Issue N° 4 | March 2016

Montesquieu Law Review

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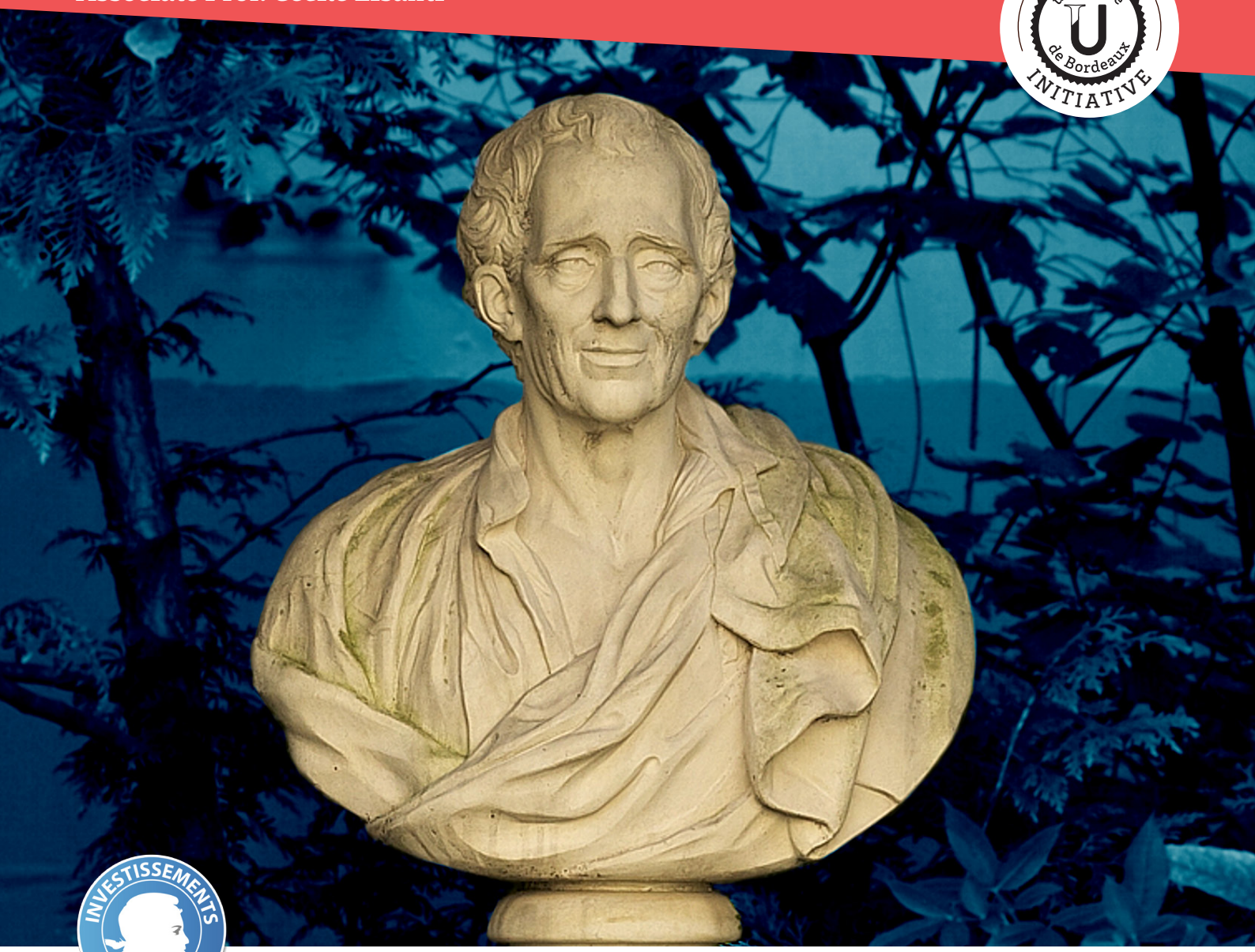

Program supported by the ANR
n°ANR-10-IDEX-03-02

Forum Montesquieu
Faculté de droit et science politique

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Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings

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Regulation (EU) 2015/848 of 20 May 2015 on insolvency proceedings recasts Regulation 1346/2000 of 29 May 2000. Most of its provisions will come into force on 26 June 2017. While this is undoubtedly not a revolution, the recast is substantial.

Regulation 1346/2000 laid the foundations for a European insolvency law based on the principle of mutual trust between Member States. To do this, it sets out common rules on conflicts of laws but not a unified European bankruptcy law. It addresses issues related to determining the competent court by means of the concept of centre of main interests (COMI), determining the law applicable through the application of *lex fori concursus*, and the recognition of judgments handed down in another Member State. One of the features of the European bankruptcy law is the adoption of a solution involving competent court and applicable law, which is also standard in private international law on bankruptcy. In principle, the applicable law is the law of the location of the court which opened the insolvency proceedings.

While the new legislation does not question these foundations, it marks a new stage in the construction of European bankruptcy law. It extends the scope thereof to include preventive proceedings which do not provide for divestment of the debtor. This aspect reflects a significant change because as it integrates developments in the modern corporate law, which tend to favour the use of proceedings to anticipate financial difficulties. Moreover, an attempt is made to address the shortcomings of Regulation 1346/2000, primarily through the accuracy of the concept of centre of main interests or even by linking main and secondary proceedings. Similarly, the inclusion of groups of companies, together with the reinforcement of the provision of information for creditors, reflect this desire to improve the earlier law. On this last point, it should also be noted that the Regulation outlines several rules on standardised substantive law.

The scope of European bankruptcy law is extended by the new Regulation. *Rationae loci,* it applies to proceedings initiated against a debtor whose main center of interests is situated in one of the Member States. *Rationae temporae,* the new Regulation will apply to proceedings initiated after 26 June 2017. *Ratione materiae,* Article 1 of the Regulation (1) sets out the eligibility criteria of national proceedings subject to the Regulation (2). Previously, one must note that Article 1 makes no distinction on the basis of the capacity of the debtor, who may therefore be a natural or legal person, professional or consumer. The scope of the Regulation therefore goes beyond corporate insolvency proceedings and is also intended to apply to household overindebtedness proceedings. Regarding the relevant proceedings more specifically, the legislation takes into account the development of different national laws in order to incorporate within it proceedings with various purposes for the prevention and anticipation of financial difficulties. Thus, the insolvency criterion is no longer a necessary condition and the probability of insolvency alone is a determining factor in the matter. The Regulation has also relaxed the criterion relative to the collective nature of the proceedings and allows the integration of semi-collective proceedings. At the same time, however, the legislation makes requirements that tend to exclude certain technical areas of the new

Regulation. Thus the public nature of the insolvency proceedings is required, which leads to the exclusion under French law of unapproved conciliation or *ad hoc* mandates. Equally, the proceedings concerned must be techniques specifically provided by insolvency law, which excludes measures arising from contract law. This is why certain techniques, such as schemes of arrangement under English law, fall outside the scope of the Regulation. Lastly, conventionally, Article 1 sets down a series of proceedings that are excluded from the scope of the Regulation because of the existence of specific rules, such as bankruptcy of insurance undertakings.

Formally, the new Regulation contains 92 articles divided into seven chapters. Chapter 1 deals with general provisions; Chapter 2 the recognition of insolvency proceedings; Chapter 3 secondary insolvency proceedings; Chapter 4 provision of information for creditors and lodgement of their claims; Chapter 5 insolvency proceedings of members of a group of companies; Chapter 6 data protection; Chapter 7 transitional and final provisions. The essential contributions that it makes are sometimes simple adaptations (I), sometimes genuine innovations (II).

I. Adaptations arising from the Regulation

A. International jurisdiction

The Regulation adapts the rules of international jurisdiction to strengthen the fight against forum shopping, and especially under Articles 3 and 4.

The rules of international jurisdiction, expressed in Article 3 of the Regulation, offer no choice to the applicant. Article 3 reaffirms the principle that the main insolvency proceedings have universal effect and is open only to the centre of main interests. The Regulation rather opportunely clarifies the key concept of the measure, namely the concept of centre of main interests, which is defined as "*the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties*". The concept is therefore envisaged on the basis of two criteria, namely the debtor's usual location and whether that location can be ascertained by third parties. The legislation is also clarifies the concept of centre of interests for legal and natural persons, by setting forth a number of presumptions. For corporations, the centre of main interests is presumed to be the registered office. This presumption is nevertheless a presumption that can be rebutted in favour of the real registered office. On this point, the Regulation establishes the solution adopted by the ECJ in *Interedil* (3). For individuals, a distinction is made between natural persons engaged in an independent activity and private individuals. While for the former, the centre of main interests is the principal place of business, for the latter, the Regulation stipulates the place of habitual residence. These presumptions can be reversed, especially if the majority of the debtor's assets are located in a Member State which is not that of habitual residence. Moreover, and more generally, the Regulation provides that the various presumptions are offset where the debtor's principal place of business or residence is transferred by the debtor in the six months preceding the opening of insolvency proceedings.

In order to strengthen the fight against forum shopping, Article 4 now clearly requires the court hearing an application to open insolvency proceedings to examine its international jurisdiction. In this regard, the legislation establishes the solution that was adopted by the Court of Justice in *Eurofood* (4). This means that the court must automatically check that the centre of main interests for main proceedings, and the establishment for secondary proceedings, is indeed located within the Member State where the court is sitting.

B. Applicable law

The issue of applicable law is settled under Article 7 of the Regulation, which states that "*the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened*" (*lex fori concursus*). This solution had already been used under Article 4 of Regulation 1346/2000. This law can only be that the national law of a Member State. It is stated at Recital 66 that uniform rules on conflict of laws replace national rules of private international law. In principle, and subject to the existence of secondary proceedings, only the law of the court opening the insolvency proceedings is intended to apply to the entirety of a class action with an international dimension. *In limine,* paragraph 1 of the Article, however, expressly reserves the possibility of exceptional remedies provided by Regulation excluding the application of the law of the court opening insolvency proceedings. A number of exclusions concerning the law applicable to the rights *in rem* of third parties, the offset of debts and retention of title are envisaged in Article 8 *et seq*. There are also special rules for determining the applicable law set out in Articles 11 to 18 of the Regulation. For all of these situations, the *lex fori consursus* will simply be discarded. These limitations are explained in Recital 66 *et seq.* of the Regulation. The tricky issue raised by Article 7 is likely that the precise determination of the scope of the *lex fori concursus.* This area is considered in broad term by the legislation, the general purpose of the law of the court opening insolvency proceedings being clearly enshrined in the new Regulation at all stages of the proceedings.

C. Secondary proceedings

Alongside the main universal insolvency proceedings, the Regulation provides for the possibility of opening territorial secondary proceedings in territorial vocation in each Member State where the debtor has an establishment (5). By "territorial", it is understood that the secondary proceedings apply only to assets situated in the Member State where the proceedings are opened. The Regulation also makes some important clarifications on the relationship between the main and secondary proceedings, which was one of its major challenges and is discussed in a specific chapter. The Regulation's most notable contribution is to allow, in the context secondary proceedings, the opening of any collective proceedings, and not just winding-up proceedings as provided by Regulation 1346/2000. To do this, Annex B, which established the list of secondary proceedings, disappears from the new Regulation. This solution serves to avoid a paradoxical solution which could have been rejected, consisting of the opening of proceedings to save the company, which carried with them secondary proceedings that necessarily involved winding-up. Furthermore, Article 38 makes important clarifications regarding the decision on secondary insolvency proceedings by enshrining their optional nature for the court hearing the application. To this end, the court receiving an application for secondary proceedings shall inform the trustee in bankruptcy in the main proceedings (6). The latter can be heard should they wish and can make submissions as to the disadvantages of opening secondary proceedings. The court may then, in full knowledge of the facts, refuse to open proceedings or decide to open the secondary proceedings best suited to the main proceedings and the interests of local creditors.

Article 36 of the Regulation enshrines a practice developed insolvency practitioners to prevent the opening of secondary proceedings. It provides the opportunity for the trustee in the main proceedings to give a unilateral undertaking in respect of assets in the Member State where the debtor's establishment is located. This undertaking therefore benefits local creditors only, i.e. those who hold a debt resulting from the operation of the debtor's establishment (7). Article 36 specifies the purpose and content of the undertaking given by the trustee. Its purpose being to

avoid the opening of secondary proceedings, this undertaking may only relate to assets located in the Member State where the debtor's establishment is located. In essence, the undertaking must provide that local creditors will be paid on the realisation of those assets in accordance with the distribution and priority rights under national law. This technique allows local creditors to be paid as though secondary proceedings had been opened.

II. Innovations arising from the Regulation

A. Insolvency proceedings relating to groups of companies

The Regulation establishes a new specific chapter on "insolvency proceedings involving members of a group of companies", which were not envisaged in the Regulation 1346/2000. In essence, these provisions do not impose a single set of proceedings for a group of companies. Thus, each company is the subject of specific proceedings that can be divided into main and secondary proceedings. The financial independence of each company therefore remains the principle, without any hierarchy between the various main proceedings arising within the group. The Regulation therefore does not retain the concept of opening proceedings to other companies within the group by contamination or that of main "pilot" proceedings among the various main proceedings.

The European Parliament has nevertheless provided a framework for links between the various proceedings and communication between insolvency practitioners and the courts. The rules adopted are based on solutions devised by insolvency practitioners. A first section of the Chapter (8) structures the co-operation between practitioners, between courts, and between practitioners and courts. Specifically, the conclusion of agreements and protocols between practitioners is encouraged and practitioners will have the opportunity to be heard before foreign courts. Within these protocols, there may well be provision for the appointment of a lead trustee with powers enabling them to offer a comprehensive restructuring plan.

A second section offers the opportunity for appointed practitioners to request the opening of collective coordination proceedings (9). Such proceedings will lead to the appointment of a co-ordinator practitioner who may not be one of those previously appointed as part of the proceedings concerning one of the group's members. The idea is appealing because the co-ordinator can ask practitioners for any and all information that will enable them to develop collective measures with a view to rescuing the group. They also have the authority to arbitrate disputes between the trustees of the various proceedings and, subject to certain conditions, they can even request the suspension of proceedings should the co-ordination project require it. One can nevertheless wonder as to question the effectiveness of this measure since each insolvency practitioner may decide not to participate in the coordination.

B. Creditors' rights

The improvements brought to creditors' rights are due in part to the reinforcement of measures relative to increased disclosure of insolvency proceedings and also to the standardisation of declaration of claims forms.

Regulation 1346/2000 did not envisage the establishment of a disclosure system at EU level. This oversight having been heavily criticised, particularly from the point of view of creditors' rights, the new Regulation requires, not the creation of a single register at Union level, but the creation and interconnection of national registers specifically relating to insolvency proceedings (10). These

measures are clearly intended to reinforce the rights of third parties. The Commission is required to take enforcement action allowing access to the e-justice portal for all national registries, to be made available in all official languages of the Union. In addition, Article 27 of the new Regulation specifies the conditions for access via this system, which will be free and must guarantee the protection of the debtor's personal data. The implementation of this system will initially involve the widespread creation of registers specifically dedicated to insolvency proceedings; currently, only fourteen EU Member States have such registers in place. Given these implementation difficulties, this provision will come into force on 26 June 2018, later than the other provisions.

Next, as regards the lodgement of claims, the Regulation requires that creditors be provided with a standard claims form for all Member States, with the title "Lodgement of claims". This solution conveniently establishes a uniform rule for the declaration of claim. On this issue, which fundamentally affects the equality of creditors, it would have been better to go further by providing a single deadline for lodgement and a single penalty for failure to lodge a claim. Similarly, the verification and admissibility of claims could benefit from recognition in all proceedings initiated against the debtor (11). No doubt these issues will be the subject of future revision of the Regulation, which is envisaged by the Regulation itself at Article 90 and which must take place no later than 27 June 2027.

Notes:

(1) For commentary on this Article, see M.-H. Monsérié-Bon, Commentaire de l'article 1er, in Règlement (UE) n°2015/848 du 20 mai 2015 relatif aux procédures d'insolvabilité, Commentaire article par article, Société de législation comparée, collection Trans Europe Expert, vol. 12, sous la direction de L. Sautonie-Laguionie et la coordination de L. Sautonie-Laguionie et C. Lisanti.

(2) Eligible proceedings are specifically mentioned at Annex A of the Regulation. Provision being made for proceedings in said Annex, the court is not required to verify the eligibility of the proceedings .

(3) ECJ, Case C- 396/09, *Interedil Srl, in liquidation v Fallimento Interedil Srl and Intesa Gestione Crediti SpA* [2011] ECR I-09915.

(4) ECJ, Case C-341/04, *Eurofood IFSC Ltd* [2006] ECR I-03813

(5) Article 34 *et seq*.

(6) Or the debtor in the absence of divestment.

(7) The fact that the creditor has its own registered office or domicile in the Member State where the establishment of the debtor is located does not establish its standing as a local creditor.

(8) Articles 56 to 60.

(9) Articles 61-77.

(10) Articles 24 *et seq*.

(11) In this sense, see G. Jazottes, Commentaire de l'article 53, *Règlement (UE) n°2015/848 du 20 mai 2015 relatif aux procédures d'insolvabilité, Commentaire article par article*, Société de législation comparée, collection Trans Europe Expert, vol. 12, sous la direction de L. Sautonie-Laguionie et la coordination de L. Sautonie-Laguionie et C. Lisanti.