



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

# **Forum shopping and filing insolvency proceedings in a global legal world**

**Insolvency Commission**

**WORKSHOP B**

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**National Report of the Czech Republic**

Kamil Blažek, Leo Javorek

Kinstellar, s.r.o., advokátní kancelář

Na Příkopě 19

117 19 Prague 1

Czech Republic

(420) 221 622 111

[kamil.blazek@kinstellar.com](mailto:kamil.blazek@kinstellar.com)

[leo.javorek@kinstellar.com](mailto:leo.javorek@kinstellar.com)

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In the Czech Republic the jurisdiction of insolvency courts in cross-border matters is governed and the conflict of laws rules are set by Act no. 91/2012, on international private law (“Act on International Private Law”), and directly applicable EU regulation no. 1346/2000, on insolvency proceedings (“Insolvency Regulation”). The Insolvency Regulation shall apply to cases where the debtor’s main centre of interest is situated within the territory of the EU and at least one creditor is situated in another member state. In the event the Insolvency Regulation is not applicable, the conflict of laws shall be governed by the Act on International Private Law, which stipulates that the rules set forth the Insolvency Regulation shall be applied accordingly.

**1. Proper place for commencement of insolvency proceedings and centre of main interests.**

**a. In your jurisdiction which is the proper place for commencement of insolvency proceedings? Is the applicable law determined separately than the venue?**

The proper place for commencement of insolvency proceedings is the country where the debtor’s centre of main interest (“COMI”) is situated. The courts of such country shall have jurisdiction to open insolvency proceedings.

Within the Czech Republic, an insolvency petition must be filed at the general court of the debtor (i.e. the relevant regional court where the debtor has its registered office). Also, the insolvency proceedings may be commenced at a court which has already opened insolvency proceedings with another member of the debtor’s holding.

If the court’s jurisdiction cannot be determined in line with the above (e.g. the debtor is registered in a foreign country), it is possible to file an insolvency petition at the regional court where the debtor has an enterprise or branch office.

The applicable law governing the insolvency proceedings shall always be that of the country (court) where such proceedings are opened (*lex fori concursus*). In other words, the Czech insolvency court shall always apply Czech insolvency law and it is not possible for the insolvency court to apply foreign law.

**b. Is there in your country a notion or definition of the debtor’s centre of main interests (“COMI”)?**

The applicable law does not provide for a definition of the COMI. Point 13 of the preamble to the Insolvency Regulation sets forth that the 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”. In the case of a legal entity, the place of its registered office is presumed to be the COMI.

Further interpretation of the COMI is based on the case law of the European Court of Justice (“ECJ”) and national courts.

**c. Which are the factors relevant to the determination of centre of main interests?**

In the case of a legal entity, the place of its registered office is presumed to be the COMI. This, however, applies only in the absence of proof to the contrary, so it is possible to determine the COMI according to other factors.

Decisions of the ECJ provide for some guidance on what factors shall be applied when determining the COMI. Determination of the COMI should be objective and it shall follow the series of steps mentioned below:

1. the place of its registered office;
2. the place where the debtor conducts the administration of its interests and is ascertainable by third parties (where this differs from the place of registered office);
3. the place where the debtor has intensive economic and other interests, which are not just temporary and which are objectively ascertainable (where this differs from the place of registered office and/or the place where the debtor conducts its administration).

Based on the existing case law the following factors may further be taken into account when determining the COMI:

1. location of everyday management;
2. nationality of the members of the board;
3. location of employees and creditors;
4. the address communicated by the debtor to creditors;
5. the debtor has substantive shares in a number of companies in a certain country;
6. the domicile of an executive body, which is fully and solely responsible for conducting business operations;
7. location of other contractual activities;
8. position of the debtor within a holding;
9. location of human resources policy, bookkeeping and management of information systems.

**d. Is this essential in determining the jurisdiction?**

Yes. The court in the Czech Republic must first decide whether jurisdiction of the Czech courts is given (based on the COMI criteria). If the court comes to the conclusion that the COMI is located in another country, the court shall not open the insolvency proceedings, and in the case that the proceedings are already pending, they shall be stopped.

**2. Movement of the place of registration (or habitual residence) of centre of main interest.**

- a. Is it possible for the debtor to move its place of registration (or habitual residence) prior or after the commencement of insolvency proceedings? Will such a move affect the decision as to centre of main interests and the determination about the commencement of the proceedings?**

As described above, the registered office is only presumed to be the COMI and proof to the contrary is acceptable. Therefore, movement of the registered office may or may not also have an effect on the debtor's COMI.

Two conditions must be met in order for a change of registered office to also mean a change of the COMI:

1. there is no proof that the COMI is located in a different country than the registered office (the COMI shift must be real);
2. the COMI shift must not be abusive. As there is no Czech case law regarding this matter, we may consider a decision of the German Federal Court of Justice, which ruled that if the purpose of the COMI shift is only to transfer value from creditors to the debtor and its owners, it would not be recognised. In such case the COMI would remain located in the original jurisdiction.

The COMI at the time of filing the insolvency petition is decisive and any COMI shifts after the filing of the insolvency petition are not relevant. The court that opened the insolvency proceedings will continue to have jurisdiction even after such shift.

- b. Is it possible to move a debtor's centre of main interests prior to commencement of insolvency proceedings?**

Yes; see paragraph 2(a) above,

- c. Is it possible to move a debtor's centre of main interests between the time of the application for commencement and the actual commencement of those proceedings?**

Yes, but such a move would have no relevance and the court at which the insolvency petition has been filed shall consider its jurisdiction based on COMI as at filing the petition and shall not lose its jurisdiction upon subsequent COMI shift.

- d. If there is evidence of such a move in close proximity to the commencement of the commencement, in determining whether to recognize those proceedings, will the court scrutinize more closely such a move?**

The applicable law does not provide for any explicit "hardening period", which would mean that a former COMI remains decisive in the case an insolvency petition is filed shortly after a COMI shift. To our knowledge there is no relevant Czech case law regarding this issue. However, case law of German courts may provide some

guidance, and the principles formulated by German courts might be an inspiration to the Czech courts too.

In a case that raises such a question, the court may assess whether the COMI shift was or was not abusive. The shift could be considered abusive if its purpose was not to maximize the net assets available for the creditors, but rather to prevent the creditors from obtaining such assets. Close proximity to the commencement of the proceedings could be an indicator that a COMI shift may be abusive, but it would not be the only relevant factor. Even if occurring shortly before filing the insolvency petition, a COMI shift should not be considered abusive if it serves a restructuring objective, maximizes the net value for creditors and is undertaken for those purposes.

**e. Is forum shopping allowed under domestic or supranational law which applies in your jurisdiction?**

One of the main purposes of the Insolvency Regulation is to prevent forum shopping. However, its other objectives are the efficient and effective administration of cross-border insolvency and maximization of the net assets to satisfy creditors. Those two goals may be in conflict in various cases.

The aforesaid is interpreted in a way that forum shopping is allowed if its purpose is to maximize the net assets available to satisfy the creditors' claims. In such case, it should not be considered abusive and should be allowed. On the other hand, if the evident goal of the COMI shift is to benefit the debtor at the expense of creditors (or benefit some creditors at the expense of others), it should not be recognized.

It should also be emphasized that the above only applies to real COMI shifts (i.e. the situation when the debtor actually moves its COMI from one jurisdiction to another). If the COMI shift is fictitious or pretended (e.g. the debtor tries to mislead the court), it should not be recognised.

**f. What are factors in your country that may influence a debtor to choose one forum over another, e.g. judges, favorable laws, case law precedent, etc.?**

There are various factors that debtors take into account when choosing jurisdiction for the insolvency proceedings:

1. some jurisdictions are more likely to allow reorganisation or allow more flexible methods of reorganisation, which plays its role if the parties prefer to reorganise the debtor and avoid its liquidation;
2. the policy regarding protection of employees may be more favourable for the debtor in another jurisdiction;
3. some jurisdictions permit hybrid legal instruments allowing creditors to gain participation in the company (e.g. debt-equity swap), which is useful in the event the creditors wish to be more active and reorganise the company;
4. the influence that the creditors (or debtor) have over the trustee and scope of creditors' rights generally;

5. some jurisdictions may not allow or limit application (satisfaction) of certain kinds of receivables, whereby favouring other types of creditors.

There may be various other reasons for forum shopping, e.g. foreseeability of court judgments, speed and efficiency of insolvency proceedings or professionalism of the courts.

- g. Is it possible for a creditor or other party to force or cause a debtor's insolvency proceedings to be moved (rather than dismissed), as a result of a challenge to the debtor's definition of its centre of main interests?**

If during the insolvency proceedings the Czech court determines that the debtor's COMI as at commencement of the proceedings was situated in another country (and the debtor has no establishment in the Czech Republic), the court shall cease the insolvency proceeding.

Any court decision opening insolvency proceedings is automatically recognised by other member states of the EU. Once the insolvency proceedings have commenced, it is relatively difficult to challenge the jurisdiction of the court under the regime of the Insolvency Regulation. Even though location of the real COMI may be open to dispute, when there are reasonable indications that the COMI is in a certain jurisdiction and the relevant court opens the insolvency proceedings, such proceedings will have priority over any insolvency proceedings opened later in different jurisdictions (i.e. such proceedings could only be opened as secondary proceedings with limited territorial effects).

As follows from the above, under the Insolvency Regulation, it is not possible to directly cause the insolvency proceedings to be moved to another jurisdiction. The pending insolvency proceedings would first have to be ceased by the respective court due to lack of jurisdiction.

### **3. Recognition of foreign proceedings, main and secondary proceedings**

- a. Is the recognition of foreign proceedings allowed in your country? What are the requirements? Is this recognition affected by the notion of centre of main interests?**

The insolvency proceedings before the courts of other EU member countries are automatically recognised in the Czech Republic based on the Insolvency Regulation and there are no special requirements needed (e.g. special recognition proceeding).

The only exception whereby the Czech courts may refuse to recognise such insolvency proceedings is when the effects of such recognition or enforcement would be manifestly contrary to the public policy, in particular its fundamental principles or the constitutional rights and liberties. Only in such cases might the Czech court commence insolvency proceedings after such proceedings have been opened in other EU member country.

Decisions of foreign insolvency courts that fall outside the scope of the Insolvency Regulation shall be recognised in the case that reciprocity with such jurisdiction is

ensured. Also, the COMI must be located in such jurisdiction and property of the debtor must not be subject to insolvency proceedings already opened in the Czech Republic.

- b. Does your relevant domestic or supranational legislation have the notions of main and secondary proceedings or otherwise distinguish between the concepts?**

Yes. A secondary proceeding may be opened if the debtor has an establishment in the country.

- c. Does your legislation permit secondary proceedings to be opened to run in parallel with the main proceedings? Are the effects of secondary proceedings limited to the assets located in that State where secondary proceedings are opened?**

Yes. Effects of the secondary proceedings are limited to assets located in the jurisdiction where the secondary proceedings are opened. Its main purpose is better protection of local creditors and better access to property located in the country.

- d. Does your jurisdiction allow a challenge to proceedings being designated as secondary? If so, please explain in greater detail.**

Secondary proceedings under the Insolvency Regulation may be opened if two conditions are cumulatively met:

1. main insolvency proceedings have been opened;
2. the debtor has an establishment in the country where the secondary proceedings would be opened.

In the event the above is met, the court shall open secondary insolvency proceedings and is not entitled to determine whether or not the debtor is insolvent. In order to challenge the secondary proceedings, it would have to be proven that the conditions mentioned above have not been met. It would have to be proven that:

1. the recognition of the main proceedings should be refused in line with the conditions discussed in paragraph 3(a) above; or
2. the debtor does not have establishment in the jurisdiction.

### **3. Abuse of process**

- a. In your jurisdiction, is a court able to take account of abuse of its processes as a ground to decline recognition?**

The recognition under the Insolvency Regulation is automatic and the Czech court may decline recognition in the event such recognition would be manifestly contrary to the public policy, particularly its fundamental principles or constitutional rights and liberties. Therefore, the abuse of processes would have to reach such intensity in order for it to establish grounds for the Czech court to decline recognition of foreign insolvency proceedings.

**b. What happens if the applicant falsely claims the centre of main interests to be in a particular State?**

In such case the respective court should not open the insolvency proceedings, because it does not have jurisdiction.

**c. Are those issues governed by international or supranational regulations or only by domestic law?**

Those issues are governed mainly by the Insolvency Regulation, which is directly applicable in the EU. The Act on International Private Law (which applies in cases when the Insolvency Regulation does not apply) contains similar principles except for the automatic recognition of the foreign insolvency proceedings.

The insolvency proceedings itself shall be governed by Czech law.