

Cross-border business: any threat of cross-border insolvency? (2) (3/30/19)

This article completes what we wrote last week.

Territorial insolvency proceedings

Although a company's centre of main interests (COMI) lies in one member state, the courts of another member state have jurisdiction to open insolvency proceedings against the debtor company if it has a place of business in that other member state.¹ In other words, the place of business is any place of business where the debtor has carried on a permanent business using its staff and assets within three months before a petition for opening the main insolvency proceedings (MIP) was filed.

Territorial insolvency proceedings (TIP) may be the only ones if the MIP have not been opened in the member state where the COMI lies. If the MIP have been opened, then TIP become secondary proceedings² affecting only the debtor's assets situated in the member state where the TIP were opened.³

In the case of two simultaneous insolvency proceedings, the courts should invoke the principles and policies for cross-border insolvency cooperation, particularly the UNCITRAL guidelines.⁴

Article 3(4) of the Regulation provides that TIP may be opened before the MIP only in two cases:

1. The MIP cannot be opened because of the law of the member state where the debtor's COMI lies; or
2. TIP are requested –
 - a) by a creditor whose claim is related to the place of business; or
 - b) by a public body authorised to ask for insolvency proceedings to be opened under the law of the member state of the place of business.

So, if a Latvian-registered company posts its construction workers to Germany for carrying out construction projects and fails to pay German taxes, the German tax authority may file a petition with the German courts for opening the Latvian company's insolvency proceedings in Germany. Although its COMI lies in Latvia, the German courts will have grounds for opening TIP in Germany under German law.

A different procedure would apply to a Latvian company that supplies services only in Latvia but purchases material from a German company. If the Latvian company has accounts payable to the German company, who becomes the Latvian company's creditor, the German courts will have no grounds for opening TIP in Germany because –

1. the Latvian company has its COMI in Latvia;
2. it does not carry on any business in Germany.

This leads to the conclusion that business evolution and free market advantages will result in increasing numbers of EU cross-border insolvency proceedings. So entities in their active phase of business should know the consequences of insolvency and the member state where insolvency proceedings can be opened. Creditors should also treat the matter of cross-border insolvency with care because any business may become a debtor and a creditor.

¹ Article 2 of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (applicable to insolvency proceedings opened after 26 June 2017)

² F. Garcimartin, *The EU insolvency regulations: rule of jurisdiction*, page 9

³ Article 34 of the Regulation

⁴ Consideration 48 of the preamble to the Regulation