

# PRINCIPLES OF CROSS-BORDER INSOLVENCY LAW

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Reinhard Bork



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## Principles of Cross-Border Insolvency Law

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*To my wife Nicole  
and my children Carsten, Franziska, Julius and Moritz*

## FOREWORD

This book deals with my favourite subject, the principles of cross-border insolvency law. Not only is this a subject of great academic interest, too little dealt with in the literature, but it is also a vital subject for arguing cases in the courts, particularly at the highest level.

Once a case reaches the Supreme Court or CJEU level, there is no binding precedent, and the court is required to consider the subject in the light of the applicable principles. This can be seen in a whole series of CJEU decisions on the EIR, which all stress the cross-border insolvency law principles involved. Professor Bork discusses many of these in detail. Likewise, in the UK Supreme Court, I have seen counsel asked by the judges: ‘What is the principle involved here?’ In teaching cross-frontier insolvency law as a Visiting Professor in Corporate Insolvency law at Oxford I ask students the same question. They cannot do well by simply telling me the rules – I need to know the underlying principles and not just how they have been applied by the judges, but also how they ought to be applied.

Even at lower court levels, the higher court precedents on cross-border insolvency law often leave much scope for argument and some scope for the exercise of discretion. A knowledge of and reference to applicable principles is essential for lower court judges to be able to decide wisely and well.

The consideration of principles and their application is no simple matter. As Professor Bork explains, potentially applicable principles often conflict. The CJEU is good at pointing to the principles it uses to decide cases, but is elusive in explaining how it has resolved conflicting principles and how a court decides to give more weight to one principle than another. Here the courts can get into dangerous territory, as the respective weight to be given to principles can involve politically charged issues such as employment protection.

Professor Bork sensibly stays clear of taking either a conservative or socialist standpoint. However, he does implicitly side with those of us who take the view that law is not merely a system of rules but involves the application of principles. He makes reference to the work of Professor Ronald Dworkin, whose lectures on the subject of principles at Oxford I was privileged to attend in the 1970’s.

Principles can also sometimes be linked to policies. For example, in the UK much weight is placed in domestic law on the rights of secured creditors, who are regarded as having a proprietary interest in an asset. This carries over into cross-frontier insolvency law, for example in the way in which the UNCITRAL

Model Law has been modified. Special protection from foreign insolvency proceedings for secured creditors in the British version of the Model Law can be described as being based on the principle of protecting property rights. It can also be regarded as pursuing a policy of the UK being regarded as a secured creditor-friendly jurisdiction. Unsurprisingly, I am not in agreement with Professor Bork's thought-provoking suggestions regarding rights in rem, but of course his discussion is a valuable addition to the literature.

It is well known that domestic legal systems differ considerably, even within the EU, and that that includes insolvency law. Nevertheless, it is striking how often different approaches lead to similar solutions in practice. I do not believe that research has yet established everything that the common law system, as well as the civil law system, owe to Roman law in this regard.

In the case of cross-border insolvency law, the situation has been less harmonious, because of the split between universalists and territorialists. The EIR is a very successful compromise between the two positions. In the UK we have, even outside the EIR, been developing our own compromise, which has been well described as 'modified universalism'. This is reflected in English common law rules of cross-frontier insolvency law. The UNCITRAL Model Law can also be described as a form of modified universalism. Thus it is that in cross-border insolvency law fundamental principles have clashed and have produced a practical compromise. However, any understanding of the EIR, the Model Law, common law insolvency cross-border rules and modified universalism requires a knowledge and awareness of the original principles and how far they subsist.

The present book is clearly the product of massive and admirable research. Professor Bork discusses the topics in the light of and using an analysis of many cases from the EU, USA and Canada, with reference also to various international treaties and other instruments, such as the UNCITRAL Model Law. Reference is also made to numerous books and articles, as well as provisions of legislation in the EU and elsewhere. It is a major step forward in learning on this subject.

Gabriel Moss QC  
3-4 South Square, Gray's Inn, London WC1R 5HP

## PREFACE

'Principles don't fall from heaven ..., they have to be found and to be elaborated.'<sup>1</sup>

The thesis of this book is that cross-border insolvency rules of all kinds (e.g. the European Insolvency Regulation, the UNCITRAL Model Law, the ALI Principles for the NAFTA states, national laws such as Chapter 15 US Bankruptcy Code and Sch. 1 Cross-Border Insolvency Regulation 2006) are founded on, and can be traced back to, basic values, and that they aim to pursue and enforce such principles. Furthermore, several principles can be identified, distinguished and then sorted into three groups: jurisdictional principles (e.g. unity, universality, equality, mutual trust, cooperation and communication, subsidiarity, proportionality), procedural principles (e.g. efficiency, transparency, predictability, procedural justice, priority) and substantive principles (e.g. equal treatment of creditors, optimal realisation of the debtor's assets, debtor protection, protection of trust [for secured creditors and contractual partners, amongst others], social protection [for employees and tenants et al]). If this thesis is correct, it might be helpful for both deciding cases and shaping cross-border insolvency law through the use of a principle-based approach. Legislators as well as judges could be offered new substantive and methodological support in making decisions, e.g. where the treatment of secured creditors, support for foreign insolvency practitioners or even harmonisation of cross-border insolvency laws is at stake.

Some of my theses and proposals – for example that the fate of rights *in rem* should be governed by the *lex fori concursus* – may seem provocative to many readers. If 'provocative' is used in the sense of 'thought-provoking', then I am very happy with this assessment. In the field of cross-border insolvency law, academic thinking must not become jaded. It is hoped that putting the principle-based approach developed in this book up for discussion may contribute to an open-minded and fertile discourse on how to improve the laws on international insolvency proceedings.

---

<sup>1</sup> Koopmans, 1 (1993) ERPL, 67, 78.

Furthermore, this is not a political book. It does not aim for ‘conservative’ or ‘socialist’ solutions, and it does not seek to make the legal world a better place. It simply tries to offer a methodological proposal on how to serve the needs of a global market for harmonised (cross-border) insolvency laws in an economically reasonable and hopefully acceptable way.

It may well be that the view in favour of consequent universalism, expressed throughout the book, is too ambitious and too optimistic. However, pessimism has rarely led to key developments.

The book covers literature and case law published before 30 June 2016. Sources published after this date may be mentioned only in passing.

Books almost always rest on the shoulders of several people. In my case, I could not have completed this work without the contributions and most helpful support of many persons and institutions. Hence, my gratitude must be expressed in many ways.

First of all, my thanks go to Bob Campbell, who very generously endowed Magdalen College, University of Oxford with the Robert S. Campbell Visiting Fellowship. This fellowship offers lawyers from abroad the opportunity to carry out academic research in the cloistered quietness of one of the most beautiful colleges in Oxford. I have been awarded it twice and I am therefore deeply indebted to the benefactor regarding this invaluable support.

I am also very grateful to the fellows of Magdalen College, especially in law: Roderick Bagshaw, Katharine Grevling, Jeremias Prassl and above all Roger Smith, who through their friendship, as well as their decision to nominate me Robert S. Campbell Visiting Fellow a second time, once again opened the door to this inspiring world and enabled me to participate in college life as one of their own.

However, spending a research year in Oxford would not have been possible without the collegial support of the Faculty of Law of the University of Hamburg, which permitted me a year’s sabbatical, and the *Deutsche Forschungsgemeinschaft*, who generously funded this project.

My colleagues in Oxford have been of the utmost assistance, not least by discussing my ideas in a very helpful way and by having me participate in academic life at the Law Faculty, namely Alexandra Braun, Horst Eidenmüller, Wolfgang Ernst, Sir Roy Goode, Louise Gullifer, Jenny Payne, and above all Kristin van Zwieten. It has been enriching to work with new friends and not just new colleagues.

Burkhard Hess and Björn Laukemann invited me to the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law. Together with their brilliant team, they enabled me to spend very effective research time in a very enriching academic atmosphere.

While based abroad, my team in Hamburg relieved some of the burden on me. In this regard I am very grateful to Jasper Bothe, Margrit Brüggemann, Julia



Harten, Philipp Hartmann, Anna Leipson and Sebastian Zeyns. Charlotte Cutts, who invested a large amount of time and energy in checking that my English drafts were easy to read, deserves special mention. The same holds true for Maria Weber, who drafted the lists and tables in a commendably thorough manner.

Finally, and most importantly, I am deeply indebted and enormously grateful to my wife and my children, to whom this book is dedicated. Nicole, Julius and Moritz accompanied me enthusiastically to England the second time round, where they gave me the support that any good academic work requires, while Carsten and Franziska finished their studies in Germany. It is both reassuring and encouraging to be in such good hands.

Hamburg, July 2016

*Reinhard Bork*

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## TABLE OF ABBREVIATIONS

ABIJ	American Bankruptcy Institute Journal
ABILR	American Bankruptcy Institute Law Review
ABLJ	American Business Law Journal
AC	Law Reports, Appeal Cases (Third Series)
AG	1) Advocate General (of the Court of Justice of the European Union) 2) <i>Amtsgericht</i>
ALI	American Law Institute
Am. Bankr. LJ	American Bankruptcy Law Journal
ARAFIP	Act on Recognition of and Assistance for Foreign Insolvency Proceedings
Art.	Article (of a statute)
BAG	<i>Bundesarbeitsgericht</i>
Bankr.	Bankruptcy Court
Bankruptcy Code	Transformation of the UNCITRAL Model Law into Chapter 15 of Title 11 United States Code
BAP	Bankruptcy Appellate Panel
BGB	<i>Bürgerliches Gesetzbuch</i>
BGH	<i>Bundesgerichtshof</i>
BGHZ	<i>Amtliche Sammlung der Entscheidungen des Bundesgerichtshofes in Zivilsachen</i>
B.R.	Bankruptcy Reporter
BRA	Bankruptcy and Rehabilitation Act of 28 February 2003, Poland
Brook. J. Int'l L.	Brooklyn Journal of International Law
Brussels Ia Regulation	Regulation (EU) No. 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters
BT-Drs.	<i>Drucksachen des Deutschen Bundestages</i>
Bus. L. Int'l	Business Law International
BVerfG	<i>Bundesverfassungsgericht</i>

BVerfGE	<i>Entscheidungen des Bundesverfassungsgerichts</i>
B.Y.B.I.L.	British Year Book of International Law
CA	Court of Appeal
CBIR 2006	Cross-Border Insolvency Regulations 2006
CBR	Canadian Bankruptcy Reports
C.D.Cal.	Central District of California
cf.	<i>confer</i>
ch.	chapter
Ch.	Law Reports, Chancery Division (3rd Series)
Chi. L. Rev.	University of Chicago Law Review
Cir.	Circuit
CJEU	Court of Justice of the European Union
CLJ	The Cambridge Law Journal
CLP	Centre for Insolvency Law and Policy
CML Rev.	Common Market Law Review
Code Bustamante	Havana Convention on Private International Law
COM	European Commission
COM(2012)	Communication from the European Commission 2012
COMI	Centre of Main Interests
CRI	Corporate Rescue and Insolvency
Data Protection Directive 95/46/EC	Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data
Data Protection Regulation 2016/679	Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to processing of personal data and on the free movement of such data
Data Protection Regulation 45/2001	Regulation (EC) No. 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data
DCFR	Draft Common Frame of Reference
D.Del.	District of Delaware



DG JUST	European Commission Directorate-General for Justice and Consumers
Dig.	Digest
Directive 2001/17	Directive 2001/17/EC of the European Parliament and of the Council of 19 March 2001 on the reorganisation and winding-up of insurance undertakings
Directive 2011/7	Directive 2011/7/EU of the European Parliament and of the Council of 16 February 2011 on combating late payment in commercial transactions (recast)
Directive 97/7	Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect of distance contract
D.Mass.	District of Massachusetts
D.Nev.	District of Nevada
D.N.J.	District of New Jersey
Duke J. Comp & Int'l L.	Duke Journal of Comparative & International Law
EBOR	European Business Organization Law Review
EC	European Community
ECF	Electronic case files
ECLI	European Case Law Identifier
ed.	editor/edition
E.D.Cal.	Eastern District of California
E.D.N.Y.	Eastern District of New York
E.D.Okla.	Eastern District of Oklahoma
eds.	editors
E.D.Va.	Eastern District of Virginia
EFTA	European Free Trade Association Court
e.g.	<i>exempli gratia</i>
EGInsO	<i>Einführungsgesetz zur Insolvenzordnung</i> /Introductory Act to the Insolvency Regulation
EIR	Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings
EIR 2000	Council Regulation (EC) 1346/2000 of 29 May 2000 on insolvency proceedings
EIRCR	European Insolvency Regulation Case Register
ELJ	European Law Journal

ELR	European Law Review
ERPL	European Review of Private Law
et al.	<i>et alii</i>
et seq.	<i>et sequens</i>
etc.	<i>et cetera</i>
EU	European Union
EuInsVO	<i>Europäische Insolvenzverordnung</i>
European Credit Institutions Directive	Directive 2001/24/EC of the European Parliament and the Council of 4 April 2001 on the reorganisation and winding up of credit institutions
EWCA	England & Wales Court of Appeal
EWCA Civ.	England & Wales Court of Appeal, Civil Division
EWHC	England & Wales High Court
EWHC (Ch)	England & Wales High Court, Chancery Division
EWHC (Comm)	England & Wales High Court, Commercial Division
FCAFC	Federal Court of Australia: Full Court
FCD	Financial Collateral Directive, Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements
FIBI	First International Bank of Israel
fn.	footnote
Fordham Int'l LJ	Fordham International Law Journal
Fordham L. Rev.	Fordham Law Review
FS	<i>Festschrift</i>
GG	<i>Grundgesetz</i>
GmbH	<i>Gesellschaft mit beschränkter Haftung</i>
GmbHG	<i>Gesetz betreffend die Gesellschaft mit beschränkter Haftung</i>
Harvard L. Rev.	Harvard Law Review
Hastings Int'l & Comp.L.Rev.	Hastings International and Comparative Law Review
IA 1986	Insolvency Act 1986
IBA	International Bar Association
ibid.	<i>ibidem</i>
IBRC	Irish Bank Resolution Corporation
ICLQ	The International and Comparative Law Quarterly
ICR	International Corporate Rescue
i.e.	<i>id est</i>

IEHC	High Court of Ireland
IESC	Supreme Court of Ireland
III	International Insolvency Institute
IILR	International Insolvency Law Review
IIR	International Insolvency Review
Ill. L. Rev.	University of Illinois Law Review
InsO	<i>Insolvenzordnung</i>
INSOL Europe	International Association of Restructuring, Insolvency & Bankruptcy Professionals (Europe branch)
Insolv. Int.	Insolvency Intelligence
Int. Insolv. Rev.	International Insolvency Review
Int'l Law.	The International Lawyer
IO	<i>Insolvenzordnung</i>
Iowa L. Rev.	University of Iowa Law Review
IRPax	Praxis des Internationalen Privat- und Verfahrensrechts
Istanbul Convention	Istanbul Convention of 5 June 1990
JCB	<i>Jurisprudence commerciale de Belgique</i>
JCLS	Journal of Corporate Law Studies
JIBFL	Butterworths Journal of International Banking and Financial Law
J. Int'l Bank. L. & Reg.	Journal of International Banking Law and Regulation
JPIL	Journal of Private International Law
K.B.	Law Reports, King's Bench
KTS	<i>Zeitschrift für Insolvenzrecht</i>
LAG	<i>Landesarbeitsgericht</i>
LAG	<i>Landesarbeitsgericht</i>
Ley Concursal	Ley 22/2003 of 9 July 2003 (Spain)
LFMR	Law and Financial Markets Review
LG	<i>Landgericht</i>
MA	Massachusetts
Mich. J. Int'l L.	Michigan Journal of International Law
Mich. L. Rev.	Michigan Law Review
Montevideo Treaty	Montevideo Treaty on International Commercial Terrestrial Law of 19 March 1940

MünchKomm. BGB	<i>Münchener Kommentar zum Bürgerlichen Gesetzbuch</i>
MünchKomm. InsO	<i>Münchener Kommentar zur Insolvenzordnung</i>
n.	footnote
NAFTA	North American Free Trade Agreement
N.D.Tex.	Northern District of Texas
NIBLeJ	Nottingham Insolvency and Business Law e-Journal
NIQB	High Court of Justice Northern Ireland: Queen's Bench Division
NJW	<i>Neue Juristische Wochenschrift</i>
No.	Number
Nordic Bankruptcy Convention	Nordic Bankruptcy Convention of 7 November 1933
NotBZ	<i>Zeitschrift für die notarielle Beratungs- und Beurkundungspraxis</i>
N.Y. Sup. Ct.	New York City Supreme Court
N.Y.S.	New York State Reporter
NZI	<i>Neue Zeitschrift für Insolvenz- und Sanierungsrecht</i>
OHADA	Organisation for the Harmonisation of Business Law in Africa
OHADA Uniform Act	Uniform Act organising collective proceedings for wiping off debts
OJ	The Official Journal of the European Union
OLG	<i>Oberlandesgericht</i>
ONCA	Ontario Court of Appeal
ONSC	Ontario Superior Court of Justice
p.	page
para.	paragraph
pt.	part
Q.B.D.	Law Reports, Queen's Bench Division
RabelsZ	<i>Rabels Zeitschrift für Ausländisches und Internationales Privatrecht</i>
Rdnr.	<i>Randnummer</i>
RIW	<i>Recht der internationalen Wirtschaft</i>

Rome I Regulation	Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations
s.	section
Sch.	Schedule
S.C.R./SCR	Canada Supreme Court Reports
S.Ct.	Supreme Court Reporter
S.D.Fla.	Southern District Florida
S.D.N.Y.	Southern District of New York
S.D.Tex.	Southern District of Texas
S.D.Tex.	Southern District of Texas
supp.	supplement
TEU	Treaty Establishing the European Union
Tex. Int'l LJ	Texas International Law Journal
TFEU	Treaty on the Functioning of the European Union
TRI Leiden	Turnaround, Rescue & Insolvency Leiden (Leiden Law School)
UK	United Kingdom
UKHL	United Kingdom House of Lords
UKPC	United Kingdom Privy Council
UKSC	United Kingdom Supreme Court
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Model Law	UNCITRAL Model Law on Cross-Border Insolvency (1997)
UNIDROIT	International Institute for the Unification of Private Law
Unif. L. Rev.	Uniform Law Review
Univ. Penn. L. Rev.	University of Pennsylvania Law Review
US/USA	United States (of America)
U.S.C.	United States Code
VG	Verwaltungsgericht
Virg. J. Int'l L.	Virginia Journal of International Law
vol.	volume
Vorbem.	<i>Vorbemerkungen</i>
vs.	<i>versus</i>
WDR	World Development Report

Table of Abbreviations

W.D.Wash.	Western District of Washington
Wisc. Int'l LJ	Wisconsin International Law Journal
WLR	Weekly Law Reports
ZEuP	<i>Zeitschrift für Europäisches Privatrecht</i>
ZIP	<i>Zeitschrift für Wirtschaftsrecht</i>
ZPO	<i>Zivilprozessordnung</i>

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