

SCHULTZE & BRAUN INSOLVENCY LAW

Registering claims for the insolvency schedule in practice

Besides the insolvent asset liabilities, the relevant liabilities to be taken into account in insolvency proceedings are the claims to be registered for the schedule. The importance of registering claims is substantial. Only after registering its claim will a creditor be allowed to partake in the insolvency proceedings, including voting and codetermination rights during the creditors' meeting. The registered (and recognised) claim constitutes the basis for the (prorated) satisfaction of the creditors from the insolvent assets.

Particularly in view of the expected economic outcome of insolvency proceedings, both creditors and their agents often pay insufficient attention to the procedure involved in registering one's claims.

Definition of the creditors in the registration of claims

Each entity at home and abroad may qualify as a creditor. What should be noted in this context is that the name of the firm is stated correctly, the reason being that the subsequent extract from the insolvency schedule together with the acknowledgement docket by the insolvency court constitutes an enforceable legal instrument. Any other existing titles, for instance a final judgement by the creditor against the insolvent debtor, will be invalidated by the insolvency court (§ 178 InsO; Insolvency Code).

The legal form (or structure) of the registering creditor is often incorrect or missing altogether. What is also often ignored is the fact that the registration of a multitude of creditors is only permissible if the registration shows clearly which portion each entity or individual claims for itself. The reason for this is to allow the claims registered by each individual creditor to be contested during the review hearing. This will be frustrated by a class registration for several creditors which ultimately fails to show the portion of the claim to which each creditor is entitled.

Registering claims by authorised agents

When it comes to smaller claim amounts, the question arises whether it makes sense to register the claim by mandating a lawyer.

The legal counsel acting on behalf of the creditor receives a 3/10th fee under § 75 BRAGO (Federal Code of Lawyers' Fees) for registering the claim, with the counsel's activities (particularly in claims already titled) limited to asserting a claim of which the creditor is already aware. For instance, for an amount claimed of DM 10,000.00, the fee is DM 178.50 (BRAGO West) plus postage and other expenses. However, the cost incurred for registering the claim only constitute subordinated liabilities under § 39 InsO which hardly ever attract a quota.

Data on the quota distributions which schedule creditors may expect on average are as yet not available. Taking the quotas to date from bankruptcy and collective execution proceedings, adjusted by the preferential creditors' rights no longer existing, quotas above 10% will remain the exception, whereas quotas between 0% and 5% may be considered more likely. It is realistic to assume that only marginal quotas or no quotas at all will be paid to schedule creditors in about half the insolvency proceedings opened.

Nature and scope of the claim

Principal claim

The claims to be registered on principle under § 38 InsO include the principal claim, statutory or contractual interest until the day the insolvency proceedings are opened, and the costs incurred through collecting the claim under the aspect of default.

Subordinate liabilities

Without the express request by the insolvency court, “subordinate liabilities” under § 39 InsO need not be registered separately. These include, among others, the interest accrued since the opening of the insolvency proceedings, the expenses incurred by the creditors in attending the insolvency proceedings, fines, penalties, enforcement fines, claims arising from services rendered by the debtor without consideration, and claims for reimbursement of the capital-replacing loan by a shareholder / partner, or similar claims.

Claims not due

Claims not due may also be registered in insolvency proceedings; these are deemed to be due under § 41 InsO. If they bear no interest, they are to be discounted using the statutory rate of interest.

Claims subject to a condition subsequent

Claims subject to a condition subsequent are viewed by the insolvency court as unconditional claims as long as the condition has not occurred.

Amounts in money

Claims must be filed in DM or EURO. Non-monetary claims or claims whose amount in money is not determinable, should be asserted with their estimated value. Non-monetary claims cannot be included in the schedule.

What is as yet open is whether the creditor himself has to calculate and specify interest, or whether stating the amount of the claim, the interest rate and the pertinent period is sufficient. As a precaution, the creditor should list a specified and properly calculated interest amount in his claim registration form.

Time of filing the claim registration

On the date the insolvency court opens the insolvency proceedings, it will also specify the date of the reporting and the review hearing, and the period allowed for registering the claims. The insolvency administrator must notify the creditors who have come to his attention through the debtor’s bookkeeping or accounting or otherwise of the opening of the insolvency proceedings and the option of registering claims. As a rule, the insolvency administrator will use his own form and an instruction sheet outlining the claim registration.

Publication of the opening of the proceedings

At the same time, the opening of the insolvency proceedings together with the relevant periods allowed and the insolvency administrator’s name and address must be published in the *Bundesanzeiger* (Federal law gazette), also in the *Land Gazette* of the appropriate federal Land

and in the local publication media. Creditors can also find out about the opening of proceedings through other media, for instance through the internet.¹

Notification of creditors

Creditors should not necessarily rely on being notified by the insolvency administrator. The reason for this is the often inadequate bookkeeping and/or the inadequate co-operation by the debtor or the bodies acting on behalf of the debtor. Naturally a creditor who is unknown to the insolvency administrator for the lack of correct accounting documents cannot be notified. Also, requests for registering claims are often sent by way of hundreds of letters without the usual identification features such as customer number, invoice number, etc., such that there is the risk, particularly among major firms, that request for registering claims sent by the insolvency administrator fail to reach the creditor's appropriate department or cost centre.

Registration with the insolvency administrator

It should be emphasised that the claim is to be registered with the insolvency administrator and not, as in the old bankruptcy code, with the bankruptcy court. Experience has shown that, if claims are erroneously sent to the insolvency court, their forwarding to the insolvency administrator can take several months as a result of the excessive workload under which the court registries have to work.

Consequences of the failure to keep within the time limits allowed

Claims received by the insolvency administrator on the last day of the period allowed for filing claims will be included in the schedule, provided that the other conditions are met. Claims received by the insolvency administrator between that date and the date of the review hearing will be taken along to the hearing where the creditors present can decide whether the subsequently filed claims should also be reviewed or not. As a rule, there are no serious objections raised to such late filing.

The situation is somewhat more difficult for creditors filing their claims after the date of the review hearing. They are not automatically suffering the loss of their rights which they did, for instance, under the old collective execution code (exclusion period under § 14 GesO). Claims may actually be filed until the final date, but it should be kept in mind that this will incur extra charges which may exceed the original claim.

For a subsequent review hearing, the creditor must pay a flat fee of DM 25 (schedule of costs [KV] No. 4140 of the GKG). It should also be noted that the costs of the public announcement of the special date of the review hearing, which can often amount to several hundred Deutschmark, are imposed upon the creditor in derogation of the statutory provisions (KV No. 9004 of the GKG).

All this should be kept in mind when filing late claims. If, under economic aspects, registering a claim for small amounts is often a doubtful venture, for instance when offsetting it against the time and effort spent in the accounts receivable department, late registrations of claims will in many instances be a minus business.

Summary

¹ Cf. e.g. www.sachsen.de/de/freunde/gerichtstafel/index_gerichtstafel.html

At first glance, registering one's claims in insolvency proceedings appears to be a relatively simple legal process which, however, is often underrated in its significance and complexity. In particular, creditors must be mindful of the financial expenditure involved when mandating a legal representative or when filing late. All this should be taken into account in view of the amount of the claim, the difficulties in giving reasons/enforcing, and in the prospects of being included in the quotas.

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