

# Secondary Insolvency Proceedings

- Coordination
- Cooperation
- Communications

Eberhard Nietzer

[www.insolvencycourts.org](http://www.insolvencycourts.org)

# Basis of Cooperation

## Whereas 3

The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently and effectively. This Regulation needs to be adopted in order to achieve that objective, which falls within the scope of judicial cooperation in civil matters within the meaning of Article 81 of the Treaty.

## Article 81 of the [Treaty on the Functioning of the European Union](#) (excerpt)

The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases. Such cooperation may include the adoption of measures for the approximation of the laws and regulations of the Member States.

For the purposes of paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt measures, particularly when necessary for the proper functioning of the internal market, aimed at ensuring: ...

# Coordination through Cooperation (Insolvency Representatives)

Art. 41

## subsection 1:

- Duty to cooperate to the extent cooperation is consistent with the laws governing the respective proceedings. The cooperation can be effected in any manner including on the basis of agreements or protocols.

## Subsection 2 Duties during the Cooperation pursuant to Subsection 1

- A) as Art. 31 (1) old but only if appropriate measures for the protection of confidential information are in force
- b) examination of possibilities to save or reorganize the debtor if possible, coordination of the preparation and implementation of a reorganization plan
- c) coordination of the liquidation or use of the insolvency estate and of the management of the debtor's business operations

# Coordination through Cooperation

## Other details, about which information should be communicated:

- Status and size of the estate as it should lie according to the applicable legal provisions in the respective proceedings
- planned or litigated disputes for the restoration of the estate as it should lie according to the applicable legal provisions in the respective proceedings (avoidance litigation)
- Opportunities for litigation to recover items that were part of the insolvency estate.
- Litigation for the compensation of damages and with respect to claims filed (with a view to Art. 23)
- Result of the verification of claims and the status of litigation related to the assessment of claims.
- Number of creditors
- Ranking of creditors
- Planned measures of reorganization and restructuring
- Opportunities for liquidating assets
- Status of the management of the proceedings
- Probable rate of satisfaction of the creditors.
- discharge

# Coordination through Coordination (Courts)

## Article 42 (1) (Cooperation)

For the purpose of coordinating the main insolvency proceedings, territorial proceedings, and secondary insolvency proceedings over the assets of the same debtor

and to the extent consistent with applicable laws,

each court responsible for an insolvency petition or an opened proceeding cooperates with any other court also having such a proceeding pending before it.

For that purpose, the court may appoint an independent individual or agency which will become active if so instructed by the court.

## Article 42 (2) (Communications)

As part of the cooperation,

the courts,

or an individual

or an agency within the meaning of subsection 1 acting on their behalf

may directly

communicate with each other

or directly request for information and assistance among each other

If the procedural rights of the parties involved and the confidentiality of the information is respected.

# - Courts through Cooperation between Insolvency Representatives and Courts

## Article 43 (1) (Cooperation and Communication)

For the purpose of coordinating the main insolvency proceedings, territorial proceedings, and secondary insolvency proceedings over the assets of the same debtor

and to the extent that such coordination and communications are consistent with the laws applicable to the individual proceedings and do not result in any conflict of interest,

the insolvency representatives have to cooperate and communicate with the courts as follows:

- The insolvency practitioner of the main insolvency proceedings cooperates and communicates with each court having received a petition for the opening of secondary insolvency proceedings or having opened such proceedings.
- The insolvency practitioner of a territorial insolvency proceeding or a secondary insolvency proceeding cooperates and communicates with the court having received a petition for the opening of main insolvency proceedings or having opened such proceedings.
- The insolvency practitioner of a territorial insolvency proceeding or a secondary insolvency proceeding cooperates and communicates with the court having received a petition for the opening of another territorial or secondary insolvency proceeding or having opened such a proceeding.

# Means and Methods of Cooperation - Art. 41

## Art. 41 (1) sentence 2

The cooperation can be effected in any manner including on the basis of agreements or protocols.

### Comment on Agreements (insolvency Administration Agreements, Protocols):

- The respective partners of any agreement are not at liberty to make contractual dispositions regarding any compulsory obligations imposed on them by any applicable law.
- The interests of the creditors of the main and secondary insolvency proceedings must not be adversely affected by a diminution of the estate.
- Participation rights of the creditors under national laws (e.g., approval pursuant to [section 160 of the German insolvency code](#)) must not be ignored.
- German law does not provide for the inclusion of agreements between the insolvency representatives into a court order declaring such agreements to be binding. Moreover, such an order might violate rights of creditors.

# Means and Methods of Cooperation - Art. 42 and 43

## Article 42 (3) (Courts)

Any method the court considers appropriate can be chosen, including without limitation:

- a) coordination in the appointment of insolvency representatives
- b) communication of information by any means considered appropriate by the court
- c) coordination of the administration and supervision of the debtor's assets and affairs\_
- d) coordination of the conduct of hearings
- e) coordination in the approval of protocols, where necessary

## Article 43 (2) (Insolvency Representatives and Courts)

Any method can be used, e.g., the methods mentioned in Art. 42 (3)



# Means and Methods of Cooperation - Whereas Clauses

## Whereas Clause 48 Sentence 5

When cooperating, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law, and in particular the relevant guidelines prepared by the United Nations Commission on International Trade Law ([UNCITRAL](#)).\_\_

## Whereas Clause 49

- This clause promotes the conclusion of agreements and stipulations between insolvency representatives and courts for the purpose of facilitating cross-border cooperation to the extent consistent with the laws applicable to any respective proceedings.
- The form - written or by word of mouth - and the extensiveness - from general to specific - of such agreements and stipulations may vary and they may be entered into by varying parties.

# Principles and Guidelines on Cooperation

Europe	International
<u>European Communication and Cooperation Guidelines for Cross-border Insolvency (CoCo Guidelines)</u>	<u>Guidelines Applicable to Court-to Court Communications in Cross-Border Cases</u>
	<u>UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation</u>
<u>EU Cross Border Insolvency Court-to-Court Cooperation Principles (EU JudgeCo Principles)</u>	<u>ALI/III Global Principles for Cooperation in International Insolvency Cases</u>