

Enforcement of Insolvency-Derived Judgments

The Approach of the European Insolvency Regulation

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European Insolvency Regulation (EIR)

- Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings
- 27 Member States (all Member States of the European Union except Denmark)
- Provisions on (a) International Jurisdiction, (b) Applicable Law, (c) **Recognition and Enforcement of Judgments**, and (d) Cooperation and Communication in Cross-Border Cases
- EIR applicable only when COMI is in a Member State of the EIR

EIR Rules on Recognition and Enforcement

- Chapter II: Recognition of Insolvency Proceedings (Art 16 – 26)
- Judgments opening insolvency proceedings:
 - Art 16: Principle („automatic recognition“)
 - Art 17: Effects of recognition
- **Other judgments:**
 - Art 25: recognition and enforcement depending on type of judgment
- Provisions on powers of the insolvency administrator (Art 18), hotchpotch rule (Art 20), and public policy exception (Art 26)

Recognition of Judgments

Opening Insolvency Proceedings

- **Recognition – the principle:**
automatic recognition in all other Member States
(Art 16)
- **Effects of recognition:**
 - **main proceedings: extension of effects** to all other Member States (Art 17 para 1)
 - **secondary proceedings: effects only in opening state** (Art 17 para 2)

Recognition and Enforcement of *Insolvency-Derived* Judgments (1)

- Judgments of insolvency court on *course and closure* of insolvency proceedings and *compositions* appr. by that court (Art 25 para 1 subpara 1)
- Judgments *deriving directly* from the insolvency proceedings and which are *closely linked* with them, even if handed down by *another court* (“insolvency-related proceedings”) (Art 25 para 1 subpara 2)
- Judgments relating to *preservation measures* (Art 25 para 1 subpara 3)
- *Other judgments* (Art 25 para 2)

Recognition and Enforcement of *Insolvency-Derived* Judgments (2)

- Judgments under para 1, i.e.,
 - J. on course, closure, and compositions
 - **J. handed down in insolvency-related proceedings**
 - J. relating to preservation measures
- ⇒ Recognition: „automatic“, i.e., like opening decisions
- ⇒ Enforcement: according to Brussels I Regulation (Council Regulation [EC] No 44/2001)
- Judgments under para 2, i.e., other judgments:
Recognition and enforcement acc. Brussels I only if applicable

Insolvency-Related Proceedings (1) - General

- „*deriving directly from*“ and „*closely linked to*“ insolvency proceedings (definition: ECJ *Gourdain v. Nadler*, C-133/78)
- Primary purpose: defining the scope of application of Brussels Convention (Art 1 para 2 subpara b: „... *shall not relate to bankruptcy* ...)
- Criteria (as defined by ECJ in *Gourdain v. Nadler*):
 - exclusive jurisdiction of the insolvency court (no longer relevant, cf. Art 25 para 1 subpara 2)
 - **administrator's standing** to sue on the claim
 - allocation of **proceeds to creditors as a whole**

Insolvency-Related Proceedings (2) – positive examples

- Avoidance actions (ECJ *Seagon v. Deko Marty* C-339/07)
- Insolvency law-related lawsuits on personal liability of D&O (French *action en comblement du passif*)
- Lawsuits concerning the priority of a claim
- Disputes btw. administrator and debtor on inclusion of an asset in the estate
- Approval of an insolvency plan; discharge of residual debt
- Actions on administrator's liability for damages, if exclusively based on the carrying out of the insolvency proceedings
- Action by creditor aiming at the nullification of administrator's decision to recognize another creditor's claim
- Claims by administrator based on specific insolvency law privilege (ECJ *SCT Industri v. Alpenblume* C-111/08)

Insolvency-Related Proceedings (3) – negative examples (not related)

- Actions by and against administrator which would have been possible also without insolvency proceeding
- Criminal proceedings in connection/w insolvency
- Action to recover property in possession of debtor
- Action to determine legal validity or amount of claim pursuant to general laws
- Claims by creditors with a right for segregation of assets (ECJ *German Graphics v. van der Schnee* C-292/08)
- Claims by creditors with a right for separate satisfaction (secured creditors)
- Avoidance action filed not by administrator but by legal successor/assignee (ECJ *F-Tex* C-213/10)

Art 16 EIR (Principle)

1. Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings.

This rule shall also apply where, on account of his capacity, insolvency proceedings cannot be brought against the debtor in other Member States.

2. Recognition of the proceedings referred to in Article 3(1) shall not preclude the opening of the proceedings referred to in Article 3(2) by a court in another Member State. The latter proceedings shall be secondary insolvency proceedings within the meaning of Chapter III.

Art 17 EIR (Effects of recognition)

- 1. The judgment opening the proceedings referred to in Article 3(1) shall, with no further formalities, produce the same effects in any other Member State as under this law of the State of the opening of proceedings, unless this Regulation provides otherwise and as long as no proceedings referred to in Article 3(2) are opened in that other Member State.**
- 2. The effects of the proceedings referred to in Article 3(2) may not be challenged in other Member States. Any restriction of the creditors' rights, in particular a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.**

Art 25 EIR (Recognition and enforceability of other judgments)

1. Judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with Article 16 and which concern the course and closure of insolvency proceedings, and compositions approved by that court shall also be recognised with no further formalities. Such judgments shall be enforced in accordance with Articles 31 to 51, with the exception of Article 34(2), of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the Conventions of Accession to this Convention.

The first subparagraph shall also apply to judgments deriving directly from the insolvency proceedings and which are closely linked with them, even if they were handed down by another court.

Art 25 EIR (Recognition and enforceability of other judgments – cont.)

The first subparagraph shall also apply to judgments relating to preservation measures taken after the request for the opening of insolvency proceedings.

2. The recognition and enforcement of judgments other than those referred to in paragraph 1 shall be governed by the Convention referred to in paragraph 1, provided that that Convention is applicable.

3. The Member States shall not be obliged to recognise or enforce a judgment referred to in paragraph 1 which might result in a limitation of personal freedom or postal secrecy.

Thank you for your attention!

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