The EU Insolvency Regulation
general outline and main features

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Road map

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Introduction

• European insolvency framework

• The Insolvency Regulation is binding in its entirety and directly applicable in all Member States (except Denmark) without the need (or possibility) for ratification or implementation by domestic legislation.

• The Insolvency Regulation does not harmonise substantive or procedural insolvency law in Europe. It is a private international law instrument that contains uniform rules on (i) jurisdiction, (ii) applicable law, and (iii) recognition.

• Regulation 1346/2000 (from 31 May 2002)  
• Regulation 2015/848 (from 26 June 2017)
Scope

• Territorial scope:

  – The Insolvency Regulation applies only to insolvency proceedings where the centre of the debtor’s main interests (COMI) is located in the EU.

  – If a debtor’s COMI is located outside the EU, the Insolvency Regulation does not apply and courts are free to apply their own domestic private international law rules.

  – If a non-EU corporate debtor’s COMI is located in the EU, the Regulation applies!
    • E.g. BRAC Rent-A-Car International Inc
Scope

• The Insolvency Regulation applies to public collective proceedings based on laws relating to insolvency: art 1(1).
  – former Insolvency Regulation was restricted to proceedings in which a debtor is totally or partially divested of its assets and an insolvency practitioner is appointed, i.e. proceedings within Art 1(1)(a).
  – The scope of the Insolvency Regulation has been extended to include hybrid and pre-insolvency proceedings
  – NOT the UK scheme of arrangements (Recital 16)

• Annex A

• Certain entities are excluded: art. 1(2)
Modified universalism

- Main proceedings with universal effect
  - COMI (art. 3)
  - Automatic recognition in other Member States (art. 19 and 20)
  - Insolvency proceedings and their effects are governed by the law of the Member State where the proceedings have been opened (art. 7, with exceptions in art. 8-18)
  - Insolvency practitioner can exercise his powers in other Member States (art. 21)
  - Publicity (art. 24-30)

- Secondary proceedings with territorially limited effect in Member States where the debtor has an establishment
  - Establishment (art. 3 (2), 2 (10))
  - Effects restricted to assets situated in that Member State (art. 3(2), 34)
  - Limits the ’universal’ effect of main proceedings

- Rules to localise assets: art. 2(9)
- Cooperation and Communication (art. 41 et seq.)
COMI

• Art. 3 (1)
  – For incorporated debtors: presumption that COMI is at registered office
  – How to rebut the presumption?
    • CJEU re Eurofood (case C-341/04)
    • CJEU re Interedil (case C-396/09)

• Recitals 28 and 30

• Group COMI?
  – Recital 53

• COMI to be determined on the basis of the facts at the time of the request to open proceedings
  – CJEU re Staubitz-Schreiber (case C-1/04)
COMIgration

- Forum shopping not looked at favourably
  - Recital 4

- Practice: COMI-shifts
  - Change of registered office
  - Change of "centre of management and supervision"

- Regulation seeks to provide safeguards against fraudulent or abusive forum shopping
  - Recitals 29, 31, 32
  - Art. 3(1), 5
The reach of the courts of the Member States

- The courts of the Member State where proceedings have been opened have jurisdiction for any action which derives directly from the insolvency proceedings and is closely linked with them
  - E.g. CJEU re Seagon/Deko Marty, case C-339/07
  - Art. 6(1)

- Judgements are automatically recognised and can be enforced in other Member States (art. 32)

- Jurisdiction extends to defendants outside of the EU
  - E.g. CJEU re Schmid/Hertel, case C-328/12

- If an action is determined to be within the scope of the Insolvency Regulation, the conflict of laws rules of the Regulation apply
  - CJEU re Kornhaas/Dithmar, case C-594/14: German directors’ liability rules apply to a UK company
Secondary proceedings

- Objectives (recital 40)
  - Protection of local interests (e.g. priority rights)
  - Efficient administration of the estate

- Risks
  - E.g. CJEU re Bank Handlowy, case C-116/11

Novelties in the EIR (recast)

- Secondary proceedings no longer necessarily liquidation proceedings
- “Synthetic” secondary proceedings: art. 36
- Postponement of the opening of secondary proceedings in view of negotiations on a rescue plan (art. 38)
Groups of companies

New Chapter V (Insolvency Proceedings of Members of a group of Companies)

- Obligations of cooperation and communication (art. 56-60)
- Group coordination proceedings (art. 61-77)
Amsterdam: the new London?

Museums, canals - not to mention trading infrastructure

Rent: €340 (sq m/year)
Tax on annual salary of €1m: 512,816
Culture: 🎈iktig
Financial buzz: €€
Verdict: Good financial infrastructure and only an hour's flight for the City of London