

“Oops, they did it again” - Remarks on the intertemporal application of the recast Insolvency Regulation

Robert Freitag, Professor for private, European and international law at the University of Erlangen, Germany, has kindly provided us with his following thoughts on the recast Insolvency Regulation.

It is already some time since regulation Rome I on the law applicable to contractual obligations was published in the Official Journal. Some dinosaurs of private international law might still remember that pursuant to art. 29 (2) of regulation Rome I, the regulation was (as a general rule) supposed to be applied “from” December 17, 2009. Quite amazingly, art. 28 of the regulation stated that only contracts concluded “after” December 17, 2009, were to be governed by the new conflicts of law-regime. This lapse in the drafting of the regulation gave rise to a great amount of laughter as well as to some sincere discussions on the correct interpretation of the new law. The European legislator reacted in time by publishing a “Corrigendum” (OJ 2009 L 309, p. 87) clarifying that regulation Rome I is to be applied to all contracts concluded “as from” December 17, 2009.

Although one can thoroughly debate whether history generally repeats itself, it obviously does so on the European legislative level at least with regard to the intertemporal provisions of European private international law. The 2015 recast regulation on insolvency proceedings (Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, OJ L 141, p. 19) has, according to its art. 92 (1), entered into force already on June, 26, 2015. However, the European legislator has accorded a lengthy transitional period to practitioners and national authorities. The recast regulation therefore foresees in art. 92 (2) that it will only be applicable “from” June 26, 2017. This correlates well with art. 84 (2) of the recast regulation, according to which “Regulation (EC) No 1346/2000 shall continue to apply to insolvency proceedings which fall within the scope of that Regulation and which have been opened *before* 26 June 2017”. Since the old regime will be applicable only before June 26, 2017,

the uninitiated reader would expect the new regime to replace the current one for all insolvency proceedings to be opened “as of” or “from” June 26, 2017. This is, hélas, not true under art. 84 (1) of the recast regulation which states that “[...] this Regulation shall apply only to insolvency proceedings opened *after* 26 June 2017.” The discrepancy between the two paragraphs of art. 84 is unfortunately not limited to the English version of the recast regulation; they can be observed in the French and the German text as well. The renewed display of incompetence in the drafting of intertemporal provisions would be practically insignificant if on June 26, 2017, all insolvency courts will be closed within the territorial realm of the recast regulation. Unfortunately, June 26, 2017 will be a Monday and therefore (subject to national holidays) an ordinary working day even for insolvency courts. The assumption seems rather farfetched that on one single day next summer no European insolvency regime at all will be in place and that the courts shall - at least for one day - revert to their long forgotten national laws. Art. 84 (1) of the recast regulation is therefore to be interpreted against its wordings as if stating that the new regime will be applicable “as of” (or “from”) June 26, 2017. This view is supported not only by art. 92 (2) and art. 84 (2), but also by art. 25 (2). The latter provision obliges the Commission to adopt certain implementation measures “by 26 June 2019”.

It would be kind of the Commission if once again it would publish a corrigendum prior to the relevant date. And it would be even kinder if the members of the “European legislative triangle”, i.e. the Commission, the European Parliament and the Counsel, would succeed in avoiding making the same mistake again in the future although there is the famous German saying “Aller guten Dinge sind drei” and it is time for an overhaul of regulation Rome II namely with respect to claims for damages for missing, wrong or misleading information given to investors on capital markets ...