

Table of Contents

BibliographyXVII

List of AbbreviationsXXIX

1 Introduction 1

 1.1 Methodology, Scope and Aim of the Study 1

 1.2 Outline of the Study 2

 1.2.1 The Different Parts 2

 1.2.2 The Comparative Research 2

 1.2.3 Distribution of Responsibilities 5

2 Executive Summary 7

 2.1 General Assessment 7

 2.2 The Scope of the Regulation 7

 2.2.1 Main Issues 7

 2.2.1.1 The Definition of Insolvency Proceedings 7

 2.2.1.2 The Insolvency of Private Individuals and Self-employed Persons 8

 2.2.1.3 The Exception Rule of Article 1 (2) EIR 8

 2.2.1.4 Absence of Provisions for the Recognition of Insolvency Proceedings
 Opened outside the EU or the Coordination between Proceedings inside
 and outside the EU 9

 2.2.2 Policy Options and Recommendations 9

 2.2.2.1 The Definition of Insolvency Proceedings 9

 2.2.2.2 The Coordination between Article 1 (1) EIR and Annex A 9

 2.2.2.3 The Exception Rule of Article 1 (2) EIR 10

 2.3 Pre-insolvency and Hybrid Proceedings not Listed in the Annex A of the EIR 10

 2.4 Article 3 EIR 11

 2.4.1 The COMI of Corporations 12

 2.4.2 The COMI of Natural Persons 12

 2.4.3 Improving the Procedural Framework 12

 2.4.4 Territorial Proceedings (Articles 3 (2) – (4) EIR) 14

 2.5 Insolvency-related Actions (Article 3 a EIR) 14

 2.5.1 Main Issues 14

 2.5.2 Policy Options and Recommendations 15

 2.6 Groups of Companies 15

 2.7 Applicable Law 17

 2.7.1 Article 4 EIR 17

 2.7.2 Articles 5 and 7 EIR 17

 2.7.3 Article 6 EIR 17

 2.7.4 Article 8 EIR 17

 2.7.5 Article 9 EIR 17

 2.7.6 Article 10 EIR 18

 2.7.7 Article 11 EIR 18

 2.7.8 Article 12 EIR 18

 2.7.9 Article 13 EIR 18

 2.7.10 Article 14 EIR 19

 2.7.11 Article 15 EIR 19

 2.8 Coordination of Proceedings 19

 2.9 Lodgement of Claims – Main Findings 21

 2.9.1 Substantial Issues 21

 2.9.2 Procedural Issues 22

Table of Contents

3 Scope of the Regulation	24
3.1 Underlying Policies	24
3.2 Main Issues	25
3.2.1 The Definition of Insolvency Proceedings	25
3.2.2 The Insolvency of Private Individual and Self-employed Persons	29
3.2.3 The Exception Rule of Article 1 (2) EIR	30
3.2.4 Absence of Provisions for the Recognition of Insolvency Proceedings Opened outside the EU or the Coordination between Proceedings inside and outside the EU	31
3.3 National Legislation and Case-Law	32
3.3.1 Pre-insolvency and Hybrid Proceedings in EU-Member States	32
3.3.1.1 Austria	32
3.3.1.2 Belgium	32
3.3.1.3 Czech Republic	35
3.3.1.4 France	35
3.3.1.5 Germany	36
3.3.1.6 Greece	37
3.3.1.7 Italy	38
3.3.1.8 Latvia	38
3.3.1.9 Malta	39
3.3.1.10 Netherlands	39
3.3.1.11 Poland	39
3.3.1.12 Romania	40
3.3.1.13 Spain	40
3.3.1.14 Sweden	41
3.3.1.15 United Kingdom (England and Wales)	41
3.3.2 Assessment: Common Features of Pre-insolvency and Hybrid Proceedings	43
3.3.3 Insolvency Proceedings of Consumers and of Self-Employed Persons	45
3.3.3.1 Austria	45
3.3.3.2 Belgium	46
3.3.3.3 Bulgaria	46
3.3.3.4 Cyprus	46
3.3.3.5 Czech Republic	46
3.3.3.6 Estonia	46
3.3.3.7 Finland	47
3.3.3.8 France	47
3.3.3.9 Germany	47
3.3.3.10 Greece	47
3.3.3.11 Hungary	48
3.3.3.12 Ireland	48
3.3.3.13 Italy	48
3.3.3.14 Latvia	49
3.3.3.15 Lithuania	49
3.3.3.16 Luxembourg	49
3.3.3.17 Malta	50
3.3.3.18 Netherlands	50
3.3.3.19 Poland	51
3.3.3.20 Portugal	51
3.3.3.21 Romania	52
3.3.3.22 Slovakia	52
3.3.3.23 Slovenia	53
3.3.3.24 Spain	53
3.3.3.25 Sweden	53
3.3.3.26 United Kingdom (England and Wales)	54
3.3.4 Assessment of the Findings of the National Reports	54
3.3.5 Absence of Provisions for Proceedings Opened outside the EU and for the Coordination of Proceedings inside and outside of the European Union	56
3.3.5.1 Austria	56

Table of Contents

3.3.5.2 Belgium	56
3.3.5.3 Estonia	57
3.3.5.4 Finland	57
3.3.5.5 France	57
3.3.5.6 Germany	58
3.3.5.7 Greece	59
3.3.5.8 Hungary	59
3.3.5.9 Italy	59
3.3.5.10 Latvia	60
3.3.5.11 Lithuania	60
3.3.5.12 Malta	60
3.3.5.13 Netherlands	61
3.3.5.14 Poland	61
3.3.5.15 Romania	61
3.3.5.16 Slovakia	62
3.3.5.17 Slovenia	62
3.3.5.18 Spain	62
3.3.5.19 Sweden	62
3.3.5.20 United Kingdom (England and Wales)	62
3.3.6 Assessment: the Application of the EIR with Regard to Third States	63
3.4 Policy Options	63
3.4.1 Extention of the Regulation to Pre-insolvency Proceedings	63
3.4.2 Improving the Interfaces between the Definitions in Articles 1 and 2 and the Annexes to the EIR	65
3.5 Recommendations	67
4 Jurisdiction	69
4.1 Article 3 EIR: Definition and Determination of the Centre of Main Interests	69
4.1.1 Underlying Policies	69
4.1.2 Main Issues	71
4.1.2.1 COMI of Corporations	72
4.1.2.2 COMI of Individual Persons	74
4.1.2.3 Relocation Cases	75
4.1.2.4 Territorial Proceedings	76
4.1.3 The Application of the Regulation in the Member States	78
4.1.3.1 The COMI of Corporations	78
4.1.3.2 The COMI of Natural Persons	92
4.1.3.3 Investigation <i>ex officio</i>	96
4.1.3.4 Relocation Cases	97
4.1.3.5 Territorial Proceedings	103
4.1.3.6 Policy Options and Recommendations	109
4.1.3.7 Territorial Proceedings (Articles 3 (2) – (4) EIR)	111
4.2 Annex Proceedings	112
4.2.1 Introduction and Underlying Policy	112
4.2.2 The Case-Law of the ECJ	114
4.2.2.1 Gourdain v. Nadler	114
4.2.2.2 Seagon v. Deko Marty Belgium	115
4.2.2.3 SCT Industri AB i likvidation v. Alpenblume AB	116
4.2.2.4 German Graphics Graphische Maschinen GmbH v. Alice van der Schee, acting as liquidator of Holland Binding BV	116
4.2.2.5 F-Tex SIA v. Lietuvos-Anglijos UAB “Jadecloud-Vilma”	117
4.2.2.6 ERSTE Bank Hungary Nyrt v. Magyar Állam, BCL Trading GmbH, ERSTE Befektetési Zrt	117
4.2.2.7 Rastelli v. Hidoux	118
4.2.2.8 Pending Cases	118
4.2.3 The Implementation of the ECJ’s Ruling in the Member States	119
4.2.4 Methodological Aspects	122
4.2.5 Delimitation between the Scope of the EIR and the Brussels I Regulation	124
4.2.5.1 Principles	124

Table of Contents

4.2.5.2 Key Criteria	125
4.2.5.3 The Objective Scope of the <i>vis attractiva concursus</i> : Examples of Specific Types of Actions	128
4.2.6 Exclusive or Elective Jurisdiction	141
4.2.6.1 Current Legal Situation	141
4.2.6.2 Policy Options	142
4.2.6.3 Related Claims and Jurisdiction on the ground of Connectedness	143
4.2.7 Annex Proceedings Related to Secondary or Territorial Insolvency Proceedings ..	145
4.2.8 Conflicting Proceedings and Decisions	145
4.2.9 Annex Proceedings Against Third State Defendants on the Example of Avoidance Actions	146
4.2.9.1 General Remarks	146
4.2.9.2 Annex Jurisdiction in Cases Related to Third States?	148
4.2.10 Recommendations	151
5 Groups of Companies	153
5.1 The Problem	153
5.1.1 General	153
5.1.1.1 Status Quo: No Specific Provisions in the EIR	153
5.1.1.2 The Need for Legislation	153
5.1.1.3 Groups of Companies Come in All Shapes and Sizes	154
5.1.1.4 Respect Company Law	155
5.2 Ways to Improve Coordination	157
5.2.1 General	157
5.2.2 Coordination between Insolvency Proceedings against Group Companies	158
5.2.2.1 General	158
5.2.2.2 “Soft” Coordination	159
5.2.2.3 Who Could Take the Lead?	159
5.2.2.4 A Market Economy Oriented Approach to Group of Companies Insolvencies	162
5.2.3 From “Head Office” to “Group COMI”?	162
5.2.3.1 The Head Office Approach	162
5.2.3.2 <i>Eurofood</i> : Hard Cases Make Bad Law	164
5.2.3.3 <i>Interedil</i> : The Return of Pragmatism	165
5.2.3.4 Safeguarding the <i>Interedil</i> Approach: One Step in the Right Direction	166
6 Applicable Law	168
6.1 Article 4 EIR: Applicability of the Law of the State of the Opening of the Proceedings (<i>Thomas Pfeiffer</i>)	168
6.1.1 The General Principle	168
6.1.2 Qualification	169
6.1.2.1 General Aspects	169
6.1.2.2 Scope in Relation to Company Law	171
6.1.3 Other Questions Relating to General Concepts of Private International Law	172
6.1.4 Specific Issues	173
6.1.4.1 Determination of the Debtor (Article 4(2)(a))	173
6.1.4.2 Determination of the Assets Belonging to the Estate (Article 4(2)(b))	173
6.1.4.3 Powers of the Debtor and the Liquidator (Article 4(2)(c))	174
6.1.4.4 Conditions for Set-off (Article 4(2)(d))	174
6.1.4.5 Effects of Insolvency Proceedings on Current Contracts (Article 4(2)(e)) .	174
6.1.4.6 Effects of the Insolvency Proceedings on Individual Proceedings not Pending (Article 4(2)(f))	175
6.1.4.7 Treatment of Claims against Estate and Debtor (Article 4(2)(g))	175
6.1.4.8 Lodging, Verification and Admission of Claims (Article 4(2)(h))	176
6.1.4.9 Distribution, Ranking and Set-off Article 4(2)(i))	176
6.1.4.10 Conditions for and the Effects of Closure of Insolvency Proceedings (Article 4(2)(j))	176
6.1.4.11 Creditors’ Rights after the Closure of Insolvency Proceedings (Article 4(2)(k))	176

Table of Contents

6.1.4.12 Costs and Expenses (Article 4(2)(l))	176
6.1.4.13 Voidness, Voidability or Unenforceability of Legal Acts Detrimental To All Creditors (Article 4(2)(m))	176
6.1.4.14 Applicability in Primary and Secondary Proceedings	176
6.2 Article 5 EIR: Third Parties' <i>rights in rem</i> (Andreas Piekenbrock)	177
6.2.1 The Underlying Policy	177
6.2.2 The Main Issues	178
6.2.2.1 How to Achieve the Policy Goals?	178
6.2.2.2 Scope of Application	178
6.2.2.3 Localisation of Intangible Assets	179
6.2.2.4 Adjustment, Reduction or Discharge of the Secured Claim	179
6.2.3 ECJ Case-Law	180
6.2.4 Implementation by the Member States	180
6.2.4.1 Practical Problems Reported	181
6.2.4.2 The National Legal Context on <i>rights in rem</i>	184
6.2.5 Discussion	187
6.2.5.1 The First Issue: How to Achieve the Policy Goals?	187
6.2.5.2 Discussion of the Other Issues	194
6.2.6 Recommendations	197
6.3 Article 6 EIR: Set-off (Andreas Piekenbrock)	198
6.3.1 The Underlying Policy	198
6.3.2 The Main Issues	198
6.3.2.1 Third-State-Cases	198
6.3.2.2 Applicability to Netting Agreements	198
6.3.3 Implementation of Article 6 by the Member States	199
6.3.3.1 Practical Problems Reported	199
6.3.3.2 The National Legal Framework on Set-off	199
6.3.4 Recommendations	202
6.4 Article 7 EIR: Reservation of Title (Andreas Piekenbrock)	202
6.4.1 The Underlying Policy	202
6.4.2 The Main Issue	202
6.4.3 ECJ Case-Law	202
6.4.4 Implementation by the Member States	203
6.4.5 Discussion	203
6.4.5.1 Case 1	203
6.4.5.2 Case 2	204
6.4.6 Recommendations	204
6.5 Article 8 EIR: Contracts Relating to Immoveable Property (Andreas Piekenbrock)	204
6.5.1 Underlying Policy	204
6.5.2 Discussion	205
6.5.3 Recommendation	205
6.6 Article 9 EIR: Payment Systems and Financial Markets (Thomas Pfeiffer)	205
6.7 Article 10 EIR: Employment Contracts (Thomas Pfeiffer)	206
6.7.1 Employment Law Standards and Insolvency	206
6.7.1.1 General Aspects	206
6.7.1.2 Transfer of an Undertaking	207
6.7.2 Issues of Qualification	207
6.7.3 Issues of Assimilation (Adaptation)	207
6.7.4 Coordination with Guarantee Institutions	208
6.8 Article 11 EIR: Effects on Rights Subject to Registration (Andreas Piekenbrock)	208
6.8.1 Underlying Policy	208
6.8.2 Discussion	209
6.8.3 Recommendation	209
6.9 Article 12 EIR: Community Patents and Trade Marks (Robert Magnus)	209
6.9.1 Scope and Underlying Policy	209
6.9.2 Article 12 EIR and Article 5 EIR	211
6.9.3 Article 12 EIR and Article 3 (4) lit a) EIR	212
6.9.4 Recommendation	212

Table of Contents

6.10 Article 13 EIR: Avoidance, Avoidability and Voidness (<i>Thomas Pfeiffer</i>)	213
6.10.1 General Questions	213
6.10.2 Need for an Abolishment or Limitation of Article 13 EIR?	213
6.10.2.1 Legitimate Expectations of the Parties	213
6.10.2.2 Complexity of the Provision?	214
6.10.2.3 Fraudulent Manipulations?	214
6.10.2.4 The Proposal to Protect against Changes of the COMI Only	215
6.10.2.5 Result	215
6.10.3 Need for an Extension?	215
6.11 Article 14 EIR: Protection of Third-party Purchasers (<i>Andreas Piekenbrock</i>)	216
6.11.1 Underlying Policy	216
6.11.2 Main Issue	216
6.11.3 Implementation in the Member States	216
6.11.4 Discussion	216
6.11.5 Recommendation	217
6.12 Article 15 EIR: Effect of the Insolvency Proceedings on Individual Proceedings in Other Member States (<i>Thomas Pfeiffer</i>)	217
6.12.1 Information Problem	217
6.12.2 Qualification Issues	218
6.12.3 Arbitration	218
7 Coordination of Proceedings	219
7.1 General	219
7.2 Tools	220
7.2.1 Jurisdiction	220
7.2.1.1 Uniform Law as Tool of Coordination: The COMI	220
7.2.1.2 Territorial Proceedings	221
7.2.1.3 Coordination of Putative Main Proceedings	223
7.2.1.4 Jurisdiction for Insolvency-Related Litigation	229
7.2.2 Recognition	229
7.2.3 Applicable Law	232
7.3 Coordination of Main and Secondary Proceedings	234
7.3.1 Politics as the Raison d'Être for Secondary Proceedings	234
7.3.1.1 Universality and Territorial Sovereignty	234
7.3.1.2 Recital 19: The Truth Well Told	234
7.3.1.3 "The Protection of Local Interest": An Opaque Approach	236
7.3.1.4 Secondary Proceedings in Practice	237
7.3.1.5 Two Options: Reduction of Secondary Proceedings and Improvement of Coordination	240
7.3.2 Opening of Secondary Proceedings	241
7.3.2.1 The Right to Apply for Secondary Proceedings	241
7.3.2.2 The Opening Procedure	241
7.3.2.3 Requirements for the Opening of Secondary Proceedings	242
7.3.2.4 Undertakings in Order to Avoid Secondary Proceedings	243
7.3.3 Coordination of Parallel Proceedings	244
7.3.3.1 General	244
7.3.3.2 Duties under Art 31 EIR	246
7.3.3.3 Cooperation between Courts or Liquidators and Courts	246
7.3.3.4 Poor Excuses for Non-Cooperation	248
7.3.3.5 Art 33 EIR: The Mechanism for Resolving Disputes between the Main and the Secondary Liquidator	248
7.3.3.6 Secondary Proceedings: Not Necessarily Winding-Up Proceedings	251
8 Information for Creditors and Lodging of Claims	253
8.1 Introduction	253
8.2 Regulatory Framework and Underlying Policies	253
8.3 Main Issues	255
8.3.1 Challenges of Ensuring a Pan-European Notification of Creditors	255
8.3.1.1 Application of Articles 40 and 42 (1) EIR in Practice	255

Table of Contents

8.3.1.2 Public Register as Information Tool	257
8.3.2 Procedural Intricacies of the (Transnational) Lodging of Claims	259
8.3.3 Lodging of Claims: Substantive Issues	262
8.4 Conclusion and Policy Options	263
9 The Recognition of Decisions on Insolvency Proceedings under the European Insolvency Regulation	264
9.1 Automatic Recognition of Decisions Opening Insolvency Proceedings (Article 16)	265
9.1.1 Problems Concerning the Recognition of Decisions Opening Insolvency Proceed- ings	265
9.1.1.1 Austria	265
9.1.1.2 Belgium	266
9.1.1.3 France	266
9.1.1.4 Germany	266
9.1.1.5 Poland	266
9.1.1.6 Slovakia	267
9.1.1.7 Spain	267
9.1.2 Practical Problems Concerning the Recognition of Decisions Opening Insolvency Proceedings	267
9.1.2.1 Belgium	267
9.1.2.2 United Kingdom (England and Wales)	268
9.1.2.3 Estonia	268
9.1.2.4 Germany	268
9.1.2.5 Latvia	268
9.1.2.6 Poland	269
9.2 The Public Policy Exception (Article 26 EIR)	269
9.2.1 General	269
9.2.2 The Application of the Public Policy Exception in the EU-Member States	270
9.2.2.1 Austria	270
9.2.2.2 Belgium	271
9.2.2.3 France	271
9.2.2.4 Germany	271
9.2.2.5 Lithuania	272
9.2.2.6 Poland	272
Index	273
Annex – Systematic Summary of National Reports	285
Annex – Systematic Compilation of Case-Law	725