

The European Insolvency Case Register: < www.eir-database.com >

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In late 2003 a number of insolvency professionals at INSOL Europe's annual conference in Cork saw the need to capture developments, particularly in case law, relating to the EC Regulation on Insolvency Proceedings 2000 (No. 1346/2000) ('the Regulation'), which had by then been in force for rather less than 18 months. With the EU's expansion from 15 to 25 member states only 6 months away and no central mechanism in existence for monitoring case law arising from this pan-European legislation, a recognition that INSOL Europe's members – 800 insolvency professionals practising in all EU Member States – were ideally placed to source such information gave rise to the birth of the Case Register. As the leading European organization for restructuring and insolvency professionals with an interest in cross-border matters, which includes an academic wing and works closely with the European Union, INSOL Europe saw significant value in promoting the Case Register as an internet database, accessible to all. This article illustrates the Case Register by reference to the Regulation and seeks to encourage its use and support.

Some jurisdictions such as the UK have a strong tradition of reporting cases, but even here one of the early leading cases on Article 3(1) (centre of main interests ('COMI')), *re Enron Directo*, 4 July 2002¹ was unreported and no transcript of the judgement was

produced. Other jurisdictions' approaches to written judgements and reporting vary widely. Whereas common law jurisdictions such as the UK² and Ireland are clearly based on precedent, even the most strict civil law jurisdictions in practice use precedents, particularly from higher courts, to interpret the law. Between Member States precedents are not binding, although it has been suggested, wryly, in some quarters that the German courts learnt from the British in *Daisytek*³ and applied the lesson against the Austrians in *Hettlage*.⁴

The European Court of Justice ('ECJ') is the ultimate court to which questions on interpretation of the Regulation may be referred by the supreme court of a Member State. The first case so referred was *Eurofoods*,⁵ a Parmalat subsidiary where both the Irish and Italian courts had sought to open main proceedings⁶ (which seems to have been less a case of the Italians learning from the Germans and more a question of a breakdown of communications between Parma and Dublin, to put it politely).

In February 2004, some 37 out of 40 identified Regulation cases analysed⁷ related to COMI, which proportion has subsequently reduced to some 46 out of 73, but still highlights the difficulties of Article 3.

Other developing areas arise from the registration and publication provisions of Articles 21 and 22 as

Notes

- 1 A creditor of this Spanish-registered Enron company successfully petitioned the High Court in London for an administration order, as its head office, where all the principal executive strategic and administrative decisions were taken, was in the UK.
- 2 The Regulation treats the three UK legal jurisdictions of England and Wales, Scotland and Northern Ireland as a single jurisdiction.
- 3 German subsidiaries of Daisytek-ISA Ltd were made the subject of English administration orders ([2003] BCC562, Chancery Division, Leeds District Registry, 16 May 2003) on the grounds that their COMIs were in England for a number of specific reasons but essentially because their administrative functions were, and were known by creditors to be, conducted in England (at the parent company's head office). Whereas the German Court at first instance (Düsseldorf, 6 June 2003 – 502 IN 126/03) refused to recognize the English administration orders and opened its own main proceedings, this was overturned on appeal.
- 4 The Munich district court found that Hettlage's Austrian subsidiary, Hettlage Österreich, had its COMI at the German parent company's head office in Munich, where its purchasing, sales, marketing, distribution, personnel and accounting functions were conducted.
- 5 Unreported, Irish Supreme Court, 27 July 2004; expected to be heard by the ECJ in 2006.
- 6 See also D. Marks, 'Conflict under the EC Insolvency Regulation: First Come, First Served? Part II' (2004) 1(5) *International Corporate Rescue* 260.
- 7 M. Martinez Feber, 'European Union Regulation on Cross Border Insolvency Proceedings (1346/2000) – Current issues and findings' <www.unige.ch/droit/insolvency-symposium2004/documents/wp/MMartinez%20-%20EU%20Regulation.pdf>.

illustrated by *Crisscross Telecommunications*⁸ where an English administrator wished to give notice in various jurisdictions of his appointments across a pan-European group.⁹ A final issue, which has yet to be the principal subject of a court decision, is officeholder co-operation pursuant to Article 31. Secondary proceedings are not commonplace, but the writer has experience of the requirement of a liquidator to cooperate appearing to be honoured in the breach (although this should perhaps not be surprising in view of the antipathy that has emerged between courts on occasions, for example in *Eurofoods* and *Daisytek*).

Although publications on the Regulation are now appearing with references to many of the cases,¹⁰ the Case Register is the only source that endeavours to be comprehensive. It has been live since September 2004 and includes commentaries (which users can submit)

as well as the judgments (where available) and summaries. It is however – and will remain – a work in progress, as INSOL Europe members, *Eurofenix* readers and site users are regularly entreated to fill in the gaps and provide any new material they come across. A particularly valued feature is the periodic alerts e-mailed to some 300 (free) subscribers to the mailing list.¹¹

The next stage of the Case Register's development, being sought through extension of its sponsors beyond INSOL Europe and Cimejes GmbH (its co-founder), is to perfect the user interface, include a summary of Member States' registration and publication provisions (Articles 21 and 22), arrange translation of judgments and proactively maintain the content. The writer¹² would welcome any offers of assistance!

Notes

8 English High Court, May 2003, unreported.

9 Discussed in G. Flannery, 'Keeping track of regulation and registration' [2005] Spring *Eurofenix* 14.

10 J Marshall, *European Cross Border Insolvency* (Sweet & Maxwell, London, 2004) is the prime example.

11 Subscribe by e-mailing <casealert@insol-europe.org>.

12 Contact via <caseregister@insol-europe.org>..