

European Cross-border Insolvency Law Framework

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Key points Insolvency Regulation

- Applicable in 24 Member States
- Basis in Article 61 EC Treaty
 - ‘judicial cooperation’
- 33 Recitals, 47 Articles, 3 Annexes
 - OJ 6 May 2006, L 121
- Insolvency proceedings – Article 1(1)
- All debtors, except financial institutions

Key points InsReg (cont'd)

- International jurisdiction of courts
- Recognition
- Conflict of law rules
- Information to creditors
- Communication and cooperation between 'liquidators'

International jurisdiction of courts

- Main insolvency proceedings
'centre of a debtor's main interests' [COMI]
- Recital 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

International jurisdiction of courts (cont'd)

- Company: place of the registered office shall be presumed to be the COMI in the absence of proof of the contrary
- Natural persons: no presumption

International jurisdiction of courts (cont'd)

- Secondary proceedings
 - Article 2(h) 'establishment' shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods
- Characteristics
 - Effects restricted to assets in State
 - Winding-up proceedings (Annex B)
 - No insolvency test

Recognition

- Automatic
 - ‘mutual trust’
- Judgment produces same effects in other Member States
 - ‘with no further formalities’
- Liquidator may exercise all powers
- Unless secondary proceedings

Law applicable

- To proceedings and their effects: lex concursus
- But: 'shall not affect' rights in rem, right of creditor to set-off or reservation of title
- Or: other choice of law, e.g.
 - Contracts re immovable property
 - Contracts re employment
- Relation to non-EU Member States: per country

Coordination between proceedings

Recital (12)

This Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. 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.

Coordination between proceedings

- Recital (20)

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.

Financial institutions

- Excluded in Article 1(2)
 - Specific asset structure
 - Place in economy
- Basis in Article 47 EC Treaty
 - 'free establishment – free provision of services'
- Single licence
- Home country control

Financial institutions (cont'd)

- Unity
 - One competent court; No secondary proceedings
 - No open norm for 'COMI', but fixes COMI to registered office
- Single entity
 - Wound up as one legal entity, including assets of branches
- Universality
 - Lex concursus, also in EEA countries
 - Choice of law re netting and repurchase agreements
- Provisions for branches of non-EU institutions