INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

THE QUEST FOR COORDINATION OF PROCEEDINGS IN CROSS BORDER INSOLVENCY CASES

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Report for Belgium

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

a.

Belgium has the notion of "main insolvency proceedings", but only for insolvency proceedings regarding international insolvency cases.

Where European Regulation 1346/2000 applies, the "*centre of a debtor's main interests*" is mentioned in Article 3 of this Regulation and is described in Recital 13 as "*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.*". Article 3 of this Regulation provides that : "*In the case of a company or legal person, the place ofthe registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.*"

The ECJ further provided guidance in its cases Staubitz-Schreiber, Eurofood, Interedil and Rastelli.

Where European Regulation 2015/848 applies, the "*centre of a debtor's main interests*" is mentioned in Article 3 § 1 of this Regulation and is described in this Article as "*The centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties.*". Further details about the localization of the "*centre of a debtor's main interests*" are listed in this Article 3 § 1.

Article 118 § 1 of the Belgian Code on Private International Law applies where the European Regulations 1346/2000 and 2015/848 do not apply. This article 118 refers in its first sentence to the European Regulations (the "*insolvency regulation*"). The second sentence of Article 118 § 1 refers to situations where the European Regulations do not apply; in which case Article 118 § 1 also makes a distinction between "principal proceedings" and "territorial insolvency proceedings". Article 118 § 1 reads : "*Contrary to the general provisions of the present statute, Belgian courts only have jurisdiction to open insolvency proceedings in the cases provided for by article 3 of the insolvency regulation. In the other cases, they have however jurisdiction: 1° to open a principal proceeding: if the main establishment or statutory seat of the body with separate legal entity is located in Belgium, or if the domicile of a natural person is located in Belgium; 2° to open territorial proceedings: if the debtor has an establishment in Belgium.*"

Belgian law does not have the notion of "main insolvency proceedings" if the insolvency situation is purely internal in Belgium, without international connection.

b.

This notion is both procedural and substantial. Procedural, because it will lead tot he jurisdiction of a Belgian court. And substantial, because the Belgian court will apply its own law. Insolvency law is always a combination of procedural and substantive law. E.g. the rights and the position of a creditor (which is subtantive) will depend on which law applies, and the applicable law will be determined by the jurisdiction oft he court (which is procedural).

c.

I refer to my answer above under a. : this notion is purely international.

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

Yes, Belgium knows the notion of "secondary insolvency proceedings". This notion is however purely international.

I refer to my answer above to Question 1.

3. **a. Are the material effects of the main proceedings halted when secondary proceedings elsewhere are opened? b. 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.**

a.

No. Recital 12 to Regulation 1346/2000 provides that : *"To protect the diversity of interests, this Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings. Secondary proceedings may be opened in the Member State where the debtor has an establishment. The effects of secondary proceedings are limited to the assets located in that State. Mandatory rules of coordination with the main proceedings satisfy the need for unity in the Community."*

To the contrary, Recital 20 provides for the possibility that the liquidator in the main insolvency proceedings proposes a restructuring plan or composition, and/or that he requests that the realization of the assets in the secondary insolvency proceedings be suspended."

Article 3 § 2 of Regulation 1346/2000 provides that *"The effects of* (the secondary proceedings) *shall be restricted to the assets of the debtor situated in the territory of the latter Member State."* Article 27, last sentence, repeats this principle. Article 3 § 3 further mentions that the secondary proceedings *"must be winding-up proceedings"*. This means that these secondary proceedings will always be at a lower level than the main proceedings.

Regulation Regulation 1346/2000 provides that the material effects of the secondary proceedings may be halted in its Article 33.

Articles 3 § 2, last sentence, and 34, last sentence, and 46 of Regulation 2015/848 repeat these principles. However, the requirement that the secondary proceedings have to be *"winding-up proceedings"* is deleted.

The Belgian Code on Private International Law applies if the European Regulations do not apply. This Belgian Code does not mention specific rules about the staying of proceedings.

b.

Article 4 § 2 (e) of Regulation 1346/2000 provides that *"The law of the State of the opening of proceedings" "shall determine in particular" : "(e) the effects of insolvency proceedings on current contracts to which the debtor is party"*.

However, an exception is made for employment contracts in Article 10 of Regulation 1346/2000 : "The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment."

Articles 7 § 2 (e) and 13 of Regulation 2015/848 repeat these principles.

The Belgian Code on Private International Law applies if the European Regulations do not apply. This Belgian Code provides the following rules in its Article 119 § 3 : "§.3. *(…), the effects of the opening of the insolvency proceeding on :*
1° a contract conferring the right to acquire or make use of immovable property are governed by the law applicable to the contract;
2° the rights and obligations of the parties to a payment or settlement system or to a financial market, are governed by the law applicable to that system or market;
3° employment contracts and relationships are governed by the law applicable to the employment contract;
4° the rights of the debtor in immoveable property, a ship, or an aircraft, that is subject to registration in a public register, are governed by the law applicable to those rights."

The national rules on private international law of a Third (non-EU) State apply if the secondary insolvency proceedings are opened in this Third (non-EU) State.

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

Yes, Recital 21 to Regulation 1346/2000 provides that : *"Every creditor, who has his habitual residence,* domicile *or registered office in the Community, should have the right to lodge his claims in each of the insolvency proceedings pending in the Community relating to the debtor's assets. This should also apply to tax authorities and social insurance institutions."*

Article 32 of Regulation 1346/2000 provides that : *"Any creditor may lodge his claim in the main proceedings* and *in any secondary proceedings."*

Yes, Recital 63 to Regulation 2015/848 provides that : *"Any creditor which has its habitual residence, domicile or registered office in the Union should have the right to lodge its claims in each of the insolvency proceedings pending in the Union relating to the debtor's assets. This should also apply to tax authorities and social insurance institutions."*

Article 45 § 1 of Regulation 2015/848 provides that : *"Any creditor may lodge its claim in the main insolvency proceedings and in any secondary insolvency proceedings."*

The Belgian Code on Private International Law applies if the European Regulations do not apply. This Belgian Code does not mention specific rules about this matter.

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?**

The pooling of dividends is obtained in two steps.

Step 1 : the creditors have to return what they obtained to the liquidator.

Article 20 § 1 of Regulation 1346/2000 provides that : *"A creditor who, after the opening of the proceedings referred to in Article 3(1) obtains by any means, in particular through enforcement, total or partial satisfaction of his claim on the assets belonging to the debtor situated within the territory of another Member State, shall return what he has obtained to the liquidator, subject to Articles 5 and 7."*

Step 2 : an equivalent dividend is distributed among the creditors.

Recital 21 to Regulation 1346/2000 provides that : *"However, in order to ensure equal treatment of creditors, the distribution of proceeds must be coordinated. Every creditor should be able to keep what he has received in the course of insolvency proceedings but should be entitled only to participate in the distribution of total assets in other proceedings if creditors with the same standing have obtained the same proportion of their claims."*

Article 20 § 2 of Regulation 1346/2000 provides that : *"In order to ensure equal treatment of creditors 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."*

Recital 63 and Article 23 of Regulation 2015/848 repeat these principles (the two steps).

The Belgian Code on Private International Law applies if the European Regulations do not apply. This Belgian Code does not mention specific rules about this matter. I am not aware of any such situation or any published case where such a situation was discussed.

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?**

Article 35 of Regulation 1346/2000 provides that : *"If by the liquidation of assets in the secondary proceedings it is possible to meet all claims allowed under those proceedings, the liquidator appointed in those proceedings shall immediately transfer any assets remaining to the liquidator in the main proceedings."*

Article 49 of Regulation 2015/848 repeats this principle.

The Belgian Code on Private International Law applies if the European Regulations do not apply. This Belgian Code provides the following rule in its Article 120, which will only apply in case of reciprocal cooperation : *"If the liquidation of the estate of territorial proceedings offers the possibility to satisfy all admitted claims in full, the liquidator appointed in this proceeding will transfer the balance immediately to the liquidator of the principal proceedings, on condition of a reciprocal cooperation and communication duty in the relevant proceedings."*

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

Recital 20 to Regulation 1346/2000 provides that : *"Main insolvency proceedings and secondary proceedings can, however, contribute to the effective realisation of the total assets only if all the concurrent proceedings pending are coordinated. The main condition here is that the various liquidators must cooperate closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main insolvency proceedings, the liquidator in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. For example, he should be able to propose a restructuring plan or composition or apply for realisation of the assets in the secondary insolvency proceedings to be suspended."*

I further refer to Article 31 of Regulation 1346/2000 on the *"duty to cooperate and communicate information"* and to Article 33 on the *"stay of liquidation"*.

More detailed rules are provided for in Recitals 48-49-50-51-52 to Regulation 2015/848.

I further refer to Article 41 of Regulation 2015/848 on *"cooperation and communication between insolvency practitioners"*, Article 42 on *"cooperation and communication between courts"*, Article 43 on *"cooperation and communication between insolvency practitioners and courts"* and to Article 46 on the *"stay of the process of realization of assets"*. Further rules are provided in the Articles 56-57-58 for the insolvency of group companies.

The Belgian Code on Private International Law applies if the European Regulations do not apply. This Belgian Code provides the following rule in its Article 120, which will only apply in case of reciprocal cooperation : *"The liquidator of principal proceedings or territorial proceedings opened by a court having jurisdiction on the basis of article 118§1 part 2 is duty bound to cooperate and communicate information with the liquidators of foreign insolvency proceedings concerning the debtor. This duty applies only if the law of the State where the proceedings were opened, provides on a reciprocal basis for an equivalent co-operation and communication duty in respect of the relevant proceedings."*

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?**

See my answers above.
It is too early to answer this question.

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?**

No answer.

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?

The rules on group companies are new and may be very useful. However, we will have to see whether they pass the test of practice.

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?**

The positive side of the new EU Regulation 2015/848 is that many pre-insolvency proceedings are also covered. See Recitals 10-11-12-15-17 and see Article 1 of Regulation 2015/848.

The negative side is that not everything is covered by EU Regulation 2015/848. For instance, the "bankruptcy work-out" is not covered (this is a pre-insolvency agreement between a debtor and some of its creditors). Also the "prepac insolvency" is not covered (this is the possibility to prepare the complete bankruptcy proceedings before a debtor files for bankruptcy).