

SECURITY RIGHTS AND THE EUROPEAN
INSOLVENCY REGULATION

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Edited by
Gerard McCORMACK
Reinhard BORK



intersentia

Cambridge – Antwerp – Portland

Intersentia Ltd
Sheraton House | Castle Park
Cambridge | CB3 0AX | United Kingdom
Tel.: +44 1223 370 170 | Fax: +44 1223 370 169
Email: mail@intersentia.co.uk
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Security Rights and the European Insolvency Regulation

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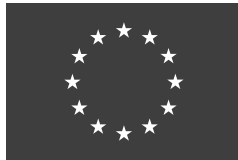
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PREFACE

This book arises out of a research project that was very generously funded by the European Commission under the Civil Justice Action programme – grant JUST/2013/JCIV/AG/4631. We thank the European Commission for their funding.

The events of 23 June 2016 may cast a long shadow but we hope that they do not dim unduly the prospects for further European scientific research and cooperation.

This book is very much a team effort led by Gerard McCormack at the University of Leeds in the UK and including Reinhard Bork at the University of Hamburg in Germany, Laura Carballo Piñeiro and Marta Carballo Fidalgo at the University of Santiago de Compostela in Galicia, Spain, Renato Mangano at the University of Palermo in Italy and last, but certainly not least, Tibor Tajti at the Central European University, Budapest, Hungary.

The book aims to analyse critically the provisions governing rights in rem (security rights) and transactional avoidance in the European Insolvency Regulation – now Regulation 2015/848 – and to address whether there is scope for reform of the law. Security rights are essentially rights over property intended to secure payment of a debt or other obligation. They are of fundamental importance to the granting of credit and are generally considered to increase the availability and lower the costs of credit with concomitant benefits for both debtors and the overall economy. But there are divergent views on the extent to which it should be possible to create and enforce security rights over assets.

The book also:

- assesses the extent of the protection given to security rights under the main EU legal traditions;
- evaluates the policy reasons behind protection;
- elaborates whether, and to what extent, this protection also applies in the context of insolvency proceedings affecting the debtor;
- assesses whether, and under what conditions, security rights created prior to the institution of insolvency proceedings can be set aside in those proceedings;

Moreover, it considers the need for further European harmonisation.

The first part of the book expounds common themes and ideas and suggests possible law reform measures. The project team as a whole has contributed to this part which considers the extent to which the relevant law in the EU countries

under review measures up against international benchmarks such as the World Bank Doing Business ‘getting credit’ and ‘resolving insolvency’ indicators and the UNCITRAL Legislative Guides on Secured Transactions and Insolvency. It asks whether there is any pressing need for reform at the national or EU level in light of these international benchmarks and whether reform is a realistic and achievable goal. Finally, it considers what form any reform measures might take. The focus is very much on the business debtor and it does not consider possible measures of consumer protection that may be appropriate in particular instances.

The first part of the book is followed by a second part containing chapters that address Germanic legal systems, the Common Law, Roman legal systems and Central and Eastern European legal systems. It should be noted that the book is based on reports submitted to the European Commission on 1 May 2016, although in some cases it has been possible to take into account developments after that date, such as changes to Italian law.

In the course of the project and in the writing of the book we have incurred many debts, not least to members of our International Advisory board and to those who spoke at the three international conferences that we organised as part of the project – London (May 2015), Erice (Trapani) in Italy (November 2015), and Santiago de Compostela (April 2016).

Those to whom we are indebted – in no particular order – include Lina Aleknaite-van der Molen (Kazimieras Simonavicius University, Vilnius, Lithuania); Paul Beaumont (University of Aberdeen, UK); Maya Boureghda Chebeane (JURISMED, Tunis); Catherine Bridge (European Bank for Reconstruction and Development); Michael Bridge (University College London); John Briggs (South Square Chambers, London); Richard Calnan (Norton Rose Fulbright LLP); Reinhard Dammann (Clifford Chance, Paris); Eric Dirix (Leuven); Ian Fletcher (University College London); Francisco Garcimartín Alférez (UAM, Spain), Anna Gardella (European Banking Authority); Robert van Galen (INSOL Europe); Louise Gullifer (University of Oxford); Santiago Hurtado Iglesias (Deloitte Abogados); Krzysztof Kaźmierczyk (Dentons, Poland); Andrew Keay (University of Leeds); Lisa Linklater (Exchange Chambers); Karolina Lyczkowska (DLA Piper, Spain); Jennifer Marshall (Allen & Overy LLP); Irit Mevorach (University of Nottingham); Karim Mouttaki (Mouttaki and Partners, Casablanca); Federico Mucciarelli (SOAS University of London, and University of Modena e Reggio Emilia); Paul Omar (Nottingham Trent University, UK); Jacinto José Pérez Benitez (High Court Pontevedra, Spain); Françoise Pérochon (Université de Montpellier, France); Juana Pulgar Esquerra (UCM, Spain); Magda Raczynska (University College London); Wolf-Georg Ringe (Copenhagen Business School, Denmark); Teresa Rodríguez de las Heras Ballell (UC3M, Spain); Felix Steffek (University of Cambridge); Andrew

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We would especially like to thank the overall project administrator, Alexandra Braithwaite, who is based at the University of Leeds, and her colleagues in the partner universities. We are also grateful for the tremendous support from our staff, especially Philipp Hartmann (University of Hamburg), who contributed significantly to the success of our project.

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Gerard McCormack and Reinhard Bork
Leeds and Hamburg, July 2016

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QUESTIONNAIRE

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E. Quasi-Security Agreements

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F. Transactional Avoidance

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TABLE OF ABBREVIATIONS

Abbreviation	Full text	Translation
AC	Law Reports, Appeal Cases (Third Series) (England)	–
AG	Advocate General (of the Court of Justice of the European Union)	–
AG	Amtsgericht (Germany)	lowest-instance court
AG	Aktiengesellschaft (Germany/Austria)	(public) company limited by shares
ABGB	Allgemeines Bürgerliches Gesetzbuch (Austria)	Civil Code
al.	et alii/et aliae/et alia	and others
ALR	Australian Law Review	–
All ER	All England Law Reports	–
a.M.	andere Meinung	disagreement, differing opinion
Anh.	Anhang	attachment, index, annex
AO	Ausgleichsordnung (Austria)	Act on the Composition with Creditors
App Cas	Law Reports Appeal Cases (Second Series) (England)	–
App.	Corte di appello (Italy)	Appeal Court
Art.	Article (of a statute)	–
Art. D.	Article d'un décret codifié (France)	Article of a Decree
Art. L.	Article d'une loi codifiée (France)	Article of a Law
Art. R.	Partie réglementaire d'un code (France)	Section of a Law Act
Az.	Aktenzeichen (Germany)	Reference Number
BAG	Bundesarbeitsgericht (Germany)	Federal Labour Court
BBTC	Banca, borsa e titoli di credito (journal, Italy)	Bank, stock exchange and credit instruments
BCC	British Company Law Cases	–

Abbreviation	Full text	Translation
BCCI	Bank of Credit and Commerce International	–
BCLC	Butterworths Company Law Cases (England)	–
Beschl.	Beschluss (Germany)	order
BGB	Bürgerliches Gesetzbuch (Germany)	Civil Code
BGH	Bundesgerichtshof (Germany)	Federal Supreme Court
BGHZ	Amtliche Sammlung der Entscheidungen des Bundesgerichtshofes in Zivilsachen (Germany)	official journal of decisions of the Federal Supreme Court
BH	Bírósági Határozatok (Hungary)	case law report of the Supreme Court
BOE	Boletín Oficial del Estado (Spain)	Official Bulletin
BPIR	Bankruptcy and Personal Insolvency Reports	–
BR	Bankruptcy Reporter (journal)	–
BV	Besloten Vennootschap met beperkte aansprakelijkheid (Netherlands)	limited company
C	I contratti (journal, Italy)	Contracts (journal, Italy)
CA	Companies Act (England)	–
Cass. civ.	Corte Suprema di Cassazione civile (Italy)	Supreme Court (Civil)
Cass. civ.	Cour de cassation – Chambre civile (France)	Supreme Court – Civil Division
Cass. comm.	Cour de cassation – Chambre commerciale, financière et économique (France)	Supreme Court – Division for Business and Financial Litigation
CB	Common Bench Reports (England)	–
CC	Code civil (French)	Civil Code
CC	Código civil (Spain)	Civil Code
CCCat	Codi civil de Catalunya (Spain)	Civil Code of Catalonia
CCMA	Code of Conduct on Mortgage Arrears (England)	–

Abbreviation	Full text	Translation
CCo	Código de comercio (Spain)	Commercial Code
CComm.	Code de commerce (France)	Commercial Code
CEE	Central and Eastern Europe Legal Systems	–
CEO	Chief Executive Officer	–
CEU	Central European University	–
cf.	conferre	compare
CG	Corriere Giuridico (journal, Italy)	Law Journal
ch	chapter	–
Ch	Chancery Division	–
Ch App	Law Reports, Chancery Appeal Cases (England)	
Ch D	Law Reports, Chancery Division (England)	–
CL	Colección Legislativa de España (Spain)	Legislative Collection
CLC	CCH Commercial Law Cases	
CLR	Commonwealth Law Review (Australia)	–
CM	Common Bench Reports	–
Cmdn 8558	Command Papers Cork Review Committee Report on Insolvency Law and Practice 1982	–
CMon and Fin	Code monétaire et financier (France)	Monetary and Financial Code
COM	Commission	–
Comm	Commission	–
Comm	Commercial Division	–
COM (2014)	Commission Recommendation from the European Commission 2014	–
COM (2012)	Commission Recommendation from the European Commission 2012	–
COM (1999)	Financial Services Action Plan	–
COMI	Centre of Main Interests	–
CRD	Capital Requirements Directive	–
CRO	Companies Registration Office	–

Abbreviation	Full text	Translation
CRR	Capital Requirements Regulation	–
CSOH	Court of Session Outer House (Scotland)	–
CTMs	Common Trade Marks	–
CVA	Company Voluntary Agreement	–
CFR	Common Frame of Reference	–
DB	database	–
DCFR	Draft academic European Common Frame of Reference	–
DF	Il diritto fallimentare e delle società commerciali (periodical, Italy)	The law of insolvency and of business companies
DGRN	Dirección General de los Registros y del Notariado (Spain)	General Directorate of Registries and Notaries
Dir	Directive	–
dir. priv.	Diritto privato (Italy)	Civil Law
d.l.	Decreto legge (Italy)	Law Decree
d.lgs.	Decreto legislativo (Italy)	Legislative Decree
d.m.	Decreto ministeriale (Italy)	Ministerial Decree
d.P.R.	Decreto del Presidente della Repubblica (Italy)	Presidential Decree
EBRD	European Bank for Reconstruction and Development	–
EC	European Commission	–
EC	European Community (prior name for the European Union)	–
ECGI	European Corporate Governance Institute	–
ECJ	European Court of Justice	–
ECR	European Court Reports	–
ed.	edited	–
ed.	edition	–
ed(s).	editor(s)	–
e.g.	<i>exempli gratia</i>	for example
EFTA	European Free Trade Association	–
ECLI	European Case Law Identifier	–

Abbreviation	Full text	Translation
EIR	(EU) Regulation 2015/848 of 20 May 2015 on Insolvency Proceedings	–
ENAC Civile	Ente Nazionale per l'Aviazione (Italy)	National Body for Civil Aviation
Entsch.	Entscheidung (Austria)	decision
EO	Erwerbsersatzordnung (Switzerland)	Regulation for Income Compensation
EPC	European Patent Convention	–
ER	English Reports	–
et al.	et alii	and others
etc.	et cetera	and so on
et seq.	et sequentia	and that which follows
EU	European Union	–
EULIS	European Land Information Service	–
EuLR	European Law Reports	–
EvBl	Evidenzblatt der Rechtsmittel-Entscheidungen (journal, Austria)	Journal on Appeal Cases
EWCA (Civ)	Court of Appeal of England and Wales, Civil Division	–
EWHC (Ch)	High Court of England and Wales, Chancery Division	–
Ex	Law Reports, Exchequer Division (England)	–
F	Il Fallimento (journal, Italy)	Bankruptcy
ff.	and the following	–
Fl	Il Foro Italiano (journal, Italy)	–
fn.	footnote	–
FOGASA	Fondode Garantía Salarial (Spain)	wage guarantee fund
FP	Il Foro Padano (journal, Italy)	–
GBG	Grundbuchgesetz (Austria)	Land Registry Act
GI	Giurisprudenza italiana (journal, Italy)	Italian Law (Journal)
GBO	Grundbuchordnung (Germany)	Land Register Regulation

Abbreviation	Full text	Translation
GBV	Verordnung zur Durchführung der Grundbuchordnung (Germany)	Regulation on the Implementation of the Land Registry Code
GC	Giustizia civile (Italy)	Civil Law
GComm	Giurisprudenza commerciale (Italy)	Commercial Law
GDir	Guida al diritto (journal, Italy)	Guide to Law
Geo.	Geschäftsordnung für Gerichte I. und II. Instanz (Germany)	By-Laws for I. and II. level of jurisdiction
GmbH	Gesellschaft mit beschränkter Haftung	limited liability company
GmbHG	Gesetz betreffend die Gesellschaft mit beschränkter Haftung (Germany)	Limited Liability Companies Act
GmbHHR	Die GmbH-Rundschau (journal, Germany)	The GmbH Review
GSZ	Großer Senat des Bundesgerichtshofs (Germany)	Grand Panel of the Federal Supreme Court
GUG	Grundbuchumstellungsgesetz (Austria)	Act concerning changes or transfers of Land Registers
HGB	Handelsgesetzbuch (Germany)	Commercial Code
HKLRD	Hong Kong Law Reports & Digest	-
HL Cas	Clark & Finnelly's House of Lords Reports New Series (England)	-
HR Rep	House Report	-
HUF	Hungary Forint	Hungarian currency
IBAN	international bank account number	-
ibid.	ibidem	in the same place
ICAO	International Civil Aviation Organisation	-
i.e	id est	that is to say
IEHC	High Court of Ireland	-
IESC	Supreme Court of Ireland	-
IILR	International Insolvency Law Review (journal)	-
ILRM	Irish Law Reports Monthly	-
inc	incorporated	-
InDret	InDret Revista para el Análisis del Derecho (journal, Spain)	InDret Journal of Legal Analysis

Abbreviation	Full text	Translation
IR	Irish Reports	–
in <i>Re</i>	in the matter of	–
InsO	Insolvenzordnung (Germany)	Insolvency Regulation
INSOL	International Association of Restructuring, Insolvency & Bankruptcy Professionals*	–
IP	insolvency practitioner	–
IO	Insolvenzordnung (Austria)	Insolvency Act
ITR	Ridgeway, Lapp & Schoales Irish Term Reports	–
J	Justice of Her Majesty's High Court (England)	–
JBl	Juristische Blätter (journal, Austria)	Law Papers
KB	Law Reports, King's Bench (England)	–
KO	Konkursordnung (Austria)	Former Insolvency Regulation
L.	Legislativo (Spain)	Law
L.	Legge (Italy)	Law
La. Civ.	Louisiana Civil Code	–
Law Com	The Law Commission (England)	–
LBF	Lehman Brothers Finance AG	–
LBIE	Lehman Brothers International (Europe)	–
LC	Ley Concursal (Spain)	Insolvency Act
LEC	Ley de Enjuiciamiento Civil (Spain)	Procedure Law
LEH	Ley de Enjuiciamiento Civil (Spain)	Civil Procedure Act
L.Fall.	Legge Fallimentare (Italy)	Insolvency Law
LH	Ley Hipotecaria (Spain)	Mortgage Law
LHMPSD	Ley de Hipoteca Mobiliaria y Prenda sin Desplazamiento (Spain)	Law on Chattel Mortgage and Non Possessory Pledge
LJ	Lord Justice of Appeal (England)	–
Lloyd's Rep Bank	Lloyd's Law Reports Banking (England)	–
Lloyd's Rep	Lloyd's Law Report (England)	–

* The European branch has a database of relevant European case law available on LexisLibrary.

Abbreviation	Full text	Translation
LLP	limited liability partnership	–
LMV	Ley del Mercado de Valores (Spain)	Law on Securities Markets
LNA	Ley de Navegación Aérea (Spain)	Aviation Law
LNM	Ley de Navegación Marítima (Spain)	Law on Shipping
LR	Law Reports (1 st Series) (England)	–
L. Rev.	Law Review	–
Ltd	limited	–
LuftFzgG	Gesetz über Rechte an Luftfahrzeugen (Germany)	Act on Rights in Aircrafts
LVPBM	Ley de Venta a Plazos de Bienes Muebles (Spain)	Law on Hire Purchase Agreements
MAO	Mortgaging of Aircraft Order 1972 (England)	–
MCA	Master Custody Agreement	–
MCC	Maxwell Communication Corp plc	–
MDR	Monatszeitschrift für deutsches Recht (journal, Germany)	Monthly Journal for German Law
MER	Merivale's Chancery Reports (England)	–
MFI	Massimario del Foro Italiano (journal, Italy)	Law Report arranged by the journal 'Foro Italiano'
MFJ	Maxwell Finance Jersey	–
MGC	Massimario di Giustizia Civile (journal, Italy)	Law Report arranged by the journal 'Giustizia Civile'
MGl	Massimario di Giurisprudenza del Lavoro (journal, Italy)	Law Report on Labour Law
MittRhNotK	Mitteilungen der Rheinischen Notarkammer (journal, Germany)	Rhenish Notaries' Chamber Notifications
MLJ	Malayan Law Journal	–
N	Notariato (journal, Italy)	Public Notaries
NGOs	non-governmental organisations	–
NJW	Neue Juristische Wochenschrift (Germany)	New Jurists' Weekly Journal

Abbreviation	Full text	Translation
NJW-RR	Neue Juristische Wochenschrift Rechtsprechungs-Report (Germany)	New Jurists' Weekly Journal Case Law Report
No.	number	–
NO	Notariatsordnung (Austria)	Notarial Code
Nr.	Nummer (Germany)	number
NR	National Report	–
NZI	Neue Zeitschrift für Insolvenz- und Sanierungsrecht (Germany)	New Insolvency and Restructuring Law Journal
NZLR	New Zealand Law Reports	–
ÖBA	Zeitschrift für das gesamte Bank- und Börsenwesen (Austria)	Journal of Banking and Financial Research
OECD	Organisation for Economic Cooperation and Development	–
OGH	Oberster Gerichtshof (Austria)	Highest Court
OJ	Official Journal of the European Communities	–
ÖJZ	Österreichische Juristenzeitung (Austria)	Lawyers Journal
OLG	Oberlandesgericht (Germany)	Upper State Court*
OMC	Open Method of Coordination	–
Öster.	Österreichische	Austrian (referring to a decision)
OR	European Insolvency Regulation (Old Regulation)	–
OVPBM	Ordenanza de la Ley Venta a Agreements Plazos de Bienes Muebles (Spain)	Ordinance on the Law on Hire Purchase
Oy	Osakeyhtiö (Finland)	incorporated company
p.	page	–
para(s).	paragraph(s)	–
PatG	Patentgesetz (Austria)	Patent Act
PAYE	pay as you earn	–
PBl	Österreichisches Patenblatt (Austria)	Patent Law Papers

* Instance above Landgericht but below the Federal Supreme Court with mostly appellate but some original jurisdiction.

Abbreviation	Full text	Translation
P & CR	Planning and Compensation Reports (journal, England)	–
plc	public limited company (England)	–
PMSI	Purchase Money Security Interests	–
PRA	Pubblico Registro Automobilica (Italy)	Public Automobile Register
PRIMA	place of the relevant intermediary approach	–
PPSAs	Personal Property Security Acts	–
QB	Law Reports, Queen's Bench Division (England)	–
QBD	Law Reports, Queen's Bench Division (England)	–
RAN	Registro Aeronautico Nazionale (Italy)	National Aeronautical Register
RD	Real Decreto (Spain)	Royal Decree
r.d.	Regio decreto (Italy)	Royal Decree
RDGRN	Resolución de la Dirección General de los Registros y del Notariado (Spain)	Resolution of the General Directorate of Registries and Notaries
r.d.l.	Regio decreto legge (Italy)	Royal Decree
RdTW	Recht der Transportwirtschaft (journal, Germany)	Transport Business Law
Reg.	Regulation	–
RH	Reglamento Hipotecario (Spain)	Mortgage Regulation
RJ	Repertorio de Jurisprudencia (Spain)	Collection of Court Decisions
RN	Reglamento Notarial (Spain)	Notarial Code
RN	Rivista del Notariato (journal, Italy)	Journal on Notaries
ROT	retention of title	–
RRM	Reglamento del Registro Mercantil (Spain)	Regulation of the Business Registry
s.	section	–
SA	Société Anonyme (France)	(public) company limited by shares
Sch.	schedule	–

Abbreviation	Full text	Translation
SchiffRegO	Schiffsregisterordnung (Germany)	Ship Register Regulation
SchiffRG	Schiffsregistergesetz (Germany)	Maritime Register Act
SchiffRG	Schiffsregistergesetz (Austria)	Act on Rights over Registered Ships and Ships under Construction
Sez. Un.	Sezioni Unite (Italy)	United Chambers of the Italian Supreme Court of Cassation
SIP 16	Statement of Insolvency Practice 16	–
SJD	Scientiae Juridicae Doctor	Doctor of Laws
S.p.A.	Società per Azioni (Italy)	corporation
SREIR	Security Rights & European Insolvency Regulation	–
STS	Sentencia del Tribunal Supremo (Spain)	Supreme Court Decision
SSTS	Sentencia del Tribunal Supremo (Spain)	Supreme Court Decision
SWD	Commission Staff Working Document	–
SZ	Amtliche Sammlung Zivilrecht (Austria)	Official Journal of Civil Law Decisions
TLR	Times Law Reports (England)	–
TS	Tribunal Supremo de España (Spain)	Supreme Court
UAM	Universidad Autónoma de Madrid (Spain)	–
UCC	Uniform Commercial Code	–
UCM	Universidad Complutense de Madrid (Spain)	–
UC3M	Universidad Carlos III de Madrid (Spain)	–
UGB	Unternehmensgesetzbuch (Austria)	Companies Act
UHG	Urkundenhinterlegungsgesetz (Austria)	Act on the Deposit of Documents
UIBM	Ufficio Italiano Brevetti e Marchi (Italy)	Office of Patents and Trademark
UK	United Kingdom	–

Abbreviation	Full text	Translation
UKPC	United Kingdom Privy Council	–
UKSC	United Kingdom Supreme Court	–
UNCITRAL	United Nations Commission on International Trade Law	–
UrhG	Urheberrechtsgesetz (Germany)	Copyright Act
Urt.	Urteil (Germany)	judgment
US	United States (of America)	–
USAID	United States Agency for International Development	–
v	vom	of (referring to a date)
v	versus	against, in contrast to
VAT	Value Added Tax	–
V(-)C	Vice Chancellor High Court (England)	–
Ves	Vesey Junior's Chancery Reports (England)	–
Vol.	Volume	–
WM	Zeitschrift für Wirtschafts- und Bankrecht (journal, Germany)	Business and Banking Law
WN	Weekly Notes of Cases (England)	–
WLR	Weekly Law Reports (England)	–
WW	World War	–
ZB	Registerzeichen Beschwerden BGH (Germany)	Register
ZInsO	Zeitschrift für das gesamte Insolvenzrecht (Germany)	Journal for Insolvency Law
ZIP	Zeitschrift für Wirtschaftsrecht (Germany)	Journal for Business Law
ZPO	Zivilprozessordnung (Germany)	Code of Civil Procedure
ZVG	Gesetz über die Zwangsversteigerung und Zwangsverwaltung im Wege der Zwangsvollstreckung	Act on Forced Auctions