Introduction

1. The Insolvency Regulation changed the complexion of transnational insolvency law to a significant degree. The purpose of the regulation was to harmonise EU Insolvency Law, it deals with both individuals and companies and there is a very considerable body of case law on the corporate side. One effect of the regulation has been the creation of what is known, primarily in the United Kingdom, as “Bankruptcy Tourism”. A debtor may relocate to a jurisdiction with a more favourable insolvency regime; the question is when that constitutes “forum shopping”. The reason this has become an issue is because of the differing insolvency regimes across the European Union jurisdictions. As between the UK and Ireland the bankruptcy regimes were similar up until the late 1980’s. Ireland relied on the Bankruptcy Act of 1914 and the prior legislation which were British. In 1986 the United Kingdom changed its system somewhat whereas the Irish Bankruptcy Act of 1988 was very much a product of the 1960’s.

2. More dramatically in the UK, the Insolvency Act of 2000 and the Enterprise Act of 2002 modelled British bankruptcy law on the very debtor friendly United States system whereby the Bankruptcy is dealt with very swiftly (usually a year) and the policy focus is to have the debtor free to set up in business again unless morally culpable or uncooperative. 

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1 This paper does not deal with the new Irish Rules of the Superior Courts, or caselaw which are being covered by Mark Sanfey SC.
3 The 2002 Act contained fundamental debtor friendly changes and it came into force on the 1st April 2004. See “Personal Insolvency Law, Regulation and Policy” David Milman
3. Therefore a significant divergence arose between British bankruptcy law and that of most of the other European bankruptcy regimes. It is apparent that the regime in the United Kingdom is attractive to insolvent debtors across Europe but particularly Ireland.

4. The main advantages for a debtor of being adjudicated in the United Kingdom are that the bankruptcy will ordinarily end after twelve months. The reasoning behind this is that the United Kingdom has a system of bankruptcy restriction orders and unless the debtor has been proved to have behaved in an inappropriate manner (either pre or post bankruptcy) a short period should apply. It would seem possible that there may be logistical difficulties for a UK Trustee / Receiver seeking a restriction order in relation to issues which occurred in Ireland. A claim on the pension is more likely in Ireland. However, in the UK, despite the short period assets remain vested in the Trustee after discharge. They also make Income Payment Orders which subsist after the bankruptcy for up to 3 years (if a lump sum is received in that period it may become the subject of an order). To date, claims on the family home have been prosecuted more quickly in England where they have to realise it within three years. The interplay between the Irish and UK systems in relation to these matters is undeveloped but will be interesting.

5. The application of the Insolvency Regulation meant that any individual citizen of a member-state of the EU could avail of the UK system provided they had their “centre of main interests” (“COMI”) within the United Kingdom. The COMI is reasonably readily established in the case of a corporate entity (with the exception of group companies) because it is generally considered to

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be the registered office. For individuals, and the personal insolvency regime, COMI was not defined in the Regulation.

6. In Ireland a number of very high profile cases emerged in 2010-2012 of Irish individuals (with property related debt) seeking to adjudicate themselves in the United Kingdom. This has led to considerable media coverage as to how it can arise that someone who, from a common sense perspective is an Irish citizen with debts to banks owned by the Irish taxpayer can suddenly be bankrupt in Britain to claim a more favourable regime.

7. Analysed more particularly from the perspective of a legal practitioner two related issues arise in the caselaw. The first is procedural, the application is frequently *ex parte* as it is an application for self adjudication and that context is sometimes abused. The second issue, which is substantive and much more difficult, relates to exactly what constitutes *‘forum shopping’* which is prohibited under the Regulation.

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5 There are issues which arise in relation to companies, which might have a very significant business entity in one country and a name plate registered office in another which are not the subject of this paper.

6 As of April 2012 the European Commission was seeking submissions and establishing a panel of experts to re-examine the Regulation generally and the concept of COMI in particular.

7 See Irish Times 14th June 2012 *Westlife’s Shane Filan is the latest star declared bankrupt with huge property debts* and Irish Times 15th June 2012 *“O’Donnell bankruptcy bid opposed by bank”* as well as the cases of Sean Quinn, Tom McFeely and others.
8. The Regulation provides as follows:

**Article 3**

*International jurisdiction*

1. The courts of the Member State within the territory of which the centre of a debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

2. Where the centre of a debtor's main interests is situated within the territory of a Member State, the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if he possesses an establishment within the territory of that other Member State. The effects of those proceedings shall be restricted to the assets of the debtor situated in the territory of the latter Member State.

3. Where insolvency proceedings have been opened under paragraph 1, any proceedings opened subsequently under paragraph 2 shall be secondary proceedings. These latter proceedings must be winding-up proceedings.

4. Territorial insolvency proceedings referred to in paragraph 2 may be opened prior to the opening of main insolvency proceedings in accordance with paragraph 1 only:

(a) where insolvency proceedings under paragraph 1 cannot be opened because of the conditions laid down by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or

(b) where the opening of territorial insolvency proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the Member State within the territory of which the establishment is situated, or whose claim arises from the operation of that establishment.⁸

**Article 4**

*Law applicable*

1. Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State
within the territory of which such proceedings are opened, hereafter referred to as the “State of the opening of proceedings”.

9. Recital 13 says that COMI should

“correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties”.

10. Recital 4 of the regulation states,

“it is necessary for the proper function of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one member state to another, seeking to obtain a more favourable legal position (forum shopping).” ⁹

11. Arising out of Article 3 and 4 the law of the place where the main proceedings are opened (i.e. where the petition is presented¹⁰) is the applicable law. However, the secondary or territorial proceedings are governed by the law of the state in which those assets are present. The “time of the opening of proceedings” means “the time at which the judgment opening proceedings becomes effective, whether it is a final judgment or not”) Article 2(f) . In many jurisdictions, and particularly in Ireland, that date is the presentation of the petition on the basis that any judgment dates back to the presentation of the petition.

12. While there is considerable public coverage in relation to bankruptcy tourism, the reason it frequently doesn’t cause immediate commercial chaos is that secondary proceedings can be opened to recover assets in any other

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⁹ As per Shierson v. Vlieland – Boddy [2005] EWCA Civ. 974/2005 1 WLR 3966judgment this needs to be read in conjunction with Recital 8 and 12

jurisdiction. Also in the modern commercial world most lending will be secured and Article 5 of the Regulation provides as follows:

**Article 5**

**Third parties’ rights in rem**

1. The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immovable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

2. The rights referred to in paragraph 1 shall in particular mean:

   (a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, **in particular by virtue of a lien or a mortgage**;
   
   (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
   
   (c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
   
   (d) a right in rem to the beneficial use of assets.

13. Arising out of same the secured creditors deal with their assets in the normal way and outside the bankruptcy, as they would in any case. The bankruptcy relates generally to the unsecured balance and frequently there are very limited unsecured assets to meet same. Therefore, equally frequently, unsecured creditors have given up at this point.

**Definition of COMI**

14. In defining COMI the courts were presented with something of a difficulty as the ECJ set out in **re Euro Food IFSC Limited (Case C – 341/04) [2006] 3 WLR 309**. The ECJ pointed out that

   “the concept of the centre of main interests is peculiar to the regulation. Therefore, it has an autonomous meaning and must therefore be interpreted in a uniform way, independently of national legislation”
The only significant aid to interpretation is the Virgos-Schmit Report (on the original convention on insolvency proceedings) which stated “the concept of “centre of main interest” must be interpreted as the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties” [which is precisely what was subsequently set out in the recital]. The report goes on to say

“by using the term ‘interest’, the intention was to encompass not only commercial, industrial or professional activities, but also general economic activities, so as to include the activities of private individuals (e.g. consumers). The expression ‘main’ serves as a criterion for the cases where those interests include activities of different types which are run from different centres.

In principle, the centre of main interest will be in the case of professionals be the place of their professional domicile and for natural persons in general, the place of their habitual residence…”

15. The early cases in relation to COMI in the United Kingdom demonstrated the ease with which citizens of other EU countries could come and establish a COMI there but more recent cases have suggested the system is being tightened up in terms of procedures.

The Case Law on Establishing COMI

16. The caselaw is primarily from the United Kingdom but it has application across the EU. Although not the first case in time, the case of Stojevic v. Official Receiver (20th December 2006) [2007] BPIR 141 is interesting in that in 2006 the Court noted a fundamental problem which has exercised them greatly since. In finding that “The true inquiry ... must be as to [the debtors] habitual residence”, the court noted “the fundamental difference between the

English legal system, which is adversarial, and the continental legal system, which is inquisitorial”.

17. This was an early reference to the main procedural issue which arises in relation to bankruptcy tourism, the application is usually made by the bankrupt *ex parte*. In the UK they are not obliged to advertise the application and there will be no *legitimus contradictor* in the majority of cases. The cases are dealt with at County Court level and involve filling in forms so it would be unusual for a bankruptcy order not to be made. In reality unless a creditor pursued the Bankrupt, a phenomenon which is on the increase, a UK judge would accept what is put on affidavit.\(^\text{12}\)

18. The main substantive issue was what constituted forum shopping. If the facts suggested that a person had moved when already insolvent could they change their COMI. In *Shierson v. Vlieland-Boddy [2005] BPIR 1170* the facts were that in February and May 2003 the debtor, who was an accountant and insolvency practitioner, made attempts to set up individual voluntary arrangements which were necessarily based on his centre of main interests being in England and Wales; those proceedings continued until October 2003. In January 2004 a bankruptcy petition was presented against the debtor in respect of costs incurred in the individual voluntary arrangement proceedings by the Trustee. The debtor asserted that since the commencement of those proceedings Spain had become his centre of main interests and that he had no establishment in England, accordingly, the High Court had no jurisdiction to hear the bankruptcy petition. He claimed to have been in Spain for some 9 months.

19. Ultimately the Court of Appeal ruled that his COMI was in Spain but that territorial proceedings could be opened in relation to some assets in England. The crucial portion of the decision in relation to COMI is at paragraphs 55 and 56 of the judgment of Chadwick LJ which is worth reciting in full:

\(^{12}\) As stated in *Shierson* para. 56 but it has given rise to procedural concerns. The Official Receiver can also challenge jurisdiction.
55 I have set out the authorities to which we were referred in deference to the arguments which were addressed to us and in recognition that the point in the present appeal has not previously been before this court. But, as it seems to me, they provide little assistance in the context of the present appeal. The question raised in this appeal must be determined by construing article 3(1) of the Regulation in the light of the Community purpose which the Regulation was intended to promote. I can summarise my own conclusions as follows. (1) A debtor’s centre of main interests is to be determined at the time that the court is required to decide whether to open insolvency proceedings. In a case where those proceedings are commenced by the presentation of a bankruptcy petition, that time will normally be the hearing of the petition. But, in a case such as the present, where the issue arises in the context of an application for permission to serve the petition out of the jurisdiction, the time at which the centre of the debtor’s main interests falls to be determined will be at the hearing of that application. Similar considerations would apply if the court were faced with an application for interim relief in advance of the hearing of the petition. (2) The centre of main interests is to be determined in the light of the facts as they are at the relevant time for determination. But those facts include historical facts which have led to the position as it is at the time for determination. (3) In making its determination the court must have regard to the need for the centre of main interests to be ascertainable by third parties; in particular, creditors and potential creditors. It is important, therefore, to have regard not only to what the debtor is doing but also to what he would be perceived to be doing by an objective observer. And it is important, also, to have regard to the need, if the centre of main interests is to be ascertainable by third parties, for an element of permanence. The court should be slow to accept that an established centre of main interests has been changed by activities which may turn out to be temporary or transitory. (4) There is no principle of immutability. A debtor must be free to choose where he carries on those activities which fall within the concept of "administration of his interests". He must be free to relocate his home and
his business. And, if he has altered the place at which he conducts the administration of his interests on a regular basis, by choosing to carry on the relevant activities (in a way which is ascertainable by third parties) at another place, the court must recognise and give effect to that. (5) It is a necessary incident of the debtor’s freedom to choose where he carries on those activities which fall within the concept of “administration of his interests”, that he may choose to do so for a self-serving purpose. In particular, he may choose to do so at time when insolvency threatens.

In circumstances where there are grounds for suspicion that a debtor has sought, deliberately, to change his centre of main interests at a time when he is insolvent, or threatened with insolvency, in order to alter the insolvency rules which will apply to him in respect of existing debts, the court will need to scrutinise the facts which are said to give rise to a change in the centre of main interests with that in mind. The court will need to be satisfied that the change in the place where the activities which fall within the concept of "administration of his interests" are carried on which is said to have occurred is a change based on substance and not an illusion; and that that change has the necessary element of permanence.

56 Applying those principles to the facts in the present case, I find it impossible to say that the judge was not entitled to reach the conclusion that he did, that the debtor’s centre of main interests had moved to Spain. The judge was clearly aware that there were grounds for suspicion that the move was self-serving and might not be genuine. But, unless he were prepared to disbelieve the debtor’s evidence as to what he was doing in Spain and why he was living there, the judge was bound to take that evidence into account. He held that it would not be fair to the debtor to disbelieve that evidence in the circumstances that the petitioner had chosen not to test it by cross-examination. He cannot be said to have erred in taking that view. As Rimer J observed in Long v Farrer [2004] BPIR 1218, para 57:
"It is ... by now familiar law that, subject to limited exceptions, the court cannot and should not disbelieve the evidence of a witness given on paper in the absence of the cross-examination of that witness."\textsuperscript{13}

That is not, of course, to say that the court is bound to accept untested evidence which is plainly incredible. But the debtor's evidence as to what he was doing in Spain and why he was living there, in contrast to other evidence (for example, his evidence that he had had no connection with Millennium Investment International Ltd), was not of that character.

20. It is clear that when insolvency threatens the debtor is entitled to change their centre of main interests. There must be a degree of permanence so a habitual residence must be established in the United Kingdom and, after a period of between 6 to 9 months it should still be possible to be adjudicated in bankruptcy in the United Kingdom. After adjudication the bankrupt must stay in the UK for most of the 12 month period of adjudication.\textsuperscript{14} The substantive question which remains in relation to COMI is whether there should be 'dominant purpose' test or something analogous to that. The free movement of workers will trump the insolvency legislation but if the dominant reason for the movement is to forum shop, is that acceptable?

21. In terms of procedures the UK Courts have become very aware of their jurisdiction has been abused over the last 6-8 years and applications can no longer be expected to go through as casually as might have occurred previously. \textit{Official Receiver v. Eichler [2007] BPIR 1636} (Eichler 1) is probably the high point in terms of bankruptcy tourism when a UK order was

\textsuperscript{13} Also quoted in \textit{IBRC v. Quinn} Deeny J No. 133303 2011.

\textsuperscript{14} Media reports suggest that there is a very specifically designed strategy used to frame the application of Irish people seeking to go to the UK, ironically in order to avoid accusations of 'forum shopping'. "Irish dodge debts through UK bankruptcy tourism' Bankrupt clients from Ireland have used a Leicester solicitor and UK courts to wipe out more than €1bn debts taken out in the republic" Guardian 27\textsuperscript{th} May 2012
made against Mr. Eichler. He was a German doctor and it was made on the basis that his COMI was in England and Wales while he was carrying out locum consultant work. He was employed by a UK company. He had no significant assets and three creditors in Germany. There were no UK creditors.

22. In this case the Official Receiver challenged the claim that is centre of main interest was in England based on the following facts:

(i) The creditors were all in Germany and Mr. Eichler had moved to England in October of 2006 and lived in temporary accommodation. His wife continued to live in Germany. His locum work was by its nature temporary and the company, which employed him, had his wife as a director. The company took the benefit of his earnings leaving nothing for the Official Receiver to seek to attach by way of income payments. The set up was alleged to be a sham to deprive creditors of money they might otherwise expect to go towards the payment of a dividend.

(ii) Mr. Eichler owned a property in Germany which was transferred into his wife’s name and if that transfer was to be undone those proceedings should be taken in Germany rather than the United Kingdom. The insolvency arose as a result of a judgment given against him in Germany and insolvency in the UK, as opposed to in Germany, was prejudicial to the creditors.

23. Chief Registrar Baister found that Mr. Eichler was free to change his COMI from Germany to the UK and that as he continued to work in the UK, there was no basis on which to conclude that his presence was purely temporary. He said that “it is also plain that his habitual residence, in the sense of the residence where he is most often to be found, is here... to the extent that it may be relevant (which I doubt) it would also appear that his professional domicile
is here if all the expression means that it is the place where he is carrying on his profession at the present time”.

24. The fact that his debts were in Germany was deemed not a relevant factor and there was no evidence that his creditors would be prejudiced. The Court found that the Official Receiver or any trustee appointed would be obliged to investigate his affairs and realise any assets which may be available so as to pay a dividend to creditors irrespective of their location.

25. It should be noted that in Stojevic the court took account of the fact that the debtor’s wife lived in Austria whereas in Eichler 1 the court did not do so. There is no authority which establishes any minimum period of time which a person must spend in the Member State before it can be said to have become his COMI. However, on the basis that it must be a “habitual residence” it would presumably require them to have some element of permanence and to have established operations there that are capable of ascertainment by third parties. It appears the practice is a minimum of 6 months.

26. The change in attitude of the UK Courts to bankruptcy tourism between 2005 to 2007 and 2011 is cast into start relief by the “Eichler 2” decision handed down on the 30th June 2011 by the Chief Bankruptcy Registrar. This also demonstrates the importance of a legitimus contradictor and how a creditor can prevent or overturn the bankruptcy order. Having defeated the 2007 application of the Official Receiver one of Mr. Eichler’s creditors from Germany ultimately challenged his bankruptcy and sought the annulment of the adjudication order. She also sought an order rescinding the bankruptcy order. This occurred in circumstances where the creditor was making applications in Germany in relation to various assets.  

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15 For the perspective of UK practitioners on the phenomenon of bankruptcy tourism over the past few years see “Cross Border insolvency Update” Stefan Ramel Guildhall Chambers January 2012 and “COMI Bankruptcy and Proving Jurisdiction” Marcia Shekerdemian and Registrar Baister February 2009
27. The Court analysed the situation and it was apparent that Mr. Eichler had administered his interests in both jurisdictions, paying taxes having residences and bank accounts in both Germany and the UK. The court ultimately rescinded the Bankruptcy Adjudication on the basis that Mr. Eichlers COMI had at all times been in Germany. At paragraph 190 and 191 of the judgments the Chief Bankruptcy Registrar stated

“this is one of a number of cases in which the courts have annulled bankruptcy orders made on petitions presented by German debtors where it has been established that the court had no jurisdiction to open the proceedings. The scope of the inquiries the court can make when faced with a debtor's bankruptcy petition and doubts about the truth of what a debtor says about where his centre of main interest is situated is limited, not least of all because there is an understandable reluctance to depart from the long established principle that evidence given on oath (or nowadays in a witness statement verified by a statement of truth) should not be disbelieved unless it is properly challenged or is inherently incredible.

In the light of persistent abuse of its jurisdiction, however, this court has now developed two practices when dealing with petitions where it has doubts about its jurisdiction. Before a bankruptcy order is made, a debtor may be required to file more detailed evidence than is required by RR 6.38 and 6.41 of the Insolvency Rules in order to establish that his centre of main interests really is in this country, exhibiting documentary evidence in support of his claim that it is situated here; and/or the court may adjourn the petition and require that notice of the hearing be given to the debtor’s creditors so that they can appear and make representations at that stage in opposition to the making of the order instead of having to apply after the order has been made. It is hoped that in future those steps (and perhaps others which may develop in the future) will ensure that bankruptcy orders founded on sham claims as
to jurisdiction are supported by a false statement of affairs are not made in the future”.  

28. In another case, the Official Receiver –v- Mitterfellner [2009] BPIR 1075 the debtor had incurred significant debts in Germany and self adjudicated as a Bankrupt in the UK. The Official Receiver challenged the Bankruptcy Order on the basis that Mr. Mitterfellner's COMI was in fact Germany. Evidence was shown to the Court that Mr. Mitterfellner travelled frequently to and from Germany and that all of his tickets were purchased in Germany. There was also significant concern that notification had been given to German authorities that he was in fact moving to Dublin and not the UK and the details surrounding his UK job offer were vague. The bankruptcy order was therefore overturned.

29. There remains the inherent frailty of an ex parte application but it does appear that the UK courts now view the relocation of insolvent individuals with an appropriate degree of caution having regard to Recital 4 of the Insolvency Regulation to discourage forum shopping.

30. Nonetheless, the fundamental position remains that an individual can still relocate solely for the purpose of seeking a more favourable insolvency regime. It is clear that EU citizens can forum shop provided the plan their expedition with care, spend enough time in the UK and are candid with the Court.

Edward Farrelly
25th June 2012

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16 Emphasis added.