# International Corporate Rescue

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# A Message from UCL Faculty of Laws

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As a restructuring and insolvency partner for many years in a leading international law firm, I was always delighted to be asked to speak at conferences and to write commentaries and articles for publication in journals which I felt would shape opinion. Like many others, after the initial flush of flattery there came the inevitable angst of acceptance: yet another deadline to add to those of a busy practice, not to mention the need to raid the barren shelf of the ideas' pantry. Earlier this year I left private practice to join UCL as Dean of the Faculty of Laws. When asked by the General Editor to contribute an introductory message to this issue of ICR, in which I might offer a few observations on this transition, I of course immediately accepted. My first observation is therefore that old habits die hard!

My second and more pertinent observation is that it is obvious to me, even after such a short time at UCL, that the barriers between practitioners and academic lawyers, if they ever did exist, are well and truly behind us. In virtually all areas where there is a discernible legal practice, legally-trained scholars whose main work is researching and teaching are increasingly interested and even involved in the disputes and transactions which occupy the days and nights of busy practitioners. Equally, many of the busiest practitioners somehow do find time to contribute fulsomely to many of the world's leading law faculties, including UCL. From my new vantage point, it is an absolute delight to see the sheer volume of quality knowledge transfer taking place.

On a related note, readers may be interested to know that at UCL Faculty of Laws we shall shortly be launching a Centre for Restructuring, Insolvency and Bankruptcy Law. No fewer than six full-time members of the Faculty have a very significant domestic and international presence in this field, which probably makes UCL Laws the leading repository of such expertise of any university in the world. We intend to make the most of this. This new Centre will be led by Professor Ian Fletcher, who is, as many readers of this journal will know, one of the most influential scholars in this field in the world.

Given this forum, I cannot resist a few comments on the concept of Centre of Main Interests (COMI). As is well known, this notion is at the heart of both the EU Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvency, the latter having found substantial expression in the US as Chapter 15 of Bankruptcy Code. In the early days, when the UK courts were frequently persuaded in ex parte hearings that COMI was in the UK when, as a matter of corporate, employment and tax law, the company was self evidently somewhere else, this was hailed as lateral thinking and loudly applauded. However, as other EU jurisdictions followed suit, this has led to bizarre and irreconcilable results, such as a Dutch court, on the one hand, holding that the presumption that COMI is in the jurisdiction of the registered office can only be rebutted if there are virtually no activities in that jurisdiction, and an English court, on the other hand, holding that the presumption is 'just another factor' to be taken into account into deciding the question (*BenQ Mobile Holding BZ* LJN AZ 9985, Rb Amsterdam, 31 January 2007; *Re Ci 4 net.com.inc* [2004] EWHC 1941 and *re Parkside Flexibles SA* [2006] BCC 589).

It seems to me that the problem with the COMI question is that the stakes are simply too high. In the EU, recognition as main proceedings means that the local law which applies to them will (subject to certain exceptions) for most practical purposes be embedded for the duration of the case in the law of the recognising jurisdiction. Ironically, this may be a far more powerful intrusion into local practices and procedures than the harmonising regime which was found to be too difficult to agree in Europe and to which the EU Insolvency Regulation, including the COMI concept, represented a fall back response.

One has to feel particular sympathy for US judges. In this area the US had been leading the way in cross-border bankruptcy practice well before the notion of COMI reached American shores. I refer, of course, of the former section 304, under which the US bankruptcy courts developed a very useful and flexible means of dealing with requests for assistance by the foreign representative of a debtor. Now that s. 304 has been replaced, US bankruptcy court judges are forced to deal with the question of recognition, and thus consider the question of COMI, whenever a foreign representative needs recognition but may not want to take advantage of Chapter 7 or Chapter 11 procedures. The reticence demonstrated by Judge Lifland in the recent *Bear Stearns* cases (now under appeal) was not, I suspect, due to the shape of the Cayman proceedings themselves, or the type of

entity concerned (traditional corporation, hedge fund or other) but rather to the loss of the ability of the US court properly to oversee what might be very substantial activities by an essentially (by US standards) unsupervised insolvency practitioner appointed on an ex parte basis somewhere else. Simply put, many US judges do not share the confidence of judges in Commonwealth jurisdictions that such an office holder will do all that the interests of creditors might require. Whether this belief is justified is beside the point, and it seems to me that it is up to those advising the party seeking recognition to deal with this concern, whether Ch.15 requires it or not. One way *not* to deal with it is to repeat, over and over again, that Chapter 15 is based upon a wish to 'promote comity'. It would be much more helpful, I suggest, to refer to the provisions in Chapter 15 which could help the judge find a way to tailor the order granting recognition to the circumstances of the case so that, so far as possible, US traditions of judicial involvement might be observed (see, for example, sections 1520 (a) (3) and section 1521 (b) (c)). And of course reference could be made to the practice in the EU, where, in cases like Collins and Aikman and MG Rover, UK office holders *volunteered* what would amount to concessions to the requirements of local law which were not, strictly speaking, required in order to avoid local disputes and generally to smooth the way.

As far as I know, it was never the expectation of the primary authors of what was to become the EU Insolvency Regulation, the Model Law and Chapter 15 that what are viewed as cultural imperatives in the jurisdiction according recognition were to be swept aside. But even if it were, the reality is making it clear that a more creative approach is required. Call it 'cap in hand' if you wish, but as practitioners and academics, we ought to do our best to find ways to address this problem. Too much money is being wasted on COMI disputes when the real issue so often lies just beneath the surface.

## International Corporate Rescue

*International Corporate Rescue* addresses the most relevant issues in the topical area of insolvency and corporate rescue law and practice. The journal encompasses within its scope banking and financial services, company and insolvency law from an international perspective. It is broad enough to cover industry perspectives, yet specialized enough to provide in-depth analysis to practitioners facing these issues on a day-to-day basis. The coverage and analysis published in the journal is truly international and reaches the key jurisdictions where there is corporate rescue activity within core regions of North and South America, UK, Europe Austral Asia and Asia.

Alongside its regular features – Editorial, The US Corner, Economists' Outlook and Case Review section – each issue of *International Corporate Rescue* brings superbly authoritative articles on the most pertinent international business issues written by the leading experts in the field.

*International Corporate Rescue* has been relied on by practitioners and lawyers throughout the world and is designed to help:

- Better understanding of the practical implications of insolvency and business failure – and the risk of operating in certain markets.
- Keeping the reader up to date with relevant developments in international business and trade, legislation, regulation and litigation.
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