Introduction to German and European Insolvency law[1]

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Introduction

The information about insolvency of big enterprises as Enron and Worldcom in the Untied States and Bremer Vulkan, Philip Holzmann and actually Babcock Borsig and CargoLifter in Germany and an even discussed insolvency of States[2] (f.ex. Argentina) awake publics interest on insolvency law and proceedings. Regarding the actual developments of insolvency proceedings in Germany, an increasing tendency in the first half 2002 can be stated: 34.600 total insolvency proceedings - 42,9% more than in the first half 2001 with 24.210 total insolvency proceedings (and connected with the loss of 310.000 jobs)[3]. What are the reasons for this rate of insolvency in Germany? Of course there are many reasons and explanations more or less intensively discussed between politicians and economists – a difficult economical situation, problems in construction industry, with banks and trade – but for sure the latest modifications in German insolvency law influenced the statistics. The modified legal aspects of insolvency in Germany, as possible consumer insolvency proceedings since 1999, amendment of the discharge regulation (discharge after six instead seven years) and insolvency proceedings for self employed persons and individual proprietors since the end of 2001 have to be mentioned and respected while interpreting the above mentioned rate.

As rightly stated in the literature, "legislation on insolvency is a crossroads where all the elements of the legal system in question meet'"[4]. Insolvency laws usually provide for some limitation of rights of the debtor and his creditors in order to efficiently pursue their basic principles. Furthermore, it may even limit the rights of third parties. In the most general terms, one of the basic purposes of insolvency law is to provide a framework for dealing with the competing interests and claims within a given system of ranking. The manner in which the competing interests are balanced is not necessarily identical in all insolvency laws. It can be said that an insolvency statute is drafted in a manner which is, in a particular legal system, regarded as the most suitable to pursue effectively the underlying policy and the prevailing purpose of the insolvency law, be it the protection of the debtor or his creditors or the preservation of employment. Generally, and without reference to any particular legal system, it may be said that insolvency laws provide for the following:

- the legislative framework for the collection and distribution of the property of the debtor comprised in the estate, in an orderly manner which maximizes payment to the creditors, and
- the statutory scheme for compositions and arrangements with creditors or for a reorganization of the debtor in financial difficulties.

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1 Fassung eines Vortrags im Rahmen des Seminars: „Das Unternehmen in Europa - Die Zukunft der Harmonisierung deutsch-spanischer Unternehmensbeziehungen" vom 30.09.-11.10.2002 an der Universidad Pontifica de Comillas, Madrid. Die Fußnoten sind auf exemplarische Nachweise beschränkt.

2 Paulus, Rechtlich geordnetes Insolvenzverfahren für Staaten, ZRP 2002, 383.

3 NJW 2002, XV, XIV.

4 Didier, 'La Problématique du droit de la faillite internationale', RDAI (1989), 201 (203).

In pursuing the basic principles and aims, insolvency law generally contains the provisions of a substantive and procedural nature.

This report will be divided into two parts: **part one** dealing with the actual German insolvency system and **part two** with the European insolvency law both respecting the actual developments and jurisdictions. Concerning the German insolvency system I will present the basics of the German Insolvency Act, focusing on the insolvency opening procedure and then the opened insolvency proceeding. On the European level the European Council's Regulation no 1346/2000 on insolvency proceedings, its purpose, scope and contents should be discussed.

Part one: German insolvency system

In 1994, the German Bundestag (Federal Parliament) adopted the new Insolvency Statute[5] (Act) which entered into force on 1 January 1999, last amendment on 1 December 2001[6]. The Insolvency Statute replaced the previous Bankruptcy and Settlement Codes (Konkurs- und VergleichsO) as well as the Act on Collective Enforcement (GesamtvollstreckungsO) in the new Länder, creating a uniform insolvency statute for all of Germany.

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1 Objectives pursued by the new insolvency procedure

The reform of the law on insolvency serves not only to reharmonise the law as it stands within Germany in the area of insolvency, but especially implements the results of a long and intensive discussion which subjected the practicability of the two-tier law on bankruptcy and settlements to a critical examination. In contrast to previous insolvency law the object of the new Insolvency Statute is to provide a legal framework for the economically efficient management of insolvency combining traditional principles of German insolvency law with American ones: priority of the creditors interests and reorganising the debtor. In other words: satisfaction of the claims of creditors through total execution upon assets of the debtor[7]. The insolvency estate is to be enlarged so that a greater number of creditor claims may be satisfied. According to § 1 it is adapted towards settling creditors' claims in the best way possible. "Insolvency proceedings serve the purpose of the collective satisfaction of the creditors of a debtor by means of the realisation of the debtor's assets and the distribution of the proceeds, or by providing an alternative regulation by way of an insolvency plan, particularly with the intention of maintaining the enterprise." The insolvency proceedings of enterprises, called regularly insolvency proceedings, may lead either to the liquidation (by realising the debtor's assets and distributing the money on sale of the assets) or to the

5 BGBl. I 1994, 2866 et seqq.
6 Law modifying the Insolvency Statute and other laws from 26.10.2001, BGBl. I, 2710.
7 Gres/Fege, German Insolvency Act, 2002, 3,4.

reorganisation. If the debtor is a natural person, he/she may be discharged from his/her remaining obligations on the basis of a special consumer insolvency procedure; this kind of discharge from residual debt was previously unknown under German law.
The exclusive jurisdiction for insolvency proceedings shall be given to the local court in the district of which a regional court is located, § 2.
You will find several procedures regulated in the German Insolvency Statute (GIS):

- regularly insolvency proceedings: §§ 11-216
- insolvency plan §§ 217 ff.
- self-administration §§ 270 ff.
- discharge of residual debt: §§ 286 ff.
- consumer insolvency proceedings §§ 304 ff.
- special types of insolvency proceedings:
  inheritance estate insolvency proceedings §§ 325 ff, insolvency proceedings concerning the joint marital property or a jointly-administered joint marital property §§ 332 ff.

In the following, the basics of the regularly insolvency proceedings, the discharge and the consumer insolvency proceedings will be presented.

2 Course of the insolvency procedure in the case of insolvent enterprises – regularly insolvency proceedings

2.1 The opening of insolvency proceedings

Initiation

According to § 11 GIS insolvency proceedings can be opened wether the debtor is a natural person or a legal person. The GIS states now for the first time that insolvency proceedings could be opened even on Civil Code partnerships, § 11 sect. 2 no 1[8].

- The procedure is initiated at the request of the debtor or of a creditor if the debtor is insolvent, § 13 sect. 1 sent 1 GIS. There is a legal duty of procedure inititation especially for legal persons (§§ 42 sect. 2 BGB, joint-stock company §§ 92 sect. 2, 94, 268 sect. 2278 sect. 3, 283 no 14 Stock Corporation Act, company with limited liability §§ 64 sect. 1, 71 sect. 4 Act concerning Companies with Limited Liability) and mercantile partnerships (no legal persons) with no partner being personally liable (§§ 130a, 177a Commercial Code). If the debtor is a legal-entity, the legal duty has to be fulfilled by the management body, § 15.

Insolvency reasons

Then there must be a reason for the opening of insolvency proceedings, § 16 GIS. A general reason is the (permanent not temporary[9]) insolvency/illiquidity of the debtor or in the case of legal persons, over-indebtedness also constitutes grounds for initiation, §§ 17, 19 sect. 1 GIS. If the debtor himself applies, the procedure may already be initiated if there is only a risk

8 BGH NJW 2001, 1056; OLG Köln, NZI 2001, 308. The rule should not determine the legal status of this kind of partnership.
9 Smid, Grundzüge des Insolvenzrechts, 2002, 71.

of insolvency, § 18 GIS. This reason would be accepted only in this constellation so to avoid any pressure measures/arguments of the creditors prior the insolvency proceedings. Furthermore if the debtor is a natural person and initiates the proceedings, he could benefit of the possibilities of discharge, §§ 286 ff.

Provisional and protective measures

This phase is called provisional insolvency proceeding ("Vorläufiges Insolvenzverfahren") and most provisions of the Insolvency Statute do not apply during this provisional proceeding.

Following the insolvency request, the insolvency court may

- (1) appoint a provisional insolvency liquidator, § 21 sect. 2 no 1;
- (2) issue an order prohibiting the creditors from pursuing execution or enforcement actions and /or prohibit the debtor to transfer property rights or require the provisional insolvency liquidators permission for that until the decision on the insolvency proceedings has been made, §§ 21 sect. 2 no 2, 22 sect. 1.

(1) provisional insolvency liquidator

An insolvency liquidator is generally appointed when the proceedings are initiated getting the power of disposal. The court may, however, also leave the power of disposal with the debtor, who is then placed under the supervision of a creditors' trustee. The provisional insolvency liquidator shall preserve and protect the property of he debtor, carry on the business for the time being unless the insolvency court has decided and determine if the debtors assets are sufficient to cover the costs of the general insolvency proceedings.

(2) pohibition of pursuing execution or enforcement actions for the creditors

(3) prohibition to transfer property rights or only with permission

Both preservation measures concerning the assets are very important to guarantee the effectiveness of the insolvency proceedings and to protect the creditors interest[10]. The debtor's powers are suspended and transferred to the liquidator, but remaining under the positive duty to provide information.

Decision about the insolvency initiation, §§ 26, 27

At the end of its investigations, the court decides if insolvency proceedings will be opened or the request of the debtor or creditor would be rejected if, in all likelihood, the debtor's property will be insufficient to cover the costs of the proceedings.

2.2 Opened insolvency proceedings

With the decision of the court the insolvency proceedings are opened and an insolvency liquidator has to be nominated, § 27 sect. 1 GIS.

[10] Smid, Grundzüge des Insolvenzrechts, 2002, 83.

Claims in insolvency

?? According to § 28, the court order commencing the insolvency procedure, when served on creditors or publicised, will include a notice to creditors requiring them to submit their claims to the liquidator within a period of between two weeks and three months from the date of order. Creditors have to inform the liquidator if they claim to have security over the enterprise's chattels or movable assets. The subject, nature, and basis of the security, and the claims secured should also be indicated. Creditors must register their claims with the liquidator in writing, stating the basis and value of the claim, § 174. Copies of documents supporting or evidencing the claim must be attached to the claim. In an examination hearing, the registered claims will be examined to determine value and priority, § 176. Then the insolvency court will prepare a schedule of registered claims showing which claims have been admitted and setting out the amount and priority of each claim.

Powers of the insolvency liquidator

A reputable and experienced liquidator has to care about the administration and realisation of assets, § 80 sect. 1 GIS. Immediately he should become owner of all assets of the insolvency estate, § 148 sect. 1. The debtor is deprived of the right to manage and to dispose of the estate. He lacks the right to undertake legal actions concerning the property forming part of the assets. Also, the debtor loses the right to sue and to be sued (locus standi) in the legal proceedings concerning the estate.

The liquidator has to elaborate a register with all assets, § 29 sect. 1 no 1 and another register with all creditors, § 152. Both registers would be the basis of a report prepared by the liquidator and at the latest three months after the opening of insolvency proceedings the creditors' meeting decides because of this report whether the enterprise is to be liquidated – this means conclusion or termination of all legal relations (contracts, employments) - or continued for the purpose of reorganisation.

Furthermore the insolvency liquidator has the right to demand the set-off of legal actions, realised prior the opening of insolvency poceedings and being not favourable for the insolvency creditors, §§ 129 ff. The set-off powers of the insolvency liquidator have been extremely enlarged by the GIS vis-à-vis the former law.

If the liquidator neglects or violates his powers, he would be responsible for caused damages, § 60.

Insolvency estate

The insolvency proceedings encompass all the debtor's assets at the time the proceedings are opened and any additional assets acquired during the course of the proceedings.

Insolvency creditors

According to § 38 the insolvency estate shall serve the satisfaction of the individual creditors who have a legally justified financial claim against the debtor at the time of opening the insolvency proceedings (legal definition of insolvency creditors).

The GIS foresses different types of creditors:

- A creditor, whose rights don't belong to the insolvency assets/creditor with right to separation, § 47.

Anyone who's entitled to claim by reason of a right in rem or in personam that an asset does not belong to the insolvency estate, shall not be considered as an insolvency creditor. F.i. the seller's right based on a reservation of title. (This means the transfer of ownership of a sold product is put under the condition of full payment not only of the respective purchase price but also of all outstanding debts between the parties. In Germany, these security-interests do not require notarial form and can be provided in sales conditions.)

- A creditor, whose rights belong to the insolvency assets but which are assigned for security reasons and realised by the insolvency liquidator, §§ 49 ff.

Those creditors shall be entitled to preferential satisfaction under the provisions of the German Act Governing Auctions and Sequestrations of Immovables. The insolvency liquidator takes the cost of determining the securities, the realisation costs and the turnover tax from the proceeds of the realisation.

- A creditor, whose rights are not secured/ creditor of the insolvency estate, § 53

The insolvency estate shall be used to settle in advance the costs of the insolvency proceedings and the further insolvency estate liability. The claims of those creditors were created subsequently or by the opening of the insolvency proccedings. An intensively discussed problem in literature and jurisdiction[11] is the character of debts resulting of activities of an provisional insolvency liquidator without the power to administrate or realise, so called insolvency liquidator with consenting reservation, if they are insolvency estate liabilities.

It is the intention of the GIS to ensure the equal treatment of all creditors and fair and equitable distribution (the previously law made it possible for certain privileged creditors to disadvantage the claims of general creditors through the exercise of preferred rights).

Insolvency Plan

The satisfaction of creditors with a right to preferential satisfaction and of the insolvency creditors, the realisation of the insolvency estate and their distribution to the parties as well as the liability of the debtor extending beyond the discontinuation of insolvency proceedings may be settled by way of an insolvency plan at variance with the provisions of the GIS. Therefore the insolvency plan is an exception of the German Insolvency Statute, § 217. This new legal tool is available for the reorganisation of the debtor. According to § 218 sect. 1 it can be submitted either by the debtor or by the insolvency liquidator; the creditors vote on the plan in groups. It is then up to the court to decide whether or not to confirm the plan.
It will contain provisions for a partial waiver of claims or for deferred payment. The plan must describe the poposed measures for reorganising the debtor and how the plan effects the rights of the creditors. The plan must separate creditors into classes, distinguishing between secured and unsecured creditors and list the various classes of subordinated creditors, § 222.

11 OLG Köln, NZI 2001, 545; LG Essen NZI 2001, 217; LG Wuppertal, ZIP 2001, 1778; Förster, ZinsO 2001, 790; Spliedt, ZIP 2001, 1941; Bork ZIP 2001, 1521.

2.3 Conclusion

Liquidation and reorganisation are formally concluded by an order of the insolvency court, §§ 200, 268. As soon as the final distribution has been made, the insolvency court will make an order terminating the insolvency proceedings. As far as reorganisation cases are concerned, the insolvency court orders the termination of the insolvency proceedings as soon as the insolvency plan has been unconditionally approved. If the performance of the plan is to be supervised, an order to that effect will be made together with the order terminating the insolvency proceedings. The insolvency court will then order the end of supervision if all the claims covered by the plan have been satisfied, or three years have elapsed since the termination of the insolvency proceedings and no petition to commence the insolvency proceedings has been filed, § 268.

3 Discharge of residual debt, §§ 286 ff.

Because of the increasing number of insolvent private households the German legislator introduced the legal instrument of discharge. In our days there are multiple possibilities to get a credit, EC-cash and payment with credit cards facilitate shopping and intensify enticements for the consumer. Consumer's behaviour, the extensive demand for more consuming objects causes many consumer insolvency proceedings with effects for the employment and health of the individual. Chronical diseases appear, the criminality rate increases and in the worst case the debtor has to ask for social aid. So since many years there is an intensive discussion in Germany, if economical overcharge may lead to the nullity of a credit contract, according to § 138 Civil Law. The German Federal Court decided that a severe imbalance between debt and individual solvency could cause the nullity of contracts[12]. The GIS' rules of discharge were a reaction on this development pursuing two aims: on the one hand the protection of the individual and on the other hand his economical reintegration. According to § 286, natural persons shall be discharged of such obligations to the insolvency creditors which were not fulfilled during the insolvency proceedings This means, an insolvency proceeding has to be opened before a discharge would be possible, §§ 286 ff, at least §§ 208 ff.

In principle the debtor is responsible for his activities and his estate because of his self determined decisions. The instrument of discharge "disturbs" this mechanism of private autonomy introducing the principle: "debts without liability". Following § 301 sect. 1, the discharge has to be respected by all insolvency creditors, even those who did not register their claims. But the debtor cannot be discharged of debts resulting of torts or fines, § 302.

The discharge is the most discussed rule of the GIS, whereas the principle as such is widely consented but problems arise upon the concrete contents and interpretation of the discharge. Besides, it is obvious that there will be no discharge if the insolvency proceedings are not opened.

12 BGH NJW 1997, 3372 (3373).

The legal discharge is structured by two parts: starting with the request of the debtor, §§ 287 sect. 1 sent. 1, 305 sect. 1 and ending with the decision of the court – announcing or refusing a discharge. With the court's announcement of discharge, the debtor gets the admission to the real discharge or main proceeding, characterised by the so called trustee time over six years. The final decision about discharge will be taken afterwards.
The discharge could be refused for several reasons, § 290 sect. 1 or disclaimed, § 303, if the debtor violates one of his legal duties leading to a severe infringement of the creditor's interests.

4 Consumer insolvency proceedings, §§ 304 ff.

Under the new Insolvency Statute, for a natural person, neither pursuing nor having pursued any independent business activity, the general provisions shall apply to the proceedings, unless otherwise provided in the special rules. If a debtor has pursued an independent business activity consumer insolvency proceedings can be opened if his property circumstances are clear (less than 20 creditors at the time of the request) and if there are no claims against him resulting from employment relationships, § 304.
There are intensive discussions concerning the question whether regularly or consumer insolvency proceedings should be opened if the debts result of former commercial activities but the debtor has already given up this activities months or years ago, before the request for opening the insolvency proceedings[13]. According to a basic court decision, such constellation demands for the opening of consumer insolvency proceedings[14].
There are several reasons for the introduction of the new procedure – the consumer insolvency proceedings – different to other procedures: the strict relation of discharge and insolvency proceedings, a debtor without any "professional" support in a very complicated procedure and the increasing number of the expected proceedings in the next years leading to an overcharged justice.
The consumer insolvency proceedings, introduced by a request of the debtor[15], consists of three phases: The debtor must initially seek an out-of-court settlement with the creditors. If this attempt to reach an agreement is unsuccessful, the court insolvency proceedings follow. In a first step, the court attempts once more to arrive at an agreement between the creditors and the debtors on the basis of a debt reorganisation plan submitted by the debtor. Here, it may also substitute the approval of individual creditors under certain preconditions if the content of the plan is suitable. If no debt reorganisation plan is prepared, a simplified insolvency procedure is carried out. If the debtor then settles with his creditors to the best of his ability for another six years, he will be discharged from his remaining obligations. This structure should reveal to the participants of the proceedings that it will be in their favour to

13 See Pape, Aktuelle Entwicklungen im Verbraucherinsolvenzverfahren, ZVI 2002, 225 (228); OLG Schleswig, ZinsO 2000, 155; OLG Celle, NZI 2000, 229.
14 OLG Celle, NZI 2000, 229.
15 Now, there is a legal duty to use the official form for consumer insolcency procedure and discharge, introduced by regulation of 17 February 2002, BGBl. I, 703 ff.

find a consent in a first or second step and to profit of an individual and flexible solution[16].

An insolvent individual retains the right to exercise effectively his personal rights and obligations and to undertake legal actions with respect to the property not included in the estate.

But despite this innovation in the GIS and the strictly separation of consumer and regularly/enterprise insolvency proceedings, the consumer's subsistence level will not be guaranteed by the new Statute[17]. If the criteria for a consumer insolvency proceedings are not fulfilled, a regularly insolvency proceeding has to take place.

Result

Significant innovations were introduced by the new statute. The proceedings headed by the State are compatible with the requirements of the political order.

Despite the introduction of the GIS and the amendment of 2001, the great reformation process in insolvency law is still going on and has not ended[18]. A dynamic development of the insolvency law will be expected for the next years[19].

16 Kothe/Ahrens/Grote, Restschuldbefreiung und Verbraucherinsolvenz, 1999, Vorbemerkung zu §§ 304 ff., Rz. 1, 2.
17 Kothe/Ahrens/Grote (1999), Vorbemerkung zu §§ 304 ff., Rz. 5.
18 Pape, Entwicklung des Regelinsolvenzverfahrens im Jahre 2001, NJW 2002, 1165.
19 Pape, Entwicklung des Regelinsolvenzverfahrens im Jahre 2001, NJW 2002, 1165.

Part two: European Insolvency Law

1 Introduction

The activities of enterprises have more and more European or international effects. Assets of an insolvent enterprise could be spread in several countries and the insolvency proceedings have to be administered in the best way. But although in case of the insolvency of a private person or in case of insolvency of the estate, the assets outside Germany have to be appropriated among all creditors. Till the end of May 2002 cross-border insolvency procedures were handled in Europe without any existing regulation of the European Community[20]. The 31 May 2002 the European Councils Regulation no 1346/2000 on insolvency proceedings of 29 may 2000, came into force in all European Community Member States (except Denmark)[21]. It is an international convention, binding and directly applicable in the Member States, recital 8[22]. This Regulation is the result of a lot of consultations and discussions over many years, creating finally a new credit instrument[23]. The content corresponds largely to the planned "Europäisches Übereinkommen über Insolvenzverfahren" from 23.11.1995[24], not entered into force for general political reasons.

2 Purpose of the Regulation

The proper functioning of the internal market requires that cross-border insolvency proceedings should operate efficiently, recital 2, measures to be taken regarding an insolvent debtor's assets should be co-ordinated, recital 3, and the transfer of assets or judicial proceedings from one Member State to another seeking to obtain a more favourable legal position has to be avoided (forum-shopping – recital 4). Therefore the Regulation offers rules solving the collision between the different legal systems and the competency conflicts between the courts. Cross-border insolvency procedures become for all participants calculable so that already negotiations before the opening of an insolvency procedure would be facilitated.
The basic principle is the universal scope of insolvency proceedings, because the Regulation enables the main insolvency proceedings to be opened in the Member State where the debtor has the centre of his main interests aiming at compassing all the debtor's assets. Besides, territorial proceedings could be opened running in parallel with the main proceedings so to protect the diversity of interests. But where insolvency proceedings have

20 Wimmer, Die EU-Verordnung zur Regelung grenzüberschreitender Insolvenzverfahren, NJW 2002, 2427.
21 There was an initiative of the Federal Republic of Germany and the Republic of Finland. OJ L 160, 30.6.2000, 1.
22 Nevertheless the national law has to be adapted. See the discussion paper about a draft law concerning the reorganisation of the international insolvency law from 18.03.2002: www.bmj.de.
23 Wimmer, Die EU-Verordnung zur Regelung grenzüberschreitender Insolvenzverfahren, NJW 2002, 2427; Huber, Die Europäische Insolvenzverordnung, EuZW 2002, 490.
24 Published in ZIP 1996, 976.

already been opened, any proceedings opened subsequently shall be secondary proceedings, Art. 3 sect. 3.

3 Scope

3.1 Objective scope

According to Art. 1 sect. 1 the regulation shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator. It shall not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings, Art. 1 sect. 2. For both exceptions special European regulations have been elaborated in 2001[25].

3.2 Subjective scope

Art. 3 sect. 1 (and recital 15) establishes the international jurisdiction[26] designating the Member State the court of which may open insolvency proceedings, if the centre of the debtor's main interests is located in the Community, recital 14[27]. The debtor can be a natural or a legal person, a trader or an individual, recital 9. Furthermore there must be a cross-border insolvency[28], recital 2 and 3, otherwise the Regulation is not applicable. The centre of main interests should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties. According to Art. 3 sect. 1 sent. 2 in the case of an enterprise or a legal person the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary. Without expressive statement, the main interests of a natural person will be determined by his/her habitual residence[29]. The opening of insolvency proceedings has to be recognised in the other Member States whitout any possibility to control or revise this decision (to scrutinise the court's decision, recital 22 in the end). In case of a positive competency conflict a solution should be find basing on the principle of **mutual trust**, recital 22.

25 Directive 2001/17/EEC of 19 March 2001 on the reorganisation and winding-up of insurance undertakings (OJ L 110, 29) and the Directive 2001/24/EEC of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ L 125, 15).

26 International insolvency law is partly governed by Article 102 of the Introductory Act to the Insolvency Statute (Einführungsgesetz zur Insolvenzordnung) corresponding to the European Regulation on insolvency proceedings. In spite of the recognition of foreign proceedings, special insolvency proceedings may be initiated in Germany relating to the debtor's domestic assets, Art. 102 sect. 3 phr. 1.

27 Territorial jurisdiction must be established by the national law of the Member State concerned, recital 15.

28 No restrictive interpretation of this notion, it is already cross-bording if rights in rem of third parties on assets in another Member State exist.

29 But there are discussions about this determination, see Leipold in Stoll (ed.), Vorschläge und Gutachten zur Umsetzung des EU-Übereinkommens über Insolvenzverfahren ins deutsche Recht, 1997, 190.

3.3 Applicability in time

According to Art. 43 the provisions of this Regulation shall apply only to insolvency proceedings opened after its entry into force, after the 31 May 2002, whereas the time of the opening of proceedings means the time at which the judgement opening proceedings becomes effective, wether it is a final judgement or not, Art. 2 f.

4 Automatic recognition of decisions of the opening court

The Regulation provides the immediate recognition of judgements concerning the opening, conduct and closure of insolvency proceedings, Art. 16. The principle of automatic recognition has been established for these decisions of the opening court by this European Regulation meaning that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States. Beside this main proceedings the Regulation foresees that territorial proceedings could be opened. According to recital 11, the regulation acknowledges the fact that as a result of widely differing substantive laws it is not practicable to introduce insolvency proceedings with universal scope in the entire Community. Especially on security interests or preferential rights of some creditors (Vorrechte einiger Gläubiger) the existing laws are widely differing. Therefore the Regulation takes account of this in two differrent ways:

- provision for special rules on applicable law concerning particularly significant rights and legal relationships f.i. rights in rem and contracts of employment (Sonderanknüpfungen für besonders bedeutsame Rechte und Rechtsverhältnisse z.b. dingliche Rechte und Arbeitsverträge) and
- possibility of national insolvency proceedings covering only the assets situated in the state of opening beside main insolvency proceedings with unicersal scope.

This will be the content of Art. 17. According to Art. 17 sect. 2 any restriction of the creditors rights, in particular a stay or discharge shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

According to Art. 26 any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgement 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.

5 International jurisdiction

The Regulation focus on the international jurisdiction of the courts (meaning all judicial body or any other competent body of a Member State empowered to open insolvency proceedings or to take decisions in the course of such proceedings, Art. 2 d) without determining which

court has the jurisdiction at a place, insofar the rules of the German Insolvency Statute would be applicable.
To protect the diversity of interests, the Regulation permits the opening of territorial insolvency proceedings, running in parallel with the main proceedings. But it has to be asked for the international jurisdiction concerning preservation measures prior and after the openings of the insolvency proceedings to guarantee the effectiveness of the insolvency proceedings. According to the already mentioned Art. 3 sect. 1 the courts of the Member State within the territory of which the centre of a debtor's main interests is situated have the international jurisdiction for the main insolvency proceedings. This court should be enabled to order provisional and protective measures from the time of the request to open proceedings, recital 16 – even covering assets situated in the territory of other Member States.

The German courts have an international competency if the debtor's main interests are situated in another Member State and if he posseses an establishment within the territory of Germany, Art. 3 sect. 2 sent. 1. Inside this procedure, restricted to the assets of the debtor situated in this territory, two different proceedings could be opened:
The secondary proceedings are territorial proceedings, opened **subsequently** to the main proceedings. The main proceedings will be restricted by these secondary proceedings regarding the assets situated in the Member State where the secondary proceedings take place. The opening of territorial insolvency proceedings **prior** to the opening of main insolvency proceedings (Partikularverfahren) will be possible only under the strict preconditions of Art. 3 sect. 4.

Main and territorial insolvency proceedings can only contribute to the effective realisation of the total assets if all the concurrent proceedings pending are coordinated, recital 20: coordination of the various liquidators and exchanging information. But the liquidator of a main proceeding has the dominant role and he should have several possibilities to intervene in secondary proceedings pending at the same time. For instance he should be able to propose a restructuring plan or composition or apply for realisation of the assets in the secondary proceedings to be suspended (content of the secondary proceedings Art. 27- 38).

6 Contents

6.1 Powers of the liquidator

The most important consequence of the automatic recognition concerns the powers of the liquidator. According to Art. 18 sect. 1 he may exercise all the powers conferred on him by law of the State of the opening of proceedings in the other Member States. The law of this State determines his administrative and transactive powers. He may claim through the courts or out of court in any other Member State that moveable property was removed from the territory of the State of the opening of proceedings to the territory of another Member State and he may also bring any action to set aside which is in the interests of the creditors, Art. 18 sect. 2. He even may request the opening of secondary insolvency proceedings, recital 18. But especially regarding the procedures for the realisation of assets, the liquidator shall

comply with the law of the Member State within the territory of which he intends to take action, Art. 18 sect. 3 sent. 1. In any case he has to respect the general principle that coercive measures or the right to rule on legal proceedings or disputes are not allowed, Art. 18 sect. 3 sent. 2 (if necessary he has to contact the authorities of the concerned Member State).
The powers of the liquidator could be restricted in other Member States by the opening of secondary insolvency proceedings or by order of provisional and protective measures.

6.2 Applicable Law

If the main proceedings are opened in a Member State, the applicable law to insolvency proccedings and their effects shall be that of the Member State within the territory of which such proceedings are opened beside exceptions inside this regulation – **lex concursus**, Art. 4 sect. 1. The so determined law is applicable for the conditions for the opening of those proceedings, their conduct and their closure, Art. 4 sect. 2[30].
The Regulation contains uniform rules on conflict of laws replacing national rules of private international law.

Exeptions of the applicable law of the State of the opening of proceedings

The Regulation made provisions for a number of exceptions (Art. 5 - 15) to the general rule to protect legitimate expectations and the certainty of transactions in Member States other than in which proceedings are opened, recital 24.

?? **Set-off, Art. 6**

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 solvent debtor's claim. 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, recital 26.

?? **Effects on rights subject to registration, Art. 11**

The registration rules are very different in the individual Member States. But registrations are neccesary to protect legal relations and legal security. Therefore 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, Art. 11 and according to Art. 14 the validity of debtor's disposition concerning the already mentioned "objects" 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.

30 See BGH decision on discharge of 18 September 2001, NJW 2002, 960.

?? **Protection of employees, Art. 10**

In order to protect employees and jobs Art. 10 states that the effects of insolvency proceedings on employment contracts and relationships shall be governed only by the law of the Member State applicable to the contract of employment in accordance with the general rules on conflict of law (in Germany: Art. 30 sect. 2 EGBGB the law of the State where the employee works in general). Any other inslovency–law questions, such as wether 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, recital 28.

?? **Rights in rem, Art 5**

There is a particular need for a special reference diverging from the law of the opening State in the case of rights in rem. The basis, validity and extent of such a right in rem should therefore normally be determined according to the lex situs, recital 25. So Art. 5 sect. 1, being in principal no conflict law, states that certain rights in rem of creditors or third parties on assets belonging to the debtor and situated within the territory of another Member State at the time of the opening of the proceedings shall not be affected by the opening of insolvency proceedings. With this rule concerning the rights in rem, the regulation gives up the principle of universal scope of insolvency proccedings for all assets of the debtor[31]. Because of the protection of the legal relations, the importance of the main insolvency proceedings will be reduced[32].

6.3 Provision of information for creditors and lodgement of their claims

Creditors may lodge their claims in writing in the main proceedings and in any secondary proceedings, Art. 32. Known creditors, resident in the Community are individually informed of the opening of proceedings using a multilingual form, Art. 18. The creditor sends copies of supporting documents for his claim. He may be required to provide a translation of the lodgement of claim.

7 Result

The presentation showed that the introduction of insolvency proceedings with universal scope in the entire Community has not been realised by the Regulation. But this could not be the purpose of the Regulation because of the widely differing substantive laws in the Member States. To solve problems related to insolvency, the Regulation offers a lot of rules. Actually, four month after the entry into force, we have to wait the further developments in literature and jurisdiction, so to judge on the effectiveness of this Regulation.

31 Wimmer, Die EU-Verordnung zur Regelung grenzüberschreitender Insolvenzverfahren, NJW 2002, 2427 (2430).

32 This is not a cogent effect, because the Directive 2001/17/EEC of 19 March 2001 on the reorganisation and winding-up of insurance undertakings (OJ L 110, 29) and the Directive 2001/24/EEC of 4 April 2001 on the reorganisation and winding up of credit institutions (OJ L 125, 15) state very consequently the principle of uniformity of proceedings and the opening of secondary proceedings is prohibited.

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