**COMI, forum shopping, and the adequate protection of creditors against mid-stream changes in the applicable law – a European perspective**

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For decades, the COMI-principle has been representing a paramount pillar of the global international insolvency law framework (i.e. the UNCITRAL model law), identifying the (most) adequate connecting factor in cross-border insolvency. Recently, however, it has been increasingly criticized for provoking opportunistic forum shopping while subjecting efficient forum choices to substantial costs associated with a COMI transfer. In an effort to promote efficiency-driven forum shopping, it has been proposed to abandon COMI, and facilitate credible self-commitment (in the debtor’s charter), or installing a collective worse-off-test instead.

COMI, however, is not unique to the UNCITRAL model law, but is also enshrined into the EIR, where it serves not only as the decisive factor determining the scope of cross-border recognition, but limits the power of national courts to open (main) proceedings in the first place. Although this anticipates potential litigation over the debtor’s COMI in an early stage and, thus, reduces legal uncertainty (and associated costs), many of the arguments put forward against COMI are equally valid in the intra-EU context.

This holds true especially for managements’ and shareholders’ incentives to unilaterally change the applicable law governing the distribution of assets. Regarding mid-stream substitutions of the corporate structure, including creditor protection instruments featured therein, the EU has recently harmonized cross border conversions. Since 2023, Directive 2019/2121 subjects intra-EU reincorporations to certain safeguards, including guarantees and warrants for pre-existing claims, and preserving their original forum. As an additional means to honor creditors’ ex-ante expectations, it allows member states to demand solvency declarations from the company’s management. Given these EU-level safeguards governing mid-stream corporate law shopping, coherence would demand, that equal measures be instituted to protect pre-existing creditors when it comes to mid-stream changes in the applicable insolvency law.

Against this background, the article analysis possible regulatory amendments aimed at developing a (European) international insolvency law that is both coherent with its corporate counterpart, and economically sound. Compared to the debate over the UNCITRAL model law, the European perspective reveals an even broader picture of the issue. With EU legislation containing both, rules on international jurisdiction (and applicable law) in insolvency matters, and a wide-reaching body of harmonized corporate law basics, it is particularly suited to discuss substantive rules regulating mid-stream changes to the connecting factor(s). Furthermore, in light of the newly added dimension of European pre-insolvency restructuring law introduced by Directive 2019/1023 the European perspective promises to be particularly fruitful: This is because the Directive offers member states the so-called relative priority rule option, which – if transposed into national law – allows distributions to junior classes (or shareholders), creating enhanced incentives for opportunistic forum (and law) shopping. With the predominant position being that COMI is not required to use a jurisdiction’s restructuring regime, this might trigger forum (and law) shopping at an unprecedented scale.