meant the same under the EC Regulation and the

11. *Id.*

12. Case C-341/04, *In re Eurofood IFSC Ltd*, 2006 E.C.R. I-3854 (often mistakenly cited as “Eurofoods”).

13. *Id.*; EU Insolvency Regulation, *supra* note 8, art. 3(1).

14. Case C-341/04, *In re Eurofood IFSC Ltd*.

15. *See Moss, supra* note 1, at 1014–1017.

16. *See id.* at 1016.

17. *See id.* at 1016.

18. *See Isaacs & Brent, supra* note 2, para. 8.85 n.109.

19. *In re Stanford Int’l Bank Ltd*, [2010] EWCA (Civ) 137.

20. *Id.* paras. 50–56.

21. *See generally* Isaacs & Brent, *supra* note 2.

22. *In re Stanford Int’l Bank Ltd*, para. 31.

Model Law.²³ This meant that English courts faced with Model Law recognition issues would follow precedent interpreting the Regulation, as in *Stanford*.

The deviation in the reasoning in *Stanford* with respect to the “head office functions” approach cannot now stand with the position taken in the *Interedil* case decision by the ECJ.²⁴

Interedil is one of those rare cases where considering the facts can only confuse the reader, and people are well advised to focus only on the legal reasoning. We have to remember that we are not looking for the holding in a Supreme Court case, since we are not dealing with a decision of a Supreme Court in any usual sense. Rather, we are looking for a sanctioned interpretation of an undefined, but central, concept in the Regulation.

The ECJ judgment observed that *Interedil* was formed as a limited liability company under Italian law and had its registered office in Italy.²⁵ It then notes that “[o]n 18 July 2001, [Interedil’s] registered office was transferred to London (United Kingdom).”²⁶

Unfortunately, that is not possible, at least not literally. Leaving aside the question of a cross-border merger, which is not suggested, a *de jure* transfer is impossible under English law. A *de facto* transfer of a registered office can only be achieved by registering a new company in England, and transferring the business from the Italian company before the Italian company dissolved under Italian law.²⁷ It is not suggested that that actually happened.

So what did happen? The next sentence in paragraph 10 reads: “On the same date, it was removed from the Register of Companies of the Italian State.”²⁸ The statement suggests the company was dissolved as an Italian company, although no suggestion is made that there was a new company registered in England. The judgment goes on to state that “[f]ollowing the transfer of its registered office, *Interedil* was registered with the United Kingdom Register of Companies and entered in the Register as an “FC” (Foreign Company).”²⁹ As previously explained, there could not—strictly speaking—have been a “transfer” of the registered office. Furthermore, a registration as a Foreign Company is not a form of incorporation and relates only to the requirement to register as a company carrying on a business in England. In fact, as a matter of logic, a foreign registered company can only

23. *Id.* para. 54.

24. Case C/396/09, *Interedil Srl (in liq.) v Fallimento Interedil Srl*, 2012 E.C.R. I-9939.

25. *Id.* para. 10.

26. *Id.*

27. See GOWER & DAVIES’ PRINCIPLES OF MODERN COMPANY LAW § 6-17 (Paul Davies et al. eds., 9th ed. 2012).

28. Case C/396/09, *Interedil Srl*, para. 10.

29. *Id.*

register as a foreign company doing business in England if it actually exists under its own incorporation law.³⁰

But it gets worse. In paragraph 11, the Court says that Interedil claims to have been “removed from the United Kingdom Register of Companies on 22 July 2002.”³¹

This probably means that Interedil ceased to be registered as a Foreign Company doing business in England, but the move was interpreted by the ECJ as meaning that Interedil ceased to exist.³²

On October 28, 2003, an Italian bank filed a petition with the first instance court in Bari, Italy for the opening of bankruptcy proceedings against Interedil.³³ The non-existent Interedil challenged the jurisdiction of the Bari court on the grounds that, as a result of the “transfer” of the registered office to the UK, only the courts of the UK had jurisdictions over insolvency proceedings.³⁴ Thereafter, the procedural tangle becomes as surreal as the facts.

On December 13, 2003, Interedil (despite its assumed non-existence) requested that the Italian Supreme Court of Cassation give a ruling on the preliminary issue of jurisdiction.³⁵ However, on May 24, 2004, without waiting for a decision from the Supreme Court of Cassation, the first instance court in Bari ordered that Interedil be wound up.³⁶ On June 18, 2004, Interedil lodged an appeal to the Supreme Court of Cassation.³⁷

On May 20, 2005, the Supreme Court of Cassation decided the preliminary issue to the effect that the Italian courts had jurisdiction. It treated Interedil as being registered in England. However, it held that the presumption based on the place of the registered office set out in the Regulation could be rebutted by (i) the presence of movable property in Italy owned by Interedil, together with (ii) a lease agreement in respect of two hotel complexes and a contract concluded with a banking institution, as well as (iii) the fact that the Bari register of companies had not been notified of the “transfer” of Interedil’s registered office.³⁸

The first instance court in Bari now had a problem. On the one hand, the ruling of its own Supreme Court of Cassation would normally bind it in relation to preliminary issues. On the other hand, that ruling appeared to be

30. This follows from the principle that the question of whether a company exists is governed by the law of the place where the company was purportedly incorporated. See GOWER & DAVIES' PRINCIPLES OF MODERN COMPANY LAW, *supra* note 27, § 6-2.

31. Case C/396/09, *Interedil Srl*, para. 11.

32. *Id.* paras. 22–25.

33. *Id.* para. 12.

34. *Id.* para. 13.

35. *Id.*

36. *Id.* para. 14.

37. *Id.* para. 15.

38. *Id.* para. 16.

inconsistent with the ECJ's decision in *Eurofood* on the approach to COMI. It was in these circumstances that the first instance court in Bari decided to stay the proceedings and refer preliminary issues to the ECJ.³⁹

Before we come to the main point about COMI, it is worth noting two other important points that emerge from the decision of the ECJ.

Firstly, the ECJ held that, as a result of constitutional changes in the European Union, it was now possible for even a first instance court to refer preliminary issues to the ECJ.⁴⁰ It was no longer necessary for parties to work their way through to final appellate courts in their home jurisdiction (or as far as possible in that direction) before a reference could be made.

Secondly, the ECJ firmly emphasized that, in any conflict between the rulings of local appellate courts and the ECJ, the ECJ's decision had to be followed.⁴¹

It is now time to put behind us the factual misunderstandings and procedural complications, which could have featured in a Rossini comic opera. We have to accept that the ruling is based on certain facts, however improbable. Those facts include the supposed transfer of registration to England, followed by its supposed dissolution under English law, as opposed to the presence of certain types of assets in Italy.⁴²

In terms of timing, the ECJ held that, in principle, the time at which one looks at COMI for the purposes of the allocation of international jurisdiction within the European Union is the time at which the request is filed to open insolvency proceedings.⁴³ Note that the emphasis is on the date of filing, not the date of hearing or judgment or the date on which insolvency proceedings are to be opened. This results from the principle that if a court has jurisdiction when a petition is filed, it does not lose jurisdiction by reason of any subsequent events,⁴⁴ a point decided in the previous ECJ case of *Staubitz-Schreiber*.⁴⁵

What if the debtor no longer exists? No problem—in that case, one has to look at the place of COMI “. . . at the time when the debtor company was removed from the Register of Companies and ceased all activities.”⁴⁶

Finally, we come to the relevant criteria. Needless to say, and as mentioned above, facts which go to rebut the presumption based on the place of registered office (i.e., at the time of removal from the Register) have to be objective and ascertainable by third parties “in order to ensure

39. *Id.* para. 17.

40. *Id.* paras. 18–21.

41. *Id.* paras. 34–40.

42. *Id.* paras. 10–25.

43. *Id.* para. 55.

44. The principle of *perpetuatio fori*. See MIGUEL VIRGOS & FRANCISCO GARCIMARTIN, THE EUROPEAN INSOLVENCY REGULATION: LAW AND PRACTICE 54 (2004).

45. Case C-1/04, *In re Staubitz-Schreiber*, 2006 E.C.R. I-719.

46. *Id.* para. 58.

legal certainty and foreseeability.”⁴⁷ That was already established by the *Eurofood* case.

The ECJ then goes on to adopt what is, in substance, the “head office functions” or “command and control” test for COMI. Thus, at paragraph 50:

[W]here the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions that the company had taken, in a manner that is ascertainable by third parties, in that place, the presumption . . . that the centre of the company’s main interest is located in that place is wholly applicable.⁴⁸

However, if the facts point away from the place of the registered office, “[t]he presumption . . . may be rebutted . . . where, from the viewpoint of third parties, the place in which a company’s central administration is located is not the same as that of its registered office.”⁴⁹

There then follows one of those generalizations, which appellate courts are fond of and which can be summarized as “it all depends on the facts of each case.” The ECJ stated:

The factors to be taken into account include, in particular, all the places in which the debtor company pursues economic activities and all those in which it holds assets, as far as those places are ascertainable by third parties . . . those factors must be assessed in a comprehensive manner, account being taken of the individual circumstances of each particular case.⁵⁰

More helpfully, the ECJ then emphasizes that the key criterion is the location of “the company’s *actual centre of management and supervision and of the management of its interests*.”⁵¹ The mere presence of assets and contracts for the financial exploitation of those assets in another Member State, other than where the registered office is located, “cannot be regarded as sufficient factors to rebut the presumption” based on the location of the registered office.⁵²

In summary, the judgment ruled:

A debtor company’s main centre of interests must be determined by attaching greater importance to the place of the company’s central administration, as may be established by objective factors which are ascertainable by third parties. Where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken,

47. See Case C/396/09, *Interedil Srl*, para. 49.

48. *Id.* para. 50.

49. *Id.* para. 51.

50. *Id.* para. 52.

51. *Id.* para. 53.

52. *Id.*

in a manner that is ascertainable by third parties, in that place, the presumption in that provision cannot be rebutted. Where a company's central administration is not in the same place as its registered office, the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State.⁵³

This approach to COMI is of critical importance in the case of groups. Prior to the opening of insolvency proceedings, "the company's actual centre of management and supervision and of the management of its interests" will be where the head office functions are actually carried out.⁵⁴ That, in turn, is likely to be centralized in a group situation, either in the place of administration of the entire group or in the place of administration of a sub-group, such as a European sub-group of a US group headquartered in London or Paris. The administration of the group or sub-group companies will tend to be carried out from that one place and, generally speaking, it will be convenient to conduct a rescue or reconstruction or a sale of the entire business of the group (or one or more of the businesses of the group) from that one place. This is particularly so where, as often now happens, businesses straddle across different corporate entities.

II. THE "HEAD OFFICE FUNCTIONS TEST" COMES TO THE UNITED STATES

Whereas under the EC Regulation, the function of COMI is to determine the allocation of jurisdiction to open main proceedings as between different Member States of the European Union, the function of COMI under the UNCITRAL Model Law is to act as the key criterion for the recognition of main proceedings. This difference has affected the timing issue: whereas COMI, for the purposes of the EC Regulation, is judged at the time of the request being filed for the opening of insolvency proceedings, the relevant time for judging COMI under Chapter 15 of the U.S. Bankruptcy Code (the enactment of the Model Law in the United States) is the time of filing the request for recognition.⁵⁵ *In re Fairfield Sentry Limited v. Krys* decided that COMI was to be determined at filing for recognition. The same case also heralded the arrival of what is, in

53. *Id.* ruling para. 3 (emphasis added).

54. *Id.* para. 53.

55. *Morning Mist Holdings Limited v. Kenneth Krys (In re Fairfield Sentry Limited)*, 714 F.3d 127, 137 (2d Cir. 2013).

substance, the “head office functions” approach in the United States and neatly correlates with *Interedil*.

Fairfield Sentry was the largest feeder fund for Bernard Madoff.⁵⁶ When Madoff was arrested, Sentry’s two independent directors suspended share redemptions and focused on winding down Sentry’s business and on preserving assets in anticipation of litigation and bankruptcy.⁵⁷ Teleconference board meetings were initiated by Sentry’s registered agents in the British Virgin Islands (BVI), and correspondence with shareholders about the measures that were taken were issued from Sentry’s address in the BVI.⁵⁸ The independent directors later constituted themselves as a litigation committee with the authority to consider, commence, and settle litigation by or against Sentry.⁵⁹ Subsequently, in July 2009, the BVI court appointed liquidators and gave them custody and control of the assets.⁶⁰ The liquidators ran matters from the BVI, and later applied for recognition under Chapter 15 of the U.S. Bankruptcy Code.⁶¹ Sentry’s registered office was at all times in the BVI.⁶²

In considering the question of the location of COMI, the Second Circuit held that “any relevant activities, including liquidation activities as administrative functions, may be considered in the COMI analysis.”⁶³ They referred to the rebuttable presumption based on the place of the registered office and quoted a list of relevant factors from the judgment in *In re SPhinX Limited*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006):

Various factors, singly or combined, could be relevant to such a determination: the location of the debtor’s headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor’s primary assets; the location of the majority of the debtor’s creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.⁶⁴

The Second Circuit points out that this is a helpful guide, but “consideration of these specific factors is neither required nor dispositive.”⁶⁵

The key point appears to emerge from a footnote where the Second Circuit pointed out that the “principal place of business” approach

56. *Id.* at 130.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 131.

61. *Id.*

62. *Id.* at 130.

63. *Id.* at 137.

64. *Id.*

65. *Id.*

employed in a previous case “does not control the analysis.”⁶⁶ So what does? Here we come to the crux: “But to the extent that the concepts are similar, a court may certainly consider a debtor’s ‘nerve center’, including from where a debtor’s activities are directed and controlled, in determining a debtor’s COMI.”⁶⁷

Thus, the Second Circuit comes into accord with the “head office functions” or “command and control” approach in *Interedil*.

In applying the test, the Second Circuit quoted a finding by the bankruptcy court:

[T]he Debtors have no place of business, no management, and no tangible assets located in the United States. Rather, the Debtors’ activities for an extended period of time have been conducted only in connection with winding up the debtors’ business The Court finds that the facts now extant provide a sufficient basis for finding that the Debtors’ COMI for the purpose of recognition as a main proceeding as in the BVI, and not elsewhere.⁶⁸

Importantly, the Second Circuit went on to rely on the finding of the bankruptcy court that “. . . even though Sentry had assets in other jurisdictions, the *administration of its affairs in the relevant time was orchestrated from the BVI.*”⁶⁹

III. THE CURRENT POSITION

We can now see that the “head office functions” approach to COMI, initiated in the case of *Enron Directo SA* in July 2002, has now been adopted at the highest levels, both in the EU and in the United States.⁷⁰ This also involves the adoption of the English pragmatic approach taken in *Enron Directo* based on the idea that the administration of the rescue, reorganization, or sale of the business can most conveniently be carried out at the same place as that in which it was run prior to proceedings, which, in the case of a group, will be the group or sub-group center where the “headquarters” functions are carried out.

IV. AVOIDING SECONDARIES

Even where main proceedings have been opened for the group companies in one location, the smooth process of rescue can be disrupted by the opening of a secondary proceeding in another country.⁷¹ I have

66. *Id.* at 138 n.10.

67. *Id.* (emphasis added).

68. *Id.* at 138.

69. *Id.* at 139 (emphasis added).

70. Moss, *supra* note 1, at 1010.

71. *Id.* at 1017.

explained the technique used in *Collins & Aikman*⁷² in which the UK administrators of the UK main proceedings for non-UK, but EU-registered group companies, met with committees of local creditors and dissuaded them from applying for the opening of secondary proceedings in return for assurances that local law priorities would be respected.⁷³ This approach was mostly successful, and the legal problems were solved in the judgment.⁷⁴

Thus, unnecessary and disruptive secondaries in other EU countries have been avoided by means of undertakings promising to respect local priorities. Such undertakings are, however, not necessarily available in all other EU countries. The process used in England is admired abroad and has acquired the name “synthetic secondary.” It is considered to be so useful that the European Commission has suggested that it be legislated for all EU countries affected by the Regulation by means of an amendment to the Regulation.⁷⁵ A statutory amendment expressly giving such powers to main liquidators in all Member States would obviously be useful. This is yet another pragmatic solution to what might otherwise be an impractical legal situation.

As far as England is concerned, this development of “synthetic secondaries” has been followed up and consolidated. In *Nortel*⁷⁶—a massive collapse affecting Canada, United States, Europe, and others—the UK administrators in the UK main proceedings for the various non-UK European registered companies obtained the permission of the English court to give the types of undertakings I have just mentioned.⁷⁷ The court gave permission and, again, the opening of secondaries was generally avoided, leading to a beneficial sale of the various businesses of the group.⁷⁸

One of the concerns of the *Nortel* case was that, in some European jurisdictions, notice of a request to the local court to open a secondary proceeding might not be given to the UK main proceeding administrators. Accordingly, the UK main administrator might not get an opportunity to oppose such an opening as both unnecessary and destructive of value.

In the case of *Rover*,⁷⁹ the Court of Appeal of Versailles on December 15, 2005 had declined to open secondary French proceedings in a case where that was unnecessary for the protection of local interests or the

72. *Re Collins & Aikman Europe SA*, [2006] EWHC (Ch) 1343.

73. *Id.* para. 8.

74. *See generally id.*

75. *See Proposal for a Regulation of the European Parliament and of the Council Amending Council Regulation (EC) No. 1346/2000 On Insolvency Proceedings*, sec. 3.1.3, COM (2012) 744 final.

76. *Re Nortel Networks SA*, [2009] EWHC (Ch) 206.

77. *Id.* para. 14.

78. *See generally id.*

79. Cour d’appel [CA] [regional court of appeal] Versailles, 2006, I.L.Pr.32 (Fr.).

realization of assets. The court stated that the UK main proceeding administrators had argued,

[W]ithout contradiction that the insolvency proceedings are progressing without difficulty, and that they are preserving the interests of all concerned; they hold that single proceedings permit continuation of activity and hence sale of vehicles over a longer period, and allow co-ordination of the sales operations throughout the territory of Europe; in their eyes secondary insolvency proceedings would multiply costs and formalities to no purpose.⁸⁰

On the basis of that, the Court of Appeal of Versailles concluded that it “does not appear to be demonstrated that the opening of secondary proceedings would offer advantages in this case, in particular by improving the protection of local interests or the realization of assets.”⁸¹

This decision was encouraging in suggesting that secondary proceedings should not be allowed to disrupt main proceedings unless there is some particular purpose, such as the protection of local interests or the realization of assets.⁸² In most cases under the Regulation, realization of assets does not require a local proceeding, since the main administrator’s powers of disposal extend throughout the EU (except Denmark) and the focus is on the protection of local interests.⁸³ The type of undertaking given in both *Collins & Aikman* and *Nortel* sufficiently protected local interests by ensuring that local law priorities relating to distribution were to be respected. Accordingly, there is no practical point of interest in opening secondary proceedings.

As a matter of procedure, however, main administrators would want to be as certain as possible that they would actually get notice of any request to open a secondary proceeding, so that such arguments could be deployed. In view of the fact that such notice is not required in all the countries in the EU, a new approach was developed in *Nortel*.

At the request of the UK administrators in the main proceedings, the judge in England agreed to send out “letters of request” to all the relevant European courts asking them to ensure that notice was given to the UK main administrators of any request to open a secondary proceeding, so as to enable them to oppose any such request.⁸⁴ Anecdotal evidence suggests that some European courts were rather surprised by the request, but no court expressly rejected the approach. In any event, the efficacy of the tactic was not tested.

80. *Id.* para. 46.

81. *Id.* para. 47.

82. See also discussion *infra* of Case C-116/11, *Bank Handlowy w Warszawie SA v. Christianapol sp. z o.o.*, (Nov. 22, 2012), <http://curia.europa.eu>.

83. See EU Insolvency Regulation, *supra* note 8, art. 18(3).

84. *Re Nortel Networks SA*, [2009] EWHC (Ch) 206 para. 14.

V. WINDING UP AND WINDING DOWN ACTIVITY

Recalling *Fairfield Sentry*, the Second Circuit regarded the activities of the independent directors, and later the liquidators, in winding down and winding up the company's affairs as being relevant to the question of the location of COMI. An analogous issue has arisen in England in relation to the criterion of "establishment," which, under the EC Regulation, must be sufficiently shown before there can be jurisdiction to open a secondary proceeding. Subject to some differences in wording, the "establishment" criterion is the key criterion for the recognition of non-main proceedings under the Model Law and Chapter 15 of the U.S. Bankruptcy Code.⁸⁵

Establishment has been addressed in the case of *In re Olympic Airlines SA*.⁸⁶ The Greek company Olympic Airlines was liquidated through main proceedings in Greece and transferred its airline business to the United Kingdom. The English Court of Appeal held that the activities at the London branch of Olympic Airlines were insufficient "establishment" for the purposes of opening secondary proceedings in England.⁸⁷ The U.K. Supreme Court has agreed to hear an appeal from this decision in early February 2015.

VI. DISTRIBUTION OF ASSETS

The EC Regulation does not expressly deal with potential conflicts between main and secondary proceedings. Recital (20) in the Preamble to the Regulation does, however, refer to the "dominant role of the main insolvency proceedings."⁸⁸ There are detailed rules in the Regulation to ensure that the main proceedings remain dominant. For example, secondary proceedings opened after a main proceeding can only be liquidation proceedings.⁸⁹ The liquidator or administrator in the main proceeding has special rights such as applying for a stay of the process of liquidation in the secondary proceeding or proposing a plan of reorganization.⁹⁰

With regard to the question of a dispute as to whether a particular asset falls within the main or secondary proceedings, a preliminary issue has been referred by the Versailles first instance court to the ECJ in the matter of the French Nortel Company.⁹¹

85. See U.N. COMM. ON INT'L TRADE L., UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY WITH GUIDE TO ENACTMENT AND INTERPRETATION, art. 17(2)(b), U.N. Sales No. E.14.V.2 (1997); 11 USC § 1517(b)(2).

86. *Re Olympic Airlines SA*, [2012] EWHC (Ch) 1413.

87. *Id.*

88. See EU Insolvency Regulation, *supra* note 8, recital 20.

89. *Id.* art. 3(3).

90. *Id.* arts. 33–34.

91. Case C-649/13, Comité d'entreprise de Nortel Networks and Others, available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62013CN0649&from=EN>.

The original proceeding was brought by employees who claimed to be entitled to certain severance payments.⁹² In addition to claiming that the payments were due, they have also tried to raise a question as to whether certain assets fall within the main or secondary proceedings. The French liquidator, who was a party to this proceeding, has in effect, joined the UK administrators in the main proceedings on the basis that the question relating to the attribution of assets affects the rights in the main proceedings. The preliminary issue raises the question of whether the French court, as the court of the secondary proceedings, actually has jurisdiction to hear a dispute about the correct allocation of assets, as opposed to the court of the main proceeding. There is also the issue of whether the question of allocation can be judged in accordance with national law or whether the rules as to deemed location of assets contained in Article 2(g) of the Regulation override national law.

VII. WIDER ISSUES ABOUT THE RELATIONSHIP OF MAIN AND SECONDARY PROCEEDINGS

The ECJ had to grapple with some tricky issues relating to the relationship between main and secondary proceedings in a group situation in the case of *Bank Handlowy v. Christianapol sp. z.o.o.*⁹³

The debtor company, Christianapol, was registered in Poland but its ultimate parent was a French company.⁹⁴ On October 1, 2008, the French first instance (French court) court at Meaux opened what the French regard as pre-insolvency proceedings against Christianapol on the basis that COMI was in France.⁹⁵ The type of proceedings opened were “sauvegarde” proceedings, which are, strictly speaking, not insolvency proceedings, but pre-insolvency or reorganization proceedings.⁹⁶ Nevertheless, they are (by subsequent amendment procured by France) listed in Annex A of the Insolvency Regulation as an insolvency proceeding.⁹⁷

Subsequently, in April and June 2009, the bank, as creditor of the company, requested a court in Poland to open secondary insolvency proceedings.⁹⁸ On July 20, 2009, the French court approved a rescue plan for the debtor company under which debts would be paid off in installments spread over 10 years.⁹⁹ There was a prohibition on the transfer of the

92. The following discussion is based on the author’s personal knowledge gained while co-drafting the English administrators’ submissions to the ECJ.

93. Case C-116/11, *Bank Handlowy w Warszawie SA v. Christianapol sp. z.o.o.*, (Nov. 22, 2012), available at <http://curia.europa.eu>.

94. *Id.* para. 17.

95. *Id.* para. 18.

96. *Id.* paras. 51–53.

97. EU Insolvency Regulation, *supra* note 8, ann. A.

98. Case C-116/11, *Bank Handlowy*, para. 19.

99. *Id.* para. 20.

business in Poland and of certain defined assets belonging to the debtor.¹⁰⁰ Amongst other things, the French court appointed a person to oversee the implementation of the plan.¹⁰¹

The debtor argued, among other things, that the claims of the bank and other creditors had been compromised by the French rescue plan and the claims could not be used to apply for secondary proceedings in Poland.¹⁰² The debtor wanted the application for the opening of secondary proceedings to be dismissed.¹⁰³

The ECJ was left to tackle some tricky issues. Firstly, as I pointed out in my 2007 article, the text of the Regulation was out of date by the time the Regulation was brought.¹⁰⁴ It assumed that proceedings would be insolvency proceedings and did not really cater, at least expressly, for rescue or reorganization proceedings.¹⁰⁵ It also assumed that debtors would be insolvent, according to domestic law criteria, before they entered any of the proceedings falling within the Regulation.¹⁰⁶ It is on this basis that Article 27 of the Regulation appears to provide that, when one seeks the opening of a secondary proceeding, one does not have to reargue the issue of insolvency: this is conclusively presumed from the opening of the main proceeding.¹⁰⁷

In addition to the non-insolvency proceedings listed in Annex A of the Regulation, EU Member States were allowed to add proceedings that were very clearly not insolvency proceedings by Continental Europe standards, but are referred to as “pre-insolvency proceedings.” The French sauvegarde procedure is a very good example. It is meant to be a pre-insolvency proceeding, which prevents insolvency under French law from ever occurring. If one has reached insolvency in the French law sense, it is too late and an insolvency proceeding must be filed.¹⁰⁸

One question that arose in the *Bank Handlowy* case was the position the Polish court should take when faced with a request for the opening of a secondary proceeding. The main proceeding had been a sauvegarde proceeding opened specifically on the basis that the debtor was *not* insolvent under French law. Logically, the prior question was whether the Polish court had to accept the sauvegarde proceeding as being within the Regulation at all. For this purpose, the ECJ had to reconcile Article 1(1),

100. *Id.*

101. *Id.*

102. *Id.* para. 22.

103. *Id.*

104. See Moss, *supra* note 1, at 1005.

105. See EU Insolvency Regulation, *supra* note 8.

106. See *id.*

107. *Id.* art. 27.

108. See PHILLIP WOOD, PRINCIPLES OF INTERNATIONAL INSOLVENCY § 6-055 (2d ed. 2007).

“[t]his Regulation shall apply to collective insolvency proceedings . . . ”¹⁰⁹ and Article 2(a), which, for the purposes of the Regulation, defines “insolvency proceedings” as being the collective proceedings referred to in Article 1(1).¹¹⁰ So far, so circular. However, Article 2(a) goes on to say, “[t]hese proceedings are listed in Annex A.”¹¹¹

By the time of the *Bank Handlowy* case, the French pre-insolvency *sauvegarde* proceeding had come to be listed in Annex A. The only way out of the circle was to go to Annex A, and the ECJ appears to have accepted that the *sauvegarde* proceeding had to be treated as an insolvency proceeding within the Regulation despite the fact that it is very clearly in fact a pre-insolvency proceeding.¹¹²

The consequential effect of having to treat the *sauvegarde* proceeding as an insolvency proceeding was that Article 27 secondary proceedings could be opened “without the debtor’s insolvency being examined” in Poland.¹¹³ In other words, since the main pre-insolvency proceeding in France had to be treated as an insolvency proceeding, the pre-insolvent company was treated as insolvent in Poland.

Unsurprisingly, the court in Poland had tried to find out whether the French main proceedings were extant or closed following implementation of the plan of reorganization. They had not been able to get a clear answer out of the French court. The ECJ therefore stated, logically, that if French proceedings have been closed, the Polish court cannot be asked to open a secondary proceeding. Moreover, the Polish court could not open a new main proceeding unless it could be shown that the debtor’s COMI had been transferred to Poland after the opening of the main proceedings in France.¹¹⁴

Alternatively, if the French proceedings are considered extant, the question then is whether or not the Polish court should take steps that might undermine the plan of reorganization under the main proceedings. In its judgment, the ECJ points out that opening a secondary proceeding in that type of situation (i.e., where the main proceeding is a rescue proceeding, and where the secondary proceeding has to be a winding up proceeding under Article 3(3) of the Regulation) “risks running counter to the purpose served by main proceedings, which are of a protective nature.”¹¹⁵

The ECJ then points out that there are a number of mandatory rules of co-ordination “intended to ensure . . . the need for unity in the Community .

109. EU Insolvency Regulation, *supra* note 8, art. 1(1).

110. *Id.* art. 2(a).

111. *Id.*

112. Case C-116/11, *Bank Handlowy w Warszawie SA v. Christianapol sp. z o.o.*, para. 63, (Nov. 22, 2012), available at <http://curia.europa.eu>.

113. *Id.* para. 74.

114. *Id.* para. 43.

115. *Id.* para. 59.

. . . the main proceedings have a dominant role in relation to the secondary proceeding”¹¹⁶

The ECJ judgment also refers to certain “prerogatives” of the liquidator in the main proceedings “which allow him to influence the secondary proceedings in such a way that the protected purpose of the main proceedings is not jeopardized.”¹¹⁷ The judgment refers to Article 33(1) and the potential request by the main liquidator for a renewable stay of the process of liquidation in the secondary proceeding for up to three months.¹¹⁸ Reference is also made to Article 34(1) and the ability of the main liquidator to propose a closure of the secondary proceedings with a rescue plan, composition, or comparable measure.¹¹⁹ There is also reference to Article 34(3), which provides that during the stay of the process of liquidation under Article 33(1), only the liquidator in the main proceedings or the debtor may propose measures closing the secondary proceeding by a rescue plan, composition, or comparable measure.¹²⁰

At paragraph 62, the ECJ refers to the principle of sincere cooperation.¹²¹ This requires the court having jurisdiction to open secondary proceedings to respect the objectives of the main proceedings and to take into account the scheme of the Regulation.¹²² The Regulation has the aim of ensuring efficient and effective cross-border insolvency proceedings through mandatory co-ordination of the main and secondary proceedings, guaranteeing the priority of the main proceedings.¹²³

I detect a strong hint here that the ECJ is suggesting to the Polish court that if the French proceedings still subsist, then the Polish court should not open secondary proceedings if it will disrupt the plan of reorganization in the main proceeding.

The ECJ judgment in *Bank Handlowy* does not explore what would actually happen if a secondary proceeding were opened. Nevertheless, it is clear that the effect of opening a secondary proceeding, pursuant to Articles 3(2) and 27, is that the assets in the territory of the Member State in which the secondary proceeding is opened are subtracted from the assets subject to the main proceedings.¹²⁴ Thus, if the plan of reorganization in the main proceedings relies upon the availability of those assets (as in *Bank Handlowy*) they can, in theory, be taken out of the main proceeding, thereby

116. *Id.* para. 60.

117. *Id.* para. 61.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* para. 62.

122. *Id.*

123. *Id.*

124. See EU Insolvency Regulation, *supra* note 8, art. 3(2), 27.

undermining the plan or reorganization. However, the court being asked to open a secondary proceeding should not allow that to happen.

CONCLUSION

The “head office functions” approach to COMI has enabled a pragmatic solution to be reached in relation to COMI and groups. On such a test, it is easy to find that COMI for group companies is centralized at the place where the group or sub-group headquarters’ functions are actually carried out, as long as that can be approved by objective evidence and is ascertainable to third parties. This enables the group to be rescued or beneficially realized after the start of proceedings as well as being run efficiently before proceedings are started.

The practice that has developed has led to references being made to there being a “group COMI,” although we must never forget that this is not a legally sound concept.

English courts and practitioners in the area of insolvency and restructuring have long found practical solutions on a pragmatic basis in which legal concepts and rules become our tools rather than our masters. The British pragmatism reflected in this approach has found favor in other EU Member States in some cases, and has certainly found favor with the European Commission. We can only hope that in the current consideration of proposed amendments to the Regulation, the European Parliament and the European Council will also adopt a pragmatic and practical approach.