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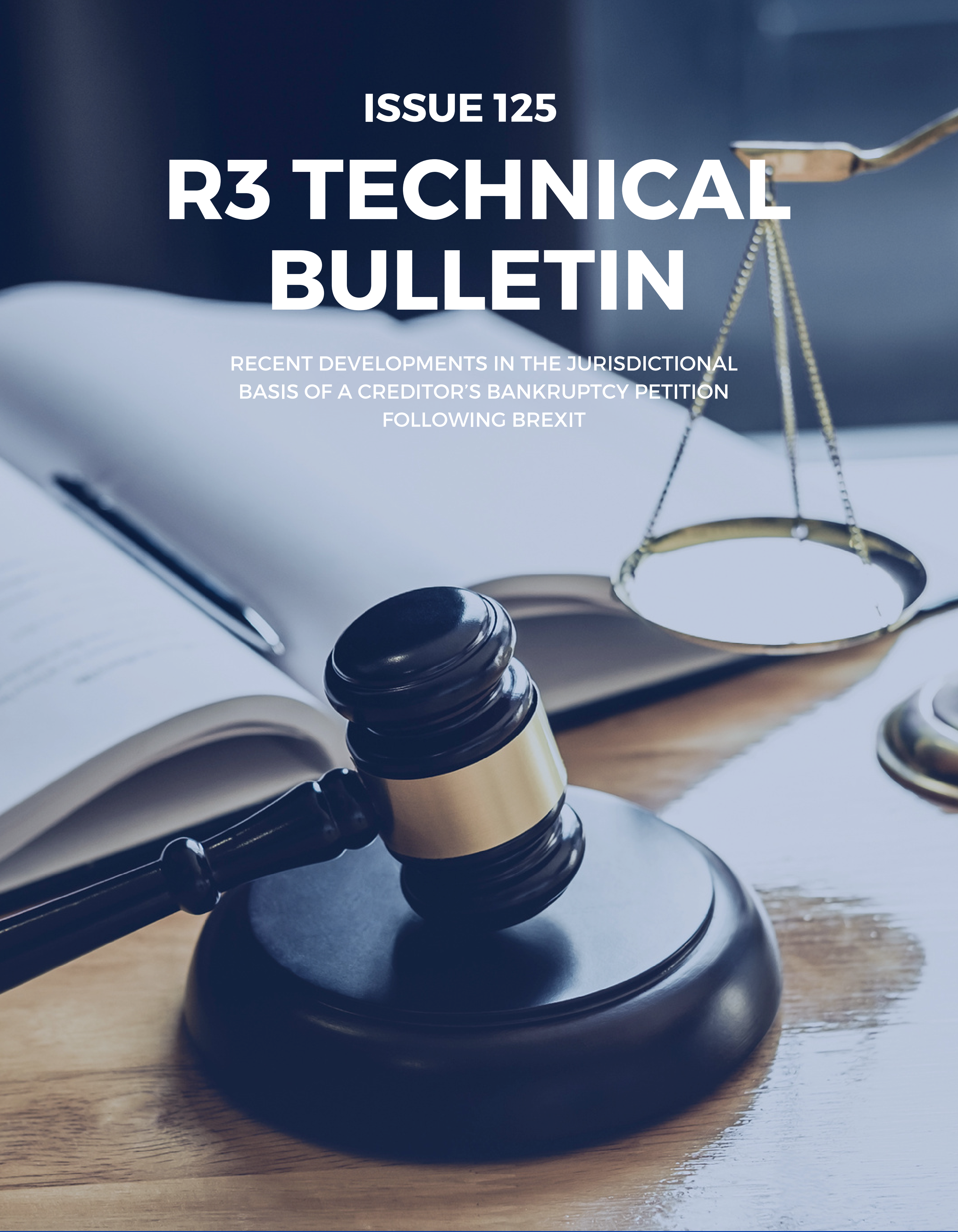
RECENT DEVELOPMENTS IN THE JURISDICTIONAL BASIS OF A CREDITOR'S BANKRUPTCY PETITION FOLLOWING BREXIT



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RECENT DEVELOPMENTS IN THE PRESENTATION OF BANKRUPTCY PETITIONS FOLLOWING BREXIT

This issue has been kindly written by Louis Doyle QC, Kings Chambers, a commercial silk with particular expertise and a reputation and extensive experience in insolvency and insolvency-related work. He is co-author of Doyle, Keay & Curl: Annotated Insolvency Legislation (LexisNexis, 10th edn, 2021).

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The R3 Technical Team would like to thank Louis Doyle QC, for this analysis on the Brexit-related changes to s.265 of the Insolvency Act 1986 and the consideration given to the relevant terms and concepts in the recent authorities.

R3 OVERVIEW

The opening section notes that recent years have provided fertile ground for developments in the law around bankruptcy petitions. For example, in Barker v Baxendale-Walker [2018] EWHC 1681, [2018] BPIR 1243, it was found that permission to appeal against a judgement debt sought but not obtained is not a ground for opposing bankruptcy petition.

Changes to s.265 Insolvency Act 1986 (IA86)

This section focuses on the changes to this section of the IA86, in particular –

- A bankruptcy order may now be made irrespective of COMI (Centre of Main Interests) subject to Domicile or Residence tests being met;
- How UK law now implements EU insolvency law;
- A review of recent authorities on Residence test;
- This is a two pronged test; EITHER a person has to have been resident/had a place of residence in the jurisdiction OR carried on business in the jurisdiction;
- Residence must have a degree of permanence; person must intend to and actually reside in the jurisdiction for a substantial period of time;
- Having a place of residence is a de facto situation rather than matter of legal right; and
- Carrying on of business is a matter of fact and even a single transaction may suffice.
- Review of authorities on Domicile test;
- Review of authorities on ascertainment of COMI;
- Centre of main interests must be in the jurisdiction and have an element of permanence;
- It is of fundamental importance that the centre of main interests is ascertainable by third parties; and
- Ascertainability stems from matters in the public domain and what a typical third party would learn as a result of doing business with the [person] rather than such as might be ascertained on enquiry.

The court's common law jurisdiction to recognise foreign bankruptcy proceedings

This section acts as a reminder that that the English courts have a longstanding common law jurisdiction to recognise foreign insolvency proceedings. However, there is no common law power to grant assistance to a foreign trustee in bankruptcy in relation to immovable property.

Recent Developments in the Jurisdictional Basis of a Creditors Bankruptcy Petition following Brexit

Introduction

1. Recent years have provided fertile ground for developments in the law around bankruptcy petitions. For example, in ***Barker v Baxendale-Walker*** **[2018] EWHC 1681, [2018] BPIR 1243**, Chief ICC Judge Briggs addressed the not uncommon scenario in which a respondent to a bankruptcy petition based on a judgment debt seeks to argue that an outstanding application to appeal the judgment constitutes a ground of opposition to the petition justifying its dismissal (or, as can arise in practice, the (often lengthy) adjournment of the petition pending resolution of the appeal). Judge Briggs gave that argument short shrift. After examining the source of the Court's powers on the hearing of a bankruptcy petition in IR r.10.24 of the Insolvency Rules 2016 ("**IR 2016**"), the Judge drew attention to the wording in IR r.10.23(2):

> *"(2) If the petition is brought in relation to a judgment debt, or a sum ordered by any court to be paid, the court may stay or dismiss the petition <u>on the ground that an appeal is pending</u> from the judgment or order, or that execution of the judgment has been stayed." (underlined emphasis)*

2. The proposition for which ***Barker*** is authority is that, for the purposes of IR r.10.23(2), an appeal is not "*pending*" in relation to a judgment or order if permission to appeal a judgment debt has been sought, but not obtained. That conclusion may give rise to potentially harsh consequences – as alternatives, of course, to the debtor paying up on the judgment but staying in the game with the creditor by appealing it – but it also protects against the abuse inherent in a bankruptcy petition being scuppered by what, on closer examination, might in substance be a hopeless permission to appeal application employed simply as a time-buying device (and, in these times, a potentially significant period of time) to frustrate the enforcing judgment creditor.

The amendment of section 265 of the 1986 Act ("the 1986 Act")

3. Since 1 January 2021, following the end of the Brexit transition period one hour previously at 11pm on 31 December 2020, s.265 of the 1986 Act has provided:

"265. Creditor's petition: debtors against whom the court may make a bankruptcy order.

(1) A bankruptcy petition may be presented to the Court under Section 264(1)(a) only if -
(a) the centre of the debtor's main interests is in England and Wales, or
(ab) the centre of the debtor's main interests is in a member state (other than Denmark) and the debtor has an establishment in England and Wales, or
(b) the test in subsection (2) is met.

(2) The test is that –
(a) the debtor is domiciled in England and Wales, or
(b) at any time in the period of three years ending with the day on which the petition is presented, the debtor –

(i) has been ordinarily resident, or has had a place of residence, in England and Wales, or
(ii) has carried on business in England and Wales.

(3) The reference in subsection (2) to the debtor carrying on business includes –
(a) the carrying on of business by a firm or partnership of which the debtor is a member, and
(b) the carrying on of business by an agent or manager for the debtor or for such a firm or partnership.
(4) In this section, references to the centre of the debtor's main interests have the same meaning as in Article 3 of the EU regulation.
(5) In this section, 'establishment' has the same meaning as in Article 2(10) of the EU regulation."

4. With effect from 31 December 2020, by virtue of the Insolvency (Amendment) (EU Exit) Regulations (SI 2019/146), Reg 1(3), Sch para 33(2)(b) (with regs 4,5): 2020 c.1, Sch 5, para 1(1), the words *"the centre of the debtor's main interests is not in a member state of the European Union which has adopted the EU regulation, but"* were omitted from the opening to s.265(1)(b), leaving only the words now referring to the s.265(2) test remaining. That provision contains two distinct tests: that in s.265(2)(a) *("Domicile test"), or that in s.265(2)(b)* ("Residence test") in s.265(2)(b) which is capable of being fulfilled on either or both grounds in its sub-sections (i) and (ii).

5.This new form of s.265 of the 1986 Act delineates the classes of debtor against which a Court in England and Wales may make a bankruptcy order and differs very much in substance from its previous form. The provision was amended, first, with effect from 6 April 2016 (by the Enterprise and Regulatory Reform Act 2013), and, by operation of the European Union (Withdrawal Agreement) Act 2020, with effect from 1 January 2021. The amendments are substantive; for example, the former requirement for the debtor to be "*personally present*" in the jurisdiction has gone.

Some dry black letter provisions: how UK law now implements EU insolvency law

6. The EU Regulation on Insolvency Proceedings 2015 (SI 2015/848) ("the EU Regulation"), dated 20 May 2015, came into force in the UK as part of European Community Law whilst the UK was a member of the European Union ("the EU"). (The EU Regulation recast the earlier Regulation in materially the same terms and is often termed the Recast Regulation). Following the UK's departure from the EU ("Brexit"), what can be overlooked (or misunderstood) is that some parts of European law, with some adaptations in most cases, remain in force, enshrined in the relevant domestic laws of the constituent parts of the UK, notwithstanding Brexit.

7. In essence, the technique for the invocation of EU law into domestic law is as follows. On 26 June 2018, the European (Withdrawal) Act 2018 ("the 2018 Act") passed into UK law. The 2018 Act, as originally enacted, repealed the European Communities Act 1972, converted EU law as it stood at that moment of exit into domestic law, and preserved laws made in the UK to implement EU obligations. The 2018 Act also created temporary powers to make secondary legislation to enable corrections to be made to such laws that would otherwise no longer operate appropriately once the UK had left the EU. The purpose of these changes was to ensure that the UK domestic legal system continues to function appropriately outside the EU.

8. The European Union (Withdrawal) Agreement Act 2020 (**"the 2020 Act"**) amended the 2018 Act and retained relevant EU law as part of UK law in the period after exit from the EU to the end of the transition period at 11pm on 31 December 2020. After that date the 2018 Act and the 2020 Act enable such EU law to be converted into the relevant domestic law of the UK, as EU retained law, with adaptations, from that date.

9. Two relevant sets of UK regulations have been made to deal with EU insolvency law. The first is the Insolvency (Amendment) (EU Exit) Regulations 2019 (SI 2019/146) ("**the 2019 Regulations**"). The 2019 Regulations were amended by the Insolvency (Amendment) (EU Exit) Regulations 2020 (SI 2020/647) ("**the 2020 Regulations**"). Collectively, those provisions amend the EU Regulation (insofar as it has been "retained" in UK law). They also amend the 1986 Act and IR 2016. The amendments effected by the 2019 Regulations and the 2020 Regulations only apply where main proceedings were "opened" after 11pm on 31 December 2020. The previous legislative background and the EU Regulation continues to apply to proceedings opened before that date.

10. Prior to 31 December 2020, the EU Regulation would apply where a bankruptcy order was made in relation to an individual debtor whose centre of main interests was in the UK: see Articles 1 to 3 of the EU Regulation. The position altered where bankruptcy proceedings (as insolvency proceedings) are opened on or after 1 January 2021. As a matter of general relevance, a matter directed at the practice commonly known as forum shopping. Paragraph (32) of the Recital to the EU Regulation indicates that, where there are doubts about the Court's jurisdiction, "*the court should require the debtor to submit additional evidence to support its assertions*". England and Wales has for some time been an especially attractive forum for some debtors since, with effect from 1 April 2004, the 3-year ordinary discharge period in s.279(1) of the 1986 Act, and the consequences of discharge contained in s.281, was reduced to 12 months, albeit extendable specifically or generally under s.279(3).

11.The 2015 EU Regulation is amended so that Article 1 now reads as follows (underlined emphasis relevant to bankruptcy):

"*1. <u>The grounds for jurisdiction to open insolvency proceedings set out in Paragraph 1B are in addition to any grounds for jurisdiction to open such proceedings which apply in the laws of any part of the United Kingdom.</u>*

1A. *<u>There is jurisdiction to open insolvency proceedings listed in Paragraph 1B where the proceedings are opened for the purposes of rescue, adjustment of debt, reorganisation or liquidation and—</u>*

(a) the centre of the debtor's main interests is in the United Kingdom; or

(b) the centre of the debtor's main interests is in a Member State and there is an establishment in the United Kingdom.

1B. <u>The proceedings referred to in Paragraph 1 are —</u>

(a) winding up by or subject to the supervision of the court;

(b) creditors' voluntary winding up with confirmation by the court;

(c) administration, including appointments made by filing prescribed documents with the court;

(d) voluntary arrangements under insolvency legislation; and

(e) bankruptcy or sequestration."

12. It follows that in the case of an individual potentially susceptible to a bankruptcy order, jurisdiction to open insolvency proceedings applies irrespective of whether the debtor's centre of main interest is in the UK; that is, the EU Regulation itself, as adapted into UK law, will no longer ground the relevant jurisdiction to open the proceedings. This change in position explains why the amended s.265(1)(b) of the 1986 Act now allows for a bankruptcy order irrespective of COMI, but subject to the Domicile test or the alternative two-pronged Residence test being met. However, if the centre of the debtor's COMI is also within the UK then the (adapted) EU Regulation will provide a further alternative basis of jurisdiction, as now contained in s.265(1)(a); if a debtor's COMI lies in another member state (other than Denmark) then the further alternative to the Domicile or Residence tests is as contained in s.265(1)(ab).

13. For completeness, the IR 2016 were also amended by the 2019 Regulations. Those include changed references to COMI proceedings and what can be termed Establishment proceedings which flow from amendments made to IR 2016 r.1.2(2) (effected by Para 46 of the 2019 Regulations) which, as amended by the 2019 Regulations, provide, in mirroring the content of the new s.265 of the 1986 Act (above):

> *"'centre of main interests' has the same meaning as in the EU Regulation';* [set out in the next paragraph below]
>
> *'COMI proceedings' means insolvency proceedings in England and Wales to which the EU Regulation applies where the centre of the debtor's main interests is in the United Kingdom;*
>
> *'establishment' has the same meaning as in Article 2(10) of the EU Regulation;* [set out in the next paragraph below]
>
> *'establishment proceedings' means insolvency proceedings in England and Wales to which the EU Regulation applies where the debtor has an establishment in the United Kingdom;".*

14..The EU Regulation defines "centre of main interests" and provides:

> *"The courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings ('main insolvency proceedings'). The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.*
>
> *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. The presumption shall only apply if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings."*

15. Article 2(10) of the EU Regulation provides:

> *"(10) 'establishment' means any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open insolvency proceedings a non-transitory economic activity with human means and assets."*

16. This latest form of Article 2(10) expands upon and refines the meaning of its predecessor. The place of operations is defined, not just as any place of operations (present tense) but including any place where a debtor has carried out a non-transitory economic activity in the 3-month period prior to the request to open the proceedings (ie prior to the Petition: ***Re Office Metro Ltd [2012] EWHC 1191 (Ch), [2012] BPIR 1049)***. The now superfluous reference to "main insolvency proceedings" is now a request to open "*insolvency proceedings*", and the term "*assets*" (which would catch land or other fixed assets) has been substituted for the narrower term "*goods*".

The jurisdictional questions raised by the new form of s.265 of the 1986 Act

17. If either the Domicile test or either limb of the Residence test is met, the Court need go no further because the jurisdiction to make a bankruptcy order is engaged, subject to the exercise of the Court's discretion. In practice, the Domicile and Residence tests will commonly pose a more attractive alternative to a petitioning creditor in comparison with the COMI limbs in s.265(1)(a) and (ab). Domicile and residence are very different concepts; the latter will often be the easier to establish as a fact for the purposes of the Residence test. These alternative grounds are now considered in that order.

Section 265(2)(b)(i): "ordinarily resident, or has had a place of residence, in England and Wales" in the last three years

18. Chief Registrar Baister (as he was) considered the "*ordinarily resident*" (and the former "having a place of residence") requirement in ***Reynolds Porter Chamberlain v Khan*** [2016] BPIR 722. (It is submitted that the former "*having a place of residence*" is almost certainly indistinguishable in substance from the present "*has had a place of residence*". After reviewing the authorities, the following appears by way of a succinct distillation of the relevant principles at [25] and [26], but it will be seen from the opening words to the former paragraph that the summary need not be read as exhaustive:

> *"25. The following seem to be relevant to "ordinarily resident" (or its predecessor "ordinarily resided"):*
>
> *(1) The expression is not to be treated as a term of art in a legal sense (Skjevesland paragraph 13).*
>
> *(2) Ordinary residence is a question of fact and degree (Norris page 113, Bright 204,Skjevesland paragraph 20).*
>
> (3) *Such residence must have a degree of permanence; the person concerned must intend to and actually reside for a substantial period of time; casual visits will not suffice (Skjevesland paragraph 32). (I pause at this point respectfully to question the relevance of intention, but the learned judge does mention it). It must be of some duration: two or three days do not suffice (Bright). A period of 92 days in a year was held to be sufficient in Skjevesland (see paragraphs 18 and 19; cf. Stojevic paragraph 45).*

(4) "[G]eneral staying at an hotel" is probably not sufficient to amount to residence for the statutory purpose, although the court did not express a definite opinion on the point; but where a person has "exclusive use of lodgings and pays for them he does reside" (Norris, 114). Constant movement from, say, one boarding house to another would not suffice (Brauch).

(5) A person may have more than one usual residence (Skjevesland paragraphs 33 and 34) and may even be ordinarily resident in more than one country (Skjevesland paragraph 38).

(6) It is not necessary to be able to specify the places at which the debtor is said to have ordinarily resided, although inability to do so may be a circumstance which tells against ordinary residence (Brauch page 333).

(7) Ordinary residence does not necessarily require the person residing to be the landlord or tenant under any lease or tenancy agreement (Skjevesland paragraphs 10 and 13).

(8) Ordinarily residing may include residing with family members (Skjevesland paragraph 12). It is fair to note also, however, the use of the word "exclusive" in some of the authorities, a point on which Mr Birtchnell relies.

(9) Care is needed as to the weight to be attached to documentary evidence such as parking permits and letterheads, but documentary evidence does have a role to play especially if it gives an address for official purposes, e.g. for a firearms certificate or as an address for service (Skjevesland paragraphs 40 ff.).

(10) Having access to a key kept at premises is "not without significance" (Skjevesland paragraph 45).

(11) The purpose of a visit or visits to the jurisdiction may be relevant (Bright).

(12) It is important to distinguish between using a residence as such and using it to carry on corporate activity (Stojevic paragraph 53 ff)

(13) Being capable of being telephoned at premises may be a factor (Brauch).

(14) The cumulative effect of the evidence, which I take to mean both the oral and documentary evidence, is important (Skjevesland paragraph 47).

26. As to having a place of residence:

(1) Having a place of residence is a de facto situation rather than a matter of legal right (Skjevesland paragraph 50 and the passage from Brauch there cited). So a licensee may have place of residence (Brauch 334).

(2) A moral claim to premises may be sufficient (Skjevesland paragraph 52).

(3) The person concerned may well have to phone to make arrangements to occupy because others use the premises as well as him but this is no obstacle to a finding of having a place of residence (Skjevesland paragraph 53).

(4) It is possible to have a dwelling house without being in occupation in the relevant period (Brauch, 335) but the greater the occupation the more likely the finding; but not perhaps if the relevant property has been abandoned (Nordenfelt and Brauch, 335)

(5) Living in a place with one's family as a tenant in rooms makes those rooms a dwelling house (Hecquard 74)."

19. The question of intention raised by the Chief Registrar in para 25(4) is interesting. The reference to Skjevesland is to the decision of Lightman J, who had dismissed the debtor's appeal from Registrar Jaques and whose decision in making a bankruptcy order on grounds of residence was upheld by the Court of Appeal: [2002] EWCA Civ 1567, [2003] 1 WLR 912. True it is that the Judge made reference to the intention of the debtor to reside in any particular location, but without any real elaboration. This passing reference to intention can be read two ways. What is not called for, it is suggested, is some form of forensic inquiry as to the debtor's state of mind at the relevant time for the purpose of demonstrating (or not) a requisite mental element as a pre-condition to establishing residence. The alternative, which sits well with the other authorities and the concept of residence as an issue of fact, is in the petitioner demonstrating that, on the facts, the debtor can be taken – although the debtor may well dispute this – as having been resident at a particular location or locations other than transiently. Usually this will involve looking at the wider background for context and the Court forming a view as to whether the debtor can be said to have been residing at any particular location or locations with any degree of permanence – which the Court is well able to infer – or whether something else is afoot in terms of why the debtor comes to be located as he or she is. A more recent decision gives a good illustration.

20. In ***Lakatamia Shipping Company Ltd v Su*** [2021] EWHC 1866 (Ch) Bacon J, reversing the decision of the Deputy ICC below, who upheld the debtor's application for his own bankruptcy on the basis of the debtor having been resident within the jurisdiction, analysed the term "*has had a place of residence*" in s.265(2)(b)(i). Her Ladyship gave effect to the appeal of the appellant judgment creditor who stood to lose significantly on the bankruptcy of the debtor, a Taiwanese/Japanese national who, in obtaining his own bankruptcy in England, had claimed a place of residence based on his enforced stay in the jurisdiction by reason of a combination of events: the confiscation of his passports (by order of the Commercial Court in which the creditor's significant judgments had been entered), a stint in HMP Pentonville for contempt, a failed attempt upon release at fleeing the jurisdiction by ferry to Southern Ireland and a series of short stays at hotels and a flat in Maida Vale which belonged to a former cellmate. The facts of the case are very unusual, but the review of the authorities identifies, in demonstrating residence, the requirement for a degree of substantiality, permanence and an expectation of continuity connecting debtor with jurisdiction. On the facts of the case, in allowing the creditor's appeal, the residence requirement could not be met by the debtor with the consequence that the bankruptcy order was set aside. There is, it is submitted, consistency between this approach and that of Lightman J in Skjevesland, as explained above.

Section 265(2)(b)(ii): "has carried on business in England and Wales" in the last three years

21. The carrying on of business is an issue of fact, and even a single transaction to which the debtor is party is capable of constituting carrying on business for s.265 purposes: *Gate Gourmet Luxembourg IV Sarl v Morby* [2015] EWHC 1203 (Ch), [2015] BPIR 787 at [25] (Registrar Briggs, as he was), a case involving the giving of a guarantee containing a provision confirmatory of residence of the debtor. Again, the requirement here is one of fact; reading in a requirement for intention (which is not mentioned in the provision) is not called for.

Section 265(2)(a):"The debtor is domiciled in England and Wales"

22. As above, domicile, as a fact, is something very different from residence. The leading authorities on domicile remain the Court of Appeal's decisions in Re Bird [1962] 1 WLR 686 and *Re Brauch* (a debtor) [1978] Ch 316, and the more recent survey of the authorities by Arden LJ (as she was) in *Barlow Clowes International Ltd v Henwood* [2008] EWCA Civ 577, [2008] BPIR 778 (Waller and Moore-Bick LJJ agreeing).

23. At [8] in ***Henwood***, Arden LJ identified the following principles, by reference to the current edition of ***Dicey, Morris & Collins on the Conflict of Law***s, (presently in its 15th iteration, but unchanged in substance on this point) as not being in issue:

"(i) A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home. A person may sometimes be domiciled in a country although he does not have his permanent home in it (Dicey, pages 122 to126).
(ii) No person can be without a domicile (Dicey, page 126).
(iii) No person can at the same time for the same purpose have more than one domicile (Dicey, pages 126 to128).
(iv) An existing domicile is presumed to continue until it is proved that a new domicile has been acquired (Dicey, pages 128 to 129).
(v) Every person receives at birth a domicile of origin (Dicey, pages 130 to 133).
(vi) Every independent person can acquire a domicile of choice by the combination of residence and an intention of permanent or indefinite residence, but not otherwise (Dicey, pages 133 to138).
(vii) Any circumstance that is evidence of a person's residence, or of his intention to reside permanently or indefinitely in a country, must be considered in determining whether he has acquired a domicile of choice (Dicey, pages 138 to143).
(viii) In determining whether a person intends to reside permanently or indefinitely, the court may have regard to the motive for which residence was taken up, the fact that residence was not freely chosen, and the fact that residence was precarious (Dicey, pages 144 to151).

(ix) A person abandons a domicile of choice in a country by ceasing to reside there and by ceasing to intend to reside there permanently, or indefinitely, and not otherwise (Dicey, pages 151 to153).

(x) When a domicile of choice is abandoned, a new domicile of choice may be acquired, but, if it is not acquired, the domicile of origin revives (Dicey, pages 151 to 153)."

Section 265(1)(a) and (ab): the authorities on the ascertainment of the Debtor's COMI

24. Sub-section 265(1)(a) of the 1986 Act, like sub-section 265(1)(ab), is only concerned with "*the centre of the debtor's main interests*". In contrast to s.265(1)(b), these COMI-related provisions make no reference to the debtor's nationality, residence or the state of his or her domicile or citizenship; confusing those concepts with COMI is unhelpful although, in substance, there may be some overlap.

25.The recent judgment of Miles J in ***Melars Group Ltd (in liquidation) v. East-West Logistics LLP** [2021]* **EWHC 1523 (Ch)** provides a thorough review of the authorities on the determination of COMI and itself provides very useful guidance. (Miles J overturned on appeal the order of (by now) Deputy ICC Judge Baister who had concluded that the debtor company's COMI was in England and Wales, rather than Malta, where the company's registered office was located; the fact that Melars was a company case does not prevent its wider application to bankruptcy). Under the heading "The Legal Framework" the judgment in ***Melars***, at [5] to [14], reviews the relevant authorities. In particular:

26.1. Article 3(1) of the EU Regulation (ie of the Recast Regulation, as set out above) is the starting point. It is materially the same as its predecessor such that authorities on that predecessor are applicable equally to the interpretation and application of Article 3(1).

26.2.Recitals (27) to (33) to the EU Regulation are relevant generally. So far as relevant to bankruptcy, Recitals (29) to (32) provide:

"(29) This Regulation should contain a number of safeguards aimed at preventing fraudulent or abusive forum shopping.

(30) Accordingly, the presumptions that the … habitual residence are the centre of main interests should be rebuttable and the relevant court of a Member State should carefully assess whether the centre of the debtor's main interests is genuinely located in that Member State … In the case of an individual not exercising an independent business or professional activity, it should be possible to rebut this presumption, for example, where the major part of the debtor's assets is locate outside the Member State of the debtor's habitual residence, or where it can be established that the principal reason for moving was to file for insolvency proceedings in the new jurisdiction and where such filing would materially impair the interests of creditors whose dealings with the debtor took place prior to the relocation.

(31) With the same objective of preventing fraudulent or abusive forum shopping, the presumption that the centre of main interests is at the place of the registered office, at the individual's place of business or at the individual's habitual residence should not apply where, respectively, in the case of a company, legal person or individual exercising an independent business or professional activity, the debtor has relocated its registered office or principal place of business to another Member State within the 3-month period prior to the request for opening insolvency proceedings, or, in the case of an individual not exercising an independent business or professional activity, the debtor has relocated his habitual residence to another Member State within the 6-month period prior to the request for opening insolvency proceedings.

(32) In all cases, where the circumstances of the matter give rise to doubts about the court's jurisdiction, the court should require the debtor to submit additional evidence to supports its assertions and, where the law applicable to the insolvency proceedings so allows, give the debtor's creditors the opportunity to present their views on the question of jurisdiction."

26.3. In *Shierson v. Vlieland-Boddy* [2005] EWCA Civ 974, [2005] 1 WLR 3966at [55] Chadwick LJ summarised his own conclusions as to the construction of Article 3.1 in light of the Community purpose which the Regulation was intended to promote. Notably:

"(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.

...

(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 a 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 as a change based on substance and not an illusion; and that that change has the necessary element of permanence."

26.4. The warning Chadwick LJ went on to give in ***Shierson** at* [55(5)] as to any alleged change of COMI being "*based on substance and not an illusion*" is prescient in the face of any suspected attempt at forum shopping.

26.5. In ***Re Eurofood IFCS Ltd*** (Case C-341/04), [2006] Ch 508 the European Court of Justice at [33] emphasised the fundamental importance of perception by third parties in the determination of COMI:

> *"[33] That definition [in Article 3(1) of the EU Regulation] shows that the centre of main interest must be identified by reference to criteria that are both objective and ascertainable by third parties. That objectivity and that possibility of ascertainment by third-parties are necessary in order to ensure legal certainty and foreseeability concerning the determination of the court with jurisdiction to open main insolvency proceedings."*

26.6. In ***In Re Stanford International Bank*** [2009] EWHC 1441 (Ch), [2009] BPIR 1157 Lewison J (as he was) decided that the ascertainability by third parties of COMI is central to the concept and that his earlier decision in ***Re Lennox Holdings plc*** [2009] BCC 155 (in which the Judge did not have the benefit of adversarial argument), to contrary effect, was wrong.

26.7. In the Court of Appeal in ***Re Stanford International Bank*** [2010] EWCA Civ 137, [2011] Ch 33 at [56], Sir Andrew Morritt C agreed with Lewison J that the approach he had taken in ***Lennox*** was wrong in holding that the ascertainability by third parties of the centre of main interests is not central to the concept. Notably, at [56] the Chancellor said this:

> *"(3) Thus it is conclusively established that the factors relevant to a rebuttal of the presumption must be both objective and ascertainable by third parties. Lewison J confined factors ascertainable by third parties to matters already in the public domain and what a typical third party would learn as a result of dealing with the company and excluded those which might be ascertained on enquiry. A good sense of this conclusion is demonstrated by the cases in English domestic law relating to constructive notice and its various degrees, see, for example, Barden v. Société Générale SA [1993] 1 WLR 509 at [250]-[274].To extend ascertainability to factors, not already in the public domain or apparent to a typical third party doing business with the company, which might be discovered on enquiry would introduce into this area of the law a most undesirable element of uncertainty."*

26.8. In ***Interedil Srl v. Fallimento and Interedil Srl*** **(Case C-396/09) (20 October 2011), [2011] BPIR 1639** the ECJ commented again on the presumption of a company's COMI as its place of registration, and the factors capable of rebutting it. As relevant for present purposes:

> *""52. The factors to be taken into account include, in particular, all the places in which the debtor company pursues economic activities and all those in which it holds assets, insofar as those places are ascertainable by third parties. As the Advocate General observed at [70] of her opinion, those factors must be assessed in a comprehensive manner, account being taken of the individual circumstances of each particular case.*
>
> *53. In that context, the location, in a Member State other than that in which the registered office is situated, of immovable property owned by the debtor, in respect of which the company has concluded lease agreements, and the existence in that Member State of a contract concluded with a financial institution - circumstances referred to by the referring court -may be regarded as objective factors and, in the light of the fact that they are likely to be matters in the public domain, as factors that are ascertainable by third parties. The fact nevertheless remains that the presence of company assets and the existence of contracts for the financial exploitation of those assets in a Member State other than that in which the registered office is situated cannot be regarded as sufficient factors to rebut the presumption laid down by the EU legislature unless a comprehensive assessment of all the relevant factors makes it possible to establish, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State."*

26.9. In ***O'Donnell v. Bank of Ireland*** **[2012] EWHC 3749 (Ch), [2013] BPIR 509** Newey J (as he was) emphasised that, in assessing the location of decision-making, a company's administrative connections take precedence over its operational connections.

27. It is worth drawing attention to the approach of Miles J to ascertainability in Melars in light of the authorities cited above, that being the central ground on which the decision of the Deputy ICC Judge below was reversed. At [68]-[69] the Judge made the following observations as to this key concept:

"68. The second related flaw in the judge's reasoning is his approach to the importance of ascertainable. A leitmotif of the European jurisprudence is that only those features of a debtor's administration of its interests which are readily identifiable by third parties will be relevant for determination of its centre of main interests. That, again, is because of a need for legal certainty and foreseeability .Unfortunately, the judge was not referred to the Stanford case, which emphasised this point (and held that Re Lennox was wrong to suggest otherwise). When the judge ascertained the various connecting factors, such as the governing law or the contracts for the company's banking arrangements, he did not go on to examine the further question whether such aspects of the company's business were ascertainable, in the sense of being available to typical third parties of the company, without further enquiry.

69. To my mind, the judge's error is well illustrated by his comment in paragraph 55, that the petitioner had ascertained the company's centre of main interests in the face of a cloud of obscurity. He said that it had been discovered by a reasonably diligent creditor (the petitioner).The judge was referring there to the petitioner reaching that conclusion in the light of all of the evidence that was before the court, including evidence, for example, about the banking contracts and the various contracts that had been disclosed in the course of the proceedings. There is no reason to suppose that those matters would have been ascertainable to typical creditors of the company, and the judge did not address that question separately."

125.1

The court’s common law jurisdiction to recognise foreign bankruptcy proceedings

28. Finally, as a footnote, it is worth bearing in mind that the English courts have a longstanding common law jurisdiction to recognise foreign insolvency proceedings.

29. This is an exceptional jurisdiction which does not derive from the foreign bankruptcy or English statute. It is undeveloped and limited, notably as regards immovable property, most obviously land but also anything affixed to land and not easily moved or dismantled. The decision of Snowden J, as he was, in *Re Bedzhamov, Vneshprombank LLC v Bedzhamov* [2021] EWHC 2281 (Ch) provides a recent and illustrative example. The judgment of the Court of Appeal, handed down on 21 January 2022 ([2022] EWCA Civ 35), confirmed that, notwithstanding there being no power at common law to grant assistance to a foreign trustee-in-bankruptcy in relation to immovable property situated in the United Kingdom – the case concerned two properties referred to as the Belgrave Square Property valued at circa £35m - such that the Court was unable to make a vesting order in favour of a Russian bankrupt’s trustee; neither did the Court have jurisdiction either to order the property to be transferred to the trustee or otherwise confer possession and control of the real property on the trustee. This is notwithstanding what the Court of Appeal accepted was the English Court’s standing to recognise foreign insolvency proceedings under the common law principle of modified universalism, as identified by Lord Sumption in *Singularis Holdings Ltd v PricewaterhouseCoopers* [2014] UKPC 36, [2015] AC 1675 at [19] as a concept not discredited and “part of the common law” but subject to local law and local public policy and the court being restricted by the scope of its own statutory and common law powers. (There was no appeal against the Judge’s finding that the bankrupt had submitted to the jurisdiction of the Russian bankruptcy court by appearing at various hearings through his legal adviser in Russia). At the same time, the Court of Appeal allowed the bankrupt’s appeal against the English Court’s recognition of his bankruptcy and remitted the issue back to the High Court. The recognition of a foreign bankruptcy can be opposed on the ground of fraud, amongst others, by reference to *Dicey, Morris & Collins on the Conflict of Laws*, 15th edn, at Rule 50. It had been wrong for the Court at first instance to reject outright on the balance of probabilities the bankrupt’s allegations of fraud, made in his written witness evidence, against his principal creditor which, if successful, would likely have prevented recognition. The issue ought to have been tested by way of the cross-examination of the witness for which the High Court could give directions.

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