The term "Centre of Main Interests" (= "COMI")

within the meaning of

Art. 3 para. 1 sentence 1 EU Regulation on Insolvency Proceedings (*EIR*)

against the background of recent legal cases in Germany

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The determination of international competence to institute main insolvency proceedings in cross-border insolvencies within the EU presupposes the interpretation of the undefined legal concept of the "centre of main interests". The following contribution describes how differently courts interpret the "centre of main interests" of European companies by giving examples from European court rulings.

I. Introduction

At least[1] since the *"ISA/Daisytek rulings"*[2], the "competition for the institution of main insolvency proceedings" and the so-called *"forum shopping"* in connection with cross-border insolvencies over the assets of legal entities[3] have become the centre of discussions around insolvency law also in Germany[4]. After England[5] first affirmed its international competence so far – especially in connection with group insolvencies – and has instituted main insolvency proceedings even with regard to companies having their registered office abroad, Germany, where preliminary insolvency proceedings often take several weeks or months[6], has now also been able to win the "competition" for the institution of main insolvency proceedings through two remarkable recent rulings[7]: The rulings of the *Local Court of Mönchengladbach ("EMBIC I")*[8] and the *Local Court of Munich ("Hettlage")*[9] have obviously been

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[1] The development already began in connection with the ruling of the *London High Court* of 4 June 2002 - "Enron Directo Sociedad Limitada = Enron Spain" (unpublished, only the "skeleton argument" was published on the Internet under **www.iiiglobal.org**). See also II.2. below.

[2] *High Court of Justice of Leeds*, ZIP 2003, 1362, as well as ZIP 2004, 219=; ZIP 2004, 963 – "ISA I"; *Local Court of Düsseldorf*, ZIP 2003, 1363; NZI 2004, 269 = ZIP 2004, 623; ZIP 2004, 866 – "ISA II"; regarding the French "ISA rulings" see *Cour d' Appel de Versailles*, ZIP 2004, 377 L; regarding "ISA case law" see e.g. *Herchen*, ZInsO 2004, 61; *Paulus*, ZIP 2003, 1725; *the same*, EWiR 2003, 709; *Mankowski*, EWiR 2003, 767; *the same*, EWiR 2003, 1239; *Smid*, DZWir 2003, 397; *Pannen/Riedemann*, NZI 2004, 301 et seq.

[3] "Forum shopping" in connection with consumer insolvencies does not constitute the subject matter of the present essay.

[4] *Braun*, NZI aktuell issue No. 1/2004, V; regarding the phenomenon of *"forum shopping"* see under the EIR also *Willcock*, INSOL World – 3rd Quarter 2003, 8 et seq.

[5] However, *"forum shopping"* under the EIR seems to occur not only in England but also in other member states. In the – as far as we are informed – unpublished case *"Cirio Del Monte"*, for instance, the Italian court ruled that the "centre of main interests" of two Italian companies and one Dutch branch was situated in Rome. See *van Galen*, The European Insolvency Regulation and Groups of Companies, INSOL Europe Annual Congress Paper 2003, p. 3.

[6] This means that the point in time that is relevant for the "competition for institution of insolvency proceedings" occurs substantially later than in England.

[7] *Wilcock*, INSOL World – 3rd Quarter 2003, 8 describes this competition very vividly and particularly as a competition of the different insolvency jurisdictions: "... But the speed at which the application of the Regulation is developing suggests some jurisdictions will be winners, some losers."

[8] *Local Court of Mönchengladbach*, NZI 2004, 383 with Ann. *Lautenbach*. See also *Bähr/Riedemann*, ZIP 2004, 1066.

influenced by the English rulings relating to Art. 3 EIR. In the absence of a legal definition of the concept of the "centre of main interests", the aforesaid provision offers a certain scope for interpretation regarding the determination of which country's court is competent to institute main insolvency proceedings[10].

The scope of application of the EIR provides that one single main insolvency proceeding[11] over the assets of a legal entity shall be admissible in each individual case[12]. In the event that several member states claim international competence to institute main insolvency proceedings, the proceedings are to be acknowledged as main insolvency proceedings which have been instituted effectively first (principle of priority[13]), Recital No. 22 of the Regulation[14]. The mere effectiveness of the court ruling on the institution of proceedings will be decisive in this respect and not its formal *res judicata*. The date for filing a petition[15] or bringing an action[16] will not be authoritative, either. The appointment as preliminary German administrator is not sufficient[17] in order to "block" the initial institution of main insolvency proceedings abroad.

The interpretation of the term "Centre of Main Interests" (hereinafter referred to as "COMI") within the meaning of Art. 3 para. 1 sentence 1 EIR, which is decisive for determining the competence of a court to institute main insolvency proceedings, varies depending on the individual member state. In particular, English courts tend to interpret the term "COMI" widely and to assume their international competence –

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[9] *Local Court of Munich*, NZI 2004, 450 with Ann. *Mankowski.* Regarding the institution of secondary insolvency proceedings in Austria see *Bähr/Riedemann*, EWiR 2004, 1085 et seq.

[10] The problems concerning international competence in connection with the shifting of the centre of main interests to another member state by the insolvency debtor following the filing of a competition, however prior to the institution of insolvency proceedings ("Perpetuation of the competence to institute proceedings") shall not be discussed in the present essay; see *Federal Supreme Court*, NJW-RR 2004, 848 = NZI 2004, 139. This question was referred to the *ECJ*.

[11] Main insolvency proceedings apply universally. They shall cover the entire assets of the debtor and all creditors worldwide. See *Virgós/Schmit*, in: Stoll: Proposals for and Opinion on the Implementation of the EU Convention on Insolvency Proceedings into German Law, 1997, p. 32 (60); *Pannen*, in; *Breutigam/Blersch/Goetsch,* InsolvenzR, August 2004, Art. 3 EIR, marginal number 3.

[12] *Pannen*, in: *Breutigam/Blersch/Goetsch* (see footnote 11 above), Art. 3 EIR, marginal number 7; *Moss/Fletcher/Isaacs*, The EC Regulation on Insolvency Proceedings, 2002, p. 41; *Virgós/Schmit,* in: *Stoll* (see footnote 11 above), 32 (60).

[13] *Eidenmüller*, IPRax 2001, 2 (7); *Herchen*, ZInsO 2004, 61 (64); *Leible/Staudinger*, KTS 2000, 533 (545); *Pannen,* in: *Breutigam/Blersch/Goetsch* (see footnote 11 above), Art. 3 EIR, marginal number 13; *Pannen/Riedemann*, NZI 2004, 301 (302); obviously contrary opinion *Mankowski*, EWiR 2003, 767 (768).

[14] *Huber*, ZZP 114 (2001),133 (144).

[15] *Pannen,* in: *Breutigam/Blersch/Goetsch* (see footnote 11 above), Art. 3 EIR, marginal number 13.

[16] *Leible/Staudinger*, KTS 2000, 533 (545).

[17] See however the reference to the *ECJ* by the *Supreme Court of Ireland*, NZI 2004, 505.

especially in the case of group insolvencies – very quickly[18]. In most cases, the court does not refer to the insolvency debtor's economic activity[19] that is obvious to third parties in general business dealings as authoritative but to the place where strategic management decisions are made[20]. It shall be decisive, according to the above, where *"head office functions"* are performed[21] or, respectively, where the *"mind of management"*[22] is based.

Thus it is possible, for instance, that insolvency proceedings over a German limited liability company (*GmbH*) are conducted in England by applying the English insolvency law regulations (the *lex fori concursus* within the meaning of Art. 4 EIR will be English law in this case[23]) although neither assets nor creditors, employees, or economic activities of the insolvency debtor having external effects exist there [24].

According to English case law, *"forum shopping"* is rendered possible prior to insolvency proceedings, particularly in the case of group insolvencies[25]. A deliberate or planned choice of the applicable insolvency law jurisdiction prior to insolvency can be very attractive from the perspective of insolvency counseling. However, it is obvious that *"forum shopping"* also invites abuse. Wilcock describes this quite vividly as follows:

"This is real draw for Forum Shoppers. Simply pick your favoured jurisdiction, transfer your company's papers and bank accounts there and you're in business. If you are worried about antecedent transaction, go to Greece. Preferential creditors? Try Germany or the UK, which don't have any. Want to protect jobs? Go to France ...

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[18] See e.g. *Sabel*, NZI 2004, 126; *Vallender*, event "Five years InsO", mentioned by *Rein*, NZI 2004, 310, and *Mankowski*, EWiR 2003, 1239, who refers to "insolvency tourism", "insolvency imperialism" as well as an "aggressively self-interested interpretation". See also *Herchen,* ZInsO 2004, 825 (826).

[19] Recital No. 13 EIR as well as *Virgós/Schmit* (see footnote 11 above), 32 (60); see also *Pannen/Kühnle/Riedemann*, NZI 2003, 72 (74).

[20] See comment of *Taylor*, event "Cross-border insolvencies in the insolvency practice", mentioned by *Leithaus*, NZI 2004, 194 (195).

[21] *Moss/Fletcher/Isaacs*, (see footnote 12 above), p. 169.

[22] *Taylor*, event "Cross-border insolvencies in the insolvency practice", mentioned by *Leithaus*, NZI 2004, 194 (195).

[23] In contrast, German law applies as corporate charter with regard to all company law issues (since the *"Inspire Art"* ruling of the *ECJ*, NJW 2003, 3331 = NZI 2003, 676, the so-called "incorporation theory" is to be applied instead of the "company seat theory"), as to the gap between corporate charter and insolvency statute see also *Riedemann*, GmbHR 2004, 345 et seq.

[24] *Sabel*, NZI 2004, 126 (127). In the case of the *Local Court of Cologne*, NJW-RR 2004, 1055 = NZI 2004, 151 = ZIP 2004, 471, even the creditors' meeting of the main insolvency proceedings according to English law shall be held in Germany.

[25] *Braun*, NZI 2004, V (VI); *Vallender*, event "Five years InsO", mentioned by *Rein*, NZI 2004, 310; see also *Oberhammer*, ZInsO 2004, 761 (767 et seq.).

If you're first to court, you can tie the whole of the EU into your insolvency. Foreign parties can only challenge your insolvency through your own court, not theirs. You can pre-empt any interference by foreign courts if you establish a 'secondary proceeding' yourself"[26].

In the present discussion around the "COMI" one should bear in mind that the prevention of *"forum shopping"* is a declared objective of the EIR.[27]

II. The concept of the "centre of main interests" with examples from European case law

The EIR[28], which entered into force on 31 May 2002, created a uniform legal framework for cross-border insolvencies within the EU (except for Denmark)[29]. Art. 249 para. 2 sentence 2 EC Treaty provides that the EIR is universally and directly applicable in all member states as a secondary legal act[30]. Separate implementation in Germany was unnecessary; however, the German legislator considered the adjustment of certain German provisions to the provisions of the EIR to be necessary[31].

The term "Centre of Main Interests" (= "COMI") according to Art. 3 para. 1 sentence 1 EIR, which is decisive for affirming the international competence to institute main

[26] *Wilcock*, INSOL World – 3rd Quarter 2003, 8.
[27] Recital No. 4 EIR.
[28] See e.g. comment: *Pannen,* in: *Breutigam/Blersch/Goetsch* (see footnote 11 above), EUInsVO; *Duursma-Kepplinger/Duursma/Chalupsky*, EUInsVO, 2002; *Moss/Fletcher/Isaacs*, (see footnote 12 above); *Smid*, European Insolvency Law, 2002; *Smid*, German and European International Insolvency Law, 2004.
[29] It has to be acknowledged as a major progress that insolvency proceedings of each individual European member state are now, in principle, being automatically acknowledged by the respective other European member states without a formal acknowledgement procedure being required, Art. 16 et seq. EIR.
[30] This does not apply to Denmark (Art. 1 and 2 of the Protocol concerning the Position of Denmark, which is attached to the Treaty on European Union and the EC Treaty). The United Kingdom and Ireland have announced their participation in and acceptance of the EIR according to Art. 3 of the Protocol concerning the Position of the United Kingdom and Ireland, which is also attached to the Treaty on European Union and the EC Treaty.
[31] The German provisions implementing the EIR are contained in Art. 102 Sections 1-11 Introductory Law of the Insolvency Code (*EGInsO*), as amended. See *Pannen/Riedemann*, NZI 2004, 301. However, one has to bear in mind that the EIR takes priority over the German implementing provisions and will prevail in case of doubt: Art. 102 Introductory Law of the Insolvency Code, as amended, as one of the provisions implementing the EIR, only applies in case of international insolvency proceedings within the scope of application of the EIR. Regarding third countries, the autonomous German international insolvency law is to be applied (Sections 335 et seq. German Insolvency Code). However, conversely, German autonomous international insolvency law (Sections 335 et seq. German Insolvency Code) does not only apply to third countries. It may also be applicable in European insolvency proceedings provided that neither the EIR nor the implementing provisions contained in Art. 102 Introductory Law of the Insolvency Code contain special provisions.

insolvency proceedings, is not legally defined in the EIR[32]. According to Recital No. 13 EIR, the place is referred to where the debtor usually pursues its interests, which means that the place is obvious to third[33] parties[34]. Also, the so-called *Virgós/Schmit Report*[35], an explanatory report on the European Insolvency Convention (*EuInsÜ*)[36] which is helpful for discovering the legislator's intention, gears to these – objective – criteria for determining the COMI as authoritative[37]. The reason for this method of interpretation is that insolvency constitutes a real risk. Therefore, according to the above Report, insolvency is to be handled at a place that is known to the debtor's potential creditors[38].

It is assumed until the contrary is proved that in the case of companies and legal entities the COMI is situated at the place of the registered office in conformity with the articles of association (Art. 3 para. 1 sentence 2 EIR). This assumption is refutable and was actually refuted in the much-discussed rulings in the following legal cases: *Enron Directo* Sociedad Limitada, *Crisscross* Telecommunications Group, *Daisytek/ISA/PAR/Supplies* Team, *Hettlage*, *EMBIC*, etc. The subject matter of the above cases was group insolvencies. One weak point of the EIR is that it does not contain any provisions concerning group insolvencies[39]. In particular, it does not follow from the EIR that in the case of a cross-border group the subsidiaries have their COMI at the registered office of the parent of the group[40].

And yet, group insolvencies are the prototype of cross-border insolvencies, and the problem of international competence to institute main insolvency proceedings within the meaning of Art. 3 EIR particularly arose in group insolvencies. This shall be illustrated by the following examples from recent court rulings (the following not being a complete list)[41].

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[32] *Moss/Fletcher/Isaacs*, (see footnote 12 above), p. 39.
[33] "Third parties" within this meaning are particularly creditors.
[34] See also *Bähr/Riedemann*, ZIP 2004, 1066 (1067).
[35] The wording of the European Insolvency Convention corresponds to the text of the EIR to a large degree. See also *Pannen*, in: *Breutigam/Blersch/Goetsch* (footnote 11 above), Preamble EIR, marginal number 2.
[36] See *Virgós/Schmit*, in: *Stoll* (footnote 11 above), p. 32 (60).
[37] *Virgós/Schmit*, in: *Stoll* (see footnote 11 above), p. 32 (60).
[38] *Virgós/Schmit*, in: *Stoll* (see footnote 11 above), p. 32 (60).
[39] See also *Ehricke*, EWS 2002, 101 et seq. as well as *van Galen* (footnote 5 above); *Wilcock*, INSOL World – 2nd Quarter 2004, 6 et seq.
[40] *Ehricke*, EWS 2002, 101 (103).
[41] Further examples are to be found with *Martinez Ferber*, European Insolvency Regulation, 2004.

1. Crisscross Telecommunications Group

In the case of Crisscross Telecommunications Group[42], the English court assumed that the centre of main interests of all eight group companies from various EU member states[43] and Switzerland was situated in England[44]. Main insolvency proceedings were instituted in England[45]. The same administrator was appointed in each individual case. The assumption that the COMI was situated in England was justified by stating that the *"headquarter activities"* had been performed in England, the majority of business had been transacted via accounts held in England, and the majority of customers had concluded contracts – governed by English law – with one of the English companies. It is quite interesting that not the parent of the group was registered in England, but one of its subsidiaries. However, the actual *"headquarter activities"* were performed in London[46].

2. Enron Directo Sociedad Limitada

By the ruling of the *London High Court* of 4 June 2002 "*Enron Directo* Sociedad Limitada (= Enron Spain)[47], main insolvency proceedings were instituted in England over a Spanish debtor [48] on the basis of a creditor's petition.

The debtor's registered office was based in Spain so that it seems reasonable to initially assume that Spain has international competence (Art. 3 para. 1 sentence 2 EIR). Furthermore, all assets, customers, and 450 employees were based in Spain. The English court nevertheless assumed that the *"centre of main interests"* within the meaning of Art. 3 para. 1 sentence 1 EIR was situated in England. The assumption that the COMI was situated in England was justified by stating that the *"headquarter functions"* were performed in London and essential strategic decisions as well as important decisions regarding staff were made in London. Furthermore, payment

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[42] *The London High Court*, ruling of 20 May 2003, unpublished. The ruling is referred to by *Martinez Ferber* (see footnote 41 above), p. 40; see also *van Galen* (footnote 5 above)
[43] Including the German *Crisscross* Communications Germany GmbH.
[44] See *Braun*, NZI aktuell issue No. 1/2004, V.
[45] See *van Galen* (footnote 5 above).
[46] *Van Galen* (see footnote 5 above), as well as *Martinez Ferber* (see footnote 41 above), p. 40.
[47] Unpublished, however the "skeleton argument" has been published on the Internet under **www.iiiglobal.org**. As to the ruling see also *Martinez Ferber*, (footnote 41 above), p. 41 et seq.
[48] Belonging to *Enron* group.

transactions were effected through Citibank Madrid (a dependent branch of Citibank International plc. London).

3. Daisytek Group

In Germany, the insolvency of *Daisytek* group, a worldwide group trading in computer accessories with 14 enterprises in England, Germany, and France has particularly become the focus of discussion[49].

Daisytek, the parent company of the US American group, has applied for Chapter 11 proceedings in the United States. One of the subsidiaries of Daisytek is *ISA* International plc., which is registered in England and has the function of a European holding company. It has several subsidiaries based in different member states. In Germany, *PAR* Beteiligungs GmbH (German holding company), *Supplies* Team GmbH (operative subsidiary with less than ten employees), and *ISA* Deutschland GmbH (operative subsidiary with more than 100 employees) belong to this group. After the insolvency of the US American parent, it was planned to conduct the insolvency of the entire European group of companies by instituting main insolvency proceedings in England, applying English law as *lex fori concursus* within the meaning of Art. 4 EIR[50]. On Friday, 16 May 2003, applications for the institution of so-called "administration proceedings" according to Section 8 of the Insolvency Act 1986 were submitted to the *High Court of Justice of Leeds* for the 14 enterprises. The Court issued an administration order the same day, assuming that the proceedings were main insolvency proceedings within the meaning of Art. 3 EIR.

The reason for assuming that the COMI of the German companies was situated in England was[51] that the financial, contractual, and supply duties as well as guarantee obligations were factually assumed and controlled by the international management based in England. For instance, a reservation of approval existed in the case of expenses exceeding EUR 5,000. Furthermore, the German companies held their

[49] *High Court of Justice* of Leeds, ZIP 2003, 1362, as well as NZI 2004, 219 = ZIP 2004, 963 – "ISA I"; *Local Court of Düsseldorf*, ZIP 2003, 1363; NZI 2004, 269 = ZIP 2004, 623; ZIP 2004, 866 – "ISA II"; regarding the French "ISA rulings" see *Cour d' Appel de Versailles,* ZIP 2004, 377 L; regarding "ISA case law" see footnote 2 above.

[50] *Liersch*, NZI 2004, 271.

[51] See NZI 2004, 269 = ZIP 2004, 963.

bank accounts with German branches of an English bank. By letter of 17 May 2003 (Saturday), received by the Court on 19 May 2003, the sole Managing Director of the German companies filed a petition for the institution of insolvency proceedings also in Germany[52]. The Managing Director did not inform the Court about proceedings already pending in England. A notice of branch office or group control has not been registered in the commercial register with regard to the German companies. By ruling of 19 May 2003, a German lawyer was appointed as preliminary administrator. On 10 July 2003, main insolvency proceedings were instituted over the assets of *Supplies* Team GmbH and the assets of *ISA* Deutschland GmbH also in Germany; on 1 August 2003, secondary insolvency proceedings within the meaning of Art. 27 et seq. EIR were instituted over the assets of *PAR* Beteiligungs GmbH.

The *ISA/Daisytek* ruling was discussed in Germany particularly because, at times, there were parallel main insolvency proceedings in England as well as in Germany where both the English and the German administrator claimed to be the main administrator. After the – much-discussed – clarifying ruling of the *Local Court of Düsseldorf* dated 6 June 2003 according to which the ruling of the *High Court of Justice of Leeds* did not have binding effect[53] so that it was assumed that the German proceedings were main insolvency proceedings, it took some time until the German main insolvency proceedings were discontinued[54]. Finally, the English main insolvency proceedings over the German companies had to be acknowledged accordingly, in Germany, in conformity with the priority principle[55] (Art. 16 EIR).

[52] Presumably in order to fulfil its duty to file for insolvency within the meaning of Sec. 64 para. 1 German Act on Limited Liability Companies (*GmbHG*) (however, filing a petition for the institution of main insolvency proceedings with the (competent) EU court is already sufficient in this case). See with regard to this issue also *Local Court of Cologne*, NJW-RR 2004, 1055 = NZI 2004, 151 = ZIP 2004, 471; *Pannen,* in: *Breutigam/Blersch/Goetsch* (see footnote 11), Sec. 335 marginal number 21; *Vallender/Fuchs*, ZIP 2004, 829; *Bähr/Riedemann*, ZIP 2004, 1066 (1067).

[53] This ruling was vehemently criticised as a flagrant violation of Art. 16 et seq. EIR. See instead of all *Smid,* DZWIR 2003, 397 (400).

[54] The German main insolvency proceedings were to be discontinued according to Art. 102 Sec. 4 para. 1 sentence 1 Act Introducing the Insolvency Code (*EGInsO*). Main insolvency proceedings already instituted may not be continued if main insolvency proceedings have already been instituted in another member state. *Local Court of Düsseldorf,* NZI 2004 = ZIP 2004, 623. See also: *Pannen/Riedemann*, NZI 2004, 301.

[55] The validity of the priority principle is presumed in the Recital No. 22 EIR, see *Herchen*, ZInsO 2004, 61 (63).

4. BRAC Rent-A-Car

By the English *BRAC* Rent-A-Car[56] ruling, an administration order was issued with regard to a major company registered in the US. The debtor belonged to a group of companies where the individual enterprises underwent reorganization proceedings according to Chapter 11 Bankruptcy Code (*KO*). The *High Court of Justice, Chancery Division,* assumed[57] that proceedings of the debtor of the above kind did not offer protection from execution according to English case law, at least in England and Wales (so that automatic stay according to Chapter 11 proceedings did not apply) and held that it had international competence to institute main insolvency proceedings. It did not deal with the question whether, apart from Chapter 11 proceedings, secondary insolvency proceedings (aiming at liquidation) within the meaning of Art. 3 para. 2, Art. 27 et seq. EIR were to be instituted.

Although the United States do not belong to the EU so that the EIR does not apply to them the Court assumed that the COMI within the meaning of the EIR was situated in England. The Court justified its ruling as follows:

"The company[58] is incorporated in Delaware, and has its registered address in the United States. However, that is not an address from which it trades, and it has never traded in US. Its operations are conducted almost entirely in the UK. ... It trades from an address in Hemel Hempstead, in England. ... It has no employees in the US, and all its employees work in England, with contracts of employment governed by English law, apart from a small number in branch office in Switzerland. Its trading activities are carried out by way of contracts with subsidiaries and franchisees. All of these are governed by English law..."[59]

One of the administrators appointed in the above proceedings stressed the advantages of this approach by stating as follows:

"Brac should be a template for consensual cross-border restructurings. It establishes what can be achieved with the European Regulation. The only alternative for Budget

[56] Also referred to as *"BRAC". High Court of Justice, Chancery Division Court*, ZIP 2003, 813 including comment *Sabel/Schlegel*, EWiR 2003, 367.
[57] Based on the ruling in the matter of *Banque Indosuez* v. *Ferromet*, (1993) BCLC 112.
[58] Refers to *BRAC* Rent-A-Car International Inc.
[59] *High Court of Justice Chancery Division Companies Court*, ZIP 2003, 813 et seq.

Rentacar was Provisional Liquidation in the UK, which would have made a sale of the business virtually impossible[60]".

By the above ruling, the English Court brought about automatic stay without infringing the case law of its own jurisdiction[61]. If one follows this ruling, one may institute main insolvency proceedings within the meaning of the EIR in all EU member states, even against non-European dummy corporations with actual head office in the EU[62].

5. EMBIC I

By the *"EMBIC I"* ruling of the *Local Court of Mönchengladbach* of 27 April 2004[63] Germany perhaps succeeded in "winning" the "competition" for the initial institution of main insolvency proceedings for the first time while at the same time a petition for the institution of main insolvency proceedings had been filed in England. Prior to the institution of main insolvency proceedings in England, main insolvency proceedings were instituted in Germany although a petition for the institution of secondary insolvency[64] proceedings had been filed there only[65]. The German court, given the circumstance that main insolvency proceedings had not been instituted in England yet, interpreted the German petition as a petition for the institution of main insolvency proceedings[66]. It was impossible to institute secondary insolvency proceedings in the absence of main insolvency proceedings[67]. According to the above ruling, the place where the debtor unfolds promotional activities is decisive for the determination of the COMI. In contrast to (consistent) English court rulings, the *Local Court of*

[60] Quoted from: *Willcock*, INSOL World – 3rd quarter 2003, 8 (9).
[61] *Smid*, DZWIR 2003, 397 (403).
[62] The ruling *"Ci4net"* of the *High Court of Justice*, Leeds, ZIP 2004, 1769 et seq., continues this court practice.
[63] *Local Court of Mönchengladbach,* NZI 2004, 383 including comment *Lautenbach* = ZIP 2004, 1064 including comment *Bähr/Riedemann*.
[64] Secondary insolvency proceedings are territorial proceedings conducted at the place where the debtor has an establishment (insolvency proceedings only covering the assets situated in the state where insolvency proceedings are conducted), which will only be conducted once main insolvency proceedings have been instituted, Art. 3 para. 3 EIR. The aforesaid proceedings must be winding up proceedings. This also covers German insolvency proceedings. One should keep in mind that according to current court practice the principal place of business is also considered as establishment within the meaning of the EIR, *Local Court of Cologne*, NJW-RR 2004, 1055 = ZIP 2004, 471; see *Sabel,* NZI 2004, 126. See also *Cour d'Appel de Versailles*, ZIP 2004, 377.
[65] Thus, the applicant intended to have main insolvency proceedings conducted in England so that English law would apply as *lex fori concursus* within the meaning of Art. 4 EIR.
[66] See also *Bähr/Riedemann*, ZIP 2004, 1066 (1068).
[67] Obviously, territorial insolvency proceedings had neither been relevant nor had the duty to file for insolvency according to Sec. 64 para. 1 German Act on Limited Liability Companies (*GmbHG*) been fulfilled by their institution, see *Bähr/Riedemann*, ZIP 2004, 1066 (1069).

Mönchengladbach does not refer to the place where strategic business decisions are made as authoritative. The Court holds that it had not been obvious to third parties that business decisions were made in England. According to the above, the overall consideration of the fact that customer relations exclusively existed in Germany, the object of the company was situated in Germany, staff was employed in Germany, staff accounting was situated in Germany, and the company held accounts with a bank based in Germany is decisive in order to justify that the COMI was situated in Germany.

6. Hettlage

In its *"Hettlage ruling"* of 4 May 2004[68], the *Local Court of Munich* assumed that the COMI of a foreign subsidiary was situated in Germany as its business management was ensured by the domestic parent company and essential services were performed from Germany. The Austrian debtor, which is the wholly-owned subsidiary of the German company *Hettlage* KG aA, has 13 sales branches in Austria. The Court assumed that the COMI of the debtor was based in Germany because the place where economic interests were managed was situated there. The Court held that, from the economic perspective, the debtor was engaged in economic activities in Germany and that the competent management, like the sales management being responsible for the operative business, was based in Germany. The Court further held that the entire purchasing performance for the Austrian subsidiaries was effected in Germany where decisions were also made and organization was ensured. Also, the Court held that services such as staff accounting, accounting, controlling, organization, EDP, planning, contract management, insurances, advertising, etc. were ensured by the parent company's employees in charge. On 11 May 2004, the *District Court of Innsbruck* instituted secondary insolvency proceedings according to Austrian law upon the request of the German main administrator[69].

[68] *Local Court of Munich*, NZI 2004, 450 including comment *Mankowski*.
[69] *District Court of Innsbruck,* ruling of 11 May 2004 – 9 S 15/04, including comment *Bähr/Riedemann,* EwiR 2004, 1085.

7. Parmalat

The so-called *"Parmalat insolvency"* affecting approx. 36,000 employees is particularly spectacular[70]. About 250 companies belong to *Parmalat* group as well as another 200 companies to the *Tanzi* family holding *"La Coloniale"*. Financing had been primarily ensured by a company abroad (Holding *Parmalat* Netherlands BV). Insolvency proceedings under reference to Art. 3 EIR were instituted in Parma over five Dutch and two Luxembourgian companies. The Court substantiated its ruling by holding that the enterprises' substantial financing function for the parent company and the group was obvious to creditors. It further held that the creditors' knowledge could also be based on the circumstance that it followed from the bond prospectuses that the parent company gives a guarantee for bonds. The Court also assumed that the COMI was situated in Italy because the activity was exclusively performed in the parent company's interest, control was entirely ensured by the Italian parent company, and instructions for all substantial decisions were given from Italy.

The problem concerning conflicts of interests that exists with regard to the Irish subsidiary, *Eurofood* IFSC[71] ltd. (hereinafter *"Eurofood"*) in connection with the institution of main insolvency proceedings is, among other things, also interesting in this respect. The Italian Parmalat group founded *Eurofood* with registered office in Dublin in 1997 as finance company for the capital market[72]. *Eurofood* did not have its own employees or offices at any time. A registered office is maintained in a Dublin law firm. The meetings of the board of management took place in Dublin. The executives from Parma took part in meetings by phone[73].

[70] See e.g. *Tribunale di Parma*, ZIP 2004, 1220 et seq.; *High Court Dublin*, ZIP 2004, 1223 as well as the IBA-Newsletter, April 2004, p. 23 et seq. as well as *Willcock*, Parmalat shows lack of co-operation in insolvencies, INSOL World, 2nd Quarter 2004, p. 6 et seq. Reference should also be made in this respect to the "lex Parmalat", Decree No. 347/03, "for supplementing urgent measures for restructuring major insolvent commercial enterprises". The Decree was introduced on 23 December 2003 (the petition for the institution of insolvency proceedings was filed on 24 December 2003) and confirmed retroactively. If a company has more than 1,000 employees and its liabilities exceed EUR 1 billion the company may file a petition for "administrazione straordinario" with the Minister of Industry according to the above. The court merely confirms the Minister's decision.

[71] IFSC means "International Financial Services Center".

[72] *Tribunale di Parma,* ZIP 2004, 1220.

[73] *Tribunale di Parma,* ZIP 2004, 1220.

A petition for provisional liquidation of the assets of *Eurofood* was filed in Ireland on 27 January 2004. On the same day, a provisional liquidator was appointed. The provisional liquidator informed the *"Commissario Parmalat"* about the order on 30 January 2004, who, in turn, filed an appeal. On 9 February 2004, the Italian Minister of Industry issued an order for extraordinary administration over *Eurofood*. The Court of Parma confirmed the order on the basis of the COMI on 20 February 2004[74]. According to the Court, the order by an Irish court of provisional liquidation of a company having its registered office in conformity with the articles of association in Ireland does not have a restrictive effect on the Italian court's international competence of according to Art. 3 para. 1 EIR, provided that the centre of main interests of the company is situated in Italy. The Court further held that the COMI is not deemed situated at the registered office in conformity with the articles of association if the company does not maintain its own offices there but only a pro forma seat in the offices of a law firm. Furthermore, the Court stated that the factual management of an Irish ltd. at the registered office of the parent of the group based in Italy is obvious to third parties if the Irish company has been founded for financing transactions of the group and the parent of the group has assumed a payment guarantee vis-à-vis the creditors of the finance company[75].

On 23 March 2004, the *Irish High Court* gave a judgment in which it dealt with the question whether a petition in Ireland and the order of provisional liquidation issued correspond to the institution of main insolvency proceedings within the meaning of Art. 3 EIR[76]. The Court held that not only the appointment of a provisional liquidator according to Irish law but already the filing of a petition for the institution of insolvency proceedings triggers main insolvency proceedings according to Art. 3 EIR[77]. The *High Court* confirmed in its ruling that institution was effective in Ireland and therefore also binding within the EU. The Court further held that, according to the assumption of registered office provided in Art. 3 para. 1 sentence 2 EIR, the COMI was situated in Ireland, which was also confirmed by a taking of evidence at the hearing.

[74] *Tribunale di Parma,* ZIP 2004, 1220 et seq.
[75] *Tribunale di Parma,* ZIP 2004, 1220.
[76] *High Court Dublin*, judgment of 23 March 2004 – 33/04, extracts published in ZIP 2004, 1223. See also reference to *ECJ, Supreme Court of Ireland,* NZI 2004, 505.
[77] *High Court Dublin,* ZIP 2004, 1223. That the date when the petition is filed is *not* decisive for the existence of main insolvency proceedings see above under I. See in this respect also reference to *ECJ, Supreme Court of Ireland,* NZI 2004, 505.

According to the Court, it followed from the taking of evidence that the COMI was situated in Ireland since the management of the enterprise was situated in Ireland, the meetings of the board of management took place in Ireland (several Italian Directors only took part in meetings by phone), and bondholders had to assume that they dealt with an Irish enterprise[78]. The Irish ruling was given earlier than the Italian ruling so that the Irish proceedings have to be classified as main insolvency proceedings. The wording of the judgment of the *High Court* was as follows:

"Furthermore although not expressly stated in the court order of 27 January 2004, the whole basis for the making of that order was that the court was satisfied that the centre of main interests of the company was in this jurisdiction[79]".

In its ruling, the *Irish High Court* presumed that it was not necessary to clarify that the COMI was situated in Ireland. It held that the objective fact that a liquidator was appointed were sufficient. The requirement to state reasons as provided by Art. 102 Section 2 Introductory Law of the Insolvency Code[80] is apparently inexistent under Irish law.

By judgment of 27 July 2004[81] in connection with *Eurofood/Parmalat*, the *Supreme Court of Ireland* referred to the *ECJ* several questions concerning the centre of main interests within the framework of group insolvencies so that it is to be expected that the *ECJ* will comment on these issues soon.

III. Summary

There are many reasons to interpret the term "centre of main interests" within the meaning of Art. 3 para. 1 sentence 1 EIR restrictively. According to Recital No. 13 EIR, the centre of main interests must be obvious to third parties. A similar statement

[78] *Willcock,* INSOL World – 2nd Quarter 2004, p. 6.
[79] *High Court Dublin*, ZIP 2004, 1223 (1226).
[80] See *Pannen,* in: *Breutigam/Blersch/Goetsch* (footnote 11 above), Art. 102 Sec. 2 Introductory Law of the Insolvency Code, as well as *Pannen/Riedemann*, NZI 2004, 301 (302). However, an insolvency order is not null and void in Germany, either, if it has been issued in the absence of verification and determination of international competence as well as by failing to observe Art. 102 Sec. 2 Introductory Law of the Insolvency Code.
[81] *Supreme Court of Ireland,* NZI 2004, 505.

may be inferred from the explanatory report on the European Insolvency Convention[82]. The reason for setting an objective standard is that potential creditors shall have a certain degree of security with regard to the insolvency statute to be applied. The more vaguely the term "COMI" is understood, the more likely it is that main insolvency proceedings will be instituted in parallel (see *"ISA/Daisytek"* discussion in Germany). In addition, the realization that only one main insolvency proceeding exists within the scope of application of the EIR leads to a "competition" for initial institution in the event of a broad interpretation. Finally, a broad interpretation of the COMI facilitates *forum shopping*, which the EIR is intended to prevent according to Recital No. 4 EIR.

Furthermore, there is much to be said against an extension of the scope of application of the EIR to non-EU countries on the grounds of legal security, like in the matter of *"BRAC* Rent-A-Car", although this may be economically useful in the individual case. The EIR does not contain, in principle, any provisions concerning international insolvency law issues with regard to the relationship between EU member states and third countries[83]. The international insolvency law of the respective member state must pave its way in this respect[84].

The court rulings outlined above under II. are certainly also important with regard to the question whether a "group jurisdiction" exists for European insolvencies. In the case of companies and legal entities, it is assumed that the centre of main interests is the place where their registered office in conformity with the articles of association is situated until the contrary is proved. This assumption according to Art. 3 para. 1 sentence 2 EIR is refutable. Therefore, one could assume that the COMI of subsidiaries is not situated at the registered office in conformity with the articles of association, but at the registered office of the parent of the group. However, as already set out above, the COMI must be determined on the basis of an objective standard[85]. As correctly substantiated by the *Local Court of Mönchengladbach*[86], it is

[82] *Virgós/Schmit,* in: *Stoll* (see footnote 11 above), p. 32 (60).
[83] *Balz*, ZIP 1996, 948; *Eidenmüller* IPRax 2001, 2 (5); also: *Leible/Staudinger* KTS 2000, 533 (538). However, open in the case of *Duursma-Kepplinger/Duursma/Chalupsky* (see footnote 28 above), Art. 1 marginal number 52.
[84] In Germany, Secs. 335 et seq. German Insolvency Code (*InsO*) are insofar applicable.
[85] See Recital No. 13 EIR, *Bähr/Riedemann,* ZIP 2004, 1066 (1067).

decisive where the enterprise's promotional activities are obvious to third parties[87]. The internal course of business ("mind of management") cannot be decisive[88]. Only by setting an objective standard can it be ensured that competence is linked with a place that is known to creditors[89] so that the risks become calculable for them[90]. This does not have to be the registered office of the parent of the group at all, as shown by the above *Crisscross* case.

Summarizing it can be stated that the rulings to be given by the *ECJ* on issues regarding the COMI referred to it by supreme courts are eagerly awaited[91].

[86] *Local Court of Mönchengladbach,* NZI 2004, 383 = ZIP 2004, 1064.
[87] See *Ehricke*, EWS 2002, 101 (103), as well as *Bähr/Riedemann,* ZIP 2004, 1066 (1067).
[88] *Bähr/Riedemann,* ZIP 2004, 1066 (1067).
[89] For, it has to be borne in mind when discussing the "COMI" that insolvency proceedings are conducted for creditors. It is their interests that should be the centre of attention.
[90] *Ehricke*, EWS 2002, 101 (103).
[91] *Supreme Court of Ireland,* NZI 2004, 505; *Federal Supreme Court,* NJW-RR 2004, 848 = NZI 2004, 139.