ARTICLE 13

CONTRACTS OF EMPLOYMENT

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1. **The effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment.**
2. **The courts of the Member State in which secondary insolvency proceedings may be opened shall retain jurisdiction to approve the termination or modification of the contracts referred to in this Article even if no insolvency proceedings have been opened in that Member State.**

   The first subparagraph shall also apply to an authority competent under national law to approve the termination or modification of the contracts referred to in this Article.

A. OVERVIEW

13.001 Most insolvency laws contain special provisions which, by way of derogation from general labour law, regulate the effects of the opening of insolvency proceedings on employment contracts and relationships to which the debtor is a party and whose performance is ongoing at the time of the opening of the proceedings. Depending on the cases, these provisions determine: (i) whether and at what conditions the insolvency practitioner may take over, terminate, or assign such contracts, or modify their terms, and (ii) the respective rights and obligations of the parties.

13.002 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

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

For employment contracts and relationships, Article 13(1) sets an exception to Article 7(2)(e) by providing that the effects of insolvency proceedings on those contracts and relationships shall be governed solely by the law of the Member State applicable to the contract of employment. This exception aims at protecting employees and jobs (as clarified by Recital 72), by safeguarding them from the application of a foreign law, different from that which governs their contractual relationship with the employer.[2] As also clarified by Recital 72, this law shall be determined 'in accordance with the general rules on conflict of laws'. For all the Member States, these rules are contained in Article 8 of the Rome I Regulation.[3] **13.003**

Being an exception to the general rule in Article 7(2)(e), Article 13(1) is to be interpreted narrowly. It only concerns the *effects* of the opening of insolvency proceedings on employment contracts and relationships. It does not concern other aspects contemplated by Article 7, 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)).[4] **13.004**

Article 13(1) verbatim reproduces Article 10 of Regulation 1346/2000. Compared to Article 10, however, Article 13 contains a second paragraph, concerning jurisdiction to approve the termination or modification of employment contracts.[5] **13.005**

A rule corresponding to Article 13(1) is contained 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).[6] **13.006**

Article 13 does not concern the guarantee by national institutions of employees' outstanding claims against insolvent employers, which is governed by Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees **13.007**

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1 Cf *supra*, commentary on Art 7.

2 See Miguel Virgós and Etienne Schmidt, *Report on the Convention of Insolvency Proceedings* (1996), para 125.

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

4 See Recital 72; Francisco Garcimartín and Miguel Virgós, 'Article 13', in Reinhard Bork and Kristin van Zwieten (eds), *Commentary on the European Insolvency Regulation* (2nd edn, OUP 2022) para 13.10; Reinhard Dammann, 'Article 10', in Klaus Pannen (ed), *European Insolvency Regulation* (De Gruyter 2011) 282 f.; Stefan Reinhart, 'Article 13', in *Münchener Kommentar zur Insolvenzordnung* (4. Aufl., Beck 2021), para 9; Peter Kindler, 'Article 13', in *Münchener Kommentar zum BGB* (8. Aufl., Beck 2021), paras 2 and 6.

5 On Art 13(2), see Section D below.

6 Cf. Art 20(a) of Directive 2001/24/EC on the reorganisation and winding up of credit institutions [2001] OJ L125/15 ('The effects of a reorganisation measure or the opening of winding-up proceedings on:… (a) employment contracts and relationships shall be governed solely by the law of the Member State applicable to the employment contract'), and Art 285(2)(a) 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 reorganisation measures or of winding-up proceedings shall be governed as follows: (a) in regard to employment contracts and employment relationships, exclusively by the law of the Member State applicable to the employment contract or employment relationship').

in the event of the insolvency of their employer.[7] Article 9 of this Directive provides that, if the insolvent employer is an undertaking with activities in the territories of at least two Member States, (i) the institution responsible for meeting employees' outstanding claims shall be that in the Member State in whose territory they work or habitually work and (ii) the extent of employees' rights shall be determined by the law governing the competent guarantee institution.

B. THE CONDITIONS FOR THE APPLICATION OF ARTICLE 13

13.008 For Article 13 to be applicable, three requirements must be met.

13.009 The first requirement is the existence of employment contracts or relationships.

13.010 These notions have an autonomous meaning and must therefore be construed in a uniform way, independently of domestic law.[8] Reference can be made to interpretation by the Court of Justice of the European Union (CJEU) of the corresponding terms contained in other provisions of EU law, such as Article 45 of the Treaty on the Functioning of the European Union, Articles 8 of the Rome I Regulation, Article 20 of the Brussels Ibis Regulation,[9] and the EU directives in labour matters.[10] According to the Court's case law, 'the essential feature of an employment relationship is that for a certain period of time one person performs services for and under the direction of another in return for which he or she receives remuneration'.[11]

13.011 The reference to 'employment relationships', in addition to 'employment contracts', has no particular consequences. It only serves to clarify that the object of Article 13 is the overall legal relationship between employee and employer, which is not necessarily limited to the agreement concluded between the parties but also extends to the rights and obligations arising from the law or from collective bargaining agreements.[12]

13.012 Article 13 applies not only in the event of the employer's insolvency, but also of the employee's insolvency. In the latter scenario, which rarely occurs, the main question concerns the possible exemption of salary from attachment. This question, however, does not relate to the effects of insolvency proceedings on the employment contract, but to the identification of the assets

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7 [2008] OJ L283/36.

8 Reinhart, 'Art 13' (n 4), para 4; Kindler, 'Art 13' (n 4), para 2; Dammann (n 4), 281.

9 Regulation 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 ('Brussels I recast') [2012] OJ L351/1.

10 Among which: Directive 96/71/EC concerning the posting of workers in the framework of the provision of services [1997] OJ L018/1; Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses [2001] OJ L082/16; Directive 2008/94/EC on the protection of employees in the event of the insolvency of their employer (n 7 and accompanying text).

11 Case C-804/19, *BU*, ECLI:EU:C:2021:134, para 25 (with respect to Art 20 of Brussels I Regulation) and the case law cited.

12 See Patrizia De Cesari and Galeazzo Montella, *Le procedure di insolvenza nella nuova disciplina comunitaria* (Giuffrè 2004) 162; Reinhart, 'Art 13' (n 4), para 4; Garcimartín and Virgós, 'Art 13' (n 4), para 13.09.

which form part of the estate. As such, it does not fall within the scope of Article 13, but within the scope of the *lex fori concursus* pursuant to Article 7(2)(b).[13]

The second requirement is that the employment contract is in force at the time of the opening of the insolvency proceedings.[14] This requirement, which is implied in Article 13, is confirmed by the reference to 'current contracts' in Article 7(2)(e), i.e., the general rule with respect to which Article 13 introduces an exception. **13.013**

The third requirement is that the law applicable to the employment contract is the law of a Member State other than the State of the opening of the insolvency proceedings. This requirement prevents the application of Article 13 in two situations: (a) when the employment contract is governed by the law of the Member State of the opening of the insolvency proceedings and (b) when it is governed by the law of a third State. **13.014**

If the employment contract is governed by the law of the Member State of the opening of the insolvency proceedings – irrespective of whether those proceedings are main or secondary proceedings – Article 13 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). **13.015**

If the employment contract is governed by the law of a third State (a situation which may well occur considering the universal character of the Rome I Regulation),[15] Article 13 does not apply either. In this scenario, the effects of the opening of insolvency on employment contracts shall be governed by the *lex fori concursus* pursuant to Article 7(2)(e). The question however 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 13, may provide for exceptions to domestic insolvency law in favour of the law of the third State governing the employment contract. 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. **13.016**

However, other elements lead the present author to prefer an affirmative answer.[16] Whereas the Regulation does not expressly provide for the applicability of domestic conflict-of-law **13.017**

13 Cf. Garcimartín and Virgós, 'Art 13' (n 4), para 13.08; Reinhart, 'Art 13' (n 4), paras 7 and 17.

14 Cf. Kindler, 'Art 13' (n 4), para 5; Reinhart, 'Art 13' (n 4), para 6.

15 Pursuant to Art 2 of the Rome I Regulation, '[a]ny law specified by this Regulation shall be applied whether or not it is the law of a Member State'.

16 Garcimartín and Virgós, 'Art 13' (n 4), para 13.05; 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) 88; François Mélin, *Le règlement communautaire du 29 mai 2000 relatif aux procédures d'insolvabilité* (Bruylant 2008) 275; Kindler, 'Art 13' (n 4), para 11; Dammann (n 4), 283; Dicey, Morris and Collins, *The Conflict of Laws* (15th edn, Sweet and Maxwell 2012) 1668. For the contrary interpretation, see however Michaël Raimon, *Le règlement Communautaire 1346/2000 du 29 mai 2000 relatif aux procédures d'insolvabilité* (LGDJ 2007) 167, 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. For Reinhart ('Art 13' (n 4), para 18 f.), one should distinguish depending on whether the employee habitually carries out his work in a Member State or not. In the first case, the Regulation's conflict-of-law provisions (including Art 13) would apply, whereas in the second

provisions, 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 explains that the Convention's uniform conflict-of-law provisions (including Art 10, corresponding to Art 13 of the Regulation) were aimed at governing only intra-EU conflicts of laws.[17] This limitation is implied by the wording of Article 13, which assumes that the employment contract is governed by the law of 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 governing the employment contract. An example of such a domestic conflict-of-law provision is offered by Section 337 of the German *Insolvenzordnung*, as adopted in 2003.[18] 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 employment contracts governed by the law of a third State but prefers to refer to the *lex contractus* 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 of domestic conflict-of-law rules providing for exceptions to the *lex fori concursus* in situations analogous to those covered by Articles 8–16.

13.018 The above conclusion is not contradicted by the *Schmid* judgment of the CJEU.[19] 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'. [20] Article 13 is precisely among those provisions. Thus, the *Schmid* judgment does not exclude, but rather seems to concede that, where Article 13 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*.

case the Regulation's conflict-of-law provisions (including Art 13) would not apply and one should apply the domestic conflict-of law provisions of the State of the opening.

17 Virgós and Schmidt (n 2), para 44.

18 Section 337 of the *Insolvenzordnung* was introduced by the *Gesetz zur Neuregelung des Internationalen Insolvenzrechts* of 14 March 2003 (BGBl I 345), as subsequently amended. It provides that: 'The effects of the insolvency proceedings on an employment relationship shall be subject to the law applicable to the contractual relationship in accordance with [the Rome I Regulation]' (our translation).

19 Case C-328/21, *Schmid v. Hertel*, ECLI:EU:C:2014:6, para 20.

20 *Schmid v. Hertel* (n 19), para 22.

C. THE CONSEQUENCES OF THE APPLICATION OF ARTICLE 13

If the conditions set by Article 13 are met, the effects of insolvency proceedings on the employment contracts and relationships shall be governed exclusively by the law of the Member State which governs the employment contract (*lex contractus*). **13.019**

This law shall be determined based on Article 8 of the Rome I Regulation. Pursuant to Article 8, an employment contract shall be governed: **13.020**

(a) by the law chosen by the parties, provided that any such choice of law may not have the result of depriving the employee of the protection afforded to him by the mandatory provisions under the law that, in the absence of choice, would have been applicable pursuant to Article 8(2) and (3) (Art 8(1));
(b) in the absence of choice of law by the parties, by the law:
  (i) of the country in which or, failing that, from which, the employee habitually carries out his work in performance of the contract (Art 8(2)); or, where the law applicable cannot be determined pursuant to Article 8(2),
  (ii) by the law of the country where the place of business through which the employee was engaged is situated Article 8(3) (hereinafter, jointly, '*lex loci laboris*');
(c) by way of derogation from Article 8(2) and (3) (letter (b) above), if it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in Article 8(2) and (3), by the law of that other country (Art 8(4)).

The principle that, in case of choice of law by the parties, the employee shall not be deprived of the protection afforded to him by the mandatory provisions under the *lex loci laboris*, also applies in the context of Article 13. Therefore, to determine the effects of insolvency proceedings on a certain employment contract, one shall apply: (i) the law chosen by the parties (if any); or (ii) the *lex loci laboris* if more favourable to the employee.[21] **13.021**

The reference to the *lex contractus* made by Article 13 concerns the insolvency law rules governing the effects of the opening of insolvency on employment contracts and relationships.[22] These rules include, among others, those: **13.022**

(a) providing for the continuation or the discontinuance of the employment contract as a consequence of the opening of insolvency proceedings towards the employer;[23]
(b) the powers of the insolvency practitioner (including any authorisation requirements) in respect of the continuation or discontinuance of the employment contract;
(c) the respective rights and obligations of the parties (including any employees' right to compensation);[24]

21 See Garcimartín and Virgós, 'Art 13' (n 4), para 13.07.

22 In Italy, for instance, the effects on employment contracts of the opening of a procedure of 'liquidazione giudiziale' towards the employer are governed by Art 189 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*').

23 Thus, for instance, if the employment contract is governed by Italian law, Art 189(1) of the *Codice della crisi* shall apply, pursuant to which the placement of the employer under 'judicial liquidation' does not constitute a ground for dismissal.

24 See Virgós and Schmidt (n 2), para 125; Mélin (n 16), 277; Garcimartín and Virgós, 'Art 13' (n 4), para 13.09.

(d) the effects on employment contracts of any reorganisation measure adopted by the insolvency practitioner, including any business transfer to third parties.

13.023 Thus, for instance, if the employment contract is governed by Italian law and insolvency proceedings towards the employer have been opened in another Member State, Article 189 of the *Codice della crisi* shall apply, pursuant to which, in particular: (i) the placement of the employer under 'judicial liquidation' does not constitute a ground for dismissal (para 1); (ii) from the date of the court decision opening the judicial liquidation, the employment contracts in force are suspended until the liquidator, with the authorisation of the delegated judge and after hearing the creditors' committee, notifies the employees to take over the contracts or the withdrawal (para 1); and (iii) in the absence of any liquidator's decision as to the take-over, the employment contracts shall be automatically terminated (para 2).

13.024 Article 13 may give rise to difficulties when, depending on the type of proceedings (namely, whether they are liquidation or reorganisation proceedings), the insolvency law of the *lex contractus* sets different regimes for the consequences of the opening of insolvency proceedings on employment contracts. For example, in Italy, the provisions of Article 189 of *Codice della crisi* just cited apply to 'judicial liquidation' (*liquidazione giudiziale*), but not to *concordato preventivo*, in respect of which the application of the special rules on the effects of insolvency proceedings on pending contracts is expressly excluded by Article 97(13). When insolvency proceedings have been opened in another Member State and the employment contract is governed by Italian law, the question therefore arises as to whether the effects on employment contracts in the specific case shall be determined according to the Italian regime for *liquidazione giudiziale* or *concordato preventivo*. This problem must be solved through a 'substitution' operation.[25] It must be ascertained, in the light of the characteristics of the insolvency proceedings opened abroad, to which of the insolvency proceedings under domestic law those foreign insolvency proceedings can be considered functionally equivalent. The rules of the latter must then be applied to determine the effects of the opening of proceedings on employment contracts in the specific case.

13.025 Unlike Article 9 concerning set-off, where the application of a law other than the *lex fori concursus* is set as an alternative to the latter,[26] Article 13 provides that the effects of insolvency proceedings on employment contracts and relationships shall be governed *solely* by the *lex contractus*. Therefore, this law shall always be applied – as an exception to the *lex fori concursus* – to determine the effects of the insolvency proceedings on employment contracts and relationships,

25 Similar problems may arise with respect to Art 11 concerning contracts relating to immoveable property: cf. *supra*, commentary on Art 11. 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.

26 Cf. *supra*, commentary on Art 9.

irrespective of whether it is more or less favourable to the counterparty of the insolvent debtor than the *lex fori concursus*.[27]

As noted above, Article 13 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)). Therefore, whereas the *lex contractus* shall govern the employees' rights following the opening of insolvency proceedings towards their employer, the *lex fori concursus* shall determine whether the employees' claims are protected by preferential rights and the status such preferential rights may have.[28] The only exception, as clarified by Recital 72, concerns the case where the practitioner has given an undertaking to avoid the opening of secondary proceedings under Article 36, in which case the employees' claims shall be subject to the distribution and priority rights under the law of the Member State in which such secondary proceedings could have been opened (Art 36(1)).[29] **13.026**

D. JURISDICTION TO APPROVE THE TERMINATION OR MODIFICATION OF EMPLOYMENT CONTRACTS

Domestic insolvency laws frequently subject the termination or modification of employment contracts to a prior approval by a court or other national authority. For contracts encompassed by Article 13, it is for the *lex contractus* (as law governing of the effects of insolvency on contracts) to set these requirements.[30] Yet, lacking secondary proceedings in that Member State, difficulties could arise as to the identification of the court (or authority) having jurisdiction to grant the approval requested by the *lex contractus*. Provided that the employer has an establishment in the Member State whose law governs the employment contract, any interested party could apply for the opening of secondary proceedings in that State, whose courts would then have jurisdiction to grant the necessary approvals. The opening of secondary proceedings could however entail unnecessary costs and delays. **13.027**

Having this concern in mind, Article 11(2) – which was introduced in the 2015 recast – confers jurisdiction to 'the courts of the Member State in which secondary proceedings may be opened' to approve the termination or modification of the employment contracts. Furthermore, pursuant to Article 13(2), second subparagraph, the above rule 'shall also apply to an authority competent under national law to approve the termination or modification of the contracts referred to in this Article'. **13.028**

27 Cf. Miguel Virgós and Francisco Garcimartín, *The European Insolvency Regulation: Law and Practice* (Kluwer 2004), 123; Reinhart, 'Art 13' (n 4), 17; Dicey, Morris and Collins (n 16), 1665; Mélin (n 16), 278.

28 See Recital 72. Cf. Fletcher (n 16), 88; Mélin (n 16), 273; Garcimartín and Virgós, 'Art 13' (n 4), 13.10; Dammann (n 4), 282 f.; Reinhart, 'Art 13' (n 4), para 9; Kindler, 'Art 13' (n 4), paras 2 and 6. For the opposite view see however De Cesari and Montella (n 12), 162 ff.

29 Cf *supra*, commentary on Art 36.

30 In Italy, e.g., Art 189(1) of the *Codice della crisi* requires that the liquidator's decision to take over or terminate employment contracts be authorised by the delegated judge: cf. *supra* n 25 and accompanying text.

13.029 The solution adopted by Article 13(2) is different from that adopted by Article 11(2) for contracts relating to immovable property, which confers jurisdiction to approve the termination or modification of those contracts to the court which opened main proceedings.[31] This difference is explained by the greater factual and legal complexity of decisions relating to the termination or modification of employment contracts (compared to contracts relating to immovable property), as well as the need to consider the impact of those decisions on the local economy.[32]

13.030 The reference in Article 13(2) to the 'Member State in which secondary proceedings may be opened' requires verification, as a precondition for the operation of this special jurisdiction rule, that there is an establishment in the Member State of the court seised. According to the definition contained in Article 2(10), an establishment means 'any place of operations where a debtor carries out or has carried out in the 3-month period prior to the request to open main insolvency proceedings a non-transitory economic activity with human means and assets'.[33] Lacking such an establishment, any court approval of the contract termination or modification required by the *lex contractus* shall be sought from the courts of the State of opening.[34]

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31 Cf. *supra*, commentary on Art 11.

32 Cf. Garcimartín and Virgós, 'Art 13' (n 4), para 13.17. According to these authors, Art 13(2) is not exclusive, but alternative. Thus, it would still be open to employees to defer the issues of termination or modification of their employment contract to the court of the Member State which opened the insolvency proceedings as an alternative to the courts of the Member State where the establishment is located.

33 Cf. *supra*, commentary on Art 2(10).

34 Cf. Reinhart, 'Art 13' (n 4), para 26; Galeazzo Montella, 'La normativa di conflitto di leggi e quella di diritto comune uniforme' in Patrizia De Cesari and Galeazzo Montella (eds), *Il nuovo diritto europeo della crisi di impresa. Il regolamento (UE) 2015/848 relativo alle procedure di insolvenza* (G. Giappichelli Editore 2017) 131.