EVALUATION OF COUNCIL REGULATION (EC) NO 1346/2000 OF 29 MAY 2000 ON INSOLVENCY PROCEEDINGS

Response Form For Evaluation Questionnaire

Respondent Details	**Please return by 29 September 2009 to:**
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Tick this box if you are requesting non-disclosure of your response. ☐

Please state whether you are responding as an individual or representing the views of an organisation. If responding on behalf of an organisation, please make it clear who the organisation represents and, where applicable, how the views of members were assembled.

The City of London Law Society ("CLLS") represents approximately 13,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This response in respect of the Evaluation of Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings has been prepared by the CLLS Insolvency Law Committee.

General overview

Q1 - The questions which follow seek information on a number of specific areas. However, in general, does the Regulation work satisfactorily and, if not, what principal changes would you want to see?

The Regulation has led to an overall improvement in the conduct of insolvency proceedings in a European cross border situation. Whilst the Regulation does not seek to harmonise insolvency procedures themselves, it provides a framework for determining jurisdiction, recognition and cooperation. As with any new framework there are areas that require clarification and improvement. Our members have set out below their practical experience of the Regulation and highlighted where the difficulties arise.

Some of the issues raised by our members may be easier to solve than others. For example, the introduction of an EU registry of insolvency proceedings would greatly assist on a practical level in determining whether main proceedings have already been opened. However, the difficulties experienced in the context of the insolvency of groups of companies is an area fraught with difficulty to which there is no simple solution.

Q2 - Please give an indication of:

a) how often you have experienced the effects of the Regulation in a cross-border context;
b) in what role you have experienced the effects of the Regulation, e.g. as an insolvency office-holder, creditor, legal advisor etc
c) whether your experience of the Regulation has related to:
    - a UK entity subject only to main proceedings elsewhere in the EU; and/or
    - an entity subject to main proceedings in the UK and secondary proceedings in another Member State; and/or
    - an entity subject to secondary proceedings in the UK and main proceedings in another Member State.

Our members have experienced the effects of the Regulation as part of their day-to-day role as legal advisors in all three scenarios set out in (c) above.

Centre Of Main Interests ("COMI")

Q3 - Is the lack of a comprehensive definition of "Centre of main interests" a problem? If so, in what way and how might the difficulties be overcome?

Since the Regulation came into force, the issue of COMI has been subject to much judicial consideration. In the case of *Eurofood IFSC Ltd (Case 341/04)* the European Court of Justice ("ECJ") held that the registered office presumption contained in Article 3(1) of the Regulation "*can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect"*. Whilst the court provided the extreme example of a letterbox company which does not carry on any business in the country in which it has its registered office, it did not provide any further guidance on the objective factors that would be relevant to rebutting the registered office presumption.

In the absence of further clarification from the ECJ there is also a continuing risk that local Member State courts may consider different objective factors and afford them different weightings in terms of importance. This may result in a lack of consistency in determining jurisdiction across the EU.

The continuing uncertainty may also mean that different courts would find that a company's COMI is in more than one Member State at the same point in time. This leaves the rather unsatisfactory situation of a race to court by competing stakeholders to try and establish jurisdiction.

Despite this uncertainty, however, our members recognise that a concept such as COMI will always involve an element of subjectivity and interpretation on a case by case basis. Indeed this has allowed the courts a degree of flexibility for the mutual benefit of all stakeholders particularly when dealing with groups of companies (see further our response to Q20 below).

Q4 - Does any uncertainty as to the location of a debtor's COMI or the fact that the debtor can change this COMI at some future date (i.e. after a debt has been incurred) cause difficulties for creditors or other parties such as directors, employees or regulatory authorities in assessing the risks of entering into business transactions?

Our members are of the opinion that both the uncertainty as to the location of a debtors' COMI and the fact that the COMI might change at a future date cause difficulties although the situation is better than the ad hoc conflict of laws that applied prior to the Regulation coming into force.

Directors will want to know which Member States' insolvency laws apply so that they can ensure that they are meeting the relevant duties required of them and are aware of the potential liabilities they may be subject to.

Uncertainty as to a debtors' COMI causes difficulties for creditors as their risk and remedies may be different in a different Member State. This issue is particularly acute for banks and other lenders as the COMI of the debtor may impact both on their ability to enforce and the effectiveness of their security.

Where a debtor has operations in a number of Member States, it is possible that different creditors and other stakeholders may perceive the COMI to be in a number of different Member States. It is not yet clear what approach the courts will take to where competing creditors consider a debtors' COMI to be in different Member States.

In addition to the uncertainty as to determining a debtor's COMI when a transaction is entered into, it is possible that the COMI may move after the transaction has completed. This is of particular concern to banks and other secured lenders as they would prefer certainty as to which insolvency regime would apply should the debtor get into financial difficulty. It is common for secured lenders to seek to obtain representations from the debtor as to the location of its COMI and covenants that they will not take any steps that would cause the COMI to change. However, a breach of such a representation would only give rise to a claim in damages which may be of limited use if the debtor is in financial difficulty although it is possible that the court will take such covenants into account in considering what is ascertainable to third parties on COMI.

Q5 - Is there evidence of debtors relocating their COMI from one Member State to another in order to frustrate creditor claims or to benefit from insolvency laws more advantageous to them?

Our members have not had any direct experience of debtors relocating their COMI from one Member State to another in order to frustrate creditor claims.

Debtors are, however, moving their COMI to take advantage of another Member State's insolvency regime. This can be done either by moving a debtor's COMI from one Member State to another or by legitimately transferring the debtor company's assets and liabilities to another company with its COMI in the new Member State. For example, in the Schefenacker case such a transfer allowed the business to be rescued through a CVA in the UK. This would not have been possible in the debtor's native Germany.

Where this is done for the mutual benefit of a debtor's creditors, our members see no reason why this practise should be limited.

Q6 – Is there evidence of debtors not being able to gain bankruptcy relief for debts incurred in one EU Member State due to a legitimate change in COMI and limitations in the scope of national insolvency proceedings in the Member State of the new COMI? For example, this might arise in the case of individuals who have incurred debts in the UK (their original COMI) but who have since moved their COMI as a result of their now living and working in another EU Member State. To gain relief from debts incurred in the UK, they would have to seek bankruptcy proceedings in the location of the new COMI but the national bankruptcy laws of that jurisdiction may limit bankruptcy proceedings to traders. If yes, is this a problem that needs to be addressed?

Our members have no direct experience of this. We are not aware of any European insolvency proceedings in which foreign debts cannot be pursued and so we would be surprised if this was a problem in practice.

Q7 - Are there adequate provisions enabling interested parties to ascertain the reasons behind a Court's determination of the location of the COMI?

The Regulation provides no mechanism for interested parties to ascertain the reasons behind a court's determination of the location of the COMI. Interested parties are therefore dependent on the insolvency laws and court practice of the relevant Member State.

In England and Wales the court order commencing the insolvency proceedings would not normally contain the court's reasoning on COMI unless there had been a dispute about this at the time of commencing proceedings. An interested party may be able to attend a hearing but that presumes that he has had notice of it in advance. This is often not the case. Therefore, in the absence of a written judgment or a transcript of the hearing an interested party will have no opportunity to ascertain the court's reasoning. Certain insolvency proceedings can be commenced without the need for a court order. Again, the reasoning for the location of the debtor's COMI will not be set out in the papers filed in court.

This lack of disclosure of the reasons for a COMI decision, either in the court order or the out of court appointment documents, has attracted criticism from both the German (*Hans Brochier 8004 IN 1326 1331/06 Local Court of Nuremberg, 15 August 2006*) and Austrian (*Zvonko Stojevic 8 Ob 135/4t. Austrian Supreme Court, 17 March 2005*) courts.

Q8 - Are there adequate provisions enabling interested parties to challenge a decision on the location of the COMI?

In *Eurofood IFSC Ltd (Case 341/04)* the ECJ held that an interested party can only challenge a decision on the location of a debtor's COMI in the Member State in which the main proceedings have been opened. This means that an interested party would be asking the court which originally determined the issue of COMI to review its own decision. There is no mechanism contained in the Regulation for appealing decisions on COMI and therefore the regime of the relevant Member State will apply. This results in a disparity in the right to appeal depending on the Member State in which the main proceedings have been opened, including in certain Member States no right of appeal at all.

Interaction of Main and Secondary Proceedings

Q9 - Have there been any difficulties with the definition of "Establishment" (any place of operations where the debtor carries out a non-transitory economic activity with human means and goods)? For example, should the definition of "Establishment" be extended to human means, goods *and services*?

In contrast to COMI there remains very little case law on the meaning of "Establishment" and the matter has not been considered by the ECJ[1]. This would suggest that the definition of "Establishment" is causing fewer difficulties in practice than the definition of "COMI". However, in our experience it is not always clear whether a company's presence in a jurisdiction amounts to an establishment and further guidance is still needed on this point.

One of the identified difficulties in relation to the definition of "Establishment" concerns the wording "human means". The Czech Supreme Court raised the issue, without giving an answer, of whether an individual debtor carrying out economic activities himself without employing any other person could fall within the phrase "human means"[2]. Furthermore, the Austrian Higher Regional Court of Innsbruck held that where a debtor (who was a natural person) did not employ anyone in relation to his business activities in Austria, he did not carry out an activity with "human means" in Austria[3]. This issue needs clarifying, as if the Austrian decision is correct, then it will be very difficult for individuals operating as sole traders to possess an establishment.

The English court would appear to have held that a historical establishment which has since ceased to exist would be sufficient to allow the opening of secondary proceedings[4]. However, it should be noted that the Regulation provides that "....the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he *possesses* an establishment....." [emphasis added]. The word "possesses" is in the present tense and if an historical establishment could be taken into account it is arguable that the Regulation would have used the word "possessed". Contrary views have been reached by both the Swedish Court of Appeal in *Batteriservice & Transport Ltd*[5] and the Belgian court in *Ghent Commercial Court (NV Interstore/Megapool BV)*[6] where prior presences in the jurisdiction which may have given rise to an establishment were discounted. Whether historical factors can be taken into account by a court when assessing whether the debtor possesses an "Establishment" in the jurisdiction is something which would benefit from clarification.

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1 It should be noted that the Greek court declined to make a reference to the ECJ on the meaning of "Establishment" because it considered the definition in the Regulation was clear (DEE 1/2004, Athens Multi-Member Court of First Instance, 2003).

2 Decision of the Supreme Court of the Czech Republic dated 31 January 2008.

3 8 Ob 12/06g, 30 November 2006 (full German text available under www.ris.bka.gv.at/jus/).

4 *Re Energea Umwelttechnologie GmbH* (unreported (and no transcript available), Chancery Division (Leeds District Registry), 10 March 2009).

5 Ö 929-05, Övre Norrland Court of Appeal, 14 February 2006.

6 05/02654 (unpublished), Ghent Commercial Court, 21 February 2006.

We are also aware that the German court held that in order for a branch office to satisfy the definition of “Establishment”, the debtor must possess a business at the branch office that is ascertainable to third parties. Purely internal business activities will not be sufficient. However, we note that the Regulation only refers to what is "ascertainable to third parties" in the context of a debtor's "COMI"[7]. There is no such concept in the definition of "Establishment". However, it may assist parties when assessing counterparty risk if both the test for "COMI" and "Establishment" include a need for the factors to be "ascertainable to third parties".

We agree that it would be beneficial for the definition of "Establishment" to be extended to human means, goods and services as this would mean that companies operating solely in the provision of services would be more likely to fall within the definition of Establishment.

Q10 – Have any difficulties arisen in cases where assets are located within a particular jurisdiction but insolvency proceedings cannot be brought by local creditors because the debtor does not have or no longer has its COMI or an establishment in that jurisdiction? If so, is there any evidence that this has been used as a means to avoid creditor claims?

As a general rule the inability to open insolvency proceedings in the Member State where a creditor resides should not enable a debtor to avoid creditor claims; the Regulation provides that any creditor who has his habitual residence, domicile or registered office in a Member State other than the State of the opening of proceedings and social security authorities of EU Member States, shall have the right to lodge claims in the insolvency proceedings. However, the rules as to priority of claims vary in the different Member States. Accordingly, it may be that creditors may wish for secondary proceedings to be opened in the Member State in which they are domiciled so that they can obtain the benefit of the priority rules in that Member State. We are aware of a Belgian case (*Ghent Commercial Court (NV Interstore/Megapool BV)*[8]) where a landlord requested the opening of secondary proceedings in Belgium, as in Belgian insolvency proceedings unpaid rent would be paid in priority to other debts. Under Dutch law (the main proceedings had been opened in the Netherlands) the unpaid rent would have ranked along with other unsecured creditors. In this case the Belgian court refused to open secondary proceedings as there was no establishment existing in Belgium at the time the application to open secondary proceedings was made. However, we are not aware of any evidence that an inability to open insolvency proceedings in a particular jurisdiction is being used as a means to actively avoid creditor claims.

A separate question arises as to whether it is possible to create a sufficient presence for there to be an establishment after main proceedings have been commenced (for example to take advantage of the avoidance, moratorium or other insolvency provisions of a particular Member State). We are unaware of this question being considered by the courts of any Member State.

It may be beneficial to amend the Regulation so that secondary proceedings can always be commenced in the jurisdiction where the company has its registered office. If the registered office presumption of COMI is rebutted and the company does not carry out "a non-transitory economic activity with human means and goods" in the jurisdiction where it has its registered office, then insolvency proceedings will not be able to be commenced in the jurisdiction where the company has its registered office[9]. This is seen as counter-intuitive by some creditors.

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7 See Recital 13 of the Regulation.

8 05/02654 (unpublished), Ghent Commercial Court, 21 February 2006.

9 Examples of such cases are *Criss Cross s.r.l.* where main proceedings had been opened in the UK and secondary proceedings could not be opened in Italy, the jurisdiction where the company's registered office was located (unreported, Tribunal of Milan, 18 March 2004) and *Hans Brochier Holdings Limited* where main proceedings were

Q11 - Does the fact that secondary proceedings are restricted to winding up proceedings create difficulties in conducting a cross-border rescue of a company with establishments in different Member States? If so, has it been possible to overcome these difficulties?

The fact that secondary proceedings are restricted to winding up proceedings can create problems when conducting a cross-border rescue although this may be a problem inherent in secondary proceedings whatever their nature. In particular, where main proceedings have been opened in relation to a number of group companies in one jurisdiction it may be the case that the opening of secondary proceedings in relation to a group company impacts on the ability to rescue the companies within the group in a coordinated and effective manner. Accordingly, it may often be in the interests of the creditors of all individual group companies that secondary proceedings are not opened. In addition to making a rescue of the company concerned more difficult, the opening of secondary proceedings will result in another officeholder being appointed in relation to the same company, thus adding another layer of expense[10].

The fact that officeholders are looking to prevent the opening of secondary proceedings was highlighted by the case of *Nortel Networks*[11] where main insolvency proceedings had been opened in England in respect of a number of companies with establishments in other Member States. The English administrators took the view that the best option available to maximise value for the creditors of each company was through a coordinated reorganisation of the whole group which required the various companies to be able to continue trading. There was concern that if secondary proceedings were opened in relation to any of the companies then this would prevent a rescue of the group as the commencement of a winding up procedure in relation to any of the companies may have prevented the continued trading of that company or even the whole group (the group was closely integrated). The administrators therefore obtained an order from the English court for a letter of request to be sent from the English court to the courts in each of the Member States where Nortel Group subsidiaries were registered. The letter requested that the foreign courts notify the administrators of any application to open secondary proceedings and to give the administrators the opportunity to be heard on any such application. While not preventing secondary proceedings from being opened, if such letters are respected this should enable courts in other Member States to be fully informed of the facts, in particular any adverse impact on the rescue of the company, before deciding whether or not to open secondary proceedings. Of note here is the decision of the French court in the *MG Rover* case where, having heard the English administrators, the French court declined to open secondary proceedings on the basis that such proceedings would be of no advantage[12]. Such a policy seems sensible and it may be useful to include a provision in the Regulation to provide that there must be an advantage to the creditors as a whole in order for secondary proceedings to be opened.

It should be noted that the ability of the court which has opened secondary proceedings to stay the process of liquidation may not always solve any difficulties created by the opening of secondary proceedings[13]. While a stay of the liquidation process will halt the realisation of assets located in the Member State where secondary proceedings have been opened, it does not remove the existence of the secondary (liquidation) proceedings. This means for example, that regard would still have to be given by the officeholder in the main proceedings to any liquidation proceedings (even if the liquidation process was stayed) and thus the existence of those proceedings may prevent the company in question from trading (save for

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opened in Germany and secondary proceedings could not be opened in the UK, the jurisdiction where the company's registered office was located (unreported and no transcript available, Chancery Division, 8 December 2006).

10 See also our comments on officeholder remuneration in relation to question 13.

11 2009 EWHC 205 (Ch), 11 February 2009.

12 Unreported, Commercial Tribunal of Nanterre, 4 May 2005 and 20 May 2005. Unreported, Versailles Court of Appeal, 15 December 2005.

13 See Article 33 of the Regulation. See also our response to question 28.

the purpose of the liquidation). Furthermore, even if staying the liquidation proceedings may assist the officeholder in the main proceedings with a corporate rescue it may be that the court which has opened the secondary proceedings refuses to stay the liquidation process[14].

Q12 - Does the relationship between the main proceedings and any secondary proceedings work efficiently and effectively? For example, is it beneficial for the proper co-ordination of action relating to a debtor's assets that secondary proceedings can be opened at any time and by any person empowered under the relevant national law and what impact does this have on the efficiency and effectiveness of the insolvency as a whole?

The general consensus of our members is that the relationship between main and secondary proceedings does not work efficiently and effectively. Indeed, in our experience, the officeholder in the main proceedings will actively discourage the commencement of secondary proceedings.

Improvements could be obtained by: (i) making reorganisation proceedings available as secondary proceedings; and (ii) providing that the officeholder in the main proceedings be notified of any application to open secondary proceedings and has a right to be heard at the court hearing to consider the opening of the secondary proceedings.

Q13 - Where there is more than one proceeding do current provisions relating to priority of costs work in a satisfactory way? If not, why not and what needs to be done to address the issue?

We have no specific comment on this question. However, we note that the remuneration of the administrators in the English main proceedings was an issue of contention in the *MG Rover* case. Secondary proceedings had also been commenced in Germany in relation to the German registered MG Rover subsidiary and the company's creditors' committee refused to approve the remuneration of the English administrators. The English court went on to approve the administrators' remuneration[15]. The difficulties in relation to officeholder remuneration arose because the creditors' committee felt that it was not reasonable to pay for two officeholders when there had been a large duplication of the work carried out by the officeholders in the main and secondary proceedings. Problems in relation to duplication of expenses and work carried out by officeholders in main and secondary proceedings are expected in future cases. While an element of duplication is unavoidable as each set of officeholders will have their own duties and responsibilities under the local laws, it is hoped that good communication and cooperation between the officeholders will prevent large scale duplication of work and the difficulties this can cause. As such any measures to improve communication and cooperation between officeholders are to be welcomed.

Q14 - Does the duty to co-operate and communicate with liquidators in different Member States operate in a satisfactory way in practice?

In our experience, it appears that cooperation and communication between officeholders is on the increase. Furthermore, we are aware that, in some cases, in order to facilitate the smooth interrelation of multiple proceedings in respect of the same debtor, protocols have

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[14] This was the case in relation to *MG Rover* where the German court refused to stay the liquidation process. The decision is unreported, Düsseldorf Court, 8 November 2005.

[15] Unreported, Chancery Division (Birmingham District Registry), 14 August 2006.

been entered into by the officeholders in the main and the secondary proceedings[16]. In addition we are aware of communication taking place between courts. See for example communication between the German and Dutch courts in the *BenQ* case and notably between the French and Austrian courts in the *EMTEC* case in relation to the coordination of main and secondary proceedings and the timing of asset sales. While the Regulation is silent on the subject of court-to-court communication, both the English and Austrian courts have held that the duty for liquidators to communicate and cooperate with each other should reflect a wider obligation which extends to cooperation between courts which exercise control of insolvency procedures in their respective jurisdictions[17]. We are of the view that such court-to-court communication can be beneficial in assisting with the smooth interaction between main and secondary proceedings and is to be encouraged within appropriate boundaries.

Q15 - Have the provisions of Article 34 (measures ending secondary insolvency proceedings) been used in practice and, if so, was the outcome satisfactory?

Our members have no direct experience of this.

Applicable law

Q16 - Do the exceptions to the general rule that the law applicable to the proceedings is that of the State of the opening of proceedings (Articles 5 – 15) adequately protect expectations and certainty of transactions and contracts of employment? For example, do they strike the right balance between the need to protect 3rd parties and the general principal that the applicable law should be that of the State of opening?

Article 5:

Our members recognise that Article 5 is intended to strengthen the position of a secured creditor whose collateral is situated in a different Member State from that where the proceedings are opened.

There is much about Article 5 that is not clear as yet. Where assets are intangible (e.g. a bank account, a right of action in tort or a contractual claim), there may be difficulties in determining where the asset is situated for the purposes of the exception. For example, in the case of bank accounts, some commentators have suggested that such an account is located in the place where the bank has its own COMI rather than the place of the branch holding the account and it would be useful if this could be clarified by the Commission.

Timing may be important if the asset is a moveable one, and its location has changed between the time at which the right was created and the time when proceedings are opened. This could disadvantage a secured creditor if the asset is in a jurisdiction which does not afford protection to the security interest concerned at the time proceedings are opened. Conversely, unsecured creditors could be disadvantaged if the asset has been moved to a territory where the secured creditors' rights are stronger and more protected than they would otherwise have been (although actions for voidness, voidability or unenforceability are not precluded by virtue of Article 5(4)).

Our members query whether it is now necessary to perfect or register any security over the asset in question in the jurisdiction in which the asset is deemed to be located for the

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16 See for example the protocol entered into between the liquidators in the main and secondary proceedings in *Sendo International Ltd* and *Eurodis*.

17 See *In the matter of Nortel Networks* 2009 EWHC 205 (Ch), 11 February 2009 and *Zvonko Stojevic* 8 ob 135/4t, 17 March 2005.

purposes of Article 2(g) (which defines the meaning of "the Member State in which assets are situated"). This would result in a dual due diligence requirement with the need to perfect the security according to both where it is situated on traditional conflict of law principles, and on the basis of the definitions in Article 2(g).

Other concerns regarding the interpretation of Article 5 are dealt with in our response to question 17 below.

Article 15:

When considering the effect of the exception in Article 15 in the recent case of *Syska (Elecktrim SA) v Vivendi Universal SA & Ors [2009] EWCA Civ 677*, the English Court had to decide whether "lawsuit" included arbitration proceedings. It concluded that it did. In doing so, the court took into account the underlying purpose of the Regulation to protect the legitimate expectations of parties and the certainty of transactions. It held that it would be against the aim of the Regulation to interpret "lawsuits" narrowly to include only proceedings made before a court and not arbitration proceedings. Commercially, many contracts contain arbitration agreements and it would be unfair not to protect the legitimate expectations of parties by limiting "lawsuits" to only those who had commenced a court action against the counterparty prior to insolvency proceedings being opened, but not those who had initiated arbitration proceedings.

However, our members query whether this approach would be taken by courts in all Member States. There may be problems arriving at a consensus in approach across the courts of Member States.

Q17 - Are the exceptions to the general rule that the law applicable to the proceedings is that of the State of the opening of proceedings (Articles 5 – 15) appropriate? For example, do they work as they should/are they sufficiently clear?

Article 4 contains a list of matters which shall be determined by the law of the State where proceedings are opened. Although the list does not claim to be exhaustive, our members query whether directors' duties and liabilities are included - would claims which arise directly from the insolvency proceedings fall within article 4(2), while claims which arise as a result of a breach of more general duties under corporate law would not? The general consensus amongst our members is that it seems likely that only those duties or liabilities which arise directly from the insolvency proceedings would fall within the ambit of Article 4(2). However, it may not always be possible to categorise directors' duties as arising clearly under either insolvency or corporate law. For example, disqualification proceedings may be brought in the UK under the Company Directors Disqualification Act 1986 - in theory, these may not always be brought in the context of an insolvency. It is not clear whether judgments made in such proceedings brought outside the context of an insolvency would fall to be judgments which would fall within the ambit of Article 4(2).

Article 5:

Our members also query whether Article 5 protects the secured debt as well as the security interest itself. For example, insolvency proceedings in a number of Member States can give rise to a compromise or discharge of claims, including secured claims, so long as the requisite majority of creditors votes in favour of the compromise. If a secured creditor's claim is reduced as a consequence of a main insolvency proceeding, can the secured creditor rely on Article 5 to enforce its security over assets in another Member State in respect of the full amount of its original secured claim, or only in the amount in the reduced claim as compromised in the main insolvency proceedings? The general consensus of our members is that it would be an erosion of a secured creditor's rights if Article 5 did not protect the secured debt as well as the secured creditor's rights to enforce its security in respect of that debt. However, it is not helpful that such an essential aspect of Article 5 is unclear.

Article 6:

Our members have several questions regarding Article 6, which states that the opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such set off is permitted by the law applicable to the insolvent debtor's claim:

- Does the law applicable to the insolvent debtor's claim have to be a law of a Member State? Unlike Article 13, it is not expressly stated that the applicable law must be one of a Member State.

- Once the law applicable to the debtor's claim has been determined, which set-off provisions of that law will apply? Is Article 6 limited to insolvency set-off rules or are such rules relevant only in the event of insolvency proceedings having been commenced in the relevant jurisdiction?

- Does the right of set-off, or the debtor's claim, need to arise prior to the opening of insolvency proceedings?

- How does Article 6(1) relate to Article 6(2)? While Article 6(1) states that the opening of insolvency proceedings shall not affect the rights of creditors to set-off, Article 6(2) carves out actions for voidness, voidability or unenforceability. In the UK, set-off is mandatory on insolvency where the necessary requirements are met. However, in many of the civil law systems, insolvency laws prohibit set off *because* it is held that this is an improper preference of a particular creditor, and so is contrary to the avoidance provisions. Should Article 6(2) be construed in this way, or does it simply mean that the liquidator in the insolvency proceedings can challenge the entering into of the transaction which gives rise to the right of set-off, and not the exercise of the set-off right itself?

- Does Article 6 also apply to close-out netting? In some jurisdictions, a distinction is drawn between set-off and netting for the purposes of Article 6. Some commentators have concluded that Article 6 strictly applies to set-off only, and other related questions, such as whether a contract can be terminated or claims "closed out" or accelerated, are to be determined by the laws of the Member State in which insolvency proceedings are commenced. This distinction would exclude from the effect of Article 6 many of the standard close-out mechanisms used in market standard master agreements.

- Which law determines which claims are eligible for set-off?

- Article 20 requires a creditor who, after the opening of proceedings obtains by any means, total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another Member State, to return those gains to the liquidator. Article 20 contains a carve-out in relation to Articles 5 and 7, but not Article 6. Is this meant to be the case? Our members question whether this is an oversight.

Article 12:

Article 12 provides that Community patents and trademarks, and other similar rights may only be dealt with in main proceedings. Currently, Community trademarks, Community designs and Community plant variety rights all cover the whole of the EU and are not situate in any individual Member States. These rights therefore cannot be dealt with at all in secondary or territorial proceedings, even where (in the latter case) no main proceedings have been

opened. This may be problematic if territorial proceedings are opened under Article 3(4)(a) on the ground that it is not possible to open main proceedings in the territory in which the debtor has its COMI. Any Community trademarks, designs and plant variety rights would not be covered by the territorial proceedings. The English court held in *Hans Brochier Holdings Limited* that in order for territorial proceedings to be opened under Article 3(4)(a), any conditions laid down by the law of the Member State within the territory in which the debtor's COMI is situated preventing the main proceedings being opened must be absolute and not temporary. If this view is correct, then it will not be possible to open main proceedings at all, potentially leaving assets falling within Article 12 out of the insolvency proceedings.

Article 13:

This article provides a potential defence to claims for transaction avoidance, by providing that the avoidance rules of the Member State in which proceedings are opened shall not apply if the person who benefited can show that the act is subject to the law of another Member State and that law does not allow any means of challenging that act in the relevant case. Our members query what "subject to" means in this context. For example, is the giving of security "subject to" English law if English law is the governing law of the security document? Is a payment made under a contract at a time when there were insufficient assets to pay all creditors "subject" to the law governing the contract under which the payment was made, or does it depend on where the recipient was located?

Our members also query whether, once the applicable law is decided, Article 13 involves a consideration of the insolvency law of that jurisdiction even if no insolvency proceedings have been commenced there. For example, if a transaction is governed by English law, and a liquidator or administrator would be able to challenge the transaction, but insolvency proceedings had not been commenced in the UK, can that transaction be challenged? If fo, what hardening period should be used?

Article 15:

The recent case of *Syska (Elecktrim SA) v Vivendi Universal SA & Ors [2009] EWCA Civ 677* has given some guidance on the English court's interpretation of the exception contained in Article 15. The Court of Appeal held that proceedings commenced by way of execution would be governed by the law of the Member State where the insolvency is proceeding (under Article 4(1)), while proceedings commenced to establish liability will fall under the Article 15 exception, and be governed by the law of the Member State in which that law suit is pending. The court argued that until a particular claim is ascertained, it has no relevance to insolvency proceedings at all. It is only once a party obtains a decision on the merits of a case that he is able to join the body of creditors with claims in the insolvency. The Court of Appeal stated that Articles 4 and 15 are not in conflict, but each has its own sphere of operation.

Our members understand that there are discrepancies in Member States' language versions of the text of Article 15. The English text states that the exception applies to lawsuits pending "*concerning an asset or a right of which the debtor has been divested*". Our members are aware that there are differences between the English text, and the German, Danish, Czech, Greek, Hungarian, Polish, Portuguese, Swedish, Spanish, Bulgarian and Austrian texts. It is likely that there will be difficulties arriving at an autonomous meaning for the Regulation which will apply in all Member States.

There have also been differing decisions made in Member States regarding the application of the words "the effects of insolvency proceedings on lawsuits pending". For example, the Austrian court has taken the view that it should first consider which Austrian insolvency procedure is the equivalent to that commenced in the State of opening, and then how such an equivalent Austrian proceeding would affect the lawsuit pending. However, the English court (in *Mazur Limited v Mazur Media GmbH*) instead looked at whether English law provided for a stay to be granted in respect of English legal proceedings if a company were subject to

foreign insolvency proceedings. The Virgos Schmidt Report comments (see para. 92) that in cases where the effects of the insolvency proceedings are governed by the laws of a Member State different to that where the insolvency proceedings are opened, the effects of the insolvency proceedings are those effects which would be attributed to a domestic proceeding of the same nature as that opened in the other Member State. This lends support to the Austrian court's view. However, our members are concerned that it may not always be easy, and it may even be impossible, to establish which domestic insolvency proceeding most closely resembles that opened in the other Member State.

If the Austrian interpretation is correct, then a further question arises - how should the court decide which is the equivalent domestic proceeding? Should the court look at the description of the foreign insolvency proceeding, or the effects and powers which it gives to the officeholder?

Our members are also concerned that, once the court has decided which is the equivalent insolvency proceeding to consider, it is not always clear whether the application of a proceeding of an equivalent nature will result in a stay. Under the English administration regime, whether or not an action is stayed would depend on whether either the administrator or the court gave permission for the proceedings to continue or not. Would the court have to look at the likelihood of the administrator or the court consenting to the legal proceedings continuing? Or would a more simplistic approach have to be taken, concluding that as English administration proceedings result in a *prima facie* stay of legal proceedings, the English legal proceedings should be stayed?

Opening of Proceedings

Q18 - Does the definition of Court create any difficulties in terms of 'extra-judicial' insolvency proceedings, if so, what are those difficulties and how might they be overcome? In particular, have any difficulties been encountered in the recognition of insolvency proceedings which are not opened by an order of court, e.g. voluntary arrangements and have any difficulties been encountered in the current regime whereby creditor voluntary liquidations must be confirmed by the Court under Rule 7.62 of The Insolvency Rules 1986 before they are brought within the scope of the Regulation?

On the whole Member States' courts appear to be giving effect to the wide definition of "court" in Article 2(d) of the Regulation and so we are not aware of the definition causing wide-scale difficulties. See for example the decision of the Italian court in *Eurofood*[18] (where it was held that the Ministry of Industry was a competent body of a Member State empowered to open insolvency proceedings) and the decision of the English court in *Re Salvage Association*[19] (where it was held that "court" should be given a wide meaning so as not to be limited to organs of the State but should apply to any body being competent in that Member State to resolve upon (or open) the insolvency proceedings in question). These interpretations should mean that problems in terms of recognition of insolvency proceedings which are not opened by an order of the court in the formal sense are less likely to arise. However, it should be noted that the German court in the *Hans Brochier* case[20] refused to recognise administration proceedings commenced via the out-of-court route on public policy grounds (see also our answer to question 22). While the German courts did not rely on the argument that the proceedings were not opened by a court and the facts in this case were

[18] Rivista di diritto internazionale privato e processuale, n. 2, April - June 2007, p.457-467, Consiglio di Stato, Section VI, 25 January 2007 n.269.

[19] [2003] All E.R. 265, Chancery Division, 9 May 2003.

[20] 8004 IN 1326 1331/06, Local Court of Nuremberg, 15 August 2006.

quite unique, we are of the view that further problems in relation to the recognition of out-of-court appointments of administrators are likely to arise in the future (and that this may be caused by the lack of any formal court involvement in the appointment). Indeed it is often advised that, where there is a cross-border element, administrators be appointed in court in order to avoid any potential recognition problems.

Q19 - Is the time at which proceedings are opened clear in relation to any given insolvency proceedings in any Member State and, if not, what difficulties does this cause?

The time at which insolvency proceedings are commenced is important for a number of reasons under the Regulation. For example, once main proceedings have been commenced in a particular Member State, the courts of the other Member States are required to recognise those proceedings and so they will want to know if and when such proceedings have been commenced. Furthermore, by virtue of Article 43, the effects of the provisions of the Regulation only operate once insolvency proceedings are opened. A doubt as to when insolvency proceedings are opened could also impact on the application of Articles 5 – 15 and could give rise to further conflicts of law.

In *Staubitz Schreiber* the ECJ[21] held that insolvency proceedings are only opened when a judgment opening the insolvency proceedings is delivered. However, the ECJ did not have to consider some of the complexities that can arise in relation to some Member States' insolvency proceedings. For example, certain Member States backdate the commencement of proceedings to the date when the application for insolvency proceedings was filed[22]. This is sometimes referred to as "relation-back". The question therefore arises as to whether proceedings are "opened" (for the purposes of Article2(f) of the Regulation) on the date specified in the national legislation, applying any "relation-back" concept, or on the date on which the order opening the proceedings is made.

In *Eurofood*, the ECJ held that the appointment of the Irish provisional liquidator commenced main proceedings and so it was not necessary for the court to consider the relation-back principle and whether the Irish winding up proceedings were commenced on the date of the petition or the date of the winding up order. However, the Advocate General in the *Eurofood* case expressed the opinion that the national law of the Member State where the insolvency proceedings are commenced is to determine when those insolvency proceedings are commenced. Accordingly, winding-up proceedings whose commencement is deemed by national law to date back to the date of presentation of the winding-up petition will be commenced for the purposes of the Regulation from the date the petition was presented. In the absence of any dicta from the ECJ on this point, we are of the view that the Advocate General's opinion remains persuasive. While it could be argued that the Advocate General's view is consistent with Article 4(2) of the Regulation that the law of the State of opening should determine the effects of the insolvency proceedings (including, although not specifically listed in Article 4(2), the time at which those proceedings are deemed to be commenced), such an approach could cause problems across the EU. There may be a pending petition in a Member State whose insolvency laws contain backdating provisions at a time when the courts of another Member State are requested to open main proceedings; the courts of that other Member State may be unaware of the petition or, even if they are aware of it, it may not be clear at that time whether any order will be made on the basis of the petition in the first Member State.

There are also problems in the case of an English creditors' voluntary liquidation which only falls within the scope of the Regulation once it has been confirmed by the court. It is not

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21 C-1/04, 17 January 2006.

22 An example would be English liquidation proceedings where the winding up is deemed to commence at the time of the presentation of the petition for the winding-up, rather than the date of the court order. A similar principle applies in relation to an Irish liquidation.

clear whether such a liquidation would be deemed to have commenced, for the purposes of the Regulation, on the date on which the shareholders' resolution commencing the liquidation was passed or the date of the court confirmation. Since the creditors' voluntary liquidation would not be a proceeding falling within the scope of the Regulation without the court confirmation, it seems likely that, for the purposes of the Regulation, the proceedings will be deemed to have commenced on the date of the court confirmation. However, contrary arguments could be made.

It is also worth noting that Annex B of the Regulation has now been amended for the UK to include a winding up within the context of an administration, presumably to cover the administrator's power to make distributions to creditors under the provisions added by the Enterprise Act 2002. Timing problems also arise in this respect. When an administrator is appointed, he or she will not generally know (until investigations have been made) whether it will be possible to rescue the company (the primary purpose of administration) and the decision to make distributions to creditors may come at a later stage. If a winding up within the context of an administration is to be available as a secondary proceeding, whereas administration generally is not available as a secondary proceeding, does this mean that an administration can only be commenced as a secondary proceeding in circumstances where the administrator knows in advance that a rescue will not be possible and that he or she will be realising the assets in order to make a distribution to creditors?

Given the above issues we are of the view that an amendment to the Regulation is needed to give greater clarity to the meaning of the expression "the opening of insolvency proceedings" under the Regulation and that, in the interests of transparency, this should be when the relevant order or court confirmation is made. We are aware, however, that given the differences in national laws as to when the various proceedings are opened this may be a challenge.

Group Companies

Q20 - Is the lack of special provisions dealing with group companies detrimental to the efficiency and effectiveness of cross border insolvency proceedings and, if so, in what way and how might this be addressed?

It has been widely suggested that one of the weaknesses of the Regulation is that it contains no provisions relating to groups of companies. If, as is commonly the case, a group is organised by way of a number of separately incorporated subsidiary companies in different Member States, separate insolvency proceedings will need to be commenced in respect of each subsidiary company; there are no provisions which allow such companies to enter into a single set of consolidated insolvency proceedings and the provisions on co-ordination between main proceedings and secondary proceedings do not apply when separate parts of the same enterprise have been incorporated in the form of separate legal entities. By contrast, where a company trades through a number of branch offices in different jurisdictions, the court will only need to consider the COMI of the single legal entity although it may be possible to commence secondary proceedings in relation to the branch offices if these constitute "establishments" (and the activities of the branch offices may well have a bearing on the location of the company's COMI).

It will often be beneficial for the assets of separate legal entities which are part of the same group to be administered under a single insolvency process, for example, so as to avoid splitting up the business sales process which could cause a considerable loss of value to the assets of the group as a whole or to enable an easily coordinated continuation of the business trade while a reorganisation takes place. Furthermore, having one set of insolvency officeholders appointed in respect of each company within the group is likely to promote

efficiency and effectiveness[23] as it could save time and costs and make the administration of the insolvency or reorganisation proceedings more efficient. Weighed against this, however, is the fact that each legal entity may have different creditors and a consolidation (on a group basis) may prejudice those who intended to deal with a particular entity in the group.

Prior to the ECJ decision in *Eurofood*, the UK courts were prepared to appoint the same administrators in respect of various foreign subsidiaries of a UK parent company on the basis that, in each case, the subsidiaries were being managed by the parent so that the centres of main interests of the subsidiaries were in the UK[24]. Similar decisions were made by the Hungarian court in *Parmalat*[25], the German courts in *Hettlage*[26], *ZENITH*[27] and *HULKA*[28], the Belgian court in *Sprl Gabriel Tricot*[29] and the French court in *EMTEC*[30]. If it is properly determined that the COMIs of the subsidiaries are in the same jurisdiction as the parent company (on the basis of factors which are both objective and ascertainable to third parties), this does not seem objectionable or contrary to the intentions of the Regulation.

In *Eurofood*, the ECJ held that the registered office presumption in Article3(1) of the Regulation should only be rebutted if factors which are both objective and ascertainable to third parties enable it to be established that an actual situation exists which is different from locating the debtor's COMI at its registered office. If the company carries on business in the territory of the Member State where its registered office is situated, the mere fact that its economic choices are or can be controlled by a parent company in another Member State will not be enough, of itself, to rebut the registered office presumption. A parent company may, however, do more than control the "economic choices" of its subsidiary and the ECJ judgment leaves open the question of what level of parental control would be sufficient to rebut the registered office presumption and to lead third parties to conclude (based on objective and ascertainable factors) that the subsidiary has its COMI in the same jurisdiction as its parent's. It is clear that the ECJ decision has not prevented courts, in particular circumstances, from concluding that all subsidiaries within a group have their respective COMIs in the same place. For example, in the *Eurotunnel* case, the French court was prepared to place companies with their registered offices in Member States other than France into *sauvegarde* proceedings based on the control exercised by the French parent company[31]. Furthermore, in *Lennox Holdings PLC* the English court was prepared to place two Spanish registered subsidiaries of an English parent into administration[32]. The question arises, however, as to whether the English court would have been able to reach the decisions it did in *MG Rover*[33] and *Collins & Aikman*[34] if these cases had been heard after the ECJ's decision in *Eurofood*. Ultimately this will depend upon the evidence put before the court but it may be that the *Eurofood* decision has raised the evidential bar that has to be overcome to show that a subsidiary has its COMI in the same place as its parent company.

It is a separate question as whether the consolidation provisions in certain Member States (such as Italy), whereby an insolvency officeholder appointed in respect of one company may be able to extend those insolvency proceedings to other companies in the group, should enable any insolvency proceedings in respect of a parent company to be extended to its subsidiaries, even if the subsidiaries have their COMIs or any establishments outside the jurisdiction in which the insolvency proceedings in respect of the parent company were

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23 One of the overriding aims of the Regulation – see recital 8.

24 See, for example, the *Daisytek*, *Crisscross*, *MG Rover* and *Collins & Aikman* decisions.

25 Unreported, Metropolitan Court of Budapest, June 14, 2004.

26 1501 IE 1276/04, District Court of Munich, 4 May 2004.

27 25 IN 154/04, July 1, 2004.

28 2 IN 133/04, August 2, 2004.

29 0 ZIP 2005, 1641.

29 Unreported, Tournai Commercial Court, 24 May 2005 and unreported, Mons Court of Appeal, 24 April 2006.

30 Unreported, Commercial Court of Nanterre, 1 February, 2006 and 15 February 2006.

31 RG 07/05764, jurista No. 2007/346870 and RG 07/05752, jurista No. 2007/354294, Tribunal de commerce de Paris, 15 January 2007; Bull. Joly 2007 p.459; Court of Appeal of Paris; 3rd court, Section B, 29 November 2007.

32 [2009] B.C.C. 155, Chancery Division, 20 June 2008.

33 Unreported, Chancery Division, Birmingham District Registry, 18 April 2005; unreported, Chancery Division, Birmingham District Registry, 11 May 2005.

34 Unreported, Chancery Division, 15 July 2005

commenced. The Regulation requires that each company is treated separately and so such consolidation provisions may be seen as being contrary to the jurisdiction rules in the Regulation. Clarification on this issue would be welcome.

It is arguable that it is the failure on the part of the Regulation to deal explicitly with the insolvency of groups of companies that led to some of the early conflicts of jurisdiction (in cases such as *Daisytek* and *Eurofood*). It should be noted, however, that many of these conflicts are now being resolved and that fewer conflicts are occurring in practice as the workings of the Regulation become more familiar. However, national courts are often faced with a practical dilemma. On the one hand, it is not always the case that every company in a group has its COMI in the same country. On the other, there would be significant benefits, in terms of the efficient realisation of those group's assets, if those companies were subject to the same insolvency regime. Faced with these conflicting interests, national courts may come under pressure to find that the COMI of a number of group companies are in the same place. Even bearing in mind the principle of recognition embodied in Article 16, this will inevitably lead to some conflicts between different national courts over where the centre of a COMI may lie and often leads to a race to the courts.

Whilst our members recognise that the lack of special provisions dealing with group companies is detrimental to the efficiency and effectiveness of cross border insolvency proceedings, this is not an easy issue to resolve. The conflict between group structures created for strategic business reasons and the absence of a legal concept of group has been the subject of extensive debate in domestic law for a number of years. Our members are of the view that any attempt to incorporate a concept of "group" into the Regulation would need to be afforded significant further consideration.

General Technical Issues

Recognition and enforcement of insolvency proceedings and judgements

Q21 - Are there any problems with the interaction of the Regulation with the Judgments Regulation/Brussels I, not just in terms of the application of the enforcement provisions of the Judgments Regulation/Brussels I but also in terms of the insolvency exception in Article 1(2)(b) of the Judgments Regulation/Brussels I? If so, what practical difficulties do they create?

Recital 6 to the Regulation provides that it is confined to provisions governing jurisdiction to open insolvency proceedings and judgments which are delivered directly on the basis of insolvency proceedings and are closely connected with such proceedings. Issues may therefore arise as to whether a particular action taken by an insolvency officeholder or a proceeding brought against the insolvent company is an insolvency issue (and so within the scope of Article 3 of the Regulation). If the action or proceeding is not "closely connected" with the insolvency proceedings, it may be governed by a different regime, such as the Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Council Regulation 44/2001 (EC)) (the "Judgments Regulation").

Article1(2)(b) of the Judgments Regulation excludes from its scope "bankruptcy proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings". When analysing the equivalent provision in the 1968 Brussels Convention (the "Brussels Convention"), the ECJ held that actions directly derived from insolvency and in close connection with the insolvency proceedings are excluded from the operation of the Brussels Convention[35]. The question is

[35] Case 133/78 *Gourdain v Nadler* [1979] E.C.R. 733, recently considered and applied by the ECJ, in relation to the whether specific actions brought in the context of insolvency proceedings fell within the exclusion in Article1(2)(b) in the Judgments Regulation, in Case 111/08 *SCT Industri AB v Alpenblume AB* [2009] All ER 47 and *Case C-292/08,*

whether the claim relates to a legal provision specifically applicable to insolvency or which is intrinsic to, rather than consequential upon, the insolvency, or is instead a claim arising under general law.

The ECJ has recently had to consider the above issues and held that Article 3(1) of the Regulation conferred international jurisdiction on the Member State where insolvency proceedings were opened, to hear and determine actions which derive directly from those proceedings and which are closely connected with such proceedings. Therefore, the courts of the Member State within the territory of which insolvency proceedings have been opened have jurisdiction to decide an action, in the context of insolvency, to set a transaction aside that is brought against a person whose registered office is in another EU Member State[36].

Following the ECJ's decision, the relationship between the Regulation and the Judgments Regulation could now be summarised as follows. Where the claim is one that only an insolvency officeholder could bring (and thus is dependent on insolvency proceedings having been opened) it is likely that jurisdiction to hear the claim will be governed by the Regulation. However, if the claim is one arising under general law (i.e. the claim does not require insolvency proceedings to have been opened in order for it to be brought) then it is likely that the Judgments Regulation will govern jurisdiction to hear the claim. However, it may not always be easy to identify which of the categories above the claim will fall into. Perhaps reflecting this difficulty, the ECJ have recently handed down two judgments which concern the scope of the exclusion in Article1(2)(b) of the Judgments Regulation[37].

As well as questions of jurisdiction the relationship between the Regulation and the Judgments Regulation is important in the context of the recognition and enforcement of judgments[38]. We note that there is some debate as to applicability of previous ECJ case law on the Judgments Regulation when considering the recognition and enforcement of judgments under the Regulation. The Swedish Court of Appeal[39] has held that Article 25 of the Regulation means that a Spanish Judgment[40], handed down pursuant to Spanish insolvency law against two Swedish registered companies, would be enforced in Sweden, even though the Swedish registered companies had not had an opportunity to be heard in the Spanish court proceedings. The Swedish Court of Appeal held that when determining whether a judgment could be enforced under Article 25 of the Regulation previous case law under the Judgments Regulation was irrelevant[41]. However, as Article 25(1) of the Regulation provides that part of the Judgments Regulation is to govern the enforcement of judgments falling within the scope of that Article, it could be argued that decisions of the ECJ on the enforcement of judgments under the Judgments Regulation should be relevant in relation to the enforcement of judgments under Article 25(1) of the Regulation. When reaching its decision the Swedish Court of Appeal referred to one of the key purposes of the Regulation, to improve the efficiency and effectiveness of insolvency proceedings with a cross-border element. This indicates to us that the Swedish Court of Appeal viewed the question of enforcement of a judgment under Article 25 of the Regulation, even thought that Article refers to parts of the Judgment Regulation, as a question which fell to be considered taking into account the specific aims of the Regulation. This may mean that a different decision

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German Graphics Graphische Maschinen GmbH v Alice van der Schee (acting as liquidator of Holland Binding BV), 10 September 2009.

36 Case 339/07, *Seagon v Deko Martin Belgium NV*.

37 Case 111/08 *SCT Industri AB v Alpenblume AB* and *Case C-292/08, German Graphics Graphische Maschinen GmbH v Alice van der Schee (acting as liquidator of Holland Binding BV)*.

38 Article 25(1) provides for the recognition and enforcement of judgments which concern the course and closure of insolvency proceedings and judgments which are directly derived from and are closely linked with insolvency proceedings. Such judgments are to be enforced in accordance with Articles 31 to 51 (with the exception of Article 34(2)) of the Judgments Regulation. The recognition of such judgments is to be automatic under Article 16 of the Regulation.

39 Ö 4988-08; Svea Court of Appeal; 21 October 2008.

40 The judgment concerned preservation measures.

41 This was particularly pertinent as the ECJ had held that preservation measures that are ordered ex parte and are intended to be enforced without service on the parties affected (the Spanish judgment fell within this description) do not fall within the scope of the Judgments Regulation (*Bernard Denilauler v. SNC Couchet Fréres* [1980] E.C.R. 1553).

would be reached as to whether a judgment should be enforced under Article 25(1) of the Regulation than in previous cases solely concerning the Judgments Regulation. Clarification on the applicability of previous case law on the Judgments Regulation to Article 25 of the Regulation would be beneficial. We note that the ECJ in *Eurofood* held that a Member State may refuse to recognise a judgment opening insolvency proceedings where the decision was taken in flagrant breach of the fundamental right to be heard. Accordingly, it could be argued that a Member State should be able to refuse to enforce a judgment which falls within Article 25(1) of the Regulation where the party against whom that judgment is to be enforced did not have a right to be heard. It is not known if the Swedish Court of Appeal considered the application of the principles set out by the ECJ in *Eurofood* but our view is that the same considerations should apply in relation to judgments opening insolvency proceedings and judgments covered by Article 25 of the Regulation.

A further issue arises on the relationship between the Regulation and the Judgments Regulation. This concerns the scope of the Regulation, which is defined in Article1(1) as covering "*collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator*"[42] and the exclusion in Article1(2)(b) of the Judgments Regulation for "*bankruptcy proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings*". These two provisions leave scope for some insolvency/restructuring proceedings to fall between the two regulations (which was probably never intended). This arises because there are some insolvency/restructuring proceedings which are classed as judicial arrangements or composition proceedings and are therefore within the exclusion in the Judgments Regulation, but which fall outside the scope of the Insolvency Regulation. For example in the UK a scheme of arrangement has been held to fall within the exclusion in the Judgments Regulation[43] but is not listed in the UK Annex entries to the Regulation and therefore falls between the two regulations. The effect of this is that ad-hoc national laws are likely to apply to the recognition of a scheme of arrangement in Member States which is likely to make recognition more expensive and less certain. It would be beneficial if this uncertainty and discrepancy between the Regulation and the Judgments Regulation was removed in order to bring greater certainty to the recognition and enforcement of proceedings which fall within them across the EU. Where a proceeding is aimed at rescuing a company which is insolvent or is in financial distress, it is suggested that such a proceeding should be within the scope of the Regulation in order to benefit from the automatic recognition provisions within that regulation and to achieve the wider objectives of the Regulation. In the current economic climate, where new rescue style proceedings (as opposed to more traditional insolvency proceedings) are being introduced by Member States which do not necessarily entail "divestment" and which may not therefore fall within the scope of the Regulation, but are likely to fall within the exclusion in the Judgments Regulation, the issue is likely to be one of growing importance.

We understand that the European Commission is currently conducting a review of the Judgments Regulation. In our view such a review should be joined up with a review of the Regulation on the above issues.

Q22 - Have any Member States relied on the provisions of Article 26 to refuse to recognise insolvency proceedings or to enforce a judgment on the grounds of public policy? If so, please provide examples and state what sort of public policy grounds were raised.

On the whole Member States' courts appear to be applying the guidance set out by the ECJ in *Eurofood* that Article 26 should only be applied in exceptional circumstances. See for example

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42 The particular insolvency and restructuring proceedings to which the Insolvency Regulation applies are then specifically set out for each EU Member State in Annexes to the Insolvency Regulation.

43 See for example *In the matter of DAP Holding NV* [2005] EWHC 1602 (Ch).

the decision of the Luxembourg district court in relation to PIN Group AG S.A.[44] and the Higher Regional Court of Innsbruck[45]. Both courts recognised insolvency proceedings opened in other Member States, despite arguments being raised that recognition should be refused on Article 26 public policy grounds. However, it should be noted that, in the *Hans Brochier* case the ECJ's decision in *Eurofood* did not prevent the German court from relying on public policy arguments when refusing to recognise an English administration commenced via the out-of-court route for reasons which could potentially apply to any administration commenced in this manner[46].

The German court's decision was reached on the following grounds.

a) The English court had not independently verified its competence to open main insolvency proceedings, but simply relied on unsubstantiated representations made by the directors in the papers filed with the court. This was a fundamental breach of German procedural rules.

b) Because this was an out-of-court appointment, there was no English court order containing reasons for the decision to open administration proceedings. This represented a breach of German procedural rules, as under German law the substantiation of a court's reasoning for a decision is a fundamental requirement for a fair proceeding[47].

c) The English court had not verified the independence of the administrators which was also a fundamental breach of German public policy[48].

d) The English administration (by way of the filing of documents with the English court) was only made possible by Hans Brochier Limited's directors concealing the true facts of the case from the English court.

Ultimately, these public policy arguments did not need to be considered by a higher German court because, on 15 August 2006, the English court (on the application of the English administrators) held that Hans Brochier Limited's COMI was in Germany. On 1 October 2006, the Local Court of Nuremberg held the same.

However, the same public policy arguments may be used again in relation to any English administration commenced via the out-of-court route particularly as in such an administration, the English court will not ordinarily: (i) verify whether the jurisdictional representations made by the applicant are correct; (ii) provide reasons for the opening of the proceedings; or (iii) verify the independence of the administrators. It should be noted that a creditor may, however, appeal the decision to open administration proceedings via the out-

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44 n°113189 du rôle, (District Court) Luxembourg, 21 March 2008.

45 1 R 176/08d, Higher Regional Court Innsbruck, 8 July 2008.

46 8004 IN 1326 1331/06, Local Court of Nuremberg, 15 August 2006.

47 In the *Stojevic* case the Austrian Court of Appeal also criticised the fact that English court orders do not contain the reasons for the order but merely set out the terms of the order (8 Ob 135/4t. 17 March 2005). In that case, it was argued that this was a breach of procedural public policy and accordingly Article 26 of the Regulation could be invoked. The Austrian Supreme Court rejected this argument, holding that it was not manifestly contrary to Austrian public policy. The English court responded to the criticisms regarding English court orders by stating that the English insolvency legislation ensures a fair legal process ([2007] BPIR 141, Chancery Division, 20 December 2006). It should be remembered, however, that the English legal system is adversarial rather than inquisitorial and so a court will make a decision on the evidence presented to it (rather than making its own enquiries). Where evidence as to a debtor's COMI is not contradicted or disputed, the English court will not of its own volition enquire into the matter as a German or Austrian court may do. It should also be noted that the Austrian case involved the opening of English bankruptcy proceedings by way of a court application (and not an out-of-court appointment as in *Hans Brochier*).

48 It is understood that the German court was particularly critical of the fact that the administrators had previously advised Brochier Limited's directors. It is not uncommon in England for officeholders to be appointed who have previously had some involvement with the company or its creditors, particularly as there are cost advantages of such appointments. As a matter of professional conduct, however, an officeholder cannot take an appointment if he or she has had a "material professional relationship" with the company or individual in relation to which or whom the appointment is taken (see the Department of BIS's Guidance to Professional Conduct and Ethics for persons authorised by the Secretary of State as Insolvency Practitioners).

of-court route in the UK and, if there is evidence that the administrators are not independent, this would be a ground for their removal. It is not known whether the German court took this right of appeal into account and, if it had, whether its decision would have been different. Furthermore, administration commenced via the out-of-court route is included in the UK Annex A entry and so it is questionable whether public policy arguments should be raised in other Member States which go to the very nature of how such a proceeding is commenced as a matter of English law. As mentioned above such future problems may be avoided by the European Commission issuing guidance that EU Member States cannot refuse to recognise insolvency proceedings opened under the Regulation on grounds of public policy, where the opening of the relevant proceedings have complied with the procedural and legal rules of the Member State opening the proceedings.

In *Eurofood*, the ECJ provided one example where a Member State may refuse to recognise insolvency proceedings opened in another Member State, that is where the decision to open insolvency proceedings was taken in a flagrant breach of the fundamental right to be heard. The Austrian court considered this guidance when recognising the appointment of a German interim insolvency trustee, in particular the comments on the fundamental right to be heard[49]. The Austrian court held that, although the German procedural law relating to the commencement of interim insolvency proceedings, in certain instances of particular urgency, denied the debtor the right to be heard as to whether an interim insolvency trustee should be appointed, there was a comprehensive right for the debtor to appeal such decision. As such there was no fundamental breach of the right to be heard and therefore no breach of Austrian public policy. This very much reflects the policy we have been seeing of only applying Article 26 in exceptional circumstances and such decisions are to be welcomed.

Given the guidance set out by the ECJ in *Eurofood* on the right to refuse to recognise insolvency proceedings opened in another Member State under Article 26 of the Regulation, rights of parties to make representations in relation to the opening of insolvency proceedings and any rights of appeal they may have under Member States' laws are likely to be a key aspect in assessing whether the opening of insolvency proceedings is manifestly contrary to public policy. As, at present, such rights vary widely from Member State to Member State[50], in order to create a level playing field, we are of the opinion that a standard set of rules in relation to the above should be applied to insolvency proceedings opened under the Regulation.

Detrimental acts

Q23 - How do the provisions in the Regulation relating to detrimental acts impact on our provisions relating to antecedent transactions? For example, do our antecedent transaction provisions operate successfully in cross-border cases?

See answer to Q 17 - commentary on Article 13.

Our members have little additional experience in this area. There is no case law on Article 13 yet but our members note that, in the ongoing Parmalat case, the Parma court heard expert evidence on the interpretation of Article 13 by two leading QCs in England who came to directly contradictory views on the meaning of “any means of challenging that act in the relevant case”.

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[49] 1 R 176/08d, Higher Regional Court Innsbruck, 8 July 2008.

[50] For details on these rights we would refer you to the publication "European Cross Border Insolvency" published by Sweet & Maxwell and edited by Jennifer Marshall. This publication includes a chapter on the insolvency laws of each Member State and information on rights to be heard and rights of appeals are included in sections 4 – 6 of each chapter.

Publications

Q24 - Is the lack of mandatory publication across the EU of (main) insolvency proceedings a problem? If yes, what issues arise as a result?

At present where a court of a Member State is faced with an application to open insolvency proceedings it has no way of being sure that main proceedings have not already been opened in another Member State. There is no central EU register of insolvency proceedings and each Member State has its owns rules for the publication of insolvency proceedings opened in its own jurisdiction[51]. This may mean that main proceedings are inadvertently opened in respect of the same debtor in more than one Member State. The opening of two sets of main proceedings in relation to the same debtor can result in a large scale waste of costs. For example, there can only be one set of main proceedings opened in the EU in relation to the same debtor and so further court applications will be needed to remedy the situation and for a time there will be two sets of officeholders with the duplication of expenses this will bring. Furthermore, the opening of two sets of main proceedings can give rise to many difficulties. For example in the *Daisytek* case main proceedings were opened in respect of the German registered company in both England and Germany. Eventually the German main proceedings were replaced by secondary proceedings but difficult questions arose as to the effectiveness of acts carried out by the German officeholder in the now defunct German main proceedings. The German court held[52] that where second main proceedings were opened with knowledge of the first main proceedings then any acts carried out in the second main proceedings will not be effective. If the second main proceedings were opened without knowledge of the first main proceedings then acts carried out in the second main proceedings will be valid. The German court did not discuss what would constitute "knowledge" of the first main proceedings. However, if there was a central EU register of insolvency proceedings, such questions would fall away, as parties would be able to search this register in order to establish whether main proceedings have already been opened. The entries of the register could be classed as constructive notice to the world of the fact that insolvency proceedings have already commenced.

Where main proceedings have been opened in a Member State other than the one in which the company's registered office is located, the insolvency officeholders in the main proceedings have increasingly been seeking to register and publish the judgment opening the main proceedings in the jurisdiction of registered office[53]. We understand that, in part, this process has been undertaken, despite the automatic recognition provisions in the Regulation, in order to make sure that creditors are aware of the opening of insolvency proceedings. Given that, in some cases, main proceedings have been commenced in respect of a number of companies within the same group in one jurisdiction a central EU register of insolvency proceedings would make it easy for interested parties to establish whether a company has been placed into insolvency proceedings in any Member State.

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51 We note that in some Member States, including the UK, it can be difficult to be definitively sure whether insolvency proceedings have been commenced in relation to a debtor.

52 IX ZB 103/07, German Federal Court of Justice, 29 May 2008.

53 See for example in relation to *Crisscross Telecommunications.*

We are also aware of practical recognition difficulties encountered where main proceedings have been commenced in a different Member State to that where the debtor's registered office address is situated. When a company goes into an insolvency procedure in the UK the details will be recorded at Companies House. As a result, the Registrar of Companies will not actively chase the company for the filing of its annual returns and annual accounts. Our members have encountered difficulties where a UK company is in main proceedings in a Member State other than the UK. The existence of main proceedings elsewhere in the EU is not capable of registration and is therefore not being recognised by Companies House. We have experienced instances where the Registrar of Companies has taken steps to strike a company off for failure to file its annual accounts. Similar problems have been experienced in dealings with HMRC. In the absence of a EU Register of Companies, our members are of the view that a mechanism for the recognition and recording the details of main proceedings commenced in another Member State should be implemented.

Given the above we are of the opinion that a central EU register of insolvency proceedings would be of great practical benefit.

Q25 - Is it currently easy to establish whether a company has been placed into insolvency proceedings in any Member State? If not, what problems has this caused and how might this be addressed?

Establishing whether a company has been placed into an insolvency process in another Member State is not straightforward. The most obvious problem of not easily being able to establish whether a company has been placed into an insolvency procedure is the risk of a second set of main proceedings being commenced.

A central EU register of insolvency proceedings would be of great practical benefit. There is a question, however, as to whether all insolvency proceedings commenced in a particular Member State should be registered on this register, regardless of whether there is thought to be any cross-border effect (see scope of Regulation under question 34). There are difficulties in either approach. If all proceedings are registered, this could lead to hundreds and thousands of entries. However, it may not be clear at the outset whether there is a cross-border element.

Powers of the liquidator

Q26 - Do the provisions relating to the exercise of the liquidator's powers operate in a satisfactory way in practice? If not, why not and what needs to be done to address the issue?

Outside of the issues which arise in relation to the opening of secondary proceedings being potentially detrimental to corporate rescues (see above), we are of the view that generally liquidators have been able to exercise their powers in a satisfactory way.

One issue which has arisen is whether the officeholder has the power to deal with assets located outside of the EU. The Regulation is silent on this point. We are aware that in the *EMTEC* case the Austrian court held that it was the officeholder in the main proceedings that had the power to deal with such assets. Given that the Regulation is clear that secondary proceedings only encompass the assets situated in the jurisdiction where the secondary proceedings have been opened, the decision must be correct. Equally, paragraph 73 of the

Virgos-Schmit Report[54] provides that main insolvency proceedings have universal scope. They aim at encompassing all the debtor's assets on a world-wide basis and effecting all creditors, wherever located. While we do not regard the conclusion of the Austrian court to be controversial it may be useful to insert an amendment in the Regulation to clarify that main insolvency proceedings have universal scope. However, we recognise that the universal scope of the main proceedings may not be recognised by all jurisdictions outside the EU.

There is also the question as to whether the directors have the power to open secondary proceedings where, under the law of the jurisdiction in which main proceedings have been commenced, the directors have been divested of the power to represent the company. We are aware of this causing difficulties where directors want to file in the jurisdiction of an establishment to protect their personal position.

Q27 - Where there is more than one proceeding do current provisions relating to priority of costs work in a satisfactory way? If not, why not and what needs to be done to address the issue?

See our comments in relation to question 13 above.

Stay of liquidation

Q28 - Have the provisions of Article 33 (stay of liquidation) been used in practice and, if so, was the outcome satisfactory?

We are aware of the provisions of Article 33 being used in relation to the insolvency proceedings concerning companies within the *Collins & Aikman* group. Main and secondary proceedings had been opened in England (administration) and Austria (bankruptcy) respectively in relation to the Austrian registered subsidiary. The time limit to appeal against the opening of the secondary proceedings in Austria had expired. Accordingly, the English administrators applied for the stay of the Austrian secondary proceedings or, in the alternative, the stay of the liquidation process. The English administrators claimed that it would be beneficial to realise the goodwill of the entire group, arguing that they could obtain a higher sale price if they sold the group as a whole rather than if the production sites were sold separately. The requested stay of the secondary proceedings or liquidation process would give them sufficient time to search for interested investors and would be of mutual benefit to the creditors of the main and the secondary insolvency proceedings. Initially the Austrian court rejected the application. On appeal, the Higher Regional Court Graz[55] refused to stay the secondary proceedings (as there were no provisions in the Regulation to do so) but did stay the liquidation process under Article 33. We do not have any information as to whether the stay of the liquidation process resulted in a satisfactory outcome. However, it is important to note that staying the liquidation process does not remove the existence of secondary proceedings and Article 33(1) of the Regulation only allows for a stay to be granted for a three month period. Where the stay of the liquidation process is to facilitate a coordinated group-wide approach to the company's insolvency, it may not be possible to finalise this in a three month period. Therefore, another court application may be needed to obtain a further three month stay of the liquidation process (with the costs and expenses this brings)[56]. Given the above, it will often be more beneficial to the officeholder in the main

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54 A detailed explanatory report, by Professor Virgos and Mr Schmit (the "Virgos-Schmit Report"), was prepared to accompany the European Convention on Insolvency Proceedings (the forerunner to the Regulation). This carries no official status and is not decisive regarding the meaning of the Regulation but, as the Regulation is based so closely on the text of the Convention, courts across the EU are using it as guidance in determining the intention and scope of many provisions of the Regulation.

55 3 R 149/051, Higher Regional Court Graz, 20 October 2005.

56 We would also refer you to the comments we made in response to question 11 on the deficiencies in a stay of the liquidation process (rather than a stay of the secondary proceedings).

proceedings if they are given the chance to make representations on any application to open secondary proceedings or, at least, are given prompt notice of the secondary proceedings so they can bring an appeal against their opening in time. The English court recognised this *In the matter of Nortel Networks* (see our response to question 11 for further detail). Given the above we are also of the view that provisions should be included in the Regulation allowing for the officeholder in the main proceedings to apply to close secondary proceedings, where such closure would be beneficial to the creditors of the company concerned.

We are also aware that, in relation to the insolvency proceedings concerning companies within the *MG Rover* group, the German court refused to stay the liquidation process in respect of a German registered subsidiary. It is not known if this caused problems to the officeholders in the main proceedings, but the fact that the liquidation process continued contributed to duplication of costs and expenses which led to litigation in the English court (see our comments on question 13 above).

Preservation measures

Q29 - Have the provisions of Article 38 (preservation measures) been used in practice and, if so, was the outcome satisfactory?

Many Member States have provisions in their laws for the appointment of interim officeholders for the purpose of preserving the debtor's assets. Whether the appointment of an "interim officeholder" opens insolvency proceedings for the purpose of the Regulation or results in the officeholder being classed as a temporary officeholder under Article 38 depends on the facts of each case. The ECJ set out guidance on the matter in *Eurofood* when holding that the appointment of a provisional liquidator by the Irish court had opened main proceedings for the purpose of the Regulation. Applying the guidance set out in *Eurofood* the question of whether the appointment of an "interim officeholder" has opened insolvency proceedings for the purpose of the Regulation will depend on whether: (i) they are appointed within an application to open insolvency proceedings listed in Annex A or B (this will determine whether the proceedings are main or secondary); (ii) the officeholder is listed as a liquidator in Annex C; and (iii) the officeholder's appointment results in the divestment (full or partial) of the debtor's power of management over its assets. This assessment will often depend on the precise terms of the court order appointing the "interim officeholder", as in many Member States it will be the court order which will set out whether the debtor's power of management has been divested. If the appointment has not opened insolvency proceedings for the purpose of the Regulation then it will need to be considered whether the "interim officeholder" is a temporary administrator under Article 38 of the Regulation. However, we are not aware of the provisions in Article 38 being used in practice. This may be because, in our experience, it is more usual for the appointment of an "interim officeholder" to open insolvency proceedings under the test set out above.

Duty to inform creditors

Q30 - Are liquidators complying with the obligation to provide the heading on the "Invitation to lodge a claim" form in all the official languages of the institutions of the EU and are there any problems associated with this?

Our members have no direct experience of this.

Right to lodge claims & distributions to creditors

Q31 - Are the claims of creditors from Member States other than the State of the opening of proceedings being dealt with satisfactorily? If not, why not and what needs to be done to address the issue?

Our members have no direct experience of any issues.

Q32 - Does the cross-lodgement of claims between different proceedings work satisfactorily in practice? If not, why not and what needs to be done to address the issue?

Our members have no direct experience of this.

Content of the lodgement of a claim

Q33 - Are creditors from Member States other than the State of the opening of proceedings complying with the obligation to provide the heading on the "Lodgement of claim" form in the official language of the State of the opening of proceedings and are there any problems associated with this?

Our members have no direct experience of this.

Other issues

Q 34 – If you have encountered any other problems or issues with the Regulation, please provide details.

Annex Entries

There has been some debate as to whether the Annex entries for each country should be regarded as definitive. Questions have arisen as to whether a court may go behind the Annex entries and enquire whether an insolvency proceeding, despite being listed in the Annexes, actually falls outside the wording of Article 1(1) of the Regulation and so should not be recognised on that ground. An initial decision of the Tribunal de commerce de Paris held that as the French *sauvegaurde proceedings* were listed in Annex A to the Regulation, the Regulation applied[57]. Once a proceeding is listed in the Annexes a court is not also required to check whether the insolvency proceedings in question falls within the definition of "collective insolvency proceedings". However, as this decision was later invalidated by the Court of Appeal of Paris[58] it is likely to be difficult to rely on. It could be argued that it is the responsibility of each Member State to list its insolvency proceedings falling within Article 1(1) and so the Annexes should be regarded as definitive. It remains to be seen, however, whether the Commission will take action if a Member State attempts to list an insolvency proceeding that does not fulfil the criteria set out in Article1(1). Given these uncertainties it would be beneficial if an amendment could be made to the Regulation to clarify that Annex entries for each country are definitive and, when a Member State, seeks to include a new

[57] RG 07/05764, jurista No. 2007/346870 and RG 07/05752, jurista No. 2007/354294, Tribunal de commerce de Paris, 15 January 2007; Bull. Joly 2007 p.459.

[58] Court of Appeal of Paris, 3rd court, Section B; 29 November 2007.

insolvency proceeding in the Annexes, that the Commission actively assesses whether such a proceeding should be included.

A further issue which arises with the Annex entries concerns the amendment by a Member State of its insolvency laws to create a new insolvency proceeding. When new insolvency proceedings come into effect in a particular Member State, there is often a delay before the Annexes are amended. This creates problems for practitioners as "insolvency proceedings", "liquidator" and "winding up proceedings" are defined in the Regulation by reference to Annex A, B or C of the Regulation as relevant[59]. If the new insolvency proceedings are not listed in the Annex entry for that Member State at the time they are commenced, the question arises as to whether the Regulation applies to them. The Austrian courts seem to have taken the view that, even though the appointment of an interim liquidator in Germany was not listed in the German Annex entries, the rules governing the effect of the German interim liquidation on the Austrian proceedings should be governed by the Regulation[60]. An alternative view, however, is that the Annexes contain an exhaustive list of the relevant insolvency proceedings so that, unless and until the Annexes are amended, the new insolvency proceedings should fall outside the Regulation's scope. The uncertainty this causes in practice when a Member State creates a new insolvency proceeding is unhelpful. It is suggested that Member States should seek to amend the Annexes so that the amendments take effect as soon as the new insolvency proceedings come into force and that the Commission actively coordinate matters with the relevant Member States' Governments in this regard.

Scope of the Regulation

In accordance with recital 14 of the Regulation our view is that the Regulation applies to all insolvency proceedings where the debtor's COMI is located in the EU. This, in our view, should be the case whether or not the insolvency proceedings have a cross-border element. However, we are aware that courts in some Member States are taking the opposite view. For example, in Germany the Local Court of Hamburg[61] stated that in order for the Regulation to apply the insolvency proceedings must have a cross-border element. While it is clear from the Recitals that the Regulation is intended to assist with insolvency proceedings with a cross-border element, there is nothing in Articles 1(1) and 3 of the Regulation which limits the application of the Regulation to proceedings of this nature. In contrast the English court applied the Regulation in determining whether it had jurisdiction in a purely domestic case[62]. Given that the above debate creates uncertainty as to when the Regulation will apply it is suggested that an amendment is made to the Regulation to provide that it applies in all cases where the debtor's COMI is in the EU, whether or not the insolvency proceedings involve a cross-border element.

Article 1(1) of the Regulation provides that it does not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holdings of funds or securities for third parties, or collective investment undertakings. We understand that such carve outs were made because it was intended that such undertakings be covered by separate legislation. Insurance undertakings and credit institutions are covered by separate European legislation, namely the EU Directive on the Reorganisation and Winding-up of Credit Institutions, Directive 2000/24/EC of 4 April 2001 and the EU Directive on the Reorganisation and Winding-up of Insurance Undertakings, Directive 2001/17/EC of 19 March 2001. However, as yet no separate European legislation has been enacted in relation to investment undertakings which provide services involving the holdings of funds or securities for third parties or to collective investment undertakings. This is particularly pertinent in light of the collapse of Lehman Brothers. One of the UK Lehman entities was an investment undertaking which provided services involving the holdings of

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59 Articles 2(a), (b) and (c) respectively.

60 9 Ob 135/04z, Austrian Supreme Court, 23 February 2005.

61 67a IE 1/06, Local Court of Hamburg, 16 August 2006.

62 *Salvage Association* [2003] All E.R. 265, 9 May 2003.

funds or securities for third parties. As such, the lack of legislation in this area meant that, among other things, there were no provisions providing for harmonised recognition of the insolvency proceedings across the EU.

Administration and Administrative Receivership

In the case of a company with its registered office in the UK but which is held to have its COMI outside the UK, it will not (generally[63]) be possible to appoint an administrator in respect of that company but, unless an exception to the prohibition in section 72A of the Insolvency Act 1986 applies, it will also not be possible to appoint a receiver over the whole or substantially the whole of the assets (as such a receiver would be deemed to be an administrative receiver). It is not clear how security over the assets of such a company would be enforced. As the COMI test is very different from the place where the assets are located, it is possible that there could be cases where the COMI is outside the UK but where substantially the whole of the assets are in the UK. An example might be an investment company with a portfolio of English assets but where the management of the company was out-sourced to an entity outside the UK. It would be helpful if section 72A of the Insolvency Act 1986 could be amended so that there was no prohibition on appointing an administrative receiver in circumstances where it is not possible to appoint an administrator.

In the case of a company with its registered office outside the UK[64] but with its COMI in the UK, it will be possible to appoint an administrator but, even where an exception to section 72A of the Insolvency Act 1986 applies, it may not be possible to appoint an administrative receiver. This is because of the different definitions of "company" for the purposes of the administration provisions (paragraph 111 of Schedule B1 to the Insolvency Act) and the receivership provisions (section 251 of the Insolvency Act 1986). This is particularly relevant in the context of securitisations and structured finance transactions where, for tax and other reasons, the issuer may have its registered office outside the UK (for example in the Cayman Islands or Jersey) but may hold and manage a portfolio of assets located in the UK. If the COMI was held to be in the UK (for example because the management of the assets was being out-sourced to a UK company), the rating of the securitisation could be significantly impaired as it is not currently possible to give a "clean" opinion that an administrative receiver could be appointed in order to prevent the appointment of the administrator, even where an exception to section 72A would otherwise apply, because of the different definitions of "company" that are used. For these reasons, it would be helpful if the same definition of "company" could be used for the purposes of the administration and administrative receivership provisions.

Application of the Regulation to Scheme of Arrangement

For the purposes of section 895(2)(b) of the Companies Act 2006, the English court has jurisdiction to sanction a scheme of arrangement in relation to any company liable to be wound up under the Insolvency Act 1986[65]. As the Regulation may affect the ability of the English court to wind up a company with its COMI in the EU, the question arises as to whether the Regulation could therefore have an indirect application on the English court's jurisdiction to sanction a scheme of arrangement. This has been considered in the English decisions in *Re Drax Holdings Ltd*[66]*, DAP Holding N.V.*[67] and *Re Sovereign Marine & General*

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63 The exception is the appointment of an administrator as a territorial proceeding under Article 3(4) based on an establishment in the UK but the circumstances in which this can be done are limited.

64 Following the decision in *Brac Rent-a-car International INC* [2003] 2 All ER 201, this would even apply to companies with their registered office outside the EU.

65 On April 6, 2008 the provisions in the Companies Act 1985 on schemes of arrangements were repealed and replaced by sections 895-901 of the Companies Act 2006. The entering into force of the provisions in the Companies Act 2006 did not result in any substantive change to the law and therefore case law concerning the Companies Act 1985 remains relevant. In particular section 425(6) of the Companies Act 1985 had provided that the English court had jurisdiction to sanction a scheme of arrangement in relation to any company liable to be wound up under the Companies Act 1985 (which had been construed as meaning the Insolvency Act 1986). In effect this was the same test as now exists under the Companies Act 2006.

66 [2004] 1 B.C.L.C. 10, 17 November 2003.

Insurance Co Ltd[68], in all three cases the court was of the view that the Regulation had not had an impact on the English court's jurisdiction to sanction a scheme. Despite this case law, doubts have been expressed as to the court's reasoning. Accordingly, in order to alleviate the uncertainty caused and for other reasons listed above (in particular in response to question 21) we are of the view that consideration should be given to including schemes of insolvent companies in the UK Annex Entries.

Directors' Liability

An issue arises regarding whether a director of the debtor company can apply for the opening of secondary proceedings under Article 29(b) where the law of the main proceedings divests him or her of such a power. This would appear to be inconsistent with Article 4(2)(c) regarding the effects of the main proceedings[69]. However, if the director does not apply for the opening of such proceedings, the director may be personally liable under the insolvency law of the Member State in which the establishment is located. In this regard, the German decision of the Regional Court of Kiel should be noted[70]. This case involved a company that had been incorporated and was registered in England. At first instance, the Local Court of Bad Segeberg held that corporate governance issues should be governed by English law (as the place of incorporation). This was overturned on appeal, however, by the Regional Court of Kiel which found that the company's centre of main interests was in Germany so that German law governed the insolvency proceedings and their effects (including the liabilities of the directors for failing to file for insolvency proceedings). This should be contrasted with the German decision regarding the German Collins & Aikman subsidiary[71]. In that case, the German court held that there was no need to open insolvency proceedings in Germany solely for the company's directors to fulfil their duties in respect of the timely filing of the opening of insolvency proceedings; the directors of the German registered company complied with their duties by the filing of an application to open insolvency proceedings in another Member State without undue delay. The difference between these two decisions is that, in the first case, no insolvency proceedings in relation to the English registered company had been commenced (either in Germany or the UK) whereas, in the *Collins & Aikman* case, insolvency proceedings had been commenced in England. Pending clarification, the prudent advice to directors (or any insolvency officeholder) must be to attempt to commence proceedings in the Member State of the establishment (if there is otherwise a risk of personal liability) and then to leave it to the court of that Member State to determine whether the director has authority to file such an application following the commencement of main proceedings. Given the above issues, it would be beneficial for their to be an amendment to the Regulation to provide that, once main insolvency proceedings have been opened, directors will not be in breach of any national law requirement to file for the opening of insolvency proceedings in the Member State where any establishment is located.

Applicability in Time

We would welcome clarification regarding Article 43 which states that "acts done" by a debtor before the entry into force of the Regulation continue to be governed by the law which was applicable to them at the time they were done. Does this mean, for example, that if a contract was entered into before 31 May 2002, the provisions of Article 4(2)(m) and Article 13 (for example) would not apply in relation to that contract? This would mean that an insolvency officeholder would have the onerous job of establishing which legal relationships were created before and after 31 May 2002 and different rules would apply to the legal relationships depending on the categories into which they fell. It would also mean that the full effect of Article 4 and the various exceptions would not be felt for some time but, instead, there would be a piecemeal application of the Regulation over the debtor's estate. While this

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67 [2005] EWHC 2092, 26 September 2005.

68 [2006] EWHC 1335, 9 June 2006.

69 Art.4(2)(c) provides that the law of the State of the opening of proceedings shall determine the respective powers of the debtor and the liquidator.

70 10 S 44/05, 20 April 2006.

71 67 g IN 358/02, AG Hamburg, 14 May 2003.

71 71 IN 416/05, 10 August 2005.

issue will gradually fall away over time, as less acts will have been done by a debtor before the entry into force of the Regulation, many companies have contracts which last for long periods and thus this question will remain live for some time.