



# **INTERNATIONAL INSOLVENCY INSTITUTE**

## **Twelfth Annual International Insolvency Conference**

Supreme Court of France

Paris, France

## **RIGHTS AND ROLES OF UNSECURED CREDITORS**

### *Survey on Rights of Creditors-Germany*

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June 21-22, 2012

INTERNATIONAL INSOLVENCY INSTITUTE

12TH ANNUAL CONFERENCE

A. RIGHTS, DUTIES AND POWERS OF UNSECURED CREDITORS IN INSOLVENCY PROCEEDINGS <sup>1</sup>		
1.	Does your jurisdiction have an insolvency proceeding that enables an entity to restructure or only an insolvency proceeding that enables a company to liquidate?	There is one set of proceedings, “the insolvency proceedings” stipulated in the one and only Insolvency Code (Insolvenzordnung) that allows companies to restructure, to rescue their business or to liquidate depending on the circumstances and development of the situation during the proceedings, hence a shift from restructuring or rescue to liquidation within the same proceedings is permissible.
2.	If your jurisdiction has an insolvency proceeding that enables an entity to restructure, does the debtor entity remain in control of its restructuring and/or business operations, or is an independent trustee or administrator appointed for such purposes?	<p>The statutory principle is to deprive the management of its powers and appoint an insolvency administrator who takes over control of the business operation as well as the restructuring or the winding-down activities.</p> <p>However, especially in restructuring cases, the code allows the management to stay in place. This instrument is inspired by the US debtor-in-possession concept, but requires an explicit petition and approving court order, so called “self-administration”.</p> <p>With the revision of the Insolvency Code by the Act Facilitating the Restructuring of Companies (ESUG), in</p>

<sup>1</sup> The participation rights of creditors as described herein are referred to ordinary insolvency proceedings where no insolvency plan is submitted. The voting and participation of creditors in an insolvency plan procedure is subject to separate rules.

		<p>force since March 2012, this instrument of self-administration has been strengthened. While formerly, the applicant was rather in the mercy of the court, the court now has to provide important cause and reasoning to turn down such application.</p> <p>However, in case of such self-administration the court will appoint a supervisor or custodian to oversee the process and activities conducted by the management. In most of the cases, the debtor appoints an insolvency expert additionally to the board to provide and demonstrate the specific requirements attached to the proceedings</p>
<p><b>B. UNSECURED OR GENERAL CREDITORS OFFICIAL ROLE IN INSOLVENCY PROCEEDINGS IN YOUR JURISDICTION</b></p>		
<p>3.</p>	<p>Do unsecured or general creditors have an official role or any type of responsibilities in insolvency proceedings in your jurisdiction?</p>	<p>The unsecured creditors together with the secured creditors form the creditors meeting which is entitled to establish a creditors committee by majority voting. As long as a creditors committee is in place, the creditors meeting has less powers. Even though a creditors committee is formed, the creditors meeting's consent is required for a business sale to insiders or –upon application and presentation of a better offer – at an undervalue.</p>
<p>4.</p>	<p>Generally describe the role played by unsecured or general creditors.</p>	<p>The creditors committee supervises and supports/assists the insolvency administrator. Especially in case of “important legal transactions” its consent is required.</p> <p>Upon a certain threshold in the total sum of filed claims, creditors may also request to invoke a creditors meeting. Creditors have the right to determine the outcome of the proceedings – hence they may instruct the administrator by majority voting whether to continue the operation or to wind-down the business. Creditors may also instruct the administrator to create and submit an insolvency plan.</p> <p>Now, since ESUG, immediately upon filing a provisional creditors committee can be formed that may nominate someone unanimously to be appointed insolvency administrator by the court. In case of an unanimous nomination, the court may only refuse this person, if he/she is not capable or qualified. Previously, creditors didn't have any formal influence on the person to be chosen by the court.</p>

		Besides that, unsecured creditors have only the chance to participate in case of a submitted insolvency plan where consent of the creditors groups is required. Otherwise, creditors are in fact out of the picture and mostly do not no further involvement or access other than the proof of claim filing.
5.	Do the responsibilities or roles differ in restructuring proceedings vs. liquidation proceedings?	No, the structure of creditors meeting and creditors committee do not change in liquidation scenarios to what is described before. Practically, creditors are usually less interested and there will be no insolvency plan procedure to liquidate. In addition, the statutory requirements for a creditors meetings' voting in case of a business sale or a sale at an undervalue will not be applicable.
6.	Are the responsibilities or roles official in that they are set forth in the applicable insolvency statutes or are the responsibilities one of custom and practice?	The role of the creditors is set out in the Insolvency Code.
<b>C. STRUCTURE OF ROLES OR RESPONSIBILITIES</b>		
7.	If the roles or responsibilities are official, how are they structured?	Please see answer to question 6 above.
8.	Can unsecured creditors form their own group or committee or does some other person or entity form it?	There is only one creditors committee that represents all secured and unsecured creditors. Such committee usually is formed by someone from the financing parties, customer representative, supplier representative, works council or employees representative, pension insurance protection fund, tax authorities etc. There are not different several groups or committees, only the overall assembly for all secured and unsecured creditors

		– the creditors meeting – and the established creditors committee.
9.	How is the group or committee formed?	<p>Please see above.</p> <p>The creditors committee is established and its member nominated by majority voting of the creditors meeting. Beforehand, the court in cooperation with the insolvency administrator forms a provisional creditors committee in case several urgent and important issues are to be discussed.</p> <p>The provisional creditors committee in order to nominate an insolvency administrator needs to be set-up at the date of the filing. In practice, creditors willing to serve will have to submit their availability in writing to the debtor or to the court.</p>
10.	If committees are formed, how large or small are the committees?	There is no rule. It should be a picture of all sorts of creditors; secured, unsecured, large and small. It shall include an employees' representative. There is no number anywhere stipulated. Usually it contains of not fewer than 5, but fewer than 10 members.
11.	What is the criterion for serving on a committee?	The criterion is to the Code's ideal of a full representation of all creditors. Finally, the creditors meeting votes on the establishment or confirmation of the provisional and each member of the committee.
12.	Can there be more than one committee?	No, only one creditors' committee may be formed.
13.	What is the attitude of the court to the committee(s)?	The courts are neutral. It's a matter of the creditors.
14.	What are the rights of the group or committee?	The committee has very general rights to assist the administrator in conducting his functions. Committee members do not only support him, but also supervise and oversee his actions. They are entitled to check the

		books and accountings and request information and documentation.
15.	Can the committee or group appear before the court or insolvency tribunal?	No, there is no forum for the creditors committee to appear anywhere in the judicial system.
16.	What are the dues and obligations of the group or committee?	The committee's dues are the supervision of the administrator's actions, to check the books and records.
17.	Are they required to provide information or report to their constituency?	No, the administrator will regularly submit a report to the court. Creditors are entitled to access the court's file and review and/or copy the report. Creditors committee members are rather bound by certain confidentiality agreements.
18.	Does the group of committee have any responsibilities or owe any duties to: (i) the court; (ii) the debtor; and/or (iii) the creditors themselves?	Their duties as described in No. 16 and above is a duty to the creditors (assembly) themselves. They can be held liable for wrongdoing to the harm of the debtors whereas, the administrator usually arranges insurance for the committee members, paid by the estate.
19.	Does the group act as a fiduciary as that term is used in your jurisdiction?	
20.	Can the group or committee hire counsel or other professional (accountants, investment advisors, etc) to assist it in	This is not the role/function of the committee.  The role of the committee is to assist the administrator in conducting his functions. In special circumstances,

	their insolvency proceeding?	<p>an expert in a certain area might be appointed a member of the committee to provide his expertise. A creditors committee member is not necessarily a creditor ('s representative).</p> <p>However, the creditors committee's duty to check the accounts is usually conducted by a professional auditor on their behalf.</p>
21.	If so, who pays the fees and expenses of such professionals?	<p>The administrator will pay other professionals as an expense of the administration. The committee's cash and accounts auditor is also paid by the estate.</p> <p>The creditors' committee and the court do, however, sanction the administrator's experts' remuneration.</p> <p>At the end, the administrator has to render the accounts incl. the expenses for attorney, accountants etc to the court which are subject to an interim and final auditing.</p>
22.	What is the relationship between the group or committee and the trustee and or insolvency administrator?	<p>It depends on the circumstances. Usually, the work-relationship is very professional and cooperative.</p>
23.	Can the group or committee negotiate various matters, such as post-filing financing, asset sales, plan terms, use of cash and other operational matters?	<p>The purpose of the committee is to ensure that creditor interests are represented.</p> <p>The committee may require the administrator to furnish it with such information concerning the running of the administration as it may reasonably require, but there is no such power to negotiate matters. This is left to the administrator.</p>
24.	How do the committees operate? Do they have leaders, by-laws, structure, etc?	<p>The Insolvency Code contains almost no rules on the operation of the committee, unless that the creditors committee can form a resolution by majority voting. Each member of the committee has one vote and a resolution is passed when a majority of the members present or represented have voted in favour of it.</p> <p>Besides that, the committee meets via phone or in person on a regular basis and as the need may be. There</p>

		<p>is no chairman unless the committee volunteers to elect one internally. It has also no by-laws.</p> <p>Creditors' committee members are paid by a (small) hourly fee and will receive their reasonable travelling expenses as a cost of the administration.</p>
<p><b>D. RIGHTS, DUTIES AND POWERS OF UNSECURED CREDITORS IN INSOLVENCY PROCEEDINGS</b></p>		
25.	<p>If there is no statutory creditors' group or committee, do ad hoc groups form seeking to represent the interests of unsecured creditors?</p>	<p>No – ad hoc groups do not exist as a legitimate body. If there is no creditors committee, the creditors meeting is entitled to request information, reporting and auditing. At least one or more creditors with 40% of the filed claims sum may request a creditors meeting; at least 5 creditors with 20% of the filed claims sum may request a creditors meeting.</p> <p>The creditors meeting's consent is required for especially important matters in case there is not creditors committee formed.</p>
26.	<p>Do insolvency courts or tribunals recognize such ad hoc groups?</p>	<p>No.</p>
27.	<p>If there is no official role or responsibilities for unsecured creditors in insolvency proceedings in your jurisdiction, how are the rights of unsecured creditors protected and by whom?</p>	<p>n/a</p>
28.	<p>What input do unsecured creditors have in a proceeding, if any?</p>	<p>Unsecured creditors have almost no input, unless they are members of the creditors committee. During the statutory creditors meeting, creditors are entitled to speak and provide their view or request further</p>

		explanation or put an item on the agenda in order to have the creditors meeting's voting on that item.
29.	Can unsecured creditors object to actions being taken by the debtor, trustee or administrator?	<p>Practically only if he has majority or informally acts in concert with others.</p> <p>In case there is a creditors committee established and the unsecured creditor is not member of the committee, a consent of the creditors meeting (where he can object) is only required in case of a sale to an insider or if the court order such consent in case of a sale at an undervalue.</p>
30.	Can unsecured creditors pursue causes of action on behalf of the estate?	No – this is the job of the administrator.
31.	Can unsecured creditors purchase assets from the estate?	Yes. However, if the unsecured creditor has a claim amounting to at least 20% of the sum of all claims, the creditors meeting must consent to such sale.
32.	Can unsecured creditors seek to appoint or remove a trustee or administrator?	<p>An administrator may only be appointed by court. A provisional creditors committee can unanimously nominate a proper person whom the court can only refuse for good cause.</p> <p>During the first creditors meeting (usually 4-6 months upon filing), the creditors may elect another insolvency administrator. This almost never happens due to the significant time that has passed already.</p> <p>The court can remove the administrator ex officio or upon petition by the creditors committee or the creditors meeting for good cause.</p>
33.	Can unsecured creditors investigate the management or acts of the debtor, both pre and post filing?	It is the job of the administrator, not of the creditors.

34.	Do creditors have the right to receive information about the estate from the trustee or administrator?	Yes – all creditors have the right to receive information about the administration and the management of the business. This is usually done through the reports submitted to the court where the creditors can get access and through reporting during the creditors meeting.
35.	Can unsecured creditors propose terms of a plan or restructuring arrangement?	Creditors have the right to instruct the insolvency administrator to draft and submit an insolvency plan. Creditors themselves are not entitled to submit a plan.
36.	Do any of your answers above differ if a proceeding is a cross-border proceedings rather than a solely domestic proceeding? If so, how?	No, as long as these are commenced insolvency proceedings under German law, these above described rules apply.
37.	Is it your view that insolvency proceedings in your jurisdiction would be benefited by unsecured creditors having larger and better defined roles and responsibilities or would such participation hinder the insolvency process? Please state reasons for your opinion.	<p>In most of the cases cooperation with the creditors committee is positive, proactive and reasonable. At this level, feedback and decision making can be achieved quickly. Usually, creditors committee members are experienced per definition of their profession who understand the outset, scope and implications.</p> <p>Unsecured creditors are usually sufficiently represented by the creditors committee. Further committees or other ad hoc groups would probably hinder the process. The German creditors committee represents all types of creditors so that an additional “special” group might be in contrary to the ordinary creditors committee. This would cause unnecessary fractions.</p>