

# European Insolvency Regulation

Brinkmann

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for a reverse exemption from the exemption provision contained in paragraphs 1 and 2 for cases in which the reservation of title was founded by an act that prejudices creditors. Where this reverse exemption applies, the general provisions (in particular Article 7(2)(m) EIR) apply, to the effect that – subject to the provision contained in Article 16 EIR – the *lex fori concursus* applies.

To this extent, and just like the parallel provisions contained in Article 8(4) EIR and Article 9(2) EIR, it is irrelevant whether the voidness, voidability or unenforceability of a legal act under the *lex fori concursus* arises only as the result of an assertion thereof (by way of an action) or already arises *ipso iure* (see for example the provision contained in § 88 German Insolvency Act – InsO).<sup>12</sup>

## D. Legal consequences

### I. Purchaser's insolvency (paragraph 1)

#### 1. Legal consequences with respect to the rights under the reservation of title

In accordance with paragraph 1, the opening of insolvency proceedings against the purchaser of assets “shall not affect” the rights of the seller under a reservation of title clause. Just like the parallel norm contained in Article 8(1) EIR, Article 10 EIR is also **not a conflict of laws norm**,<sup>13</sup> but instead, serves as a **provision of substantive law**, for more details in this regard see Dahl/Kortleben above Art. 8 mn. 25 et seqq. Article 10(1) EIR is a provision of substantive law that seeks to protect the seller with respect to the assets that are not located in the Member State in which proceedings are opened.<sup>14</sup> This means that the opening of main insolvency proceedings has no effect upon the rights under the reservation of title. From the standpoint of general conflict of laws rules, the rights to which the holder of the reservation of title is entitled are governed by the law applicable in the state in which (main insolvency) proceedings are opened; this will usually be the law in the state in which the assets are situated (*lex rei sitae*).<sup>15</sup>

#### 2. Legal consequences with respect to the subject of the reservation of title

Just like Article 8 EIR, Article 10(1) EIR only relates to the rights under the reservation of title clause, but not the asset covered by the reservation of title. Initially, this **asset becomes part of the actual insolvency estate** and is governed by the *lex fori concursus*.<sup>16</sup>

Having regard to this background, the position is sometimes taken that the seller with a reservation of title is required to remit the proceeds resulting from the realisation of the asset to the main insolvency administrator to the extent by which such proceeds exceed the purchase price claim that was secured (i. e. by the reservation of title).<sup>17</sup> This view should be rejected, however, because it relies on the incorrect assumption that the

<sup>12</sup> CJEU Case C-557/13 *Lutz v Bäuerle* ECLI:EU:C:2015:227, mn. 30; opinion of Advocate General Szpunar, 27 November 2014 Case C-557/13 *Lutz v Bäuerle* ECLI:EU:C:2014:2404, mn. 45 et seq.

<sup>13</sup> In this sense however Wessels, *International Insolvency Law*, mn. 10671.

<sup>14</sup> cf. CJEU Case C-292/08 *German Graphics Graphische Maschinen GmbH v Alice van der Schee* ECLI:EU:C:2009:544, mn. 35 et seq.

<sup>15</sup> Huber, in Geimer/Schütze, *Internationaler Rechtsverkehr in Zivil- und Handelssachen*, Art. 7 VO Nr. 1346/2000, mn. 12.

<sup>16</sup> cf. Braun, in *Commentary on the German Insolvency Code*, mn. 369.

<sup>17</sup> In this sense e.g. with reference to recital 68 cl. 5; J. Schmidt, in Mankowski/Müller/J. Schmidt, *EuInsVO 2015*, Art. 10, mn. 14; dissenting e.g. Huber, in Geimer/Schütze, *Internationaler Rechtsverkehr in Zivil- und Handelssachen*, Art. 7 VO Nr. 1346/2000, mn. 14; Duursma-Kepplinger, in Duursma-Kepplinger/Duursma/Chalupsky, *Europäische Insolvenzverordnung*, Art. 7 EIR 2000, mn. 20.

simple reservation of title – and only this is covered by Article 10 EIR, see above mn. 5 – secures the purchase price claim of the seller with a reservation of title. This view cannot be adopted, since – in contrast to, for example, the expanded reservation of title – the simple reservation of title does not secure the purchase price claim, but instead secures only the entitlement to the goods that were sold.<sup>18</sup> The claim of the seller with a reservation of title is not only aimed at the preferential satisfaction (right to separate satisfaction) from the realization proceeds, but instead is aimed at the delivery (right to separation) of the asset that was sold. Where the seller with a reservation of title enforces its delivery claim by separating sold assets from the insolvency estate, this asset is no longer part of the insolvency estate. Any expectant right to the asset held by the insolvency estate is extinguished. Title to the asset sold is once again held in full by the seller with a reservation of title and this party may freely dispose of the asset. If that party does so by selling the asset, it may keep the full amount of the proceeds.

- 15 The main insolvency administrator may preclude a realisation by the seller with a reservation of title by making timely payment of the outstanding remaining purchase price to the seller with a reservation of title and by doing so, bringing about the transfer of title to the debtor.<sup>19</sup> Where the administrator fails to make use of this opportunity, the administrator may claim neither the asset itself nor the proceeds from its realisation for the insolvency estate.
- 16 **Legal consequences with respect to the (purchase price) claim of the seller**  
Article 10 EIR does not set out whether the purchase price (claim) of the seller belongs to the category of claims in insolvency.<sup>20</sup> In accordance with Article 7(2)(sentence 2)(g) EIR, this question is governed by the *lex fori concursus*.

## II. Seller's insolvency (paragraph 2)

- 17 Pursuant to paragraph 2, the opening of insolvency proceedings against the seller of assets after these assets have been delivered does not justify the rescission or termination of the purchase agreement and does not bar the purchaser from acquiring title. Just like paragraph 1 and Article 8(1) EIR, paragraph 2 is also a provision of substantive law.<sup>21</sup> The opening of main insolvency proceedings has no effect upon the legal position (“expectant right”) of the purchaser, whereby this position is neither subject to the limitations of the *lex fori concursus* nor to the limitations of the *lex rei sitae*.<sup>22</sup> Where the purchaser makes payment of the sums owed pursuant to the contract, the purchaser acquires title to the asset sold upon making the last payment.<sup>23</sup>

<sup>18</sup> For more details in this regard cf. Germany: BGH, Beschl. v. 27.03.2008 – IX ZR 220/05, NJW 2008, 1803, 1806 (DEU); Austria: OGH, 30 August 1961 – 5Ob248/61, Kopf SZ 34/113, ECLI:AT:OGH0002:1963:0040OB00012.63.0604.000 (AUT).

<sup>19</sup> J. Schmidt, in Mankowski/Müller/J. Schmidt, *EuInsVO 2015*, Art. 10, mn. 14; Huber, in Geimer/Schütze, *Internationaler Rechtsverkehr in Zivil- und Handelssachen*, Art. 7 VO Nr. 1346/2000, mn. 14.

<sup>20</sup> Mankowski, *NZI* 2008, 604, 605; Mäsch, in Rauscher, *Europäisches Zivilprozess- und Kollisionsrecht (EuZPR/EuIPR)*, Art. 7 EG-InsVO 2000, mn. 5; cf. CJEU Case C-292/08 *German Graphics Graphische Maschinen GmbH v Alice van der Schee* ECLI:EU:C:2009:544.

<sup>21</sup> Virgós/Schmit *Report on the Convention on Insolvency Proceedings*, mn. 112; Mäsch, in Rauscher, *Europäisches Zivilprozess- und Kollisionsrecht (EuZPR/EuIPR)*, Art. 7 EG-InsVO 2000, mn. 8; only acc. to Art. 7 (2) EIR 2000; Wessels, *International Insolvency Law*, mn. 10671.

<sup>22</sup> Mäsch, in Rauscher, *Europäisches Zivilprozess- und Kollisionsrecht (EuZPR/EuIPR)*, Art. 7 EG-InsVO 2000, mn. 8; cf. Duursma-Kepplinger, in Duursma-Kepplinger/Duursma-Chalupsky, *Europäische Insolvenzverordnung*, Art. 7 EIR 2000, mn. 24 et seq. with further references.

<sup>23</sup> Virgós/Schmit, *Report on the Convention on Insolvency Proceedings*, mn. 114.

## Article 11 Contracts relating to immoveable property

1. The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated.

2. The court which opened main insolvency proceedings shall have jurisdiction to approve the termination or modification of the contracts referred to in this Article where:

- (a) the law of the Member State applicable to those contracts requires that such a contract may only be terminated or modified with the approval of the court opening insolvency proceedings; and
- (b) no insolvency proceedings have been opened in that Member State.

Recitals: 22, 67.

### Case law:

EU: CJEU, 26 October 2016, Case C-195/15, *Senior Home v Gemeinde Wedemark*, ECLI:EU:C:2016:804; CJEU, 22 November 2012, Case C-116/11, *Bank Handlowy v Christianapol*, ECLI:EU:C:2012:739; CJEU, 20 October 2011, Case C-396/09, *Interedil*, ECLI:EU:C:2011:671, mn. 42; CJEU, 29 October 2009, Case C-174/08, *Construction Danmark v Skatteministeriet*, ECLI:EU:C:2009:669.  
**Germany:** BGH, Beschl. v. 20.07.2017 – IX ZB 69/16, ECLI:DE:BGH:2017:200717BIXZB69.16.0, NZI 2017, 770 et seq.; BGH, Urt. v. 18.09.2014 – VII ZR 58/13, NZI 2014, 969 et seq.; OLG Hamm, Urt. v. 15.09.2011 – 18 U 226/10, IPRax 2012, 351 et seq.; OLG Koblenz, Urt. v. 10.12.2010 – 8 U 1112/09, ECLI:DE:OLGKOB:2010:1210.8U1112.09.0A, NZI 2011, 448 et seq.; LG Göttingen, Urt. v. 13.04.2011 – 5 O 102/07, ECLI:DE:LGGOETT:2011:0413.5O102.07.0A, IPRspr 2011, no. 320, 863 et seq.

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## A. Purpose

According to **paragraph 1**, the effects of insolvency proceedings upon a contract conferring the right to acquire or make use of immovable property are determined exclusively by the law of the Member State in whose sovereign territory the property is situated. This provision permits an exception from Article 7(2)(sentence 2)(e) EIR, according to which the issue of whether and to what extent insolvency law affects existing contracts is generally governed by the *lex fori concursus*.<sup>1</sup> Paragraph 1 amounts

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<sup>1</sup> For delimiting scopes also regarding Article 7(2)(sentence 2)(m) EIR see OLG Koblenz, Urt. v. 10.12.2010 – 8 U 1112/09, ECLI:DE:OLGKOB:2010:1210.8U1112.09.0A, NZI 2011, 448 et seq.,

to a special reference providing that the law of the State where the immovable property is situated (*lex rei sitae*) applies instead of the law of the Member State in which insolvency proceedings were opened.<sup>2</sup> This exemption provision takes into account the fact that by its nature, real property has a strong connection to the state in which it is situated and the respective individually-designed regulation systems in such States.<sup>3</sup> The special reference prevents an encroachment into these differently-structured national regulation systems and in this manner, ensures that national standards are maintained, such as tenant protection.<sup>4</sup> This special reference also serves to promote legitimate expectations and legal certainty in the state where the immovable property is situated.<sup>5</sup>

- 2 Pursuant to **paragraph 2**, the court that has opened the main insolvency proceedings has jurisdiction to consent to a termination or modification of contracts in terms of Article 11 EIR. This amounts to a uniform regulation of international, territorial and substantive law jurisdiction to the benefit of the court of the Member State in which main insolvency proceedings were opened.<sup>6</sup>

## B. Historic development

- 3 In the course of the reform, Article 11(1) EIR was amended in its wording only twice (“territory”, “situated”). Paragraph 2, on the other hand, is entirely new.

## C. Interpretation

### I. Conditions set out in paragraph 1

#### 1. Immovable property

- 4 Article 11 EIR relates to contracts for the acquisition or use of immovable property. The EIR does not contain a definition for the term “**immovable property**” to which the right of acquisition or use must relate. Following the court decisions of the CJEU that European Union law provisions must be interpreted autonomously,<sup>7</sup> it can be assumed in particular with regard to the provision contained in Article 14 EIR – “rights of a debtor in immovable property, a ship or an aircraft” – that this term must be **interpreted narrowly** and, in particular, that the property specially referred to in Article 14 EIR (ships and aircraft) cannot be regarded as immovable property.<sup>8</sup> A narrow interpretation is also supported by the fact that Article 11 EIR is an exemption from Article 7 EIR, and exemptions are generally interpreted narrowly.<sup>9</sup> A basis for this differentiation can be found in the fact that the physical movability of the

mn. 18 et seq. (DEU); LG Göttingen, Urt. v. 13.04.2011 – 5 O 102/07, ECLI:DE:LGGOET-2011:0413.5O102.07.0A, *IPRspr* 2011, no. 320, 863 et seq., mn. 21 et seq. (DEU).

<sup>2</sup> Moss/Fletcher/Isaacs, *EU Regulation on Insolvency Proceedings*, mn. 8.211.

<sup>3</sup> Virgós/Schmit, *Report on the Convention on Insolvency Proceedings*, mn. 118.

<sup>4</sup> Virgós/Garcimartín, *European Insolvency Regulation*, mn. 204; Virgós/Schmit, *Report on the Convention on Insolvency Proceedings*, mn. 118.

<sup>5</sup> cf. recitals 22, 67 EIR.

<sup>6</sup> Garcimartín, *ZEuP* 2015, 694, 718.

<sup>7</sup> CJEU Case C-116/11 *Bank Handlowy v Christianapol* ECLI:EU:C:2012:739, paras. 49 et seq.; CJEU Case C-396/09 *Intereidil* ECLI:EU:C:2011:671, mn. 42; CJEU Case C-174/08 *Construction Danmark v Skatteministeriet* ECLI:EU:C:2009:669, mn. 24.

<sup>8</sup> Consenting Bork, in Bork/Mangano, *European Cross-Border Insolvency Law*, mn. 4.87; cf. Reinhart, in *Münchener Kommentar zur InsO*, Art. 8 VO (EG) 1346/2000, mn. 4 et seq.

<sup>9</sup> cf. CJEU Case C-195/15 *Senior Home v Gemeinde Wedemark* ECLI:EU:C:2016:804, mn. 24 et seq.

property is used as a distinction here; accordingly, real property and buildings are covered by Article 11 EIR.<sup>10</sup>

## 2. Property is situated in another Member State

Article 11 EIR contains the additional condition that the immoveable property is located within the territory of a Member State. Article 11 EIR therefore expressly sets out that the provision does not apply where immovable property is situated in a third country. The provision likewise does not apply where the immoveable property is situated in the Member State where proceedings were opened, since in this case, the law of that Member State already applies in accordance with Article 7(2)(e) EIR. Article 11 EIR is therefore applicable if immoveable property is situated in a Member State and the insolvency proceedings were opened in another Member State.

## 3. Contract conferring the right to acquire or make use

Article 11(1) EIR relates to contracts that confer the right to acquire or make use of immoveable property.<sup>11</sup> The provision covers not only contracts for the use of property (rental, leasing etc.), but also contracts that govern a change in material ownership by way of a transfer of legal title.<sup>12</sup> There is no limitation to only reciprocal contracts, in particular purchase agreements. For this reason, deeds of gift are also covered by this.<sup>13</sup>

At least from the perspective of those legal systems that differentiate between transactions that create obligations and those that transfer title (“separation and abstraction principle”), the question arises whether only contracts under the law of obligations or also contracts *in rem* are covered. The EIR itself contains no restrictions to this extent. A contract that confers the right to acquire or make use of immoveable property should therefore not be excluded from the scope of application of paragraph 1 merely because the contract is a contract *in rem*.<sup>14</sup> A categorical exclusion of contracts *in rem* would conflict with the purposes of paragraph 1 of maintaining differently-designed national regulation systems and promoting legitimate expectations and legal certainty in the State in which the immovable property is situated (see above with additional citations mn. 1).

## II. Conditions set out in paragraph 2

The new provision contained in paragraph 2 that was created in the context of the reform applies where **two conditions** are cumulatively met: **First**, a contract in terms of paragraph 1 exists and the law of the Member State in which the immovable property is situated provides for court consent to the termination or modification of that contract. The consent requirement is limited to court consent: In contrast to Article 13(2) (sentence 2) EIR, Article 11(2) EIR does not provide for an expansion of its scope of application to other consent requirements, such as consent by authorities.<sup>15</sup> **Second**, no

<sup>10</sup> Bork, in Bork/Mangano, *European Cross-Border Insolvency Law*, mn. 4.87.

<sup>11</sup> For more details in this regard see Mankowski, in Mankowski/Müller/J. Schmidt, *EuInsVO 2015*, Art. 11, mn. 22 et seq. with further references; in contrast to other claims within context of property purchase agreements cf. OLG Hamm, Urt. v. 15.09.2011 – 18 U 226/10, *IPRax* 2012, 351 et seq., mn. 62 (DEU).

<sup>12</sup> Virgós/Garcimartín, *European Insolvency Regulation*, mn. 203; Virgós/Schmit, *Report on the Convention on Insolvency Proceedings*, mn. 119.

<sup>13</sup> Wessels, *International Insolvency Law*, mn. 10686; Duursma-Kepplinger, in Duursma-Kepplinger/Duursma/Chalupsky, *Europäische Insolvenzverordnung*, Art. 8 EIR 2000, mn. 1.

<sup>14</sup> cf. Moss/Fletcher/Isaacs, *EU Regulation on Insolvency Proceedings*, mn. 8.212.

<sup>15</sup> Bornemann, in Wimmer/Bornemann/Lienau, *Neufassung EuInsVO*, mn. 305; Josko de Marx, in Braun, *Insolvenzordnung*, Art. 11, mn. 22.

insolvency proceedings may have been opened in the respective Member State. Where secondary insolvency proceedings have been opened, paragraph 2 does not apply, since the provisions of Article 34 EIR et seq. apply to this extent. In accordance with Article 34(sentence 3) EIR and Article 35 EIR, the court of the State where secondary proceedings were opened would be responsible for the (potentially required) consent to a termination or modification of the contract.

#### D. Legal consequences

- 9 The legal consequence of **paragraph 1** is that the law of the Member State in whose territory immovable property is located is exclusively determinative for the effects of the insolvency proceedings on a contract conferring the right to acquire or use that property.<sup>16</sup> “Exclusively” means that only the law of the State where the property is situated (including that State’s insolvency law) is applicable, but not the *lex fori concursus* in accordance with Article 7 EIR.<sup>17</sup>
- 10 Where the conditions contained in **paragraph 2** are met, the approval requirements in the State in which the property is located will be recognised, but the competence to provide such approval will be allocated to the court that has opened the main insolvency proceedings.<sup>18</sup> Consequently, the court that has opened the insolvency proceedings must apply foreign law, i.e. the law of the Member State in which the property is situated) when approving or modifying such contracts.

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<sup>16</sup> BGH, Beschl. v. 20.07.2017 – IX ZB 69/16, ECLI:DE:BGH:2017:200717BIXZB69.16.0, NZI 2017, 770 et seq. mn. 19 (DEU); BGH, Urt. v. 18.09.2014 – VII ZR 58/13, NZI 2014, 969 et seq. mn. 11 (DEU).

<sup>17</sup> Virgós/Schmit, *Report on the Convention on Insolvency Proceedings*, mn. 118.

<sup>18</sup> Garcimartín, *ZEuP* 2015, 694, 718.

## Article 12 Payment systems and financial markets

1. Without prejudice to Article 8, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.

2. Paragraph 1 shall not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under the law applicable to the relevant payment system or financial market.

Recital: 71.

**Specific bibliography:** Ebenroth/Benzler, Close-out Netting nach der neuen Insolvenzordnung, *ZVglRWiss* 95 (1996), 335; Ehrlicke, Zum anwendbaren Recht auf ein in einem Clearing-System vereinbartes Gattstellungsverfahren im Fall der Insolvenz ausländischer Clearing-Teilnehmer, *WM* 2006, 2109; Keller, Die EG-Richtlinie 98/26 vom 19.5.1998 über die Wirksamkeit von Abrechnungen in Zahlungs- sowie Wertpapierliefer- und -abrechnungssystemen und ihre Umsetzung in Deutschland, *WM* 2000, 1269; Kieper, *Abwicklungssysteme in der Insolvenz*, München 2004; Kilgus, Keine Zahlungspflicht unter internationalen Derivaten bei Insolvenz des Vertragspartners? *ZIP* 2010, 613; Ruzik, *Finanzmarktintegration durch Insolvenzrechtsharmonisierung*, 2010; Schneider, Netting und Internationales Insolvenzrecht, in Kohler/Obermüller/Wittig, *Kapitalmarkt – Recht und Praxis*, Recklinghausen 2006, S. 197.

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### A. Purpose and background

Article 12 EIR has its background in the increasing importance of interconnected financial cross-border transactions. Monetary transactions and share transactions are carried out more and more via clearing systems in which not every single claim is asserted and settled but instead a continuous overall settlement takes place, known as “netting” or “set off”.<sup>1</sup> These **highly integrated networks** are considered to be the indispensable backbone of the financial sector.<sup>2</sup> Such systems, however, also bear

<sup>1</sup> Kindler, in *Münchener Kommentar zum BGB*, Art. 12 EuInsVO, mn. 2; Ruzik, *Finanzmarktintegration durch Insolvenzrechtsharmonisierung*, p. 156 et seq.

<sup>2</sup> Mankowski, in Mankowski/Müller/J. Schmidt, *EuInsVO 2015*, Art. 12, mn. 1; Ruzik, *Finanzmarktintegration durch Insolvenzrechtsharmonisierung*, p. 45 et seq.

significant risks, in particular those arising from potential chain reactions: Due to the tight integration within the system, a participant's insolvency could have a knock-on effect and lead directly to other members being unable to meet their obligations, even if they were not in direct contact with the insolvent party.<sup>3</sup>

- 2 In order to enhance liberalisation of capital movements, European law seeks to reduce this **systemic risk** and to generally "minimise the disruption to a system caused by insolvency proceedings against a participant in that system"<sup>4</sup>. The main legal approach for this, apart from Article 12 EIR, has been the Settlement Finality Directive 98/26/EC (SFD) of the European Parliament and of the Council on settlement finality in payment and securities settlement systems.
- 3 While the SFD "should take precedence"<sup>5</sup> over the general rules laid down in the EIR, the Regulation and the Directive are rather complementary.<sup>6</sup> While, for example, the knock-on effect described above can be reduced mainly by the SFD's (partial) harmonisation of material insolvency law,<sup>7</sup> the **conflict-of-law rule** laid down in Article 12(1) EIR primarily ensures legal certainty, predictability, and calculability.<sup>8</sup>
- 4 In order to achieve this goal, Article 12(1) EIR provides an **exception to the general rule of *lex fori concursus***. If the applicable law would follow from Article 7 EIR as it does in general, the effects of insolvency proceedings on payment or settlement systems or on financial markets would be determined on a case-by-case basis.<sup>9</sup> This would mean that depending on where the debtor's COMI is, a different law would apply, notwithstanding the law otherwise applicable to the system or market.<sup>10</sup> Article 12 EIR ensures that the law of the system or market applies both before and after the opening of insolvency proceedings and is not "being altered in the case of insolvency of a business partner"<sup>11</sup>. This avoids uncertainties and high costs for hedging risks<sup>12</sup> and establishes **confidence in the systems and markets**.<sup>13</sup>

## B. Reform

- 5 Article 12 EIR 2015 is identical with its predecessor (Article 9 EIR 2000), only the reference to Article 8 EIR has been updated. Thus, the literature and the commen-

<sup>3</sup> Mankowski, in Mankowski/Müller/J. Schmidt, *EuInsVO 2015*, Art. 12, mn. 1; cf. Ruzik, *Finanzmarkt-integration durch Insolvenzrechtsharmonisierung*, p. 180 et seq., 202 et seq.; Duursma, in Duursma-Kepplinger/Duursma/Chalupsky, *Europäische Insolvenzverordnung*, Art. 9 EIR 2000, mn. 6.

<sup>4</sup> Recital 4 of Commission Directive 98/26/EC; cf. also Virgós/Schmit, *Report on the Convention of Insolvency Proceedings*, mn. 23.2.(c).

<sup>5</sup> Recital 71 EIR.

<sup>6</sup> Pannen, in Pannen, *Europäische Insolvenzverordnung*, Art. 9 EIR 2000, mn. 7 et seq.; Bork, in Kübler/Prütting/Bork, *Insolvenzordnung*, Art. 12, mn. 6.

<sup>7</sup> Contrary to a widespread opinion (cf. e.g. Undritz, *Hamburger Kommentar zum Insolvenzrecht*, 6th Edition, Art. 9, mn. 1; Duursma, in Duursma-Kepplinger/Duursma/Chalupsky, *Europäische Insolvenzverordnung*, Art. 9 EIR 2000, mn. 6; Brinkmann, in K. Schmidt, *Insolvenzordnung*, Art. 9 EIR 2000, mn. 1), Article 12 EIR has only a limited impact in this respect. On the important role of the SFD Kindler, in *Münchener Kommentar zum BGB*, Vorbemerkung EuInsVO, mn. 26.

<sup>8</sup> Virgós/Schmit, *Report on the Convention of Insolvency Proceedings*, mn. 121; Moss/Fletcher/Isaacs, *EU Regulation on Insolvency Proceedings*, mn. 4.32.

<sup>9</sup> Garcimartín/Virgós, in Bork/van Zwielen, *Commentary on the European Insolvency Regulation*, Art. 12, mn. 12.02.

<sup>10</sup> Liersch, in Vallender, *EuInsVO*, Art. 12, mn. 2; Jahn/Fried, in *Münchener Kommentar zur InsO*, Art. 9 EuInsVO 2000, mn. 1.

<sup>11</sup> Recital 71 EIR.

<sup>12</sup> Mankowski, in Mankowski/Müller/J. Schmidt, *EuInsVO 2015*, Art. 12, mn. 2.

<sup>13</sup> Bork, in Bork/Mangano, *European Cross-Border Insolvency Law*, mn. 4.88; Virgós/Schmit, *Report on the Convention of Insolvency Proceedings*, mn. 120(1).