



EUROPEAN LAWYERS ASSOCIATION  
**NEWSLETTER**  
2012



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**Hanif Mohamed**  
Chairman



## A WORD FROM THE CHAIRMAN

Dear ELA-friends,

As some of you may know, at this year's annual meeting in Milan I was elected as the new chairman of the ELA. I would like to thank you all for your confidence and trust in me.

My priority as chairman for the next two years will be to try and get the European Young Lawyer's Course (the "Course") re-launched.

As most of you know, thanks to the efforts of the board, our former Chairman Peter Bisgaard and, in particular, Charles Mullin, ELA managed to continue to run the course in Edinburgh for an additional three years after the British Council had decided to stop funding it.

Regrettably, the funds have now been exhausted and therefore the Course has been interrupted again.

The ELA Board, together with some other members, are working hard to come up with a sustainable solution to re-launch the Course again in Edinburgh and/or London. During the Milan meeting this project was kick-started by a generous financial commitment of EUR 10,000 by our Milan member Girolamo Abbatescianni.

In the meantime, some other members have also indicated their willingness to make a financial donation.

A working group is in the process of being set up and will be looking at different funding methods such as, inter alia, member funding and sponsors. Subsidies from individual member states and/or EU will also be explored.



This will of course not be an easy task but we are confident that with the required efforts, commitment and support from the members we will be able to re-launch the Course.

Finally, for those of you who do not know me very well (or at all), I attended the Course in London 1998 as the Belgian representative. After the course I spent several years in Brussels, London and Abu Dhabi practicing as a corporate lawyer with a large UK firm. I am currently working as corporate in-house counsel in Brussels with a financial institution.

I very much look forward to meeting you at one of our next ELA meetings. The next upcoming activity to which you are all invited is the ELA board meeting which is open for all members to attend and which will take place in Amsterdam from Friday 2 November until Sunday 4 November 2012.

I would also invite you to make a note in your diaries of the details of next year's ELA annual meeting which will take place in Antwerp (Belgium) from Thursday evening 9 May until Sunday 12 May 2013, a wonderful programme is being put together by Philippe Jadoul who is heading up the Belgian organising committee.

I very much look forward to welcoming you to these events.  
Best regards,

**Hanif Mohamed**  
Chairman



**Matthias Zillich**  
editor



**Asun Sueiro Sierra**  
editor

## BITS OF INTERESTING INFO...

- A fourth edition of the Belgo-Dutch dinner took place in Rotterdam On 21 September. The Belgo-Dutch dinner is slowly becoming a local ELA tradition and this was for the first time organised by the Dutch members. The previous three editions of the dinner were organised by the Belgian ELA members in respectively Brussels and Antwerp. Esteemed ELA member Roderick Rischen realised that the Dutch were being put to shame by the Belgians and took up the gauntlet to organise the fourth edition of the dinner in Rotterdam. A wonderful drinks reception was hosted by Roderick's law firm Rischen-Nijhuis at their offices in Rotterdam. After a boozy reception the party of about 15 people went on to have a very nice (and again boozy) dinner in a local restaurant nearby. Some new faces (i.e. ELA members who had previously not been spotted at or had not attended any ELA activities) joined the dinner and were met with the traditional ELA hospitality and enthusiasm. Everyone thoroughly enjoyed the evening which ended around midnight with a drive back to Belgium for most of the Belgians

- The next board meeting will take place in Amsterdam from the 2nd to the 4th November 2012. You are all welcome to attend. Our friend and treasurer of ELA, Leonie Rameloo is organising the event which will include a trip down the famous Amsterdam canals and a concert on Sunday morning following the all important meeting on Saturday morning. More to come on the next issue...

- For those of you who did not attend the Milan meeting, please note the next ELA meeting will take place in Antwerp, Belgium, from the 9th to the 12th May 2013. Please put these dates in your diary and do not forget to attend. Phillipe Jadoul has promised a really entertaining programme and has undertaken to do so at a price not exceeding 300 euro! If he can do it, we shall put his name forward as candidate for Chairman of the

European Central Bank (or even better, as Irish/Greek/Italian or Spanish Chancellor of the Exchequer!).

This exciting programme will include: a stay at the Banks Hotel, Thursday dinner at the Applemans Brasserie, a seminar of legal talks at the European Court of Justice, a visit to the European Institutions, a reception at the British embassy, and a BBQ along the river on Friday. Saturday will be kicked started with the Annual General meeting which will be followed by a reception at the Antwerp Town Hall. This will be followed by a visit to the Harbour by boat. It has not been decided yet how the Saturday afternoon will be spent. A choice between shopping or a diamond tour has been proposed. Of course, being in Antwerp and missing the opportunity to go on a diamond tour would be like being in Amsterdam in spring time and failing to visit the tulip fields! The gala dinner will then put the icing on the cake to a meeting that promises to be as entertaining as it sounds.

- For those of you unfamiliar with Northern Eastern Europe, there will not be a better opportunity to visit than the 2014 ELA meeting in Riga, Latvia. A young country with a rare buoyant economy that will no doubt show favour with the ELA members of a more adventurous type. Where else would you rather be in May 2014?

- ELA members from the Spanish city of Valencia are considering a bid to put this beautiful Mediterranean city forward as the venue for the 2015 ELA meeting. More to follow shortly....

- Spruce up for the Antwerp meeting!! In an attempt to improve the existing membership register, a few board members and the organising committee of the Antwerp meeting have decided that photographs of all delegates will be taken upon registration in 2013 with a view to incorporating them on to the ELA webpage. The photos will be downloaded on to the individual page for each member so as to assist in mutual recognition prior to annual meetings. Of course you can easily avoid this picture taking by simply responding to Luis Carreras' call to download or send him your picture for the aforementioned purpose. Up to you! Should be fun at Antwerp though...





**Peter Burbidge MA (Cantab)**  
Barrister  
**Senior Lecturer**  
University of Westminster

## BANKRUPTCY TOURISM

A guide for the discerning bankruptcy tourist

### Introduction

Over the last few years a new word has entered the English language. "Bankruptcy tourism" implies the seeking out of countries which offer the debtor the best arrangements for his eventual bankruptcy. It is a form of "forum shopping" (another pejorative term) but in the bankruptcy field it involves establishing a new "centre of main interests" or COMI (essentially habitual residence) before filing for bankruptcy. This will enable the debtor to benefit from the EU Insolvency Regulation 1346/2000 Art. 3.1 which requires the other member states of the EU to recognise the insolvency proceedings of the country where the debtor has his COMI. Although the Regulation Art. 3.2 allows for secondary bankruptcy or liquidation proceedings in countries where the debtor has an establishment, this is confined to businesses. Hence individual or consumer bankrupts have seen a considerable advantage in seeking out the most desirable country knowing that those proceedings will be the only proceedings that apply to his estate. In many cases both for insolvent companies and bankrupt individuals England and Wales has represented the best choice of venue for these proceedings.

This short article therefore looks at this phenomenon, concentrating in particular on the advantages for individuals. Here it should be underlined that English law distinguishes between company insolvency procedures, essentially liquidation (or winding up) and administration, and those for individuals. "Bankruptcy" procedures strictly apply only to individuals, although no distinction is made between consumer debtors and those who are in business. Nevertheless the popular term "bankruptcy tourism" tends to be used in the wider American sense to embrace company insolvencies as well.

The advantages of changing one's COMI to England have been made possible by the fact that the Regulation does not seek in any meaningful way to harmonise the actual rules that apply to the insolvency; it merely harmonises the rules as to which insolvency proceedings will be recognised. In the midst of a financial crisis where many debtors can at

an early stage anticipate that things are likely to get worse we have seen a large number of Europeans mainly from Germany resettle in the United Kingdom with a view to taking advantage of what are often significant advantages for the debtor concerned. If this has been true of individual debtors seeking bankruptcy it is equally true of companies (again often German) seeking also to relocate to the UK to obtain perceived advantages in the area of restructuring or "pre-pack" sales by administrators who are usually appointed out of court but under court supervision.

The fact that the United Kingdom has been chosen for this honour has been received with a rather jaundiced eye by the British Press. Here is a sample of the headlines that greeted the news that a number of continental companies and individuals were relocating their COMI to England.

"Abuse of pre-pack deals could turn Britain into an insolvency brothel"  
Times 18 January 2010.

- "London risks becoming a brothel for bankruptcy tourists" Observer 21 January 2010.
- "Firms flock to Bankruptcy Brothel UK" The Sunday Times 7 March 2010.
- "Skint Germans visit Britain to escape debts" Metro 23 September 2009.

The reference to brothels in the reports of the three respectable newspapers here shows their general disapproval of this process which is likened to sex tourism. The downmarket Metro by contrast registers a certain satisfaction that the Germans are suffering (Schadenfreude) combined with indignation that they are coming here.

*Forum shopping under the EU Insolvency Regulation 1346/2000.*

Needless to say the UK insolvency profession in the form of Frances Coulson, vice-president of the insolvency practitioners' trade body R3 representing some 1735 insolvency practitioners (mostly accountants and lawyers) reacted differently:

"Germans can come to the UK to take advantage of our bankruptcy rules just as we might go to Poland to get our teeth done."

Their web-site ([www.r3.org.uk/](http://www.r3.org.uk/)) boasts that in 2009 members of 3R the Association of Business Recovery Professionals saved 6,000 businesses, preserving 2 million jobs. According to the World Bank: UK procedures last just one year on average, and recover 84% of the debts at a cost of 6% of the businesses value. For value for money it ranks 6th behind Singapore, Canada, Japan, Norway, Belgium.

The international view (i.e. United States) equally recognises the UK system as one they can relate to:

"European restructuring of companies with the exception of the UK is still inflexible, bureaucratic, and value destructive. For this reason international practitioners favour the UK, should a choice be available". See Tilley: European Restructuring: Clarifying Trans-Atlantic Misconceptions [2005] Journal of Private Equity 99 at 102. One particular advantage in company insolvencies is the ability of the debtor company or its directors to appoint an administrator out of court (notifying the court of the appointment) and thus at a very early stage organise a sale of the business before its goodwill is damaged by the insolvency. Very often in fact the sale takes the form of a "pre-pack", where the insolvency practitioner has already organised the sale of the solvent parts of the business before his appointment as administrator and merely completes the sale after he is appointed.



It should be stressed that although these perceived advantages were particularly exploited by German companies moving their COMI to England, the German government has not been slow in responding to the threat of bankruptcy tourism. A few years ago German businesses, taking advantage of the Centros case (C 212/97), often preferred to operate as English registered private Limited Liability companies in order to avoid the minimum capital requirements of German company law. Over a thousand German businesses thus operated as UK registered private companies through an establishment in Germany. The German legislator eventually responded by creating German €1 companies which are gradually replacing the English registered companies in popularity. The response to bankruptcy tourism has been the same. To prevent companies relocating to the UK a new German law operative from 1 March 2012 (Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen) now offers some of the same advantages, notably the possibility of an administrator of the insolvent company being appointed out of court.

#### *Bankrupt Individuals*

Leaving aside the difficult issue of the COMI of companies, especially that of subsidiary companies within a group (perhaps the subject of a later article) this article concentrates on the bankruptcy of individuals. The advantages of a UK bankruptcy are as follows:

- Automatic Discharge after 1 year (indeed usually on individual application after 6 months). This has been so since 2004, when it was reduced from 3 years. [It is true that individually tailored bankruptcy restrictions are possible for up to 15 years but this is unusual]
- Debtors can make the applications and can usually obtain orders on the same day.
- The ranking of creditors is particularly striking in that since the Government no longer has a priority. The payment order is: 1. Creditors with fixed charges 2. Trustee's expenses 3. The employees (subject to limits) 4. Ordinary creditors (including the taxman!). Hence a discharge for the bankruptcy tourist in England will in principle clear his tax debts in the other EU countries.

These advantages compare very favourably with those of other countries in the EU where no discharge is possible. This seems to be the case in Bulgaria, Croatia (joining in 2013), Rumania, Greece, Italy, Portugal, (Luxembourg, Lithuania, Hungary). The cases of Greece Italy and Portugal are particularly noteworthy as everyone knows these are the states with the most sovereign debt in the Eurozone but here of course we are looking at individual household debt and here it is striking that it is the richer EU states notably Germany and particularly the UK which have the biggest household debt. Indeed Germany's total debt (state and household) is less than that of Italy where the Italian housewife seems to outperform the fabled German Hausfrau. In Germany the current position is that the bankrupt comes under the control of a trustee who controls his income for 6 years. After this he can apply for the discharge of his debts but it is still possible for creditors to object. Thus even though the advantages of the UK proceedings are greater in the other states the German level of household debt being significantly greater than the other countries accounts for the keenness of the "skint Germans" to become bankruptcy tourists over here. There ought in principle to be another prime source of such tourists, Ireland, because there the period you currently need to wait before discharge is 12 years! But although there are undoubtedly Irish bankrupts who choose to file for bankruptcy in the nearest Welsh court, the actual numbers of Irish bankruptcy tourists is difficult to detect. There is such an Irish presence on the British mainland anyway that the Kellys and O'Shanes will not stand out in the way the Mittelfellners do.

So at what point does a debtor change his COMI? How is it to be recognised by the courts? Recital 13 gives the clue. It is "where the debtor administers his interest on a regular basis" but must be ascertainable by third parties. There is moreover a Presumption in the Regulation that for individuals it is the place of habitual residence. As we have stated if you can change the COMI then consumer bankrupts get the significant advantage of choosing the single set of proceedings that will apply to their assets, home and abroad, as the assets they may have in other countries e.g. a House or a bank account are not considered an "establishment". What is required is an element of permanence plus substance plus objective appearance. However when it comes to a change EU law has sent out some mixed messages. On the one hand the Regulation Recital 4 stresses the need to avoid « forum shopping ». But on the other hand there is in the EU Treaty (TFEU Art.49) a right of establishment which Centros (C 212/97) stresses can be exercised even if the motive is to avoid a tougher law. The only limit imposed so far by the ECJ is that you cannot change the COMI once proceedings have begun (see Re Staubitz-Schreiber [2006] ECR I-701)

When applying for bankruptcy in England the pro forma debtor's petition must state the COMI (plus home address, former address and occupation). In addition he must confirm residence or business in the district concerned for the last 6 months and that he has had no insolvency adjudication in the last 5 years. But it is noteworthy that there is no sworn statement on the COMI, the only sworn affidavit being that for the statement of affairs. The fact that the courts in the current crisis are overwhelmed with enormous numbers of petitions and usually grant a same day bankruptcy order will indicate the amount of scrutiny they give to such documents.

Of course relocation to England is not easy and there are middlemen who offer their help. In particular if they want to say their COMI is in England they will normally need a job. Thus one of the main sources of bankruptcy tourists is German doctors (who have become indebted by running up excessive debts on their houses, cars, yachts etc). Hence the web-site [www.insolvenz-agentur.com](http://www.insolvenz-agentur.com) helps German doctors relocate by finding jobs in National Health Service hospitals, where they are always wanted. They advertise that they will arrange accommodation, open bank accounts, obtain credit cards and help the German debtors get National Insurance numbers etc. In *Official Receiver v. Dr. Eichler* [2007] BPIR 1636 – a German doctor took a job in England as a locum earning just £500 p.m. All his debts and creditors were in Germany as indeed was his wife. Despite the fact that his UK accommodation was only rented lodgings the District Judge accepted that he had changed his COMI to England. The proceedings are often unopposed as the German creditors will be reluctant to throw good money after bad by intervening in these foreign proceedings. Nevertheless there are instances where the District Court is unconvinced by the alleged change of COMI. In *Official Receiver v Dr. Mittelfellner* [2009] BPIR 1075 the COMI on the facts remained in Germany as the debtor had deliberately installed himself in Kent (close to the Channel tunnel) and made regular returns to Germany.

In the highly publicised case of the Irish property millionaire Sean Quinn the attempted change of COMI from Ireland to Northern Ireland also failed. Mr Quinn, once acknowledged to be the “richest man in Ireland” became insolvent through failed property deals and had run up debts of €2.8 billion to Anglo Irish Bank, which he could not repay. Amongst the companies he ran were some registered in Northern Ireland where he paid some tax as a director under PAYE. He also claimed to have a residence there so in November 2011 he petitioned for bankruptcy in a Belfast court and was granted a bankruptcy order on the basis that this was his COMI. The advantage of this of course was the prospect of restarting his business activities with all debts cleared through automatic discharge after 1 year. However with such a large debt it was unlikely that this would go unopposed by Deutsche Bank which owned Anglo-Irish. On appeal they produced evidence that he did not have a UK passport (Northern Irish often have both) was still on all electoral rolls in the Republic and on the company forms had given Southern Irish addresses as director of his 95 companies. Since Quinn had not revealed this information to the court his Belfast bankruptcy order was annulled on December 10 2011 and in January 2012 he was made bankrupt in Dublin.



#### *Conclusion*

Of course bankruptcy tourism would be eliminated if there was harmonisation of substantive bankruptcy law as is the case under the US Bankruptcy Code. In the current review undertaken by the EU Commission there are a number of proposals for a harmonising directive (notably from the EU parliament) but these do not include tackling the big differences on such issues as automatic discharge from bankruptcy. Ironically however a de facto harmonisation is occurring anyway. Just as the French and German legislators created €1 companies in response to the threat from the UK private company so the pressure from the English one year automatic discharge is forcing a similar “race to the bottom”. There is a proposal for a German law that will give automatic discharge after 3 years (subject to certain conditions) and the Irish are also talking about allowing discharge after 3 years, bringing their rather out-dated Insolvency laws into line with the position under the UK Insolvency Act 1986. The Irish government in a statement on 25 January 2012 considers that this will enable several thousand bankrupt entrepreneurs to return to business in Ireland. Of course one of the reasons for this change of heart is that bankruptcy reform was one of the conditions for Ireland’s financial rescue. The EU Commission is equally enthusiastic about ensuring that entrepreneurs are not over-penalised for taking the risks that are expected of them and also encourages these developments. Hence it is inevitable that through one means or other the current financial crisis will push those countries which have not yet done so into modernising their bankruptcy laws, and thus bringing bankruptcy tourism to an end.



**Elias Bischof**

## MY FIRST MEETING AS A MEMBER OF ELA 2011

I was not sure what to expect from my first ELA meeting when I travelled from Edinburgh to Milan in May 2012. Of course I was looking forward to seeing my friends from the ELP 2011 in Edinburgh again. When we met for dinner on Thursday evening I realised that these people were not my friends, but something more, some kind of family.

I felt very excited to have the opportunity to meet so many new ELA Members on Friday and Saturday. In my opinion, the ELA is a very special and unique organisation with so many nice, relaxed and interesting people from all parts of Europe. I can honestly say that I was not the only Eurodevil who felt – particularly on Saturday evening during the Gala Dinner – that I was a member of the “European Lawyers Family” (ELF) rather than of an Association.

A big thank you and many congratulations to everyone who contributed to putting this wonderful weekend together. Well done!. I now look forward to meeting again in Antwerp



**Federico Mamoli**

## DINNER AT BRELLIN RESTAURANT - NAVIGLI AREA

It is hard to believe that landlocked Milan was once an important port... But in the 12th century a series of canals were built to transport goods in and out of the city and surrounding areas of Lombardy before flowing into the rivers that eventually lead to the sea.

Many of these canals were filled in during the 1930s-1960 as they became less and less significant as a method of transport, with roads built over the straight lines created by the canals.

But a few remained, at least in part, with the Naviglio Grande and Naviglio Pavese to the south of the city and what is left of the Darsena (port) now a major attraction. The architecture remains much as it was when the district was a working class area.

Lined with houses, old and new, old washing-houses with wooden beamed roofs and craftsmen’s workshops, art galleries, antique shops, bars and restaurants make the Navagli area a very different destination to enjoy Milan.

These canals provide the setting for Milan’s liveliest area after the sun sets and a most pleasant and picturesque environment to take a stroll at any time of the day. Here you can enjoy Milan history, creativity, art, tradition and its night life.

Milan ELA Meeting 2012 Organizing Committee had no doubt when choosing a typical restaurant in this part of the city. The Naviglio Grande, Ristorante “El Brellin”, became the venue for Friday dinner. It is located in “The Vicolo dei Lavandai” where women used to do their washing in days gone by.

In a candlelit courtyard and amongst a 18th-century laundry display, “El Brellin” serves up classical Milanese cooking, with fresh pasta, good meat dishes, and delicious home-cooked desserts...

ELA delegates were allocated a table upstairs in very nice rooms with wooden fittings, a fireplace, and glamorous decorations. They were thus given the opportunity to admire a wonderful view of the canal after the sunset which followed a lovely spring sunny day...

The typical poetic environment of Naviglio Grande and “El Brellin” Restaurant helped delegates disconnect from Milan hectic business life and feel a part of Milan history throughout centuries in an area very close to the city center...

We ate a good variety of pasta, rice and meat dishes accompanied by superb Italian wine...The great spirit of the ELA group found the most appropriate place to express itself and delegates walked back to the hotel very happy and relaxed after spending such a different night in the most typical area of Milan.



## GENERAL INFORMATION 2012-2013

(following elections in Milan on 19 May 2012)

### BOARD

Chairman	Hanif Mohamed	<i>hanif.mohamed@dexia.com</i>
General Secretary	Sabrina Jenquin	<i>sabrina.jenquin@roslin.ed.ac.uk</i>
Treasurer	Leonie Rammeloo	<i>rammeloo@van-doorne.com</i>
Director	Christina Koycheva	<i>christinakoycheva@gmail.com</i>
Director	Charles Mullin	<i>charlesmullin@me.com</i>
Director	Panos Poulios	<i>ppoulios2001@yahoo.com</i>
Director	Donald Venkatapen	<i>donald@venkatapen.com</i>
Director	Henna Kinnunen	<i>Henna.Kinnunen@castren.fi</i>
Webmaster	Luis Carreras	<i>luis-carreras@bufete-carreras.es</i>
Directory Master	Philippe Jadoul	<i>Philippe.Jadoul@vialegis.eu</i>
Annual Meeting Supervisor	Matthias Zillich	<i>mz@zillich-zillich.de</i>
Newsletter Editors	Matthias Zillich	<i>(idem)</i>
	Asunción Sueiro Sierra	<i>asunsueiro@hotmail.com</i>
Meeting Secretary 2013	Philippe Jadoul	<i>Philippe.Jadoul@vialegis.eu</i>

### ELA address

European Lawyers Association  
c/o Marteyn & Keymeulen  
Gentsesteenweg 1154  
B 1082 Brussels (Belgium)

### ELA bank account

IBAN: BE20 425520333156  
BIC: KREDBEBB  
KBC bank  
branch: Sint-Agatha-Berchem  
Dr. A. Schweitzerplein 2  
B-1082 Sint-Agatha-Berchem

### NATIONAL REPRESENTATIVES 2012/2013

Belgium	Brent Van Tassel	<i>brentvantassel@hotmail.com</i>
Bulgaria	George Bivolarsky	<i>george.bivolarsky@kpblegal.com</i>
Croatia	Nensi Saric	<i>Nensi.Saric@hypo-alpe-adria.hr</i>
Czech Republic	David Rehak	<i>david.rehak@rehaklegal.cz</i>
Denmark	Flemming Keller Hendriksen	<i>fkf@forumadvokater.dk</i>
England, Wales & N. Ireland	Robert Dudley	<i>Robert.Dudley@lawcol.co.uk</i>
Estonia	-	-
Finland	Henna Kinnunen	<i>Henna.Kinnunen@castren.fi</i>
France	Dominique Gantelme	<i>dominique.gantelme@wanadoo.fr</i>
Germany	Dieter Strubenhoff	<i>dieter.strubenhoff@lovels.com</i>
Greece	Panos Poulios	<i>ppoulios2001@yahoo.com</i>
Hungary	-	-
Ireland	Nessa Barry	<i>nessabarry@hotmail.com</i>
Italy	Antonio Toma	<i>antonio.toma@freshfields.com</i>
Latvia	Peteris Dalderis	<i>peteris.dalderis@glimstedt.lv</i>
Liechtenstein	Stefan Daniel Wenaweser	<i>stefan.wenaweser@marxerpartner.com</i>
Lithuania	-	-
Luxembourg	Donald Venkatapen	<i>donald@venkatapen.com</i>
Norway	Siv Elisabeth Hveberg	<i>hveberg@gmail.com</i>
Poland	Bartłomiej Jankowski	<i>b.jankowski@wkb.com.pl</i>
Portugal	Mariana Magalhães	<i>mm@m2advogados.com</i>
Romania	-	-
Scotland	Charles J. Mullin	<i>charles.mullin@scotland.gsi.gov.uk</i>
Slovakia	-	-
Spain	María Luisa Perez Alvare	<i>ml.perez@hotmail.com</i>
Sweden	Anna Berntson	<i>anna.berntson@whitecase.com</i>
Switzerland	Markus Hungerbühler	<i>markushungerbuhler@yahoo.com</i>
The Netherlands	Jan Holthuis	<i>jholthuis@holthuis.com</i>

## IN MEMORIAM

### (i) Antonio Lombardini



Asun Sueiro Sierra

"It is with great sadness that we heard of the passing away of our friend and co-organiser of the Madrid meeting Antonio Lombardini. Some of you may remember him as a most pleasant individual who attended some of the ELA meetings in the company of our friend and esteemed colleague Maria Luisa. Antonio was a true citizen of the world. He had family connections in France, Italy and even Russia! He could speak English, Italian, French and Spanish (and I believe I once heard him say he could defend himself in Russian). Unlike us, Antonio was an architect and he left us suddenly and unexpectedly whilst working on the island of Corsica. He will be sorely missed. Rest in peace."

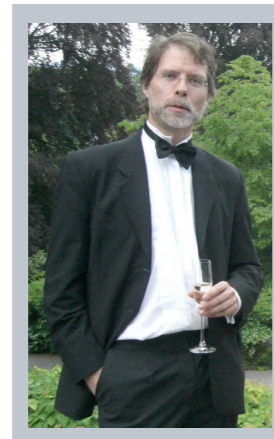


### (ii) Adrian Dewey



Luis Carreras

"It was with great sorrow that we learned of Adrian Dewey's untimely death back on November 11, 2011 after a hard fought battle with a terminal illness. Adrian was one of the most active ELA members over the years. Despite not having been a student member of the EYLS, he became involved with the scheme in the late eighties, becoming a member shortly thereafter. He attended most of the annual meetings since 1991 when I first met him in Sitges, Barcelona. We all remember Adrian's gentle spirit and helpful nature. He will be remembered as an exceptional individual and a special and generous friend. His true gentleness and permanent smile can be seen in the attached photograph taken at one of our annual meetings. After 25 years of sharing their life together, Adrian married his wife Alison in a very moving ceremony a few days before his final departure. Alison and their son Rupert will no doubt find peace and comfort in the knowledge that his suffering is now over. He will be sorely missed by all who knew and loved him. May almighty God grant him eternal rest and may his soul rest in peace."



## A JOKE AT YOUR EXPENSE!

The examples quoted below have been taken from the book: "Disorder at Court". All of them, without exception, have been taken from real cases.

The quotes below were in fact recorded literally by the transcribers:

1. Lawyer: What is your date of birth?  
Witness: 15th July  
L: Which year?  
W: Every year
2. L: That condition, miastenia gravis, does it affect your memory?  
W: Yes  
L: How does it affect your memory?  
W: I forget things...  
L: You forget things... Can you provide an example of something you have forgotten?  
W: I can't remember...
3. L: How old is your son?  
W: 35 or 38, I can't remember.  
L: How long has he lived with you for?  
W: 45 years
4. L: What is the first thing your husband said that morning?  
W: He said: Where am I, Maria?  
L: And why did that annoy you so much?  
W: Because my name is Ann.
5. L: Your youngest son, the 20 year old one  
W: Yes?  
L: How old is he?
6. L: In connection with this picture of yours...  
W: Yes?  
L: Were you there when it was taken?
7. L: So, the date when your son was conceived was the 8th of August?  
W: Yes  
L: And... What were you doing on that day?
8. L: She had 3 children, is that correct?  
W: Correct  
L: How many were boys?  
W: None  
L: And... how many were girls?  
9. L: Could you describe the suspect?  
W: Average height. He wore a beard  
L: Was it a man or a woman?  
10. L: Dr, how many post mortem procedures have you carried out on deceased patients?  
W: All of them have been done on deceased patients  
11. L: Dr, what time did you commence the examination of the victim?  
W: Yes, the post mortem began at 20.30 pm  
L: and was Mr Smith dead at that time?  
W: No... He was sat on the bed asking why I was carrying out a post mortem on him  
12. L: Dr, before you began the post mortem, did you check the victim's pulse?  
W: No  
L: Did you check his blood pressure?  
W: No  
L: Did you check if he was breathing?  
W: No  
L: In that case, is it possible that the victim may have still been alive when the autopsy commenced?  
W: No  
L: How can you be so sure?  
W: Because the victim's brain was on a tray on top of the table  
L: But, could he still be alive?  
W: Yes, it is possible he may have still been alive...and studying Law in the same Faculty where you obtained your Law Degree