ARTICLE 11

CONTRACTS RELATING TO IMMOVEABLE PROPERTY

Zeno Crespi Reghizzi

1. **The effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated.**
2. **The court which opened main insolvency proceedings shall have jurisdiction to approve the termination or modification of the contracts referred to in this Article where:**
   (a) **the law of the Member State applicable to those contracts requires that such a contract may only be terminated or modified with the approval of the court opening insolvency proceedings; and**
   (b) **no insolvency proceedings have been opened in that Member State.**

A. OVERVIEW

Most insolvency laws contain special provisions which, by way of derogation from general contract law, regulate the effects of the opening of insolvency proceedings on contracts to which the debtor is a party and whose performance is ongoing at the time of the opening of the proceedings (executory contracts). Depending on the cases, these provisions aim at: (i) preventing the insolvency practitioner from remaining bound by contracts that are financially disadvantageous (or may hinder the implementation of the restructuring or liquidation plan), and/or (ii) preventing the opening of the insolvency from causing the termination of contracts whose performance may be in the interest of the estate. **11.001**

From the conflict-of-law perspective, those provisions normally apply if they belong to *lex fori concursus*. This solution stems from Article 7(2)(e), which sets the competence of the law of the **11.002**

Member State of the opening of proceedings to determine 'the effects of insolvency proceedings on current contracts to which the debtor is party'.[1]

11.003 For contracts conferring the right to acquire or make use of immoveable property, Article 11(1) sets an exception to Article 7(2)(e) by providing that the effects of insolvency proceedings on those contracts shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated (*lex rei sitae*). This exception is explained by the fact that, for the contracts in question, many insolvency laws contain special provisions that balance the above-mentioned interests of the insolvency estate with the potentially conflicting interests of the debtor's contractual counterparties, such as tenants or acquirers of immoveable property. The close connection existing between the contracts contemplated by Article 11 and the Member State where the immoveable property is located justifies the application of the *lex rei sitae*, instead of the *lex fori concursus*, to regulate the effects of the opening of insolvency proceedings on those contracts.[2]

11.004 Being an exception to the general rule in Article 7(2)(e), Article 11(1) is to be interpreted narrowly. It only concerns the *effects* of the opening of insolvency proceedings on the contracts in question. It does not concern other aspects contemplated by Article 7, such as the ranking of claims deriving from these contracts (Art 7(2)(i)), the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors (Arts 7(2)(m) and 16), and the creditors' rights after the closure of insolvency proceedings (Art 7(2)(k)).[3]

11.005 Article 11(1) corresponds verbatim to Article 8 of Regulation 1346/2000. Compared to Article 8, however, Article 11 contains a second paragraph, concerning jurisdiction to approve the termination or modification of the contracts referred to in Article 11.[4]

11.006 A rule corresponding to Article 11(1) can be found, with some differences, in Directives 2001/24/EC on the reorganisation and winding up of credit institutions, and 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II).[5]

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1 Cf *supra*, commentary on Art 7.

2 Cf. Miguel Virgós and Etienne Schmidt, *Report on the Convention of Insolvency Proceedings* (1996), para 116 ff.; Miguel Virgós and Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer 2004), 123 ff.

3 Cf. Susanne Riedemann, 'Article 8', in Klaus Pannen (ed), *European Insolvency Regulation* (De Gruyter 2011), 263 f.; Stefan Reinhart, 'Art. 11', in *Münchener Kommentar zur Insolvenzordnung* (4. Aufl., Beck 2021), para 2; Peter Kindler, 'Art. 11', in *Münchener Kommentar zum BGB* (8. Auflage, Beck 2021), paras 1 and 13; François Mélin, *Le règlement communautaire du 29 mai 2000 relatif aux procédures d'insolvabilité* (Bruylant 2008), 262 f.

4 On Art 11(2), see Section D below.

5 Cf. Art 20(b) of Directive 2001/24/EC on the reorganization and winding up of credit institutions [2001] OJ L125/15:

> The effects of a reorganization measure or the opening of winding-up proceedings on:… (b) a contract conferring the right to make use of or acquire immovable property shall be governed solely by the law of the Member State within the territory of which the immovable property is situated. That law shall determine whether property is movable or immovable

cf, Art 285(2)(b) of Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) (recast) [2009] OJ L335/1:

> By way of derogation from Articles 269 and 274, the effects of the opening of reorganization measures or of winding-up proceedings shall be governed as follows:… (b) in regard to contracts conferring the right to make use of or acquire immovable property, exclusively by the law of the Member State where the immovable property is situated.

B. THE CONDITIONS FOR THE APPLICATION OF ARTICLE 11

For Article 11 to be applicable, four requirements must be met. **11.007**

The first requirement is that the contract in question relates to immoveable property. **11.008**

The interpretation of the term 'immoveable property' is debated. For some authors, it has an autonomous meaning and must therefore be construed in a uniform way, independently of domestic law.[6] For others, it must be construed in the light of the *lex rei sitae*.[7] The first interpretation is more convincing, also considering that, unlike Article 20(b) of Directive 2001/24/EC on the reorganisation and winding up of credit institutions,[8] Article 11 of the Regulation does not refer to the *lex rei sitae* for the characterisation of property as moveable or immoveable. To characterise a certain asset as 'immoveable property', one should consider its physical mobility or immobility and disregard any *fictio iuris* contemplated by the *lex rei sitae*. Article 11 encompasses contracts relating to real property, as plots of land, buildings, real estate units. It does not cover contracts relating to ships and aircraft, as confirmed by systematic reading of Article 11 in conjunction with Article 14 (which, unlike Art 11, expressly mentions those assets in addition to immoveable property).[9] **11.009**

Further characterisation issues arise with respect to contracts concerning both moveable and immoveable property, such as the sale (or lease) of an industrial plant (including its machines), or the sale (or lease) of a hotel (including its furniture).[10] To decide whether Article 11 is applicable or not, one should consider the specific features of each individual contract and assess which of the two components (immoveable or moveable property) prevails. Any agreement of the parties as to the severability of the various components of the contract should also be considered.[11] **11.010**

The second requirement is that the contract in question confers the right to acquire, or make use of, immoveable property. **11.011**

Contracts conferring the right to *acquire* immoveable property include sale contracts, donations, and all other contracts aimed at transferring the ownership of immoveable property. This category also includes '*contratto preliminare*' under Italian law, i.e., a contract, frequently used in real estate transactions, by which the parties undertake to enter into a subsequent, definitive contract, the essential content of which must already be set out in the first contract.[12] Article **11.012**

6 Reinhart, 'Art. 11' (n 3) para 4; Kindler, 'Art. 11', (n 3) para 2.

7 Riedemann (n 3) 267; Richard Snowden, 'Article 11', in Reinhard Bork and Kristin van Zwieten (eds), *Commentary on the European Insolvency Regulation* (2nd edn, OUP 2022), para 11.03 265; Gilles Cuniberti, Paola Nabet and Michaël Raimon, *Droit européen de l'insolvabilité. Règlement (UE) 2015/848 du 20 mai 2015 relatif aux procédures d'insolvabilité* (LGDJ 2017) 249 f.

8 See note 5.

9 Riedemann (n 3), 267; Reinhart, 'Art. 11' (n 3), para 5. See *infra* commentary on Art 14.

10 For an example, see Oberster Gerichtshof, judgment of 21 March 2018 - 1 Ob 24/18p.

11 See Reinhart 'Art. 11' (n 3), para 8 ff.

12 Cf. Patrizia De Cesari and Galeazzo Montella, *Le procedure di insolvenza nella nuova disciplina comunitaria* (Giuffrè 2004) 157. In Italy, the effects of the opening of a judicial liquidation (*liquidazione giudiziale*) on a *contratto preliminare* are reg-

11 applies irrespective of whether the insolvent debtor is the seller or purchaser, or the donor or donee.

11.013 Contracts conferring the right to *make use* of immoveable property include rental and leasing contracts. Article 11 applies irrespective of whether the insolvent debtor is the landlord or tenant, or the lessor or lessee. For instance, with respect to an immoveable property situated in Italy, Article 185 of the Italian *Codice della crisi*[13] shall apply to determine the effects on a rental contract of the landlord's or tenant's insolvency proceedings, respectively.

11.014 Article 11 only applies to *contracts* (conferring the right to acquire or make use of immoveable property); it does not apply to *rights in rem*, be they rights *in rem* conferring the right to use immovable property (e.g., usufruct) or security rights *in rem* (e.g., mortgage). To the extent that a third party has acquired any such rights *in rem* before the opening of the insolvency proceedings and the assets concerned are located in a Member State other than the State of the opening, the effects of the opening of insolvency proceedings on such rights is governed by Article 8.[14]

11.015 The third requirement is that the contract conferring the right to acquire, or make use of, immoveable property has been entered into, and is in force, at the time of the opening of the insolvency proceedings. This requirement, which is implied in Article 11, is confirmed by the reference to 'current contracts' in Article 7(2)(e), i.e., the general rule with respect to which Article 11 introduces an exception.

11.016 Therefore, Article 11 does not apply to contracts entered by the insolvency practitioner after the opening of the insolvency proceedings. The fact that a contract concluded by the debtor before the opening of insolvency proceedings is subject to a term or condition does not preclude the application of Article 11 to that contract.

11.017 The fourth requirement is that the immoveable property forming the subject matter of the contracts contemplated by Article 11 is situated in a different Member State than the State of the opening of the insolvency proceedings. This requirement prevents the application of Article 11 in two situations: (a) when the immobile property is situated in the Member State of the opening of the proceedings and (b) when it is situated in a third State.

11.018 If the immoveable property is situated in the Member State of the opening of the insolvency proceedings – irrespective of whether those proceedings are main or secondary proceedings – Article 11 does not apply and the effects of the opening on the contracts in question are governed by the *lex fori concursus* pursuant to Article 7(2)(e).

11.019 If the immoveable property is situated in a third State, Article 11 does not apply either. In this scenario, the effects of the opening of insolvency on contracts relating to immoveable property shall be governed by the *lex fori concursus* pursuant to Article 7(2)(e). The question however

ulated in Art 173 of the *Codice della crisi d'impresa e dell'insolvenza* ('Enterprise Crisis and Insolvency Code'), Legislative decree No 14 of 12 January 2019 (in force as of 15 July 2022) (hereinafter, '*Codice della crisi*').

13 See note 12 above.

14 Cf. *supra*, commentary on Art 8.

arises as to whether there is any room left for the application of a domestic conflict-of-law provision of the *lex fori concursus* which, like Article 11, may provide for exceptions to the application of domestic insolvency law in favour of the law of the third State where the property is situated. On this issue, the Regulation offers conflicting indications. Pursuant to Recital 66, '[t]his Regulation should set out, for the matters covered by it, uniform rules on conflict of laws which replace, within their scope of application, national rules of private international law'. By referring to the 'replacement' of domestic private international law rules by the uniform conflict-of-law rules of the Regulation, Recital 66 would seem to suggest a negative answer to the question.

However, other elements lead the present author to prefer an affirmative answer.[15] Whereas the Regulation does not expressly provide for the applicability of domestic conflict-of-law provisions of the *lex fori concursus*, it does not exclude it either, except for the aforementioned Recital 66, which, however, has no prescriptive value in itself. The Virgós/Schmidt explanatory report to the EC Convention on insolvency proceedings indicates that the Convention's uniform conflict-of-law provisions (including Art 8, corresponding to Art 11 of the Regulation) were aimed at governing only intra-EU conflicts of laws.[16] This limitation is implied by the wording of Article 11, which assumes that the immoveable property is situated in a Member State other than the law of the State of the opening of insolvency proceedings. In the opposite scenario, it remains therefore possible for the private international law of *lex fori concursus* to exclude the application of its domestic insolvency law in favour of the law of the third State where the immoveable property is situated. An example of such a domestic conflict-of-law provision is offered by Section 336 of the German *Insolvenzordnung*, as adopted in 2003.[17] This interpretation has also the advantage of avoiding the application of the substantive rules of the *lex fori concursus* whenever the latter does not intend to regulate the effects of insolvency on contracts relating to immoveable property situated in a third State but prefers to refer to the *lex rei sitae* for this purpose. In the light of these elements, and notwithstanding the ambiguity of the Regulation, the better interpretation seems to be that the 'replacement' of the domestic private international law rules by the conflict-of-law rules of the Regulation under Recital 66 concerns the general rule on the applicability of the *lex fori concursus* (Art 7) and the exceptions to that rule (Arts 8–16), but only within their respective scope, which precisely concerns intra-EU conflicts of law. In any other case, this 'replacement' is without prejudice to the application **11.020**

15 Virgós and Garcimartín (n 2) 91, 124; Ian Fletcher, 'Choice of Law Rules', in Gabriel Moss, Ian Fletcher and Stuart Isaacs (eds), *The EU Regulation on Insolvency Proceedings* (3rd edn, OUP 2016) 86; Mélin (n 3) 263; Reinhart, 'Art. 11' (n 3), para 15; Stefan Reinhart, 'Art. 1', in *Münchener Kommentar zur Insolvenzordnung* (4. Aufl, Beck 2021), para 30 ff.; Peter Kindler 'Art. 1', in *Münchener Kommentar zum BGB* (8. Aufl., Beck 2021), para 22 ff.; Dicey, Morris and Collins, *The Conflict of Laws* (15th edn, Sweet and Maxwell 2012) 1665. For the contrary interpretation, see however Michaël Raimon, *Le règlement Communautaire 1346/2000 du 29 mai 2000 relatif aux procédures d'insolvabilité* (LGDG 2007) 164, who considers that the conflict-of-law provisions of the Regulation do not leave any room for the operation of domestic private international law provisions. See also Cuniberti, Nabet and Raimon (n 7), 250 f.

16 Virgós and Schmidt (n 2), para 44.

17 Section 336 of the *Insolvenzordnung* was introduced by the *Gesetz zur Neuregelung des Internationalen Insolvenzrechts* of 14 March 2003 (BGBl I 345). It provides that:

1. The effects of insolvency proceedings on a contract relating to a right in rem in immoveable property or to a right to use immoveable property shall be subject to the law of the State where the property is situated.
2. In the case of property registered in a ship register or an aircraft mortgage register, the law of the State under the control of which the register is kept shall apply (our translation).

of domestic conflict-of-law rules providing for exceptions to the *lex fori concursus* in situations analogous to those covered by Articles 8–16.

11.021 The above conclusion is not contradicted by the *Schmid* judgment of the Court of Justice of the European Union.[18] Whereas this judgment held that the Regulation does not limit its scope to situations presenting links with two or more Member States, it acknowledged that 'the application of a number of the Regulation's provisions requires the presence of connecting factors with the territory or the legal system of at least two Member States'.[19] Article 11 is precisely among those provisions. Thus, the *Schmid* judgment does not exclude, but rather seems to concede that, where Article 11 does not apply, there remains room for the application of national private international law rules providing for exceptions to the application of the *lex fori concursus*.

C. THE CONSEQUENCES OF THE APPLICATION OF ARTICLE 11

11.022 If the conditions set by Article 11 are met, the effects of insolvency proceedings on the contracts contemplated by this rule shall be governed exclusively by the law of the Member State in which the immoveable property is situated (*lex rei sitae*). As a special conflict rule, Article 11 derogates from Article 7(2)(e), under which such effects are in principle determined according to the *lex fori concursus*.

11.023 The reference to the *lex rei sitae* made by Article 11 concerns the insolvency law rules governing the effects on contracts of the opening of insolvency proceedings against one of the parties thereof. These rules include, among others, those:

(a) governing the conditions for the insolvency practitioner's taking over, terminating, or modifying contracts to which the debtor was a party, including any court approval requirement;[20]
(b) granting the insolvent debtor's counterparty compensation or indemnification in the event of termination of the contract by the insolvency practitioner; and
(c) providing for the ineffectiveness of contractual clauses making the termination of the contract dependent on the opening of insolvency proceedings against one of the contracting parties.[21]

11.024 All other aspects shall remain governed by the law applicable to the contract (*lex contractus*), to be determined on the basis of the conflict-of-law rules contained in the Rome I Regulation.[22] These rules provide that:

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18 Case C-328/12, *Schmid v. Hertel* ECLI:EU:C:2014:6, para 20.

19 Ibid., para 22.

20 See Tribunale di Mantova, 23 March 2021 (2022) Il Fallimento 267, which applied s 178 of the Insolvency Act 1986 to determine whether an insolvency practitioner in main insolvency proceedings opened in Italy could be authorised by the Italian court which opened insolvency proceedings to temporarily suspend the effects of a lease contract concerning an immoveable property located in London.

21 See, for instance, Arts 172 ff. of the Italian *Codice della crisi* (n 12).

22 Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L177/6 (Rome I Regulation).

(a) a contract shall be governed by the law chosen by the parties (Art 3(1));
(b) in the absence of choice of law by the parties, 'a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated' (Art 4(1)(c)), and
(c) where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply (Art 4(3)).

11.025 Therefore, leaving aside the exceptional case last mentioned: (a) when the parties have chosen the law applicable to their contract, that law may not coincide with the *lex rei sitae*, since Article 3 does not limit the parties' choice to any particular law;[23] (b) by contrast, when the parties have not chosen the law applicable to their contract, this law will normally coincide with the *lex rei sitae*, based on Article 4(1)(c) of the Rome I Regulation.

11.026 Unlike Article 9 of the insolvency Regulation concerning set-off, where the application of a law other than the *lex fori concursus* is set as an alternative to the latter,[24] Article 11 provides that the effects of insolvency proceedings on the contracts in question shall be governed *solely* by the *lex rei sitae*. The *lex rei sitae* shall therefore always be applied – as an exception to the *lex fori concursus* – to determine the effects of the insolvency proceedings on the contracts in question, irrespective of whether it is more or less favourable to the counterparty of the insolvent debtor than the *lex fori concursus*.[25]

11.027 As noted above, Article 11 only concerns the effects of insolvency proceedings on contracts contemplated therein. It does not concern other insolvency-related aspects, such as the ranking of claims deriving from those contracts (Art 7(2)(i)), the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors (Arts 7(2)(m) and 16), and creditors' rights after the closure of insolvency proceedings (Art 7(2)(k)). The coordination between the *lex rei sitae* and the *lex fori concursus* may be difficult when the same domestic insolvency law provision governs simultaneously the effects of the insolvency on contracts (falling within the scope of Art 11) and other insolvency-related aspects (which fall within the scope of Art 7). For example, in the event of insolvency of the seller in a *contratto preliminare* for the sale of immoveable property,[26] Article 173 of the Italian *Codice della crisi* allows the insolvency liquidator to dissolve that preliminary contract. In such a case, the buyer is not entitled to damages, but only to be reimbursed the amount paid to the seller. To do so, he must lodge his claim among the liabilities in the insolvency proceedings and has a special privilege over the immoveable property pursuant to Article 2775-bis of the Civil Code. If insolvency proceedings with respect

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23 The only exception being the situation in which 'all the other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen', in which case 'the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement' (Art 3(3)). On this provision see Giacomo Biagioni, 'Art. 3', in Francesco Salerno and Pietro Franzina (eds), 'Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali ('Roma I') (2009) Nuove leggi civili commentate 629; Peter Mankowski, 'Article 3', in Ulrich Magnus and Peter Mankowski (eds), *Rome I Regulation* (Sellier 2017) 228.

24 Cf. *supra*, commentary on Article 9.

25 Cf. Virgós and Garcimartín (n 2) 123; Reinhart, 'Art. 11' (n 3), para 17; Riedermann (n 3), 268; Dicey, Morris and Collins (n 15), 1665.

26 On the notion of *contratto preliminare* under Italian law, see n 12 and accompanying text.

to the seller have been opened in a Member State other than Italy and the immoveable property is situated in Italy, Article 173 shall apply as part of the *lex rei sitae* based on Article 11 of the Regulation, except however for the attribution of a special privilege to the purchaser. Privileges do not concern the effects of insolvency on contracts but ranking.[27] As such, based on Article 7(2)(i), they shall be governed by the *lex fori concursus* and not by the *lex rei sitae*. In cases like this, the concurrent application of the *lex rei sitae* pursuant to Article 11 (to determine the creditor's right to restitution) and the *lex fori concursus* pursuant to Article 7(2)(i) (to determine the ranking of that claim) poses delicate problems of coordination. These problems must be solved through 'substitution'.[28] It must be established, based on a judgment of functional equivalence, whether the right conferred on the creditor by the *lex rei sitae* can be brought under one of the situations which, under the *lex fori concursus*, give rise to a privilege.[29]

D. JURISDICTION TO APPROVE THE TERMINATION OR MODIFICATION OF CONTRACTS RELATING TO IMMOVEABLE PROPERTY

11.028 Domestic insolvency laws frequently subject the termination or modification of contracts by the insolvency practitioner to a prior court approval. For contracts encompassed by Article 11, it is for the *lex rei sitae* (as law governing of the effects of insolvency on contracts) to set these requirements. However, since no insolvency proceedings have been opened in that Member State, uncertainties could arise as to the identification of the court having jurisdiction to grant the approval requested by the *lex rei sitae*.

11.029 Having in mind this concern, Article 11(2) – which was introduced in the 2015 recast – confers jurisdiction to the courts which opened main proceedings to approve the termination or modification of the contracts referred to in Article 11(1). Such a conferral of jurisdiction is subject to two conditions.

11.030 The first condition is that 'the law of the Member State applicable to those contracts requires that such a contract may only be terminated or modified with the approval of the court opening insolvency proceedings' (Art 11(2)(a)). Despite some ambiguity in the wording, the reference to the 'law of the Member State applicable to those contracts' must be interpreted as a reference to the law governing the effects of insolvency proceedings on contracts according to Article 11(1) (i.e., the *lex rei sitae*), and not the law governing the contract (*lex contractus*).

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27 Cf. Virgós and Garcimartín (n 2) 79.

28 Similar problems may arise with respect to Art 13 concerning employment contracts: cf. *infra*, commentary on Art 13. In private international law, a problem of substitution arises: (i) when the law applicable to a certain legal relationship (the 'main' relationship) makes the production of a certain legal effect conditional on the existence of a distinct legal relationship (the 'preliminary' relationship) and (ii) the 'preliminary' and 'main' relationships are governed by different laws. In such a case, the question arises whether the 'preliminary' legal relationship as envisaged by domestic law may be substituted with a corresponding legal relationship arising under foreign law: see Hans Lewald, 'Règles générales des conflits de lois: contribution à la technique du droit international privé', 69 Recueil des cours (1939) 130 ff.; Jan Kropholler, *Internationales Privatrecht* (6. Aufl, Mohr Siebeck 2006) 231.

29 Cf. Virgós and Garcimartín (n 2) 79.

Furthermore, whereas Article 11(2) literally refers to the contract's termination or modification, one may wonder whether this provision also applies where the *lex rei sitae* requires an insolvency court's decision for other contract-related purposes, such as: (a) assigning the insolvency practitioner, at the request of the other party to the contract, a time limit for deciding whether or not to take over the contract;[30] or (b) in case of termination of a contract by the insolvency practitioner, determining the amount of the indemnity due to the other party to the contract.[31] According to the wording of Article 11(2), these cases would be excluded from the scope of that provision. However, a consideration of its rationale and purpose justifies an extensive interpretation, to allow the court that opened the insolvency proceedings to pronounce the measures required by the *lex rei sitae* in these cases as well. **11.031**

The second condition is that 'no insolvency proceedings have been opened in that Member State', i.e., in the State where the immoveable property is situated. If secondary proceedings have been opened in that Member State, Article 11 simply does not apply. In such a case, the effects of the insolvency proceedings on the contract in question shall be governed by the law of the Member State of the opening of the secondary proceedings, which shall be applicable as *lex fori concursus* pursuant to Articles 7(2)(e) and 35.[32] **11.032**

In referring to 'the court which opened main insolvency proceedings' Article 11(2) does not generically confer jurisdiction on the courts of the Member State of the main proceedings, but it identifies the *specific* competent court within that State. This court is the same court that opened the insolvency proceedings. Departing from the general principle set in Recital 26 and differently from Articles 3 and 6, Article 11(2) leaves therefore no room for the application of the internal rules of the law of the State of opening to identify the competent court. This solution is justified in the light of the objective of ensuring efficient conduct of the proceedings, which in turns requires that the authorisation contemplated in Article 11(2) be sought from the court which opened the insolvency proceedings and which is competent to oversee their conduct. **11.033**

30 Cf. *Codice della crisi*, Art 172(1).

31 Cf. *Codice della crisi*, Art 185.

32 Cf. Reinhart, 'Art. 11' (n 3), para 20.

ARTICLE 12

PAYMENT SYSTEMS AND FINANCIAL MARKETS

Matthias Lehmann

1. **Without prejudice to Article 8, the effects of insolvency proceedings on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the Member State applicable to that system or market.**
2. **Paragraph 1 shall not preclude any action for voidness, voidability or unenforceability which may be taken to set aside payments or transactions under the law applicable to the relevant payment system or financial market.**

A. GENERAL

1. Purpose of the provision

12.001 Article 12 protects payment and settlement systems as well as financial markets against potential disruption caused by insolvency proceedings. In this sense, it serves as a safeguard to preserve financial stability in times of crisis. Payment and settlement systems (collectively also called 'financial market infrastructures') are the core of the financial system, and are often said to be its 'plumbing'. Financial markets, e.g., regulated exchanges, play a similarly vital role. The suspension of transfers and freezing of assets inherent in insolvency proceedings can