

FRANCE 3
Reporting sheet

Insolvency Regulation

COMI: centre of the debtor's main interests.

1) **The necessity of revising the definition of the COMI, establishing a new more detailed criterion and that the situation when COMI is located outside EU should remain outside the scope of the Regulation (Portugal)**

a) Relevant arguments

The Portuguese team pointed out the gaps in the current definition of COMI. Indeed:

- The Regulation does not contain provisions concerning groups of companies. The team highlighted the advantages of creating such provisions. The analysis of the European national courts' decisions was complete and gave a good overview of the way they deal with this problem.
- There is no presumption for natural persons.

The idea of transferring the recital 13 about the definition of the "centre of main interest" to Article 2 seems relevant.

We appreciated the efforts the team provided to redraft article 3 of the Regulation.

The discussion concerning the necessary "proof to the contrary" to invert the burden of proof linked to the presumption given by article 3 (1) on the place of the center of the main interests of a company or legal person was interesting.

The team made interesting proposals to solve the problem concerning the fact that the Regulation does not apply if the COMI is located outside the EU (Recital 14). They argued for solutions other than its inclusion in the Regulation: improvement of countries' own domestic system, adoption of UNCITRAL Model law, extension of the Regulation to other countries, improvement of their private international law and conclusion of bilateral conventions.

b) Debated arguments

The idea of the Portuguese team to add a time condition concerning the definition of the COMI may let unresolved a important number of cases when this condition is not fulfilled, reinforcing uncertainty for litigants.

The criteria provided to define the COMI (for legal and natural persons) appeared to be too detailed and may impede the judges' assessment of concrete cases. Indeed, a margin of appreciation should be left to judges in order to take into account the particularities of each case.

2) **The present definition of COMI is the best option for the purpose of avoiding forum shopping and the Regulation should contain rules with respect to situations when COMI is located outside the EU (France)**

a) Relevant arguments

Reconciling opposite goals was an interesting approach (freedom of establishment a/ prevent forum shopping, predictability v/ adaptability).

The French team developed several arguments in favor of the COMI criterion:

- It ensures predictability to third parties
- It links jurisdiction, applicable law and who can be a liquidator
- It reconciles opposite goals
- It does not sacrifice outside creditors

The team tried to demonstrate the positive aspects of the current definition comparing it with other possible criteria which was interesting.

The French team highlighted the problems concerning the exclusion of situations where the COMI is situated in the EU (recital 14). They well defined the situations with an international linked and focused on three unwanted consequences of this exclusion: secondary proceedings, risk of denial of justice, difficulties linked to recognition and enforcement of judgments from a third country. They also showed the limits of international texts (interpretation, multiplication of bilateral conventions).

b) Debated arguments

It would have been useful to have more concrete examples on common factors that could determine the main interest in the terms of the Regulation.

The team could also have a more balanced approach underlying the limits of the present definition.

The team may have insisted on the link between the definition of the COMI and its aim to avoid forum shopping. The distinction of loyal and disloyal forum shopping during the questions session was interesting.

Concerning the extension of the Regulation on situations outside the EU, they may have highlighted the difficulties to draft provisions binding non EU countries.

Arbitration

1) The NY Convention of 1958 is satisfactory for the recognition and enforcement of arbitrary awards (Netherlands)

a) Relevant arguments

The focus on the practical dimension of the issue was interesting. Indeed, the team explained that with the NYC, only 5 % of cases resolved through arbitration went to Court afterwards.

The team's opinion on the importance of the principle of freedom of contract in arbitration might be a good argument against the extension of Brussels I to arbitration.

It was interesting to underline innovative arbitration means.

b) Debated arguments

The Dutch team said that the differences between common law and continental law systems would be an obstacle to extend Brussels I Regulation to arbitration. However, in our opinion, arbitration is not linked to cultural issues since parties choose the procedure they want to follow.

We may have expected a comparison between the NYC provisions and Brussels I provisions.

Moreover, it would have been interesting to distinguish between different types of arbitrations. Indeed, in certain cases, the implementation of common procedural and substantive safeguards (abusive clauses...) appears to be necessary.

We disagree with the argument that arbitration would not fall into the scope of article 81 TFEU because according to us, it is necessary for the proper functioning of the internal market.

2) **The Regulation should be interpreted so as to support arbitration and the recognition/enforcement of arbitral awards (Germany)**

a) Relevant arguments

We really appreciated the analysis the team made on the relevant provisions of the NYC and Brussels I Regulation.

They also well demonstrated the possible extension of Brussels I Regulation to arbitration through the explanation of the interpretation already made by the EUCJ.

We liked the idea that EU fundamental principles in the area of justice (mutual trust, efficiency, legal certainty and so on) justify the need for a specific legal framework in addition to the NYC.

b) Debated arguments

The team stated that no minimum standards were needed to frame arbitration proceedings thanks to the mutual trust shared by EU Member States. However, the implementation of such standards may improve mutual trust and cooperation within the EU.

It would have been interesting to see the advantages of a Regulation through practical cases showing the limits of the current provisions of the NYC.