

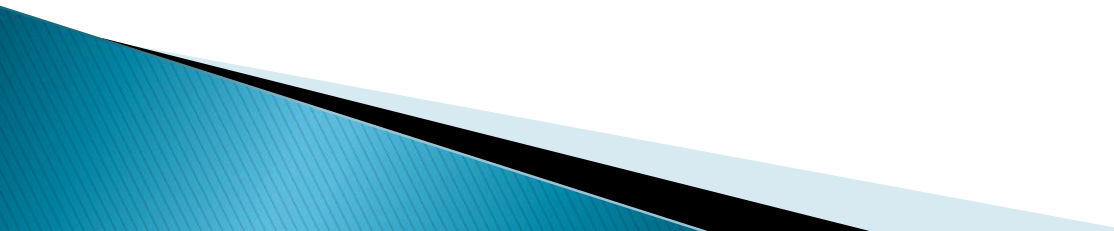
# European Insolvency Regulation

## 12. Effects on other proceedings against or by the debtor. Creditor rights

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# Insolvency vs. other proceedings – basics

- ▶ Proceedings brought by other parties (creditors) against the debtor
  - ▶ Proceedings brought by the debtor against another party (the debtor's debtor)
  - ▶ Lawsuits pending
  - ▶ Enforcement proceedings
  - ▶ Other proceedings (i.e. administrative proceedings, arbitration, non-contentious proceedings)
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# Insolvency vs. other proceedings – basics

- ▶ Basic rule (common to most insolvency laws) – the collective character of insolvency proceedings and the divestment of the debtor are reflected in the effects of insolvency on other proceedings →

The opening of insolvency proceedings has usually the following effects:

- **automatic stay** of individual proceedings against the debtor: termination or suspension of proceedings already started, ban to start new proceedings
- proceedings by the debtor against another party are usually suspended and later continued by the liquidator or the administrator

# Other proceedings under the EIR

- ▶ Conflict of laws – *lex fori concursus* (law of the State of the opening of insolvency proceedings) or *lex fori processus* (law of the State where the proceedings in question are pending)
- ▶ **Rule**: *lex fori concursus* applies to proceedings brought by individual creditors (Art. 7(2)(f) EIR)
- ▶ **Exceptions**:
  - *lex fori processus* (law of the state in which the lawsuit is pending) applies to lawsuits pending at the time of the opening of insolvency proceedings, concerning an asset or the right of which the debtor has been divested (Art. 18 EIR)
  - law of the state in which the arbitral tribunal has its seat applies to pending arbitral proceedings (Art. 18 EIR)

# Scope of „lawsuits pending” under Art. 18

- ▶ Enforcement proceedings are NOT included → *lex fori concursus* always applies to effects of insolvency on enforcement proceedings
- ▶ Court proceedings pending in civil or commercial matters are included, both with the debtor being claimant and defendant
- ▶ Pending arbitration proceedings – included, as they functionally correspond to pending lawsuits (expressly confirmed in Art. 18 of the recast EIR)
- ▶ Pending administrative proceedings, pending non-contentious proceedings – included IF functionally corresponding to pending lawsuits (controversial)

# Effects on pending proceedings – a case

According to the contract between E (a Polish company) and V, all contentious matters under the contract were submitted to an arbitration court in London. Arbitration proceedings were started by V against E. Subsequently, bankruptcy proceedings were opened in Poland against E.

According to Polish bankruptcy law at the time, arbitration clauses were rendered invalid in case of bankruptcy of a party and pending arbitration proceedings were discontinued. English law allows for continuation of pending arbitration proceedings despite bankruptcy of a party.

Can the arbitration proceedings continue?



# Creditor rights under the EIR

- ▶ Rule: law of the State of the opening applies to creditors' rights (Art. 7 EIR)
- ▶ Modifications (extensions of the creditors' rights) brought by Art. 53–55 EIR
- ▶ Right of any EU creditor to lodge claims, including tax and social security authorities (Art. 53) → see also Art. 45 (lodgement of claims between main and secondary proceedings)

However, no automatic priority for tax or social security authorities even if enjoyed by their domestic law (cf. Art. 342(1)(2) BL in Poland) → ranking of claims according to *lex fori concursus* → possible motivation for tax authorities to request the opening of secondary proceedings

# Creditor rights under the EIR

- ▶ Duty to inform known foreign creditors about the opening of proceedings, by individual notice (Art. 54 EIR) → a certain preference for foreign creditors over domestic ones (who are usually not individually informed)
- ▶ „foreign creditor” defined in Art. 2(12) EIR
- ▶ More details on the content of the information required by Art. 54(2) EIR → standard notice form established by Commission Implementing Regulation (EU) 2017/1105 of 12 June 2017 and published on the European e-Justice Portal at <https://e-justice.europa.eu/447/EN/insolvencybankruptcy>



# Language of the information for foreign creditors

- ▶ Art. 54(3) EIR: notice on a standard notice form with a heading in all official languages of the EU.
- ▶ For the content: language of the state of the opening of proceedings shall be used, or in another language which that state has indicated that it can accept, if it can be assumed that this language is easier to understand (→ a way to use English in cross-border lodgements?)

# Lodgement of claims by foreign creditors

- ▶ Provisions on the lodgement [submission, filing] of a claim:
  - content (Art. 55(1)–(4) EIR)

A provision of substantive law, specifying maximal requirements for lodging a claim.

- overrides more onerous provisions of national law (see e.g. Art. 240 of the Polish BL)
- in some cases foreign creditors are put in better position than domestic ones

**Standard claims form** introduced under Art. 55(1) and (2) EIR  
→ by Commission Implementing Regulation (EU) 2017/1105 of 12 June 2017 and published on the European e-Justice Portal at <https://e-justice.europa.eu/447/EN/insolvencybankruptcy>

Lodgement deadline specified by the *lex fori concursus* (Art. 55(6) EIR: for foreign creditors it should be no less than 30 days from the publication of the opening of proceedings in the insolvency register, cf. Art. 51(1)(4) of the Polish BL)

# Lodgement of claims by foreign creditors

Languages of the lodgement of a claim (Art. 55(5) EIR)

Right to lodge a claim in any official language of the institutions of the Union, in particular the creditor's own language. A translation may be required but a lodgement of a claim in the creditor's language is effective (and sufficient to meet the deadline). An additional accepted language can be indicated by Member States (used both for lodgements of claims and informing foreign creditors under Art. 54(3) EIR).

- ▶ Unclear consequences of failure to provide a required translation:
  - rigorous approach: the court may refuse to proceed with the claim if the translation is not provided;
  - less rigorous approach: the liquidator has the translation made at the creditor's expense

# Lodgement of claims – technicalities

- ▶ Means of communication used for lodgement of claims: any means accepted by the law of the State of opening of proceedings (Art. 53 EIR) → electronic lodgement possible in some Member States
  - ▶ No mandatory representation by a lawyer or other legal professional can be required for the sole purpose of lodgement of claims (Art. 53 EIR)
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