

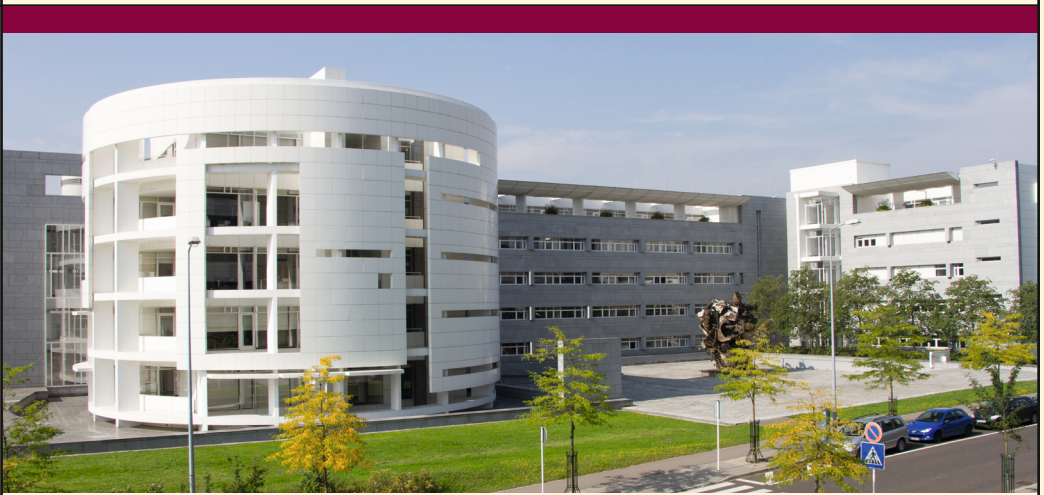
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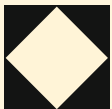
Hess/Oberhammer/Bariatti/Koller/Laukemann/Requejo Isidro/Villata (eds.)

The Implementation of the New Insolvency Regulation

Improving Cooperation and Mutual Trust



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PUBLISHING



Nomos



Max Planck Institute
LUXEMBOURG
for Procedural Law

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International, European and Regulatory Procedural Law

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Volume 10

Burkhard Hess/Paul Oberhammer/Stefania Bariatti
Christian Koller/Björn Laukemann/Marta Requejo Isidro
Francesca Clara Villata (eds.)

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Preface

This book presents the results of a Study on ‘The Implementation of the New Insolvency Regulation – Improving Cooperation and Mutual Trust’. Supported by the European Commission under the Specific Programme ‘Civil Justice’,¹ this Study is a follow-up research project to the Heidelberg-Luxembourg-Vienna Report.² It pursues a two-fold objective: first, to analyse the application of the Regulation’s reformed – and sometimes innovative – rules in practice, and, second, to examine and implement the new procedures and changes to national insolvency law. This book constitutes a revised version of the final report that was sent to the Commission in January 2017.

Apart from the core Study, the book contains reports of distinguished insolvency academics and practitioners supporting the project teams as external experts. We therefore would like to express our gratitude to Professor *Reinhard Bork* (University of Hamburg), Avv. *Giorgio Corno* (Milan), Professor *Renato Mangano* (University of Palermo), Professor *Irit Mevorch* (University of Nottingham), Professor *Christoph Thole* (University of Cologne), and Professor em. *Bob Wessels* (University of Leiden).

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Moreover, we have to thank *Sandra Becker* (MPI Luxembourg) and Mag. *Kevin Labner* (Vienna) who greatly assisted in preparing the publication of the Study. Our particular gratitude is owed to Dr. *Robert Arts* (MPI Luxembourg). This book would not have been published without his unreserved and excellent support.

It was an honour and privilege to conduct the present Study as part of the European Commission’s scientific programme. We hope that its results

1 JUST/2013/JCIV/AG/4679.

2 *Hess/Oberhammer/Pfeiffer* (eds), *European Insolvency Law – Heidelberg-Luxembourg-Vienna Report*, Munich 2014.

Preface

provide a valuable contribution to the ongoing dialogue between academia and legal practice on the application of the new European Insolvency Regulation.

Luxembourg/Milan/Vienna

The editors

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List of Abbreviations

ad ex.	ad extra
a.F.	alte Fassung (old version)
Affd.	affirmed
ALI	American Law Institute
Am. Bankr. Inst. J.	American Bankruptcy Institute Journal
Anm.	Anmerkung (comment)
arg e	argumentum e
Art(s)	Article(s)
BCC	British Company Law Cases (British legal journal)
BGH	Bundesgerichtshof (German Federal Court of Justice)
Brook.J.Corp.Fi.&Com.L.	Brooklyn Journal of Corporate, Financial & Commercial Law (American legal journal)
Brook. J. Int'l. L.	Brooklyn Journal of International Law (American legal journal)
Bull. Joly Sociétés	Bulletin Joly Sociétés (French legal journal)
Bus. L. Int'l	Business Law International
BT-Drs.	Bundestagsdrucksache (official document of the German Bundestag)
BV	Besloten vennootschap met beperkte aansprakelijkheid (Dutch private limited liability company)
Cass. Sez. Un.	Corte Suprema di Cassazione Sezioni Unite (Italian Supreme Court grand chamber)
cf	confer (compare)
ch	chapter
CJEU	Court of Justice of the European Union
CLLS	City of London Law Society
CLJ	Cambridge Law Journal
CLP	Current legal Problems

List of Abbreviations

CNAJMJ	French Conseil National des Administrateurs Judiciaires et des Mandataires Judiciaires
CoCo (guidelines)	European Communication and Cooperation Guidelines for Cross-border Insolvency
Colum. J. Transnat'l L.	Columbia Journal of Transnational Law (American legal journal)
COMI	centre of the debtor's main interests
dAktG	German Stock Corporation Act (deutsches Aktiengesetz)
DAV	Deutscher Anwaltsverein
DB	Der Betrieb (German legal journal)
DZWIR	Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht (German legal journal)
EBDJ	Emory Bankruptcy Developments Journal (American legal journal)
EBOR	European Business Organization Law Review
EC	European Council
ECFR	European Company and Financial Law Review (German legal journal)
ECGI	European Corporate Governance Institute
ECJ	European Court of Justice
ECL	European Company Law
ecolex	Fachzeitschrift für Wirtschaftsrecht (Austrian legal journal)
ed(s)	editor(s)
edn	edition
e.g.	exempli gratia (for example)
EGInsO	German Introductory Act to the Insolvency Act (Einführungsgesetz Insolvenzordnung)
EIR 2000	European Insolvency Regulation (Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings)
EIR	European Insolvency Regulation (Regulation (EU) 2015/848 of 20 May 2015 on Insolvency Proceedings)
EJ	The Economic Journal

Emory Bankr. Dev. J.	Emory Bankruptcy Developments Journal
ERA Forum	Journal of the Academy of European Law
et al.	et alii (and others)
etc.	et cetera (and so forth)
EU	European Union
EuInsVO	Europäische Insolvenzverordnung (European Insolvency Regulation)
EUJudgeCo	European Judge Cooperation
EuZW	Europäische Zeitschrift für Wirtschaftsrecht (German legal journal)
EWHC (Ch)	High Court of Justice (High Court of England and Wales), Chancery Division
EWiR	Entscheidungen zum Wirtschaftsrecht (German legal journal)
EWS	Europäisches Wirtschafts- und Steuerrecht (German legal journal)
f, ff	following
fn	footnote (external)
Foro it.	Il Foro italiano
FS	Festschrift (German for Liber Amicorum)
GmbHG	Gesetz betreffend die Gesellschaften mit beschränkter Haftung (German Law on Limited Liability Companies)
Giur.comm.	Giurisprudenza commerciale (Italian legal journal)
GPR	Zeitschrift für das Privatrecht der Europäischen Union (German legal journal)
Harv. Int'l L.J.	Harvard International Law Journal (American legal journal)
IBA	International Bar Association
ibid	ibidem (in the same place)
ICCLR	International Company and Commercial Law Review (British legal journal)
ICLQ	International and Comparative Law Quarterly

List of Abbreviations

i.e.	id es (that is)
Il dir. fallim.	Il diritto fallimentare (Italian legal journal)
Il Fall.	Il Fallimento e le altre procedure concorsuali (Italian legal journal)
IILR	International Insolvency Law Review
IJLSR	International Journal of Legal Studies and Research
ILA	The Inception Impact Assessment
Inc.	incorporated
infra	see below
InsO	Insolvenzordnung (German Insolvency Code)
INSOL	International Association of Restructuring, Insolvency & Bankruptcy Professionals
Insolv. Int.	Insolvency Intelligence (British legal journal)
Int. Insolv. Rev.	International Insolvency Review
Int'l Lis	Corriere trimestrale della litigation internazionale (Italian legal journal)
insolvency practitioner(s)	Insolvency Practitioner(s)
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts (German legal journal)
JCL	Journal of Cooperation Law (American legal journal)
JCLS	Journal of Corporate Law Studies
J. Int'l Bus. & L.	Journal of International Business and Law (American legal journal)
J Int'l L	Journal of International Law
JPE	Journal of Political Economy (American legal journal)
J.Priv.Int.L.	Journal of Private International Law
jurisPR-InsR	Juris Praxisreport Insolvenzrecht (German legal database)
JZ	Juristen Zeitung (German legal journal)
KSzW	Kölner Schrift zum Wirtschaftsrecht (German legal journal)
KTS	Zeitschrift für Insolvenzrecht (German legal journal)
LC	Ley Concursal (Spanish Insolvency Act)

lit.	litera
LMK	Lindenmaier-Möhring- Kommentierte BGH-Recht- sprechung (German legal journal)
LOPJ	Ley Orgánica del Poder Judicial
LS	Legal Studies (British legal journal)
Ltd	Limited Liability Company
MJ	Maastricht Journal of European and Comparative Law
MLR	The Modern Law Review
MS	Member State
MüKoInsO	Münchener Kommentar zur Insolvenzordnung (German commentary)
n/nn	footnote (internal)
NICH	High Court of Justice in Northern Ireland, Chancery Division
NILR	Netherlands International Law Review
no(s)	number(s)
Norton J. Bankr. L. & Prac.	Norton Journal of Bankruptcy Law and Practice
NV	Naamloze vennootschap (Dutch public limited liability company)
NVRII	Nederlandse Vereniging voor Rechtsvergelijkend en In- ternationaal Insolventierecht (Netherlands Association for Comparative and International Insolvency Law)
Nw. J. Int'l L. & Bus.	Northwestern Journal of International Law & Business
NZG	Neue Zeitschrift für Gesellschaftsrecht (German legal journal)
NZI	Neue Zeitschrift für Insolvenz- und Sanierungsrecht (German legal journal)
p	page(s)
para(s)	Paragraph(s)
passim	indicates that something is to be found at many places in the same book
pers	persons

List of Abbreviations

Q	Question
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht (German legal journal)
REGSOL	Central Solvency Registrar (Digital Bankruptcy Platform for Belgian bankruptcies)
Rev. crit. DIP	Revue critique de droit international privé (French legal journal)
Rev. proc. coll.	Revue des procédures collectives (French legal journal)
Riv.dir.int.priv. e proc.	Rivista di diritto internazionale private e processuale (Italian legal journal)
RIW	Recht der internationalen Wirtschaft (German legal journal)
s.	sentence
sec	section
SA	Société anonyme/Sociedad Anónima
San Diego Int'l L.J.	San Diego International Law Journal (American legal journal)
SIA	Sabiedriba ar ierobezotu atbildibu (Latvian limited liability company)
SpA	Società per Azioni (Italian shared company)
Stan. J.L. Bus. & Fin.	Stanford Journal of Law, Business and Finance
STS	Sentencia del Tribunal Supremo
subpara	subparagraph
supra	see above
Tex.Int'l L.J.	Texas International Law Journal (American legal journal)
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
The Geo. Wash. Int'l L. Rev.	The George Washington International Law Review (American legal journal)
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law

List of Abbreviations

UNIDROIT	International Institute for the Unification of Private Law
U.S.	United States
v	versus
VO	Verordnung (Regulation)
WM	Zeitschrift für Wirtschafts- und Bankrecht (German legal journal)
Yale L.J.	The Yale Law Journal (American legal journal)
ZEuP	Zeitschrift für Europäisches Privatrecht (German legal journal)
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht (German legal journal)
ZIK	Zeitschrift für Insolvenzrecht und Kreditschutz (Austrian legal journal)
ZInsO	Zeitschrift für das gesamte Insolvenzrecht (German legal journal)
ZIP	Zeitschrift für Wirtschaftsrecht (German legal journal)
ZR	Zivilrechtssenat (Civil Panel)
ZVglRWiss	Zeitschrift für Vergleichende Rechtswissenschaft (German legal journal)
ZZP	Zeitschrift für Zivilprozeß (German legal journal)

Introduction

Insolvency law has changed considerably over the last decade. Legislative activity across the EU Member States mirrors a still ongoing shift from liquidation towards the reorganisation of companies, or, to put it differently, from a creditor based approach towards a more debtor oriented concept of insolvency.¹ This trend of rescue culture embedded in preventive out-of-court proceedings is complemented by the debt discharge of consumers and self-employed persons.² At the same time, complex cross-border cases raise the need for flexible regulatory instruments adjusting a company's debts right on the eve of insolvency – with the participation of only parts of the creditors deciding on the basis of a majority vote. From a legal perspective, these so-called pre-insolvency proceedings tend to blur the boundaries between insolvency law, general procedural law, company law and even contract law.³ In addition, the opening of insolvency proceedings against members of a corporate group raises intricate questions in a cross-border setting.⁴

As a consequence, the EU legislator was held to evaluate the efficiency of the regulatory regime in place and to keep pace with these substantial developments of domestic law by reforming the European rules on cross-border insolvencies.

1 See, e.g., *Hess*, in: Festschrift Stürner (2013), p 1253; *Paulus*, RIW 2013, 577; *Thole*, JZ 2011, 765.

2 Cf *infra* Part 1, II. 1.2, regarding the Swedish debt relief proceeding, analyzed by the CJEU, 8 November 2012, Case C-461/11, *Radziejewski*, ECLI:EU:C:2012:704; see also the provisions on debt discharge in case of natural persons, consumers and self-employed persons (§§ 182 ff of the Austrian Insolvency Act, as lastly amended by the Insolvency Act Amendment Act 2017, Federal Law Gazette I 2017/122.

3 Cf *Jacoby*, ZGR 2010, 359; *Madaus*, KSzW 2015, 183, 184 ff; *Piekenbrock*, IILR 2014, 424.

4 Cf, for instance, *Oberhammer*, in: Hess/Oberhammer/Pfeiffer (eds), Heidelberg-Luxembourg-Vienna Report (2014), para 5.2.1.1; *Eble*, NZI 2016, 115; *Hirte*, ECFR 2008, 213.

I. Genesis of the Study

After winning a European Commission tender, the MPI Luxembourg for Procedural Law together with the Universities of Heidelberg (Professor *Burkhard Hess* and Professor *Thomas Pfeiffer*) and Vienna (Professor *Paul Oberhammer*) in a first research project evaluated the functioning of the European Insolvency Regulation since its adoption in 2002. The main objective of this study was to analyse the Regulation's application in practice and examine and implement the new procedures and changes to national insolvency law. The legal analysis and empirical data carried out and collected in 26 EU Member States resulted in the so-called Heidelberg-Luxembourg-Vienna Report of December 2012 which drew up proposals for the amendment of the Regulation. A great number of these proposals, such as the recommendation to introduce pre-insolvency proceedings, to insert a new head of jurisdiction for insolvency-related actions as well as to improve the coordination of proceedings were adopted by the European Commission and are now incorporated in the binding text of the new Regulation taking effect from June 2017.

This reform gave rise to the present follow-up research project. Carried out by the MPI Luxembourg for Procedural Law (Professor *Burkhard Hess*), in cooperation with the University of Vienna (Professor *Paul Oberhammer*) and the University of Milano (Professor *Stefania Bariatti*), and supported by the European Commission under the Specific Programme 'Civil Justice',⁵ this Study addresses the implementation and interpretation of the new Insolvency Regulation.

II. Methodology, scope and objective of the Study

The two-year project, which ended in December 2016, aimed to formulate guidelines and recommendations to the EU Commission. Apart from desk-study and archival research, the final report relies upon responses to an online questionnaire⁶ as well as upon contributions by renowned insolvency academics, practitioners and representatives of the German Ministry of

5 JUST/2013/JCIV/AG/4679, see Decision No 1149/2007/EC of the European Parliament and the Council from 25 September 2007, OJ L 257, 3.10.2007, p 16.

6 The Online Questionnaire is available at the Website of the Max Planck Institute Luxembourg for Procedural Law (<http://insreg.mpi.lu/Guidelines.pdf>).

Justice during conferences in Vienna, Milano and Luxembourg. The input given by those distinguished experts significantly enhanced the academic dialogue. It enabled the project teams to put their ideas and suggestions under scrutiny. In order to make parts of this academic dialogue available to a broader audience many of the expert contributions are published in the Annex of this book.

From a *practical* perspective, this follow-up project was (and is) dedicated to provide guidance for the interpretation of the new Regulation, even before its entry into force. It goes without saying that many aspects raised by the reform of the Insolvency Regulation, both legal and empirical, need clarification – by the Court of Justice and legal doctrine. From an *academic* viewpoint, the new legal instruments introduced by the Regulation as well as its adaptation to modern types of rescue proceedings have opened up new and innovative fields of research. At the same time, these regulatory developments require adjustments to domestic insolvency law – thereby constituting some sort of regulatory dialogue within the European Union’s multilevel system. That being said, conducting the Study at this early stage was not only helpful to provide interpretative guidance from the outset but also to raise the national legislators’ awareness of the potential need for regulatory action. In that regard, the participation of the German Ministry of Justice in the conferences of the project made it possible to contribute to the Member States’ implementing regulation.

III. Outline of the Study

The original version of the European Insolvency Regulation already provided a successful instrument capable of facilitating cross-border insolvency proceedings within the European Union. Consequently, the reform does not fundamentally change the basic structures of the Regulation. The regulatory approach underpinning the amendments can, essentially, be divided into three groups: the codification of the CJEU’s case law, the implementation of tools developed in practice (e.g. synthetic proceedings), and the adoption of entirely new rules (e.g. group coordination proceedings).

The reform relates in essence to four issues: the scope of the EIR; provisions dealing with jurisdiction; the coordination of proceedings, in particular with regard to groups of companies; and the information for creditors and the lodging of claims. The present Study focuses on provisions

of the new Regulation that raise particularly intricate questions of interpretation and (potentially) interact with domestic insolvency law. To that end, the three main parts of the Study address the following issues:

1. Widening the scope of the Regulation: opening up for rescue culture (Part 1)

The EU legislator decided to considerably widen the scope of the new Regulation to include debt discharge proceedings in relation to consumers and self-employed persons, but also pre-insolvency proceedings. These latter proceedings, such as the French *procédure de sauvegarde financière accélérée*,⁷ address the adjustment and renegotiation of debts if a company in actual or imminent financial distress faces only a likelihood of insolvency, thus leaving the debtor fully or partially in control of his assets or affairs. The ‘semi-collective’ nature is characteristic of pre-insolvency proceedings, which means that they do not include the creditors as a whole, but only a significant part of them – typically financial creditors deciding by a majority vote.

Against this backdrop, the follow-up Study had to clearly answer the intricate question of under what conditions these pre-insolvency proceedings will be covered by the new Regulation, by establishing criteria for drawing the line between its scope, on the one hand, and the Brussels I regime, the Rome I Regulation and the autonomous rules of national procedural law, on the other.⁸

2. Coordination between main and secondary proceedings (Part 2)

Along with the recommendations of the first research project, the EU legislator was not only willing to reshape the conceptual balance between universalism and territoriality, but also strengthen procedural cooperation. In this context, new regulatory paths have been laid for cross-border proceedings. Three of them shall be singled out:

7 Cf *Piekenbrock*, KSzW 2015, 191, 192 f; *J. Schmidt*, in: Mankowski/Müller/Schmidt, EuInsVO 2015 (2016), Art 1, para 14; *Degenhardt*, NZI 2013, 830.

8 Cf *infra*, Part 1, III. 1.2.

2.1 Judicial cooperation: from soft law to innovative hard law

The new Insolvency Regulation sets up a framework for enhanced cooperation – not only between insolvency practitioners, but also between courts. This approach tends to overcome classical means of cross-border mutual assistance, by providing for an increasingly refined mechanism of coordination, including cooperation and communication. Following existing soft law principles and guidelines from international organizations, the new Regulation introduces a legal duty of judges to properly cooperate and communicate with one another.⁹

In that regard, the Study recommends, *inter alia*, a practice guide to be established by the Commission raising awareness and explaining the new rules through technical advice, the compilation of best practices, case studies and links to other pertinent documents of soft law,¹⁰ thereby helping to remove the well-known legal and factual obstacles to judicial cooperation.

2.2 Synthetic proceedings: from practice to regulation

The opening of parallel territorial proceedings against the same debtor may hamper the efficient administration of the insolvency estate as a whole and, therefore, the concept of universality. Following British restructuring culture, the new Regulation entitles a main practitioner to give a so-called undertaking to foreign local creditors with the aim of preventing the opening of territorial proceedings.¹¹ By approving such an undertaking, those creditors are treated with respect to distribution and priority rights as if territorial proceedings had been opened and local insolvency law (familiar to them) applied.¹² This contract-related instrument which is based on a conflict of laws mechanism well illustrates that once it becomes subject to regulation, the rule of law and, more precisely, procedural guarantees need to be strictly taken into account: such as the right of foreign creditors to be heard and to have access to the proceedings, their

9 See Art 42 (regarding secondary proceedings) and Art 57 (regarding groups of companies) EIR.

10 See *infra* Annex, VI. 6.

11 See Art 36 EIR.

12 Art 36(2) EIR.

right to challenge an undertaking, and also liability issues if the insolvency practitioner fails to comply with its provisions.¹³ However, as demonstrated by the reform, this approach entails the risk of overregulation, undermining the attractiveness of an instrument which has proven to work in practice before being regulated.¹⁴ For many Member States the concept of synthetic proceedings is entirely new and triggers the need to adopt specific rules on a domestic level that ensure effectiveness of the instrument. To that end, the Study highlights interfaces between the Regulation and domestic law that might require the Member States' attention.

3. Group of companies: contractual flexibility versus procedural overregulation (Part 3)

Finally, the Study had to consider the conflict between the need for clear and foreseeable rules, on the one hand, and the requirement to regulate cross-border insolvencies flexibly, on the other. When it comes to the insolvency of group of companies, we developed criteria for coordinating the proceedings of different group members: firstly, with regard to *jurisdiction* by proposing a stronger and more refined consideration of economic parameters which facilitate concentration of different proceedings under one jurisdiction and one insolvency statute;¹⁵ and secondly, from a *contractual* perspective, by means of agreements and protocols concluded between the representatives of the different group members in order to facilitate and improve the administration of multiple insolvency proceedings in the best interest of the whole group of companies and its creditors.¹⁶ The Study further stresses that issues of coordination between the respective group members' proceedings might appear in a number of scenarios subject to different coordination regimes. It provides guidelines for the interpretation of key provisions, such as Article 60 EIR dealing with the powers of an insolvency practitioner in proceedings concerning (other) group members.

The collapse of Lehman Brothers serves as a prime example, being the largest bankruptcy in history with over \$600 billion in liabilities. In this case, a cross-border insolvency protocol has been reached, covering

13 See Art 36(3)-(10) EIR.

14 Cf *infra* Part 2, I. 2, 3.3 and Annex III. 2.

15 See *infra* Part 3, II.

16 See *infra* Part 3, III. 3.1.