

Table of Contents

Preface	v
About the Authors	xv
Abbreviations	xvi

PART I. GENERAL ISSUES

Chapter 1. The European Community Regulation on Insolvency Proceedings: The Rule and its Context.	3
1. LEGAL BASIS	3
2. INTERPRETATION	4
3. CONTENT	7
4. THE INSOLVENCY REGULATION AS PART OF A EUROPEAN INSOLVENCY SYSTEM	8
Chapter 2. The Normative Model	11
1. APPROACHES TO THE CROSS-BORDER ASPECTS OF INSOLVENCY	11
1.1. Normative models: universality vs. territoriality	11
1.2. General policy considerations	12
1.2.1. <i>The territorial model</i>	12
1.2.2. <i>The universal model</i>	14
2. Model of the Insolvency Regulation: “mitigated universality”	15
Chapter 3. Sphere of Application.	21
1. PRELIMINARY	21
2. SPHERE OF TERRITORIAL APPLICATION: THE “COMMUNITY CONNECTION”	21
3. SPHERE OF SUBJECTIVE APPLICATION: ELIGIBILITY (ARTICLE 1.2)	26
3.1. Debtors covered by the Insolvency Regulation	26
3.2. Debtors excluded: credit institutions, insurance companies, investment undertakings.	27
4. SPHERE OF SUBSTANTIVE APPLICATION: INSOLVENCY PROCEEDINGS INCLUDED (ARTICLE 1.1 AND ARTICLE 2.a AND 2.c)	28
5. SPHERE OF APPLICATION IN TIME (ARTICLES 43 and 47)	30
6. RELATIONSHIP WITH OTHER COMMUNITY LEGAL INSTRUMENTS AND INTERNATIONAL CONVENTIONS (ARTICLE 44)	32

PART II. THE MAIN INSOLVENCY PROCEEDINGS

Chapter 4. International Jurisdiction	37
1. The Centre of Main Interests: General Aspects (Article 3.1)	37
2. The Centre of Main Interests: Test of Application	39
2.1. First directive: the primacy of the “administrative connection” . . .	40
2.2. Second directive: the primacy of the “external sphere”	41
2.3. Third directive: the “principle of unity”	42
2.4. Application of the test	43
2.5. Companies and legal persons	44
2.5.1. <i>Presumption in favour of the place of the</i> <i>registered office</i>	44
2.5.2. <i>Groups of companies and combines</i>	46
3. Internal territorial jurisdiction	48
4. Other problems	49
4.1. Examination as to jurisdiction	49
4.2. Reference date	49
4.3. Conflicts of jurisdiction	51
5. Scope of international jurisdiction	54
5.1. Territorial scope: “world-wide” extension	54
5.2. Substantive scope: insolvency matters	55
5.2.1. <i>Background</i>	55
5.2.2. <i>No regulatory loopholes between the Insolvency</i> <i>Regulation and the Regulation on Civil Jurisdiction</i> <i>and Enforcement</i>	56
5.2.3. <i>No referral back to national law</i>	57
5.2.4. <i>No adoption of a “vis attractiva concursus” principle</i>	57
5.2.5. <i>Matters under the jurisdiction of the court of opening</i>	59
5.2.6. <i>Character of the jurisdiction: exclusive jurisdiction</i> <i>and its exceptions</i>	63
6. Preservation measures	66
7. Special regime for credit institutions and insurance undertakings	67
 Chapter 5. Applicable Law: The <i>lex fori</i> <i>concursum</i> as General Rule	 69
1. Preliminary	69
2. General Rule: the Law of the State of Opening (Article 4)	72
2.1. Justification	72
2.2. Scope of the applicable law	73
2.3. Particular issues regarding the insolvency of companies	81
2.3.1. <i>General overview</i>	81
2.3.2. <i>Directors disqualifications</i>	82

2.3.3. Reorganization plans and compositions	83
2.4. Credit institutions and insurance companies	88
Chapter 6. Applicable Law: Exceptions to the <i>lex fori concursus</i>	89
1. INTRODUCTION	89
2. THIRD-PARTY RIGHTS IN REM AND RETENTION OF TITLE	91
2.1. Rights <i>in rem</i> of creditors and third parties (Article 5).	91
2.1.1. The rule	91
2.1.2. Condition of application: rights <i>in rem</i> in respect of assets located in a Member State other than the State of opening	94
2.1.2.1. Meaning of “rights <i>in rem</i> ”	94
2.1.2.2. The time factor	99
2.1.2.3. Property protected by Article 5	100
2.1.2.4. The situs of assets	101
2.1.3. Legal consequence: non-alteration of the right <i>in rem</i>	103
2.2. Retention of title (Article 7)	108
2.3. Detrimental acts	110
2.4. Credit institutions and insurance undertakings.	111
3. SET-OFF (ARTICLES 4 AND 6)	111
3.1. Article 4: set-off under the <i>lex fori concursus</i>	112
3.2. Article 6: set-off under the law governing the insolvent debtor’s claim (“primary claim”)	115
3.3. Contractual set-off	117
4. EFFECTS ON CONTRACTS.	121
4.1. General rule: <i>lex fori concursus</i> (Article 4.2.e)	121
4.2. Exceptions to the <i>lex fori concursus</i>	123
4.2.1. Contracts relating to immovable property (Article 8)	124
4.2.2. Employment contracts and relationships (Article 10)	125
5. PAYMENT SYSTEMS AND FINANCIAL MARKETS (ARTICLE 9)	126
6. EFFECTS ON RIGHTS SUBJECT TO REGISTRATION (ARTICLE 11)	131
7. COMMUNITY PATENTS AND TRADEMARKS (ARTICLE 12)	133
8. DETRIMENTAL ACTS (ARTICLES 4.2.M AND 13)	134
9. PROTECTION OF THIRD-PARTY PURCHASERS (ARTICLE 14)	138
10. EFFECTS ON LAWSUITS PENDING (ARTICLE 15)	140
Chapter 7. Applicable Law: Uniform Rules.	143
1. PUBLICATION AND REGISTRATION (ARTICLES 21–22)	143
1.1. Publication	143
1.2. Registration.	145
1.3. Credit institutions and insurance companies	146

2. HONOURING AN OBLIGATION TO DEBTOR (ARTICLE 24)	147
3. PROVISION OF INFORMATION FOR CREDITORS AND LODGEMENT OF THEIR CLAIMS (ARTICLES 39–42)	148
3.1. Duty to inform	148
3.2. Lodgement of claims	150
3.3. Credit institutions and insurance undertakings	151

PART III. TERRITORIAL PROCEEDINGS

Chapter 8. Territorial Insolvency Proceedings: Jurisdiction and Applicable Law	155
1. INTRODUCTION	155
1.1. Functions of the territorial insolvency proceedings	155
1.2. Secondary and independent territorial insolvency proceedings	157
2. JURISDICTION: ARTICLES 3.2, 2.G AND 27	158
2.1. The concept of “establishment”	158
2.2. Scope of the international jurisdiction	162
2.3. Uniform rules of location	163
2.3.1. <i>Meaning</i>	163
2.3.2. <i>The rules</i>	164
3. LAW APPLICABLE	168
3.1. Introduction: <i>lex concursus</i> and exceptions (Article 28)	168
3.2. Requirements for the opening of territorial proceedings	169
3.2.1. <i>Requirements derived from national law</i>	169
3.2.2. <i>Requirements established by the Regulation</i>	170
3.2.2.1. <i>Independent territorial proceedings (Article 3.4)</i> ..	170
3.2.2.2. <i>Secondary territorial proceedings (Articles 27, 29 and 30)</i>	172
3.3. Aim of the proceedings: winding-up or restructuring	174
3.4. Creditor’s right to participate (Articles 32 and 39)	176
3.5. Other special features of territorial proceedings	177
3.6. Restrictions of creditors’ rights (Articles 17.2 and 34.2)	178

PART IV. RECOGNITION OF INSOLVENCY PROCEEDINGS

Chapter 9: Recognition of Foreign Insolvency Proceedings	185
1. THE INSOLVENCY REGULATION’S SYSTEM OF RECOGNITION: GENERAL CHARACTERISTICS	185
2. DECLARATION OF OPENING: RECOGNITION AND EFFECTS	188
2.1. Automatic and immediate recognition (Article 16).	188
2.2. Effects of recognition (Article 17)	190

2.2.1. <i>Main proceedings</i>	191
2.2.2. <i>Territorial proceedings</i>	193
3. THE LIQUIDATOR	195
3.1. Definition	195
3.2. Powers: supervision, administration, disposal and realisation of assets (Article 18)	195
3.3. Proof of the liquidator's appointment (Article 19)	199
3.4. The temporary administrator (Article 38)	200
3.5. Table of liquidator's powers and duties	203
4. RETURN AND IMPUTATION: ARTICLE 20 (REMISSION)	204
5. PUBLICATION, REGISTRATION AND ASSOCIATED COSTS ARTICLES 21–23 (REMISSION)	204
6. HONOURING OF AN OBLIGATION TO THE INSOLVENT DEBTOR: ARTICLE 24 (REMISSION)	205
7. RECOGNITION AND ENFORCEMENT OF "OTHER" INSOLVENCY DECISIONS (ARTICLE 25)	205
7.1. Decisions included	205
7.1.1. <i>In general</i>	205
7.1.2. <i>Insolvency plans, compositions and comparable measures</i> .	206
7.1.3. <i>Insolvency-derived decisions</i>	207
7.1.4. <i>Preservation measures</i>	208
7.2. Enforcement of decisions	209
8. GROUNDS FOR NON-RECOGNITION: ARTICLES 25.3 AND 26	211
8.1. General aspects	211
8.2. Public policy	213
8.2.1. <i>Elements of the test</i>	213
8.2.2. <i>Content</i>	215
8.2.3. <i>Partial recognition and non-recognition</i>	219
9. DIRECTIVES OF REORGANISATION AND WINDING-UP CREDIT INSTITUTIONS AND INSURANCE UNDERTAKINGS	220

PART V. COORDINATION BETWEEN INSOLVENCY PROCEEDINGS

Chapter 10: Coordination between Insolvency Proceedings Opened in Different Member States	225
1. THE MODEL OF INTERNATIONAL COORDINATION	225
2. HYPOTHESIS OF COORDINATION	227
3. RULES REGARDING PARTICIPATION (ARTICLE 32)	228
4. RULES REGARDING COOPERATION (ARTICLE 31)	232
4.1. Obligation to exchange information	232
4.2. General duty to cooperate	233
4.3. Proposals regarding the use of assets in the secondary proceedings	235
5. RULES REGARDING THE ALIGNMENT OF PROCEEDINGS	235
5.1. Stay of liquidation (Article 33)	237

5.2. Ending of secondary proceedings without liquidation, through a composition or reorganisation plan (Article 34)	238
5.3. Subsequent opening of the main proceedings (Articles 36–37) . . .	241
6. RULES REGARDING DISTRIBUTION	242
6.1. Assets remaining in the secondary proceedings (Article 35)	242
6.2. Return and imputation.	243
6.2.1. <i>Rule regarding return (Article 20.1)</i>	243
6.2.2. <i>Rule regarding imputation (Article 20.2)</i>	244
7. CREDIT INSTITUTIONS AND INSURANCE UNDERTAKINGS	248
 Bibliography	 249
 Index	 253