

Contents

| | | |
|---|---|----|
| Chapter 1 | Introduction | 1 |
| Where European Insolvency Law has come from, and where it might be going | 3 | |
| A. Needs and limits of cross-border insolvency law | 3 | |
| B. The route leading to Regulation No 1346/2000 | 4 | |
| C. The scope of the Regulation. The exclusion of cross-border proceedings relating to credit, insurance and investment undertakings | 6 | |
| D. The machinery of the Regulation | 7 | |
| I. The first necessary pillar | 7 | |
| II. The second necessary pillar | 8 | |
| III. The third, optional, pillar | 8 | |
| E. The centre of main interests (COMI) and the relevant case law | 9 | |
| F. The lack of specific prescriptions regarding the cross-border insolvency of parent companies and subsidiaries | 11 | |
| G. Bibliography | 12 | |
| Chapter 2 | Regulation | 15 |
| COUNCIL REGULATION (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings | 17 | |
| CHAPTER I | GENERAL PROVISIONS | 23 |
| Article 1 | Scope | 23 |
| Article 2 | Definitions | 23 |
| Article 3 | International jurisdiction | 24 |
| Article 4 | Law applicable | 24 |
| Article 5 | Third parties' rights in rem | 25 |
| Article 6 | Set-off | 26 |
| Article 7 | Reservation of title | 26 |
| Article 8 | Contracts relating to immovable property | 27 |
| Article 9 | Payment systems and financial markets | 27 |
| Article 10 | Contracts of employment | 27 |
| Article 11 | Effects on rights subject to registration | 27 |
| Article 12 | Community patents and trade marks | 27 |
| Article 13 | Detrimental acts | 27 |
| Article 14 | Protection of third-party purchasers | 28 |
| Article 15 | Effects of insolvency proceedings on lawsuits pending | 28 |
| CHAPTER II | RECOGNITION OF INSOLVENCY PROCEEDINGS | 28 |
| Article 16 | Principle | 28 |
| Article 17 | Effects of recognition | 28 |
| Article 18 | Powers of the liquidator | 29 |
| Article 19 | Proof of the liquidator's appointment | 29 |

Contents

| | | |
|--|--|----|
| Article 20 | Return and imputation | 29 |
| Article 21 | Publication | 30 |
| Article 22 | Registration in a public register | 30 |
| Article 23 | Costs | 30 |
| Article 24 | Honouring of an obligation to a debtor | 30 |
| Article 25 | Recognition and enforceability of other judgments | 31 |
| Article 26 | Public policy | 31 |
| CHAPTER III SECONDARY INSOLVENCY PROCEEDINGS | | 32 |
| Article 27 | Opening of proceedings | 32 |
| Article 28 | Applicable law | 32 |
| Article 29 | Right to request the opening of proceedings | 32 |
| Article 30 | Advance payment of costs and expenses | 32 |
| Article 31 | Duty to cooperate and communicate information | 32 |
| Article 32 | Exercise of creditors' rights | 33 |
| Article 33 | Stay of liquidation | 33 |
| Article 34 | Measures ending secondary insolvency proceedings | 34 |
| Article 35 | Assets remaining in the secondary proceedings | 34 |
| Article 36 | Subsequent opening of the main proceedings | 34 |
| Article 37 | Conversion of earlier proceedings | 34 |
| Article 38 | Preservation measures | 35 |
| CHAPTER IV PROVISION OF INFORMATION FOR CREDITORS AND LODGEMENT OF THEIR CLAIMS | | 35 |
| Article 39 | Right to lodge claims | 35 |
| Article 40 | Duty to inform creditors | 35 |
| Article 41 | Content of the lodgement of a claim | 35 |
| Article 42 | Languages | 36 |
| CHAPTER V TRANSITIONAL AND FINAL PROVISIONS | | 36 |
| Article 43 | Applicability in time | 36 |
| Article 44 | Relationship to Conventions | 36 |
| Article 45 | Amendment of the Annexes | 39 |
| Article 46 | Reports | 39 |
| Article 47 | Entry into force | 39 |
| ANNEX A | | 40 |
| ANNEX B | | 44 |
| ANNEX C | | 47 |
| REPORT on the Convention on Insolvency Proceedings | | 51 |
| I. | BACKGROUND TO THE CONVENTION | 53 |
| II. | GENERAL INTRODUCTION TO THE CONVENTION | 55 |
| A. | Scheme of the Convention | 55 |
| B. | Reasons for the Convention | 55 |
| C. | Scope | 56 |
| D. | The main and secondary model of insolvency proceedings | 57 |
| E. | The main insolvency proceedings | 57 |

| | |
|---|------------|
| F. Protection of local interest within the main proceedings | 59 |
| G. Local insolvency proceedings: "independent" and "secondary" territorial proceedings | 60 |
| H. Functions of the local proceedings | 61 |
| I. Coordination of local insolvency proceedings | 62 |
| III. ANALYSIS OF THE PROVISIONS | 64 |
| A. Preamble | 64 |
| B. Chapter I: General provisions | 67 |
| C. Chapter II: Recognition of insolvency proceedings | 97 |
| D. Chapter III: Secondary insolvency proceedings | 116 |
| E. Chapter IV: Provision of information for creditors and lodgement of their claims | 130 |
| F. CHAPTER V: INTERPRETATION BY THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES | 133 |
| G. Chapter VI: Transitional and final provisions territorial application | 137 |
| Chapter 3 Case Law | 143 |
| Reference OF 22.2.1979 – CASE 133/78 | 145 |
| JUDGMENT Facts and Issues | 145 |
| I. Facts and procedure | 145 |
| II. Written observations submitted pursuant to Article 20 of the Protocol on the Statute of the Court of Justice of the EEC | 147 |
| A. Written observations of the "syndic", Mr Gourdain, the appellant in the main action | 147 |
| B. Written observations of Mr Nadler, the respondent in the main action | 148 |
| C. Written observations of the Commission | 149 |
| D. Written observations of the Government of the Federal Republic of Germany | 151 |
| III. Oral procedure | 153 |
| Decision | 153 |
| Costs | 156 |
| Reference OF THE COURT (First Chamber) 17 March 2005 | 157 |
| Judgment | 158 |
| I. Facts | 158 |
| A. The contract | 158 |
| B. Performance of the contract | 162 |
| C. The payments made by the Commission and the claim for reimbursement | 163 |
| D. The winding up of three of the defendants | 164 |
| II. The jurisdiction of the Court of Justice | 165 |
| A. Legal framework | 165 |
| B. The applicability of the arbitration clause | 165 |

| | |
|--|-----|
| III. The admissibility of the action in so far as it is directed against the three defendants that are being, or have been, wound up | 166 |
| A. Legal background | 167 |
| B. The admissibility of the action in so far as it is directed against Inter-Team | 169 |
| C. The admissibility of the action in so far as it is directed against A-Consult and Ision | 170 |
| D. The additional claims made by the Commission | 171 |
| IV. The merits of the application in so far as it is directed against AMI Semiconductor, Intracom, Euram and Nordbank | 172 |
| A. The right to reimbursement based on Article 23.3 of Annex II to the contract | 172 |
| B. The right to reimbursement based on Paragraph 812 of the BGB | 176 |
| V. Intracom's counterclaim | 176 |
| Costs | 176 |
| Reference OF THE COURT (Grand Chamber) 17 January 2006 | 177 |
| Judgment | 177 |
| Legal background | 177 |
| The dispute in the main proceedings and the question referred for a preliminary ruling | 180 |
| The question referred for a preliminary ruling | 181 |
| Costs | 182 |
| Reference OF THE COURT (Grand Chamber) 2 May 2006 | 183 |
| Judgment | 184 |
| Legal context | 184 |
| Background and questions referred for a preliminary ruling | 186 |
| The questions | 189 |
| Costs | 195 |
| Reference OF THE COURT (First Chamber) 12 February 2009 | 197 |
| Judgment | 197 |
| Legal background | 198 |
| The dispute in the main proceedings and the question referred for a preliminary ruling | 199 |
| The questions referred for a preliminary ruling | 200 |
| Costs | 202 |
| Reference OF THE COURT (First Chamber) 21 January 2010 | 203 |
| Judgment | 204 |
| Legal context | 205 |
| The facts in the main action and the questions referred for a preliminary ruling | 207 |
| Consideration of the questions | 209 |
| Costs | 213 |

| | |
|--|-----|
| Reference OF THE COURT (First Chamber) 2 July 2009 | 214 |
| Judgment | 215 |
| Legal framework | 216 |
| The main proceedings and the question referred for a preliminary ruling | 217 |
| The question referred for a preliminary ruling | 218 |
| Costs | 220 |
| Reference OF THE COURT (First Chamber) 10 September 2009 | 222 |
| Judgment | 224 |
| Legal context | 224 |
| The dispute in the main proceedings and the questions referred for a preliminary ruling | 226 |
| The first question | 227 |
| The second and third questions | 228 |
| Costs | 230 |
| Reference OF THE COURT (First Chamber) 20 October 2011 | 231 |
| Judgment | 231 |
| Legal context | 232 |
| The dispute in the main proceedings and the questions referred for a preliminary ruling | 233 |
| The questions referred | 234 |
| Costs | 242 |
| Reference OF THE COURT (First Chamber) 17 November 2011 | 244 |
| Judgment | 244 |
| Legal context | 245 |
| The dispute in the main proceedings and the questions referred for a preliminary ruling | 246 |
| Consideration of the questions referred | 248 |
| Costs | 251 |
| Reference OF THE COURT (First Chamber) 15 December 2011 | 252 |
| Judgment | 253 |
| Legal context | 253 |
| The dispute in the main proceedings and the questions referred for a preliminary ruling | 254 |
| The questions referred for a preliminary ruling | 255 |
| Costs | 259 |
| Reference for a preliminary ruling from the Landgericht Essen (Germany) lodged on 15 October 2010 Dr Biner Bähr, in his capacity as liquidator in respect of the assets of Hertie GmbH v HIDD Hamburg-Bramfeld B. V.1 | 260 |
| Questions referred | 260 |

| | |
|--|-----|
| Reference for a preliminary ruling from the Magyar Köztársaság Legfelsőbb Bírósága (Hungary) lodged on 15 November 2010 – ERSTE Bank Hungary Nyrt v Magyar Állam, B. C.L Trading GmbH, ERSTE Befektetési Zrt. | 262 |
| Question referred | 262 |
| Reference for a preliminary ruling from the Sąd Rejonowy Poznań (Republic of Poland) lodged on 7 March 2011 – Bank Handlowy, Ryszard Adamiak, Christianapol sp. z o. o. | 263 |
| Questions referred | 263 |
| Reference for a preliminary ruling from the Lietuvos Aukščiausiasis Teismas (Republic of Lithuania) lodged on 4 May 2010 – F-Tex SIA v Lietuvos- Anglijos UAB ‘Jadecloud-Vilma’ | 264 |
| Questions referred | 264 |
| Chapter 4 Further Materials | 267 |
| United Nations Commission on International Trade Law (Uncitral) | 269 |
| <i>Part one UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY</i> | 272 |
| Preamble | 272 |
| Chapter I. General provisions | 272 |
| Chapter II. Access of foreign representatives and creditors to courts in this state | 274 |
| Chapter III. Recognition of a foreign proceeding and relief | 276 |
| Chapter IV. Cooperation with foreign courts and foreign representatives | 280 |
| Chapter V. Concurrent proceedings | 281 |
| <i>Part two GUIDE TO ENACTMENT OF THE UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY</i> | 282 |
| I. Purpose and origin of the Model Law | 282 |
| Purpose of the Model Law | 282 |
| Preparatory work and adoption | 283 |
| II. Purpose of the Guide to Enactment | 285 |
| III. Model Law as a Vehicle for the Harmonization of Laws | 285 |
| IV. Main Features of the Model Law | 286 |
| Background | 286 |
| Fitting the Model Law into existing national law | 287 |
| Scope of application of the Model Law | 288 |
| Types of foreign proceedings covered | 288 |
| Foreign assistance for an insolvency proceeding taking place in the enacting State | 289 |
| Foreign representative’s access to courts of the enacting State | 289 |
| Recognition of foreign proceedings | 290 |
| Cross-border cooperation | 292 |

| | |
|--|------------|
| Coordination of concurrent proceedings | 292 |
| V. Article-by-Article Remarks | 293 |
| Title | 293 |
| Preamble | 294 |
| Chapter I. General provisions | 295 |
| Chapter II. Access of foreign representatives and creditors to courts in this State | 304 |
| Chapter III. Recognition of a foreign proceeding and relief | 310 |
| Chapter IV. Cooperation with foreign courts and foreign representatives | 327 |
| Chapter V. Concurrent proceedings | 330 |
| VI. Assistance from the uncitral secretariat | 336 |
| Annex | 336 |
| 52/158. Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law | 336 |
| UNCITRAL Legislative Guide on Insolvency Law Part three: Treatment of enterprise groups in insolvency | 338 |
| <i>Part three Treatment of enterprise groups in insolvency</i> | <i>338</i> |
| Introduction | 338 |
| Purpose of part three | 339 |
| Glossary | 339 |
| I. General features of enterprise groups | 340 |
| A. Introduction | 340 |
| B. Nature of enterprise groups | 341 |
| C. Reasons for conducting business through enterprise groups | 346 |
| D. Defining the »enterprise group« – ownership and control | 348 |
| E. Regulation of enterprise groups | 350 |
| II. Addressing the insolvency of enterprise groups: Domestic issues | 352 |
| A. Introduction | 352 |
| B. Application and commencement | 353 |
| C. Treatment of assets on commencement of insolvency proceedings | 365 |
| D. Remedies | 382 |
| E. Participants | 399 |
| F. Reorganization of two or more enterprise group members | 403 |
| III. Addressing the insolvency of enterprise groups: International issues | 406 |
| A. Introduction | 406 |
| B. Promoting cross-border cooperation in enterprise group insolvencies | 408 |
| C. Forms of cooperation involving courts | 410 |
| D. Forms of cooperation involving insolvency representatives | 422 |
| E. Use of cross-border insolvency agreements | 426 |