

THE APPLICABLE LAW AND THE “CENTRE OF MAIN INTERESTS” IN CROSS-BORDER INSOLVENCY: A COMPARISON OF THE LEGAL REGULATION IN THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY 1997 AND THE EU REGULATIONS 2000 AND 2015 ON INSOLVENCY PROCEEDINGS

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Annotation. *The article is devoted to the study of the common and distinctive features of the legal regulation of the applicable law and the “Center of Main Interests” in the EU Council Regulation No. 1346/2000 of 29 May 2000 on insolvency proceedings (hereinafter – the EU Regulation 2000), the UNCITRAL Model Law on Cross-Border Insolvency of 1997 (hereinafter – the Model Law) and EU Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (hereinafter – the 2015 EU Regulation). Albeit the provisions of the EU Regulation 2000 have lost their legal force, they are important for scientific and theoretical research in order to better demonstrate both the evolution of the intentions of the EU countries on the example of a comparison with the following act, and to better understand the state of affairs that existed at the beginning of 2000s on the European continent in a more “fair” time frame for the Model Law in comparison.*

The purpose of the article is to identify common and distinctive features in the legal regulation of the applicable law and the “Center of Main Interests” according to the Model Law, EU Regulation 2000 and EU Regulation 2015. It is emphasized that the legal regulation of the applicable law contained in the EU Regulations 2000 and 2015 once again proves the affiliation of these acts to the theory of territorial universalism.

Based on the results of the research, the author concludes that summarizing the analysis of the three normative acts, it should be noted that the EU Regulations 2000 and 2015 contain a completely different legal mechanism for regulating the cross-border insolvency procedure compared to the Model Law, which, among other things, should be connected with different legal nature of these acts. The provisions of the EU Regulation 2015 regarding the determination of the debtor’s center of main interests are much more developed than the provisions of other comparable regulatory acts. The fact that the provisions of the EU Regulation 2000 regarding the consideration of the subjective factor such is the possibility of awareness of third parties in order to determine the center of main interests find their place in the EU Regulation 2015, once again indicates the appropriateness of such regulation.

Keywords: *insolvency, cross-border insolvency, Center of Main Interests, European Union, jurisdiction, European Council Regulation on Insolvency Proceedings.*

1. Introduction.

EU Council Regulation No. 1346/2000 of May 29, 2000 on Insolvency Proceedings (hereinafter – EU Regulation 2000) [1], UNCITRAL Model Law on Cross-Border Insolvency of 1997 (hereinafter – Model

Law) [2] and EU Regulation 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (hereinafter – the 2015 EU Regulation) [3] form a very interesting subject of research, since they have one important common feature – the regulation of cross-border insolvency. At the same time, despite that the provisions of the EU Regulation 2000 have lost their legal force, they are nonetheless important for scientific and theoretical research in order to better demonstrate both the evolution of the intentions of the EU countries on the example of a comparison with the following act, and for a better understanding of the state of affairs that existed at the beginning of 2000 years on the European continent in a more “fair” time frame for the Model Law in comparison.

2. Research status.

Current issues of cross-border insolvency have repeatedly been in the center of attention of Ukrainian and foreign scientists, among whom should be noted: O. Byruykov, M. Verbytska, V. Panchenko, B. Poliakov, O. Stahaeva-Bohovyk and others. Along with this, the legal regulation of the applied law in various international legal acts remains insufficiently researched, which determines the relevance of the scientific understanding of this issue.

3. The purpose of the article.

The purpose of this article is to identify common and distinctive features in the legal regulation of the applicable law and the “Center of Main Interests” under the Model Law, EU Regulation 2000 and EU Regulation 2015.

4. Presentation of the main research material.

Concerning the EU Regulation 2000 and the EU Regulation 2015, it is worth pointing out that there is an important regulation regarding the applicable law. Article 4 of the EU Regulation 2000 and Article 7 of the EU Regulation 2015 are sharing the same title “Applicable law” and devoted to the same issue, where Part 1 determines that the legislation of the country where the proceedings were opened will be applied to insolvency proceedings and their consequences, while Part 2 provides a detailed list of issues that fall under mentioned legal regulation. It should be noted that such regulation undoubtedly belongs to the theory of pure universalism.

However, in reality, the regulation of the issue of applicable law is not limited to only one article with a universal character, and in the EU Regulations 2000 and 2015 there is a certain list of articles with affiliation to territoriality. For example, according to Article 5 of the EU Regulation 2000 and Article 8 of the EU Regulation 2015, the commencement of insolvency proceedings does not affect the rights in rem of creditors regarding the property of the debtor, which is located in the territory of another member state at the time of the opening of the proceedings. Or Article 6 of the EU Regulation 2000 and Article 9 of the EU Regulation 2015 allows creditors to set off claims against the debtor in the member state where such set-off is permitted by insolvency legislation.

In accordance with Article 8 of the EU Regulation 2000, the issue of the impact of insolvency proceedings on contracts regarding immovable property (acquisition or use) is governed by the legislation of the member state on the territory of which the immovable property is located, just as the issue of the impact on employment agreements (Article 10 of the EU Regulation 2000). As for the EU Regulation 2015, such issues are governed by Articles 11 and 13, respectively, but with certain modifications. Therefore, despite the fact that Part 1 of Article 11 of the EU Regulation 2015 has a similar regulation as the Article 8 of the EU Regulation 2000 regarding the issue of the impact of insolvency proceedings on real estate contracts, the second Part of the said article authorizes the court in the main proceedings to amend or terminate the specified contracts in the event if there is no open secondary proceedings in the EU member state, where located property and state law provides that such contracts must be modified or terminated by an insolvency court.

However, in Article 13 of the EU Regulation 2015 there is an even more interesting regulation of the issue of the impact of proceedings on employment agreements. If the general regulation has not been changed in the successor to the EU Regulation 2000, then the addition specified in Part 2 of Article 13 of the EU Regulation 2015, really looks interesting, since in accordance to the provisions of this norm, the courts of the state, where secondary proceedings may be opened, have jurisdiction over changes or termination of employment agreements even without the commencement of secondary proceedings. We consider such legislative regulation to be positive given the fact that employees are naturally one of the most, if not the most, vulnerable participants in the insolvency procedure, and therefore, the legislator must take care of their protection. For such a protection, the theory of territoriality is to some extent better suited than the theory of universalism, since no one can take care of workers better than the domestic courts. However, on the other hand, such an opportunity is given to domestic courts even without the corresponding opening of proceedings, and therefore such states of affairs should be considered as the "Solomon's decision".

It is definitely worth supporting the position of P. Omar, who in his article "The European Insolvency Regulation 2000: A Paradigm of International Insolvency Cooperation" noted: "Drawing a line between the extreme positions of universality and territoriality, the Regulation recognises that strict application of the law of any member state where proceedings are opened to these assets would lead to insuperable problems and likely conflicts. The example cited in support of the framework the Regulation will introduce is that of security interests" [4, p. 223].

It is also worth noting that the legal regulation of the applicable law contained in EU Regulations 2000 and 2015 once again proves that these acts belong to the theory of territorial universalism. We support the position of I. Mevorach, who noted the application of several laws in territorial universalism: "Modified universalism acknowledges that more than one process may be opened because that could be more efficient (for example in mega cases spanning multiple jurisdictions and time-zones), in which case several laws may apply" [5].

At the same time, if we are talking about the Model Law, the described regulation regarding the applied law is completely absent there, not to mention even such provisions as granting jurisdiction to resolve disputes without open proceedings. Again, one should agree with the following position of I. Mevorach: "The MLCBI does not prohibit deference to the forum laws but does not explicitly provide which law applies in main or secondary proceedings. The original drafters of the MLCBI proceeded with caution when they, for the first time, designed an international framework for cross-border insolvency in 1997" [5].

The only provision which could be only remotely comparable with applicable law regulation prescribed in the EU Regulations 2000 and 2015 that is the provision of relief that can be granted to foreign proceedings, as such relief will (in certain cases) be subject to the consideration of the court, and therefore the latter will have to decide which law to apply. However, it is quite clear that local legislation will get the most use. Even in cases where it will be possible to apply the legislation of another state, such foreign regulation naturally cannot go against the existing local law.

Nevertheless, the latter assertion may be also applied to the EU Regulation 2000 and the EU Regulation 2015.

For instance, it is possible to take the invalidation of the debtor's transactions in the insolvency procedure.

In accordance with clause (m) of Part 2 of Article 4 of the 2000 Regulation and clause (m) of Part 2 of Article 7 of the EU Regulation 2015, the rules regarding actions aimed at the detriment of all creditors are determined by the law of the member state where the insolvency proceedings were opened. However, there is an exception in Article 13 of the EU Regulation 2000 and a corresponding exception in Article 16 of the EU Regulation 2015 that significantly reduces the attractiveness of such, at first glance, progressive regulation. After all, according to the aforementioned norms, the provisions of the applicable law regarding the invalidation of the debtor's actions directed to the detriment of creditors are not applied if the person who will benefit from the transaction committed to the detriment of creditors proves that this transaction is subject to regulation by the legislation of another state and in accordance with a such legislation, this action cannot be disputed in this kind of case. The presence of a territorial character should definitely be stated.

Regarding the Model Law, attention is also paid to the question of contesting the debtor's transactions in the insolvency procedure. In particular, Article 23 with the title "Actions to avoid acts detrimental to creditors" is devoted to this issue. Therefore, in this legal norm, only the "fairway" for the implementing state is indicated, namely, the proposal to specify what actions are available in this country for the person or body carrying out the reorganization or liquidation.

It is clear and obvious that such different legal regulations cannot even be compared, and therefore, despite the significant shortcomings, the advantage remains again on the side of the provisions of the EU Regulations 2000 and 2015.

It is also worth to pay attention to such a weak point of the Model Law as the recognition of court decisions. It is considered as weak because there is no mention of such a mechanism in the Model Law at all, nonetheless it is naturally clear that such kind of mechanism is vital for the implementation of the theory of territorial universalism, since without mentioned mechanism the existence and application of the said theory will be greatly doubted. Nevertheless, such a regulatory document as the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (2018) [6] is worth mentioning.

Howsoever, it does not seem possible to share such a metaphorical description of I. Mevorach: "UNCITRAL decided to step into the void and develop a new instrument, which was finally adopted by the organization in 2018 as a Model Law on the Recognition and Enforcement of Insolvency-Related Judgments (MLIJ)" [5]. Since in the EU Regulations 2000 and 2015, a separate article is devoted to this issue – Article 25 of the EU Regulation 2000 and Article 32 of the EU Regulation 2015, which determines the automatic recognition of court decisions of a judicial institution whose decision to open insolvency proceedings was recognized. Therefore, the metaphor "step into the void" is hardly appropriate, because it does not seem possible to call the state of affairs, which has existed for over 18 years as a "void". Nevertheless, we will get a similar situation as with the regulation of insolvency of groups of companies. This issue goes beyond the Model Law of 1997, entailing inevitable shortcomings, in particular as the need for a new implementation of these norms in national legislation, and therefore cadit quaestio about the imperfection of the Model Law.

Returning to the analysis of the mentioned provisions of EU Regulations 2000 and 2015, it should be noted that the provisions of Article 32 of the EU Regulation 2015 are significantly reduced in comparison with Article 25 of the EU Regulation 2000. Similarly, in Article 32 of the EU Regulation 2015 there is a reference to the norms of the Regulation (EU) of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), № 1215/2012 (2012) [7] (hereinafter EU Regulation on recognition and enforcement of judgments), in particular, we are talking about Articles 39–44 and 47–57 of the EU Regulation on recognition and enforcement of judgments. Therefore, as it becomes clear from the analysis of the above articles of the EU Regulation on recognition and enforcement of judgments, we are talking about enforcement and a refusal to enforce judgments. As for Article 25 of the EU Regulation 2000, this norm contains a reference to the provisions of Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters of 1968 [8] (hereinafter – The Brussels Convention 1968), in particular on Articles 31–51, which in their essence are also directed to the enforcement and possible cases of refusal to enforce judgments. Therefore, it is quite logical to claim that there is a similar approach in these two legal acts.

Likewise, we cannot fully agree with the following position of Salah, O., Durlinger, K., and Hooijdonk, B.: "The core principle of the EIR is the automatic recognition of main insolvency proceedings across the Member States. Consequently, judgments rendered in the context of the main insolvency proceedings are automatically recognised across the Member States" [9].

The fact is that the described norms do not contain links to the automatic recognition of decisions exclusively of the main proceedings, moreover, the decisions rendered in both secondary and territorial proceedings are recognized automatically on the same level as decisions in the main proceedings.

After all, attention should definitely be paid to the comparison of the concept of the "Center of main interests of the debtor", i.e., the debtor's COMI in the three legal acts being compared.

If we turn to the provisions of the Model Law, then the only definition of the concept of COMI, which will be possible to find there, will be specified in Part 3 of Article 16, and will have the following form: "In the

absence of proof to the contrary, the debtor's registered office, or habitual residence in the case of an individual, is presumed to be the centre of the debtor's main interests." [1].

In the EU Regulation 2000, the situation is not much better. In this normative act, we find the definition in clause (13) before the main text of the act with such content: "The "centre of main interests" 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." [2]. Also, a certain clarification of this definition can be found in Part 1 of Article 3 of this normative act, where in the second sentence of the first paragraph inconspicuously indicated the presumption of the location of the COMI at the place of the registered office of the company or legal entity in the absence of proofs of the contrary.

Consequently, by and large, both regulations do not have a clear definition of COMI, because even the place of registration cannot be considered as an undisputed COMI of the debtor. Moreover, the imperfection of the given legal regulation is further strengthened by the fact that in both cases such a feature of the debtor's COMI as a possible change of location or the mobility of this concept is not taken into account. We share the position of Marino, S., Stivanello, L., and Vanin, O. which indicated: "Therefore, the COMI shall be traced via objective elements that localize the debtor economic life. It is a mobile notion, in that it follows the debtor movements." [10].

Therefore, regardless of the fact that the provisions of the EU Regulation 2000 bind the definition of the COMI also to the subjective side of third parties, because such a place must be known to them, still such legal regulation cannot be evaluated as successful due to the shortcomings described above. It is worth to support the position of O. Stakheeva-Bohovyk mentioned in her dissertation: "Cross-border insolvency: legal category "center of main interests of the debtor"" [11]: "Despite the importance of developing a unified approach to the interpretation of the legal category "center of main interests of the debtor", international instruments (Council Regulation (EU) 1346/2000 and the UNCITRAL Model Law of 1997) lack an exhaustive legal definition of the mentioned category" [11]. On the other hand, the following statement of the mentioned author causes misunderstanding: "The UNCITRAL Model Law of 1997 somewhat "borrowed" developments from the Council Regulation (EU) 1346/2000 in order to promote the approximation of the legislation of different countries of the world in the field of legal regulation of cross-border insolvency, and also uses the legal category "the center of the main interests of the debtor" as key in the regulation of cross-border insolvency relations" [11], whereas how can a normative legal act of 1997 "borrow" the provisions of another normative act from 2000? It is conceivably to borrow from development projects, however, in no case from the adopted regulatory act itself.

If we are talking about the EU Regulation 2015, then frankly, the regulation of the COMI issue in this act reaches a completely different level compared to its predecessors. In particular, paragraphs 2-4 of Part 1 of Article 3, as well as half of Paragraph 1 of the mentioned norm, are devoted to this issue. Ergo, it is possible to say with confidence that the issue of COMI acquires its own separate legal regulation.

Right from the beginning, it should be felicitous to compare the derived presumption in the Model Law and EU Regulation 2000 with the presumptions available in the EU Regulation 2015.

Thus, paragraph 2 of Part 1 of Article 3 of the EU Regulation 2015 defines a presumption similar to the presumption found in Part 1 of Article 3 of the EU Regulation 2000 regarding the presumption of a company's or legal entity's COMI at the place of the registered office, in the absence of evidence to the contrary. However, the EU Regulation 2015 provides an additional temporal criterion, the observance of which is necessary for the presumption of COMI, namely the place of registration must be unchanged for 3 months from the moment of submission of the request to initiate the opening of insolvency proceedings.

A parallel three-month temporal criterion is defined in paragraph 3 of Part 1 of Article 3 of the EU Regulation 2015 regarding the presumption of the location of the COMI of a natural person-entrepreneur in the place where the main place of business activity of such natural person is located.

In the same way, a temporal criterion of 6 months is defined in paragraph 4 of Part 1 of Article 3 of the EU Regulation 2015 regarding the presumption of the location of the COMI of other natural persons, who do not fall under the criterion of natural persons-entrepreneurs, in the place of their usual place of residence.

In addition to this differentiation of presumptions and territorial criteria for different types of debtors, paragraph 1, part 1, article 3 of the EU Regulation 2015 defines the COMI as follows: “The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.”

Therefore, we should agree with the following position of O. Stakhaeva-Bohovyk: “Analyzing the content of the legal category “center of main interests of the debtor”, which is provided for in Council Regulation (EU) 1346/2000 and the UNCITRAL Model Law of 1997, we can come to the conclusion that both international documents define the “center of the debtor’s main interests” through the prism of the “rule of presumption” [11] and to supplement it with the fact that the EU Regulation 2015 also has a presumptive definition of the concept of COMI.

5. Conclusions.

Thus, by summarizing the above-described analysis of the three normative acts, it must be noted that the EU Regulations 2000 and 2015 contain a completely different legal mechanism for regulating the cross-border insolvency procedure in comparison with the Model Law, which, among other things, should be associated with the different legal nature of these acts. The provisions of the EU Regulation 2015 regarding the determination of the debtor’s COMI are much more developed than the provisions of the others comparative regulatory acts. However, the provisions of the EU Regulation 2000 regarding the consideration of the subjective factor of the possibility of awareness of third parties in order to determine the COMI find their place in the next normative act, which once again proves the relevance of such regulation.

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