Applicable Law

- Working Paper -

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(23) This Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law. Unless otherwise stated, the law of the Member State of the opening of the proceedings should be applicable (lex concursus). This rule on conflict of laws should be valid both for the main proceedings and for local proceedings; the lex concursus determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings.

(24) Automatic recognition of insolvency proceedings to which the law of the opening State normally applies may interfere with the rules under which transactions are carried out in other Member States. To protect legitimate expectations and the certainty of transactions in Member States other than that in which proceedings are opened, provisions should be made for a number of exceptions to the general rule.

(25) 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 carried out in another Member State, the liquidator in the main proceedings should be able to request the opening of secondary proceedings in the jurisdiction where the rights in rem arise if the debtor has an establishment there. If a secondary proceeding is not opened, the surplus on sale of the asset covered by rights in rem must be paid to the liquidator in the main proceedings.

(26) If a set-off is not permitted under the law of the opening State, a creditor should nevertheless be entitled to the set-off if it is possible under the law applicable to the claim of the insolvent debtor. In this way, set-off will acquire a kind of guarantee function based on legal provisions on which the creditor concerned can rely at the time when the claim arises.
(27) There is also a need for special protection in the case of payment systems and financial markets. This applies for example to the position-closing agreements and netting agreements to be found in such systems as well as to the sale of securities and to the guarantees provided for such transactions as governed in particular by Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement systems. For such transactions, the only law which is material should thus be that applicable to the system or market concerned. This provision is intended to prevent the possibility of mechanisms for the payment and settlement of transactions provided for in the payment and set-off systems or on the regulated financial markets of the Member States being altered in the case of insolvency of a business partner. Directive 98/26/EC contains special provisions which should take precedence over the general rules in this Regulation.

(28) In order to protect employees and jobs, the effects of insolvency proceedings on the continuation or termination of employment and on the rights and obligations of all parties to such employment must be determined by the law applicable to the agreement in accordance with the general rules on conflict of law. Any other insolvency-law questions, such as whether the employees’ claims are protected by preferential rights and what status such preferential rights may have, should be determined by the law of the opening State.
Because of the non-harmonized Member States’ domestic insolvency laws, it is essential that there should be clear and uniform rules to determine which state’s law is to be applicable to issues which will typically be encountered during the course of insolvency proceedings. This enables affected parties to calculate in advance the legal risks inherent in their relationship with a debtor in the event of insolvency.

The uniform rules are applicable to all proceedings governed by the EIR. The uniform rules indicate which state’s law shall in fact govern.

The matters which are to be governed by the law of the state of the opening (the *lex concursus*) are mentioned in a non-exhaustive list in Article 4(2), while the particular exceptions to the regime of the *lex concursus* are contained in Articles 5 to 15.¹

The primary rule in favour of the application of the *lex concursus* is subject to displacement under specified circumstances.²

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Article 4 (LAW APPLICABLE)

(1) Save as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened, hereafter referred to as the "State of the opening of proceedings".

(2) The law of the State of the opening of proceedings shall determine the conditions for the opening of those proceedings, their conduct and their closure. It shall determine in particular:

(a) against which debtors insolvency proceedings may be brought on account of their capacity;
(b) the assets which form part of the estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings;
(c) the respective powers of the debtor and the liquidator;
(d) the conditions under which set-offs may be invoked;
(e) the effects of insolvency proceedings on current contracts to which the debtor is party;
(f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of lawsuits pending;
(g) the claims which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of insolvency proceedings;
(h) the rules governing the lodging, verification and admission of claims;
(i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right in rem or through a set-off;
(j) the conditions for and the effects of closure of insolvency proceedings, in particular by composition;
(k) creditors' rights after the closure of insolvency proceedings;
(l) who is to bear the costs and expenses incurred in the insolvency proceedings;
(m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

The EIR set out, for the matters covered by it, uniform rules on conflict of laws, which replace national rules of private international law. Therefore Article 4 lays down the basic rule on conflict of laws of this Regulation, determining the law applicable to the insolvency proceedings. Unless otherwise stated by EIR, the law of the Member State of the opening of the proceedings (lex concursus) is applicable. This rule of conflict of laws is valid both for the main proceedings
and for local proceedings, being secondary or independent territorial proceedings.

The applicable law of the State of the opening of the proceedings determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. *Lex concursus* governs all the conditions for the opening, conduct and closure of the insolvency proceedings, all the matters necessary for the insolvency proceedings to fulfil their aims.\(^3\)

Due to Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings in Article 4 (2), point (m) should be replaced by the following:

“\((m)\) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors.\(^4\)”

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\(^3\) Bob Wessels in “European Union Regulation on Insolvency Proceedings: An Introductory Analysis (Second Edition)”, Copyright © 2003, 2007 by the American Bankruptcy Institute, p. 31-32, 2.3.

Judgment
Court: First instance court - Amtsgericht Hamburg
Date: 14 May, 2003
Jurisdiction: Germany
Original language: German
Official reference: AG Hamburg v. 14.5.2003 – 67g IN 358/02

Parties: Vierlaender Bau Union Limited (debtor)

Public source: AG Hamburg v. 14.5.2003 – 67g IN 358/02, ZIP 2003, 1008

Key facts
The debtor, Vierlaender Bau Union Ltd., was registered at Companies House in England and had a capital of £100. It produced double floors in Hamburg and traded exclusively on the German market, but did not register a branch in Germany. It shared its business premises with B-GmbH which was supposedly run by the wife of the director, but in fact the director ran both companies with the B-GmbH being the contracting partner for all incoming orders and the debtor purchasing materials and employing most employees.

Key issue
Was the debtor an eligible debtor under German insolvency law?

Summary of the decision
German law, pursuant to the lex fori concursus principle (Article 4 EIR), determined whether the undertaking was an eligible debtor. Since German jurisprudence now applied the incorporation theory with respect to companies established in other EU member states, the English limited company as such had to be regarded as an eligible debtor.

Ultimately, the court refused the request to open insolvency proceedings due to insufficiency of assets. It further noted that the limited liability aspect of the company would not be recognised in Germany because of abuse of freedom of establishment (then Article 43, 48 EG [now: Article 49, 54 TFEU]), since the business concept of B-GmbH and the debtor was to separate claims and liabilities and to allocate the liabilities to the debtor as a company with (purported) seat abroad and without noteworthy legal capital.5

5 All the abstracts are taken from the EIR Case Register http://www.insolvencycases.eu/ (1 Jan 2000 – 31 Dec 2012).
**Judgment**
Court: First instance court - Amtsgericht Duisburg
Date: 14 Oct, 2003
Jurisdiction: Germany
Original language: German


**Key facts**
The debtor was a private limited liability company with its registered office in London. It had been established by a German craftsman from Oberhausen through a company called C-Ltd. as a trustee in order to circumvent the German legal requirements for craftsmen. The sole director was C-Ltd. in London. However, *de facto*, the business was conducted by Y on the basis of a general power of attorney granted in German. Both management and production were conducted in Oberhausen (Germany) under the same address as Y’s individual enterprise. The debtor did not have any business premises in London and its letterheads only gave the addresses and bank details in Oberhausen.

On 19 November 2002, the debtor was struck off from the register at Companies House. In November 2002 and March 2003, two creditors filed requests for the opening of insolvency proceedings at the Amtsgericht (local court) Duisburg; one of which was later withdrawn.

**Key issue**
Was the debtor still an eligible debtor despite it having been struck off the register?

**Summary of the decision**
Since the debtor had been struck off the register it no longer existed as a legal person pursuant to English law (as the *lex societatis*) and was thus no longer an eligible debtor.
Judgment
Court: Appellate court - Cour d’Appel de Versailles
Date: 15 Jan, 2004
Jurisdiction: France
Original language: French
Official reference: CA Versailles, 13e ch., 15 janvier 2004, non publié

Parties: SCP Becheret Thierry -v- Industrie Guido Malvestio SpA

Key facts
A French company paid four invoices dated in April and May 2000 in advance to one of its main suppliers (“Malvestio”), a company incorporated in Italy. A French judgment determined, however, on 31 December 1999 that the date when the company was unable to pay its debts as they fell due. The administrators sought to set asides as preferential payments the advance payments made by the company to Malvestio under French insolvency Law. The Commercial Court of Nanterre rejected the administrators' arguments and refused to set aside preferential payments made by the French company. The insolvency office holders of the French company appealed.

Key issue
The question was whether French law applied on setting aside preferential payments made by a French insolvent company for the benefit of its main Italian supplier?

Summary of the decision
The appellate court considered that Article 4(2)(m) EIR applied and the law applicable to insolvency proceedings was the law of the opening member state, and this included provisions relating to the setting aside of preferential payments as acts detrimental to the general body of creditors.
**Key facts**
The debtor was an English limited company with a capital of £10. Its business activities were in the construction sector and it was only active on the German market, although not registered in the German commercial register. On 29 November 2004, the director filed a request for the opening of insolvency proceedings at the Amtsgericht (local court) Saarbrücken.

**Summary of the decision**
German law pursuant to the *lex fori concursus* principle (Article 4 EIR), determined whether the undertaking was an eligible debtor. Since German jurisprudence now applied the incorporation theory with respect to companies established in other EU Member States, the English limited company as such had to be regarded as an eligible debtor. In the context of the opening proceedings, the court only had to decide on the formal eligibility as a debtor; but if the limited company had been established for abusive purposes, the liquidator may plead this in the once the proceedings were opened and then a “piercing of the veil” might be possible.

However, ultimately the court refused the request to open insolvency proceedings due to insufficiency of assets.
Judgment
Court: First instance court - High Court of Ireland
Date: 27 Jul, 2005
Jurisdiction: Ireland
Original language: English
Official reference: In re Flightlease (Ireland) Ltd (In Voluntary Liquidation) [2005] IEHC 274

Parties: Flightlease (Ireland) Ltd (In Voluntary Liquidation)

Public source: www.courts.ie

Key facts
Flightlease (the company), a subsidiary of Swissair, was declared insolvent in proceedings opened in Ireland. Swissair entered into an agreement with the Société d’Exploitation OAM Air Liberté (Air Lib) pursuant to which Air Lib agreed to take on the activities of the company in return for payment from Swissair. Swissair discontinued its payments following the September 2001 terrorist attacks. In November 2001, Air Lib and its holding company issued debt collection proceedings in France against a number of companies, including the company. In 2003 Air Lib was placed into liquidation and its liquidators submitted a proof of claim to the liquidators of the company. Air Lib’s proof of claim was rejected, as was its request that the liquidation of the company be stayed. Air Lib sought to appeal the rejection of its claim to the Irish High Court and the company initiated proceedings seeking the court’s determination on certain issues arising from the provisions of the Insolvency Regulation.

Key issue
The court was asked to determine the following issues of interpretation arising from the Insolvency Regulation. Did Article 4 EIR require the claim made by the liquidators of Air Lib in the liquidation of the company to be determined by the Irish courts in accordance with Irish law governing the lodging, verification and admission of claims in insolvency proceedings?

Summary of the decision (relevant part)
The court noted that the primary rule in relation to insolvency proceedings governed by the Insolvency Regulation is clearly set out in Article 4: the law applicable to such proceedings is that of the member state in which the proceedings have been opened. The court also noted that Article 4(h) EIR specifically states that the law governing the lodging, verification and admission of claims in insolvency proceedings is to be that of the state in which the proceedings were opened. The court further noted that these rules apply save where otherwise provided.

The court found that it had not been shown that the claim made by the liquidators of Air Lib in the winding up of the company fell within any of the exceptions to the general rule set out in the Insolvency Regulation. It, therefore, answered the question in the affirmative and concluded that the claim fell to be determined by the Irish court in accordance with the Irish law governing the lodging, verification and admission of claims in insolvency proceedings.
Parties: NV MG R.B. -v- vzw K.B.T.C.

Key facts
A creditor of a Belgian company obtained court authorisation to attach the assets of another Belgian company, which was part of the Rover automotive group. After it had been subject to insolvency proceedings in England, the company whose assets had been attached, sought to have the attachments quashed.

Key issues
What was the effect of the insolvency proceedings opened against the debtor in England on the various attachments made by the creditor in Belgium? Did the fact that the debtor had been subject to insolvency proceedings render all attachments null and void?

Summary of the decision (relevant part)
The court noted that the liquidators appointed in England had authority under Article 4 EIR to request the setting aside of the attachments. The court concluded that the attachments should be set aside.
Judgment
Court: First instance court - English High Court, Chancery Division
Date: 09 Jun, 2006
Jurisdiction: England & Wales
Original language: English
Official reference: Collins & Aikman Europe SA, Re [2006] EWHC 1343 (Ch)


Public source: BAILII [2006] EWHC 1343 (Ch)

Key facts
A group of companies supplied components to leading car manufacturers on a global basis. The US holding company and US part of the group filed for reorganisation under Chapter 11 of the US Bankruptcy Code on 17 May 2005. The European part of the group consisted of 24 companies, spread over 10 countries, employing 4,000 people at 27 sites, with a turnover of approximately US$1billion per annum.

The European companies applied to the English court on 15 July 2005 for the making of administration orders asserting in each case that the centre of main interests was England pursuant to Art 3 EIR. The English court made administration orders on that basis and directed that the proceedings would be main proceedings.

Many of the group companies’ functions were organised on a Europe wide rather than national basis. The liquidators therefore recognised that a co-ordinated approach to the continuation of the businesses, funding of the administration and sale of the businesses and assets would lead to a better overall return for creditors.

The European creditors remained entitled to seek the opening of secondary proceedings in their respective jurisdictions against their proper debtor. However, the liquidators believed that this would have made it difficult to trade the businesses and achieve the best outcome on sales processes on a group-wide basis. They therefore gave assurances to creditors that if there were no secondary proceedings then their respective financial positions as creditors under the relevant local law would be respected in the English administration as far as possible. This strategy was supported by creditors with only a few minor exceptions and the liquidators believed that this is what enabled them to achieve very favourable realisations in excess of prior estimates. By April 2006, the liquidators held over $125 million for distribution to creditors of the European companies.

As the rules of priority between creditors was a matter of lex concursus, and so the liquidators were otherwise bound by English law as to priority, the liquidators made an application to the English Court to approve the payments necessary to honour the assurances given, even though the effective application of other member states’ priority principles would be to the disadvantage of some creditors.
Essence
Article 4 EIR provides that the law of main proceedings is that of the member state in which the proceedings are opened. The English court found that it had jurisdiction nonetheless to direct as a matter of English law that the liquidator could depart from the English law rules as to priority between creditors. This allowed the liquidator to honour assurances given to creditors in other member states pursuant to which those creditors had not sought to open secondary proceedings.

Commentary
The court noted and approved the earlier decision of the court in *MG Rover Belux SA/NV of 29 March 2006* EWHC 1296 (Ch).
Judgment
Court: First instance court - Tribunal de Paix de Luxembourg, siègeant en matière de saisie-arrest spéciale
Date: 26 Apr, 2007
Jurisdiction: Luxembourg
Original language: French

Parties: Banque AAA & others vs XX & others

Public source: Bulletin d’Information sur la Jurisprudence 2007, p. 113

Key facts
In 2005, two banks signed loan agreements with the debtor, Ms X and granted credit to the debtor by way of overdraft facility. To secure the repayment of these loans and overdrafts, Ms X signed wage assignments in favour of the two banks. Ms X did not repay the loans and the banks started legal proceedings in order to attach the wages of Ms X pursuant to the wage assignments. A lawyer, who had represented Ms X in a previous and similar case, also started attachment proceedings to obtain payment of unpaid fees. However, it appeared that Ms X, who was not a trader but resided in France, in the Moselle region (where French insolvency laws applicable to traders are also applicable to non traders) had been subject to insolvency proceedings since 2003, and under judicial liquidation since 7 September 2004. The banks were not aware of this insolvency situation. The appointed trustee claimed that pursuant to Article 5 EIR the wage assignments had to be considered as null and void.

Key issue
The court reviewed the following notions: (1) Applicable law for the insolvency proceedings and its effects, (2) Validity of wage assignments.

Summary of the decision
Regarding applicable law, the court acknowledged that the debtor was under insolvency proceedings and that this specific insolvency procedure was foreseen by Article 1 EIR. The court further explained that in accordance with the provisions of Article 4 EIR, the applicable law to insolvency proceedings and its effects was French law, as the insolvency proceedings opened against the debtor was a French insolvency proceedings.

The court then stated that according to relevant provisions of French law, the opening of insolvency proceedings prevents any claim from creditors who have claims originating prior to the opening of the insolvency proceeding. It appeared that the wage assignments, the loan agreements and the fees of the lawyer all originated after the opening of the insolvency proceedings of the debtor and as such were considered as valid by the court, especially as the banks were not aware that the debtor was subject to insolvency proceedings.
Insolvency proceedings were opened in the Netherlands in respect of a company registered in that member state. Its shareholders filed a petition in France against a French Bank which had granted loans to that company on the grounds that it had interfered with the management of the insolvent company.

**Key issue**
The question was whether legal action could be initiated in France after the opening of insolvency proceedings in the Netherlands?

**Summary of the decision**
The Court of Appeal ruled that if the law of the state of the opening of proceedings shall determine the effects of the insolvency proceedings on proceedings brought by individual creditors under Article 4(2)(f) EIR, any person who suffers loss, resulting from the interference of a creditor (a bank) in the management of an insolvent debtor, shall be allowed to initiate legal action in France as long as such complies with French law.

Under French law, only individual damages can be claimed by a shareholder of an insolvent company against a bank which interfered in the management of the debtor. As this was not the case, the Court of Appeal of Paris rejected the legal action.
Judgment
Court: Appellate court - Cour d’Appel d’Aix-en-Provence
Date: 22 May, 2008
Jurisdiction: France
Original language: French

Parties: S.A.S. Telecom Italia -v- S.A.R.L. FEDEROL

Public source: www.legifrance.gouv.fr

Key facts
An Italian company (the company) contracted out services supplied on behalf of a French company. Insolvency proceedings were started against the company in Italy. The French sub-contractor summoned the French company to appear before French courts under the legislation governing the sub-contracting rules which allowed the sub-contractor to act directly against the company on whose behalf the sub-contracts were made.

Key issue
Was a sub-contractor, who wished to summon the French company to appear before French courts, under the duty to lodge its claim first, on a provisional basis, into the Italian insolvency proceedings opened in respect of the project leader?

Summary of the decision
The French court made clear that a sub-contractor was allowed to summon the sub-contracting company to appear before French courts as the law governing the sub-contracting rules in France did not depend on the opening of an insolvency proceeding of the project leader. French sub-contracting rules only apply when it is proved before the court that the project leader failed to pay the sub-contractor.

In conclusion, the Court of Appeal stated that the Insolvency Regulation did not apply to such cases as its scope is limited only to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.

The appellate court ruled that the Commercial Court of Marseille had jurisdiction to deal with the present issue which would not be a judgment deriving directly from or closely linked with the insolvency proceedings initiated in Italy.
Judgment
Court: Appellate court - Tribunal d’arrondissement de et à Luxembourg, troisième chambre
Date: 24 Oct, 2008
Jurisdiction: Luxembourg
Original language: French
Official reference: Garnishment judgment III N° 221/08, (Numéro 98691, 98692, 108144 et 108145 du rôle)

Parties: Marc Sasha Migge & others -v- Thomas Benedikt Schmidt, in his quality of “Treuhänder” of the assets of Jürgen Rüdiger Migge & others

Public source: LJUS 99863455

Key facts
By judgment dated 29 September 2005 rendered by the Amtsgericht Wittlich (Germany), insolvency proceedings were opened against an individual, Jürgen Migge. Various attachments to earnings were initiated by the creditors prior to the opening of the insolvency proceedings and the debtor signed two wage assignments, one in favour of his mother on 15 December 2001, and the other in favour of his son on 19 November 2003. The German insolvency practitioner and a creditor disputed the validity of the wage assignments; consequently the court was asked to decide on the allocation of the seized amounts according to the attachments to earnings and wage assignments and to decide on validity of the wage assignments.

Key issues
The court was asked to review the following notions: (1) the effects of the insolvency proceedings on pending lawsuits; (2) the applicable law and jurisdiction for examining the validity of legal acts which could be detrimental to all creditors; and (3) the effect of insolvency proceedings on third parties’ rights in rem.

Summary of the decision
The court stated that in accordance with Article 15 EIR, the effects of the insolvency proceedings on pending lawsuits relating to an asset or a right of which the debtor has been divested shall be governed solely by the law of the member state in which the lawsuit is pending and that according to Luxembourg law, the court before which a lawsuit is pending still has jurisdiction in the case of insolvency proceedings. Therefore the court confirmed that it had jurisdiction.

The court stated that the list mentioned at Article 4 EIR on applicable law could be interpreted as entailing the jurisdiction of the court of the state that opened the proceedings to be competent in assessing issues relating to the validity of legal acts. Furthermore, the court explained that even if the jurisdiction of the court in charge prior to the opening of insolvency proceedings was not automatically called into question by the mere fact that insolvency proceedings had been opened, by the effect of universality linked to the insolvency proceedings, the court was incompetent to assess issues for which the court of the state that opened the proceedings” had exclusive jurisdiction. Therefore, the court decided, in accordance with Article 4 EIR that the court having opened the insolvency proceedings against the debtor, i.e. the German court, was solely competent to examine the validity of the wage assignments that were disputed by the German insolvency practitioner.
Regarding the effects of the insolvency proceedings on claims brought by individual creditors against the assignees of wages, the court stated that Article 4 EIR provides that the law of the state that opened the proceedings determines the conditions of opening, the course and the conditions of the closure of the insolvency proceedings as well as the effects of the insolvency proceedings on claims brought by individual creditors, with the exception of the pending lawsuits. The court explained that the suspension of the effects of enforcement proceedings is contemplated by German insolvency law. The court decided that according to Article 4 EIR and the relevant article of German insolvency law, the court of the state that opened the proceedings is solely competent to decide on disputes relating to the admissibility of enforcement measures, especially on the application of Article 5 EIR as to wage assignments. The court decided a stay of the proceedings in order to allow the litigant parties to ask the German court to decide on the validity of the wage assignments and the application of Article 5 EIR to such wage assignments should they be declared valid.
Parties: L.J.M. Luchtman (in his capacity as liquidator in the bankruptcies of Kasterlee Optiek B.V., Kasterlee IT Components B.V. and Optiland B.V.) -v- [X], Ermer Beheer B.V. & others

Public source: LJN: BH9042 (www.rechtspraak.nl)

Key facts
The liquidator brought civil proceedings in the Netherlands against [X], a person with domicile in Belgium, as (indirect or de facto) director of a number of Dutch companies, based on rules of Dutch law on directors’ liability that apply in the event of a company’s insolvency (and that also apply to indirect and de facto directors). The basis for this action was, inter alia, that, according to the liquidator, the directors of the companies concerned had failed to maintain a proper administration of the companies’ assets and liabilities and had not prepared and published the companies’ annual accounts, as required under Dutch law.

Key issue
Is Dutch law applicable to the liquidator’s claim?

Summary of the decision (relevant part)
The court decided that Dutch law applied to the liquidator’s claim pursuant to Article 4(1) EIR (with reference to paragraph 23 of the preamble).
Parties: Börlind Gesellschaft für Kosmetische Erzeugnisse mbH (Germany) -v- H. Weinans (in his capacity as liquidator in the bankruptcy of Börlind Benelux B.V.)

Public source: JOR (Jurisprudentie Onderneming & Recht) 2010/27

Key facts
Börlind Germany, a producer of cosmetics, supplied products to Börlind Benelux on the basis of a distribution agreement. There were substantial arrears in the payment of monies due from Börlind Benelux to Börlind Germany pursuant to the distribution agreement. Following discussions between Börlind Benelux, Börlind Germany and the bank, the arrangement between Börlind Germany and Börlind Benelux was changed into a consignment agreement. Customers of Börlind Benelux continued to place their orders with and received invoices from Börlind Benelux. However, these invoices not only mentioned bank account numbers of Börlind Benelux but also a bank account number of Börlind Germany. The invoices did not state in whose name the bank accounts were kept. A number of payments of customers of Börlind Benelux were thus made directly into the bank account of Börlind Germany. After Börlind Benelux was declared bankrupt in the Netherlands, the liquidator brought action against Börlind Germany to set aside the consignment agreement because it was detrimental to the creditors (actio pauliana) and to return the monies received pursuant to the consignment agreement to the estate. The court of first instance sustained the liquidator’s claim. Börlind Germany subsequently lodged an appeal against that decision.

Key issue
Was the court of first instance correct in deciding that the consignment agreement was voidable on the basis of the Actio Pauliana?

Summary of the decision
The court of appeal upheld the decision of the court of first instance. It decided that, pursuant to Article 4(2)(m) EIR, the action brought by the liquidator was governed by Dutch law and that, given that in the present case the consignment agreement was voidable under Dutch insolvency law, it was irrelevant which law governed the consignment agreement (something that the court consequently did not go into).

Commentary
It was not clear from the decision whether Börlind Germany put forward a (sufficiently motivated) defence based on Article 13 EIR, in which case the law governing the consignment agreement would have been relevant.
Parties: Société DHL Global Forwarding (UK) Ltd -v- S.A.S. TOE Transmanche & Société Mc Namara Freight Limited

Public source: www.legifrance.gouv.fr

Key facts
The foreign creditors challenged the lower court judgment which dismissed the lodgment of their claims on the basis that they were too late. The creditors argued on the contrary that the insolvency office holder had failed to inform them of the time limit for lodging a claim using the proper form prescribed by the Insolvency Regulation and that, consequently, they had failed to lodge their claims in due time.

Key issue
Whether foreign creditors could bring a challenge before French courts on the basis that they had not received any “notice for proofs of debts” pursuant to the provisions of the Insolvency Regulation.

Summary of the decision (relevant part)
The Court of Appeal ruled that if, pursuant to Articles 40 and 42 EIR, all known creditors whose registered offices are located in a member state that differs from the opening state have specific rights of information and rights relating to the filing of their proof of debt including the right to receive an individual notice of information with the title “Invitation to lodge a claim. Time limits to be observed”, remedies are (only) governed by French law by virtue of Article 4(2) EIR.
Judgment
Court: Highest appellate court - Cour de cassation, Chambre commerciale
Date: 15 Dec, 2009
Jurisdiction: France
Original language: French

Parties: Société Aenix -v- Société Access Graphics BV

Public source: www.legifrance.gouv.fr

Key facts
A claim of a Dutch company was lodged with a French liquidator appointed in insolvency proceedings opened against a French company. The claim was filed by an employee of the Dutch company. The judge of the lower court recognised the power of the representative of the Dutch corporate creditor to lodge its claims for insolvency proceedings.

Key issue
Was the law of the opening state applicable to define the powers of the creditor’s representative regarding the lodgement of claims?

Summary of the decision
The Cour de cassation approved the admission of the filed claim, on the basis of the conflict of law set of rules pursuant to Article 4(2)(h) EIR which states that rules applicable to lodging, verification and admission of claims are defined by the law of the opening State. The court also noted that conditions required by French jurisprudence were evident in the present case namely a special mandate to act on behalf of the corporate creditor even if the evidence of that mandate was produced to the court after the expiry of the time dedicated to lodge claims pursuant to French insolvency law provided that the applicant did have that power when he lodged the disputed claims.

Commentary
<table>
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<td>Original language: Dutch</td>
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Parties: Van Kester -v- FFP

Public source: LJN BK 3574 (www.rechtspraak.nl)

Key facts
The Van Kesteren partnership (vennootschap onder firma, ro: vof), a contractual partnership without limited liability, had ceased trading and its individual partners, Mr and Mrs Van Kester had moved to Poland. Upon the request of FFP the court declared the partnership and its individual partners bankrupt. At the time of the filing of the petition the COMI of the partnership was considered to be located in the Netherlands whereas the COMI of its individual partners was located in Poland. The individual partners also did not have an “establishment” in the Netherlands.

Key issue
Does the rule under Dutch law, that the insolvency of a partnership necessarily implies the insolvency of its individual partners, apply on the basis of Article 4 EIR, which would lead to the insolvency of the individual partners in this case even though they neither had their COMI nor an establishment in the Netherlands at the time of the filing of the petition, or must the Dutch court also have jurisdiction with respect to the individual partners on the basis of Article 3 EIR for the individual partners to be declared bankrupt?

Summary of the decision
The Supreme Court reiterated that pursuant to Article 4 EIR the effects of insolvency proceedings are determined by the law of the State in which the insolvency proceedings have been opened. The Supreme Court ruled that there were no grounds for an exception to the rule under Dutch insolvency law that the insolvency of the partnership necessarily leads to the insolvency of its individual partners. The Dutch insolvency of the partnership therefore led to the insolvency of its individual partners, despite the fact that they had neither their COMI nor an establishment in the Netherlands.
Parties: P.G. Gilhuis (in his capacity as liquidator of Movietech BVBA, incorporated under the laws of Belgium) -v- X

Public source: LJN: BL2214 (www.rechtspraak.nl)

Additional sources: Also published in Jurisprudentie Onderneming & Recht 2010/90

Key facts
Movietech BVBA, a company incorporated under the laws of Belgium, was declared bankrupt in the Netherlands. The liquidator brought civil proceedings in the Netherlands against the director of Movietech, a person with domicile in Belgium, based on rules of Dutch law on directors’ liability that apply in the event of a company’s insolvency. The main basis for this action was that, according to the liquidator, the director had failed to maintain a proper administration of the company’s assets and liabilities and had not prepared and published the company’s annual accounts, as required under Dutch law.

Key issue
Is Dutch law applicable to the liquidator’s claim, given the fact that the company was incorporated under the laws of Belgium?

Summary of the decision (relevant part)
The court decided that Dutch law applied to the liquidator’s claim pursuant to Article 4(1) EIR – it was a claim that derived directly from the insolvency proceedings and was brought by the liquidator for the benefit of the insolvent estate – and rules of Dutch (statutory) private international law (Dutch conflict of laws act corporations, Wet conflictenrecht corporaties). Furthermore, the court observed that Dutch law applied as the lex loci delicti as it concerned a possible wrongful act committed by the director in the Netherlands against Dutch creditors.

The court found the director liable for the entire deficit of the estate (all claims that could not be met from the proceeds of the company’s assets), based on the conclusion that the director had failed to maintain a proper administration of the company’s assets and liabilities as required under Dutch law. The court did not take the failure to prepare and publish the company’s annual accounts into consideration as it found that these requirements of Dutch law did not apply to companies that were incorporated in accordance with the laws of another member state.
Parties: Danieli Corus -v- Agintis


Key facts
A claim of a Dutch company was lodged with a French liquidator appointed in insolvency proceedings opened against a French company. The claim was filed by an employee of the Dutch company, entitled to act with a general mandate.

The judge of the lower court, applying French jurisprudence requiring a specific mandate where the lodgement of claims are not filed by the creditor itself, rejected the claim by ruling that the mandate was too wide and vague. There was not sufficient evidence to show that the representative of the creditor had the power to lodge claims for insolvency proceedings.

Key issue
Was the law of the opening member state applicable to define the powers of the creditor’s representative regarding the lodgement of claims?

Summary of the decision
The Cour de cassation approved the rejection of the filed claim, on the basis of the conflict of law set of rules pursuant to Article 4(2)h EIR which states that rules applicable to lodging, verification and admission of claims are defined by the law of the opening State.

The court also noted that conditions required by French jurisprudence were missing in the present case, particularly as regards the powers of the representative of a foreign creditor to lodge claims in an insolvency proceedings.

Commentary
The judgment does not mention the lex societatis applicable to the powers of the manager and of their employees which are normally ruled by the law of the registered office of the company.
Parties: Te Biesebeek and Hoppenbrouwers (as liquidators of Groen Invest Nederland B.V. & others) v. B.

Public source: LJN: BQ7552 (www.rechtspraak.nl)

Key facts
B (an individual residing in Belgium) was a director of a group of companies (all of which were incorporated under the laws of the Netherlands) that had been declared bankrupt in the Netherlands. The Dutch liquidators initiated a director’s liability action before the Dutch court against the Belgian director on the basis of a provision of Dutch corporate law that only applies in the event of a company’s insolvency.

Key issue
Is Dutch law applicable to the liquidator’s claim?

Summary of the decision (relevant part)
The court decided that Dutch law applied to the liquidator’s claim pursuant to Article 4(1) EIR (with reference to paragraph 23 of the preamble). Dutch law was considered to be applicable to the company that qualified as an investment undertaking pursuant to Dutch domestic rules of International Private Law.
Judgment
Court: Appellate court - Helsingin hovioikeus
Date: 23 Jan, 2012
Jurisdiction: Finland
Original language: Finnish
Official reference: S11/3303

Parties: Appellant: Keskinäinen työeläkevaktuusyhtiö Varma, adverse party: A OÜ SIVULIIKE SUOMESSA.

Key facts
A Finnish company, Keskinäinen työeläkevaktuusyhtiö Varma, demanded a declaration that a branch of an Estonian company was bankrupt. By virtue of Article 3 EIR, the first instance court was competent to decide the matter, since it involved the bankruptcy of a branch of a company situated in another EU state.

On the basis of Article 4(2)(a) EIR, the first instance court considered that Finnish law should be applied to determine which debtors bankruptcy proceedings may be brought on the basis of their capacity. According to Finnish law, only a private individual, a corporation, a foundation and another legal person could be declared bankrupt. The first instance court considered that the branch was not a separate legal person, but simply a part of the Estonian company. Thus, the branch could not be declared bankrupt. The first instance court dismissed the matter without consideration of the merits.

Key issues
Was the Finnish first instance court competent to decide a matter that involved the bankruptcy of a branch of a company situated in another EU state? Which country’s law should be applied to determine the conditions for opening insolvency proceedings in Finland against a company of another EU member?

Summary of the decision
Referring to Article 4(2)(a) EIR, the first instance court stated that Finnish law should be applied to determine the conditions for the opening of bankruptcy proceedings in respect of an Estonian company’s branch situated in Finland. Since the company was considered to be simply a branch of another Estonian company, Finnish law did not provide for the possibility of bringing insolvency proceedings against that branch on the basis of its capacity.

Commentary
The Finnish courts did not consider whether the “branch” of the Estonian company could qualify as an “establishment” within the meaning of Article 2(h) EIR. If the elements mentioned in Article 2(h) were present, the EIR provides that secondary proceedings can be opened [see Article 3(3) EIR].

Public source: LJN: BV6710 (www.rechtspraak.nl)

Key facts
Y was declared bankrupt in the Netherlands on 20 September 2006. After the commencement of the bankruptcy proceedings, Y transferred a sum of money from his Austrian bank account to the Dutch bank account of Z. The liquidator of Y claimed repayment from [Z] of this amount. In the first instance court of the Netherlands, it was decided that, based on the Insolvency Regulation, Dutch law was applicable to this repayment claim. In an appeal, this decision was contested by Z. Z argued that in cases that were not specifically related to the Dutch bankruptcy – such as in this case the issue of undue payment from an Austrian bank account – Austrian law is applicable.

Key issue
Which law is applicable to the repayment claim of the Dutch liquidator?

Summary of the decision
Although the claim of the liquidator was based on general civil law, the appellate court considered the payment to Z – which was made by Y after he was declared bankrupt - to be detrimental to all creditors of [Y] within the meaning of Article 4(2)(m) EIR and considered Dutch law to be applicable to the repayment claim of the liquidator on that basis.

Commentary
No defence was raised under article 13 EIR (“double actionability test”).
(1) The opening of insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of tangible or intangible, moveable or immoveable assets - both specific assets and collections of indefinite assets as a whole which change from time to time - belonging to the debtor which are situated within the territory of another Member State at the time of the opening of proceedings.

(2) The rights referred to in paragraph 1 shall in particular mean:
(a) the right to dispose of assets or have them disposed of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage;
(b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee;
(c) the right to demand the assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled;
(d) a right in rem to the beneficial use of assets.

(3) The right, recorded in a public register and enforceable against third parties, under which a right in rem within the meaning of paragraph 1 may be obtained, shall be considered a right in rem.

(4) Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Rights in rem have a very important function with regard to the granting of credit and the raising of capital. They protect their holders against the risk of insolvency of the debtor and the interference of third parties.

The rationale of Article 5 is that the basis, validity and extent of right in rem should normally be determined according to the lex situs and not be affected by the law of the State of 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.

Article 5 excludes from the effects of the opening of the insolvency proceedings rights in rem of creditors or third parties in respect of assets belonging to the debtor that, at the time of the opening of the proceedings, are situated within the territory of another Member State (a State different from the State of the
opening of proceedings). The holder of the right \textit{in rem} may exercise his right to separate the security from the estate and, where necessary, realise the asset individually satisfying his claim.

The Regulation does not impose its own definition of a right \textit{in rem} but in order to facilitate its application and to avoid doubts provides a non-exhaustive list of types of rights that are commonly considered by national laws as rights \textit{in rem}.\textsuperscript{6}

Judgment
Court: Appellate court - Oberlandesgericht Stuttgart
Date: 15 Jan, 2007
Jurisdiction: Germany
Original language: German
Official reference: OLG Stuttgart vom 15.01.2007 – 5 U 98/06

Parties: Unknown - [OLG Stuttgart vom 15.01.2007 – 5 U 98/06]

Public source: BeckRS 2007, 02211

Key facts
Insolvency proceedings over the assets of the debtor were opened in France in 1993. The defendant, a bank, had granted the debtor (who, at that time was living in Germany) several credits – the last one in 1993 – which were secured by a lien on real estate which was located in Germany. The defendant was not aware of the opening of insolvency proceedings until 1998 although the opening of such was published in France. The defendant then filed a claim with the French liquidator. The liquidator rejected these claims on the basis that they were deemed to have expired under French law because of the delay in lodging. The defendant’s remedy before French courts had been successful only in relation to the last credit from 1993. In 1999 the defendant began enforcement of the lien and received an amount of EUR 162,147.22. However, the receivable owed to the defendant only amounted to EUR 69,762.07. Therefore, the debtor as claimant, acting on behalf of the French liquidator, sought the difference from the defendant.

Key issues
(1) Does the opening of insolvency proceedings in France have an impact on other countries prior to the Insolvency Regulation coming into effect?
(2) Would it violate the German public policy (ordre public) if claims filed against the debtor’s assets are not filed within the time limits prescribed under (former) French insolvency law, even if this affects a creditor’s right in rem located in Germany and if the creditor was not aware of French insolvency proceedings?

Summary of the decision
The Insolvency Regulation was not applicable with respect to insolvency proceedings opened in 1993 (Art. 43 EIR). OLG Stuttgart came to the conclusion that prior to the Insolvency Regulation coming into effect French insolvency law followed the principle of territoriality to be understood as not having any effect on the debtor’s assets which were not located in France. Therefore the enforcement of a land charge in Germany was not inhibited by French law.

Alternatively, German international insolvency law at that time would in principle recognise any effects of foreign insolvency proceedings in Germany. However, as it is now provided for in Article 5(1) EIR, rights in rem located in a different member state remain unaffected by the opening of insolvency proceedings even under former German international insolvency law. The effect of claims which are deemed to have expired under (former) French insolvency law because of a delay in lodging, would not be recognised in Germany. It would violate the German ordre public (principle of being heard) according to Art. 6 EGBGB.
Judgment  
Court: Court of Justice of the European Union  
Date: 05 Jul, 2012  
Jurisdiction: European Union  
Original language: Hungarian  
Official reference: Case C-527/10

Parties: ERSTE Bank Hungary Nyrt v Magyar Állam, BCL Trading GmbH, ERSTE Befektetési Zrt

Public source: [www.eur-lex.europa.eu](http://www.eur-lex.europa.eu)

Additional sources: Relevant CJEU case law  
Eurofood IFSC Ltd, 2 May 2006, C-341/04  
MG Probud Gdynia, 21 January 2010, C-444/07  
Rastelli Davide e C., 15 December 2011, C-191/10

Key facts
An Austrian registered company (the company) which was put into insolvency proceedings in Austria on 5 December 2003 had assigned, before the opening of those proceedings, a letter of credit issued to the company by a Hungarian creditor to several banks and the company had given shares which it held in its (Hungarian) creditor as a guarantee (a security deposit). Those shares were later purchased pursuant to a judicial decision by competent authorities in Hungary and the proceeds of those shares were subsequently paid into court. ERSTE Bank, the legal successor of the debtor’s creditor, brought an action before the Hungarian courts against the defendants in the main proceedings seeking a declaratory judgment to the effect that it had a right over the security deposit paid into court. ERSTE Bank also sought to open secondary proceedings against the company in Hungary. Pursuant to Article 4(1) EIR, the (Hungarian) Court of appeal ruled that it was for Austrian law to determine whether ERSTE Bank could obtain a declaratory judgment to the effect that it had a right over the proceeds of the shares paid into court. According to Austrian law, it could not; the claim was therefore struck out. In addition, the Hungarian court also declined to open insolvency proceedings against the company in Hungary on the grounds that the company did not have an establishment in Hungary. ERSTE Bank appealed and contended that the Insolvency Regulation was not applicable because the insolvency proceedings opened against the company in Austria had been opened before Hungary’s accession to the European Union.

Key issue
Is Article 5 EIR applicable to cases where at the time the insolvency proceedings were opened in a member state of the EU (Austria) the debtor’s assets on which the right in rem concerned was based were in another State (Hungary) which, at that time, was not yet a member state of the European Union?

Summary of the decision
On that question, the CJEU ruled that “in order to maintain the cohesion of the system established by the Regulation and the effectiveness of insolvency proceedings, Article 5(1) thereof must be interpreted as meaning that that provision is applicable even to insolvency proceedings opened before the accession of the Republic of Hungary to the European Union in a case, such as that in the main proceedings, when, on 1 May 2004, the debtor’s assets on
which the right in rem concerned was based were situated in that State, which is for the referring court to ascertain.”

Article 5(1) EIR which states that the opening of main insolvency proceedings shall not affect the rights in rem of creditors or third parties in respect of assets belonging to the debtor which are situated within the territory of another member state at the time of the opening of proceedings is applicable to proceedings opened before the accession of a new member state to the European Union where it has to be recognised provided that, from the date of accession of that state to the EU, the debtor’s assets on which the right in rem concerned was based were situated in that state.

The Insolvency Regulation was immediately applicable from the date of the accession of Hungary to the EU, including the specific provisions regarding certain rights as long as it could be ascertained by the referring court that the debtor’s assets on which the right in rem concerned was based were situated in that state since that date.
Parties: Unknown - [Kúria Gfv.VII.30.236/2012/5]

Public source: www.lb.hu/hu/fizkepugy

Additional source: Relevant CJEU case law C-527/10

Key facts
Insolvency proceedings against an Austrian debtor was opened in Austria in 2003. At that time Austria was a member of EU, Hungary was not an EU member state. Hungary acceded the EU in 2004.

The plaintiff stated that the debtor had granted a type of right in rem (security deposit) over its assets in Hungary before Hungary acceded to the European Union. In 2006, the plaintiff "brought an action before the Fővárosi Bíróság (Budapest Municipal Court) against the defendants in the main proceedings seeking a declaratory judgment to the effect that it had a right over the security deposit paid into court."

The first and second instance court struck the claim out. On appeal, the Hungarian Supreme Court referred the case to the CJEU for a preliminary ruling. The judgment of the CJEU clarified that the Hungarian court had to take the Insolvency Regulation into consideration.

The Hungarian first and second instance courts refused to deal with the case because it was of the view that in accordance with Article 4 EIR, that the law applicable to insolvency proceedings and their effects should be that of the member state within the territory of which such proceedings are opened, the law applicable was therefore Austrian insolvency law. According to Austrian law, after the opening of insolvency proceedings, any action against the debtor outside the proceedings are prohibited; creditors must demand their claims in the insolvency procedure. There are two exceptions: creditors with rights to satisfy themselves outside the proceedings, and those who state their ownership over the assets which belong to the debtor have the possibility to bring an action, but the defendant in this procedure can only be the insolvency practitioner, because the debtor itself cannot bring a claim. (Austrian Insolvency Act - Konkursordnung – Art.6.(2)).

Key issue
Which article of the Insolvency Regulation must be applied in the case: Article 4 as the former courts did, or Article 5?

Summary of the decision
The Kúria, the Supreme Court of Hungary held that Article 4 EIR provides the general rule, with exception to the law applicable in Article 5 EIR, which contains the rule that the opening of main proceedings does not affect creditors’ rights. It means that the court has to conduct the civil procedure as if the defendant was not under insolvency proceeding. The applicable
law to judge the dispute and the jurisdiction are decided by the rules which are applied in civil proceedings. In a cross-border situation within the EU the Brussels I. Regulation contains rules which govern jurisdiction.

The court referred to Article 5 EIR, Recital 25 and to the Virgós-Schmit Report (95.) and stated that the opening of main proceedings did not affect the rights in rem of creditors or third parties in respect of assets which are situated in an other member state at the time of the opening of proceedings, namely this fact does not affect the establishment, validity and effect of the rights in rem. This exception also contains the possibility of enforcing these rights through civil procedure in that member state where the assets are located, even if the law of the main proceedings prohibits any action to be brought against the debt. The fact that the law applicable contains provisions enabling a debtor to be sued is considered irrelevant, because Article 5 EIR puts the creditor in such a position where he would have been if the main proceedings had not been opened.

The Hungarian court therefore had jurisdiction to deal with the case, and according to Hungarian civil law, it was required to decide on the petition, as pursuant to Recital 25 "the basis, validity and extent of such a right in rem should therefore normally be determined according to the lex situs".

When the court is required to decide the identity of the defendant, the law applicable is the domestic law of the debtor. According to Austrian insolvency law the debtor lost its actionability, and it was only the insolvency practitioner against whom an action could be brought.

**Essence**
The rule in Article 5(1) EIR requires the court to conduct civil procedure as if the defendant is not under insolvency proceedings. In a cross-border situation within the EU the Brussels I. Regulation provides rules concerning jurisdiction.
**Article 6 (SET-OFF)**

(1) The opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

(2) Paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Set-off is a way of paying one’s obligations. Set-off in principle means that two claims will be offset mutually.

If the *lex concursus* allows the set-off, no problem will arise under Article 4. But, if the *lex concursus* does not allow for set-off, Article 6 constitutes an exception to the general rule of the applicability of the law of the member State where the proceedings are opened. This Member State shall permit the set-off according to the conditions established for insolvency set-off by the law applicable to the debtor’s claim. Although Article 6 is not clear, it seems most likely that the provision implies that “law applicable” is the applicable law of a Member State [not only general civil law but also insolvency law].

Article 4 deals with the effects of the opening of the insolvency proceedings; it does not imply any material conditions [for example the maturity of the claim] with regard to the set-off.⁷

Due to Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings the following Article 6a should be inserted:

"**Article 6a**

Netting agreements

*Netting agreements shall be governed solely by the law of the contract governing such agreements.*"⁸

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Parties: U. Zerrath in his capacity as liquidator of Stobet & Morlock Warmekraft GmbH v. NEM B.V.

Public source: published in JOR 2003/101 with annotation by Prof P.M. Veder (www.jor.nl)

**Key facts**
Stober & Morlock, a German company with limited liability (GmbH), had claims arising from a contract with NEM, a Dutch private limited liability company (B.V.), relating to the delivery of certain equipment and services to NEM. The relevant contract was governed by Dutch law. Stober & Morlock, a company incorporated in Germany, entered into German insolvency proceedings prior to the coming into force of the Insolvency Regulation. The liquidator of Stober & Morlock filed a suit against NEM before a Dutch court. In its defence, NEM argued that it had a damages claim against Stober & Morlock, which exceeded the claims of Stober & Morlock had on NEM. In its reply, the liquidator *inter alia* argued that German insolvency law did not allow set-off of the alleged damage claim as the damage did not arise prior to the opening of the insolvency proceedings.

**Key issue**
Which law governs the question of which conditions a set-off of claims is allowed in a cross-border insolvency to which the Insolvency Regulation does not apply? Analogous application of the Insolvency Regulation.

**Summary of the decision**
The question of which conditions to follow to decide whether set-off is allowed in insolvency proceedings is governed by the *lex concursus*. This view is supported by Article 4(2)(d) EIR. However, the court further ruled that the requirement of legal certainty entailed that the *lex causae*, in this case the law governing the claim of the debtor, i.e. Dutch law, ought to be taken into account as well. As Dutch insolvency law allowed the set-off, the question whether German law contained stricter requirements on set-off could be left unanswered. The view that, in this case, the possibility of set-off should be judged pursuant to Dutch law is also supported by Article 6(1) EIR.
Parties: Conde Nast National Magazine Distributors Limited -v- Ediciones del Prado, S.A. and the liquidators

Key facts
The English company Conde Nast National Magazine Distributors and the debtor entered into a distribution agreement which was governed by English law. According to this agreement Conde Nast National Magazine Distributors had exclusive distribution rights of the debtor’s publications in the UK and Ireland. Arising from this agreement the debtor had a claim against the English company and the English company had a claim against the debtor. Both claims were of pecuniary nature.

Subsequently, the debtor agreed to extend the agreement on the condition that the English company made an advance payment of £500,000 to the debtor. The English company paid the money to the debtor and, after the opening of insolvency proceedings against the debtor, filed its claim against the debtor’s estate. In the alternative, the English company asked to set-off of its claim against the claim of the debtor.

Key issues
(1) Was the payment of the advance payment part of the distribution agreement or alternatively a new contract? (2) What law would be applicable in the case of a new contract? (3) Would set-off be permitted in this case?

Summary of the decision
From the communications between the parties in relation to the extension of the contract, the court found that the advance payment of £500,000 established a new contract between the parties. The court considered this new contract to be a loan agreement by which the English company granted the debtor an interest-free loan. The court noted that Spanish law was applicable to this loan agreement.

According to Article 4 EIR the law applicable to insolvency proceedings and their effects shall be that of the member state within the territory where such proceedings were opened. Furthermore, Article 4 (2) EIR states that the law of the state of the opening of proceedings shall determine the conditions for the opening, the conduct and the closure of those insolvency proceedings and in particular, the conditions under which set-offs may be invoked. The court noted that this could be problematic where a party wishes to assess the possibility of setting-off a claim in the debtor’s insolvency, because in order to do so it will need to predict the place of the debtor’s centre of main interest at the time of opening of insolvency proceedings. This solution is not entirely in line with certain legislative measures which align the right of set-off having a function similar to a guarantee. The court noted that Article 6 EIR establishes an exception in order to protect legitimate expectations and the security of transactions. In case of insolvency the right to set-off is permitted according to the law applicable to the insolvent debtor’s claim which is the principal claim. The determining law
for assessing whether set-off is applicable or not is therefore the law applicable to the debtor’s claim, which is not necessarily the law of the opening state. The court stated that the law applicable to the loan agreement was Spanish law. The Spanish Insolvency Act, as a general rule, provides a prohibition on setting-off a claim once the insolvency proceedings have been opened, unless requirements for such set-off were met prior to the opening of the insolvency proceedings. The court concluded that in the present case prior to the opening of the proceeding those requirements were not met and the creditor therefore was not allowed to invoke set-off.
Article 7 (RESERVATION OF TITLE)

(1) The opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of opening of proceedings.

(2) The opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings.

(3) Paragraphs 1 and 2 shall not preclude actions for voidness, voidability or unenforceability as referred to in Article 4(2)(m).

Article 7, paragraphs 1 and 2, distinguish between rules applicable to a purchaser (buyer) and those applicable to a seller.

Article 7(1) governs the insolvency of the purchaser of an asset by allowing the seller to preserve his rights based on a reservation of title. For this rule to be applied, the asset must be located, at the time when the insolvency proceedings are opened, in a Member State other than the State where the proceedings are opened. A change of location, after the opening of the proceedings, does not affect the application of the provision.

Article 7(2) governs the insolvency of the seller of an asset after delivery of the asset, allowing the sale to remain valid. If the purchaser continues to make payments, he shall acquire title at the end of the period set out in the contract. For this rule to be applied, it is also a requirement that at the time of the opening of the insolvency proceedings the asset is located within a State other than the State of the opening of proceedings.⁹

Parties: METSO POWER A.B. -v- ROTTNEROS MIRANDA S.A. & others

**Key facts**
A Swedish company, METSO POWER (“MP”), acting as seller, entered into an asset sale agreement with a Spanish company, ROTTNEROS MIRANDA (“RM”), acting as purchaser. After a partial asset delivery, insolvency proceedings against the purchaser was opened. According to the sale agreement, MP, had a reservation of title right over the assets delivered to the purchaser. He claimed recognition of his claim as preferential which was denied by the liquidator due to the non-registration of the reservation of title. According to Spanish law, the debt is preferential only if the right of reservation of title is registered in a public register. MP alleged that according to the sale agreement, Swedish law was applicable and therefore no registration was required.

**Key issue**
Is the law of a member state other than the state opening the proceedings applicable to seller’s rights based on a reservation of title where the asset is situated within the territory of the state of opening of proceedings?

The court was asked to decide whether Swedish law which governed the asset sale agreement was applicable to the seller’s reservation of title rights even though the asset was situated in Spain where the insolvency proceedings were opened.

**Summary of the decision**
The court noted that Swedish law was not applicable to assets situated in Spanish territory. The court stated that according to the Spanish conflict of law rules, the law of that state where the asset is situated is applicable. The court further concluded that this decision could be inferred from Article 7 EIR which states that the law of the state opening the proceedings is not applicable to rights based on reservation of title where the assets are situated outside the territory of said state. Article 7 EIR can therefore be interpreted in the opposite sense, namely that the law of the state opening the proceedings is applicable to assets situated within the territory of that state.
Article 8 (CONTRACTS RELATING TO IMMOVEABLE PROPERTY)

The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated.

The need to protect the specific interests (namely the interests of the parties to the contract and the general interests protected by the State in which the immoveable property is to be found) was seen justifying an exception to the application of the law of the State of the opening of the insolvency proceedings. Therefore Article 8 makes the effects of the insolvency proceedings subject solely too the law of the Member State where the immoveable property is located. The word “solely” illustrates that only and exclusively the law of the Member State of the location of the immoveable property (lex rei sitae), and not the lex concursus under Article 4, is applicable to establish these effects.\(^\text{10}\)

There is the proposal that Insolvency Regulation should be reviewed so that where the law of the Member State governing the effects of insolvency proceedings on contracts referred to in Article 8 provides that a contract can only be validly terminated with the approval of the court opening insolvency proceedings but no insolvency proceedings have actually been opened in that Member State, the court which is competent to open insolvency proceedings for the debtor in that Member State shall be competent to approve the termination.\(^\text{11}\)


\(^{11}\) Bob Wessels in “Ten Key Novelties in the Future EU Insolvency Regulation”, 6. Law applicable (attachment to e-mail on Harmonisation of Insolvency Law in Europe from 16 Dec 2012)
Article 9 (PAYMENT SYSTEMS AND FINANCIAL MARKETS)

(1) Without prejudice to Article 5, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.

(2) Paragraph 1 shall not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under the law applicable to the relevant payment system or financial market.

The intention of Article 9 is to prevent the possibility of mechanisms for the payment and settlement of transactions provided for in the payment and set-off systems or on the regulated financial markets of the Member States being altered in the case of insolvency of a business partner. By making the effects of insolvency exclusively subject to the law applicable to the payment and the financial market and avoiding any modification of the mechanisms for regulating and settling transactions provided for in payment or settlement systems or organised financial markets operating in Member States in the event of insolvency of a party to a transaction rather than the lex concursus, general confidence in these mechanisms is protected.

The reference to Article 5 in Article 9(1) means that protection of rights in rem of any kind of creditors or third parties over assets belonging to the debtor is always carried out in the same way under the Regulation. This applies regardless of where the assets are located and regardless of the type of creditor or institution which may benefit from its function as a guarantee. Rights in rem affect third parties, and therefore uniform treatment is essential in order to protect trade.\(^\text{12}\)

**Article 10 (CONTRACTS OF EMPLOYMENT)**

The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.

This provision aims to protect employees and labour relations from the application of a foreign law, which might be different from the law that governs the contractual relations between employer and employees. For this reason, the contract will be subject to the general conflict of law rules of the applicable law. This law regulates the effects of the insolvency proceedings on the continuation or termination of the employment relationship and on the rights and obligations of each party under such relationship. Only the law applicable to the employment contract is applied in order to establish these effects and not the *lex concursus* as provided in Article 4. Any other insolvency law questions, such as whether the employees’ claims are protected by preferential rights and what status such preferential rights may have, should, however, be determined by the law of the State of opening.\(^\text{13}\)

There is the proposal that Insolvency Regulation should be reviewed so that where the law of the Member State governing the effects of insolvency proceedings on contracts referred to in Article 10 provides that a contract can only be validly terminated with the approval of the court opening insolvency proceedings but no insolvency proceedings have actually been opened in that Member State, the court which is competent to open insolvency proceedings for the debtor in that Member State shall be competent to approve the termination.\(^\text{14}\)

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\(^\text{14}\) Bob Wessels in “Ten Key Novelties in the Future EU Insolvency Regulation”, 6. Law applicable (attachment to e-mail on Harmonisation of Insolvency Law in Europe from 16 Dec 2012)
opened in that Member State, the court which opened the insolvency proceedings shall have the competence to approve the termination or modification of these contracts."\textsuperscript{15}

Judgment
Court: Appellate court - Hof van Beroep te Gent
Date: 11 Apr, 2005
Jurisdiction: Belgium
Original language: Dutch

Parties: Stefan de Rouck -v- G.C.

Public source: www.juridat.be

Key facts
An individual, employed by a Belgian company, had been working in Taipei and in South East Asia. Following the insolvency of the company, the ex-employee claimed payment of a number of items, such as overdue compensation.

Key issue
Was the claim privileged under applicable law?

Summary of the decision
After noting that the treatment afforded to claims of ex-employees in insolvency situations could differ greatly among jurisdictions and reviewing the fundamental principles of the Insolvency Regulation, the court noted that the Regulation was strictly speaking not applicable in the case as the insolvency had been opened before the Regulation came into force. The court nonetheless found inspiration in the provisions of the Regulation to hold that the consequences of the opening of insolvency proceedings on employment contracts are governed by the law applicable to the employment contract, whereas the question of whether an employee's claim is privileged and what rank should be assigned to the claim, should be governed by the law of the country where proceedings were opened. Applying Belgian law, the court concluded that the claim was privileged. It did not matter that the employee had performed his work outside Belgium. This fact could not deprive the ex-employee of the privilege granted to ex-employees under the laws of Belgium.
Article 11 (EFFECTS ON RIGHTS SUBJECT TO REGISTRATION)

The effects of insolvency proceedings on the rights of the debtor in immoveable property, a ship or an aircraft subject to registration in a public register shall be determined by the law of the Member State under the authority of which the register is kept.

The Insolvency Regulation does not try to modify systems that deal with registration of rights in rem within Member States. To preserve these systems, Article 11 establishes an exception to the application of the lex concursus.

Article 11 does not cover assets but rights (of the debtor over immoveable property, ships or aircraft and only their affects) that are subject to registration in public registers, the purpose of which is to determine who is the holder or which are the rights in rem over assets. It also includes systems of registration of deeds relating to immoveable property that affect priorities.\(^\text{16}\)

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**Article 12 (COMMUNITY PATENTS AND TRADE MARKS)**

*For the purposes of this Regulation, a Community patent, a Community trade mark or any other similar right established by Community law may be included only in the proceedings referred to in Article 3(1).*

The Insolvency Regulation opens up the possibility of insolvency proceedings with universal effects if the debtor’s main interests are located in a Member State. By virtue of Article 3(1), in conjunction with this provision, Article 12 is only applicable when the debtor has his centre of main interests in a Member State.¹⁷

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**Article 13 (DETRIMENTAL ACTS)**

**Article 4(2)(m) shall not apply where the person who benefited from an act detrimental to all the creditors provides proof that:**

- the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and
- that law does not allow any means of challenging that act in the relevant case.

The conditions, content and the consequences of the voidability of acts between a debtor and a creditor are derived from the law of the State of opening. The aim of Article 13 is to acknowledge legitimate expectations of creditors and third parties. Given the validity of the act in accordance with the national law that would normally be applicable, without any interference from a different *lex concursus*, Article 13 represents a defence against the application of the law of the State of the opening.\(^{18}\)

The Insolvency Regulation stipulates in Article 4(2)(m) that Member States shall determine the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors. In addition, Article 13 provides for an exemption. Harmonisation in this respect would reduce the scope of Article of the Insolvency Regulation and may, thus, contribute to the equal treatment of creditors within the Internal Market and diminish legal uncertainty among liquidators.\(^{19}\)

Namely, the European Parliament considers that Article 13 of the Insolvency regulation should be reviewed so that it does not encourage cross-border avoidance actions but helps to prevent avoidance actions from succeeding by means of choice-of-law clauses.\(^{20}\)

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Article 14 (PROTECTION OF THIRD-PARTY PURCHASERS)

Where, by an act concluded after the opening of insolvency proceedings, the debtor disposes, for consideration, of:
- an immoveable asset, or
- a ship or an aircraft subject to registration in a public register, or
- securities whose existence presupposes registration in a register laid down by law,

the validity of that act shall be governed by the law of the State within the territory of which the immoveable asset is situated or under the authority of which the register is kept.

Article 14 fosters the desire to protect the confidence of third parties in the content of property registers when the debtor, after the insolvency proceedings have been opened, disposes for consideration [and not gratuitously] of an asset from the estate, and the opening of the insolvency proceedings or the restrictions on the debtor have not yet been entered or referred to in the register in question. The provision covers a ship, an aircraft, immoveable assets or certain securities subject to registration in a public register. The law of the Member State within the territory of which the immoveable asset is situated or under the authority of which the register is kept applies in relation to dispositions of these assets by a debtor to a third party after commencement of the insolvency proceedings.\textsuperscript{21}

The Insolvency Regulation distinguishes between the effects of insolvency on individual enforcement proceedings and those on lawsuits pending. The effects on individual enforcement actions are governed by the law of the State of the opening of the insolvency proceedings (Article 4(2)(f)). The interests of individual enforcement are carried out in collective insolvency proceedings that prevent any individual enforcement action brought by creditors against the debtors’ assets.

The effects of the insolvency proceedings on other legal proceedings concerning the assets or rights of the estate are, according to Article 15, governed by the law of the Member State in which these proceedings are underway. The procedural law of this State shall decide whether or not the proceedings are to be suspended, how they are to be continued and whether any appropriate procedural modifications are needed in order to reflect the loss or the restriction of the powers of disposal and administration of the debtor and the intervention of the liquidator in his place.  

There is the proposal that Insolvency Regulation should be reviewed so that the effects of insolvency proceedings on lawsuits pending will also apply to arbitral proceedings.

Due to Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings Article 15 shall be replaced by the following:

"Article 15
Effects of insolvency proceedings on lawsuits or arbitral proceedings pending

The effects of insolvency proceedings on a pending lawsuit or arbitral proceeding concerning an asset or a right of which the debtor has been..."
divested shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral proceedings have their seat.\(^{24}\)

Parties: Unknown - [Oberster Gerichtshof 23 February 2005, 9 Ob 135/04z]

Public source: www.ris.bka.gv.at/Jus/

Key facts
In 2001, a limited liability company (A) with its registered office in Germany, sued F, an Austrian businessman, for payment of approximately EUR 180,000 before the Austrian courts. In January 2004, the court of first instance awarded A a large part of the claim. F appealed against the judgment.

During the appellate proceedings A filed for insolvency in Germany. On 13 April 2004, the German Amtsgericht (local court) Kaiserslautern appointed a provisional liquidator (in accordance with Section 21 German Insolvency Statute) and, among other preservation measures, transferred the power to dispose of receivables and of bank accounts from A to the provisional liquidator.

Before the Austrian court of appeal, A’s counsel contended that he had been granted power of attorney by both A and the provisional liquidator and that the appointment of the provisional liquidator was irrelevant for the pending lawsuit. F invoked nullity of the appellate proceeding in Austria due to invalid representation of A.

In July 2004, the court of appeal confirmed the decision of the court of first instance and held that the power of attorney in question was still valid; the preservation measures taken by the German court did not stay the lawsuit in Austria. F appealed to the Austrian Supreme Court.

In August 2004, the German local court opened insolvency proceedings against A and appointed L as liquidator. On 10 September 2004, L informed the Austrian courts that insolvency proceedings had been opened and applied for the continuation of the pending lawsuit which had been stayed automatically by virtue of Section 7 of the Austrian Bankruptcy Code. On 16 September 2004, the court of first instance changed the party name of plaintiff from “A” to “L as liquidator” and decided that the lawsuit be resumed.

Key issue
Did the German decision to appoint a provisional liquidator have effects on the pending lawsuit in Austria?

Summary of the decision (relevant part)
While the law of the state of opening proceedings (lex fori concursus) governs the respective powers of the debtor and the liquidator (Article 4(2)(c) EIR), the effects of insolvency proceedings on pending lawsuits (for example, whether or not the lawsuit is suspended) are governed solely by the law of the state where the pending lawsuit has been brought (lex fori processus; Article 15 EIR). The laws of both member states may not be applied cumulatively. Consequently, a pending lawsuit might be stayed due to the lex fori processus, although the
The court held that a flexible approach is necessary when foreign reorganisation proceedings have been opened and different rules apply on liquidation and reorganisation proceedings under the *lex fori processus*. Deciding on the effects of foreign insolvency proceedings on the pending lawsuit, the competent court shall examine the principles and fundamental features of the foreign reorganisation proceedings. It shall then apply those national rules which would determine the effects on the pending lawsuit if domestic insolvency proceedings had been opened which could, taking into account the results of the prior analysis, be considered the nearest equivalent to the foreign proceedings. The court continued that these principles must also apply when, as in the case at hand, provisional measures had been ordered prior to the opening of insolvency proceedings and such measures concerned assets that were the object in a pending lawsuit.

The court then examined the provisional measures ordered by the German court and concluded that they were aimed at the preservation of the debtor’s estate prior to the formal opening of insolvency proceedings. The same would hold true for provisional measures under Austrian insolvency law (Section 73(2) of the Austrian Bankruptcy Code) which according to Section 7 of the Austrian Bankruptcy Code does not lead to an automatic stay of lawsuits pending.

Nevertheless, the court argued that the stay of pending lawsuits, when insolvency proceedings are opened against a litigating party, shall provide the liquidator with a deliberation period during which he can decide on whether or not to continue the litigation. A teleological approach to both German and Austrian insolvency law required a stay of the pending lawsuit, because this proceeding concerned assets of which the debtor could no longer dispose and for which the provisional liquidator was responsible.

**Commentary**

According to Section 7 of the Austrian Bankruptcy Code lawsuits pending at the time of opening of insolvency proceedings, in which the debtor is either plaintiff or defendant and that concern the debtor’s estate, are suspended. The creditor can lodge his claim against the estate (Sections 102 seqq. Austrian Bankruptcy Code). If the claim is contested by the liquidator or another creditor the creditor can request continuation of the pending lawsuit in order to prove the claim (Section 7(3), Section 109 Austrian Bankruptcy Code).

This decision has been criticised by various scholars; see e.g. the remarks by Alexander Klauser and Gregor Maderbacher in “The European Insolvency Regulation in Recent Austrian Case Law”, available at http://www.iiiglobal.org/component/jdownloads/?task=view.download&cid=4057.
Parties: Unknown (8 Ob 131/04d)

Public source: www.ris.bka.gv.at/Jus

Key facts
In 2003 T filed a claim before Austrian courts (mainly) for payment of sold goods against P. On 1 March 2004 a German court opened main insolvency proceedings against P. and appointed Mr. Köhler as liquidator. Based on P’s request the Austrian court of first instance suspended the pending lawsuit on 12 March 2004.

T. lodged its claim in the German insolvency proceedings. The claim was contested. In order to prove his claim, T requested the Austrian court to continue the lawsuit. On 21 July 2004 the Austrian court rejected this petition. The appellate court overturned this decision and ordered the continuation of the lawsuit.

Key issue
Did Austrian or German law govern the effects of the opening of German insolvency proceedings on the lawsuit pending in Austria?

Summary of the decision
The court held that, according to Article 15 EIR, Austrian law – as lex fori processus – governed the effects of the German insolvency proceedings on a lawsuit pending in Austria (for example, whether or not the lawsuit is suspended, various procedural adoptions). The wording “an asset or a right of which the debtor has been divested” in Article 15 EIR means all assets that form part of the estate. The lawsuit in question must be pending at the time of opening of the insolvency proceedings and affect the estate; for instance it concerns a claim of or against the estate.

According to German law – the relevant lex fori concursus (Article 4[2][b] EIR) – T.’s claim formed part of the German estate. The court further pointed out that this would not be the case if the claim concerned, for example unseizable parts of wages or non-pecuniary matters. Consequently, P’s complaint was dismissed and the lawsuit had to be continued before Austrian courts.

Commentary
According to section 7 Austrian Bankruptcy Code, lawsuits pending at the time of opening of insolvency proceedings, in which the debtor is either plaintiff or defendant and it concerns the debtor’s estate, are automatically suspended. The creditor can lodge his claim against the estate (Sections 102 Austrian Bankruptcy Code). Where the claim is contested by the liquidator or another creditor, the creditor can request continuation of the pending lawsuit in order to prove the claim (Section 7 para. 3, Section 109 Austrian Bankruptcy Code).
Judgment
Court: First instance court - High Court of Ireland
Date: 27 Jul, 2005
Jurisdiction: Ireland
Original language: English
Official reference: In re Flightlease (Ireland) Ltd (In Voluntary Liquidation) [2005] IEHC 274

Parties: Flightlease (Ireland) Ltd (In Voluntary Liquidation)

Public source: www.courts.ie

Key facts
Flightlease (the company), a subsidiary of Swissair, was declared insolvent in proceedings opened in Ireland. Swissair entered into an agreement with the Société d’Exploitation OAM Air Liberté (Air Lib) pursuant to which Air Lib agreed to take on the activities of the company in return for payment from Swissair. Swissair discontinued its payments following the September 2001 terrorist attacks. In November 2001, Air Lib and its holding company issued debt collection proceedings in France against a number of companies, including the company. In 2003 Air Lib was placed into liquidation and its liquidators submitted a proof of claim to the liquidators of the company. Air Lib’s proof of claim was rejected, as was its request that the liquidation of the company be stayed. Air Lib sought to appeal the rejection of its claim to the Irish High Court and the company initiated proceedings seeking the court’s determination on certain issues arising from the provisions of the Insolvency Regulation.

Key issue
The court was asked to determine the following issues of interpretation arising from the Insolvency Regulation. Did Article 15 EIR require that the effect of the winding up of the company on certain proceedings instituted by Air Lib against the company in France be governed by the law of France?

Summary of the decision (relevant part)
The court noted that Article 15 EIR is a specific exception to the general provision of Article 4 EIR and should be interpreted as such. It provides that a lawsuit pending concerning an asset or a right of which the debtor has been divested shall be governed by the law of the member state in which that lawsuit is pending.

As the claim pending in France was for a money sum and did not relate to an asset or right of which the company had been divested, the court held that the exception in Article 15 EIR did not apply. Accordingly, the court found that Article 15 EIR did not require that the effect of the liquidation of the company on certain proceedings taken against it by Air Lib in France be governed by the laws of France.
Key facts
The claimant filed a lawsuit before the Greek courts against the defendant R.B.A. B.V., to recover a debt arising from an existing commercial agreement. Pending the lawsuit, the defendant was declared insolvent in the Netherlands.

Key issue
What was the effect of the insolvency proceedings opened against the defendant in the Netherlands, on the lawsuit pending in Greece? More particularly, the court had to decide whether Greek law was applicable, on the basis that in another member state insolvency proceedings had already been commenced.

Summary of the decision
The court held that in order to protect the claimant creditor, as well as the interests of justice, the pending proceedings in Greece must be excluded from the extension of the effects of the law of the member state opening the insolvency proceedings. Hence, the court decided that according to Article 4(2)(f) EIR and Article 15 EIR, Greek law as opposed to Dutch law, applied. It further concluded that, according to Greek law, the unsecured creditors, such as the claimant, are barred from enforcing their rights and remedies against the defendant. More specifically, once the debtor is declared insolvent, the commencement or the continuation of legal proceedings and the commencement or continuation of execution upon the debtor’s estate is precluded. As a consequence, and in order to satisfy its claim, the claimant could only seek recourse from the appointed liquidator R.S., and pursue the proceedings of lodging and verification of its claim before the liquidator in the Netherlands.
Judgment
Court: Appellate court - English Court of Appeal
Date: 09 Jul, 2009
Jurisdiction: England & Wales
Original language: English
Official reference: [2009] EWCA Civ 677

Parties: Syska and another -v- Vivendi Universal SA and others


Key facts
The claimant was contracted to sell to the defendants an interest in a Polish telecoms company. It was a clause of the contract that disputes would be submitted to arbitration in London. A dispute arose and the defendant commenced proceedings against the claimant. Subsequently, the claimant was declared bankrupt by a Polish court. Article 4(2)(e) EIR provides that the law of the state opening the proceedings governs the effects of the proceedings on current contracts and proceedings brought by creditors. Article 4(2)(f) further provides an exception for pending lawsuits in progress, where Article 15 states that the governing law of the lawsuit would be the law of the member state where the suit had been commenced and was in progress.

It was contended by the claimant’s administrators that the exception for pending lawsuits did not cover arbitral proceedings and, in any event, the arbitration agreement in accordance with Polish law had been brought to an end when insolvency proceedings were commenced.

The tribunal held that the arbitration proceedings fell under the pending lawsuits exception and therefore Article 4(2)(f) prevailed over Article 4(2)(e) with the validity of the arbitration agreement being determined pursuant to English law as required under Article 15.

The claimants appealed.

Key issues
The court was asked to decide the following questions in relation to the arbitration proceedings: (1) did the pending lawsuits exception apply to the arbitration agreement? and (2) was the validity of the arbitration agreement to be determined by English law or Polish law?

Summary of the decision
The court held that the tribunal was correct to decide that the continuation of the pending arbitration proceedings were to be determined by English law. The court noted that Article 4 and 15 were different and neither prevailed over the other. Article 4 provided that it must be the law of the state opening the insolvency proceedings that governed their conduct, whereas Article 15 provided that if litigation or arbitration had begun before insolvency occurred, it should be the law of the state of those proceedings which determine those proceedings. As the exception in Article 4(2)(f) includes pending references to arbitration, the arbitration proceedings in this case would therefore fall to be determined by English law pursuant to Article 15.
Judgment
Court: Highest appellate court - Hoge Raad
Date: 11 Dec, 2009
Jurisdiction: Netherlands
Original language: Dutch

Parties: Parc de Chôdes N.V. -v- Hollandsche Bank-Unie N.V.

Public source: LJN: BK0867 (http://zoeken.rechtspraak.nl)

Key facts
A Dutch Bank, HBU, brought civil proceedings in the Netherlands against a Belgian company, PdC, to obtain an order for payment of approximately €5 million. The court of appeal ordered PdC to pay HBU. PdC lodged an appeal against this judgment with the Supreme Court. Pending the appeal, PdC was declared bankrupt by the court of Antwerp in Belgium.

Key issue
Do proceedings in which a creditor seeks an order for payment of a monetary obligation fall within the scope of Article 15 EIR? The court was asked to decide what the effect was of the insolvency proceedings opened against the defendant in Belgium on the proceedings pending in the Netherlands.

Summary of the decision
The Supreme Court observed that the effects of insolvency proceedings on pending lawsuits are not governed by the law of the State of the opening of proceedings (Article 4(2)(f) EIR). It was however unclear whether proceedings in which a creditor seeks an order for payment of a monetary obligation could be characterised as proceedings “concerning an asset or a right of which the debtor has been divested” and, consequently, fall within the scope of Article 15 EIR. The court refrained from lodging a reference for a preliminary ruling on the interpretation of Article 15 EIR with the CJEU because even if Article 15 EIR would not apply to the present case, Dutch domestic rules of private international law would lead to the same result as the application of Article 15 EIR would.
Judgment
Court: First instance court - Rechtbank Arnhem
Date: 31 Mar, 2010
Jurisdiction: Netherlands
Original language: Dutch

Parties: X and Y -v- M.T. Immobilien GmbH

Public source: LJN: BM0057 (www.rechtspraak.nl)

Key facts
Civil proceedings had been brought in the Netherlands by X and Y against M.T. Immobilien GmbH. Pending these proceedings, insolvency proceedings were opened in respect of M.T. Immobilien GmbH in Germany.

Key issue
What law governs the effects of the insolvency proceedings opened in respect of M.T. Immobilien GmbH in Germany on the lawsuit pending in the Netherlands?

Summary of the decision
The court assumed that the insolvency proceedings opened in Germany must be recognised under Article 16(1) EIR. Pursuant to Article 4(1) EIR the effects of those insolvency proceedings were in principle governed by German insolvency law. With respect to pending lawsuits, however, Article 4(2)(f) EIR provides for an exception to the applicability of the lex concursus. Pursuant to Article 15 EIR the effects of insolvency proceedings on “a lawsuit pending concerning an asset or a right of which the debtor has been divested” shall be governed solely by the law of the Member State in which that lawsuit is pending. The court assumed that the lex fori processus also governed the effects of insolvency proceedings on pending lawsuits that did not fall within the ambit of Article 15 EIR. In this respect the court referred to the decision of the Dutch Supreme Court of 11 December 2009 (PdC v. HBU), LJN: BK0867. As a matter of Dutch law, the effects of insolvency proceedings on pending lawsuits differed depending on the type of insolvency proceeding (surseance van betaling or faillissement). For purposes of applying Dutch law as lex fori processus on the effect of the German insolvency proceedings on the lawsuit pending in the Netherlands, the court therefore requested that the plaintiffs provide further information on the status and nature of the insolvency proceedings opened in respect of M.T. Immobilien GmbH in Germany.
Parties: TI - WAY OG NITRA, s. r. o. -v- Hutní montáže, a. s.

Public source: www.nsoud.cz; Sbírka rozhodnutí a stanovisek Nejvyššího soudu České republiky, R 95/2011

Additional sources: CILFIT, 6 October 1982, case 283/81; Da Costa v Nederlandse Belastingadministratie, 27 March 1963, joined cases 28 to 30/62

**Key facts**
On 1 May 2004, the Czech Republic and the Slovak Republic became members of the European Union.

On 21 December 2004, TI - WAY OG NITRA, a Slovak company, filed a civil law suit for a monetary claim against Hutní montáže, a Czech company, before a Czech court. On 19 August, 2005, the Slovak company was declared bankrupt by an insolvency court in Bratislava, which decision was notified to the Czech court by the Slovak company’s liquidator on 25 November 2005. On 27 February 2006, the meeting of creditors of the Slovak company resolved to appoint a new liquidator who notified the Czech court on 27 April 2006 of his appointment and that he wished the proceedings before the Czech court to continue.

On 19 September 2007, the first instance Czech court ruled in favour of the Slovak company on the merits, noting that a declaration of bankruptcy in Slovakia has, in its view, no effect on law suits pending in the Czech Republic. The appellate Czech court agreed with the court of first instance on the merits. It did not deal with the effects of the Slovak bankruptcy order on the proceedings in the Czech Republic at all.

**Key issue**
What was the effect of a Slovak bankruptcy order issued in respect of the plaintiff on civil proceedings commenced by the plaintiff in the Czech Republic against a Czech defendant prior to the Slovak bankruptcy order?

**Summary of the decision**
On special appeal (dovolání), the Czech Supreme Court observed that both of the lower courts erred by ignoring the rules laid down in the Insolvency Regulation. The Supreme Court found Article 15 EIR to be clear and free from doubt, not requiring, on the facts of the case before it, a reference to the CJEU. Applying Article 15 EIR to the facts of the case, the Supreme Court held that under Article 15, pending [civil] proceedings must be stayed if, pursuant to the law of the member state in which such proceedings are pending (lex fori processus), the opening of insolvency proceedings under the Insolvency Regulation would result in such proceedings being stayed, irrespective of whether the law of the state whose court opened the insolvency proceedings (lex fori concursus) would have the same result. And vice versa, even if under lex fori consursus, pending [civil] proceedings were to be stayed in the state in which the
insolvency proceedings were opened, this would not mean that [civil] proceedings pending in another member state whose law (*lex fori processus*) did not provide for such effect in the event insolvency proceedings were opened in its territory would need to be stayed.

Accordingly, in the case at hand, the effects of the Slovak bankruptcy order on the proceedings pending before Czech courts were to be determined pursuant to the insolvency law of the Czech Republic, being the *lex fori processus*.

Upon further analysis, the Supreme Court did not find the need to quash the lower court decisions. As it happened, by notifying the Czech court that he wished the proceedings to continue, the Slovak liquidator fulfilled the terms under which pending proceedings, stayed - as they were pursuant to Czech insolvency law as it was in force at the relevant time - upon a bankruptcy order, could be resumed and continued.
Article 28 (APPLICABLE LAW)

Save as otherwise provided in this Regulation, the law applicable to secondary proceedings shall be that of the Member State within the territory of which the secondary proceedings are opened.

Article 28 expressly stipulates that, save as otherwise provided by the Regulation, the law of the State in which secondary proceedings are opened shall apply to these proceedings. In fact, this provision reformulates Article 4: the law applicable to the main proceedings is the law of the State where the main proceedings is opened. The law applicable to the secondary proceedings is the law of the State of the opening of the secondary proceedings: the *lex (forum) concursus*.  

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Key facts
The claimant, T.E.E – D. K., entered into a services agreement with N.KRC.E.U.U.G. dated 18 January 2002 for the provision of specialised personnel. On 14 June 2002 the defendant, BBP E.G. merged with N.KRC.E.U.U.G and thus, the former company assumed the rights and obligations of the latter under the service agreement. Although the claimant performed its contractual obligations, the defendant did not pay the amount due to the claimant. On 1 September 2002, the defendant was declared insolvent in Germany and Mr. H. S. was appointed as its liquidator.

Key issue
Could the court order the opening of secondary proceedings in Greece where the defendant had an establishment?

Summary of the decision (relevant part)
Pursuant to Article 27 EIR, the court ordered the opening of secondary insolvency proceedings in Greece, where the defendant had an establishment. It concluded that the defendant was carrying out a non-transitory economic activity on the basis that since 1995 the company had been performing the same work within Greece and had employed personnel and invested in goods. Pursuant to Article 28 EIR, the law applicable to secondary proceedings in this case, was Greek law. According to Greek law, the court determined 1 September 2002 as the date of cessation of payments and Mrs. Ch. K. (syndikos) was appointed as a liquidator. The court ordered the appointment of a rapporteur as well as the sealing of the debtor’s estate.
Judgment
Court: First instance court - Tribunal de Commerce de Charleroi
Date: 14 Sep, 2004
Jurisdiction: Belgium
Original language: French
Official reference: Tribunal de Commerce de Charleroi, 14 September 2004

Parties: SARL Bati France -v- Alongi et al.

Public source: Revue régionale de droit, 2004 at p. 358.

Key facts
A French company had been subject to insolvency proceedings in France. Secondary proceedings were opened in Belgium in respect of an establishment which was in Belgium. The liquidator appointed in Belgium sought to have certain detrimental acts set aside and filed proceedings to that effect against the directors of the insolvent company. The latter challenged the capacity of the liquidator to introduce such proceedings and requested that the liquidator appointed in the main proceedings be joined.

Key issue
The court was asked to decide whether the liquidator had capacity and authority to introduce such proceedings.

Summary of the decision
The court noted that the proceedings which had been opened in Belgium were secondary proceedings, whose scope was limited to the assets located in Belgium. The court added that the liquidator appointed in the framework of these proceedings could act independently, without requiring any assistance or intervention from the liquidator appointed in the main proceedings. Drawing on Art. 17 EIR, the court noted that when secondary proceedings are opened, such proceedings limit the effects of the main proceedings in the member state where secondary proceedings are opened. According to the court, the result is that the liquidator appointed in the main proceedings can no longer act in that capacity in the member state where secondary proceedings were opened. The court concluded that secondary proceedings operated relatively autonomously from the main proceedings: the liquidator appointed in the secondary proceedings could act without requiring the approval or assistance from the liquidator appointed in the main proceedings.

The court verified whether the request filed by the liquidator appointed in the secondary proceedings concerned assets falling within the secondary proceedings. Drawing on Art. 2(g) EIR, the court found that since the directors targeted by the liquidator's action were domiciled in Belgium and the companies which had contracted with the French company subject to insolvency, were established in Belgium, the request was within the confines of the secondary proceedings. Finally, the court decided that the liquidator's request should be governed by Belgian law in accordance with Article 28 EIR.
Parties: MC MODEMARKT GmbH under German insolvency proceedings

Public source: LJUS 99863626

Key facts
The insolvency practitioner of MC ModeMarkt GmbH which was subject to insolvency proceedings (Insolvenz) declared by the Court of Landau (Germany) on 15 October 2004 requested that secondary proceedings be opened in Luxembourg on 11 November 2004 with respect to the Luxembourg establishment of MC ModeMarkt GmbH.

Key issue
Type of insolvency proceedings that could be opened in case of secondary proceedings.

Summary of the decision
The Court applied Article 27 EIR for the automatic recognition of the insolvency proceedings opened for MC ModeMarkt in Germany and did not therefore verify whether the Luxembourg establishment was insolvent.

The court reminded itself that according to Article 28 EIR, the applicable law of the secondary proceedings is the law of the member state within the territory of which the secondary proceedings are opened. With this in mind and in accordance with Luxembourg law, the applicable proceeding in this case would be bankruptcy proceedings.

Commentary
It seems that the court did not review the existence of an establishment in the Grand-Duchy of Luxembourg as prescribed by Article 3 (2) EIR. In addition, the decision did not mention whether the debtor had employees in the Grand-Duchy of Luxembourg. Subsequent decisions from Luxembourg courts did however examine the existence of an “establishment” as the basis for international jurisdiction to open secondary proceedings (cf REPOR2008-03-21 T03 Luxembourg).
Parties: PROBOTEC LIMITED

Key facts
PROBOTEC LIMITED, a company governed by English law, with its registered office in Cardiff, was declared under “administration” by a decision of the High Court of Justice, Chancery Division, Birmingham District Registry. PROBOTEC LIMITED had a branch in the Grand-Duchy of Luxembourg. The court examined whether the main insolvency proceedings of PROBOTEC LIMITED opened in the UK would be recognised by the Luxembourg courts.

Key issues
The court reviewed the following: (1) recognition of insolvency proceedings opened in the UK, (2) opening of secondary proceedings in Luxembourg, and (3) applicable law to the secondary proceedings.

Summary of the decision (relevant part)
The court stated that Article 27 EIR provides that the main proceedings referred to in Article 3 (1) allow, on the basis of the principle of automatic recognition in all member states of main proceedings opened by a court of a member state having jurisdiction according to Article 3, a court in another member state to open secondary insolvency proceedings without having the debtor’s insolvency examined in that other state.

The court also mentioned that according to Article 28 EIR, the law applicable to secondary proceedings is the law of the member state within the territory of which the secondary proceedings are opened.

Commentary
It seems that the court did not review the existence of an establishment (within the meaning of Article 2(h) EIR) in the Grand-Duchy of Luxembourg as prescribed by Article 3 (2) EIR. In addition, the decision did not mention if the debtor had employees in the Grand-Duchy of Luxembourg. Subsequent decisions from Luxembourg courts examined the issue of establishment (cf REPOR2008-03-21 T03 Luxembourg).
Parties: Unknown (3.Fpk.11-05-070162/9.)

Additional sources: EUROFOOD IFSC Ltd [6 May 2006] (C-341/04)

Key facts
The German owners of a Hungarian textile company applied to the Amstgericht Hechingen to open main insolvency proceedings against the Hungarian company. They stated that the centre of main interests was in Germany. The German Court opened main insolvency proceedings on 31 March 2005 and appointed a main insolvency liquidator.

The main liquidator terminated employment contracts on the date main proceedings were opened in Germany and without taking into account the rules of Hungarian labour law. The employees filed an objection against the liquidator in the Hungarian court, which considered this as a petition for opening secondary proceedings and appointed the secondary liquidator to oversee the secondary proceedings.

Key issue
How should the Hungarian courts approach a situation involving an uncooperative main insolvency liquidator and the subsequent creditors filing for the opening of secondary proceedings?

Summary of the decision
The Court opened secondary proceedings to resolve the claims of the employees and to liquidate the company.

Essence (relevant part)
If a company carries on its business in the territory of the member state where its registered office is situated, to open main insolvency proceedings in another member state does not prohibit the court of the State of the registered office opening secondary proceedings.
Parties: Collins & Aikman Products GmbH

Key facts
Collins & Aikman Products GmbH (company) was an Austrian limited liability company with its registered office and production site in Austria. It was a member of a group of companies active in the car industry (the group).

In July 2005 the High Court in England opened main proceedings against several companies of the group, including the company, on the basis that their respective COMIs were in England. A short time later an Austrian district court approved the motion of a creditor of the company and opened secondary proceedings against the company.

The English joint liquidators of the group applied for a stay of the Austrian secondary proceeding as a whole, and in the alternative, for a stay of any liquidation of assets for a period of three months (Article 33 EIR). Furthermore, the English main liquidators asked the district court in Austria to order the Austrian secondary liquidator to enter into a co-operation agreement.

All motions were denied by the court of first instance; the applicants appealed.

Key issue
Does Article 33 EIR allow for the suspension of the secondary proceedings as a whole or merely the stay of the process of liquidating assets?

Summary of the decision (relevant part)
The Austrian appellate court held that, unless the Insolvency Regulation provided otherwise, secondary proceedings are governed by the law of the opening state of these proceedings. This includes procedural rules on the admissibility of appeal. Pursuant to applicable Austrian law, the decision not to order the secondary liquidator to enter into a co-operation agreement with the English main liquidators was not subject to review.

It follows from the provisions contained in the Insolvency Regulation that main proceedings are given a dominant role with respect to secondary proceedings. This, though, shall not be construed to constitute a strict hierarchy among the proceedings.
Parties: FNV Bondgenoten & others versus Kefaleou

Public source: LJN: BN9813 (http://zoeken.rechtspraak.nl)

Key facts
The court of Athens, Greece opened main insolvency proceedings in respect of Olympic Airlines. Appeal against that decision was not possible under Greek law. The Dutch establishment of Olympic Airlines had employees with contracts of employment governed by Dutch law. The Greek liquidator was of the opinion that, in order to be able to terminate those contracts of employment, the prior consent of a Dutch supervisory judge (rechter-commissaris) would be required, since Dutch insolvency law – which is applicable based on Article 10 EIR – requires such prior consent. The opening of secondary proceedings in the Netherlands would result in the appointment of a supervisory judge. For that reason (according to the Greek liquidator) the Dutch court was requested to open secondary insolvency proceedings in relation to Olympic Airlines in the Netherlands. The request was granted.

The Dutch Trade Union Confederation (FNV Bondgenoten) & others (employees of Olympic Airlines) objected to the opening of secondary proceedings in the Netherlands. The principle reason for their objection was that the opening of secondary proceedings would allow the liquidator to circumvent Dutch employment protection rules, since the rules of Dutch insolvency law in relation to termination of contracts of employment would become applicable. The Dutch Trade Union Confederation states (amongst other things) that (i) recognition of the Greek main proceedings, which disallows a test for insolvency when opening secondary proceedings under article 27 EIR, was manifestly contrary to the public order (Article 26 EIR) and (ii) the opening of secondary proceedings was unnecessary and contrary to the objectives of the Insolvency Regulation and constituted abuse of law.

Key issue
Which liquidator is authorised to terminate contracts of employment of employees in an establishment in a member state in which secondary proceedings have been opened?

Summary of the decision
The Dutch court held that in secondary proceedings in the Netherlands, the Dutch secondary liquidator should be deemed authorised to terminate the contracts of employment of the employees of the Dutch establishment, given the fact that Dutch insolvency law should be applied and the Dutch liquidator administers the property of the Dutch establishment.