Creditors Here and There
- or How Creditors' Claims in Cross-border Insolvency Proceedings Should Be Treated -

- by Andrea Csőke

Nowadays it is a common situation on the field of the insolvency law that there are proceedings against the debtor in several countries. Within the EU according to the Regulation EC No 1346/2000 of 29 May 2000 (hereafter: the Regulation) there is one main proceeding and there may be several secondary territorial proceedings. The Regulation rules the responsibilities of the parties after opening the proceeding: what the main liquidator has to do and what is the task of the liquidators of the secondary proceedings in cross-border prospect; in what way do they have to communicate with each other, etc. The fundamental principles of the rules are communication and cooperation, but what happens in practice?

Look at only one part of this huge problem-mass, the Article 32 of the Regulation about *"Exercise of creditors' rights"*

1. *Any creditor may lodge his claim in the main proceedings and in any secondary proceedings.*
2. *The liquidators in the main and any secondary proceedings shall lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed, provided that the interests of creditors in the latter proceedings are served thereby, subject to the right of creditors to oppose that or to whitdraw the lodgement of their claims where the law applicable so provides.*
3. *The liquidator in the main or secondary proceedings shall be empowered to participate in other proceedings on the same basis as a creditor, in particular by attending creditors' meetings.*

What do they mean at first sight?

a) any creditor can lodge his claim in any proceeding.
b) any liquidator can lodge the creditors' claims of the proceeding where he was appointed as a liquidator in any other proceedings,
c) the liquidator of another proceeding has the same right as a creditor has in a proceeding.

But is it true? Can we interpret the text in this way?

a) The statement is logical, while it is the debtor's assets that are the subjects in the proceedings that were opened in several countries and the creditors' claims are against the debtor, so the creditors can ask for satisfaction there where the debtor's assets are.
b) Because of the second statement we have to stop here, it is not common in the insolvency acts that somebody collects other companies' claims and acts on their behalf. Naturally there are representatives in proceedings, but this is a strange one, because this liquidator from a different proceeding is an authority himself in his own proceeding and he has the power there to judge the creditors' claims. How does it work in a situation where there are a minimum of two persons who have almost the same duty to judge the creditors' claim? Let's assume that there is a main proceeding where 5 creditors lodged their claims. One of them is a tax authority in that state, one is a worker with its claim for wages, and 3 contractual creditors. The liquidator of the main proceeding gets to know that there is a secondary proceeding in a different member state where the debtor's assets are, so he decides to lodge his creditors' claims there.
   The questions suddenly arise in this situation:
   - Does the liquidator have to lodge his creditors' claims one by one, or in one amount?

- If the answer is "one by one", is the liquidator who lodged the creditor's claims their representative during the proceedings or his task is only to lodge the claims?
- Who will have the creditor's rights, is it the liquidator himself because he is a „liquidator", or is it him as a representative of his creditors or creditors one by one?
- How the claims can be dealt with when the state, where the liquidator of the other proceeding lodged the claims, prescribes in its insolvency act that if somebody wants to become a creditor in the proceeding he will have to satisfy some regulations. For example, in Hungary the person who wants to be a creditor after opening the proceeding has to lodge his claim to the liquidator and has to pay a percent of his claim into a fund (from where the fee of the liquidators are paid in proceedings where there is not money).[1] If the liquidator lodges the creditors' claims in his proceeding, are rules for his lodgement the sameas for the other creditor's lodgement? Does he have to pay this fee for one by one or for the total amount?
- Can the liquidator, whose proceeding the claims were lodged to by other liquidators, dispute the claims that had already been accepted by the other one?
- There are differences among the creditors' ranks of the member states. Should the liquidator rank every claim again in this new proceeding?
- In a situation where two or more liquidators take part, can they question the claims which are represented by the others?

I think that the answer is given us by paragraph (2) of the Article, because it assures that the creditor who does not agree with the lodgement can withdraw it. This could happen only in that system where the creditors are listed, examined and ranked one by one.
The theoretical principle is that the debtor's assets constitute one unit meanwhile they are in different countries. With the system of main-territorial proceedings the concept endeavours to increase the creditors' satisfaction on the same level. In this concept the only solution is the following:
The liquidator justifies and ranks the claims of the creditors lodged in his proceeding. When he decides to lodge the claims in the other proceeding, he is only a representative of the creditors, and he has to list the creditors, he has to attach the documents which prove the claims of the creditors, to his lodgement. In my opinion the liquidator in his own proceeding has to communicate with his creditors about the lodgement - according to that act on which his proceeding is based. There are insolvency statutes where the creditor committee has a power to order the liquidator and there are statutes where the creditors do not have such rights, but - considering the second half of paragraph (2) - the creditors have rights one by one to oppose or to withdraw the lodgement of the liquidator. This ensures them a right to know about the lodgement beforehand and not only know, but to decide about it. I think that the liquidator has to ask his creditors whether they want to be creditors in a different proceeding and when the answer is 'yes', they have to take upon the burdens of the lodgement, too.

I think that we have to divide the rights of the liquidator in insolvency proceedings according to the meaning of his rights. The liquidator has two duties in every insolvency system:

- he works as a manager of the debtor's assets - and in this field he has to maintain the unity of the assets till the decision about the future of the debtor or to till the distribution among the creditors. During this period he has to work for the business and - until a creditor's claim is disputed he has to "work" against it - for the sake of the

[1] There is a minimum and a maximum level of payment. (1000 HUF-100.000 HUF)

assets entity and for the other creditors' sake. For example, when he acts as a main liquidator - when the rescue plan, a composition or a comparable measure is pending (Article 34.) - he does not work as a representative, he is empowered in the proceeding as an independent party whose task is to find the best financial solution for the parties.

- But when he works as a representative he has only such rights as the creditors have in this proceeding. For example, in Hungary he would have the right to appeal against the decision of the liquidator of the Hungarian proceeding if he refuses the creditors' claims, or he could raise an objection against the ranking or against the costs of the insolvency proceeding, etc.

This representation lightens the situation of his creditors, because they do not know the law in that member state where their claims were lodged, they do not have enough money to file their claim in this proceeding, but they are parties here.
The consequence of what I mentioned above is that they have to satisfy the rules of the Hungarian Bankruptcy Act and they have to pay the fee one by one - with the help of their liquidator.
My opinion is confirmed by paragraph (1), because a creditor can lodge his claim independently in any proceeding and the liquidator in the second proceeding will have to know whether the amount that the other liquidator lodged in this proceeding contains the creditor's claim or not.
It is sure that in these circumstances the foreign liquidator cannot lodge his creditors' claim in timet - within the 40-day-period from the publishing - so the foreign liquidator has to keep this period from his knowledge of the opening of the proceeding. When he lodge his creditors'claim in the second proceeding he has to attach an application for extension because the delay was not his - and not the creditors' - fault.

But from what I mentioned above results also the conclusion that the new liquidator can justify the claims. In my opinion it is prohibited to do just only when a judge has already ordered about the claim, because it has to be recognized according to Article 25. These judgements can deal with only the ground and the amount of the claim, the rank of the creditors' claim is specified in every member state, so the place in one country's ranking does not ensure the same place in the other's.

In a situation where liquidator1 and liquidator2 lodged their creditors' claims in a third member state, they work as representatives - and so as creditors - and if the creditor can dispute the other creditor's claim according to the insolvency law of the third country, they can question the other's claims - in front of the court of a third member state.

According to the text of the Regulation and the HBA the equally treatment of the creditors can be ensured only in the way mentioned above.

c) In my opinion the right interpretation of this Article is very important, because it may cause big problems at the calculation of votes of the composition. Does paragraph (3) mean that the liquidator has the right to vote on his own behalf or can he vote only as a representative in the name of the creditors? I think he has no interest - or perhaps his interest is against it - in the composition, he is an expert who has the right to get the fee so he should not be allowed to decide about the future of the debtor.

I know that there are different opinions about this problem, for example, Prof. Ian F. Fletcher wrote the following in his book[2]:
"The actual process of multiple cross-filing by creditors on an individual basis could be both complex and costly. In practice the more efficient approach may lie through the provision in Article 32(2) which requires the liquidators in the main and any secondary proceedings to lodge in other proceedings claims which have already been lodged in the proceedings for which they were appointed, provided that this is in the interests of creditors in the latter proceedings. If operated in conjunction with the duties of mutual communication and cooperation imposed under Article 31, the practice of collective filing by liquidators on behalf of all creditors who are participating in each repective set of proceedings would seem to be the best approach."
Prof. Fletcher concentrates only on the situation of the debtor's assets and its future, and his concept stays on theoretical ground but I have a different point of view, because in the cross-border cases as a judge I have to solve the problems in practice.

There is another solution between the NAFTA-countries (USA-Canada-Mexico), but that also does not solve every problem which I mentioned above.
I think that the solution has to be sought to find the fast and efficient treatment of the creditors' claims meanwhile the creditors are treated equally.

It is a very difficult and confused situation and I think there are more problems in this field but in Hungary proceedings where potentional problems might arise have been opened only recently.

[2] Insolvency in Private International Law, National and International Approaches; Oxford, University Press, 2005 Second edition; page 433; 7.137.