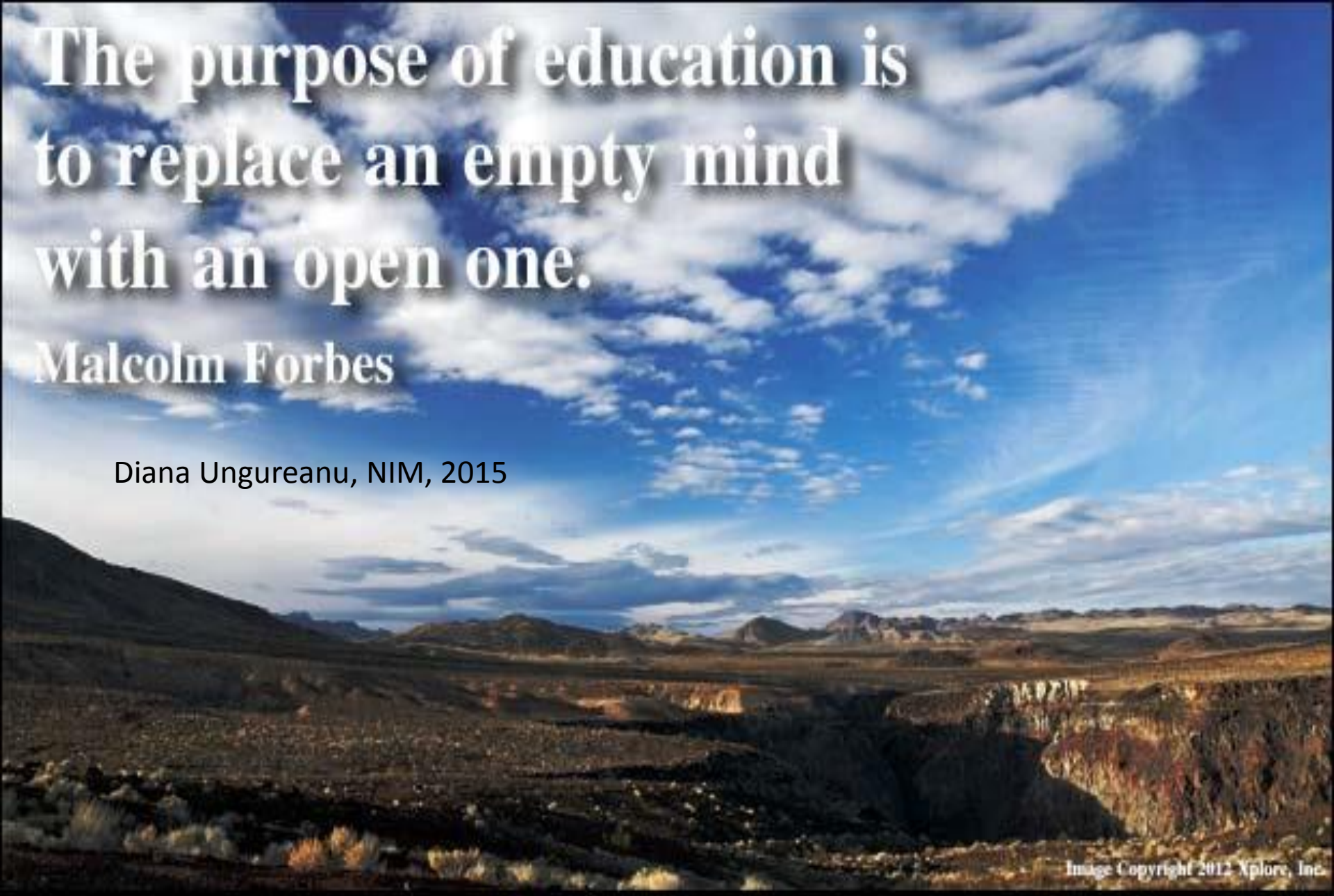

Diana Ungureanu, NIM, 2015

Material scope

- Civil and commercial matters, Article 1 (1)
- ECJ: autonomous interpretation; no recourse to national law
- C-154/11- Mahamdia

Jurisdiction over individual contracts of employment – Contract with an embassy of a third State – Immunity of the employing State

Excluded matters

- **status and legal capacity of natural persons matrimonial relationships - Reg. 2201/20, Brussels II bis**
- **wills and succession-Regulation 650/2012**
- **Bankruptcy- Regulation 1346/2000**
- **social security**
- **arbitration- New York Convention on Arbitration**
- **Maintenance Regulation- Regulation 4/2009**
- **Recast: maintenance obligations will expressly be excluded**

Material scope

- **Case C-185/07 West Tankers**

Jurisdiction of a court of a Member State to issue an order restraining a party from commencing or continuing proceedings before a court of another Member State on the ground that those proceedings would be contrary to an arbitration agreement - New York Convention.

Material scope. Rule

- In order to determine whether a dispute falls within the scope of Regulation No 44/2001, reference must be made solely to the **subject-matter of the proceedings.**
- More specifically, its place in the scope of Regulation No 44/2001 is determined by the **nature of the rights which the proceedings in question serve to protect**.

Personal and territorial scope

- **Art. 2 (1): Principle - jurisdiction rules apply only to defendants domiciled in a MS,**
- **Exceptions: Articles 22, 23; in future (Recast) also Articles 16 (1) and 19 (2)**
- **Art. 4 (1): If the defendant is not domiciled in a Member State, national law applies**
- **International Agreements:**
  - **2005 Parallel Agreement with Denmark**
  - **2007 new Lugano Convention (Denmark, Iceland, Norway and Switzerland)**
  - **In future: 2005 Hague Convention on Choice of Court Agreements**

Case I

- Mr B. sells luxury watches.
- 2005- a contract with a master watchmaker, Mr F., then resident in France- to develop movements for luxury watches, on behalf of Mr B. Mr F. carried out his activity with F M N, company of which he was sole shareholder and manager. Since 2010, Mr F. has been domiciled in Switzerland.
- Mr F. and F M N also developed, in parallel, other watch movements, cases and watch faces, which they exhibited in their own names at the world watch show in Basel (Switzerland) , marketed them in their own names and on their own behalf, whilst advertising the products online in French and German.(2009)
- Mr B. - the defendants breached the terms of their contract, business confidentiality, disrupted his business and committed fraud and breach of trust.
- The defendants raise a plea of lack of jurisdiction- only French courts have jurisdiction, Art. 5(1) of R. No 44/2001,- both the place of performance of the contract at issue and of the allegedly harmful event were situated in France.

Case 1

- **the concepts ‘matters relating to a contract’ and ‘matters relating to tort, delict or quasi-delict’ within the meaning of Art. 5(1)(a) and (3) of R. No 44/2001, must be interpreted independently, by reference to the regulation’s scheme and purpose, in order to ensure that it is applied uniformly in all the Member States (Case C-147/12 *ÖFAB* [2013] ECR, p.27). Those concepts cannot therefore be taken to refer to how the legal relationship in question before the national court is classified by the relevant national law.**
- **the concept of ‘matters relating to tort, delict or quasi-delict’ within the meaning of Art. 5(3) of Regulation No 44/2001 covers all actions which seek to establish the liability of a defendant and which do not concern ‘matters relating to a contract’ within the meaning of Art. 5(1)(a) of the regulation (Case 189/87 *Kalfelis* [1988] ECR 5565, p. 17).**
- **In order to determine the nature of the civil liability claims brought before the referring court, it is important first to check whether they are, regardless of their classification under national law, contractual in nature (Case C-167/00 *Henkel* [2002] ECR I-8111, p. 37).**

Case 1

- **the parties to are bound by a contract.**
- **the mere fact that one contracting party brings a civil liability claim against the other is not sufficient to consider that the claim concerns 'matters relating to a contract' within the meaning of Article 5(1)(a) of Regulation No 44/2001.**
- **That is the case only where the conduct complained of may be considered a breach of contract, which may be established by taking into account the purpose of the contract.**
- **That will a priori be the case where the interpretation of the contract which links the defendant to the applicant is indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of against the former by the latter.**
- **to determine whether the purpose of the claims brought by the applicant in the case in the main proceedings is to seek damages, the legal basis for which can reasonably be regarded as a breach of the rights and obligations set out in the contract which binds the parties in the main proceedings, which would make its taking into account indispensable in deciding the action.**
- **jurisdiction in matters relating to a contract is to be determined in accordance with the connecting factors defined in Article 5(1)(b) of Regulation No 44/2001 if the contract at issue in the main proceedings is a contract for the sale of goods or for the supply of services within the meaning of that provision. As provided in Article 5(1)(c) of Regulation No 44/2001, it is in fact only when a contract does not fall within either of those two categories that it is appropriate to determine the competent jurisdiction in accordance with the connecting factor provided for in Article 5(1)(a) of Regulation No 44/2001 (Case C-533/07 *Falco Privatstiftung and Rabitsch* [2009] ECR I-3327, p. 40, and Case C-9/12 *Corman-Collins* [2013] ECR, p. 42).**

Case 2

- **in principle, actions seeking legal redress for damage are civil and commercial matters and therefore come within the scope of that regulation.**
- **its scope must cover all the main civil and commercial matters apart from certain well-defined matters. Exclusions from the scope of R. No 44/2001 are exceptions which, like all exceptions, and in the light of the objective of that regulation, which is to maintain and develop an area of freedom, security and justice by facilitating the free movement of judgments, must be strictly interpreted. (recital 7)**
- **The action brought by flyLAL seeks legal redress for damage relating to an alleged infringement of competition law. Thus, it comes within the law relating to tort, delict or quasi-delict (judgment in *Sunico and Others*,p. 37)- civil and commercial in nature.**
- **although certain actions between a public authority and a person governed by private law may come within the scope of civil and commercial matters, the position is otherwise where the public authority is acting in the exercise of its public powers (*Sapir*, p. 33, *Sunico* , p. 34).**
- **The exercise of public powers by one of the parties to the case, because it exercises powers falling outside the scope of the ordinary legal rules applicable to relationships between private individuals, excludes such a case from civil and commercial matters within the meaning of Article 1(1) of Regulation No 44/2001 (*Apostolides*, p.44).**

Case 2

- **the control and surveillance of air space are activities which in essence fall within the remit of the State and which, in order to be carried out, require the exercise of public powers (*SAT Fluggesellschaft*, C-364/92, p. 28).**
- **the provision of airport facilities in return for payment of a fee constitutes an economic activity (*Aéroports de Paris* v *Commission*, C-82/01 P,).Such legal relations therefore do indeed come within the scope of civil and commercial matters.**
- **such a conclusion is not contradicted by the fact that the alleged infringements of competition law resulted from provisions of Latvian law or by the fact that the State holds 100% and 52.6% of the shares.**
- **it is irrelevant that SLR is subject, as regards the determination of the rates of airport charges and reductions in those charges, to generally applicable statutory provisions of the Republic of Latvia. That fact, on the contrary, concerns the legal relations between that Member State and SLR and does not affect the legal relationships between the latter and the airlines which benefit from its services.**
- **the Latvian State is not a party and the mere fact that it is a shareholder in those entities does not in itself constitute a situation equivalent to that in which that Member State exercises public powers. This is even more true where those entities, the majority or sole shareholder in which is, admittedly, that State, behave like any economic operator, whether a natural or legal person, operating on a given market. The action is brought, not against conduct or procedures which involve an exercise of public powers by one of the parties to the case, but against acts carried out by individuals (*Apostolides*, p. 45).**

Article 22(2) of Regulation No 44/2001

- its scope covers only disputes in which a party is challenging the validity of a decision of an organ of a company under the company law applicable or under the provisions governing the functioning of its organs (*Hassett and Doherty*, p. 26).
- the subject-matter of the substance of the dispute concerns a claim for compensation in respect of damage resulting from alleged infringements of European Union competition law, and not the validity, nullity or dissolution of companies or other legal persons or associations of natural or legal persons, or the validity of the decisions of their organs within the meaning of Article 22(2) of R.44

Contrary to public policy

- **the rules on recognition and enforcement are based on mutual trust in the administration of justice in the EU. Such trust requires that judicial decisions delivered in one MS are recognised automatically in another MS, the procedure for making those decisions enforceable in that Member State is efficient and rapid, must involve only a purely formal check of the documents required for enforceability in the MS in which enforcement is sought (*Prism Investments*, C-139/10, p. 27 and 28).**
- **Art. 34(1) of R. 44- a judgment is not to be recognised if such recognition is manifestly contrary to public policy in the MS in which recognition is sought. The grounds of challenge that may be relied upon are expressly set out in Art.34 and 35 of R. 44, to which Article 45 thereof refers. That list is exhaustive in nature, the items must be interpreted restrictively.(*Apostolides*, p.55).**
- **While the MS in principle remain free to determine, according to their own national conceptions, what the requirements of their public policy are, the limits of that concept are a matter of interpretation of that regulation. Consequently, while it is not for the Court to define the content of the public policy of a MS, it is none the less required to review the limits within which the courts of a MS may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from a court in another MS (*Krombach*, C-7/98, p. 22 and 23, and in *Renault*, C-38/98).**
- **Art. 36 and 45(2)- disallow any review of a judgment delivered in another MS as to its substance, prohibit the court of the State in which enforcement is sought from refusing to recognise or enforce that judgment solely on the ground that there is a discrepancy between the legal rule applied by the court of the State of origin and that which would have been applied by the court of the State in which enforcement is sought had it been seised of the dispute.**

Contrary to public policy

- **the court of the State in which enforcement is sought cannot review the accuracy of the findings of law or fact made by the court of the State of origin (*Apostolides*, p.58).**
- **Recourse to the public-policy clause in Art. 34(1) can therefore be envisaged only where recognition or enforcement of the judgment given in another MS would be at variance to an unacceptable degree with the legal order of the State in which enforcement is sought inasmuch as it would infringe a fundamental principle. In order for the prohibition of any review of the substance of a judgment of another MS to be observed, the infringement would have to constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognised as being fundamental within that legal order (*Apostolides*, p.59).**
- **the observance of the right to a fair trial requires that all judgments be reasoned in order to enable the defendant to understand why judgment has been pronounced against him and to bring an appropriate and effective appeal against such a judgment (*Trade Agency*, C-619/10, p.53).**
- **the extent of the obligation to give reasons may vary according to the nature of the judgment and must be examined, in the light of the proceedings taken as a whole and all the relevant circumstances, taking account of the procedural guarantees surrounding that judgment, in order to ascertain whether those guarantees ensure that the persons concerned have the possibility to bring an appropriate and effective appeal against that decision**

Contrary to public policy

- **there is no lack of reasoning, since it is possible to follow the line of reasoning which led to the determination of the amount of the sums at issue. The parties concerned had the opportunity to bring an action against such a decision and they exercised that option.**
- **Therefore, the basic principles of a fair trial were respected and, accordingly, there are no grounds to consider that there has been a breach of public policy.**
- **As regards the consequences attached to the amount of the sums which are the subject of the provisional and protective measures ordered by the judgment**
- **the concept of public policy is intended to prevent a manifest breach of a rule of law regarded as essential in the legal order of the State in which recognition is sought or of a right recognised as fundamental within that legal order.**
- **seeks to protect legal interests which are expressed through a rule of law, and not purely economic interests. That also applies where the public authority acts as a market participant, in the present case as a shareholder, and exposes itself to certain risks.**
- **the financial consequences attaching to the amount of potential losses have already been the subject of discussion before the Lithuanian courts. the provisional and protective measures at issue in the main proceedings do not consist in the payment of a sum but simply in the monitoring of the assets of the defendants in the main proceedings.**
- **the mere invocation of serious economic consequences does not constitute an infringement of the public policy of the MS in which recognition is sought, within the meaning of Article 34(1).**

Case 3

- **R.44 is based on the general rule, set out in Article 2(1), that persons domiciled in a Member State are to be sued in the courts of that State, irrespective of the nationality of the parties. It is only by way of derogation from that fundamental principle attributing jurisdiction to the courts of the defendant's domicile that R.44 makes provision for certain special jurisdictional rules, such as that laid down in Art. 5(3) .(Case C-147/12 *ÖFAB* , p.20.**
- **Those rules of special jurisdiction must be interpreted restrictively and cannot give rise to an interpretation going beyond the cases expressly envisaged by that regulation (*ÖFAB*, p.31).**
- **in the case where the place in which the event which may give rise to liability in tort, delict or quasi-delict occurs and the place where that event results in damage are not identical, the expression 'place where the harmful event occurred' in Art. 5(3) must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it, with the result that the defendant may be sued, at the option of the claimant, in the courts for either of those places (*Zuid-Chemie*, p. 23, and *Pinckney*, p. 26).**
- **Since identification of one of those connecting factors is intended to enable the court objectively best placed to determine whether the elements establishing the liability of the person sued are present to assume jurisdiction, only the court within the jurisdiction of which the relevant connecting factor is to be found is the court before which an action may properly be brought is (*Pinckney*, p. 28).**

Case 3

- **with regard to product liability, this is the place where the event which damaged the product itself occurred (*Zuid-Chemie*, p. 27). This is, in principle, the place where the product in question was manufactured.**
- **In so far as proximity to the place where the event which damaged the product itself occurred facilitates, on the grounds of, inter alia, the possibility of gathering evidence in order to establish the defect in question, the efficacious conduct of proceedings and, therefore, the sound administration of justice, the attribution of jurisdiction to the courts in that place is consistent with the rationale of the special jurisdiction conferred by Art. 5(3), that is to say, the existence of a particularly close connecting factor between the dispute and the courts for the place where the harmful event occurred (*Zuid-Chemie*, p. 24, and *Pinckney*, p. 27).**
- **Attribution of jurisdiction to the courts for the place where the product in question was manufactured addresses, moreover, the requirement that rules governing jurisdiction should be predictable, in so far as both the manufacturer, as defendant, and the victim, as applicant, may reasonably foresee that those courts will be in the best position to rule on a case concerning, inter alia, the finding that the product in question is defective.**
- **It must therefore be held that, in the case where a manufacturer faces a claim of liability for a defective product, the place of the event giving rise to the damage is the place where the product in question was manufactured.**

Regulation 1346/2000

National cases database

- http://www.insolvencycases.eu/

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 Recital13.** 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

- **<u>SAS Daisytek-Isa</u>** :

  - 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 be 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

- **<u>SAS Rover France</u>** :

  - 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 that the mere fact that the parent company may control its subsidiaries' economic choices adding that:

- '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**'

- 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 enterpreneur 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 enterpreneur 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…". Interedil case