INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

THE QUEST FOR COORDINATION OF PROCEEDINGS IN CROSS BORDER INSOLVENCY CASES

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General Report

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Preamble.

First of all, we would like to thanks the national reporters for their job and the efforts put into their work, secondly we would like to emphasize that when possible we have assembled the answers coming from the European Countries. Indeed the existing EU regulations have facilitated the task, thus confirming that a certain degree of uniformity has been definitely attained. Now, without the ambition of answering to the complex question whether or not homogeneity is helping the EU in a very delicate and distressed economic and political period characterized by the crisis of the pillars of the democracy and union, surely and with more modesty we can affirm that standardization has favoured in many ways the work of the General Reporters. As long-lasting friends and supporters of an educated form of legal cosmopolitism, we do believe that equality and consistency in the application of the law, even international law, are true milestones in the necessary evolution of the legal system towards higher standards of predictability and foreseeably. If one knows history then realizes how important standardization is in the evolution of our civilization. As the ancient Romans said *ubi societas ibi jus*. Where there is a society, there also is a legal system. The more developed the legal system is the safer the future for the people. Law and society are indeed indivisible. Maintenance of harmony legal and social will happen in its entirety only if there is an harmonised law for the society.

1. **Do you have the notion of main insolvency proceedings in your legal system? Is this notion procedural or substantial? Is this notion purely international or also domestic?**

In general, in the European Union every legal system distinguishes the notion of "main insolvency proceedings" as opposed to "secondary insolvency proceedings". The said bipartition comes from EU or International Law, by contrast the notion of main insolvency proceedings is rather mysterious under the applicable domestic legislations.

Thus, one can state that the domestic legislations, in general, do not contemplate the idea of "main insolvency proceedings". All aspects of insolvency are dealt with in one single procedure to which the domestic law shall apply. This is the case of **Germany**, where the German Insolvency Code (Insolvenzordnung, "InsO") applies. **Slovakia** whose Act No. 7/2005 on Bankruptcy and Restructuring does not distinguish between main and secondary proceedings. **Spain**, by contrast, being quite unique from this point of view, does recognise domestically the notion of main Insolvency Proceedings. In the Spanish legal system one must underscore the existence of a sort of "universal scope" of the main Insolvency proceedings. This includes all the assets of the debtor, whether or not they are located within or outside Spain and notwithstanding it being possible to open a secondary proceeding limited to the local assets of the debtor situated in other countries.

Other States have only an international understating of the matter, such as **Ireland** where the notion of main Insolvency Proceedings derives entirely from the EU Regulation n. 1346/2000, "the Regulation", (EU Regulation n. 848/2015 is coming into force on June 26, 2017). The **Netherlands** where again the concept under discussion emanates from the Regulation. It is worthy to be noted that in other international cases different from EU cases the domestic cross-border Insolvency legislation codified in the Dutch Bankruptcy Act (1893) shall apply. Furthermore Netherland domestic law provides for well-established

principle of territoriality that provides that the effects of foreign insolvency proceedings on assets of the debtor located in the Netherlands are not automatically recognized and shall have no consequences in the Dutch jurisdiction. **Italy** does recognise domestically the notion of main proceedings, neither provides any specific rule for the coordination of transnational insolvency proceedings. Art. 9 of the Italian Bankruptcy Act determines that a distressed enterprise having its main headquarters abroad can be declared bankrupt in Italy even if a bankruptcy procedure has been opened elsewhere abroad. As far as cross border Insolvency proceedings involving Italy and other Non-Member States are at hand, one can conclude that it is possible to have multiple proceedings in different countries without any specific provision of law providing coordination for the proceedings started in Italy. This is the case also for **Belgium** where in case of non-application of the Regulation, art. 118 of the Code on Private International Law shall apply, the code establishes the principle of territoriality already mentioned above.

Having said that, one can conclude stating that the notion of main insolvency proceedings existing in the European or International law is both procedural and substantial in nature. The Regulation determines the application of the law of the Member State where the Insolvency proceedings has been opened ("*lex fori concursus*"), the said law shall govern all the principal issues regarding the procedure such as the assessment of the conditions and other requirements for opening the insolvency proceedings, the role of the estate liquidator or receiver, the legal position of creditors, the distribution of the proceeds from the liquidation of the assets, the effects on pending contracts.

Art. 3.1. of the Regulation postulates the opening of the main proceeding in the "centre of main interest" (COMI) of the debtor that is the "place where the debtor has the administration of his interests on a regular basis and is therefore ascertainable by third parties" (Point 13 of the Preamble to the Regulation), The seminal case where the definition of COMI has been well settled is the *Eurofood* Case, with the ensuing Decision of the European Court of Justice rendered on May 2006.

Cross border Insolvency proceedings involving countries outside the European Union, are generally regulated by domestic legal provisions of private International Law. In **Germany** for example an autonomous boy of laws on cross-border Insolvency proceedings according to Sections 335 et seq. of the German Insolvency Code envisages the application of the law of the state in where the Insolvency proceedings have been opened, unless provided otherwise.

In the **U.S.** The notion of "main insolvency" proceedings only exists under the UNCITRAL Model Law on Cross Border Insolvency, codified in Chapter 15 of the United States Code and the notion is purely substantial, the difference of proceedings here is expressed in terms of "main" and "non-main" proceedings. To locate the main proceedings though an analysis not dissimilar to the COMI one, for the U.S. Courts shall take into account where (i) the headquarters and registers offices, (ii) the places where the managers and officers are, (iii) the assets of the company, (iv) the creditors, (v) and the jurisdiction whose law would apply to most of the debtor's disputes, are situated. The Court noted that it must be applied the principle of flexibility here. The creditors in the foreign main proceeding are entitled to benefit from the stay of all actions or execution against the debtor's property within the territorial jurisdiction of the United States, 2) the

ability to sell the petitioner's assets under the aegis of the U.S. Federal Bankruptcy Court, 3) the ability to recover the petitioner's assets to the extent they have been fraudulently transferred pursuant to U.S. Law, and 4) the ability to operate the petitioner's business and exercise the powers of a trustee over such business. By contrast the recognition of " foreign non-main proceeding" does not involve any automatic relief. The petitioner in this second proceeding might apply for a discretionary relief which include the option to seek a stay of all actions or execution upon the debtor's property in the United States and other actions. In this latter case the petitioner has the burden to prove that the relief is necessary to protect the assets of the debtor or the interests of the U.S. creditors.

As far as **Peru** is at stake one must underscore that the Bankruptcy Law is applied by an administrative authority called INDECOPI (Institute for the Defence of the Free Competition and Intellectual Property) through a Commission of Insolvency Proceedings, the Peruvian General Bankruptcy Law, Law 27809 is in force since October 2002. Art. 6.1. of the Bankruptcy Law provides that INDECOPI is competent to conduct all insolvency proceedings involving debtors domiciled in Peru, the competence of INDECOPI is limited to the debtor's assets located within Peruvian territory. The Bankruptcy Law follows the territoriality principle, and in case of International Insolvency proceedings, the Peruvian Law follows the "Secondary Bankruptcy Proceeding" theory, by which a separate proceeding must be opened in Peru once a foreign judicial decision declaring the debtor's bankruptcy is acknowledged by Peruvian Courts through an exequatur process. The foreign decision will be automatically recognised if several requirements are met, such as the non-exclusivity of jurisdiction for the matters decided by the foreign judge, or the respect of the principle of due process of law.

Jersey does not have the notion of main Insolvency proceedings, and as a self-governing dependency of the British Crown it does not apply the UK Insolvency Act 1986 nor the Cross Border Insolvency Regulation 2006, neither Jersey is a European Member State. So Jersey follows the traditional English conflict of laws principles as regards the proper place for commencement of Insolvency proceedings. The fundamental principle in this respect is that a company should be wound up in its place of incorporation in one unitary proceeding. There are however some circumstances in which a foreign company may be declared *en desastre* in Jersey or conversely where a Jersey company may be placed into liquidation abroad. The acknowledgement of a decision of winding up of a foreign company can be demanded to the Jersey Judicial Authority and for certain countries the application of recognition is made under Article 49 of Desastre Law (this is the case for U.K., Guernsey, Isle of Man, Australia and Finland), for other Country the Jersey Court would recognise the decision on the basis of comity and reciprocity principles. Jersey Court will consider whether the foreign proceedings comply with natural justice, whether jurisdiction has been exercised validly, and whether recognition would offend public order rules.

2. **Do you know the notion of secondary insolvency proceedings? Is this notion purely international or also domestic?**

Some EU countries have this notion from a domestic point of view: in Germany the autonomous German law on cross border insolvencies provides for secondary insolvency proceedings in order to protect local creditor's rights and interests as well as in order to

facilitate the proceedings: in Germany the secondary proceeding may be opened over the local assets of the debtor if somewhere else secondary insolvency proceedings have already been opened and if the opening of the foreign insolvency proceedings is recognizable in Germany (otherwise only territorial proceedings could be opened over the local assets).

Nevertheless the notion of "secondary proceedings" exists especially from an EU and International legal point of view. Art. 3.2 of the Regulation provides that an Insolvency proceedings opened in another member state than the state where the main proceedings has been opened may be opened in addition to the main Insolvency proceedings if the debtor possesses an establishment within that state. In the said article one finally finds the core of the current research i.d. the fatidic words "Secondary Insolvency Proceedings". Moreover art. 3.3 of the Regulation postulates that secondary Insolvency Proceedings are subordinated to the main insolvency proceedings and so the secondary proceedings run parallel to the main Insolvency Proceedings. Moreover secondary proceedings are limited to the assets located in the member state where the secondary proceedings are opened and they can only be winding up proceedings. For sake of completeness, one must say that the Regulation contemplates also the notion of "territorial proceedings". Those are basically secondary proceedings opened in a Member State in which the debtor has an establishment. Unlike secondary proceedings they are not limited to winding-up proceedings and they can only be opened by local creditors.

The notion of "secondary proceedings" in the **U.S.** Code is totally absent and the notion is merely international.

Secondary Insolvency proceeding are regulated in **Peru** though a local approach theory, that is more national than international, the Peruvian Law grants a preferential rights over the assets located in Peru to the Peruvian domiciled creditors. Art. 2061 of the Peruvian Civil Code provides that Peruvian Courts are competent in actions pertaining to a foreign bankruptcy estate related to assets located in Peru.

As underscored above **Jersey** does not have the notion of "secondary Insolvency proceedings".

3. **Are the material effects of the main proceedings halted when secondary proceedings elsewhere are opened? Please specify, if this is not the case, whether or not the law of the State in which main proceedings are opened shall affect certain rights of third parties or have effect in certain contractual relations, e.g. labour contracts.**

In domestic private International Law of the EU Countries the main proceedings will continue unaffected if secondary Insolvency proceedings are opened elsewhere and the *lex fori concursus* shall apply to the secondary proceedings.

Art. 17 of the Regulation states that when secondary proceedings are opened in a State, the assets located in such a State can only be affected by the said local proceedings and the liquidator of the main proceedings cannot exercise anymore his powers towards such assets. Moreover one can also affirm that the main proceedings has a "dominant role" on the secondary proceedings because the liquidator of the main proceedings has the right to

intervene in the secondary proceeding and demand to the court of the secondary proceedings the conversion of the secondary proceeding into a winding up proceedings.

Moreover, the Regulation provides certain exceptions to the application of the *lex fori concursus* principle. For example art. 5 determines when the law of the Member State in which the Insolvency proceedings have been opened does not affect certain rights of third parties or certain contractual relations. Another example is offered by the application of the *lex situs* for the rights *in rem*: the opening of the Insolvency proceedings does not affect the rights in rem of creditors or third parties in respect of assets belonging to the debtor which are located within the territory of another Member State at the time of the opening of proceedings. Finally one can take into consideration art. 10 that provides that the effects of insolvency proceedings on employment contracts and relationships shall solely be governed by the law of the Member state applicable to the employment contract.

As far as domestic private International Law of the EU States are at stake, there are some exceptions to the general rule of *lex fori concursus*. Under German International Insolvency Law the effects of the Insolvency proceedings on employment contracts shall be solely subject to the law which is relevant to the employment. Likewise in Spain, where the Spanish Insolvency Act, in Chapter III, Title IX provides certain exemptions to the application of the Spanish Law governing the main Insolvency Proceedings. This is the case for the real estate assets whose destiny is governed by the law of the state in which they are situated, and also the employment contracts shall be governed by the law of the State applicable to the Contract. In Ireland the effects of secondary proceedings are limited to the assets situated in that other Member State. In other words, secondary proceedings do not have extra territorial effects and also in Ireland there are exemptions for the rights *in rem* governed by the law of the state in which the assets are situated and also for the law of the employment contracts. In Belgium, the same exemptions occur pursuant to Art. 119 of its Belgian Code on Private International Law.

In the **U.S.** the process (purely international as already said) is not mentioned to halt the foreign proceedings but rather to grant coordination and assistance to the foreign representative. Chapter 15 of the United States Code seeks the promotion of cooperation between U.S. Courts and foreign courts and competent authorities involved in such cross border insolvency proceedings; the fair and efficient administration of cross border proceedings, protect the interests of all creditors and interested parties, protects the maximization of the debtor's assets, facilitate the rescue of financially troubled business.

The law of the State in which the Foreign insolvency proceedings is pending will greatly affect the proceedings in the U.S. Under Chapter 15, and frequently U.S. Courts employ foreign law when determining what is in the best interests of creditors, all this that we have said is subject to two caveats, 1) the foreign law must not be manifestly contrary to the public policy of the United States, 2) in case that an international treaty is in force between U.S. And a foreign state such treaty or requirement must prevail.

Peruvian Law is silent on this point, one can only state that foreign judicial decisions are acknowledged in **Peru** through the exequatur process so as to enforceable.

Having already said that **Jersey** does not have the notion of "main" and "secondary" proceedings, one can add that the Desastre Law permits foreign companies to be declared *en desastre* in Jersey and also to be wound up elsewhere.

4. **Shall the creditors have the right to lodge claims in any of the insolvency proceedings (main and secondary)?**

Art. 32.1 of the Regulation provides that creditors may lodge claims in the main proceedings and also in the secondary proceedings to the full amount and so it is generally recognised by domestic private International Law of EU Countries, this the case of Germany, Slovakia, Spain, Ireland, the Netherlands, Belgium and Italy. Moreover art. 32.2 of the Regulation determines also that Liquidators have the obligation to file the claims filed in their proceedings as in other proceedings as well. In the Netherlands a remarkable decision of the Supreme Court in the case Kallir v Comfin has established that foreign and Dutch creditors have equal rights thus confirming a rule already encompassed into the Dutch Bankruptcy Act.

Chapter 15 of the **U.S.** Code does not provide a claims procedures for U.S or foreign creditors to lodge claims in the U.S.

In **Peru** this is possible and it will also depend on the regulations provided for in the law applicable to the principal insolvency proceeding.

In **Jersey** legal provision about the right to lodge claims in an Insolvency proceeding involving foreign creditors must be determined by the Jersey Court.

5. **Are the dividends in all proceedings pooled? In other words, are dividends obtained in proceeding X deducted from dividends to be obtained in other proceedings?**

In the European Regulation a creditor who has lodged claims in several insolvency proceedings of the debtor and participates in the distribution of the proceeds of these proceedings, shall deduct the dividends so obtained from the dividends to be distributed in other proceedings so as to ensure equal treatment and equality among creditor creditors. The same principle apply for instance in **Italy** where it is known as *par condicio creditorum.*

Pursuant to article 20, of the Regulation a creditor who has, in the course of insolvency proceedings, obtained a dividend on his claim shall share in distributions made in other proceedings only where creditors of the same ranking or category have, in those other proceedings, obtained an equivalent dividend.

Art. 20 also determines four crucial rules that relgutate this matter:

1- No creditor shall receive more than 100% of this claim

2- In determining the dividend to be paid out, the original amount is taken into account

3- The claim shall only be taken into account in the distribution where creditors of the same rank have received a benefit in the other proceeding as well

4- The ranking or category of each claim for each procedure is determined by the law of the EU Member State in which the Insolvency proceedings are opened

Unequal treatment of creditors however may arise where creditors take advantage of different priority rules among the various *lex fori concursus* or of different assets of the debtor and submit their claims in another jurisdiction, where their claims would be given a higher priority and/or have better chances of being the subject of a distribution. This the case of **Germany**, **Spain**, **Slovakia** and **Ireland**. The **Dutch** Bankruptcy Act at Articles 203- 205 prevents that foreign creditors obtain payment on their claims more than once in different jurisdictions.

Under Chapter 15, there is no specific procedure for distributing or administering the assets of bankruptcy estate other than the right to do so without discriminating against **U.S.** Creditors.

Likewise under **Peruvian** Law there is no express reference to dividends, and once again the preferential treatment of Peruvian domiciled creditors shall prevail.

In **Jersey** the assets of all proceedings will be pooled and distributed according to the rule of equality amongst creditors.

6. **If by liquidation of assets in any secondary proceedings it is possible to meet all claims, shall the liquidator transfer any remaining assets to the liquidator in the main proceedings?**

This is indeed the rule under the Regulation and under the majority of local laws of the National Reports received.

The only exceptions are the **U.S.**, **Jersey** and, surprisingly, the **Netherlands** (for non-EU cross-border insolvency procedures) whose National Report expressly mentions the non-existence of such rule in local legal system.

7. **Does the so-called "dominance" of the main proceedings create a leading role for the liquidator, appointed in the main proceedings, to coordinate all insolvency proceedings pending against the same debtor?**

Generally speaking, one can not speak of "dominance" or "leading role" of the liquidator of the main proceeding over the destinies of the secondary proceedings.

Even if the Regulation does indeed give pre-eminence to some decisions of the liquidator of the main proceeding (as pointed out by the **German** National Report), the general principle is that liquidators of the different procedures need to work in "tandem" within their respective spheres of appointment.

8. **How do you think the above mentioned issues have been tackled by the new EU Regulation on Transnational Insolvency? If yes, in which way defective or useful?**

The National Reports received from the EU indicate that the above mentioned issues have been tackled positively by the Regulation.

Among the positive aspects of the Regulation, most Reports mention the clarified notion of COMI, the fact that secondary proceedings are not limited to winding up proceedings and that a greater cooperation and co-ordination between main and secondary procedures has been enhanced.

9. **How do you think the above mentioned issues have been tackled by the UNCITRAL Model Law on Cross-Border Insolvency? If yes, in which way defective or useful?**

The **Jersey**, **German**, **Irish** and **Dutch** national reports stress that the UNCITRAL Model Law on Cross-Border have not been adopted by their respective legal systems.

The National Report from **Slovakia**, a jurisdiction where both the European Insolvency Regulations and the UNCITRAL Model Law apply, considers the European to be superior in the solutions adopted.

The **U.S.** report mentions the positive impact of the UNCITRAL Model Law in the **U.S.** legal system, which has been useful in the interpretation of Chapter 15 of the **U.S.** Code by **U.S.** Courts.

10. **Are there other salient aspects of the EU Regulation on Transnational Insolvency or the UNCITRAL Model Law on Cross-Border Insolvency that are key to answer the need and quest for coordination in cross borders insolvency proceedings?**

Among the aspects mentioned by EU National Reports are the European Insolvency Register, the application of the EU Regulation to some pre-insolvency proceedings and its new rules in relation to group insolvency proceedings, which are generally considered positive for the purpose of rescuing groups as a whole where possible.

The **U.S.** report stresses that cooperation and direct communication between international courts and their representatives are often underused.

11. **Are there other devices that the EU Regulation on Transnational Insolvency or the UNCITRAL Model Law on Cross-Border Insolvency should have regulated or adopted to enhance further coordination in cross borders insolvency proceedings?**

EU National Reports indicate the need to increase the scope of recognition of pre- or para-insolvency solutions that exist in some jurisdictions, like bankruptcy work-outs and pre-pack insolvencies, as well as other schemes of arrangement and arrangements binding on creditors and even ADR, like mediation.

The U.S. report mentions the need to improve COMI analysis and the need to avoid insolvency forum shopping.

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