

Conditions of main and territorial proceedings

When Hungary accessed to the European Union (1 May, 2004), that day the law of the European Union became part of the Hungarian law, so the Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings (hereafter Regulation) modifying the Hungarian Bankruptcy Act (Act XLIX of 1991 on Bankruptcy and Liquidation Proceedings, hereafter: HBA) divided the judicial practice of insolvency proceedings into two parts. One group of judges determine in their decisions about opening the proceedings against a Hungarian debtor whether the proceedings are main proceedings or territorial ones. The other part of judges refuse to write this determination into their decision, their persuasion is that only in those situation, where there is an international part involved, the type of proceedings have to be determined. If this peculiarity appears during the proceedings, the judge has to decide about the characteristics of the proceedings only in that particular situation.

The discussion arose last year, and there is no solution yet. The problem is special in Hungary because of the HBA. There are several countries all over the world where the judicial examination about the insolvency situation of the debtor is based on his properties and duties, and there are some countries - like Hungary - where the examination is based on the debtor's liquidity. Simplifying the situation: if one of the invoices is not satisfied by the debtor, it¹ becomes insolvent according to the Hungarian law. This solution does not allow the examination of the debtor's properties and duties, so the judge does not know whether the debtor has got any "international aspect".

The articles of international papers speak about the "competition of the courts" which is a real situation, so one could see that the discussed problem is an important one. I thought it was a special Hungarian problem, but recently I have seen an order from Germany where the judge decided in an already opened proceeding only about the matter whether it is a main proceedings or not, so it could be a deeper problem.

My opinion is that every judge has to decide about the characteristics of the proceeding at the time of its opening. It is possible that the insolvency practitioners /liquidators/ do not meet any international problems during the proceeding but if they do, they have to know what their limits are. The determination situates the proceedings among the other possible proceedings that may arise all over the world.

What international situations can occur according to the Regulation?

- I. There is no discussion about the international character if the question is about the COMI or the establishments. In this situation the **debtor** - in his body - is the one that crossed the borders, either its COMI is questionable or its establishments in another country.
- II. The second situation is when the **debtor as an owner** "crosses" the borders, because it has got some properties in another member country. According to the Regulation (Article 5-15.) the creditors have got the rights to satisfy themselves from these properties if they have rights in rem in respect of the debtor's properties. The Articles do not state that the creditor has to have its COMI in another member state as the debtor has, so it is possible that they have their COMI in the same country. The single

¹ In Hungary only companies and other associations, that deal with economic activity, can become a debtor, individuals and natural persons can not be the subjects to insolvency proceedings.

condition this satisfying is that the property with rights in rem should be in another country where the insolvency proceeding was opened.

- III. It is possible that the **creditor** "crosses" the borders, the creditor's COMI is situated in another member state. The Regulation has got rules (1) about the publication of the opening of the proceedings for unknown creditors, (2) about the duty to inform known creditors and (3) the special rules of set-off if the debtor and the creditor have got claims and debts against each other, and the creditor is in another member state.
- IV. It is also possible, that the **debtor as a creditor** "crosses" the borders, it has got claims against somebody whose COMI is in another member state. There are (1) rules about the creditor who has rights in rem over the debtor's claims against somebody whose COMI is in another member state and (2) rules about the situation when an obligation has been honoured for the benefit of a debtor that is subject to insolvency proceeding opened in another member state.

I think that the above mentioned situations could occur also when the pre-examination about the debtor's economic situation has been completed before the opening.

The problems could arise not only within the EU, but all over the world. According to the UNCITRAL Model Law there are foreign main proceedings and foreign non-main proceedings, which categorization is the same as in the Regulation. To be able to decide about the request of the foreign liquidator the judge has to know whether the requested proceeding is a main or a non-main one.

All over the world the judge should decide about international jurisdiction when he takes a complaint or a request of the opening an insolvency proceedings in hand. If the judge has no jurisdiction he has to refuse the complaint or the request because he does not have the right to deal with it.

So it is the first question he has to decide about. It is obvious that generally it does not cause any problems because the parties come from the same country, so the judge does not mention it in his decision, but he has to decide about it. The authority of the court and the jurisdiction within the country are only the second questions to arise..

My opinion is that the judge has to declare in his decision whether the opened proceeding is a main or a non-main one

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