



INTERNATIONAL ASSOCIATION OF YOUNG LAWYERS

# **THE QUEST FOR COORDINATION OF PROCEEDINGS IN CROSS BORDER INSOLVENCY CASES**

**MUNICH 2016**

**National reporter**

**Gráinne Crimmins**

MASON HAYES & CURRAN

South Bank House, Barrow Street, Dublin 4, Ireland.  
e gcrimmins@mhc.ie

**General reporters**

**Giuseppe Scotti**

Studio Macchi di Cellere Gangemi  
Milano, Italy  
g.scotti@macchi-gangemi.com

**Héctor Sbert**

Lawants  
Barcelona, Spain  
hector.sbert@lawants.com

09 November 2015

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

- I. Yes.
- II. Substantive.
- III. The notion comes from EU law so in that sense it is international/European.

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

- I. Yes.
- II. The notion comes from EU law so in that sense it is international/European.

**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.**

- I. No, the material effects of the main proceedings are not halted when secondary proceedings are opened elsewhere.

Where secondary proceedings are opened in another Member State, the effects of such proceedings are restricted to the assets of the company situated in that other Member State. In other words, secondary proceedings do not have extra-territorial effects.

- II. The opening of insolvency proceedings does not affect, for example, the following:

- i. the rights *in rem* of creditors or third parties in respect of assets situated in the territory of another Member State at the time when the proceedings commenced;
- ii. the right of creditors to set off of their claims against the claims of the debtor, where permitted by the applicable law;
- iii. a seller's rights based on a reservation / retention of title where, at the time of opening the proceedings, the asset is situated in the

territory of a Member State other than where the proceedings were opened;

- iv. rights in respect of immovable property; which are governed solely by the laws of the Member State in which the immovable property is situated; and
- v. the effect of insolvency proceedings on contracts of employment are governed solely by the law of the Member State applicable to the contract of employment.

Please note that the above does not constitute an exhaustive list.

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

Every creditor who has habitual residence, home, domicile or registered office in the Community has the right to lodge his/her claims in writing in each of the insolvency proceedings relating to the debtor's assets.

However, he/she can recover from insolvency proceedings in other jurisdictions only if the creditors of equal standing have received the same proportion of their claims.

**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?**

A creditor participates *pro-rata* in accordance with the priority of their claim.

A creditor is only entitled to participate in the distribution of the total assets in other proceedings where creditors with the same standing have obtained the same proportion of their claims.

**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?**

Yes. In the event that all claims may be paid in secondary proceedings, giving rise to a surplus, this is immediately transferable to the liquidator in the main 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?**

Yes, to a certain extent.

The liquidator in the main proceedings may request the Court which opened the secondary proceedings to stay the secondary proceedings, in whole or in part.

The liquidator in the main proceedings also has the opportunity to submit proposals on the liquidation/use of assets in the secondary proceedings.

The liquidators may participate in the other proceedings on the same basis as a creditor, in particular by attending creditors’ meetings, and are also duty bound to communicate information to each other and to cooperate with each other.

However, the existence of secondary proceedings means that a liquidator appointed in main proceedings may not exercise the same powers in the Member State where secondary proceedings have been opened as he would be able to exercise in every other Member State. Liquidators in both Member States/sets of proceedings will instead 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?**

- I. The Recast European Insolvency Regulation, which was adopted by the European Parliament on 20 May 2015 and is due to take effect June 2017 (in respect of all insolvency proceedings opened thereafter), goes a long way to improving this landscape. It is in line with the European Union’s current political priorities of promoting economic growth and recovery and is more favorable towards businesses and entrepreneurs in financial difficulties than the current Regulation. It also enhances cooperation and coordination in insolvency proceedings.

II. The Recast Regulation is useful in many ways, some of which are summarised below:

- a. it has further clarified the concepts of centre of main interests (“*COMI*”) and “*establishment*”. These clarifications are in line with the developments in the case law from the European Court of Justice and attempt to deal with artificial and abusive forum shopping;
- b. secondary proceedings are no longer limited to winding up proceedings. However, undertakings given by the insolvency practitioner in the main proceedings, as to the treatment of creditors in other Member States, will be formally recognised as a way of avoiding secondary proceedings in those jurisdictions;
- c. there is provision for greater cooperation and co-ordination in insolvency proceedings, between the insolvency practitioner in the main proceedings and secondary proceedings, between the Courts and between the insolvency practitioners and the Courts; and
- d. there is a requirement to establish insolvency registers to improve sharing of information between insolvency practitioners, creditors and the Courts in respect of insolvency proceedings.

III. In some ways, it could be said that the Recast Regulation does not go far enough. In particular, two useful measures that are available in Ireland are excluded from its scope:

- a. schemes of arrangement, provided for by Chapter 1 of Part 9 of the Companies Act 2014; and
- b. arrangements binding on creditors, which are simply passed by a resolution of three fourths in number and value of the creditors.

Given the focus of the current EU consultation on an effective insolvency framework within the EU<sup>1</sup>, on effective and efficient restructuring measures

---

<sup>1</sup> [http://ec.europa.eu/justice/newsroom/civil/opinion/160321\\_en.htm](http://ec.europa.eu/justice/newsroom/civil/opinion/160321_en.htm).

to save viable businesses, it is to be hoped that such measures may be afforded recognition in the future.

**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 UNCITRAL Model Law on Cross-Border Insolvency has not been adopted In Ireland.

**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?**

As set out above, the UNCITRAL Model Law on Cross-Border Insolvency has not been adopted in Ireland so this response deals with the Recast Regulation only.

In addition to the points set out in response to question 8 above, the Recast Regulation is also a positive development in the following ways:

- a. it has extended its application to pre-insolvency proceedings promoting recovery for businesses in distress; and
- b. it introduces new rules in relation to group insolvency proceedings which are positive and create a framework to allow for the rescuing of a group as a whole where possible.

**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 UNCITRAL Model Law on Cross-Border Insolvency has not been adopted in Ireland so this response deals with the Recast Regulation only.

As set out in the response at 8(III) above, the most notable exclusion from recognition from the Recast Regulation are the schemes of arrangement and arrangements binding on creditors Their status is therefore uncertain in Europe.

However, the exclusion of the same may be welcomed for companies wishing to take advantage of their flexibility.<sup>2</sup>

For the most part, the changes brought about by the Recast Regulation appear sensible. It remains to be seen how they will play out in practice.

**Disclaimer:**

*General Reporters, National Reporters and Speakers grant to the Association Internationale des Jeunes Avocats, registered in Belgium (hereinafter : "AIJA") without any financial remuneration licence to the copyright in his/her contribution for AIJA Annual Congress 2016.*

*AIJA shall have non-exclusive right to print, produce, publish, make available online and distribute the contribution and/or a translation thereof throughout the world during the full term of copyright, including renewals and/or extension, and AIJA shall have the right to interfere with the content of the contribution prior to exercising the granted rights.*

*The General Reporter, National Reporter and Speaker shall retain the right to republish his/her contribution. The General Reporter, National Reporter and Speaker guarantees that (i) he/she is the sole, owner of the copyrights to his/her contribution and that (ii) his/her contribution does not infringe any rights of any third party and (iii) AIJA by exercising rights granted herein will not infringe any rights of any third party and that (iv) his/her contribution has not been previously published elsewhere, or that if it has been published in whole or in part, any permission necessary to publish it has been obtained and provided to AIJA.*

---

<sup>2 2</sup> The English courts, in particular, appear to be comfortable with companies with tenuous links to England availing of schemes of arrangement in that jurisdiction. See paragraph 18 of *Codere Finance (UK) Limited* [2015] EWHC 3778 (Ch):

*"In cases such as the present, however, what is being attempted is to achieve a position where resort can be had to the law of a particular jurisdiction, not in order to evade debts but rather with a view to achieving the best possible outcome for creditors. If in those circumstances it is appropriate to speak of forum shopping at all, it must be on the basis that there can sometimes be good forum shopping. "*