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European international insolvency law - Council regulation (EC) No. 1346/2000 on insolvency proceedings

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regarded as unfair. It is not disputed that a term appearing in the list need not necessarily be considered unfair and, conversely, a term that does not appear in the list may none the less be regarded as unfair.

21. In so far as it does not limit the discretion of the national authorities to determine the unfairness of a term, the list contained in the annex to the Directive does not seek to give consumers rights going beyond those that result from Articles 3 to 7 of the Directive. It in no way alters the result sought by the Directive which, as such, is binding on Member States. It follows that, contrary to the argument put forward by the Commission, the full effect of the Directive can be ensured in a sufficiently precise and clear legal framework without the list contained in the annex to the Directive forming an integral part of the provisions implementing the Directive.

22. Inasmuch as the list contained in the annex to the Directive is of indicative and illustrative value, it constitutes a source of information both for the national authorities responsible for applying the implementing measures and for individuals affected by those measures. As noted by the Advocate General in paragraph 48 of his Opinion, Member States must therefore, in order to achieve the result sought by the Directive, choose a form and method of implementation that offer a sufficient guarantee that the public can obtain knowledge of it.

23. In the present case, the Annex to the Directive has been reproduced in its entirety in the preparatory work for the law implementing the Directive. The Swedish Government has claimed that, according to a legal tradition that is well established in Sweden and common to the Nordic countries, preparatory work constitutes an important aid to interpreting legislation. It has also stated that such preparatory work may easily be consulted and that, in addition, information concerning terms that are considered or may be considered to be unfair is provided to the public by various means. The Commission has not disputed these statements but has confined itself to maintaining that those factors cannot compensate for the fact that the list in the annex to the Directive is not an integral part of the provisions implementing the Directive.

24. The Commission has therefore failed to establish that the measures taken by the Kingdom of Sweden do not offer a sufficient guarantee that the public can obtain knowledge of the list contained in the annex to the Directive.

25. It follows from the foregoing that the Commission has not shown that the Kingdom of Sweden has failed to adopt the measures necessary to implement in its national law the annex referred to in Article 3(3) of the Directive.

26. The application must therefore be dismissed. (…)"
The ambition was to realize to the largest extent possible the theoretical ideal of unified proceedings. “Unified proceedings” here denotes a single insolvency process in which all creditors take part and in which all the assets of the debtor are liquidated under one law. It soon seemed that the model of a unified proceeding was hardly attainable. The respective fields of substantive law on which EU insolvency law is based (e.g. labour law, security law) as well as insolvency law in the Member States were too incompatible so as to make a harmonisation in the area of insolvency law unthinkable. The differences became particularly apparent in terms of the preferential rights. Consequently, the 1984 draft dealt with the creation of a territorial and mathematical subdivision of assets of the insolvent estate under the unified proceeding, and failed for lack of practicability.

Building on these experiences and spurred by the positive results of the Council of Europe in connection with the Istanbul Convention, the “model of controlled universality” shaped the further negotiations. Under this model, there should be a universal proceeding recognised by all Member States which has power over claims with regard to the entirety of debtor’s assets located in the Member States. Supporting collateral proceedings can be initiated in the Member States, however; these proceedings co-operate and co-ordinate with the universal proceedings. Conflict of law rules determine the applicable law in each case.

The draft of a convention on insolvency proceedings of 23 November 1995 (European Insolvency Convention) followed the latter, more modest approach. The BSE crisis and the Gibraltar question – and not substantive reasons – prevented its signature by all Member States and thus its entry into force. The lack of a uniform European regulation on cross-border insolvencies in the domestic market was increasingly perceived as a shortcoming. Therefore, Germany and Finland took the initiative to restart negotiations on the basis of the draft convention, which was successfully concluded in the adoption of the insolvency regulation.

2. Legal bases

The insolvency regulation is based on Articles 61(c), 67(1), and 249 of the EC Treaty. In choosing to adopt the policy in the form of a regulation, the Council selected the strongest European legal instrument, since a regulation is binding in its entirety and directly applicable in all Member States in accordance with Article 249(2) of the EC Treaty. Allowing the individual Member States a margin of appreciation in implementing the regulation and the differences arising therefrom would have worked against the goal of a uniform regulation – especially of a consistent creditor protection policy and the implementation of equal treatment for creditors – and is therefore excluded. As secondary Community law, the insolvency regulation falls under the jurisdiction of the European Court of Justice, which ensures its uniform interpretation.

II. Scope of the insolvency regulation

1. Material scope

Pursuant to Article 1(1), the insolvency regulation applies to “collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator”. Article 2(a) defines these proceedings as insolvency proceedings. A complete list of the insolvency proceedings fulfilling the criteria outlined in Article 1(1) is found in Annex A, thereby facilitating the practical application of the insolvency regulation. The insolvency regulation provides a corresponding list with regard to liquidators (Article 2(b) in connection with Annex C). The definitions thus only have meaning if the extension of the annexes is at issue – for example, due to the entry of another state in the European Union.

The insolvency regulation does not prescribe any particular process of realisation for the insolvency proceedings – the option of liquidation, for instance. In this way the insolvency regulation can also find application in a winding-up proceeding. This should be welcomed in principle. The insolvency regulation does not determine when an insolvency exists. On the contrary, the actual law of the state of the opening of an insolvency proceeding should decide (Article 4(2) sentence 1), what the responsible national office – a court, as a general rule – must review. Thus, for example, an Insolvenzverfahren (insolvency proceedings) in the sense of the German insolvency regulation (“InsO”) that has been opened on the basis of an imminent inability to pay pursuant to § 18 InsO falls within the ambit of the insolvency regulation. The creditors’ voluntary winding-up in the United Kingdom is likewise covered to the extent that it is opened on the grounds of the insolvency, that this is judicially established and that this leads to the appointment of a liquidator. The regulation is inapplicable to purely pre-insolvency proceedings such as the French réglement amiable.

7 Ibid.
8 “European Convention on certain international aspects of bankruptcy”, signed on 5 June 1990 in Istanbul; for comprehensive comments on this, see Kolmann (supra note 5), at 63 et seq.
9 Thus the phrase coined by Hanisch, i.e.: Aktuelle Probleme des internationalen Insolvenzrechts, [1982] SchrJbl 36, 115 et seq.
10 Published in [1996] 35 I. L. M., 1223 et seq.
12 See the introductory and preambular paragraph (2) of Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings.
14 See Article 45.
15 As a consequence, secondary proceedings are insolvency proceedings within the meaning of III.2.b.
16 Art. 2(d) defines a “court” as a “judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings”; on this functional approach see also preambular paragraph (15) of Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings.
17 See Kolmann (supra note 5), at 271; for a sceptical view, see Leipold, in: Stoll (eds), Vorschläge und Gutachten zur Umsetzung des EU-Überreinkommens über Insolvenzverfahren im deutschen Recht, 1997, at 187.
2. Personal scope

Basically, the insolvency regulation applies both to the insolvency of natural and legal persons, although it is left to the law of the state of the opening of proceedings to determine the debtor’s capacity to declare insolvency. The regulation does not cover corporate insolvencies. It only regulates questions of cross-border insolvencies of a single legal subject.\(^{19}\)

Regrettably, insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, as well as collective investment undertakings all fall outside the provisions of the insolvency regulation in accordance with Article 1(2). These sorts of insolvency proceedings have their own directives, so that arrangements for the settlement of cross-border insolvencies will exist independently of the insolvency regulation.\(^{20}\)

3. Spatial and temporal scope

The insolvency regulation applies to all Member States of the European Union with exception of Denmark,\(^{21}\) but then only when the “centre of the debtor’s main interests” is located in one of the Member States bound by the insolvency regulation.\(^{22}\) When the centre lays elsewhere, the co-ordination rules of the insolvency regulation cannot apply. Generally speaking, the insolvency regulation contains no provisions as to the relationship to third states, so the rules of the individual states govern to this extent.\(^{23}\)

Temporally, the insolvency regulation covers only those insolvency proceedings opened after its entry into force (Article 43). If one of several insolvency proceedings was already initiated against the same debtor, the insolvency regulation does not apply.\(^{24}\)

III. Concept of the insolvency regulation – implementation of the “controlled universality” model

The following section provides a systematic overview of the universal and secondary proceedings in the sense of the insolvency regulation, their co-ordination and the position of creditors. Details follow thereafter.

1. Universal proceedings/main proceedings

a) International jurisdiction to open proceedings

In order to realise the model of controlled universality among several states, a consensus was needed as to which state should exercise jurisdiction to open the single universal proceeding. In the insolvency regulation, the negotiating parties agreed that the international jurisdiction to open proceedings should reside in the state in whose territory the debtor has the centre of his main interests (Article 3(1) sentence 1). In the case of an undertaking or legal person, this centre of interest is presumed to be the place of the registered office absent proof to the contrary (Article 3(1) sentence 2).

The presumption rule takes into consideration the approximation of the international corporate law theories concerning headquarters and place of incorporation.\(^{25}\) It continues to offer only conditional help, however, since the court with subject-matter and local competence under domestic state law must officially determine the international jurisdiction to open proceedings when doubts exist.\(^{26}\) The preambular paragraphs of the insolvency regulation help construe the prime criteria for determining the centre of interests: It should depend on outward recognisability.\(^{27}\) Thus the centre of interests lies where the debtor predominantly pursues his economic activities in a way recognisable to creditors. This essentially corresponds to the core concept of the effective administrative seat endorsed by the headquarters theory in German international corporate law. In the case of natural persons, this will be their usual place of residence.\(^{28}\)

The insolvency regulation is based on the notion that a debtor has only one centre of his main interests. This notion is not conclusive, so there can be positive jurisdictional conflicts. In keeping with the principles of confidence in the Community and of the proper exercise of judicial authority, such cases should be governed by the principle of priority,\(^{29}\) whereby the decisive moment should be at the time the application is filed. This is because preservation measures can already be recognised prior to the opening of the main insolvency proceeding, so that already before the actual opening it becomes necessary to determine the order of priority.

b) Recognition and applicable law

The insolvency regulation provides its own set of rules to grant effect to the universal proceedings in the other Member States as well, beginning with Article 16. The other Member States recognise the judgment opening proceedings with the consequence of the extending its effect. Moreover, the general conflict rule contained in Article 4(1) determines that the law of the Member State in which proceedings are opened (lex fori concursus) shall govern insolvency proceedings and their effects. Different provisions of the insolvency regulation con-
tain special connecting factors for conflict-of-laws and also some substantive rules.

2. Territorial proceedings

The insolvency regulation refers to the secondary proceedings in the sense of the model of controlled universality as “territorial proceedings”. With this term the essence of the territorial proceeding is itself spatially and concretely, i.e. as regards subject-matter, limited in its effects to the assets of the debtor situated in a Member State (see Article 3(2) sentence 2). In all other respects territorial proceedings are in principle full insolvency proceedings with own administration, utilisation and distribution of the debtor assets. The insolvency regulation permits two different forms of these proceedings: Insofar as the territorial proceeding temporally follows a recognised universal proceeding (so-called “main insolvency proceedings”), Articles 3(2), 16 and 27 speak of “secondary proceedings”. In addition, the regulation permits – dogmatically, an especially undesired special case within the model of controlled universality – the initiation of so-called isolated territorial proceedings before the opening of the universal proceedings. Both forms of territorial proceedings share commonalities such as the already mentioned spatial-subject-matter limitation. In other respects, the insolvency regulation makes different arrangements for these proceedings.

a) Select similarities 31

In accordance with Article 3(2), the courts of a Member State are authorised to open an insolvency proceeding (i.e. have international jurisdiction) only if the debtor has an establishment within the territory of this Member State. Article 2(h) defines establishment as “any place of operations where the debtor carries out a non-transitory economic activity with human means and goods”. In a conscious deviation from the concept in the ECJ’s interpretation of Article 5 No. 5 of the Brussels Convention, 32 “establishment” here depends on the development of economic activity in the market, which must be tied to a certain permanence and a minimum of organisation. 33 The mere location of assets is in any event insufficient by itself – in other words, the opening of a territorial proceeding is inadmissible. In this respect the insolvency regulation hinders the opening of territorial proceedings and lends a more comprehensive effect to the universal proceeding.

In the context of the limited scope of a territorial proceeding, the regulation’s provisions as to applicable law basically apply to territorial proceedings as well; for secondary proceedings, these provisions are partly modified in order to ensure a co-ordination with the main insolvency proceedings. According to the predominant view, the regulation mandates the possibility for all creditors to participate in each territorial proceeding. 34 The recognition of a territorial proceeding in the other Member States means that its effects may not be challenged there (Article 17(2) sentence 1).

The problem of determining the assets covered by a territorial proceeding is common to both forms of territorial proceedings. Only the sites of the assets in the state of establishment is decisive; it does not depend on any reference to the establishment. In respect of tangible property, it is principally the actual circumstances that are determinative; however, as to property or rights of which the ownership or entitlement must be entered in a public register, these assets fall within the Member State under the authority of which the register is kept. Claims are then located in the state of establishment, if the third party required to meet them has the centre of his main interests there in the sense of Article 3(1) (see Article 2(g)). Remaining unsettled are, for instance, the conditions under which unfulfilled reciprocal contracts would be regarded as being located in the state of establishment. 35 It can be derived from Article 18(1) of the insolvency regulation that the decisive time for the respective situs determination must be the outset of the insolvency petition.

b) Select differences

Opening an isolated territorial proceeding presupposes either the impossibility of opening a universal proceedings or a creditor with a special link to the state of establishment or a claim arising from the establishment of the debtor lodging the insolvency petition (Article 3(4)). It becomes clear from these restrictions that isolated territorial proceedings are basically unwelcome. The regulation does not indicate how a basis for opening proceedings can be specified in an isolated territorial proceeding, especially if an investigation of the financial situation of the debtor – at least EU-wide – becomes necessary. 36

With the opening of a secondary proceeding, which can be requested by a person empowered under the law of the Member State in addition to the liquidator in the main proceedings (Article 29), the fact that a main insolvency proceeding has been opened replaces the examination of the grounds for opening the proceedings (Article 27). In contrast with the isolated territorial proceeding, the secondary proceeding must be a winding-up proceeding in the sense of the Article 2(c) in connection with Annex B (Article 3(3) sentence 2), whereas in the context of the main insolvency proceeding, a planned re-structuring can sometimes be substantially complicated. This is the result of a compromise by which winding-up proceedings were included within the scope of the regulation.

Isolated territorial proceedings can be also proceedings in the sense of Annex A. If a main insolvency proceeding is subsequently opened, the provisions for the co-ordination of a

31 For a comprehensive account of differences and similarities, see Kolmann (supra note 5), at 327 et seq.
32 See the Report on the European Insolvency Convention (supra note 23), No. 72, on Article 5 No. 5 of the Brussels Convention, see the fundamental decision: ECJ 1978, 2190 et seq.
33 See the Report on the European Insolvency Convention (supra note 23), No. 71.
34 For a detailed account of the current opinion, see Kolmann (supra note 5), at 342 et seq.
35 For a comprehensive account on questions relating to demarcation of assets in the insolvent estate, see Kolmann (supra note 5), at 339 et seq.
36 On this point, see Kolmann (supra note 5), at 335 with further references.
secondary proceeding with the main insolvency proceeding also apply for the isolated territorial proceeding, in so far as the progress of the isolated territorial proceedings permits (Article 36). In addition the liquidator in the main proceedings has the right to demand the conversion of the isolated territorial proceeding into winding-up proceedings in the sense of Annex B (Article 37).38 Even if Articles 36 and 3 entail certain difficulties in their details,39 the effort of the insolvency regulation to settle again the system break caused by the allowance of isolated territorial proceedings becomes recognisable.

3. Coordination of several proceedings

In relation to its scope, a territorial proceeding has priority over the main proceeding in accordance with the speciality principle (see also Articles 17(2) and 18(1)). Secondary proceedings have to take over the effects caused by a recognised main insolvency proceeding before their opening insofar as preservation measures do not prevent this in the context of the secondary proceeding. With opening of the secondary proceeding, the applicable law also changes:40 Now in principle it is not the lex fori concorsus of the main proceedings that controls, but rather that of the state of establishment.

Despite the priority of the secondary proceeding, the insolvency regulation binds the liquidator of the main insolvency proceeding to the settlement of the secondary proceeding and grants him different powers in order to be able to affect course of proceedings there for the purposes of the main insolvency proceeding. In this way the goal of a uniform settlement of an insolvency can be in principle achieved despite a priority proceeding.

4. Provision of information for creditors and lodgement of their claims

The background of an insolvency proceeding is usually that the assets of the debtor are insufficient for the complete satisfaction of all creditors. Instead of individual actions being brought, all creditors can assert their rights in a comprehensive winding-up. In the case of cross-border insolvencies, creditors are frequently faced with practical difficulties: language difficulties, lack of notice of the formalities surrounding the filing proof of debt or even the fact that foreign creditors do not learn about a domestic insolvency proceeding. The opinion was also commonly held that claims of a foreign sovereign – such as tax liabilities, for example – may not be relieved in a domestic insolvency proceeding. The insolvency regulation considers these difficulties to be needy of regulation and deals with them in Articles 39 through 43. Here it concerns uniform special provisions; however, there are no express rules in European law concerning creditors in third states.

If an insolvency proceeding is opened in a Member State, the court with jurisdiction or the appointed liquidator must inform known creditors who have their habitual residences, domiciles or registered offices in the other Member States (Article 40(1)), including the tax authorities and social security authorities (Article 39), immediately and individually (Article 40(2)) by means of a form in one of the official languages of the State of the opening of proceedings (Article 42(1)). The form should indicate time limits, the penalties laid down in regard to those time limits, the body or authority empowered to accept the lodgement of claims and the other measures laid down. Such notice shall also indicate whether creditors whose claims are preferential or secured in rem need lodge their claims (Article 40(2)).

Each creditor, whether informed or not, has the right to lodge claims in the insolvency proceeding (Article 39). The creditor must lodge his claim in writing, sending copies of any supporting documents and indicating the nature of the claim, the date on which it arose and its amount, as well as whether he alleges preference, security in rem or a reservation of title in respect of the claim and what assets are covered by the guarantee he is invoking (Article 41). Alternatively the creditor may lodge his claim in the official language of his state of residence (Article 42(2)). In that case, the registration must bear the heading "Lodgement of claim" in an official language of the state of the opening of proceedings; in addition, he may be required to provide a translation into an official language of this state (Article 42(2)).

IV. Recognition

1. Recognition of actions

The insolvency regulation does not speak of the recognition of "insolvency proceedings" per se; the heading of Chapter II is misleading to this extent. In an almost exemplary manner the insolvency regulation differentiates the various actions that are recognised. Here belong judgments opening a main insolvency proceeding as well as a territorial proceeding (Article 16(1)); judgments concerning the course and closure of an insolvency proceeding including compositions approved by court (Article 25(1) subparagraph 1); judgments deriving directly from the insolvency proceedings and which are closely linked with them, even when they were handed down by a court other than that opening the proceedings (Article 25(1) subparagraph 2); and finally judgments relating to preservation measures taken after the request for the opening of insolvency proceedings (Article 25(1) subparagraph 3). As to the recognition of judgments other than those mentioned, these are governed by the Brussels Convention, provided that it is applicable (Article 25(2)). The manner in which judgments and measures in the sense of Article 25(1) are executed is subject to Articles 31 to 51 of the Brussels Convention, with the exception of Article 34(2) (Article 25(1) subparagraph 1, sentence 2 in connection with subparagraphs 2 and 3).41

The basis for all these decisions in the insolvency regulation

38 Portugal has already declared that it would fall back upon the doctrine of public policy if necessary; see OJ EC C 183 of 30 June 2000, at 1.
39 See Thiem, Vermögensgerichtsstände, Inlandsbezug und Partikularkonkurs, Jahresheft 1995/96 der Internationalen Juristischen Vereinigung, Osnabrück (D), at 82, 91.
40 On the consequences thereof, see Kolmann (supra note 5), at 347 et seq.
41 In this regard, see Kolmann (supra note 5), at 299 et seq.
is a concept of procedural recognition, not a conflict recognition. The following remarks have a particular bearing upon the recognition of the judgment to open proceedings.

2. Conditions for recognition

a) Qualification as insolvency proceedings

One of the main questions presented in domestic international insolvency law is whether the foreign judgment to be recognised concerns an insolvency proceeding in the sense of international insolvency law standards. The insolvency regulation answers this in connection with its scope of application (see in particular annex A).

An examination of the other Member States as to whether the court of the Member State in which proceedings are opened has correctly affirmed the existence of an insolvency does not take place in the context of the recognition. The principle of Community confidence applies to that extent. Article 16(1) requires only the effectiveness of the judgment and thereby apparently means the time at which the judgment becomes valid; its formal legal power is immaterial. 43

b) International jurisdiction

aa) With respect to the judgment opening proceedings

In terms of the insolvency regulation, the international jurisdiction is constituted as the opening of proceedings, so that it systematically presents no condition for recognition. Given the lack of a rule in the insolvency regulation, which based on Article 28(3) of the Brussels Convention expressly forbids review of international jurisdiction, no contrary conclusions should be made at least with regard to the judgment opening proceedings. 44 Thus it is only a matter of whether the actual court affirmed its international jurisdiction within the meaning of Article 3 of the insolvency regulation whatsoever (see Articles 16(1) and 21(2) sentence 2).

bb) With respect to the remaining matters of recognition

According to the first subparagraph of Article 25(1), the court with international jurisdiction over judgments concerning the course and closure of an insolvency proceeding, in particular for the approval of compositions, is the court issuing the judgment opening proceedings. In order to differentiate judgments of this sort from those in the sense of the second subparagraph of Article 25(1), only the key decisions in insolvency law with a procedural character should be included. 45 The international jurisdiction of the same court exists for preservation measures in the sense of the third subparagraph of Article 25(1).

International jurisdiction raises problems for “judgments deriving directly from the insolvency proceedings and which are closely linked with them”. According to a decision of the ECJ 46 by which the authors of the insolvency regulation considered themselves bound, judgments of this sort are excluded from the scope of the Brussels Convention. This means that they are subject neither to its rules for jurisdiction rules nor those for recognition. Article 25(2) does not extend the scope of the Brussels Convention any further, but rather has to this extent significance only as clarification. Thus in the future not only the authoritative criteria must be formed in order to delimit the respective scopes of the Brussels Convention and the insolvency regulation from one another. For the insolvency regulation, the prime question that arises is that of international jurisdiction.

The insolvency regulation is not unequivocal. Were it to indicate a direct international jurisdiction in favour of the courts of the state in which the proceedings were opened, in contrast to its wording, the insolvency regulation would lead to a concept nearer to that of vis attractiva concursus (i.e. the insolvency court takes on for itself the (often exclusive) jurisdiction for disputes of this sort). This does not correspond to the intent of the regulation’s authors. 47 Correct may be that the insolvency regulation does not regulate international jurisdiction at all, but rather only the legal consequences of recognition, which stand only under the reservation of the public policy doctrine. 48 This in any event seems appropriate for specific insolvency law problems such as appeals and civil liability actions against the liquidator, but not for actions for the restoration of goods or property, neither for most disputes over the bankrupt’s estate or debtor’s assets. To this extent, a quick clarification by the ECJ would be most welcome, insofar as it could close the gaps in the insolvency regulation and thus orient itself towards the need for legal protection of concerned parties. 49

c) The public policy doctrine

The public policy doctrine presents the only real prerequisites for recognition; it applies equally to the remaining actions to be recognised. Under Article 26, recognition may not lead to a result that obviously cannot be reconciled with the public order, and in particular with fundamental principles or constitutionally recognised rights and freedoms. This reservation is to be interpreted narrowly in an outcome-oriented manner. It addresses questions of both procedural and substantive law. 50

Pursuant to Article 25 of the insolvency regulation, recognition may be refused on grounds of an infringement of public policy if the judgment might result in a limitation of personal freedom or postal secrecy. Under Article 16(1) subpara-

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42 Luke (supra note 25), at 280 with further references.
44 See the Report on the European Insolvency Convention (supra note 23), No. 147.
45 See the Report on the European Insolvency Convention (supra note 23), No. 202, 144; Kolmann (supra note 5), at 283.
47 ECJ Decision 1979 I, 733.
48 See the Report on the European Insolvency Convention (supra note 23), No. 77.
49 On the current state of opinion, Kolmann (supra note 5), at 292 et seq.
50 See also Luke (supra note 25), at 295.
51 See the Report on the European Insolvency Convention (supra note 23), No. 204, 206.
graph 2, however, there is no basis for refusal if the debtor estate in the recognition state cannot be made subject to insolvency proceedings. Insolvency proceedings of this sort cannot be refused recognition on grounds of public policy. Basically, judgments and measures made by a court lacking international jurisdiction should not justify a refusal of recognition by reference to doctrine of public policy.  

**d) Additional conditions for recognition**

The insolvency regulation has, at any rate, achieved reciprocity between the Member States. The question of the object and purpose of raising reciprocity in international insolvency law to a condition of recognition thus does not arise. The recognition of judgments other than those opening proceedings will have to be made dependent on whether the judgment opening proceedings would be recognised or for example (in the case of preservation measures) is recognised.  

3. **No formal recognition proceedings**

A separate recognition proceeding such as that foreseen by the UNCITRAL model law, for example, does not take place under the insolvency regulation. The principle of automatic recognition applies; the office that is called upon in the recognition state reviews the conditions for recognition incidentally. Moreover, the insolvency regulation dispenses with additional formalities or a legalisation of the actual judgment.

This dispensation can theoretically bring contradictory judgments on the ability to recognise a proceeding in a recognition state along with it. A further consequence of the automatic recognition is that in the recognition state effects take place of which concerned parties living there are unaware. The insolvency regulation partially reacts to this problem area, which will be taken up later in connection with the effects of recognition.

4. **Effects of recognition**

**a) Extension of effect, relation to applicable law**

Under Article 17(1), the result of the recognition of the judgment to open a universal proceeding is that the judgment will have the same effects in any Member State as it has in the state of the opening of proceedings, so far as the regulation does not stipulate otherwise and so long as no territorial proceeding has been opened in this Member State. As a rule this first of all means an extension of the effects on legal relationships such as the ban on the institution of individual actions as well as the transfer of disposal rights from the debtor to the liquidator.

At the same time the ability of the judgment opening a universal proceeding to recognise proceedings leads to the same law being applicable in the recognition state as in the state of the opening of proceedings. The ability to recognise proceedings is a preliminary question of the conflict rule of Article 17, which deviates from the lex fori concursus principle of Article 4 as well as the special connecting factors for conflicts of laws. One of the consequences of this is, for instance, that the powers of the liquidator to act in recognition states are by virtue of the recognition basically the same powers he has under the law of the state of the opening of proceedings. In order to be able to

As proof of his appointment, the liquidator receives a certified copy of the decision appointing him or a comparable certificate, which must in certain instances be translated; in no case, however, is there a need of additional formalities such as a legalisation (Article 19).

**b) Powers of the liquidator – Limitations and clarifications**

Article 18(1) offers another example of the aforementioned principle. At the same time, the provision makes it clear that the liquidator must pay heed to territorial proceedings opened in a recognition state or to preservation measures, both of which have priority. Articles 5 and 7 present additional reservations, under which the liquidator may remove the assets belonging to the estate from the territory of the recognition state. The liquidator must always comply with the law of the other state in exercising his powers, in particular with regard to procedures for the realisation of assets. Coercive measures may be used exactly as little as he has quasi-sovereign decision-making authority (Article 18(3)). In the end, this means a cumulative solution: The right of the state of the opening of proceedings determines “whether” he has powers; those of the recognition state apply to “how” such powers may be used.

Article 38 regulates a special case by extending the powers of the temporary administrator in a universal proceeding. The provision empowers the temporary administrator to request any measure provided for under the law of the recognition state in which the debtor has an establishment to preserve his assets for a winding-up proceeding. The temporary administrator will use this possibility in particular when the preservation measures there are more comprehensive than those of his own state. Difficulties can be ruled out since the preservation measures under the law of the state of the opening of proceedings are to be adapted into the legal structure of the recognition state. Moreover the provision of Article 38 can contribute to differentiating the effects of the universal proceeding and of a later secondary proceeding from one another.

Article 20 (1) is logical given the automatic extension of ef-

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52 See the Report on the European Insolvency Convention (supra note 5), No. 202. For correction in exceptional cases, Lepold (supra note 17), at 192.
53 For references on the current state of opinion in Germany, see Kolmann (supra note 5), at 128 supra note 135.
54 Kolmann (supra note 5), at 293.
55 For detailed commentary on this point, see Kolmann (supra note 5), at 413 et seq.
56 See the Report on the European Insolvency Convention (supra note 23), No. 143, 152.
57 On the legal nature of Article 17, see the following section in the text.

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58 Only the immediate contents of the judgment opening proceedings are procedurally recognised. Further consequences of recognition are to be established by means of the conflict of law rules. On the differentiation between procedural recognition and the choice of the proper law under conflict of laws, see Kolmann (supra note 5), at 278, 110 et seq. Kolmann (supra note 5), at 323.
fect. It allows the the liquidator to request a creditor obtaining satisfaction from an asset of the estate in any manner, in particular by judicial execution, to surrender that asset, subject to Articles 5 and 7.

c) Publication, registration in a public register

The effective settlement of a cross-border insolvency presupposes that all interested parties can be made aware of the insolvency proceeding as soon as possible once it is opened. Thus the liquidator may request at the cost of the estate (Article 23) that a notice of the judgment opening proceedings, its essential contents as well as the decision appointing him (Article 21(1)) be published in the Member States in accordance with the each state’s publication procedures. The liquidator should do this in any event if signs exist for a purchase of the insolvent debtor company to another member state, since the liquidator would otherwise expose himself to liability risks. The notice must indicate whether it concerns a universal or territorial proceeding; of course, this information should already have been contained in the judgment opening proceedings. If the debtor has an establishment in a Member State, the liquidator must pay particular attention to whether this Member State has made use of its authority pursuant to Article 21(2) and requires mandatory publication.

Up until the time of publication, in the absence of proof to the contrary, a payment made in good faith by a third party debtor is accepted to discharge the debt, although the debtor is in actual fact only allowed to render payment to the liquidator of the insolvency proceeding opened in another Member State (see Art. 24). Early publication can thereby help to prevent a diminution of the estate.

Furthermore the liquidator of a universal proceeding must determine whether the Member States require the registration of the opening of a universal proceeding in the land register, trade register or any other public register kept in that state (Article 22). In any event the costs for registration requested by the liquidator can be regarded as costs of the proceedings (Article 23).

V. Applicable law

1. Acceptance of lex fori concursus as basic principle

As discussed earlier, the insolvency law of the state of the opening of proceedings applies both in that state and in the recognition state. The insolvency regulation follows the conflict-of-laws principle under which the applicable law in international cases is that with the closest connection to the matter at issue.61 The equivalent generally formulated conflicts rule is Article 4(1). Article 4(2) sentence 2 lists in model fashion which regulation areas are to be assigned to the insolvency statute and thus facilitates the determination under insolvency law.

Here for example comes the question of ownership of the estate (Article 4(2) sentence 2(b)). However, under Article 12 a Community patent, Community trade mark or any other similar right may be included only in the estate in a universal proceeding. The following special arrangements represent further restrictions to the scope of lex fori concursus, leading to a cumulative or alternative consideration of another law. These special provisions are exhaustive; the regulation aims to prevent the development of further special connecting factors.

2. Special arrangements

a) Lawsuits pending

Article 4(2) sentence 2(f) provides that the lex fori concursus is not to be determined by the effects of lawsuits pending. Article 15 fills in this gap, subjecting the effects of insolvency proceedings on a lawsuit pending concerning an asset or a right exclusively to the law of the Member State in which that lawsuit is pending. The insolvency regulation thus makes it clear that it deals to that extent with a procedural question, as opposed to the question on the applicable insolvency law as determined by conflict of law rules. Accordingly the respective lex fori governs.62

b) Third parties’ rights in rem

The insolvency regulation assumes the legal-political default that trade relations with regard to rights to assets of the debtor estate in the state in which they are located are to be protected. Consequently the opening of insolvency proceedings does not affect the previously existing rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immovable assets of the debtor which are situated within the territory of another Member State at the time of the opening of proceedings (Article 5(1)).

The insolvency regulation does not provide a definition for rights in rem. It contents itself with a non-exhaustive list of rights in rem in Article 5(2) and equates them with the rights recorded in a public register in Article 5(3), similar to the German practice of priority notice in the Grundbuch (land title register). Whether rights of this sort effectively arise must be determined in a preliminary referral. To this extent cases are subject to the lex rei sitae.63 Article 5(4) additionally states that actions for voidness, voidability or unenforceability under insolvency law as referred to in Article 4(2) sentence 2(m) remain unaffected.

As a result, rights in rem can thus be only be included in the winding-up when the asset of the debtor estate is in a Member State in which the debtor has an establishment and a territorial proceeding has been opened. Otherwise, the creditor – the third party, for instance – can realise his right in rem outside of the insolvency proceedings. This is remedied only to a certain extent by the fact that the liquidator may dispose of the assets of the estate as such to the extent not limited by the rights in rem (see Article 18(1) sentence 2).64

61 See BGH, [1997] ZIP 1242 et seq.
62 See the Report on European Insolvency Convention (supra note 23), No. 96.
63 For an exhaustive account, Kolmann (supra note 5), at 304.
64 See Flessner, in: FS Drobny, Tübingen (D), 1998, at 284 et seq.
c) **Set-off**

The possibility of a creditor to demand a set-off against the claims of the debtor has a factual security character. The regulation makes mention of set-off in Article 4(2) sentence 2(d) as well as in Article 6. The following facts are concluded: the statute applicable to the main claim against which the creditor’s claims will be set-off (lex causae) governs the substantive law conditions for the set-off. The insolvency regulation changes nothing here. With respect to the admissibility of the set-off under insolvency law, a differentiation is necessary. In principle, the lex fori concursus applies to this extent. Only if this set-off is deemed inadmissible can the creditor appeal to the insolvency law of the set-off statute, in accordance with Article 6. Under Article 6(2), actions for voidness, voidability or unenforceability are unaffected. Because it enforces the narrowest restrictions on set-offs as a result, the insolvency regulation quite comprehensively translates the security character of set-off into reality.\(^{66}\)

\(^{66}\) Critical in this regard, for instance, is Kemper, [2001] ZIP 1617.

\(^{65}\) For an exhaustive account, Kolmann (supra note 5), at 329 et seq.

\(^{67}\) Without prejudice to Article 5 and Article 9(2), the effects of proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market is regulated by the law of the Member State applicable to that system or market (Article 9(1)). The provision covers in particular settlement and net settlement contracts, as well as the sale of securities and guarantees as a result the security and mobility of the payment systems and markets.\(^{68}\)

\(^{68}\) Kemper (supra note 66), at 1617; See also preambular paragraph (27) of Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings.

\(^{69}\) Balz (supra note 18), at 950.

\(^{70}\) Kolmann (supra note 5), at 322.

d) **Reservation of title**

The authors of the insolvency regulation did not see the seller’s retention of title as a material right in the sense of Article 5, but rather as an annex to the sales contract, so that the retention of title is covered by its own regulation. Under Article 7(1) the insolvency of the purchaser has no effect on the seller’s retention of title over assets which at the time of the opening of proceedings are situated within the territory of another Member State and which are not void, voidable or unenforceable under the applicable lex rei sitae (see Article 7(3)).

Article 7(2) contains a genuine harmonisation of substantive law. It addresses the effects of the opening of proceedings on an unfulfilled sales contract with delivery under reservation of title. Under the provision, the opening of proceedings does not constitute grounds for rescinding or terminating the sales contract so that the debtor can nevertheless acquire title where at the time of the opening of proceedings this asset is situated within the territory of another Member State.

e) **Contracts relating to immovable property, contracts of employment, payment systems and financial markets**

By its nature, immovable property has its strongest ties to the legal rules of the state in which it is located. Article 8 thus deviates from the general principle laid out in Article 4(2) sentence 2(e) in making the effects of proceedings on contracts conferring the right to acquire or make use of immovable property solely subject to the law of the state in which the property is situated.

The regulation considers general rules of international private law in the case of contracts of employment. In accordance with Article 10, the effects on employment contracts and relationships are governed exclusively by the law applicable to the employment contract under international private law. With this method of regulation the insolvency regulation takes into account flexibility in employer-employee relationships.\(^{67}\)

In the affirmative, see Flessner, in Stoll (supra note 23), at 225.

Without prejudice to Article 5 and Article 9(2), the effects of proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market is regulated by the law of the Member State applicable to that system or market (Article 9(1)). The provision covers in particular settlement and net settlement contracts, as well as the sale of securities and guarantees as a result the security and mobility of the payment systems and markets.\(^{68}\)

f) **Rights subject to registration**

The regulation contains several provisions concerning assets which are subject to entry in a public register while considering the interest of legal relations in the correctness of the register. Article 22 confirms the power of the liquidator to request the registration of the opening of proceedings in a public register. In principle, only the lex fori concursus would apply to the effect on the rights of the debtor subject to registration belonging to the insolvent estate. Article 11 limits the effects of secondary insolvency proceedings to the standard recognised by the law of the state of registry; thus it leads to a cumulative application of two legal orders. In this way, for instance, the numeros clausus of real estate law is protected.\(^{69}\)

In close connection to the aforementioned provisions is Article 14, which as a result protects the good faith of a third-party purchaser in the correctness of the register under the law of the registry state from the disposal of the debtor of specified assets for consideration, to the extent that the registrations in accordance with Articles 22 and 11 do not chill good faith. The protection of good faith in gratuitous dispositions as well as with regard to disposals of all assets not mentioned in Article 14 is subject to the lex fori concursus.\(^{70}\)

g) **Contestation, detrimental acts**

In accordance with Article 4(2) sentence 2(m), whether and which legal acts are detrimental to all creditors, void, voidable or unenforceable depends in principle on the law of the state of the opening of proceedings. At the same time, however, the regulation strives to protect those persons favoured by the act, having relied upon its existence and effectiveness. Under Article 13, these individuals are permitted an objection and the onus is placed on them to show that the act is subject to a substantive law (of a Member State!) other than that of the State of the opening of proceedings and also that this law confers legal existence on the act. If the proof is sufficient, the enforceability etc. under the lex fori concursus cannot be asserted. Within the framework of international private law, the regulation opens up the possibility of misuse in that the parties may by agreement subject a legal act to the law of that

\(^{67}\) In the affirmative, see Flessner, in Stoll (supra note 23), at 225.

\(^{68}\) Kemper (supra note 66), at 1617; See also preambular paragraph (27) of Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings.

\(^{69}\) Balz (supra note 18), at 950.

\(^{70}\) Kolmann (supra note 5), at 322.
Member State with the weakest legal means for contestation and so forth.

VI. Coordination of Main and Secondary Proceedings

1. General

a) In principle, main and secondary insolvency proceedings are procedurally independent of one another. The regulation retreats from this independence, however – with the opening of secondary proceedings, for example (see entitlement to submit an application, renunciation/relinquishment on verification of the basis for opening proceedings) and proceeds even further in keeping with the goals of the model of controlled universality. Since its procedural priority ends with the closure of the secondary proceeding, the liquidator in the secondary proceeding must immediately report to the main proceeding the surplus remaining after the satisfaction of determined demands (Article 35). The regulation contains numerous additional co-operation rules for the meantime.

b) Article 31(1) places a general obligation on each liquidator to exchange information if this information could be of importance for another proceeding, particularly insofar as it concerns the progress in lodging and verifying claims and all measures aimed at terminating the proceedings. Article 31(1) creates a general and mutual obligation on the part of liquidators to exchange immediately all information that could be of importance to other proceedings, in particular to the extent such information relates to the progress made in lodging and verifying claims and all measures aimed at terminating the insolvency proceedings. Moreover, in accordance with Article 31(2), the liquidators must work with one another subject to the rules applicable to each of them. In particular, the liquidator in the main insolvency proceeding must at a given time have the opportunity to submit proposals on the liquidation or any use of the assets (Article 31(3) – at any rate with important decisions such as the continuation of the established enterprise.

c) Under Article 32(2) the liquidators may lodge claims that have already been lodged in “their” proceedings in other proceedings to the extent this appears appropriate after an abstract test. It does not require involvement of the creditors who have the right to lodge claims in any insolvency proceeding in accordance with Article 32(1). They can object to the filing of a claim, however. In order to ensure equal treatment of creditors, a creditor shares in distributions made in other proceedings only where creditors of the same ranking or category have in those other proceedings obtained an equivalent dividend that the creditor already requested in another proceeding (Article 20(2)). This leads to a consolidated overview of dividends.\(^73\) Article 32(3) gives each liquidator the right to participate in other proceedings “on the same basis as a creditor”. A liquidator will make particular use of this when he wants to implement the liquidation judgment in “his” proceedings in the remaining insolvency proceedings. The liquidator will try to convince the creditors in the other proceedings during the creditors’ meeting.

d) Especially important for the implementation of the liquidation judgment in the main insolvency proceeding is the power of the liquidator in the main proceeding under Article 33 to request a stay of the process of liquidation from the court that opened the secondary proceedings. At the same time, the provision gives the court criteria to determine when the request of the liquidator should be followed and when it should be waived. Remarkably, the court is permitted to order additional obligations or the like in order to reach an individually tailored solution.\(^74\) This creates a desirable flexibility, as it requires adequate co-ordination among several insolvency proceedings.

2. Termination of winding-up proceedings

Article 34(1) sentence 1 grants the liquidator the right to propose a rescue plan, a composition or a comparable measure to close the proceedings under the law applicable to secondary proceedings. The liquidator will do this above all when a closure of this sort is planned in “his” proceedings. The regulation thus seeks to make the necessary means available so that all proceedings may end with a uniform reorganisation measure, despite their procedural independence.\(^75\) In contrast, measures of this sort in secondary proceedings require in principle the approval of the liquidator. After a stay of the process pursuant to Article 31, the liquidator or (with his consent) the debtor has the exclusive right of proposal (Article 34(3)).

Winding-up measures frequently lead to a restriction of creditor rights (e.g. discharge of residual debt). The regulation does not consider this to be acceptable if the creditor rights are to be circumscribed although only a limited portion of the debtor’s assets provided the basis for the secondary proceeding. Under Article 34(2), all creditors having an interest must consent in order for a measure in a secondary proceeding in respect of debtors’ assets located in other Member States to have effect. What significance the difference has in relation to the formulation in Article 17(2) sentence 2 is unclear.\(^76\)

VII. Summary

Even if the insolvency regulation brings with it difficulties in interpretation in subsections and is not entirely convincing in each regard, it must be regarded altogether as a great success now that it enters into force. It finally lays down uniform rules for the settlement of cross-border insolvencies that does not just enable a realisation of the principle of equal treatment of creditors on paper alone. Practice will tell whether and to what extent the conflict-of-law procedure and the co-ordination of several proceedings are practicable. Already at this point however it can be predicted that no way will lead past a standardisation of insolvency law in the long term.

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\(^{72}\) See Kolmann (supra note 5), at 351 et seq.

\(^{73}\) See Kolmann (supra note 5), at 353.

\(^{74}\) See Kolmann (supra note 5), at 353 et seq.