

THEMIS 2011

INTERNATIONAL COOPERATION IN CIVIL MATTERS

OBSERVATION FILE

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by

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DEBATE ROUND 3: FRANCE 1 AND PORTUGAL 1

1. For the purposes of the observation file for the third debate round a short overview of the topic both team have dealt with will be presented (**I.**) followed by an observation note to the presentations (**II.**)

I. Short Overview of the Topic

2. The subject matter of the third round of debates covered the evaluation of the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (***Insolvency Regulation***), which represents a result of highly disputed negotiation's process between member States. Because of various controversies and differences between legal systems as well as in positions of the Member States, some uncertainties found their way into the current Insolvency Regulation.
3. In specific, the limited harmonization which was reached by the Regulation despite of the purpose stipulated in its recital is often pointed out as a short-coming of the created legal framework. Finally, the core point of the discussion was the definition and interpretation of the part of the Regulation stating that "*the place of the registered office of a company or a legal person shall be presumed to be the centre of its main interests in the absence of proof of the contrary*", the so-called COMI, and the lack of any provisions which are applicable if the COMI is located outside the EU.

II. Observation of the Presentation

4. The teams analysed the current framework and respective case law in regard to the uncertainties provided by the current Regulation and critically reviewed whether the aimed harmonization has been reached by the Regulation and enhanced by the case law established in the meantime. In particular, the teams reviewed the question whether the current definitions and interpretations of COMI is satisfactory to prevent the problem of forum-shopping or whether further regulations are required. In addition, the teams discussed the issue of insolvency proceedings involving third states and lack of regulations in case COMI is located outside of the European Union. Calling for the

additional regulations in this regard the teams referred to possible risks of legal uncertainty.

5. As a contribution to a rather challenging topic and discussions which were going deeply to the core issues surrounding the topic of insolvency proceedings, we would like to add, that except of the interpretation provided by the courts and possibility to prevent uncertainties with the help of this approach, one could argue that a so-called “*forum shopping*” might lead to race of improvement between jurisdictions. “*Escapes*” from particular jurisdictions might serve as an indication for the respective states that their legal systems might be improved or enhanced in relation to the regulations on insolvency proceedings.
6. At the same time, we do agree, that there are some difficulties involved in relation to proceedings involving third parties which are situated outside of the EU. However, since the scope of the EU regulations is limited in its application to the Member States, international treaties might indeed present a possible solution. In this point we do not necessarily agree that conclusion of multiple treaties will lead to legal uncertainties. In view of the fact that UNCITRAL Model Law in Cross-Border Insolvency has been developed and could be implemented and accepted by the states, a conclusion of international treaties on its basis will not necessarily create further uncertainties but rather a comprehensible set of rules for a big amount of parties.