

# **The UNCITRAL Model Law and Its Implementation So Far**

**Germany - Why we did it our way**

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# Contents

- A. Historical Background – Why ?
- B. Actual Legal Situation – How ?

# A.I Prior to Revision

- Prior to current Insolvency Code:
  - 2 provisions in former Bankruptcy Code
  - And interpretation in literature and case law formed German international insolvency law
- New draft insolvency code in `90s
  - contained substantive provisions for cross-border insolvency proceedings

## **A.II Revision**

- Drafted sections eliminated again
- Since The 1995 European Community Convention on Insolvency Proceedings was to be finalised
- German legislative decided to wait with several rough paragraphs on how to handle cross-border proceedings

## A.III Plan

- Intention of German legislative:
  - To put Convention into force also applicable for non-EC member state proceedings
- Convention failed and intention became obsolete
- [UNCITRAL Model Law approved in Dec.1997, affected by common law]

## A.IV EC Regulation

- Discussions since 1999, into force 2002
- EC Regulation was based on
  - trust in constitutional legality and functionality of judiciary within the EC
  - Unique international insolvency law in all member states required by the connexion of main and secondary proceedings
- not transferable to all countries outside the EC
- Decision to establish an own, autonom German international insolvency law

# **A.V German International Insolvency Law**

- Needed to meet worldwide application
- Former draft insolvency code from 1992 were close to those requirements
- Legislative referred to that draft
- Several ideas from the European debate included because of the concurrent drafting and discussion process
- Into force in March 2003

# **B.I Principle of German International Insolvency Law**

- Base: principle of universality
  - Commenced insolvency proceedings have the effect that all assets of the debtor are attached / involved
- Main assumption:
  - Insolvency law of the commencing country is decisive and applicable for insolvency proceedings and their effects
  - Exceptions for certain issues (labour, etc.)

## **B.II Recognition**

- Result from the principle of universality:
  - Automatic recognition of the opening decision of foreign insolvency proceedings
  - Unless
    - Breach of ordre public
    - Commencing court not with competent jurisdiction pursuant to German insolvency law

## **B.III Secondary Proceedings**

- In case of assets or establishments in Germany: opening of secondary proceedings in Germany possible
- Same mechanism as like as EC Regulation

## **B.IV Comparison with UNCITRAL**

- Automatic recognition of all foreign insolvency proceedings together with
- Application of substantive insolvency law of the commencing country to the recognised proceedings
- Goes beyond the effectiveness of UNCITRAL Model Law