

SECONDARY INSOLVENCY PROCEEDINGS:

SPECIAL POWERS OF THE INSOLVENCY  
PRACTITIONER OF THE MAIN PROCEEDING

- Tools for Avoiding or Influencing  
Secondary Proceedings -

**Eberhard Nietzer**

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

# Stay of the Opening

- **Art. 38 (3) sentence 1:**

- Requirements:
  - ✓ Temporary Stay of individual enforcement proceedings to allow for negotiations between the debtor and his creditors.
  - ✓ Existence of suitable measures to protect the interests of the local creditors.
- Period of the stay:  
up to 3 months

- **Art. 38 (3) sentence 2 (preservation measures by the court):**

- The court enjoins the insolvency practitioner or debtor in possession from removing or selling items of the estate situated in the MS in which the establishment is located unless the item is removed or sold in the ordinary course of business.
- The court orders other measures to be taken to protect the interests of the local creditors during a stay unless such measures are inconsistent with the national rules of civil procedure.

- The court may lift the stay sua sponte or upon a motion by a creditor either after an agreement between the debtor and his creditors has been concluded or if the the rights of the so moving creditor are adversely affected by a continuance of the stay.

# Opening of Different Proceeding

- Art. 38 (4)

- Upon the request of the main insolvency practitioner, the court may open a proceeding listed in Annex A which is different from the type of proceeding originally requested if the requirements of national laws for opening those different proceedings are met and if that type of proceeding is best suited for the interests of the local creditors and the coherence between the main and the secondary insolvency proceedings.

# Right to Submit Proposals pursuant to Art. 41 (2) subitem c)

## **Art. 41 (2) subitem c)**

The insolvency practitioner of the secondary insolvency proceedings has to give the insolvency practitioner in the main insolvency proceedings an early opportunity to submit proposals on the realization or use of the assets in the secondary insolvency proceedings.

**No authority of the insolvency practitioner of the main insolvency proceedings to issue instructions to the insolvency practitioner of the secondary insolvency proceedings**

# Stay of the Liquidation of Assets

## Art. 46

The request can only be denied if the stay is obviously of no interest for the creditors of the main insolvency proceedings.

The court may, however, require the insolvency practitioner of the main insolvency proceedings to take reasonable measures for the protection of the interests of the creditors of the secondary insolvency proceedings and of other groups of creditors.

The period of the stay is up to 3 months and can be extended.

Discontinuance upon the request of the insolvency practitioner of the main insolvency proceedings or on the courts own motion, or on the motion of a creditor or by the insolvency practitioner of the secondary insolvency proceedings if the facts show that this measure can no longer be justified by the interests of the creditors of the main insolvency proceedings or secondary insolvency proceedings.

# Conversion

## Art. 51

Territorial proceedings that had been opened before the main insolvency proceedings were opened, may subsequently be converted into another type of proceeding mentioned in Annex A upon the request of the insolvency practitioner of the main insolvency proceedings.

# Right to Participate in Secondary Proceedings (Art. 45 (3))

## Art. 45 (3)

The insolvency practitioner in the main insolvency proceedings has the right to participate in the secondary proceedings like a creditor, especially by attending the meetings of the creditors.

He is not entitled to vote, however (prevailing opinion in Germany)

# Proposals of Restructuring Plans

## **Art. 47 (1) sentence 1**

The insolvency practitioner of the main insolvency proceedings may propose a restructuring plan if the domestic laws of the MS in which the secondary insolvency proceedings were opened permit the resolution of the proceedings through a plan.

## **Art. 47 (2)**

If any measure restricting the rights of creditors (e.g., respite) is to have cross-border effect beyond the territory of the secondary insolvency proceedings, the debtor needs to obtain the approval of all affected creditors.