

The European Insolvency Regulation in Recent Austrian Case Law

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A. Preface

The European Insolvency Regulation (EIR), which has been in force for almost four years as of today, has already been the subject of a fair amount of court authorities in Austria. Few of the cases, however, were decided upon by the Austrian Supreme Court (in Civil and Criminal Matters).¹ Although the Supreme Court's rulings have no binding effect (in a strict sense) on anyone who has not been a party to the proceeding the Supreme Court decided upon,² its judgments and decisions are still of foremost importance to the Austrian legal system because they generally determine the interpretation of Austrian law by all courts of lower instances.³ So far, the Austrian Supreme Court has only rendered three decisions that required a detailed discussion of provisions contained in the EIR, two of which will be discussed below. Although not handled by the Austrian Supreme Court but by a court of lower instance, we will report on a third case further below because it seems to have been of greater interest to practitioners and scholars alike than the rulings handed down by the Supreme Court so far.

In short, a survey of Austrian case law shows (and the discussion of the Supreme Court judgments below will confirm this) that the most contentious issues regarding the EIR are questions of jurisdiction and recognition of proceedings opened in other EU member states. Surprisingly, the uniform provisions on the law applicable in insolvency proceedings contained in Articles 4 to 15 EIR have not been subject to great judicial attention so far, although in legal literature a great number of contentious – and important – issues regarding e.g. the treatment third party rights *in rem* (Article 5 EIR) or contracts of employment (Article 10 EIR) remain, as of today, completely unresolved.

B. Effects of provisional measures prior to the opening of an insolvency proceeding on lawsuits pending in another EU member state

In its judgment 9 Ob 135/04z of 23 February 2005,⁴ the Austrian Supreme Court had to decide on the following matter:

On 6 August 2001, plaintiff, a limited liability company with its registered office in Kaiserslautern, Germany, filed an action against defendant, an Austrian businessman, for default on payment of an amount of DM 350,000 (approximately EUR 180,000) before an Austrian court. Defendant had guaranteed for a loan which plaintiff had granted to a defaulting third party.

¹ Oberster Gerichtshof in Zivil- und Strafsachen – OGH, hereinafter referred to as ‘Austrian Supreme Court’.

² “*stare decisis*” is not a principle known to the Austrian legal system.

³ For a more detailed description of the Austrian legal system see e.g. *H. Hausmaninger*, *The Austrian Legal System*, 3rd edition (2003).

⁴ The texts of judgments handed down by Austrian Courts can be downloaded at <http://www.ris.bka.gv.at/jus>.

But for a small portion of the claim, the action was successful in the first instance. Defendant appealed against the judgment. Before the hearing on the appeal took place, plaintiff filed for insolvency. The German Amtsgericht Kaiserslautern on 13 April 2004 appointed a provisional insolvency administrator for plaintiff and transferred the power to dispose of outstanding claims and bank accounts belonging to plaintiff from the latter to the provisional insolvency administrator.⁵

In the course of the subsequent hearing before the Austrian court of appeal, plaintiff's counsel contended that (i) he had been granted power of attorney by both plaintiff and the provisional insolvency administrator, (ii) the fact that merely a *provisional* insolvency administrator⁶ had been appointed for plaintiff was of no relevance to the pending lawsuit so that plaintiff, itself, still had full legal capacity to act and (iii) for the purposes of the lawsuit pending, plaintiff was not represented by its provisional insolvency administrator, but by him and that no formal or other consent given by the provisional insolvency administrator were needed. Defendant disagreed and invoked nullity of the proceeding due to invalid representation of plaintiff.

The court of appeal upheld the decision of the court of first instance. Defendant's contention that the proceeding before the court of appeal had been void was dismissed. The court of appeal held that plaintiff's counsel's power of attorney was still valid. The effects of the appointment of a (German) provisional insolvency administrator on lawsuits pending in another EU member state were governed solely by the law of that other state. Given that, Austrian law was to govern. The court of appeal also held that preservation measures according to §§ 21 subs. German Insolvency Code, that may entail the appointment of a provisional insolvency administrator, were comparable to an Austrian reorganization proceeding within the scope of the provisions of the Austrian Settlement and Recomposition of Debts Act.⁷ Pursuant to said Act the opening of a reorganization proceeding had no effects on lawsuits pending. Only the opening of an *insolvency* proceeding in Germany by virtue of Article 15 EIR had immediate effects on lawsuits pending in Austria regarding assets belonging to the estate. Defendant appealed to the Austrian Supreme Court.

As of 9 August 2004, the Amtsgericht Kaiserslautern opened an insolvency proceeding regarding plaintiff and Jochen L was appointed as liquidator. On 10 September 2004, plaintiff's counsel, on behalf of Jochen L, informed the Austrian court of first Instance that an insolvency proceeding had been opened and applied for the resumption of the lawsuit currently pending before the Austrian Supreme Court. The proceeding, by virtue of § 7 Austrian Bankruptcy Act,⁸ had been stayed automatically as of the opening of the insolvency proceeding. On 16 September 2004, the court of first instance changed the denomination of plaintiff to Jochen L as liquidator and decided that the lawsuit be resumed.

The Austrian Supreme Court rescinded the Court of Appeal's judgment. It held that the appointment of the *provisional* insolvency administrator in Germany on 13 April 2004 had caused an automatic stay of the lawsuit pending before the court of appeal according to § 7 Bankruptcy Act. Since no formal decision on the resumption of the proceeding had been issued

⁵ Partial divestment of powers pursuant to § 21(2)(2), 1st case German Insolvency Code (*Insolvenzordnung – InsO*).

⁶ *Vorläufiger Insolvenzverwalter*, see Annex C to the European Insolvency Regulation (Deutschland).

⁷ *Ausgleichsordnung - AO*, Federal Law Gazette Part II [1934] 221, last amended by Federal Law Gazette Part I [2006] 8.

⁸ *Konkursordnung – KO*, Imperial Law Gazette [1914] 337, last amended by Federal Law Gazette Part I [2006] 8.

before the court of appeal handed down its judgment, the Supreme Court ruled that this judgment had to be held void. The Supreme Court provided the following rationale:

- The fact that Annex A to the EIR, which contains a list of insolvency proceedings referred to in Article 2(a) EIR for each EU member state (except Denmark), with regard to Germany names the “*Insolvenzverfahren*”, but also the “*Konkursverfahren*”, the “*Gerichtliche Vergleichsverfahren*” and the “*Gesamtvollstreckungsverfahren*” has historical reasons which “do not limit the scope as of the current legal status”.⁹ Since 1 January 1999 only the “*Insolvenzverfahren*” as provided for by the German Insolvency Code¹⁰ is applicable in Germany. As regards the respective powers of the debtor and the liquidator, these are governed by the *lex fori concursus* (Article 4(2)(c) EIR). Effects of insolvency proceedings on pending lawsuits, on the other hand, pursuant to Article 15 EIR are governed exclusively by the law of the state in which the lawsuit is pending. There shall be no “cumulative” application of the laws of both states, so that it is well possible that the opening of an insolvency proceeding in member state A leads to a stay in a lawsuit pending before the courts of state B, even if the law of state A would not provide for a stay of the proceeding.¹¹

- With regard to Article 15 *Duursma-Kepplinger* has expressed her view that when a reorganization proceeding of a type listed in Annex A to the EIR has been opened in member state A, member state B when deciding on its effects on a lawsuit pending before its courts must examine the principles and fundamental features of this reorganization proceeding conducted in state A and consequently apply those national rules which it would apply had a comparable proceeding been opened on its own territory. The same principle must apply when, as in the case at hand, provisional measures are ordered by a court of state A *prior* to the actual opening of an insolvency proceeding and such measures *may*, under circumstances specified by the law of that state, lead e.g. to a stay of pending lawsuits that regard assets the debtor may no longer dispose of.

- Provisional measures of the kind ordered by the German Amtsgericht, which divest the debtor of the power to make dispositions regarding certain assets, among which the one actually in dispute,¹² aim at protecting the estate from detrimental acts by the debtor and from seizure by single creditors to the detriment of the creditors as a whole. The same would hold true for the appointment of a provisional insolvency administrator under Austrian insolvency law (§ 73(2) Bankruptcy Act). The purpose of staying lawsuits in case an insolvency proceeding is opened regarding a litigating party, on the other hand, is that the appointed administrator be allowed a deliberation period during which he can freely decide on whether or not to continue litigation for the estate. Given that, a teleological approach to both German and Austrian substantial

⁹ This is a literal translation of the somewhat unclear German wording used by the Supreme Court (“... historische Gründe, die den Anwendungsbereich nach der geltenden Rechtslage nicht einschränken.“). Apparently the court wants to express the notion that the term “*Insolvenzverfahren*” must not be construed narrowly, e.g. excluding certain phases of an insolvency proceeding conducted under German law from the applicability of the EIR.

¹⁰ Insolvenzordnung – InsO.

¹¹ The Supreme Court makes reference here to *Duursma-Kepplinger* in *Duursma-Kepplinger/Duursma/Chalupsky*, Europäische Insolvenzverordnung (2002), Article 15 EIR, recitals 20 subs. It must be noted that according to Austrian insolvency law the appointment of a provisional insolvency administrator (in Austria) does *not* affect pending lawsuits.

¹² It is noteworthy that even under German law, the appointment of a provisional insolvency administrator does *not* lead to a stay of pending lawsuits pursuant to § 240 German Civil Procedure Code (*Zivilprozessordnung – ZPO*), unless the debtor is *entirely* divested of his powers to dispose of *any* (not just certain specified) assets, see BGH 21. September 1999, II ZR 70/98.

insolvency law thus requires a stay of the Austrian proceeding, because the object of this proceeding is an asset the debtor has no power to dispose of personally.

This decision handed down by the Austrian Supreme Court is remarkable in various respects. Firstly, its reasoning to an extraordinary extent relies on teleological aspects, which is rather uncommon for courts of civil law provenance. It has surely been a surprise to many insolvency lawyers of both Austrian and German upbringing to see that the Supreme Court has considered it imperative for reasons of both Austrian and German law that the proceeding pending in Austria be stayed despite the fact that both Austrian and German law in an intra-border case would have provided for no such stay.

Secondly, the judgment is very much in line with the ECJ's preliminary ruling in the *Eurofood* case handed down only very recently.¹³ In said ruling the ECJ concurred with Advocate General *Jacobs'* view that, on a proper interpretation of the first subparagraph of Article 16(1) EIR, a decision to open *insolvency proceedings* for the purposes of that provision is a decision handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation.¹⁴ Applying these principles on the case at hand, the appointment of the German provisional insolvency administrator may well have constituted an opening of an *insolvency proceeding* and for that reason (and to the same effect) could have triggered the automatic stay of the Austrian litigation pursuant to § 7 Austrian Bankruptcy Act.

Thirdly, however, the decision is remarkable because in it, in our view, the Austrian Supreme Court – unfortunately like the ECJ in the *Eurofood* case – misinterprets the relevant provisions of the EIR, especially Article 16(1) EIR. As has been argued by the Austrian government, only a decision of the court of a EU member state to open an *insolvency proceeding* (as listed in Annex A to the EIR) is subject to recognition by the other EU member states. Neither Annex A nor Annex B for Austria or Germany (or, with a view to the *Eurofoods* case, for Ireland) list “provisional” (or the like) insolvency proceedings as insolvency proceedings for the purposes of the application EIR. In the *Eurofoods* case, the ECJ argued that the recognition principle laid down in Article 16(1) EIR should be applied as soon as possible “*in the course of the proceedings*”,¹⁵ which is probably true – but is it true, also, that it should be applied as soon as possible *before the opening* of an insolvency proceeding? Unlike the ECJ and the Austrian Supreme Court, we do not think so.

The decision by the Austrian Supreme Court referred to above illustrates the result of a clearly precocious “recognition”. The lawsuit pending in Austria was held to be stayed because of the appointment of a German provisional insolvency administrator, which had to be “recognized” in Austria pursuant to Article 15 EIR – but German insolvency law did not provide for such stay, nor did Austrian insolvency law in a comparable intra-border situation! This result cannot logically be supported by “teleological” reasons. As the annulment of the appeal proceedings in the case at hand shows, the aim of “improving the efficiency and effectiveness of insolvency

¹³ ECJ 2 May 2006, case C-341/04 *Eurofood IFSC Ltd*. The full text can be downloaded from the ECJ's website at <http://curia.eu.int>.

¹⁴ see ECJ C-341/04 *Eurofood IFSC Ltd*, recital 69, paragraph 3.

¹⁵ Recital 52.

proceedings having cross-border effects”¹⁶ is not necessarily achieved, either, by such an interpretation of the provisions of the EIR.

In our view, the rulings referred to above could only be justified if a harmonization of national insolvency laws were intended by all parties in interest. There are various clear indications, however, that this is not the case.¹⁷

C. Public policy exception to the principle of recognition and enforcement (Article 26 EIR) – powers of a liquidator in other insolvency proceedings (Article 32(3) EIR)

In judgment 8 Ob 135/04t of 17 March 2005,¹⁸ the Austrian Supreme Court decided on the following case:

On 26 November 2003 Austrian Bank applied for the opening of insolvency proceedings regarding Zvonko Stojevic. Austrian Bank in its application stated that Mr Stojevic was a consultant working for a UK company, but also worked as a director of an Austrian company and was in default of payment of an amount owed to it of approximately EUR 230,000. Mr Stojevic was insolvent. Upon said application the Commercial Court of Vienna on 28 January 2004 decided to open insolvency proceedings, which decision was not appealed against and entered into force. On 29 January 2004, the Commercial Court of Vienna received an application (mailed on 27 January 2004) from Mr Stojevic, stating that opening of proceedings was not permissible because the High Court of Justice (London) on 27 March 2003 had already opened main insolvency proceedings regarding himself upon application of Komerčni banka a.s. (Komerčni banka), and said proceeding was still pending. He provided a copy of the High Court’s decision, which clearly stated that the court, “upon reading the evidence” and “being satisfied that the EC Regulation does apply and that these proceedings are main proceedings as defined in Article 3 of the Regulation“ had opened the proceedings. The decision contained no reasoning or statement of fact whatsoever on *why* it was satisfied, that Mr Stojevic’s centre of main interest was located on UK territory. Mr Stojevic also communicated that he had no income or other assets in Austria and that his centre of main interests was not located in Austria, but in Croatia.

In the course of the Austrian insolvency proceeding, Mr Stojevic contended that he had a claim against Komerčni banka in the amount of approximately EUR 500 million. Because the claim seemed ill-founded, but also because there was no money in the estate the appointed liquidator, Mr Igáli-Igálffy, did not sue Komerčni banka for said amount. Instead, he applied to the Commercial Court of Vienna for permission to assign the claim to Mr Stojevic, who would be free to assert the claim at his own discretion.¹⁹ The application was granted. Komerčni banka, however, and Yvonne Venvil, the liquidator appointed in the UK proceedings, appealed against the decision. Komerčni banka’s appeal was dismissed by the court of appeal. Ms Venvil’s appeal, though, was partially granted: The court of appeal amended the decision to the effect that the purported claim against Komerčni banka be assigned to Mr Stojevic *notwithstanding a possible divestment of Mr Stojevic’s power to dispose of the claim brought about by the opening of the UK*

¹⁶ see No 8 of the recitals to the EIR.

¹⁷ see e.g. No 11 of the recitals to the EIR (“This regulation acknowledges the fact that as a result of widely differing substantive law it is not practical to introduce insolvency proceedings with universal scope in the entire Community.”).

¹⁸ see footnote 4.

¹⁹ Pursuant to § 119(5) Bankruptcy Act.

proceedings. Against this decision, both Ms Venvil and Mr Igáli-Igálffy appealed to the Austrian Supreme Court.

The Austrian Supreme Court entirely dismissed Mr Igáli-Igálffy's appeal, while Ms Venvil's appeal was granted. The reasoning given by the Supreme Court confirmed virtually all views expressed by the court of appeal on the various legal issues relevant in this case. The most important aspects of the Supreme Court's reasoning were the following:

- Ms Venvil was held competent to appeal against the decision taken by the Commercial Court of Vienna to assign the purported claim to Mr Stojevic. This, however, was *not* due to Article 32(3) EIR, which provides that the liquidator in the main or secondary proceedings shall be empowered to participate in other proceedings on the same basis *as a creditor*, in particular by attending in creditors' meetings: According to Austrian insolvency law, creditors have *no* right to appeal against a decision that allows the debtor to dispose freely of certain assets, nor, for that matter, against *any* decision regarding the realization of the debtor's assets. Rather, Ms Venvil was allowed to appeal against the decision because her powers as a liquidator as provided for by Article 18 EIR were impaired by the Commercial Court's decision.

- Although Mr Igáli-Igálffy had contended that the UK proceedings must not be recognized, relying on the public policy exception provided for in Article 26 EIR. Mr Igáli-Igálffy argued that (i) Mr Stojevic's centre of main interest was not in the UK and (ii) The fact that the High Court had not provided any explanation or reasoning as to why Mr Stojevic's centre of main interests was held to be in the UK was manifestly contrary to public policy which demanded that a decision having an impact on civil rights of a party must state the arguments in support of it. The Austrian Supreme Court dismissed both arguments, providing the following reasoning:

Firstly, as can be considered common ground as of lately and is explicitly set forth in recital 22 to the EIR, a decision of a EU member state to open (main) insolvency proceedings generally must be questioned by the courts of other member states on the grounds that the former state had not been competent to do so.²⁰ Any party in interest who believes that a decision of the court of a EU member state to open (main) insolvency proceedings is faulty shall make use of the remedies available under the law of said state.

Secondly, refusing recognition to a judgment opening insolvency proceedings on the grounds that it does not state any reasons in support of it would be tantamount to scrutinizing the decision as to its merits and would therefore violate the principle of mutual trust as set forth in recital 22 of the EIR. Furthermore, the applicant for the opening of insolvency proceedings in the UK has invoked facts that constituted some connecting factor between the debtor and UK territory, especially the fact that the debtor had unfolded commercial activities there. Thus, in the case at hand, the violation of public policy (if any) is not as "manifest" as required by Article 26 EIR; the UK proceedings therefore must be recognized.²¹ Application of Article 26 EIR must be restricted to extreme, blatant violations of public policy.

²⁰ "(22) ... The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision."

²¹ The Supreme Court did not have to and did not decide on the further conduct of the proceeding as such, which – like the UK proceeding – had been opened as a *main* insolvency proceeding. It still expressed its view that "something had to happen" and suggested, *inter alia*, that the lower courts consider possible ways of terminating the proceedings, e.g. for lack of assets.

- Finally, the Supreme Court held that the assignment of the purported claim against Komerčni Banka could not be the subject of a decision of the Commercial Court of Vienna, because said claim did not form a part of the estate, anyway: Pursuant to Article 2(g) EIR a claim is held to be situated within the territory of the member state of which the third party required to meet it has the centre of its main interests, i.e., in the case at hand, the Czech Republic. Since the UK proceedings had to be recognized as main insolvency proceedings and said proceedings had universal territorial scope, the Austrian insolvency court (Commercial Court of Vienna) had no jurisdiction on the claim.

This decision handed down by the Austrian Supreme Court, again contains a number of interesting clarifications. Although it seems quite reasonable to grant a liquidator the power to appeal against decisions that have an impact on the rights and powers that vest in him by virtue of the provisions of the EIR, the EIR does not expressly say so. On the contrary: Article 32(3) EIR only (and deliberately²²) states that a liquidator in another insolvency proceeding shall have the power to attend creditors' meetings. Apart from that, the wording of Article 32 EIR hints at no powers that need to be awarded to the liquidator other than those awarded to the participating creditors in general. The Supreme Court in its decision makes reference to a number of previous court authorities and states that anyone who is affected legally (not just economically) by a decision handed down during insolvency proceedings has a right to appeal. A liquidator affected adversely in his powers according to Article 18 EIR makes no exception.

The Supreme Court's rationale regarding recognition of the UK insolvency proceedings and restrictive application of the public policy exception seems entirely sound. More interestingly, though, the Supreme Court stated that a different solution might be adequate in cases where "no connecting factors between the debtor and the state of the opening of proceedings could be found and additional aspects of the case (e.g. distance of the forum concursus to the actual centre of main interest or language) make it seem unfair within the meaning of Article 6 ECHR to open proceedings within that state (it follows from the Supreme Court's further explanations that what it contemplated was unfair treatment of *creditors*, not the debtor, that might allow for an application of Article 26 EIR). In our view, however, practically relevant examples for an actual scope of application for these considerations are hard to imagine. Although the Supreme Court stated expressly that it will not apply Article 26 merely because the High Court of Justice did not provide any arguments in support of its decision, the bottom line of the judgment could still be that as long as a decision to open insolvency proceedings provides any, if feeble, reasoning as to why the debtor's centre of main interest lies within the territory of the state of the opening of proceedings, recourse to Article 26 EIR is barred.²³

The Supreme Court's findings regarding Mr Stojevic's purported claim against Komerčni banka deserve no criticism, either. One interesting aspect to the case, however, remained unanswered due to the Czech Republic's accession to the European Union in May 2004: At the outset of the UK (and Austrian) proceedings, the claim was "situated" outside EU territory. It would have been very interesting to hear the Supreme Court's opinion on whether or not such a claim (but for the Czech Republic's accession to the Community) would have formed a part of the estate. Although according to many authors the EIR only regulates "intra-community effects" of cross-

²² c.f. *Duursma-Kepplinger* in *Duursma-Kepplinger/Duursma/Chalupsky*, Europäische Insolvenzverordnung (2002), recital 18 to Article 32 EIR.

²³ In the case at hand, the ostensible grounds for the establishment of the debtor's centre of main interests in the UK followed from the creditor's application to open insolvency proceedings.

border insolvencies, e.g. *Virgós/Garcimartín* argue that a main insolvency proceeding opened in an EU member state has truly “universal” effects, i.e. it encompasses *all* of the creditors’ assets, wherever they may be located.²⁴

D. Stay of secondary insolvency proceedings – stay of liquidation

An interesting case was heard before the courts of the Austrian province Styria on the following subject:²⁵

Collins & Aikman Products GmbH (“Collins & Aikman”) was an Austrian limited liability company with its registered office in Kapfenberg, Styria. It was a member of a corporate group active in the car components industry, its shareholders were two companies incorporated in the US and Luxembourg, respectively. On 15 July 2005 the High Court of Justice in London (UK) opened main insolvency proceedings regarding a number of companies of the Collins & Aikman group, among them Collins & Aikman. Before the end of the same month, the provincial court Leoben, Austria, upon the application of a creditor of Collins & Aikman opened secondary insolvency proceedings. Collins & Aikman’s production site (and only asset) was located in Austria.

The joint liquidators of the Collins & Aikman group appointed in the UK applied for a stay of the entire Austrian insolvency *proceeding*, and – only in case this primary motion had been dismissed – for a stay of any *liquidation of assets* for a period of three months. Furthermore, the UK liquidators applied to the provincial court Leoben to give an order to the Austrian liquidator to sign a co-operation agreement between the UK and Austrian liquidators. Both applications were denied in first instance. The provincial court Leoben held that neither the EIR nor Austrian insolvency law provided for a stay of the entire insolvency proceedings upon application of the liquidator in the main proceedings. As to a stay of liquidation of assets the court held that such stay would have presupposed that (a) concrete suggestions on the liquidation of assets that form (part of) the estate in the secondary insolvency proceedings had been made by the applicants and that (b) a liquidation of assets had actually been intended in the near future by the Austrian liquidator – and neither had been the case. Additionally, as the court argued, a stay of liquidation was manifestly of no interest to the creditors in the main insolvency proceedings in the UK²⁶ because *all* of debtor’s assets formed a part of the Austrian (secondary) insolvency proceedings and creditors in the main and secondary proceedings were virtually identical. Finally, as regards an order to the liquidator in the Austrian proceedings to sign a co-operation agreement, the court held that neither the EIR nor Austrian insolvency law would provide for its discretion to order as applied for.²⁷ Applicants appealed.

²⁴ Virgós/Garcimartín, *The European Insolvency Regulation: Law and Practice* (2004), No 17: “The Insolvency Regulation is based on a universal model in the sense that it permits the opening of insolvency proceedings in the State where the debtor has his centre of main interests and gives this process universal scope, both in terms of the estate of the debtor and the body of creditors, on a worldwide basis.”

²⁵ Decisions taken by the Provincial Court Leoben 31 August, 2005, 17 S 56/05m = ZIK 2005/254, 209 and (upon appeal) Appellate Court Graz 20 October 2005, 3 R 149/05i = ZIK 2005/255, 210; Provincial Court Leoben 1st December 2005, 17 S 56/05m = ZIK 2006/35, 33.

²⁶ see Article 33(1) EIR.

²⁷ Applicants founded their move on § 84(1) Bankruptcy Act which provides that the competent court has to monitor the appointed liquidator’s activities. Pursuant to the same provision, the court may issue orders regarding the conduct of the liquidator’s activities and demand reports on them. The court further supported its reasoning, thus, with the fact that liquidator had not disregarded any of his duties.

The Appellate Court Graz only partially rescinded the court of first instance's decision and held as follows:

- The EIR provides for no stay of entire (secondary) insolvency proceedings, but only for a stay of liquidation. The court of first instance's decision is upheld.

- An application submitted by the liquidator of main insolvency proceedings to stay liquidation in secondary insolvency proceedings may only be denied if such stay were manifestly of no interest to the creditors in the *main* proceedings. If the liquidator in the main proceedings is also appointed as liquidator for several other, structurally interwoven group companies and is striving for a uniform sale of all assets as a going concern, a stay of liquidation in secondary proceedings cannot be deemed to be "manifestly of no interest" to the creditors in the main proceedings. The interests of creditors in the secondary insolvency proceedings are without relevance when deciding upon an application to stay the liquidation, but are safeguarded by Article 33(2) EIR which *inter alia* provides that a stay of the process of liquidation may be terminated upon request of a creditor in the secondary proceedings. Only if at the time the application to stay the process of liquidation is made it is already obvious that such stay would impair the interests of creditors in the secondary proceedings (and the stay, upon application of such creditor, would have to be terminated), this fact must be considered when deciding upon the application. In the case at hand, however, there is no such conflict of interests between the creditors in main and secondary insolvency proceedings.

- A stay of liquidation does *not* presuppose that liquidation measures have already been taken or are about to be taken. Rather, it makes sense to allow the liquidator to apply for a stay of liquidation in order to further his efforts to sell a going concern. This is particularly true because the EIR provides for no sanctions if the duties regarding mutual information and co-operation are disregarded and thus the liquidator in the main proceedings often may not even know of liquidation measures (about to be) taken in the secondary proceedings. The application made by the liquidators in the main proceedings must therefore be granted.

It follows from the provisions contained in the EIR, however, that main insolvency proceedings are given a dominant role with respect to secondary proceedings. This dominant position, though, shall not be construed to constitute a "hierarchy" among the proceedings. Notwithstanding Article 33 EIR, the liquidator in the secondary proceedings may liquidate the estate at his discretion, *taking into consideration* to the extent feasible any suggestions made by the liquidator in the main proceedings on a composition or comparable measure. Only if the liquidator in the secondary proceedings, himself, intends to end the proceedings without liquidation he will need the *consent* of the liquidator in the main proceedings.

- Unless otherwise provided for by the EIR, secondary insolvency proceedings are governed by the law of the state of the opening of these proceedings. Decisions of an insolvency court²⁸ according to § 84 Bankruptcy Act, pursuant to applicable Austrian insolvency law, are not subject to appeal. Thus, the court of first instance's decision not to order the liquidator to sign a co-operation agreement with the joint liquidators in the UK proceedings is not subject to review.

Possibly bearing in mind the Appellate Court's reasoning quoted above, the insolvency court (of first instance) finally agreed to a sale of all assets to an Austrian businessman, who paid a

²⁸ To order that the appointed liquidator take measures of whatever sort in the proceedings or to dismiss any move to this effect.

purchase price of approximately EUR 1.5 million – although the UK liquidators were negotiating a sale for EUR 1.75 million to another potential buyer. The purchase price paid eventually was accepted by the insolvency court because with it all creditors – privileged and non-privileged – had their claims met and all costs of the proceedings were covered. Liquidators in the main proceedings did not appeal against the decision to liquidate this way. Because of this fortunate ending of the case, another interesting question remained unanswered: Liquidators in the main proceedings asserted their fees for administration of the estate until opening of the secondary proceedings in Austria in the Austrian proceedings. It was considered unclear whether these claims would have to be considered claims according to § 46(1)(2) Bankruptcy Act, pursuant to which provision *inter alia* the costs of administering the estate are privileged claims in proceedings. Since these costs accrued *before* the Austrian secondary insolvency proceedings were opened, it could have been argued that these were not costs of administering *the estate*. This question, however, still awaits its answer.

The decision handed down by the Appellate Court Graz, which became binding and effective, in our view reflects a literal and probably accurate reading of the relevant provisions of the EIR (i.e. Articles 33 and 34 EIR). It also demonstrates, however, that co-ordination between main and secondary insolvency proceedings is dealt with inadequately in the EIR. As could be seen, the estate was sold at a price that was below the maximum achievable amount.²⁹

E. Summary

The EIR has already proven a very useful instrument at facilitating cross-border insolvencies within the EU. It seems to us that, maybe unlike other EU law instruments, the EIR has also been accepted by lawyers and courts likewise and is being applied very much in the spirit the authors of the EIR intended it to, that is in a spirit of mutual trust between the member states. Given the court authorities handed down so far, however, it seems that there is room for some clarifications or maybe even amendments, primarily with regard to jurisdiction and recognition of proceedings in the EU member states, but also with regard to co-ordination of main and secondary insolvency proceedings.

²⁹ It must be noted, however, that the price negotiated by the UK administrators was part of an offer that contained a number of conditions precedent and other qualifications. It seems well possible that the sale at the actual lower price was in the best achievable outcome, anyway.