

E(european) I(nsolvency) R(egulation) **1346/2000**

Morituri te salutant...



Overview

1. Historical background
2. Legal background
3. Scope and features of Regulation 1346/2000
4. Implementation of “controlled universality” model
5. Recognition
6. Applicable law
7. Back to the future
(EC Regulation 848/2015 5.06.2015)





1. Historical background...

- Since 1960: preliminary drafts in 1970, 1980, 1984
 - Aim: agreement for seizure of debtor's property in M(ember)S(tates) to satisfy claims of creditors.
 - Theoretical idea of "Unified Proceedings": all assets liquidated under one law
 - Failed: insolvency law in different MS was too incompatible

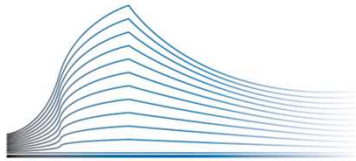




1. Historical background...

- Istanbul Convention 1990: “model of controlled universality”: universal proceeding:
 - recognised by all MS
 - over all debtor’s assets
 - Located in all MS
- European Insolvency Convention 1995: was never signed
- UNICITRAL Model Law on Cross-Border Insolvency with Guide 1997
- Therefore: Germany and Finland restarted negotiations which concluded in...

EC 1346/2000



2. Legal background

- Based on art:

1. Art. 61 (c) Treaty establishing the European Community:

In order to establish progressively an area of freedom, security and justice, the Council shall adopt:

(c) measures in the field of judicial cooperation in civil matters as provided for in Article 65;

2. Art. 65 Treaty establishing the European Community:

- Measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include:





2. Legal background

(a) improving and simplifying:

...

- the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;

(b) promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction;

(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.

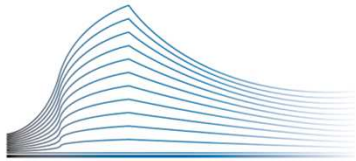


2. Legal background

- Regulation:
 - Strongest European legal instrument
 - Binding in its entirety
 - Directly applicable in all MS
 - No margin of appreciation for MS: against uniform regulation...



- “Secondary community law”: under Jurisdiction of European Court of Justice



3. Scope and features of Regulation 1346/2000

1. Material scope.

applies to (art. 1.1)

- ✓ **proceedings** (no pre-insolvency procedures: eg. French règlement à l' amiable)
- ✓ **which are collective**
- ✓ **based on the debtor's insolvency** (insolvency procedures: art. 2 (a) referring to Annex A: list of procedures in different MS)
- ✓ **which entail divestment (total/partial) of the debtor** (divestment=opposite of an [investment](#))
- ✓ **where a liquidator has been appointed** (liquidator: art. 2 (b) referring to Annex C: list of liquidators in different MS)



3. Scope and features of Regulation 1346/2000

2. Personal scope.

applies to (art. 1.2)

- ✓ Natural persons
- ✓ Legal persons

(if law of the state of the opening of proceedings allows)

doesn't apply to

- Corporate insolvencies
- Insurance undertakings, credit institutions, investment undertakings: own directives.



"I know he didn't pay his bills, but let's get the lien off the coffin."



3. Scope and features of Regulation 1346/2000

3. Spatial and temporal scope.



Applies to all MS

- ✓ When the “Centre Of the debtor’s Main Intrests” is located in one of the MS

Doesn’t apply in... Denmark

According to “about this document”: (<http://eur-lex.europa.eu/legal-content/EN/NOT/?uri=CELEX:32000R1346&qid=1434385362278>)

- Date of document: 29/05/2000
- Date of effect: 31/05/2002; Entry into force See Art 47
- Date of end of validity: 24/06/2015; Repealed by 32015R0848



4. Implementation of “controlled universality” model

1. Main proceedings

a. Opening proceedings: international jurisdiction?

➤ MS of the debtor’s COMI (art. 3.1): (MS where a debtor predominantly pursues his economic activities in a way recognizable to creditors)

- ❖ Debtor is company/legal person:
 - presumption: registred office
 - Unless proof of contrary
- ❖ Debtor is natural person:
 - Usual place of residence
- ❖ Possible conflict: principle of priority

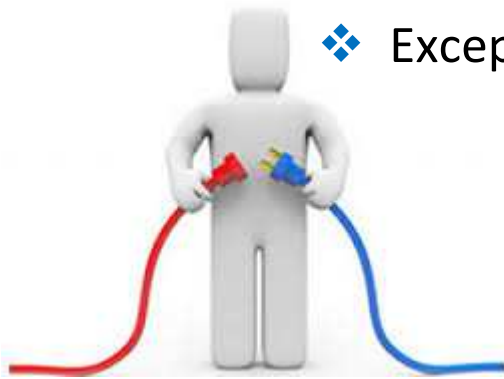


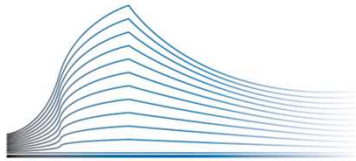
4. Implementation of “controlled universality” model

1. Main proceedings

b. Recognition/applicable law

- Art. 16.1: Judgement of opening proceedings is recognized by other MS.
- Art. 4.1: Applicable law (+effects): MS where proceedings have been opened.
- ❖ Exceptions: special connecting factors (see further on)





4. Implementation of “controlled universality” model

2. Secondary proceedings (= territorial proceedings)

➤ 2 forms:

- ✓ follows a recognized main procedure (art. 3(2),16 and 27)
- ✓ before a recognized main procedure: “isolated territorial proceeding” (art. 3.4), only when:
 - Main insolvency proceedings cannot be opened because of the law of the MS where the COMI is situated.
 - When requested by a creditor of a MS:
 - Where establishment of debtor is situated
 - Who’s claim arises from that establishment



4. Implementation of “controlled universality” model

2. Secondary proceedings (= territorial proceedings)

- Definition of “establishment”: (art. 2 (h)): any place of operations where the debtor carries out non-transitory economic activities with human means and goods
 - ✓ An economic activity in the market
 - ✓ Permanence
 - ✓ Minimum of organization (location of assets is not enough)
- Recognition/applicable law:
 - ✓ Law: provisions of regulation, partially modified to ensure coordination with main insolvency proceedings
 - ✓ Art. 17(2) 1: recognized territorial proceeding: may not be challenged





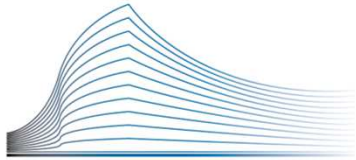
4. Implementation of “controlled universality” model

2. Secondary proceedings (= territorial proceedings)

- ✓ the situs of the **asset** determines the law to apply, not the place of the establishment.
 - tangible property
 - goods of which propriety is entered a public register: MS where register is kept.

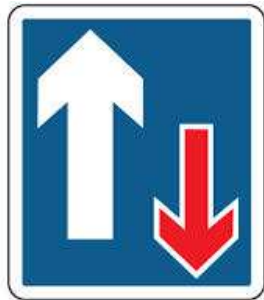


- ✓ **claims**: are met in the MS where the third party has his CMI



4. Implementation of “controlled universality” model

3. Coordination of Main and Secondary proceedings.



➤ Secondary Procedures have priority on main proceeding (specialty principle of art. 17(2) and 18(1))



➤ liquidator is granted powers to affect course of Secondary proceedings for purposes of Main proceeding.



4. Implementation of “controlled universality” model

4. Information for creditors and lodgment of their claims.

- Opening: liquidator must inform (known) creditors (art. 40(1))
 - ✓ Includes tax-social security authorities (art. 39)
 - ✓ Immediately
 - ✓ Individually (art. 40(2))
 - ✓ By a form
 - In one of the official languages of the MSOP
 - With time limits (in all official languages of EU) (art. 42.1)
 - With penalties (in all official languages of EU) (art. 42.1)
 - Mentioning “body of authority”



4. Implementation of “controlled universality” model

4. Information for creditors and lodgment of their claims.

- Each creditor has the right to lodge a claim (art. 39)
 - ✓ In writing
 - ✓ With supporting documents
 - ✓ Indicating the nature of the claim
 - ✓ Date of the claim and amount
 - ✓ Assets covered by guarantee
 - ✓ Preference/security in rem
- language: may be official language of his own MS, but in that case: translation can be asked.(art. 42 (2))



5. Recognition

1. Recognition of actions: enumeration

- art. 16.1: judgement opening main Insolvency Proceeding
- art. 25.1 par. 1: judgements about course and closing IP
- art. 25.1 par. 2: deriving judgements even from other court/close link



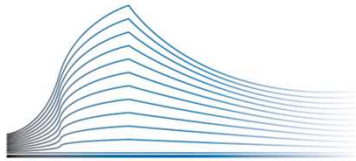
- (all other judgements: recognition via other EU regulation 44/2001)



5. Recognition

2. Conditions for Recognition

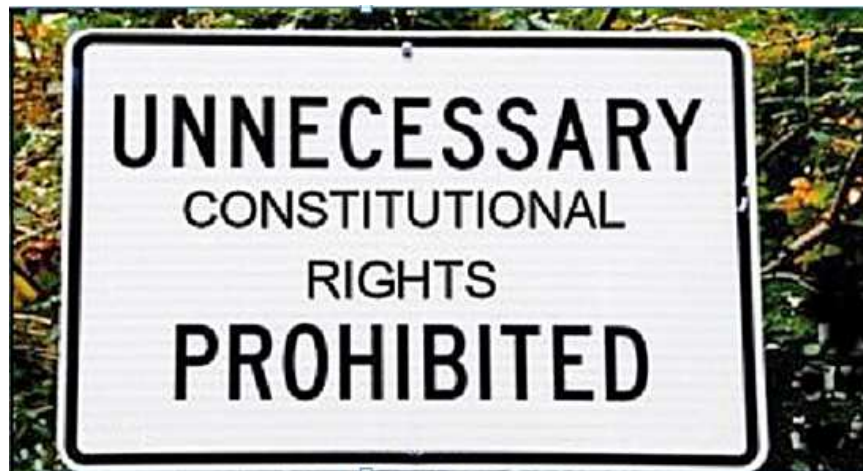
- Qualification as “insolvency proceeding”
 - ✓ See annex A
 - ✓ “principle of Community confidence”: no control (art. 16.1)
- International jurisdiction:
 - ✓ opening: no condition for recognition if international jurisdiction is stated in opening judgement (art. 16.1 and 21.2.2)
 - ✓ other: “key decisions”: jurisdiction = same court as opening (art. 25.1) e.g. course and closure of IP
- Automatic: no formal procedures required, only “incidental review”



5. Recognition

3. The public policy doctrine

- Art. 26: recognition may not lead to a result that obviously cannot be reconciled with the public order, in particular with fundamental principles and constitutionally recognized rights.





6. Applicable law

2. Basic principle: lex fori.



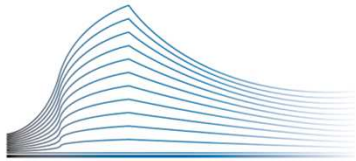
- The insolvency law of the MS of the OP, applies both in that state and in the recognition state. (art. 4.2)



6. Applicable law

3. Exceptions to this principle:

- Law suits pending (art. 4.2 (f)): example: art. 15
- Third parties right in rem: OP does not effect previously existing rights in rem where the property or status is the primary object of the action. (art. 5.1) Art. 5.2 contains non exhaustive list of such actions.
- Set-off: (art. 4.2 (d)-art. 6) set-off is the common law right of a creditor to balance mutual debts with a debtor. OK, If set-off is permitted by the law applicable to the insolvent debtors claim.
- Contracts of employment (art. 10): law applicable to the employment contract under international private law
- Rights subject to registry: law of the registering state (art. 11)



7. Back to the future

EC 1346/2000 was a first step in the direction of a “controlled universality for insolvency proceedings...



What were the shortcomings?



7. Back to the future...

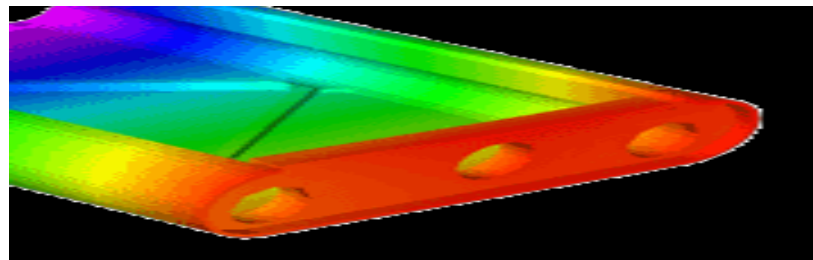
- 2012 report: regulation works well in general but needs to be modernised:
 - to facilitate rescue of (groups of) companies
 - To give a COMI definition (Eurofoods)
 - Forum-shopping to be discouraged
 - to improve publicity through insolvency registers
- 2012 COM proposal;



New Regulation: 848/2015 (5/6/2015)

1. Scope

- Scope broadened to cover also
 - Debtor-in possession proceedings if under court control
 - More personal insolvency proceedings
 - Proceedings where debtor is in financial difficulties but not yet insolvent
- Annexes exhaustive and definitive





New Regulation: 848/2015 (5/6/2015)

2. Reform of jurisdiction:

- Concept of COMI maintained and clarified
- Procedural framework for examining COMI reinforced
 - ✓ Examination ex officio
 - ✓ Right to judicial review
- Reducing forum-shopping/insolvency tourism
 - ✓ Presumptions only kick in after certain period of time (3/6 months)





New Regulation: 848/2015 (5/6/2015)

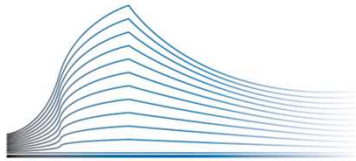
3. Applicable law:

- only minor changes
 - ✓ Jurisdiction for approving termination of contract
 - Immoveable property, Art. 8
 - Employment contracts, Art 10
 - ✓ Inclusion of arbitration in Art 15

4. Enforcement:

- Enforcement under rules of Regulation 44/2001
 - ✓ Reform: replaced by Regulation 1215/2012





New Regulation: 848/2015 (5/6/2015)

5. Publicity of proceedings/ Insolvency Registers

- Reform: System of interconnected insolvency registers
 - ✓ Composed of national insolvency registers
 - ✓ Accessible free of charge via e-justice Portal
 - ✓ MS can restrict access to info on consumers

6. Main/secondary proceedings

- Limitation to winding-up abolished
- Cooperation duties extended to courts



New Regulation: 848/2015 (5/6/2015)

7. Lodging of claims:

- Standard forms for lodging claims
- minimum deadline for lodging claims

8. Legal framework for group insolvency (new)

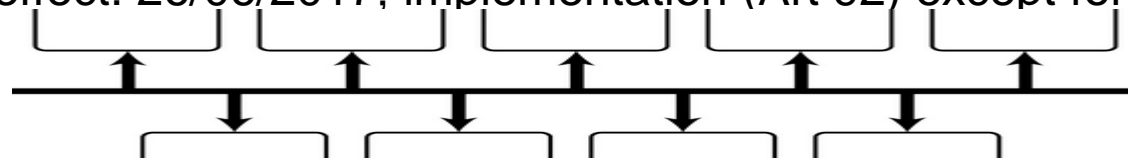
- Legal framework for group insolvency
 - ✓ Cooperation and communication between courts and IPs
 - ✓ Group coordination proceedings
 - ✓ Powers of the IP outside group coordination proceedings



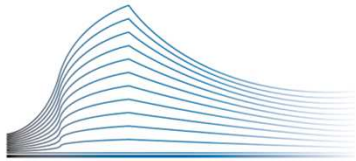
New Regulation: 848/2015 (5/6/2015)

9. Timeline?

- Date of document: 20/05/2015; Date of adoption
- Date of effect: 25/06/2015; Entry into force Date pub. +20 (Art 92)
- Date of effect: 26/06/2017; implementation (Art 92) except for:



- Date of effect: 26/06/2016; Art. 86: short description of national insolvency regulation.(Art 92 Pt (a))
- Date of effect: 26/06/2018; Establishment of insolvency registers (Art 92 Pt (b))
- Date of effect: 26/06/2019; Interconnecting of insolvency registers (Art 92 Pt (c))



New Regulation: 848/2015 (5/6/2015)



