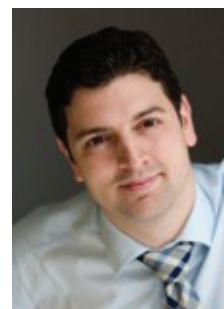


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Cross Border “Bankruptcy Tourism”



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The use of “forum shopping” has been a topic of great interest to practitioners in different jurisdictions for some time. The global problems with the financial markets has seen companies and individuals alike, seek to exploit the differences between insolvency regimes in different jurisdictions.

In recent months, corporate entities have sought to incorporate subsidiary companies and try to manipulate rules relating to their centre of main economic interest and operation, with a view to using the bankruptcy laws of England and Wales to deal with debts of the group, and individuals have sought to claim residence in the UK, again with a view to using potentially more favorable laws to deal with their debts.

This article concentrates on the recent position for individuals, in relation to cross-border forum shopping, which has seen a surge in German and Irish nationals choosing to go bankrupt in England and Wales rather than their own country. Insolvency laws in Germany mean that it takes between six and nine years to “escape” debts after being made bankrupt. Likewise a bankrupt in Ireland will normally remain an ‘undischarged bankrupt for 12 years. However in England and Wales bankruptcy laws are more lenient, and in most cases the period of bankruptcy will last for 12 months, with the possibility of a bankrupt being discharged earlier.

This practice is now known as ‘Bankruptcy Tourism’ and appears to have gained recent popularity and is doing much to help the economic situation in the UK. The Insolvency Service in England and Wales has confirmed that it had identified many cases of people from Europe filing for bankruptcy after appearing to have been resident in the UK for less than 12 months with all or most of the debts being owed to creditors outside the UK. Under the current English system, there is no minimum time limit for a non UK national to be resident and be ‘economically active’ in the UK before applying to the Court for a bankruptcy order.

A director of ‘*Insolvenz Agentur*’ based in Erith, a small town in Kent which is about 107 kms from the port of Dover, has been advising German and Austrian nationals on how best to take advantage of English bankruptcy laws. The director of *Insolvenz Agentur* said recently “they come from all over the European Union, and like the ... laws here as they are better than the ones in their country”.

The company has provided assistance to management consultants, doctors, accountants, dentists and lawyers, helping them to resettle in the UK by facilitating the opening of bank accounts; obtaining a national insurance number; finding

accommodation, and obtaining work placements or finding office accommodation. Possibly Napoleon was wrong when he said that 'England was a country of shopkeepers', it now appears to have found a niche in the rehabilitation of bankrupts.

There should be a word of caution to those who may have clients or contacts who they feel would be interested in making use of the existing difference between regimes. The Insolvency Service in England and Wales is now aware of this practice and is scrutinising applications from people who have been resident for less than 12 months. If there is evidence that the bankruptcy order ought not to have been made, they will report the matter back to the Court with a view to having the bankruptcy order rescinded.

A recent example is the case of [Vitas Anton Mitterfielde](#), a café proprietor who incurred substantial debts in Germany before moving to England (he claimed) to start a new life. He petitioned in the Hastings County Court (77 kms from Dover). It was found that he had supplied some false information concerning his residence.

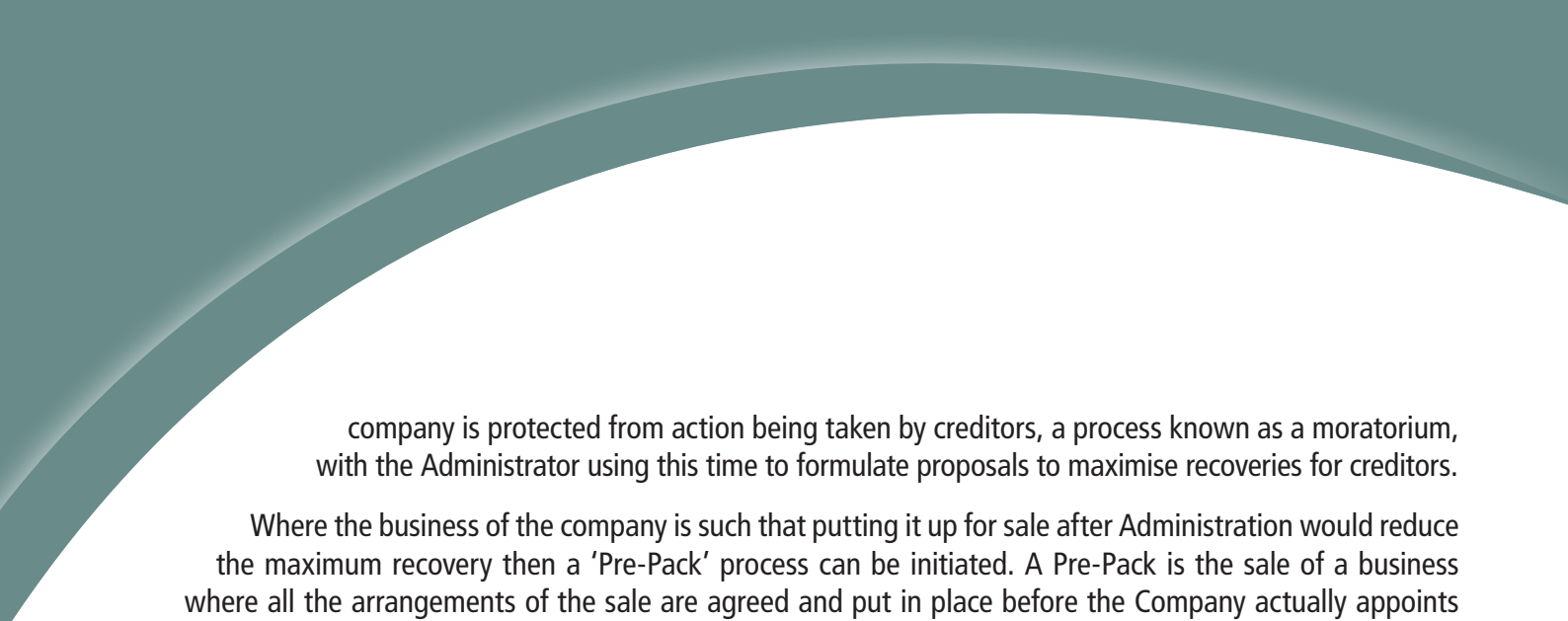
The Court concluded that although there were some factors that pointed towards the centre of main interest ("COMI") being within the jurisdiction of the Court, other factors indicated that it was fiction. For example, although he had a UK bank account it had never operated and he had flown over specifically for the purpose of opening it. He had also not given full information with respect to a forthcoming offer of employment. The Court annulled the bankruptcy order.

It should also be highlighted that, not only can the Insolvency Service of England and Wales appeal against a bankruptcy order, but so can a creditor. Whilst the stark differences exist between jurisdictions, the use of forum shopping is something that we can probably expect to continue, and we will probably see an increase in the number of challenges from disgruntled creditors to such bankruptcy applications.

Company Reconstruction by a 'Pre-Pack Procedure' in England and Wales

As part of the ongoing growth of interest in the ABL/Integra Insolvency and Restructuring Unit, it has been agreed that there should be a balance between those situations which deal with the ultimate failure of a business, and the placing of that entity into an insolvency procedure, and those situations where some sort of rescue or recovery is possible. There is constant press speculation about potential changes to the insolvency and rescue regimes, and one of the most controversial types of process in England and Wales has been the huge surge in the use of "pre-packaged" acquisitions of businesses.

Where a company is in difficulty, and there exists some hope of recovery, then the use of an 'Administration Procedure' may be an appropriate method of salvaging the business. Administration is a protective steps used when seeking to aid the rescue or turnaround of a company and involves the appointment of an Insolvency Practitioner as the Administrator of the Company. This appointment usually takes place by either the company (through its directors) or a secured creditor filing paperwork to deal with the appointment. Once an Administrator is appointed, the



company is protected from action being taken by creditors, a process known as a moratorium, with the Administrator using this time to formulate proposals to maximise recoveries for creditors.

Where the business of the company is such that putting it up for sale after Administration would reduce the maximum recovery then a 'Pre-Pack' process can be initiated. A Pre-Pack is the sale of a business where all the arrangements of the sale are agreed and put in place before the Company actually appoints Administrators and goes into Administration.

The assets required by that purchaser will be agreed and a price for the business settled, invariably by reference to an independent valuation. The Company then goes into Administration and the business is sold to the new proprietors soon after the Administrator's appointment.

This method allows the Administrator to effect a quick sale and is aimed at providing the best deal to creditors. It enables the buyer to start trading without the burden of the past debts of the company, and has, as a result, caused significant concern in the press in the UK, leading to a new statement of practice to be issued in 2009, setting out a series of requirements to be complied with in any pre-packaged sale of a business by the Administrators.

One of the main issues surrounding these types of transaction is the question over what happens regarding the transfer of employees to the new company. Laws within different territorial jurisdictions may make it compulsory for the new company to continue the employment of employees of the old company. In the UK, this regime is governed by the Transfer of Undertakings (Protection of Employment) Regulations ("TUPE") and there has been recent case law on the effect of these regulations on "Pre Pack" transactions, in a case called [Oakland v Wellswood](#), which has caused much excitement amongst insolvency practitioners and employment lawyers alike.

The decision in that case, handed down in October 2009, has made it difficult for businesses to be acquired without the staff already employed within the business continuing to be employed in the new business, with the new employer. Additionally, any employees transferred to the new owner, will retain their continued period of service.

Despite the new rules governing "pre pack" transactions, there still seem to be a large number of transactions ongoing, and whilst in the majority of cases the pre-existing owners or management have taken advantage of the regime, the rules are proving popular with creditors and suppliers who are keen to take advantage of the circumstances of a company and acquire the business for a good price, and is worth bearing in mind as an option for clients looking at opportunities arising from the global financial pressures.