

JURISDICTION OVER CROSS-BORDER INSOLVENCY PROCEEDINGS

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Abstract: *The analysis of the opening of insolvency proceedings under European Union law involves the identification of incidental rules applicable to the insolvency proceedings with an element of foreignness when it concerns the Member States. In order to ensure a comprehensive understanding of cross-border insolvency proceedings, it is necessary to analyze the relevant rules in the field of private international law, when the international character of the insolvency legal relationship is reflected in relation to another third country of the European Union.*

Key words: *Centre of main interests, European Union law, private international law, insolvency proceedings.*

1. Introduction

The rules of procedure in cross-border insolvency proceedings govern issues arising from conflicts of jurisdiction which may arise in this matter, namely the determination of jurisdiction, the establishment of the law applicable to insolvency proceedings and the legal effects to be recognized in a State other than that in which a judgment was given. In principle, the law applicable to insolvency proceedings (*lex concursus*) is the law of the State on whose territory the main proceedings were instituted, but the opening of the main proceedings may coexist with a secondary procedure, in which the law of the State on whose territory the secondary proceedings were opened would apply. Both variants presuppose certain situations arising in the procedure may be regulated by a foreign law. However, before knowing which law is applicable, it is necessary to determine the competent court to resolve the case.

2. Jurisdiction under European Union Law

According to the Romanian civil procedural law, the court has the obligation that before analyzing the legal report field to the court, to rule with priority on its own competence. Article 1071 para. 1 of the Code of Civil Procedure stipulates that “(1) The notified court verifies ex officio its international jurisdiction, proceeding according to the

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internal rules on jurisdiction, and if it establishes that neither it nor any other Romanian court is competent, it rejects the request as not being within Romanian jurisdiction, subject to the application of the provisions of art. 1070. The decision of the court is subject to appeal to the hierarchically superior court. (2) The international incompetence of the Romanian court can be invoked in any state of the process, even directly in the appeals. The provisions of art. 1067 remain applicable". Although the norm described by art. 1067 of the Code of Civil Procedure allows the voluntary extension of jurisdiction in favor of Romanian courts, in matters of insolvency the parties cannot validly agree on jurisdiction because jurisdiction in insolvency is exclusive, both Community regulations and conflicting rules of private international law referring to the law of the forum (*lex fori*) the latter having an imperative character regarding competence.

Given the scope of Community regulations, different from that of Title III of Law 85/2014, the Romanian courts will have to establish the applicable procedural rules in relation to the scope of each normative act. Thus, when the legal relationship with an element of foreignness has as a party a third state of the European Union, the applicable procedural rules will be those provided by Law 85/2014, compared to the situation where the party in the legal relationship with an element of foreignness is one of the states of the European Union, in which case the applicable rules will be those of the Community regulations.

In European Union law, from 26 June 2017 in matters of jurisdiction, the provisions of Regulation (EU) 848/2015 are applicable between Member States. Jurisdiction over cross-border insolvency belongs to the courts, and the currently applicable regulation defines the term "court" as "the judicial body or any other competent authority in a Member State, empowered to open insolvency proceedings or give judgments in that court proceedings (art. 2 letter d of the Regulation)"; As can be seen, the term "court" is widely used and does not necessarily imply the intervention of a judicial authority, but may open insolvency proceedings, confirm them or take decisions during this procedure and anybody empowered by national law in this, however, in compliance with the Regulation and provided that the acts and formalities provided for by law in insolvency proceedings are officially recognized and enforceable in the Member State where the insolvency proceedings are opened.

The power to open insolvency proceedings rests with the court of the Member State in whose territory the debtor's main interests - COMI or CIP - are located (Article 3 of the Regulations). Until proven otherwise, the place where the registered office of the legal person subject to the procedure is located shall be considered to be the center of the debtor's main interests. The presumption is useful, given the principle of legal certainty and the fact that the registered office is known to all interested parties due to its publicity. It can be overturned only by invoking objective factors that can be verified by third parties.

Being referred with a preliminary question regarding the interpretation of art. 3 align. 1, second thesis of Regulation, The European Court of Justice stated in Case C-341/04 that the presumption established by the Regulation that the center of a subsidiary's main interests is placed in the Member State in which its registered office is situated can

be overturned by proof of a different real situation, such as the case of a company which has not carried on any activity on the territory of the Member State in which its registered office is situated. On the other hand, if a company carries on its economic activity in the Member State in which it is located and its registered office, the fact that its business is controlled by a parent company established in another Member State is not sufficient to rebut the presumption established by regulations.

The center of main interests must correspond to the place where the debtor normally conducts his interests and can therefore be verified by third parties. Thus, the presumption that the registered office is also the center of the main interests of the debtor can be overturned when it can be proved that the main interests of the debtor are usually taken to another secondary office. The Romanian courts have considered that when the debtor company is a branch established in Romania by a company with its registered office on the territory of a Member State of the European Union, which carries out its entire activity in Romania and where all creditors, assets and employees of the company are in Romania, then the secondary headquarters of this company, respectively the branch opened in Romania, will be considered the center of the main interests of the debtor (see the *sentence of August 24, 2009 pronounced in File 33914/3/2009 of the Bucharest Tribunal, commercial section VII*).

The time when the center of the debtor's main interests is assessed is that of the referral to the court, regardless of whether after the application is filed, but before the decision to open the procedure is made, the debtor transfers his center of main interests to the territory of a state other than the initial one towards which the notification had previously been made.

The new arrangement of Regulation (EU) 848/2015 is more precise, in the sense that the center of the debtor's main interests is the place where the debtor normally manages his interests and which is verifiable by third parties, thus confirming the solutions in the CJEU case law. The Regulation stated that the center of main interests would in principle be located where the debtor's registered office is registered. In the case of a company or legal person, the center of main interests is presumed to be, unless proven otherwise, the place where the registered office is located, but to prevent fraudulent and abusive use of the most favorable court search practice, this presumption applies only if the registered office has not moved to another Member State in the three months preceding the request to open insolvency proceedings. The notion of "headquarters" means any place of operations where a debtor has exercised in the last three months before the application for the opening of the main insolvency proceedings, on a non-transitional basis, an economic activity involving human and active resources.

Given that the new provisions also apply to individual debtors, the Regulation (EU) provides that in the case of a natural or self-employed debtor, the center of main interests is presumed to be the principal place of business, in the absence of evidence to the contrary, but in order to prevent the fraudulent and abusive use of the most favorable court search practice, this presumption applies only if the principal place of business has not moved to another Member State in the three months prior to the request to open insolvency proceedings. In the case of any other natural person, the

center of main interests is presumed to be the place where the natural person has his habitual residence, in the absence of evidence to the contrary. This presumption only applies if the habitual residence has not moved to another Member State in the six months preceding the request to open insolvency proceedings.

The presumptions that the registered office, the principal place of business and the habitual residence are the center of main interests are relative, and the relevant court of a Member State should carefully check whether the center of the debtor's main interests is indeed in that Member State. In the case of a company, it should be possible to rebut this presumption if the company's head office is located in a Member State other than that in which it has its registered office and where a comprehensive assessment of all relevant factors decides, in a verifiable manner by third parties, that the actual center of management and supervision of the company and the center of management of its interests are located in that other Member State. In the case of a natural person who is not self-employed, it should be possible to rebut this presumption, for example, if most of the debtor's assets are outside the Member State in which the debtor has his habitual residence or where it can be established that the main reason for moving was the opening of insolvency proceedings before the new court and if such opening could significantly affect the interests of creditors whose business with the debtor was held before moving. In any case, if the circumstances of the case give rise to doubts as to the jurisdiction of the court, it will have to ask the debtor to present additional evidence to substantiate his claims and, if the law applicable to insolvency proceedings allows it, to give the creditors of the debtor the opportunity to present their views on jurisdiction. When determining whether the center of the debtor's main interests is verifiable by third parties, special attention should be paid to creditors and their perception of where the debtor manages his interests. This may require the creditors to be informed in good time of the new place where the debtor operates, for example by drawing attention to the change of address in commercial correspondence or by publicly announcing the new place by other appropriate means.

Under the new rules, the court presented with an application for insolvency proceedings or the body empowered by national law to do so will examine on its own whether it has jurisdiction to open proceedings and whether that jurisdiction is based on a primary or secondary procedure, respectively if the center of the debtor's main interests or its registered office are actually located in its jurisdiction. If the court to which an application for insolvency proceedings had been filed finds that the center of main interests is not located in its territory, it should not open a main insolvency proceeding. The debtor or any creditor may challenge in court the decision to open the main insolvency proceedings for reasons of international jurisdiction.

The courts of the Member State in whose territory insolvency proceedings have been instituted shall have jurisdiction in any action directly arising out of and in connection with the insolvency proceedings. Actions which are so closely linked that it is appropriate to investigate and adjudicate them at the same time in order to avoid the risk of irreconcilable judgments if they are tried separately are considered to be related. These actions include revocation actions brought against defendants from other

Member States and actions relating to obligations arising during insolvency proceedings, such as advances for the payment of procedural costs. On the other hand, actions aimed at fulfilling the obligations under a contract concluded by the debtor before the opening of the procedure do not flow directly from the procedure. If such an action is associated with another action based on general civil and commercial law, the insolvency practitioner will be able to bring both actions in the courts of the defendant's domicile, if he considers it is more effective to bring the action thus. For example, this could happen if the insolvency practitioner wishes to combine a liability action against the administrator based on insolvency law with an action based on company law or general tort law.

The competent court to open a main insolvency proceeding will be empowered to order interim and precautionary measures from the time the application for the opening of the proceedings is submitted. In this respect, this Regulation should provide for various possibilities. On the one hand, the court having jurisdiction in the main proceedings should also be empowered to order interim measures and the preservation of property located on the territory of other Member States. On the other hand, an insolvency practitioner provisionally appointed before the opening of the main proceedings may, in the Member State in which there is a registered office of the debtor, request the adoption of the conservation measures provided for by the legislation of those Member States.

3. Jurisdiction in Cross-border Insolvency under Private International Law

Jurisdiction in cross-border insolvency involves the determination of the competent court which has the right to open insolvency proceedings with an element of foreignness. There is a conflict of jurisdictions in the case where the courts of two or more states appear to be called upon to settle the case which has an element of extraneity. The court invested with the settlement of the dispute with an element of foreignness must determine in advance its competence to resolve such a dispute. This is done according to its own legal norm. The procedure is therefore subject to the law of the forum, and the effects of foreign judgments are also determined by its own legal norm. Title III of Law no. 85/2014 includes norms of private international law in the matter of insolvency, and in the matter of jurisdiction, art. 276 of the law establishes that the attributions regarding the recognition of foreign proceedings and the cooperation with foreign courts are within the competence of the tribunal, through the syndical judge, as well as of the Romanian representative.

From the point of view of territorial jurisdiction, the competent court will be the one in the constituency where the debtor's registered office is located. For the purposes of the law, it is considered that the debtor, a foreign legal entity, has its headquarters in Romania and if it has on the territory of the country a branch, agency, representation or any other entity without legal personality. If the debtor has several offices in Romania, the competence belongs to any of the courts in whose district the respective offices are located, and if the debtor does not have any office in Romania, the competent court will be: a) the court or any of the courts in whose district there are real estate belonging to

the debtor, when in the object of the application real estate is found exclusively or together with other goods; b) the court in whose district the register in which the listed ship or aircraft that is the subject of the application is kept; c) the court in whose district the headquarters of the Romanian company where the debtor holds the securities that are the object of the application is located; d) The Bucharest Tribunal, in case the object of the request is the intellectual property rights protected in Romania, government securities, treasury bills, state and municipal bonds belonging to the debtor; e) if the object of the request is the debtor's claims on a person or public authority, the court in whose district the domicile or residence is located, respectively the seat of the person or public authority concerned.

The territorial jurisdiction of the court is exclusive and is determined by the location, in the broad sense, of the debtor or, in his absence, by the nature of the assets for which recognition or cooperation is sought. Thus, we will have the following situations: for immovable property, the court of the district in which such property is situated shall have jurisdiction; for goods representing ships or aircraft, the competent court shall be the court in whose district the register in which they are entered is kept; for the assets consisting in securities held by the foreign debtor subject to the insolvency procedure, the court in whose area the headquarters of the issuing Romanian company is located will be competent, as provided by art. 2622 para. (2) lit. a) Civil Code "the law applicable to securities is the law applicable to the organic status of the issuing legal entity"; for intellectual property rights protected in Romania, government securities, treasury bills, state and municipal bonds belonging to the debtor, the competent court will be the Bucharest Municipal Court; for the debt rights of the foreign debtor subject to the insolvency procedure on a Romanian public person or authority, the court in whose area the domicile/residence/headquarters of the respective public person or authority is located will be competent.

4. Conclusions

In conclusion, the jurisdiction in insolvency proceedings with an element of foreignness is analysed according to the content of the link point of this element, respectively whether it is located in or outside the European Union, in the first case the rules of private international law are incidental, and in the second situation the European Regulation 848/2015 being applicable.

References

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