



European and International Insolvency Law

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Schedule

- A. EIR – Recapitulation
- B. Conflict of Laws in the EIR
 - I. the *lex (fori) concursus*, Art. 7 EIR, as applicable law
 - II. the exceptions, Art. 8-18 EIR, in an overview
 - III. selected exceptions & qualification issues
 - 1. scope of the estate (*cross-border commuter cases*)
 - 2. insolvency vs. company law (*obligation to file, directors' and shareholders' liability, shareholder loans, share transfer*)
 - 3. third-party rights *in rem*, Art. 8 EIR / reservation of title, Art. 10 EIR
 - 4. avoidance and similar rules, Art. 16 EIR
 - 5. contracts of employment, Art. 13 EIR

EIR

lex (fori) concursus, Art. 7 EIR

- principle: Art. 7 I EIR: applicable law = *lex fori concursus*
 - „to insolvency proceedings and their effects“
 - also for secondary proceedings, Art. 35 EIR
- specifications in Art. 7 II EIR
 - sentence 1: „the conditions for the opening of those proceedings, their conduct and their closure“
 - sentence 2: list of examples for issues governed by the *l.f.c.*, e.g.:
 - subjects / capacity (a)
 - scope of the estate (b)
 - powers of participants, set-off, avoidance (c, d, m)
 - effects on contracts, debt enforcement actions (e, f)
 - claims, lodging/verification, ranking and distribution (g-i)
 - closure and creditors’ rights, costs and their distribution (j-l)

EIR

exceptions from *l.f.c.*

Overview:

- Art. 8, 10: rights *in rem*/reservation of title → **unaffected**
- Art. 9: rights to set-off → **unaffected**
- Art. 11: contracts reg. immoveables → *lex rei sitae* governs
- Art. 12: payment systems etc. → *lex causae*
- Art. 13: employment contracts → *lex causae*
- Art. 14: registered rights → law of the register
- Art. 15: European patents etc. only in main proceedings
- Art. 16: avoidance etc. → *lex causae* if proven advantageous
- Art. 17: third party purchaser → *lex rei sitae*/law of register
- Art. 18: pending lawsuits → *lex fori processus*

- in addition: *lex societatis*, *lex loci delicti* etc.

EIR

selected exceptions & qualification issues

example 1: scope of the estate (§ 36 InsO → ZPO?)

- case: insolvent German employee works in Austria; are the German or the Austrian rules on the attachment of wages (and the exempted amounts) applicable to determine the scope of the estate?
- Art. 7 II 2 lit. b EIR states that the (German) *l.f.c.* governs the scope of the estate; according to § 36 InsO objects exempt from execution usually are not part of the estate, mentioning in particular the German rules on the attachment of wages (§§ 850 seq. ZPO); the wages, however, would „normally“ (outside insolvency proceedings) have to be attached in Austria according to Austrian law
- LG Traunstein, NZI 2009, 818, LG Chemnitz, 3 T 494/09: German law
- AG Passau, NZI 2009, 820: Austrian law (cf. Art. 21 III EIR)
- open: BGH, IX ZB 31/10

EIR

selected exceptions & qualification issues

example 2: obligation to file (§ 15a InsO)

- *l.f.c.*: connection to petition and position of debtor, protection of creditors, Art. 7 II 1 EIR: conditions for opening
- *lex societatis*: does not immediately concern the proceeding, connection to limited liability, freedom of establishment
- ECJ (C-594/14 [Kornhaas]): *l.f.c.* applies

example 3: directors' liability (§ 64 GmbHG)

- *l.f.c.*: connection to obligation to file; usually liability towards company with the aim to protect estate and creditors (cf. § 92 InsO)
 - KG, ZIP 2009, 2156
- *lex societatis* / *lex loci delicti*: no universal rule; connection to limited liability; in part direct liability; can be asserted outside of proceedings; *wrongful trading* as equivalent is even less insolvency-related
- ECJ (C-594/14 [Kornhaas] / C-295/13 [H.]): *l.f.c.* applies (see, however, ECJ C-147/12 [ÖFAB]: *lex loci delicti*)

EIR

Art. 8 EIR – third party rights *in rem*

- reason: protection of legitimate expectations, cf. rec. 68
- the „opening of insolvency proceedings **shall not affect**“ third party right *in rem* in another MS
 - material / conflict rule?
 - also if established in the MS opening the proceeding?
 - what does „shall not affect“ mean?
 - immune to insolvency, cannot be realised (or only in a secondary proceeding or through redemption), not subject to a plan
 - realisation only in a way conserving the right
 - realisation only according to *lex rei sitae* (insolvency or enforcement regimes? or only by creditor?)
 - realisation according to *l.f.c.*, but creditor must not be worse off than in case of realisation under *lex rei sitae*
- avoidance remains possible
- similar: reservation of title, Art. 10 EIR, if purchaser insolvent

EIR

Art. 16 EIR – avoidance of detrimental acts

- starting point: *l.f.c.* according to Art. 7 II 2 lit. m EIR
- but the other party can prove that act cannot be challenged by any means under the different *lex causae*
 - ECJ C-310/14 [Nike]
 - ECJ C-557/13 [Lutz]; OLG Stuttgart, ZIP 2012, 2162; BGH IX ZR 265/12
- possible misuse through choice of law?

EIR

Art. 13 EIR – contracts of employment

- „effects of insolvency proceedings on employment contracts and relationships“ → *lex causae / lex (loci) laboris*
- does, e.g., not affect ranking, Art. 7 II 2 lit. i EIR