

Themis 2011

Germany 1

Observation File

Third Working Session

Question I

While the Portuguese team saw a great problem in the fact that COMI is an unclear term and can be influenced by many factors, the French team regarded this flexibility as a positive central aspect of COMI to get to reliable but still flexible solutions within the national jurisdiction.

The Portuguese team considered the presumption of the registration place to be the COMI as uncertain as it was not clear what kind of presumption it should be. It was not clear to which consequences the different concepts of presumption would lead. The place of registration was somehow not considered to be recognised by the parties that would only see where a company's activities appear.

The Portuguese team wanted to prevent "bankruptcy tourism" by expanding the time periods that have to be considered when defining the COMI. But there should be solutions, too, if the COMI has never existed for such a long period of time.

The French team stated that there are no better criteria than COMI. To develop this opinion to more than a simple statement a clear analyses of other criteria would have been necessary.

The Portuguese definition relied to the predictability of the COMI to third parties. The main thought of the French team was that COMI is clearly predictable by third parties.

It was not stated in which way a private person might find out which is the actual COMI of a company. How can a contracting party define the COMI when entering into a contract with the future insolvent party if even a court has to recognize different aspects that can change this COMI? The place of registration of a company that is published is the only criterion a party can clearly recognize. This point was not considered in the discussion. The COMI is not likely to be predictable at all.

Fact of interest: It is also possible to prevent bankruptcy tourism effectively if national courts pay enough attention to that problem and demand more proof for e.g. that the centre of a natural person's life is in that country. In the past, bankruptcy tourism was often performed by German natural persons going to the French department of Alsace and two other neighbouring departments where some special laws dating from the German time existed and allowed for a fast liberation from the debts by way of an insolvency proceedings. Once the awareness of the French courts to that problem was raised they demanded more proof that those new Alsace inhabitants actually lived there, e.g. by demanding water and telephone bills in addition to rental contracts. After this became known in insolvency circles, bankruptcy tourism to those French departments ceased.

Furthermore, insolvency proceedings do not only have to solve the conflicts between the insolvent party and its creditors. They must solve the conflicts between the creditors, too. From the creditors' point of view the COMI might seem to be in different places. This leads to the following consequences:

1. The parties cannot choose the jurisdiction where insolvency proceedings shall take place to the disadvantage of another creditor.
2. The COMI cannot be defined in a subjective way taking into account the view of one creditor, because there can be many different views of the different creditors. COMI has to be defined by objective criteria.
3. Yet, the insolvent party might cause one creditor to consider that the COMI of a company is at a certain place in a way that should cause the insolvent party to be reliable to any disadvantages caused in respect to this creditor. Therefore one might think of a system that - between these parties - leads to this solution: After the first insolvency proceeding in the state of COMI, the creditor is put into a situation that resembles the situation he would have to face if the insolvency proceeding would have taken place in the state, where he had the right to presume that it would take place in.

For example: If the liability of the insolvent party in the country of COMI is restricted to 10.000 € and in the country, where the creditor thought that COMI is, it is not restricted, *inter partes* the restriction is not applied.

Therefore positive consequences for the insolvent party resulting from the insolvency proceeding might not be applied *inter partes* by a court of a member state. A European regulation should contain a solution to this problem.

Question II

Considering question two, the Portuguese team showed that a regulation might be found using other instruments than a European regulation. The French team showed that there are several situations where there is no solution within the current regulation, therefore there should be some solutions. The disadvantages that result from this lack of regulation compared to the other ways of finding a solution were not clearly analysed. The French conception of denial of justice can be highly contested as denial of justice can only be considered when a legal system has installed proceedings for a certain legal problem.

Both teams did not take into account whether the EU is at all competent to make such a regulation. Widening the scope of application of a future directive beyond the competence of the EU infringes the principle of subsidiarity and therefore is not possible. It is nothing but an academic approach how the treaties of the EU should be changed.