

Cross Border Restructuring and Insolvency Update

November 2011

Welcome to the first edition of our Cross Border Restructuring and Insolvency Bulletin which will be published monthly.

Debtor's Centre of Main Interest (COMI)

New EU case provides further guidance on determining a debtor's COMI

COMI is a hot topic at the moment. *Interedil*¹ has provided further guidance on COMI under the EC Regulation. *Interedil* was an Italian company that transferred its registered office from Italy to the UK in 2001. Subsequently, *Interedil* sold its business to a third party and removed itself from the register of companies in the UK, but retained property in the form of two lease agreements in Italy. Winding up proceedings were issued in Italy by a creditor, which *Interedil* opposed on jurisdictional grounds. The Italian Court made a winding up order but subsequently referred the matter to the Court of Justice of the European Union.

The Court held that "central administration" is a key criterion for determining COMI, in other words, in which location are "the bodies responsible for the management and supervision"? Each case will turn on its facts and all relevant circumstances will be taken into account. Forum shoppers should tread with caution.

¹*Interedil Srl (in liquidation) v Fallimento Interedil Srl and another* [2011] EUECJ C-396/09

Bankruptcy Tourism

A growing trend in Europe

Anglo Irish Bank (now Irish Bank Resolution Corporation ("IBRC")) v Sean Quinn brings the concept of bankruptcy tourism to the forefront of legal debate. On 2 November 2011, IBRC lodged a claim for almost €2 billion in personal guarantees from Mr Quinn in the Irish courts. Nine days later Mr Quinn was adjudged bankrupt in Northern Ireland, alleging that his COMI was in Northern Ireland on the basis that "he was born, bred and worked all [his] life" in Northern Ireland. IBRC launched a formal application last week challenging Mr Quinn's bankruptcy on the basis that his COMI is in fact in Ireland.

The UK has long been seen as "debtor friendly" and many foreign debtors are utilising its insolvency procedures. It is a popular destination for migrating companies and individual debtors because of its well regarded insolvency procedures. Its popularity is largely due to the certainty and predictability of the insolvency process and for individual debtors there is automatic discharge and release from their debts after 12 months - one of the shortest discharge periods in Europe.

The EU Parliament passed a resolution on 15 November 2011 in respect of insolvency proceedings in the context of EU company law recommending, among other things, that there should be a definition of COMI formulated in such a way to prevent fraudulent form shopping. We wait to see whether this recommendation will be enacted.

Updates from around the world

Ireland

The Civil Law (Miscellaneous Provisions) Act 2011 came into effect on 11 October 2011. This Act amends the discharge provisions under the Bankruptcy Act 1988. The Act introduces a provision on automatic discharge after 12 years, meaning some 360 bankrupts will now be discharged from their bankruptcies.

Germany

The German parliament has passed a Bill on the "Further Facilitation of the Reorganization of Enterprises". The Bill aims to promote the restructuring of insolvent enterprises by making insolvency proceedings more transparent and predictable for debtors and creditors alike. It is due to come into force on 1 March or 1 April 2012.

New Zealand

The New Zealand parliament has introduced the Companies and Limited Partnerships Amendment Bill, which seeks to criminalise serious breaches of directors duties. Penalties are up to five years imprisonment and a \$200,000 fine.

Australia

The Personal Property Securities Act 2009 came into effect on 31 October 2011. The Act establishes a single regime for regulating security interests over all personal property, excluding land and buildings. It creates a single national register for the registration of security interests in personal property. The Act also changes the way in which the rights of ownership and priority between security interests will be determined and enforced.



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