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4. *Some Topics related to the Recognition and Enforcement of Judicial Decisions in
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Migration of the centre of main interest

In 2002 the European Insolvency Regulation entered into force.¹ The Regulation initiates an efficient and effective system to deal with the recognition of insolvency proceedings in different member states and to coordinate measures relating to the assets of an insolvent debtor. This is of major importance because cross-border insolvencies have great impact on the functioning of the international market. The Regulation provides guidelines to determine where and based on which law insolvency proceedings can be opened. The Regulation mentions main and non-main (secondary) proceedings. According to Article 3(1) of the Regulation, main proceedings can be opened in a member state where the debtor has his or her 'centre of main interest' (COMI). These proceedings have a universal scope.² Secondary proceedings can be opened in the state where the debtor has an establishment. An establishment is defined in Article 2(h) of the Regulation as "any place of operations where the debtor carries out a non-transitory economic activity with human means and goods". Secondary proceedings have a territorial scope only.³ They are designed primarily to protect local interests.

There is no definition of the COMI in the Regulation, but according to Recital 13 the COMI "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". The COMI applies to companies as well as private individuals. With regard to companies there is the presumption that the centre of main interest is the place where the registered office is located, in the absence of proof to the contrary.⁴ In the case of a natural person who is not self-employed there is no such presumption and the place where one lives is considered to be one's COMI, not the place where one works. Prior to the Eurofood case⁵ there was a lot of discussion about Article 3(1) of the Regulation. It was unclear when the presumption could be rebutted. In the Eurofood case the court decided: "the presumption in article 3 section 1 of the Regulation can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which location at that registered office is deemed to reflect. That could be true in particular in the case of a company not carrying out any business in the territory of the member state in which its registered office is situated." It was not to be expected that the Eurofood case would lessen the controversy surrounding this subject. However, since Eurofood the ages of great European cross-border struggles have come to an end. But have there been other struggles and do we know better now how to avoid them?

After the Eurofood case, one of the matters courts still have to deal with is the possibility of 'forum shopping'. Forum shopping is the transfer of assets or judicial proceedings from one member state to another in order to obtain the most favourable legal position. For a properly functioning international market it is of great importance to avoid these

¹ Council Regulation (EC) No. 1346/2000 of 29 May 2000, OJ L160, 30.6.2000.

² Article 3(2) InsReg juncto Recital 13.

³ Article 3(2) juncto Article 2(h) InsReg.

⁴ See Virgos/Schmit Report (1996), no 75.

⁵ European Court of Justice 2 May 2006, nr. C-341/04, Eurofood.

transfers. Today I will deal with the Schefenacker and PIN cases and discuss the question if the constructions used in those cases could be seen as forum shopping.

In 2006, German auto part maker Schefenacker AG (Schefenacker) moved its COMI from Germany to the United Kingdom (UK). This was done because it was considered favourable to use the English legal system for bankruptcy. There are better possibilities for the reorganisation of a business in the UK than in Germany. Hence, the German company was transformed into an English limited company to make use of the Company Voluntary Arrangement or section 425 of the Companies Act 1985 Scheme of Arrangement (restructuring arrangement in the UK). In the UK 75% of the stakeholders must support this Arrangement in order to be able use it, whereas under German law this is only possible with the approval of all stakeholders. Schefenacker AG did not go to court for this strategic moving of its COMI, because the majority of the stakeholders supported it. The reason Schefenacker moved its interests was that the company believed that the differences between German and English law were so significant that it was preferable to spend millions of euros and pounds to change its COMI. However, it is doubtful if it was worth it to spend so much money on restructuring. What Schefenacker did in 2006 can be seen as a form of forum shopping.

In 2008 the insolvency proceedings of the PIN Group AG S.A. (PIN case) were opened in Cologne.⁶ The PIN Group was Germany's second largest mail service provider. The holding company of this group was registered in Luxemburg, but the offices of the management staff were transferred to Cologne. In the Eurofood case the European Court of Justice ruled that the presumption from Article 3(1) of the Regulation could only be rebutted on the basis of factors that were both objective and ascertainable by third parties. The Court in Cologne reasoned that creditors and third parties could have ascertained that the material and important business decisions of the company were being made in Cologne. Therefore, the Court determined that the COMI was in Cologne and rejected the argument that the migration of the Luxembourgish holding companies could be seen as a form of forum shopping. However, the question is: is this true? The real reason they moved to Cologne was to open pre-proceedings. In Cologne the possibility exists to ask for the opinion of the Court in advance. With the help of this preliminary opinion, one can estimate what the decision of the Court might be if one would actually start proceedings. Based on this preliminary opinion, one can decide what further actions should be taken. In reply to this judgement, other parts of Germany accused Cologne of going one step too far. The Cologne Court should not have made this decision. To determine whether the PIN case can be seen as forum shopping, one has to establish whether or not the COMI was moved to Cologne. The answer to this question is not clear. The importance of this case for future cross-border restructurings in Europe is that, according to the Cologne Court, a company's COMI can, under certain circumstances, be moved to another member state.

One should not be surprised if other situations that are similar to those in the Schefenacker or PIN cases will occur, for example in a context between Germany and Alsace-Lorraine (France). The discharge of debts of natural persons happens a lot faster in Alsace-Lorraine than under German law. Therefore, it might be very tempting in some cases to open insolvency proceedings there. People might decide to move and make use of a different law system. This can be seen as a semi-fraudulent application. Legally it is not forbidden, but it is something that the Regulation wants to avoid to guarantee a proper functioning of the international market. In addition, one of the standards to determine where a COMI is located is to check where the bills for fixed costs are sent to and what amount they add up to. Judges might be charged with being a sleuth, but have effectively barred the way in the past. It is still difficult to prove that one's COMI is in a different place than where one lives.

⁶ Amtsgericht Cologne 19 February 2008, 73 IE 1/08, PIN Group.

In conclusion, a combination of little ordinance and a lot of money available can be the basis for forum shopping. Examples like the PIN and Schefenacker cases show that there is a need for effective restructuring of the German law on this topic. The German legislator has carried out some reforms already in order to protect the international market from forum shopping. Amongst them is the introduction of the MOMI, the 'Modernisierungs Gesetz'. Apart from the reforms made in domestic law, there should be more communication and cooperation between courts in different member states.⁷ An example of a case where this has happened is BenQ.⁸

BenQ Holding BV had a permanent location in the Netherlands and a subsidiary in Munich. Employees were working in Munich and also in the Netherlands. All the activities were taking place in Munich. There were two managing directors, one in Amsterdam and one 'travelling part-time manager'. For all his decisions, the second director needed the consent of the other director. The director residing in the Netherlands had the power to make decisions on his own. In December 2006 the Dutch company filed a petition for a moratorium ('surseance van betaling'). The Amsterdam Court granted an immediate, but preliminary order. A couple of days later the German part of the company filed for bankruptcy in Munich. The judge granted the opening of insolvency proceedings, but did not yet decide on the type of proceedings. The story goes that the German judge phoned the judge in Amsterdam in order to decide what type of proceedings should be opened. The result was that on January 31, 2007 the Amsterdam Court opened main proceedings and a few days later secondary proceedings were opened in Munich. The communication between the courts (judges) prevented main insolvency proceedings from being opened in both the Netherlands and in Germany. This is a good example of how communication and cooperation between courts can be very useful in international insolvency proceedings.

Recognition of judgements and the public policy defence

Besides the problem of forum shopping, there are also problems with the automatic recognition of foreign judgements. With regard to this matter, one of the most important cases is the Brochier case from 2006.⁹

Brochier, an English limited company with its effective seat in the United Kingdom but with all of its employees in Germany, opened main insolvency proceedings in Nuremberg on August 2 at 14:30 hours. These main proceedings were opened a very short while after the opening of main proceedings at 12:34 hours the same day in a London Court. The Court in Nuremberg had not yet been informed about the opening of the first main proceedings when it opened the main proceedings. The judge in Nuremberg decided that the English proceedings did not need to be recognized. The only reason why it can be decided not to recognize such proceedings is a 'violation of public policy', as described in Article 26 of the Insolvency Regulation. The German court stated that German public policy was violated. It gave the following reasons to support this point of view: (i) the liquidators were appointed by associates of the applicant, (ii) the English court did nothing to examine the case, and (iii) insolvency proceedings were opened without giving any reasons as to why this was done.

In the Brochier case Article 26 was used for the first time. After the liquidators approached the English Court and the Nuremberg Court denied the decision on the grounds mentioned above, the English Court responded, in short, by saying: "We do not believe that the COMI of Brochier Limited is in London. Perhaps we could say that it has been in Nuremberg all the time". The English Court subsequently denied its international jurisdiction.

⁷ Article 31 InsReg.

⁸ District Court of Amsterdam, 27 February 2007, BenQ Mobile Holding BV.

⁹ High Court of Justice Chancery Division, 15 August 2006, Hans Brochier Ltd.

Another case that illustrates the problems concerning automatic recognition is the *Stojevic* case.¹⁰ Mr. Stojevic, an Austrian resident, had an office in London and lived there as well. A creditor, a bank, filed for the bankruptcy of Mr. Stojevic in the United Kingdom. After main proceedings were opened there, an application for the opening of insolvency proceedings was submitted in Austria. The argument was that the COMI had been in Austria all the time. The Vienna Court said that it had to recognize the decision of the English Court and that it was not in the position to open main proceedings. The Vienna Court dismissed the application for opening main insolvency proceedings and also the application for secondary proceedings.¹¹ The reason for rejecting the application for secondary proceedings was the fact that Stojevic was an Austrian resident only. To open secondary proceedings it is necessary that the debtor has an establishment in the member state. However, three years later the United Kingdom recognized that there was no COMI in London and that it had been in Vienna all the time. On appeal, the original judgement was lifted. The English Court argued that it has to deal with a lot of bankruptcy applications and does not have the time to examine them before making a judgement. English courts first open proceedings and then examine them.

The aim of the Regulation is to initiate an efficient and effective system to deal with the recognition of insolvency proceedings in different member states. To ensure this, the system is based on automatic recognition.¹² The result of this system is that the judgement opening main proceedings will have the same effect in any other member state as under the law of the state in which the proceedings were opened. Article 16 of the Regulation establishes the principle of automatic recognition:

“Any judgement opening insolvency proceedings handed down by a court of a member state which has jurisdiction pursuant to Article 3 shall be recognized in all the other member states from the time it becomes effective in the state of the opening of proceedings”. In addition, Article 17 of the Regulation states that the recognition operates with no further formalities and Article 18 guarantees the recognition of the appointment of the liquidator and his powers. Recital 22 concerning the automatic recognition of the judgement in other member states, reads: “automatic recognition should mean that the effects attributed to the proceedings by the law of the state in which the proceedings were opened extend to all the member states”. This system of automatic recognition is based on the principle of ‘mutual trust’. Mutual trust is a political phrase and is a fundamental cornerstone of the European Court of Justice. The principle of mutual trust also played a part in the *Eurofood* case. In that case a foreign court’s judgement that it had jurisdiction was not to be examined, one had to trust that this judgement was well considered. One was not authorized to have second thoughts about the decision made in another member state. But is this the way it should be? Does a member state have to trust a judgement of another member state if this judgement is not examined? Doesn’t trust have to be earned? Are there any minimum requirements that have to be met before one give one’s trust?

Nonetheless, the principle of mutual trust remains a fundamental cornerstone of the Regulation. Therefore, the only grounds on which a member state can refuse recognition are those concerning the state’s ‘public policy’.¹³ Violation of public policy in particular means violation of fundamental principles or constitutional rights and liberties of the individual. In a state where the court has to recognize the jurisdiction of a foreign court, the court is only permitted to consider whether the foreign judgement will have effects that are contrary to the state’s public policy. If that is the case it can refuse recognition.

In the *Brochier* case, the notion of public policy was overextended. The court at Nuremberg tried for over three years to find something effective against the English

¹⁰ District Court of Vienna, March 2005, EuLF 3-2005, II-108; NZI 2005, 465, *Stojevic*.

¹¹ Article 3(2) juncto Article 2(h) InsReg.

¹² Article 16 EU InsReg.

¹³ Article 26 EU InsReg.

evaluation, to hold the liquidators personally liable. No one could have ever foreseen what happened in Nuremberg. Moreover, did anybody outside of Germany really care about the decision of the Nuremberg Court, apart from the English liquidators? And even the liquidators did not challenge it. I doubt if a higher court had approved of the decision laid down by the Nuremberg Court if it would have been challenged. The Nuremberg Court's interpretation of the concept of 'public policy' might not be the right one. This is how the rule can be used or misused.

Brochier was the last of the big confrontations. The decision by the Nuremberg Court should be seen as a warning to London: "do not go too far and do not be too sure that your judgement will have effect abroad".

The last point of Article 26 of the Regulation regards the violation of public rights, in particular the right to a fair trial. The question here is: who has these rights? Do creditors have these rights? If one wants to appeal a court's decision, one has to do this in the member state where the decision was made. One cannot complain about the decision without making an appeal at a higher court. If the creditors indeed have the right to a fair trial, it can be argued that their possibilities to fight a judgement are too limited. The Regulation gives no definite answer to this question. Under Article 26 it is possible to completely or partially refuse to recognize a decision. Partial non-recognition might be the case when the opening of the main proceedings as such is recognized, but the appointment of a certain liquidator is not. This partial non-recognition is not an everyday thing. An example of this concept is: main proceedings are opened in the Netherlands. The judgements contain the opening of the main proceedings and the appointment of the liquidator, but also the rule that all mail has to go from the debtor to the liquidator. In this case Ireland has to recognize this decision but the Irish constitution says that sending the mail to the liquidator is against the rules of privacy. Ireland most probably will recognize the judgement except for the stipulation that the mail has to be sent to the liquidator.

Furthermore, in the Eurofood case Ireland made an objection with regard to the hearing in Italy. The form of hearing conducted in Italy was seen as being in conflict with Irish public policy. Also in the BenQ Holding case an appeal to public policy was made, before communication between both judges took place. There was a subsidiary in Munich and all the activities took place in Munich. The Munich Court determined that the COMI of the Holding was in Munich. The German liquidator said: "We will make use of the statement that the first judgement in Amsterdam did not refer to the fact if the opening regarded main or non-main proceedings. Dutch local law says that every judgement should contain the text that it either concerns main or secondary proceedings. So the judgement itself did not follow domestic procedural rules". See Article 6(4) of the Netherlands Bankruptcy Act. In light of the Eurofood case it is doubtful if this defence would hold.

Conclusion

The overall lesson to be learned here is that since Eurofood the big struggles are over, yet there are still certain situations and cases in which questions arise regarding the use of the Regulation or even the need to change it. This is important because of the great impact of cross-border insolvencies on the functioning of the international market. The Regulation, for example, wants to avoid forum shopping. This is not completely excluded, as we saw in the PIN and Schefenacker cases. Another problem is the fact that there is no other rule besides the principle of 'mutual trust' to recognize foreign decisions. To avoid cases like Stojevic and Brochier, Articles 3 and 16 must be read carefully. However, there is no perfect solution.

Finally, I would like to offer four points to take into consideration in order to avoid cases such as those mentioned in this article. They are:

- The principle of mutual trust must be given less weight;
- There must be a clear avoidance definition, derived from Article 25 of the Regulation;
- There should be special rules about the examination before the opening of main proceedings, otherwise Germany always has to compete with countries where no examination is performed;
- Judges have to be included in Article 31 of the Regulation.