NIKI, COMI, Air Berlin and Art. 5 EIR recast

Written by Lukas Schmidt, Research Fellow at the Center for Transnational Commercial Dispute Resolution (TCDR) of the EBS Law School, Wiesbaden, Germany.

The Regional Court of Berlin has, on the basis of the immediate appeal against the order of the provisional insolvency administration on the assets of NIKI Luftfahrt GmbH (under Austrian law), repealed the decision of the District Court of Charlottenburg (see here) as it finds that international jurisdiction lies with Austrian and not German courts. In its decision, the regional court has dealt with the definition of international jurisdiction, which is based on the debtor's centre of main interests ('COMI'). According to the provisions of the European Insolvency Regulation, that is the place where the debtor usually conducts the administration of its interests and that is ascertainable by third parties.

The court has founded its decisions on the following arguments:
Since the debtor is based in Austria, it is assumed that the centre of their interests is also there (see Art. 3 II EIR recast). If this presumption is to be rebutted, high demands must be made to ensure legal certainty. According to the case-law of the European Court of Justice, objective and, for a third party, recognizable circumstances that would prove that the place of the head office is not located at the registered office are necessary.
The various factors should be considered in their entirety. In the present case, it can not be established with sufficient certainty on the basis of the arguments put forward by the debtor, on the one hand, and the complainant on the other hand, that the COMI is indeed located in Germany. Rather, no uniform picture is recognizable that could justify refuting the presumption.
The place from which the essential business activities of the debtor are controlled, namely Berlin, is not a solely decisive criterion. The fact that Air Berlin had been practically NIKI's only customer, and thus the sales were particularly generated in Germany, was not automatically decisive, as well.
Then again, the fact that the debtor maintains offices in Vienna, in which amongst other things NIKI's financial accounting is conducted, argues for a COMI in Austria. Likewise, the competent supervisory authority is located in Vienna and

the debtor has an Austrian operating license and the airworthiness of the aircraft is monitored from there. In addition, approximately 80% of the employment contracts concluded by the debtor are subject to Austrian employment law.
Finally, the debtor's own behaviour also indicates that it assumes its COMI in Austria. It had not informed the creditors and the public that it had relocated its COMI to Germany. Furthermore, in an insolvency proceeding opened at the request of a creditor before the Korneuburg Regional Court (file reference 35 Se 323 / 17k) in Austria, the debtor did not raise the objection that there was no international competence in Austria.

This should be the first case of application of the 'new' Art. 5 I EIR recast, that regulates the examination of international jurisdiction. It is very likely not the last, as the case shows that the COMI-concept is still controversial. It waits to be seen if the case will even be referred to the German Federal Court of Justice (the Regional Court has admitted the appeal to the German Federal Court of Justice which may be lodged within a period of one month).

The press release of the Regional Court of Berlin can be found here.