An Introduction to European Insolvency Law

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INTRODUCTION

This book is not a comprehensive treatise on the various instruments of European insolvency law. It is intended instead as a 'one-night read' for people who already have some knowledge of insolvency law and wish to get a broad understanding of the European infrastructure. The discussion of the European Insolvency Regulation and three EU Directives is not exhaustive. Readers seeking more in-depth information should therefore consult the various excellent commentaries that are available. However, this book may perhaps help them on their way.

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TABLE OF CONTENTS

CHAPTER 1
NOTIONS OF EUROPEAN LAW

1. As it stands today, insolvency law within the European Union consists primarily of the national law of its member states. However, the European Union itself has also developed several instruments relating to insolvency law, of which the most important to date is the European Insolvency Regulation (EIR).[1] This deals with jurisdiction, applicable law and cross-border recognition and assistance within the European Union. Other relevant instruments are the Brussels I Regulation[2] on the recognition and enforcement of ordinary judgments which do not fall within the scope of the EIR, and the directives on employee pay guarantees,[3] employees' rights in the event of transfers of undertakings[4] and preventive restructuring frameworks.[5] Separate regimes apply to banks and insurance companies. This book will not discuss these separate regimes.

2. Over time, provisions of EU law have not only changed but also often been shuffled around or assumed a different appearance. For example, provisions originally contained in a treaty were later included in a regulation. In this book, I will generally refer to the present versions of statutory provisions, even if they had a different number or belonged to a different instrument at the time of the court decision I am discussing. My aim is to avoid burdening the reader with technical information about the history of the legislation and instead to provide information that can be used in interpreting today's legislation. Where necessary, of course, the changes will be explained.

The European Union

3. In the literature, there are different views on how the European Union should be perceived: as a federal or nascent federal state, as an inter-

1 Regulation (EU) No 2015/848.
2 Regulation (EU) No 1215/2012, often referred to as the Recast Brussels I Regulation, which is the successor to Council Regulation (EC) 44/2001.
3 Directive 2008/94/EC
4 Directive 2001/23/EC.
5 Directive (EU) 2019/1023.

national organisation or as a *sui generis* creature. What view authors take may depend not only on their political predilections but also on how they interpret what is a complex organisation and its subtle process of development. Although I will refrain from taking any position in this debate, I think it would be useful to mention some of the European Union's relevant characteristics.

4. The European Union has a very substantial impact on its people and on economic activity within its borders. It generates vast amounts of legislation in areas such as corporate law, antitrust law, banking law, consumer law, environmental law, tax (particularly VAT) and immigration. Over time, its areas of involvement have broadened as the treaties on which its powers were based have been revised. The EU started as an initiative to integrate the economies of its six founding states: Italy, France, West Germany, the Netherlands, Belgium and Luxembourg. There were three founding treaties: the Treaty establishing the European Coal and Steel Community (ECSC) of 1951, the Treaty establishing the European Atomic Energy Community (Euratom) of 1957 and, most importantly, the Treaty establishing the European Economic Community (EEC) of 1957. Amendments to the EEC Treaty were subsequently made by a series of treaties, for example the Treaties of Maastricht, Amsterdam, Nice, and Lisbon. The original focus of the EEC Treaty was primarily on the internal market (free movement of goods, services and persons and freedom of establishment). The legislative process involving the European Commission, the Council (consisting of ministers of the member states) and the European Parliament concerned such areas. As the Union developed, other areas of common interest were decided upon by the Council. At that time, voting on such topics required unanimity, not a qualified majority. Later, however, particularly in 1999,[6] many of these topics were brought within the scope of the ordinary European legislative process, which does function with qualified majority decisions. The ordinary legislative process covers many areas, including civil justice. The EIR and the Brussels I Regulation belong to that area. Since the Lisbon Treaty of 2009 abolished the use of the terms European Economic Community and European Community, the only terms in use have been European Union or simply Union.[7] Areas such as common foreign and security policy and police and judicial cooperation in criminal matters were integrated more closely into the framework. The change of name symbolised the evolving nature of the

6 Treaty of Amsterdam of 2 October 1997 (came into force on 1 May 1999).

7 Treaty of Lisbon of 13 December 2007 (came into force on 1 December 2009). The ECSC had been absorbed by the EEC in 2002 when the ECSC Treaty expired, but the Euratom Treaty still co-exists with the European Union.

organisation as it ceased to be a purely socioeconomic grouping.[8] Since the Lisbon Treaty, the Union has been based on two treaties: the Treaty on European Union (TEU)[9] and the Treaty on the Functioning of the European Union (TFEU).[10] These treaties are thus the successors to the EEC Treaty.

5. Just as the volume of legislation grew over time, so did the European Union itself. Until 1973 it consisted of the six founding members, but by 2013 it had grown to 28 member states. Since the departure of the United Kingdom there have been 27. Although the subject of this book is EU legislation and case law only, it should be borne in mind that the EU is not simply involved in generating European legislation. There are many other areas in which it plays an important role: the creation of a single currency for most of the EU member states, abolition of internal border controls, subsidies for numerous projects, competition regulation, supervision of major banks, immigration control and air traffic control are just a few of them.

European Law

6. The main instruments of European legislation are the treaties, regulations and directives. The treaties are the founding documents that have been agreed between the member states. Regulations and directives are the product of the legislative process within the European Union. As a general rule, the Commission has the prerogative to make a proposal for a regulation or directive. Proposals may be amended by and require the approval of a majority of both the Council and the Parliament. The calculation of the requisite qualified majorities in the Council is a fairly complicated process and is based on the size of the participating member states. It has to be said that the amendments are not always improvements.

7. The difference between regulations and directives is that the former do not need to be implemented by the member states, whereas the latter direct the member states to pass legislation designed to achieve the intended result.[11] Consequently, regulations have direct effect: their provisions can be invoked and relied on by private parties and must be applied by the national courts. In general, directives have no such direct effect. They must be transposed into national legislation. Sometimes,

8 Paul Craig and Gráinne de Búrca (eds.), *The Evolution of EU Law*, second edition 2011: Deirdre M. Curtin and Ige F. Dekker, *The European Union from Maastricht to Lisbon*, p. 185.

9 OJ C 202 (2016).

10 OJ C 202 (2016).

11 Article 288 of the Treaty on the Functioning of the European Union.

however, provisions of directives can be relied upon directly by private parties against a member state if it has not implemented them correctly or in time.[12] The courts may also consult the provisions of a directive when interpreting the national legislation based upon it. In cases where national legislation is in conflict with provisions of a directive that have no direct effect, the courts must apply the national provisions. In some instances, the provisions of a treaty also have direct effect. A well-known example is the case of Van Gend & Loos.[13] Under the EEC Treaty, duties on exports or imports of goods between member states could not be increased from a certain date onwards. Van Gend & Loos invoked this treaty provision in order to challenge an increase imposed by the Dutch government. In a preliminary ruling, the European Court of Justice (ECJ) held that that provision had direct effect and created individual rights which the national court must protect. In other words, individuals could rely on these provisions. The fundamental decision in this case was that whether specific provisions of Community law have direct effect is a matter that comes within the jurisdiction of the ECJ.[14]

8. Other important principles are those of primacy and subsidiarity. According to the principle of primacy, EU provisions with direct effect take precedence over provisions of national law where they are mutually inconsistent. In its judgment in *Costa v Enel*,[15] the ECJ proclaimed the primacy of European law over domestic law[16] in the sense that '*the law stemming from the Treaty (...) could not (...) be overridden by domestic law provisions*.' Although national courts have almost always complied with this primacy principle, the German constitutional court recently held that the principle could be limited in a case where European law transgresses the boundaries of the treaties.[17] The principle of subsidiarity provides that EU legislation should be adopted only where and in so far as national legislation does not suffice. The subsidiarity principle is not immediately relevant here since the legislation discussed in this book is already in existence. However, it may still have a role in some instances. For example, some EU law seeks to harmonise national legislation. The principle of subsidiarity may be relevant in determining whether the EU provisions entail full harmonisation of the domestic laws or minimum harmonisation only. In the latter case, the EU provi-

12 ECJ 26 February 1986, C-152/84, ECLI:EU:C:1986:84, *Marshall v Southampton and South-West Hampshire Health Authority*.

13 ECJ 5 February 1963, C-26/62 ECLI:EU:C:1963:1.

14 P. Craig and G. de Búrca, *The Evolution of EU Law*, 2011: Bruno de Witte, p. 327; M. Horspool et al., *European Union Law*, 2016, 4.34].

15 ECJ 15 July 1964, C-6/64, ECLI:EU:C:1964:66.

16 Paul Craig and Gráinne de Búrca (eds.), *The Evolution of EU Law*, 2011: Bruno de Witte, pp. 328-329.

17 *Bundesverfassungsgericht* 5 May 2020 2BvR859.

sions may not limit the effect of national provisions that provide additional rights or obligations, as the case may be.

Remedies and the European Court of Justice (ECJ)

9. Articles 251-281 TFEU concern the Court of Justice of the European Union, also known as the European Court of Justice. This court should be distinguished from the European Court of Human Rights (ECtHR), which is located in Strasbourg and is not an EU body. The ECtHR belongs to a completely different organisation known as the Council of Europe, which has many more member states than the EU. It hears complaints from citizens about violations of human rights. The ECJ, on the other hand, is an EU body located in Luxembourg. It has several tasks, but the most important aspect of its remit here is to provide the courts of the member states with interpretations of EU law. Article 267, second paragraph, TFEU provides that where a question is raised before a national court regarding the interpretation of an EU treaty or EU legislation[18] that court '*may, if it considers that a decision on the question is necessary to enable it to give judgment, request the [ECJ] to give a ruling thereon*.' The third paragraph of that article provides that where any such question is raised before a national court against whose decisions there is no judicial remedy under national law, that court *shall* bring the matter before the ECJ. In summary, national courts may, and the highest national courts must, refer questions on the interpretation of EU law to the ECJ for a preliminary ruling. The ECJ sends an answer to the preliminary question to the requesting court, which then decides the case by reference to the ruling given by the ECJ. An important role of the ECJ is therefore to promote the correct and uniform interpretation of EU law.

10. Although the TFEU does not contain such a provision, two exceptions to the obligation of the highest national court to submit questions on European law to the ECJ are accepted and mentioned in the case law of the ECJ.[19] The first exception concerns questions which have already been resolved by the ECJ in other cases (*acte eclairé*), and the second concerns questions where the EU law provision is clear (*acte clair*). The parties to the proceedings cannot compel the national court to refer questions to the ECJ, and cannot contact the ECJ directly if the national court refuses to refer a question to it. The ECJ's role is sometimes described as supervision, but this may be a misnomer as there is no real supervision. After all, the ECJ is dependent on the referral by the na-

18 '..interpretation of acts of the institutions, bodies, offices or agencies of the Union'.

19 ECJ 27 March 1963, C-28-30/62, ECLI:EU:C:1963:6, *Costa and Schaake NV v Dutch Tax Authorities*; ECJ 6 October 1982, C-283/81, ECLI:EU:C:1982:335, *CILFIT v Ministry of Health (Italy)*.

tional court. For example, when the United Kingdom was a member state of the EU, restructurings often involved the adoption of a scheme of arrangement. A scheme of arrangement was not an insolvency proceeding under the EIR, because it was not listed as such in Annex A to the EIR. A question which therefore arose in many court proceedings in the United Kingdom was whether such a scheme of arrangement would be recognised in other EU member states under the Brussels I Regulation,[20] which deals with the recognition of ordinary judgments. Article 1(2)(b) of Brussels I Regulation provides that that Regulation does not apply to bankruptcy and compositions. The obvious question is therefore whether such a scheme of arrangement constitutes a composition. In early cases, the British courts decided that the exception of Article 1(2)(b) did not apply to such schemes and that the UK schemes would thus be recognised in other European jurisdictions.[21] In later cases, they simply assumed that the Brussels Regulation applied.[22] Remarkably, the British courts never once submitted a question to the ECJ for a preliminary ruling. It should be noted that these cases did not reach the highest British courts, but the lower courts too can submit relevant questions to the ECJ. In view of the sheer number of schemes, such a referral might well have been appropriate.

11. The absence of coercive measures capable of being used to compel referral of questions to the ECJ can to some extent be seen as a weakness of the system. On the other hand, it is also a strength, because it means that EU law is shaped as a result of the mutual efforts of the national courts and the ECJ. The ECJ has a remarkable degree of authority with the national courts, and the highest courts in particular faithfully refer relevant questions to the ECJ for a preliminary ruling. Over the past six years, the number of preliminary referrals has ranged between 400 and 700 annually. The ECJ rarely refuses to give a ruling.

20 Regulation (EU) No 1215/2012.

21 High Court 6 May 2011, [2011] EWHC 1104 (Ch), *re Rodenstock GmbH*; High Court 3 December 2013, [2013] EWHC 3800 (Ch), *re Magyar Telecom B.V.*; High Court 14 April 2014, [2014] EWHC 1867 (Ch), *re Apcoa Parking Holdings GmbH*; more implicitly High Court 19 November 2014 [2014] EWHC 3849 (Ch), *re Apcoa Parking Holdings GmbH*.

22 High Court 22 July 2015, [2015] EWHC 2151 (Ch), *re Van Gansewinkel Groep BV*; High Court 17 December 2015, [2015] EWHC 3778 (Ch), *re Codere Finance (UK)*; High Court 27 July 2018, [2018] EWHC 1980 (Ch) *re Lehman Brothers International (Europe)*; High Court 2 November 2018, [2018] EWHC 2911 (Ch), *re Noble Group Ltd*; High Court 26 July 2019, [2019] EWHC 2532 (Ch), *re NN2 Newco Ltd*; High Court 28 January 2020, [2020] EWHC 382 (Ch), *re Lecta Paper UK Ltd*; High Court 3 April 2020, [2020] EWHC 969 (Ch), *re Castle Trust Direct Plc*; High Court 13 July 2020, [2020] EWHC 1864 (Ch*), Colouroz Investment 2 LLC*; High Court 23 September 2020, [2020] EWHC 2793 (Ch), *re New Look Financing PLC*; High Court 14 October 2020, [2020] EWHC 2689 (Ch), *Selecta Finance UK Ltd*; High Court, 26 November 2020, [2020] EWHC 3455 (Ch), *Steinhoff International Holdings N.V.*

12. If the national court refuses to refer a relevant question to the ECJ, the aggrieved party is not entirely without recourse. Under the case law of the ECJ, the member states must provide for adequate remedies against incorrect application of EU law. If the court of last instance has manifestly infringed EU law, the aggrieved party is entitled to damages.[23] This may be the case, for instance, if that court refused to refer questions to the ECJ on the grounds that the EU legislation concerned constituted an *acte clair*, and the ECJ subsequently decides differently with respect to those questions in another case. This doctrine may spur the national court to refer relevant questions to the ECJ. Member states may also be liable if they do not implement EU directives correctly or in time. As already noted, if a directive has not been implemented or has been implemented wrongly and has no direct effect, the national court may not give precedence to the directive and will apply the national law instead. However, in such circumstances the aggrieved party may have a claim for damages against the member state concerned.[24] Those cases will have to be brought in the national courts, and the aggrieved party will have no direct access to the ECJ. The European Commission, however, may bring cases before the ECJ against member states that have failed to fulfil an obligation under the EU Treaties.

13. The ECJ may consider the facts of the case in replying to the preliminary question and will sometimes restate the facts, especially if it considers that the referring court has missed a point. Often, the replies to the questions are very much geared towards the facts of the case. Sometimes, the ECJ hands down judgments of a more delphic character, or formulates a general rule and then draws a conclusion with respect to the case in hand without clearly explaining how it has made the jump. Some of these cases will be discussed later on. These phenomena may be due in part to the fact that the ECJ provides only a single collective ruling. There are no concurring or dissenting opinions. Consequently, the decisions may sometimes show the marks of compromise.

14. The study of European law poses its own specific challenges. The European regulations and directives are available in all 24 official languages of the EU. While this service is, of course, agreeable to the reader, it does have the disadvantage that the meaning in the various language versions can sometimes appear to differ. This is particularly troubling since all language versions are 'authentic'. In such cases, interpretation

23 ECJ 30 September 2003, C-224/01, ECLI:EU:C:513, *Köbler v Austria*; ECJ 13 June 2006, C-173/03, ECLI:EU:C:2006:391 *Traghetti del Mediterraneo v Italy*; ECJ 9 December 2003, C-129/00, ECLI:EU:C:2003:656, *Commission v Italy*.

24 ECJ 19 November 1991, C- 6 and 9/90, ECLI:EU:C:1991:428.

may involve studying several of these versions or other sources. The case law of the ECJ is freely accessible through https://eur-lex.europa.eu/homepage.html?locale=en. This too is usually available in many, if not all of these languages, but this does not apply to the case law of the courts of the member states, which also may be authoritative when it comes to interpretation of European legislation. There are some important textbooks in English, but also many important books and articles in other languages, especially German. This hampers the transparent development of the law. If English scholars cannot read German, they are likely to miss important developments in academic thinking. Hence, there is a risk that legal developments may occur in compartmentalised language areas without the necessary cross-border fertilisation. The problem of inaccessibility is exacerbated by the fact that legal databases tend to be limited to one jurisdiction or language area. Sometimes legal research is undertaken on the basis of translated case law or excerpts,[25] but such sources are of only limited value. Consequently, it is difficult for anybody who is not familiar with some 24 languages and does not have access to legal databases from all these jurisdictions to get a comprehensive overview of developments. That this is not a merely hypothetical problem became apparent recently when it was realised that the Dutch courts had completely missed a development in German case law involving the interpretation of a directive on consumer protection, which was subsequently adopted by the ECJ. As this book is intended as an introduction, a discussion of domestic case law would be beyond its remit.[26]

25 See, for example, R. Snowden in Reinhard Bork and Kristin van Zwieten (eds.), *Commentary on the European Insolvency Regulation*, 2016. This uses excerpts in English provided by Insol Europe.

26 Domestic case law in one member state is not binding on courts in other member states, but it may (i) carry authority and (ii) influence the case law of the ECJ. However, the case law of the ECJ is binding throughout the EU.

CHAPTER 2
THE EUROPEAN INSOLVENCY REGULATION

ORIGINS OF THE EIR

15. Article 220 of the 1968 EEC Treaty provided inter alia:

> 'Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals [...]:
>
> *the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards.*'

Initially, this subject matter was not one of the topics under the EEC Treaty to which the ordinary EU legislation procedure applied. It was therefore treated as an intergovernmental matter. Although a model law could possibly have been negotiated on this subject matter, the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters was concluded between the member states in 1968.[1] This contained rules on jurisdiction in such matters and provided for a system of recognition and enforcement of judgments obtained in other member states. Important features of the Brussels Convention were that where a court in a member state had assumed jurisdiction on the basis of the Convention's provisions its decision could only be challenged on appeal, whereas the court concerned could refer questions on the interpretation of the Brussels Convention to the ECJ. However, except for some special cases, jurisdiction could not be contested in other member states. Consequently, even a judgment given by a court which had wrongly assumed jurisdiction under the Brussels Convention would be recognised and given effect to in the other member states. The Brussels Convention was succeeded by the Brussels I Regulation of 2000, which was itself revised in 2012.[2] The system has remained the same.

1 Convention of 27 September 1968, 72/454/EEC.
2 Regulations of 22 December 2000, EC/44/2001 and 12 December 2012, EU/1215/2012.

16. However, Article (1)(2)(b) of the 1968 Brussels Convention/Brussels I Regulation provides as follows:

> *'This Convention/Regulation shall apply in civil and commercial matters whatever the nature of the court or tribunal.*
> *The Convention/Regulation shall not apply to:*
> *[…]*
> *(b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings.'*

17. Thus, insolvency proceedings were excluded from this Convention/Regulation. Consequently, as the wording of Article 220 of the EEC Treaty (see above) did not exclude insolvency proceedings, the member states still had to introduce an instrument for the simplification of formalities governing the reciprocal recognition and enforcement of insolvency judgments.[3]

18. Several attempts were made to reach agreement on a convention regarding insolvency proceedings, and finally, in 1995, the wording was agreed. The convention had been signed by all member states except the United Kingdom by 23 May 1996, which was the deadline for signature specified in the draft of the convention. As a reason for its refusal to sign, the United Kingdom referred to the EU measures that had been introduced to prevent British beef being exported to the Continent following an outbreak of mad cow disease. Needless to say, this reason was quite unrelated to the subject matter of the convention. A more likely explanation for the refusal is that the drafters had omitted to include a provision limiting the effects of Spanish insolvency proceedings in Gibraltar, which was a sensitive issue at the time.[4] Thus, the 1995 draft was never adopted. However, as the constitutional documents of the EU were subsequently adapted in such a way that the subject matter could be provided for in a regulation,[5] the provisions of the draft convention were copied into an EU regulation,[6] which was adopted in 2000 (Regulation (EC) No 1346/2000) and entered into force on 31 May

3 Reinhard Bork and Kristin van Zwieten (eds.), *Commentary on the European Insolvency Regulation*, 2016: Van Zwieten 0.14.

4 For more information about these two reasons, see Bork & Van Zwieten (2016): Van Zwieten 0.29.

5 Treaty of Amsterdam of 10 November 1997.

6 With some exceptions, the most notable of which is that the convention provided that proceedings would be before the ECJ. Such a provision was unnecessary in the regulation because it is based on Articles 61(c) and 67(1) of the Treaty establishing the European Community, which itself provided for proceedings to be before the ECJ.