

**The purpose of education is
to replace an empty mind
with an open one.**

Malcolm Forbes

Diana Ungureanu, NIM, 2015

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Case C-396/09, Interedil

- **Where the bodies responsible for the management and supervision of a company are in the same place as its registered office and the management decisions of the company are taken, in a manner that is ascertainable by third parties, in that place, the presumption in that provision cannot be rebutted.**
- **where a debtor company's registered office is transferred before a request to open insolvency proceedings is lodged, the COMI is presumed to be the place of its new registered office.**

Case C-396/09, Interedil

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

Case C-396/09, Interedil

- The term 'establishment' must be interpreted as requiring **the presence of a structure consisting of a minimum level of organisation** and a degree of **stability** necessary for the purpose of pursuing an economic activity.
- **The presence alone of goods in isolation or bank accounts does not, in principle, meet that definition.**

Jurisdictional Disputes

- Although the Regulation does not directly address multinational companies, the national courts provided their interpretation of the Regulation. However, the inherently problematic definition of COMI is capable of offering varying judicial interpretations
- *Re Enron Directo Sociedad Limitada* (unreported, 4 July 2002)

The Anglo-French Saga

- *Daisytek ISA Limited* [2004] B.P.I.R. 30.
- *MG Rover* [2005] EWHC 874(Ch.)
- *Eurofood IFS Limited*, Case C-341/04 ECJ (2 May 2006)

Enron Directo Sociedad Limitada

- **Held:** A Spanish incorporated Enron company trading in Spain, whose head office functions were carried out in London, had its COMI in England.
- In determining the COMI of the company, it should be considered whether the registered office corresponded with the company's head office functions.
- Where the debtor provides proof to the contrary that the head office and registered office are not located in the same MS and the head office is where the main financial, administrative, executive and strategic functions are performed then the presumption can be rebutted.

Daisytek ISA Limited

- Following the insolvency of the holding company of a group of trading companies, a petition was filed before the English court for administration orders in respect of 14 European subsidiaries, including French and German subsidiaries.
- **Held:** The English court had jurisdiction to make an administration order in respect of each of the companies on the basis that their COMI was in England regardless of their foreign incorporation.
- **-Emphasis placed on Recital 13.** In identifying the COMI consideration should be given to the scale and importance of the interests administered at the various locations, which could be regarded as the COMI, including the jurisdiction of the registered office.
- **A)** effective management and control of all the companies in the group was conducted from the head office in England.
- **B)** The companies' funding was provided through English financial institutions
- **C)** All financial information was compiled in accordance with English accounting principles
- **D)** 70% of the supply contracts were negotiated centrally through the English head office.

SAS Daisytek-Isa

➤ SAS Daisytek-Isa :

- Daisytek-Isa SAS, High Court of Justice of Leeds, May 16, 2003 (Administration order)
- SAS Daisytek-Isa, Commercial Court of Pontoise, May 26, 2003 (Opening decision in France)
- SAS Daisytek-Isa, Commercial Court of Pontoise, July 1, 2003 (Third party proceedings against the French proceeding)
- SAS Daisytek-Isa, Court of Appeal of Versailles, September 4, 2003 (Appeal against the decision of July 1, 2003)
- SAS Daisytek-Isa, French Supreme Court, June 27, 2006 (Final decision)

The SAS Daisytek ISA was the first French judgment applying the EC Regulation where the automatic recognition of a foreign insolvency regime (English Administration procedure) was highlighted in respect of a company born under French Company legislation.

'It was like the effects of a bomb'...

MG Rover

- MG Rover Ltd. was the holding company of sales subsidiaries trading in 8 EU jurisdictions, amongst them was France.
- Following the reasoning in *Daisytek* the English court concluded that it had jurisdiction to open administration proceedings in respect of the subsidiaries, as their COMI was in England.
- The presumption stated under Art.3(1) was rebutted in the light of the factual evidence.
- Public policy argument pursuant to Article could not be invoked, as the French employees' interests were fully protected.

SAS Rover France

- **SAS Rover France** :
 - MG Rover Group Ltd, High Court of Justice of Birmingham, April 18, 2005
(Administration order)
 - SAS Rover France, Commercial Court of Nanterre, May 19, 2005
(denying French jurisdiction)
 - SAS Rover France, Court of Appeal of Nanterre, December 15, 2005
(Confirmation of the judgment of the Commercial Court of Nanterre)

The *SAS Rover France* case demonstrated that finally both English and French courts and practitioners have actively collaborated to find a pragmatic solution in the interests of all parties involved in the *Rover* insolvency.

Application of the ECJ's guidelines by national courts

- *Hans Brochier Holdings Ltd.*, High Court of 15 August 2006
- *BenQ* Rechtbank, Amsterdam of 31 January 2007
- *Eurotunnel*, Tribunal de Commerce de Paris of 2 August 2006

National cases

- *Re Nortel Networks SA*
High Court of 14 January 2009
- *Re Lennox Holdings Plc*
High Court of 20 June 2008
- *Re Stanford International Bank Ltd.* High Court of 3 July 2009

EUROTUNNEL, Commercial Court of Paris, August 2, 2006

- EUROTUNNEL, Commercial Court of Paris, August 2, 2006
- **Eurotunnel and the French Safeguard Procedure:**
 - Act No 2005-845 of July 26, 2005
 - Substantially reformed the law of January 25, 1985
 - In force on January 1, 2006
 - The most significant innovation of the 2005 French reform
 - New legal provisions BEFORE the debtor's 'CESSATION OF PAYMENTS'
 - Judicial protection **prior to a cessation of payments** as long as the debtor demonstrates that he is experiencing '**insurmountable**' **difficulties leading to such state**.
 - The 'procédure de sauvegarde' is a kind of a restructuring process for **SOLVENT** debtors and supervised by a court.
- **The Paris Commercial Court decision in respect of the EUROTUNNEL Group of companies**
 - a specific structure
 - a tumultuous history

The SAFEGUARD procedure in EUROTUNNEL

- The question of the TERRITORIAL JURISDICTION of the Paris Commercial Court (Article 3 and Article 16 of the EC Regulation)

THE PARIS COMMERCIAL COURT

Relevant set of factors in determining the location of foreign companies COMI of this group in Paris included :

- (1) the place where the entities were required to comply with a strategic and operational management plan drawn up by the '*Conseil Commun*';
- (2) the place where the finance functions and accountancy principles were applied;
- (3) the main place where transactions, assets and employees are located;
- and (4) the place of negotiation of the debt restructuring.

THE PARIS COMMERCIAL COURT considered then that there was something more than the mere fact that the parent company may control its subsidiaries' economic choices adding that:

o 'it is **good practice** to find a **unique solution** to the same financial difficulty threatening the applicant **entities guarantors of a debt which exceeds their assets**'

o The Paris commercial court also emphasized the fact that third parties were aware of this organization through Eurotunnel's **annual reports and press releases**.

Thus, the French simply held that '*a body of corroborating evidence ('**un faisceau d'indices concordants**') that were verifiable by third parties*' allowed the French court to locate the COMI of all debtors in Paris.

Conclusion

- The Eurotunnel case is the first application of the EC Regulation to the safeguard proceeding since its insertion in the Annex A of the Regulation by the adoption of the EC Regulation No 694/2005 of 27 April 2006.
- The Eurotunnel case is the main application of the safeguard procedure regarding the size of the Group and its huge financial pressure.
- The Eurotunnel case is the first main French decision after the European Court of Justice decision in *Eurofood*
- **This is the first time that the location of the restructuring talks is taken into account for the determination of the COMI.**
- The Eurofood case has not prevented all companies within a group being placed into insolvency proceedings in the one jurisdiction on the basis that a parent company controls many aspects of the policy, management and administration of the subsidiaries.

The location of a company's centre of main interests with 'certainty' has always been difficult to obtain as it is merely a question of fact for a court to determine on the basis of the evidence presented to it that the company conducts the administration of its interests on a regular basis in a different jurisdiction to that of its registered office, and that this administration is ascertainable by third parties as required by the ECJ.

COMI of natural persons – examples

1. AB lives in Romania and commutes daily to work as employee in a bicycle repair-shop, in Hungary. He is employed on the basis of an employment contract under Hungarian law.
2. AB lives in Romania and commutes daily to his own bicycle repair-shop BikeFix.de in Hungary. He is registered as an entrepreneur in Hungary.
3. AB lives in Romania and commutes daily to work for BikeFix.de in Hungary. In order to avoid the rigidity of Hungarian labour law, the owner of BikeFix.de told AB to register in Hungary as an entrepreneur and concluded a contract for cooperation with him. AB is paid an hourly rate and works mostly for BikeFix.de, where he spends between 15 and 20 working days per month.

The Proposal

- The Commission's Proposal keeps the COMI as a main connecting factor.
- The new text:
 - (i) introduces a definition in the main body of the instrument, inspired by recital 13 of the current text; the place where the debtor conducts the administration of his interests on a regular basis and which is ascertainable by third parties.
 - (ii) introduces a provision determining the COMI of natural persons; *In the case of an individual exercising an independent business or professional activity, the center of main interest shall be that individual's principal place of business; in the case of any other individual the centre of main interests shall be the place of the individual's habitual residence.*
 - (iii) adds a recital clarifying the nature of the presumption of the registered office.
"... It should be possible to rebut this presumption if the company's central administration is located in another Member State than its registered office and a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State...". Interdil case