CENTRE OF THE MAIN INTERESTS

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Abstract
The centre of the main interests of the debtor is a legal tool meant to settle conflicts that can arise between jurisdictions in cross-border insolvencies, based on the principles of mutual recognition and co-operation.

Key words: *insolvency, COMI, bankruptcy, debtor, creditor.*

Introductory considerations

Considering the increasingly cross-border nature of trade relations and their increasing complexity, a large number of insolvency proceedings include a cross-border element.

The international legal practice has recently recorded several cases of high legal, economic, social and political impact, which started from the collapse of certain multinational companies.

Hence a substantial number of cases on cross-border insolvency whose main focus was the identification of the debtor‘s centre of main interests (COMI). This will be the criteria which this study aims to review through an initial theoretical comment followed by a brief study of the case law of the Court of Justice of the European Union.

Regarding the international law, the main regulatory acts governing the conflict of jurisdictions in cross-border insolvency matters are the nr. 1346/2000 EU Council Regulation, UNCITRAL Regulation and Chapter 15 of the United States' Insolvency Code.

The EU Council Regulation No. 1346/2000 aims at harmonizing the practice in the area of conflict of jurisdictions, establishing thus the nationality of the competent court to open the main procedure depending on the location of the debtor's centre of main interests (COMI). However, the identification of the debtor‘s centre of main interests proves to be an increasingly difficult matter.

The practical consequences of determining the debtor's centre of the main interests in one jurisdiction or another may be particularly significant, such choice being sometimes the key to success or failure of the restructuring procedure.

Considering this, there have been quite a few cases in which, sensing a decline in business, the managers decided to move the centre of main interests from one state to another, precisely because, in the event of the opening the insolvency proceedings, the company would benefit from more favourable treatment.

Such measures taken in a time of economic recession are, however, inefficient as shown by the recent case law, namely PIN Group AG (Germany), their aim to avoid the competent jurisdiction being much too obvious.

In most situations, however, considering also the relatively short periods of appeal in insolvency matters, determining the centre of main interests is an already accomplished fact for the less diligent creditors.

This study aims to review the most important reference points of the recent legislation and case law on conflict of jurisdictions in the cross-border insolvency proceedings, with a focus on the matter of identifying the debtor's centre of main interests.

In addition to the conflict of jurisdictions, the referred to laws also establish the rules which will govern the transactions conducted by the insolvent debtor with its contractual partners located on

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the territory of another member state, as well as the rules for recovering the assets of the insolvent debtor, should they be within the territory of another state than the state on which it operates.

Analyzing this problem from the macroeconomic perspective, the development of multinational companies, transnational companies, of groups of interests on the emerging European market, with business centres within the territory of two or more member states, necessarily required the creation of a collective instrument of standardization of insolvency-related proceedings.

The economic situation in this time of crisis made the managers of multinational companies create so-called "tax vehicles", to be able to report to the shareholders on the application of the controversial concept of tax optimization which is often on the limits of legislation.

Content

The notion is an EU law one and the legal framework is EU Regulation on insolvency proceedings No. 1346/2000 which became effective on May the 31st, 2002. As a rule, it should be applied automatically, prevailing over the national legislation, in case of conflict.

Its main purpose is to codify the manner in which a member state decides whether it has territorial competence to commence the insolvency proceedings and to avoid the so-called "COMI migration" or "forum shopping".

It is also aimed at unifying the way the applicable legislation is selected and the automatic recognition of the insolvency proceedings initiated in an EU member state, although, in practice, this recognition is not automatic and does require a substantial commitment of the insolvency practitioner.

Legal framework:

1. UNCITRAL Regulation
2. EU Council Regulation No. 1346/2000 of May the 29th, 2000 on insolvency proceedings; effective from May the 31st, 2002
3. Romanian laws on insolvency proceedings consists mainly of:

- 85/2006 law (as further amended and supplemented) on insolvency proceedings,
- 637/2002 law on the regulation of private international law on insolvency and
- Government's Emergency Ordinance (OUG) no. 86/2006 (as further amended and supplemented) which regulates the activity of insolvency practitioners;

According to art. 3 of no. 637/2002 law, foreign proceedings are the collective, judicial or administrative proceedings which are conducted according to the insolvency law of a foreign state, including interim procedure, in which the assets and business of the debtor are subject to control or supervision by a foreign court, for the purpose of restructuring or liquidation of the debtor's business.

The foreign main procedure is the foreign insolvency proceedings conducted in the state in which the centre of main interests of the debtor is located, whereas, according to the same article of law, the foreign secondary procedure is the foreign insolvency procedure, other than the main procedure, which is conducted in the state in which the debtor has an establishment.

According to art. 26, para. 1 of 637/2002 law, the Romanian courts will cooperate with the foreign courts and representatives in a more extensive manner, and the cooperation may be achieved directly or through the Romanian representative. Likewise, the courts are able to communicate or request information or assistance directly from the foreign courts or representatives.

Regarding the presumption of insolvency based on the recognition of the foreign main proceedings, article 32, para. 1 of the above-mentioned law states that the recognition of foreign main proceedings is, until proven otherwise, a presumption of the state of insolvency of the debtor, based on which the insolvency proceedings may be opened. These provisions do not apply if the recognized foreign proceedings is secondary.

The purposes of the regulation are:

1. achievement of a general satisfaction of the creditors' claims and/or a viable, effective recovery/restructuring
2. unitary recovery of the assets of the insolvent debtor, with the avoidance of territorial enforcements, detrimental to the maximization of the list of creditors
3. avoiding of "forum-shopping"
4. should not be taken as an attempt to unify the national legislations on matters of insolvency, but only as a legal outline of instruments likely to make the application of the basic institutions easier.

The main rules are:

1. The single state principle of the main proceedings: the main proceedings may be initiated only on the territory of the member state where the centre of main interests of the debtor is located.
2. The principle of automatic recognition: recognition and automatic application of the judgment opening the main procedure in all member states.
3. The subsidiarity principle.
4. The single law principle: the law of the member state where the main proceedings was initiated applies to the entire insolvency proceedings, with certain exceptions.
5. The cooperation principle: the designated office-holder in the main proceedings actively cooperates with the office-holder of the secondary proceedings.

A possible issue of the regulation might consist of the fact that this centre of main interests of the debtor does not treat the debtor as a corporate group, but as an independent legal entity, that is the legal entity identified as such by its own elements.

The competence field of the 1346/2000 EU Council Regulation is:

1. The centre of main interests of the debtor in the European Union, including the companies which were incorporated outside the European Union, but whose centre of main interests of the debtor is in an EU member state.
2. applies to collective insolvency proceedings, such as listed in Appendix A and B of the regulation
3. applies to various entities – but mostly trade companies
4. does not apply to credit institutions, banks, insurance companies or investment funds. These are regulated by two other separate laws.

TYPES OF PROCEEDINGS:

1. Main proceedings - definition
2. Secondary proceedings
3. Territorial proceedings

Concerning the coordination of several foreign procedures, art. 31 of 637/2002 law states that: "should several foreign proceedings be initiated for the same debtor, the court will take the cooperation and coordination measures, as stated in art. 26-28, with regard to the aspects mentioned in art. 2, and shall proceed as follows:

a) any measure with temporary execution approved based on art. 20 or 22 to the representative of foreign secondary proceedings, subsequent to the recognition of foreign main insolvency procedure, must be compatible with the development of the foreign main proceedings;

b) when the request for the recognition of the foreign secondary proceedings is admitted or only filed prior to the recognition of the foreign main proceeding, any measure with temporary execution admitted under art. 20 or 22 will be reviewed by the court, which will order the amendment or termination thereof, to the extent that it is incompatible with the development of the foreign main proceedings;

c) should there be several foreign secondary proceedings recognized successively, the court will approve, amend or order the termination of the measures with temporary execution in a manner which would enable the coordination of the respective proceedings."

The notion of European insolvency procedure is regulated by art. 3 para. g of 637/2002 law of 07/12/2002 concerning the regulation of private international law on insolvency as being "the collective procedure determined by the insolvency of the debtor, which is initiated in a member state of the European Union, consequently removing the administration rights completely or partially from the debtor and the appointment of a European insolvency practitioner."

The law does not indicate an exact definition of the notion of centre of main interests of the debtor (COMI), but also outlines a few hints to guide the practitioner in identifying the centre of main interests of the debtor:

- "the centre of main interests of the debtor will correspond to the location in which the debtor currently runs its business and for that reason it is recognized as such" (Paragraph 13 of the preamble); and
- "In case of a legal entity, the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary". (Article 3(1)).

Considering the absence of guidance in support of the interpretation, there have been various practical solutions, leaving room for interpretation to the national courts.

In the absence of a clear definition of the centre of main interests of the debtor (COMI) the following factors are to be considered (but not limited to):

- the main registered office of the legal entity;
- the headquarters of the individual carrying out a business or an independent profession;
- internal accounting functions;
- business relations with clients;
- the law governing its main contracts;
- creditors;
- strategic control functions;
- IT systems;
- tax domicile and the domicile of its directors;
- board meetings;
- general supervision.

Three significant aspects are to be considered in this case, such as:

- administration of the interests of the debtor;
- consistency;
- opposability/recognition by third parties.

The attraction to a particular jurisdiction may be that it:

- has a good track record and is considered to be more transparent, sophisticated, efficient and flexible in the way it handles proceedings. New insolvency legislation in certain jurisdictions such as Spain and Germany which is geared towards addressing the current financial crisis may make those jurisdictions more attractive; however, new legislation will often be untested and its benefits may be outweighed by the perceived uncertainty over its interpretation and implementation;
-is more familiar to stakeholders;
- allows the debtor to impose a cram-down on dissenting secured or unsecured creditors;
- allows more pre-planning (in the UK, for example, the use of the Administration procedure allows sufficient pre-planning to permit an immediate sale of businesses or assets on terms negotiated by the insolvency practitioner before his appointment as administrator - a "pre-pack administration");
- allows the stakeholder(s) to choose who is appointed as officeholder, rather than an appointed by the relevant Courts;

- requires less court involvement;

- provides an opportunity to take advantage of DIP funding available to insolvent entities (for example, debtor-in-possession financing in Sweden and the US or Insolvenzgeld in Germany and Austria);

- avoids the application of employees' rights on a transfer of an undertaking[1].

Criteria for Identifying the COMI as Outlined in the Case Law of The Court of Justice of the European Union

The relevant factors in determining the nationality of the centre of main interests of the debtor are:

- The location in which the day-to-day management takes place and the management strategies are developed.

- The location in which the marketing and branding strategies & the defining the identity of the relevant entity are developed.

- Citizenship and residence of the directors and the location in which the meetings of the board of directors are held.

- Time spent by the employees of other entities (from other jurisdictions) in the management of the company.

- In case of entities holding ownership of (immovable) assets, the jurisdiction of the place in which they are managed is important rather than their location.

- Location in which the significant financial operations are carried out.

According to the Romanian legislation, art. 3, para. q of 637/2002 law, the state in which an asset is located is:

- for tangible property – the state within the territory of which the property is situated;

- for property and rights ownership of or entitlement to which must be registered – the state under the authority of which the register is kept;

- for claims – the state within the territory of which is situated the centre of main interests of the debtor of the claim;

Appealing to the Court of Justice of the European Union

The first significant request was made in the case Eurofood IFSC Ltd (Case C-341/04), a company incorporated in Ireland, a member of Parmalat SPA Group – Italy.

Two courts in two different jurisdictions claimed their competence, stating that the centre of main interests of the debtor would be in its own jurisdiction, thus leading to a positive conflict.

The Irish court justified its position based on the following elements:

• Eurofood IFSC Ltd. was registered in Ireland and was an Irish tax payer;

• The day-to-day management was carried out in Ireland, and the accounts of the company were also there;

• The meetings of the board of directors were held in Ireland;

• The presumption of the creditors was that the centre of main interests of the debtor was in Ireland.

The Italian court, on the other hand, claimed that the centre of main interests of the debtor was in Italy, arguing that:

• The company only applied the financial policy imposed by the parent company from Italy;

• The business of the company had as a sole reference the Italian company;

• The operational offices were in Italy;

• The central management was carried out in Italy.

Now, the certainty in relation to establishing the territorial competence is given only by the appeal to the Court of Justice of the EU. However, this takes a lot of time and is a somewhat expensive process.

[1] "Restructuring and Insolvency Briefing"- Macfarlanes.

Following the requests received to solve the conflicts of competence like the above-mentioned one, Court of Justice of the EU had the opportunity to give a few directions to guide the insolvency practitioners and the national courts, thus clarifying the issue.

We further summarized a few cases supporting the above-mentioned opinions.

Reference Cases in the EU Jurisprudence

Case no. 1: ENRON Directo Sociedad Limitada

- The company was incorporated in Spain under the name "Enron Directo Sociedad Limitada"
- Certificate of incorporation subject to the Spanish law, any disputes between partners are referred to the Spanish court for competent settlement
- Carries out operations, in particular tax operations, in Spain
- It cannot be clearly determined where the creditors presume that the centre of main interests of the debtor is located
- The head office was in the UK, directors of British nationality, management and leadership in London
- There was a relative presumption, determined by the provisions of art. 3.1, in the meaning that the registered office was the centre of main interests of the debtor.

Case no. 2: DAISYTEK (British approach)

In the Daisytek case there were several companies registered in France, UK and Germany, as subsidiaries of Daisytek multinational company, incorporated in US.

The parent company creates a holding-type entity, situated in the UK, which controls the activities of all the companies operating in the EU.

At the same time, an action is filed in the UK to initiate the insolvency procedure for all companies, even if four of them were not registered in the UK.

Separately, the court initiated the main proceedings in Germany in relation to the German subsidiary company. In the appeal, the German procedure was closed after finding out that the manager of the German company authorized the British procedure.

In France the court ruled that the centre of main interests of the French company was located in France, but the appeal did not confirm this ruling.

The question is whether the proceedings may be opened in the UK for legally independent companies, but which are economically dependent on a company incorporated in the UK.

Another question would be: where could we locate, on a scale of the main interests of the debtor, the criterion of legal independence from another company, on which it is dependent on in terms of decision-making and organization, and, respectively, if an extension of competence of the British judge can be accepted, meaning that (s)he could issue restructuring rulings, based on a plan, for companies not incorporated in the UK.

Case no. 3: EUROFOOD IFSC Ltd.

Eurofood is a company registered in Ireland, 100% owned by Parmalat SPA, an Italian company.

On January the 27th, 2004 Bank of America applied for commencing the insolvency proceedings concerning Eurofood at the High Court in Ireland. On the same day, the court appointed an insolvency practitioner as judicial administrator.

On February the 9th, 2004 the Italian government wanted to place Eurofood under extraordinary administration procedure and appointed an Italian insolvency practitioner (subsequently confirmed by the Italian court on February the 20th, same year).

In March 2004 the Irish court ruled that the Italian one was not competent and COMI was in Ireland because the company was registered there and the creditors were also convinced that the centre of Eurofood's interests was also located there.

The decision was challenged and two issues were submitted for settlement to the Court of Justice of the European Union:

a. If it was the Italian court or the Irish one which opened the main proceedings;

b. If the Irish court was entitled to claim the provisions of art. 26 of the Regulation.[3]

The question is to determine which of the two proceedings can be considered the main one and if the judge in the member state who opened the proceedings subsequently, may refuse the recognition and enforcement of the judgment ruled in the other member state on the grounds that the centre of main interests of the debtor is located in its jurisdiction.

It is also important to note whether a judge from a member state may decide to commence the main proceedings on the grounds that the centre of main interests of the debtor is located in their jurisdiction.

An important argument is the criterion of ownership of the company shares as being the most important in identifying the centre of main interests of the debtor.

It is considered preferable that, once the proceedings have been initiated, even if it is proven that the centre of main interests of the debtor is, in fact, situated within the territory of a member state other than the initiating one, the original proceedings should be continued as the main one.

It is debatable which is the better solution in the strictly chronological application of the criterion of the main procedure versus the secondary procedure, assuming that the national legislation gives retroactive effect to the proceedings initiation ruling, not from the time when it was adopted, but from the time when the petition was filed.

Case no. 4: PARMALAT

The Parmalat Group started from an Italian company with headquarters in Collecchio, engaged in food manufacturing (dairy) and which had an intensive acquisition policy for twenty years.

In December 2003 it was discovered that Parmalat Spa had a huge financial problem (of approximately $ 7 billion).

Parmalat Finance Corporation -owned by a group of companies from the Netherlands and Luxembourg- carried out commercial transactions with other companies in the Netherlands and had Dutch creditors who were aware of each other's claims.

Parmalat Finance Corporation is owned by the same group of companies which own Parmalat SPA, has issued bonds in the Netherlands, having intense relations with Dutch banks to guarantee new loans and other financial operations.

Parmalat SPA was placed under special administration procedure by the 347 Decree Law from December the 23rd, 2003.

Parmalat Finance Corporation filed for insolvency in Parma, Italy.

There is the opinion according to which it would be accurate to note that the centre of main interests of the debtor is in the Netherlands, considering there are certain creditors (banks and financiers) which granted loans regulated by the Dutch law and there is a scale of the most important creditors, whose positive presumption may become important in determining the location of the centre of main interests of the debtor.

In case that there is the assumption that the destination of the loans, in their various forms, was to support the Parmalat shareholders, it is claimed that it is correct to establish the location of the centre of main interests of the debtor in Parma, Italy.

One issue under discussion is the assumption that we consider the tax maximization policy as a relevant proof in rebutting the relative presumption that the centre of main interests of the debtor is in the member state where the registered office of the debtor is situated.

It is argued that the determination of the centre of main interests of the debtor depends (to a great extent) on the relationship between the parent company and its subsidiary.

Case no. 5: MG Rover Group Limited

- MG Rover Group Limited is a trade company incorporated in the United Kingdom of Great Britain and Northern Ireland;
- SAS Rover France is a company registered in France, wholly owned by MG Rover Group Limited. The French company has significant staff with employment relations with the French employer.
- The Birmingham High Court ruled in favour of the extension of the insolvency proceedings to the French company, acknowledging the fact that the centre of main interests of the debtor is in the UK.
- The Chief Prosecutor of France promoted the legal remedies to establish that the ruling of the British judge cannot be recognized in France, since it violates the French public order, using in the argument of placing the French employees in a less favourable position, since they have to participate in collective insolvency proceedings which take place in the UK.

The argument used is the amount of employees from another member state as a single criterion in the identifying the centre of main interests of the debtor. The same argument is also used for refusing the recognition of the main proceedings initiated in another member state.

When determining whether a ruling identifying the centre of main interests of the debtor observes or not the national public order, the degree and rapidity of satisfaction of the employees' claims are to be considered.

Conclusions

The purpose of this work was not to offer clear cut solutions in such a controversial area, but rather to bring arguments in favour of the flexibility which the national courts should show in determining the identification criterion of the territorial competence.

The centre of main interests of the debtor is one of the best examples of concepts clarified by the practice of the Court of Justice of the European Union.

This topic will surely stir many other debates in the international legal academic environment, taking into consideration the current economic context.

However, this is an issue where we might consider that the economic and social aspects prevail over the judiciary.

Determining the centre of main interests of the debtor becomes a matter of interdisciplinarity.

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