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**Principles of European International Bankruptcy-law
(Council regulation (EC) No 1364/2000 of 29 May 2000 on
insolvency proceedings)**

Summary

This paper deals with the basis of the EU bankruptcy law. The explanations of the EU bankruptcy law are grounded on the Council Regulation (EC) No 1364/2000 of 29 May 2000 on Insolvency Proceedings. The author presents the main principles of the EU bankruptcy proceedings. These principles are: 1) the centre of main interest as competent for the main proceedings; 2) secondary proceedings as an exception; 3) application of law of the state where insolvency proceeding commenced; 4) universality of commencement the main proceeding across the member state.

Key Words: *Bankruptcy Law; Insolvency; EU; Procedure.*

Not only legal but also private persons more and more often own properties abroad. Industry in our times of a globalized world does not stay any longer in one country only, but migrates to those countries, where it is – for example due to legal regulations in tax-law – easier to build up industrial plants or to those countries, where production is possible at a much lower price. About 4.5 millions employees are nowadays working abroad for German companies.

Just two examples:

- Firms producing IT-technology do computer programming in India, where there are lots of IT-experts performing this job not only at a lower price but also at a high-level standard. The possibility of long-distance transmission of data does no longer require, that those experts are working in or near the mother-company.
- Most of the cars “made in Germany” are nowadays only partially produced in Germany. A large percentage (up to forty percent) of the necessary components are produced in other countries than Germany. Not only few companies have established subsidiary companies abroad, where those components can be produced at the high-level standard, well known as “Made in Germany”. All of this is no longer Utopia but an existing fact.

My experience as a judge in bankruptcy-proceedings is, that there are more and more proceedings where parts of the debtors property are to be found abroad. Especially in those cases, where it may - despite the insolvency - be possible to reorganize a firm, there must be found solutions for harmonizing legal procedures. The general problem can be defined as the fact, that economic entities in different countries can be harmonized much faster than legal procedures in those different countries. So there is an urgent need for finding legal solutions concerning cross-border proceedings.

On behalf of these facts the European Community has found a solution by ratifying the “European Union Regulation on Insolvency proceedings” (i.e. Council regulation N^o 1364/2000 from May, 29th 2000). The Regulation has come into force on 31st May 2002 in all countries of the European Community with the exception of Denmark.

Germany – as a member of the European Community – has not only ratified this regulation but also passed an amendment to the German bankruptcy-code concerning cross-border cases in general, i.e. with regard to other countries than those of the European Community. The stipulations found in this amendment to the German bankruptcy law derive to a high degree from the stipulations within the European Council Regulation.

What are the main principles of those regulations? Subsequently I will give an overview on some of the principles and regulations therein:

1. Centre of Main Interests (Article 3 para. 1) - Main Proceedings

The regulation shall apply to insolvency-proceedings, no matter if the debtor is a natural or a legal person, a trader or an individual.

The courts in the European Union are competent to institute insolvency proceedings with international relation if the debtor has a general place of venue in the European Union. The place of venue is the debtor’s residence with the exception that the centre of his self-employment business establishment is at a different place. The courts of the member state within the territory in which the centre of debtor’s main interests (COMI) is situated, shall have jurisdiction to open so-called main insolvency proceedings.

Hence, for example German courts may institute main insolvency proceedings against a debtor with a foreign residence provided that his business establishment or the practice in which he works freelance is situated in Germany.

In the case of a company or legal person, the place of the registered office shall be presumed to be the centre of main interests in the absence of proof to the contrary (Article 3 para. 1).

Intended to create single insolvency proceedings within the European Union with universal effect so-called main insolvency proceedings can only be commenced in the member state where the debtor's COMI is located. Main insolvency proceedings, once commenced, are to be automatically recognised across all the other member states. There can only be one main proceeding, the decision of a court opening main proceedings blocks any other court to open another main proceedings.

It is not yet settled, which moment is decisive for the local competence. Is it the moment, when the debtor declares bankrupt or is it the moment of the opening of the procedures? The council regulation does not say anything about that. There have already been conflicts between different courts within the European Community concerning this question of competence. Meanwhile the German High Court has made a presentation to the European High Court concerning this unsolved problem.

2. Secondary Proceedings (Territorial Proceedings)

Insolvency proceedings can also be opened in a member state where the debtor has only an establishment and not his COMI. Establishment is defined as any place of operations, where the debtor carries out a non-transitory economic activity with human means and goods (Article 2 lit. h). There must therefore be a "place of economic operations". The mere presence of assets is in itself insufficient.

Such insolvency proceedings will only apply in respect of the assets situated in that member state. Those proceedings are defined as secondary proceedings, if commenced in a member state after main proceedings have been commenced before in another member state (article 3 para. 2). Secondary proceedings must compulsory be winding-up (i.e. liquidation) proceedings.

If no main proceedings have been commenced, so-called territorial proceedings may be opened prior to the opening of main proceedings, if:

- a) the law of the member state where the debtor's COMI is situated preclude the opening of Main Proceedings,
- or
- b) opening of proceedings is requested by a creditor who has his domicile, habitual residence or registered office in the same member state where the debtor's establishment is situated, or where a creditor's claim arises from that establishment.

3. Applicable Law (Article 4)

The law generally applicable to insolvency proceedings, whether Main/ Secondary/ Territorial proceedings, is that of the member state where those insolvency proceedings are commenced (lex fori concursus).

Hence, a situation can arise where Main Insolvency Proceedings will be subject to the law of the member state where they have been commenced, whereas Secondary Proceedings relating to the same debtor are subject to the law of the member state where the Secondary/ Territorial Proceedings are commenced.

The laws applicable in respect of Main Proceedings do not automatically govern secondary Insolvency Proceedings.

The applicable law will apply to both substantive law, and procedural matters.

The law of the state of the opening of proceedings shall determine in particular:

- against which debtor proceedings will be possible;
- which assets form part of the estate and the treatment of those assets after the opening of the proceedings;
- the respective powers of the debtor and the administrator;
- the effects of insolvency proceedings on current contracts to which the debtor is party;
- the claims, which are to be lodged against the debtor's estate and the treatment of claims arising after the opening of proceedings;
- the rules governing the lodging, verification and admission of claims;
- 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;
- the conditions for and the effects of closure of insolvency proceedings, in particular by composition;
- creditors' rights after the closure of insolvency proceedings;
- who is to bear the costs and expenses incurred in the insolvency proceedings;
- the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to all the creditors.

In certain cases, rights over assets located in another member state are excluded from the scope and effect of Main Insolvency Proceedings. As an exception of the general regulation the relevant applicable national law, and not the law of the member state where the main insolvency proceedings have been commenced, will govern any such rights. Some categories of assets have been excluded. Just to mention some of those:

- Third parties' rights in rem including security rights - Article 5;
- Retention of title - Article 7;
- Contracts relating to immovable property - Article 8;
- Payment systems and financial markets - Article 9;
- Contracts of employment - Article 10;
- Effects on rights subject to registration - Article 11;
- Detrimental Acts - Article 13;
- Effects of insolvency proceedings on pending law suits/actions - Article 15.

4. Recognition of Insolvency Proceedings

Insolvency Proceedings, once commenced, are to be automatically recognised across all member states (Article 16). The law of the member state where insolvency Proceedings are commenced will govern the proceedings. The opening of the proceedings shall, with no further formalities, generally produce the same effects in any other member state (Article 17).

Apart from the exception of secondary proceedings the insolvency proceedings generally refer to any asset of the debtor, even to assets situated abroad (“principle of universality”). On the contrary, the effects of secondary proceedings are restricted to the assets of the debtor situated only in the country, where he has an establishment.

In order to achieve this effect the liquidator appointed by a court, which has jurisdiction pursuant to Article 3, may exercise all the powers conferred on him by law in any member state, as long as no secondary proceedings are opened in that other member state (Article 18 para. 1). As a consequence of this fact the insolvency administrator, for example, may remove the debtor’s assets from the territory of the foreign member state in which they are situated. As a matter of fact, he must have an evidence for his appointment, issued by the court that has jurisdiction. A translation into the official language of the member state may be required (Art. 19). The universality principle forces the insolvency administrator to take any effort legally admissible to take possession of and realize also the foreign assets or at least their value if they form part of the debtor’s property.

There is an important exception to the principle of universality, regulated in Article 26 (ordre public), which says: “Any member state may refuse to recognise insolvency proceedings opened in another member state or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State’s public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual”. But in general we can say that grounds for non-recognition are reduced to the minimum necessary.

According to the Council Regulation insolvency proceedings are – as said above - mutually recognized in all member states of the European Community with the exception of Denmark. The recognition comprises the order instituting the proceedings, attachments, procedural rights of the administrator and also safeguarding measures. Furthermore, any other court decision related to the implementation or termination of the proceedings such as on the discharge of residual debt or compositions shall take the same effect in all member states. As before, enforceable deeds require a respective declaration to be enforceable and must be executed under national law.

The administrator’s powers to achieve effects are restricted only if secondary proceedings have been instituted in the other member state. Both administrators have the obligation to cooperate. The administrator of the main insolvency proceedings has the right to initiate an insolvency plan and he can claim the suspension of realization in secondary insolvency proceedings. The ranking of main and secondary insolvency proceedings is also clearly demonstrated by Article 37 Council Regulation pursuant to which the administrator

of the main insolvency proceedings may petition that the particular proceedings instituted in another member state are converted into liquidation proceedings. The implementation of the universality principle also results in the obligation of the administrator of secondary insolvency proceedings to transfer a surplus amount which remained after all claims have been paid off to the administrator of the main insolvency proceedings.

Article 31 prescribes the duty of cooperation and communication of information. The liquidators both in the main and in the secondary proceedings “shall be duty bound to communicate information to each other”. They shall “immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings”. This is necessary because the creditors may lodge their claims not only in the main proceedings but also in any secondary proceedings.

5. Problem of Different Languages

As a matter of fact difficulties can arise in cross-border proceedings in consideration of the different languages spoken in Europe.

Article 40, for example, prescribes, that any known creditor shall immediately be informed by the court or the liquidator appointed especially how to lodge their claims. The necessary information for the creditors shall be provided in the official language of the state of the opening of proceedings. For that purpose an official form shall be used bearing the heading “Invitation to lodge a claim. Time limits to be observed” in all the official languages of the institutions of the European Union. Creditors may lodge their claims in the official language of the member state, where they have their habitual residence, domicile or registered office. The lodgement of claims must however at least bear the heading “Lodgement of claim” in the official language of the state of the opening of proceedings.

In addition to that creditors may be required to provide a translation into the official language of the state of the opening of proceedings (Article 42).

Summary:

1. According to European international bankruptcy law the jurisdiction of a court generally derives from the centre of main interests (COMI) of any debtor. The opening of so-called main insolvency proceedings in the state, where the COMI is situated, blocks any other jurisdiction of another court. Main proceedings apply to all the debtor’s assets irrespective of the place where they may be situated.

2. However there can be opened additional (secondary) proceedings in another country in case that the debtor has an establishment in that other country. Such proceedings will only apply in respect of the assets situated in that member state. In cases, when there are different bankruptcy proceedings, the different liquidators shall be duty bound to communicate and cooperate.

3. The applicable law generally is that of the member state, where insolvency proceedings are commenced (called: *lex fori concursus*). But there are exceptions to this principle, especially for third parties' rights in rem, contracts relating to immovable property and contracts of employment.

4. Insolvency proceedings are generally to be automatically recognized across all member states. Decisions and measures are generally executable too. Recognition and enforceability are excluded, when the effects of decisions are contrary to a state's public policy (*ordre public*).

- Retention of title - Article 7; (=Eigentumsvobehalt)
- Detrimental Acts - Article 13; (=benachteiligende Handlungen)

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**Начела европског међународног стечајног права
(Правило Савета ЕЗ бр. 1364/2000 од 29. маја 2000 г. о стечајном
поступку)**

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Каучне речи: стечајни поступак, стечај, ЕУ, поступак.