DEBATE France 1 – Portugal 1

Observations by Italian Team

(6 october 2011)

As both the teams have underlined during the debate, the goals of the regulation 1346/2000 are enable the cross border insolvency proceedings to operate effectively, to avoid forum shopping and to provide for coordination of the measures to be taken with regard to the assets of the debtor.

One of the most problematic points of the Regulation is the identification of the centre of main interest of the debtor. It should correspond to the place where the debtor has the administration of his interest.

But this concept of "centre of main interests", which is essential not only for the applicability of the Regulation but also – and above all – for the identification of the jurisdiction, is not well defined. Although some jurisdictions also consider similar criteria, the notion of "main interests" is rather vague and indefinite and can be interpreted in various ways.

According with these considerations, we think, as Portugal team has underlined, that the notion of COMI has to be reviewed. If the main objective of this regulation is avoiding the debtor's temptation of transferring its assets or legal proceedings from a member state to another in order to benefit of a more favorable treatment *("**forum shopping**")* we agree that the definition of COMI does not provides the right remedy to this problem.

The observation of the France team that the others possible criteria would be more uncertain that the COMI, it seems a way just to avoid a problem but does not eliminate the fact that the COMI is a notion very vague. An abstract indication of the meaning supplied by par. 13 of the Recitals *the centre of main interests should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.* This statement leaves unresolved certain key questions such as the elements which constitute the process of administration and the sense in which the term interest is to be understood.

Moreover, the fact that the Regulation introduces a presumption can not solve the lack of certainty of the COMI definition. This presumption is just a *iuris tantum presumption* and seems to be not able to guarantee a stable identification of the jurisdiction but, even more, it could lead to a more complicated system of jurisdiction: for example the proceedings might be seized to the Court where the enterprise is registered (on the basis of presumption) but it might occur that in a second moment significant items, revealing the real center of interests,

could lead to an other jurisdiction (ex. where is the head of the company which takes decisions and invest moneys). In our opinion, the solution is not provided by that presumption but giving the judge clear indications about the items which could be considered in order to make a decision about the COMI.

However, the EU Court of Justice in the case Eurofood, appeared to have placed much weight of the presumption of the registered office: *in determining the COMI of the debtor company, the simple presumption leaded down by the Community legislature in favor of t registered office of that company can be rebutted only if factors which are both objective and ascertainable by thirds parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect.*

The second critical aspect of the Regulation is the fact it does not apply if the COMI is located outside the EU. This means that the Regulation 1346/2000 does not provide whether the Member States can open insolvency proceedings in such a case, or the type of effects that such proceedings, if opened, would produce in other Member States. It might be helpful if the Regulation 1346/2000 contained rules with respect to these situations, as well. These rules should cover the following issues:

- Recognition of non-EU insolvency proceedings. This could, for example, be achieved through incorporating in the Regulation the UNCITRAL Model Law on cross-border insolvencies with respect to these cases;
- Opening of proceedings in Member States. It is conceivable that in such case it is required that the debtor has an establishment in that Member State.

A further possibility would be that provisions be added with respect to recognition of non-EU proceedings in cases where the COMI is within the European Union. In that case, the adoption of the UNCITRAL Model Law could be put forward as the better solution.

DEBATE The Netherlands – Germany 2

Observations by Italian Team

(6 october 2011)

Arbitration is a matter of great importance to international commerce.

During the debate we have focused the following topics:

The problem of coordination between proceedings concerning the validity of an arbitration agreement before the court and an arbitral tribunal:

The more problematic aspect concerns the power of the courts in verifying the validity of the arbitration agreement which is totally reserved to the court (this is the point of contact and conflict between the two jurisdictions).

We think, as the German team has underlined, that a large interpretation of The Regulation Brussels I could give a support for the recognition of arbitral awards. This might again be combined with a strengthened cooperation between the courts seized, including time limits for the party which contests the validity of the agreement.

A uniform conflict rule concerning the validity of arbitration agreements, connecting to the law of the State of the arbitration, might reduce the risk that the agreement is considered valid in one Member State and invalid in another.

This may enhance, at Community level, the effectiveness of arbitration agreements compared to Article II New York Convention. Further, as far as recognition and enforcement is concerned, arbitral awards which are enforceable under the New York Convention might benefit from a rule which would allow the refusal of enforcement of a judgment which is irreconcilable with that arbitral award.

An alternative or additional way forward might be to grant the Member State where an arbitral award was given exclusive competence to certify the enforceability of the award as well as its procedural fairness, after which the award would freely circulate in the Community.

Interpretation of Brussels I: Within the EU Area of Justice, private methods of disputes resolution should not be favored over judicial determinations. This assumption is confirmed by the role that the courts play in the constitutional order of the member states about the value of the access to justice at reasonable costs to protect a fundamental right of the citizens. However, that does not mean that the ADR should not be recognized as a valid tool for resolving disputes.

We think that only if there will be a public control upon the arbitral award by the judge (concerning the respect of the procedural rules in particular the right of contradictory, the right of defense) it will be possible to establish, at least under the aspects of the executive enforceable, the same treatment as well as the sentences. In this way we could bring the arbitral award in to the scope of the Regulation 44/2001 (which recognizes the enforceability of the authentical instrument, as the arbitral award will become after the judicial control).

Finally in order to ensure the application of Regulation Brussels I without a forced interpretation (which remain in any case questionable) it would be much more reasonable to erase the current rule which exclude the arbitration from its scope.