European Insolvency Law

The Heidelberg-Luxembourg-Vienna Report

on the Application of
Regulation No. 1346/2000/EC on Insolvency Proceedings
(External Evaluation JUST/2011/JCIV/PR/0049/A4)

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List of Abbreviations

AB	Aktiebolag (Swedish limited company on shares)
AG	Advocat General at the European Court of Justice/Amtsgericht (German Local Court)
ALJB	Association Luxembourgeoise des Juristes de Droit Bancaire
All. E.R	All England Law Reports
Am.Bankr.L.J.	American Bankruptcy Law Journal
AnfG	Anfechtungsgesetz (Act on Contestation of the debtor's transactions)
Art./Art	Article
BB	Betriebs-Berater (German legal journal)
BCC/B.C.C.	British Company Law Cases (British legal journal)
BDT	Bírósági Döntések Tára (Hungarian case law report of the Court Appeals of Hungary)
BeckRS	Beck-Rechtsprechung (German legal journal, collection of court decisions)
BG	Schweizerisches Bundesgericht (Federal Supreme Court of Switzerland)
BGB	Bürgerliches Gesetzbuch (German Civil Code)
BGBl.	Bundesgesetzblatt (Federal Law Gazette)
BGE	Entscheidungen des Schweizerischen Bundesgerichts (Collection of the decisions of the Federal Supreme Court of Switzerland)
BGH	Bundesgerichtshof (Federal Supreme Court, Austria/ Germany)
BGHZ	Entscheidungen des Bundesgerichtshofes in Zivilsachen (Collection of the decisions of the German Supreme Court)
BH	Bírósági Határozatok (Hungarian case law report of the Supreme Court of Hungary)
BOE	Boletín Oficial del Estado
BPIR	Bankruptcy and Personal Insolvency Reports (British legal journal)
BRL	Polish Bankruptcy and Reorganisation Law
B.V./BV	Besloten vennootschap met beperkte aansprakelijkheid (Dutch private limited liability company)
CA	Companies Act/Cour d'appel
CAO	Collectieve arbeidsovereenkomsten (Bargaining agreement under Belgian law)
CDIP	Code du droit international privé (Belgian Code on Private International Law)
cf.	confer
Ch.	Law Reports, Chancery Division
Ch. Com.	Chambre commerciale de la Cour de Cassation
C.L.J.	Cambridge Law Journal
COMI	Centre of the debtor's main interests (Art. 3 (1) EIR)
Comp. Law	Company Lawyer (British legal journal)
CVA	Company Voluntary Arrangement
DAOR	Le droit des affaires – het ondernemingsrecht (Belgian legal journal)
DEE	Δίκαιο *Επιχειρήσεων* & *Εταιριών* (Dikaio Epixeiriseon kai Etairion, Greek legal journal)
DIP	Debtor-in-possession proceedings (Eigenverwaltung)
DStR	Deutsches Steuerrecht (German legal journal)
DZWIR	Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht (German legal journal)
EBH	Elvi Bírói Határozat (Hungarian law report of the Supreme Court of Hungary)
EC	European Communities
ECFR	European Company and Financial Law Review (German Legal Journal)
ECJ	European Court of Justice
ECL	European Company Law (Dutch legal journal)
ECR	European Court Reports
ed./ed(s).	edition/editor(s)
EEC	European Economic Community
e. g.	exempli gratia (for example)

EIR	European Insolvency Regulation (Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings)
ESUG	Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen (Law for the Further Facilitation of the Restructuring of Enterprises)
et al.	et alii (and others)
et seq./et seqq.	et sequens/et sequentia (and the following)
etc.	et cetera
EU	European Union
EuGH	Europäischer Gerichtshof (European Court of Justice, *see* ECJ)
EuGRZ	Europäische Grundrechte-Zeitschrift (German Legal Journal)
EuGV(V)O	Europäische Gerichtsstands- (und Vollstreckungsverordnung), Brüssel-I-Verordnung, *see* JR
EuInsVO	Europäische Insolvenzverordnung (European Insolvency Regulation, *see* EIR)
EuIPR	Europäisches internationales Privatrecht
EuLF	European Legal Forum (German legal journal)
EuZPR	Europäisches Zivilprozessrecht
EuZW	Europäische Zeitschrift für Wirtschaftsrecht (German legal journal)
e. V.	Eingetragener Verein
EvBl.	Evidenzblatt der Rechtsmittelentscheidungen (Austrian legal journal, collection of court decisions)
EWCA Civ	Court of Appeal of England and Wales (Civil Division)
EWHC (Ch)	High Court of Justice (High Court of England and Wales), Chancery Division
EWHC (Comm.)	High Court of Justice (High Court of England and Wales), Commercial Court
EWiR	Entscheidungen zum Wirtschaftsrecht (German legal journal)
EWS	Europäisches Wirtschafts- und Steuerrecht (German legal journal)
Fasc.	Fascicule
FD-InsR	Fachdienst Insolvenzrecht (German legal journal)
FN/Fn	footnote
FS	Festschrift (German for Liber Amicorum)
GmbH	Gesellschaft mit beschränkter Haftung
GPR	Gemeinschaftsprivatrecht (German legal journal)
GWR	Gesellschafts- und Wirtschaftsrecht (German legal journal)
HelHO	Helsingin hovioikeuden osalta (Helsinki Court of Appeal, collection of court decisions)
HGB	Handelsgesetzbuch (German Commercial Code)
i. a.	inter alia (among others)
IA	Insolvency Act (UK)
i. e.	id est (that is)
IFLR	International Financial Law Review
IILR	International Insolvency Law Review
IIR	International Insolvency Review
IL&P	Insolvency Law & Practice
Inc.	Incorporated
InCA	International Caselaw Alert (Legal Journal)
InsO	Insolvenzordnung (German Insolvency Code)
INSOL	International Association of Restructuring, Insolvency & Bankruptcy Professionals
Insolv.Int.	Insolvency Intelligence (British legal journal)
InsRNews	See FDInsR (German legal database)
IO	Insolvenzordnung (Austrian Insolvency Code)
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts (German legal journal)
IPRG	Bundesgesetz über das internationale Privatrecht (Swiss Code of Private International Law)
IPRspr.	Die deutsche Rechtsprechung auf dem Gebiete des internationalen Privatrechts (German legal journal, collection of court decisions)
IVA	Individual voluntary arrangement
J.B.L.	Journal of Business Law
J Consum Policy	Journal of Consumer Policy (German legal journal)
J.I.B.L.R.	Journal of International Banking Law and Regulation (British legal journal)
JLMB	Jurisprudence de Liège, Mons et Bruxelles (Belgian legal journal)
JO	Journal officiel de l'Union européenne (see OJ)
JOR	Jurisprudentie Onderneming & Recht (Dutch legal data base)

JR	Judgement Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters)
JT (Lux)	Journal des tribunaux (Luxembourg) (Luxembourgian legal journal)
juris	Juristisches Informationssystem für die Bundesrepublik Deutschland (German legal database)
jurisPR-InsR	Juris Praxisreport Insolvenzrecht (German legal database)
KFM	Kronofogdemyndighet (Swedish Enforcement Authority)
kft	Korlátolt Felelősségû Társaság (Hungarian limited liability corporation)
KG	Kommanditgesellschaft (German limited partnership)
KTS	Zeitschrift für Insolvenzrecht – Konkurs, Treuhand, Sanierung (German legal journal)
L	Legislation (see Official Journal)
LArbG	Landesarbeitsgericht (Regional Labour Court)
LCE	Loi relative à la continuation des entreprises (Belgium)
LF	Loi sur les faillites (Belgian Bankruptcy Law)
LG	Landgericht (German Regional Court)/Landesgericht (Austrian District Court)
LJN	Landelijk Jurisprudentie Nummer (Dutch legal journal, collection of court decisions)
lit.	litera
Lloyd's MCLQ	Lloyd's Maritime and Commercial Law Quarterly (British legal journal)
LMK	Lindenmaier-Möhring – Kommentierte BGH-Rechtsprechung (German legal journal)
Ltd.	Limited liability company
NCC	New Civil Code (Romania)
NIPR	Nederlands internationaal privaatrecht (Dutch legal journal)
NIQB	Northern Ireland Queen's Bench Division
NJA	Nytt juridiskt arkiv (Swedish legal journal)
NJW	Neue Juristische Wochenschrift (German legal journal)
NJW-RR	Neue Juristische Wochenschrift, Rechtsprechungsreport (German legal journal)
No/No./no/no./nr./ núm/n°	number
N.V./NV	Naamloze vennootschap (Dutch public limited liability company)
NZG	Neue Zeitschrift für Gesellschaftsrecht (German legal journal)
NZI	Neue Zeitschrift für Insolvenzrecht (German legal journal)
OGH	Der Oberste Gerichtshof (Austrian Supreme Court)
OHG	Offene Handelsgesellschaft (German general partnership)
OJ	Official Journal of the European Union (*see* JO)
OLG	Oberlandesgericht (Higher Regional Court, Austria/Germany)
Ors	Others
OY	Osakeyhtiö (Finnish limited company)
p(p).	page(s)
para(s)	paragraph(s)
PIL	Private international Law
PLC	Public limited company
Q	Question
r(r)	rule(s)
R.D.C.	Revue de Droit commercial Belge (Belgian legal journal)
RDIPP	Rivista di diritto internazionale privato e processuale (Italian legal journal)
RdW	Österreichisches Recht der Wirtschaft (Austrian legal journal)
Rev.	Revue
Rev.crit.DIP	Revue critique de droit international privé (French legal journal)
Riv.dir.int.priv.-proc.	Rivista di diritto internazionale privato e processuale (Italian legal journal)
RIW	Recht der internationalen Wirtschaft (German legal journal)
RSDIE	Revue suisse de droit international et européen
SA/S.A.	Société anonyme/Sociedad Anónima
SARL/Sarl	Société à responsabilité limitée
SAS	Société par actions simplifiée
SchKG	Bundesgesetz über Schuldenbetreibung und Konkurs (Swiss Insolvency Code)
s./sec./ss.	section(s)
S.I.	Statutory Instrument
SIA	Sabiedrība ar ierobežotu atbildību (Latvian limited liability company)
SpA	Società Per Azioni (Italian shared company)

s.p.r.l.	Société Privée à Responsabilité Limitée
Srl	Società a Responsabilità Limitata (Italian limited company)
SZ	Sammlung Zivilsachen, Sammlung bürgerlichrechtliche Entscheidungen in Österreich (Austrian Supreme Court Reporter)
TBH	Revue de droit commercial Belge (Belgian legal journal)
TFEU	Treaty on the Functioning of the European Union
TranspR	Transportrecht (German legal journal)
UAB	Uždaroji akcinė bendrovė (Lithuanian closed stock company)
UK	United Kingdom
UKSC	United Kingdom Supreme Court
UNCITRAL	United Nations Commission on International Trade Law
URG	Unternehmensreorganisationsgesetz (Austrian Business Reorganisation Act)
v	versus
VAT	Value-Added Tax
VersR	Versicherungsrecht – Zeitschrift für Versicherungsrecht, Haftungs- und Schadensrecht (German legal journal)
VG	Verwaltungsgericht (Administrative Court)
VIA	Verbraucherinsolvenz aktuell (German legal journal)
viz.	videlicet (namely)
VW	Versicherungswirtschaft (German legal journal)
WM	Wertpapiermitteilungen (German legal journal)
ZEuP	Zeitschrift für Europäisches Privatrecht (German legal journal)
ZFPPIPP	Zakon o finančnem poslovanju, postopkih zaradi insolventnosti in prisilnem prenehanju (Slovenian Law on Financial Operations, Procedures concerning Insolvency and Compulsory Liquidation)
ZGR	Zeitschrift für Unternehmens- und Gesellschaftsrecht (German legal journal)
ZHR	Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (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)
ZPO	Zivilprozessordnung (German Code of Civil Procedure)
Zrt.	Zártkörûen Mûködõ Részvénytársaság (Hungarian private public company)
ZVG	Zwangsversteigerungsgesetz (German Compulsory Auction Act)
ZVI	Zeitschrift für Verbraucher- und Privatinsolvenzrecht (German legal journal)
ZZP	Zeitschrift für Zivilprozess (German legal journal)

6. Applicable Law

6.1 Article 4 EIR: Applicability of the Law of the State of the Opening of the Proceedings (*Thomas Pfeiffer*)

6.1.1 The General Principle

625 Article 4 EIR, by its legal nature, is a choice of law provision.[1] It is the source of the general rule as to the applicable law in insolvency proceedings, which is also restated in Recital 23: Unless there is a rule to the contrary, the law of the Member State of the opening of the proceedings is applicable as *lex concursus*. Within its scope of application, it takes precedence over other rules of private international law and is applicable with regard to primary as well as to secondary proceedings. Furthermore, Recital 23 affirms that this *lex concursus* "determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned." In particular, it is meant to govern "all the conditions for the opening, conduct and closure of the insolvency proceedings."

626 These principles are in line with general principles of private international law: It is characteristic of insolvency law that it has procedural as well as substantive aspects. With regard to procedure, it is a world-wide principle that courts apply their own procedural law so that Article 4, with regard to its procedural effects, can be seen as a derivative of this common procedural conflicts rule. With regard to its substantive rules, the effects of insolvency proceedings can be compared to those of mandatory rules in the sense of Article 9 Rome I-Regulation: For the purposes of an orderly collective resolution of the insolvency situation (reorganization, liquidation etc.), insolvency law intrudes into the legal relationship between debtor and creditors in order to bring about certain mandatory adjustments of their substantive rights and duties. This results in the application of the law of the forum (*lex fori*) as well: The applicability of the law of the forum (of the opening of the insolvency proceedings) is the standard conflicts rule used in order to implement a certain important regulatory policy of the forum state and to bring about the intended mandatory legal effects of forum law in an international setting. In other words: The reference to the law of the State of opening of the proceedings (in standard jurisdictional language: the law of the *forum*) is, again as a general rule and of course with exceptions[2], the logical legal answer to the substantive questions raised in international insolvency proceedings. Furthermore, this reference to the law of the forum closely links Article 4 EIR to Article 3 EIR because, as always in case of a *lex fori* rule, the rules on jurisdiction indirectly determine the applicable law. As a combined effect of Article 3 and 4 EIR, it can be stated that the law of the COMI applies with regard to both substance and procedure of the insolvency. Again, this is completely appropriate. With regard to the particular insolvency related interests of the parties, it may be said that the reference to the COMI is meant to bring about sufficient predictability of the applicable law so

[1] Cf. *ECJ*, case C-527/10, 5 July 2012, *ERSTE Bank Hungary./.Magyar Állam*, para. 36.
[2] In this respect, e. g. *ECJ,* case C-1/04, 17 January 2006, *Straubitz-Schreiber*. para. 8.

that both debtor and creditor can calculate their respective legal risks.[3] However, the circumstance that jurisdiction "entails" the determination of the applicable law under Article 4 EIR has a certain repercussion on the definition of the COMI under Article 3 EIR. Because the definition of the COMI indirectly determines the applicable law, it is essential that the COMI is sufficiently foreseeable.[4] By contrast, the rule in Article 4(1) EIR is perfectly adequate and predictable.

Therefore, it is by no means surprising that, in the case law of the *ECJ*, the applicability of the law of the forum is accepted as an undoubted and appropriate conflicts rule.[5] There is also no indication in the national reports that any changes as to this general rule would be necessary or desirable. Some national reports explicitly state that there is general satisfaction with the concept of Article 4 or that its general application does not raise any or any serious problems[6]; some go even further by expressing the same in relation to the provisions on applicable law in general (Articles 4–15 EIR).[7] Others reflect similar positions without saying so directly.[8] Consequentially, it seems fair to say that the national reports do not express any need for any amendments with regard to the general rule of Article 4(1) EIR. **627**

To be sure, it is not doubtful that exceptions to the general rule providing for the applicability of the forum law as *lex concursus* are necessary. The "seat" or "center of gravity" of a certain legal relationship or certain aspects thereof may be located or concentrated in another legal system. In some situations, it is also a question of legal certainty and predictability to apply a law other than the *lex concursus* to a certain legal relationship or question.[9] However, these exceptions must not be interpreted as an indication that the general rule needs to be changed or amended. On the contrary, their limited scope underlines that the general rule in Article 4(1) EIR is perfectly appropriate. **628**

6.1.2 Qualification

6.1.2.1 General Aspects

As far as there is case law and legal writing with regard to Article 4 EIR, but also with regard to Articles 5–15 EIR, a clear focus is put on questions of delineation of the scope of Article 4 EIR in relation to other areas of law or, expressed in traditional private international law terminology, problems of qualification or characterization. **629**

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[3] *ECJ*, case C-396/09, *Interedil*. Opinion AG Kokott, 10 March 2011, para. 46.

[4] *ECJ*, case C-396/09, *Interedil*. Opinion AG Kokott, 10 March 2011, para. 57.

[5] That is not explicitly said but can be taken from *ECJ*, case C-294/02, 17 March 2005, *Commission./.AMI Semiconductor Belgium*; para. 69; see also *ECJ*, case C-444/07, 21 January 2010, *MG Probud Gdynia*, para. 25 and *ECJ*, case C-341/04, 2 May 2006, *Eurofood*, para. 33: jurisdiction "entails" the determination of the applicable law.

[6] Belgium Report, Q 13; French Report, Q. 13.

[7] German Report, Q 13; Greek Report, Q. 13; Hungarian Report Q 13; Luxemburg Report, Q. 13; Maltese Report, Q 13; Romanian Report Q 13.

[8] Bulgarian Report Q. 13; Cyprus Report, Q. 13; Slovakian Report, Q 13, and Spanish Report, Q 13 (mentioning only problems relating to Article 5 EIR); probably also the Italian Report, Q 13 (not giving any answer to this question). The problems addressed by the Slovenian Report do not relate to Article 4 EIR either.

[9] *ECJ*, case C-527/09, 5 July 2012, *ERSTE Bank Hungary./.Magyar Állam*, para. 39.

630 Inter alia, the following issues are addressed in the national reports:

631 Whereas substantive provisions can be applied on the basis of Article 4 EIR, proceedings may be commenced only if there is jurisdiction as provided for by Article 3 EIR. In this context, the Dutch Report explains that, under Dutch law, the insolvency of a partnership, by operation of law, automatically entails the insolvency of its partners. It was discussed in the Netherlands whether this rule can be applied towards natural persons (partners) whose COMI is located outside the Netherlands.[10] A similar problem arose in the case underlying the *Rastelli* decision of the *ECJ*[11] with regard to a French rule that other persons may be "joined to opened insolvency proceedings" on the basis that their "property is intermixed with that of the debtor or where their legal entity is a sham". The *Rastelli* decision illustrates that jurisdiction over a certain debtor always depends on the COMI-requirement in Article 3(1) EIR and that any extension of an open proceeding or the opening of new proceedings cannot be based on Article 4 EIR.[12]

632 The French Report[13] addresses issues such as the delineation of the EIR from conflict rules concerning company law with regard to the question of whether the liquidation of a company entails its dissolution or the delineation of the EIR from contract law with regard to the question of whether a contract is "current" in the sense of Article 4(2)(e) EIR. Other typical problems of delineation relate to the treatment of property rights, the scope of labor law or the law of the state of registration.

633 Whereas these problems, insofar as they are of relevancy to this general report, will be discussed in their specific context, a broader remark needs to be added with regard to the issue of qualification: Some of these questions may indeed be difficult to solve; however, their general nature is not different from or more serious than other questions that typically arise when it comes to the interpretation of statutory provisions.[14] Answering such questions is part of the responsibilities of the national court systems or, if necessary, of the *ECJ*, as demonstrated in the *Rastelli* case for example.[15] Consequently and quite correctly, the Dutch Report explicitly states that these questions should not be regarded as "problems".[16] The need for further clarifications was also clearly implied by Article 4(2) EIR, which gives examples for issues covered by the *lex concursus*, because it is rather obvious that the list of Article 4(2) EIR is not exhaustive with regard to matters governed by the law of the state of the opening insolvency proceedings.[17]

634 Not surprisingly, there is no general call for resolving all of these issues, e. g. by enlarging the list of definitions or clarifications in Article 4(2) EIR, in the national reports.

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[10] Dutch Report, Q 13, referring to *Hoge Raad*, 22 December 2009, LJN BK 3574, *Van Kester./.FFP*.

[11] *ECJ*, case C-191/10, 15 December 2011, *Rastelli Davide./.Hidoux*.

[12] Cf. Dutch report, Q 13.

[13] French Report, Q 13.

[14] E. g. publications addressing the delineation of insolvency law and core areas of private law (contracts, torts, property) do not give rise to the conclusion that these issues are more than in any other area of law, see for example *Lüer*, in: Uhlenbruck, Article 4 EuInsVO, para. 15–17.

[15] See footnote 803 *supra*.

[16] Dutch Report, Q. 13.

[17] *ECJ*, case C-444/07, 21 January 2010, *MG Probud Gdynia*, para. 25.

6.1.2.2 Scope in Relation to Company Law

635 Several national reports mention questions arising with regard to the delineation of the EIR from questions of company law with regard to areas such as back payment of investment capital or liability for insufficient investment capital, delicts against creditors or directors' liability, e. g. in cases of delayed filing for insolvency.[18] In this respect, the national reports reveal a certain variety of rules, some characterized as company law rules and others characterized as rules of insolvency law. To a certain extent, it seems, there is still an ongoing discussion in the respective national laws.[19] From a European perspective, the relevance of this issue is, to a large extent, owed to the present state of private international law in these areas. Two main aspects are relevant:

636 Firstly, the choice of law rules for insolvency issues are harmonized in Europe by the EIR; there is no comparable instrument with regard to international company law (some harmonization is brought about by the *ECJ* case law relating to the free movement of companies, though).[20] Therefore, the characterization determines whether European (harmonized) or national conflicts laws apply. Because the European conflicts rules, as provided for by Articles 4–15 EIR, take precedence over any conflicts rule embodied in national company law, it is itself a question of European law, i. e. the EIR, whether or not its rules apply.

637 Secondly and more importantly, the qualification indirectly determines whether the parties can (indirectly) choose the applicable law. With regard to company law, the *ECJ* case law requires that a company, which moves the place of its main administration from one Member State to another, must be recognized by the law of the target state as long as the Member State of incorporation considers this company to be an existing legal entity. The parties can therefore indirectly choose the company law applicable to their company by choosing the Member State of incorporation. Whereas this has always been possible where national conflicts laws provided for a reference to the law of incorporation, this development is quite remarkable with regard to legal systems which traditionally followed the so-called "seat theory" (referring to the laws of the seat of the company's central administration, headquarters etc.).

638 The situation is different with regard to insolvency law. The (main) proceedings have to take place in the *forum* of the COMI, which will then – without any choice for the parties – apply its own law. To be sure, the parties are free to choose their COMI as well; but in order to do so, they have to actually move their activities there. By contrast, in the field of company law, mere registration in a certain jurisdiction may be sufficient to apply this jurisdiction's company law rules.

639 As a consequence, it is fair to say that there is considerably more freedom for choosing the applicable company law than for choosing the applicable substantial insolvency law. Therefore, in this context, the qualification indirectly determines the leeway for choosing the applicable law. Given the significance of the question of qualification, it is by no means surprising that there is a vivid discussion as to the

[18] Austrian Report, Q 14; Dutch Report, Q. 14; German Report, Q. 14; Spanish Report, Q 14; Questionnaire of *Veronika Sajadova*, lawyer with a Swedish bank.

[19] E.G. *Lüer*, in: Uhlenbruck, Article 4 EuInsVO, para. 14.

[20] *ECJ*, case C-212/97, 9 March 1999, *Centros*; *ECJ*, case C-167/01, 30 Sept. 2003, *Inspire Art*; *ECJ*, case C-378/10, 12 July 2012, *Vale*.

appropriate qualification of provisions of national law in this respect. Given the state of these controversies in several Member States, however, it is surprising that no extensive case law of the *ECJ* is available in this respect. As has been stated above, the delineation of the EIR from company law is a question of interpreting the EIR. Developing a European definition or European criteria for distinguishing company from insolvency law is therefore not only highly desirable, but also required by the EIR. If such cases were brought before the *ECJ*, the Court would certainly be able to develop criteria for this purpose – although these criteria would have to be applied with regard to the specific content and purpose of national insolvency and company law as interpreted by national courts. It may be that Member State courts have been too reluctant so far in their references to the *ECJ*. Whereas a reliable *ECJ* case law on these questions could develop on a step-by-step basis, any legislation would require intensive preparatory comparative legal analysis, which would clearly go beyond the scope of this report and its time-limits. The latter is all the more true insofar as such legislation would not necessarily have to be included in the EIR; for example, harmonization of substantive law could be an alternative.

640 On the basis of these considerations, the General Reporter's conclusion is that the time is not yet ripe for the inclusion of specific provisions on the delineation of insolvency law in relation to company law in the EIR. The development of the controversies mentioned in the national reports and *ECJ* case law will have to be monitored closely so that legislative action could be taken at a later moment if necessary.

6.1.3 Other Questions Relating to General Concepts of Private International Law

641 In this context, two aspects are mentioned in some of the national reports:

642 First, it seems that there is a clear tendency in the Member States to determine the content of foreign laws according to the same rules as in other cases where foreign law needs to be determined.[21]

643 Second, concerning public policy, it should be noted that the EIR does not include an express public policy reservation with regard to the recognition of proceedings or with regard to the application of foreign law under Articles 4–15 EIR. Nonetheless, most national reports – as far as they address this issue – take the position that there is an implied public policy provision in the EIR.[22] The question of whether such a public policy reservation is impliedly included in the EIR will have to be determined eventually by the *ECJ*. Although there is no express public policy reservation in the choice of law provisions of the EIR (Articles 4–15), a good argument can be made that the Regulation impliedly recognizes such a public policy reservation.

644 With regard to the recognition of proceedings and decisions in other Member States, there is an express public policy reservation in Article 26 EIR.

645 This express provision extends to both procedural and substantive aspects of public policy.[23]

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[21] German Report, Q. 17; Latvian report, Q. 17; Spanish report, Q. 17; UK Report, Q. 17.

[22] German Report, Q 17; Greek Report, Q 17 (under exceptional circumstances); Maltese Report, Q. 17; Romanian Report, Q 17 (difficult to decide whether it applies); Slovenian Report, Q. 17.

[23] *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings, para. 206.

Other instruments concerning the substantive choice of law include an express public policy reservation; one can conclude that it is a general principle of EU law to recognize such a reservation with regard to substantive choice of law instruments. 646

A maiore ad minus: With regard to the recognition of judgments from other Member States, the inclusion of a public policy reservation is no longer the general standard in EU instruments; some instruments provide for a public policy clause; others do not. By contrast, as has already been stated in the preceding indent, all instruments on substantive choice of law include such a reservation. Compared to procedural instruments, EU substantive conflicts law is therefore generally more open to a public policy reservation. Since the EIR includes a public policy reservation in its procedural part, it would be all the more appropriate to also apply a public policy reservation in the area of substantive choice of law. 647

It may be necessary to apply the public policy reservation in rare cases. 648

However, given the rather reluctant position of the *ECJ* in this respect[24] it is, to say the least, not certain whether the court will read a public policy reservation into the EIR without, apart from Article 26 EIR, having an express basis for this. However, as of now and in the absence of significant *ECJ* case law[25], any legislative action would probably be premature. It seems preferable to carefully observe the future development of the public policy reservation in EU law in general and the *ECJ* case law on the EIR in particular and only take legislative action if that should turn out to really be necessary.

6.1.4 Specific Issues

It is characteristic of Article 4(2)b EIR that many of its provisions do not stand alone, but rather must be interpreted in conjunction with those provisions of the Regulation, which e. g. provide particular rules for certain issues such as the one relating to rights in rem of third persons (Article 5) or on reservation of title (Article 7). The effect of Article 4(2) EIR is thus limited by these provisions; for example, the *ECJ* has ruled that Article 4(2)(b) does not block an individual action of a seller based on reservation of title against the purchaser.[26] With regard to the organization of these provisions, however, there is no indication in the national reports that the way in which the provisions on the applicable law are organized is overly complicated or raises any particular difficulties. 649

6.1.4.1 Determination of the Debtor (Article 4(2)(a))

No relevant problems have been addressed in the national reports. There is no need for any amendment of this provision. 650

6.1.4.2 Determination of the Assets Belonging to the Estate (Article 4(2)(b))

There is only a small amount of case law relating to this provision, e. g.: 651

[24] *ECJ*, case C-7/98, 28 March 2000, *Krombach./.Bamberski*, ECR 2000 I-1935.

[25] For a survey cf. *Burkhard Hess/Thomas Pfeiffer*, Interpretation of the Public Policy Exception as referred to in EU Instruments of Private International and Procedural Law, 2011, esp. p. 39 http://www.europarl.europa.eu/RegData/etudes/etudes/juri/2011/453189/IPOL-JURI_ET%282011%29453189%28PAR01%29_EN.pdf, 17 September 2012.

[26] E. g. *ECJ*, case C-292/08, 10 September 2009, *German Graphics Graphische Maschinen./.van der Schee*.

652 The Austrian Reporter refers to a case decided by the Austrian *Oberster Gerichtshof* discussing whether seizure limits, meant to protect the debtor against a disproportional seizure of assets, fall into the scope of the *lex concursus*.[27]

653 There is no indication that this question gives rise to any need for a clarification with regard to this provision.[28] An amendment to this provision is not necessary.

6.1.4.3 Powers of the Debtor and the Liquidator (Article 4(2)(c))

654 No relevant problems have been addressed in the national reports. The General reporter shares this view. There is no need for any amendment of this provision.

6.1.4.4 Conditions for Set-off (Article 4(2)(d))

655 This provision will be discussed by *Andreas Piekenbrock* in the context of Article 6 EIR.

6.1.4.5 Effects of Insolvency Proceedings on Current Contracts (Article 4(2)(e))

656 Some national reports mention questions which arose or may arise with regard to the interplay between Article 4(2)(e) EIR on one hand and contract law on the other.

657 The French Report points to a discussion about the problem that one may have to refer to national contract law in order to determine whether a contract is "current".[29] With regard to executory contracts, the Czech Report addresses the problem that there is an ongoing controversy in Czech law as to whether Article 4(2)(e) EIR provides for a retroactive unwinding of these contracts in certain situations, which might bring about a complicated interplay of Article 4, Czech insolvency law and a foreign *lex contractus*.[30]

658 A general appraisal of these problems has to take into account, again, that it is rather typical for choice of law problems to result in an interplay or overlap of different areas of law. Not surprisingly, this is also the case with regard to the Insolvency Regulation on one hand and contract law (including its PIL rules, i. e. the Rome I Regulation) on the other.[31] The discussion about the concept of "current" contracts mentioned in the French Report is a good example for this. Under the general principle that an autonomous interpretation of European instruments is preferable, unless a provision is meant to protect specific concepts of national laws (e. g. with regard to "rights in rem")[32], the criteria under which a contract is deemed to be "current" have to be defined autonomously on a European level. It is then, of course, up to the applicable contract law to state the effects of the relevant contract in order to determine whether it is current in the sense of Article 4(2)(e) EIR. Problems such as the interpretation of the term "current" are an unavoidable consequence of the circumstance that there are interfaces between insolvency law on one hand and other areas of law on the other. They do not indicate any inappropriateness or lack of clarity with regard to the relevant conflicts rule.

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[27] Austrian Report, Q 13, referring to *Oberster Gerichtshof*, 10/25/2011 – 9 Ob 42/11 h, RdW 2012/112.

[28] For an analysis cf. Austrian Report, Q 13, arguing that Article 4(2)(b) IR applies, and the German Report, Q 14.

[29] French Report, Q 13.

[30] Czech Report, Q 13.

[31] *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings, para. 117.

[32] *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings, para. 43.

In summary, the General Reporter does not see any need for an amendment of Article 4(2)(e) EIR. **659**

6.1.4.6 Effects of the Insolvency Proceedings on Individual Proceedings not Pending (Article 4(2)(f))

The rule that the *lex concursus* determines the effect of the insolvency proceedings on individual proceedings is not only necessary in order to safeguard the principle of an orderly reorganization or liquidation and an equal treatment of creditors.[33] It is also in line with Articles 16 and 17 EIR, which provide for the recognition of the insolvency proceedings in other Member States.[34] **660**

Article 4(2)(f) EIR does not raise particular problems since, as stated quite correctly by the *ECJ*, "it appears that in the procedural laws of most of the Member States a creditor is not entitled to pursue his claims before the courts on an individual basis against a person who is the subject of insolvency proceedings but is required to observe the specific rules of the applicable procedure and that, if he fails to observe those rules, his action will be inadmissible in most Member States".[35] **661**

With regard to the proposal to add a clause to the effect that the provision also covers enforcement proceedings[36], it may be said that, according to the national reports, in particular in their comments relating to Article 15 EIR, it is not really doubtful that these are already covered so that no amendment is necessary in this respect. **662**

Concerning the proposal to explicitly include arbitration into this provision[37], it should be noted that such a change would probably cause serious discussions with regard to an application of Article 4(2)(e) EIR to arbitration agreements.[38] Since it is rather doubtful whether the latter provision should indeed apply to arbitration agreements both *de lege lata*[39] and *de lege ferenda*, such a change would probably bring about an unnecessarily complex controversy with regard to arbitration. At this moment, it is probably the best policy not to make any changes of the EIR in this respect. **663**

Therefore, the general conclusion with regard to Article 4(2)(f) EIR is that there is no need for any changes of this provision. **664**

6.1.4.7 Treatment of Claims against Estate and Debtor (Article 4(2)(g))

No relevant problems have been addressed in the national reports. The General Reporter shares this view. There is no need for any amendment of this provision. **665**

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[33] *ECJ,* case C-294/02, *Commission./.AMI Semiconductor Belgium,* Opinion of AG Kokott, 23 September 2004, para. 84.

[34] *ECJ*, case C-294/02, 17 March 2005, *Commission./.AMI Semiconductor Belgium*, para. 69.

[35] *ECJ*, case C-294/02, 17 March 2005, *Commission./.AMI Semiconductor Belgium* para. 69.

[36] Proposals by INSOL-Europe, p. 48 et seq.

[37] Proposals by INSOL-Europe, p. 48 et seq.

[38] Cf. Austrian Report, Q. 25; *Thomas Pfeiffer*, in: Festschrift für Jobst Wellensiek (2011), 821–832, at 824–827.

[39] See *ECJ*, case C-294/02, 17 March 2005, *Kommission ./.AMI Semiconductor Belgium* BVBA, Slg. 2005 I-2175, para. 67, applying the procedural rules of the forum and not the *lex concursus*; see also *Pfeiffer* (footnote 830).

6.1.4.8 Lodging, Verification and Admission of Claims (Article 4(2)(h))

666 There is no evidence of serious problems with this provision: With regard to relevant national law, the Czech Report mentions that Czech law provides for a rather short delay of 30–60 days commencing with the issuance of the insolvency order, after which any claims are time-barred. Whereas this particularity may indicate some need for a minimum harmonization of insolvency laws, it does not indicate that the Conflicts rule in Article 4(2)(h) EIR is inappropriate. Consequentially, the General Reporters do not see any need for an amendment to this provision.

6.1.4.9 Distribution, Ranking and Set-off Article (4(2)(i))

667 Questions of set-off are addressed in the context of Article 6 EIR. No relevant problems have been addressed in the National Reports with regard to other issues. The General Reporter shares the view that there are no serious problems with regard to this provision. Consequently, there is no need for any amendment to Article 4(2)(i) EIR.

6.1.4.10 Conditions for and the Effects of Closure of Insolvency Proceedings (Article 4(2)(j))

668 This provision does not give rise to any noticeable problems. The Austrian Report mentions the statement of one practitioner reporting of problems relating to the recognition of a discharge of the debtor under Austrian law in other Member States. Whereas the Austrian Report underlines the usefulness of the European Insolvency Register in this context, there is no indication for any need of a change with regard to Article 4(2)(j) EIR.

6.1.4.11 Creditors' Rights after the Closure of Insolvency Proceedings (Article 4(2)(k))

669 No relevant problems have been addressed in the national reports. The General Reporter shares this view. There is no need for any amendment of this provision.

6.1.4.12 Costs and Expenses (Article 4(2)(l))

670 No relevant problems have been addressed in the national reports. The General Reporter shares this view. There is no need for any amendment of this provision.

6.1.4.13 Voidness, Voidability or Unenforceability of Legal Acts Detrimental To All Creditors (Article 4(2)(m))

671 Article 4(2)(m) is further qualified by Article 13[40]. These provisions are discussed jointly *infra*.

6.1.4.14 Applicability in Primary and Secondary Proceedings

672 With regard to primary and secondary proceedings, the effect of Article 4 is that different laws apply in different proceedings relating to the same debtor (Article 28). Questions arising from this situation are discussed in the context of secondary proceedings. However, it seems to be worth mentioning that no national reporter has raised any doubts as to the appropriateness of this effect of Article 4.

[40] *ECJ*, case C-339/07, *Seagon./.Deko Marty*, Opinion of AG Colomer, 16 October 2008, para. 13.

Again, that is not surprising, since, in many instances, the assets of a person are located in different jurisdictions so that different substantive laws may apply. As long as the national insolvency laws are not completely harmonized, it is unavoidable that different laws apply if the existence of secondary proceedings is seen as a necessary element in order to ensure a fair treatment and for creditors from different jurisdictions to protect their legitimate expectations.

6.2 Article 5 EIR: Third Parties' *rights in rem* (*Andreas Piekenbrock*)

6.2.1 The Underlying Policy

673 The first exception to the general rule on the conflict of laws laid down in Article 4 EIR addresses the rights of creditors and third parties *in rem* on any assets belonging to the debtor, tangible or intangible, moveable or immoveable. Insofar as these assets are located in a Member State[41] other than the State of the opening of proceedings (Member State A), the *rights in rem* shall not be affected by the opening of (main)[42] insolvency proceedings. To understand the underlying policy of Article 5 (1) EIR, it seems helpful to recall the *Virgós/Schmit*-Report on Article 5 (1) of the failed 1995 European Convention on Insolvency Proceedings (hereinafter referred to as "the Convention") which the European legislator has adopted word-for-word in 2000.[43]

674 According to the Report, "*the fundamental policy pursued is to protect the trade in the State where the assets are situated and legal certainty of the rights over them. Rights in rem have a very important function with regard to credit and the mobilization of wealth. They insulate their holders against the risk of insolvency of the debtor and the interference of third parties. They allow credit to be obtained under conditions that would not be possible without this type of guarantee. Rights in rem can only properly fulfil their function insofar as they are not more affected by the opening of insolvency proceedings in other Contracting States than they would be by the opening of national insolvency proceedings.*"[44]

675 In addition, EIR recital 25 reads as follows:

676 "*There is a particular need for a special reference diverging from the law of the opening State in the case of rights in rem, since these are of considerable importance for the granting of credit. The basis, validity and extent of such a right in rem should therefore normally be determined according to the lex situs and not be affected by the opening of insolvency proceedings. The proprietor of the right in rem should therefore be able to continue to assert his right to segregation or separate settlement of the collateral security. Where assets are subject to rights in rem under the lex situs in one Member State but the main proceedings are being*

[41] Article 5 (1) EIR does not apply to assets situated in Third States (including Denmark). Cf. *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings, para. 94.

[42] Due to Article 3 (2) part 2 EIR, the abovementioned prerequisites of Article 5 (1) EIR cannot be met in any territorial insolvency proceedings.

[43] *Virgós* himself has pointed out that the Report on the European Insolvency Convention is of significant importance for the understanding of the Regulation. Cf. Council of the European Union (ed.), Civil Law, 2004, 93 no. 4, available under http://www.consilium.europa.eu/uedocs/cms_data/librairie/PDF/CL_EN_WEB.pdf (last verification on 20 November 2012).

[44] *Virgós/Schmit*, Report on the Convention on Insolvency Proceedings, para. 97.