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Forum shopping and filing insolvency proceedings in a global legal world

Insolvency Commission

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GENERAL REPORT FOR WORKSHOP 2

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1. Proper place for commencement of insolvency proceedings and centre of main interests.

a. In your jurisdiction which is the proper place for commencement of insolvency proceedings? Is the applicable law determined separately than the venue?

Across most jurisdictions, it seems clear that the proper place for commencement of insolvency proceedings for a corporation is either the place where the business is registered to do business or its principal place of business, which are often, but not always, the same location. In the Netherlands, there is no separate determination as to the governing venue. Notably, in Peru, bankruptcy proceedings are not handled by a court, but rather through a governmental authority called Instituto Nacional de Defensa de la Competencia y Proteccion de la Propiedad Intelectual through its Bankruptcy Proceedings Commission. In Jersey, only companies incorporated in Jersey may be liquidated there, with some exceptions, even though a Jersey court may give recognition to foreign proceedings when necessary for the liquidation of assets found in Jersey.

b. Is there in your country a notion or definition of the debtor's centre of main interests ("COMI")?

Often, when a multinational corporation, or at least a corporation with assets in more than one jurisdiction, it may be necessary for a court to determine that debtor corporation's center of main interests, or COMI. For most countries in the European Union, there is a definition of COMI. In China, Peru and Jersey, the concept of COMI does not exist *per se*, but the determination of the proper jurisdiction for a company's insolvency proceedings is where that debtor has its main office—thus, it is a concept similar in practice to that of COMI. In the US, however, the concept of COMI applies only to Chapter 15 involving the need for foreign liquidation or recognition of a foreign proceeding. For domestic proceedings, a United States court will look to the principal place of business for a debtor. In Sweden and Switzerland, there is no definition of COMI, but insolvency proceedings must be commenced where the debtor is domiciled.

c. Which are the factors relevant to the determination of centre of main interests?

The principal considerations for COMI in most jurisdictions is where the debtor regularly conducts its business or where it maintains its principal place of business, according to the various governmental records. As the German national reporter noted, in the European Union, there are two different theories defining the factors for the determination of the COMI, which are the mind-of-management-theory and the business-activity-theory. According to the mind-of-management-theory, the COMI is located at the place of the debtor's head office or strategic management, where things like internal accounting, IT systems, or board meetings or other strategic decisions occur. In contrast, the business-activity-theory establishes the COMI where the debtor actually operates his business and focuses on external factors that are apparent to third parties (such as creditors). Factors to be considered here would be the location of bank accounts, warehouses or factories, and advertising. German courts, while not saying so specifically, have tended to lean toward the use of the business-activity theory.

In the United States, bankruptcy courts will also look at the timing of the debtor's activities to determine whether the majority of such activities took place at its principal place of business prior to the commencement of the insolvency proceeding or whether they took place elsewhere, such that COMI might be at the other location for the United States debtor. Jersey does not have a definition of COMI.

d. Is this essential in determining the jurisdiction?

For most EU member states and Chapter 15 proceedings for the United States, the determination of COMI is essential to determine a court's jurisdiction. Determining where a corporation has its principal place of business is also important for Sweden and Switzerland.

e. Are there international or supranational regulations regarding the proper place for commencement of insolvency proceedings and/or the determination of the centre of main interest applicable in your country?

For most member countries in the European Union, Regulation 1346/2000 of the European Council, dated 29 May 2000, is the governing regulation for COMI, in connection with certain state-specific insolvency regulations. As mentioned above, in the United States, the definition of COMI and proceedings related thereto, are governed by Chapter 15 of the United States Bankruptcy Code, which is modeled after the UNCITRAL Model Law on Cross-Border Insolvencies.

f. Is the debtor's centre of main interests the place where an insolvency proceeding concerning the debtor is likely to commence? Why or why not?

Generally, for most countries, even those that do not have a definition of COMI, the insolvency proceedings are commenced at either the debtor's COMI or principal place of business, except for China, and Sweden, which require the proceedings to be commenced where the corporation is registered, with some possible exceptions. However, as the Swedish national reporters stated, most often, the corporation's domicile is often the same as its COMI.

g. Please discuss the issues of timing and procedure with respect to the determination of centre of main interests, including when or if a judicial determination on this issue is required or made?

Following the UNCITRAL Model Law, in the United States, a judicial determination regarding COMI must be made at the time the insolvency application is made. In China, a court must decide whether to accept jurisdiction over a bankruptcy application within fifteen days of receipt of the application. In the Netherlands, the courts generally accept the debtor's information provided regarding COMI, and will not make a determination on the issue unless there is a challenge to the COMI as stated by the debtor. In Sweden, the judicial determination to accept an application is made within a few hours of filing—just enough for the country's registration records to be checked as to where the debtor corporation is registered.

2. Movement of the place of registration (or habitual residence) or centre of main interest.

a. It is possible for the debtor to move its place of registration (or habitual residence) prior or after the commencement of insolvency proceedings? Will such a move affect the decision as to centre of main interests and the determination about the commencement of the proceedings?

In the Czech Republic and for most EU member states, the movement of a corporation's registration is irrelevant after the commencement of insolvency proceedings. Prior to such commencement, if it can be seen that the shift of registration is not done to frustrate creditors, then it may be recognized in the Czech Republic. In France and most other EU member states, if a corporation moves its place of registration less than 6 months before its insolvency application, only the court situated in the district where the corporation was initially registered will be able to exercise jurisdiction over the proceedings. In Switzerland, given that the insolvency proceedings commence where the debtor is registered, the debtor's choice must be honored, except that a debtor's choice to move its registration after commencement of the proceedings will not affect the jurisdiction of the court overseeing the insolvency proceedings. In Germany, the move of a company's registration does not necessarily affect where its COMI is, and the COMI is of primary importance for determining where the insolvency proceedings should take place. In the United States, it is possible to shift a debtor's place of incorporation, but for purposes of determining which court has jurisdiction, the court will look at where the debtor "resided" or did business for the majority of the 180 days preceding the bankruptcy petition. However, as with the EU regulations, the United States courts, in Chapter 15 proceedings, are concerned about "last minute" moves as evidence of a debtor's bad faith and abuse toward creditors. In China, in general, it is increasingly difficult to move the place of registration for a corporation prior to the commencement of insolvency proceedings, and it cannot be done after commencement. In Peru, it is possible for a debtor to move its registration prior to commencement of insolvency proceedings, and if the shift is done after commencement of proceedings, it will not affect the jurisdiction of the Commission overseeing the proceedings.

b. Is it possible to move a debtor's centre of main interests prior to commencement of insolvency proceedings?

In general for most countries, it is possible, but the shift must not be seen as abusive to creditors as set forth above. The EU regulations are clear that shifts of either registration or COMI must not be done to be abusive to creditors, as the laws are clearly written to prevent forum shopping.

c. Is it possible to move a debtor's centre of main interests between the time of the application for commencement and the actual commencement of those proceedings?

For many countries, there is no difference between the time of application and commencement of insolvency proceedings. However, with regard to any shifts of COMI (or registration) after commencement of insolvency proceedings, such a shift will have no impact on the exercise of jurisdiction by the court where the application for insolvency proceedings was filed.

- d. If there is evidence of such a move in close proximity to the commencement of the proceedings, in determining whether to recognize those proceedings, will the court scrutinize more closely such a move?**

In a word, yes, the courts in most countries will scrutinize such moves carefully so as to avoid forum shopping.

- e. Is forum shopping allowed under domestic or supranational law which applies in your jurisdiction?**

Forum shopping is frowned upon in the European Union, the United States, and Peru, even though it may be done. In Switzerland and China, because of the mandatory nature of where insolvency proceedings must be filed, the potential for forum shopping is quite limited. In Jersey, there are no prohibitions against forum shopping.

- f. What are factors in your country that may influence a debtor to choose one forum over another, e.g. judges, favorable laws, case law precedent, etc.?**

Factors that may affect the forum selected by a debtor in the United States include judges and particular laws, as well as case law precedent, especially as those domestic laws vary from state to state within the United States. Even though the bankruptcy laws are federal in nature, and thus apply in all states, certain state-specific laws govern the disposition of debtor's property. For instance, states such as Florida are seen as very debtor-friendly, which makes Florida very attractive for insolvency filings. In the European Union, national laws may also be a motivating factor in determining where to file. Specifically, for example, German laws are not seen as debtor friendly as those in the United Kingdom.

- g. Is it possible for a creditor or other party to force or cause a debtor's insolvency proceedings to be moved (rather than dismissed), as a result of a challenge to the debtor's definition of its centre of main interests?**

In the European Union, under the Insolvency Regulation referenced above, any such moves would have to be facilitated with a dismissal of the proceeding in first country and a commencement of the proceeding in the new country. However, it is indeed possible for a creditor to challenge the debtor's professed COMI within the European Union. In the United States, a creditor may challenge a debtor's forum selection. In those countries, such as Jersey where COMI is not defined, this is not applicable.

3. Recognition of foreign proceedings, main and secondary proceedings

- a. Is the recognition of foreign proceedings allowed in your country? What are the requirements? Is this recognition affected by the notion of center of main interests?**

The United States recognizes foreign proceedings by virtue of the UNCITRAL Model Law on Cross-Border Insolvency adoption whereby foreign proceedings are recognized in another country. There are certain requirements: 1) a certified copy of the decision; 2) a certificate affirming the existence of such foreign proceedings and the appointment of the foreign representative; and 3) in the absence of such evidence, any other evidence

acceptable to the court of the existence of such foreign proceedings, and of the appointment of the foreign representative. Additionally, an application for recognition must be filed and accompanied by a statement identifying all foreign proceedings with respect to the debtor that are known to the foreign representative and a statement detailing the corporate ownership structure of a corporate debtor. Whether the foreign insolvency proceeding is pending in the country where the debtor has its center of main interests will affect whether the proceeding is recognized as a “foreign main proceeding” or a “foreign no - main proceeding”.

In Peru foreign judicial decisions may be enforced, generally speaking, subject to an *exequatur* process, where the Peruvian courts shall acknowledge the foreign judicial decisions or awards, without re-examination of the matter on the merit, provided that such decisions comply with certain requirements such as: 1) exclusive jurisdiction of Peruvian courts is not at stake; 2) the decision has been rendered by court having original jurisdiction; 3) the defendant was properly served, was granted the opportunity to appear before the court and due process rights; 4) *res iudicata* status; 5) no *lis pendens*; 6) no *ne bis in idem* or double jeopardy; 7) not contrary to public order; and 8) reciprocity.

In the Netherlands, France, Germany, Sweden and Czech Republic, foreign insolvency proceedings that are commenced within the EU and in a state which is a party to the EU will be automatically recognized based on the EU Insolvency Regulation n.1346/2000 (the “EU Regulation”). In the Netherlands, insolvency proceedings that are commenced in a state that is not a party to the EU will not be recognized. The recognition on the basis of the EU is affected by the notion of COMI. In Czech Republic, decisions of foreign insolvency courts that fall outside the scope of the EU Regulation shall be recognized in case of reciprocity. Also, the Center Of Main Interest (“COMI”) must be located in such jurisdiction and property of the debtor must not be subject to insolvency proceedings already opened in Czech Republic. In Germany, according to section. 343 of the *Insolvency Act* InsO (*Insolvenzordnung*), non-EU insolvency proceedings are also recognized. The recognition is only declined if the foreign court does not have jurisdiction in accordance with Germany law, also, where the recognition of proceedings leads to a result which is incompatible with major principles of German law, in particular with the basic rights of the constitution. In Sweden, it is uncertain whether non-EU proceedings would be recognized, as there is no Swedish legislation that regulates these questions.

In Switzerland, according to section 166 of the Federal Act on International Private Law (“FAIPL”) a foreign bankruptcy order shall be recognized in Switzerland at the request of the foreign trustee in bankruptcy or of a creditor of the bankrupt estate provided that: 1) the order is enforceable in the state where it was rendered, 2) no conflict with Swiss policy i.e. *ordre publique*, proper summoning of parties, compliance with minimal requirements of Swiss procedural rules and 3) reciprocity. The element of reciprocity often proves to be an obstacle because there are still a number of countries, which do not recognize foreign insolvency orders generally and therefore also from Switzerland. Currently Swiss courts consider that the following countries offer reciprocity to Swiss insolvency proceedings: Belgium, Germany, France, Luxemburg, Italy, Greece, United Kingdom, Canada, the United States and Australia. No reciprocity appears to be recognized in respect of the Netherlands, Portugal, Denmark, Finland, Sweden, Norway, Japan or Liechtenstein.

In China, a foreign court's judgment or ruling on a bankruptcy case that has taken effect involves assets in the territories of the People's Republic of China an application or request for judicial recognition and enforcement of the judgement is made to the People's Court. The People's Court shall, pursuant to the international treaty that the People's Republic of China has executed or is a member of, pursuant to the principle of reciprocity, examine the application or request. Where the People's Court deems that the application or request will not violate the basic principles of law of the People's Republic of China, threaten national sovereignty, security and public order, and will not impair the lawful rights and interests of the creditors within the territory of the People's Republic of China, the People's Court shall make a ruling on recognition and enforcement.

In Jersey, recognition of insolvency proceedings from prescribed countries can occur under Article 49 of the *Desastre* Law. For other countries, recognition can occur at common law.

The main requirements for recognition of foreign proceedings are: original jurisdiction, due process, public order and reciprocity. Those issues are particularly relevant in non EU countries. The notion of reciprocity is very important in Switzerland.

b. Does your relevant domestic or supranational legislation have the notions of main and non-main proceedings?

In the United States, domestic legislation does not distinguish between the notion of main and secondary proceedings as the bankruptcy of any one debtor will be consolidated in one court. In the cross-border insolvency context, under 11 U.S.C. §1517, a foreign insolvency proceeding may be granted recognition as a "foreign main proceeding" or a foreign "non-main proceeding". A "foreign main proceeding" is one where the insolvency proceeding is pending in the country where the debtor has its Center Of Main Interest. Recognition of a foreign insolvency proceeding as a foreign main proceeding also entitles the petitioner to automatic relief including the benefit of a stay of all actions or execution against the debtor's property within the territorial jurisdiction of the United States. By contrast, recognition of foreign insolvency proceedings as foreign non-main proceedings does not bring with it any automatic relief.

In Peru, for international insolvency proceedings, Peruvian law follows the Secondary Bankruptcy Proceeding theory, by which a separate insolvency proceeding shall be initiated in Peru once a foreign judicial decision declaring the debtor's bankruptcy is acknowledged by Peruvian courts through an exequatur process.

In the Netherlands, Czech Republic, France, Germany and Sweden, on the basis of the EU regulation which is applicable, main proceedings have to be started in a state where the COMI of the debtor is. Secondary proceedings can be commenced in a state where the debtor has assets or an establishment in that country.

In Switzerland, debt enforcement against assets in Switzerland of a legal entity with domicile outside of Switzerland is, in general, possible. The FAIPL has the notion of main and secondary proceedings while domestic legislation does not distinguish between the notion of main and secondary proceedings.

In China and Jersey the secondary proceedings notion is not applicable.

The notion of secondary proceedings is sometimes known only as far as cross borders insolvency proceedings are at stake; this is the case for United States, Perù, Switzerland and Germany (in France, it is known from a domestic point of view). In the other EU countries, it is always known. China and Jersey do not have such notion, while in the United States automatic stay may be triggered only in case on main proceedings.

c. Does your legislation permit secondary proceedings to be opened to run in parallel with the main proceedings? Are the effects of secondary proceedings limited to the assets in that State where secondary proceedings are opened?

In the United States, the U.S. Bankruptcy Code does not permit main and secondary proceedings to run parallel to each other. As stated above, that concept is not recognized in the domestic context. In the international context, under § 1517, a U.S. court may recognize a foreign insolvency proceeding as either a foreign main proceeding, if it is pending in the country where the debtor has its main interests, or a foreign no main proceeding if the debtor merely has an establishment in the other country. The two are exclusive. Further, all proceedings under Chapter 15, whether main or non-main, are limited to administering assets within the territorial jurisdiction of the United States.

In the Netherlands, Czech Republic, France, Germany and Sweden, on the basis of EU Regulation, secondary proceedings may be opened if two conditions are cumulatively met: 1).main insolvency proceedings have been opened, and 2).the debtor has an establishment in the country where the secondary proceedings would be opened. Effects of the secondary proceedings are limited to assets located in the jurisdiction where the secondary proceedings are opened. These proceedings are limited to assets located in the Member State where they are opened and can only be winding-up proceedings. They run parallel with main proceedings. The main purpose is a better protection of local creditors and a better access to property located in the country.

In France, secondary proceedings are permitted, however, even if secondary proceedings can be opened to run in parallel with the main proceedings, the competent court to open secondary proceedings has to consider the aims of the main proceedings. The goal is to ensure efficiency and effectiveness of international insolvency proceedings, through cooperation between main and secondary proceedings, in order to guarantee the primacy of main proceedings. By contrast, the German legislation only permits secondary proceedings opened in parallel with main proceedings for cross border insolvencies according to EU Regulation.

In Switzerland, according to section 172 of FAIPL a Swiss judgement granting recognition of the foreign bankruptcy order has the same effect as a Swiss bankruptcy order. The Swiss administrator has to realize the assets in accordance with Swiss bankruptcy law. The assets realized will be used to satisfy: 1) claims secured with pledges or mortgages on assets located in Switzerland; and 2) claims not secured by pledge of creditors with domicile in Switzerland but that are privileged under Swiss law.

Any surplus will be handed over to the administrator of the foreign main bankruptcy under the condition that the Swiss court has examined the schedule of claims of the foreign

bankruptcy proceedings in order to determine whether creditors residing in Switzerland, but which are not privileged and have not been satisfied in the Swiss proceedings, have been given adequate consideration in the foreign main bankruptcy. The creditors concerned must be heard. In case the Swiss court does not recognize the foreign schedule of claims, the surplus is to be distributed among the creditors who reside in Switzerland even as regard to unprivileged claims. Therefore, the recognition of a foreign bankruptcy always leads to secondary proceedings.

In China and Jersey, the local legislations do not mention secondary proceedings. However, in Jersey as the *Desastre* Law expressly permits foreign companies to be declared *en desastre*, it is implicit that situations may arise where foreign company is *en desastre* in Jersey and also being wound up elsewhere. Applications to commence parallel or ancillary proceedings in Jersey are very rare

d. Does your jurisdiction allow a challenge to proceedings being designated as secondary? If so, please explain in greater detail.

In the United States, orders granting recognition as a foreign non-main proceeding are appealable. A determination that a proceeding is secondary, or a foreign non-main proceeding under 11 USC §1517, generally involves a factual determination that the country in which the foreign insolvency proceeding is pending is not the debtor's COMI. On appeal, the appellate court reviews legal conclusions *de novo* and findings of fact made as to non - main, an appellate court will not overturn a lower bankruptcy court's factual finding, vis a vis the debtor's COMI unless clearly erroneous

The Peruvian law does not contemplate such a challenge course of action.

In the Netherlands, Czech Republic, France, Germany and Sweden, if secondary proceedings are commenced under the EU Regulation, secondary proceedings will be opened without examining the debtor's insolvency (article 27 EU Regulation). Secondary proceedings can be challenged on the basis of article 26 EU Regulation. In order to challenge the secondary proceedings, it would have to be proven that the conditions mentioned above have not been met. It would have to be proven that:

1. the recognition of the main proceedings should be refused in line with the conditions discussed in paragraph 3 (a) above, or
2. the debtor does not have establishment in the jurisdiction.

In France, a creditor can challenge the "Opening Judgment" of the secondary proceedings through third party proceedings according to article L.661-2 of the French Commercial Code and to article 583 of the French "Code de procedure civile", in case of fraud or if the creditor can invoke his/her own defenses. In Germany as well, a challenge of secondary proceedings is possible also under local legislation.

In Switzerland if the requirements of the recognition of the foreign bankruptcy order are not met, the foreign insolvency proceedings will not be recognized in Switzerland. Other than that, there is no challenge to the proceedings in Switzerland being designated as secondary.

In China and Jersey, no challenge to proceedings being designated as secondary is possible.

4. Abuse of process

a. In your jurisdiction, is a court able to take account of abuse of its processes as a ground to decline recognition?

In the United States, pursuant to 11 U.S.C. §105, all bankruptcy courts of the United States are given the power to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of the Bankruptcy Code" This includes "taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." Courts have recognized this power to be broad enough to permit dismissal of a case, even *sua sponte* , to prevent an abuse of process.

In Perù the Courts can refuse to acknowledge a foreign judgement if the same affects due process rights, public order regulations and good morals.

In the Netherlands, Czech Republic, France, Germany and Sweden, the recognition under the EU Regulation is automatic; local courts may decline recognition in the event such recognition would be manifestly contrary to the public policy therefore, the abuse of process notion would have to reach such intensity in order for it to establish grounds for the court to decline recognition of foreign insolvency proceedings. Within Sweden, it is in principle not possible to abuse the rules since all legal entities are registered with the Official Companies Office and all natural persons in the national registration.

In Switzerland, recognition of a foreign bankruptcy order may be denied on the grounds that it violates Swiss substantive *ordre public* in insolvency matters. A foreign bankruptcy order is not recognizable if a creditor is discriminated in the main proceedings due to his nationality, if the main insolvency is a sham (with the purpose to pull out assets of the Swiss debtor), if the purpose of the main insolvency proceedings is to enforce expropriation measures or in case of simulated main insolvency proceedings. Only the violation of fundamental Swiss substantive *ordre public* will be taken into account.

In China, the judge will consider the national sovereignty, security and public interest, and will not impair the lawful rights and interests of the creditors. When it comes to the domestic insolvency cases in China, most of the insolvency proceedings are initiated by creditor. The People's Courts are very conservative where debtor applies for insolvency proceeding.

The Jersey court has discretion, on receiving a letter of request from a foreign court seeking assistance in a foreign bankruptcy, whether or not to provide assistance. It will take into account all material factors. The fact of the request for assistance is a weighty factor to be taken into account. As noted above, the Jersey court will generally seek to cooperate subject to local law and public policy. As a matter of public policy, the Jersey court will consider whether the foreign proceedings comply with natural justice, whether jurisdiction has been exercised validly, and whether recognition would offend public order rules. Any alleged abuse of process in the foreign court may be taken into account. The Jersey court can also have regard to any alleged abuse of its own processes. So, for example, on an ex parte application for recognition, the applicant is required to give full and frank disclosure.

If it is later shown that such disclosure was not given, the Jersey court can amend or revoke its order granting recognition.

b. What happens if the applicant falsely claims the center of main interests to be in a particular State?

In the United States, Rule 1004.2 (b) of the Federal Rules of Bankruptcy Procedure provides that the United States Trustee or a party in interest may file a motion with the Bankruptcy Court challenging the debtor's purported COMI.

In the Netherlands, Czech Republic, France, Germany and Sweden, in such a scenario, the respective courts should not open the insolvency proceedings, because it does not have jurisdiction.

In Switzerland, according to the section 166 FAIPL only a foreign bankruptcy order, which was rendered at the debtor's domicile is to be recognized in Switzerland provided that the order is enforceable in the state in which it was rendered.

The COMI is not directly relevant in Jersey. But if the underlying basis of the appointment of the office-holders turns out to be based on false COMI grounds, the Jersey Court may amend or revoke its order granting recognition.

c. Are those issues governed by international regulations or only by domestic law?

In the United States, all bankruptcy matters are governed by federal, domestic bankruptcy law as codified and as interpreted by the Courts. In Peru and China, all bankruptcy matters are regulated by domestic law. In Switzerland these issues are governed by domestic law i.e. by the FAIPL.

In the Netherlands, Czech Republic, France, Germany and Sweden, such issues are governed by the EU Regulation but also by domestic legislation. This is the case in Czech Republic, where the Act on International Private Law contains similar principles to the ones encompassed in the EU Regulation except for the automatic recognition of the foreign insolvency proceedings. In France the notion of abuse of process is governed by domestic law only.

In Switzerland, these issues are governed by domestic law i.e. by the FAIPL.

In Jersey, there are issues determined by the Jersey court under Jersey law, but clearly if the alleged abuse is, for example, a false claim that the company's COMI is in England by which English liquidators have been appointed who are seeking recognition in Jersey, the Jersey court may have to consider how COMI ought properly to be determined under English law. The Jersey court could receive expert evidence of foreign law for that purpose.

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