The Battle for Company Reorganisations

As between Germany and England, business people not only quarrel about the preferred form of corporation (i.e. Ltd. or GmbH), but also about the law applicable to their liquidation or reorganisation.

Recent years have seen a vivid discussion about the advantages and disadvantages of incorporating a company in the form of a "Company limited by shares" (Ltd.) for doing business in Germany. At a glance, the main line of argument has turned on the perceived greater flexibility of English company law. As a result, the German legislator has recently presented a Reform Bill that provides for substantive changes in German company law.

The discussions about the advantages and disadvantages of both legal systems have now turned to focus on the final phase of a corporate cycle: the company's liquidation or its insolvent reorganisation. According to the European Insolvency Regulation, the courts of the Member State in which the debtor has its main interest (its so-called "COMI") have jurisdiction for conducting the main insolvency proceedings, thus determining which law governs those proceedings.

Shortly after the regulation came into force in 2002, the English accountancy and legal profession moved quickly and convinced English courts in various decisions to establish a rule, that in case of a group of companies, respective insolvency orders will be made not only with respect to the English holding company but also with respect to its European subsidiaries, if the administration of such subsidiaries was conducted from England (thus securing the lucrative job as administrator or liquidator for the entire group of companies). Naturally, such transfer of business did not remain unanswered. Various decisions by national courts of other EU Member States (including German courts) followed, objecting to the view of the English courts, until a clarifying judgement by the European Court of Justice was rendered with respect to the Italian Parmalat insolvency, that mainly rejected the English approach.

However, the clash (watched with curiosity by the accountancy, legal and consultancy professions) did focus the attention of the business community on how much forum shopping might be possible in insolvency matters, in order to take advantage of alternative insolvency laws. The saga continued with two German companies (Deutsche Nickel AG and Schefenacker AG) that had carefully undertaken various corporate steps in order to establish their COMI in England and subsequently entered into administration proceedings under English insolvency law (from which they emerged successfully).

Although such kind of forum shopping by debtors may not always be to the advantage of creditors, it has helped the German insolvency profession to realise that globalisation has even reached the competition for the "best" insolvency law. The concerns of the German insolvency profession have gone so far as to convince the Ministry of Justice to set up a working group on measures to be taken, to stop such migration towards England.

However, there are (at least) two sides of the coin for the British-German business community:

- For corporate debtors in distress, it may be worthwhile examining whether Germany or England (or any other European country) offers a more appropriate approach to an intended reorganisation under insolvency laws.
- For creditors, in particular banks, the possibility of forum shopping, however, means that they have to be more careful about corporate moves of their debtors, in order not to find themselves suddenly in an entirely different position, confronted with an insolvency law they had not anticipated when financing was provided.
- And finally, the German legislator will have to reconsider whether it stopped in no-man's land when it reformed Germany's insolvency law in 1999, and whether further reform is required or desirable.

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