

# ANALYSIS OF THE MODEL OF REGULATION OF CROSS-BORDER INSOLVENCY UNDER GERMAN LAW

Poliakov Rodion

**Annotation.** *The article is devoted to the analysis of the model of regulation of cross-border insolvency under German law. The purpose of the article is the scientific understanding and identification of the characteristic features of the model of regulation of cross-border insolvency under German law.*

*The presence of dualism in the legal regulation of the cross-border insolvency procedure under German law for EU member states and non-EU member states has been ascertained.*

*It is argued that there are five types of proceedings in the cross-border insolvency procedure under the provisions of the German insolvency Statute 1) main proceedings; 2) secondary proceedings; 3) domestic secondary proceedings; 4) foreign proceedings; 5) territorial proceedings), as well as the absence of a legally established definition of these concepts.*

*The absence of the concept of the debtor's COMI was found in the provisions of the German insolvency Statute, even despite the fact that such a concept exists in the regulatory act itself, such concept does not fall under the classical understanding of cross-border insolvency, because it concerns the insolvency of a group of companies. The similarity of the provisions of the German insolvency Statute regarding the regulation of cross-border insolvency with the provisions of the predecessor acts of the 19th century regarding the same issue, as well as the exploitation of even similar terminology in relation to territorial proceedings, is proven. The almost complete impossibility of universalism in accordance to the provisions of the German insolvency Statute on cross-border insolvency has been proven, despite the presence, at first glance, of an environment favorable to the implementation of the mentioned theory.*

*It is substantiated that the modern procedure of cross-border insolvency in Germany for third countries that are not members of the EU embodies the theory of territorialism. It has been proven that the existing territorial ideology of cross-border insolvency in modern Germany can be traced back to the existence of the Konkursordnung of 1877.*

*By virtue of improving the legislation of Ukraine on bankruptcy, it is proposed to add a new Book to the Bankruptcy Code of Ukraine, which would contain the regulation of the cross-border insolvency procedure.*

**Key words:** *bankruptcy, cross-border insolvency, Germany, European Union, jurisdiction.*

## 1. Introduction.

In Germany, the issue of cross-border insolvency requires special attention in view of its uniqueness compared to other non-EU member states. The peculiarity is that in this state there is a dualism in the regulation of the mentioned legal relations in the sphere of insolvency. Given such a special feature, and Ukraine's status as a candidate for EU membership, the legal experience of a leading EU-member state can be useful to us.

## 2. Research status.

Different aspects of cross-border insolvency were the subject of research by such Ukrainian and foreign scientists as: O. Biryukov, M. Verbytska, V. Panchenko, B. Poliakov, O. Stakhayeva-Bohovyk, K. Pannen, I. Boehmer, A. Heidbrink, M. Thorn, H. Müller and others. At the same time, it is necessary to state that such

an issue as models of regulation of cross-border insolvency under German law is insufficiently researched, which determines the actuality of researching this issue.

### 3. The purpose of the article.

The purpose of this article is the scientific understanding and identification of the characteristic features of the model of regulation of cross-border insolvency under German law.

### 4. Presentation of the main research material.

When speaking about dualism in legal regulation, we mean the presence of both Section 12 of the Insolvenzordnung (hereinafter – the Statute) [1] and Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (hereinafter - EU Regulation 2015) [2].

It is worth quoting the position of Prof. Dr. Hans-Friedrich Müller, who in his lecture “Vorlesung Internationales Insolvenzrecht” (International Insolvency Law) [3] indicates the scope of application of the EU Regulation (in fact, the predecessor of the EU Regulation 2015, namely EU Council Regulation No. 1346 /2000 of May 29, 2000 on insolvency procedures (hereinafter – EU Regulation 2000) [5]), as well as the Statute. In particular, this scientist claims that the EU Regulation 2000 has “Direct application as a regulation in accordance with Article 288 of the TFEU” and also acts as a “Replacement of German national insolvency legislation in European bankruptcy proceedings, since it contains material norms that are decisive regulation in cross-border European situations and which conflict with German legislation.” [3]. At the same time, regarding the application of the Statute, this scientist indicates that it “applies to third countries and if the Regulation or implementing law does not contain any rules” [3].

Regarding the relationship between the Statute and the EU Regulation 2000, Ilka Annette von Bemmer has the following position: “Both regulatory complexes have been applied in this country side by side since the entry into force of the Law on Amendments to International Insolvency Law on March 20, 2003.” [4, p. 29], while indicating the priority of the Regulation [4, p. 29]. We also find confirmation of the position of Hans-Friedrich Müller regarding the application of the provisions of the Statute to all non-EU countries: “Since the Regulation concerns only relations between EU member states, its provisions do not apply in relation to third countries: in this regard, only §§335 apply and further InsO...” [4, p. 30].

At this stage, it should be immediately noted that, by and large, despite the fact that the EU Regulation 2015 is the successor of the EU Regulation 2000, the same dualism remains in Germany, since the legal nature of the two EU Regulations is absolutely identical.

Due to this state of affairs, we consider it as appropriate to focus the main attention on the analysis of the provisions of the Statute, while at the same time conducting only a partial parallel comparison with the provisions of the EU Regulation 2015, because at the end of the day, the latest regulatory legal act has a universal character for EU-member states and has, in this case, only an indirect relation to Germany.

Moreover, if we are talking about relevance especially for Ukraine, currently taking into account the fact that our country has not yet acquired the status of an EU member the most appropriate for Ukrainian legal science will be provisions of the Statute, since in the event of a cross-border insolvency procedure with the assets of the debtor both in Ukraine and Germany, the norms of the Statute will be applied, instead of the EU Regulation 2015.

When starting the analysis of the provisions of the Statute regarding the regulation of cross-border insolvency, it should be noted that the German legislator devotes an entire Part 12 of the normative act to this issue, which in its turn is divided into 3 divisions, the first of which is related to the definition of the basic principles of cross-border insolvency, the second concerns the regulation of foreign insolvency procedures, when the third regulates the territorial proceedings. However, despite such a wide branching of legal regulation, Part 12 of the Statute contains only 24 paragraphs (§§335–358). Thus, it is possible to state that from a purely formal point of view of legal technique in Germany, the legal regulation of the cross-border insolvency procedure can be compared with the legal regulation available in Ukraine, both

in terms of the presence of a whole section devoted to this issue (Chapter 8 of Book 3 of the Code of Ukraine on Bankruptcy Procedures (hereinafter – Bankruptcy Code) [6]), and by approximately the same number of articles (in Ukraine, the legislator devotes 16 articles to this issue). However, for instance, in England, a whole normative legal act is dedicated to the regulation of the mentioned issue. And again, thanks to the described dualism, to some extent it can be claimed that Germany also possesses a whole regulatory document dedicated to the regulation of cross-border insolvency (we are talking about EU Regulation 2015). Therefore, it would be appropriate for Ukraine to borrow such experience and add a new Book to the Bankruptcy Code, which would contain the regulation of the cross-border insolvency procedure.

Eventually, despite this seemingly extensive legal regulation of the cross-border insolvency procedure under German law, in fact, it does not seem possible to call such legal regulation as sufficient. Evaluating it in a whole, certain gaps or even “chasms” immediately become clear, which do not let to consider such regulation as a complete. Of course, the provisions of Part 12 reproduce the provisions of the EU Regulation 2015, they touch on similar issues in many respects, however, they also contain certain features and, unfortunately, are not devoid of plainly obvious shortcomings.

For example, as it was already mentioned, the first division of Part 12 of the Statute deals with the definition of the basic principles regarding the cross-border insolvency procedure. However, and strangely enough, the entire division largely boils down to regulating the definition of applicable law. Exceptions are §§341 and 342 of the Statute, which in their turn relate to the exercise of creditors’ rights and the return of property, respectively. When §§335–340 of the Statute relate to the determination of the applicable law. Therefore, by and large, the provisions of the EU Regulation 2015 are being repeated. For example, §335 of the Statute contains a progressive regulation regarding the application to foreign proceedings of the law on the basis of which they were commenced (that is, a similar regulation from part 1, Article 7 of the EU Regulation 2015). We share the position of Dr.K. Pannen, who noted: “Insolvency proceedings and their consequences are governed by the principle of *lex fori concursus*, §335.”[9]. The mentioned §342 of the Statute contains a similar regulation from Article 23 of the EU Regulation 2015 regarding the return of property to the liquidation mass (namely, to the insolvency administrator) by a creditor who has satisfied his own claims in another state where there are no open proceedings. However, part 1 of §342 of the Statute specifies the application of the consequences of illegal enrichment (*ungerechtfertigten Bereicherung*). Thus, there is a reference to the German Civil Code [7], namely to Title 26, Division 8 of Book 2 entitled “Illegal Enrichment”. Thereby, in Germany, the legislator envisions a special procedure for regulating the return of property to the liquidation mass, however, in general terms, such regulation does not bring anything fundamentally new, establishing only procedural features.

Nonetheless, in general, if the provisions of the first division of Part 12 of the Statute somewhat repeat the provisions of the EU Regulation, then what is the problematic aspect? Undoubtedly, the above regulation determines the applicable law in various situations (§336 of the Statute refers to the determination of the law in relation to transactions and rights in rem in an immovable property; §337 of the Statute defines the applicable law in relation to employment aspects; §338 of the Statute defines the creditor’s right to set off claims, if the applicable law allows it; §339 of the Statute enables the debtor’s actions to be contested under the law of the state in which the insolvency proceedings were opened, unless another person proves that the law of another state should be applied to the action; §340 of the Statute regulates issues related to organized markets and pension transactions and determines the law applicable to such issues), as well as defining the right of creditors to declare their claims in other proceedings (part 1 §341 of the Statute) and a similar right of insolvency administrator to declare registered claims in other proceedings (part 2 of §341 of the Statute) are very progressive and filled with the spirit of universalism. But where does the imperfection lie?

Indeed, already in the first subsection we are aware of the existence of two types of proceedings - The main insolvency proceedings (*Hauptinsolvenzverfahren*) and Secondary insolvency proceedings (*Sekundärinsolvenzverfahren*). However, we do not find any legally established definition of these terms either in the first division of Part 12 of the Statute nor in any other structural component of this normative act. To some extent, the situation is similar in the EU Regulation 2015, where there are also no similar definitions, but there is an Article 3, from the logical analysis of which the meaning of the terms of both main and secondary proceedings, as well as territorial proceedings, will immediately become clear. And

it is certainly possible to state that the German legislator aims for a legal regulation similar to the EU Regulation 2015, especially since the concept (of course without definition) of territorial proceedings (Particularverfahren) is usually found in the Statute, at most, an entire division of Part 12 is devoted to this type of proceedings Statute.

But, such a remark would probably be inappropriate.

Firstly, as it was already mentioned, in Germany there is a dualism in the regulation of cross-border insolvency, and therefore similar concepts in two different regulatory acts may differ. In particular, how differ territorial proceedings.

Secondly, in addition to the three types of proceedings mentioned in the Statute, there is also a fourth type of proceedings – foreign insolvency proceedings (Ausländisches Insolvenzverfahren), to which the second division of Part 12 of the Statute is devoted. Moreover, there is even a mention of such a fifth type of proceedings as domestic secondary insolvency proceedings (inländischen Sekundärinsolvenzverfahren).

Thirdly, and probably the most important, if the subsections of Part 12 of the Statute are devoted to territorial proceedings and foreign proceedings, §356 with a similar name is devoted to secondary proceedings, and from this it is possible to formulate at least some understanding of these concepts, then the situation with regard to the main proceedings is radically different, since to it nothing is dedicated. Despite the fact that, by large, §356 does not reveal the essence of the secondary proceedings, only determining the possibility of its opening with respect to domestic assets after the recognition of the main foreign proceedings. An absolutely similar situation exists with domestic secondary insolvency proceedings, insomuch as there is only one mention of it in part 1 §344 of the Statute.

As a result, it should be stated that accordingly to the provisions of the Statute, 5 types of cross-border insolvency proceedings are envisaged, namely: 1) main proceedings; 2) secondary proceedings; 3) domestic secondary proceedings; 4) foreign proceedings; 5) territorial proceedings. And whence, expectedly, a rhetorical question arises, why is the definition of these concepts is not enshrined in the first division of Part 12 of the Statute which actually is entitled “fundamental principles”?

Having mentioned above the differences between the provisions of the EU Regulation 2015 and the Statute, we should proceed to their analysis.

First of all, let's draw attention to the absence of the concept of the debtor's COMI (centre of main interests) in the Statute. More precisely, such a concept as the COI (Mittelpunkt ihrer prächteneren Interessen) is mentioned in the Statute only once, namely in §3e of the Statute regarding the insolvency of a group of companies, but this insolvency procedure has only an overtly indirect relation to the classic cross-border insolvency procedure. Furthermore, if we are talking about distinguishing such type of proceedings as the main proceedings, then in the EU Regulation 2015, its main distinguishing feature will be the presence of the debtor's COMI in the given state. Moreover, even the UNCITRAL Model Law on Cross-Border Insolvency of 1997 (hereinafter - the Model Law) [8] distinguishes the foreign main proceedings from the non-main proceedings precisely on the basis of the location of the debtor's COMI.

§343 of the Statute also looks very interesting. In particular, in accordance with the provisions of part 1 §343 of the Statute, the recognition of the opening of foreign insolvency proceedings is envisaged. Of course, the legislator provides certain exceptions, such as the lack of jurisdiction of a foreign court to open insolvency proceedings in the sense of German law (M. Thorn quite originally calls such legal regulation the “mirror principle” [13]), and when recognition the proceedings lead to a violation of the basic principles of German law and basic rights. Thus, the exceptions to the above norm regarding the recognition of foreign proceedings appear to be purely symbolic and logically grounded, so their existence in principle cannot be regarded as proof of the presence of a territorial character.

On top of that, according to part 2 of the mentioned paragraph of the Statute, automatic recognition is also given to decisions in recognized proceedings regarding the course and closure of these proceedings.

It would seem that a pure form of universalism is evident, there is a repetition of the provisions of part 1 of Article 19 of the EU Regulation 2015, which enshrines an automatic recognition of open proceedings,

and par. 1 of part 1 of Article 32 of the EU Regulation 2015, which in its turn provides for the automatic recognition of decisions regarding the course and closure of proceedings. And in contrast to the provisions of the EU Regulation 2015, the provisions of the Statute revolutionarily bring absolute universalism to any state in the world...

By the same token, the second division of Part 12 of the Statute defines the possibility of enforcement of foreign court decisions (§352 of the Statute), i.e., in essence, there is an obvious similarity with the provisions of Article 32 of the EU Regulation.

Additionally, the possibility of protecting assets that should be covered by domestic secondary proceedings at the request of the appointed temporary insolvency administrator before the commencement of the main insolvency proceedings is determined (§344 of the Statute) (at the same time, the German legislator makes a reference to the security measures defined in §21 of the Statute). Besides that, even the court that has jurisdiction over such an application is determined (§348 of the Statute).

When §347 of the Statute is devoted to the regulation of confirmation of the appointment of the insolvency administrator, which is similar to Article 22 of the EU Regulation 2015.

Likewise, the provisions of §352 of the Statute are fully related to the theory of universalism, because they determine the automatic termination of judicial proceedings in relation to property belonging to the insolvency estate and provide the existence of such termination or until the joining of a person who is authorized by the law of the *lex fori concursus* to participate in such kind of proceedings, or until the recognized insolvency procedure would be finished.

However, at this stage, a logical question arises, which in its turn brings some doubt on the application of the theory of universalism – why is there no definition of the legal capacity and powers of the foreign insolvency administrator in the second division?

Similarly, the provisions of §349 of the Statute, which relate to the regulation of the case of the debtor's realization of property belonging to the insolvency estate, probably cause even more concern to the supporter of the theory of universalism. A very interesting feature is noted by Dr. K. Pannen: "If the buyer acts in a good faith, in accordance with the terms of §349, this may mean that the confiscation effect of foreign insolvency proceedings on national assets is excluded." [9]. Given this state of affairs, the following position of this scientist seems rather satirical: "Recognition of a foreign decision on commencement occurs automatically, that is, without a special recognition procedure or a separate name of recognition. The idea behind this is that the insolvency estate should be protected without gaps." [10]. If the mentioned legal regulation of §349 of the Statute leaves the possibility for the debtor to remove the property from the insolvency estate, then what can be considered as a "gap"? Whether could such legal protection of the debtor's property be considered as appropriate and sufficient to ensure the implementation of the theory of universalism? Of course, the questions are rhetorical.

Moreover, the third division of Part 12 of the Statute simply nullifies the significance of all previous regulation and essentially confirms all fears about the impossibility of universalism.

Everything begins with §354 of the Statute, which is as devastating to the theory of universalism as hail to ripe grapes in September. The point is that this norm precisely regulates the issue of opening territorial proceedings.

For understanding the ingrained nature of this type of proceedings, it is worth quoting Dr. V. Endemann, who noted the following as early as 1889: "There is a deviation from the basic idea, according to which competitive proceedings seize all the property of an insolvent debtor, in accordance with international conditions, only a territorial competition (orig. Particularkonkurs) arises, since the proceedings in the competitive case affects only the internal assets of the debtor, despite the fact that other assets of the same exist abroad, and regardless of whether there is a competitive process on foreign assets." [12, p. 644].

By and large, if we take a similar type of proceedings under EU Regulation 2015, then thanks to the structural and logical analysis of Article 3 of this act, it becomes clear that the territorial type of proceedings can be opened only in the case of the presence of an establishment of the debtor in the state, only before the opening of the main proceedings and upon the application of exceptional subjects in compliance

with clearly defined special requirements, and with the opening of the main proceedings, the territorial proceedings automatically will be transformed to secondary.

But, as it becomes clear, the situation in Germany is completely different. According to part 1 of §354 of the Statute, territorial proceedings can be opened in the case of the presence of an establishment or assets of the debtor in Germany and can only concern the assets available in this country. As it becomes clear, the legislator deliberately establishes a competition between the recognition of foreign proceedings and the commencement of the territorial, since in both cases they will naturally and without alternative relate to assets available in Germany. At this stage, it would be appropriate to mention the §292 of the Prussian competitive Statute of 1855 [16], which enshrined the opening of a territorial competition (Particularkonkurs) by the district court regarding all domestic assets of a foreign debtor, provided that the commercial representative office of the debtor is located in the district of this court. §293 of the Prussian competitive Statute of 1855 allowed the enforcement of the domestic assets of the debtor in the absence of commercial representation.

Returning to our days, it should be emphasized that the German legislator defines a special subject of initiating territorial proceedings, namely the creditor of the debtor. Moreover, a special condition for initiating territorial proceedings is defined in the case where the debtor does not have an establishment in Germany, but possesses property there. The condition for opening territorial proceedings in such a case will be proof by the creditor of the fact that with another type of proceedings he will be in a worse position than with the opening of territorial proceedings.

Any other regulation in the Statute regarding the fact that the territorial proceedings will be transferred to the secondary after the recognition of the main proceedings, is absent, which in its turn, contradicts with the provisions of the EU Regulation 2015, where in the last paragraph of part 4 of Article 3 such a transformation of territorial proceedings is clearly determined.

Nevertheless, the situation with territorial proceedings in the light of the provisions of the Statute is gaining even greater momentum. Part 3 of §354 of the Statute defines the exclusive jurisdiction of the German court regarding the opening of proceedings based on the location of the debtor's establishment or property. At the same time, it should be emphasized that the German legislator uses the term proceedings itself (Verfahren), and not territorial proceedings (Particularverfahren). And at this stage we have to turn to history again. For example, if we take §208 of the Competition Statute of 1877 (Konkursordnung 1877) [15], we will see that in paragraph 3 of this norm, the legislator determines the exclusive jurisdiction of the court regarding the opening of proceedings, in the district of which the debtor's establishment or property is located. In spite of the fact that in the modern act, just like in the act of the 19th century, the same term is used to describe the establishment - Niederlassung, and in both cases the same term "procedure" is used - Verfahren, but not territorial proceedings. Of course, after understanding the fact that the regulation of cross-border insolvency was contained in the predecessor of the Competition Statute of 1877, the presence of this regulation in this regulatory act is not surprising, however, the use of identical terms and essentially almost identical regulation more than 100 years later is interesting.

Returning to modern times, it is necessary to take into account the reference in part 3 of §354 of the Statute to the provisions of part 3 of §3 of the Statute, which determine that in the presence of concurrence of jurisdictions of courts for the opening of insolvency proceedings, priority is given to the court, which was the first to receive the application on commencement of proceedings.

Given the provisions of paragraph 1 of part 1 of §343 of the Statute, which determines the necessity for a foreign court to have a jurisdiction to open proceedings against the debtor in accordance with German law, as well as the above-mentioned legal regulation of territorial proceedings, as well as the part 1 of §3 of the Statute, which determines the jurisdiction of the court for the opening of proceedings against the debtor, at the location of his COMI (although this rule does not contain such a concept, but it logically covers the existing regulation) it is possible to reach the following:

1. In the event that the proceedings were opened in a state where there is neither the property nor the COMI of a debtor, such proceedings cannot be recognized in Germany;
2. If the debtor's COMI is located in Germany, recognition of any other foreign proceedings is impossible;

3. If the debtor's COMI is not located in Germany, but there is his property, recognition of foreign proceedings is possible in condition that the foreign court that opened the proceedings received the application to open the proceedings earlier than the correspondingly designated court in Germany.

Taking into account such conclusions, which are based on a logical analysis of the mentioned normative provisions, the question remains, whether is it possible to commence a territorial proceedings after the recognition of a foreign proceedings?

It should be stated right away that the legislator does not specify any legislative restrictions on the opening of territorial proceedings after the recognition of foreign proceedings. Ergo, one should start from the defined legal regulation of territorial proceedings and hence the "physical" possibility of initiating territorial proceedings after the recognition of foreign proceedings.

Therefore, if the debtor has an establishment in Germany, a territorial proceedings at the request of the creditor may be opened even after recognition of the foreign proceedings, because the legislator does not specify any additional conditions for the creditor to initiate this type of proceedings in part 1 §354 of the Statute.

A slightly different situation occurs if the debtor does not have an establishment in Germany, but has property there. In such a case, the creditor will have to prove and justify the necessity of opening territorial proceedings. And at this stage, certain difficulties and obstacles could arise.

The fact is that in §356 of the Statute, the possibility of secondary proceedings is determined. Part 1 of §356 of the Statute duplicates the provisions of EU Regulation 2015 (part 2 of Article 19) and it is determined that the recognition of foreign proceedings does not exclude the opening of a secondary one. Despite that §356 of the Statute does not define the range of subjects for submitting an application for the opening of secondary proceedings, except that part 2 authorizes a foreign insolvency administrator to initiate such proceedings, it is quite clear that both the debtor and creditors can initiate it in accordance to general rules, so long as such proceedings will be opened in Germany, and the fact, that the German legislator defines a foreign insolvency administrator as an additional subject of initiation of such type of proceedings, only once again confirms the above statement. It is also important that according to part 3 of §356 secondary proceedings are opened without the need to prove this necessity.

Consequently, in the absence of the establishment of the debtor in Germany, it will be very problematic for his creditors to prove the necessity of opening territorial proceedings after the recognition of a foreign one, provided that this type of proceedings exists as a secondary one.

And frankly, if we take into account the legal regulation of coordination between domestic secondary and foreign main proceedings, available in the Statute, then it should be noted that the sign of "equality" between secondary and territorial proceedings, unreservedly, between two different types of proceedings, has essentially been established. Since the coordination between the two proceedings is devoted to as many as two paragraphs, which are declarative: §358 of the Statute defines the obligation of the insolvency administrator in secondary proceedings to transfer the surplus from the realization of the debtor's assets to the bankruptcy administrator of the foreign main proceedings; §357 of the Statute is devoted to cooperation between insolvency administrators and, by large, boils down to the possibility of providing comments and opinions to the insolvency administrator of foreign proceedings to the insolvency administrator of secondary proceedings, as well as the possibility of the first to attend meetings of creditors and submit its own insolvency plan.

As a result, taking into account this state of affairs, the debtor's creditors do not in fact have any need to initiate territorial proceedings, since secondary proceedings, paradoxical as it may sound, are a mirror image of the latter.

The position of Dr.K. Pannen, which at first glance also looks paradoxical and impossible, should be shared: "Concurrent proceedings in insolvency procedure can be opened as an independent proceedings or as a secondary proceedings in insolvency procedure, and in the latter case, Articles 356–358 of the InsO also apply." [11]. However, taking into account the above analysis, it becomes quite clear that territorial proceedings serve as a type of concurrent proceedings in Germany in the case of the presence of the

establishment of the debtor. Namely, because of this circumstance that regulation of the coordination of concurrent proceedings is essentially absent, given the absence of the subject of regulation itself.

Moreover, if we turn again to the historical analysis of the cross-border insolvency procedure in Germany, the provisions of the first paragraph of §294 of the Prussian competitive statute of 1855 provided the need to transfer the excess funds received as a result of the territorial competition to a foreign bankruptcy court. That is, in essence, we have a duplication of the modern provisions of §358 of the Statute, as well as confirmation that the territorial competition served as a type of concurrent proceedings. Moreover, the provisions of §294 provided the transfer of assets to a foreign state in the event that no territorial competition was opened.

As the consequence, we must share the position of A. Heidbrink, who, describing the historical development of cross-border insolvency in Germany, noted: "Ever since the original German Bankruptcy Code became law in 1879, German bankruptcy proceedings have claimed universal effect on all of the debtor's assets worldwide. By contrast, German courts have held for almost a century that bankruptcy proceedings pending abroad had no effect on assets located in Germany, except as provided in some rare bi-national treaties." [14]. Because as we can see, with the creation of the Competition Statute of 1877, there was a change in the model of regulation of cross-border insolvency, when its predecessor (the Prussian competitive Statute of 1855) contained outspokenly revolutionary provisions for its time.

Thus, with a due regret, it should be stated that such a territorial ideology of cross-border insolvency in Germany, which was introduced in the Competitive Statute of 1877, is preserved to this day, on top of that, the provisions of the Statute regarding the regulation of the cross-border insolvency procedure are so similar to the provisions of its predecessors that involuntarily, the suspicion arises that the modern act was drawn up by a lawyer from the 19th century.

We conclude that the modern cross-border insolvency procedure under German law is the epitome of territorialism. Of course, the territorialism tries to be hidden and imperceptible, provisions are added to the Statute that are supposed to serve as confirmation of universalism. However, in fact, with each subsequent paragraph, it becomes more and more clear that such provisions are used here for nothing more than a cover, and in the end, even territorial universalism is impossible, since secondary proceedings look like no more than then an additional name for territorial. It is not surprising that the German legislator establishes the primacy of territorial proceedings over foreign ones, it is surprising that there is a competition between secondary and territorial proceedings, a competition that is hardly appropriate in the 21st century and which is a win-win for territorialism.

## 5. Conclusions

Based on the results of the research, we reached the following conclusions:

1. The presence of dualism in the legal regulation of the cross-border insolvency procedure under German law for EU member states and third non-EU member states has been ascertained.
2. It has been proven that there are gaps in the legal regulation of the cross-border insolvency procedure under German law for third countries, which is available in the Statute, despite the fact that the provisions of this regulatory act touch on similar issues as the provisions of the EU Regulation 2015.
3. The presence of five types of proceedings in the cross-border insolvency procedure in accordance with the provisions of the Statute, as well as the absence of a legally established definition of these terms, was argued.
4. The absence of the concept of the debtor's COMI was found in the provisions of the Statute, since despite the fact that such a concept exists in the regulatory act itself, it does not relate to the classical understanding of cross-border insolvency, because it concerns the insolvency of a group of companies.
5. The similarity of the provisions of the Statute regarding the regulation of cross-border insolvency with the provisions of the predecessor acts of the 19th century regarding the same issue, as well as the use of even similar terminology in relation to territorial proceedings, was proven.



6. The almost complete impossibility of universalism under the provisions of the Statute on cross-border insolvency has been proven, despite the presence, at first glance, of a favourable environment for the implementation of this theory.
7. The possibility of competition between secondary and territorial proceedings is substantiated.
8. The actual impossibility of territorial universalism in Germany during cross-border insolvency proceedings against third non-EU member states has been proven due to the actual establishment by the German legislator of the "equality" sign between territorial and secondary proceedings.
9. It is substantiated that the modern procedure of cross-border insolvency in Germany for third countries that are not members of the EU embodies the theory of territorialism.
10. It has been proven that the existing territorial ideology of cross-border insolvency in modern Germany can be traced back to the existence of the Competition Statute of 1877.
11. In order to improve the legislation of Ukraine on bankruptcy, it is proposed to add a new Book to the Bankruptcy Code which would contain the regulation of the cross-border insolvency procedure.

### References:

1. Insolvenzordnung (1994) (Deutschland). <https://www.gesetze-im-internet.de/inso/BJNR286600994.html> [in German].
2. Regulation (EU) of the European Parliament and of the Council on insolvency proceedings (recast), № 2015 / 848 (2015). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:02015R0848-20220109> [in English].
3. Müller, H.-F. (6. д.). Internationales Insolvenzrecht. [https://www.uni-trier.de/fileadmin/fb5/prof/ZIV013/SoSe\\_12/Internationales\\_Insolvenzrecht/Paentation\\_Internationales\\_Insolvenzrecht.pdf](https://www.uni-trier.de/fileadmin/fb5/prof/ZIV013/SoSe_12/Internationales_Insolvenzrecht/Paentation_Internationales_Insolvenzrecht.pdf) [in German].
4. Boehmer, I.A. v. (2006). (Deutsches) Internationales Insolvenzrecht im Umbruch : Grundfragen grenzüberschreitender Insolvenzen, unter Berücksichtigung der UNCITRAL-Modellbestimmungen über grenzüberschreitende Insolvenzverfahren / vorgelegt von Ilka Annette von Boehmer. <http://d-nb.info/984257691/3> [in German].
5. Council Regulation (EC) on insolvency proceedings, № 1346 / 2000 (2000). <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32000R1346> [in English].
6. Kodeks Ukrainy z protsedur bankrutstva, Kodeks Ukrainy № 2597-VIII (2023) (Ukraina). <https://zakon.rada.gov.ua/laws/show/2597-19#Text> [in Ukrainian].
7. Bürgerliches Gesetzbuch (2023) (Deutschland). <https://www.gesetze-im-internet.de/bgb/BJNR001950896.html> [in German].
8. UNCITRAL Model Law on Cross-Border Insolvency (1997). <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf> [in English].
9. Pannen, K. (6. д.). Blersch / Goetsch / Haas, InsO § 349 Verfügungen über unbew... / 1. Regelungsbereich. [https://www.haufe.de/recht/deutsches-anwalt-office-premium/blerschgoetschhaas-inso-349-verfuegungen-ueber-unbewe-1-regelungsbereich\\_idesk\\_PI17574\\_HI7321736.html](https://www.haufe.de/recht/deutsches-anwalt-office-premium/blerschgoetschhaas-inso-349-verfuegungen-ueber-unbewe-1-regelungsbereich_idesk_PI17574_HI7321736.html) [in German].
10. Pannen, K. (6. д.). Blersch / Goetsch / Haas, InsO § 343 Anerkennung. [https://www.haufe.de/recht/deutsches-anwalt-office-premium/blerschgoetschhaas-inso-343-erkennung\\_idesk\\_PI17574\\_HI7321799.html](https://www.haufe.de/recht/deutsches-anwalt-office-premium/blerschgoetschhaas-inso-343-erkennung_idesk_PI17574_HI7321799.html) [in German].
11. Pannen, K. (6. д.). Blersch / Goetsch / Haas, InsO § 354 Voraussetzungen des Partikularverfahrens. [https://www.haufe.de/recht/deutsches-anwalt-office-premium/blerschgoetschhaas-inso-354-voraussetzungen-des-partikularverfahrens\\_idesk\\_PI17574\\_HI7321696.html](https://www.haufe.de/recht/deutsches-anwalt-office-premium/blerschgoetschhaas-inso-354-voraussetzungen-des-partikularverfahrens_idesk_PI17574_HI7321696.html) [in German].

12. Endemann, W. (1989). Das Deutsche Konkursverfahren. Leipzig. Fues's Verlag (R. Reisland) [in German].
13. Thorn, M. (2021). UK and Germany: New restructuring tools and cross-border recognition post-Brexit. Norton Rose Fulbright. <https://www.nortonrosefulbright.com/en/knowledge/publications/effde6d3/uk-and-germany-new-restructuring-tools-and-cross-border-recognition-post-brexit> [in English].
14. Heidbrink, A. (2003). The new German rules on international insolvency law. *American Bankruptcy Institute Journal*, 22(9), 16 [in English].
15. Konkursordnung für das deutsche Reich Mit Einleitung, dem Reichseinführungsgesetze, Anmerkungen und Register von Eduard Graf. Zweiter Abdruck., 10.02.1877, Nördlingen. [in German].
16. Konkurs-Ordnung vom 8. Mai 1855, Berlin, der Dederschen Geheimen Ober-Hofbuchdruckerei, 1855. [in German].

---

**Rodion Poliakov,**

*PhD in law, doctoral student of  
Zaporizhzhia National University  
E-mail: rodion.pol@ukr.net  
ORCID 0000-0001-5266-224X*