THEMIS FINALS 2011
DEBATES

I

Germany and Hungary

Background:

1. In enacting Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters ("the Mediation Directive") the European Parliament and the Council acknowledged that mediation can provide cost-effective and quick extra-judicial resolution of disputes and that agreements resulting from mediation are more likely to preserve an amicable and sustainable relationship between the parties.

2. Concerns have been raised about the seemingly arbitrary consequences of limiting the Directive's application to cross-border disputes (Article 2); possible problems raised by the enforceability provisions (Article 6) and perceived limitations of the confidentiality provisions (Article 7) having regard to the different interpretations of the phrase "overriding considerations of public policy" at European level.

Both teams *will analyse the Directive in the light of the contents of paragraph 2, above.*

Germany 1 *will argue that the provisions of the Directive should be strengthened in order to make the mediation process more binding on the parties and suggest amendments to the Directive through which this could be achieved.*

Hungary *will argue that more certainty is required in the wording of the Articles referred to in the paragraph 2, above in order to make the Directive as presently drafted better able to achieve the intentions that underpin it as set out in the Preamble clauses.*

II

Italy and France

Background:

Since 2000, the European Union has progressively acted to implement a cohesive, Europe-wide regulatory scheme for dealing with jurisdiction, status and recognition in certain areas involving matrimonial causes.
Progressive attempts through Regulations in Brussels I Regulation (Council Regulation (EC) 44/2001); Brussels II *bis* (Council Regulation (EC) No 2201/2003 replacing the earlier Brussels II) and Rome III (Council Regulation (EU) No 1259/2010) have served to create new problems in a number of areas while attempting to address old ones. The domestic history, culture and legal systems of the 27 member states of the European Union are so diverse that harmony through such Regulations (or anything like it) is some way off.

By specific reference to the implementation of the Regulations referred to above and to such other Regulations in the area of family law, case law and other material that the teams think appropriate:

Italy *will argue that attempts to bring the practices of member states into harmony is unlikely to produce an outcome that accords with the wishes of European policy makers.*
France *will argue that, difficult though such harmony might be, attempts to bring it about must continue and may lead to a successful eventual outcome.*

III

France and Portugal

Background A:

On 31 May 2002 the Council Regulation (EC) n° 1346/2000 of 29 May 2000 on insolvency proceedings (Regulation 1346/2000) entered into force. Since the entry into force, this Regulation has brought a very significant change to the insolvency scene within the European Union, because up to that time assistance to foreign insolvency proceedings varied very much from one Member State to the other, and the landscape was quite patchy.

The Regulation 1346/2000 was the result of a very lengthy negotiation process during which several drafts failed to become adopted. The Regulation itself bears some traces of this process in the sense that a number of sensitive issues have been left out and that it only carries out very limited harmonization of the laws of the Member States. In the Preamble, the Regulation stipulates as being necessary for the proper functioning of the internal market to avoid incentives for the parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favorable legal position (*forum shopping*).

The article 3 of the Regulation 1346/2000 states that 'the place of the registered office of a company or legal person shall be presumed to be the centre of its main interests in the absence of proof to the contrary' (COMI). The manipulation of COMI has a great impact. The opening of main proceedings in a certain jurisdiction does not only determine who can be a liquidator and which court supervises the insolvency proceedings, but it also to a large extent determines the applicable law.

An important question is whether there should be a hard and fast rule to determine the COMI, or whether the present definition should be maintained.

France *will argue that the present definition is the best option for the purpose of avoiding the forum shopping.*

Portugal *will argue the necessity of revising this definition, establishing new more detailed criteria in order to give more precision.*

Background B:

The Regulation 1346/2000 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.

Would it be helpful if the Regulation 1346/2000 contained rules with respect to these situations, as well?

France *will argue that the Regulation 1346/2000 should contain rules with respect to situations when COMI is located outside the EU.*

Portugal *will argue that the situation when COMI is located outside the EU should remain outside the scope of the Regulation.*

V

Germany and the Netherlands

Background:

Arbitration falls outside the scope of the Regulation 44/2001. The *rationale* behind the exclusion is that the recognition and enforcement of arbitral agreements and awards is governed by the 1958 New York Convention, to which all Member States are parties.

Parallel court and arbitration proceedings arise when the validity of the arbitration clause is upheld by the arbitral tribunal but not by the court; procedural devices under national law aimed at strengthening the effectiveness of arbitration agreements (such as anti-suit injunctions) are incompatible with the Regulation if they unduly interfere with the determination by the courts of other Member States of their jurisdiction under the Regulation; there is no uniform allocation of jurisdiction in proceedings ancillary to or supportive of arbitration proceedings; the recognition and enforcement of judgments given by the courts in disregard of an arbitration clause is uncertain; the recognition and enforcement of judgments on the validity of an arbitration clause or setting aside an arbitral award is uncertain; the recognition and enforcement of judgments merging an arbitration award is uncertain.

***Germany** will argue that, despite the broad scope of the exception, the Regulation should be interpreted so as to support arbitration and the recognition/enforcement of arbitral awards.*

The team will further argue that the recognition and enforcement of arbitral awards, governed by the NY Convention, is less swift and efficient than the recognition and enforcement of judgments.

***The Netherlands** will argue that judgments merging an arbitral award should be recognized and enforced in accordance with the NY Convention, not with the Regulation.*

The team will further argue that 1958 the recognition and enforcement of arbitral agreements and awards governed by the 1958 New York Convention operates satisfactorily and the scope of Regulation 44/2001 couldn't be extended de lege lata.