

The European Insolvency Regulation: Law and Practice

By Miguel Virgós & Francisco Garcimartín

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Preface

From its inception, the objective of this work has been to provide an impartial explanation and integral interpretation of the Regulation on Insolvency Proceedings (EC 1346/2000), including its most significant legal aspects and characteristics.

Hence our approach to the Regulation from a “neutral” viewpoint, a necessary prerequisite to provide a uniform commentary that distances (yet does not detach) itself from the different legal systems of the Member States. This explains why many valuable works that centre on the impact of the Insolvency Regulation on a given national system have not been expressly cited as references although, naturally, they have been taken into account.

Central to this approach has been the interpretation of Community law as a legal system. Thus, we have studied the Insolvency Regulation not as an isolated piece of legislation, but as part of Community law, viewed in relation with other rules, such as the Directives on the restructuring and winding-up of credit institutions or insurance undertakings. As a result, arguments flow from one rule to another, as elements of a coherent system.

Key to the understanding and interpretation of the Insolvency Regulation has been the Virgós/Schmit report on the 1995 Brussels Convention on Insolvency Proceedings, a treaty whose implementation was initially frustrated by Community policies (it was one of the many victims of the so-called “mad cows” crisis), but which was later set in motion, once it had been transcribed as Community Regulation, by these same policies. The weight of the genetic argument in the book is easily justified, at least in the first stages of application of the Insolvency Regulation by the courts, as that report provides valuable information on the teleology of its rules.

With a view to mitigating the somewhat abstract nature of the Regulations’ rules, we have tried to relate them to the different stages of insolvency proceedings, thereby providing an answer to the most recurrent problems posed by trans-border insolvencies.

Designed to be accessible for judges and practitioners alike, the commentary has not been ordered sequentially, article by article, but rather thematically, to accommodate the Regulation to a judge’s or practitioner’s view of an insolvency proceeding and its different phases.

Works on the interpretation and application of the Regulation on Insolvency Proceedings in different Member States must rely heavily on information from private sources. With a view to improving the information provided here in any subsequent editions of the work, should these be printed, we would be very pleased

to receive comments and papers on the subjects covered by this work and, in particular, on the national application of the Regulation. Materials can be sent to M. Virgós, Facultad de Derecho, Universidad Autónoma, Cantoblanco, 28049 Madrid, Spain.

We are grateful to a number of people who have facilitated in various ways the preparation and publications of this edition, in particular to Prof. Bob Wessels. The present members of the Department of International Law at the UAM and UCLM were most supportive and tolerant of the time which had to be devoted to the preparation of this work. At home, our debt to our wives and children for their patience can only be expressed by the token of dedicating this book to them. Finally, we would like to thank the reader for having chosen this book and can only hope to meet his expectations.

Miguel Virgós Soriano

Francisco Garcimartín Alférez

About the Authors

Miguel Virgós is professor at the School of Law of the Universidad Autónoma de Madrid, member of the Spanish Law Commission and Of-Counsel at Uría & Menéndez, Madrid. He is coauthor of the Virgós/Schmit Report on the 1995 Convention on insolvency proceedings from which the Insolvency Regulation stems and has participated in the drafting of the new Spanish Insolvency Law. *Francisco Garcimartín* is professor at the School of Law of the Universidad de Castilla-La Mancha and Spanish delegate for the negotiation and drafting of the Convention on the Law Applicable to Certain Rights in respect of Securities held with an Intermediary, drawn up by the Hague Conference on private international law. Both authors have ample experience providing legal advice in regard to international business transactions and litigation.

Any comment on this book will be welcome at either <miguel.virgos@uam.es> or <francisco.garcimartin@uclm.es>

Abbreviations

A.B.L.J.	American Bankruptcy Law Journal
A.E.D.I.P.	Anuario Español de Derecho Internacional Privado
BOE	Boletín Oficial del Estado
CML Rev.	Common Market Law Review
Dir.Fall.	Diritto Fallimentare
EC	European Community
ECB	European Central Bank
ECJ	European Court of Justice
E.L.F.	European Legal Forum
EuZW	Europäische Zeitschrift für Wirtschaftsrecht
Int. Insolv. Rev.	Internacional Insolvency Review
IPRax	Praxis des Internationalen Privat-und Verfahrensrecht
JIBFL	Journal of International Banking and Finance Law
KTS	Zeitschrift für Insolvenzrecht
L.Q.R.	Law Quarterly Review
Mich.L.Rev.	Michigan Law Review
NJW	Neue Juristische Wochenschrift
O.J.E.C.	Official Journal of the European Community
R.C.D.I.P.	Revue Critique de Droit International Privé
R.D.M.	Revista de Derecho Mercantil
R.E.D.I.	Revista Española de Derecho Internacional
Riv.Dir.Internat.Pr. e Proc.	Revista di Diritto Internazionale Privato e Processuale
Riv.Dir.Proc.	Rivista di Diritto Processuale
Riv.trim.dr.pr. e proc.	Rivista trimestrale di diritto privato e processuale
Uniform L.Rev.	Uniform Law Review
Yale L.J.	Yale Law Journal
ZfVR	Zeitschrift für Rechtsvergleichung
ZIP	Zeitschrift für Wirtschaftsrecht
ZZP	Zeitschrift für Zivilprozeßrecht

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Part I

General Issues

The European Community Regulation on Insolvency Proceedings: The Rule and its Context

1. LEGAL BASIS

1. Cross-border insolvency has been the object of considerable attention during the past years. This attention goes hand in hand with the fact that companies have become increasingly international in both their physical presence and market activities. This process has taken place at a faster pace within the European Community. For this reason, the need to coordinate national insolvency proceedings is also more acute at the European level. Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings¹ (hereafter, the *Insolvency Regulation*) aims precisely at establishing a common framework for cross-border insolvency among the Member States. Its general goal is to promote the proper functioning of the internal market, by enabling insolvency proceedings to operate efficiently and effectively throughout the Community.

The Insolvency Regulation was adopted by the European Council under Articles 61c and 67(1) in relation with Article 65 of the European Community Treaty, as amended by the Treaty of Amsterdam² with effect from 1 May 1999. These articles form part of a new Title IV of the EC Treaty, which is concerned with the progressive establishment of an area of “*freedom, security and justice*”. This Title provides the purposive framework within which the Insolvency Regulation has to be interpreted and prescribes the role that the European Court of Justice plays in the interpretation of this Regulation.³

NB. The powers conferred on the European Community by this Title in the area of judicial cooperation in civil matters with cross-border implications have already given rise to other Community legal instruments in the sector of Private International Law.⁴ From the point of view of judicial cooperation, the Insolvency Regulation “supplements” Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgements in Civil and Commercial Matters, which does not cover insolvency proceedings. This is an

¹ Council Regulation (EC) No. 1346/2000 of 29 May 2000, Official Journal of the European Communities (hereafter, *OJ*) L 160, 30.06.2000, p. 1; as from 1 February 2003 this Journal is known as the Official Journal of the European Union.

² Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and related Acts, *OJ* C 340, 10 November 1997. See further amendments by the Treaty of Nice, *OJ* C 80, 10 March 2001.

³ FLETCHER in MOSS/FLETCHER/ISAACS, pp. 16–17.

⁴ See, with further references, KHOLER, *passim*; BORRAS, *passim*; BASEDOW, *passim*.

important factor for the interpretation of some of the Insolvency Regulation solutions, as we will explain later on.

2. The Insolvency Regulation has, according to Article 249 II of the European Community Treaty, “*general application*”, is “*binding in its entirety*” and is “*directly applicable*” in all Member States. Thus, the Insolvency Regulation takes effect automatically and simultaneously in the legal order of all Member States. It establishes a set of *uniform rules* for all Member States, without these needing to be transposed into the national legislation.

Pursuant to Article 69 of the EC Treaty, the position of the *United Kingdom* and *Ireland*, on the one hand, and *Denmark*, on the other, with regard to the new *Title IV* of the EC Treaty is subject to special rules.⁵ Without wishing to go into too much detail, it is sufficient for our purposes to state that the United Kingdom and Ireland expressed their wish to participate in the adoption by the Council of the Insolvency Regulation (see Recital 32) and are therefore bound by it. Denmark, on the other hand, has not participated in the adoption of the Regulation; consequently, unless it revises its position, the Insolvency Regulation is not applicable to this country (Recital 33).⁶ For the time being, then, and for the purposes of the Insolvency Regulation, Denmark must be considered by the other Member States as if it were a non-Member State.

Article 299 of the EC Treaty governs other aspects of the territorial scope of application of the Insolvency Regulation, such as the status of European territories subject to special arrangements (e.g. the Channel Islands and the Isle of Mann, to which the Regulation does not apply⁷), European territories for whose external relations a Member State is responsible (e.g. Gibraltar, to which the Regulation applies⁸) and non-European territories.

2. INTERPRETATION

3. As a result of this legal basis, the *Court of Justice of the European Communities* (hereafter, the *ECJ*) has jurisdiction to give preliminary rulings concerning the validity or interpretation of the Insolvency Regulation; specifically, to resolve any questions

⁵ See Article 3 of the Protocol on the Position of the United Kingdom and Ireland, and Articles 1 and 2 of the Protocol on the Position of Denmark, annexed to the EC Treaty.

⁶ See *Re: Arena Corporation Limited*, 12 December 2003, [2003] EWHC 2032 (Ch.); in this case an Isle of Man company had its centre of main interest in Denmark and the proceedings were not subjected to the regulation. On the possible solutions presented by the “Danish problem”, Heß, pp. 28, 30; LEIBL/STAUDINGER (2000), p. 537 (suggesting the possibility of a parallel agreement based on Article 293 of the EC Treaty or a bilateral convention between the EU and Denmark).

⁷ ISAACS/BRENT, in MOSS/FLETCHER/ISAACS, p. 16.

⁸ However, the procedure set forth in the Agreement between the United Kingdom and Spain of 19 April 2000 (Council document 7998/00) has to be taken into account. Decisions of the Gibraltar courts will need to be certified by the United Kingdom/Gibraltar Liaison Unit for EU Affairs of the Foreign and Commonwealth Office based in London. See the United Kingdom statement on Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Official Journal C 013, 2001). On the part of Spain, see the *Resolución* of 20 February 2001 (BOE 8 March 2001). The same arrangement is applicable in the case of the Insolvency Regulation.