The Triumph of "fraternité":
ISA Daisytek SAS
(Court of Appeal of Versailles, 4 September 2003)

Round 1: The English High Court in Leeds

On 16 May 2003 His Honour Judge McGonigal sitting as a Judge of the High Court in Leeds made administration orders in respect of English, German and French companies in the same Daisytek Group. These administration orders were all made as main proceedings under the rules of International jurisdiction contained in the EC Regulation on Insolvency Proceedings 2000. It was held that the centre of main interests of each of the companies was in Bradford in West Yorkshire, England.

The English company, Daisytek ISA Limited is a subsidiary of Daisytek International Corporation. That company and its subsidiaries files for Chapter 11 reorganisation in the USA on 7 May 2003. The English company is itself a holding company for a European group of companies. This group is a reseller and wholesaler distributor of electronic office supplies. All the European activities of the group are co-ordinated from the head office in Bradford.

The interesting aspects of the judgment, finalised in June 2003, relate to the three German companies and the one French company. The three German companies have their registered offices in Germany and conduct their business from premises in German cities. However, the majority of the administration of the German companies is conducted from the Bradford head office. The Judge held that he was satisfied on the evidence that Bradford was the place where each of the German companies conducted the administration of its interests on a regular basis: see recital (13) to the Regulation. The Judge placed particular emphasis on the ascertainability of the centre of main interest by third parties, following *Geveran Trading Co Limited v Skjevesland* [2003] BCC 209 at 223A per Registrar Jacques. The Judge also made reference to paragraph 75 of the Virgos-Schmidt Report on the original Convention. He considered that the most important "third parties" referred to in Recital (13) are potential creditors. In the case of a trading company the most important groups of potential creditors are likely to be financiers and trade suppliers. The financing of the business of the German companies was organised in Bradford and 70% of the goods

supplied were supplied under contracts made in Bradford. A large majority of potential creditors by value knew that Bradford was where many important functions of the German companies were carried out. By comparison the local functions of the German companies in Germany were limited. They required approval from Bradford to buy anything costing more than Euros 5,000. Only 30% of the stock purchases were negotiated locally. The Judge was accordingly satisfied that Bradford was the centre of main interest of the German companies.

With regard to the French company, ISA Daisytek SAS (SAS being a simplified form of French company), this company traded from premises which were also its registered office, located in France. However, the Bradford group headquarters operated in relation to the French company in the same way that it operated in relation to the German companies. The French company was controlled from Bradford in the same way as the German companies.

Round 2: The Tribunal de Commerce of Sergy Pontoise, France

On the 26 May 2003, after the making of the administration orders, but before the issue of the reasoned judgment, the directors applied to the Tribunal de Commerce of Sergy Pontoise. Under French law, directors must report the fact of insolvency to the Tribunal de Commerce or face potential criminal penalties. The hearing is attended by the public prosecutor. Although notified of the English administration order in respect of the French company, the French court made a French administration order. It held that the English administration order was "without effect" and that the French company could only benefit from a French proceeding.

The French first instance decision unfortunately overlooked a key principle of the Regulation, to be found in the last sentence of Recital (22):-

> "The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision".

In other words the French court should have accepted the decision of the English court and not declared it to be ineffective. The correct remedy would have been for

any relevant party to go back to the English High Court and seek to set aside or to appeal the English administration order.

Round 3: The Court of Appeal in Versailles, France

The Court of Appeal in Versailles has now put the matter right. It has held that the English court having opened a main proceeding on the 16 May 2003 on the basis that the centre of main interests was in England, Articles 16 and 17 of the EC Regulation required recognition of that fact in France without any further formality and therefore the French court had no jurisdiction to open a main proceeding in respect of the same company. The Court of Appeal recited the fact that the English judge had taken into account the presumption in the EC Regulation (Article 3) that the place of registration was the centre of main interest but had found facts both in the case of the German companies and in the case of the French company which showed that that presumption was overcome and that the centre of main interest was in England. The taking of main proceeding jurisdiction by the English courts prevented any French court subsequently opening a main proceeding in respect of the same company.

As in many cases where there is a lack of merits, the respondents to the Appeal took a human rights point under article 6 of the European Convention, apparently claiming that there was a lack of proper notice to those running the Company when the administration order was obtained. The other last resort for those without merits, the public policy exception in Article 26 of the EC Regulation, was also invoked. This was a very cheeky point, since, as the Court of Appeal pointed out, the Company had been represented by its director when it obtained the administration order in England. The Court of Appeal also pointed out that even if there had been some procedural irregularity in Leeds, this was a matter which had to be raised in an application attacking the English administration order and could not be raised in France. The production of a certified copy of the administration order was sufficient in France (compare Article 19). The French administrator, wrongfully appointed by the French court, was ordered to pay the court costs and his own legal costs.

This is an excellent result and brings the French courts completely into line with the EC Regulation. It follows the approach of the last sentence of recital (22) without specifically referring to it. The English administrators now have the task of sorting out the mess left by the actions of the French administrator whilst he thought he was validly appointed as such.

GABRIEL MOSS QC (English counsel for the English administrators and editor of *Moss Fletcher and Isaacs: The EC Regulation on Insolvency Proceedings, Oxford University Press, December 2002*)