

# Re: EC Regulation – the Debtor’s Centre of Main Interest (COMI)



**December 2008**

The issue of the debtor’s centre of main interest (“COMI”) and whether one can change COMI has been considered in various cases such as *Shierson v Vlieland-Boddy* [2005] and *Re Staubitz-Schreiber* [2006]. In the latter, it was decided that a Member State which receives a request for the opening of insolvency proceedings did not have jurisdiction to open such proceedings if the debtor moved his COMI to the territory of another State after filing his request, as this would be contrary to the objectives of the EC Regulation.

The determination of the jurisdiction representing a debtor’s COMI at the date of the request to open proceedings can in some instances be difficult to determine.

## **Official Receiver v Eichler [2007]**

### **Facts**

In this case, the Chief Registrar was faced with an application by the Official Receiver for directions as to whether or not a bankruptcy order, which was made upon the debtor’s self petition, should have been made in the UK, on the basis that the debtor’s COMI was actually in Germany.

In his self petition the debtor disclosed that his COMI was within England and Wales and that for the greater part of the preceding six months he had been residing in Hertfordshire. However, the evidence disclosed by the Official Receiver illustrated that the debtor was German by birth, and worked as a locum consultant in the area of radiology and nuclear medicine. His Statement of Affairs disclosed no assets. He had three German creditors, to whom he owed £206,700 (two of whom were owed £200,000 under a judgment obtained in Germany), and no UK creditors.

The Official Receiver, in support of his application, advised that the debtor’s debts were incurred entirely in Germany, and that the debtor had moved to England approximately five months before presenting his petition. During this period, he lived in temporary accommodation provided in connection with his employment and his wife continued to live in Germany. The Official Receiver also submitted that as the debtor had owned a property in Germany which had been recently transferred into his wife’s name, proceedings to undo this transaction could more conveniently be pursued in Germany through a German bankruptcy.

The debtor argued that he had genuinely moved to the UK for work purposes, and whilst his wife remained in Germany, he spent more time in the UK in connection with his work than in Germany. He denied that there was any impropriety in connection with the transfer of the property to his wife, and that he had initiated bankruptcy proceedings in this jurisdiction after taking advice from a Solicitor in Germany.

### **The Court’s Ruling**

The Chief Registrar ruled that the debtor was at liberty to change his COMI, and that the country in which the debtor’s debts were incurred was not a relevant consideration in establishing his COMI. The true inquiry was to the debtor’s habitual residence. It was ruled that at the date the proceedings were opened, the debtor’s COMI was in the UK, and even where the debtor’s residence was temporary, that would not necessarily change the position. The Chief Registrar stated that he was not aware of any authority establishing any minimum period of time which a person must spend in a Member State before it could be said to have become his COMI. It was declared that the bankruptcy

*Please note: The content of this article is for information purposes only and further advice should be sought from a professional advisor before any action is taken.*

order was properly made and the declaration as to the applicability of the EC Regulation and the nature of the proceedings was also properly made.

## **Comment**

Bankruptcy proceedings by debtors with foreign connections are becoming increasingly common. It is therefore necessary for the Official Receiver and creditors to be vigilant to ensure that such proceedings are not an abuse of process, in the sense that the debtor is simply “forum shopping” for the more indulgent insolvency regime in this jurisdiction, by acquiring an accommodation address or by having some other temporary connection with the UK. Notably, we understand there are internet advertisements in Germany for debtors to take short “insolvency holidays” in England, so as to take advantage of this jurisdiction as an “insolvency paradise”!! This way, a debtor with debts in Germany can potentially clear himself of all debts whilst making little or no contribution and obtain discharge and release within one year or less. The relevant discharge occurs after a period of seven years if an individual is made bankrupt in Germany.

*Please note: The content of this article is for information purposes only and further advice should be sought from a professional advisor before any action is taken.*