

CORPORATE INSOLVENCY LAW

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A Comparative Textbook

Reinhard BORK

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FOREWORD

This textbook is a hugely welcome addition to the body of literature on the laws relating to insolvency and restructuring. It comes at a time when the European Union has taken an important step towards harmonisation of insolvency laws of the Member States with the adoption of the Directive on restructuring and insolvency. And undoubtedly there is more to come in the not too distant future.

In a world with strongly interconnected markets, where businesses are not confined to the territory of one single country, it is important to have a comparative outlook on how jurisdictions deal with businesses in financial distress. This is important not only for practitioners, judges, and scholars, but also for students. Notwithstanding that domestic legal systems show considerable differences in this respect, often these different approaches lead to similar solutions in practice. When insolvency looms or is present the questions that arise are in essence similar, regardless of the jurisdiction involved. And these questions are addressed in this textbook in a very structured and illustrative manner. In his book, professor Bork addresses fundamental issues, such as what insolvency actually means, the relationship between the parties involved in the process, how proceedings are commenced and what their effects are on legal relationships that the debtor entered into prior to the opening of proceedings, including transactions avoidance – a topic that has the warm interest of both professor Bork, who is also a close colleague at Radboud University where he holds a chair in Finance, Security Rights and Insolvency Law, and myself as co-chairs of an international working group that has set out to produce a proposal for principle based harmonised rules on transaction avoidance in the EU –, rights and ranking of creditors, and even cross-border implications of insolvency proceedings. In dealing with these (and more) fundamental questions of restructuring and insolvency, he looks at English, French, German, and US law, but only as examples to illustrate the underlying principles and how they may be operationalised.

With professor Bork I agree that law, including the law relating to insolvency and restructuring, is not merely a set of rules. When studying insolvency law on a domestic and, certainly, on a comparative level,

it is not sufficient to just know what the rules say and compare them. It is important to understand where those rules come from, what they try to achieve and, therefore, to understand the underlying principles and policy choices that drive those rules. As professor Bork points out, legal rules are only very rarely of a purely technical, valueless nature. More often they link back to basic principles. In order to be able to understand the mechanics of insolvency and restructuring proceedings in any given jurisdiction, it is necessary to analyse those underlying principles. And this is precisely what this textbook does.

The principle based approach taken by professor Bork, an approach which he already followed in his much acclaimed treatise on the Principles of Cross-Border Insolvency Law, is to be welcomed. I believe that this approach has tremendous added value. As a young scholar I had the distinct privilege of being involved in the project that led to the publication of the Principles of European Insolvency Law. That project strengthened me in my conviction that comparative research is not merely about comparing rules. Unravelling the principles underlying restructuring and insolvency laws is a necessary and very important step in order to understand the restructuring and insolvency regime in any given jurisdiction and essential when attempting to achieve a meaningful degree of harmonisation of laws.

Personally, having studied German insolvency law through professor Bork's much praised "Einführung in das Insolvenzrecht", I welcome his choice for not merely translating his textbook on German insolvency law into English, but for taking it a step further. It is clear that extensive research went into this book and that it is an extremely valuable step forward in learning on the topic. It will be very helpful to all those who embark on a study of insolvency and restructuring law and I have no doubt that it will find its way in academia and practice.

Michael Veder
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Faculty of Law, Radboud University

PREFACE

When I first started to write my German textbook “Einführung in das Insolvenzrecht” (Introduction to Insolvency Law) in 1994, shortly after the German government having published a draft new Insolvency Statute, I did not expect both to become a success. The new German “Insolvenzordnung” was highly appreciated in Germany, pushed both the German Insolvency Law as well as the German insolvency scene to the world’s best and was, on the recommendation of – among others – World Bank and International Monetary Fund, adopted in many states, especially in Eastern Europe after the fall of the iron curtain. Likewise, my textbook advanced to the small number of standard references, used by practitioners and students alike.

It was against this background that friends and colleagues from abroad frequently suggested that I have the textbook translated into English. Although I took this as a huge compliment, I hesitated to translate a book which only deals with German insolvency law for foreign readers. Instead, I chose to put the book on a more general level and to rewrite it as a general textbook which deals with insolvency law as such, with the ideas and general features of insolvency law, using national legislation as examples only. In this respect, throughout the book, English, French, German, and US law is considered. I picked these jurisdictions because they represent leading systems internationally as it concerns insolvency law, albeit with typical differences, and their laws are role models for many other states.

I was strongly endorsed in this approach by an invitation as Distinguished Visiting Professor to the College of Law at National Taiwan University in Taipei in 2019. I was asked to hold lectures on insolvency law, putting the general aspects in the foreground. Since I have no knowledge of Taiwanese insolvency law and Taiwanese students are probably only moderately interested in German insolvency law, I offered to deliver the talks on a wider basis. I am very grateful that the College of Law at NTU willingly accepted this concept. It was the initial spark for this book. Occasionally, solutions from other jurisdictions are mentioned, however, without any intention to be exhaustive.

I am deeply obliged to three persons who contributed significantly to this book. First and foremost, Belle Vulto (Nijmegen) must be mentioned who read the whole manuscript from an editor's point of view, highlighting inconsistencies and ambiguities. In my eyes, her contribution made the book better. Lillian Jewell von Seggern controlled my English and added significantly to the perceivability of the text. Last but not least, I am grateful to Marlene Krusemark who controlled the formalities and drafted the lists and tables in a commendably thorough manner.

Insolvency law – as most other fields of law – is subject to constant change, either by legislators or by courts. Hence, it is most likely that this book contains mistakes or refers to outdated legislation. I will therefore be grateful for any hints to new developments, lacunas, or other weaknesses, and I will appreciate any criticism as to design, content, or usability of this textbook.

Reinhard Bork
Hamburg, April 2020

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LIST OF ABBREVIATIONS

ABILR	American Bankruptcy Institute Law Review
AC	Law Reports, Appeal Cases (Third Series)
AGS	<i>L'Association pour la gestion du régime de Garantie des créances des Salariés</i>
AktG	<i>Aktiengesetz</i>
Am. Bankr. LJ	American Bankruptcy Law Journal
arg.	argument ?
Art.	Article (of a statute)
Bankr.	Bankruptcy Court
BAP	Bankruptcy Appellate Panel
BGH	<i>Bundesgerichtshof</i>
BGHZ	<i>Amtliche Sammlung der Entscheidungen des Bundesgerichtshofes in Zivilsachen</i>
BR	Bankruptcy Rules
B.R.	Bankruptcy Reporter
Bull. civ.	<i>Bulletin des arrêts des chambres civiles de la Cour de cassation</i>
CA	Court of Appeal
C.D. Cal.	Central District of California
cf.	<i>confer</i>
ch.	chapter
Ch.	Law Reports, Chancery Division (3rd Series)
Cir.	Circuit
CJEU	Court of Justice of the European Union
COMI	Centre of Main Interests
Corp.	Corporation
CRI	Corporate Rescue and Insolvency
D. Del.	District of Delaware

ECLI	European Case Law Identifier
ed.	Editor/edition
E.D.N.Y.	Eastern District of New York
E.D. Pa.	Eastern District of Pennsylvania
E.D. Va.	Eastern District of Virginia
e.g.	<i>exempli gratia</i>
EIR	Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings
et seq.	<i>et sequens</i>
etc.	<i>et cetera</i>
EU	European Union
EuInsVO	<i>Europäische Insolvenzverordnung</i>
Eur Bus Org Law Rev	European Business Organisation Law Review
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
Ex. P.	<i>Ex parte</i>
Fed. Appx.	Federal Appendix
fn.	footnote
FS	<i>Festschrift</i>
GmbH	<i>Gesellschaft mit beschränkter Haftung</i>
GmbHG	<i>Gesetz betreffend die Gesellschaft mit beschränkter Haftung</i>
ibid.	<i>ibidem</i>
i.e.	<i>id est</i>
IER	Immigrant and Employee Rights Section
IILR	International Insolvency Law Review
IIR	International Insolvency Review
InsO	<i>Insolvenzordnung</i>

JCLS	Journal of Corporate Law Studies
JIBFL	Butterworths Journal of International Banking and Financial Law
K.B.	Law Reports, King's Bench
Mich. L. Rev.	Michigan Law Review
Minn. L. Rev.	Minnesota Law Review
n.	footnote
NAFTA	North American Free Trade Agreement
N.D. Ill.	Northern District of Illinois
NJW	<i>Neue Juristische Wochenschrift</i>
NJW-RR	<i>Neue Juristische Wochenschrift Rechtsprechungs-Report</i>
No.	Number
N.Y. Sup. Ct.	New York City Supreme Court
N.Y.S.	New York State Reporter
NZG	<i>Neue Zeitschrift für Gesellschaftsrecht</i>
NZI	<i>Neue Zeitschrift für Insolvenz- und Sanierungsrecht</i>
OJ	The Official Journal of the European Union
ONCA	Ontario Court of Appeal
ONSC	Ontario Superior Court of Justice
p.	page
para.	paragraph
PEIL	Principles of European Insolvency Law (cf. Literature)
Q.B.D.	Law Reports, Queen's Bench Division
s./sec.	section
Sch.	Schedule
S. Ct.	Supreme Court Reporter
S.D.N.Y.	Southern District of New York
S.D. Ohio	Southern District of Ohio
S.D. Tex.	Southern District of Texas
SSRN	Social Science Research Network
supp.	supplement

UK	United Kingdom
UKHL	United Kingdom House of Lords
UKPC	United Kingdom Privy Council
UKSC	United Kingdom Supreme Court
UNCITRAL Model Law	UNCITRAL Model Law on Cross-Border Insolvency (1997)
Urt.	<i>Urteil</i> (judgment)
US/USA	United States (of America)
U.S.C.	United States Code
v.	<i>vom</i> (of)
v./vs.	<i>versus</i>
VAT	Value Added Tax
ZHR	<i>Zeitschrift für das gesamte Handels- und Wirtschaftsrecht</i>
ZIP	<i>Zeitschrift für Wirtschaftsrecht</i>