

EU PRIVATE INT'L INSOLVENCY LAW FRAMEWORK

1. International Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters

> 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, now
2002 Brussels Regulation

2. International Jurisdiction, Recognition and Applicable Law in Insolvency Matters

- > Regulation 1346/2000 on Insolvency Proceedings
- > Entry into force: 31 may 2002

3. Insurance Undertakings, Credit Institutions and Investment Undertakings

- > 'Insurance undertakings' Directive 2001/17 of 19th March 2001
- > 'Credit institution' Directive of 4th April 2001
- > Implementation dates:
20 April 2003 (insurance) and 5 May 2004 (credit institutions)

EU PRIVATE INT'L INSOLVENCY LAW FRAMEWORK (cont'd)

4. Netting and Securities settlement Systems

- > Directive 1998/26; implementation date was 1 January 1999

5. Financial Collateral Arrangements

- > Proposal for a Directive (OJ C 180, 26/06/2001)
- > Implementation date is 31 December 2004

6. Late Payments in Commercial Transactions.

- > EU Directive 2000/35 of 29th June 2000 on Combating Late Payments in Commercial Transactions (OJ L 200, 08/08/2000)
- > Implementation date for this Directive is 8 August 2002.

GOAL of EU INSOLVENCY REGULATION

> EU wishes to coordinate measures to be taken regarding an insolvent debtor's assets, while the proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively

> InsReg aims to achieve this objective within the scope of judicial cooperation in civil matters within the meaning of Art. 65 of the EC Treaty, so:

a. to determine the *international jurisdiction* of the courts or authorities with regard to the intra-Community effects of insolvency proceedings

b. to create certain uniform *conflict-of-laws rules* for such proceedings

c. to ensure the *recognition and enforcement of judgments* given in such matters

d. to make provisions for the possibility of opening secondary insolvency proceedings

e. to ensure *mutual coordination and communication* between liquidators in main and secondary proceedings

f. to guarantee information for *creditors* and a right to lodge claims

SCOPE IN NATURE / GEOGRAPHY / TIME

From 'Convention' 1995 to Insolvency Regulation

> *TERRITORY*

Community law measure which is binding and directly applicable in Member States, except Denmark

> Applicability in *TIME*: to insolvency proceedings opened 'after its entry into force'.

Art. 43: 'Acts done by a debtor before the entry into force shall continue to be governed by the law which was applicable to them at the time they were done'

> Replaced 10 Conventions between 2 or more Member States (Art. 44.1), but a Convention continues to have effect on proceedings opened before 31 May 2002

> Replaced Council of Europe Convention of Istanbul 1990 (Art. 44.1 (k))

> EU InsReg shall not apply where it is irreconcilable with obligations arising 'in relation to bankruptcy' from convention between Member State and third country before 31 May 2002

> in UK and Northern Ireland when irreconcilable with obligations / arrangements with Commonwealth existing at 31 May 2002

> Declaration (reservation) by Portugal re Art. 26 and 37.

SCOPE IN SUBSTANCE

EU InsReg is applicable (Art 1.1) to proceedings

1. that are '*collective*'
 - > all creditors concerned may seek satisfaction only through these insolvency proceedings, as individual actions will be precluded
2. based on '*the debtors insolvency*' and not on other grounds.
 - > the insolvency-test itself is rooted in the legislation of the *lex concursus*.
3. the proceedings must entail the *total or partial divestment* of the debtor, and
4. the appointment of a '*liquidator*'.

Limited framework:

> 'proceeding' and 'liquidator' should be mentioned in one of the applicable Lists in the Annexes:

- A. Insolvency proceedings referred to in Art. 2(a);
- B. Winding up proceedings, referred to in Art. 2(c), and
- C. 'Liquidator', as referred to in Article 2(b).

IMPACT

The EU Insolvency Regulation applies

> to all (52) listed insolvency proceedings

> in which a person/body (acting as 'liquidator') (58) is appointed

> in 14 EU countries, whether the debtor is a natural person or a legal person, a trader, a merchant or an individual

> but not to insolvency proceedings concerning financial institutions
(Art. 1.2)

FORMAL SCOPE

Main proceedings (Art. 3.1)

> The court of a Member State where the 'centre of the debtor's main interests' is situated

> universal scope and aim at encompassing all the debtor's assets

> Whereas 13: The 'centre of main interests' 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'

> For a company or legal person, the centre of its main interests is the place of its registered office (rebuttable presumption)

Secondary proceedings (Art. 3.2 + Art. 27)

> The court of another Member State shall have only jurisdiction, if 'the debtor possesses an establishment within the territory of that other Member State' (Art. 3.2) - Art. 2 (h) – '.... any place of operations where the debtor carries out a non-transitory economic activity with human means and goods'

> Effects restricted to the assets of the debtor situated in the territory of the other Member State (Art. 3.2)

> serve mainly three purposes:

(a) protect – usually – local creditors from the main proceedings

(b) assist and support the main proceedings

(c) may be requested by 'main' liquidator '...when the efficient administration of the estate so requires' in a case '....the estate of the debtor is too complex to administer as a unit...', see Whereas (19)

> Opened after opening main proceedings: no 'insolvency test' in other State + nature must be winding up proceedings (Annex B) (Art. 3.3. and 27)

FORMAL SCOPE (cont'd)

Independent territorial insolvency proceedings

> Art. 3.4: opened prior to the opening of main proceedings:

a. 'comi'-law does not allow main proceedings to be opened

b. where the opening is requested by a local creditor or whose claim arises from the operation of that establishment

Non applicability of InsReg

> centre of main interests outside EU territory, see Whereas (14)

> 'Intra-Community'

LAW APPLICABLE - Lex (forum) concursus

> Art. 4 (and 28): the law applicable 'to insolvency proceedings and their effects' is the law of the Member State of the opening of the proceedings (or: lex concursus) is applicable and determines all the effects of the insolvency proceedings, both procedural and substantive

> Lex concursus governs all the conditions for the opening, conduct and closure of the insolvency proceedings, in particular – Art. 4.2 letter (a) – (m):

- (a) against which debtors insolvency proceedings may be brought on account of their capacity;
- (b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;
- (c) the respective powers of the debtor and the liquidator;
- (d) the conditions under which set-offs may be invoked;
- (e) the effects of insolvency proceedings on current contracts to which the debtor is party;
- (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;
- (g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;
- (h) the rules governing the lodging, verification and admission of claims;
- (i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;
- (j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;
- (k) creditors' rights after the closure of insolvency proceedings;
- (l) who is to bear the costs and expenses incurred in the insolvency proceedings;
- (m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors

EXCEPTIONS (Art. 5-15)

Exclusion from Lex concursus: opening 'shall not affect...'

- third parties' rights in rem (Art. 5)
- set-off (Art. 6)
- reservation of title (Art. 7)

Reference to another applicable law (than the lex concursus)

Subject

Choice of Law

- | | |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <ul style="list-style-type: none"> - contracts relating to immovable property (Art. 8) | <ul style="list-style-type: none"> - law of Member State within which property is situated (Lex rei sitae) |
| <ul style="list-style-type: none"> - rights and obligations of parties to payment or settlement systems or to a financial market (Art. 9) | <ul style="list-style-type: none"> - law of Member State applicable to system or market |
| <ul style="list-style-type: none"> - contracts of employment (Art. 10) | <ul style="list-style-type: none"> - law of Member State applicable to the employment contract |
| <ul style="list-style-type: none"> - the debtor's rights in immoveable ship or aircraft subject to registration (Art. 11) | <ul style="list-style-type: none"> - law of Member State under property, the authority of which the register is kept |
| <ul style="list-style-type: none"> - validity of some acts of the debtor's debtor concluded after the opening of insolvency proceedings, to protect third-party purchasers (Art. 14) | <ul style="list-style-type: none"> - law of Member State within the territory of which the immovable asset is situated or under the authority of which the register is kept |
| <ul style="list-style-type: none"> - the effects of insolvency proceedings on lawsuits pending (Art. 15) | <ul style="list-style-type: none"> - law of Member State in which lawsuit is pending |

Rights only to include in main proceeding
Article 12 (Community patents and trade marks)

RECOGNITION

> Art. 16: immediate (automatic) recognition of judgments concerning the opening, conduct and closure of insolvency proceedings, unless secondary proceedings in other member State are opened

> Art. 25.1: automatic recognition also for 'other' judgements, to be enforced according to 2002 Brussels Regulation (unless judgement results in limitation of personal freedom or postal secrecy, Art. 25.3) see

> Automatic recognition means that the effects attributed to the proceedings by the Lex concursus (Art. 4) extend to all other Member States, 'with no further formalities' (Art. 17.1).

The principle of universality of main proceedings embraces all the debtor's assets and in principle affects all his creditors, implies recognition of the proceedings and their effects in the other Member States in which those assets or creditors are situated:

- >> unless Art. 5-15 apply
- >> General defence of Member State: effects of recognition or enforcement 'manifestly contrary to that State's public policy,' (Art. 26)

LIQUIDATOR

Power

> 'Liquidator' broad concept of Art. 2 (b) / Annex C

> Automatic recognition of insolvency proceedings opened in a Member State means the recognition of the appointment of the liquidator and of his power in all other Member States.

> Nature, scope of 'office', rights, obligations and liabilities of the liquidator are determined by the Lex (forum) concursus

> Art. 18.1: the liquidator may transfer assets out of the State in which they are situated; he must respect however Art. 5 (Third parties right in rem) and Art. 7 (Reservation of title)

> Defense of creditors: request opening of secondary proceedings concerning those assets, provided that the conditions ex Art. 3.2 and 3.3 are met

Restrictions

> (1) the possible opening of insolvency proceedings in another Member State under Art. 3.2: assets cannot be subjected to the powers of two different liquidators

>> Consequently: liquidator in secondary proceedings has exclusive powers over the local assets

>> Influence by 'main' liquidator through the powers ex Art. 31-37 to co-ordinate one or more territorial proceedings and the main proceedings

> (2) Art. 18.3: the liquidator's obligation to comply with the law of the Member State within the territory of which he intends to take action exercising his powers

Appointment

- > Art. 19 proof of the liquidator's appointment: 'document'
- > Translation may be required, but no legislation formality shall be required

- > liquidator may publish 'opening' and 'decision appointing him', see Art. 21.1
- > liquidator may register opening main proceeding in public register, see Art. 22.1

- >> Member State may require mandatory publication (21.2) or mandatory registration (22.2)

Effects of publication

- > Art. 24 re honouring obligations to a debtor: presumption of awareness when obligation is honoured after such publication

COORDINATION RE PROCEEDINGS

The liquidator in the main proceedings may:

1. exercise right ex art. 20 (creditor in other Member State shall return what he has obtained).
2. request publication in another Member State of opening judgment (art. 21)
3. request registration of judgment in public registers kept in another Member State (art. 22)
4. request opening of secondary proceedings in other Member States (art. 29)
5. participate in secondary proceedings (art. 32.3)
6. request stay the process of liquidation of secondary proceedings (art. 33.1) and may request measures as mentioned in art. 34.1 (see art. 34.3)
7. request termination of this stay (art. 33.2)
8. propose a rescue plan, when allowed (art. 34.1)
9. dis-content with finalizing liquidation in secondary proceedings (art. 34.2)
10. claim the remaining assets (art. 35)
11. exercise rights of 5 – 10 to proceedings opened before the main proceeding
12. request that these previous proceedings will be converted in winding up proceedings (art. 37).

Duties of the liquidator in the main proceedings:

1. to communicate information (art. 31.1) (same goes for 'secondary' liquidators)
2. to cooperate (art. 31.2)
3. to lodge all claims lodged in the main proceedings (art. 32.2)
4. to immediately inform all known creditors (art. 40.1) by individual notice (art. 40. 2)

CREDITORS AND LODGMENT OF THEIR CLAIMS

Art. 39 – 42 apply to main and to territorial (independent or secondary) insolvency proceedings, see Whereas (21).

Information to creditors

> Duty to inform ‘known’ creditors ‘who have their habitual residences, domiciles or registered offices in the other Member States’

> Form and content info: Art. 40.2.

> In the official language(s) of the State of the opening of proceedings: Art. 42.1.

Right to lodge claims

> Every creditor, who has his habitual residence, domicile or registered office in a Member State

> including ‘the tax authorities and social security authorities’ (Art. 39)

> Content of the lodgement of a claim: Art. 41

> In the official language(s) of ‘that other’ State (other than the State of the opening of proceedings): Art. 42.1. of

ISSUES for LEGISLATORS OF MEMBER STATES

‘Implementation’ (putting into practical effect)

> Procedural

- Should request for opening expressly ask for ‘main’ or ‘secondary’ proceeding?
- Must court look into its int’l jurisdiction this ‘ex officio’?
- Provision re mandatory support by a ‘procureur’ for a foreign liquidator?

> Registrations

- Registration in national ‘Bankruptcy’ register, when debtor has establishment
- Registration ditto of foreign main proceeding
- And: in registers of which court (when Member States has no central registration)?

> Publications (and third party rights)

- Changes in legal situation of immovable assets may result in publication in Public register in other Member State
- Adaptation of national Trade Register, e.g. of a foreign court with appropriate int’l jurisdiction, that opens main proceeding against debtor-entrepreneur in which a foreign liquidator is appointed abroad
- in which sources (Official Gazette/Newspaper) and in which languages?

> Facilitate Co-ordination of main and secondary proceedings

- Liquidator can ask a stay (Art. 33) in secondary proceeding and may ask to terminate this stay: which court in the other Member State?
- Possibility of appeal? By whom?
- Same as 4 re Ending secondary proceedings (Art. 34)
- Same as 4/5 re Converting earlier proceedings (Art. 37)
- Certain obligations for court staff re information / registration / translation
- Provision re power of liquidator to propose rescue plan (Art. 34)

RELATIONSHIPS WITH NON EU MEMBER STATES

Scope of the Regulation

- > Whereas (14): 'This Regulation applies only to proceedings where the centre of the debtor's main interests is located in the Community'.
- > When the centre of the debtor's interests is located outside the territory of a Member State, the Regulation consequently does not apply: Norway, Switzerland, Turkey, CIS, US.
- > InsReg fails to address the problems of co-operation with Countries (courts or 'liquidators') other than those of the Member States
- > The InsReg is universal within EU, but territorial as to third Countries

International aspects:

1. Opening of Insolvency proceedings in Member State towards debtor, who's 'comi' is outside EU, but where national legislation offers sufficient ground for the jurisdiction of that Member State's court
2. Recognition of proceedings and effects of it, opened in Member States, but which falls outside scope of EU InsReg
 - > debtor located outside territory of EU InsReg
 - > proceeding not listed in Annex A
3. proceedings opened outside the EU re debtors with 'comi' outside EU

POSSIBLE OPTIONS

By individual Member States

1. Application by analogy of EU InsReg on non-EU insolvencies
 - > whether or not on mutual basis
 - > including additional provisions re cooperation / coordination between 'liquidators' and / or court-to-court communication
2. Enactment of UNCITRAL Model Law
 - > with country-tailored adaptations
3. A Member State designs its own domestic regulation
 - > on issues mentioned
 - > on possibility of opening secondary proceedings, with territorial limitation, when debtor has no establishment (but may have just assets)
 - > on 'group'- or 'consolidated' insolvency, whether or not based on mutuality

By Others

4. Await new EU initiatives
 - > to coordinate insolvency of 'establishment' in Member State for debtor with 'comi' outside the EU
 - > to enact – in all Member States - in coordinated manor UNCITRAL Model Law (Art. 3 Model Law respects international obligations of enacting States, including EU InsReg)
5. Others
 - > E.g. US in its relationship to EU