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CROSS-BORDER INSOLVENCY IN UKRAINE: GAPS TO FULFILL

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SUMMARY

This article mainly analyses the concepts of debtor's «centre of main interests» («COMI») and «establishment» in cross-border insolvency cases. Main emphasis is made to their interpretation in the EC Regulation on Insolvency Proceedings, 2000 and the UNCITRAL Model Law on Cross-Border Insolvency, 1997 in order to suggest improvements to the legislation of Ukraine. The analysis of these legal instruments gives grounds to state that «COMI» and «establishment», being the criteria for opening the main and non-main insolvency proceedings respectively, should be implemented to the Law of Ukraine by way of introducing the autonomous concepts, independent from the national law.

Key words: Cross-border insolvency, «centre of main interests», «establishment», main and non-main insolvency proceedings.

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Данная статья посвящена, главным образом, анализу концепций «центра основных интересов» («ЦОИ») и «предприятия» должника по делам о трансграничной несостоятельности. Главный акцент уделен интерпретации этих концепций в Регламенте ЕС «О производстве по делам о несостоятельности», 2000 г. и Типовом Законе ЮНСИТРАЛ «О трансграничной несостоятельности», 1997 г. с целью внести предложения об изменении законодательства Украины. Проведенный анализ международных документов дал основания утверждать, что концепции «ЦОИ» и «предприятие» должника, будучи критериями для возбуждения основного и неосновного производства о несостоятельности соответственно, должны быть имплементированы в законодательство Украины методом внедрения автономных конструкций, без поисков аналогов в национальном праве.

Ключевые слова: трансграничная несостоятельность, «центр основных интересов» и «предприятие» должника, основное и неосновное производство по делам о несостоятельности.

Problem setting. ***Cross-border insolvency is deemed to appear once the insolvent debtor has either creditors or / and assets in more than one state. This situation is very wide-spread nowadays considering the accelerating development of international trade and internationalization of relations. To facilitate this it is important to have a strong mechanism, i.e. insolvency legislation, to protect interests of different creditors throughout the world. However, the existing differences in legislation of different states regarding debtor's insolvency require better unification of approaches in order to enable efficient solving of cross-border insolvency cases in practice. Ukraine has recently adopted the Model Law «On Cross-Border Insolvency», 1997 which entered into force on January 19, 2013. These actions towards unification of approaches in Ukraine seem positive, although require improvement, as not all key jurisdictional concepts have been correctly transformed into the national legislation of Ukraine.***

Actuality of the problem. This topic is actual as practically no fundamental research works in Ukraine into the key jurisdictional concepts (connecting factors) in cross-border insolvency have been made so far.

Research level degree. The general topic of cross-border insolvency has been subject to research in some national works of such scholars as O. Biryukov, V. Popondopulo, O. Mokhova, O. Polischyuk, O. Ryaguzov, E. Fainschmidt, etc. The major contribution to this matter has been provided by foreign scholars, like S. Brooks, B. Wessels, R. Westbrook, M. Virgos, K. Walsh, L. Gaylot, F. Garcimartin, L. Gasten, R. Gitlin, G. Moose, D. Troutman, L. Perkins, P. Redmond, I. Fletcher and others.

Aim of the research. The main aim of this article is to analyze the core international documents regulating cross-

border insolvency, i.e. the UNCITRAL Model Law «On Cross-border Insolvency», 1997 and EC Regulation «On Cross-border Insolvency Proceedings», 2000 and provide an insight into the key jurisdictional concepts used therein to effectively solve cross-border insolvency cases, and suggest improvements to the current law of Ukraine on insolvency.

Main material. Solving insolvency problems with a foreign element present in relations, i.e. cross-border insolvency cases, gets more difficult. However, it is deemed possible to resolve this problem by virtue of application of two legal instruments that currently specifically focus on cross-border insolvency issues, i.e. the European Council Regulation on Insolvency Proceedings of May 29, 2000 (hereinafter, the EC Regulation) and the United Nations Commission on International Trade Law Model Law on Cross-Border Insolvency of 1997 (hereinafter, the Model Law). The EC Regulation entered into force on May 31, 2002 and has a direct effect on all EU Member States, except for Denmark [1, 1605]. Its origin began with the European Union Convention on Insolvency Proceedings, 1995 (hereinafter, the EU Convention) which did not come into force [2, 119], and was subsequently transformed into the EC Regulation with similar to the EU Convention provisions. Due to virtual identical character of the EC Regulation it became possible to use an unofficial explanatory report prepared by Professor Miguel Virgos of Spain and M. Etienne Schmit of Luxembourg (hereinafter, the Report) [3]. Although the Report has never been approved by the Council, nor has it been published officially [1, 1606], it has an influential effect when interpreting vague provisions of the EC Regulation [4, 30].

The Model Law, developed by the United Nations Commission on the International Trade Law, was adopted on May 30, 1997. It, in its turn, does not have a direct effect like the EC Regulation, and is designed to assist states to equip their insolvency laws with a modern legal framework to more effectively address cross-border insolvency proceedings concerning debtors experiencing severe financial distress or insolvency [5]. The Model Law can serve as a framework for cooperation and coordination between jurisdictions and does not attempt to unify the substantive insolvency law, and respects the differences among national procedural laws.

Despite the differences in nature of the EC Regulation and the Model Law, both of them use similar concepts that enable solving cross-border insolvency issues, i.e. «main» and «non-main» insolvency proceedings, debtor's «centre of main interests», «establishment», etc. The EC Regulation provides for universal jurisdiction to the EU Member State that opened a main insolvency proceeding, and grants immediate and automatic recognition of such a proceeding in the territory of other EU Member States, except for Denmark. Main insolvency proceedings encompass all the debtor's assets and affect all creditors and assets, wherever located in the world, but for some exceptions. The effects of secondary («non-main» in the language of the Model Law) insolvency proceedings are limited to the assets located in the territory of the EU Member State opening the secondary proceeding and are to be winding-up proceedings. Such secondary proceeding is deemed to protect interests of local creditors [6, 3-4]. The Model Law, in its turn, is less ambitious and does not grant an automatic recognition to the main proceeding, rather makes it subject to recognition in the state where application for such recognition is lodged, and provides for a presumption regarding such recognition.

The basic principle in cross-border insolvency lies in jurisdictional issue, i.e. define a relevant state for opening «main» or «non-main» (territorial or secondary) proceedings to facilitate the recognition thereof in the territory of other states [7]. In this connection two international documents apply the same criteria to solve this jurisdictional challenge, namely, by setting a connecting factor like debtor's ***«centre of main interests»*** (hereinafter, «COMI») to open the main proceeding, and an ***«establishment»*** of the debtor – to open the «non-main» proceeding.

The Law of Ukraine «On Restoring the Solvency of the Debtor or Recognizing the Debtor Insolvent» dated 1992 (as amended) [8] (hereinafter, the Law of Ukraine) by virtue of implementing the provisions of the Model Law also distinguish between two insolvency proceedings, i.e. main and non-main. However, it provides for different connecting factors to solve the jurisdictional problem. Unlike the EC Regulation or the Model Law it does not operate the COMI concept to establish the main insolvency proceeding. The Law of Ukraine instead uses the registration office criterion to define the court of what state has jurisdiction to commence a main insolvency proceeding. It also uses a «permanent establishment» connecting factor to establish a non-main jurisdiction. These connecting factors that differ from the ones suggested by the international documents may lead to the situation of different interpretation which does not enable efficient solving of the jurisdictional issue, and thus the effective resolution of cross-border insolvency cases. Therefore it is important to have a deeper insight into the essence of «COMI» and «establishment» concepts used in the EC Regulation and the Model Law for better understanding their rational and potential implementation into the legislation of Ukraine.

The Model Law, as well as paragraph 1 of Article 3 of the EC Regulation provide that «in the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests *in the absence of proof to the contrary*» [emphasis added] [9]. The EC Regulation went further and provided for an interpretive tool in the form of Recital 13 (hereinafter, Recital 13) that states that 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*» [4, p. 3]. In this connection a battle between the registered seat and real seat factors arises, i.e. what criterion is more dominant when defining COMI location? Also it becomes not clear what circumstances would be most relevant when rebutting the registered office presumption when «proving the contrary» [10, p. 331]. Quite often the registered seat presumption is criticized for its mere formality by giving the possibility of creating letter-box companies and for the absence of a genuine connection with the debtor and a state. Therefore in the situations where debtor's COMI does not coincide with the place of its registration, the suggested presumption of COMI location at the

debtor's place of registration is deemed quite weak, and courts quite often tend to adopt a real seat approach [11]. Hence, a number of additional factors concerning the debtor's business may be considered. *Moss and Smith* [12, p. 39], for example, explain that a more correct approach would be to focus on the question of the location of the place from which *«head office functions»* are carried out rather than on the location of the head office (management) itself. It is suggested that this should correspond to the place where activities such as strategic, executive and administrative decisions regarding accounting, IT, corporate marketing, branching etc., are performed. Another factor to be considered is an objective test based on what is apparent to third parties and especially to creditors. This enables legal risks to be calculated. Nevertheless, the operational head office factor [10, p. 349] recently became a more dominant factor in comparison to ascertainability by third parties factor, which was frequently mentioned in a supporting role [10, p. 352]. The rational for this lay in the fact that use of the operational head office factor as a major criterion in determining COMI could clearly point to the location of an economic centre. Hence, it is seen that the international instruments suggest using the wording of COMI concept as a ground for rebutting a simple presumption of the registered office of the debtor. It looks like the legislation of Ukraine neglected the wording like *«in the absence of proof to the contrary»* that is deemed to be crucial when determining the correct jurisdiction to commence the main insolvency proceeding. It addition to this one can refer to the UNCITRAL Secretariat Note, developed by Working Group V [13, 25] which also expressed a view on competing and determining factors to be taken into account. The latter states that the location of the registered office is *merely* one of the factors to be considered within the whole body of *evidence* for reaching a conclusion as to the location of debtor's COMI. Thus it requires a balancing exercise and a qualitative assessment to be carried out. As Bob *Wessels* stressed judicial decisions on COMI are fact-related.

Another important connecting factor that determines jurisdiction to open the non-main insolvency proceeding is *«establishment»* under the EC Regulation and the Model Law. It is defined as any place of operations where the debtor carries out a non-transitory economic activity with human means and goods [9] or services [14]. There has been a number of discussions regarding what legal and organizational form should be observed to be qualified as an «establishment» present in the territory of a particular state in order to have jurisdiction to open the non-main insolvency proceeding. In *Factortame case* [15] it was decided that «establishment» is a place of actual economic activity done via a permanent establishment for an undefined period of time. In this connection it is not clear whether only permanent establishments could be qualified for «establishment» for the purpose of the Model Law and the EC Regulation; or whether it is possible for a legal entity, say, a subsidiary of a parent company, to be considered as an «establishment» in order to open the non-main insolvency proceedings? Earlier the French commentators stressed that the non-main proceeding cannot be commenced against the subsidiary due to the wording of Article 2(h) of the EC Regulation. They deemed that it relates only to a branch, an agency or offices but not to a legal entity» [16]. However, later this opening has changed to the opposite approach so that the European Court of Justice (hereinafter, the ECJ) held that independent foreign subsidiaries, controlled by their parent companies, could qualify for «establishments» [16]. Moreover, it was stated that «COMI» and «establishment» concepts should have an autonomous meaning, independent from the national legislation of different states [16]. This decision was made in the recent *Interedil case* [17].

Conclusions. To sum up, it is important to stress that solving cross-border insolvency cases is deemed difficult to resolve without proper cooperation between courts of different states. In this connection it is vital to minimize the differences in insolvency legislation of different legal systems. At the first stage it is possible to do by virtue of implementation of provisions of the Model Law. Nevertheless, each state is to proper transmit the rules thereof in order to achieve the positive result. The outcome of such actions in Ukraine is vivid in introducing of Chapter IX to the Law of Ukraine. At the same time the current legislation of Ukraine, in the view of the analyzed provisions of the Model Law and the EC Regulation, proved the need to improve the national law of Ukraine. The first actions to be recommended are to introduce the autonomous concepts of «COMI» and «establishment» into the Law of Ukraine in order to unify the jurisdictional standards when deciding cross-border insolvency cases. At the same time the review of other provisions, like exceptional jurisdiction and reciprocity principle, should also be done in the future.

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ОБЗОР ЗАКОНОДАТЕЛЬСТВА ЕС ПО ВЗАИМОПРИЗНАНИЮ ТОВАРОВ, УСЛУГ, СТАНДАТИЗАЦИИ В СТРОИТЕЛЬНОЙ СФЕРЕ

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SUMMARY

In the article conducted research of legislation of European Union, regulative the questions, related to взаимо by confession of commodities and services, standardization in a building sphere. The question related to development of this legislation is illuminated. Essence of basic normatively-legal acts opens up in a sphere confessions of products, certification of building products. It is reasonable, that the study of legislation of EC is needed in the field of certification of building products by virtue of a number of the reasons. Firstly, with the purpose of taking to taking to the Ukrainian producers of building products, mastering the European market, for an increase competition of ability of their products. Secondly, any producers, placing products at the internal market of European Union, must understand the European system of technical legislation and rules that behave to the product, to define whether products answer obligatory requirements. Thirdly - for more effective adaptation of the Ukrainian legislation in this sphere.

Key words: legislation of EC, building products, confession of commodities, certification.

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В статье проводится исследование законодательства Европейского Союза, регулирующего вопросы, связанные с взаимопризнанием товаров и услуг, стандартизацией в строительной сфере. Освещается вопрос, связанный с развитием этого законодательства. Раскрывается суть основных нормативно-правовых актов в сфере взаимопризнания продукции и услуг, сертификации строительной продукции. Обосновано, что необходимо изучение законодательства ЕС в сфере сертификации строительной продукции в силу разных причин. Во-первых, с целью доведения до сведения украинским производителям строительной продукции, осваивающим европейский рынок, для повышения конкурентоспособности их продукции. Во-вторых, любые производители, размещающие продукцию на внутреннем рынке Европейского Союза, должны понимать европейскую систему технического законодательства и правила, которые используются к продукту, чтобы определить, отвечает ли продукция обязательным требования. В-третьих – для более эффективной адаптации украинского законодательства в этой сфере.

Ключевые слова: законодательство ЕС, строительная продукция, взаимопризнание товаров, сертификация.

Постановка проблемы. Проблема исследования законодательства ЕС в сфере взаимопризнания товаров и сертификации строительной продукции является одним из важных направлений украинского законодательства в сфере строительства, так как использование европейского законодательства, связанного со строительной продукцией, позволяет облегчить завоевание внутреннего строительного рынка ЕС украинскими потребителями и товаропроизводителями строительной продукции.

Актуальность темы исследования обусловлена несколькими факторами. Во-первых, данная тема характеризуется тем, что в настоящее время практически нет ни одной фундаментальной работы по законодательству ЕС, которое регулирует взаимопризнание товаров, услуг и стандартизацию строительной продукции, что затрудняет процесс имплементации и адаптации европейских правовых норм к законодательству Украины в строительной сфере. Во-вторых, данная тема имеет очень большой практический интерес для завоевания и использования внутреннего строительного рынка ЕС.

Состояние исследования. На основании анализа научной литературы,