SCRITTI DI DIRITTO PRIVATO EUROPEO
E INTERNAZIONALE

18

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# European and National Perspectives on the Application of the European Insolvency Regulation

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# Index

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# Preface

Following a practical comparative international methodology, the goal of the Project was to collect and exchange best practices in the field of insolvency and pre-insolvency cross-border proceedings, so to help office holders to better coordinate and implement international cooperation, thus enhance management of multiple proceedings, reorganization of companies and the protection of creditors and interests of stakeholders.

The Project aimed at collecting best practices, rules of private international law and case law in insolvency and pre-insolvency cross-border proceedings at the domestic level, and to identify areas of insolvency and pre-insolvency cross-border proceedings where best practices can enhance the possibility to save distressed companies and increase protection of cross-border creditors and stakeholders.

Domestic best practices are reported and commented in the second part of this *Volume*, whilst the first part of this book is devoted to a comment on the new Insolvency Regulation, under the special focal lenses on how this instrument should be interpreted so as to ensure better application in the European judicial space.

All contributions have undergone linguistic revision and double blind peer review process.

I would like to thank the many people that in all the Partner Institutions have taken part to this Project, have cooperated in carrying out practical research, collection of laws and of case law, and in the organization of the best practices exchange conferences in different Member States.

October, 2017 Ilaria Queirolo

# Part I

# The EU Insolvency Regulation

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# Scope of Application of the Regulation (EU) 2015/848 on Insolvency Proceedings

**José Juan Castelló Pastor**
**Francisco Gómez Fonseca**



## 1. Introduction

The Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (hereinafter, recast EIR)[1], significantly improves the functioning of cross-border insolvency proceedings. It aims at enhancing the effective administration of these cross-border proceedings to be developed effectively and efficiently for the proper functioning of the internal market of the European Union.

Approved in mid-2015 and applicable to insolvency proceedings opened after 26 June 2017[2], the recast EIR introduces important developments such as the extension of the scope of application, the definition of the «*centre of main interests*», the coordination between secondary

[1] OJ L 141, 5.6.2015.

[2] Article 84 recast EIR. In addition, note the exceptions noted in Article 92 Recast EIR: «*This Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union. It shall apply from 26 June 2017, with the exception of: (a) Article 86, which shall apply from 26 June 2016; (b) Article 24(1), which shall apply from 26 June 2018; and (c) Article 25, which shall apply from 26 June 2019*».

proceedings with the main insolvency proceedings, or the introduction of a chapter relating to group insolvencies, to name a few.

The recast EIR is not a recasting of the previous rule[3], even if the title itself indicates «*recast*». Its structure is similar to that of the repealed[4] Council Regulation 1346/2000 of 29 May 2000 on insolvency proceedings (henceforth, 2000 EIR), although it almost duplicates the number of its provisions and improves them in order to strengthen the effective administration of insolvency proceedings, cross-border insolvency, in line with the Europe 2020 Strategy for smart, sustainable and inclusive growth[5].

The present paper focuses on the analysis of the scope of application of the recast EIR, and it is structured in the following sections: first, we examine the material scope in its positive dimension, *i.e.* the analysis of the subjects covered by the recast EIR, and in its negative dimension: excluded subjects; secondly, the personal scope of application is examined; thirdly, the temporal scope of application and, finally, the territorial scope of application.

## 2. Material scope of application

One of the main innovations of the recast EIR from the perspective of the substantive scope is, undoubtedly, its application not only to insolvency proceedings – in the traditional or classic sense – but also extends to preventive, hybrid or pre-insolvency proceedings[6]. It should be

[3] Professor ESPLUGES MOTA points out that the «*Regulation 2015/848 is not a recast of its predecessor, it is not a mere addition of past amendments, but rather that the current Regulation on insolvency proceedings introduces, on an already existing basis, a number of important developments and significant changes* [...]»; See ESPLUGES MOTA, (Dir.), *Derecho del comercio internacional*, 8 ed., Valencia, 2017, p. 383.

[4] See Article 91 recast EIR.

[5] See Commission Communication, EUROPE 2020, «A strategy for smart, sustainable and inclusive growth», Brussels, 3.3.2010, COM (2010) 2020 (available at: http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52010DC2020&from=ES).

[6] Recital 10 states that «*the scope of this Regulation should extend to proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs. It should, in particular, extend to proceedings which provide for re-*

noted, in this respect, that the definition of «*insolvency proceedings*» has been extended, as the current Annex A covers more national proceedings than the predecessor´s Annex A.

Thus, compared to the 2000 EIR, the recast EIR is more explicit because – in addition to the aforementioned catalogue of national procedures listed in Annex A – it establishes the requirements that must be compulsorily applied in insolvency proceedings to be within its material scope of application, such as a the debtor being totally or partially divested of its assets and an insolvency practitioner being appointed; and the assets and affairs of a debtor are subject to control or supervision by a court.

It should also be added that its material scope of application extends also to proceedings in which a temporary suspension of enforcement actions by individual creditors is agreed where such actions adversely affect the negotiations and hinder the prospects of restructuring the debtor´s commercial activity, as well as to proceedings whose opening is subject to publicity (*sensu contrario*, confidential insolvency proceedings are excluded). On the other hand, and not less important, there is the requirement that the insolvency proceedings must be included in Annex A to fall under the scope of application of the Regulation.

There are two requirements for the material application of the recast EIR, in essence: that the proceeding complies with the requirements of Article 1.1 and that the proceeding is expressly listed in the appropriate Annex, otherwise, it will not apply. Nor will the Regulation apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment firms (and other undertakings and entities to the

*structuring of a debtor at a stage where there is only a likelihood of insolvency, and to proceedings which leave the debtor fully or partially in control of its assets and affairs. It should also extend to proceedings providing for a debt discharge or a debt adjustment in relation to consumers and self-employed persons, for example by reducing the amount to be paid by the debtor or by extending the payment period granted to the debtor. Since such proceedings do not necessarily entail the appointment of an insolvency practitioner, they should be covered by this Regulation if they take place under the control or supervision of a court. In this context, the term 'control' should include situations where the court only intervenes on appeal by a creditor or other interested parties*».

extent that they fall within the scope of Directive 2001/24/EC) and collective investment undertakings, as it was established in the 2000 EIR and will be discussed below.

It is common practice to devote the first article of Regulations to clarify its scope of application. Again, the drafters have opted for this legal technique. Thus, the first article often begins by establishing in its first part –positively– the issues covered by the instrument, while it leaves the issues excluded from its scope application in the second. In this way, and following the proper structure of the recast EIR itself, these two dimensions are analysed.

### 2.1. Positive dimension: proceedings covered by the Regulation

It is clear that the scope of application of the 2000 EIR mirrors a conventional concept of insolvency as it applies to those collective insolvency proceedings that entail the divestment of the debtor – partial or total – and the appointment of a liquidator (Art. 1 (1) 2000 EIR). Nevertheless, many Member States have latterly incorporated the so-called pre-insolvency or hybrid proceedings into their national legal systems[7]

[7] See Commission's Report (cit.) 5-6; Hess, Burkhard, Oberhammer Paul. European insolvency law: the Heidelberg – Luxembourg – Vienna Report on the application of the Regulation No. 1346/2000/EC on Insolvency Proceedings (External Evaluation JUST/2011/JICV/PR/0049/A4). München: Beck; Baden Baden : Nomos, 2014. paras. 129-175; INSOL Europe, *Revision of the European Insolvency Regulation*, 2012, www.insol-europe.org (30.4.2015), at 25-28; INSOL Europe, *Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member's State relevant provisions and practices*, http://ec.europa.eu/justice/civil/files/insol_europe_report_2014_en.pdf (30.4.2015); BRINKMANN, *Grenzüberschreitende Sanierung und europäisches Insolvenzrecht*, in *KTS* 4, 2014, 381, at 383-384; DAMMANN, BLEICHER, *En route vers la modernization du règlement européen relative aux procedures d'insolvabilite*, in *La Semain Juridique*, 1275, 16.5.2013, 22, at 24-25; GARCIMARTÍN, *The Review of the Insolvency regulation: Hybrid Procedures and other issues*, in *I.I.L.R.,* 3 2011, 321, at 323-326; KINDLER, *Hauptfragen der Reform des Europäischen Internationalen Insolvenzrechts*, n *KTS,* 1, 2014, 25, at 26-30; MOCK, *Das geplante neue europäische Insolvenzrecht nach dem Vorschlag der Kommission zur Reform der EuInsVO*, in *Z.P.E.U.*, 2013, 136, at 136-137; PIEKENBROCK, *The future scope of the European Insolvency Regulation*, in *I.I.L.R.*, 4, 2014, 424, 433-438; THOLE, *Die Reform der Europäischen Insolvenzverordnung*,in *ZEuP,* 2014, 39, at 45; VALLENS, *Réviser le règlement communautaire CE 1346/2000 sur les procedures d'insolvabilité*, in *R.P.C.*, 2010, 25, at 26; WESSELS, *What is an insolvency proceeding anyway?*, in *I.I.L.R.*, 4, 2011, 491, *passim*.

in an effort to further the rescuing of distressed companies that may be still economically viable. As so, these collective or quasi-collective proceedings, which are not purely voluntary, cater to the reorganizing of the liabilities of a company or firm at a moment in which the debtor is not yet insolvent, but likely to become insolvent soon.

At the same time, Member States have implemented and promoted national proceedings dealing with debt discharge or debt adjustment of self-employed persons and consumers. These proceedings do not necessarily involve either the insolvency of the debtor or his divestment (nor the designation of an insolvency practitioner) as the debtor remains in possession of his assets, which implies that the circumstances do not always meet the conditions established in the 2000 EIR for the definition of insolvency proceedings. Via the recast EIR, this situation is amended, so much so that the Recast includes such proceedings within its scope of application, in order to adjust, therefore, the EU regime to the late progression of national insolvency laws. Article 1 recast EIR, hence, states that the new Regulation applies to: «*[...] public collective proceedings, including interim proceedings, which are based on a law relating to insolvency and in which, for the purpose of rescue, adjustment of debts, reorganization or liquidation, (a) a debtor is totally or partially divested of his assets and an insolvency practitioner is appointed; (b) the assets and affairs of a debtor are subject to control or supervision by a court; or (c) a temporary stay of individual enforcement proceedings is granted by a court or by operation of law, in order to allow for negotiations between the debtor and its creditors, provided that the proceedings in which the stay is granted provide for suitable measures to protect the general body of creditors, and, where no agreement is reached, are preliminary to one of the proceedings referred to in point (a) or (b)*».

The complexity and detail of the new definition of «insolvency proceedings» in Article 1 makes for an interesting study. For one, as we have mentioned, it extends the scope of application to a varied nature-and-content national proceedings that deal with insolvency or pre-insolvency situations[8]. But at the same time, it sets out also to limit certain

[8] On the complexity of a EU characterization of insolvency proceedings, see i.a., Eidenmüller Maastricht Journal of European and Comparative Law 2013, 133, at 141-142; McBryde,

national solutions, as it considers that not all insolvency-related internal proceedings ought to benefit from the application of the Regulation.

In order to better examine the positive dimension of Art. 1(1) of the EIR recast, this section is divided into five basic elements. As per Article 1, the proceedings must be: (A) collective; (B) public; (C) include interim proceedings, (D) there must be based in an insolvency-related law, and (E) they must impose limitations to the individual rights of the debtor and/or the creditors. Moreover, (F) they have to be included in Annex A of the recast EIR as one of the national proceedings to which the Regulation will be applied.

### a) Collective proceedings

As can be seen from the drafting of recast Article 1 EIR above, the very first condition stated is that the proceedings must be «public collective proceedings». It is Article 2(1) of the recast EIR the one that defines the term "collective" as those «*…proceedings which include all or a significant part of the debtor's creditors provided that, in the latter case, the proceedings do not affect the claims of those creditors not involved in them.*» Hence, the Regulation is now also applicable to certain pre-insolvency restructuring proceedings set out in certain Member States legal systems that, for example, include only financial creditors[9]. As is only natural, the Regulation puts in place a series of safeguards in the case of proceedings that only involve a certain class of creditors: for one, the creditors that are excluded in the proceedings cannot be affected by them (Art. 2 (1) recast EIR), which comes to mean that their claims must not suffer any adjustments as a result[10]. Furthermore, the

FLESSNER, KORTMANN, *Principles of European Insolvency Law*, Kluwer Law International, 2003, at 16-28.

[9] See e.g. D.A. 4ª Spanish Insolvency Act, which in principle limits its effects to financial creditors. With further references, PIEKENBROCK, International Insolvency Law Review, 4, 2014, 424, at 436-437. For a critical analysis, EIDENMÜLLER, *Was ist ein Insolvenzverfahren?*, in *ZIP*, 4, 2016, 145, at 149-150.

[10] Though it is not absolutely clear what «affected» means in this context, in principle it implies that the non-participating creditors should not suffer any interference upon the content

proceedings should be aimed at rescuing the debtor and the creditors – in amount – must represent a «significant part» of the debtor's outstanding debts. Contrary to these cases, all those proceedings that lead to the liquidation of the debtor's assets shall include all creditors, as stated in Recital 14 recast EIR.

### b) Public proceedings

Moreover, the Regulation applies only to public proceedings of insolvency or pre-insolvency[11]. This means that the proceedings must be submitted to publicity in order to fall within the scope of the Regulation, thus allowing for the creditors to be aware of the proceedings and to exercise their procedural rights (i.e. contest the jurisdiction of the court that opens the proceedings, or lodge claims (Recital 12 recast EIR)). An exhaustive list of insolvency registers that facilitate publicity is included in the Recast EIR (see Art. 24 et seq).

Even though Member States are able to uphold confidential proceedings in their national legal systems, these must survive outside the scope of application of the Recast EIR[12]. As a result, and due to the fact that their confidentiality does not allow their creditors in other Member States to know of the opening of such proceedings, it is only fair that the Regulation does not provide for the recognition of their effects in other Member States (see Recital 13 recast EIR)[13]. Thus, these proceedings do not benefit from the cross-border recognition rules set out by the Regulation. Confidential proceedings, hence, will only be covered by the scope of application of the Recast EIR from the moment they become public proceedings.

(amount, maturity date,…) of their individual claims. Note, however, that in certain legal systems that may be «indirectly» affected if the restructuring arrangement enjoys a privileged status vis à vis claw-back rules.

[11] *Brinkmann*, in *KTS*, 4, 2014, 381, at 385-386; THOLE, in *ZEuP*, 2014, 39, at 47-49.

[12] See INSOL Europe, Study, at 21-23, with references to national Laws.

[13] But see Article 38 and Annex C (Germany) of the 2000 EIR. Therefore, the same holds under the 2000 EIR, see PAULUS, *Europäische Insolvenzverordnung*, 4 th ed. 2013, Einl. para. 63; RIEDEMANN: in PANNEN (ed), *European Insolvency Regulation, 2007, Article 2*, para. 23; VIRGÓS, GARCIMARTÍN, *The European Insolvency Regulation: Law and Practice*, 2004, 200-202.

### c) Interim proceedings

As per article 1 (1)), interim proceedings fall within the scope of application of the recast EIR. Some national legal systems, (i.e. Germany), provide for provisional or interim insolvency proceedings, which appoint provisional insolvency administrators until there is a final and conclusive decision to open insolvency proceedings (Recital 15). These proceedings, alongside those in which the debtor continues to administer his assets and a provisional administrator is designated are included in the Regulation according to the new text (Annex B, recast EIR).

### d) Insolvency related proceedings

One of the most explicit changes in the drafting of the recast EIR is the use of a broader concept of «insolvency proceedings». Whilst the 2000 EIR referred to «insolvency proceedings"[14] as such, the recast EIR simply requires that the proceedings are based on «laws relating to insolvency», which is a phrase included in the UNCITRAL Model Law on Cross-border Insolvency (Art. 2 (a))[15]. Hence, for the purpose of the Regulation, in order to characterize a national proceeding as an insolvency proceeding, this condition is needed alongside the next one, that concerns the effects upon the individual rights of the debtor and creditors.

[14] On the concept of insolvency proceedings under the 2000 EIR see i.a. VIRGÓS, SCHMIT, *Report on the Convention on Insolvency Proceedings*, 1996, para. 49; BARIATTI, *Recent Case Law Concerning Jurisdiction and the Recognition of Judgments under the European Insolvency Regulation*, in *Rabels Z*, 73, 2009, 629, at 631-634; DUURSMA-KEPPLINGER: in DUURSMA-KEPPLINGER, DUURSMA, CHALUPSKY (eds), *Europäische Insolvenzverordnung*, 2002, Art. 1 paras. 18-29; FLETCHER: in MOSS, FLETCHER, ISAACS (eds), *The EC Regulation on Insolvency Proceedings*, 2nd ed., 2009, paras. 3.02-3.07; MÄSCH: in RAUSCHER (ed), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR*, 2010, Art. 1 paras. 2-4; PANNEN, *Art. 1*, paras. 6- 21; PAULUS, *Art. 1*, paras. 6-11; VIRGÓS, GARCIMARTÍN, 28-30; WESSELS, in *I.I.L.R*,. 4, 2011, 491, at 493. (authors of the commentaries oft he differente articles hereby consulted)

[15] See UNCITRAL Model-Law on Cross-border Insolvency and Guide to Enactment and Interpretation, accessible at ww.uncitral.org: «*The purpose was to find a description that was sufficiently broad to encompass a range of insolvency rules irrespective of the type of statute or law in which they might be contained». It includes those laws that « […] deals with or addresses insolvency or severe financial distress*» (p. 73).

The condition of the proceedings having to be based on a law relating to insolvency, results too ambiguous and can lead to an over-inclusive application, as a consequence of it needing to be sufficiently broad to include most pre-insolvency and hybrid proceedings set out by Member States' national legislation.

To tackle this problem, the recast EIR includes further conditions and elements in order to prevent this over-inclusive application. First of all, it narrows the application by including a reference to the aim of the proceedings, which do not only need to be based on a law relating to insolvency but also need to be «…for the purpose of rescue, adjustment of debt, reorganization or liquidation» (Article 1 (1) I recast EIR). Hence, the provision includes all those national proceedings that restructure the debts of viable companies but distressed companies that need to be rescued without them being declared insolvent, or those proceedings that aim to hand out a second chance to natural persons by adjusting or discharging their debts – Recital 10 –. The text goes even further by stating that when the proceedings are opened because of a potential insolvency, the objective of the proceedings should be to avoid the insolvency of the debtor or the offset of their operation (Article 1 (1) V recast EIR). The Regulation also allows for the possibility of proceedings opened when the debtor faces non-financial difficulties when these may give rise to the future impossibility of the debtor to face his debts when due (Recital 17 clarifies this condition). Last but not least, the Regulation requires for them to be, in particular for those pre-insolvency and hybrid proceedings, preliminary to ordinary insolvency proceedings which must be opened when no refinancing agreement is reached (Article 1 (1) (c) in fine recast EIR).

Contrariwise, this means that those collective proceedings based on general company law that are not exclusively designated for insolvency situations are excluded from the scope of application of the recast EIR (Recital 16)[16].

[16] This wording seems to be formulated with the English Schemes of Arrangement in mind. Such proceedings are envisaged in Part 26 of the Companies Act 2006 and may be used for different purposes, such as takeovers, mergers or demergers, or to prevent the insolvency of the debtor. Its versatility leaves them outside the scope of the EIR Recast, even if they are used with this latter purpose. In view of the statement contained in Recital 7 of the EIR Recast – i.e. that proceedings excluded from the Brussels I Regulation Recast should be covered by the EIR

The Regulation also excludes national proceedings that write off debts of natural persons and do not make provisions for the payment of creditors (Recital 16 in fine recast EIR).

**e) Effects**

Article 1(1) lays down a condition that refers to the effects of the proceedings. In order to comprise a wide range of national proceedings, all those proceedings that encompass some «interference» or «impairment» of the individual rights of the debtor and/or his creditors, will fall under the scope of application of the Regulation.

There are three particular situations foreseen in the recast EIR: 1) an insolvency practitioner is appointed and the debtor is partially or totally divested of his assets[17]; 2) the court subjects to its control or supervision of the assets and affairs of the debtor, or 3) the court or the operation of the law allow for negotiations between the debtor and his creditors by granting a stay of the individual enforcement proceedings.

The first situation is related to the traditional or ordinary insolvency proceedings that defined the scope of application of the 2000 EIR. As for the other two situations, they include those national proceedings that do not require the appointment of an insolvency practitioner and aim for rescuing distressed businesses and providing second opportunities for natural persons. (…)

Another possibility included in Article 1 (c) of the recast EIR is that of pre-insolvency proceedings without court supervision in which the debtor remains in full control of his assets and affairs, but provide for a moratorium on debt-enforcement actions, thus restricting the creditors' rights. The Regulation, however, sets out a series of constraints in these cases: (i) the moratorium has to be granted by a judicial body – i.e.

Recast, and vice versa, so as « […] *to avoid regulatory loopholes between the two instruments*» – there is an argument to conclude that the English Schemes remain within the scope of other EU instruments, in particular the Brussels I Regulation Recast.

[17] Art. 2 (5) of the EIR Recast defines the term «insolvency practitioners in very broad terms. Annex B of the Regulation lists the types that are accepted.

court, Article 2 (6)(1) – or by operation of law[18]; (ii) the aim is to provide a space for the debtor and creditors to reach an agreement for refinancing or restructuring; (iii) there should be appropriate measures in place to protect the general body of creditors; (iv) and as we already explained, they should be precursory to one of the other two types of proceedings if no agreement is completed (Article 1(1) V and Recital 11 recast EIR).

It is Article 3 of the recast EIR the one that provides the jurisdiction to open these proceedings, and articles 19 and 32 rule their cross-border effects[19]. According to these provisions, the proceedings can lead to a stay on individual insolvency proceedings carried out in other Member States, as well as precluding the opening of additional main insolvency proceedings. A decision that confirms a restructuring plan or a debt discharge will also be recognized and be effective in the remaining Member States under these provisions, as we have explained before. Article 8 recast EIR, however, states that a temporary moratorium may not necessarily affect the rights *in rem* of creditors or third parties over the assets placed in different Member States, leading only to a temporary stay of the opening of secondary proceedings as per Article 38 (3) – for a maximum of a three month period, and as long as there are measures in place to protect the interests of local creditors (Section V (1) (c)).

### f) Annex A

Both pre-insolvency/hybrid and traditional formal insolvency proceedings shall be included in Annex A when notified by Member States if they meet the stipulations set out by Article 1 (1) of the recast EIR. This means that only those proceedings included in Annex A will be covered by the Regulation, and once they are included, the Regulation is applied

[18] See, for example, Art. 5bis of the Spanish Insolvency Act, granting a stay by operation of law once the debtor has notified the court that he has entered into negotiations to reach a refinancing agreement.

[19] Thus, for example, if a Spanish company has entered into negotiations with its creditors to restructure its liabilities under one of the pre-insolvency proceedings included by Spain in Annex A EIR Recast, the affected creditors will be prevented from initiating individual enforcement proceedings not only in Spain but also in other Member States, and no main insolvency proceedings may be opened in other Member States. Spanish Law determines the time at which the judgment opening those proceedings becomes effective (see Art. 2 (8)).

in full extent without any further examination from the national courts of other Member States (Recital 9 II recast EIR). As with other Regulations, the aim of this mechanism is to provide legal certainty and predictability, saving the courts the time and resources that have to be displayed when analysing whether the proceedings meet the conditions of Article 1 (1) of the recast EIR.

### 2.2. Negative dimension: excluded proceedings by the Regulation

The recast EIR includes a new cross-reference to Directive 2001/24/EC, which has been amended to include investment firms within its scope of application, meaning that the restructuring, resolution or winding up of most investment firms falls under the scope of Directive 2001/24/CE as per Article 1 (2) (c) recast EIR [20]. The recast EIR, however, as it was also the case of the 2000 EIR, does not apply to the insolvency of financial institutions (Article 1 (2) recast EIR)[21]. The reason for this exclusion is the strong subjection of these procedures to special regimes and that the national supervisory authorities have wide powers of intervention (Recital 19 recast EIR).

As mentioned above, insolvency proceedings of a confidential nature are also outside the scope of application of the recast EIR. Even if the articles do not expressly indicate the confidential or reserved nature of the proceeding, the fact is this exclusion can be affirmed *sensu contrario,* since Article 1.1 recast EIR extends its application only to «*public collective procedures*». In addition, Recital 12 and 13 indicates that it should be applicable «*to proceedings the opening of which is subject to publicity in order to allow creditors to become aware of the proceedings and to lodge their claims, thereby ensuring the collective nature of the proceedings, and in order to give creditors the opportunity to challenge the jurisdiction of the court which has opened the proceedings*".

[20] Directive 2001/24 of 4 April 2001, on the reorganization and winding up of credit institutions, OJ 2001 L 125, 15.

[21] See INSOL Europe, *Revision*, cit, 28; GARCIMARTÍN, in: GARCIMARTÍN, LENNARTS (eds), *The Review of the EU Insolvency Regulation: Some Proposal for Amendments*, 2012, iUS, 19-21.

*And, in the other hand, that "insolvency proceedings which are confidential should be excluded from the scope of this Regulation. While such proceedings may play an important role in some Member States, their confidential nature makes it impossible for a creditor or a court located in another Member State to know that such proceedings have been opened, thereby making it difficult to provide for the recognition of their effects throughout the Union*».

Furthermore, we must point out the determining nature of Annex A of the recast EIR as it defines the scope of the Regulation[22]. That is to say, the Regulation will not cover procedures not listed in Annex A[23].

Annex A is a closed list. It is an exhaustive list system which provides legal certainty to the extent that the procedures expressly set out in the list are considered procedures for the purposes of the Regulation, in line with the CJEU case-law *Bank Handlowy SA v Christianapol*[24] or *Ulf Kazimierz Radziejewski*[25], to cite a few examples. Consequently, national insolvency proceedings that are not listed in the Annex are automatically excluded from its scope.

## 3. Personal scope of application

With regards to the personal scope of application of the recast EIR, we should bear in mind that the only reference that is made in the article – and in a generic way – is to the «*debtor*», but does not define it. In spite of this, Recital 9 specifies that a debtor may be a natural person or a legal person, a trader or an individual.

The *lex fori concursus* is *prima facie* responsible for determining the type of debtor subject to insolvency proceedings. In other words, in accordance with Article 7 recast EIR, the delimitation of the subjective

[22] DE MIGUEL ASENSIO, *La evolución del régimen europeo sobre procedimientos de insolvencia*, in *La Ley Unión Europea*, nº 28, 2015, p. 6; VAN ZWIETEN, *An introduction to the European Insolvency Regulation, as made and as recast*, in BORK, VAN ZWIETEN (eds.), *Commentary on the European Insolvency Regulation*, Oxford University Press, 2016.

[23] See Recital 9 EIR Recast.

[24] CJEU 22 November 2012, *Bank Handlowy SA v Christianapol*, Case C-116/11.

[25] CJEU 8 November 2012, *Ulf Kazimierz Radziejewski v Kronofogdemyndigheten i Stockholm,* Case C-461/11.

scope of the Recast EIR must be carried out in accordance with the law of the Member State within the territory of which such proceedings are opened. Hence, it is stated in Article 7.1 EIR recast, and it points out that this law shall determine, in particular, the debtors against which insolvency proceedings may be brought on account of their capacity (Article 7.2 a).

To this end, it should be remembered that insurance undertakings, credit institutions, investment firms and collective investment undertakings (Article 1.2 recast EIR) are expressly excluded from the scope of subjective application.

## 4. Temporal scope of application

Article 297.2 of the TFEU states that the Regulations «*[…] shall enter into force on the date specified in them or, in the absence thereof, on the twentieth day following that of their publication*». Whereas Article 92 recast EIR stipulates that «*this Regulation shall enter into force on the twentieth day following that of its publication in the Official Journal of the European Union*», and, also, that its publication was on 5 June 2015, the entry of the Regulation into force was on June 26, 2015[26].

However, the drafter considered it appropriate to make a distinction between its entry into force and its date of application[27]. Thus, the recast EIR is applicable from June 26, 2017, with certain exceptions (Article 92 recast EIR). In addition, it applies to all insolvency proceedings opened as of 26 June 2017 (Article 84 recast EIR). On the other hand, procedures opened prior to this date continue to be applicable to the 2000 EIR, provided they fall within its scope (art 91.2 recast EIR).

[26] Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates and time limits (OJ L 124, 8.6.1971, p. 1).

[27] About this aspect, see CJEU17 November 2011, *Deo Antoine Homawoo v. GMF Assurances SA*, Case C-412/10, in *Reports*, 2011, I-11603. It stated that « […] *such a procedure may in particular, once the act has entered into force and is therefore part of the legal order of the European Union, enable the Member States or European Union institutions to perform, on the basis of that act, the prior obligations which are necessary for its subsequent full application to all persons concerned*» (paragraph 24).

Therefore, it is necessary to determine what is meant by «*open*» insolvency proceedings.

According to the definition set in Article 2.7 recast EIR, it is stated that the «*judgment opening insolvency proceedings includes the decision of any court to open insolvency proceedings or to confirm the opening of such proceedings; and the decision of a court to appoint an insolvency practitioner*». Hence, the mere date of the request for the procedure is not understood as an «*open*» procedure[28], in so far as the decision of a court is necessary.

In addition to that, «*acts committed by a debtor before that date shall continue to be governed by the law which was applicable to them at the time they were committed*» (Article 84 *in fine* recast EIR). Hence, the law applicable to acts (*v. gr.* a contract) committed by a debtor is not modified even if the recast EIR governs the proceeding and its effects.

## 5. Territorial scope of application

With regard to the territorial scope of application, the recast EIR applies throughout the territory of all Member States, with the exception of Denmark[29]. As it is mentioned «*the Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties*».

Furthermore, the recast EIR applies only to proceedings concerning a debtor whose centre of main interests is located in the Union (recital 25).

[28] See CJEU 17.1.2006, *Susanne Staubitz-Schreiber*, C-1/04, paragrah 21, about Article 43 of the 2000 EIR: « […] *the first sentence of Article 43 of the Regulation lays down the principle governing the temporal conditions for application of that regulation. That provision must be interpreted as applying if no judgment opening insolvency proceedings has been delivered before its entry into force on 31 May 2002, even if the request to open proceedings was lodged prior to that date. That is in fact the case here, since the request by the applicant in the main proceedings was lodged on 6 December 2001 and no judgment opening insolvency proceedings was delivered before 31 May 2002*».

[29] See Recital 88: «*In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application*».

Previous to the recast EIR, the principle of territoriality governed cross-border insolvencies. In accordance to this principle, every single Member State had the exclusive jurisdiction over the part of the assets of the debtor located within their territory and international judicial cooperation was discretionary for the national courts and authorities. This particular situation meant that it was often chosen to open «domestic» insolvency proceedings governed by national laws. The resulting scenario was that of the opening of several insolvency proceedings in multiple forums and governed by substantially different bankruptcy laws for a single –although multinational– debtor.

Due to the undisputedly negative effects of territorialism in terms of the efficiency of cross-border insolvencies, the shift towards the principle of «universalism» was only a matter of time. This principle – in its purest form – and as is well known, calls for the determination of a single insolvency forum that in turn will apply a single bankruptcy law of universal scope. However, because the implementation of «universalism» implies the surrender of sovereignty, it became clear that its application was unrealistic and impractical, bringing forward the need for a nuanced conception of the principle.

Therefore, EU legislators opted for a «hybrid» cross-border insolvency model, offering a compromise between the two opposed principles. This has come to be known as «modified universalism», which moves among the sphere of universalism while including the most relevant traits of territoriality. It provides the possibility for the opening of insolvency proceedings in the State in which the «centre of main interest» (COMI) of the debtor is located, whilst allowing for territorial secondary proceedings to be opened in any other Member States in which the debtor's assets are located. Hence, the main proceedings come to have universal effect over all of the debtor's assets, and the secondary proceedings will be limited only to the portion of the debtor's assets that are located within their jurisdiction – acting as auxiliaries to the main proceedings – but allowing for national courts to take part in the asset distribution system while ensuring the protection of the local creditor's interests.

The implementation of the centre of main interests allows for an improved legal certainty, while offering a solution for the potential jurisdiction conflicts that may arise. As for the aspects relating to the choice-

of-law rule, determining the centre of main interests signals the seat of the insolvent company and subsequently determines the applicable insolvency law. Nonetheless, due to the facts pointed out above, any potential manipulation of the centre of main interests can give rise to an insolvency forum shopping, a subject that has been dealt with by the ECJ in numerous occasions and that was taken into consideration when drafting the new rules for the determination of the centre of main interests in the present recast EIR.

Definitively, one of the improvements of the recast EIR with respect to the 2000 EIR lies in the delimitation of the concept of the «centre of main interests» of the debtor. This figure offers the connecting factor to designate the international jurisdiction of a court of a Member State with respect to main insolvency proceedings (Article 3.1 recast EIR). Moreover, in order to avoid forum shopping, the recast EIR contains provisions aimed to avoid it through the fixation of the centre of main interest.

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# The International Jurisdiction for Main Proceedings: Practical Difficulties in the Application of Art. 3 InsRRecast

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*Both in jurisprudence and in scholarly writing, the international jurisdiction for the opening of main insolvency proceedings has attracted utmost attention. Whereas many hold that due to several decisions of the European Court of Justice (ECJ), a relatively high level of legal certainty has been achieved, others are more sceptical. This article tries to analyse the current interplay between the ECJ and national courts in the field of international jurisdiction for the opening of main insolvency procedures. It puts an emphasis on whether there is sufficient certainty and clarity in the application of the new rule on international jurisdiction in Art. 3 InsRRecast.*

## 1. Introduction

From the debtor´s point of view as well as from the creditor´s point of view, it is of great importance in which state the main insolvency proceeding will take place. If the procedure takes place in a foreign state, in many cases, many creditors will refrain from taking part in that procedure. This is due to the fact that in insolvency procedures, there is very often a very low average satisfaction quota and that, therefore, most creditors are understandably not willing to invest too much time and money in an insolvency proceeding.

Under the InsRRecast, there is another reason for the great importance of international jurisdiction for insolvency proceedings. Pursuant to Art. 7 InsRRecast, with only some limitations and variations in Artt. 8-18 InsRRecast[1], the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened. In other words, there is generally a synchronisation of forum and ius. Quite evidently, as the European Union (EU) has not yet tried to unify the insolvency law of the Member States, the national laws of the Member States still vary considerably. As a consequence, the outcome of an insolvency proceeding essentially depends on the applicable law and thus on the place where the proceeding will be opened. This is especially relevant with regard to a possible restructuring process of the debtor, a possible discharge of personal debts and to the best possible satisfaction for creditors[2].

Finally, in the insolvency regulations, the rules on jurisdiction are not only relevant for the opening of insolvency proceedings. In *Christopher Seagon and F-Tex SIA,* the ECJ held that the rule on international jurisdiction in the InsR was also applicable (by analogy) for any action which derived directly from the insolvency proceedings and was closely linked with them[3]. In Art. 6 (1) InsRRecast, the European legislator has mainly confirmed the ECJ´s decision. Alternatively, pursuant to Art. 6 (2) InsRRecast, the insolvency practitioner may bring such action before the court where the defendant is domiciled if the action is related to a civil or commercial action against the same defendant where the court has jurisdiction pursuant to the Brussels I-Regulation (Recast)[4].

[1] Former Artt. 5-13 InsR.

[2] See for instance (depicting the role of creditors in the proceedings and their influence on a restructuring process) RINGE, Forum Shopping under the EU Insolvency Regulation, *European Business Organization Law Review* (EBOR) 2008, 579, 597 et seqq.

[3] ECJ, 12.2.2009, C-339/07, Christopher Seagon v Deko Marty Belgium NV. In *Schmidt/Hertel*, the ECJ held that the member state of the opening court also has jurisdiction to hear claims on transaction avoidance against defendant whose habitual residence is not in the EU (ECJ, 16.1.2014, C-328/12).

[4] Regulation (EU) 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 (recast), O.J. L 351/1.

## 2. The definitions of COMI in detail

### a) The COMI as an indeterminate concept

Both in European as well as in national legislation, the legislator usually prefers to use clearly defined terms in order to achieve legal certainty. The paramount goal of legal certainty is, for instance, clearly highlighted in recital 15 of the Brussels I-Regulation (Recast). This recital stresses that «*rules of jurisdiction should be highly predictable*». Therefore, for the sake of legal certainty, one could have expected that, defining international jurisdiction for the opening of insolvency proceedings, the European legislator would have made recourse to established terms such as "habitual residence" or "seat" of the debtor or similar terms already used in existing EU regulations.

However, the European legislator has used a very different approach. Pursuant to Art. 3 (1) subpara. 1 s. 1 of the InsRRecast, «*(t)he courts of the Member State within the territory of which the centre of the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings*». The expression "centre of main interests" (COMI) can be characterized as a vague and indeterminate compromise formula[5]. While it leaves a margin for a flexible assessment of every individual, it is *per se* not able to create a sufficient degree of legal certainty[6].

Therefore, legal certainty in the field of international jurisdiction for insolvency proceedings essentially depends on the courts, in particular the ECJ. It is not surprising that, in recent years, many national courts

[5] EIDENMÜLLER, *Free Choice in International Company Insolvency Law in Europe*, in *European Business Organization Law Review* (EBOR) 6 (2005), 423, 428 (criticizing the "fuzziness of the COMI standard"); concurring RINGE, *Forum Shopping under the EU Insolvency Regulation*, in *European Business Organization Law Review* (EBOR) 2008, 579, 612 et seq.; FEHRENBACH, *Die Rechtsprechung des EuGH zur Europäischen Insolvenzverordnung: Der Mittelpunkt der hauptsächlichen Interessen und andere Entwicklungen im Europäischen Insolvenzrecht*, in *Zeitschrift für Europäisches Privatrecht* (ZEuP) 2013, 353, 361 et seqq.

[6] Very critical MCCORMACK, *Time to Revise the Insolvency Regulation*, in *International Insolvency Law Review* (IILR) 2011, 121, 130 («*… the EC Insolvency Regulation contains a fatal flaw at its heart; namely the COMI test governing the exercise of insolvency jurisdiction. The paper argues that the COMI concept is vague, uncertain, subject to manipulation and last minute changes*».); see also MCCORMACK, Legal Studies 30 (2010), 126, 133.

initiated preliminary-ruling proceedings asking the ECJ to advance solutions to the COMI-enigma. There is no doubt that the ECJ´s decisions have been helpful and have brought about a certain degree of legal certainty[7]; but it is also fair to say that not all questions are solved and that in certain areas, the ECJ´s decisions themselves leave considerable room for interpretation and controversy[8].

### b) Elements of the COMI
### aa) COMI of individuals

At the starting point of the discussion, the ECJ made it clear that the COMI has an autonomous meaning and therefore must be interpreted in a uniform way, independently of national legislation[9]. Moreover, it is obvious that Art. 3 InsRRecast makes a clear difference between the COMI of individual persons on the one hand and companies and other legal persons on the other.

Under the InsR, national courts and scholars soon agreed that with regard to individuals, a further distinction had to be made between individuals exercising an independent business or professional activity and other individuals[10]. When an individual exercised an independent

[7] See HESS, OBERHAMMER, PFEIFFER (eds.), *External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings, Just/2011/JCIV/PR/0049/A4,161*, p. 16: «*The overview of the practice in the Member States in general demonstrates that the case law of the ECJ, especially in Eurofood and Interedil, has clarified the definition of the COMI in Article 3 (1) EIR*». MANKOWSKI, in: MANKOWSKI/MÜLLER/J. SCHMIDT (eds.), *EuInsVO 2015*, 1st ed. 2016, EuInsVO 2017 Art. 3 para. 3.

[8] See in this regard Report from the Commission to the European Parliament, the Council and the European economic and social committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (12.12.2012, COM(2012) 743 final), p. 9: «*The concept of COMI is of paramount importance for the application of the Regulation. The Commission notes that there is general support of the concept of COMI as interpreted by the CJEU. This is in line with the results of the public consultation where a significant majority of respondents (77%) approved of the use of the COMI to locate the main proceedings. However 51% considered that the interpretation of the term COMI caused practical problems*».

[9] ECJ, 2.5.2006, C-341/04 - Eurofood, para. 31.

[10] GRUBER/SCHULZ, in: AHRENS/GEHRLEIN/RINGSTMEIER (eds.), *Insolvenzrecht*, 3rd ed. 2017 Anh. I, Art. 3 EuInsVO a.F. paras. 2, 13 et seqq.; UHLENBRUCK/LÜER, *Insolvenzordnung, EuInsVO a.F.*, Art. 3 Rn. 10; MANKOWSKI, *Grenzüberschreitender Umzug und das center of main interests im europäischen Internationalen Insolvenzrecht*, in *Neue Zeitschrift für das Recht der Insolvenz und Sanierung* (NZI), 2005, 368, 369 et seq.

business or professional activity, it was widely accepted that the COMI was – in the absence of specific circumstances pointing to another state – situated in the state of the individual's principal place of business[11]. If, however, the individual did not exercise an independent business or professional activity, the COMI was generally believed to be located in the state where the individual was habitually resident[12].

The InsRRecast has – with only minor modifications – confirmed this prevailing interpretation: Pursuant to Art. 3 (1) subpara. 3 s. 1 InsRRecast, in case of an individual exercising an independent business or professional activity, the COMI shall be presumed to be that individual's principal place of business in absence of any proof to the contrary. The presumption does not apply if the individual's principal place of business has been moved to another Member State within a three-month period prior to the request for the opening of insolvency proceedings (Art. 3 (1) subpara. 3 s. 2 InsRRecast). In that case, by an *argumentum e contrario*, it is safe to assume that there is a presumption of the COMI being located at the *previous* principal place of business[13]. According to recital 29 of the InsRRecast, this provision aims at "preventing fraudulent or abusive forum shopping".

In case of any other individual, as explicitly prescribed by Art. 3 (1) subpara. 4 s. 1 InsRRecast, the COMI shall be presumed to be the place

[11] See e.g. Bundesgerichtshof 22.3.2007 – IX ZB 164/06, Neue Zeitschrift für das Recht der Insolvenz und Sanierung (NZI), 2007, 344, 345; BALZ, *Das neue europäische Insolvenzübereinkommen*, in *Zeitschrift für Wirtschaftsrecht* (ZIP) 1996, 948, 949; HUBER, *Internationales Insolvenzrecht in Europa: Das internationale Privat- und Verfahrensrecht nach der Europäischen Insolvenzordnung*, in *Zeitschrift für Zivilprozess* (ZZP) 2001, 133, 140; GRUBER/SCHULZ, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, Anh. I, Art. 3 EuInsVO a.F. paras. 13 et seqq.

[12] See e.g. Landgericht Göttingen 4.12.2007 – 10 T 146/07, in *Zeitschrift für das gesamte Insolvenzrecht* (ZInsO) 2007, 1358; PAULUS, *Die europäische Insolvenzordnung und der deutsche Insolvenzverwalter*, in *Neue Zeitschrift für das Recht der Insolvenz und Sanierung* (NZI), 2001, 505 (509); GRUBER/SCHULZ, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, Anh. I, Art. 3 EuInsVO a.F. paras. 21 et seqq.

[13] GRUBER/SCHULZ, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, Anh. II, Art. 3 EuInsVO n.F. para. 6; Dissenting MANKOWSKI, in: MANKOWSKI/MÜLLER/J. SCHMIDT, *EuInsVO 2015*, EuInsVO 2017, Art. 3 para. 37; COMMANDEUR/RÖMER, *Aktuelle Entwicklungen im Insolvenzrecht*, in *Neue Zeitschrift für Gesellschaftsrecht* (NZG) 2015, 988, 989; GARCIMARTÍN, *The EU Insolvency Regulation Recat: Scope, Jurisdiction and Applicable Law*, in Zeitschrift für Europäisches Privatrecht (ZeuP) 2015, 694, 711 et seq.

of the individual's habitual residence in absence of any proof to the contrary. The presumption does not apply, if the habitual residence has been moved to another Member State within a six-month period prior to the request for the opening of insolvency proceedings (Art. 3 (1) subpara. 4 s. 2 InsRRecast).

The terms principal place of business and habitual residence are frequently used in other EU regulations dealing with international jurisdiction and/or international private law issues[14]. They have a well-established conceptual nucleus that can be transferred to the InsR and (now) the InsRRecast. However, with regard to details, the expressions "principal place of business" and "habitual residence" are still subject to some controversy. In scholarly writing, there is a widespread opinion that the expression "habitual residence" may have a slightly different meaning in different regulations and contexts[15]. Similar questions arise with regard to the term "principal place of business." As always, the devil is in the details[16]. In order to clarify further details, national courts should continue to make use of the preliminary-ruling proceedings and ask the ECJ for clarification.

Moreover, it should be noted that Art. 3 (1) subpara. 3 InsRRecast only creates a rebuttable presumption in favor of the principal place of business and the habitual residence respectively. So, in exceptional circumstances, courts have the possibility to locate the COMI in a state where the debtor does not have his principal place of business or habitual residence. Quite obviously, the assessment of whether there is such

[14] See for instance Art. 19 (1) s. 2 Rome I-Regulation: «*The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business*». The term habitual residence is used in all EU regulations dealing with family law and also in the Regulation (EU) of the European Parliament and of the Council of of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession (OJ. L 201/107).

[15] BAETGE, in: BASEDOW/HOPT/ZIMMERMANN (eds.), *Handwörterbuch des Europäischen Privatrechts*, p. 759; HELMS, *Liber Amicorum Pintens*, pp. 681, 689; KROPHOLLER, *Internationales Privatrecht*, p. 285.

[16] See also SCHULZ, *Case note on the Judgment of the High Court of Justice, London, England, of 26 January 2015: Location of the COMI of companies forming a shipping fleet*, in *International Insurance Law Review* (IILR) 2015, 299, 302: «*The COMI test, the comprehensive assessment and the weighing of evidence leaves enough leeway and as a result legal uncertainties when identifying where a company's COMI is located*».

an exceptional case has to be based on a comprehensive evaluation of all individual facts at hand. As there is a broad variety of possible fact patterns, the ECJ will hardly be able to provide a comprehensive rule on when there is such an exception and when there is not. Therefore, in this regard, national courts cannot really count on clear directives by the ECJ.

#### bb) COMI of companies and other legal persons
#### (1) Outline of the actual solution
#### (aa) The relevance of the company's central administration

The COMI of companies and other legal persons creates even more difficulties. Therefore, it is not surprising that many preliminary-ruling proceedings before the ECJ on the InsR touched on the definition of COMI for companies.

In *Eurofood* and again in *Interedil*, the ECJ took recital 13 of the InsR as a starting point[17]. Pursuant to recital 13, «*(t)he 'centre of main interests' should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties*». In the InsRRecast, the legislator has confirmed this formula; it was moved from the recital to the actual text of Art. 3 (1) subpara. 1 s. 2 InsRRecast. So, in substance, the InsR and the InsRRecast follow the same rule[18].

By referring to recital 13 and the aspect of ascertainability of the COMI, the ECJ (implicitly) rejected an approach which previously had been favored by English courts and was very often referred to as the "mind-of-management-theory". The mind-of-management-theory considered the COMI to be located in the Member State where the crucial decisions of the insolvent company had been made. In case of a group of companies, therefore, pursuant to the mind-of-management-theory,

[17] ECJ, 2.5.2006, C-341/04 – Eurofood, para. 32; ECJ, 20.10.2011, C-396/09 – Interedil, para. 47.

[18] In scholarly writing, Eidenmüller advocated a complete abolition of the COMI-concept for companies and legal persons. Instead, the place of the registered office should be the decisive criterion (EIDENMÜLLER, *Free Choice in International Company Insolvency Law in Europe*, in *European Business Organization Law Review* (EBOR) 6 (2005), 423-447). However, the EU did not follow this suggestion.

the COMI of all companies involved was located in one and the same state provided that in this state, the most important decisions were made for all the companies belonging to that group. Accordingly, in most cases the COMI of a subsidiary company was considered to be situated at the COMI of the parent company, especially when the parent company was able to give direct orders to the subsidiary company[19]. However, the mind-of-management-theory has been rebutted by the ECJ arguing the place where (internal) decisions of the company are made cannot easily be ascertained by third parties and is therefore in direct contradiction to the prerequisites of recital 13 of the InsR. Consequently, pursuant to the ECJ, the mere fact that a subsidiary company´s economic choices are controlled by a parent company in another Member State does not move the COMI of this subsidiary company to the COMI of the parent company[20].

Whereas in *Eurofood* the ECJ did not really give a conclusive definition of the COMI, the court went one step further in *Interedil*. Here, the ECJ pointed to the fact that the wording of Art. 3 InsR as well as recital 13 reflected «*the European Union legislature's intention to attach greater importance to the place in which the company has its central administration as the criterion for jurisdiction*»[21]. So, according to many scholars, the ECJ has chosen the company's central administration as the primary element for the location of the COMI[22].

### (bb) Presumption in favour of the registered office

In practice, the courts´ assessment will start with the (factual) presumption in Art. 3 (1) subpara. 2 s.1 InsRRecast. According to that provision, the place of the registered office shall be presumed to be the COMI in

[19] See High Court of Justice Leeds 16.5.2003 - 861–876/03, in *Neue Zeitschrift für das Recht der Insolvenz und Sanierung* (NZI) 2004, 219, 221.

[20] ECJ, 2.5.2006, C-341/04 – Eurofood, para. 37.

[21] ECJ, 20.10.2011, C-396/09 – Interedil, para. 48.

[22] BRÜNKMANS, *Die Renaissance der Sitztheorie im europäischen Insolvenzrecht*, in *Kölner Schrift zum Wirtschaftsrecht* (KSzW) 2012, 319, 320 et seq.; WOLF, *Der Mittelpunkt der hauptsächlichen Interessen bei Gesellschaften*, in *Zeitschrift für das Privatrecht der Europäischen Union* (GPR) 2012, 149, 150; GRUBER/SCHULZ, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, Anh. II, Art. 3 EuInsVO a.F. paras. 32 et seqq.

absence of any proof to the contrary. So, a court will first verify in which state the company is registered. However, the court´s duty to establish the COMI does not stop there. The court then has to verify whether there are objective factors leading to the conclusion that the COMI – i.e. the central administration of the company – is in fact located in another state.

It is unclear under which circumstances national courts will assume that the presumption has been rebutted. Recital 30 to the InsRRecast only gives very limited guidance[23]; and the same is true for the ECJ[24]. In *Eurofood*, the ECJ held that the presumption could be rebutted «*in particular in the case of a 'letterbox' company not carrying out any business in the territory of the Member State in which its registered office is situated*»[25]. Except for this case, uncertainties persist. Not surprisingly, studies suggest that in some Member States the presumption is more easily rebutted than in others[26].

Departing from the InsR, Art. 3 (1) subpar. 2 s. 2 InsRRecast brought about some limitation of the presumption from a temporal point of view. According to this provision, the presumption shall not apply if the registered office has been moved to another Member State within the three-month period prior to the request for the opening of insolvency proceedings. In that case, by an *argumentum e contrario*, it is safe to assume that there is a presumption of the COMI being located at the

[23] See recital 30 s. 2: «*In the case of a company, it should be possible to rebut this presumption where the company's central administration is located in a Member State other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State*».

[24] ECJ, 2.5.2006, C-341/04 - Eurofood, para. 34: «It follows that, in determining the centre of the main interests of a debtor company, the simple presumption laid down by the Community legislature in favour of the registered office of that company can be rebutted only if factors which are both objective and ascertainable by third parties enable it to be established that an actual situation exists which is different from that which locating it at that registered office is deemed to reflect».

[25] ECJ, 2.5.2006, C-341/04 - Eurofood, para. 35.

[26] See HESS, in: HESS, OBERHAMMER, PFEIFFER (eds.), *External Evaluation of Regulation No.1346/ 2000/EC on Insolvency Proceedings, Just/2011/JCIV/PR/0049/A4*,161, p. 107.

*previous* registered office[27]. Just as for the parallel provision for the COMI of individuals, recital 29 InsRRecast points out that this limitation should help to prevent "fraudulent or abusive forum shopping".

**(2) Remaining doubts und questions**

**(aa) Lack of definition of "the company´s central administration"**

Although in *Interedil*, the ECJ clearly pointed to the company's central administration as a prime indicator for international jurisdiction, it did not answer all questions. Most importantly, the ECJ did not really give a definition of what is to be understood by "central administration" of a company.

As the ECJ stresses that the COMI has to be "ascertainable by third parties"[28], the term "central administration" cannot be understood to mean only (purely) internal decisions within the company. Rather, the "central administration" has to produce perceptible *external* effects. Arguably, the place of central administration is the place where the relevant internal management decisions are transformed into the day-to-day business activities of a company[29]. However, as the ECJ does not really give a definition, it is not entirely clear whether this approach is completely in line with the ECJ´s concept or whether – in future decisions – the ECJ will refer to a (slightly) different definition.

In light of the fact that insolvency law is a very special subject, it is also uncertain whether the "central administration" as used by the ECJ with regard to the InsR and the InsRRecast is fully identical with the

[27] Dissenting MANKOWSKI, in: MANKOWSKI/MÜLLER/J. SCHMIDT, *EuInsVO 2015,* EuInsVO 2017 Art. 3 para 61.

[28] ECJ, 2.5.2006, C-341/04 - Eurofood, para. 34.

[29] MANKOWSKI, in: MANKOWSKI/MÜLLER/J. SCHMIDT, *EuInsVO 2015,* EuInsVO 2017 Art. 3 para. 60.

term "central administration" used in the Brussels I-Regulation (Recast)[30] or in the Rome I-Regulation[31]. Therefore, definitions used in the Brussels I-Regulation and the Rome I-Regulation cannot simply be transferred to the InsRRecast without further verification[32]. All in all, some clarifying words by the ECJ about the exact meaning of the term "central administration" would have been extremely helpful.

### (bb) Exact role of "business activities" performed by the company

Moreover, at a closer look at the ECJ´s reasoning, it appears doubtful whether the "central administration" is the *only* relevant factor for the definition of the COMI, or whether other connecting factors can also have an impact on the final assessment of the COMI. In *Interedil*, the ECJ pointed out that assessing the location of COMI, the courts should take into account various factors, «*in particular, all the places in which the debtor company pursues economic activities and all those in which it holds assets, in so far as those places are ascertainable by third parties*»[33].

This leads to the question, whether the state where the company "pursues economic activities" is (also) a part of the substantive definition of the COMI, or whether it only serves as a purely *factual indication* as to where the central administration of this company is located – and in the latter case, which weight should be given to this factual indi-

[30] See Art. 63 (1) Brussels I-Regulation Recast (Regulation (EU) 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 (recast), O.J. L 351/1: «*1. For the purposes of this Regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat; (b) central administration; or (c) principal place of business*».

[31] See Art. 19 Rom I-Regulation (Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations), O.J. L 177/6: «*For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration*».

[32] Dissenting MANKOWSKI, in: MANKOWSKI/MÜLLER/J. SCHMIDT,*EuInsVO 2015*, EuInsVO 2017 Art. 3 para. 61.

[33] ECJ, 20.10.2011, C-396/09 – Interedil, para. 52.

cation. Here, again, the ECJ´s decision lacks clarity, and this is not without practical consequences. Normally, a company will pursue its (main) economic activities in the state where the company´s "central administration" is located. However – of course, depending on the exact definition of "central administration" – this does not necessarily have to be the case: Arguably, a company can have its central administration in one state and carry out some or even its main "economic activities" in another state. So, in a nutshell, while in the view of most scholars, the ECJ has furthered the uniform understanding of the COMI within the EU, at a closer look, there are still some uncertainties and ambiguities[34].

### c) Relocation of the COMI
### (aa) Cases of forum shopping

Neither the InsR nor the InsRRecast specify the relevant point of time for determining a debtor's COMI. This important question was settled in *Staubitz-Schreiber*, the ECJ´s first decision on the InsR. In this decision, the ECJ ruled that the relevant point of time for determining a debtor's COMI is the request (or petition) for the opening of insolvency proceedings. In *Staubitz-Schreiber*, the debtor had moved his COMI from a Member State after the lodging of the request there. Pursuant to the ECJ, in such a situation, the court of the Member State where the request to open an insolvency proceeding has been lodged, retains international jurisdiction despite the later relocation of the COMI[35]. This Member State can therefore open the insolvency proceeding[36].

From *Staubitz-Schreiber*, it can reversely be derived that a relocation of the COMI at an earlier date – i.e. a relocation that happens *before* the request for opening the proceeding is made – is relevant for interna-

[34] For more detail see GRUBER, in: AHRENS/GEHRLEIN/RINGSTMEIER (eds.), 2nd ed. 2013, Anh. I Art. 3 EIR para. 34 with further references; SCHULZ, *International Insolvency Law Review* (IILR) 2015, 299, 301.

[35] This solution is very often referred to as "*perpetuatio fori*".

[36] ECJ, 17.1.2006, C-1/04 – Susanne Staubitz-Schreiber, para. 29. Concurring Bundesgerichtshof 9.2.2006, IX ZB 418/02, in *Neue Zeitschrift für das Recht der Insolvenz und Sanierung* (NZI) 2006, 297.

tional jurisdiction: If the COMI is relocated *before* the request for opening of the proceeding is made, international jurisdiction is determined by the *new* location of the COMI.

This conclusion was explicitly confirmed in *Interedil*. There, the debtor had relocated his COMI before the request for opening the proceedings had been made and the ECJ pointed out that the international jurisdiction had to be based on the *new* COMI of the debtor[37].

From all this, it is safe to infer that a relocation of the COMI can be used to shift international jurisdiction as long as it happens before the request for opening the procedure is made. Moreover – due to the synchronization of forum and ius as prescribed by the InsR and (now) the InsRRecast – a relocation of the COMI can also be used to reach the application of another insolvency law. Thereby, the debtor can use a relocation of its COMI to request the opening of an insolvency proceeding which suits its interests. So basically, the relocation of the COMI can be used as a tool for forum shopping.

Practice has proven that debtors make use of this possibility. This is especially true for individuals who moved their habitual residence from one Member State to another in order to declare a personal bankruptcy there and to seek a discharge of debts. Some laws were deemed very favourable to a quick discharge of debts, namely English law and the law of the territory Alsace-Lorraine in France, whereas other laws – such as the German or the Irish law – took a stricter position[38]. Therefore, regions with a debtor-friendly law soon became favorable destinations for the so-called "insolvency tourism"[39].

[37] ECJ, 20.10.2011, C-396/09 – Interedil, paras. 54 et seqq.

[38] See Report from the Commission to the European Parliament, the Council and the European economic and social committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (12.12.2012, COM(2012) 743 final), p. 9: «The issue which is sometimes terms as "bankruptcy tourism" is limited to a few regions in the Union with eastern France, the UK and Latvia attracting debtors from other countries. Especially German and Irish debtors tried to take advantage of the discharge opportunities of English law which provides for a debt release within only one year».

[39] For more detail *inter alia* WALTERS/SMITH, *Bankruptcy tourism under the EC regulation on insolvency proceedings: A view from England and Wales*, in *International Insolvency Law Review* (IILR) 2010, 181–208; WRIGHT/FENWICK, *Bankruptcy tourism – what it is, how it works and how creditors can fight back*, in *International Insolvency Law Review* (IILR) 2012, 45-54; see also (for France) Cour de cassation, 15.2.2011, pourvoi n. 10–13, 832, in *Rev. crit. dr. int.*

However, insolvency tourism is not restricted to individuals trying to get a discharge of their debts. It also applies to companies, especially those seeking reorganization. Depending on the business of the company, a relocation of the COMI can be a difficult task. Companies with large production facilities will face greater difficulties in the relocation of the COMI than financial holding companies[40].

One of the first cases in which there was a relocation of the COMI of an indebted company was the *Deutsche Nickel* case. In 2004, *Deutsche Nickel*, a German company, faced severe financial problems. It then decided to profit from the procedures of corporate restructuring offered in the UK. In order to move the COMI from Germany to the UK, *Deutsche Nickel* transferred all assets and liabilities to a newly founded English company. After that, a procedure of "Company Voluntary Arrangement" (CVA) provided by the law of the UK was opened. Within that proceeding, the new founded English company reached a reorganization plan including a debt equity swap. Two years later, the German company *Schefenacker* adopted a very similar solution in order to profit from a CVA[41]. Both relocations of the COMI were successful as the liquidation of the companies could be avoided.

Of course, courts have to closely verify whether a relocation of the COMI really took place or whether such relocation has only been pretended[42]. In the cases of *Deutsche Nickel* and *Schefenacker*, the courts in the UK held that there had been a real relocation of COMI. In the case of the German company *Hans Brochier*, however, the English High Court was of the opinion that a relocation of the COMI had only

*privé* 100 (2011), 901 with case note JUDE (*denying a relocation of COMI from Germany to France despite a removal of the habitual residence*).

[40] For a detailed description of the steps taken see RINGE, *Forum Shopping under the EU Insolvency Regulation*, in *European Business Organization Law Review* (EBOR) 2008, 579, 586 et seq.

[41] For a detailed description of the steps taken see RINGE, *Forum Shopping under the EU Insolvency Regulation*, in *European Business Organization Law Review* (EBOR) 2008, 579, 585 et seq.

[42] See on the distinction between (fraudulent) relocations of the COMI which really took place and cases in which the debtor only pretended a COMI relocation EIDENMÜLLER, *Abuse of Law in the context of European Insolvency Law*, in *European Company and Financial Law Review* (ECFR) 2009, 9 et seqq.

been pretended[43]. Therefore, an English CVA could not be used in order to save *Hans Brochier*.

### (bb) Relocation of COMI and abuse of rights

As pointed out above, in Art. 3 (1) subpara. 2 InsRRecast, the EU legislator has provided for a new look-back period: The presumption that the place of the registered office shall be the COMI is not applicable if the registered office has been moved to another Member State within a three-month period prior to the request for the opening of insolvency proceedings. Similar provisions exist for individuals who move their COMI (principal place of business or habitual residence) three or six months prior to the request for the opening of insolvency proceedings (Art. 3 (1) subpara. 3 s. 2 and Art. 3 (1) subpara. 4 s. 2 InsRRecast). As already mentioned, according to recital 29, these rules are intended to prevent "fraudulent or abusive forum shopping".

Apart from these rules, there is a scholarly debate on whether a relocation of a company´s COMI can be deemed irrelevant for international jurisdiction as well as for the applicable law if the relocation of the COMI constituted an "abuse of rights". Here – at a closer look – there is another field in which uncertainties persist[44].

[43] High Court of England and Wales, 15.8.2006 (Hans Brochier Holdings Ltd. v Exner), [2007] BCC 127 = [2006] EWHC 2594 (Ch), in *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* (NZI) 2007, 187, reviewed by ANDRES/GRUND, in *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* (NZI) 2007, 137 et seqq; for a description of the case see also RINGE, *Forum Shopping under the EU Insolvency Regulation*, in *European Business Organization Law Review* (EBOR) 2008, 579, 587 et seq. In this case, following the example of Schefenacker und Nickel, the Hans Brochier Holding Ltd had had become the legal successor of the German company Hans Brochier GmbH; it had accordingly been incorporated in England. 10 months later, an English court issued an administration order against the company. Just another 45 minutes later, a German court (Amtsgericht Nürnberg) – unaware of the opening of procedures in England - appointed a provisional insolvency liquidator. The English administrators appealed against the decision of the English court before the High Court of Justice in London. The High court held the presumption of Article 3 (1) InsR could be rebutted and that the company´s COMI was indeed located in Germany. In its reasoning, the court pointed to the fact that almost all employees were located in Germany and that business operations were conducted from the company´s headquarters in Germany.

[44] See amongst others de WEIJS/BREEMAN, *Comi-migration: Use or Abuse of European Insolvency Law?*, in *European Company and Financial Law Review* (ECFR) 2014, 495–530; EIDENMÜLLER, *Konkurs Treuhand Sanierung* (KTS) 2009, 137, 147–161.

*Interedil* would have been a good case to discuss that question. In *Interedil*, the main proceedings were commenced after the relocation of the COMI. After the relocation of the COMI, the debtor had simply carried out winding-up activities but not done any business. So, it appears highly questionable that there were legitimate reasons for the relocation. Indeed, the advocate general *Kokott* cautiously touched the concept of "abuse of rights", but quickly continued by pointing out that the referring court had not formulated a question on this topic and that, therefore, the concept of abuse of rights would not have to be discussed in detail[45]. Consequently, in its decision the ECJ did not even mention a possible abuse of rights and its eventual consequences for international jurisdiction.

In fact, some authors gave considerable room to the concept of "abuse of rights"[46]. This was especially true for *Horst Eidenmüller* who, with regard to the InsR, held that «*COMI shifts that evidently do not contribute to maximizing the debtor's net assets for the creditors' benefit are abusive*»[47]. In my opinion, however, the concept of "abuse of rights" cannot be used to generally override the definition of COMI as given by the ECJ. Otherwise, international jurisdiction would no longer be sufficiently predictable; and this was clearly not the will of the EU legislator[48].

[45] Opinion of advocate General KOKOTT, 3.11.2011, C-396/09 –Interedil, para. 72: «*For the purposes of the present case it is not necessary to consider the problem of a transfer of the centre of main interests in order to escape the provisions on insolvency or liability in the State of origin or in order to put available assets beyond the reach of the creditors. The issue of a potential misuse of rights in respect of a transfer gives rise to interesting questions in relation to the conflicting priorities between the basic freedoms of the debtor on the one hand and creditor protection and the avoidance of 'forum shopping' which is addressed in recital 4 of Regulation No 1346/2000 on the other hand. However, since the referring court did not formulate a question on this topic and it is not possible to infer sufficient grounds to suggest misuse of rights from the facts of the case which have been outlined, the present case does not permit these questions to be determined conclusively*».

[46] EIDENMÜLLER, *Abuse of Law in the context of European Insolvency Law*, in *European Company and Financial Law Review* (ECFR) 2009, 1-28; REUß, *„Forum Shopping" in der Insolvenz*, 2011, 327 et seqq.

[47] EIDENMÜLLER, *Abuse of Law in the context of European Insolvency Law*, in *European Company and Financial Law Review* 2009 (ECFR), 1, 16 et seqq.

[48] GRUBER, *Festschrift Schilken*, 2015, p. 679, 684 et seqq.

Additionally, as mentioned above, the new rules already aim at preventing abusive relocations of the COMI by limiting the presumption in favour of the newly-acquired registered office, principal place of business or habitual residence. In other words, when framing the InsRRecast, the EU legislator was well aware of the problem of a possible abuse of rights; and instead of referring to the general concept of abuse of rights, the EU legislator opted for a differentiated solution. At least under the InsRRecast, therefore, it does not seem possible to resort to the "abuse of rights"-theory in order to correct or to modify the results which are achieved by the application of Art. 3 InsRRecast[49].

Therefore, in my opinion, if there is a sufficiently ascertainable relocation of COMI and if the debtor has relevant benefits from this relocation of its COMI, the change in jurisdiction as prescribed by Art. 3 InsRRecast cannot be made ineffective by general considerations on the "abuse of rights". Possible benefits can be seen in rules and procedures allowing for a restructuring of the company[50], but also in more lenient rules on the discharge of debts for individuals[51].

Of course, there are cases in which the debtor´s actions purely and simply aim at putting available assets beyond the reach of the creditors; and it is obvious that such conduct should not result in a shift in international jurisdiction and applicable law. However, the definition of COMI given by the ECJ offers the possibility to reach reasonable results in such cases: If the debtor simply aims at hiding from the creditors, the circumstances which otherwise would possibly lead to a relocation of the COMI are not sufficiently ascertainable by the creditors. So generally, it seems that with regard to international jurisdiction for the opening of main proceedings, there is no room for the concept of abuse of rights.

[49] MANKOWSKI, in: MANKOWSKI/MÜLLER/J. SCHMIDT, *EuInsVO 2015,* EuInsVO 2017 Art. 3 para. 12; concurring EIDENMÜLLER, *Strategische Insolvenz: Möglichkeiten, Grenzen, Rechtsvergleichung*, in *Zeitschrift für Wirtschaftsrecht* (ZIP) 2014, 1197, 1204.

[50] GRUBER, *Festschrift Schilken*, 2015, p. 686 et seq.; DUURSMA-KEPPLINGER, *Zeitschrift für Wirtschaftsrecht* (ZIP) 2007, 896, 900.

[51] GRUBER, *Festschrift Schilken*, 2015, p. 679, 687 et seq.; dissenting (with regard to the InsR) EIDENMÜLLER, *Abuse of Law in the context of European Insolvency Law*, in *European Company and Financial Law Review* (ECFR) 2009, 1, 18 et seqq.

### d) COMI in a group of companies
### (aa) Rebuttal of the mind-of-management-theory in *Eurofood*

Special problems arise when there is a group of insolvent companies. From an economic point of view, one might argue that one single procedure for the whole group of companies is preferable to various proceedings for the individual companies belonging to that group. One single procedure could lead to a coherent solution for the whole group – be it a coordinated liquidation or a reorganization of the group's business.

However, the InsR was based on the assumption that international jurisdiction has to be determined separately for each legal entity. Accordingly, the ECJ held in *Eurofood* that for every legal entity, the COMI has to be assessed individually[52].

Before *Eurofood* und *Interedil*, courts in the UK had found a way to place a whole group of companies into proceedings in just one Member State. In almost all cases, they used the so-called mind-of-management-theory arguing that the COMI was located where the crucial decisions of the insolvent company had been made. And when it could be established that management and control of the whole group laid within the UK, the courts held that the COMI of every company belonging to the group was situated in the UK[53].

In *Eurofood* however, as already pointed out above, the ECJ rebutted the mind-of-management-theory[54]. Pursuant to the ECJ, the COMI has to be ascertainable by third parties[55]. The mind-of-management-theory, by contrast, focuses mainly on internal decisions within a group of companies which are by their nature not ascertainable by third parties. So,

[52] ECJ, 2.5.2006, C-341/04 - Eurofood, para. 30; see also ECJ, 15.12.2011,C-191/10, - Rastelli Davide e C. Snc v Jean-Charles Hidoux, para. 25 (here, the ECJ held that the intermixture of the property of two companies (having legal personality) does not result in a single COMI).

[53] See High Court of Justice Leeds 16.5.2003 - 861–876/03, in *Neue Zeitschrift für das Recht der Insolvenz und Sanierung* (NZI) 2004, 219 (221).

[54] Recital 5 InsRRecast states that incentives for debtors to move to a different Member State to benefit from a more favourable legal position at the expense of the general body of creditors should be avoided. However, one cannot say that – absent a clear rule in Art. 3 InsRRecast – any relocation of the COMI which is detrimental to (some) creditors is irrelevant based on the concept of "abuse of rights".

[55] ECJ, 2.5.2006, C-341/04 - Eurofood, para. 34.

quite evidently, the mind-of-management-theory is in contradiction with the ECJ´s position first adopted in *Eurofood* and then further developed in *Interedil*. Also for companies belonging to a group, every company has to be considered individually. Therefore, the ECJ held in *Eurofood* that Ireland had international jurisdiction over the subsidiary company of the Parmalat group as the COMI of this subsidiary company was located in Ireland; it did not matter that the parent company´s COMI and the group's operational headquarters were located in Italy.

**(bb) Cooperation as the solution in the InsRRecast**

The insolvency of companies belonging to a group was in the focus of debate on possible amendments to the InsR. Many scholars argued that in the case of several companies belonging to a group, there should be a "group COMI" or another form of procedural concentration[56]. In essence, the European legislator could have included a provision stating that the COMI of the European parent company is deemed to be the COMI of each of the subsidiary companies as well.

However, the InsRRecast follows the solution adopted by the ECJ with regard to international jurisdiction for a group of companies. Also under the InsRRecast, insolvency proceedings against different companies belonging to the same group can be opened in different Member States.

Instead of changing the rules on international jurisdiction, the InsRRecast prescribes a coordination of the individual proceedings[57].

[56] See, for instance, MERLINI, *Reorganisation and Liquidation of Groups of Companies: Creditors' Protection vs. Going Concern Maximisation, the European Dilemma, or simply a Misunderstanding in light of the new EU Insolvency Regulation No. 2015/848*, in *International Insurance Law Review* 2016, 119-135; EIDENMUELLER, *A New Framework for Business Restructuring in Europe: The EU Commission's Proposals for a Reform of the European Insolvency Regulation and Beyond* (March 8, 2013). ECGI - Law Working Paper No. 199/2013, available at https://ssrn.com/abstract=2230690, p. 19 et seq.; MEVORACH, *The 'Home Country' of a Multinational Enterprise Group Facing Insolvency*, in 57 *International and Comparative Law Quarterly* (ICLQ) 2008, 427-448.

[57] For a critical assessment of the new rules, see *inter alia* REUMERS, *What is in a Name? Group Coordination or Consolidation Plan—What is Allowed Under the EIR Recast?*, in *International Insolvency Review* (INSOL) 2016, 225–240; THOLE/DUEÑAS, *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, in *International Insolvency Review* (INSOL) 2015, 214–227; MADAUS, *Insolvency proceedings*

According to Art. 56 InsRRecast, practitioners appointed in different insolvency proceedings have a duty to cooperate with each other. The duty to cooperate exists to the extent that such cooperation helps to make these proceedings more efficient, does not violate the rules of the *lex fori concursus* governing the proceedings and does not entail any conflict of interest. The cooperation may take any form; perhaps most importantly, practitioners can conclude agreements or protocols. Pursuant to recital 52, the various insolvency practitioners should be under a similar obligation to cooperate and communicate with each other as those involved in main and secondary insolvency proceedings relating to the same debtor.

Moreover, the InsRRecast provides for a special "group coordination procedure". In that procedure, a coordinator will be appointed (Art. 68 (1) lit. a InsRRecast). Any involved insolvency practitioner can request the opening of such a procedure before any court having jurisdiction over insolvency proceedings of a member of the group (Art. 61 (1) InsRRecast). The request shall follow the rules of the individual proceedings, in which the insolvency practitioner has been appointed (Art. 61 (2) InsRRecast). Additionally, the request shall be accompanied by a proposal for a group coordinator, an outline of the proposed group coordination, a list of the group members' insolvency practitioners and an outline of the estimated costs (Art. 61 InsRRecast).

Pursuant to Art. 72 (1) lit. b InsRRecast, the coordinator shall, inter alia, propose a group coordination plan that identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies. These recommendations are not binding[58]. Moreover, as Art. 73 (3) InsRRecast makes clear, the coordination plan shall not include recommendations as to any consolidation of proceedings or insolvency estates.

*for corporate groups under the new Insolvency Regulation*, in *International Insurance Law Review* 2015, 235-247.

[58] See WEISS, *Bridge over Troubled Water: The Revised Insolvency Regulation*, in *International Insolvency Review* (INSOL) 2015, 192, 212 (arguing that "the group coordination plan can turn into a lame duck"); THOLE/DUEÑAS, *International Insolvency Review* (INSOL) 2015, 214, 217 et seq. (however arguing that the insolvency practitioner in the respective proceeding might come under an indirect pressure to follow the recommendations of the coordinator).

In scholarly writing it has been pointed out that in practice, a formal group coordination procedure might be envisaged if the insolvency administrators appointed in the individual proceedings fail to cooperate properly and to reach an agreement of their own. In this context, it appears questionable whether a group coordination procedure, which does not lead to legally binding results, will really be helpful[59].

As this article deals with international jurisdiction for the opening of insolvency proceedings, it is not the place for a closer analysis of the rules on group coordination proceedings. As far as international jurisdiction is concerned, in my opinion, the EU legislator was well advised to refrain from introducing a "group COMI". Such a "group COMI" – most probably in the form of a COMI for all subsidiary companies in the Member State of the COMI of the parent company or the "operational headquarters of the group"[60] – would have had several drawbacks. Most importantly, creditors would have faced severe problems in ascertaining the COMI of a company belonging to a group. They would have had to check whether the company belongs to a group; if so, they would have had to investigate the group's structure in order to determine the COMI of the parent company. At any rate, from the creditors´ point of view, the introduction of a group company would have potentially led to the international jurisdiction of a rather remote court and – due to the synchronization of forum and ius – to the application of a remote law. This would have been especially disturbing in case there was only the insolvency of one subsidiary company and not the parent company[61].

Therefore, as far as international jurisdiction is concerned, the lack of a special rule for companies belonging to a group should not be criticised. Of course, despite *Eurofood* and *Interedil*, the general uncertainties and ambiguities in the definition of the COMI, which have been

[59] Also very sceptical THOLE/DUEÑAS, *International Insolvency Review* (INSOL) 2015, 214, 217 et seq.

[60] See MEVORACH, *The 'Home Country' of a Multinational Enterprise Group Facing Insolvency*, in 57 *International and Comparative Law Quarterly* (ICLQ) (2008), 427, 440 et seqq.

[61] See Revision of the European Insolvency Regulation, Proposals by INSOL Europe, p. 92, available at http://www.insol-europe.org/technical-content/revision-of-the-european-insolvency-regulation-proposals-by-insol-europe/.

described above also complicate the correct assessment of the COMI of companies belonging to a group.

### e) Conclusions

This survey shows that the concept of COMI is not without disadvantages, especially with regard to legal certainty. In the field of international jurisdiction, legal certainty is of paramount importance; and vague compromise formulas such as the COMI are likely to cause uncertainty. Not surprisingly, national courts in the Member States initially used very different and sometimes irreconcilable approaches. This is especially disturbing as in cases of insolvency, considerable economic, political and social interests are at stake. It took several years until the ECJ established a more coherent interpretation.

Admittedly, the ECJ succeeded in transferring the vague concept of COMI into more meaningful terms (principal place of business; habitual residence; central administration). However, the ECJ´s decisions, as demonstrated above, leave some room for interpretation and did not clarify all ambiguities.

## 3. National courts´ duty to establish the relevant facts

### a) Introduction of the ex officio-principle

The scholarly debate has focused for many years on the elements of the COMI and the definitions given by the ECJ. However, at a closer look, the challenge does not stop there. Apart from the abstract definitions of the COMI, national courts are faced with the difficult task of establishing the factual circumstances that are relevant for the COMI. In order to establish "habitual residence", the "principal place of business" and equally – as the ECJ has stressed in *Interedil*[62] – the "central administration" of a debtor, there has to be an overall assessment of the facts of the individual case. Therefore, the correct determination of the

[62] ECJ, 20.10.2011, C-396/09 – Interedil, para. 53.

COMI does not only depend on the substantive definition of its elements; it equally requires national courts to establish and evaluate the relevant facts. In scholarly writing, it has been pointed out appropriately that the COMI standard is "extremely fact-sensitive"[63]. Even if national courts agree on the material standard of COMI, they can still come to different results, especially due to different standards of ascertaining and weighing of the relevant facts.

The InsR did not address procedural issues connected with the ascertainment of the facts relevant for the COMI. Therefore, this question was governed by the *lex fori concursus*. And in this regard, the laws of the Member States were very different: Whereas some Member States followed the *ex officio*-principle, other Member States allowed the courts to basically rely on the information provided by the debtor and/or other applicants[64]. The courts´ willingness to rely simply on the information provided by the debtor opened the possibility for false statements by the debtor and encouraged abusive forum shopping. Convincingly, the so-called Heidelberg report suggested that in an InsRRecast, there should be an obligation of the court to examine its jurisdiction ex officio[65]. Accordingly, implementing this proposal, Art. 4 InsRRecast

[63] See EIDENMÜLLER, *Free Choice in International Company Insolvency Law in Europe*, in *European Business Organization Law Review* (EBOR) 6 (2005), 423, 431: «*The problem remains, however, that the COMI standard is extremely fact-sensitive. Even if agreement existed on the factors to be taken into account when determining the COMI, ascertaining these factors and balancing them remains a delicate issue*».

[64] HESS, OBERHAMMER, PFEIFFER (eds.), *External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings, Just/2011/JCIV/PR/0049/A4,161*, p. 18. See also High Court of Justice London 20.12.2006, 9849/02, in *Neue Zeitschrift für das Recht der Insolvenz und Sanierung* (NZI) 2007, 361 (363) Rn. 24: «*Where the evidence as to the centre of a debtor's main interests is not denied it is not the practice of the English Bankruptcy Court to inquire into that matter in the way that, as I understand it, a Continental Bankruptcy Court would do*». See however also High Court of Birmingham 29.8.2012, (2012) EWHC 2432 (CH) – Sparkasse Hilden Ratingen Verlbert v Benk and another – case note *GOSLAR, Neue Zeitschrift für das Recht der Insolvenz und Sanierung* (NZI) 2012, 912; Official Receiver v. Eichler (2007), BPIR 1636 and Official Receiver v Mitterfellner (2009), BPIR 1075, 53; *WALTERS/SMITH*, *International Insolvency Review* (INSOL) 2010, 181, 195 et seqq.

[65] HESS, OBERHAMMER, PFEIFFER, *External Evaluation of Regulation No.1346/ 2000/EC on Insolvency Proceedings, Just/2011/JCIV/PR/0049/A4,161*, p. 18 et seq.

stipulates that a court seized of a request to open insolvency proceedings shall of its own motion examine whether it has jurisdiction pursuant to Art. 3 InsRRecast.

Moreover, quite rightly, Art. 4 (1) s. 2 InsRRecast imposes an obligation of the court to explain its decision. The judgment opening insolvency proceedings shall specify the grounds on which the jurisdiction of the court is based. The courts cannot only restrict themselves to presenting the abstract definition of COMI; they have to detail the facts that have been established and explain why they are deemed relevant for international jurisdiction.

However, experience on the national level has shown that the introduction of an obligation by the courts to establish facts *ex officio* is not always put into practice. That is why, pursuant to Art. 5 (1) InsRRecast, the debtor or any creditor may challenge the decision opening main insolvency proceedings on grounds of international jurisdiction.

National practice will have to adapt to the new rules. In Germany, pursuant to § 5 InsO, the insolvency court shall investigate ex officio all circumstances relevant to the insolvency proceeding. This provision applies both to local and international jurisdiction[66] and is therefore fully in line with Art. 4 InsRRecast. In practice, courts will very often appoint a provisional insolvency administrator or other experts. These experts will then provide the necessary factual information[67].

In German law, according to §§ 6, 34 (2) InsO, the debtor is entitled to bring an immediate appeal (Sofortige Beschwerde) against the decision of the insolvency court to open the insolvency proceeding. This provision was not fully in line with Art. 5 (1) InsRRecast as it did not grant creditors a right to challenge the court's decision. Therefore, the

[66] Bundesgerichtshof 19.7.2012 – IX ZB 6/12, in *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* (NZI) 2012, 823 (regarding the local jurisdiction); Bundesgerichtshof 1.12.2011 – IX ZB 232/10, in *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* (NZI) 2012, 151 (regarding the international jurisdiction); GANTER/LOHMANN, in: *Münchener Kommentar zur Insolvenzordnung*, § 5 paras. 13 et seq.; GRUBER/SCHULZ, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, Anh. I, Art. 3 EuInsVO a.F. paras. 9, 54; STEPHAN, in: SCHMIDT, *Insolvenzordnung*, § 5 para. 3; Pape, in: UHLENBRUCK/HIRTE/VALLENDER (eds.), *Insolvenzordnung*, 14th ed. 2015, § 5 para. 8.

[67] According to § 58 (1) 2 InsO in connection with § 21 (2) no. 1 InsO, at the request of the court at any time, the provisional insolvency administrator is obligated to give any specific information to the court.

German legislator made an adjustment in Art. 102c § 4 Einführungsgesetz zur Insolvenzordnung (EGInsO) providing an immediate appeal against the court's decision for both the debtor and any creditor.

### b) Conclusions

In essence, there will only be a truly uniform application of the InsRRecast if the newly-introduced *ex officio*-principle is effectively implemented on the national level. In this regard, national legislature is required to pass additional implementing laws. Moreover, especially Member States which did not follow the ex officio-approach so far, should offer training for judges and insolvency practitioners.

As experience shows, judicial procedures do not only depend on legal provisions, but also on experience and training of the actors involved. In its report on the application of the InsRRecast which is due no later than 27th June 2027[68], the Commission should devote extra attention to these practical issues.

[68] Art. 90 (1) InsRecast.

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# Jurisdiction in Secondary and Territorial Proceedings

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SUMMARY: 1. Jurisdiction in respect of secondary proceedings. – 2. Who may open secondary insolvency proceedings? – 3. Place of opening secondary insolvency proceedings. – 4. Purpose of opening secondary insolvency proceedings. – 5. Effect of secondary insolvency proceedings. – 6. Duty of court to examine its own jurisdiction. – 7. Territorial proceedings. – 8. Provisional and protective measures. – 9. Limitations on the opening of secondary insolvency proceedings. – 10. Coordination of insolvency proceedings.

## 1. Jurisdiction in respect of secondary proceedings

Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) (hereinafter 'the Recast Regulation'), like Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings (hereinafter 'the Original Regulation') includes provisions governing jurisdiction for opening insolvency proceedings and actions which are directly derived from insolvency proceedings and are closely linked with them[1].

As detailed above[2], the Recast Regulation enables main insolvency proceedings to be opened in the Member State where the debtor has the centre of its main interests (hereinafter 'COMI'). Additionally, with the aim of protecting diversity of interests, the Recast Regulation permits secondary insolvency proceedings to be opened after main proceedings have already opened in the debtor's COMI, to run in parallel with those

[1] Recital (6).

[2] See in this *Volume*, re. main insolvency proceedings.

main insolvency proceedings[3]. Jurisdiction to open secondary insolvency proceedings exists only if the debtor's centre of main interests is situated in a Member State[4]. Chapter III of the Regulation contains the detailed rules pertaining to secondary insolvency proceedings.

## 2. Who may open secondary insolvency proceedings?

Article 37 provides that the opening of secondary insolvency proceedings may be requested by the insolvency practitioner in the main insolvency proceedings, where the efficient administration of the insolvency estate so requires[5], or by any other person or authority empowered to request the opening of insolvency proceedings under the law of the Member State within the territory of which the opening of secondary insolvency proceedings is requested, that is, under the national law of the Member State where the debtor has an establishment[6].

Article 38(4) permits, at the request of the insolvency practitioner in the main insolvency proceedings, a court seised of a request to open secondary insolvency proceedings, to open insolvency proceedings of a type listed in Annex A (other than the type initially requested), provided that the conditions for opening that type of proceedings under national law are fulfilled and that that type of proceedings is the most appropriate having regard to the interests of local creditors and coherence between the main and secondary insolvency proceedings. Where the main insolvency proceedings required that the debtor be insolvent

[3] Recital (23). See also M. VIRGOS. E. SCHMIT, *Report on the Convention on Insolvency Proceedings*, European Council, Doc No 6500/96 (1996) (hereinafter 'M. VIRGOS, E. SCHMIT, *Report*'), para 211.

[4] The gateway clause, or so-called 'master condition' is narrated in recital (25), viz. the Regulation applies only to proceedings in respect of a debtor whose centre of main interests in located in the Union (cf. recital (14), of the Original Regulation). See G. MOSS, I. F. FLETCHER, S. ISAACS (eds.), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings*, Oxford University Press, 3rd edition, 2016, at para 3.10, where it is observed that it is unfortunate that this important geographical limitation is narrated only in the recitals and not in the body of the regulation.

[5] Recital (40).

[6] Recital (38).

(i.e. main proceedings without a protective rescue or restructuring purpose), the debtor's insolvency shall not be re-examined in the Member State in which secondary insolvency proceedings may be opened[7].

By art 3(3) of the Original Regulation, there was a requirement that secondary insolvency proceedings must be winding-up, and not reorganisation, proceedings[8]. This requirement has been excised from the Recast Regulation, and does not feature in the recast wording of art 3(3). The removal of this restriction is in line with the Recast Regulation's objective of promoting the rescue of economically viable but distressed businesses[9]. Accordingly, the opening of secondary insolvency proceedings no longer need signal the demise of the debtor, but rather may lead to the reorganisation of the debtor's business or its financial situation, and can have a stronger supportive function to the main insolvency proceedings.

The insolvency practitioner in the main insolvency proceedings may challenge a decision to open secondary insolvency proceedings before the courts of the Member State in which secondary insolvency proceedings have been opened on the ground that the court did not comply with the conditions and requirements of art 38[10].

[7] Article 34. Cf. the different wording in the corresponding article (art 27) of the Original Regulation, in respect of the interpretation of which, see *Bank Handlowy w Warszawie SA and PPHU «ADAX»/Ryszard Adamiak v Christianapol sp z oo*, Case C-116/11, [2013] I.L.Pr. 21.See, for detail, paras [65], [67] – [70] and [74], where the European Court of Justice held, with regard to interpretation of art 27 of the Original Regulation that the wording used was not entirely clear, but had to be construed in light of the overall scheme and purpose of the Regulation of which it formed a part. A prerequisite for the opening of main proceedings was that the court having jurisdiction had established that the debtor was insolvent under national law and under art 16(1) of the Original Regulation, main insolvency proceedings opened in one Member State were to be recognised in all the other Member States from the time that it became effective in the State of the opening of proceedings. It followed that the examination of the debtor's insolvency by the court having jurisdiction to open main insolvency proceedings was binding on any other court before which an application to open secondary insolvency proceedings was made. Article 27 of the Original Regulation had be interpreted as meaning that the court before which an application to have secondary insolvency proceedings opened had been made could not examine the insolvency of a debtor against which main proceedings had been opened in another Member State, even where the latter proceedings had a protective purpose.

[8] See M. VIRGOS, E. SCHMIT, *Report*, para D.83, and at para 221: the purpose of secondary insolvency proceedings had to be to realise the debtor's assets.

[9] Recital (10).

[10] Article 39.

By art 51, at the request of the insolvency practitioner in the main insolvency proceedings, the court of the Member State in which secondary insolvency proceedings have been opened may order the conversion of the secondary insolvency proceedings into another type of insolvency proceedings listed in Annex A, provided that the conditions for opening that type of proceedings under national law are fulfilled, and that that type of proceedings is the most appropriate having regard to the interests of local creditors and coherence between the main and secondary insolvency proceedings. In considering the request of the insolvency practitioner in the main insolvency proceedings, the court of the Member State in which secondary insolvency proceedings have been opened may seek information from the insolvency practitioners involved in both proceedings[11].

## 3. Place of opening secondary insolvency proceedings

The rule of international jurisdiction concerning the opening of secondary insolvency proceedings is set out in art 3(2), and is to the effect that where the centre of the debtor's main interests is situated within the territory of a Member State[12], the courts of another Member State shall have jurisdiction to open insolvency proceedings against that debtor only if it possesses an establishment[13] within the territory of that other Member State. The key connecting factor, therefore, as regards jurisdiction to open secondary insolvency proceedings, is the debtor's 'establishment'. Since a debtor may have more than one establishment in different Member States, it is competent for more than one set of secondary insolvency proceedings to take place concurrently[14].

[11] Article 51(2).

[12] Recital (25).

[13] Recital (23). Before opening insolvency proceedings, the competent court should examine of its own motion whether the centre of the debtor's main interests or the debtor's establishment is actually located within its jurisdiction: recital (27).

[14] M. VIRGOS, E. SCHMIT, *Report*, para D.83. See also A. LEANDRO, Chapter I.9: *Insolvency, jurisdiction and vis attractiva*, in J. BASEDOW, G. RÜHL, F. FERRARI, P. DE MIGUEL ASENSIO (eds.), *Encyclopedia of Private International Law*, Cheltenham, 2017, at para II.1.

Article 2(10) of the Recast Regulation defines 'establishment' as meaning «*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*». There must be an element of permanence to the establishment, though the existence of a branch office is not necessary.

The European Court of Justice made clear in *Interedil Srl v. Fallimento Interedil Srl and Intesa Gestione Crediti SpA*[15] that, to ensure that jurisdiction to open secondary insolvency proceedings is legally certain and foreseeable, the existence of an establishment for the purposes of art 3(2) of the Original Regulation[16] must be determined (like the location of the debtor's COMI) on the basis of objective factors which ought to be ascertainable by third parties[17], that is to say, the debtor's creditors, in particular, ought to be aware of them[18]. The European Court of Justice held that 'establishment' must be interpreted as requiring the presence of a structure consisting of a minimum level of organisation and a degree of stability necessary for the purpose of pursuing an economic activity[19]. In the Court's view, the presence of goods in isolation or of bank accounts did not satisfy the definition[20].

In *Trustees of Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA*[21] the United Kingdom Supreme Court held that the definition of an 'establishment' had to be read holistically, as a whole, rather than being broken down into discrete elements because each element coloured the others. The court held that what was

[15] Case C-369/09, [2011] ECR I-9915.

[16] On the principle of vertical continuity of interpretation, applicable where two consecutive instruments deal with and refine the rules relative to a particular topic, see E. B. CRAWFORD, J. M. CARRUTHERS, *International Private Law: A Scots Perspective*, Edinburgh, 4th edition, 2015, para 1-11.

[17] Case C-369/09, [2011] ECR I-9915, at para [63].

[18] Cf. *Trustees of Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines SA* [2015] UKSC 27, per Lord Sumption JSC at [13].

[19] Case C-369/09, [2011] ECR I-9915, at para [64].

[20] Cf. M. VIRGOS, E. SCHMIT, *Report*, para D.80: «*The mere presence of assets is not sufficient to open territorial proceedings*». *Sed quaere* the decision of the English Court of Appeal in *Shierson-Vlieland v Boddy* [2005] EWCA Civ 974; [2005] 1 W.L.R. 3966, notably per Chadwick LJ at [64] – [68], and per Longmore LJ at [73].

[21] [2015] UKSC 27.

envisaged by the term 'establishment' was a fixed place of business where the business consisted, not of acts of pure internal administration, but of dealings with third parties[22]. Lord Sumption JSC held that the relevant activities must be (i) "economic", (ii) "non-transitory", (iii) carried on from a "place of operations", and (iv) "using the debtor's assets and human agents". The accumulation of these factors suggests that what is envisaged is a fixed place of business. The requirement that the activities should be carried on with the debtor's assets and human agents suggests a business activity consisting in dealings with third parties, and not pure acts of internal administration. Moreover, his Lordship observed that the activities must be "exercised on the market", that is, externally[23]: «*I do not think that this can sensibly be read as requiring that the debtor should simply be locatable or identifiable by a brass plate on a door. It refers to the character of the economic activities. They must be activities which by their nature involve business dealings with third parties*»[24].

Further, in *Burgo Group SpA v Illochroma SA (in liquidation) and another*[25] the Court of Justice of the European Union held that there was nothing in the Original Regulation limiting the right to request the opening of secondary insolvency proceedings to creditors which had their domicile or registered office in that member state; and that a national court could not restrict the right to seek the opening of secondary insolvency proceedings to creditors who had their domicile or registered office within that member state, or to creditors whose claims arose from the operation of an establishment in that member state, since such a restriction would constitute indirect indiscrimination on grounds of nationality.

The definition of 'establishment' in art 2(10) should be compared with the definition of 'establishment' set out in art 2(h) of the Original

[22] [2015] UKSC 27, per Lord Sumption JSC at [13].

[23] Cf. *Interedil Srl v. Fallimento Interedil Srl and Intesa Gestione Crediti SpA* (Case C-369/09) [2011] ECR I-9915, at [49].

[24] [2015] UKSC 27, per Lord Sumption JSC at [13].

[25] Case C-327/13 (2014), at paras 45, 47–49, and 51.

Regulation, namely, «*'establishment' shall mean any place of operations where the debtor carries out a non-transitory economic activity with human means and goods*».

Insertion of the words "or has carried out in the 3-month period prior to the request to open main insolvency proceedings"[26] is an innovation in the Recast Regulation and is intended to clarify the position regarding the opening of secondary insolvency proceedings, and to permit the opening of territorial proceedings whenever the debtor has carried out a non-transitory economic activity in the three month period prior to the request to open main insolvency proceedings[27]. Where the secondary insolvency proceedings are opened on the ground that the debtor has previously carried out (rather than currently is carrying out) the necessary non-transitory economic activity, those proceedings are conditional on main insolvency proceedings having been opened already in the debtor's COMI.

The 'look-back' ground of jurisdiction prevents a debtor from evading proceedings being opened against him, and seeks to protect the interests of local creditors in a jurisdiction which the debtor has contrived recently to leave.

The recast wording of art 2(10) has eliminated the doubt which existed under the Original Regulation concerning cases where the debtor's establishment was operating at the time of opening of the main insolvency proceedings, but where it had ceased to function by the time of the request to open secondary insolvency proceedings. The revised wording makes clear that territorial proceedings may be opened if the establishment was in active operation in the three month period immediately[28] preceding the request to open main proceedings.

[26] The so-called 'look-back period' (G. MOSS, I. F. FLETCHER, S. ISAACS (eds.), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings*, cit., at para 8.551).

[27] Cf. under the Original Regulation, *Trustees of Olympic Airlines SA Pension and Life Assurance Scheme v Olympic Airlines S*A [2015] UKSC 27.

[28] See the residual ambiguity pointed out by Moss *et al* (G. MOSS, I. F. FLETCHER, S. ISAACS (eds.), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings*, cit.), at para 8.552, and at para 3.31: it is not clear «*whether it is necessary that the establishment must have been fully operational throughout the three-month period before the request to open main proceedings, or whether it is sufficient to be able to demonstrate that the establishment was in active operation at some time within that period*».

Where main insolvency proceedings have been opened in accordance with art 3(1) in the territory in which the centre of the debtor's main interests is situated, any proceedings opened *subsequently* in accordance with art 3(2) constitute secondary insolvency proceedings[29].

Where main insolvency proceedings concerning a legal person or company have been opened in a Member State other than that of its registered office, it should be possible under the Recast Regulation to open secondary insolvency proceedings in the Member State of the debtor's registered office, provided that the debtor is carrying out an economic activity with human means and assets in that State, in accordance with the case-law of the Court of Justice of the European Union[30].

If there is any doubt about a court's exercise of jurisdiction, the onus is on the court of the Member State seised to require the debtor to submit additional evidence to support its assertions and, where the law applicable to the insolvency proceedings so allows, to give the debtor's creditors the opportunity to present their views on the question of jurisdiction[31]. Moreover, any creditor is empowered to seek a remedy against a court's decision to open insolvency proceedings. The Regulation provides that the consequences of any challenge to the decision to open insolvency proceedings should be governed by national law[32].

## 4. Purpose of opening secondary insolvency proceedings

The Recast Regulation makes clear that secondary insolvency proceedings can serve different purposes, besides the protection of local interests. «*Cases may arise in which the insolvency estate of the debtor is too complex to administer as a unit, or the differences in the legal systems concerned are so great that difficulties may arise from the extension of effects deriving from the law of the State of the opening of proceedings to the other Member States where the assets are located*»[33].

[29] Article 4(4).

[30] Recital (24).

[31] Recital (32).

[32] Recital (34).

[33] Recital (40).

To ensure effective protection of local interests, the insolvency practitioner in the main insolvency proceedings may not realise or re-locate, in an abusive manner, assets situated in the Member State where an establishment is located, with a view, for example, to frustrating the possibility that local interests could be satisfied if secondary insolvency proceedings were subsequently to be opened[34].

## 5. Effect of secondary insolvency proceedings

Secondary insolvency proceedings constitute an important exception to the principle of universality. Articles 3(2) and 34 of the Recast Regulation state explicitly that the effect of secondary insolvency proceedings is restricted to the assets of the debtor situated in the territory of the Member State in which they are opened[35], that is, the territory of the Member State in which the debtor's establishment is situated.

## 6. Duty of court to examine its own jurisdiction

Article 4(1) – a new provision in the Recast Regulation having no counterpart in the Original Regulation – imposes a duty on any court seised of a request to open insolvency proceedings to examine, of its own motion, whether it has jurisdiction pursuant to art 3[36]. To that end, a judgment opening insolvency proceedings[37] must specify the ground on which the court's jurisdiction is based and should note, in particular,

[34] Recital (46).

[35] Recital (23).

[36] The CJEU made clear in *Burgo Group SpA v Illochroma SA (in liquidation) and another* (Case C-327/13) [2015] 1 W.L.R. 1046 that the decision by the court of a Member State to open main insolvency proceedings in respect of a debtor company under art 3(1) of the Original Regulation, and the finding, at least by implication, that the centre of a debtor company's main interests was situated in that Member State, could not, in principle, be called into question by a court of the other Member States.

[37] In the case of insolvency proceedings which are opened in accordance with national law without a decision by a court, the insolvency practitioner should specify the grounds on which jurisdiction is based and, in particular, whether jurisdiction is based on art 3(1) or 3 (2) (art 4(2)).

whether the proceedings are main proceedings, based on art 3(1), or territorial proceedings, based on art 3(2). This is an important self-policing mechanism. Given the different consequences which attach to main and secondary insolvency proceedings, respectively[38], it is important for a court to make clear the capacity in which it is acting.

## 7. Territorial proceedings

Strictly speaking, independent insolvency proceedings are not 'secondary' until such time as main insolvency proceedings have been opened.

Article 3(4) provides that territorial insolvency proceedings may be opened *prior* to the opening of main insolvency proceedings only where (a) main insolvency proceedings cannot be opened because of the conditions laid down[39] by the law of the Member State within the territory of which the centre of the debtor's main interests is situated; or (b) the opening of territorial insolvency proceedings is requested by: (i) a creditor[40] whose claim arises from or is in connection with the operation of an establishment situated within the territory of the Member State where the opening of territorial proceedings is requested; or (ii) a public authority which, under the law of the Member State within the territory of which the establishment is situated, has the right to request the opening of insolvency proceedings.

Cases in which independent territorial insolvency proceedings are requested prior to the opening of main insolvency proceedings are intended to be limited to "what is absolutely necessary"[41]. For that reason,

[38] Recital (23) and art 3(2).

[39] In respect of the interpretation of which, see *Procureur-generaal bij het hof van beroep te Antwerpen v Zaza Retail BV* (Case C-112/10), at [26]. President of the Court, Judge Tizzano said that the expression "conditions laid down" did not refer to conditions excluding particular persons from the category of persons empowered to request the opening of main insolvency proceedings.

[40] In respect of the interpretation of which, see *Procureur-generaal bij het hof van beroep te Antwerpen v Zaza Retail BV* (Case C-112/10), at [32] – [34]. President of the Court, Judge Tizzano said that term "creditor" in art.3(4)(b) did not include an authority of a Member State whose task under the national law of that state was to act in the public interest or in the name or on behalf of creditors.

[41] Recital (37).

the right to request, prior to the opening of main insolvency proceedings, the opening of territorial insolvency proceedings in a Member State where the debtor has an establishment, is restricted to local creditors and public authorities, or to cases in which main insolvency proceedings cannot be opened under the law of the Member State where the debtor has its centre of main interests[42].

## 8. Provisional and protective measures

An insolvency practitioner temporarily appointed prior to the opening of main insolvency proceedings should be able to apply, in any Member State in which an establishment belonging to the debtor is to be found, for preservation measures which are available under the law of that Member State[43].

## 9. Limitations on the opening of secondary insolvency proceedings

Since the existence of secondary insolvency proceedings may hamper the efficient administration of the insolvency estate[44], the Recast Regulation sets out two specific situations in which a court seised of a request to open secondary insolvency proceedings may postpone or refuse the opening of such proceedings, at the request of the insolvency practitioner in the main insolvency proceedings[45].

[42] Recital (37).

[43] Recital (36).

[44] See MAX PLANCK INSTITUTE LUXEMBOURG FOR PROCEDURAL LAW *et al*, *The Implementation of the New Insolvency Regulation: Recommendations and Guidelines* (JUST/2013/JCIV/AG/4679), p. 56, para 1.1.

[45] Recital (41).

### a) Unilateral undertaking[46]

The first limitation upon the opening of secondary insolvency proceedings concerns the power conferred on the insolvency practitioner in main insolvency proceedings to give an undertaking to local creditors that they will be treated with respect to distribution and priority rights as if secondary insolvency proceedings had been opened[47]. Main insolvency proceedings which are intended to be pre-insolvency, protective rescue or restructuring proceedings may be adversely affected by the subsequent opening of secondary insolvency proceedings in another Member State. Consistent, therefore, with the Recast Regulation's objective of promoting the rescue of economically viable albeit distressed businesses[48], it is possible now for the insolvency practitioner in the main insolvency proceedings to give an undertaking not to open secondary insolvency proceedings in another Member State. This is a power to forestall the opening of secondary insolvency proceedings[49], which ought to be exercised in order to secure a preferable outcome and to maximise value for all creditors. The undertaking device prioritises universal efficiency over 'local protection'[50] and is likely to be of particular use in situations where it is hoped to bring about the rescue or restructuring of the debtor[51].

[46] Otherwise known as 'synthetic proceedings' (See MAX PLANCK INSTITUTE LUXEMBOURG FOR PROCEDURAL LAW *et al*, *The Implementation of the New Insolvency Regulation: Recommendations and Guidelines*, cit., p. 57, para 1.2; and G. MOSS, I. F. FLETCHER, S. ISAACS (eds.), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings*, cit., at paras 3.32 and 3.32), or 'virtual secondaries' (Moss *et al*, at para 8.654).

[47] Recital (42).

[48] Recital (10).

[49] Moss *et al*, cit., para 3.22; and MAX PLANCK INSTITUTE LUXEMBOURG FOR PROCEDURAL LAW *et al*, *The Implementation of the New Insolvency Regulation: Recommendations and Guidelines*, cit., para 1.2.1.

[50] See MAX PLANCK INSTITUTE LUXEMBOURG FOR PROCEDURAL LAW *et al*, *The Implementation of the New Insolvency Regulation: Recommendations and Guidelines*, cit., p. 62, para 2.

[51] Albeit it is not restricted to such cases. See G. MOSS, I. F. FLETCHER, S. ISAACS (eds.), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings*, cit., at para 3.22: «*It is equally applicable to liquidation-type proceedings where the possibility of one or more secondary proceedings could materially affect the ultimate net realization available for distribution among all creditors, having regard to the additional costs incurred by multiple insolvency proceedings concerning the same debtor*».

By art 36(1) – which is a new provision, having no counterpart in the Original Regulation – in order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking in respect (only) of the assets located in the Member State in which secondary insolvency proceedings could be opened[52], that, when distributing those assets or the proceeds received as a result of their realisation, it will comply with the distribution of proceeds from the realisation of assets and priority rights, that is, the ranking of creditors' claims under national law, that local creditors would enjoy if secondary insolvency proceedings were to be opened in that Member State.

The undertaking must satisfy various conditions narrated in art 36, in particular that it is approved by a qualified majority of known local creditors[53]. Local creditors may apply to the courts of the Member State in which main insolvency proceedings have been opened, in order to require the insolvency practitioner in the main insolvency proceedings to take any suitable measures necessary to ensure compliance with the terms of the undertaking available under the law of the State of the opening of main insolvency proceedings[54]. Additionally, local creditors may apply to the courts of the Member State in which secondary insolvency proceedings could have been opened in order to require that court to take provisional or protective measures to ensure compliance with the terms of the undertaking by the insolvency practitioner[55].

An undertaking given and approved in accordance with art 36 is binding on the debtor's estate[56]. By art 38.2, where the insolvency practitioner in the main insolvency proceedings has given an undertaking in accordance with article 36, a court seised of a request to open secondary insolvency proceedings should refuse the request and shall not open secondary insolvency proceedings if it is satisfied that the undertaking adequately protects the general interests of local creditors.

[52] See MAX PLANCK INSTITUTE LUXEMBOURG FOR PROCEDURAL LAW *et al*, *The Implementation of the New Insolvency Regulation: Recommendations and Guidelines*, cit., para 1.2.2.

[53] Article 36(5).

[54] Article 36(8).

[55] Article 36(9).

[56] Article 36(6).

When assessing local creditors' interests, the court should hold in mind the fact that the undertaking has been approved by a qualified majority of local creditors[57].

For the purposes of giving an undertaking to local creditors, the assets and rights located in the Member State where the debtor has an establishment should form a sub-category of the insolvency estate and, when distributing them or the proceeds resulting from their realisation, the insolvency practitioner in the main insolvency proceedings should respect the priority rights that creditors would have enjoyed if secondary insolvency proceedings had been opened in that Member State[58].

The insolvency practitioner in the main insolvency proceedings is liable for any damage caused to local creditors as a result of its non-compliance with the obligations and requirements set out in art 36[59].

### b) Temporary stay of the opening of secondary insolvency proceedings

The second limitation upon the opening of secondary insolvency proceedings concerns the possibility of staying the process of realisation of assets in the court which opened the secondary insolvency proceedings. The court which opened the secondary insolvency proceedings shall stay the process of realisation of assets in whole or in part upon receipt of a request from the insolvency practitioner in the main insolvency proceedings[60]. In such a case, it may require the insolvency practitioner in the main insolvency proceedings to take any suitable measure to guarantee the interests of the creditors in the secondary insolvency proceedings and of individual classes of creditors. Such a request from the insolvency practitioner may be rejected only if it is manifestly of no interest to the creditors in the main insolvency proceedings. Such a stay

[57] National law should be applicable in relation to the approval of an undertaking. Where under national law the voting rules for adopting a restructuring plan require the prior approval of creditors' claims, those claims should be deemed to be approved for the purpose of voting on the undertaking: recital (44).

[58] Recital (43).

[59] Article 36(10).

[60] Article 46(1). Cf. *Re Nortel Networks SA* [2009] I.L.Pr. 42, concerning art 33(1) of the Original Regulation.

of the process of realisation of assets may be ordered for up to three months, and may be continued or renewed for similar periods.

By art 38(3), when a temporary stay of individual enforcement proceedings has been granted in relation to main insolvency proceedings in order to allow for negotiations between the debtor and its creditors, the court, at the request of the insolvency practitioner or the debtor in possession, can temporarily (for a period not exceeding three months) stay the opening of secondary insolvency proceedings, in order to preserve the efficiency of the stay granted in the main proceedings[61]. The court should grant a temporary stay only if satisfied that suitable protective measures are in place to protect the general interests of local creditors in the secondary insolvency proceedings[62]. For example, the court may prohibit the insolvency practitioner or the debtor in possession from removing or disposing of any assets which are located in the Member State where its establishment is located, unless removal or disposal is done in the ordinary course of business. The Regulation makes clear that all creditors who could be affected by the outcome of negotiations on a restructuring plan should be informed of such negotiations and permitted to participate in them.

Any temporary stay may be lifted by the court, of its own motion or at the request of any creditor, if continuation of the stay is detrimental to any creditor's rights, in particular if the negotiations have been disrupted or it has become evident that they are unlikely to be concluded, or if the insolvency practitioner or the debtor in possession has infringed the prohibition on disposal of its assets or their removal from the territory of the Member State where the establishment is located.

## 10. Coordination of insolvency proceedings

The opening of parallel universal and local insolvency proceedings is likely to increase complexity and cost: “Uncoordinated splits of the

[61] Recital (45).

[62] Art 38(3).

[debtor's] estate might thus prove detrimental to the creditors as a whole"[63].

It is stated that mandatory rules of coordination with the main insolvency proceedings satisfy the need for unity in the Union[64]. Insolvency proceedings opened in the Member State where the debtor has its COMI are categorised as 'main' and are universal in character, whereas local proceedings subsequently opened are "subject to mandatory rules of coordination and subordination[65]. Recognising that the main insolvency proceedings and the secondary insolvency proceedings are "interdependent proceedings which concern a debtor with several centres of activity and assets spread over several territories"[66], the Recast Regulation lays down rules on the coordination of insolvency proceedings relating to the same debtor or to several members of the same group of companies.

Recital (50) of the Recast Regulation provides that the courts of different Member States may cooperate by coordinating the appointment of insolvency practitioners: they may appoint a single insolvency practitioner for several insolvency proceedings concerning the same debtor, or for different members of a group of companies, provided that this approach is compatible with the rules applicable to each set of proceedings, having particular regard to any requirement concerning the qualification or licensing of the insolvency practitioner.

By art 38 (a new provision having no counterpart in the Original Regulation[67]), a court seised of a request to open secondary insolvency proceedings must immediately notify the insolvency practitioner or the debtor in possession in the main insolvency proceedings and give such parties an opportunity to be heard on the request.

By art 36(6), if secondary insolvency proceedings are opened in accordance with arts 37 and 38, in circumstances where the insolvency practitioner in the main insolvency proceedings has given a unilateral

[63] MAX PLANCK INSTITUTE LUXEMBOURG FOR PROCEDURAL LAW *et al*, *The Implementation of the New Insolvency Regulation: Recommendations and Guidelines*, cit., p. 56, para 1.1.

[64] Recital (23).

[65] M. VIRGOS, E. SCHMIT, *Report*, para D.14.

[66] *Ibid*., para 229.

[67] See, by way of comparison, *Re Nortel Networks SA* [2009] I.L.Pr. 42.

undertaking in terms of art 36(1), the insolvency practitioner in the main insolvency proceedings must transfer any asset which it removed from the territory of that Member State after the undertaking was given (or, where those assets have already been realised, their proceeds) to the insolvency practitioner in the secondary insolvency proceedings, in order to safeguard the interests of local creditors in those secondary proceedings.

If, by the liquidation of assets in the secondary insolvency proceedings, it is possible to meet all claims allowed under those proceedings, art 49 requires the insolvency practitioner appointed therein immediately to remit any surplus assets to the insolvency practitioner in the main insolvency proceedings[68].

[68] Cf. Original Regulation, art 35. The Virgos Schmit Report, at para 252, explains that, «*The transfer of any remaining assets to the main proceedings reflects the primary nature of those proceedings*».

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# Determination of Applicable Law in International Insolvency Proceedings

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## 1. Applicable law (*lex fori* and exceptions to the *lex fori*) in international insolvency proceedings

### 1.1. Principles of determining law applicable to international insolvency proceedings

The determination of applicable law in international insolvency proceedings is currently regulated by the new Insolvency Regulation Recast[1]. The main rule for determining the applicable law is contained in Article 7 of the Insolvency Regulation Recast with respective exceptions to this rule being set out in Articles 8 to 18 of the Insolvency Regulation Recast. Articles 7 to 18 adopt a major part of the regulation contained previously in the Insolvency Regulation[2], in which the main rule for determining the applicable law was provided for in Article 4 and the relevant exceptions to its use in Articles 5 to 15 of the Insolvency Regulation.

[1] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, in OJ L 141, 5.6.2015, p. 19, as amended by Regulation (EU) 2017/353 of the European Parliament and of the Council of 15 February 2017 replacing Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings, in OJ L 57, 3.3.2017, p. 19.

[2] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, in OJ L 160, 30.6.2000, p. 1.

The inclusion of new paragraphs in the provisions of the Insolvency Regulation Recast on contracts relating to immovable property (Article 11) and in the provisions of the Insolvency Regulation Recast relating to employment contracts (Article 13) can be regarded as the most important changes between the Insolvency Regulation and the Insolvency Regulation Recast. We can find more details below in the interpretations of these respective provisions[3].

Insolvency laws of the individual Member States differ from each other (as they are not harmonised), thus, the issue of unambiguous determination of applicable law governing the opening, conduct and closure of insolvency proceedings is of a paramount importance, primarily from the perspective of parties (even potential parties) to the proceedings the interest of which is to have the possibility of determining in advance the particular law of a EU Member State which will govern their rights and obligations in the case of insolvency proceedings. In other words, the need for determining applicable law follows from the principle of foreseeability[4]. In this respect the importance of foreseeability of the law applicable to insolvency proceedings was expressed also by Advocate General F. G. Jacobs in his opinion in the case *Eurofood*[5]. In agreement with the Virgos-Schmit Report he concludes that insolvency proceedings pose a foreseeable risk and that «*it is important that international jurisdiction (which entails the application of the insolvency laws of a given State) be based on a place known to the debtor's potential creditors, thus enabling the legal risks which would have to be assumed in the case of insolvency to be calculated*»[6].

[3]With regard to continuity of the *lex fori concursus* concept in the Insolvency Regulation and the Insolvency Regulation Recast the relevant literature relating to the Insolvency Regulation is also referred to.

[4] In connection with the applicable law provision, the foreseeability principle was mentioned also by the Court of Justice of the European Union (CJEU) in the case C-557/13 Lutz with which we deal in more detail in connection with Article 16 of the Insolvency Regulation Recast.

[5] C-341/04 Eurofood IFSC [2006] ECR I-3813; Opinion of the Advocate General on this case.

[6] Opinion, point 122, VIRGOS-SCHMIT *Report*, Article 75.

The Insolvency Regulation Recast accommodates the previously stated needs by stipulating uniform rules on conflict of laws which replace national rules of private and procedural international laws of the individual EU Member States. Thus, the Insolvency Regulation Recast enshrines uniform rules on conflicts of laws for insolvency proceedings involving an international aspect. If the rules on conflict of laws refer to a specific applicable law, such reference is made to the national law of a particular EU Member State with the exception of rules of national private international law, thus renvoi is not permitted[7]. In addition to the general rules on conflict of laws provided for in Article 7, the Insolvency Regulation Recast also contains other provisions and exceptions to this article. It is, in particular, the prevention of transfers of assets or disputes to other States in order to achieve a better position in insolvency proceedings (*forum shopping*) that can be regarded as a common purpose of these provisions[8]. From the beginning, the European legal regulation of insolvency proceedings aims at eliminating this phenomenon which is undesirable in relations involving resolution of a debtor's insolvency.

The basic rule of the Insolvency Regulation Recast relating to the determination of applicable law is set out in Article 7. The rule determines which law is to be applied to insolvency proceedings during their entire conduct, i.e. which law is to be applied in considering the conditions for the opening of those proceedings, their conduct and their closure. A law determined in this manner is decisive not only for procedural questions but also for substantive effects of insolvency proceedings on the rights and obligations of involved parties. Thus, the law determined under Article 7 has a universal impact on the entire proceedings. Therefore, it is possible to state that it constitutes the expression and application of the principle of universality which was embodied already in Article 4 of the Insolvency Regulation[9].

[7] MOSS, FLETCHER, ISAAC, in *Moss, Fletcher and Isaacs on the EU regulation on insolvency proceedings*, Third edition, Oxford: Oxford University Press, 2016, p. 339.

[8] DUURSMA-KEPPLINGER, DUURSMA, CHALUPSKY, *Kommentar - Europäische Insolvenzverordnung*, 1st edition, Vienna, Springer Verlag, 2002, *Article 4, no. 1.*

[9] GEIMER, *Internationales Zivilprozessrecht*, Cologne, 2001, p. 993-992.

Under Article 7 of the Insolvency Regulation Recast a law applicable to insolvency proceedings and their effects (*lex fori concursus*) is the law of the Member State within whose territory such insolvency proceedings were commenced, unless otherwise provided by the Insolvency Regulation Recast. Thus, in the case of main proceedings such law will be the law of the State within the territory of which the centre of the debtor's main interests (COMI) is situated within the meaning of Article 3(1) of the Insolvency Regulation Recast. This is due to the fact that, as the above indicates, courts of such State have international jurisdiction to open insolvency proceedings. This rule is applicable to main as well as ancillary (secondary as well as particular) proceedings[10].

The opening, conduct and closure of insolvency proceedings, all its effect on the position of the debtor, insolvency practitioner, creditor and third parties (in particular in the scope set out in Article 7(2) of the Insolvency Regulation Recast) are covered by law of the State within the territory of which a court opened the insolvency proceedings (*lex fori concursus*). However, certain precisely defined issues (i.e. cases "otherwise provided" for in the Insolvency Regulation Recast) are subject to other applicable law. For the sake of foreseeability the Insolvency Regulation Recast contains also provisions on the validity of a law other than the law of the State of the opening of proceedings[11]. These exceptions to the basic *lex fori concursus* rule are enumerated in Articles 8 to 18 of the Insolvency Regulation Recast.

However, it is necessary to note that irrespective of the absence of an express regulation in the Insolvency Regulation Recast, the rules enshrined in Articles 7 to 18 of the Insolvency Regulation Recast will not apply to the determination of a law applicable to questions which arise in main or secondary insolvency proceedings but to which such proceedings are not linked in any specific manner. The law applicable to such questions will be determined under the rules of private interna-

[10] Recital (66) and Article 35 of the Insolvency Regulation Recast.

[11] EHRICKE, RIES, *Die neue Europäische Insolvenzverordnung*, Juristische Schulung, 2003, p. 313.

tional law of the relevant Member State which are otherwise applicable[12]. Thus, it is necessary to apply the insolvency statute only to questions which are closely related to the relevant international insolvency proceedings. It is therefore necessary to analyse whether a given insolvency is only a precondition of the facts of the case or whether the rules alone directly serve the purposes of insolvency proceedings (such as equal treatment of creditors)[13].

As indicated above, with regard to the content of unifying provisions on conflict of laws relating to the applicable law, remission and transmission are excluded. However, these rules on conflict of laws are not of a universal nature. With regard to the territorial applicability of the Insolvency Regulation Recast these rules may only refer to the law of a certain Member State. In relation to third states it will still be necessary to use rules of national or international law, as the case may be, which regulate these matters[14].

The *lex fori concursus* as the rule for a uniform main insolvency statute determines the effects of insolvency proceedings, both substantive and procedural[15]. Owing to the uniform determination of the insolvency statute for substantive and procedural questions it is therefore not necessary to differentiate between the substantive and procedural rules of the applied law which is not always simple, especially in insolvency law[16]. Questions falling within the main insolvency statute determined on the basis of Article 7(1) of the Insolvency Regulation Recast are demonstratively specified in Article 7(2) of the Insolvency Regulation Recast.

In our opinion, it can be concluded that Article 7 of the Insolvency Regulation Recast constitutes a norm having an aspect of rules on the

[12] DUURSMA-KEPPLINGER, DUURSMA, CHALUPSKY, *Kommentar - Europäische Insolvenzverordnung*, 1st edition, Springer Verlag, 2002, Article 4, no. 6.

[13] ČIHULA, *Aktuální otázky insolvenčního řízení s cizím prvkem. Dissertation. Prague*, Charles University, Faculty of Law, 2007, p. 71.

[14] PAUKNEROVÁ, *European private international law*, 1st edition, Prague, C. H. Beck, 2008, p. 334.

[15] VIRGOS-SCHMIT *Report*, Article 90; identically Recital (66) of the Insolvency Regulation Recast.

[16] DUURSMA-KEPPLINGER, DUURSMA, CHALUPSKY, *Kommentar - Europäische Insolvenzverordnung*, 1st edition, Vienna: Springer Verlag, 2002, Article 4, no. 9.

conflict of laws, as it determines applicable law for substantive questions in international insolvency proceedings but, as we believe, it also possesses the characteristics of international procedural law, as it determines the rules under which given international proceedings will be conducted.

### 1.1.1. Article 7 of the Insolvency Regulation Recast - the *lex fori concursus* principle

Under Article 7 of the Insolvency Regulation Recast, the law applicable to insolvency proceedings shall be that of the State within the territory of which such proceedings are opened. This constitutes the determination of the *lex fori concursus* principle. This means that such law will be the law of the State within the territory of which the debtor's COMI is situated within the meaning of Article 3(1) of the Insolvency Regulation Recast. In Article 7(2) of the Insolvency Regulation Recast, questions to which the *lex fori concursus* principle is to be particularly applied, are demonstratively set out. These questions include for example the question of which assets form part of the insolvency estate or the rules governing the lodging, verification and admission of claims[17].

Thus, Article 7 of the Insolvency Regulation Recast contains a basic rule for the determination of applicable law, setting out the *lex fori con-*

[17] The *lex fori concursus* determines in particular: (a) the debtors against which insolvency proceedings may be brought on account of their capacity; (b) the assets which form part of the insolvency estate and the treatment of assets acquired by or devolving on the debtor after the opening of the insolvency proceedings; (c) the respective powers of the debtor and the insolvency practitioner; (d) the conditions under which set-offs may be invoked; (e) the effects of insolvency proceedings on current contracts to which the debtor is party; (f) the effects of the insolvency proceedings on proceedings brought by individual creditors, with the exception of pending lawsuits; (g) the claims which are to be lodged against the debtor's insolvency estate and the treatment of claims arising after the opening of insolvency proceedings; (h) the rules governing the lodging, verification and admission of claims; (i) the rules governing the distribution of proceeds from the realisation of assets, the ranking of claims and the rights of creditors who have obtained partial satisfaction after the opening of insolvency proceedings by virtue of a right *in rem* or through a set-off; (j) the conditions for, and the effects of closure of, insolvency proceedings, in particular by composition; (k) creditors' rights after the closure of insolvency proceedings; (l) who is to bear the costs and expenses incurred in the insolvency proceedings; (m) the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the general body of creditors.

*cursus* as the law applicable to insolvency proceedings. Hence, the applicable law determined under Article 7 of the Insolvency Regulation Recast has a universal effect on the entire proceedings. This provision purports to apply one law to the entire insolvency proceedings which will govern substantive and procedural questions relating to the insolvency proceedings[18].

### 1.1.2. *Lex fori concursus* and the CJEU

The CJEU has recently provided its opinion on the application of the *lex fori concursus* rule as well (in connection with a question referred for a preliminary ruling regarding Article 4 of the Insolvency Regulation)[19]. In this case, a company which became insolvent had its registered office in Hungary and an establishment in Romania, where after expiry of the time-limit for the lodging of claims set out by Hungarian law (*lex fori concursus*) a tax audit was conducted, a tax assessment and an enforcement warrant were issued and an application for the enforcement of a decision was filed. Under these circumstances the Romanian court of first instance referred a question to the CJEU whether the effects of the insolvency proceedings governed by the law of the State in which proceedings are opened (in this case Hungary) include forfeiture of the right of a creditor, which has not taken part in the insolvency proceedings, to pursue its claim in another Member State or suspension of the enforcement of that claim in that other Member State (in this case Romania). The court of first instance further enquired, if it is relevant that the claim pursued by means of enforcement is a fiscal claim.

The CJEU concluded that Article 4 of the Insolvency Regulation must be interpreted as meaning that provisions of domestic law of the Member State on the territory of which insolvency proceedings are opened which provide, in relation to a creditor who has not taken part in those proceedings, for the forfeiture of its right to pursue its claim or for the suspension of the enforcement of such a claim in another Mem-

[18] EU Council: Report on the Convention of Insolvency Proceedings, Brussels, 3 May 1996, 6500/96, Art. 90.

[19] CJEU judgment in the case C-212/15, ENEFI.

ber State come within its scope of application. The CJEU further concluded that the fiscal nature of the claim has no bearing on the answer to be given to the first question referred for a preliminary ruling.

In the grounds of the judgment the CJEU also stated that in view of this dominant role of the main insolvency proceedings, it seems entirely consistent that national legislation (*lex fori concursus*) could, on the basis of the forfeiture of the claims lodged outside of the time limit prescribed, exclude all requests brought by the person holding those claims seeking the opening of secondary insolvency proceedings, given that the opening of such proceedings would make it possible to circumvent the forfeiture provided for by the *lex fori concursus*. Furthermore, such legislation (*lex fori concursus*) prevents a creditor who did not participate in the main insolvency proceedings from being capable of frustrating a composition or any of the debtor's comparable restructuring measures adopted in the context of that procedure by requesting the opening of secondary insolvency proceedings.

In our opinion, it can be summarised that by this judgment the CJEU confirmed the broadest possible application of the *lex fori concursus* to all questions, which may arise in the main insolvency proceedings. Furthermore, it should be emphasised that the CJEU did not decide in favour of any priority treatment or position of tax (i.e. fiscal) claims.

### 1.2. Exceptions to the application of Article 7 of the Insolvency Regulation Recast

As a general rule, Article 7 of the Insolvency Regulation Recast sets out the application of the *lex fori concursus* the consequences of which are described above. Articles 8 to 18 of the Insolvency Regulation Recast set out exceptions to this rule. A common aspect of all these exceptions is that they regulate situations in which it is necessary to modify the *lex fori concursus* rule in a certain manner.

### 1.2.1. Third parties' rights *in rem* (Article 8 of the Insolvency Regulation Recast)[20]

The first exception to the general principle of *lex fori concursus* under Article 8(1) of the Insolvency Regulation Recast is third parties' rights *in rem* to assets belonging to a debtor which are situated within the territory of another Member State at the time of the opening of proceedings. Hence, an exception to the general principle of *lex fori concursus* is the principle of *lex rei sitae* in this case. The creation, validity and scope of rights *in rem* to assets belonging to a debtor which at the time of the opening of proceedings[21] are situated within the territory of a Member State other than the State within the territory of which such proceedings were opened are governed by law of the state within the territory of which such debtor's assets are situated. This means that although the *lex fori concursus* may claim local assets as part of the debtor's estate, the rights *in rem* of any third parties in relation to those assets are preserved in accordance with local law[22]. However, it is necessary to add that Article 8 does not prevent insolvency practitioners from requesting the opening of secondary insolvency proceedings in the jurisdiction where the rights *in rem* arise if the debtor has an establishment there. And if secondary insolvency proceedings are not opened, any surplus on the sale of an asset covered by rights *in rem* should be paid to the insolvency practitioner in the main insolvency proceedings[23].

Points (a) to (d) of paragraph 2 provide a non-exhaustive list of rights which are to be regarded as rights *in rem* for the purposes of the application of this article such as a right guaranteed by a lien in respect of the claim or a right *in rem* to the beneficial use of assets[24]. In addition,

[20] Article 8 of the Insolvency Regulation Recast adopts the rules set out in Article 5 of the Insolvency Regulation.

[21] If rights *in rem* are created only after the main insolvency proceedings were opened, the effects of the *lex fori concursus* will apply; compare with VIRGOS-SCHMIT *Report*, Article 96.

[22] MOSS, FLETCHER, ISAAC, in *Moss, Fletcher and Isaacs on the EU regulation on insolvency proceedings*, Third edition, Oxford: Oxford University Press, 2016, p. 347.

[23] Compare with Recital (68) of the Insolvency Regulation Recast.

[24] Article 8(2) of the Insolvency Regulation Recast refers to the following rights as rights *in rem* unaffected by *lex fori concursus*: (a) the right to dispose of assets or have them disposed

it is set out in Article 3 that the right, recorded in a public register and enforceable against third parties, based on which a right *in rem* within the meaning of paragraph 1 may be obtained shall be considered to be a right *in rem*. Such rights *in rem* are then governed by the law of the State within the territory of which a public register is kept in which the relevant right *in rem* is entered.

Paragraph 4 sets out that paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in point (m) of Article 7(2). This means that courts in a Member State where insolvency proceedings are conducted (under *lex fori concursus*), shall have jurisdiction for an action for voidness, voidability or unenforceability of a legal act upon which a right *in rem* to assets within the meaning of paragraph 1 was created (which is otherwise governed by the law of the State within the territory of which the assets are situated, i.e. *lex rei sitae*). If all creditors of the debtor are damaged by this right *in rem*, under Article 7(2) point (m) of the Insolvency Regulation Recast the action will be decided in accordance with the law of the Member State in which the insolvency proceedings are conducted (*lex fori concursus*) and the decision of the court of such Member State must be recognised in the Member State within the territory of which the debtor's assets are situated[25].

The CJEU has recently interpreted the legal regulation contained in the relevant article, stating that this article must be interpreted to the effect that security created by virtue of a provision of national law, such as that at issue in the main proceedings, by which the real property of a person owing real property taxes is, by operation of law, to be subject to a public charge and that property owner must accept enforcement of

of and to obtain satisfaction from the proceeds of or income from those assets, in particular by virtue of a lien or a mortgage; (b) the exclusive right to have a claim met, in particular a right guaranteed by a lien in respect of the claim or by assignment of the claim by way of a guarantee; (c) the right to demand assets from, and/or to require restitution by, anyone having possession or use of them contrary to the wishes of the party so entitled; (d) a right *in rem* to the beneficial use of assets.

[25] KOZÁK, BUDÍN, DADAM, PACHL, *Insolvenční zákon a předpisy související. Nařízení Rady (ES) o úpadkovém řízení. Komentář*, 2nd edition, 2013. Available from ASPI [accessed on 15 August 2017].

the decision recording that tax debt against that property, constitutes a 'right *in rem*' for the purposes of that article[26].

### 1.2.2. Set-off (Article 9 of the Insolvency Regulation Recast)[27]

Under the legal regulation in Article 9(1) of the Insolvency Regulation Recast the opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of a debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim.

Therefore, with regard to Article 7(2) point (d) of the Insolvency Regulation Recast, depending on circumstances, it is possible that a right arises in favour of a creditor for a set-off of claims either on the basis of the *lex fori concursus* rules or on the basis of the law applicable to the insolvent debtor's claim. However, this only applies to rights to set-off arising in respect of mutual claims incurred prior to the opening of the main insolvency proceedings. Regarding claims incurred after the opening of proceedings, a rule applies that possibilities for setting off claims may only ensue from the *lex fori concursus* within the sense of Article 7(2) point (d) of the Insolvency Regulation Recast[28].

At the same time, a question arises whether the term "law applicable to the insolvent debtor's claim" includes not only general (in particular

[26] CJEU judgment in the case C-195/15, SCI Senior Home. Furthermore, please take note of the judgement of the CJEU in the case C-156/15, Private Equity Insurance Group, where in connection with Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements the CJEU concluded that this Directive is to be interpreted as conferring on the taker of financial collateral, such as the collateral at issue in the main proceedings, whereby monies deposited in a bank account are pledged to the bank to cover all the account holder's debts to the bank, the right to enforce the collateral, notwithstanding the commencement of insolvency proceedings in respect of the collateral provider, only if, first, the monies covered by the collateral were deposited in the account in question before the commencement of those proceedings or those monies were deposited on the day of commencement, the bank having proved that it was not aware, nor should have been aware, that those proceedings had commenced and, second, the account holder was prevented from disposing of those monies after they had been deposited in that account.

[27] Article 9 of the Insolvency Regulation Recast adopts the rules set out in Article 6 of the Insolvency Regulation.

[28] MOSS, FLETCHER, ISAAC, in *Moss, Fletcher and Isaacs on the EU regulation on insolvency proceedings*, Third edition, Oxford: Oxford University Press, 2016, p. 351.

civil) law of the relevant Member State but also its insolvency law. Different answers may lead to different results as rules of the general civil law of a certain State may prohibit, for example, the set-off of an undue claim, whereas rules of the same State's insolvency law may allow such set-off, and vice versa[29].

Paragraph 2 sets out that paragraph 1 shall not preclude actions for voidness, voidability or unenforceability as referred to in point (m) of Article 7(2). As regards the content of this provision, we refer to the interpretation of the same provision of Article 8(4) of the Insolvency Regulation Recast.

### 1.2.3. Reservation of title (Article 10 of the Insolvency Regulation Recast)[30]

Article 10 of the Insolvency Regulation Recast relates to certain legal relations between the seller and the purchaser.

Paragraph 1 enshrines an exception to the *lex fori concursus* rule under which opening of the insolvency proceedings shall not affect the sellers' rights that are based on a reservation of title, if at the time of the opening of proceedings the asset is situated within the territory of a Member State other than the State of the opening of proceedings[31]. Where these conditions are met the insolvency practitioner is not authorised to demand the surrendering of an asset for the purchaser's (debtor's) insolvency estate; the insolvency practitioner is only authorised to the surrender of a financial amount which has already been paid to the seller[32]. This exception will apply only rarely in practice as the

[29] *Ibid*.

[30] Article 10 of the Insolvency Regulation Recast adopts the rules set out in Article 7 of the Insolvency Regulation.

[31] In its judgment in the case C-292/08 German Graphics Graphische Maschinen GmbH the CJEU confirmed that the relevant exception does not apply where the asset covered by the reservation of title is situated in the Member State of the opening of those proceedings at the time of opening of those proceedings. Therefore, the *lex fori concursus* rules will apply in such a case.

[32] KOZÁK, BUDÍN, DADAM, PACHL, *Insolvenční zákon a předpisy související. Nařízení Rady (ES) o úpadkovém řízení. Komentář*, 2nd edition, 2013. Available from ASPI [accessed on 15 August 2017].

goods to which the title reservation applied is usually already held by the purchaser[33].

Paragraph 2 protects the title of a purchaser that purchased an asset from a seller against which insolvency proceedings have been opened by setting out that the opening of insolvency proceedings against the seller of an asset, after delivery of the asset, shall not constitute grounds for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title where at the time of the opening of proceedings the asset sold is situated within the territory of a Member State other than the State of the opening of proceedings.

Thus, it is important for the application of this exception under paragraph 2 where the asset is situated rather than, for example, whether the purchase price has been already paid or whether the title to the asset has already passed onto the purchaser. If the purchaser had not paid the full purchase price before the insolvency proceedings were opened, the insolvent seller's claim against such purchaser becomes a part of the insolvency estate and the insolvency practitioner is entitled to the payment of such claim to the credit of the insolvency estate[34].

However, if at the time of the opening of insolvency proceedings against the seller an asset is situated within the territory of the Member State of the opening of proceedings, it is impossible to apply Article 10(2) of the Insolvency Regulation Recast. Consequently, the purchaser does not become entitled to the surrendering of the asset and the asset becomes a part of the insolvency estate as long as this is applicable under the *lex fori concursus*. If the purchaser has already paid the purchase price and the asset has become a part of the insolvency estate, the purchaser becomes a creditor and may lodge their claim in the relevant insolvency proceedings.

In addition, it is stated in paragraph 3, that paragraphs 1 and 2 shall not preclude actions for voidness, voidability or unenforceability as referred to in point (m) of Article 7(2). In relation to this provision we

[33] DUURSMA-KEPPLINGER, DUURSMA, CHALUPSKY, *Kommentar - Europäische Insolvenzverordnung*, Vienna, 2002, Article 7 No. 8.

[34] KOZÁK, BUDÍN, DADAM, PACHL, *Insolvenční zákon a předpisy související. Nařízení Rady (ES) o úpadkovém řízení. Komentář*, 2nd edition, 2013. Available from ASPI [accessed on 15 August 2017].

refer to the interpretation of Article 8(4) of the Insolvency Regulation Recast.

### 1.2.4. Contracts relating to immovable property (Article 11 of the Insolvency Regulation Recast)

In comparison to Article 8 of the Insolvency Regulation, the content of Article 11 of the Insolvency Regulation Recast has been amended. Namely a new paragraph 2 has been inserted into this article (see below).

Paragraph 1 is fully based on the Insolvency Regulation and sets out an exception in favour of the *lex rei sitae* by providing that the effects of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the Member State within the territory of which the immoveable property is situated. The reference to the law of that Member State includes a reference to its insolvency law[35]. Hence, the effects of the *lex fori concursus* are ruled out in such a case.

The new paragraph 2 sets out that the court which opened main insolvency proceedings shall have jurisdiction to approve the termination or modification of the contracts referred to in this Article where: (a) the law of the Member State applicable to those contracts requires that such a contract may only be terminated or modified with the approval of the court opening insolvency proceedings; and (b) no insolvency proceedings have been opened in that Member State.

Thus, the new inserted paragraph 2 is basically an exception to the exception set out in paragraph 1, conferring defined powers to the court which has opened main insolvency proceedings provided that specified conditions are met, and which proceeds in accordance with the *lex fori concursus*.

The definition of the term "immovable property" is also important for the application of this article, as this term may have different contents in different laws across the Member States. It should be mentioned in this connection that it is suitable to base the definition of the term

[35] Moss, Fletcher, Isaac, in, *Moss, Fletcher and Isaacs on the EU regulation on insolvency proceedings*, Third edition. Oxford: Oxford University Press, 2016, p. 353.

"immovable property" on the law of the Member State within the territory of which the assets are situated. If under such law a certain asset constitutes immovable property, the effects of the *lex fori concursus* will be precluded, as under the *lex fori concursus* such asset does not constitute immovable property[36].

### 1.2.5. Payment systems and financial markets (Article 12 of the Insolvency Regulation Recast)[37]

An exception to the *lex fori concursus* principle will apply also to rights and obligations of parties to a payment or settlement system or to a financial market, as such rights and obligations are governed solely by the law of the Member State applicable to that system or market. At the same time, Article 12(1) of the Insolvency Regulation Recast provides for priority application of Article 8 of the Insolvency Regulation Recast. This means that in the case of conflicting laws Article 8 of the Insolvency Regulation Recast relating to third parties' rights *in rem* will take priority; otherwise, Article 12 of the Insolvency Regulation Recast will apply under the specified conditions.

The exception set out in this article applies mainly to position-closing agreements and netting agreements, sale of securities and the guarantees provided for such transactions. That law is intended to prevent the possibility of mechanisms for the payment and settlement of transactions, and provided for in payment and set-off systems or on the regulated financial markets of the Member States, being altered in the case of insolvency of a business partner. The Directive 98/26/EC contains special provisions which should take precedence over the general rules laid down in the Insolvency Regulation Recast[38].

The transactions specified under Article 12(1) of the Insolvency Regulation Recast can be challenged upon an action for voidness, voidability or unenforceability as well, however, the possibility to file such

[36] KOZÁK, BUDÍN, DADAM, PACHL, *Insolvenční zákon a předpisy související. Nařízení Rady (ES) o úpadkovém řízení. Komentář*, 2nd edition, 2013. Available from ASPI [accessed on 15 August 2017].

[37] Article 12 of the Insolvency Regulation Recast adopts the rules set out in Article 9 of the Insolvency Regulation.

[38] Compare with Recital (71) of the Insolvency Regulation Recast.

actions will always be governed by the law applicable to payment systems or financial markets within which such transactions were effectuated. In this respect, this constitutes an exception to the application of Article 7(2) point (m) of the Insolvency Regulation Recast.

### 1.2.6. Contracts of employment (Article 13 of the Insolvency Regulation Recast)

Article 13 of the Insolvency Regulation Recast is another provision the content of which has been more significantly amended as compared to the Insolvency Regulation (Article 10). Namely, a new paragraph 2 has been inserted into this article (see the text below).

Paragraph 1 prescribes an exception to the *lex fori concursus* rule, under which effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the Member State applicable[39] to the contract of employment. It is important to emphasise that this provision affects questions relating only to contracts of employment such as the manner in which they are concluded, the continuation and termination of employment, questions relating to working hours, remuneration, overtime work or a notice period.

The new paragraph 2 sets out that 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. Hence, the new paragraph allows the avoidance of the opening of secondary proceedings which, in some cases, had to be opened before the amendment of this article only in order to assist with the termination or modification

[39] «*The question of which national law is applicable to a contract of employment will fall to be determined by the Rome I Regulation (formerly the Rome Convention)* ». MOSS, FLETCHER, ISAAC, in *Moss, Fletcher and Isaacs on the EU regulation on insolvency proceedings*, Third edition, Oxford: Oxford University Press, 2016, p. 354.

of employment contracts[40], which caused complications and protraction of the whole procedure.

### 1.2.7. Effects on rights subject to registration (Article 14 of the Insolvency Regulation Recast)[41]

The effects of insolvency proceedings on the rights of a debtor in immoveable property, a ship or an aircraft subject to registration in a public register will be determined by a law different from the *lex fori concursus*. In these cases, the effects shall be determined by the law of the Member State under the authority of which the register is kept.

This implicates that where the registered asset is physically situated is not relevant for the application of this provision. It is relevant in which State such property of the debtor is registered, i.e. under the authority of which State such register is kept. The law of the Contracting State of registration decides which effects of the insolvency proceedings (and *lex fori concursus*) are admissible and affect the rights of the debtor subject to registration in that State[42].

### 1.2.8. European patents with unitary effect and Community trade marks (Article 15 of the Insolvency Regulation Recast)[43]

If any insolvency proceedings have been opened, European patents with unitary effect, a Community trade mark or any other similar rights created by EU law should be included only in insolvency proceedings under Article 3(1) of the Insolvency Regulation Recast, i.e. in the main

[40] MOSS, FLETCHER, ISAAC, in *Moss, Fletcher and Isaacs on the EU regulation on insolvency proceedings*, Third edition, Oxford: Oxford University Press, 2016, p. 458.

[41] Article 14 of the Insolvency Regulation Recast adopts the rules set out in Article 11 of the Insolvency Regulation.

[42] VIRGOS-SCHMIT *Report*, Article 130.

[43] Article 15 of the Insolvency Regulation Recast adopts the rules set out in Article 12 of the Insolvency Regulation. However, it reflects the fact that the "Community patent" has been replaced by a "European patent with unitary effect" with this patent regime being set out in Regulations 1257/2012 and 1260/2012.

insolvency proceedings. Therefore, it is excluded for these rights to become a part of the insolvency estate in secondary insolvency proceedings, but also in territorial insolvency proceedings which may be conducted without the necessity of opening main insolvency proceedings.

### 1.2.9. Detrimental acts (Article 16 of the Insolvency Regulation Recast)[44]

Under this article the provisions of Article 7(2) point (m) of the Insolvency Regulation Recast shall not apply, where the person who benefited from an act detrimental to all the creditors provides proof that: (a) the act is subject to the law of a Member State other than that of the State of the opening of proceedings; and (b) the law of that Member State does not allow any[45] means of challenging that act in the relevant case.

This means exclusion of the *lex fori concursus* principle in considering voidness, voidability or unenforceability of a debtor's legal act, if the above conditions are met.

In connection with this article, the CJEU stated in its judgment in the case C-557/13 Lutz, that this article is applicable to a situation in which a payment, challenged by an insolvency administrator, of a sum of money attached before the opening of the insolvency proceedings was made only after the opening of those proceedings. CJEU further stated that the defence which it establishes also applies to limitation periods or other time-bars relating to actions to set aside transactions under the law governing the act challenged by the liquidator. Also, the relevant procedural requirements for the exercise of an action to set a transaction aside are to be determined according to the law governing the act challenged by the liquidator[46].

[44] Article 16 of the Insolvency Regulation Recast adopts the rules set out in Article 13 of the Insolvency Regulation.

[45] VIRGOS-SCHMIT *Report*, Article 137: "By "any means" it is understood that the act must not be capable of being challenged using either rules on insolvency or general rules of the national law applicable to the act."

[46] The interpretation of Article 16 of the Insolvency Regulation Recast (formerly Article 13 of the Insolvency Regulation) was further elaborated on by the CJEU also in the judgment in the case C-310/14, Nike European Operations Netherlands, in which the CJEU concluded that «*1. Article 13 must be interpreted as meaning that, after taking account of all the circumstances*

### 1.2.10. Protection of third-party purchasers (Article 17 of the Insolvency Regulation Recast)[47]

Where, by an act concluded after the opening of insolvency proceedings, a debtor disposes, for consideration, of an immovable asset, a ship or an aircraft subject to registration in a public register, or securities the existence of which requires registration in a register laid down by law, the validity of that act is governed by the law of the State within the territory of which the immovable asset is situated or under the authority of which the register is kept.

In this manner, good faith of a party purchasing assets from the debtor is protected, as such party may not be aware of the effects of the *lex fori concursus* on the debtor's rights to assets; therefore, based on this article the purchaser may rely on the provisions of the law of the State within the territory of which such assets are situated or under the authority of which the relevant register is kept.

However, if, in contrast, the *lex fori concursus* allows the debtor to dispose of the above- referenced assets after the insolvency proceedings were opened and the law of the State within the territory of which such assets are situated or under the authority of which the register is kept precludes any disposition of the assets by the debtor, the insolvency

*of the case, the article applies provided that the act at issue cannot be challenged on the basis of the law governing that act (lex causae). 2. For the purposes of the application of Article 13 and in the event that the defendant in an action relating to the voidness, voidability or unenforceability of an act relies on a provision of the law governing that act (lex causae) under which that act can be challenged only in the circumstances provided for in that provision, it is for the defendant to plead that those circumstances do not exist and to bear the burden of proof in that regard. 3. Article 13 must be interpreted as meaning that the expression 'does not allow any means of challenging that act …' applies, in addition to the insolvency rules of the law governing that act (lex causae), to the general provisions and principles of that law, taken as a whole. 4. Article 13 must be interpreted as meaning that the defendant in an action relating to the voidness, voidability or unenforceability of an act must show that the law governing that act (lex causae), taken as a whole, does not allow for that act to be challenged. The national court before which such an action is brought may rule that it is for the applicant to establish the existence of a provision or principle of the lex causae on the basis of which that act can be challenged only where that court considers that the defendant has first proven, in accordance with the rules generally applicable under its national rules of procedure, that the act at issue cannot be challenged on the basis of the lex causae*».

[47] Article 17 of the Insolvency Regulation Recast adopts the rules set out in Article 14 of the Insolvency Regulation.

practitioner is authorised to challenge the validity of the debtor's legal act[48].

### 1.2.11. Effects of insolvency proceedings on pending lawsuits or arbitral proceedings (Article 18 of the Insolvency Regulation Recast)[49]

The last exception to the *lex fori concursus* rule sets out that the effects of insolvency proceedings on a pending lawsuit or pending arbitral proceedings concerning an asset or a right which forms part of a debtor's insolvency estate shall be governed solely by the law of the Member State in which that lawsuit is pending or in which the arbitral tribunal has its seat (*lex fori processus*).

It is important to note that Article 18 applies only to "lawsuits pending" at the time the insolvency proceedings are opened. It does not apply to lawsuits commenced after the opening of the insolvency proceedings (which will be subject to *lex fori concursus*)[50].

## 1.3. Conclusion

In general, we can summarise that the Insolvency Regulation Recast does not show any substantial changes as compared to the Insolvency Regulation. The key principle of the *lex fori concursus* rule has been maintained as well as the scope and concept of exceptions to this rule. More significant changes have only been made to contracts relating to immovable property and contracts of employment. However, these alterations only constitute a more detailed elaboration on these exceptions rather than being a change to the general concept.

[48] KOZÁK, BUDÍN, DADAM, PACHL, *Insolvenční zákon a předpisy související. Nařízení Rady (ES) o úpadkovém řízení. Komentář*, 2nd edition, 2013. Available from ASPI [accessed on 15 August 2017].

[49] Article 18 of the Insolvency Regulation Recast adopts the rules set out in Article 15 of the Insolvency Regulation and amends it by expressly applying also to arbitration proceedings.

[50] MOSS, FLETCHER, ISAAC, in *Moss, Fletcher and Isaacs on the EU regulation on insolvency proceedings*, Third edition, Oxford: Oxford University Press, 2016, p. 361.

In our opinion, the discussed legislation meets the intended goal by setting out clear and foreseeable rules for the determination of the law applicable to issues arising in international insolvency proceedings.

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# Information to, and Rights of, Creditors

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## 1. Introduction

The question on rights of creditors, including their rights to receive information about insolvency proceedings is of crucial importance, taken into account delayed or even impossible settlements with a debtor which the debtor might suffer. Protection of interests of the creditors is one the most important goals of insolvency law [1]. There is an actual and legal risk that creditor is not informed about the beginning of proceedings of insolvency of the debtor, especially in cross-border insolvency cases with obstacles created by territorial distance, language, lack of unified register of insolvency proceedings, etc. An unsufficient amount of information can further lead to an impossibility to exercise creditor's rights provided in national and European Union normative enactments. To provide protection of creditors' interests, which are complex [2] and always of a financial nature [3], information about insolvency proceedings must be duly delivered to the creditors.

[1] BĒRZIŅŠ, *Par maksātnespējas likuma 155. panta ceturtās daļas piemērošanu*, in *Jurista Vārds*, 07.03.2017, No. 10 (964), p. 17. See also: Legal explanation of general terms of the Insolvency Law. – Insolvency Administration of Latvia. Available in Latvian at : file:///C:/Users/Dana/Downloads/visparigie_noteikumi.pdf.

[2] UNCITRAL, *Legislative Guide on Insolvency Law*, 25.06.2004, p. 25, point 14.

[3] As noted in decision No. 6-70003916/25, SKA-903/2016 of Supreme Court of Latvia, Administrative Case Department, 19.04.2016, para 7.

Therefore, insolvency proceedings should be organized in a way that adequate information is available in respect of the debtor's situation, providing incentives to encourage the debtor to reveal its positions and, where appropriate, sanctions for failure to do so. The availability of this information will enable insolvency office holders, courts and creditors to assess the financial situation of the debtor and determine the most appropriate solution [4]. Moreover, looking globally, effective creditor/debtor rights and insolvency systems are an important element of financial system stability [5]. Nevertheless, even now levels of creditor protection differs in various countries [6] of the European Union, not even talking about the broader scale.

## 2. Legal regulation for information to, and rights of creditors

Procedural normative regulation for information to, and rights of creditors during insolvency proceedings in the European Union is given by the Regulation (EU) 2015/848 adopted by the European Parliament and of the Council on May 20, 2015 [7] (hereinafter – InsRRec), which provides rules granting rights of creditors during insolvency proceedings. *Inter alia* rights to receive information about insolvency proceedings is envisaged. Also predecessor of the InsRRec, namely, the Council Regulation (EC) No. 1346/2000 on insolvency proceedings [8] (hereinafter – InsReg) was a legal source of these rights. InsReg was the first European Community normative enactment which on such a broad political, economic and legal scale regulated cross-border insolvency order [9]. Still many legal issues arising out of and connected with insolvency

[4] UNCITRAL, *Legislative Guide on Insolvency Law*, cit., p. 13, point 12.

[5] Principles for Effective Insolvency and Creditor/Debtor Regimes. The World Bank. 2016, p. 1.

[6] DEAKIN, MOLLICA, SARKAR, *Varieties of creditor protection: insolvency law reform and credit expansion in developed market economies*, in *Socio-Economic Review*, 2017, Vol. 15, No. 2, p. 359.

[7] OJ L 141, 5.6.2015, p. 19 – 72.

[8] OJ L 160, 30.6.2000, p. 1.

[9] SPROĢE, *Pārrobežu maksātnespēja : procesa novitātes*, in *Jurista Vārds*, 31.01.2017, No. 5 (959), p. 48.

procedures are under reforms with the aim of reaching higher certainty and order [10].

Analysing further roots of informed creditor institute, a glance shall be taken at the United Nations Commission on International Trade Law (hereinafter – UNCITRAL), who as a subsidiary body of the UN General Assembly has prepared a Legislative Guide on Insolvency Law [11]. The purpose of that Guide was to assist the establishment of an efficient and effective legal framework to address financial difficulty of debtors. The advice provided in the Guide aimed at achieving a balance between the need to address the debtor's financial difficulty as quickly and efficiently as possible and the interests of the various parties directly concerned with that financial difficulty, principally creditors and other parties with a stake in the debtor's business, as well as with public policy concerns [12]. As noted in the Guide, access to complete accurate information on the debtor is essential to enable proper evaluation to be made of its financial position and proposals to be made to relevant creditors. Information concerning the assets, liabilities and business of the debtor will need to be made available to all relevant creditors [13].

## 3. Rights to be informed as a right to fair trial

As noted by the World Bank, effective insolvency systems have a number of aims and objectives, although approaches vary. Nevertheless these systems shall aspire *inter alia* to provide a transparent insolvency procedure that contains, and consistently applies incentives for gathering and dispensing information [14].

[10] BROKA, *Tiesas loma maksātnespējas procesa norisē*, in *Jurista Vārds*, 31.01.2017, No. 5 (959), p. 41.

[11] Parts one and two are adopted on June 25, 2004.

[12] UNCITRAL, *Legislative Guide on Insolvency Law*, cit., p. 1, point 1.

[13] UNCITRAL, *Legislative Guide on Insolvency Law*, cit., p. 24, point 13.

[14] Principles for Effective Insolvency and Creditor/Debtor Regimes. The World Bank. 2016, p. 7. These principles equally encourage national legal systems to provide for equitable treatment of similarly situated creditors, including similarly situated foreign and domestic creditors, as well as to establish framework for cross-border insolvencies, with recognitions of foreign proceedings.

The European Court of Justice in its judgment in *Eurofood* [15] emphasized the significance of the right to a fair trial in the context of insolvency proceedings, announcing the right of creditors or their representatives to participate in insolvency proceedings "in accordance with the equality of arms principle" [16]. According to the European Court of Human Rights (hereinafter – ECHR), the aim of equality of arms is to ensure a balance between the parties to proceedings, thus guaranteeing that any document submitted to the court may be examined and challenged by any party to the proceedings. The harm which may well be caused where this balance is lacking must, in principle, be proved by the person who has suffered it [17]. Also, the so-called 'doctrine of appearances', applied to the principle of equality of arms since the judgment in *Kress* v *France* [18], has led the ECHR to declare that an objective and abstract imbalance may be sufficient for a finding of infringement of the principle of equality of arms. This precedent has been applied mainly to national criminal proceedings, but also, although less frequently, to civil, social and administrative proceedings [19].

Accordingly, creditors, affected by insolvency proceedings have the fundamental right to be heard, which is enshrined in Article 47 of the Charter of Fundamental Rights of the European Union [20] and Article 6 of the European Convention on Human Rights.

Although not explicitly stated in the InsRRec or InsReg, there are no doubts that realization of protection of creditors' rights and interests

[15] ECJ, case C-341/04, 05.05.2006, *Eurofood IFSC Ltd*, ECR 2006 I-3813, paras 65 et seqq. See also opinion of the Advocate General Kokott in the ECJ case C-416/10, 19.04.2012, *Jozef Križan and Others* v *Slovenská inšpekcia životného prostredia*, para. 175.

[16] ECJ, case C-341/04, 5.5.2006, *Eurofood IFSC Ltd*, ECR 2006 I-3813, para. 66. See also opinion of the Advocate General Cruz Villalón in the ECJ case C-199/11, 26.06.2012, *Europese Gemeenschap* v *Otis NV and Others*, paras 57 – 58.

[17] See, inter alia, the judgments in *Neumeister* v *Austria*, 27 June 1968, Series A no 8; *Delcourt* v *Belgium*, 17 January 1970, Series A no 11; *Borgers* v *Belgium*, 30 October 1991, Series A no 214-B; *Dombo Beheer B.V*. v *the Netherlands*, 27 October 1993, Series A no 274.

[18] *Kress* v *France*, no 39594/98, ECHR 2001-VI. See also literature cited in the footnote 32 to the opinion of the Advocate General Cruz Villalón in the ECJ case C-199/11.

[19] See opinion of the Advocate General Cruz Villalón in the ECJ case C-199/11, 26.06.2012, *Europese Gemeenschap* v *Otis NV* and Others, para 58.

[20] OJ 2000, C 364/1.

shall be in close line with other goals provided in national and EU laws, especially emphasizing safeguarding of principles of justice and rights of all subjects of law. Insolvency proceedings are to be organized by granting equality of arms principle, as well as safeguarding equal protection of rights and interests of both – creditors and the debtor [21].

Moreover, creditors must be able to lodge their claims in a procedure that does not impose improper legal or practical barriers on the enforcement of their claims. A precondition for creditors to be able to realize and exercise their rights is proper and timely information about opening of insolvency proceedings and, consequently, possibility to lodge their claim against the debtor.

Legal doctrine emphasizes that in addition to granting due process, provision of information to the creditors and rights of creditors to participate in the insolvency proceedings by submission of claims against debtors, there is one more aim, namely, to ensure equal treatment of creditors [22].

## 4. Publication rules

According to Article 28(1) of the InsRRec the insolvency office holder or the debtor in possession shall request that notice of the judgment opening insolvency proceedings and, where appropriate, the decision appointing the insolvency practitioner is published in any other Member State where an establishment of the debtor is located in accordance with the publication procedures provided for in that Member State [23]. Such publication shall specify insolvency practitioner appointed and whether the jurisdiction rule applied is that pursuant to Article 3(1) or (2) of the InsRRec. The insolvency office holder or the debtor in possession may request that this information is published in any other

[21] As noted in decision No. SKC-101/2014 of Supreme Court of Latvia, Civil Case Department, 15.01.2014, para 7.

[22] PANNEN (ed), *European Insolvency Regulation*, Berlin, 2007, p. 253.

[23] For instance, in Latvia it would be in accordance with Law On Official Publications and Legal Information [Oficiālo publikāciju un tiesiskās informācijas likums]. – Adopted on May 31, 2012. Published in the official gazette "Latvijas Vēstnesis" on 20.06.2012. No. 96 (4699).

Member State where the insolvency practitioner or the debtor in possession deems it necessary in accordance with the publication procedures provided for in that Member State.

Article 28 of the InsRRec primarily aims at protecting existing and (potential) future contracting parties of the debtor in those countries where the debtor conducts business, by drawing their attention to the debtor's financial situation [24]. As provided in recital 75 of the InsRRec, for business considerations, the main content of the decision opening the proceedings should be published, at the request of the insolvency practitioner, in a Member State other than that of the court which delivered that decision. If there is an establishment in the Member State concerned, such publication should be mandatory. In neither case, however, should publication be a prior condition for recognition of the foreign proceedings.

## 5. Exercise of Creditor's Rights to Lodge Claims

The right of every creditor to lodge a claim in the insolvency proceedings is a direct consequence of the principle of universality. By letting a claim to be lodged in all proceedings is the universal effect of the insolvency proceedings compatible with the principle of equal treatment of creditors [25].

Creditors, should they be natural or legal persons, state institutions or private entities, have rights to submit their claims against the debtor in a written form either in the main proceedings or the secondary insolvency proceedings. It is not prohibited to lodge claims in both proceedings according to Articles 45 and 53 of the Insolvency Regulation 2015. According to the Article 45(2) of the InsRRec the insolvency practitioner in the main and any secondary insolvency proceedings also needs to submit in other proceedings any claims which have been lodged in the proceedings in respect of which this insolvency practitioner has been appointed. The interests of creditors in the latter proceedings are served by doing so, subject to the right of creditors to oppose such

[24] PANNEN (ed), *European Insolvency Regulation*, cit., p. 253.

[25] PANNEN (ed), *European Insolvency Regulation*, cit., p. 525.

lodgement or to withdraw the lodgement of their claims where the applicable law so provides.

The right to lodge claims is linked not to nationality, but to residence and domicile. It prevents discrimination against creditors, who are resident or domiciled or incorporated in other Member States [26]. The right enshrined in Article 53 of the InsRRec applies equally to main and to territorial proceedings. The right conferred by Article 53 of the InsRRec on foreign creditors to lodge their claims means that the lodgement of such claims can't be denied on the grounds that the creditor is domiciled in another Member State, or that the claim is subject to the public law provisions of another Member State [27].

As provided in recital 63 of the InsRRec any creditor which has its habitual residence, domicile or registered office in the EU has right to lodge its claims in each of the insolvency proceedings pending in the EU relating to the debtor's assets. This should also apply to tax authorities and social insurance institutions. With that tax authorities are expressly entitled to lodge claims. Therefore the principle, which can be found in the law of most states, that foreign tax laws will not be enforced does not apply to the lodging of claims by creditors in proceedings to which the InsRRec applies [28]. In this sense the InsRRec stands in contrast to the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [29], which expressly excludes revenue and customs matters from its scope as provided in Article 1(1) of the Regulation.

Regulation No. 1215/2012 is also helpful to understand and interpret the term of domicile of companies and other legal persons, as Article 63(1) of the Regulation No. 1215/2012 provides that any such entity is domiciled at the place where it has its: (a) statutory seat or (b) central administration, or (c) principal place of business. For the purposes of

[26] MOSS, FLETCHER, ISAACS (eds), *The EC Regulation on Insolvency Proceedings. A Commentary and Annotated Guide*, Oxford University Press, 2009, p. 343.

[27] PANNEN (ed), *European Insolvency Regulation*, cit., p. 525.

[28] MOSS, FLETCHER, ISAACS (eds), *The EC Regulation on Insolvency Proceedings. A Commentary and Annotated Guide*, cit., p. 343.

[29] Regulation (EU) No. 1215/2012 of the European Parliament and of the Council, in OJ L 351, 20.12.2012, p. 1.

Ireland, Cyprus and the United Kingdom, 'statutory seat' means the registered office or, where there is no such office anywhere, the place of incorporation or, where there is no such place anywhere, the place under the law of which the formation took place [30].

Pursuant to the InsRRec the right to lodge claims is a substantive right. Nevertheless, all procedural matters governing the process of lodging are governed by the relevant national law which applies to the proceeding in question as stated in Article 7(2)(h) of the InsRRec. Therefore, issues on time limits for lodging claims and the conditions for admissibility of claims are regulated according to the law governing the proceedings – *lex concursus*. The *lex concursus* determines all the effects of the insolvency proceedings, both procedural and substantive, on the persons and legal relations concerned. It governs all the conditions for the opening, conduct and closure of the insolvency proceedings [31].

## 6. Duty to inform creditors

According to recital 64 of the InsRRec those creditors who have their habitual residence, domicile or registered office in the European Union are informed about the opening of insolvency proceedings relating to their debtor's assets. The use of standard forms available in all official languages of the institutions of the Union facilitates the task of creditors when lodging claims in proceedings opened in another Member State. Article 54(3) of the InsRRec provides that the notice of insolvency proceedings must bear the heading 'Notice of insolvency proceedings' in all 23 official languages of the European Union [32] but the text need only be in one of the official languages of the Member State of the main proceedings [33]. Without such a heading, creditors would

[30] Regulation (EU) No. 1215/2012, Article 63(2).

[31] Recital 66 of the InsRRec.

[32] Bulgarian, Danish, German, English, Estonian, Finnish, French, Greek, Irish, Italian, Latvian, Lithuanian, Maltese, Dutch, Polish, Portugese, Romanian, Swedish, Slovakian, Slovenian, Spanish, Czech, Hungarian.

[33] ALLEN & OVERY, *European Cross Border Insolvency*, London, 2010, p. 1-72.

find it very difficult to understand that the document sent is an official notice about opened insolvency procedure, which – in breach of principle of equal treatment of creditors – would deprive them of the opportunity to lodge their claims [34].

Once there is no EU register of insolvency proceedings, it is particularly important that the court or the insolvency office holder is obliged to inform all known creditors situated in another Member States [35].

The sensitive question about language of heading of the notice form was analysed in the French Court of Appeal decision [36]. The judges noted that the German creditor received an individual notice written in French from the French creditors' representative, which did not comply with the requirements of Article 42(1) of the InsReg [37] as it did not contain a translation of the heading into the German language. Due to the failure to provide such information, the court decided that the German creditor could assert that the French legal deadline of four months did not apply to it. As a consequence, the German creditor's claim was still valid even though it was sent to the French creditors' representative after the French legal deadline [38].

The issue about whether the court is obliged to inform a debtor's known creditors about opening of insolvency proceedings by sending an individual notice to each creditor arose in the court of the Czech Republic [39]. The Czech Supreme Court decided that no such obligation exists in respect of known creditors with their habitual residences, domiciles or registered offices in the Czech Republic. Posting the information of the official board of the insolvency court and simultaneous publication on the electronically accessible insolvency register was sufficient notice. However, according to Article 40 of the InsReg [40] the

[34] PANNEN (ed), *European Insolvency Regulation*, cit., 2007, p. 538.

[35] MOSS, FLETCHER, ISAACS (eds), *The EC Regulation on Insolvency Proceedings. A Commentary and Annotated Guide*, cit., p. 344.

[36] CA d'Orléans, June 9, 2005.

[37] Now Article 54(1) of the InsRRec.

[38] ALLEN & OVERY, *European Cross Border Insolvency*, cit., p. 2-266.

[39] KSBR 31 INS 5344/2008, Brno Regional Court, May 19, 2009 ; 29 NSCR 27/2008, the Czech Supreme Court, October 22, 2009.

[40] Now Article 54 of the InsRRec.

Czech court has an obligation immediately to inform known creditors who have their habitual residences, domiciles or registered offices in another Member State. Such creditors must be provided with individual notices of the opening of insolvency proceedings (hereinafter – Notice). Pursuant to Article 40(2) of the InsReg [41] the Notice must include details in relation to the lodgement of claims, including time limits, the penalties laid with regard to those limits for the lodging of claims and penalties in respect of those time limits. For this class of creditors, the time limit for submission of claims runs from the date on which they actually received the Notice. Therefore the Czech Supreme Court justified the special regime in the InsReg for known creditors who have their habitual residences, domiciles or registered offices in other Member States on the grounds that such creditors would not have the opportunity to utilize the insolvency register as an effective source of information on insolvency proceedings because of the natural language barrier [42].

The UNCITRAL has also noted importance of language issue in cross-border insolvency issues, saying that formalities for submission of foreign claims shall facilitate the access of foreign creditors to the insolvency proceedings and that it is a duty of legislator to consider whether language requirements are essential or may be relaxed [43].

One more case about receipt of information from the insolvency office holder was analysed in the court of Austria. The main proceedings [44] were opened by the Commercial Court of Vienna in relation to a company registered in Germany. The Austrian court instructed a creditor with its registered office in Germany to appoint a person in Austria authorized to receive service of judicial documents as provided in Austrian national law on insolvency. According to Austrian law an authorized service recipient is appointed by the Austrian court to receive documents from the court to pass on to the company or individual who is located in a foreign jurisdiction. When the creditor appealed, arguing that the appointment of an authorized service recipient contradicted the InsReg, the OLG Vienna, as Court of Appeal held that the instruction

[41] Now Article 54(2) of the InsRRec.

[42] ALLEN & OVERY, *European Cross Border Insolvency*, cit., p. 2-265.

[43] UNCITRAL, *Legislative Guide on Insolvency Law*, cit., p. 254, point 21.

[44] 28R78/07g, June 14, 2007, OLG Vienna.

to appoint an authorized service recipient did not contravene the InsReg. While such an instruction does complicate the participation of foreign creditors in insolvency proceedings to a certain extent, this was justified by ensuring the smooth and rapid course of the proceedings in the interests of all creditors. Lack of proof of service of judicial documents abroad could lead to substantial delays to the detriment of all creditors. Moreover, the relevant Austrian legal provision only affects the service of documents once the creditor has already lodged its claim, therefore Article 39 of the InsReg did not apply [45].

## 7. Contents of the information to the creditors

According to Article 54(2) of the InsRRec the information about opened insolvency proceedings must be provided by the insolvency office holder to the known foreign creditors by an individual notice, which in particular, but not limited to, must include the following data:

a) time limits that must be observed,
b) the penalties laid down with regard to those time limits,
c) the body or authority empowered to accept the lodgement of claims,
d) the other measures laid down,
e) whether the creditors whose claims are preferential or secured *in rem* need to lodge their claims.

The notice shall also include a copy of the standard form for lodging of claims referred to in Article 55 of the InsRRec or information on where that form is available. The form shall be published in the European e-Justice Portal. Accurate information provides creditors with the essential basic data, so the creditor could be informed and could start effective protection of his legal rights and interests in the insolvency proceedings.

[45] ALLEN & OVERY, *European Cross Border Insolvency*, cit., p. 2-267.

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# Cooperation between Authorities and Insolvency Office Holders

**ILARIA QUEIROLO, STEFANO DOMINELLI***



## 1. Introduction: best practices on communication and cooperation before the Recast Regulation

The European Insolvency Regulation(s)[1], by offering at least amongst the Member States[2] of the European Union some binding and uniform

* The present work is unitary in nature; only for academic purposes, para. 1, 2, 3, and 4 are attributable to Ilaria Queirolo, whilst paras. 5, 6, 7, 8, and 9 are attributable to Stefano Dominelli.

[1] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, in OJ L 160, 30.6.2000, p. 1 (InsReg), and now Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, in OJ L 141, 5.6.2015, p. 19 (InsRRec), as amended by Regulation (EU) 2017/353 of the European Parliament and of the Council of 15 February 2017 replacing Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings, in OJ L 57, 3.3.2017, p. 19. On the emergence of EU the insolvency regulation in private international law, see for all OMAR, *Genesis of the European Initiative in Insolvency Law*, in *International Insolvency Review*, 2003, p. 147 ff.

[2] In a framework where (at that time) Community law regulated the internal market, the lack of any rule concerning the pathologic moment of companies, which was thus entirely governed by national laws, was already subject to critiques in the VIRGOS, SCHIMT, *Report on the*

rules, have come to solve some of the issues which have emerged in connection with globalisation[3] and fragmentation of principles of substantive[4] and private international law rules[5] – where the individual management of a cross-border insolvency proceedings by each State has made cross-border coordination uneasy[6], in particular in some jurisdictions. This, to the overall[7] detriment possibly of both debtors and

*Convention on Insolvency Proceedings*, available online, p. 6. This leaves open the question following the United Kingdom possibly leaving the European Union. On this matter, and its private international law possible consequences, see *ex multis* BASEDOW, *Brexit und das Privat- und Wirtschaftsrecht*, in *Zeitschrift für Europäisches Privatrecht*, 2016, p. 567, and HESS, *Back to the Past: Brexit und das europäische internationale Privat- und Verfahrensrech*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2016, p. 409. See also the EU Position Paper on Judicial Cooperation in Civil and Commercial Matters of June, 28, 2017, setting the general principles for the post-Brexit judicial cooperation in civil and commercial matters.

[3] CARBONE, *Il Regolamento (CE) n. 1346/2000 relativo alle procedure di insolvenza*, in CARBONE, FRIGO, FUMAGALLI, *Diritto processuale civile e commerciale comunitario*, Milano, 2004, p. 87, p. 89 ff. On globalisation and private international law, see in general BASEDOW, *Internationales Einheitsprivatrecht im Zeitalter der Globalisierung*, in *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 2017, p. 193. On the issues of globalisation and cross-border insolvencies, see CALVO CARAVACA, CARRASCOSA GONZÁLEZ, *Armas legales contra la crisis económica. Algunas respuestas del derecho internacional privado*, in *Cuadernos de Derecho Transnacional*, 2013, p. 38. Also noting that cross-border insolvency cases have become a matter for courts in recent years, BECKER, *Transnational Insolvency Transformed*, in *The American Journal of Comparative Law*, 1981, p. 706, p. 707.

[4] Such as the distribution between creditors after sales of debtor's assets (for all, for a comment on a practical case see TOWNSEND, *International Co-operation in Cross-Border Insolvency: HIH Insurance*, in *The Modern Law Review*, 2008, p. 801 ff., and for a judge perspective cooperation in the UK, see MILLETT, *Cross-Border Insolvency: The Judicial Approach*, in *International Insolvency Review*, 1997, p. 99 ff.).

[5] On fragmentation in insolvency matters, see FLETCHER, *General Report and Comparative Study*, in FLETCHER (ed.), *Cross-Border Insolvency: National and Comparative Studies*, Tuebingen, 1992, p. 269 ff., and WESSELS, MARKELL, KILBORN, *International Cooperation in Bankruptcy and Insolvency Matters*, Oxford, 2009, p. 39 ff.

[6] Cf. MANKOWSKI, *Art. 41 Zusammenarbeit und Kommunikation der Verwalter*, in MANKOWSKI, MÜLLER, SCHMIDT (eds.), *EuInsVO 2015*, München, 2016, Rn. 1, ARNOLD, *The Insolvency Regulation*, in SHELDON (ed.), *Cross-Border Insolvency*, London, 2015, p. 16, at 96, and BORK, *Principles of Cross-Border Insolvency Law*, Cambridge, 2017, p. 44 ff.

[7] On the contrary, some might argue differently from the perspective of one State only, since often insolvency laws were considered as the expression of domestic rules for the protection of public interests (CARBONE, *Il Regolamento (CE) n. 1346/2000 relativo alle procedure di insolvenza*, cit., p. 93). As noted by FARLEY (reporters VIIMSALU, WEBER), *A practical Approach to Court-to-Court Communication in International Insolvency Law*, in VERWEIJ, WESSELS (eds.), *INSOL Europe Technical Series – Comparative and International Insolvency Law*

creditors of the different involved States. As is known, the mentioned regulations have been adopted in the framework of judicial cooperation in civil matters, to foster the European area of freedom, security and justice[8], and to ensure access to court as well as free movement of decisions in the European judicial space[9].

As a matter of principle, the regulations do not however provide for a (complete[10]) harmonisation of substantive insolvency law between the Member States[11], but (and this in spite of their names that, if compared with other PIL regulations, are only named regulations on insolvency proceedings[12]) rather mainly provide uniform rules on international jurisdiction, applicable law, and recognition and enforcement of decisions, along with some substantive rules. All in all, the first regulation adopted by the European Union in the matters at hand was generally

*Central Thoughts and Themes – Papers from the Honours Class 'Comparative and International Insolvency Law' organised at Leiden Law School*, The Netherlands, March - June 2009, Nottingham, 2009, p. 76, «[i]*t is only relatively recently that the insolvency profession and the courts have been able to work toward a system that pays more attention to interests of the stakeholders than to issues of the national sovereignty of the jurisdictions involved*».

[8] On which see ADINOLFI, *Art. 67 TFUE*, in POCAR, BARUFFI (eds.), *Commentario breve ai Trattati dell'Unione europea*, Milano, 2014, p. 455, p. 460.

[9] CLERICI, *Art. 81 TFUE*, in POCAR, BARUFFI (eds.), *Commentario breve ai Trattati dell'Unione europea*, Milano, 2014, p. 500, p. 502. A freedom often defined as the "fifth freedom" of the European Union (cf. BOSCHIERO, *Beni immateriali (dir. int. priv. proc.)*, in *Enciclopedia del diritto Annali II-T. II*, Milano, 2008, p. 115, p. 132). With specific reference to the former insolvency regulation, see ISRAËL, *European Cross-Border Insolvency Regulation. A Study of Regulation 1346/2000 on Insolvency Proceedings in the Light of a Paradigm of Cooperation and a Comitas Europaea*, Antwerp, 2005, p. 3251 f., challenging artt. 61, and 65 EC Treaty as a valid legal basis, being these provision aimed at ensuring the free movement of people, this not being the case of Regulation 1346/2000, whose "centre of gravity" was different.

[10] The regulations bear some substantive rights, or obligations, such as the duty to cooperate, on which see *amplius infra*. Cf. PANNEN, RIEDERMANN, *Artikel 31*, in PANNEN (ed), *Europäische Insolvenzverordnung: Kommentar*, Berlin, 2007, p. 457, at 459.

[11] QUEIROLO, *Art. 81 TFUE, Sezione 2: Regolamento (CE) n. 1346/2000 del Consiglio, del 29 maggio 2000, relativo alle procedure d'insolvenza*, in POCAR, BARUFFI (eds.), *Commentario breve ai Trattati dell'Unione europea*, Milano, 2014, p. 505, p. 506.

[12] In these terms, VAN CALSTER, *COMIng, and Here to Stay: The Review of the European Insolvency Regulation*, in *European Business Law Review*, 2016, p. 735.

perceived as a positive instrument, receiving an overall correct application in the Member States[13], even though it became quickly outdated and in need of a revision under several aspects[14] (also due to an evolution of the substantive law of different Member States, that have in time progressively abandoned the idea that insolvency procedures should only be conceived as a sanction for the debtor[15]).

It appears, with little surprise, that one of the specific fields that was in particular need for a reform was that of communication and coordination between authorities and insolvency office holders[16]. Such cooperation has been deemed necessary to try to limit some of the shortcom-

[13] HESS, OBERHAMMER, PFEIFFER, *External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings (Heidelberg Report)*, p. 10.

[14] BARIATTI, *La riforma del regolamento europeo sulle procedure di insolvenza. Considerazioni introduttive generali*, in *Sidiblog*, 2015, p. 6 ff.

[15] See already WESSELS, MADAUS, *Instrument of the European Law Institute - Rescue of Business in Insolvency Law*, Sept. 6, 2017, available on SSRN; MCCORMACK, KEAY, BROWN, *European Insolvency Law*, Cheltenham, 2017, p. 303 ff.; MCCORMACK, KEAY, BROWN, DAHLGREEN, *Study on a New Approach to Business Failure and Insolvency: Comparative Legal analysis of the Member States' relevant provisions and practices*, Brussels, 2016, p. 24, and p. 281 ff.; PAULUS, *Global Insolvency Law and the Role of Multinational Institutions*, in *Brooklyn Journal of International Law*, 2007, p. 1 ff.; FLETCHER, *General Report and Comparative Study*, cit., p. 271 f.; BARIATTI, VIARENGO, VILLATA, VECCHI, *Part 1: Scope of Application*, in the *Implementation of the New Insolvency Regulation, Recommendations and Guidelines, Study JUST/2013/JCIV/AG/4679*, 2016, p. 1, and FINCH, *The Recasting of Insolvency Law*, in *The Modern Law Review*, 2005, p. 713 ff. Recalling how the economic crisis had a role in the reevaluation of traditional insolvency laws, PACCHI, *La Raccomandazione della Commissione UE su un nuovo approccio all'insolvenza anche alla luce di una prima lettura del Regolamento UE n. 848/2015 sulle procedure d'insolvenza*, in *fallimentiesocieta.it*, 2015, p. 1, at 2. In general, for the evolutionary trends in substantive insolvency law, see the *reports* in this volume. See also for the EU's action plan, Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, COM/2016/0723 final. For a first appraisal of the proposal, see DAMMANN, *The Commission Insolvency Proposal and its Impact on the Protection of Creditors, European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs*, Brussels, 2017.

[16] On the terminology see EUROPEAN BANK FOR RECONSTRUCTION AND DEVELOPMENT, *EBDR Principles in Respect of the Qualifications, Appointment, Conduct, Supervision, and Regulation of Office Holders in Insolvency Cases*, June 2007, available http://www.ebrd.com-/downloads/legal/insolvency/ioh_principles.pdf.

ings that follow the absence of a uniform substantive cross-border insolvency law[17]. As opposed to other fields, not only is communication a necessity in insolvency law, but *quick* communication is fundamental as «*Insolvency proceedings generally involve dealing with matters subject to the immediacy of real time litigation as opposed to autopsy litigation which can be more leisurely pursued*»[18].

Practical investigations show that practitioners working in continental civil law legal systems have little experience with these different type of instruments, and thus struggled in developing best practices in this very context. On the contrary, some jurisdictions have experienced an increase in use of protocols or similar agreements to ensure a better coordinated[19] and less adversarial[20] cross-border management of an insolvency case. In the context of the practical investigation carried out in the context of the SaveComp Project, this general framework has been confirmed, as practitioners in Italy and Bulgaria have reported little practical direct experience with cooperation agreements, even though cooperation has been carried out with other practitioners. On the contrary, even where cooperation agreements are – to some extent – used in some jurisdictions, such as Germany, practitioners have reported doubts and problems, in particular concerning the use of language and the lack of knowledge of accepted best practices

The utility of international agreements between courts, between courts and insolvency office holders, and between insolvency office holders seems undisputable as they can enhance cross-border communication at least, and thus be functional to a better coordinated management of the different insolvency proceedings (main, and secondary), so as to possibly maximise the outcomes of each of them to the general

[17] SCHMÜSER, *Das Zusammenspiel zwischen Haupt- und Sekundärinsolvenzverfahren nach der EuInsVo*, Frankfurt A.M., 2009, p. 46.

[18] FARLEY, *Joint UNCITRAL/INSOL Judicial Colloquium on Cross-Border Insolvency (New Orleans, March 1997) Judges' Evaluation - Collective Report*, in *International Insolvency Review*, 1997, p. 237.

[19] Due to the existence of possible multiples procedures, albeit different in nature (cfr. ESPLUGUES MOTA, *Procedimientos de insolvencia transfronterizos*, in ESPLUGUES MOTA (dir.), *Derecho del Comercio Internacional*, Valencia, 2015, p. 387, p. 389).

[20] Expert Commitee's Report on Cross-Border Insolvency Access and Recognition, Joint Project of UNCITRAL and INSOL International on Cross-Border Insolvencies, in International Insolvency Review, 1996, p. 140, at 151.

benefit[21]. On the one side, the need of, and the importance for, communication and cooperation seems to find comfort in the efforts of some practitioners and academics to collect protocols and agreements with the aim to disseminate the collected knowledge and documents, and propose a number of relevant new practices to be adopted by practitioners[22]. On the other hand, such practices appear indeed useful to attain the goals of the uniform rules, whose aim is to ensure that cross-border insolvency proceedings operate efficiently and effectively[23]. There is little doubt that the practice to share some information, to possibly conduct parallel hearings in different States might contribute to maximising the positive outcomes of the insolvency or pre-insolvency procedures for the direct benefit of the interested parties, and for the collective good of those that might be interested in saving distressed companies, or interested in avoiding assets being sold at lower prices[24].

## 2. Terminology and classification issues connected to best practices for the exchange of information, communication, and cooperation

The very first terminological issue concerns the definition of the subject matter of the present investigation, i.e. what are "best practices". This first definition, which might seem superfluous at first sight, proves indeed to be of significant relevance. Under a practical point of view,

[21] Cfr. VIRGÓS, GARCIMARTÍN, *The European Insolvency Regulation: Law and Practice*, The Hague, 2004, p. 225.

[22] For a database of protocols and agreements see for example the work of the University of Leiden, available on the official webpage of the TRI Leiden Insolvency Protocols Project (http://www.tri-leiden.eu/project/categories/insolvency-protocols-project/). Other relevant works include the INSOL Europe's European Communication & Cooperation Guidelines for Cross-Border Insolvency, the UNCITRAL Guides, the American Law Institute and the International Insolvency Institute.

[23] Insolvency Regulation Recast, recital 2, on which see SANTEN, *Communication and Cooperation in International Insolvency: On Best Practices for Insolvency for Office Holders and Cross-Border Communication Between Courts*, in *ERA Forum*, 2015, p. 229, p. 230, noting that this «*is not a hallow phrase*».

[24] Cfr. FARLEY (reporters VIIMSALU, WEBER), *A practical Approach to Court-to-Court Communication in International Insolvency Law*, cit., p. 77.

where no mandatory rule is applicable and the actual implementation of provisions is to be supported by "best practices" to which professionals from different legal systems should adhere to, the proper identification of what a "best practice" is becomes of utmost theoretical and practical importance.

From a theoretical point of view, it seems that there is an increasing number of laws (both at the domestic and at the supra-national level) that make reference to "best practices" in different fields[25]. In this sense, the necessity to determine when a practice reaches the stage of "best" becomes self-evident. The Cambridge Dictionary defines "best practices" as «*a working method or set of working methods that is officially accepted as being the best to use in a particular business or industry, usually described formally and in detail*». Similarly, the Oxford Dictionaries define them as «[c]*ommercial or professional procedures that are accepted or prescribed as being correct or most effective*». In this sense, (comparable[26]) practices should be of relevance here only if their recourse is accepted as leading to a maximisation of the outcomes of the insolvency proceedings and thus able to ingenerate a reasonable expectation that the practice at hand will be followed by all the parties.

[25] ZARING, *Best Practices*, in *New York University Law Review*, 2006, p. 294 ff.

[26] Part of the scholarship has also stressed that the term "best practice" might not well be suited. «[I]*n order to 'find' and 'compare' best practices, as the definition of benchmarking requires, such practices should already exist. Indeed, one may argue that such best practices do exist in the EBRD Office Holders Principles 2007 and in the European Communication & Cooperation Guidelines for Cross-Border Insolvency 2007 of INSOL Europe, which have been analysed in Report I. However, neither the EBRD Principles nor the INSOL Europe Guidelines have been formulated in order to set the Best Practice. Their aim was to attain a practical level playing field for IOHs in cross-border cases.* [...A]*ll we do is contribute to a level playing field of IOHs in cross-border insolvencies, implying that these Principles and Best Practices should be the minimum level of conduct and performance to be applied in national insolvencies as well. When this line of reasoning is followed, and we admit that neither the word 'best' nor the word 'comparison' is applicable, we should reconsider the name of the to be proposed rules on performance. Maybe 'Guidelines' would be better. The online Merriam-Webster dictionary defines Guidelines by: "a rule or instruction that shows or tells how something should be done". This is exactly what we try to do in drafting 'Best Practices': these are about specific performances. We conclude that using 'Guidelines' would be preferable*» (ADRIAANSE, WUISMAN, SANTEN, European Principles and Best Practices for Insolvency Office Holders, Report II: A Comparative Analysis of Rules for Insolvency Office Holder in Eleven European Countries as a Means to Identify Room for Principles and Best Practices, 2014, , p. 38).

More surely, it seems that a practice should be classified as "best practice" if a departure from this working method is not contested by practitioners only in so far as this is reasonably justified: if a practice acquires a "comply or explain"[27] nature, this expresses the "best practice" nature of the working method.

According to recital 48 InsRRec (which builds upon concepts developed around the world[28]), interested parties are called to take into consideration "best practices" «*as set out in principles and guidelines*» adopted by relevant organisations[29]. This raises the question of the difference between "principles" and "guidelines" that can express "best practices" in cross-border insolvency matters. In light of the natural meaning of the words, as well as their position and order in the phrase, it seems reasonable to believe that these represent (as also suggested by the InsRRec itself[30]) *a crescendo* of detailed suggestions given to practitioners, each representing a higher degree of authority. In this sense, "principles" could refer to general and broad operative methodological goals, whilst "guidelines" could identify a suggested (relatively general) methodological operation. For example, the necessity for insolvency office holders to cooperate could be classified as a "principle", and the possibility for courts to schedule hearings following a parallel time-line could be the declination of the principle in a "guideline"[31].

[27] SANTEN, *Communication and Cooperation in International Insolvency: On Best Practices for Insolvency for Office Holders and Cross-Border Communication Between Courts*, cit., p. 235 f.

[28] In these very terms, BEWICK, *The EU Insolvency Regulation, Revisited*, in *International Insolvency Review*, 2015, p. 172, at 184.

[29] On which see *infra*.

[30] InsRRec., recital 49, second period.

[31] Dwelling on the issue, see ADRIAANSE, WUISMAN, SANTEN, *European Principles and Best Practices for Insolvency Office Holders, Report II: A Comparative Analysis of Rules for Insolvency Office Holder in Eleven European Countries as a Means to Identify Room for Principles and Best Practices*, cit., p. 14, arguing that «[t]*he draft EIR mentions in recital 20 three concepts, Best Practices, Principles and Guidelines, without any definition. From the sequence of the wording, one understands that Best Practices are set out in Principles and Guidelines. What does that say about the meaning of the concept Best Practice?* [...] *But what INSOL Europe intended to do, and what we feel the EC requires, is to design a set of Principles and Guidelines which will actually guide the behaviour and performance of IOHs in insolvency proceedings*».

However, speaking together of best practices, and of principles and guidelines, as recital 48 InsRRec does, could indeed raise uncertainties and thus requires a fundamental specification. Whereas a "best practice" is «*a working method* [...] *accepted as being the best to use* [...]» and a guideline is «*a rule or instruction that shows or tells how something should be done*»[32], it seems necessary to stress that best practices, in both their declination of principles and guidelines, do not necessarily express the only optimal solution for the implementation of normative provisions. The expression "best practice" should not be considered to equal "optimal (and only acceptable) practice".

Best practices, or their principles and guidelines, can also be classified as regards the nature of the problems they seek to address and solve. On the one side, best practices might wish to tackle procedural issues, such as jurisdiction, or substantive issues, such as a division of tasks between different insolvency office holders[33]. Of course, a compilation and coordination of different nature-oriented best practices can lead to agreements that are mixed in nature, wishing to tackle both aspects, even though recourse to best practices appears more significant as regards procedural aspects due to the fact that insolvency office holders enjoy in this field a higher «*discretionary power*»[34].

Another relevant aspect concerns the different types of instruments that can be concluded to ensure communication and cooperation (and thus the instruments from which best practices can be inferred from). It appears possible to divide the instruments in two different macro-categories (which are also mentioned, even though not defined, by the InsRRec[35]), categorisation based on certain characteristics of the acts. On the one side, a term that is usually employed is "cross-border insolvency agreement". According to the United Nations Commission on International Trade Law (UNCITRAL), these are «*oral or written*

[32] Merriam-Webster online Dictionary.

[33] MALTESE, *Le forme di cooperazione internazionale nelle procedure di insolvenza transfrontaliera*, in CARBONE (ed.), *L'Unione europea a vent'anni da Maastricht: verso nuove regole*, Napoli, 2013, p. 341, p. 364.

[34] MALTESE, *Court-to-Court Protocols in Cross-border Bankruptcy Proceedings: Differing Approaches between Civil Law and Common Law Legal Systems*, available at https://www.iiiglobal.org/sites/default/files/media/maltese_michele%20submission.pdf, p. 26.

[35] InsRRec., recital 49, first period.

*agreement*[s] *intended to facilitate the coordination of cross-border insolvency proceedings and cooperation between courts, between courts and insolvency representatives and between insolvency representatives, sometimes also involving other parties in interest*»[36]. On the other side, the term "protocols" is also often used in practice, sometimes to indicate that courts enter an agreement, or to approve and incorporate an agreement in a court order[37].

In this sense, it must necessarily be noted that the InsRRec does not offer a definition of the term "protocol", even though it is used. In particular, cooperation between insolvency practitioners «*may take any form, including the conclusion of agreements or protocols*»[38], whilst court can coordinate «*the approval of protocols, where necessary*»[39]. In general, both protocols and agreements are seen as a tool to facilitate cooperation[40], and may vary in form and content, being possibly specific[41], or generic[42]. All these elements taken together show that the term "protocol" and "agreement" are used by the InsRRec in a flexible and broad way so as to encompass any form of cooperation[43]. Whilst the macro-classification above does not wish to be exhaustive, it seems

[36] See UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, New York, 2010, p. 4.

[37] Noting that the InsRRec does not offer a definition of the term, KOUTSOUKOU, *Part 2: Cooperation Between Main and Secondary Proceedings – Protocols*, in the *Implementation of the New Insolvency Regulation, Recommendations and Guidelines, Study JUST/2013-/JCIV/AG/4679*, 2016, p. 85. On the issue of definition see also WESSELS, *Cross-border Insolvency Agreements: What Are They and Are They Here to Stay?*, in FABER, HEES, VERMUNT (eds.), *Overeenkomsten en insolventie*, Deventer, 2012, p. 359 ff.

[38] InsRRec, art. 41(1).

[39] InsRRec, art. 42(3)(e).

[40] InsRRec, recital 49.

[41] Looking at the practices developed in the last years, it can be noted that the first protocols mainly wished to tackle communication and cooperation issues, whilst protocols, such as the Lehman and the Madoff, developed in the context of the crisis of financial companies, were more specific in that they had s detailed (non-binding) principles for creditors' rights, intercompany claims, and other substantive aspects (see MALTESE, *Court-to-Court Protocols in Cross-border Bankruptcy Proceedings: Differing Approaches between Civil Law and Common Law Legal Systems*, cit., p. 17 f.).

[42] InsRRec, recital 49.

[43] KOUTSOUKOU, *Part 2: Cooperation Between Main and Secondary Proceedings – Protocols*, cit., p. 86.

to sufficiently suite the purposes of the present investigation to highlight how the developed practices[44] appear fluid (remarkably, some have noted that «[u]*nlike many litigators, insolvency practitioners communicate with each other*»[45]). Not only "agreement" *latu sensu* can be entered into by and between different parties (insolvency office holders and courts), but such memorandums might also have different degrees of involvement (simple communication, coordination, cooperation), and legal enforceability (non-binding agreements, binding agreements)[46].

Always in terms of classification, it seems that it would be, other than extremely difficult, somehow against the very purpose of these agreements to construct a dogmatic framework to subsume different agreements into different categories. Whilst such an operation might be

[44] WESSELS, MARKELL, KILBORN, *International Cooperation in Bankruptcy and Insolvency Matters*, cit., p. 175, noting how this practice was developed as a response to statutory gaps or uncertainties.

[45] FARLEY (reporters VIIMSALU, WEBER), *A practical Approach to Court-to-Court Communication in International Insolvency Law*, cit., p. 76.

[46] UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, cit., p. 38. It should however also be given credit that in some circumstances courts might be willing to approve protocols if they do not impose obligations upon the courts, under the belief that, save the case of clear mistakes, administrators of the insolvency procedures that lodge request for approval are better placed to determine the opportunity of entering a binding agreement. In this sense, as noted by HAMILTON, HAIR, *The Approach of the Courts of England and Wales to the EC Regulations on Insolvency Proceedings as at September 2006*, in PANNEN (ed.), *European Insolvency Regulation*, Berlin, 2007, p. 635, p. 638, the competent British court of the Maxwell Communication Corp Inc (in whose framework the first modern cross-border insolvency agreements is believed to be concluded), argues that «[t]*he Protocol was brought before me for approval. I think it took me about 20 minutes to read and approve it. I checked to see whether it contained anything which looked like an obvious mistake. Otherwise the chances are I would have approved whatever it said. I had appointed administrators and it was their duty to take charge of the business and collect the assets according to their professional judgment. They were eminent insolvency accountants who had an experience in the management of insolvent business which I certainly did not share. I would ordinarily therefore accept the judgment of the best way to go forward*». However, continental scholars tend to classify "protocols" as non-binding agreements, and "agreements" as binding arrangements (in this sense both see WESSELS, *Cross-border Insolvency Agreements: What Are They and Are They Here to Stay?*, cit., para. 2, and KOUTSOUKOU, *Part 2: Cooperation Between Main and Secondary Proceedings – Protocols*, cit., p. 86). See also, MANKOWSKI, *Art. 41 Zusammenarbeit und Kommunikation der Verwalter*, cit., Rn. 62 ff. On the different legal force of protocols, see also VALLAR, *La crisi dei gruppi bancari multinazionali. Metodi di diritto internazionale privato e coordinamento tra sistemi*, Milano, 2017, p. 102 ff.

relevant for theoretical purposes, it could also possibly lead to the idea that, once categorised, an agreement must necessarily respect the features under which it has been categorised. This would limit the flexibility that practitioners have adopted in their actions: single protocols, whilst often inspired by standard documents, should always be changed and adapted to best suit the needs of the single cross-border insolvency proceedings. In this sense, it appears that terms and definitions, although necessary, should not prejudice the natural state of flux of substance.

Following the above, it could be argued that agreements can be divided in light of their binding force, and in light of the parties bound by the agreement itself (non-binding agreement between insolvency office holders; non-binding agreements between courts in insolvency office holders, etc...)[47].

Having established that dogmatic classifications should not prejudice the flexibility practice has developed, nor hamper the possibility to adapt possible standard agreements or protocols to the specific needs of a given insolvency proceedings, it appears necessary, always with regard to terminology issues, to offer a possible definition of "communication", "coordination", and "cooperation"[48]. As the dichotomy related to the binding force of agreements and protocols shows a different degree in collaboration of the interested parties, each of the mentioned actions intends to evoke a higher or lower level of collaboration between the parties as well.

The necessity for a clear determination of the content of the obligations to communicate, coordinate, and cooperate, defined as the «*three C-s concept*»[49], already stemmed from the terminology used under the

[47] BORK, MANGANO, *European Cross-Border Insolvency Law*, Oxford, 2016, p. 211 refer to protocols as being agreements more binding in nature.

[48] On this see also BORK, MANGANO, *European Cross-Border Insolvency Law*, cit., p. 200.

[49] SANTEN, *Communication and Cooperation in International Insolvency: On Best Practices for Insolvency for Office Holders and Cross-Border Communication Between Courts*, cit., p. 230. Also on the terminology used, in the previous insolvency regulation, see PANNEN, RIEDERMANN, *Artikel 31*, cit., p. 460.

2000 Insolvency Regulation, art. 31, where practitioners lamented excessive vagueness and dissatisfaction in this regards[50]. The heading of the provision, consistent in a number of its linguistic versions[51], spoke of "cooperation" and "information". Nonetheless, the regulation itself did not provide for a clear autonomous[52] definition of these terms, which – being EU law – should have been (and still must under the new rules) be interpreted autonomously in light of the meaning of the words and in light of the goals of the instrument[53]. Liquidators had an obligation to exchange information[54], within the limits eventually imposed by

[50] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (COM(2012) 743 final), p. 14, noting that «*The duties to cooperate and communicate information under Article 31 of the Regulation are rather vague. The Regulation does not provide for cooperation duties between courts or liquidators and courts. There are examples where courts or liquidators did not sufficiently act in a cooperative manner. These findings are confirmed by the results of the public consultation where 48% of the respondents were dissatisfied with the coordination between main and secondary proceedings*».

[51] The English versions speaks of "Duty to cooperate and communicate information"; the German of "Kooperations- und Unterrichtungspflicht"; the French of "Devoir de coopération et d'information"; the Spanish of "Obligaciones de información y cooperación", and the Italian of "Obbligo di collaborazione e d'informazione".

[52] On autonomous interpretation of EU law, see *ex multis* MAGNUS, *Introduction*, in MAGNUS, MANKOWSKI (eds.), *European Commentaries on Private International Law, Volume I: Brussels Ibis Regulation*, Koeln, 2016, p. 7, p. 38 ff.

[53] Of little use also reports to international conventions that have been used as a guideline for the interpretation of those European private international law acts that have in time replaced the conventions (as, for example, and to name just one, the JENARD, *Report on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters*, in OJ 5/3/1979, C 59, p. 1). In the specific field of cross-border insolvency, the *Virgos/Schimt Report* mentioned the duty of cooperation and exchange of information between liquidators of the main and secondary proceedings. Cooperation was broadly conceived as a duty upon liquidators to act in concert «*with a view to the development of proceedings and their coordination, and to facilitate their respective work*» (VIRGOS, SCHIMT, *Report on the Convention on Insolvency Proceedings*, cit., p. 141).

[54] VIRGOS, SCHIMT, *Report on the Convention on Insolvency Proceedings*, cit., p. 140, such as for example information related to assets, recovery actions, liquidation of assets, claims lodged, verification of claims, rank of creditors, reorganisations measures or proposal for composition, as well as allocations of dividends and progress in the management of the liquidation of the insolvent company.

domestic laws for reasons of data protection[55]. Additionally, the liquidator in the secondary proceedings was obliged to inform the main liquidator of «*any use or realization*»[56] of the assets[57], and transfer to main proceedings residual sums from sales of assets (even though this being an unlikely[58] scenario), whereas the main liquidator had the right to request a stay of secondary proceedings[59].

In spite of these obligations, as mentioned, the first insolvency regulation did give little guidance on the proper definition of the terminology employed: the instrument used[60] the term "communication" four times in its art. 31 (not in its recitals); it used the term "coordination" four times in its recitals only[61]; and the term "cooperation" four times, twice in its recitals (2, and 20), and twice in article 31. Nowhere were the terms defined so as to clearly determine their terminological and legal content, which was to be inferred from the examples listed in art. 31 Insolvency Regulation.

The situation is different under the new Insolvency Regulation Recast (InsRRec), which puts great emphasis on the sharing of information, coordination and cooperation, not only between professionals,

[55] *Idem*, p. 140.

[56] *Idem*, p. 141.

[57] Nonetheless, such an obligation was not meant to impair the action of the liquidator of the secondary procedure, and had thus to be interpreted in a restrictive way, only covering the most sensitive issues, such as continuation or cessation of the activities of the establishment (*idem*, p. 141).

[58] With a strong pragmatic view, it should be highlighted that such a rule seems more, at least in the context of the first insolvency regulation, just a provision to "close the system". Indeed, secondary proceedings were only winding-up in nature, and if it would have been possible to pay all creditors of the secondary proceedings and transfer additional money to the principal procedure, the company was not insolvent in first place. The same provision is not drafted in art. 49 InsRRec.

[59] Articles 33 of the Convention, and of the Insolvency Regulation. This possibility was to be used for cases of failure of information and cooperation to the detriment of the main proceedings, even though here being the rules promoting an universalistic approach to insolvency procedures (KOLMANN, *European International Insolvency Law - Council Regulation (EC) No. 1346/2000 on Insolvency Proceedings*, in *European Legal Forum*, 2002, p. 167, p. 171).

[60] SANTEN, *Communication and Cooperation in International Insolvency: On Best Practices for Insolvency for Office Holders and Cross-Border Communication Between Courts*, cit., p. 232.

[61] Recitals 3, 12, 20, and 21.

but also between courts[62]. All in all, this regulation mentions these terms 226 times[63] in its recitals and articles, even though, again not being direct regarding the terminology employed. To offer a clear definition of the terms employed, part of the scholarship[64] has proposed a substantive definition of the different terms which seems clear enough to appreciate the differences between the different terms, and the obligations that follow from such a classification.

Whereas the European rules refers to "communication", the lowest threshold of collaboration should be intended, which is limited to exchange of (relevant) information. Whereas the European rules refer to "coordination", a mid-threshold of collaboration is intended, since here the parties involved in the management of cross-border insolvency proceedings are to work together for the realisation of shared and specific purposes[65]. An example could be the parallel schedule of hearings in different Member States: hearings on the same day, and possibly in video-connection, might indeed allow the parties involved to take into consideration, at least informally, actions and programmes decided abroad, so as to each develop a specific action that is consistent with a general overview of the procedure. On the contrary, "cooperation" should refer to the highest threshold of collaboration between the interested parties, since these should cooperate together towards then same end[66]. An example might be the appointment, if possible, of the same insolvency office holders in the different States involved in the proceedings. This might very well ensure a coordinated action both in the main and in the secondary proceedings.

[62] Cf. InsRRec, recital 48.

[63] SANTEN, *Communication and Cooperation in International Insolvency: On Best Practices for Insolvency for Office Holders and Cross-Border Communication Between Courts*, cit., p. 232.

[64] *Idem*.

[65] *Idem*, p. 231.

[66] *Idem*.

## 3. Cross-border insolvency: where do "best practices" come from – and who "promotes" them?

It seems relevant to point out that the InsRRec gives proper credit to the necessity for practitioners involved in cross-border proceedings to follow best practices. It is in fact clearly stated that «[w]*hen cooperating, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law, and in particular the relevant guidelines prepared by the United Nations Commission on International Trade Law (Uncitral)*»[67].

This passage, however, raises a number of questions. Preliminary, it should be noted that, from a practical investigation, best practices are not easily collectable and, with specific reference to continental[68] Member States, the data collected shows that practitioners and courts are not particularly used to cross-border cooperation, especially if this involves a practitioner and a foreign court, the latter being sometimes unsure of the limits for their cooperation[69]. Practices collected so far mainly concern best practices developed by insolvency office holders between other insolvency office holders. Of course, the situation is significantly different where common law countries are involved, these being more

[67] Cf. InsRRec, recital 48, last period.

[68] This in spite of voluntary framework cooperation agreements being concluded between professional representatives of some Member States. From the Italian perspective a *Protocollo per rafforzare la collaborazione tra i professionisti impegnati in procedure di insolvenza pendenti contestualmente nella Ue Roma 7/5/2010* has been signed bewteen the Consiglio nazionale forense, il Consiglio nazionale dei dottori commercialisti, and the Conseil National des administrateurs judiciaires et des mandataires judiciaires, appeared in Rassegna forense, 2010, p. 167 ff, on which see CHERUBINI, *La Guida operativa relativa alle procedure d'insolvenza transnazionali disciplinate dal Regolamento UE n1346/2000 ed il Protocollo d'intesa sottoscritto tra professionisti italiani e francesi: prime riflessioni*, in *Rassegna forense*, 2010, p. 283, and KOUTSOUKOU, *Part 2: Cooperation Between Main and Secondary Proceedings – Protocols*, cit., p. 85

[69] With specific regard to the legal system, drawing up protocols consistent with the limits imposed by German law, see BUSCH, REMMERT, RÜNTZ, VALLENDER, *Kommunikation zwischen Gerichten in grenzüberschreitenden Insolvenzen - Was geht und was nicht geht*, in *Neue Zeitschrift für Insolvenz- und Sanierungsrecht*, 2010, p. 28. Cf. also BEWICK, *The EU Insolvency Regulation, Revisited*, cit., p. 184.

inclined and more willing to cooperate at different levels with foreign counterparts[70]. From this, it necessarily follows that a non-negligible number[71] of best practices collected usually refer to approaches and solutions that have been developed in the context of common law countries[72]. Domestic courts of continental States might at first not be immediately inclined to adopt best practices and, moreover, might have doubts on the possibility to adopt such practices having regard to their specific domestic legislation[73]. Nonetheless, development of and adhesion to best practices seems fundamental to reduce methodological, procedural, and substantive «*fractions*»[74] of different legal systems.

[70] On the possibilities for UK courts to cooperate with foreign courts, see OMAR, *UK Cross-Border Cooperation: Extending Rescue to Jersey Debtors on a 'Passporting' Basis*, in *International Insolvency Review*, 2019, p. 119 ff.

[71] For an example of protocol concluded by a civil law court, see the Sendo International Protocol, appeared in HAMILTON, HAIR, *The Approach of the Courts of England and Wales to the EC Regulations on Insolvency Proceedings as at September 2006*, cit., p. 660 ff.

[72] Cf. MALTESE, *Le forme di cooperazione internazionale nelle procedure di insolvenza transfrontaliera*, cit., p. 363; REQUEJO ISIDRO, *Part 2: Cooperation Between Main and Secondary Proceedings – Cooperation, Communication, Coordination*, in the *Implementation of the New Insolvency Regulation, Recommendations and Guidelines, Study JUST/2013/JCIV/AG/-4679*, 2016, p. 78; PAULUS, *Judicial Cooperation in Cross-Border Insolvencies: An outline of some relevant issues and literature*, available at http://siteresources.worldbank.org/GILD/Resources/GJF2006JudicialCooperationinInsolvency_PaulusEN.pdf, p. 1, noting that «[g]*enerally speaking,* [common law court are] *in favour of direct communication, and* [civil law courts are] *in opposition to, or at least reluctant to embrace, it*»; KOUTSOUKOU, *Part 2: Cooperation Between Main and Secondary Proceedings – Protocols*, cit., p. 85, and FARLEY, LEONARD, BIRCH, *International Annual Regional Conference Cooperation and Coordination in Cross-Border Insolvency Cases*, available at https://www.iiiglobal.org/sites/default/files/JMFarley.pdf, p. 4, clearly writing that «[m]*ost simply put, the common law with its ingredient of inherent jurisdiction allows judges to do what justice and the law requires, but also what practicality dictates* [...] *However, the tradition of the Civil Code is that the judiciary is only allowed to do what the Code specifically allows*».

[73] Under the framework of the former insolvency regulation, raising this problem in Germany as regards agreements entered into by insolvency office holders and courts, see for example PANNEN, RIEDERMANN, *Artikel 31*, cit., p. 461.

[74] In these terms, in a different context, see WILSKE, GACK, *Expert Evidence in International Commercial Arbitration*, in *The Comparative Law Yearbook of International Business*, 2007, p. 75, p. 96.

The first[75] issue that might arise from recital 48 InsRRec concerns the proper identification of European and international organisations that are active in the field of insolvency law. The recital only partially fulfils its "guiding" role for the interpretation of the main text[76]: only the United Nations Commission on International Trade Law is expressly mentioned amongst those whose work might constitute an adequate reference in terms of best practices. No further specification, but for the active role in insolvency matters, is given in order to identify an organisation that might qualify for the purposes of recital 48. It seems that the term "organisation" should be extensively interpreted so as to include entities that are not public bodies or offices of international governmental organisations[77], so as to include private research institutes, professional associations, or permanent informal group of experts. The idea that the term "organisation" should not be interpreted in a strict public international law way seems to find comfort in the vagueness of the passage, and in its "inclusive purpose", since it is clearly foreseen that also non-EU "organisations" are fit for this "guiding" role. Any different interpretation would lead to the undesirable consequence that well-established and active institutes, such as – for example – the American Law Institute, the International Association of Restructuring, Insolvency & Bankruptcy Professionals (INSOL), or expert groups, such

[75] SANTEN, *Communication and Cooperation in International Insolvency: On Best Practices for Insolvency for Office Holders and Cross-Border Communication Between Courts*, cit., p. 235.

[76] On the use of recitals in EU law, see in general HUMPHREYS, SANTOS, DI CARO, BOELLA, ROBALDO, VAN DER TORRE, *Mapping Recitals to Normative Provisions in EU Legislation to Assist Legal Interpretation*, in ROTOLO (ed.), *Legal Knowledge and Information Systems*, Amsterdam, 2015, p. 41; DENZA, *Compromise and Clarity in International Drafting*, in STEFANOU, XANTHAKI (eds.), *Drafting Legislation. A Modern Approach*, Aldershot, 2008, p. 242, and Interinstitutional Agreement on Better Lawmaking of 22 December 1998, in OJ C 321.

[77] Also advocating for an extensive interpretation of the provision, WESSELS, *Art. 41 – Cooperation and Communication Between Insolvency Practitioners*, in BORK, VAN ZWIETEN (eds.), *Commentary on the European Insolvency Regulation*, Oxford, 2016, p. 457, at p. 464, noting that «[w]*here there is no "hard law" duty, but instead the serious suggestion "to take into account" best practices, such a limited reading does not seem necessary*».

as TRI-Leiden, would not be considered "organisation" for the purposes of recital 48 InsRRec[78].

A second issue: the expression "active" in insolvency matters remains unclear[79]. This term should be read in light of "organisation", as one term helps define the sense of the other. If "active" should be interpreted in light of the subject of the phrase (the organisation) the first conclusion is that passage «*European and international organisations active in the area of insolvency law*» of recital 48 should rather be interpreted as «organisations *with regional or global recognised experience* in the area of insolvency». It seems that such an interpretation better suits the need to rely on the action of competent experts, and allows for flexibility, since this option avoids a necessary operative time to become "organisation active in insolvency". For example, the studies of a relatively new expert group could still be qualified as the deliverable of a «*European and international organisations active in the area of insolvency law*» regardless of when the group has actually been founded, should these experts be members of former well-known organisations.

Of course, a different question is whether or not some European institution, namely the European Commission, could be entitled to "back-up" some of these works so as to possibly give a more "public" nature to possible guidelines and principles.

An affirmative answer not only seems possible, in particular if the Commission's *modus operandi* in other fields is taken into consideration, but desirable as well. As regards the feasibility, whereas art. 81 TFEU might not be an appropriate legal basis, the Commission could adopt an atypical act, or a recommendation, as it has done in the field of mediation[80], to develop or support best practices cross-border insolvency proceedings. As regards the opportunity of such an action of the

[78] Similarly, see WESSELS, *Cooperation and Sharing of Information Between Courts and Insolvency Practitioners in Cross-Border Insolvency Cases*, in GRAF-SCHLICKER, UHLENBRUCK, PRÜTTING (eds.), *Festschrift für Heinz Vallender*, Tuebingen, 2015, p. 775, at p. 783.

[79] Also asking this question, SANTEN, *Communication and Cooperation in International Insolvency: On Best Practices for Insolvency for Office Holders and Cross-Border Communication Between Courts*, cit., p. 235.

[80] Commission Recommendation 98/257 of 30 March 1998 on the principles applicable to the bodies responsible for out of court settlement of consumer disputes, in OJ L 115, 17.4.1998, p. 31; Commission Recommendation 2001/310 of 4 April 2001 on the principles for out of

Commission, this evaluation is linked with a general trend of evolution in international law, that can only be mentioned here. Traditional concepts of the post-Westphalian international community are currently challenged by international practice, which gives growing relevance to natural and legal persons under different points of view. One of such is the role of "experts", or "soft organisations" called to develop "soft laws" or recommendations that, in the end, acquire significant importance in the making of national and international law as they become common minimum standards[81]. In this sense, for the European Commission itself to adopt *best practices* could to some extent be positively evaluated.

## 4. "Unilateral", and "reciprocal" cooperation: the differences in the Insolvency Regulation Recast

As stems from the above, best practices in communication and cooperation have the final aim to ensure proper coordination of parallel insolvency proceedings (in different Member States, since the InsRRec should be applied to cross-border cases[82]) so as to pursue maximum

court bodies involved in the consensual resolution of consumer disputes, in OJ L 109m 19.4.2001, p. 56. The Commission has also promoted the European Code of Conduct for Mediators, which has been developed by private parties and stakeholders. In general, on mediation, see HOPT, STEFFEK (eds.), *Mediation. Principles and Regulation in Comparative Perspective*, Oxford, 2013; DE PALO, TREVOR (eds.), *EU Mediation. Law and Practice*, Oxford, 2012; ESPLUGUES, IGLESIAS (eds.), *Civil and Commercial Mediation in Europe, Vol. I: National Mediation and Rules of Procedures*, Cambridge, 2013; ESPLUGUES MOTA, MARQUIS (eds.), *New Developments in Civil and Commercial Mediation. Global Comparative Perspectives*, Heidelberg, 2015; PESCE, RONE (eds.), *Mediation to Foster European Wide Settlements of Disputes*, Rome, 2016, and ERVO, NYLUND (eds.), *The Future of Civil Litigation. Access to Court and Court-Annexed Mediation in the Nordic Countries*, Heidelberg, 2014.

[81] In general, see CARBONE, *I soggetti e gli attori nella comunità internazionale*, in Aa.Vv., *Istituzioni di diritto internazionale*, Torino, 2016, p. s ff., and BORLINI, *Soft Law, Soft Organizations e regolamentazione 'tecnica' di problemi di sicurezza pubblica e integrità finanziaria*, in *Rivista di diritto internazionale*, 2017, p. 98 ff.

[82] More clear in this sense when speaking of cooperation in cases of insolvency procedures against companies part to a group, see InsRRec, recital 62, according to which «[t]*he rules on cooperation, communication and coordination in the framework of the insolvency of members of a group of companies provided for in this Regulation should only apply to the extent that*

valorisation of all the assets of the debtor, or to successfully save the company (the goal being similar for cases of companies part of a group).

Focusing here on proceedings opened against the same debtor, it can be argued that the general concept is more of coordination of the secondary proceedings with the main[83]. Secondary procedures can be seen, under some circumstances, as an obstacle to the main one (though opening to doubts where the main proceedings is "poor" and the secondary one is considerably richer in terms of assets[84]). Practical investigations show that secondary proceedings are mainly felt as a tool for the protection of local interests, which is, of course, a legitimate goal. Nonetheless, the InsRRec still provides some tool for "unilateral cooperation" to ensure predominance of the main proceedings. Such "unilateral" coordination mechanisms are opposed to "reciprocal" best practices in information exchange, coordination, and cooperation, addressed *infra*.

In the first place, to unilaterally ensure coordination between cross-borders insolvency proceedings within the European judicial space, a permanent feature is the principle of automatic recognition of decisions

*proceedings relating to different members of the same group of companies have been opened in more than one Member State*».

[83] Arguing in the same sense, STARACE, *La disciplina comunitaria delle procedure di insolvenza: giurisdizione ed efficacia delle sentenze straniere*, in *Rivista di diritto internazionale*, 2002, p. 295, at p. 302; VIRGÓS, GARCIMARTÍN, *The European Insolvency Regulation: Law and Practice*, cit., p. 225 ff. See also WESSELS, *Art. 41 – Cooperation and Communication Between Insolvency Practitioners*, cit., p. 462, speaking of the "dominant role" of the main insolvency proceeding, HESS, *Europäisches Zivilprozessrecht*, Heidelberg, 2010, p. 524, PANNEN, RIEDERMANN, *Artikel 31,* cit., p. 459; LAUKEMANN, *Regulatory Copy and Paste: The Allocation of Assets in Crossborder Insolvencies – Methodological Perspectives from the Nortel Decision*, in *Journal of Private International Law*, 2016, p. 379, at p. 380; LEANDRO, *Amending the European Insolvency Regulation to Strengthen Main Proceedings*, in *Rivista di diritto internazionale privato e processuale*, 2014, p. 317, at p. 319, and ISRAËL, European Cross-Border Insolvency Regulation, cit., p. 304, and BORK, MANGANO, *European Cross-Border Insolvency Law*, cit., p. 206. On the dominant role of the main proceedings, see in the case law CJEU 22 November 2012, *Bank Handlowy w Warszawie SA and PPHU «ADAX»/Ryszard Adamiak* v *Christianapol sp. z o.o*., Case C-116/11.

[84] On this, see MANKOWSKI, *Art. 41 Zusammenarbeit und Kommunikation der Verwalter, cit*., Rn. 47.

opening proceedings in another Member State: the opening of a principal procedure in a Member State has effects without any formality[85]. This provision supersedes the issue of coordination of (international[86]) jurisdiction, depriving[87] other courts the possibility to contest the localisation of the COMI and leaving them only with the possibility to open secondary proceedings if an establishment is to be found in that State[88], and precluding individual actions as well[89].

In the second place, and always to ensure the predominance of the main proceedings, the InsRRec provides the main liquidator with an

[85] InsRRec, art. 19 (1). In this sense, there is a sensitive difference in respect to other regulations, such as – for example – the Brussels I bis Regulation – in whose framework decision that close a procedure (or provisional measures) are allowed to freely move within the European judicial space.

[86] As rules of jurisdiction only designate the competent Member State, leaving up to domestic law the determination of the competent court (InsRRec, recital 26).

[87] Cfr. in the case law, CJEU 2 May 2006, *Eurofood IFSC Ltd*, Case C-341/04, in *Reports*, 2006, I 3813. See also in the Italian case law, Cass. 29 ottobre 2015, n. 22093, *Soc. Illochroma Italia* c. *S.*, in *Fallimento*, 2016, p. 829, where the court argues that the recognition ex art. 16 Insolvency Regulation also bears the consequence that the rebuttal of the coincidence between the seat and the COMI cannot be analyzed by courts of other Member States. Always in the court's eye, it remains possible to open a secondary procedure where a company, with its seat in the Member State of that procedure, is already subject to a principal procedure in another Member State, where there has been identified its COMI, being this the place of COMI of all the companies part of a Group of Companies. The possibility to open a secondary proceedings against a company with only one seat even though its COMI has been identified in another Member State rests upon the conclusion that the relevant notion of "establishment" is a factual element that rests upon "human means and goods". The circumstance that the assets of a secondary proceedings against a company with only one seat (in the Member State of the secondary proceeding) are the same assets falling within the principal proceedings (opened in the Member State of the COMI) does not violate the principle of recognition of the decision to open the principal procedure, even though all the assets fall within the secondary proceeding. The principles and rules on cooperation between liquidators ensure that the goal of the secondary procedure is not to impair the main procedure.

[88] InsRRec, art. 53. This should however be the rule given that the court would have identified the COMI if it would not have been bound by the other court's decision.

[89] See Tribunale Venezia 21 dicembre 2010, *Dan Bunkreing Ltd.* c. *Dolphin Maritime Ltd. e altro*, in *Il Diritto marittimo*, 2011, p. 607; Tribunale Venezia 23 dicembre 2010, *First cruise one corp.* c. *Delphin maritime Ltd. e altro*, in *Il Diritto marittimo*, 2011, p. 619, and Tribunale Venezia 24 febbraio 2011, *First cruise one corp.* c. *Delphin maritime Ltd. e altro*, in *Il Diritto marittimo*, 2011, p. 622.

instrument whose aim is to avoid the necessity for coordination: according to art. 36 InsRRec[90], «[i]*n order to avoid the opening of secondary insolvency proceedings, the insolvency practitioner in the main insolvency proceedings may give a unilateral undertaking (the 'undertaking') in respect of the assets located in the Member State in which secondary insolvency proceedings could be opened, that when distributing those assets or the proceeds received as a result of their realisation, it will comply with the distribution and priority rights under national law that creditors would have if secondary insolvency proceedings were opened in that Member State* [...]». If the undertaking is approved by local creditors[91], the court requested to open secondary proceedings will postpone the decision for three months, if it believes that rights of local creditors are sufficiently protected by the undertaking[92].

Similarly, and thirdly, the main liquidator is entitled to request the court for a secondary proceedings for a three (renewable) months stay of the process of realisation of assets[93].

From the above, it emerges how the substantive rights and duties for cooperation between insolvency office holders, that are additional to those eventually provided for in the substantive law governing the role of the professional, can either have a "national" or a "cross-border" relevance. The duty to publish relevant information under art. 24 InsRRec

[90] On the instruments to avoid or postpone secondary proceedings, so as to ensure predominance of the principal proceedings, see for all LAUKEMANN, ARTS, *Part 2: Cooperation Between Main and Secondary Proceedings – Instruments to Avoid or Postpone Secondary Proceedings*, the *Implementation of the New Insolvency Regulation, Recommendations and Guidelines, Study JUST/2013/JCIV/AG/4679*, 2016, p. 56 ff.

[91] To approve the undertaking, majority and voting rules applied in the Member State for restructuring plans are respected (InsRRec, art. 36 (5)).

[92] InsRRec, art. 38 (2).

[93] According to InsRRec, art. 46 (1), such a possibility is subject to a negative condition: the request for a stay can only be rejected if it is manifestly of no interest to the creditors in the main insolvency proceedings. Additionally, the requested court may (rather than "shall") that sufficient guarantees are given for local creditors. However, according to art. 46 (2), the secondary procedures is resumed at the request of a creditor or of the insolvency practitioner in the secondary insolvency proceedings if that measure no longer appears justified, in particular, by the interests of creditors in the main insolvency proceedings or in the secondary insolvency proceedings.

has a territorial relevance, whilst obligations to inform foreign creditors under art. 54 has a extraterritorial relevance[94].

Concerning insolvency procedures for groups of companies, insolvency office holders and courts are subject to the general cooperation requirements set for coordination between main and secondary proceedings opened against the same debtor. This in mind, what will be said concerning best practices in communication, cooperation, and coordination will hold true also for insolvency procedures of groups of companies. However, in this last case, limits to cooperation appear greater. Whereas cooperation in procedures involving the same debtor are subject to the limit that cooperation is not incompatible with the rules applicable to the respective proceedings[95], for groups of companies cooperation is only admissible in so far as «*such cooperation is appropriate to facilitate the effective administration of those proceedings, is not incompatible with the rules applicable to such proceedings and does not entail any conflict of interest*»[96]. This difference seems consistent with the circumstance that two principal procedures against two separate debtors have been opened. However, it raises questions on who should have the final word on the "appropriateness" of the coordination. As framed, the provisions, it appears that only where all main liquidators agree on the lack of grounds to refuse cooperation, the rules at hand will be applicable. Hence, the effective application of such rules will mostly depend on the good will of the interested parties, and on their effective predisposition to cooperation.

Insolvency proceedings related to companies part of a group also know "unilateral" mechanisms of coordination: the liquidator of a proceedings, if this again is functional to facilitate effective administration, may be heard in any of the proceedings opened in respect of any other member of the same group, or, under certain conditions, request a stay of any measure related to the realisation of the assets in the proceedings

[94] In these very terms, BORK, MANGANO, *European Cross-Border Insolvency Law*, cit., p. 205 f.

[95] See for example InsRRec, art. 41 (1).

[96] See for example InsRRec, art. 56 (1).

opened with respect to any other member of the same group[97]. Additionally, groups of companies can be subject to a specific coordination procedure[98]: art. 61 ff. InsRRec provide parties with the possibility to request a group coordination proceedings. This marks a new feature of the current rules, group of companies are to some extent taken into account, even though a collective procedure is not admitted.

## 5. Cooperation and communication between insolvency office holders (art. 41, and art. 56 InsRRec)

### I. Scope of application of the provisions: critiques, and suggested implementation and changes

As a preliminary matter, it seems necessary to stress again the importance that exchange of information, cooperation, and coordination have acquired in the new legal framework by pointing out that no longer are insolvency office holders subject to coordination requirements alone (i.e. those that administer the assets of the insolvent[99]), but courts as well[100]. The InsRRec provides for similar rules in different provisions, starting with the duty to cooperate between insolvency office

[97] InsRRec, art. 60 (1). This possibility is subject to the condition that a restructuring plan has been proposed, and the requested stay is necessary to ensure proper implementation of the plan (which would be to the benefit of the creditors in the proceedings for which the stay is requested).

[98] InsRRec, art. 60 (1) (b) (iv). In this case, the possibility for one insolvency office holder to request stay of other proceedings will not be applicable, being this eventually a possibility for the coordinator.

[99] As recalled by BORK, MANGANO, *European Cross-Border Insolvency Law*, cit., p. 204, "insolvency practitioners" are those who represent the divested insolvent in any matter related to its assets, and the one that organizes the competition between creditors for the fulfillment of their claims.

[100] The former Insolvency Regulation only provided for coordination in one provision, art. 31, which was directed at liquidator of the main, and of the secondary procedure. In the legal scholarship, cf SANTEN, *Communication and Cooperation in International Insolvency: On Best Practices for Insolvency for Office Holders and Cross-Border Communication Between Courts*, cit., p. 232 ff., and WESSELS, *Art. 41 – Cooperation and Communication Between Insolvency Practitioners*, cit., p. 458. Additionally, it must necessarily be pointed out that some Member States, following the first insolvency regulation, adopted domestic laws to clearly regulate the duty of cooperation between insolvency office holders. In this sense, for example, see Artículo

holders, which thus becomes the reference rule to compare similar obligations[101].

Art. 41 InsRRec concerns coordination of (independent[102]) insolvency office holders in the main and the secondary proceedings, whilst similarly art. 56 InsRRec concerns cooperation between insolvency office holders of two principal proceedings opened against different companies part of a group. Whilst the provisions are – to a large extent – similar[103], cooperation under art. 56 is subject to more limits. Whereas under art. 41 InsRRec cooperation finds a limit in the compatibility of the rules applicable to both proceedings[104], cooperation between insolvency office holders in principal proceedings is subject to the additional requirement of cooperation not entailing a "conflict of interests"[105], and cooperation being «*appropriate to facilitate the effective administration*»[106]. As mentioned, such a difference seems consistent with – and justifiable under – the current legal framework that still treats companies part of a group as separate legal entities, each subject to its own principal procedure (eventually even before the same court, if all COMIs are localised in a single Member State[107]). In this sense, and leaving

227. Obligaciones de cooperación, Ley 22/2003, «BOE» núm. 164, de 10/07/2003, and §357 InsO.

[101] But not identical, as cooperation between professionals and courts cannot be drawn in the same terms (cf. BORK, MANGANO, *European Cross-Border Insolvency Law*, cit., p. 208).

[102] Even though the insolvency office holder in the principal proceedings might be recognised more powers, the two offices remain independent, and no subordination is established between the parties (in this sense, in the case law see Amtsgericht Stade, Beschl. v. 24.08.2012, Az.: 73 IE 1/12, in *unalex* DE-3341, according to which, «*Der Sekundärinsolvenzverwalter ist insbesondere den Hauptinsolvenzverwaltern gegenüber nicht weisungsgebunden. Art. 31 EUInsVO geht insoweit vom Wortlaut her deutlich von einer wechselseitigen Kooperationspflicht aus. Daraus lässt keine Weisungsgebundenheit in irgendeine Richtung erschließen*»).

[103] On the necessity to create similar rules, cf. InsRRec, recital 52. On the opportunity for art. 41 InsRRec to be a reference point also for cooperation between main insolvency practitioners appointed in proceedings opened against different debtors, see MANKOWSKI, *Art. 41 Zusammenarbeit und Kommunikation der Verwalter*, cit., Rn. 104 ff.

[104] InsRRec, art. 41 (1), first period.

[105] InsRRec, art. 56 (1), first period.

[106] Cfr. SCHMIDT, *Art. 56 – Cooperation and Communication Between Insolvency Practitioners*, in BORK, VAN ZWIETEN (eds.), *Commentary on the European Insolvency Regulation*, Oxford, 2016, p. 589, at p. 595.

[107] InsRRec, recital 53 («[t]*he introduction of rules on the insolvency proceedings of groups of companies should not limit the possibility for a court to open insolvency proceedings for*

aside here group coordination proceedings[108] (on this see *infra*), it seems only natural that each principal insolvency office holder acts to ensure maximisation of value of the assets of the company he or she is managing in the context of an insolvency procedure: only where a co-ordination between different debtors (where no "super-principal" administrator can overstep a secondary one) is for the benefit of all, any form of coordination can take place. This raises the question of who is to address whether or not cooperation under art. 56 InsRRec entails a conflict of interests: as argued, to ensure autonomy to principal administrators, it appears that this provision should be interpreted by practitioners themselves, and eventually by the Court of Justice of the European Union, as meaning that both principal administrators must agree on the lack of conflict of interests. Should, on the contrary, one of the two refuse to cooperate on such a ground, this party should not be obliged to cooperate (unless a uniform definition, as of today not contained in the InsRRec[109], of "conflict of interests" is given).

More difficult to answer seems the question that could arise from the opposite (unlikely) scenario, where two principal administrators share information knowing that this is, at least, in conflict of the interests of one company. This would be against the rules applicable to the single proceedings (which is the first of the two conditions set out by art. 56 InsReg), making cooperation and exchange of information against the regulation itself, thus possibly authorising the domestic court to take specific measures to stop the flow of information, other than those related to the breach of duties of the concerned parties.

However, whilst the necessity for agreement might be a cause for non-cooperation, rather than a cause for cooperation in conflict of interests between principal administrators, under art. 56 InsRRec administrators can agree on granting additional powers to an insolvency practitioner appointed in one of the proceedings (as long as this is permitted

*several companies belonging to the same group in a single jurisdiction if the court finds that the centre of main interests of those companies is located in a single Member State*»).

[108] InsRRec, art. 61 ff.

[109] Cfr. WESSELS, *Art. 43 – Cooperation and Communication Between Insolvency Practitioners and Courts*, in BORK, VAN ZWIETEN (eds.), *Commentary on the European Insolvency Regulation*, Oxford, 2016, p. 499, at 501.

by the rules applicable to each of the proceedings), or – under the same condition – agree on the allocation of certain tasks amongst them[110].

According to both art. 41, and art. 56 InsRRec, cooperation between administrators «*may take any form, including the conclusion of agreements or protocols*». This "freedom of forms", rather than being only expressive of a (sometimes necessary[111]) incentivising policy, seems a necessity: fragmentation of substantive and procedural law in the different Member States does not make it wise to anchor cooperation to a specific form of cooperation. Such a freedom of form should cope with the impossibility of some administrators to enter written agreements, or protocols to be homologated by courts (even though art. 41 should be a sufficient legal basis for practitioners to conclude them[112]). Whereas it is impossible (both in legal, and practical terms), to reach an agreement, and to make it binding upon the interested parties, administrators are at least encouraged to pursue informal cooperation between themselves[113].

In any case, regardless of the type of form by which cooperation takes place, agreements – if concluded – can only expand the cooperation duty envisaged in the InsRRec, not being allowed to set a lower threshold for cooperation[114]. This seems to be particularly confirmed by

[110] InsRRec, art. 56 (2), last period. Noteworthy, such a possibility is not directly envisaged un art. 41 InsRRec. This seems consistent with the circumstance that between principal and secondary administrators there already is a distribution of competences, on a territorial basis.

[111] As noted by MOSS, SMITH, *Commentary on Regulation 1346/2000 and Recast Regulation 2015/848 on Insolvency Proceedings*, in MOSS, FLETCHER, ISAACS (eds.), *Moss, Fletcher and Isaacs on the EU Regulation on Insolvency Proceedings*, Oxford, 2016, p. 482 f., art, 41 InsRRec makes clear reference to protocols «*probably because Continental judges may be reluctant to approve protocols unless there is express mention of them under the heading of the duty to co-operate*».

[112] BORK, MANGANO, *European Cross-Border Insolvency Law*, cit., p. 211.

[113] The form by which cooperation is pursued is thus relevant as regards the precondition to cooperation itself. As cooperation is only possible so far as this is not incompatible with the rules applicable to the respective proceedings, the more formal an agreement on cooperation is, the more limits it might encounter. Informal cooperation might be subject to less professional limits related to the impossibility for the single administrator to share sensitive information.

[114] MÄSCH, *Art. 31 EG-InsVO*, in RAUSCHER (ed.), *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR, Band II: EG-VollstrTitelVO, EG-MahnVO, EG-BagatellVO, EU-KpfVO, EG-ZustVO 2007, HProrogÜbk 2005, EG-BewVO, EG-InsVO*, Köln, 2015, p. 1061, at p. 1210, and MANKOWSKI, *Art. 41 Zusammenarbeit und Kommunikation der Verwalter*, cit., Rn. 2. In the context of the new regulation, see also KOUTSOUKOU, *Part 2: Cooperation Between*

the specific wording of the provision, which reads that practitioners «*shall*», rather than "*may*" cooperate one with the other[115].

Lastly, before turning the attention to the substantive obligations to cooperate, as contained in the InsRRec in light of the practice followed mostly in common law countries, there remains an open question, namely whether secondary administrators have a duty to cooperate directly between themselves[116] without the mediation of the main one. Whereas art. 41 InsRRec by itself does not seem conclusive, also some guidance from the recitals seems difficult to draw. Recital 48[117] only

*Main and Secondary Proceedings – Protocols*, cit., p. 88. However, concerning the possibility for agreements and protocols to derogate from the text of the InsRRec and its obligation, to a large extent is seems acceptable that, as proposed by OBERHAMMER, KOLLER, AUERNIG, PLANITZER, *Part 3: Insolvencies of Groups of Companies*, in the *Implementation of the New Insolvency Regulation, Recommendations and Guidelines, Study JUST/2013/JCIV/AG/4679, 2016*, p. 100, at p. 114, these can indeed derogate at least art. 59 InsRRec, as this should not be interpreted as mandatory. The provision at hand prescribes that cooperation costs (in cases of cooperation for insolvencies opened against companies part to a group) are borne to be regarded as costs and expenses incurred in the respective proceedings. This, in particular also in light of the necessity to translate in the common language, might put too much pressure on the proceedings of those companies that must disclose information, with the possible consequence that their cooperation might set at the minimum acceptable standard (or that this liquidator might not be willing to conclude a protocol, as a general principle is that cost of cooperation should never be higher than its positive outcomes). In this sense, protocols should be allowed to derogate the provision of the InsRRec, which would thus only stand for the purposes of filling the gap should the parties not agree on anything on this point.

[115] InsRRec, art. 41 (2), and 56 (2).

[116] On the problem, see in the context of the previous Insolvency Regulation MÄSCH, *Art. 31 EG-InsVO*, cit., p. 1213.Also raising the doubt of a possible "horizontal effect" of the provision, BORK, MANGANO, *European Cross-Border Insolvency Law*, cit., p. 209.

[117] «*Main insolvency proceedings and secondary insolvency proceedings can contribute to the efficient administration of the debtor's insolvency estate or to the effective realisation of the total assets if there is proper cooperation between the actors involved in all the concurrent proceedings. Proper cooperation implies the various insolvency practitioners and the courts involved cooperating closely, in particular by exchanging a sufficient amount of information. In order to ensure the dominant role of the main insolvency proceedings, the insolvency practitioner in such proceedings should be given several possibilities for intervening in secondary insolvency proceedings which are pending at the same time. In particular, the insolvency practitioner should be able to propose a restructuring plan or composition or apply for a suspension of the realisation of the assets in the secondary insolvency proceedings. When cooperating, insolvency practitioners and courts should take into account best practices for cooperation in cross-border insolvency cases, as set out in principles and guidelines on communication and cooperation adopted by European and international organisations active in the area of insolvency law, and in particular the relevant guidelines prepared by the United Nations Commission on International Trade Law (Uncitral)*».

takes into consideration cooperation between main and secondary insolvency office holders, and recital 49, which makes no distinction between main and secondary administrators, is intended to guide the rules on cooperation between the insolvency office holder and the court. On the other side, the provision does not address the case where only territorial procedures are opened, and thus no main administrator is given[118]. In interpreting the relevant rules, it does not seem possible to ignore the fact that these two scenarios, however unlikely, have (for a very long time[119]) not been taken into consideration by the European lawgiver, nor can it be ignored that from the general scheme of the act, cooperation seems conceived to ensure a predominant role of the main proceedings. In this sense, even though cooperation between insolvency office holders is a commendable goal, it does not seem possible to trace back to a clear obligation for cooperation between secondary or territorial administrators. If, however, such an obligation does not clearly find its roots in the regulation, it seems true as well that such a cooperation, in particular if performed under substantive duties of insolvency office holders, could hardly be considered against the InsRRec[120].

[118] Raising the point in connection to art. 31 Insolvency Regulation, see ISRAËL, *European Cross-Border Insolvency Regulation*, cit., p. 303.

[119] Already highlight the problem, and arguing that «[t]*he Convention does not address the exceptional situation of two parallel independent territorial proceedings taking place at the same time in the Community, without main proceedings having been opened in the Contracting State where the debtor has his centre of main interests. It should be possible to apply, by analogy, the same conventional rules which serve to coordinate secondary insolvency proceedings inter se* [...]», see VIRGOS, SCHIMT, *Report on the Convention on Insolvency Proceedings*, cit., p. 26.

[120] VIRGÓS, GARCIMARTÍN, *The European Insolvency Regulation: Law and Practice*, cit., p. 227, suggest that in those cases, both for territorial or secondary proceedings, cooperation obligations that rest upon the idea of "unity" of proceedings could find application by way of analogy, whilst being excluded those mechanism of cooperation that postulate the "higher" ranking of one of the liquidators (as, for example, the unilateral possibility of the main liquidator to request a stay of procedure in the secondary proceedings). Also clearly speaking of "duty" of cooperation in the context of the InsRRec, see BORK, *Principles of Cross-Border Insolvency Law*, cit., p. 69. See also MANKOWSKI, *Art. 41 Zusammenarbeit und Kommunikation der Verwalter*, cit., Rn. 4.

## II. Content of the obligation against the background of practical experiences: critiques, and suggested implementation and changes

### a) Exchange of information

As mentioned, whereas a duty to cooperate is imposed[121], the practical results will highly depend on the will and of the skills of practitioners to work together. For example, the InsRRec does not set the formalities[122] according to which information should be exchanged, leaving thus the interested parties the task to choose the most effective, also in terms of costs. Additionally, it does not seem that the new rules offer practitioners any tool to exchange information: whereas the creation of interconnected registries to give notice of the opening of insolvency proceedings is envisaged in the InsRRec, this instrument does not seem particularly suited to exchange information once proceedings are opened. In this sense, some practitioners[123] have already suggested a possible evolution of this system so as to make exchange of information easier under a practical point of view.

The first obligation administrators have is to exchange «*any information which may be relevant to the other proceedings, in particular any progress made in lodging and verifying claims and all measures aimed at rescuing or restructuring the debtor, or at terminating the proceedings, provided appropriate arrangements are made to protect confidential information*»[124]. Clearly, exchange of information is, also in

[121] Cf. LEANDRO, *Amending the European Insolvency Regulation to Strengthen Main Proceedings*, cit., p. 318, and CRAWFORD, CARRUTHERS, *International Private Law: A Scots Perspective*, Edinburgh, 2015, p. 659 where, at fn 197, recall that, according to the case law of the Court of Justice of the European Union, cooperation must be sincere and mandatory. In the case law, referring to the mandatory nature of some cooperation duties to ensure proper management of insolvency proceedings, see CJEU 22 November 2012, *Bank Handlowy w Warszawie SA and PPHU «ADAX»/Ryszard Adamiak* v *Christianapol sp. z o.o.*, Case C-116/11, cit.

[122] MANKOWSKI, *Art. 41 Zusammenarbeit und Kommunikation der Verwalter*, cit., Rn. 22 ff., and Rn. 40, in similar terms, as to the modalities of cooperation.

[123] On which see the Dutch Report in this *Volume*.

[124] InsRRec, art. 41 (2) (a). The necessity to offer sufficient protection to confidential information finds comfort in the practice of some protocols. See, for example, US Bankruptcy Court, Southern District of New York, in Re Everfresh Beverages Inc., and Sundance Bever-

the "new era" of insolvency law, vital to save companies and businesses[125].

In spite of exchange of information being the first necessary step to an effective and efficient cooperation[126], this is subject to a condition: namely that arrangements are taken to protect confidential information. Nonetheless, with a purposive interpretation, it seems possible to construct the provision as imposing at least an effective try to reach such an agreement: the lack of a direct and express obligation (in the InsRRec[127]) to seek reaching an agreement that is the very pre-condition to obligation itself, might run against the *effet utile*[128] of the provision. To avoid the provision being deprived of its effectiveness, the proper best practice in the application of the provision at hand should lead to interpret the passage «[...] *provided appropriate arrangements are made to protect confidential information*», not as requiring a mere factual pre-condition to the exchange of information, but rather as requiring, indirectly, a sincere and honest effort of administrators in reaching such an agreement.

In any case, the duty to surrender relevant information, or the obligation to seek an agreement for the protection of data, finds its limit in domestic laws applicable to the proceedings: if the transfer of such information is not allowed by the law of the interested proceedings, the

ages Inc., Case n. 32-077978 (available on the International Insolvency Institute website), Section 5, reading that «[i]*nformation publicly available in any forum state shall be publicly available in both fora. To the extent permitted, non-public information shall be made available to official representatives of the Debtors, including any official committee appointed in these cases and shall be shared with other official representatives, subject to appropriate confidentiality arrangements and all privileges under the applicable rules of evidence*».

[125] WESSELS, *Cooperation and Sharing of Information Between Courts and Insolvency Practitioners in Cross-Border Insolvency Cases*, cit., p. 789.

[126] MANKOWSKI, *Art. 41 Zusammenarbeit und Kommunikation der Verwalter*, cit., Rn. 10.

[127] Admitting that substantive laws, or ethic codes applicable in respect to single administrators might fill the gap at a different level. Nonetheless, fragmentation of substantive law might lead to a differentiated application of EU law in the different Member States.

[128] On which see for all CARBONE, *Principio di effettività e diritto comunitario*, Napoli, 2009.

duty at hand falls within the exception to cooperation laid down in art. 41(1), first phrase, InsRRec[129].

A further good practice, at least, that should be developed in the application of the provision at hand, and always having regard to the confidential nature of the information to be exchanged, relates to the motivation of the exception provided in art. 41 InsRRec. The mere exception of the confidential nature of a piece of information would in fact seem to run against the spirit of cooperation, and could possibly pave the way to abuses. If an administrator believes that some information is confidential in nature, and thus requires a specific agreement prior to exchange, he should "explain"[130] why he has decided not to immediately comply with the cooperation obligation.

The problem is that practices do not help in determining when a piece of information is "confidential". In some protocols and agreements where the issue is tackled, a fundamental guiding principle can be found, namely that public information is not "confidential"[131]. In this sense, if some information is public, agreements should not be concluded prior to exchange. Additionally, some also argue that the confidentiality nature of information can be relevant only if the information is commercially and practically sensible[132]. However, a list of cases in which a piece of information is not to be considered as "confidential"

[129] Noting, however, how domestic legislations cannot make recourse to such an exception to stress the goals of the regulation, VIRGÓS, GARCIMARTÍN, *The European Insolvency Regulation: Law and Practice*, cit., p. 234.

[130] SANTEN, *Communication and Cooperation in International Insolvency: On Best Practices for Insolvency for Office Holders and Cross-Border Communication Between Courts*, cit., p. 235 f.

[131] This has, for example, been clearly written in the Cross-Border Insolvency Protocol for the Lehman Brothers Group of Companies (available online), where, at art. 4.3. on Communication and Access to Data and Information Among Official Representatives, it can be read that «[t]*o facilitate access to inform action, Official Representatives should make available to each other, upon request, any information that is publicly available in their respective Fora; and may, where permitted under applicable laws, share non-public information with other Official Representatives, subject to appropriate confidentiality arrangements and all privileges under the applicable rules of evidence*». Similarly, Queen's Bench of Alberta, Calpine Canada Energy Ltd, et al, Act No 0501-17864, Section 17 reads that «[i]*nformation publicly available in any forum shall be publicly available in both fora*».

[132] WESSELS, VIRGÓS, *INSOL Europe, European Communication and Cooperation Guidelines for Cross-Border Insolvency*, 2007, also published in PANNEN (ed.), *Europäische Insolvenzverordnung: Kommentar*, Berlin, 2007, p. 876, Guideline 7.5.

is missing, and it could hardly be different since such an evaluation would require taking into consideration both practical elements of single cases, as well as the laws of the States in which insolvency proceedings are carried out. This means that, but for publicly available information, one administrator might deem it necessary to conclude an agreement to ensure protection of confidential data prior to exchange.

What remains to be settled is what happens if such an agreement is not concluded, either because of a lack of consensus on the terms of the agreement, or on the necessity of the agreement itself[133]. The InsRRec does not seem to offer the main liquidator an effective mechanism to ensure secondary administrators surrender confidential information that is significantly relevant for the principal procedure. Whereas the regulation falls short on this point, written agreements or protocols might directly provide indications on the competent court and applicable law for disputes related to the interpretation and application of the agreement. This has been done in common law countries, and its simple transposition within the European judicial space is doubtful, at least[134]. All such protocols (and noting here that the InsRRec does not constitute a legal basis to conclude protocols or agreements, as cooperation is sub-

[133] In fact, as noted by MANKOWSKI, *Art. 41 Zusammenarbeit und Kommunikation der Verwalter*, cit., Rn. 13 ff., only "relevant" information should be shared between the parties, as "information overkill" is as dangerous as no information at all.

[134] See for example Cross-Border Insolvency Protocol AgriBioTech Canada, Inc., art. 7 («*Procedure for resolving disputes under the Protocol: Resolutions of Disputes Disputes relating to the terms, intent or application of this Protocol may be addressed by interested parties to both the Bankruptcy Court and the Canadian Court upon notice*»), and Superior Court of Canada, Province of Quebec, District of Montreal, Case 500-11-036133-094, July 28, 2009, Order Approving a Cross-Border Court to Court Protocol, in Abitibobowater Inc., Section 27 («*Disputes related to the terms, intent or application of this Protocol may be addressed by interested parties to either the U.S. Courts, the Canadian Court or both Courts upon notice [...]. In rendering a determination in any such dispute, the Court to which the issue is addressed: (a) shall consult with the other court; and (b) may, in its sole discretion, either (i) render a binding decision aster such consultation, (ii) defer to the determination of the other Court by transferring the matter, in whole or in part, to such other Court, or (iii) seek a Joint Hearing of both Courts [...]*»). Cfr. also Queen's Bench of Alberta, Calpine Canada Energy Ltd, et al, cit., Section 33, and Ontario Superior Court of Justice, Eddie Bauer of Canada Inc et al, Court File 09-8240-CL, Section 25.

ject to the condition that procedural laws of all proceedings are respected[135]) were approved by courts, and mainly related to court to court cooperation, but what seems relevant is that the agreements, also providing for exchange of information between administrators, contained rules on international jurisdiction. This raises qualification issues[136] on the cooperation agreement. Only if such agreements should fall outside the scope of application of the InsRRec[137], would a choice of court clause be admissible. On the one side, insolvency protocols appear strictly connected to insolvency proceedings, as a judicial enforcement of this would not be possible without the opening of insolvency proceedings[138]. On the other hand, some of the obligations contained in the agreement might be qualified as "obligations freely taken

[135] In the context of the former insolvency regulation, see WESSELS, *Cross-border Insolvency Agreements: What Are They and Are They Here to Stay*?, cit., para. 6. Under the InsRRec, see KOUTSOUKOU, *Part 2: Cooperation Between Main and Secondary Proceedings – Protocols*, cit., p. 86, ff. However, again the principle of *effet utile* should run against domestic laws that could impose at least an absolute ban on the possibility, for both practitioners and courts, to enter formal or informal agreements. In this sense, for example, a commendable practice should be followed and enhanced: provided that no specific provisions were given as regards the conclusion of protocols and agreements, French courts approved an insolvency protocol in Sendo International (in RINGEVAL, MASON, MORELL, *France*, in *Getting the Deal Through – Restructuring & Insolvency 2013*, Question 40, p. 180, it can be read that «*Judicial administrators can enter into insolvency protocols or other arrangements with foreign courts, although it is not common practice in France and, in any event, it will be decided on a case-by-case basis. To our knowledge, there have been limited examples of such process. One example of a protocol can be found in the Sendo International case, where main insolvency proceedings had been commenced in the United Kingdom against the company Sendo International and secondary proceedings had been opened in France. The liquidators of both proceedings had entered into a protocol intended to establish a practical modus operandi intended to enable effective cooperation between the two insolvency proceedings. This protocol notably provided how to proceed with the statements of claims, the debtor's assets as well as the liquidation proceeds (Commercial Court of Nanterre, 29 June 2006, Sendo International). A more recent example is the Nortel restructurings where insolvency protocols were signed between the administrators appointed in the main proceedings (administration) in England with respect to the French Nortel companies and the judicial administrator appointed in the French secondary proceedings*»).

[136] Tackling the issue as regards the law applicable to agreements concluded by insolvency office holders, see HESS, *Europäisches Zivilprozessrecht*, cit., p. 525.

[137] On such a delicate matter, asking the question of whether it is possible to conclude a choice of law agreement for protocols, and distinguishing the answer based on the different obligations contained in the agreement, see WESSELS, *Cross-border Insolvency Agreements: What Are They and Are They Here to Stay?*, cit., para. 7.

[138] According to the French Cour de cassation 18.12.2007 - 06-17.610, in *unalex* FR-2081, «[l]'*exclusion prévue à l'art. 1-2 de la Convention de Lugano de 1988 ne concerne que les*

by the parties" as required by the case law of the Court of Justice of the European Union to classify an obligation as "contractual" in nature[139].

*actions qui dérivent directement de la faillite et qui s'insèrent étroitement dans le cadre de la procédure collective*». See also Court of Appeal (Civil Division) England and Wales (UK) 21.05.1999 - QBENI 98/1598 - QRS 1 Aps and Others / Frandsen, in *unalex* UK-4 «[a]*rticle 1(2) Brussels Convention is only applicable so far as an action directly concerns the winding up of an insolvent company. This is not the case when the action could have been brought before the company was insolvent*», and Hof Amsterdam 14.05.1992, in *unalex* NL-166 («[a]*rticle 1(2) Brussels Convention only includes claims that only the insolvency administrator may raise, meaning such claims that arise directly from the insolvency and are completely settled within that context. Not included are claims that the insolvency administrator raises for torts or delicts committed on clients of the insolvent company. Those clients may raise such claims independently of the insolvency proceedings*»).

[139] Addressing the issue under the point of view of the law applicable to such agreements, see WESSELS, *Cross-border Insolvency Agreements: What Are They and Are They Here to Stay?*, cit., para. 7, arguing that «*In the context of the Rome I Regulation, which entered into application 17 December 2009, the question may arise whether as to the law applicable, the cross-border insolvency agreement is a "contract" for the purposes of the Rome I Regulation. It may be the case that under certain domestic law the answer will be negative, but it is submitted that the term "contract" must be given an independent meaning in the light of the aims of the Regulation, to be understood as having essentially the same meaning as in Article 5(1) of the Brussels I (Judgments) Regulation, in that it refers to obligations which are freely assumed by one party towards the other. Certain matters, which may have been dealt with in the cross-border agreement, are however excluded from the Rome I's scope, such as the internal organization or winding up of a company or the personal liability of officers and other members as much for the obligations of the company, see Article 1(2)(f) Rome I. these matters are governed by the law of the place of incorporation. When the agreement contains an arbitration or jurisdiction clause, Article 1(2)(c) excludes the applicability of Rome I with regard to the validity and interpretation of such clauses. Legal questions are to be determined by Article 23 Brussels I (Judgments) Regulation or by Article II and V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Without such a choice, it seems obvious that in the context of Article 3 the law governing the agreement is the lex concursus of the Member State in which the main proceedings have been opened*». Also on the issue of the law applicable to agreements or protocols, see BORK, MANGANO, *European Cross-Border Insolvency Law*, cit., p. 211, according to whom « [...] *the interpreter must invert the terms of the problem, ask himself what is the concrete nature of a particular arrangement, and then find the regime according to which the arrangement can be made. For example,* [...] *if an arrangement is vague and does not address specific issues, it will not be a contract and will not be binding; if an arrangement has been approved by court, it will become a court order and will be subject to the law of the State of the court that has approved it; if an arrangement involves questions governed by the law of companies and the personal liability of officers and members, it will be subject to private international law governing companies* [...]». See also MANKOWSKI, *Art. 41 Zusammenarbeit und Kommunikation der Verwalter*, cit., Rn. 53 ff. noting that an "insolvency qualification" will lead to the application of art. 7 InsRRec as a conflict of laws rule, whilst the qualification as "contractual obligation" could lead to significant uncertainties as regards to the applicable law absent choice of law. In this case, due to the specificities of the obligation, there seems to lack a characteristic obligation and thus the applicable law should be determined under

At least for those "parts" of the agreements that are necessarily linked to the insolvency proceedings, it appears that the common law practice followed by courts does not seem to be perfectly transposable in the European Judicial space, these clauses being coherent with the common law principle of inherent jurisdiction[140], but against the principles of European judicial cooperation in insolvency matters.

The above mentioned bears a significant consequence: when falling within the scope of application of the InsRRec, protocols must be consistent with the laws applicable to all the proceedings involved. A condition that might limit the occasions to conclude a formal binding or non-binding cooperation agreement; in this sense, also taken into consideration the costs related to the negotiation and conclusion of a possible agreement, it would be a good practice for insolvency office holders, at least where protocols are not common in a given legal order, to seek prior informal contact with the court to check on the possible limits on such agreements[141].

This issue is connected with the general problem that the InsRRec sets obligations, but no sanctions[142]: if an administrator wishes a court to interpret the protocol, the obligations therein contained will be governed by the relevant substantive law regulating the professional conduct of the single professional[143]. This being a "connected claim", art.

the objective connecting factors under art. 4(4) Rome I Regulation, thus giving relevance to the localization of the insolvency assets, creditors, establishments of the debtors, etc. Also pointing out that "procedural aspects" contained in the protocols will be governed by the *lex fori*, with the risk of cumulative conditions, and "substantive matters" will be governed by the law applicable in light of the relevant conflict of laws rules, VALLAR, *La crisi dei gruppi bancari multinazionali*, cit., p. 133 f.

[140] On which see, in the most recent writings, GODWIN, *The Inherent Power of Common Law Courts to Provide Assistance in Cross-Border Insolvencies: From Comity to Complexity*, in *International Insolvency Review*, 2017, Published online in Wiley Online Library. But see *contra* KOUTSOUKOU, *Part 2: Cooperation Between Main and Secondary Proceedings – Protocols*, cit., p. 99 suggesting the opportunity of including dispute resolution clauses under protocols or insolvency agreements.

[141] KOUTSOUKOU, *Part 2: Cooperation Between Main and Secondary Proceedings – Protocols*, cit., p. 87 ff.

[142] MANKOWSKI, *Art. 41 Zusammenarbeit und Kommunikation der Verwalter*, cit., Rn. 87 ff., MÄSCH, *Art. 31 EG-InsVO*, cit., p. 1212 f., and PANNEN, RIEDERMANN, *Artikel 31*, cit., p. 469.

[143] And leaving here open the question on whether it would be possible to judicially enforce art. 41 InsRRec so as to allow the principal liquidator recurring to a mechanism by which the

6 InsRRec should apply[144]: it could indeed be excluded (as stated in some protocols[145]) that the principal liquidator be allowed to seise its own court to ensure compliance of professional duties by the secondary liquidator, or to seek removal of the secondary liquidator[146]: any different solution would be inconsistent with the autonomous nature of the two procedures. Were the two procedures not autonomous, the principal

other party is obliged to cooperate. There is however little doubt, as noted by WESSELS, *Cross-border Insolvency Agreements: What Are They and Are They Here to Stay?*, cit., para. 7, that it is the *lex concursus* the one that governs the substantive obligations of cooperation of the single administrator. In this sense, as noted by a pre-court protocol concluded by liquidators in the framework of the Commodore Electronics Limited, and Commodore International Electric (available on the International Insolvency Institute website), «[b]*oth the Committee and the Liquidators shall maintain confidentialities as the Liquidators may request or as may be appropriate under the circumstances The exchange of opinions or information between the Liquidators and the Committee or their respective professionals shall not be deemed a waiver of any applicable privileges, including the attorney-client and work product privileges*». Similarly, DE CESARI, MONTELLA, *Le procedure di insolvenza nella nuova disciplina comunitaria*, Milano, 2004, p. 237 f., and MANKOWSKI, *Art. 41 Zusammenarbeit und Kommunikation der Verwalter*, cit., Rn. 89 ff. In particular, see BORK, MANGANO, *European Cross-Border Insolvency Law*, cit., p. 205, arguing that art. 7(2)(c) InsRRec determines that the law of the State of appointment determines both power, as well as duties and liabilities of the professional. In the domestic case law on art. 31 Insolvency Regulation, see also LG Leoben, 31.08.2005 - 17 S 56/05m, in *Zeitschrift für Wirtschaftsrecht*, 2005, p. 1930, according to which «*Es bleibt den einzelnen Mitgliedstaaten überlassen, die Rechtsfolgen von Verstößen gegen die in Art. 31 EuInsVO normierte Kooperations- und Unterrichtungspflicht für die Verwalter des Hauptinsolvenzverfahrens und des Sekundärinsolvenzverfahrens zu regeln*».

[144] One the contrary, the different action of creditors who might seek compensation for damages following an illegitimate un-coordinated management of proceedings could seek to bring an action under the rules of the Brussels I bis Regulation, being this an action for damages for breach of professional duties.

[145] See US District Court for the Western District of Texas, San Antonio Division, in Re Inverworld Inc., et al, Civil Action No. SA99C0822FB (available on the International Insolvency Institute website), Sections 20 ff., p. 21 f., according to which «[e]*xcept as specifically provided herein, the Cayman Court shall have sole jurisdiction and power over Cayman Liquidators, as to their tenure in office, the conduct of the liquidation proceedings under Cayman law, the retention of the Cayman Liquidators and other Cayman professionals, and the hearing and determination of matters arising in the liquidation proceedings under Cayman law*» (and the same is provided for English, and for US Courts and their sole jurisdiction over English/US liquidators). Similarly, see Superior Court of Justice, Commercial List, In Re Laidlaw Inc. et al, Court File No 01-CL-4178 (available on the International Insolvency Institute website), Sections 13 ff.

[146] Less likely one could imagine that under art. 56 InsRRec the principal investigator could ask its court to order another principal administrator to produce documents and information.

liquidator would not need specific rights to seise the court of the secondary procedure to take actions[147], but would rather be authorized to "directly manage" the secondary procedure. However, some have also argued that the mere absence of sanctions does not mean that the implementation of the duty to cooperate in general is solely demanded to domestic law: as the duty to cooperate finds its roots in European Union law[148], domestic legislations should be prevented from adopting domestic laws able to frustrate the effectiveness of the regulation.

Assuming smooth exchange of the most sensitive information should be the general rule, the question turns to what the parties can share with each other. Art. 41(2)(a) InsRRec, and here contrary to art. 56(2)(1)[149], offers an open[150] list amongst which information related to «*any progress made in lodging and verifying claims and all measures aimed at rescuing or restructuring the debtor, or at terminating the proceedings*»[151]. In some cases, practices have also led to agreements clearly providing also for reasonable request all books, records, reports and opinions of experts other than those of legal counsel[152]. Both art. 41(2)(a), and art. 56(2)(a) seem to favor quick and cost-effective informal exchange of information, if this is sufficient for the purposes of the

[147] Cf., lacking a direct power of management of the secondary proceedings, InsRRec, recital 48.

[148] ISRAËL, *European Cross-Border Insolvency Regulation*, cit., p. 304.

[149] This provision in fact, being more general in nature, only provides that practitioners shall «*communicate to each other any information which may be relevant to the other proceedings*».

[150] Whose non-exhaustive nature is confirmed by the use of the term "in particular".

[151] On practical examples of information to be exchanged, ranging from an overviews of the assets to the docket number of the procedure, see MÄSCH, *Art. 31 EG-InsVO*, cit., p. 1211; VIRGÓS, GARCIMARTÍN, *The European Insolvency Regulation: Law and Practice*, cit., p. 233; WESSELS, *Art. 41 – Cooperation and Communication Between Insolvency Practitioners*, cit., p. 489, and PANNEN, RIEDERMANN, *Artikel 31*, cit., p. 465.

[152] Commodore Electronics Limited, and Commodore International Electric, cit., «[i]*t is expected that upon reasonable request all books, records, reports and opinions of experts other than those of legal counsel will be exchanged by and between the Liquidators and the Committee in connection with the sale of assets and litigation unless the Bankruptcy Court or the Supreme Court orders otherwise, subject to appropriate confidentialities*».

single case[153]. Both provisions mention that exchange of information should take place "as soon as possible" (thus without specifying "when"[154]): no formalities, to be added to possible necessary informal translations, should be imposed to the detriment of a timing choice. However, should the information be used in court by one party, and as it stems from the analysed protocols, it might be necessary that documents are sent so as to respect rules of evidence in the court where they are to be exhibited. In this sense, a best practice to be supported would consist not only in asking for relevant information, but also informing the counter-part of the possible necessary formal requirements that are imposed by the local laws, so as to avoid providing information or documents that cannot be produced in a court of law.

### b) SaveComp, and maximization of assets: coordination of liquidators

Under art. 41(2)(b) InsRRec, insolvency office holders shall «*explore the possibility of restructuring the debtor and, where such a possibility exists, coordinate the elaboration and implementation of a restructuring plan*»[155]. In the first place, it must be noted that such a provision,

[153] Also suggesting the use of IT in communication to ensure prompt exchange of information, see ADRIAANSE, WUISMAN, SANTEN, *European Principles and Best Practices For Insolvency Office Holders Report III: The Statement Of Principles and Best Practices For Insolvency Office Holders in Europe*, cit., Principle 5.

[154] What is not directly addressed is "when" liquidators should exchange relevant information when this is available, or, in other words, how the expression "as soon as possible" of art. 41(2)(a) should be interpreted. Whereas some might look up at general provisions of domestic law to solve the question, so as to identify a specific time-limit, it appears that such a rigidity should be avoided. Such a lack, after the recast, seems the product of the will of the European lawgiver. On the contrary, reference to highest professional standards, against the background of the circumstances and difficulties of the case, such as translation issues, should be made (on this point, see WESSELS, *Art. 41 – Cooperation and Communication Between Insolvency Practitioners*, cit., p. 489, and PANNEN, RIEDERMANN, *Artikel 31*, cit., p. 464). Some have also suggested that liquidators must inform all known parties about their own appointment within a four days from the appointment itself (ADRIAANSE, WUISMAN, SANTEN, *European Principles and Best Practices For Insolvency Office Holders Report III: The Statement Of Principles and Best Practices For Insolvency Office Holders in Europe*, cit., Principle 5). See also MANKOWSKI, *Art. 41 Zusammenarbeit und Kommunikation der Verwalter*, cit., Rn. 25.

[155] Similarly, see InsRRec, art. 56(2)(c), according to which liquidators «*consider whether possibilities exist for restructuring group members which are subject to insolvency proceedings*

not contained in the previous regulation, is consistent with the new scope of application of the rules, which now extend to proceedings aiming at the rescue of distressed businesses[156] (hence the provisions of cooperation also are applicable, to the possible extent, where the debtor remains in possession of his/her assets[157]). Insolvency office holders now have a duty to explore the possibility of avoiding liquidation. Should they believe a similar possibility exists, they should proceed with a possible preparation of a plan and its implementation[158].

However, it remains that the InsRRec does not provide for direct reactions to the violation of the duty to explore the possibility of reconstructing the company (whilst there clearly is no obligation as regards the positive or negative outcomes of such coordination, nor any substantive rule on how this cooperation should be carried out or which point it should be touched). However, in general terms, it seems that such a coordination is, again, for the benefit of the main insolvency proceedings[159].

Should the parties not agree on the necessity of a restructuring plan, the main liquidator may require a stay of the secondary proceedings process of realization of assets[160] or request the court of the secondary proceedings for the conversion of the secondary insolvency proceedings into another type of proceedings if this is the most appropriate as

*and, if so, coordinate with regard to the proposal and negotiation of a coordinated restructuring plan*». There have also been cases in Europe of agreements between liquidators who have sought cooperation for the sales of the debtor's assets. For a study on the practice in the BCCI Group, see SHANDRO, *Judicial Co-operation in Cross-Border Insolvency - The English Court Takes a Step Backwards in BCCl (Np. 10)*, in *International Insolvency Review*, 1998, p. 63, at p. 64 ff.

[156] InsRRec, recital 10, whereas under the previous legal framework secondary proceedings where only winding-up in nature (Art. 34(1) of the previous insolvency regulation), whilst allowing the main liquidator to ask for this procedure being closed without liquidation (if this was admitted by the *lex fori* of the secondary proceedings).

[157] InsRRec, art. 41(3).

[158] MANKOWSKI, *Art. 41 Zusammenarbeit und Kommunikation der Verwalter*, cit., Rn. 35.

[159] Under the previous legal framework, cf. VIRGÓS, GARCIMARTÍN, *The European Insolvency Regulation: Law and Practice*, cit., p. 84.

[160] InsRRec., art. 46, being the manifest lack of interest to the creditors in the main insolvency proceedings the only (negative) condition upon which the request can be rejected.

regards the interests of the local creditors and coherence between the main and secondary insolvency proceedings[161].

Art. 41(2)(b) InsRRec must necessarily be read in conjunction with art. 47, specifically devoted to the powers of the insolvency practitioner to propose restructuring plans, and art. 7(2)(j) regarding the applicable law. Art. 47(1) InsRRec empowers the main insolvency office holder to propose before the court of the secondary proceedings a restructuring plan, if the closure of the secondary proceedings by such plan is allowed by the *lex fori*, which thus regulates terms and condition of the plan. The second paragraph of the provision, consistently with the principle of territoriality of secondary proceedings[162], ensures that restructuring plans do not affect creditors' rights on debtor's assets that fall outside the scope of application of the secondary procedure.

What emerges from the above is that, if the insolvency liquidators cooperate, art. 47 InsRRec should find no application. Should cooperation based on art. 41(2)(b) fail, the main liquidator will propose the restructuring plan before the court of the secondary proceedings by lodging an autonomous claim to that end. Nonetheless, as noted in the literature[163], this party will only have the possibility to propose such a plan, not being, on the contrary, able to impose it. This necessarily follows from the reading of art. 7(2)(j) InsRRec, according to which the *lex fori* governs «*the conditions for, and the effects of closure of, insolvency proceedings, in particular by composition*». The main liquidator proposing a restructuring plan will have to respect local laws, also as regards rules concerning approval by creditors, thus excluding any possibility of imposition.

In any case, may this be functional to the liquidation or to the reorganization of the company, according to art. 41(2)(c), liquidators shall «*coordinate the administration of the realization or use of the debtor's*

[161] InsRRec., art. 51, provided that the conditions for opening that type of proceedings under national law are fulfilled and that that type of proceedings.

[162] DAMANN, *Art. 47 – Powers of the Insolvency Practitioner to Propose Restructuring Plans*, in BORK, VAN ZWIETEN (eds.), *Commentary on the European Insolvency Regulation*, Oxford, 2016, p. 529, at p. 534.

[163] *Idem*, at p. 532.

*assets and affairs*»[164]. Again, confirming the preponderant role[165] of the liquidator in the main insolvency proceedings (thus allowing for more possible autonomy where, in case of groups of companies all liquidators are "main liquidators"[166]), the insolvency office holder in the secondary proceedings, already obliged to pass any information that might be of relevance, «*shall give the insolvency practitioner in the main insolvency proceedings an early opportunity to submit proposals on the realization or use of the assets in the secondary insolvency proceedings*». This being a specification of the general obligation of cooperation and exchange of information, all the above, in terms of both good practices and open issues, still stands as above, with the further specification that the InsRRec does not set a clear and express obligation upon secondary insolvency office holders to follow the proposal of the main insolvency office holder[167].

## 6. Cooperation and communication between courts (art. 42, and art. 57 InsRRec)

As mentioned, the new InsRRec extends its scope of application as regards communication and cooperation also vis-à-vis courts[168]. Even

[164] Similarly, see InsRRec, art. 56(2)(b), according to which liquidators «*consider whether possibilities exist for coordinating the administration and supervision of the affairs of the group members which are subject to insolvency proceedings, and if so, coordinate such administration and supervision*».

[165] Cfr. DE CESARI, MONTELLA, *Le procedure di insolvenza nella nuova disciplina comunitaria*, cit., p. 237, noting that former art. 31, very similar to art. 41 InsRRec, provided equal obligations for principal and secondary liquidators, but for the case of the unilateral obligation of the latter to offer the former any information necessary to submit proposals on the realization or use of the assets in the secondary insolvency proceedings.

[166] As mentioned, according to art. 56(2), last phrase, insolvency office holders can grant additional powers to one of them, if the agreement is permitted by the rules applicable to all proceedings, or determine a distribution of tasks, under the same condition as above.

[167] MANKOWSKI, *Art. 41 Zusammenarbeit und Kommunikation der Verwalter*, cit., Rn. 77.

[168] This being consistent with the role of mutual trust in the European judicial space, that already was the basis for the principle of automatic recognition of decisions in the previous insolvency regulation (WESSELS, Art. 42 – *Cooperation and Communication Between Courts*, in BORK, VAN ZWIETEN (eds.), *Commentary on the European Insolvency Regulation*, Oxford, 2016, p. 492, at p. 493). Cfr. PAULUS, *Über die Rolle der Erwägungsgründe in der revidierten EuInsVO*, in EXNER, PAULUS (eds.), *Festschrift für Siegfried Beck zum 70. Geburtstag*, München, 2016, p. 393, at p. 402; VALLENDER, *EuInsVO 2017 – eine neue Herausforderung für*

though some domestic courts sought to construct the general rules on cooperation as also being binding upon courts[169], the former obligation for liquidators to cooperate was generally perceived as insufficient to cover the obligation to cooperate between practitioners and courts, or between courts[170]. However, it seems that direct communication between courts will overall have significant positive outcomes in those

*Insolvenzgerichte*, in *idem*, p. 537, at p. 545; MOSS, SMITH, *Commentary on Regulation 1346/2000 and Recast Regulation 2015/848 on Insolvency Proceedings*, cit., p. 483, and MANKOWSKI, *Art. 42 Zusammenarbeit und Kommunikation der Gerichte*, in MANKOWSKI, MÜLLER, SCHMIDT (eds.), *EuInsVO 2015*, München, 2016, Rn. 1.

[169] MOSS, SMITH, *Commentary on Regulation 1346/2000 and Recast Regulation 2015/848 on Insolvency Proceedings*, cit., p. 483, referring to In Re Nortel Networks SA & Ors [2009] EWHC 206 (Ch) (11 February 2009), according to which, also in comparative perspective, «*The request for the assistance of the various foreign courts stems directly from the duty of co-operation imposed by Article 31(2) of the EC Regulation. This provides that: "Subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to cooperate with each other." Although framed in terms of co-operation between office-holders, the duty has been treated by the courts of Member States as incorporating or reflecting a wider obligation which extends to the courts which exercise control of insolvency procedures in their respective jurisdictions. So in Re Stojevic (9 November 2004, 28 R 225/04w) the Vienna Higher Regional Court said that: "Although the wording of Art 31 of the EU Insolvency Regulation only obliges the trustees in bankruptcy to cooperate, this also applies to the court according to the prevailing opinion and under the UNCITRAL model law"*». Some authors also argue that the mere lack of a rule on cooperation between courts could not have been used to construct an *a contrario* argument so as to sustain that coordination between courts was irrelevant, or against the former insolvency regulation (nonetheless, being difficult to argue that "courts" could have been subsumed under the regulation's definition of "liquidator"; see PANNEN, RIEDERMANN, *Artikel 31*, cit., p. 463 f.). However, even though court-to-court cooperation could have been ontologically consistent with goals of the former insolvency regulation, the question was whether courts had the possibility to cooperate, or rather an obligation to do so absent a clear rule. A question that part of the case law as answered in the sense that «*Wenngleich Art 31 EuInsVO nach seinem Wortlaut nur die Verwalter zur Kooperation verpflichtet, gilt dies nach herrschender Auffassung - ebenso wie nach dem UNCITRAL-Modellgesetz - auch für die Gerichte*» (OLG Wien (AT) 09.11.2004 - 28 R 225/04w, in *Neue Zeitschrift für Insolvenz- und Sanierungsrecht*, 2005, p. 56 ff.).

[170] Cf. REQUEJO ISIDRO, *Part 2: Cooperation Between Main and Secondary Proceedings – Cooperation, Communication, Coordination*, cit., p. 73, and CRANSHAW, *Zehn Jahre EuInsVO und Centre of Main Interests – Motor dynamischer Entwicklungen im Insolvenzrecht?*, in *Deutsche Zeitschrift für Wirtschafts- und Insolvenzrecht*, 2012, p. 133, at p. 141. However, under the previous legal framework, domestic legislators did adopt domestic laws so as to ensure that their courts had the possibility to communicate with foreign courts. In this sense, see § 348(2) InsO. See also LEANDRO, *Amending the European Insolvency Regulation to Strengthen Main Proceedings*, cit., p. 320, noting that such a lack of a duty to cooperate was in particular detrimental to the main proceedings where this had the goal to rescue the business, whilst secondary proceedings could have only been liquidation-oriented. This being said, the Court of Justice

cases where insolvency proceedings are directly managed by courts rather than by administrators[171].

In general, the topic of court to court cooperation has been widely addressed, and there is general consensus that direct communication and cooperation can indeed be functional to a better overall management of parallel cross-border insolvency proceedings[172]. This was al-

had the chance to argue, at least that, under the former insolvency regulation that «*The principle of sincere cooperation laid down in Article 4(3) EU requires the court having jurisdiction to open secondary proceedings, in applying those provisions, to have regard to the objectives of the main proceedings and to take account of the scheme of the Regulation, which, as observed in paragraphs 45 and 60 of this judgment, aims to ensure efficient and effective cross-border insolvency proceedings through mandatory coordination of the main and secondary proceedings guaranteeing the priority of the main proceedings*» (CJEU 22 November 2012, *Bank Handlowy w Warszawie SA and PPHU «ADAX»/Ryszard Adamiak* v *Christianapol sp. z o*.o., Case C-116/11, cit., para. 62). Suggesting the paradox following from such a case law (a court seised for secondary proceedings obliged to open it, save for its obligation to adopt national measure bearing in mind the interests of the main proceedings, again LEANDRO, cit. *supra*, p. 325).

[171] BEWICK, *The EU Insolvency Regulation, Revisited*, cit., p. 184.

[172] In the literature, on cross-border cooperation between courts in insolvency matters other than the already quoted literature, see *ex multis*, BRIGGS, *Co-operation Between Courts in International Insolvency*, in *British Yearbook of International Law*, 2006, p. 678; CLIFT, *The UNCITRAL Model Law on Cross-Border Insolvency – A Legislative Framework to Facilitate Coordination and Cooperation in Cross-Border Insolvency*, in *Tulane Journal of International & Comparative Law*, 2004, p. 307; FLASHEN, SILVERMAN, *Cross-Border Insolvency Cooperation Protocols*, in *Texas International Law Journal*, 1998, p. 587; FLETCHER, WESSELS, *A Final Step in Shaping Rules for Cooperation in International Insolvency Cases*, in *International Corporate Rescue*, 2012, p. 283; GROPPER, *Cooperation in Cross-Border Insolvency Cases*, in *Festschrift für Heinz Vallender zum 65. Geburtstag,* Köln, 2015, p. 207; PAULUS, *Judicial Cooperation in Cross-Border Insolvencies*, available at http://siteresources.worldbank.org/GILD/Resources/GJF2006JudicialCooperationinInsolvency_PaulusEN.pdf; VALLENDER, NIETZER, *Cooperation and Communication of Judges in Cross-border Insolvency Proceedings*, in SANTEN (ed.), *Perspectives on International Insolvency Law: A tribute to Bob Wessels*, Deventer, 2014, p. 127; WESSELS, *EU Courts Can Rely on Soft Law Principles for Cooperation in International Insolvency Cases*, in *International Insolvency Law Review*, 2015, p. 145; EHRICKE, *Verfahrenskoordination bei grenzüberschreitenden Unternehmensinsolvenzen*, in BASEDOW, DROBNIG, ELLGER, HOPT, KÖTZ, KULMS, MESTMÄCKER (eds.), *Aufbruch nach Europa, 75 Jahre Max-Planck-Institut für Privatrecht*, Tübingen, 2001, p. 337; EHRICKE, *Zur Kooperation von Insolvenzgerichten bei grenzüberschreitenden Insolvenzverfahren im Anwendungsbereich der EuInsVo*, in *Zeitschrift für Wirtschaftsrecht*, 2007, p. 2395, and TROWER, *Court-to-Court Communication – The Benefits and the Dangers*, in *International Corporate Rescue*, 2007, p. 111.

ready highlighted in the UNCITRAL Model Law on Cross-Border Insolvency[173]. Noteworthy, as recalled in the scholarship, those (non-common law) countries in which domestic legislation has been adopted following the model law needed time for their courts to "accept" the change, as this could have been felt by courts as a way to interfere with proceedings abroad, and vice versa[174]. An issue that in court to court cooperation protocols developed mainly outside Europe has led to standard clauses specifying that courts involved retain their autonomy and jurisdiction[175]. In this sense, as a preliminary matter, two different good practices are detected, and should be supported. In the first place, domestic legislators should adopt a clear legal framework authorizing cross-border communication and cooperation between national and foreign courts, and disseminate the knowledge of such a possibility[176]. In the second place, court to court protocols should clearly reaffirm the autonomy of each court, at least to make parties to the proceedings aware of this aspect.

Also the rules on cooperation between courts are given both for cases of insolvency proceedings against the same debtor (art. 42 InsRRec), and for proceedings against companies part of a group (art. 57 InsRRec). Again, such provisions, whilst following the same line, bear some important differences.

[173] UNCITRAL, Model Law on Cross-Border Insolvency, art. 25, according to which «[...] *the court shall cooperate to the maximum extent possible with foreign courts or foreign representatives [...]. The court is entitled to communicate directly with, or to request information or assistance directly from, foreign courts or foreign representatives*». As of today, such a model law has been used by few Member States of the European Union as a guideline for domestic legislation, namely by Greece (2010), Poland (2003), Romania (2002), and Slovenia (2007). On cooperation and communication in the UNCITRAL Model Law, see for all, other than the already quoted literature, BEAUMONT, MCELEAVY, *Anton & Beaumont: Private International Law*, Edinburgh, 2011, p. 1125 ff.

[174] See TROWER, *Court-to-Court Communication – The Benefits and the Dangers*, cit., p. 111 ff.

[175] Superior Court of Canada, Province of Quebec, District of Montreal, Case 500-11-036133-094, July 28, 2009, Order Approving a Cross-Border Court to Court Protocol, in Abitibobowater Inc., Section 6, and 12; Cross-Border Insolvency Protocol AgriBioTech Canada, Inc., art. 1.02; In Re Barzel Industries et al, US Bankruptcy Court for the District of Delaware, Case No. 09-13204, Section 14.

[176] Cfr., for example, the Australian Cross-Border Insolvency Practice Note: Cooperation with Foreign Courts or Foreign Representatives (October 2016).

Under the new InsRRec, courts have an obligation to communicate and cooperate, even though such an obligation is not to be found in domestic law; any court, once the insolvency procedure has been started, is subject to this obligation, regardless of the stage of the procedure in which its (or the foreign) procedure is[177].

Art. 42(1) InsRRec starts by stating that «[i]*n order to facilitate the coordination of main, territorial and secondary insolvency proceedings concerning the same debtor, a court before which a request to open insolvency proceedings is pending, or which has opened such proceedings, shall cooperate ...* »[178]. The *chapeau* already seems of particular relevance, as it determines a (clear) obligation to cooperate also between courts in territorial proceedings. Additionally, art. 42(1), in line with the general idea of the regulation, envisages cooperation as a means to facilitate coordination. On the contrary, art. 57 InsRRec (just as art. 56) seems to establish a duty of cooperation that is weaker, as cooperation is subject to the condition that «*such cooperation is appropriate to facilitate the effective administration of the proceedings*»[179]. Of course, such an appropriateness test will highly depend upon the specificities of the single case. In this sense, the provision should be applied by taking into consideration that, in general, cooperation between insolvency proceedings bears in most cases positive effects, thus any admissible departure therefrom should be considered to be an exception.

Part of the scholarship[180] has correctly pointed out that the provision at hand extends its application in time: for courts to cooperate, it is not necessary that insolvency proceedings are opened, and thus that the insolvent status of the debtor has already been declared. The provision

[177] MANKOWSKI, *Art. 42 Zusammenarbeit und Kommunikation der Gerichte*, cit., Rn. 2 ff. Art. 41(1) InsRRec speaks of proceedings that are pending before a court of law.

[178] Thus, cooperation becomes mandatory, as in the UNCITRAL Model Law (cfr. UNCITRAL, Commentary Model Law on Cross-Border Insolvency, para. 213).

[179] Cfr. SCHMIDT, *Art. 57 – Cooperation and Communication Between Courts*, in BORK, VAN ZWIETEN (eds.), *Commentary on the European Insolvency Regulation*, Oxford, 2016, p. 598, at p. 601.

[180] BORK, MANGANO, *European Cross-Border Insolvency Law*, cit., p. 201. The same is for temporary appointed liquidators as regards the duties between insolvency office holders, as noted by MANKOWSKI, *Art. 41 Zusammenarbeit und Kommunikation der Verwalter*, cit., Rn. 6.

clearly speaks of courts before which a "request is pending". This means, even though the state of insolvency has not been declared yet by the court, courts already have an obligation to cooperate.

A general limit to cooperation rests with the necessity to respect the law applicable to each proceedings (and the lack of conflicts of interests under art. 57 InsRRec[181]), and the necessity to ensure respect of procedural rights of the parties as well as confidentiality of information[182]. However, as regards the first of the two general limits mentioned, given that the InsRRec introduces a duty to cooperation, it seems that the mere lack of specific provisions in the domestic legislation should be no ground to legitimately avoid communication and cooperation in the terms set by the regulation. Additionally, as regards the procedural rights of the parties, a peculiar practice must be evaluated and contextualized. It is not uncommon to find in some American protocols provisions that allow courts to communicate directly, with or without legal counsel of the parties, to assess a number of possible issues[183]. By some[184], the possibility for courts to communicate without the parties being given the possibility to intervene could run against European standards of procedural rights, with the consequence that, within the context of the InsRRec, this should not take place.

This being said, it should also be pointed out that any limit to cooperation and communication is to be understood as an exception to the general rule: this means that any limit should be subject to a restrictive interpretation[185], the contrary being against the goals of the InsRRec.

Under both provisions at hand, if this is considered to be appropriate, courts can «*appoint an independent person or body acting on its in-*

[181] InsRRec, art. 42(1), and art. 57(1).

[182] InsRRec, art. 42(2), and art. 57(2).

[183] Superior Court of Canada, Province of Quebec, District of Montreal, Case 500-11-036133-094, July 28, 2009, Order Approving a Cross-Border Court to Court Protocol, in Abitibobowater Inc., Section 11.

[184] MOSS, SMITH, *Commentary on Regulation 1346/2000 and Recast Regulation 2015/848 on Insolvency Proceedings*, cit., p. 484.

[185] Also arguing for a restrictive interpretation on the limits to cooperation and communication, BORK, MANGANO, *European Cross-Border Insolvency Law*, cit., p. 289.

*structions»* (even though the singular should not be strictly interpreted[186]). The utility of such an independent body can be appreciated in light of practical elements: administrators, and reasonably to a similar extent judges, whilst often being considered as expert in insolvency law, reasonably become, with exceptions, less confident in cross-border cases. Courts and practitioners might face linguistic technicalities[187], as well as time-zone differences, which make it less likely for courts to directly communicate[188]. However, a good practice would be not to "abuse" the provision. As noted in the TRI Leiden EU Cross-Border Insolvency Court-to-Court Cooperation Principles, courts should make use of this possibility with caution, since if insolvency administrators (where they usually manage the proceedings) do their work properly, there should be little need to introduce a new (costly) actor. A good practice would be to restrictively interpret the provision at hand, so as to understand the term "appropriate" also as "...when necessary".

However, should an independent body be appointed, best practices require selection amongst those who have, in the appointing's eye, the most qualified skills to actually work as a bridge between courts, and inform the appointing court of all relevant developments and problems abroad[189].

As regards communication, the regulation privileges "direct communication", i.e. avoidance of international rogatory for courts to communicate[190]. The InsRRec Regulation states that courts shall ensure

[186] MANKOWSKI, *Art. 42 Zusammenarbeit und Kommunikation der Gerichte*, cit., Rn. 9.

[187] MOSS, SMITH, *Commentary on Regulation 1346/2000 and Recast Regulation 2015/848 on Insolvency Proceedings*, cit., p. 484. In general, recalling for example that knowledge of English in non-English speaking countries is not sufficient, see SANTEN, *Communication and Cooperation in International Insolvency: On Best Practices for Insolvency for Office Holders and Cross-Border Communication Between Courts*, cit., p. 238.

[188] FARLEY (reporters VIIMSALU, WEBER), *A practical Approach to Court-to-Court Communication in International Insolvency Law*, cit., p. 81. Cfr. also WESSELS, *Art. 42 – Cooperation and Communication Between Courts*, cit., p. 497.

[189] TRI Leiden EU Cross-Border Insolvency Court-to-Court Cooperation Principles, Principle 17.

[190] SCHMIDT, *Art. 57 – Cooperation and Communication between Courts*, cit., p. 601. Cfr. also Superior Court of Canada, Province of Quebec, District of Montreal, Case 500-11-036133-094, July 28, 2009, Order Approving a Cross-Border Court to Court Protocol, in Abitibobowater Inc., Section 11. However, as argued by MOSS, SMITH, *Commentary on Regulation 1346/2000 and Recast Regulation 2015/848 on Insolvency Proceedings*, cit., p. 484, whereas

«*communication of information by any means considered*» appropriate. Due to fragmentation in substantive law, there is little surprise that the regulation does not set specific means by which exchange of information should take place. On this aspect, however, there is a trace of best practices developed at the international level[191]: the TRI Leiden EU Cross-Border Insolvency Court-to-Court Cooperation Guidelines which have tackled the issue, highlight in particular that:

a. communication should ensure respect of procedures applicable in each interested State[192];

b. communication may take place by sending or transmitting (directly or through legal counsel) of copies of formal orders, judgments, opinions, etc., or by way of "two way communication" by e-link[193] (even though these last appear to be more suited to those cases that do not present particular complexities[194]).

Not only should exchange of information interest relevant facts, substantive (in particular where one court is called to apply the foreign law) and procedural laws, but any information related to any pleading filed with one court, as well as schedules of hearings, should be communicated[195].

the regulation wishes to avoid international rogatory, courts can freely decide whether they should communicate directly, or through legal counsels or autonomous bodies.

[191] Noting that (at least from a continental perspective) «*communication and coordination between courts in insolvency cases in non-existent or (at least) weak*», WESSELS, *Cooperation and Sharing of Information Between Courts and Insolvency Practitioners in Cross-Border Insolvency Cases*, cit., p. 780.

[192] TRI Leiden EU Cross-Border Insolvency Court-to-Court Cooperation Guidelines, Guideline 2.1, on which see SANTEN, *Communication and Cooperation in International Insolvency: On Best Practices for Insolvency for Office Holders and Cross-Border Communication Between Courts*, cit., p. 238.

[193] TRI Leiden EU Cross-Border Insolvency Court-to-Court Cooperation Guidelines, Guideline 7.

[194] FARLEY (reporters VIIMSALU, WEBER), *A practical Approach to Court-to-Court Communication in International Insolvency Law*, cit., p. 81. Specifically on e-links see also TRI Leiden EU Cross-Border Insolvency Court-to-Court Cooperation Guidelines, Guideline 8.

[195] Superior Court of Canada, Province of Quebec, District of Montreal, Case 500-11-036133-094, July 28, 2009, Order Approving a Cross-Border Court to Court Protocol, in Abitibobowater Inc., Section 23.

Of course, direct communication bears the problem of language. Communication should take place in a language that is known to all the parties[196] involved in the proceedings, the possibility being ultimately left open to overcome such issue by way of appointing an independent persons acting on behalf of the court[197]. The problem of the language arises for all cases of cooperation and coordination, be this between insolvency practitioners, between courts, and between practitioners and courts. In this sense, it seems good practice if written agreements or protocols are concluded, to offer a list of definitions[198], so as also to avoid *faux amis*[199] and legal expressions encompassing different legal concepts in different jurisdictions. This issue of language is taken into express consideration (only) in art. 73 InsRRec, which is devoted to "group coordination procedures", one of the main new features of the regulation (on which see *infra*). This provision, even if contained in a different section of the act, very well could turn out as a guiding principle: according to art. 73 InsRRec, «*The coordinator shall communicate with the insolvency practitioner of a participating group member in the language agreed with the insolvency practitioner or, in the absence of an agreement, in the official language or one of the official languages of the institutions of the Union, and of the court which opened the proceedings in respect of that group member. The coordinator shall communicate with a court in the official language applicable to that court*». A provision that, on the one hand, should not be deprived of its *effet utile* by domestic laws as regards possible agreements between the parties, and that, on the other hand, turns out to be restrictive as regards cases in which there is no agreement, as, in the first case

[196] Addressing the issue, unsettled under the specific provision for cooperation between insolvency office holders, MANKOWSKI, *Art. 41 Zusammenarbeit und Kommunikation der Verwalter*, cit., Rn. 31.

[197] SCHMIDT, *Art. 57 – Cooperation and Communication between Courts*, cit., p. 600. Also, in general, on the problems connected to lack of linguistic and of sufficient legal knowledge by practitioners and courts to manage cross-border insolvency proceedings, see WESSELS, *A Glimpse into the Future: Cross-border Judicial Cooperation in Insolvency Cases in the European Union*, in *International Insolvency Review*, 2015, p. 96, at p. 99 f.

[198] KOUTSOUKOU, *Part 2: Cooperation Between Main and Secondary Proceedings – Protocols*, cit., p. 92.

[199] FARLEY (reporters VIIMSALU, WEBER), *A practical Approach to Court-to-Court Communication in International Insolvency Law*, cit., p. 81.

only English and French will be applicable by default, and only the official procedural language of the domestic court will be allowed in the second case[200].

As regards cooperation, the InsRRec provides an open[201] list of ways that can be followed by courts in light of the specificities of the single case. In particular, courts can coordinate i) the appointment of insolvency practitioners (even appoint the same person as insolvency practitioner in different proceedings[202], should this be feasible[203]); ii) coordinate the administration and supervision of the debtor's assets and affairs (even by requesting joint approval for sales of debtors' assets, as emerged in some protocols[204]); and iii) approve protocols, where necessary. The InsRRec also makes reference to "coordination of the conduct of hearings" (art. 43(3)(d)). From the US perspective, joint hear-

[200] On the provision see SCHMIDT, *Art. 73 – Languages*, in BORK, VAN ZWIETEN (eds.), *Commentary on the European Insolvency Regulation*, Oxford, 2016, p. 682.

[201] MANKOWSKI, *Art. 42 Zusammenarbeit und Kommunikation der Gerichte*, cit., Rn. 17; Additionally, also acknowledging that these kind of lists are not exhaustive, the 2006 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation expands references to forms of cooperation so as to include cooperation necessary to avoid conflict of jurisdiction (Superior Court of Canada, Province of Quebec, District of Montreal, Case 500-11-036133-094, July 28, 2009, Order Approving a Cross-Border Court to Court Protocol, in Abitibobowater Inc., Section 11; In Re Barzel Industries et al, US Bankruptcy Court for the District of Delaware, Case No. 09-13204, Section 15), and for the filing, determination and priority of claims (2006 UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation, p. 23 ff.). In other words, the principle of flexibility and effectiveness should drive the concrete application of the duty to cooperate.

[202] MANKOWSKI, *Art. 42 Zusammenarbeit und Kommunikation der Gerichte*, cit., Rn. 19. Nonetheless, it must necessarily be outlined that such a possibility is not directly in the text of the articles of the InsRRec, but is rather contained as explanation in recital 50.

[203] In this case, in fact, as opposed to the appointment of the coordinator of a group insolvency procedure, on which see *infra*, it seems that such a single person would need to have qualifications in all the interested jurisdictions. Additionally, as noted by BEWICK, *The EU Insolvency Regulation, Revisited*, cit., p. 184, practical issues are likely to emerge in such a scenario, as insolvency law is strictly interconnected with a number of areas of private and public law of a given legal system.

[204] Cross-Border Insolvency Protocol AgriBioTech Canada, Inc., art. 2.01 «*Transactions relating to the sale of ABTC's assets will be subject to the joint approval of the Canadian Court and the Bankruptcy Court*».

ings are admissible, and best practices have been developed in this regard[205]. Nonetheless, "coordination of the conduct of hearings" does not mean "joint hearing". Whereas the InsRRec provides courts with the possibility for example, to schedule their own hearings in light of the development of foreign proceedings (and, if appropriate schedule "parallel hearings"), the regulation does not grant courts the rights to conduct joint hearings[206], which thus remain possible only in so far as these are admitted by the laws of the different jurisdictions involved.

## 7. Cooperation and communication between practitioners and courts (art. 43, and art. 58 InsRRec)

Similarly as above, parallel provisions are given for cooperation between insolvency office holders and courts[207] in proceedings opened against the same debtor (art. 43 InsRRec), and against companies part of a group (art. 58 InsRRec). Limits to the application of these provisions, and issues on what kind of information should be communicated are the very same as those that can be found in art. 42, and 57; thus, what was argued before can here be integrally referred to.

Insolvency administrators have an obligation to cooperate and communicate with foreign courts. This seems to create an obligation of cooperation of administrators with foreign courts, but not the other way

[205] 2012 American Law Institute Global Principles for Cooperation in International Insolvency Cases, Guideline 10, on which see for all WESSELS, *A Global Approach to Cross-Border Insolvency Cases in a Globalizing World*, in *The Dovenschmidt Quarterly*, 2013, p. 16. See also Superior Court of Canada, Province of Quebec, District of Montreal, Case 500-11-036133-094, July 28, 2009, Order Approving a Cross-Border Court to Court Protocol, in Abitibobowater Inc., Section 11; Cross-Border Insolvency Protocol AgriBioTech Canada, Inc., art. 3.01, and 3.01.

[206] In these terms, MOSS, SMITH, *Commentary on Regulation 1346/2000 and Recast Regulation 2015/848 on Insolvency Proceedings*, cit., p. 485.

[207] On the duty to cooperate between practitioners and courts, in the domestic law see §347(2) InsO, according to which foreign practitioners that have applied in Germany for provisional measures are under the obligation to inform the court of «*all essential changes in the foreign proceedings and of all further foreign insolvency proceedings known to him relating to the assets of the debtor*».

around[208]. This particular wording of the provisions however finds some comfort in that, usually, insolvency proceedings are mostly managed by administrators (which already have an obligation to cooperate), and in that administrators are automatically recognized in their quality in the European judicial space. Hence, liquidators of the main insolvency proceedings can request information to courts that have opened a secondary proceedings, and secondary administrators can (at least[209]) ask for information to the principal administrator. With the important specification that, in case for proceedings opened against companies part of a group, an insolvency practitioner (without thus specifying if this has been appointed in a principal or secondary proceedings[210]) «*may request information from that court concerning the proceedings regarding the other member of the group or request assistance concerning the proceedings in which he has been appointed*»[211].

## 8. Coordination and cooperation: companies part of a group

Traditionally, the old insolvency regulation did not find application to companies part of a group[212]: each entity was considered autonomous

[208] Speaking of "unilateral duty", WESSELS, *Cooperation and Sharing of Information Between Courts and Insolvency Practitioners in Cross-Border Insolvency Cases*, cit., p. 787. See also MANKOWSKI, *Art. 43 Zusammenarbeit und Kommunikation zwischen Verwaltern und Gerichten*, in MANKOWSKI, MÜLLER, SCHMIDT (eds.), *EuInsVO 2015*, München, 2016, Rn. 2.

[209] The 2013 UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation suggests however a better and broader approach, as on recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities (art. 21(a)(d)). Adressing the different scenarios, MANKOWSKI, *Art. 43 Zusammenarbeit und Kommunikation zwischen Verwaltern und Gerichten*, cit., Rn, 5 ff.

[210] Cfr. SCHMIDT, *Art. 58 – Cooperation and Communication between Insolvency Practitioners and Courts*, in BORK, VAN ZWIETEN (eds.), *Commentary on the European Insolvency Regulation*, Oxford, 2016, p. 603, at p. 604.

[211] InsRRec, art. 58(b).

[212] Highlighting the positive effects of the former regulation on group of companies in spite of the lack of any specific provision on this point, see OBERHAMMER, KOLLER, AUERNIG, PLANITZER, *Part 3: Insolvencies of Groups of Companies*, cit., p. 100.

unless the two companies acted in such a way so as to ingenerate into third parties the belief that one of the two was nothing more than a branch of the other[213]. This with the consequence that parent companies were each subject to their own insolvency proceedings, leading to an uncoordinated approach of insolvency which makes it difficult to save single companies against the background of a group approach, that could avoid the insolvency of a still viable economic entity[214].

This has led to a "rush" to courts to open principal insolvency proceedings: domestic courts have sought to localise the centre of main interests of parent companies to the place of the seat of the holding[215], so as to "leave" other courts only with the possibility to eventually open secondary proceedings[216]. The Court of Justice itself has changed in time its case law admitting, at first, that the COMI of a company could have been in a place other than that of the registered seat if a company

[213] CJEU 9 December 1987, *SAR Schotte GmbH* v *Parfums Rothschild SARL*, Case 218/86. In another occasion, always related to the 1968 Brussels Convention, the Court excluded that damaged suffered by parent companies were to be localized at the place of the seat of the holding company (CJEU 11 January 1990, *Dumez France SA and Tracoba SARL* v *Hessische Landesbank and others*, Case C-220/88).

[214] SIEMON, FRIND, *Groups of Companies in Insolvency: A German Perspective Overcoming the Domino Effect in an (International) Group Insolvency*, in *International Insolvency Review*, 2013, p. 61.

[215] Cf. InsRRec., art. 53. In the case law, see for example Cass. 29 ottobre 2015, n. 22093, *Soc. Illochroma Italia* c. *S.*, cit., where an Italian company fully localized in Italy, but part to a French group, was subject to French proceedings as French courts localized the centre of main interests at the seat of the holding. See also BARIATTI, *Recent Case-Law Concerning Jurisdiction and the Recognition of Judgments under the European Insolvency Regulation*, in *Rabels Zeitschrift fuer auslaendisches und internationales Privatrecht*, 2009, p. 629, at p. 648, and MANKOWSKI, *Art. 56 Zusammenarbeit und Kommunikation der Verwalter*, in MANKOWSKI, MÜLLER, SCHMIDT (eds.), *EuInsVO 2015*, München, 2016, Rn. 3 ff.

[216] In the case law, see CJEU 4 September 2014, *Burgo Group SpA* v *Illochroma SA and Jérôme Theetten*, Case C-327/13, according to which «*Article 3(2) of Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings must be interpreted to the effect that, where winding-up proceedings are opened in respect of a company in a Member State other than that in which it has its registered office, secondary insolvency proceedings may also be opened in respect of that company in the other Member State in which its registered office is situated and in which it possesses legal personality*».

was believed to be a mere "letterbox" company[217]. In a way acknowledging the "urge"[218] felt by domestic courts, in following cases the Court admitted that the COMI of the parent company might be at the seat of the holding[219] (whose court would thus be entitled to open principal proceedings against both) where it is clear to third parties that the centre of main interests of the parent company is at the place of the holding[220] (case law that, in some cases has privileged the localisation of the place of managerial decisions). Nonetheless, the possibility for courts to rebut the presumption of the localisation of the COMI did not have the consequence that collective insolvency proceedings could have been started under the former insolvency regulation[221].

[217] CJEU 2 May 2006, *Eurofood IFSC Ltd.*, Case C-341/04.

[218] In these terms, SIEMON, FRIND, *Groups of Companies in Insolvency: A German Perspective Overcoming the Domino Effect in an (International) Group Insolvency*, cit., p. 62. Domestic courts, as noted by MCCORMACK, *Something Old, Something New: Recasting the European Insolvency Regulation*, in *The Modern Law Review*, 2015, p. 121, at p. 142, have in fact proven to be more willing to *de facto* reach a collective procedure by cumulating international jurisdiction.

[219] Even though the Eurofood case law could have been seen as the result of the Court's will to limit the national practice to automatically localize the COMI of daughter companies at the COMI of the holding (in these terms, NISI, *Centro degli interessi principali e trasferimento della sede statutaria: la Corte di Giustizia dell'Unione Europea torna sul regolamento n. 1346/2000 in materia di insolvenza transfrontaliera*, Liuc Papers n. 246, Serie Impresa e Istituzioni 29, febbraio 2012, p. 6.).

[220] CJEU 15 December 2011, *Rastelli Davide e C. Snc* v *Jean-Charles Hidoux*, Case C-191/10, and CJEU 20 October 2011, *Interedil Srl, in liquidation* v *Fallimento Interedil Srl and Intesa Gestione Crediti SpA*, Case C-396/09. The InsRRec, as noted by OBERHAMMER, KOLLER, AUERNIG, PLANITZER, *Part 3: Insolvencies of Groups of Companies*, cit., p. 102, seems to incorporate such a case law as recital 30 seems to give weight to «*the company's central administration* [...] *located in a Member State other than that of its registered office, and where a comprehensive assessment of all the relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the management of its interests is located in that other Member State*».

[221] ENGSIG SØRENSEN, *Groups of companies in the case law of the Court of Justice of the European Union*, Nordic & European Company Law LSN Research Paper Series No. 15-02, p. 18.

Whether or not the new insolvency rules should have also made it possible to open collective proceedings has been a matter of wide discussion[222], and the possible, opposite, alternatives that where most obvious were to leave the legal framework unchanged, or to create a "super-proceedings" for companies part of a group[223]. Acknowledging the importance of a global management of a group insolvency proceedings (being overall not immediate to determine when companies part of a group fall within the scope of application of the InsRRec[224]), as well as

[222] Cfr. VAN GALEN, ANDRÉ, FRITZ, GLADEL, VAN KOPPEN, MARKS, WOUTERS, *INSOL Europe Revision of the European Insolvency Regulation*, Nottingham, 2012, p. 91 ff.; MOSS, *Group Insolvency - Choice of Forum and Law: The European Experience under the Influence of English Pragmatism*, in *Brooklyn Journal of International Law*, 2006-7, p. 1005; MENJUCQ, DAMMANN, *Regulation No 1346/2000 on Insolvency Proceedings: Facing the Companies Group Phenomenon*, in *Business Law International*, May 2008, p. 145; MENJUCQ, *EC-Regulation No 1346/2000 on Insolvency Proceedings and Groups of Companies*, in *European Company and Financial Law Review*, 2008, p. 135; WESSELS, *The Place of the Registered Office of a Company: A Cornerstone in the Application of the EC Insolvency Regulation*, in *European Company Law*, 2006, p. 183; MEVORACH, *The "Home Country" of a Multinational Enterprise Group Facing Insolvency*, in *International and Comparative Law Quarterly*, 2008, p. 427; ID, *Appropriate Treatment of Corporate Groups in Insolvency: A Universal View*, in *European Business Organization Law Review*, 2007, p. 179; QUEIROLO, *Le procedure d'insolvenza nella disciplina comunitaria. Modello di riferimento e diritto interno*, Torino, 2007, p. 194 ff., and WINKLER, *From Whipped Cream to Multibillion Euro Financial Collapse: The European Regulation on Transnational Insolvency in Action*, in *Berkeley Journal of International Law*, 2008 p. 352.

[223] More complex solutions have also been suggested. For example, the European Parliament Draft Report with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI), elaborated a mixed solution. For centralized groups, only one insolvency proceedings, with one liquidator, was proposed, whilst independent proceedings, accompanied by a strong cooperation duty, was suggested for decentralized groups. On the proposal, see MANKOWSKI, *Art. 56 Zusammenarbeit und Kommunikation der Verwalter*, cit., Rn. 4 ff.

[224] According to InsRRec, art. 2(13), and (14), "group of companies" means a parent undertaking and all its subsidiary undertakings, and "parent undertaking" means an undertaking which controls, either directly or indirectly, one or more subsidiary undertakings. Additionally, an undertaking which prepares consolidated financial statements in accordance with Directive 2013/34/EU of the European Parliament and of the Council shall be deemed to be a parent undertaking. In this sense, as noted by OBERHAMMER, KOLLER, AUERNIG, PLANITZER, *Part 3: Insolvencies of Groups of Companies*, cit., p. 107, no reference is made to the question of a requirement of an independent legal personality of the entities. In light of the above, it seems that not any kind of groups of companies falls within the scope of application of the InsRRec: whereas vertically integrated groups seem to fall within the scope of application the new rules,

the difficulties related thereto, the new rules seek to meet in the middle (or nearly there) by specifying (international[225]) cooperation duties (for insolvent companies only[226]), and by establishing a "super-cooperation-procedure", excluding however that collective proceedings are admissible[227].

As regards the first case, any practitioner (thus avoiding the creation of a «*main practitioner*»[228]) appointed in insolvency proceedings opened in respect of a member of a group of companies may, to the extent appropriate to facilitate the effective administration of the proceedings, be heard in any of the proceedings opened in respect of any other member of the same group; under some conditions[229], any practitioner may request a stay[230] of any measure related to the realisation of

the same cannot be said as regards horizontally integrated groups (in these terms THOLE, DUEÑAS, *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, in *International Insolvency Review*, 2016, p. 214, at 221).

[225] Rules on cooperation, communication and coordination in the framework of the insolvency of members of a group of companies only apply to the extent that proceedings relating to different members of the same group of companies have been opened in more than one Member State (InsRRec Recital 62, and art. 62, first period).

[226] Noting how the provisions are only applicable to companies part to a group subject to an insolvency proceedings, and thus that the obligations do not extend to solvent companies part to a group, as the pre-condition for the application of the regulation is the opening of an insolvency proceedings, see MANKOWSKI, *Art. 56 Zusammenarbeit und Kommunikation der Verwalter*, cit., Rn. 10 ff.

[227] BEWICK, *The EU Insolvency Regulation, Revisited*, cit., p. 185. In favor of such a defence of the corporate veil, also in light of the possibility to localize the COMI of the company part to a group at the COMI of the holding, VAN CALSTER, *COMIng, and Here to Stay: The Review of the European Insolvency Regulation*, cit., p. 746. Also in favour of the solution adopted by the InsRRec, arguing that such a cooperation scheme is possibly one of the best in light of the best practices, BORK, MANGANO, *European Cross-Border Insolvency Law*, cit., p. 285.

[228] OBERHAMMER, KOLLER, AUERNIG, PLANITZER, *Part 3: Insolvencies of Groups of Companies*, cit., p. 112.

[229] In particular, under art. 60 InsRRec, a restructuring plan for all or some members of the group for which insolvency proceedings have been opened has been proposed and present a reasonable chance of success; the stay is necessary in order to ensure the proper implementation of the restructuring plan; the restructuring plan would be to the benefit of the creditors in the proceedings for which the stay is requested; and a group coordination procedure has not been applied for.

[230] Before ordering the stay, the court shall hear the insolvency practitioner appointed in the proceedings for which the stay is requested. Such a stay may be ordered for any period, not exceeding 3 months, which the court considers appropriate and which is compatible with the rules applicable to the proceedings. The court ordering the stay may require the insolvency

the assets in the proceedings opened with respect to any other member of the same group; or apply for the opening of group coordination proceedings. The success of this coordination and cooperation scheme, as noted in legal writings, will strongly depend upon the «*goodwill and the procedural limits to which courts and practitioners in the Member States are subject*»[231].

As seen, art. 57, and 58 InsRRec. set obligations for cooperation between courts, and between courts and practitioners. Such general duties to cooperate can also pursue a different path.

As regards the second mentioned case, there is little doubt that the rules of the InsRRec devoted to a group of companies have the aim to simply promote cooperation. Recital 52 clearly states that rules for cooperation should be extended also in such cases, without prejudice to the competence of the court to open principal proceedings against the company part of a group[232]. Additionally, such a cooperation procedure takes place on a voluntary basis (as the Commission believed that cooperation between insolvency proceedings opened against different debtors were not as spread to justify an imposition[233]), with the consequence that its overall effectiveness will only be proven by practice in time.

The goal of a group coordination proceedings is to identify a person whose duty is to develop recommendations or a group coordination

practitioner to take any suitable measure available under national law to guarantee the interests of the creditors in the proceedings. The court may extend the duration of the stay by such further period or periods as it considers appropriate and which are compatible with the rules applicable to the proceedings, provided that the conditions above continue to be fulfilled and that the total duration of the stay (the initial period together with any such extensions) does not exceed 6 months. The request for stay is subject to the conditions that i) a restructuring plan for all or some members of the group for which insolvency proceedings have been opened has been proposed and presents a reasonable chance of success; ii) such a stay is necessary in order to ensure the proper implementation of the restructuring plan; iii) the restructuring plan would be to the benefit of the creditors in the proceedings for which the stay is requested, and iv) no group-coordination proceedings is opened.

[231] See VAN CALSTER, *COMIng, and Here to Stay: The Review of the European Insolvency Regulation*, cit., p. 747.

[232] InsRRec, recital 53.

[233] InsRRec, recital 53.

plan[234]. A duty that might turn out to be difficult, as the group procedure, due to its additional costs, might only be sought where practitioners are unable to reach cooperation under their general obligations[235].

More in detail, the coordinator *shall* i) identify and outline recommendations for the coordinated conduct of the insolvency proceedings; ii) propose a group coordination plan[236] that identifies, describes and recommends a comprehensive set of measures appropriate to an integrated approach to the resolution of the group members' insolvencies (such as measures, fundamental in cases of rehabilitation plans[237], to be taken in order to re-establish the economic performance and the financial soundness of the group or any part of it; settlement of intra-group disputes as regards intra-group transactions and avoidance actions; agreements between the insolvency practitioners of the insolvent group members)[238]. Additionally, the coordinator *may* i) be heard and participate in any of the proceedings opened in respect of any member of the group; ii) mediate any dispute arising between two or more insolvency practitioners; iii) present and explain the group coordination plan; iv) request information from any insolvency practitioner (thus not directly to courts before which the proceedings is pending) in respect of any member of the group where that information is or might be of use when identifying and outlining strategies and measures in order to coordinate the proceedings; v) request a stay for a period of up to 6 months of the proceedings opened in respect of any member of the group, provided

[234] MANKOWSKI, *Art. 61 Antrag auf Eröffnung eines Gruppen-Koordinationsverfahrens*, in MANKOWSKI, MÜLLER, SCHMIDT (eds.), *EuInsVO 2015*, München, 2016, Rn. 11.

[235] THOLE, DUEÑAS, *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, cit., p. 220.

[236] Excluding however recommendations as to any consolidation of proceedings or insolvency estates (InsRRec, art. 72(3)). In favour of this option THOLE, DUEÑAS, *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, cit., 219. On the other hand, consolidation of assets has also been taken into consideration by some, and sometimes taken into consideration by practitioners.

[237] MOSS, SMITH, *Commentary on Regulation 1346/2000 and Recast Regulation 2015/848 on Insolvency Proceedings*, cit., p. 515.

[238] In these very terms, InsRRec, art. 72(1).

that such a stay is necessary in order to ensure the proper implementation of the plan and would be to the benefit of the creditors in the proceedings for which the stay is requested[239].

The coordinator, which must be eligible to be an insolvency practitioner under the law of any Member State (thus not necessarily under the law of the Member State of habitual residence), and not being already appointed in relation to an insolvency proceedings of the companies part of a group[240] (so as to ensure neutrality[241]), is appointed by one court to which request to open a group coordination proceedings is lodged[242].

From the wording of the regulation, it clearly stems that the request can be filed by any insolvency practitioner (thus not by creditors[243]) before any of the courts, thus not necessarily by the liquidator of the holding[244], nor before the court of the main proceedings opened against the holding[245]. When such a request is lodged (even though the InsRRec, as opposed to the Brussels I bis Regulation, does not offer a uniform definition of a court is to be considered "seised"[246] for the purposes of the priority rule – which could be determined by the relevant

[239] InsRRec, art. 72(2).

[240] InsRRec, art. 71.

[241] InsRRec, art. 72(5).

[242] InsRRec, art. 61. In favour of this solution, which maintains flexibility, THOLE, DUEÑAS, *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, cit., p. 223, even though acknowledging that this might lead to a certain forum shopping as regards the choice of the court competent for the group procedure. A forum shopping that seems also confirmed by the possibility for the liquidators to choose the competent court by way of agreement.

[243] Cfr. MOSS, SMITH, *Commentary on Regulation 1346/2000 and Recast Regulation 2015/848 on Insolvency Proceedings*, cit., p. 506, and MANKOWSKI, *Art. 61 Antrag auf Eröffnung eines Gruppen-Koordinationsverfahrens*, cit., Rn. 18 f.

[244] Highlighting the lack of hierarchy between insolvency office holders of companies part to a group (as somehow opposed as the relationship between main and secondary insolvency office holder in proceedings opened against the same debtor), see OBERHAMMER, KOLLER, AUERNIG, PLANITZER, *Part 3: Insolvencies of Groups of Companies*, cit., p. 114 f.

[245] MANKOWSKI, *Art. 61 Antrag auf Eröffnung eines Gruppen-Koordinationsverfahrens*, cit., Rn. 25.

[246] However, excluding that, in practice, it will be likely that there will be "rush to courts", MOSS, SMITH, *Commentary on Regulation 1346/2000 and Recast Regulation 2015/848 on Insolvency Proceedings*, cit., p. 507. Apparently more open to the possibility of such a "rush", BEWICK, *The EU Insolvency Regulation, Revisited*, cit., p. 187.

domestic laws, or, better yet, by analogy with the Brussels I bis Regulation[247]), any other court is prevented to open such a group proceedings[248].

This might raise doubts as to the appropriateness of such a rule on (international) jurisdiction, as a coordinator working at the holding's COMI might be better placed to collect all relevant information and elaborate recommendations or a group plan. To this end, the InsRRec introduces something that is completely new in the framework of European and domestic rules on international insolvency[249], i.e. a (sort of[250]) role to party autonomy in the selection of the competent court[251] by way of written agreements[252], to be concluded by two thirds of (all[253]) insolvency office holders up until such a point in time the procedure is opened (thus, an agreement concluded by the majority of insolvency practitioners after the request of a group procedure being lodged with a court, but concluded before the opening of the procedure, can trump the "rush" to the courts, if there is any[254]).

Contrary to the Brussels I bis Regulation, the InsRRec does not express the formal requirements, other than requiring the agreement to be

[247] In these terms, MANKOWSKI, *Art. 62 Prioritätsregel*, in MANKOWSKI, MÜLLER, SCHMIDT (eds.), *EuInsVO 2015*, München, 2016, Rn. 7.

[248] InsRRec, art. 62.

[249] Cf. THOLE, DUEÑAS, *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, cit., p. 216. Cf. also, noting the lack of direct party autonomy in the selection of the competent forum for the declaration of insolvency, QUEIROLO, *Le procedure d'insolvenza nella disciplina comunitaria*, cit., p. 164 f.

[250] Even though the majority of insolvency office holders can agree on the competent court, which could be most likely, for reason of effectiveness, that of the COMI of the holding, such a party autonomy cannot be compared to that typical of the Brussels I bis Regulation, as, in this case, a jurisdiction agreement does not prorogate the court with a substantive power of *jus dicere*.

[251] InsRRec, art. 66.

[252] This being the only requirement set by the InsRRec, thus leaving open questions as regards the formal and substantive validity of the agreement.

[253] MANKOWSKI, *Art. 66 Wahl des Gerichts für ein Gruppen-Koordinationsverfahren*, in MANKOWSKI, MÜLLER, SCHMIDT (eds.), *EuInsVO 2015*, München, 2016, Rn. 4 ff., also noting that the seise and the economic relevance of this two thirds is not mentioned in the provision as a condition for the validity of the agreement.

[254] MOSS, SMITH, *Commentary on Regulation 1346/2000 and Recast Regulation 2015/848 on Insolvency Proceedings*, cit., p. 511, and VAN CALSTER, *COMIng, and Here to Stay: The Review of the European Insolvency Regulation*, cit., p. 750.

in writing, nor whether the agreement can be superseded by a following one. Regarding the formal requirements, it seems reasonable to take at least into consideration the case law of the Court of Justice of the European Union that was delivered on choice of court clauses under the Brussels rules, and thus also admit subsequent expressions of the new will of the parties[255]. Nonetheless, it does not appear that also the implicit prorogation should be taken into consideration here, as this is in no way envisaged in the InsRRec, where the introduction of a role to party autonomy is new and could require a cautious approach at first. In this sense, as prescribed by art. 66(3) InsRRec, «*Any court other than the court seised under paragraph 1 shall decline jurisdiction in favour of that court*».

In any case, the request to open such a procedure, lodged by any insolvency practitioner of any of the companies part of a group in accordance with the national law of the practitioner lodging the request[256], is accompanied by a proposal as to the person to be nominated as coordinator, an outline of the proposed group coordination (also necessary for other liquidators to take an informed choice[257]), a list of the insolvency practitioners appointed in relation to the members of the group and, where relevant, the courts and competent authorities involved, and an outline of the estimated costs of the proposed group coordination and the estimation of the share of those costs to be paid by each member of the group.

The court seized will give notice as soon as possible of the request and of the proposed coordinator to the insolvency practitioners appointed in relation to all[258] members of the group (regardless of whether

[255] On these issue, see in detail MANKOWSKI, *Art. 66 Wahl des Gerichts für ein Gruppen-Koordinationsverfahren*, cit., Rn. 11 ff.

[256] InsRRec, art. 61(2), on which see BORK, MANGANO, *European Cross-Border Insolvency Law*, cit., p. 291, and MANKOWSKI, *Art. 61 Antrag auf Eröffnung eines Gruppen-Koordinationsverfahrens*, cit., Rn. 18.

[257] MANKOWSKI, *Art. 61 Antrag auf Eröffnung eines Gruppen-Koordinationsverfahrens*, cit., Rn. 37 ff., also highlighting the different liguistic versions of the InsRRec on this very point.

[258] MANKOWSKI, *Art. 61 Antrag auf Eröffnung eines Gruppen-Koordinationsverfahrens*, cit., Rn. 45.

it is apparent that one company will not take part to the group procedure) if the court believes that the group procedure is appropriate to facilitate the effective administration of the insolvency proceedings relating to the different group members and that no creditor of any group member expected to participate is likely to be financially disadvantaged by the inclusion[259]. In this last sense, it has been excluded in the scholarship that only where all creditors are better off with such procedure, the procedure would be admissible. On the contrary, the fact that some creditors might be better off should suffice, following an economic "Pareto-approach"[260].

Additionally, the court shall give insolvency practitioners the opportunity to be heard[261]. Within 30 days from notice, insolvency office holders only[262] can contest (by way of a uniform model ex art. 88 InsRRec) either (and only, as the exceptions appear to be constructed as an exhaustive list) their inclusion in the procedure, or the person[263] to be appointed as coordinator.

Addressing the problems starting from the last one, the court is not bound by the objection raised by the party as regards the person to be appointed as coordination[264]; should the court agree with the objection, the parties will have to make a new request for appointment of group coordinator[265]. Should the court disagree with the objection, the result is not self-evident, suggesting thus that the insolvency office holder

[259] InsRRec, art. 63. See also recital 58, according to which the advantages of group coordination proceedings should not be outweighed by the costs of those proceedings.

[260] MANKOWSKI, *Art. 63 Mitteilung durch das befasste Gericht*, in MANKOWSKI, MÜLLER, SCHMIDT (eds.), *EuInsVO 2015*, München, 2016, Rn. 9.

[261] InsRRec, art. 63. The *lex fori* of the seise court will determine the procedures for foreign insolvency office holders to be heard (MANKOWSKI, *Art. 63 Mitteilung durch das befasste Gericht*, cit., Rn. 13).

[262] MANKOWSKI, *Art. 64 Einwände von Verwaltern*, in MANKOWSKI, MÜLLER, SCHMIDT (eds.), *EuInsVO 2015*, München, 2016, Rn. 8.

[263] In this case, the court can refrain to appoint the coordination, and eventually invite the contesting party to submit a new application with the proposal of a different coordination (InsRRec, art. 67).

[264] MANKOWSKI, *Art. 67 Folgen von Einwänden gegen den vorgeschlagenen Koordinator*, in MANKOWSKI, MÜLLER, SCHMIDT (eds.), *EuInsVO 2015*, München, 2016, Rn. 6.

[265] InsRRec, art. 67.

should also raise an objection to the procedure if their objection as to the person is not accepted by the court.

On the contrary, and more clearly, in the first of the abovementioned cases of objection, an automatic effect of exclusion follows[266] as the contesting party will not be party to the procedure, and will in no way be bound by it[267], save the possibility to request to join the procedure at a later stage[268]. Depending on the domestic law applicable to each proceedings, this might be necessary for liquidators if they cannot accept inclusion without the prior approval of a domestic body in less than 30 days[269]. However, joining at a later stage is not immediate, as all the insolvency practitioners must agree, and must believe that all the conditions to participate are respected (such as, for example, no risk will follow for all creditors[270]). In this sense, the longer a request to join takes, the more it is likely for it to be rejected: the coordinator, when evaluating the request, takes into consideration the «*stage that the group coordination proceedings has reached at the time of the request*»[271]. Should a request to joint come at a stage where the coordination procedure is close to closure, the coordinator might believe that accepting the request could be against the interests of the creditors already involved in the procedure.

The final decision of the participation rests with the coordinator, whose decision can be appealed before the court before which the procedure has been opened.

Once the procedure is opened, the coordinator takes charge of its duties to elaborate recommendations and a possible group plan. To that end, a communication duty is established upon the administrators of insolvency procedures opened against different debtors: insolvency

[266] MOSS, SMITH, *Commentary on Regulation 1346/2000 and Recast Regulation 2015/848 on Insolvency Proceedings*, cit., p. 510.

[267] InsRRec, art. 65.

[268] InsRRec, art. 69.

[269] MANKOWSKI, *Art. 61 Antrag auf Eröffnung eines Gruppen-Koordinationsverfahrens*, cit., Rn. 27.

[270] InsRRec, art. 69.

[271] InsRRec, art. 69(2)(a).

practitioners and the coordinator shall cooperate to the extent such co-operation is not incompatible with the rules applicable to the respective proceedings. In particular, they shall communicate any information that is relevant for the coordinator to perform his or her tasks[272].

Potentially diminishing the effectiveness of the innovative legal framework, compliance to the recommendations and the plan is still voluntary: the InsRRec rather introduces a "complain or explain" rule[273] as it clearly states that «[a]*n insolvency practitioner shall not be obliged to follow in whole or in part the coordinator's recommendations or the group coordination plan. If it does not follow the coordinator's recommendations or the group coordination plan, it shall give reasons for not doing so to the persons or bodies that it is to report to under its national law, and to the coordinator*»[274]. As it clearly stems from the provision, the only true obligation is to report why the recommendation of the group-coordinator has not been followed, even though this might not always be easy, in particular if no real and substantive justification can be given. In this last sense, the unjustified breach to cooperate will give rise to professional liability under the *lex fori liquidator*.

Moreover, a possible obstacle to the proper coordinated administration of cross-border proceedings opened against companies part of a group could be determined by the very geographical scope of application of the new regulation, as this is in general only applied if a company has its COMI within the EU. Should EU-based companies part of an international group be subject to insolvency proceedings, non-EU com-

[272] InsRRec, art. 74. An obligation that resembles those already pending upon practitioners in proceedings opened against the same debtor. The lack of a similar obligation between courts, or between courts and liquidators seems justifiable as direct communication of the court for the procedure of a parent company with the court for the procedure of another parent company could *de facto* open the way to collective insolvency proceedings, which is not the choice made by the regulation, which in this sense excludes that the coordinator's plan can include recommendations as to any consolidation of proceedings or insolvency estates (art. 72(3), InsRRec).

[273] THOLE, DUEÑAS, *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, cit., p. 218, and MANKOWSKI, *Art. 70 Empfehlungen und Gruppen-Koordinationsplan*, in MANKOWSKI, MÜLLER, SCHMIDT (eds.), *EuInsVO 2015*, München, 2016, Rn. 2 ff.

[274] InsRRec, art. 70(2).

panies will not be subject to the EU rules on communication and cooperation[275]. This does not necessarily mean that foreign practitioners will not cooperate with European insolvency office holders. As seen, in particular US, British, and Canadian practitioners and courts are more inclined to cooperation. However, cooperation will be governed by domestic laws, both for EU and non-EU Member States.

Additionally, from practical investigations carried out in different contexts[276], practitioners have already pointed out the complexity of the procedure, which might have a reflect on costs, accompanied by the lack of "real powers" (other than its possibility to request a stay of proceedings for up to six months) of the coordinator, as well as the strict conditions for the opening of the procedure (in that the requested court must be satisfied that creditors are not "disadvantaged" –rather than damaged– by the coordination).

## 9. Conclusions on exchange of information, coordination, and cooperation: open issues

From the above, it seems clear that exchange of information, coordination, and cooperation is strictly interconnected with the skills and abilities of practitioners. Nonetheless, these skills and abilities are determined by domestic law only, which become of particular importance if one practitioner wishes to challenge the colleague's behavior, or if a professional is appointed as coordinator under the law of another Mem-

[275] In this sense, cf. NISI, *The Recast of the Insolvency Regulation: A Third Country Perspective*, in *Journal of Private International Law*, 2017, p. 324, at 339 f.

[276] OBERHAMMER, KOLLER, AUERNIG, PLANITZER, *Part 3: Insolvencies of Groups of Companies*, cit., p. 119 ff. Also raising some concerns on the possible effectiveness of the new rules, BEWICK, *The EU Insolvency Regulation, Revisited*, cit., p. 188; VAN CALSTER, *COMIng, and Here to Stay: The Review of the European Insolvency Regulation*, cit., p. 749, suggesting that the condition of no financial disadvantage of creditors might prove to be one of the toughest to apply; THOLE, DUEÑAS, *Some Observations on the New Group Coordination Procedure of the Reformed European Insolvency Regulation*, cit., p. 218 ff.; MCCORMACK, *Something Old, Something New: Recasting the European Insolvency Regulation*, cit., p. 143, arguing that the procedure, however noble in intentions, might unlikely be used in practice, and FAZZINI, *Promulgato il nuovo regolamento (UE) N. 2015/848 sulle procedure di insolvenza transfrontaliere: principali profile di riforma*, in *Diritto del commercio internazionale*, 2015, p. 907 ff.

ber State. It is apparent that requirements to exercise the insolvency office holders activity should converge between Member States[277]. Common ethical standards are a necessity to ensure proper implementation of the regulation. In this specific field, best practices have been collected for example by TRI Leiden[278] or by the European Bank for Reconstruction and Development[279]: it seems that not only a best practice would be for practitioners to individually adhere to such principles on a voluntary basis, but also professional orders, if not domestic legislators, should adopt binding rules to ensure compliance, throughout the whole European judicial space, to such common ethic and professional standards.

As regards the content of "European best practices" for communication and coordination, other than the suggestions made in the context of the present work, it has to be agreed with those[280] who believe that, as of today, the real issue is not developing new best practices (even though this evolutionary trend should never stop so as to keep practices updated). The core issue rests with lack of knowledge of soft law principles, guidelines, and best practices. In this sense, it appears that the above proposal for the European Commission to adopt an atypical act, or a recommendation, to support a compilation of best practices, or to develop its own set of best practices and guiding principles, might give sufficient "institutional dignity" to the practices, which would be probably more effectively followed by domestic court.

Another open issue concerns the respect of the priority rule for the opening of group coordination proceedings: rules on automatic recognition and enforcement do not take into express consideration decisions

[277] European Parliament Draft Report with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI).

[278] 2015 INSOL Europe Statement of Principles and Guidelines for Insolvency Office Holders in Europe, available online, on which see WESSELS, *Harmonisation of Requirements for Insolvency Holders on a European Level*, in *Festschrift für Bruno M. Kübler zum 70. Geburtstag*, München, 2015, p. 757 ff. See also INSOL Europe - Insolvency Office Holders Forum, Report on the Regulation of Insolvency Office Holders, 2016, available online.

[279] 2007 European Bank for Reconstruction and Development, Principles in Respect of the Qualifications, Appointment, Conduct, Supervision, and Regulation of Office Holders In Insolvency Cases, available online.

[280] REQUEJO ISIDRO, *Part 2: Cooperation Between Main and Secondary Proceedings – Cooperation, Communication, Coordination*, cit., p. 75.

rendered in proceedings opened against different debtors. Whereas some argue that such rules on automatic recognition of decisions opening an insolvency proceedings against one debtor should be applied by analogy also for the case of a decision opening a group coordination procedure[281], the same result could be attained by inferring from the priority rules of art. 62, and art. 66 InsRRec an implied and direct obligation to grant automatic recognition to such decisions. Differently, the provision at hand would be deprived of its effectiveness.

To conclude, the silence of the InsRRec on the validity requirements for the agreement to prorogate a court under art. 66 might lead to uncertainties in the practice. The question will be whether the validity of the agreement will be governed by one law (possibly that of the prorogated court), or whether such agreement will have to respect the laws of all proceedings. Where this is usually the case when it comes to coordination and cooperation in cross-border insolvency matters, the opening of such a procedure is to be made in accordance with the conditions provided for by the law applicable to the proceedings in which the insolvency practitioner has been appointed[282].

[281] OBERHAMMER, KOLLER, AUERNIG, PLANITZER, *Part 3: Insolvencies of Groups of Companies*, cit., p. 121.

[282] InsRRec, art. 61(2).

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# Recognition of Decisions (Including Question of Public Policy) and Powers of Liquidators

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## 1. Introduction: Principle of mutual recognition

The principle of almost unfettered EU-wide acceptation of all decisions falling into the scope of the European Insolvency Regulation lies at the core of the European legal regime in this matter. From the enactment of the 2000 Insolvency Regulation, according to Recital 22 it provides «*for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such insolvency proceedings. Automatic recognition should therefore mean that the effects attributed to the proceedings by the law of the State in which the proceedings were opened extend to all other Member States. Recognition of judgments delivered by the courts of the Member States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary*». Thus, the

Insolvency Regulation (InsReg) works as a so-called *double* instrument, which tends to unify in the European internal market not only the jurisdictional rules for the courts to undertake the proceedings, but also the conditions for recognition of all acts of Member State courts regarding insolvency proceedings. This is typical for all EU sources of international civil litigation, not risking in jeopardizing the effective functioning of free movement of decisions by confining themselves only to a synchronised scheme of jurisdiction.

The *Virgos/Schmidt Report* expressly states for immediate recognition of judgments concerning the opening, course (run) and closure of insolvency proceedings which come within its scope and of judgments handed down in direct connection with such proceedings[1].

Immediate recognition is guaranteed by so-called automatic recognition. The latter means that there is no special proceeding allowed to be followed in Member States for an insolvency decision to become operative on the territory of the state, where it is presented and relied on. In the structure of the InsReg the main focus is put on recognition rather than on execution, since the effects of decisions for opening and related to insolvency proceedings have no intrinsic executive effects, but force *res judicata*.

The introduction of rules for recognition in the Insolvency Regulation is the pivotal and most important tool for creating the EU insolvency regime. It could be argued to be even more vital than the rules for jurisdiction since it leaves no space for subsidiary application of national rules, nor any room for questioning the court of origin's appreciation of its jurisdiction save the public policy exception. Once issued, the insolvency decision becomes binding throughout EU[2] and the only way for protection against it is concentrated before the competent authorities of origin. This unprecedented legal value of the issuing court is built on the premises of all prevailing mutual trust in the exercise of jurisdiction.

During the procedure of recasting the InsReg, no need for introducing major changes has been detected. According to the Proposal for

[1] VIRGOS, MIGUEL AND SCHMIT, ETIENNE. (1996) *Report on the Convention on Insolvency Proceedings*. para 143;

[2] With the exception of Denmark.

InsReg[3] the EU wide recognition of the effects, which insolvency brings about is discussed only with regards to its ambit or whether to broaden its scope by inserting more decisions in the rule for recognition. The only specific proposal for change in the newly inserted Recital 29 is that the publication of insolvency decisions is a precondition for recognition, if in the host Member State there is an establishment. This prerequisite for recognition is not followed in the text of the InsReg[4].

In the Impact Assessment[5], the Commission relying on the report for the application of the InsReg perceives that the definition of insolvency proceedings should be broadened to include hybrid, pre-insolvency and personal insolvency proceedings. National insolvency procedures notified by Member States and which fall under the definition included in the Regulation and are listed in the Annex to it. The definition would require, in particular, that the insolvency proceeding entail some *degree of court supervision*, as a necessary condition for recognition based on mutual trust. Further, the Impact Assessment reveals that cases of denial of recognition of insolvency decisions are rare (23%) and the practitioners would appreciate the clarification of the contents of the notion for decision for opening insolvency proceedings and further enlargement of its scope to take into account recognition of third states insolvency decisions. The significance of third states decisions for opening insolvency proceedings is referred to when the COMI of the debtor is located on the territory of Member States and the recognising Member State shall observe for the application of InsReg rules of jurisdiction, respectively not accept the effect of the third state act[6].

In the course of the present study of best practices in Member States, no major problems with the regime of recognition in the application of InsReg have come to attention. The overall national jurisprudence of

[3] Proposal for a Regulation of the European Parliament and of the Council amending Regulation 1346/2000 on insolvency proceedings – (2012) 416 final; (2012) 417 final.

[4] Recital 75 InsRec - *publication should not be a prior condition for recognition of the foreign proceedings*.

[5] Impact Assessment accompanying the Revision of Regulation (EC) No 1346/2000 on insolvency proceedings COM (2012) 744 final.

[6] SARBINOVA, in NATOV (ed.) *The International Agreement – Source of Private International Law*, Sofia, 2013, p. 431; NISI, *The Recast of Insolvency Regulation: a Third Country Perspective*, in *Journal of Private International Law*, vol. 13, is. 2/2017.

Member States' courts is in favour of *effet utile* of the automatic recognition of insolvency decisions with few cases of disruption. The general benefits of the harmonised scheme is easily defendable having in mind the differences in the national rules for recognition, which, would require a special act of the Member State of recognition courts supplementing the foreign insolvency decisions. The condition for recognition under national laws are most diverging ranging from requirement for reciprocity in the practice/legislation of the court of origin to a list of defined requirements (the court delivering the judgment had jurisdiction according to the recognising court rules on international jurisdiction; the act introducing the procedure was served accordingly and the essential rights of the defendants were not infringed; parties rights to take part in procedure was guaranteed; the decision is *res judicata* in the origin; a foreign decision is not contrary to a prior decision of the recognising court state; *lis pendens* requirement; public order exception).

The InsRec keeps the major provisions of Insolvency Regulation regarding recognition of other Member States' insolvency decisions unchanged[7]. The *status quo* of immediate acceptance of foreign insolvency proceedings effects is upheld and the efforts are directed in clarifying the scope and meaning of the foreign decisions qualified for recognition, which is a matter of the new general provisions of Art.2 of InsRec.

## 2. Decisions subject to recognition

The Insolvency Regulation (InsReg) as well as the Regulation Recast (RegRec) divide the decisions into two distinguishable groups, which are apt for mutual recognition in Member States. The first category includes the decisions for opening of main as well as of secondary or of territorial insolvency proceedings issued by a competent court of Member States. As per Art.16, §1 InsReg/Art.19, §1 InsRec «*any judgment opening insolvency proceedings handed down by a court of a Member*

[7] Compare Art.16, Art.17 and Art.25 of Insolvency Regulation with Art.19, Art.20 and Art.32 of InsRec.

*State which has jurisdiction pursuant to the Regulation shall be recognised in all other Member States from the moment that it becomes effective in the State of the opening of proceedings*».

The other all-inclusive group of decisions is provided by Art.25, §1 InsReg/Art.32, §1 InsRec, called "Recognition and enforceability of *other* judgments". Those other acts are judgments relating to the conduct and closure of insolvency proceedings as well as to the framework of insolvency proceedings. The decisions merely related to insolvency proceedings which fall in the scope of the general civil and commercial matters provisions of Brussels I Recast Regulation are to be excluded from this first group.

### 2.1. Decisions for opening insolvency proceedings

The rules for immediate recognition put an important value on the strict qualification of decisions for opening of insolvency proceedings. As per InsReg those acts are not clearly defined, the main guidance being the type of the proceedings in which the court judgment is issued to fall into the list of Art.2 "a" and Annex A. Thus, other decisions related to preliminary appointment of the liquidator, or for applying separate measures for protection of creditors with regard to future insolvency proceedings, were not clearly covered by the recognition regime. The decisive interpretation was provided by the Court of European Communities in its decision *Eurofood*[8] whose authority is still valid for the application of InsRec. It is stated that the Regulation does not define sufficiently precisely, what is meant by a '*decision to open insolvency proceedings*', whereas the operation of the Regulation would be compromised without strict non–national definition. As per the Court the following conditions shall be fulfilled simultaneously in order for the judgment to enjoy the mutual recognition – 1**.** the decision to be handed down by a court of a Member State to which application for such a decision has been made, based on the debtor's insolvency and seeking the opening of proceedings referred to in Annex A to the Regulation; 2. The decision involves the divestment of the debtor, the latter losing the powers of management that he has over his assets and 3. the appointment of

[8] Decision of 02 May 2006 Case C-341/04 *Eurofood IFSC Ltd*.

a liquidator referred to in Annex C to the Regulation. Thus the appointment of provisional liquidator as per Annex C to the Regulation and the divestment of the debtor of management powers is a decision for opening insolvency, no matter that the main proceedings are not yet started *per se*.

Following the ratio of *Eurofood* an express legal definition of "*judgment opening insolvency proceedings*" is inserted in Art. 2, § 7 of InsRec, which includes two sorts of acts: 1. the decision of any court to open insolvency proceedings or to confirm the opening of such proceedings and 2. the decision of a court to appoint an insolvency practitioner. Since both group shall be construed in accordance with the authoritative interpretation of ECJ, questions could arise as whether the second group and, namely, decisions for appointment of insolvency practitioner[9] without the effect of divestment of the debtor of management powers are subject to recognition as per Art.19, §1 InsRec. It is indisputably clear that proceedings listed in Annex A would enter into the term of judgment opening insolvency proceedings. The appointment of an insolvency practitioner enumerated in Annex B would constitute such act, if the officer is of the type of provisional insolvency practitioner doubled with divestment of the debtor's management powers[10]. The interpretation of Art.2, §7 of InsRec for the purpose of applying Art.19, §1 InsRec shall be restrictive only to decisions, which formally open insolvency proceedings and comply with the *Eurofood* requirements, thus, excluding some of the decisions as per second subparagraph of Art.2, §7 of InsRec[11]. On the other hand, the strict application of Art.2, §7 with regards to Art.19, §1 InsRec includes all decisions for appointment of insolvency practitioner listed in Annex B, without restrictive approach[12]. The rational position reconciling the ECJ practice with the InsRec contents would be to accept that decisions opening insolvency proceedings shall have, with direct subject, one of

[9] The term "insolvency practitioner" in the body of InsRec replaces the former "liquidator" as per the InsReg 2000;

[10] BORK, in BORK, MANGANO (eds.), *European Cross – Border Insolvency Law*, Oxford, 2016, p. 173.

[11] *Ibid.*

[12] MOSS, in MOSS, FLETCHER, ISAACS (eds.), *EU Regulation on Insolvency Proceedings*, Third ed., Oxford, 2016, pp. 126-7.

those listed in Annex A or Annex B and shall have divestment effect on debtor. The decisions regarding hybrid, pre-insolvency and stabilisation proceedings, not listed in Annex A, are not covered by the principle of free movement of decisions.

### 2.2. Applicability of the InsRec.

The decisions for opening of insolvency proceedings shall be in line with the operation of the InsRec *ratione temporis*, *rationae personae* and *ratione materiae*. The temporal applicability is regulated in general in Art.84 and Art.91 InsRec, whereas the InsReg 2000 rules will continue to be operative after the entry into force of InsRec for all proceedings opened before June, 26th 2017. The proceedings need to be opened at the time of entry of the InsRec, no matter when initiated. The decisions could be decisions, which only confirm prior starting of preliminary insolvency proceedings as per the novelty introduced in Art.2, §7, since some Member States provide for such posterior declaration of opening of proceedings, which by this moment are regarded as interim with preservation character[13]. The difficulty in distinguishing between the different types of decisions stems from the fact that the national heterogeneous classifications of proceedings bearing the overall relatedness to insolvency shall be interpreted as per the uniform standard of the InsRec.

The decision could be addressed against a person, who, as per the State of recognition, is not capable of becoming insolvent. The classic example is the diverging attitude of Member States towards bankruptcy of natural persons, which is not accepted in all EU States. The continuing principle is that, no matter if the said debtor could be subject to insolvency as per the national law of recognizing court, the decision shall be recognized – Art.16, §1 InsReg/Art.19, §1 InsRec. The InsRec imposes an obligation to recognize insolvency proceedings opened in another Member State, even when such proceedings cannot be brought

[13] As per Recital 15 InsRec, it «*should also apply to proceedings that, under the law of some Member States, are opened and conducted for a certain period of time on an interim or provisional basis before a court issues an order confirming the continuation of the proceedings on a non-interim basis. Although labelled as 'interim', such proceedings should meet all other requirements of this Regulation*».

against the debtor in that State, due to his professional capacity or to his public or private nature, as in the case of non-traders in certain countries[14].

The decision shall be issued by a court of Member State, where the definition of the notion "court" as per Art.2, §6 of InsRec means judicial body *or any other* competent body of a Member State empowered to open insolvency proceedings or to confirm such opening. There is no need for more precise provision since the EU has no powers to regulate national normative approaches which functionally and structurally competent bodies should be entitled to issue judgments on insolvency and to lead proceedings. The national reports in present study don't raise significant concerns regarding the personality of the competent foreign body, whose act is put on recognition. The focus is on the powers exercised and the contents of the foreign judgment.

### 2.3. Relationship between recognition of main and secondary/territorial proceedings

The logic of the InsReg and the InsRec system of rules is that the debtor could have only one distinguishable COMI and, thus, only one set of main proceedings could be subject to recognition in all Member States. The decision opening main proceedings shall be an individual and recognizable act of Member State court.

The relationship between simultaneous decisions of more than one Member State is that of priority. The first issued judgment opening main proceedings as per Art.3, §1 InsReg/ Art.3, §1 InsRec will have precedence over all other decisions delivered by competent authorities of Member States. All other courts can't question and overrule the assessment of the rendering court about its jurisdiction to open main proceedings. This rule of priority stems from the automatic recognition principle of Art.16, §1 InsReg/Art.19, §1 InsRec and it is confirmed by ECJ in its practice. The system of recognition of decisions opening insolvency proceedings is *compulsory* and this is a natural consequence

[14] VIRGOS/SCHMIDT, *Report*, op. cit., para 148.

of the underlying mutual trust in the exercise of international jurisdiction[15]. This encourages the rush-to-court practices and *forum shopping*, especially if procedure before the courts of the natural COMI is lengthy and there is a high risk of the foreign court opening the proceedings first. The Regulation coordinates possible conduct of parallel proceedings through rigid rule of priority, immediate recognition and without providing for *lis pendens* rules, unlike other EU sources of Private International Law dealing with international civil jurisdiction[16]. The recognizing court can't object to the first court's examination of jurisdiction, if the decision enters into the scope of Art.2, §7 InsRec. The only possible solution is second in time proceedings to be qualified as secondary proceedings. As per Art.16, §2 InsReg/Art.19, §2 InsRec recognition of main proceedings shall not preclude the opening of secondary proceedings by a court in another Member State. The latter proceedings shall always be secondary insolvency proceedings. The relationship of priority becomes one of hierarchy. On the other hand, the opening of territorial proceedings limits the reach in space of main proceedings – they can't affect the assets and legal situations which come within the jurisdiction of territorial proceedings opened.

### 2.4. Automatic recognition and lack of procedure

The InsRec doesn't expressly limit the persons who are entitled to ask for recognition and, as a result**,** any person with legal interest is empowered to rely on the foreign decision for opening of insolvency proceedings. This could be the insolvency practitioner in the first place, but also the debtor, its creditors or parties on pending legal relations with debtor. In comparison, Art.15, §1 of UNCITRAL Model Law provides for only the foreign representative to apply and initiate the procedure for recognition. The decision subject to recognition need not have *res judicata*,

[15] Decision of 02 May 2006 Case C-341/04 *Eurofood IFSC Ltd*, pp. 39-40.

[16] See Art.29 and Art.33 of Brussels I Recast Regulation - in MAGNUS, MANKOWSKI (eds.), *European Commentaries on Private International Law, Volume I: Brussels Ibis Regulation*, Koeln, 2016, pp. 713 – 725.

nor be final[17] in the Member State of origin. However, it shall be effective in the State of the opening of proceedings, meaning to immediately produce the legal consequences as described above. There are no rules in case after recognition the effect of foreign decision is suspended in the Member State of origin. The recognizing court could, at any time, refuse to respect a suspended foreign decision for opening insolvency proceedings, since there is no separate act with *res judicata* for the previous recognition.

Since the InsReg/InsRec does not require any special additional national procedure for recognition, anyone could ask for automatic recognition. As a result, the right for recognition could be exercised together with other claims, via plea or objection in the course of pending other court proceedings in the state of acceptance. There is no obstacle, and from a practical point of view, recognition is commonly exercised incidentally by the insolvency practitioners in controversial proceedings to protect or collect debtor's assets. Unlike other instruments of regulation of conflict of jurisdictions in the European judicial area, the InsReg/InsRec doesn't allow any way for defense versus the automatic recognition or the refusal for it in a separate procedure[18]. If the authorities of accepting Member State decide to refuse the recognition on the limited ground of public policy exception of Art.26 InsReg/ Art.33 InsRec, normally there will be no special act in which it is to be embodied and, most often, it will be reflected as an incidental question without right to direct appeal.

### 2.5. Effects of recognition

The approach to the effect of recognition is the so – called "extension" model. The latter means that the judgment opening insolvency proceedings shall, «*with no further formalities, produce the same effects in any other Member State as under the law of the State of the opening of proceedings, unless this Regulation provides otherwise. From the time fixed by the law of the State of the opening, the judgment opening proceedings produces its effects with equal force in all Contracting States.*

[17] See Art.2, §8 InsRec.

[18] See Art.36, §2 of Brussels I Recast Regulation.

*The divestment of the debtor, the appointment of the liquidator, the prohibition on individual executions, the inclusion of the debtor's assets in the estate regardless of the State in which they are situated, the obligation to return what has been obtained by individual creditors after opening, etc., are all effects laid down by the lex concursus which are simultaneously applicable in all Contracting States*»[19]. The substantive insolvency regime of the Member State of COMI receives expanded territorial reach as a result of the recognition.

There are two major exceptions to the extension in which the InsReg/InsRec expressly provides otherwise. The first is the instance of the opening of the secondary or territorial proceedings – the insolvency laws of the recognizing State will govern the assets situated within its territory. The consequences of the COMI legislation will be restricted regarding said assets but could be allowed to have effects on concession basis. As per Art.16, §2 InsReg/Art.19, §2, any restriction of creditors' rights, in particular, a stay or discharge, shall produce effects vis-à-vis assets situated within the territory of another Member State only in the case of those creditors who have given their consent.

The second exception constitutes all introduced exceptions to the general *lex concursus* conflict of law rule of Art.7 InsReg concerning the rights *in rem* of creditors or third parties and contracts related to immovable property, the set off of creditors' claims, etc.[20]. The procedural effects on the pending court and arbitration proceedings are to be determined as the *lex fori* of the seised tribunal. These effects can be regarded not as exceptions to the effectiveness of the foreign decisions for opening insolvency proceedings, but as special conflict rules[21].

[19] VIRGOS/SCHMIDT, *Report*, op. cit., para 154.

[20] See Art. 8 – 18 InsReg.

[21] MOSS, op. cit., p.170;

## 3. Powers of the liquidator

### 3.1. Terminology and meaning

The insolvency laws within the European Union use different terms[22] to identify the person, entitled to lead the insolvency proceedings such as "administrators", "trustees", "liquidators", "supervisors", "receivers", "curators", "official", "judicial managers or commissioners"[23]. Regardless of the exact terms used in the regulations, it remains undisputed that the insolvency practitioners play a central role in the insolvency proceedings. This central role is part of the regulatory framework of the commencement of the insolvency proceedings and is essential for the effective and efficient[24] implementation of the insolvency laws[25].

The European Insolvency Regulation(s)[26] also use different terms to identify the person entrusted with certain powers over debtors and their assets[27]. The European Regulation on Insolvency Proceedings 1346/2009 ("EIR") used the term "liquidator**"** and defined it in Art.2, "b" as «*any person or body whose function is to administer or liquidate*

[22] In the United Kingdom for instance, the term "liquidator" includes the liquidator, supervisor of a voluntary arrangement, administrator, official receiver, trustee, provisional liquidator, judicial factor. In Germany the term "liquidator" encompasses Konkursverwalter, Vergleichsverwalter, Sachwalter (nach der Vergleichsordnung), Verwalter, Insolvenzverwalter, Sachwalter (nach der Insolvenzordnung), Treuhänder, Vorläufiger Insolvenzverwalter. In France the following terms are used to identify the insolvency practitioners: Représentant des créanciers, Mandataire liquidateur, Administrateur judiciaire, Commissaire à l'exécution de plan.

[23] McCormack, Keay, Brown, *European Insolvency Law. Reform and Harmonization*, Cheltenham, 2017, p. 65.

[24] For the importance of ensuring that cross-border insolvency proceedings operate efficiently and effectively see Decision of 02 May 2006 Case C-341/04 *Eurofood IFSC Ltd*.

[25] UNCITRAL, Legislative Guide on Insolvency, 2004, p.174.

[26] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, in OJ L 160, 30.6.2000, p. 1, and now Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, in OJ L 141, 5.6.2015, p. 19, as amended by Regulation (EU) 2017/353 of the European Parliament and of the Council of 15 February 2017 replacing Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings, in OJ L 57, 3.3.2017, p.19.

[27] As stated in Judgment of the Court (First Chamber), 19 April 2012, *F‑Tex SIA* v *Lietuvos‑Anglijos UAB 'Jadecloud-Vilma'*, Case C-213/10, para 36, ECLI:EU:C:2012:215 «*...that is to say as a body responsible for insolvency proceedings....*».

*assets of which the debtor has been divested or to supervise the administration of his affairs*». The EIR contains an exhaustive list of liquidators in all Member States incorporated as Annex C, thus the definition in Art.2 "b" was neither interpreted, nor used by the courts of the Member States[28].

In contrast, the recast Insolvency Regulation (Regulation (EU) 2015/848) ("The recast EIR") uses different terms with a different explanation, namely: "insolvency practitioner" *means any person or body whose function, including on an interim basis, is to:*

*(i) verify and admit claims submitted in insolvency proceedings;*
*(ii) represent the collective interest of the creditors;*
*(iii) administer, either in full or in part, assets of which the debtor has been divested;*
*(iv) liquidate the assets referred to in point (iii); or*
*(v) supervise the administration of the debtor's affairs.*

The different terminology used comes to clarify the broader scope of the recast EIR[29] and highlight that the insolvency practitioner is not competent only with respect to the debtor's affairs after the opening of the insolvency proceedings[30], but shall be a person with certain powers over proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs[31].

[28] ISRAËL, *European Cross-border Insolvency Regulation: A Study of Regulation 1346/2000 on Insolvency Proceedings in the Light of a Paradigm of Co-operation and a Comitas Europaea*, Antwerp, 2005, p. 255.

[29] VAN CALSTER, *European Private International Law*, Oxford, 2016, p. 286.

[30] MCCORMACK, KEAY, BROWN, op. cit., p. 66.

[31] With respect to the Bulgarian legislation for example and the specific appointment and powers of the listed practitioners, it could be reasonably concluded that the term "insolvency practitioner" indeed is broader and encompasses also pre-insolvency proceedings and restructuring proceedings. In comparison with Annex C of the EIR and the meaning of the term in the United Kingdom, it should be noted that the list of Annex B of the Recast EIR included one more insolvency practitioner, namely: the Interim Receiver. The German term includes additionally the Vorläufiger Sachwalter in Annex B in comparison to Annex C of the EIR.

The new term also reflects the European Parliament Resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law[32]. Thus, for the purposes of this report, the term "insolvency practitioner" ("IP") shall be used.

In any case, both Regulations resolve to Annex-approach[33] joined with an abstract definition of the powers of the IP[34]. The specific positions that fall within the scope of Art.2 (5) of the recast EIR are listed in Annex B.

What is common in both definitions is that the IP is appointed by a court of a Member State that has jurisdiction pursuant to the conflict of law rules of the recast EIR to open insolvency proceedings. However, according to Art.2 (6) the term "court" shall also be interpreted in a broad manner and includes competent body of a Member State empowered to open insolvency proceedings, to confirm such opening or to take decisions in the course of such proceedings. Therefore, the definition of the IP is a combination of the requirement for some judicial supervision, non-exhaustive list of competences and designation in Annex.

To clarify the requirement for judicial supervision, regards should be taken to the requirements for qualification and work of the IPs.

### 3.2. Requirements for the qualification and work of the insolvency practitioners

While the harmonisation of the term "insolvency practitioner" was undisputed, the requirements for the qualification and work of the IPs were broadly discussed in the process of adoption of the final text of the recast EIR. The first step towards the harmonisation of these general

[32] European Parliament resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0484+0+DOC+XML+V0//EN, last visit: 18.08.2017.

[33] The importance of the list of IPs, included in Annex to the EIR is expressly highlighted in Judgment of the Court (Grand Chamber) of 2 May 2006, *Eurofood IFSC Ltd*, case C-341/04, ECLI:EU:C:2006:281, where the Court found out that proper opening of insolvency proceedings for the purposes of the EIR requires the divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation.

[34] VAN CALSTER, op. cit., p.289.

aspects was the INSOL Europe study for the European Parliament[35]. The note identifies that in the different Member States there are different rules on the qualifications and eligibility for the appointment, licensing, regulation, supervision, professional ethics and conduct of insolvency representatives, which leads to substantial difficulties in practice[36].

As a result, the position of the European parliament[37] includes explicit recommendations on the harmonisation of general aspects of the requirements for the qualification and work of IPs. These recommendations include, but are not limited to: the requirement that the IP must be approved by a competent authority of a Member State or appointed by a court of competent jurisdiction of a Member State; must be of good repute and must have the educational background needed for the performance of his/her duties. The IP must be competent and qualified to assess the situation of the debtor's entity and to take over management duties for the company. In the event of a conflict of interest, the liquidator must resign from his/her office, etc.

However, because of the substantial differences between EU Member States,[38] it was considered unmeritorious to seek harmonization at

[35] See Note on Harmonisation of Insolvency Law at EU Level (2010), prepared by members of INSOL Europe, available at http://www.eesc.europa.eu/sites/default/files/resources/docs/-ipol-juri_nt2010419633_en.pdf, last visited: 17.08.2017

[36] *Ibid*, p. 23.

[37] European Parliament resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)), available at: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2011-0484+0+DOC+XML+V0//EN, last visit: 18.08.2017.

[38] Most of the EU Member States do not have a separate IP profession with its own code of ethics and discipline. Practice shows that IPs are generally lawyers and accountants, but no general rules or regulations exist on that matter. It should be noted that Romania, Portugal, Ireland and Cyprus, for instance, have separate legal codes dealing with the licensing and registration of IPs. The Bulgarian legislation on the other hand provides that only a natural person may become IP and that person shall not have been convicted at an age of majority for deliberate crimes, unless rehabilitated; shall not be a spouse of the debtor or a creditor; shall not be a creditor in the bankruptcy proceedings nor a bankrupt debtor that has been granted *restitutio in integrum* or in any relations with the debtor or a creditor, which may generate reasonable suspicion of impartiality. The Bulgarian law envisages that the IP must hold a postgraduate degree in economics or law and have at least 3 years of service in the field of his speciality. The IP in Bulgaria shall also have passed successfully the examination for acquiring qualification.

that level with respect to substantive insolvency law rules[39]. Therefore, the recast EIR provides for the requirement that IPs who are appointed without the involvement of a judicial body should, under national law, be appropriately regulated and authorised to act in insolvency proceedings[40].

This requirement for the eligibility of the IPs is essential since both EIR and the recast EIR implement a philosophy of EU universalism[41]. Thus an IP appointed in the main insolvency proceedings has some powers in other Member States where the debtor has assets. Different rules and regulations in different Member States may create serious difficulties where the IPs shall exercise their powers provided that no uniform rules for their capacity exist.

To illustrate the importance of the uniform rules for the qualification and work of the IPs reference should be made to the practice of the Court (First Chamber), 22 November 2012, Bank Handlowy w Warszawie SA and PPHU 'ADAX'/Ryszard Adamiak v Christianapol sp. z o.o., Case C-116/11[42], where the court stressed the dominant role of the main insolvency proceedings and the fact that the IP in the main proceedings have certain prerogatives over the secondary proceedings, which requires cooperation and effective management. Such cooperation and effective management would be impossible if the IPs were not properly qualified and experienced.

The principle of cooperation and the role of the IPs appointed in the main proceedings are even more important in the recast EIR, where the IPs exercise their powers also with respect to different companies within the same group. In particular, the recast EIR provides that the courts of different Member States may cooperate by coordinating the appointment of IPs. Therefore, it is possible to appoint a single IP for several insolvency proceedings concerning the same debtor or for different members of a group of companies. This could only be done if

[39] MCCORMACK, KEAY, BROWN, op. cit., p. 67.

[40] Recital 21 of the recast EIR.

[41] MCCORMACK, *Universalism in Insolvency Proceedings and the Common Law*, in 32 *Oxford Journal of Legal Studies*, 2012, p. 325 and FRANKEN, *Three Principles of Transnational Corporate Bankruptcy Law: A Review*, in 11 *European law Journal*, 2005, p. 232.

[42] ECLI:EU:C:2012:739.

such appointment is compatible with the rules applicable to each of the proceedings and these rules encompass also the different requirements in the Member States for the qualification and licensing of the IPs.

It remains to be seen whether the requirement for cooperation would suffice to conduct the insolvency proceedings in different Member States in a clear and competent manner or the EU legislation should provide for more harmonisation in that respect.

Not only are the requirements for the qualification and work of the IPs different in each Member State but also the powers of the IPs with respect to the proceedings and the debtor's assets. As pointed out above, the term "insolvency practitioner" under the meaning of the recast EIR encompasses both the requirement for some judicial supervision over the qualification and work of the IP and non-exhaustive list of competences[43] combined with the Annex-approach[44]. In the following lines we shall try to identify the main powers of the IP under the recast EIR.

### 3.3. Powers of the insolvency practitioner

Concerning the powers of the IP in the Member States, two main points should be discussed.

First of all, the IP, appointed in one Member State may exercise his/her powers in all other Member States – with the exception of Denmark[45]. This follows from the principle of automatic recognition of the insolvency proceedings. The recognition of main insolvency proceedings opened in a Member State triggers the automatic recognition of the

[43] PANNEN, *European Insolvency Regulation: Commentary*, Berlin, 2007, p. 328; VIRGOS/SCHMIT, *Report*, mn 158.

[44] ECLI:EU:C:2006:281.

[45] In accordance with Articles 1 and 2 of Protocol No 22 on the position of Denmark annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.

appointment[46] and the powers of the IP in those proceedings[47]. Pursuant to Art.20 of the recast EIR the judgment opening insolvency proceedings as referred to in Art.3 (1) shall, with no further formalities, produce the same effects in any other Member State as under the law of the State of the opening of proceedings, i.e. an automatic recognition of the main insolvency proceedings takes place in all other Member States. This means that the powers of the IP are also automatically recognized in another Member State without need for exequatur procedure or for public notification pursuant to Art.22 of the recast EIR. The only proof of the IP's appointment shall be a certified copy of the original decision for appointment**.** Consequently, Art.21 distinguishes the powers if the IP dependant on whether he or she was appointed in the main proceedings or in territorial insolvency proceedings.

Second, the powers of the IP are those that he/she enjoys under the *lex fori concursus*[48], i.e. those listed in the laws of the Member States governing the insolvency proceedings[49]. The exhaustive enumeration of the powers of the IP is not possible due to the different insolvency regimes in the Member States[50]. However, the recast EIR follows the

[46] With respect to the recognition of the appointment of the IP, see Judgment of the Court (First Chamber) of 2 July 2009, *SCT Industri AB i likvidation* v *Alpenblume AB*, Case C-111/08, ECLI:EU:C:2009:419, where it is stated that*:* «*the transfer of those shares was to be regarded as invalid on the ground that the court of Member State A did not recognise the powers of a liquidator from a Member State B in the context of insolvency proceedings conducted and closed in Member State B*».

[47] PANNEN, op. cit., p.328.

[48] ISRAËL, op. cit., p. 263.

[49] The different terms used in the Member States also provide for different scope of powers of the insolvency practitioner. For example in the United Kingdom, an administrator is the insolvency practitioner appointed to run an administration which is a rescue proceeding for the benefit of all creditors. An administrative receiver is an insolvency practitioner appointed by a secured creditor having security over substantially all the assets to manage the assets on behalf of the secure creditor etc. See WOOD, *Principles of International Insolvency*, London, 2007, p. 14-056.

[50] This follows directly from Art.7, para.2, "c" of the recast EIR and was introduced in Art.4, para.2, "c" of the EIR. This principle was further elaborated in case C-444/07, ECLI:EU:C:2010:24. According to the Court of justice: «*Article 4(2) of the Regulation contains a non-exhaustive list of the various matters in the proceedings which are governed by the law of State of the opening of proceedings, including in particular, in subparagraph (b), the assets which form part of the estate, in subparagraph (c), the respective powers of the debtor and the*

approach of the EIR used in Art.18 and gives the principle of the powers of the IP in Art.21, namely that the powers of the IP are dependent on the law of the Member State[51] of the opening of the proceedings. This principle was explicitly stated in Judgment of the Court (First Chamber) of 21 January 2010, MG Probud Gdynia sp. z o.o, Case C-444/07[52], where in para.23 the Court stressed: *"The universal effect of the main insolvency proceedings also has an impact upon the liquidator's powers since, under Article 18(1) of the Regulation, the liquidator appointed by a court which has jurisdiction pursuant to Article 3(1) of the Regulation may exercise in another Member State all the powers conferred on him, inter alia as long as no other insolvency proceedings have been opened there."*.

It should be highlighted that Art.21 of the recast EIR defines the power of the IP from the point of view of another Member State. For the purposes of the recast EIR, another Member State shall be understood as one of the States of the European Union, different from the State where the IP was appointed to act that falls within the scope of application of the EIR[53]. This provision illustrates the *lex fori concursus generalis* rule in the Private International Law and follows from the main rule, envisaged in Art.3 (1) of the recast EIR. Consequently, the rights and obligations of the IP are also governed by the *lex fori concursus generalis*[54].

However, to the contrast of the EIR, the recast EIR goes a bit further and as stated above includes general framework of the powers of the IP in the definition of the term itself. It could reasonably be stated that it is the IP who gains control over the administration and disposal of the debtor's assets[55]. As a result, the powers of the IP could be summarized as follows:

*liquidator, and in subparagraph (f), the effects of the insolvency proceedings on proceedings brought by individual creditors*».

[51] DUURSMA-KEPPLINGER, DUURSMA, CHALUPSKY, *Europäisches Insolvenzverordnung, Kommentar,* Art.18 mn 1.

[52] ECLI:EU:C:2010:24.

[53] PANNEN, op. cit., p.327.

[54] VIRGOS/SCHMIT, *Report*, mn 159.

[55] VAN CALSTER, op. cit., p. 289.

First, according to Art.2 (5) of the recast EIR, the IP is conferred with the powers to verify and admit claims submitted in insolvency proceedings. However, where upon request of the main IP no secondary proceedings were opened, the main IP should bear the obligation to look after the rights of the local creditor and to respect their priority rights as if secondary insolvency proceedings had been opened in that Member State.

Second, the IP shall also represent the collective interest of the creditors by caring on legal proceedings and lodging claims on behalf of certain groups of creditors. In this regard it should be noted that the recast EIR, following the legal regime established under EIR gives competence to the courts of the Member State within the territory of which insolvency proceedings have been opened also for actions which derive directly from the insolvency proceedings and are closely linked with them[56]. Clear example is given in Judgment of the Court (Sixth Chamber), 4 December 2014, H v H.K., Case C‑295/13[57], where the Court stressed that: «*the courts of the Member State in the territory of which insolvency proceedings regarding a company's assets have been opened have jurisdiction, on the basis of that provision, to hear and determine an action, such as that at issue in the main proceedings, brought by the liquidator in the insolvency proceedings against the managing director of that company for reimbursement of payments made after the company became insolvent or after it had been established that the company's liabilities exceeded its assets*».

As a result, the IP is entitled to bring avoidance actions[58] against defendants in other Member States and actions concerning obligations that arise in the course of the insolvency proceedings, such as advance

[56] On the proceedings deriving directly from the insolvency and being closely linked to it, see Judgment of the Court (First Chamber) of 10 September 2009, *German Graphics Graphische Maschinen GmbH* v *Alice van der Schee*, Case C-292/08, ECLI:EU:C:2009:544, para 33.

[57] ECLI:EU:C:2014:2410.

[58] On the rules relating to the voidness, voidability or unenforceability of legal acts detrimental to the creditors and the powers of the IP thereto see Judgment of the Court (First Chamber) of 16 April 2015, *Hermann Lutz* v *Elke Bäuerle*, Case C-557/13, ECLI:EU:C:2015:227; Judgment of the Court (First Chamber), 16 January 2014, *Ralph Schmid* v *Lilly Hertel*, Case C‑328/12, ECLI:EU:C:2014:6; Judgment of the Court (First Chamber), 19 April 2012, *F‑Tex SIA* v *Lietuvos‑Anglijos UAB 'Jadecloud-Vilma'*, Case C‑213/10, ECLI:EU:C:2012:215.

payment for costs of the proceedings[59]. Thus, the insolvency practitioner may bring an avoidance claim joined with a general civil or commercial claim[60] before the courts of the defendant's domicile if the IP considers this more effective with regard to the insolvency proceedings[61].

Third, the IP is empowered with the administration of the debtor's insolvency estate including the effective realisation of the total assets. These powers of the IP are also subject to *lex fori consursus* as explicitly stated in Case C‑116/11[62] (Bank Handlowy w Warszawie SA), where the Court stressed that: *"...it is for the national law of the Member State in which insolvency proceedings have been opened to determine at which moment the closure of those proceedings occurs."*.

Forth, the IP shall supervise the administration of the debtor's affairs[63]. This includes, for example, the possibility to apply for preservation measures which are possible under the law of the Member State where the assets of the debtor are located. However, according to the second part of Art.21 (1) of the recast EIR, the powers of the insolvency practitioner in another Member State are limited to a situation where in that Member State no other insolvency proceedings have been opened and no preservation measure[64] to the contrary has been taken there further to a request for the opening of insolvency proceedings in that State.

For the same reasons, the IP in the main insolvency proceedings is entitled to request the opening of secondary insolvency proceedings

[59] Recital 23 of the recast EIR.

[60] The Court's case-law acknowledging the jurisdiction of courts, under Article 3(1) of Regulation No 1346/2000, to rule on related actions is founded principally on the practical effect of that regulation (see, to this effect, judgments in *Seagon*, C‑339/07, EU:C:2009:83, paragraph 21, and *F-Tex*, C‑213/10, EU:C:2012:215, paragraph 27).

[61] PANNEN, op. cit., p. 326.

[62] ECLI:EU:C:2012:739.

[63] As it was expressly stated in para. 27 of the Judgment of the Court (First Chamber) of 2 July 2009 in Case C-111/08 *SCT Industri AB i likvidation* v *Alpenblume AB*, ECLI:EU:C:2009:419 that, in particular, the EIR and the recast EIR provide that, in the case of insolvency, debtors lose the right freely to dispose of their assets and the liquidator has to administer the assets in insolvency on behalf of the creditors, which includes effecting any necessary transfers.

[64] ISRAËL, op. cit., p. 262.

where the efficient administration of the insolvency estate so requires[65]. In particular, the IP has the power to request the opening of secondary insolvency proceedings in the jurisdiction where the rights *in rem* arise, if the debtor has an establishment there[66]. If secondary insolvency proceedings are not opened, any surplus on the sale of an asset covered by rights *in rem* should be paid to the IP in the main insolvency proceedings.

In addition, and following the new rules of the recast EIR, IP is not only entitled to request opening of secondary proceedings but also to request, before the insolvency court, to postpone or refuse the opening of such proceedings. This power of the IP derives from the general duty to preserve the debtor's assets and to administer the proceedings wisely instead of hampering additional costs. As it was stated by the Court in Case C‑116/11[67] (Bank Handlowy w Warszawie SA) «*The liquidator in the main proceedings thus has certain prerogatives at his disposal which allow him to influence the secondary proceedings in such a way that the protective purpose of the main proceedings is not jeopardised*».

This right of the IP however comes with reciprocal obligation, namely: to ensure that the local creditors will be treated as if secondary insolvency proceedings had been opened. As it is explicitly pointed out in recital 43 of the recast EIR «*the insolvency practitioner in the main insolvency proceedings should respect the priority rights that creditors would have had if secondary insolvency proceedings had been opened in that Member State*».

Moreover, the IP is able to propose a restructuring plan or composition or apply for a suspension of the realisation of the assets in the secondary insolvency proceedings.

Further, the second sentence of Art.21 (1) of the recast EIR gives another power to the IP, namely: the IP in the main insolvency proceedings may remove the debtor's assets from the territory[68] of the Member

[65] *Ibid*, p. 263.

[66] *Ibid*, p. 263.

[67] ECLI:EU:C:2012:739.

[68] See Judgment of the Court (First Chamber) of 11 June 2015, *Comité d'entreprise de Nortel Networks SA and Others* v *Cosme Rogeau liquidator of Nortel Networks SA* and *Cosme Rogeau liquidator of Nortel Networks SA* v *Alan Robert Bloom and Others*, Case C-649/13, ECLI:EU:C:2015:384, where the court explicitly determined that the debtor's assets that fall

State in which they are situated. However, such relocation should not be done in an abusive manner and should not jeopardise the interests of the local creditors. In other words, the power of the IP to relocate assets is limited by the rule that it shall be done only if the local creditors would still be effectively satisfied in the case of secondary insolvency proceedings being opened.

It follows, that the powers of the main IP are restricted first by the commencement of secondary insolvency proceedings and, second - of the preservation measures taken prior to the opening of secondary insolvency proceedings. This means that the main IP may exercise powers in another Member State as long as in that Member State no secondary insolvency proceedings have been opened and respectively: no secondary insolvency practitioner has been appointed.

In this regard it should be highlighted that the IP, appointed in secondary proceedings, takes the powers of the main IP with respect to the assets of the debtor located in his/her territory. Art.21 (2) of the recast EIR governs the powers of the IP in territorial insolvency proceedings that are opened by a court with jurisdiction pursuant to Art.2 (2) of the recast EIR. The principle of automatic recognition applies to secondary proceedings, respectively to the powers of the IP in the secondary proceedings as well. These powers are considerably narrower than the powers of the main IP. This is so due to the fact that they extend only to assets of the debtor located in that specific Member State where the secondary proceedings are being opened, i.e. the powers are territorially restricted[69]. The powers of the secondary IP are governed by *lex fori concursus secundarii* and are exclusively applicable to assets located in that Member State[70].

The main power of the secondary IP as per Art.21 (2) is that he/she may reclaim movable property of the debtor that under normal circumstances should be located in his/her territory. Pursuant to Art.21 (2) the

within the scope of the effects of secondary insolvency proceedings must be determined in accordance with Art.2 (g) of Regulation No 1346/2000.

[69] DUURSMA-KEPPLINGER, DUURSMA, CHALUPSKY (eds.), *Europäisches Insolvenzverordnung, Kommentar*, op. cit., Art. 18, mn 14.

[70] PANNEN, op. cit., p. 331; VIRGOS/SCHMIT, *Report*, mn 163;

secondary IP has one more substantial power, namely: to bring an action to set aside which is in the interests of the creditors. Grounds for filing such avoidance claim should be found in the *lex fori concursus*. Art. 21(2) is exception from the general principle that territorial IPs may exercise their powers only on their territory.

In addition, according to the Lutz case, C-557/13, the relevant procedural requirements for the exercise of an action to set a transaction aside are to be determined by the law governing the act challenged by the IP[71].

This shall not be interpreted as entirely excluding the powers of the main IP over the secondary insolvency proceedings, but simply as limitation that shall be taken into account. As already stated, the main IP preserves certain rights over the secondary proceedings even if an IP was already appointed there. It is open to the main IP to request opening of secondary proceedings[72], to propose stay of the proceedings and also to request preservation measures to be imposed there.

Another important power of the IP is deriving from the new rules of the recast EIR providing for coordination of the proceedings. Thus, an IP appointed in insolvency proceedings opened in relation to a member of a group of companies is able to request the opening of group coordination proceedings[73]. Again, the regulation limits this power of the insolvency practitioner with the obligation to control the costs for the coordination from an early stage of the proceedings. In addition, where coordination proceedings were opened, the insolvency practitioner has the power to request a stay of any measure related to the realisation of the assets in the proceedings opened with respect to other members of the group which are not subject to group coordination proceedings if a restructuring plan is presented[74]. To ensure the effective cooperation, the IP is also empowered to enter into agreements and protocols with the courts concerning the same debtor or members of the same group of companies, where this is compatible with the rules applicable to each of the proceedings.

[71] ECLI:EU:C:2015:227.

[72] PANNEN, op. cit., p. 331.

[73] Recital 55 of the recast EIR.

[74] Recital 60 of the recast EIR.

However, it should be noted that the recast EIR reproduces the rule of Art.24 of the EIR in the new Art.31 considering the honouring of an obligation to a debtor, which is a clear example of a situation that falls outside the scope of activities of the insolvency practitioner. This provision was clarified in Judgment of the Court (Third Chamber), 19 September 2013, Christian Van Buggenhout and Ilse Van de Mierop v Banque Internationale à Luxembourg SA, Case C‑251/12, ECLI:EU:C:2013:566[75] by pointing out that recital 30 of the EIR in conjunction with article Art.24 enables certain situations which conflict with the new situation created by the opening of the insolvency proceedings to fall outside the liquidator's control, namely: *"Article 24(1) allows the deferred recognition of the decision to open insolvency proceedings, in that it permits the assets belonging to the general body of creditors to be reduced by debts of the insolvent debtor paid to the latter by its debtors in good faith."*

Above all, Art.21 (3) of the recast EIR imposes a duty to the IP to exercise his powers by complying with the laws of the Member State in whose territory he/she takes the respective action[76]. However, as pointed out in the *Virgos/Schmit Report*[77] and applicable in full to the recast EIR, the Regulation lacks specific provision for objections or appeals against the powers of the IP. What happens when the IP exercises his/her power in an abusive or unlawful manner? It could be concluded, that deriving from the *lex fori concursus* principle, the general rules for objections against the actions of the IP that are part of the national laws of the Member State shall apply. As a result, the appeal against such action may fall within the jurisdiction of a different court. If the appeal is directed against the subject matter of the power of the IP, the competent court shall be the court of the Member State of the opening of the proceedings. Provided that the appeal is directed against the manner of the exercise of the action of the IP, it shall be directed to the court of the Member State where the IP has taken the action[78].

[75] ECLI:EU:C:2013:566.

[76] PANNEN, op. cit., p. 326.

[77] VIRGOS/SCHMIT, *Report*, op. cit.

[78] *Ibid,* p. 337.

In conclusion, it could be summarized that the recast EIR goes a bit further and clarifies the powers of the IP while preserving the general principles of the *lex fori concursus*[79] and building on the requirements for cooperation, coordination and effective management of the insolvency proceedings.

## 4. Recognition and enforcement of other judgments

### 4.1. General remarks

The history of the European Insolvency Regulations reveals that the recognition and enforcement system established is functioning well, thus, there is no need for major amendments[80]. The division between judgments opening insolvency proceedings on one side, and other judgments relating to the conduct and closure of the insolvency proceedings – including judgments adopted in the framework of those proceedings – on the other side, has proved to make sense. It follows the stages of the insolvency proceedings in practice and at the same time underlines the indispensable role of the recognition of the judgment opening the insolvency proceedings in the cross-border context.

Article 32 of the Recast Insolvency Regulation as well as Art. 25 facilitate the efficient and effective operation of the cross-border insolvency proceedings as required for the proper functioning of the internal market[81].

Article 32 of the Insolvency Regulation Recast as well as Art. 25 of the old Insolvency Regulation are supplementing Art. 19 of the new Insolvency Regulation Recast/Art. 16 of the old Insolvency Regulation in two ways: 1) by broadening the judgments covered by the European

[79] According to this principle the law of the Member State within the territory of which proceedings are opened is applicable to the insolvency proceedings and their effects (see, to that effect, *Eurofood IFSC*, paragraph 33; *MG Probud Gdynia*, paragraph 25; and Case C-191/10 *Rastrelli Davide e C.* [2011] ECR I-13209, paragraph 16).

[80] Insolvency Regulation Recast, recital 1.

[81] Insolvency Regulation Recast, recital 3 clarified in recital 65.

Insolvency Regulations and 2) by adding the enforcement aspects[82]. The aim of this provision is also to make the border line between the Insolvency Regulation Recast and Brussels I bis Regulation clearer.

The comparison between Art. 32 of the Insolvency Regulation Recast and Art. 25 of the old Insolvency Regulation revels three insignificant changes. The first one concerns the technical reference to Art. 19 of the Insolvency Regulation Recast instead to the Art. 16 of the old Insolvency Regulation. The second one is also of technical character: the Insolvency Regulation currently in force refers to Brussels Ibis Regulation, whereas the repealed one referred to the Brussels Convention on Jurisdiction and on the Enforcement of Judgments in Civil and Commercial Matters. The last difference concerns the deletion of Art. 25 (3) excluding judgments that *might result in limitation of personal freedom or postal secrecy* from the recognition and enforcement system. This rule is rightly considered as superfluous due to the overlap with the *public policy* exception envisaged previously in Art. 26 of the old Insolvency Regulation and contained now in Art. 33 of the Insolvency Regulation Recast[83].

The free movement of *other* judgments is possible as a matter of principle only in case of recognised or recognisable judgment concerning the opening of the insolvency proceedings issued by EU Member State court save Denmark. If the judgment at stake is related to preservation measures its recognition and enforcement procedure may start earlier: *after the request for the opening of insolvency proceedings or in connection with it*, i.e. even before the opening of the insolvency proceedings[84].

Article 2, point 7 Insolvency Regulation Recast defines only the judgments opening insolvency proceedings[85]. The *other* judgments are determined in Art. 32 Insolvency Regulation Recast by description of their subject matter or content rather than by their title. The systematic

[82] MANKOWSKI, MÜLLER, SCHMIDT, *Europäische Insolvenzverordnung 2015*, *Kommentar*, München, 2016, Art. 32, Rn. 2-4.

[83] MOSS, FLETCHER, ISAACS, *The EU Regulation on Insolvency Proceedings*, op. cit., p. 138.

[84] VIRGOS/SCHMIT, *Report,* mn. 198.

[85] This is a «*decision of any court to open insolvency proceedings or to confirm the opening of such proceedings; and the decision of a court to appoint an insolvency practitioner*».

construction allows the conclusion drawn from Art. 2, "a" Brussels Ibis Regulation that it is irrelevant how «*the judgment may be called, including a decree, order, decision or writ of execution, as well as a decision on the determination of costs or expenses by an officer of the court*»[86].

Article 32 Insolvency Regulation Recast differentiates three groups of *other* judgments.

### 4.2. Other judgments

The first group covers all judgments *which concern the course and closure of insolvency proceedings, and compositions approved by that court* as envisaged in subparagraph 1. The *Virgos/Schmidt report* does not consider this group of *other* judgments as raising specific problems of characterisation[87]. *Conduct* judgments are described in the literature as including all court decisions related to the insolvency proceedings save the judgment opening the insolvency proceedings having an impact on the body of creditors[88]. Other authors consider as such all judgments handed down in the course of the insolvency proceedings, in undertaking procedural actions and achieving procedural results[89]. The examples for judgments concerning the *conduct* of insolvency proceedings are court decisions on replacement or dismissal of an insolvency practitioner[90], on convening a General Meeting of creditors or on debtor's restriction[91]. Judgments concerning the *closure* of the insolvency proceedings include all court decisions terminating the procedure partially or wholly. The stay of proceedings is also covered[92]. The requirements and the effect of the judgments concerning the conduct and

[86] AMBACH, *Reichweite und Bedeutung von Art. 25 EuInsVO*, Berlin, 2009, p. 93.

[87] VIRGOS/SCHMIT, *Report*, mn. 191. Unfortunately there are some debatable cases, for example in case of decision discharging debtors.

[88] BORK, MANGANO, *European Cross-Border Insolvency Law*, Oxford, 2016, p. 176.

[89] KAYSER/THOLE, *Heidelberger Kommentar, Insolvenzordnung*, München , 2016, Art. 25, Rn. 3, MANKOWSKI, MÜLLER, SCHMIDT, op. cit., Art. 32, Rn. 18.

[90] AMBACH, op. cit, p. 102-103.

[91] MANKOWSKI, MÜLLER, SCHMIDT, op. cit., Art. 32, Rn. 18.

[92] MANKOWSKI, MÜLLER, SCHMIDT, op. cit., Art. 32, Rn. 19.

the closure of the proceedings are determined in accordance with *lex fori concursus*[93]. This first group of judgments includes also *compositions*, i.e. agreements concluded between the debtor and the creditors but only in case they are approved by the court[94]. The last prerequisite has to apply also to pre-insolvency procedures included in the Insolvency Regulation Recast.

The first category of *other* judgments has to be rendered by courts of Member States having jurisdiction under Art. 3 of the Insolvency Regulation Recast[95].

An example of *best practice* concerning judgments handed down in *the course of insolvency proceedings* could be the notion towards the provisional liquidator discussed above. The Eurofood judgment C-341/04 put these decisions in the realm of decisions opening the insolvency proceedings if, in the given case, they involve divestment of the debtor and, if the procedure and the liquidator are referred to in the respective annex to the Regulation. That happened after established overlapping between the four elements of the insolvency proceedings and the decision appointing provisional liquidator. This solution supports the need of effective and efficient cross-border insolvency and underlines the supremacy of main insolvency proceeding, including its chronological priority. The good sense behind this practice made it possible that the established best practice towards the provisional liquidator is now to be found in Art. 2, point 5 of the Insolvency Regulation Recast.

The second group of *other* judgments covers those *deriving directly from the insolvency proceedings and which are closely linked with them* (Art. 32 (1) subparagraph 2) raises more characterisation problems. Unsurprisingly it led to important ECJ rulings. The description of these "connected judgments" follows the notion established in ECJ Case 133/78 Gourdain v. Nadler. This ruling construed the scope of application of the Brussels Convention on Jurisdiction and on the Enforcement of Judgments in Civil and Commercial Matters. ECJ concluded that the

[93] See Judgment of the Court (First Chamber) of 22 November 2012, Bank Handlowy w Warszawie SA and PPHU 'ADAX'/Ryszard Adamiak v Christianapol sp. z o.o., Case C-116/11, para. 50 and Judgment of the Court (First Chamber) of 21 January 2010 MG Probud Gdynia sp. z o.o., Case C-444/07 para. 40.

[94] The company voluntary arrangements under the English insolvency law are excluded.

[95] AMBACH, op. cit., p. 105, MANKOWSKI, MÜLLER, SCHMIDT, op. cit., Art. 32, Rn. 37.

decisive criterion to be followed is based on the nature of the action undertaken. As far as the action is directly based on insolvency law and is closely linked with insolvency proceedings it shall be considered as being outside the Brussels Convention and thus has to fall in the scope of application of the Insolvency Convention[96]. The same description is to be found in *Virgos/Schmit report*[97]. This report provides examples of connected judgments: actions to set aside acts detrimental to the general body of creditors[98]; actions on the personal liability of directors based upon insolvency law; actions relating to the admission or the ranking of a claim; disputes between the liquidator and the debtor on whether an asset belongs to the bankrupt's estate[99]. Judgments concerning obligations that arise in the course of the insolvency proceedings, such as advance payment for costs of the proceedings also have to be awarded recognition and enforcement as other judgments in the sense of Art. 32[100]. The same applies to decisions on lifting the corporate veil in case of insolvency[101]. The *Virgos/Schmit report* envisages further negative examples of judgments not being connected to the insolvency proceedings in their main subject matter: actions on the existence or the validity under general law of a claim (e.g. a contract) or relating to its amount; actions to recover another's property the holder of which is the debtor; and, in general, actions that the debtor could have undertaken even without the opening of insolvency proceedings[102]. Recital 35 of Insolvency Regulation Recast adds also to the clarification: according to it, actions for the performance of the obligations under a contract concluded by the debtor prior to the opening of proceedings do not derive directly from the proceedings. ECJ clarified in the C-292/08 German Graphics Graphische Maschinen GmbH v. Alice van der Schee the action brought by a seller based on a reservation of title against a purchaser who is insolvent, where the asset covered by the reservation of

[96] VIRGOS/SCHMIT, *Report*, op. cit., p. 195.

[97] VIRGOS/SCHMIT, *Report*, op. cit., p. 196.

[98] Case C-339/07 *Seagon* but consider C-213/10 *F-Tex.*

[99] VIRGOS/SCHMIT, *Report*, op. cit., p. 195.

[100] Recital 35.

[101] MANKOWSKI, MÜLLER, SCHMIDT, op. cit., Art. 32, p. 23.

[102] VIRGOS/SCHMIT, *Report*, op. cit., p. 195.

title is situated in the Member State of the opening of those proceedings at the time of opening of those proceedings against that purchaser, is outside the scope of application of the Insolvency Regulation and thus does not amount to insolvency related judgment. Despite the legal definition, the case law and the support of the academia, the connected judgments still raise questions and create uncertainties[103].

The connected judgments may be rendered by all courts having international jurisdiction pursuant to Art. 6 (1) applied in conjunction with Art. 3 of the Insolvency Regulation Recast[104]. Despite this conclusion, Art. 6 (2) provides room for debate and possible preliminary ruling requests[105].

As far as the local jurisdiction is concerned, Art. 32 (1) subparagraph 2 explicitly states that it is not necessary for the connected judgment to be handed down by the court which opened the insolvency proceedings.

The tendency broadening the scope of application of the Insolvency Regulations in favour of connected judgments is a *practice* viewed predominantly as a good one; at least ECJ and the European legislator think so. The expectation is that the inclusion of examples in the recitals in the Insolvency Regulation Recast, as well as in the ECJ case law, in this regard will provide more certainty for the practice. Indeed, this amendment shall help more the courts hearing the case and not so much the court having to recognise or enforce the insolvency connected judgments. The court seized with the recognition and enforcement of foreign insolvency connected judgments shall face the judgment and the certificate issued pursuant to Art. 53 of Regulation 1215/2012 (Brussels I bis), if applicable. If those documents contain information about the connected character of the claim the court of enforcement shall be obliged to rely on it following the regime under the Insolvency Regulation Recast. A problem will arise when there is any insufficient information about the nature of the claim. A possible *good practice* will be to adapt the certificate under Art. 53 of Regulation 1215/2012 by including a box devoted to the character of the claim as it is considered

[103] MANKOWSKI, MÜLLER, SCHMIDT, op.cit., Art. 32, Rn. 24-25.

[104] BORK, MANGANO, *European Cross-Border Insolvency Law*, op. cit., p. 177, MANKOWSKI, MÜLLER, SCHMIDT, op. cit., Art. 32, Rn. 37.

[105] MANKOWSKI, MÜLLER, SCHMIDT, op. cit., Art. 32, Rn. 37.

by the court which handed down the decision. This amendment will help the court seized with the recognition and enforcement and will limit situations of re-evaluation of the claim and the judgment by a foreign court.

When recognition and enforcement of foreign judgments is concerned it will be quite difficult for the Member State court to understand, based on the judgment itself, and on the certificate pursuant to Art. 53 Regulation 1215/2012, if it is insolvency connected or not.

The third category of *other* judgments contained in Art. 32 (1) subparagraph 3 covers *judgments relating to preservation measures taken after the request for the opening of insolvency proceedings or in connection with it*.

The raison d'être of this provision is also to be found in the case law of ECJ construing the Brussels Convention. From Case 143/78, De Cavel v. De Cavel stems that provisional orders and protective measures shall be included in the scope of the 1968 Brussels Convention, not by virtue of "their own nature" but of "the nature of the rights which they serve to protect". Thus, preservation measures aiming at guarantying the future effectiveness of the insolvency proceeding, adopted prior to the opening of the insolvency proceedings shall be outside the Brussels Convention[106]. Logically these measures deserve separate rule expressly included in the Insolvency Convention. The subject of protection of the preservation matters – the future effectiveness of the insolvency proceedings – is determined further in Recital 36 of the Insolvency Regulation Recast. The *Virgos/Schmit report* enumerates some examples: “seizure of the debtor's assets” or more generally “provisional injunction prohibiting the disposal of assets by the debtor”. In any case those measures should have extraterritorial scope and cover the whole Community [107]. At the end of the day, the specific measures are those envisaged in *lex fori concursus.* There is no need to adopt equivalent preservation matters in the Member State of enforcement.

Article 32(1), subparagraph 3 and Recital 36 set a specific timeframe for the issuance of the judgments relating to preservation matters. The starting point is *from* the time of the request to open proceedings as

[106] VIRGOS/SCHMIT, *Report*, op. cit., p. 198.

[107] VIRGOS/SCHMIT, *Report*, op. cit., p. 200 f.

Recital 36 clarifies**.** The same moment is pointed out in the *Virgos/Schmit report* (p. 198). In spite of this wording, there are voices favouring free movement of preservation judgments under the system of the European Insolvency Regulation issued prior to the request for opening the insolvency proceedings in the case of a connection to future insolvency proceedings[108]. This possibility will help the future effectiveness of the insolvency proceedings and will be similar to the system of Brussels I bis Regulation. The comparison between subparagraph 3 and 1 shows the final moment for taking judgments relating to preservation measures – before the judgment opening the insolvency proceedings becomes effective**.** As the same system of recognition and enforcement applies to the judgments envisaged in both subparagraphs, this delimitation line is not of importance.

The free movement of preservation judgments under the Insolvency Regulations is still hindered by the uncertainty whether, and to what extent, such judgments issued *in absentia* shall circulate[109]. Room for best practices.

According to the *Virgos/Schmit report* (p. 198) and Recital 36 the court having jurisdiction to open the main insolvency proceedings should be able to order provisional and protective measures, i.e. only the courts having jurisdiction under Art. 3(1) Insolvency Regulation shall be entitled to render judgments circulating pursuant to Art. 32. This understanding is controversial as well. Some authors do not limit the jurisdiction only to paragraph 1 of Art. 3 and encompass all rules of the provision[110]. The new rule of Art. 6 (2) Insolvency Regulation Recast is also able to open a debate whether perseveration measures could be adopted and enjoy recognition and enforcement based on this new ground of jurisdiction. In any case, this measure will serve to the effectiveness of the insolvency connected claim, respectively to the effectiveness of the insolvency itself.

[108] BORK, MANGANO, op. cit., p. 176, LINNA, *Protective Measures in European Cross-Border Insolvency Proceedings*, in: 5 *International Insolvency Law Review* 1/2014, 6ff., p. 9, MANKOWSKI, MÜLLER, SCHMIDT, op. cit., Art. 32, Rn. 28.

[109] For the different view see MANKOWSKI, MÜLLER, SCHMIDT, op. cit., Art. 32, Rn. 26.

[110] MANKOWSKI, MÜLLER, SCHMIDT, op. cit., Art. 32, Rn. 37.

### 4.3. Recognition

The regime of Brussels I bis Regulation does not apply to the recognition (as there is no reference in this regard), but it is done in connection to the enforcement.

All judgments falling into the scope of Art. 32 (1) Insolvency Regulation Recast shall *be recognised with no further formalities.* These judgments enjoy the same automatic (*ipso jure)* recognition as the judgments under Art. 19 Insolvency Regulation Recast. Unfortunately, the consequences of recognition of this category of judgments are not regulated expressly like in Art. 20 in conjunction with Art. 19. The *Virgos/Schmit report*[111] puts on the same footing the judgments under Art. 32 (1), subparagraph 1 and Art. 19 and 20 by stating that the recognition of these judgments shall operate in the same way and with the same effects as the judgment opening proceedings. Based on this statement as well as on the mutual trust, and the desired universality, it will be possible to fill the legal gap by extensive interpretation of Art. 20 in regard to all *other* judgments contained in Art. 32(1) Insolvency Regulation Recast[112]. This will be true in case the jurisdiction of the court handed down the respective *other* judgment is grounded on Art.3 even be reference as it is the case in Art. 6(1) Insolvency Regulation Recast. In this case, any judgments rendered in the course of the main insolvency proceedings, will produce the same effects in any other Member State – as under the law of the State of the opening of proceedings – as long as no secondary proceedings have been opened. If the judgment is taken within territorial proceedings, the effect cannot be extended to other counties and thus be subject to recognition and enforcement. The notion rooting in Art. 20 is difficult to apply to other judgments based on Art. 6(2) Insolvency Regulation Recast especially as they could be issued in a Member State not involved in insolvency proceedings. The need for equal treatment and effectiveness of the insolvency justifies recognition of those judgments in all Member States having the same effect.

[111] P. 191 of the Report.

[112] BORK, MANGANO, op. cit., p. 183.

The automatic recognition resolves the *lis pendens* and related action concurrences by obliging the second court seized to recognise the earlier judgment delivered by another court of a Member State with jurisdiction under Article 3(1) or, as the case may be, Article 3(2)[113].

### 4.4. Enforcement

By virtue of Art. 32(1) Insolvency Regulation Recast any *other*[114] judgments shall be enforced in accordance with Articles 39 to 44 and 47 to 57 of Brussels I bis Regulation. The enforcement in strict sense requires coercive power that due to the principle of exclusive territorial sovereignty could be provided only by the authorities of the State where the assets or persons subject to the execution are situated.[115]. Thus, it is the law of the requested Member State that determines the enforcement[116].The Brussels I bis Regulation sets few preliminary prerequisites of procedural character allowing particular insolvency judgments to be put subsequently into execution in a foreign Member State. With the entry into force of the Brussels I bis Regulation the traditional intermediate *exequatur* procedure is no longer necessary (Art. 39).

Any interested party looking for execution has to obtain an authenticated copy of the *other* insolvency judgment that is enforceable in the Member State of origin (Art. 39). In addition, the interested party needs the indispensable certificate under Art. 53 of Brussels Ibis Regulation. The procedural steps to be followed are the same as applicable to any civil and commercial judgment covered by Brussels Ibis Regulation. There is one significant difference: under the Insolvency Regulation Recast there is only one ground allowing refusal of the enforcement: violation of the public policy of the Member State in which enforcement is sought. The public policy exception is dealt with, in detail, below.

[113] C-649/13 *Comité d'entreprise de Nortel Networks SA and Others* v. *Cosme Rogeau and others*, p. 45.

[114] The same rule has to apply to the judgments envisaged in Art. 19 if containing enforceable elements, BORK, MANGANO, op. cit., p. 140.

[115] VIRGOS/SCHMIT, *Report*, op. cit., p. 190.

[116] Art. 41(1) Brussels Ibis Regulation.

Based on the reference to the enforcement regime of Brussels Ibis Regulation, save its Art. 45 and 46, it could be concluded that the enforcement under the Insolvency Regulation Recast is considered to be faster and to represent an advanced level of mutual trust among the EU Member States.

### 4.5. Article 32(2) Insolvency Regulation Recast

By virtue of Art. 32(2) Insolvency Regulation Recast the recognition and enforcement of judgments other than those referred to in paragraph 1 of the same Article shall be governed by Brussels I bis Regulation, provided that that Regulation is applicable. This provision is interpreted as clarification[117] and reiteration[118] of the essential need of avoiding, as much as possible, regulatory loopholes between the Insolvency Regulation and Brussels Ibis Regulation. Best practices –зелен

## 5. Public Policy

The EU-wide circulation of insolvency judgments is not unlimited. It is subject to the "traditional[119]" public policy exception envisaged in Article 33 Insolvency Regulation Recast[120]. According to this provision «*any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual*». Traditionally, the public policy notion

[117] BORK, MANGANO, op. cit., p. 178.

[118] MANKOWSKI, MÜLLER, SCHMIDT, op. cit., Art. 32., p. 39.

[119] VIRGOS/SCHMIT, *Report*, op. cit., p. 203.

[120] This Article is identical with Art. 26 of the Insolvency Regulation.

postulates application only in exceptional cases and strict interpretation[121]. It blocks the result of the foreign judgment, not the abstract foreign rules or principles[122].

Despite the wording of Art. 33 Insolvency Regulation Recast putting reference only to judgments for opening the insolvency proceedings (Art. 19), or those handed down in the context of such proceedings (Art. 32(1)), we could conclude – as the prevailing academia does[123] – that all insolvency judgments have to be encompassed by the public policy ground of non-recognition and non-enforcement.

The public policy is defined neither in Art. 33 nor in the recitals of the Regulation. However, Art. 33 Insolvency Regulation Recast provides general examples of public policy violation: drastic contradiction with the fundamental principles or the constitutional rights and liberties of the individual in the Member State where recognition or enforcement is sought. The *Virgos/Schmit report* gives additional clarity. According to it, the public policy, based on the fundamental principles of the law of the recognizing Member State includes, in particular, constitutionally protected rights and freedoms, and fundamental policies of the requested State, including those of the Community. The fundamental principle may be of both substance and procedure. The procedural public policy may be invoked in case of breach of essential procedural guarantees such as the adequate opportunity to be heard and the rights of participation in the proceedings[124]. After having said this, the *Virgos/Schmit report* makes some reservations concerning the right of defense when services of documents and timeframes for preparation are at stake. For the reporting group, the Insolvency Regulation regime has to be more flexible than the Brussels Convention and Regulations due to the special nature of the insolvency collective proceedings and the different participants therein. Hence, the *ex parte* proceedings are not generally ruled out as for the *Virgos/Schmit report,* they could be in

[121] Decision of 02 May 2006 Case C-341/04 *Eurofood IFSC Ltd*. and Judgment of the Court (First Chamber) of 21 January 2010 MG Probud Gdynia sp. z o.o., Case C-444/07, VIRGOS/SCHMIT, *Report*, op. cit., p. 204.

[122] VIRGOS/SCHMIT, *Report*, op. cit., p. 204.

[123] MANKOWSKI, MÜLLER, SCHMIDT, op. cit., Art. 33, p. 3, BORK, MANGANO, op. cit., p. 184.

[124] VIRGOS/SCHMIT, *Report*, op. cit., p. 205, 206 and for some modality see p. 207.

accordance with the Constitution by respecting the due process by different means[125]. The infringement of jurisdiction by the Member State where the judgment originates does not constitute, in principle, manifest violation of the public policy[126]. The cases of infringement reflecting substantive law aspects cover judgments affecting personal freedom or postal secrecy, former Art. 25(3) Insolvency Regulation[127], as well as limitation of private ownership or discrimination based on nationality with the EU[128]. The status of the person subject to the insolvency may not give rise to the public policy exception (Art. 19(1), subparagraph 2).

The ECJ case law confirms and clarifies, additionally, the understanding provided by the academia. In *Eurofood* (C-341/04, p. 62-67) ECJ transposed the interpretation of Art. 27 (1) of the Brussels Convention[129] to the construction of Art. 26 Insolvency Regulation. For ECJ the infringement shall be considered as violation of public policy if it is a «*manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought or of a right recognized as being fundamental within that legal order*». Thus, the public policy stems from the national law and remains in its essence of national character. Of course, there are common fundamental principles for all EU Member States established on a supranational level like the European Convention on Human Rights or the Treaties of the EU. They should be considered as implemented in the national core principles[130]. Thus the public policy should not be used as an exception clause for the application of the EU law[131]. The ECJ considers itself competent only to review the limits within which the courts of a Member State may

[125]For example, by evidence of a good prima facie case, serious urgency, lodging of a guarantee by the applicant, immediate notification of the person concerned and the real possibility of challenging the adoption of the measures, p. 207.

[126] See the controversial debate in cases when the jurisdiction is obtained through deception or manipulative shift of the COMI, BORK, MANGANO, op. cit., p. 186.

[127] VIRGOS/SCHMIT, *Report*, op. cit., p. 208.

[128] BORK, MANGANO, op. cit., p. 184.

[129] Judgment of the Court of 28 March 2000. Dieter Krombach v André Bamberski, C-7/98.

[130] BORK, MANGANO, op. cit., p. 185.

[131] MANKOWSKI, MÜLLER, SCHMIDT, op. cit., p. 33, p. 9.

have recourse to that concept of public policy for the purpose of refusing recognition to a judgment emanating from a court in another Member State[132].

It could be summarized that the adequate public policy application depends on the result of the foreign judgment, on the public policy understanding of the requested Member States and on its limits determined by the European legislator[133] and by the ECJ**.**

Once established, the public policy may result in total or partial rejection of the foreign judgments[134], e.g. the judgment could neither be recognised nor enforced.

As regards the best practices, in the literature the prevailing view considers that the public policy exception has to be applied *ex officio*[135]. This is true, theoretically, when recognition is at stake. However, in case of enforcement, the reference to Regulation Brussels Ibis inserts its system into the system of the Insolvency Regulation Recast. Under this system – Art. 45 – the refusal of recognition may be granted on the application of any interested party, i.e. the raising of the public policy check depends fully on the parties.

[132] See, *Eurofood*, p. 63.

[133] Like Art. 19(1), subparagraph 2 or the prohibition of *révision au fond.*

[134] VIRGOS/SCHMIT, *Report*, op. cit., p. 209.

[135] MANKOWSKI, MÜLLER, SCHMIDT, op. cit., p. 33, p. 11, BORK, MANGANO, op. cit., p. 187.

# Part II

# Cross-Border Insolvency Proceedings: A Comment on Selected National Practices

*European and National Perspectives on the Application of the European Insolvency Regulation*
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# Bulgarian Legislative Assessment Report on Cross-Border Insolvency Proceedings: Detecting Best Practices

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## 1. Insolvency proceedings in Bulgaria

The Bulgarian legal history reveals that insolvency seems to be one of the victims of communism. The regime of insolvency existed until 1951, when the Commerce Act dated 1897 was revoked. "Insolvency" was reinstated in the Bulgarian law in 1994 after the collapse of communism in 1989. Currently, its regulation is in Part four of the Commerce Act[1]. Part four of this Act was subject to numerous amendments

[1] State Gazette, vol.63 of 1994.

all aimed at making the proceedings faster and more effective, especially with regard to the satisfaction of the creditors[2]. The last amendment, dated 30th December 2016[3], reacted to the EU Commission's recommendation of 12th March 2014, on a new approach to business failure and insolvency[4]. A new Part Five entitled "Merchant stabilization proceedings" was introduced. It entered into force on the 1st July 2017. The new set of rules is devoted to the reorganization of insolvent companies. The main objective is to enable effective restructuring of viable enterprises in financial difficulty and to give honest entrepreneurs a second chance. However, it seems likely that the near future will bring further reforms, at least due to the Proposal of a Directive on Preventive Restructuring Frameworks, Second Chance and Measures to Increase the Efficiency of Restructuring, Insolvency and Discharge Procedures and amending Directive 2012/30/EU of 22 November 2016[5].

It is hard to say that the Bulgarian law provides comprehensive and adequate domestic regulation of the cross-border insolvency. The Commerce Act contains only few provisions with procedural character dealing with recognition of foreign insolvency judgments, the powers of an insolvency administrator appointed by a foreign court, the foreign secondary insolvency proceedings in Bulgaria and its effect (Art. 757-760). These provisions regulate relations that do not involve EU Member States. They have never been amended and subject to any debate. The accession of Bulgaria to the EU changed the legal environment including the Private International Insolvency Law.

The foregoing shows that topics that are not in the focus of the national legislator may enjoy development due to participation in the EU as a Member State. In general, this could be seen as a *good practice*.

[2] State Gazette, vol. 83 of 1996, vol. 70 of 1998, vol. 84 of 2000, vol. 58 of 2003, vol. 31 and 43 of 2005, vol. 38 of 2006, vol. 59 and 104 of 2007, vol. 23 and vol. 47 of 2009, vol. 38 and vol. 101 of 2010, vol. 18 of 2011, vol. 41 and vol. 53 of 2012, vol. 20 of 2013, vol. 27 of 2014.

[3] State Gazette, vol. 105 of 2016.

[4] C(2014)1500.

[5] See COM(2016) 723 final – 2016/0359 (COD).

## 2. International Jurisdiction under the Bulgarian National Jurisdiction System

The current Bulgarian domestic Private International Law system does not contain any express rules determining the international jurisdiction to insolvency proceedings.

As mentioned before, insolvency was reinstated in the Bulgarian law in 1994 after the collapse of communism in 1989. It existed until 1951, when the Commerce Act dated 1897 was revoked. As far as the international jurisdiction was concerned, the 1891 Law on Civil Procedure (Закон за гражданското съдопроизводство 1891, hereinafter *1891 LCP*) envisaged no specific provision. Relief was sought in the general rules determining the domestic venue when foreigners were involved (Art. 170 *1891 LCP*)[6]. In addition, Art. 170 *1891 LCP* provided that all claims against insolvent debtors shall be lodged with the court hearing the insolvency case. The last rule is to be found in the Law on Civil Procedure from 1930 (Закон за гражданското съдопроизводство 1930*)*.

The Commerce Act reinstating insolvency in 1994 did not envisage any provisions devoted to international jurisdiction in insolvency cases. The Bulgarian Code of Private International Law from 2005[7] (hereinafter CPIL) does not provide provisions dealing with the international jurisdiction in insolvency cases. As far as no other provision prevails, it could be inferred that the general rules on international jurisdiction shall apply. They are to be found in Art. 4, paragraph 1 CPIL. According to point one of paragraph one the Bulgarian courts and other authorities shall have jurisdiction if the defendant has habitual residence, statutory seat or real central administration in Bulgaria. As per point 2 of the same paragraph, the Bulgarian courts and other authorities shall have jurisdiction if the claimant is a Bulgarian national or a judicial person, registered in Bulgaria. It can be easily established that the access to the Bulgarian court in cross-border insolvency cases is rather broad.

[6] According to this provision cases between foreigners or between foreigners and Bulgarians shall be heard and decided under the Bulgarian law.

[7] State Gazette vol. 42 of 17 May 2005.

Unfortunately, there is no detected case law dealing with the international jurisdiction in cross-border insolvency cases. Most probably there were cases with cross-border implications concerning at least Bulgarian companies. The lack of case law may lead to the suggestion that: 1) the cross border implication was not established by the courts, 2) the courts used to skip the international jurisdiction issue due to unawareness or due to the fact that the issue was not brought to its attention by the parties concerned and 3) the absence of express provision in the CPIL and in the Commerce Act.

## 3. European Uniform Rules of International Jurisdiction in the Bulgarian Case Law

The case law of the Bulgarian courts applying InsR with regard to the international jurisdiction is of small quantity. The reasons are different: 1) Bulgaria joined the EU in 2007, 2) the Bulgarian domestic cross-border insolvency, as presented above, is not well developed, 3) the courts do not always realize the foreign implication and thus, do not consider the issue of international jurisdiction in the given case, 4) the case law is not structured in a comprehensive manner allowing easy and automatic search.

The cornerstones of InsR in the Bulgarian case law concerning the international jurisdiction rules are as follows:

### a) Main proceedings

The Bulgarian courts understand rather correctly the COMI – notion, including the presumption for overlapping between the COMI and the statutory seat[8]. In one case the court established COMI in Bulgaria of a company with the statutory seat in the British Virgin Islands due to ownership of shares in Bulgarian companies, payment to Bulgarian companies and between bank accounts of the company in Bulgaria[9]. In

[8] Decision No. 1762 from 29.10.2013 under commercial case 4750/2013 Sofia City Court, decision No 1935 from 05.12.2013 under commercial case Nr. 4564/2012 Sofia City Court.

[9] Resolution No. 7153 from 2014 under commercial case 3440/2014 Sofia City Court.

the given case the court decided that the foreign company was established with the only purpose to do business in Bulgaria. In the course of this case the judge was replaced and the newly appointed judge terminated the case due to lack of international jurisdiction.

The claims for setting aside of contracts lodged by foreign insolvency administrators against Bulgarian companies are evaluated differently with regard to the international jurisdiction. Some courts refer to InsR and to Art. 3, paragraph 1[10]. In other cases, the starting point used for drawing a conclusion is the Bulgarian CPIL[11]. In addition, avoidance action against a defendant in other Member States is considered as falling within the scope of application of Regulation 44/2001[12]. The Bulgarian Court of Cassation established international jurisdiction in an avoidance claim lodged in Bulgaria by the liquidator appointed in the main proceedings in Germany by reference to Art. 18, paragraph 2 of Regulation (EU) 1346/2000. No secondary proceedings were initiated in Bulgaria[13]. In the course of the latter case a preliminary ruling C-296/17 is pending before the ECJ.

**Detected *practices:*** The Bulgarian court determines the jurisdiction in the main insolvency proceedings easily, by following the presumption for overlapping between the COMI and the statutory seat. Cases concerning legitimate or factious reallocation of the seat in Bulgaria or abroad were not detected. The setting aside of claims in Bulgaria raised the problems decided by ECJ in C-339/07 Saegon v. Deko Marty and C-328/12 Schmid v. Hertel. From the case law, it's obvious that the ECJ case law is currently not well known in Bulgaria. The provision of Art.6, paragraph 1 of Regulation (EC) 848/2015 will bring to the attention of the Bulgarian courts the solution but it will also bring some confusion. The confusion will be caused by the circumstance that the Bul-

[10] Decision No. 34 from 05.04.2013 under appellate commercial case 62/2013 Burgas Appellate Court and decision No 1745 from 03.08.2015 under commercial case 4650/2013 Sofia Appellate Court.

[11] Decision No. 1342 from 15.08.2014 under commercial case 3414/2010 Sofia City Court.

[12] Resolution No. 8271 from 06.08. 2014 under commercial case 5655/2013 Sofia City Court.

[13] Resolution No. 90 from 28.01.2013 under commercial case № 846/2012 Supreme Court of Cassation.

garian court shall have no international jurisdiction to decide on avoidance action against Bulgarian defendants in situations of main insolvency proceedings in foreign Member States, when there is neither secondary proceedings nor other actions in civil and commercial matters against the same defendant in Bulgaria (as requested by Art. 6, paragraph 2 of Regulation (EC) 848/2015).

### b) Secondary proceedings

Bulgarian courts are not quite consistent when deciding on the international jurisdiction to open secondary insolvency proceedings. They recognise the effect of the foreign decision for opening of primary proceedings in a different Member State and look for establishment within the territory of Bulgaria[14]. In some instances, the Bulgarian court[15] refers to Art. 2 "h" of InsR containing the legal definition of "establishment" as well as to the ECJ judgment C-369/09 Interedil Srl v. Fallimento Interedil Srl and Intesa Gestione Crediti SpA determining the "establishment" in a more detailed manner. In the cited case, the Bulgarian court finds an establishment in Bulgaria stemming from the registration of a branch in the Bulgarian Commercial Register (considered as proving an independent structure) and from the publication of financial records (considered as proving permanent business activity and conclusions of contracts on behalf of the company). In other instances, the Bulgarian court[16] does not undergo a profound check of all elements constituting an establishment. In the given case, the court attached the establishment to the ownership of four apartments within the territory of Bulgaria. They were owned by a person with business activity in UK. In addition, these apartments were purchased prior to the insolvency proceedings in the UK and were subject to avoidance actions in Bulgaria. The court found an establishment due to the existence of "significant property" in Bulgaria.

[14] Decision No. 1762 from 29.10.2013 under commercial case 4750/2013 Sofia City Court, decision No. 1935 from 05.12.2013 under commercial case Nr. 4564/2012 Sofia City Court.

[15] Decision No. 1762 from 29.10.2013 under commercial case 4750/2013 Sofia City Court.

[16] Decision No 1935 from 05.12.2013 under commercial case Nr. 4564/2012 Sofia City Court.

**Detected *practices*:** The difficulties in detecting an establishment in Bulgaria are connected with cases concerning individuals as the Bulgarian law does not provide access to insolvency to natural persons.

### c) Binding case law of the Bulgarian Supreme Court of Cassation

The Bulgarian Supreme Court of Cassation ruled in a binding decision[17] that the different national laws concerning insolvency and the amounts that are exempt from seizure are not an obstacle to the initiation of secondary insolvency proceedings in Bulgaria under Art. 3, paragraph 2 of InsR. The main insolvency proceedings in Member State blocks the individual proceedings against the insolvent debtor in a different Member State but is not an obstacle to the exequatur proceedings under Art. 34, point 1 of Regulation 44/2000 of a judgment stemming from a different Member State.

In the same decision the Supreme Court of Cassation considers the relationship between the secondary proceedings and the recognition and enforcement procedure. The Court finds that if secondary insolvency proceedings have been opened in Bulgaria under Art. 3, paragraph 2, a separate recognition and enforcement procedure of a foreign judgment is not needed, as the claim may be lodged in the course of the secondary proceedings. The *res judicata* of the foreign judgment shall be accepted directly by the insolvency office holder or by the insolvency court.

On the contrary, if secondary insolvency proceedings have not been initiated, the creditor shall always have interest to request, in a separate proceedings, recognition and enforcement of a foreign judgment.

The Court concluded that neither the interest of the debtor nor the interests of all other creditors may be endangered by the *exequatur* proceedings, as the creditor who, after the opening of the proceedings, obtains by any means through individual execution, is obliged – pursuant to Art. 20, paragraph 1 InsR – to return what he has obtained to the insolvency administrator.

A judgment handed down by a court of a Member State declaring insolvency of a debtor (in the main proceedings under Art. 3, paragraph

[17] Decision No. 154 from 08.05.2014 under civil case No. 5921/2013, Civil Chamber, IV Civil Unit of the Supreme Courte of Cassation.

1), does not prevent a creditor of the insolvent debtor to lodge a claim for recognition and enforcement of a judgment, delivered by a different Member State court, as the subject matter of the latter proceedings in neither individual execution, nor ordinary claim proceedings. The subject matter of this proceedings is the recognition and enforcement of the foreign judgment that does not determine the way of execution (individual or universal).

## 4. Applicable Law under Bulgarian National Conflict of Laws Rules

Given the broad *ratione materiae* scope of the InsR, the national conflict of laws rules of the Member States have a restricted application. Nevertheless, such national rules are necessary as the InsR applicable law rules are not universal as opposed to other EU private international law regulations and apply only towards debtors whose centre of main interests (COMI) is situated within the territory of a Member State. Thus, Bulgarian national insolvency conflict of laws rules may potentially apply: (i) if the debtor has its corporate seat in Bulgaria, but its COMI is not in a Member State; or (ii) if there are secondary (accessory) insolvency proceedings in Bulgaria *vis-a-vis* debtors with a COMI outside the Member States.

There is no explicit Bulgarian national rule for determining the law applicable to insolvency proceedings. As stated above, the legal institute of "insolvency" is a relatively new one for the contemporary Bulgarian legal system. It was reintroduced with an amendment to the Bulgarian Commerce Act in 1994, after a 43-year period with no such concept following the revocation in 1951 of the Commerce Act of 1897. So that may be one explanation about the lack of express rule on the matter at hand.

The presently effective Chapter Fifty-two of the Commerce Act on Private International Law aspects of insolvency is entitled "Applicable law" but contains mostly rules pertaining to the procedural aspects of private international law. In particular, it deals with the effects of recognition of foreign insolvency court judgments; the domestic powers of

an insolvency administrator appointed by a foreign court; the prerequisites for the opening of secondary insolvency proceedings in Bulgaria when primary proceedings have been opened abroad and the effect of such proceedings.

It could be summarised, in broad terms that Bulgarian national rules concerning insolvency proceedings with international implications may be squared into the predominant model, from a comparative perspective, of limited (restricted) universality as opposed to the strict territoriality model. So, arguably, if Bulgarian courts are to determine the law applicable to insolvency proceedings (outside the framework of the InsR) they would most probably apply, as a main rule, their own law in its capacity of *lex fori concursus* encompassing both substantive and procedural aspects of insolvency. This would apply both to main insolvency proceedings and to secondary (accessory) insolvency proceedings commenced in Bulgaria. The assumption is reinforced by two principles of Bulgarian private international law: firstly, the one in Art. 29 of the Bulgarian CPIL whereby Bulgarian courts apply Bulgarian law when hearing cases pending before them, and, secondly, the notion that all legal rules applicable in a case of insolvency should be characterised as overriding mandatory rules in the sense of Art. 46 of the Bulgarian CPIL and thus, should apply whenever a case is heard by a Bulgaria court.

Although this should be the general rule, it would be far-fetched to argue that *lex fori concursus* may be the only alternative for all legal relations that may be covered by and/or related to the insolvency proceedings opened in Bulgaria. Apart from l*ex fori concursus*, other legal systems may be better suited to govern some particular relations incl. by way of example – *lex personalis*, *lex sociatatis* of the debtor, *lex rei sitae* and *lex contractus*. Each of them may or may not coincide with *lex fori concursus*. Nevertheless, unlike the InsR, Bulgarian law does not contain a rule listing exceptions from *lex fori concursus*. Furthermore, the practice of the Bulgarian courts is of no help to fill the legislative lacunae on the matter. However, the general principles and sound logic dictate that the personal status of a debtor and other participants to insolvency proceedings (apart from the prerequisites for opening of insolvency proceedings vis-a-vis a particular debtor, the latter being governed solely by *lex fori concursus*) must be governed by the their

*lex personalis*, while the validity and the effect of the rights *in rem* of creditors or third parties must be governed by *lex rei sitae*. Also if contractual obligations are governed by a system of law, different from *lex fori concursus*, the rights and the obligations that have already arisen under the law applicable to the contract must be respected. However, it is a well-established principle that legal acts of a debtor after the opening of the insolvency proceedings (including such related to performance of the contractual obligations) need to be assessed in the light of *lex fori concursus*. Avoidance claims are also normally regarded as a part and parcel of insolvency law so (except when express rule is in place the other way around) they should be governed by *lex fori concursus*.

One may argue that Bulgarian parliament should establish express national rules determining the law applicable to insolvency proceedings by either adopting the same or similar provisions as in the InsR incl. rules establishing exceptions from *lex fori concursus*. Such claim however oversights that national insolvency proceedings are primarily established to protect domestic creditors so no national legislator would be inclined to establish exceptions from *lex fori concursus* in a blank manner through a very sensitive area of national law without some sort of reciprocity as in the InsR where other Member States should apply the same exceptions. Nevertheless, bearing in mind the lack of a proper level of experience and sophistication of Bulgarian judiciary when it comes to delineating the applicability of national law and EU law, it is more than desirable national conflict of law rules to be adopted in order to fill in the existing legislative lacunae. Probably they should match (without complete overlap in the exceptions list) the applicable law rules of the InsR.

## 5. Uniform conflict of laws rules under the Insolvency Regulation interpreted under Bulgarian Case Law

Bulgarian court practice on the InsR applicable law rules may be divided into two main groups. The first group confirms consistently the principle under Art. 4(2)(m) that avoidance claims normally fall within

the scope of application of the law of the State of the opening of proceedings (*lex fori concursus*)[18]. This is upheld also in cross-border cases when the claimant is a foreign debtor declared insolvent in another Member State who has filed an avoidance claim under *lex concursus* before a Bulgarian court against a local creditor[19]. In this context, Bulgarian courts also rely on Art. 24 InsR to discharge a person from liability where the latter had performed his obligation to the Bulgarian branch of a debtor subject to insolvency proceedings in Germany although performance had to be made to the insolvency administrator in the main proceedings, due to the fact that such person was unaware of the opening of proceedings. Bulgarian courts furthermore have held without further reasoning that the limitation periods for filing of the avoidance claims are also governed by *lex fori concursus*[20].

**Detected *practices*:** The Bulgarian courts take into consideration that *lex concursus* (even when it differs from *lex fori*) encompasses both substantive and procedural aspects of insolvency as a complex legal institute[21]. This is also true with respect to a limitation period applicable to an avoidance claim outside the operation of Art. 13 InsR. It is also in the context of Art. 4(2)(m) InsR that Bulgarian courts have ruled out the possibility to apply *lex contractus* (Spanish law) instead of *lex fori concursus* (Bulgarian law) for the purposes of Art. 13. The latter rule provides that persons who benefited from an act detrimental to all creditors (e.g. a payment under a contract) may challenge the application of avoidance claims under *lex fori concursus,* but only where that same person proves that: the said act is subject to the law of a Member State other than that of the State of the opening of proceedings, and that law does not allow any means of challenging that act in the relevant case.

[18] Decision No. 1745 from 03.08.2015 under commercial case No. 4650/2013 of the Appellate Court in Sofia, Decision from 15.08.2012 under civil case No. 4650/2013 of Sofia City Court; Resolution No. 555 from 13.10.2015 under commercial case No.605/2015, Commerce Chamber of the Supreme Court of Cassation.

[19] This observation is made without regard to the jurisdictional aspect.

[20] Decision from 15.08.2012 under civil case No. 4650/2013 of Sofia City Court.

[21] This understanding flows naturally as a well-established principle both in the legal doctrine and in the practice of the courts. As an example, this view is supported in the rulings of the Bulgarian Constitutional Court – Decision No. 4 from 11th of March 2014, published in the State Gazette, issue 27 from 25.03.2014.

Bulgarian courts have dismissed objections under Art. 13 as far as the party taking recourse to the rule had been in fact procedurally time-barred so the objection was inadmissible under Bulgarian law of civil procedure[22].

**Detected *practices*:** The Bulgarian courts recognise the possibility to apply *lex contractus* (Spanish law) instead of *lex fori concursus* (Bulgarian law) for the purposes of Art. 13 but within the limits of the procedural autonomy of the relevant Member State concerning the terms for appeal[23]. A second large group of court judgments taking recourse to Art. 13 InsR deal with purely internal insolvency proceedings with no indication for a cross-border element[24]. Surprisingly however, Bulgarian courts have sought arguments in the wording of Art. 13 in order to reinforce their interpretation of some Bulgarian insolvency law provisions, which have been under hot debate in recent years.

**Detected *practices*:** Bulgarian court misses the point that InsR harmonises jurisdiction and choice of law rules on insolvency proceedings and does not harmonise insolvency law. As a summary, although the Bulgarian case law on the InsR conflict of laws rules is limited, the Bulgarian courts as a whole interpret and apply the InsR provisions correctly and in line with the relevant rulings of CJEU.

[22] Decision No. 327 from 19.02.2015 under commercial case No. 1903/2014 of the Appellate Court in Sofia.

[23] That conclusion is not called into question by the fact that the exception introduced in Art. 13 includes limitation periods or other time-bars relating to actions to set aside transactions under the *lex causae*, as discussed in Case C-557/13, *Lutz*.

[24] Decision No. 49 from 03.08.2012 under commercial case No. 27/2012 of the District Court in Razgrad; Decision No. 304 from 15.11.2012 under commercial case No. 436/2012 of the Appellate Court in Varna; Decision No. 308 from 01.02.2013 under civil case No. 493/2011 of the Appellate Court in Blagoevgrad; Decision No. 386 from 27.12.2012 under commercial case No. 692/2012 of the Appellate Court in Varna; Decision from 03.08.2012 under commercial case No. 27/2012 of the District Court in Razgrad; Decision from 10.07.2012 under commercial case No. 106/2011 of the Razgrad District Court; Decision from 18.02.2013 under commercial case No. 1/2012 of the Razgrad District Court; Decision from 20.06.2013 under commercial case No. 67/2012 of the Razgrad District Court.

## 6. Recognition and enforcement of decisions under the Bulgarian national procedural rules

### a) Recognition and enforcement procedure

Recognition of foreign insolvency decisions is generally dealt with in Chapter Fifty two (previously Forty eight) of Bulgarian Commerce Act whose provisions are special to the general regime of *exequatur* of foreign decision contained in the domestic CPIL. Unlike CPIL Commerce Act imposes, as a common condition for recognition of foreign insolvency decisions *comity* defined in the terms of reciprocity. On conditions of reciprocity the Republic of Bulgaria shall recognise foreign court decisions on insolvency, provided they are taken by an authority of the state where the debtor's registered main office is located (Art. 757 Commerce Act). Further, Art.758 of Commerce Act provides for automatic recognition of powers of insolvency to the administrator appointed by foreign court, whereas the scope and contents of those powers are derived from the law of the state where insolvency proceedings are initiated, on condition they are not contradictory to Bulgarian public policy (*ordre public*). The requirement for comity is strict, material one – the court shall in any case of recognition *ex officio* find the contents of foreign law of the state of origin of the insolvency decision and study the practice of foreign courts. The conditions for recognition as per Art.117 of CPIL, which apply as a common regime for all decisions on civil and commercial matters, are not applicable. It is worthy to note that regarding comity, there is a general provision in Art.47, §2 of CPIL, albeit in respective chapter on conflict of laws, that comity is to be presumed by court as existing without searching to prove it from an objective point of view. There is no practice detected of courts regarding application of comity in the proceedings for recognition and enforcement of foreign insolvency decisions. As per chapter Fifty–two of the Commerce Act, no special procedure is needed. Bulgarian courts and other authorities shall directly and automatically recognise foreign insolvency decisions without any specification on the type of proofs that are to be presented. Normally, courts would require the interested person to deliver an official copy of the foreign decision from which its authenticity could be proved, accompanied by an express statement from the

authority of origin that the foreign act is final and binding. The foreign decision shall be legalized or bear certificate as per The Hague Convention of 1961 on Apostille. In case the debtor is not identified according to its full names, address, legal personality and other legal traits, the foreign decision is not to be recognised[25].

Recognition under Art. 757 of the Commerce Act applies to foreign judicial decisions handed down by a court of a state in which Regulation No. 1346/2000 is not applicable[26]. Still many Bulgarian courts apply Art. 757 of the Commerce Act together with Art. 16, paragraph 1 of the InsR[27].

Such a "doubling" of legal grounds is not only unnecessary but also incorrect. Every EU Regulation is "*binding in its entirety and directly applicable in all Member States*" according to Art. 288, par. 2 TFEU. Thus, no national legislation applies to matters falling within the scope of InsR. Applying both the Bulgarian Commerce Act and the Regulation simultaneously, shows unacceptable ignorance of European law and can lead to undesirable results.

Furthermore, the aforementioned provisions are not identical. According to Art. 16 of the InsR, all judgments handed down by a court of a Member State which has jurisdiction under the InsR shall be recognised in all the other Member States. Art. 3 InsR ties jurisdiction with the centre of the debtor's main interests. When the debtor is a company or a legal person, Art. 3 presumes that the centre of main interests coincides with its place of registered office. That presumption can be rebutted if enough proof is presented.

Unlike the Regulation, Art. 757 of the Commerce Act provides that the place of debtor's registered office is the only relevant factor for recognition of foreign judicial decisions regarding insolvency. Additionally, there has to be a reciprocal rule in the state where the judgment was rendered. There is a clear difference between the two provisions.

[25] Decision No. 83 from 21.03.2016 under civil case No. 2137/2015 Razgrad Regional Court.

[26] Respectively Regulation (EU) № 2015/848 when it becomes applicable.

[27] Decision No. 1935 from 05.12.2013 under civil case No. 564/2012 Sofia District Court, Decision from 04.08.2016 under civil case No. 54/2016 Razgrad District Court.

Therefore, any imprudent mixing of national and European legislations shall not be allowed.

In one ruling, the Bulgarian court did not even apply Art. 16 of Regulation No. 1346/2000, although it referred to other provisions of the InsR later in the decision[28]. The foreign judgment, which recognition was sought, was handed down by a Romanian court. The Romanian court had jurisdiction according to Art. 3 of the InsR because the debtor's centre of main interests was located in Romania. Nonetheless, the Bulgarian court decided that Art. 757 of the Commerce act was to be applied and did not mention the *Regulation* rule at all.

Other than the aforementioned examples of incorrect application of the European legislation, there is not much case law regarding recognition of foreign insolvency judgments. One decision concludes that, for a foreign judgment to be recognized, it is not necessary that the parties have to be identified in the same manner, as they would be according to Bulgarian law[29]. In this case the debtor, a natural person, was iden in the insolvency judgment only by his first and last name and his date of birth. According to Bulgarian law, all three names[30] and his relevant identity number are required. The court decided that as the identity of the debtor was clearly ascertained, there was no need for such a formal requirement to be maintained.

As to enforcement of foreign insolvency decisions, there is no special rule in Commerce Act since the characteristic effects of insolvency decisions are *res judicata* and need no enforcement. In these cases the general enforcement procedure of Art. 117 and seq. of CPIL is applicable. The enforcement procedure, as per CPIL regime, is a formal one providing for initiation of *inter partes* adversary proceedings before Sofia City Court ending in a decision declaring foreign decisions to be enforced in Bulgaria. Foreign decisions, together with the act of the court are titles for enforcement.

[28] Resolution No. 154 from 10.04.2012 г. under civil case No. 56/2010 Pazardzhik District Court.

[29] Decision from 04.08.2016 under civil case No. 54/2016 Razgrad District Court.

[30] In case the person has first, middle and last name.

Art. 759 of the Commerce Act regulates the effect of the subsidiary (secondary) proceedings and provides that the Bulgarian court may institute subsidiary bankruptcy proceedings in respect of a merchant who has been declared bankrupt by a foreign court, provided he has substantial property on the territory of the Republic of Bulgaria. The request for such a proceedings may be filed by the debtor of the insolvency administrator in bankruptcy, appointed by a foreign court or by a creditor. The decision rendered in the courts of subsidiary proceedings shall be effective only in respect of the debtor's assets on the territory of the Republic of Bulgaria.

There are very few national judgments regarding subsidiary insolvency proceedings grounded on Art. 759 of the Commerce act.

Art. 759 of the Commerce act establishes subsidiary (secondary) insolvency proceedings when the debtor has substantial assets in Bulgaria. There is no case law explanation whether the "substantial assets" requirement has to be understood as substantial concerning the whole property of the debtor or as a property with a large monetary equivalence.

Still, there is one judgment, which at least clarifies the role of the provision not only as an authorizing rule, but as a guarding one as well. The Bulgarian court concludes that when a foreign court hands down an insolvency judgment, recognised under Art. 757 of the Commerce act, only the proceedings under Art. 759 may be commenced regarding the property of the debtor in Bulgaria[31]. No single creditor can request security or enforcement over the debtor's assets on the territory of the Republic of Bulgaria in that case. The subsidiary insolvency proceedings are only used for the effective realisation of the debtor's assets in regard to the primary proceedings.

Again, courts apply Art. 759 of the Commerce act and the relevant InsR provisions simultaneously[32] or even disregard the InsR entirely[33]. As already said, such decisions can lead to undesirable results.

[31] Resolution No. 119 from 13.01.2016 under civil case No. 27/2016 Varna District Court.

[32] Decision No. 51 from 01.07.2014 under civil case No. 5159/2013 Sofia District Court.

[33] Decision No. 1935 from 05.12.2013 under civil case No. 564/2012 Sofia District Court.

### b) Effects of recognition

Automatic recognition without special procedure would mean that the foreign decision would have the same effects envisaged by the laws of the issuing court of origin in Bulgaria. Even, if as per Bulgarian laws, the debtor can't be subject to universal insolvency procedure (Bulgarian commercial law doesn't provide for personal bankruptcy of natural persons unless they are not registered as traders), the foreign decision is to be recognised no matter the nationality of the debtor[34], foreign or Bulgarian. Likely, the powers of foreign insolvency administrators are to be recognised without special procedure and sometimes ordered by the court to be published in the Bulgarian Commercial Register. The powers of the foreign insolvency administrator to be party to court and administrative proceedings, and related procedural capacities are recognised by courts as preliminary questions on producing foreign decisions for appointment. Public policy exception is not used as a tool for defending the interests of creditors with the same nationality as the court, or to pull the mass of property situated in Bulgaria out of reach of foreign insolvency.

**Detected *best practices*:** The study of jurisprudence on recognition and enforcement of foreign insolvency decisions stemming from courts of Member States proves that the aims of judicial cooperation and coordination of inter–state insolvency proceedings are satisfied. As the ***first best practice*** could be pointed out, that Bulgarian courts don't put the requests for recognition under undue tests and don't refer to national sources of private international law and namely the regime of Commerce Act in the process of recognition of decisions. This is valid for decisions for the opening of primary proceedings, as well as for decisions of member states' authorities for issuing protective and preventive measures[35]. There is no reflex effect of mirroring the requirements of comity and reciprocity from the national regime in the sphere of EU insolvency regime. ***Second***, the authority and appointment of liquidators from member states, where primary proceedings are opened, are

[34] Decision No. 1935 from 05.12.2013 under commercial case 4564/2012 Sofia City Court, Decision No. 103 from 10.05.2013 under civil case No. 346/2012 Yambol District Court.

[35] Decision 1332 of 18.08.2014 Sofia City Court, commercial case 3413/2010.

smoothly recognized and without questioning the scope of the liquidator's powers as per the appointing member state laws[36]. No additional announcement and inscription in the Bulgarian Commercial Register is needed regarding the foreign decision for the opening of the insolvency procedure and precluding the company's officers from transactions with assets in another member state in order to be recognized as a preliminary matter in the course of the court case[37]. ***Third***, the concept of decision for opening of insolvency proceedings is not subject to *lex fori* characterization, but rather is perceived as an autonomous one, since no tendency or efforts of courts to adapt the effects of members states decisions for opening of insolvency proceedings through the lenses of national sources have been detected (even in cases of opening of insolvency proceedings of natural persons by member state court, whereas Bulgarian insolvency regime doesn't allow for such)[38].

The overall conclusion is that the more detailed and adapted to coordination of concurrent proceedings rules of InsR, compared to national regime in Commerce Act are facilitating the administration of insolvency proceedings by Bulgarian courts, which could not be said for proceedings in third states.

## 7. Recognition and enforcement of decisions under the Insolvency Regulation interpreted under Bulgarian Case Law

### a) Effects of recognition

As of 1 January 2007, the intra–community rules of InsR for free movement of insolvency decisions between Member States became operative in Bulgaria. However, Bulgarian lawmakers didn't find it necessary to implement additional national rules for recognition and enforcement of judgments under InsR. As far as Art.25, §1 of InsR refers to Brussels regime of enforcement of foreign decisions, the provisions of Part VII of the Bulgarian Code of Civil Procedure are applicable.

[36] Decision 103 of 10.05.2013 Iambol District Court, civil case 346/2012.

[37] Decision 1332 of 18.08.2014 Sofia City Court, commercial case 3413/2010.

[38] Decision 1935 of 05.12.2013 Sofia City Court, commercial case 4564/2012.

Decisions of courts of other Member States for opening of insolvency proceedings are recognised as proof for the powers of the foreign insolvency administrator to bring actions before Bulgarian courts for recovery (*actio pauliana*) of the property of the debtor after the opening of the main proceedings abroad[39] or actions for payment in benefit of insolvency estates after the opening of proceedings[40]. The interest for the recognition of foreign decisions for opening main proceedings could be related to filing by the foreign insolvency administrator in the main proceedings of a request for the opening of secondary proceedings as per Art.3, § 2 of InsR by the Bulgarian court[41]. The reason for the opening of secondary proceedings is the location of a branch of the debtor on the territory of Bulgaria or the possession of assets (real estates) by the debtor.

Foreign decisions for the opening of main proceedings declaring the principal of the branch insolvent is recognised as per Art.16, §1 of InsR as the preliminary question in a case regarding payment to public authorities for taxes[42]. The court accepts that tax authorities should inform the insolvency administrator appointed by the foreign court for all files regarding the financial audit of the branch, whereas, notice of the judgment opening the insolvency proceedings is published in the Bulgarian Commercial Register as per Art. 21 InsR.

[39] Decision No. 1745 from 03.08.2015 under commercial case No. 4650/2013 Sofia Appellate Court, Decision No. 221 from 10.06.2015 under commercial case No. 3030/2014 Supreme Court of Cassation, Decision No. 1332 from 18.08.2014 under commercial case No. 3413/2010 Sofia City Court.

[40] Decision No. 84 from 07.10.2013 under appeal civil case No. 208/2013 Bourgas Appellate Court, Decision No. 103 from 10.05.2013 under civil case No. 346/2012 Yambol District Court.

[41] Decision No. 1762 from 29.10.2013 under commercial case No. 4750/2013 Sofia City Court, Decision No. 1935 from 05.12.2013 under commercial case No. 4564/2012 Sofia City Court.

[42] Decision No. 3756 from 10.12.2013 under administrative penal case No. 5919/2013 Varna County Court.

**b) Evaluation of practice.**

As a general trend, Bulgarian courts directly recognise the effects of decisions of courts of Member States for the opening of main insolvency proceedings and the appointment of the insolvency administrator as well as the powers vested in them. The operation of the system for coordination of insolvency proceedings between Member States is guaranteed and there appears to be little necessity for significant improvement of the uniform rules in the area of recognition. Likewise, the powers of the foreign insolvency administrator to start proceedings for recovery of the debtor's property or for contribution to the insolvency estates, are recognised by the courts. Courts don't encounter difficulties in the interpretation and the scope of Art. 16 to 26 of InsR. The only slight flaw of legal reasoning is the simultaneous referral to Art.16 of InsR and Art.757 of the Bulgarian Commerce Act[43] as grounds for recognition, having in mind that Art.757 of the Commerce Act is not relevant due to the superseding effect of the rules of InsR, which are directly applicable. The provision of Art.757 of Commerce Act is a national one and it is effective in the case of recognition of third states insolvency decisions.

Courts fully respect the findings and the conclusions of courts of other Member States when seized with a request for the opening of secondary proceedings as per Art.3, § 2 of InsR[44]. The foreign insolvency decision is regarded as such with "universal bearing" for all Member States, the latter being obliged to recognize it. The court is putting forward case load of ECJ on case C-116/2011[45]. The court competent for secondary proceedings is not allowed to consider the conclusions of the court of main proceedings as to whether the debtor is insolvent or to check its international jurisdiction[46]. Foreign decisions for the opening

[43] Decision from 04.08.2016 under commercial case No. 54/2016 Razgrad Distrcit Court, Decision No. 1935 from 05.12.2013under commercial case No. 4564/2012 Sofia City Court.

[44] Decision No. 1935 from 05.12.2013 under commercial case No. 4564/2012 Sofia City Court.

[45] Decision from 22 11. 2012 on Case C-116/11, Bank *Handlowy w Warszawie SA and PPHU «ADAX»/Ryszard Adamiak v Christianapol sp. z o.o*. ECLI:EU:C:2012:739;

[46] Decision No. 1762 from 29.10.2013 under commercial case No. 4750/2013 Sofia City Court.

of primary proceedings are recognized as a prerequisite for the opening of secondary proceedings in Bulgaria. The powers of the foreign insolvency administrator are automatically recognized and especially the power to ask for the initiation of secondary proceedings in Bulgaria. The courts, when asked to rule the opening of secondary proceedings as per Art.3, § 2 of InsR are prevented from questioning the jurisdiction of the court of origin by reassessing the COMI.

On the other hand, foreign decisions on commercial matters in the scope of Brussels I Regulation is to be given enforcement no matter that the decision for opening of insolvency proceedings is issued later in the Member State of origin. Opening of insolvency proceedings is not provided as ground for non–enforcement as per Brussels I Regulation[47]. The foreign insolvency administrator is entitled to ask for preventive measures or measures for recovery in such an instance.

Some remarks, however, could be addressed to the refusal for recognition of foreign insolvency opening decision and of the powers of foreign insolvency administrators to transfer assets to Bulgaria in the course of the main proceedings due to a lack of secondary proceedings opened in Bulgaria as per Art.3, § 2 of InsR and a lack of publication of the opening of primary proceedings in all Member States where the debtor's assets are located, including Bulgaria[48]. A claim for enforcement of monetary obligation to the insolvency mass by the foreign insolvency administrator is regarded as the opening of secondary proceedings. The ratio of said case load is flawed, since the insolvency administrator has the right to ask for the recognition of the foreign decision issued in proceedings as per Art.3, §1 of InsR and to take all preventive and coercive measures toward the debtor's assets in other Member States without the need to open secondary proceedings in said Member States as a condition. Such attitude of the court prevents the *effet utile* of Art.16, Art.17 and Art.18 of InsR and could be used as a tool to give undue protection to creditors in second Member States

[47] Resolution No. 148 from 30.01.2014 under civil case No. 5921/2013 Supreme Court of Cassation.

[48] Decision No. 51 from 07.01.2014 under commercial case No. 5159/2013 Sofia City Court, Decision No. 84 from 07.10.2013 under appeal civil case No. 208/2013 Bourgas Appellate Court.

where assets are situated. Another interesting approach is the conclusion of the Bulgarian court that the foreign insolvency administrator is not entitled to ask for express recognition of the decision for the opening of main proceedings by the court and for preventive measures due to a lack of interest – as per Art.16 InsR the foreign decision is directly and automatically recognized without the need of subsequent titles or acts of the courts of other Member States[49]. The foreign decision shall be recognized as a preliminary matter because the insolvency administrator requests the court to issue preventive measures on debtor's assets in Bulgaria and to instruct for the publication of foreign decisions and the appointment of the insolvency administrator in the respective national register. Also, as not to be followed could be marked a rejection of claim for recovery of assets on grounds of Art.24 of InsR and Art.7 of the Commerce Act regarding the duty to publish in the Bulgarian Commercial Register all decisions for opening of insolvency of the branch's head structure[50].

In conclusion, the study of jurisprudence on recognition and enforcement of foreign insolvency decisions stemming from courts of Member States proves that the aims of judicial cooperation and coordination of inter – state insolvency proceedings are satisfied.

## 8. Duty to Inform Creditors under the Bulgarian National Conflict of Laws Rules

The Bulgarian Commerce Act, which contains the national substantive law rules on insolvency proceedings, does not provide for the obligation of the appointed insolvency administrator to individually inform the creditors of the debtor. It is the general rule that the decision for the opening of insolvency proceedings is recorded with and published in the Bulgarian Commercial Register, kept by the Registry Agency, which is publicly available. The term for the creditors to lodge their

[49] Resolution No. 3612 from 27.05.2013under commercial case No. 2411/2013 Sofia City Court.

[50] Decision No. 1745 from 03.08.2015 under commercial case No. 4650/2013 Sofia Appellate Court.

claims starts to run from the date of the recordal. If a creditor omits to lodge its claims within the prescribed statutory terms, it may not join the insolvency proceedings at a later stage, unless its claim has arisen after the opening of the insolvency proceedings.

The InsR and the obligation to inform known creditors of the debtor in Member States, different from the one in which the insolvency proceedings have been opened, reasonably raised in Bulgaria a discussion and concerns that these rules might put at unequal footing foreign and Bulgarian creditors, since the Bulgarian legislation does not provide for an identical or similar obligation with respect to Bulgarian creditors. Irrespective of this concern, until the present moment there are no legislative initiatives on amending the Commerce Act to include a reciprocal obligation with respect to Bulgarian creditors. A court case was even identified, where a Bulgarian creditor who failed to lodge its claim within the statutory terms, tried to invoke the obligation to be informed under Art. 40 of the InsR. However, the court correctly rejected that argument and stated that there was an obligation to inform only the foreign creditors under Art. 40 InsR, which was not applicable to Bulgarian creditors[51].

## 9. Duty to Inform Creditors under the Insolvency Regulation interpreted under Bulgarian Case Law

### a) Application by the Bulgarian courts

Most of the identified court decisions or rulings of the Bulgarian courts in which the obligation under Art. 40 of the InsR to inform creditors is referenced, are court decisions on opening of insolvency proceedings, in which among others, the court expressly instructs the insolvency administrator to fulfill its obligations under Art.40 of the InsR. In particular, the courts instruct the appointed insolvency administrator to inform of the insolvency proceedings and their rights, the creditors of the debtor with habitual residence, domicile or registered office in the other

[51] Decision No. 3592 from 20.10.2015 under private commercial case No. 1461/2015 Varna District Court.

Member States, whose address is known from the commercial books of the debtor or other sources available to the debtor. These decisions indicate that the Bulgarian courts are aware of the obligation under Art. 40 of the InsR and that their approach is to instruct the insolvency administrator to observe it and not to inform the creditors themselves, which is the second option provided for in the regulation[52]. Part of the decisions are more detailed than others regarding the obligations of the insolvency administrator towards foreign creditors, for example they expressly specify that the information should be provided in accordance with Art. 14 of InsR with return receipt, that it should contain a sample form Invitation for lodgment of claims, etc.[53]. However, they do not show how a violation of this obligation would be treated and possible consequences such violation may have on the insolvency proceedings.

In part of the available court decisions, the lack of provision of information to the creditors under Art. 40 of the InsR and the interpretation of "known creditors", as used in the regulation, was examined or mentioned. The lack of provision of information was invoked in the context of different types of proceedings. In the identified court decisions, the lack of notification of the creditors was either deemed as irrelevant (proceedings for resuming suspended insolvency proceedings after the statutory terms to do this[54]; invoked in proceedings related to the insolvency proceedings in which a lack of information is claimed[55]) or was not examined in substance for procedural reasons (appeals not allowed on procedural grounds by the Supreme Court of Appeal[56]).

[52] Decision No. 196 of 09.03.2012 under commercial case No. 573/2011 Plovdiv District Court.

[53] Decision No. 348 from 11.12.2012 under commercial case No. 615 /2012 Varna Court of Appeal, Decision No. 650 from 04.04.2013 under commercial case No. 8506/2012 Sofia City Court, decision No. 405 from 06.03.2015 under commercial case No. 3750/2013 Sofia City Court, decision No. 661 from 13.04.2016 under commercial case No. 418/2015 Sofia City Court, Decision No. 464 from 19.12.2016 under commercial case No. 35/2015 Gabrovo District Court.

[54] Decision No. 280 from 09.11.2015 under appellate commercial case No. 402/2015 Varna Court of Appeal. This decision was appealed before the Supreme Court of Cassation but was not allowed to appeal.

[55] Decision No. 678 from 26.01.2015 under commercial case No. 3435/2014 Sofia Court of Appeal.

[56] Resolution No. 678 from 17.07.2012 under private commercial case No. 247/2012 of the Supreme Court of Cassation, Commercial Chamber, II commercial panel; Resolution No. 410

The decisions where the claimed deficiency was not reviewed due to procedural reasons are in line with the procedural rules. In the available decisions of the lower instance courts, the appeal of which was not allowed and which reviewed in substance the failure to provide information to creditors in other Member States, it was emphasised that there was such obligation only regarding known creditors (in one of the cases the insolvency administrator claimed that the commercial books of the company were not available and he did not have information on the foreign creditor in question)[57].

A decision was found in which the court established that the provision of information to the creditors under Art. 40 of the InsR was irrelevant for the running of the terms for resuming the insolvency proceedings and hence, those terms run also regarding a foreign creditor who was not informed[58]. That decision raises certain concerns. In particular, the obligation under Art. 40 of the InsR aims at preserving the interests of foreign creditors which, due to the fact that they are located in a different Member State, may not be expected to get informed of open insolvency proceedings from the Bulgarian Commercial Register. By adopting an approach under which, in practice, the court precluded the possibility of creditors, which were not informed in accordance with the regulation, to have their claims satisfied, the court did not take into account the spirits and the aims of the regulation. Nevertheless, since only one isolated case was identified, it may not be reasonably used to justify a general conclusion for improper application by the Bulgarian courts of Art. 40 of the InsR.

A case was identified in which the court ruled that in situations where the appointed insolvency administrator terminated existing contracts of a debtor against which insolvency proceedings were opened (specific right of the insolvency administrator in relation to the insol-

from 15.07.2015 under private commercial case No. 1099/2015 of the Supreme Court of Cassation, Commercial Chamber, I commercial panel.

[57] Resolution No. 2067 from 29.10.2014 under private commercial case No. 1257/2014 Plovdiv Court of Appeal.

[58] Decision No. 280 from 09.11.2015 under appellate commercial case No. 402/2015 Varna Court of Appeal. This decision was appealed before the Supreme Court of Cassation but was not allowed to appeal.

vency proceedings), the insolvency administrator was obliged to inform, under Art. 40 of the InsR, the respective creditor under the terminated contract, if he was in another Member State[59]. Such a broad interpretation of Art. 40 InsR might be considered excessive since the termination of the contract on the grounds of open insolvency proceedings creates an obligation for informing the creditor in question on the termination and among others – on the ground for the termination.

One court case of open insolvency proceedings was identified, where on the grounds of Art. 40 of the InsR the court ruled that the ruling establishing lack of sufficient property of the debtor to cover the expenses related to the insolvency proceedings and providing to the creditors the possibilities to cover such expenses, should be sent to the foreign creditors. In a further ruling on the case, which was for suspension of the insolvency proceedings due to the lack of sufficient property and none of the creditors being availed of the possibility to cover the necessary amount, the court ordered that the ruling should be sent to the foreign creditors, again basing itself on Art. 40 of the InsR[60]. Even though such approach aims at safeguarding the rights of foreign creditors in relation to notifications on the proceedings, which under the national legislation are published in the Commercial Register, such approach may be considered exceeding the scope of Art. 40 of the InsR, which aims at informing the creditors of the fact of opening of insolvency proceedings, so that they are able to lodge their claims towards the debtor within the statutory terms.

In conclusion, the Bulgarian courts are aware of the obligation to inform creditors under Art. 40 of the InsR and in accordance with it – instruct insolvency administrators to undertake the necessary actions in this respect. No court decisions were identified, where the respective obligation was not observed, in result of which a known foreign creditor was not able to lodge its claim within the statutory term. Therefore, the possible consequences of not complying with this obligation under the Bulgarian legislation are still to be seen.

[59] Decision No. 348 from 11.12.2012 under commercial case 615/2012 Varna Court of Appeal.

[60] Decision No. 90 from 24.06.2016 under commercial case No. 120/2015 Pazardzhik District Court.

### b) Identified practices and recommended aspects for further improvement

It has been established that the Bulgarian courts respect the right of foreign creditors to be informed of the insolvency proceedings and their rights. In particular, in the decisions on opening of insolvency proceedings the Bulgarian courts duly instruct the insolvency administrator to undertake the necessary actions for notification of creditors. There is no clarity on how failure to inform the creditors in accordance with the InsR would affect the insolvency proceedings and whether such failure could represent a valid justification for the creditors to lodge claims at a later stage. It is recommendable that the position is considered in the light of the fact that the non-observance of Art. 40 of the InsR, without a possibility for the foreign creditors to have recourse, would preclude their possibilities to have their claims satisfied.

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# International Insolvency Law in the Czech Legal System

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## 1. Czech national Insolvency Law

Czech insolvency is governed by Act No. 182/2006 Coll., the Insolvency Act ("InsA")[1]. The concept of insolvency, which is the key concept of national insolvency law, is defined in its section 3. Insolvency proceedings may be instituted only with respect to a debtor already insolvent or facing imminent insolvency. Section 3 of the InsA distinguishes two basic types of insolvency: equity (or cash-flow) insolvency and balance-sheet insolvency.

A debtor is subject to equity insolvency if all three criteria stipulated in section 3 (1) are satisfied, namely (a) multiple creditors, (b) defaulted payment of pecuniary debts for more than 30 days after the debts become due, and (c) inability of the debtor to meet his obligations. The

[1] In details see: HÁSOVÁ, *Insolvenční zákon: komentář* (Insolvency Act. Commentary), Praha: C.H. Beck, 2014; KOTOUČOVÁ ET AL, *Zákon o úpadku a způsobech jeho řešení. Komentář* (Act on Insolvency and Forms of its Resolving. Commentary). 1st edition, Praha: C. H. Beck, 2008; KOZÁK, BUDÍN, DADAM, PACHL, *Insolvenční zákon a předpisy související. Nařízení Rady (ES) o úpadkovém řízení. Komentář* (Insolvency Act and Connected Legislation. Regulation (EC) on Insolvency Proceedings. Commentary), 2nd edition, Praha: Wolters Kluwer, 2013; RICHTER, *Insolvenční právo* (Insolvency Law), 2nd edition, Praha: Wolters Kluwer, 2017.

last criterion, as intended by section 3 (1) of the InsA, means an objective inability of the debtor to satisfy his payment obligations due and not, for example, his mere unwillingness to do so because of doubts regarding the justification of such obligations. The inability to pay debts as they fall due is a situation where a debtor suffers the lack of funds to pay the debts but manifests sufficient will not only to acknowledge the debts but also to discharge them. A debtor who is objectively able to meet his obligations as they become due cannot be considered insolvent even though he is in default of payment for more than 30 days after the debts fall due.

The second type of insolvency – balance-sheet insolvency – applies, under section 3 (3) of the InsA, only to legal entities and natural persons doing business. It is defined as a situation where a debtor is subject to claims of more creditors and the aggregate of the debtor's obligations exceeds the value of his assets. All obligations of the debtor are considered, not just those having fallen due; moreover, other issues should be taken into account, such as the debtor's management of assets and/or his business operation.

Section 3 (4) of the InsA defines the concept of imminent insolvency. It is relevant where, having considered all circumstances, one may reasonably presume that a debtor will not be able to satisfy a substantial part of his pecuniary obligations in due time and manner. A petition to commence insolvency proceedings due to imminent insolvency may be lodged only by a debtor. This is to serve as an opportunity for the debtor to act swiftly and to preserve the production and employment in his business, particularly in combination with solving insolvency by means of reorganization.

The InsA provides for several methods of solving insolvency. Under section 4 of the InsA, the following methods of solving insolvency or imminent insolvency are listed: bankruptcy, reorganization, discharge, and special types stipulated by the InsA for particular types of persons and particular types of cases.

Bankruptcy is governed by section 244 and the following sections. A judicial decision declaring insolvency results in that ascertained claims of creditors are to be, in essence, proportionally satisfied from the proceeds of realization of the estate; unsatisfied claims or their parts do not extinguish.

Judicial declaration of bankruptcy results in an insolvency administrator being authorized to dispose of the property estate, to exercise debtor's rights and fulfil the debtor's obligations relating to the estate. The insolvency administrator is responsible for the realization of the estate; this responsibility comprises the transformation of all assets included in the estate into money so that creditors can be satisfied. Realization of the estate results in the extinguishment of all legal effects of pending enforcement proceedings (whether pursued by private enforcement agents or by judicial enforcement officers) as well as of other legal burdens interfering with the realization of the property estate unless the law provides otherwise.

Reorganization, that another method of solving insolvency, is governed by section 316 and the following sections of the InsA. Reorganization is usually understood as a process of gradual satisfaction of the claims of creditors in the course of operation of the debtor's business; the claims being secured by measures aimed at the business recovery according to the respective judicially approved reorganization plan under permanent control by creditors. Reorganization is a method of solving insolvency or imminent insolvency of a debtor who is a business person, as the reorganization applies to his business. Reorganization is impermissible when a debtor is a legal entity that is being wound up, trader in securities and a person authorized to trade in a commodity exchange under special laws. It is essential that a debtor is allowed to further undertake business activities, but only within the scope of the reorganization plan. The purpose of the plan is primarily to achieve the recovery of the business, and to rearrange the relations between a debtor and his creditors.

Under section 389 and the following sections of the InsA, a debtor may apply to the Insolvency Court that his insolvency or imminent insolvency should be dealt with by discharge. This possibility applies to (a) legal entities which the law does not consider to be business entities with no debts resulting from their business activities, and (b) natural persons with no debts resulting from their business activities.

It should be noted that debts resulting from the debtor's business activities do not prevent a discharge as the relevant method of solving insolvency or imminent insolvency provided there is consent expressed by the creditor whose claim is at issue, or by the creditor whose claim

has remained unsatisfied after the closing of insolvency proceedings, or by the secured creditor.

The purpose of discharge is to give the debtor a "fresh start" and to motivate the debtor to get actively engaged in paying the debt in the assumed amount of at least 30% in the case of unsecured creditors. Secured creditors may satisfy their claims from security they hold. Discharge may be pursued in two ways: (a) realizing the property estate where claims are satisfied by a one-off lump-sum paid from the existing sources of the debtor; or (b) implementing an instalment plan where the debtor has to meet an obligation to pay regular instalments from his income for the period of five years. The amount of an instalment corresponds to an amount which could be deducted directly under a garnishment of wage orders imposed by the court. As a result, the debtor loses part of his future income.

Section 4 of the InsA provides for special methods of solving insolvency, namely marginal bankruptcy and insolvency of financial institutions.

Marginal bankruptcy, which is governed by sections 314 and 315 of the InsA, should solve minor bankruptcies where a limited volume of property and a small number of creditors are involved, or in cases of insolvency of natural persons that are not doing business. This approach may be considered an autonomous method of solving insolvency to a limited extent only, as most provisions regulating regular bankruptcy apply. The essential difference between regular bankruptcy and minor-type bankruptcy consists of a substantial simplification of procedure in the latter case.

Insolvency of financial institutions is defined by the law as the incapacity of an institution to pay obligations (debts) to its creditors as they fall due. This type of insolvency is governed by section 367 and the following sections of the InsA and results from the transposition of EU directives.

## 2. The history of the legal regulation of international insolvency in the Czech Legal system

The first comprehensive regulation of insolvency law in the Czech Republic was adopted as Act No. 328/1991 Coll. on bankruptcy and composition ("BCA"). Provisions of that Act still apply to all proceedings opened under the BCA before 1 January 2008. The BCA was repealed by the InsA.

All issues relating to international insolvency were governed by section 69 of the BCA entitled "Bankruptcy with a Foreign Element". Under section 69 (1) of the BCA, a bankruptcy declared by a Czech court applied to a bankrupt's movable property located abroad, unless an international treaty provided otherwise, i.e. legal effects of Czech bankruptcy in a foreign country were dealt with. Section 69 (1) was based upon a principle of restricted universality of bankruptcy proceedings since the bankrupt´s immovables located abroad were not affected by bankruptcy declared by a Czech court.

Section 69 (2) of the BCA governed legal effects of foreign bankruptcy proceedings in the Czech Republic. The principle of restricted universality of bankruptcy proceedings applied to these issues as well, since it was stipulated that foreign bankruptcy proceedings apply just to a bankrupt's movables located in the Czech Republic. The bankrupt's movable property was given out abroad under the following conditions:

(a) The debtor's assets must not have been subject to a bankruptcy decision issued by a Czech court before the request of a foreign court was served delivered. A decision by a Czech court constituted a *lis pendens* impediment; thus, a foreign declaration of bankruptcy made later than the decision of a Czech court could give rise to no legal effects even in the restricted extent.
(b) The reciprocity principle should have been applied between the Czech Republic and the country whose court requested giving out the bankrupt's movable property. The reciprocity had to be shown in practice. It was necessary that foreign courts were in

fact giving out bankrupts' movables, the legal issues were taken into account as supportive[2].

As a result, under section 69 (2) of the BCA it was impossible to assign legal effects to a foreign bankruptcy decision in the Czech Republic with the exception of giving out bankrupt's movable property abroad and of the right of the insolvency administrator to realize such property[3].

It should be emphasized that sections 69 (1) and (2) of the BCA were used exclusively regarding insolvency proceedings relating to the Czech Republic and non-EU countries.

Subsection 69 (3) into the BCA, a result of an amendment (Act No. 377/2005 Coll.), applied to insolvency proceedings instituted in EU Member States under Regulation No. 1346/2000. Where insolvency proceedings were commenced against a person having a business establishment in the Czech Republic, the decision had to be published in the Czech Republic too. The District Court, having jurisdiction over the territory where an establishment was located, was responsible for the publication; the decision should have been published immediately after the service of the decision by the insolvency administrator or by any other body in charge. The provision of section 69 (3) applied exclusively to insolvency proceedings instituted within the EU[4].

## 3. Current legal regulation of international insolvency within the Czech Legal System

It should be emphasized that currently there is a dual system of international insolvency law in the Czech Republic: (a) international insolvency where the centre of main interests of a debtor (COMI) is in the

[2] VAŠKE, *Konkursní řízení s cizím prvkem* (Insolvency Proceedings with an International Element), Právní rozhledy, Vol. 2000, p. 342.

[3] KUČERA, *Případy a příklady v mezinárodním právu soukromém* (Cases and Examples in Private International Law), Praha, 1992, p. 114.

[4] BRODEC, in: KUČERA, PAUKNEROVÁ, RŮŽIČKA ET AL., *Úvod do práva mezinárodního obchodu* (Introduction in International Trade Law), Plzeň, 2008, p. 393.

EU, is governed by the Insolvency Regulation; and (b) international insolvency where the COMI is in a third country, is governed by the Private International Law Act ("PILA")[5]. Sections 426-430 of the InsA contain legal regulation of insolvency proceedings in relation to the EU Member States, which can be considered as another manifestation of the above-mentioned duality.

### 3.1. International insolvency law in relation to the EU Member States

Sections 426-430 of the InsA govern international insolvency with a European element, i.e. in relation to the EU Member States. Section 426 defines these insolvency proceedings as proceedings where the COMI is in an EU Member State (except for Denmark), and, at the same time, at least one creditor or a portion of the property estate are located in another EU Member State (except for Denmark). Such insolvency proceedings are to be governed by the Insolvency Regulation.

Under section 427 of the InsA, insolvency proceedings instituted in the Czech Republic should be dismissed when it is revealed, in the course of proceedings, that in compliance with the Insolvency Regulation, the COMI of a debtor were concentrated in one of the EU Member States (except for Denmark) on the date of the commencement of insolvency proceedings in the Czech Republic, and that the debtor had no establishment in the Czech Republic as of that date.

Section 428 of the InsA imposes a duty upon an insolvency administrator appointed by a court of any EU Member State to identify himself in the territory of the Czech Republic by an authenticated (notarized) copy of the appointment decision; and to show upon request an official (authenticated) translation of such copy into Czech language.

Section 430 imposes a duty upon an insolvency court to notify, without delay, all known debtor's creditors having their habitual residence, address or seat in one of the EU Member States, of the commencement of insolvency proceedings and of issuance of an insolvency decision.

These provisions were adopted with respect to the Insolvency Regulation in order to simplify its application.

[5] Act No. 91/2012 Coll., the Private International Law Act.

*Best practices under Article 3 of the Insolvency Regulation*: Evidence that a debtor's centre of main interests ("COMI") is in the Czech Republic consists of the fact that the debtor's business is undertaken, and his business decisions taken, primarily in the Czech Republic. The fact that shares and bonds issued by a debtor are traded at the Prague Stock Exchange is relevant in order to conclude that the business of the debtor is done in the Czech Republic. Third parties perceive the Czech Republic as a debtor's COMI when business partners contact the debtor at the address in the Czech Republic; and in addition, when the business group of the debtor is presented on the Internet under the registered national internet domain CZ[6].

*Best practices under Article 15 of the Insolvency Regulation*: Where under *lex fori concursus* (Slovak law in this particular case) the property estate of the petitioner (and the bankrupt) comprises also his claims against his debtors, then the lawsuit in this matter relating to a particular claim of the petitioner being conducted in the Czech Republic is subject to the regime of Article 15 of the Insolvency Regulation. Under this Article, effects of insolvency proceedings on a lawsuit pending, concerning this matter are subject to *lex fori processus*, i.e. the law of the Czech Republic, namely the provisions of the BCA. As a result, the pending lawsuit in the Czech Republic is stayed under the same conditions under which it would be stayed if the insolvency of the petitioner would have been declared by a Czech court[7].

*Best practices under section 430 of the InsA*: For the purposes of the insolvency proceedings a known creditor who has his habitual residence, address or seat in any EU Member State except for Denmark ("foreign creditor") is a creditor of whom the insolvency court, or the preliminary administrator or the insolvency administrator (after insolvency has been declared) would gain knowledge in a regular course of procedure.

A debtor (whether a business person or not) who fails to act with due managerial care and diligence and fails to keep records of assets and obligations or who fails to submit, in due time and manner, a list of obligations to the court, has no right to rely on that creditor, who would

[6] Decision of the Metropolitan Court in Prague: MSPH 79 INS 6021/2001-A-24.

[7] Decision of the Supreme Court of the Czech Republic: 29 Cdo 2181/2008.

have otherwise become known to the court within a statutory time-limit, may lose his right to submit claim(s) in insolvency proceedings as a result of the debtor's failure and negligence.

A debtor's foreign creditor who remains unknown before the lapse of time-limit for submitting claims within the insolvency proceedings set in the decision declaring insolvency, although the insolvency administrator has examined the debtor's duly kept books and other records of assets and obligations and the creditor's identity has not been revealed in any other manner, may not be considered a known creditor.

Neither the insolvency administrator, nor the insolvency court are released from the duty to inform a foreign creditor just because the relevant circumstances showing that the creditor is a known creditor are revealed later – after the lapse of time-limit; however, elapsed time to submit the claim may not be restored.

Should the debtor denote his foreign creditor vaguely and unclearly in the books, other records and filings to the insolvency court, the fact that such creditor becomes fully identified and known to the court and/or insolvency administrator after the time set for submitting claims has elapsed, goes to the detriment of the debtor.[8]

### 3.2. International insolvency law in relation to non-EU countries

#### a) Effects of commenced insolvency proceedings with respect to property in a foreign country (i.e. in a non-EU state)

Section 111 (1) of the PILA governs a potential impact of insolvency proceedings commenced by Czech courts under a directly applicable regulation of the European Union upon the property of a debtor located in a third country. This directly applicable EU law is undoubtedly the Insolvency Regulation. It should be emphasized that section 111 (1) of the PILA in no case deals with issues of European insolvency, i.e. issues having a direct impact upon EU Member States. European insolvency is exclusively subject to the regime of Insolvency Regulation and the above-mentioned provisions of the InsA.

[8] Decision of the Supreme Court of the Czech Republic: 29 Cdo 13/2010.

Section 111 (1) of the PILA regulates the legal effects of insolvency proceedings commenced in the Czech Republic according to the Insolvency Regulation with respect to countries which are not Member States of the EU. Legal effects of insolvency proceedings in a foreign territory are governed by the law of the state whose court has instituted the insolvency proceedings, namely Czech law. In other words, if insolvency proceedings have been commenced by a Czech court, legal effects of such proceedings in a foreign country would result from Czech law. Applicable law would be determined in compliance with a general connecting factor of *lex fori concursus*.

On the other hand, section 111 (1) of the PILA distinguishes between the scope of effects which would be assigned to an insolvency proceeding instituted by Czech courts in a foreign country. Applicable law for the determination of the scope of such effects shall not be the law of the country where the insolvency proceedings commenced, i.e. *lex fori concursus*, but the law of the country on whose territory the legal effects shall apply, i.e. the law of that foreign country. This represents a breaking of the general rule of *lex fori concursus*.

Under section 111 (1) of the PILA, an insolvency administrator is entitled to perform his powers in the territory of a foreign state as well; however, this may happen only when explicitly permitted by the law of that foreign state. The powers of insolvency administrators in the Czech Republic are governed by Act No. 312/2006 Coll., on Insolvency Administrators. This Act applies to the powers of insolvency administrators performed in the territory of the Czech Republic only.

### b) Jurisdiction of Czech courts to institute and conduct insolvency proceedings against an establishment

Section 111 (2) of the PILA governs the jurisdiction of Czech courts to institute and conduct insolvency proceedings if a debtor's establishment is located in the Czech Republic. This provision applies only to cases not subject to the Insolvency Regulation. In other words, this subsection applies to insolvency cases where a debtor's centre of main interests (COMI) is not in an EU Member State, but is established in the Czech Republic.

Under section 111 (2) of the PILA, Czech courts have jurisdiction to institute and conduct insolvency proceedings with respect to a debtor having his establishment in the Czech Republic. "Establishment" is not explicitly defined for the purposes of the PILA, however it is defined for example in section 22 (2) of Act No. 586/1992 Coll., on income taxes as a place where tax payors in the Czech Republic pursue their business activities, such as a workshop, office, natural resources mining site, shop (selling point) or construction site, etc. In general terms, an establishment may be any place where business is done.

Czech courts may commence insolvency proceedings in regard to an establishment located in the Czech Republic of a debtor that does not have his COMI in an EU Member State under two basic requirements.

The first requirement is that the establishment is located in the territory of the Czech Republic; this requirement must be fulfilled without exception and it is considered to be mandatory.

The second requirement is optional; it presumes that either (i) the document instituting the proceedings is submitted by a creditor with habitual residence in the Czech Republic, or (ii) the claim of a creditor resulted from activities of an establishment is located in the Czech Republic.

However, section 111 (2) of the PILA contains certain restrictions with respect to jurisdiction of Czech courts to institute and conduct proceedings against a debtor having his establishment in the Czech Republic: legal effects are limited to the property located in the Czech Republic.

### c) Application of conflict-of-law rules of the Insolvency Regulation with respect to non-EU countries

Section 111 (3) of the PILA regulates an adequate application of conflict rules stipulated in the directly applicable law of the European Union to insolvency proceedings, where the COMI is not in an EU Member State. In accordance with section 111 (3) of the PILA conflict rules of the Insolvency Regulation are applied outside of the scope of the Regulation. It may be assumed that the purpose of application of these conflict rules to insolvency proceedings, in regard to non-EU countries,

is an attempt of the legislator to gradually remove the duality of international insolvency legal regulation and to introduce uniform conflict rules[9].

### d) Law applicable to insolvency of a participant in payment and settlement systems

Section 111 (4) of the PILA regulates rights and duties of participants in the payment and settlement system with irrevocability of clearing, the system with irrevocable settlement, foreign exchange payment system with irrevocable clearing, and foreign exchange settlement system with irrevocable settlement regarding the decision on insolvency of such a participant.

If there is a decision on insolvency, or any other act of a public body having the same effects as the decision on insolvency, of a participant in the payment system with irrevocability of clearing, in the system with irrevocable settlement, in the foreign exchange payment system with irrevocable clearing, or in the foreign exchange system with irrevocable settlement the rights and duties resulting from insolvency will be governed by the same law as applicable to legal relations between participants in clearing and settlement systems.

Section 111 (4) of the PILA excludes the choice of law in matters relating to insolvency of a participant in the payment system with irrevocability of clearing, in the system with irrevocable settlement, in the foreign exchange payment system with irrevocable clearing, or in the foreign exchange system with irrevocable settlement. In other words, connecting factors in such a case are always determined as mandatory in the PILA.

[9] BRODEC, in: PAUKNEROVÁ, ROZEHNALOVÁ, ZAVADILOVÁ ET AL., *Zákon o mezinárodním právu soukromém. Komentář* (Private International Law Act. Commentary), Praha: Wolters Kluwer ČR, 2013, at p. 703.

### e) Conditions for recognition of foreign decisions and giving movable property out to foreign courts

Section 111 (5) of the PILA regulates conditions for recognition of foreign decisions in insolvency proceedings matters and conditions for giving out abroad movable property upon request of a foreign court.

Under section 111 (5) of the PILA, foreign decisions in insolvency proceedings matters shall be recognized on condition of reciprocity. It should be emphasized that the condition of reciprocity is fulfilled only in case of material reciprocity, i.e. reciprocity that is being carried out in practice, not just declared by states. When foreign decisions are being recognized by Czech courts and Czech decisions by courts of a respective foreign country, the condition of reciprocity is fulfilled. However, reciprocity is not the only recognition condition. A foreign decision shall be recognized provided: (a) it was given in the state of the debtor's main interests, and (b) provided the debtor's property is not subject to pending insolvency proceedings in the Czech Republic according to the section 111 (2) of the PILA. The term "centre of the main interest of a debtor" is a place where the debtor has its unit for strategic managerial decisions. Since the PILA contains no definition of the concept of the COMI of a debtor it may be reasonably assumed regarding earlier practice that the concept is to be interpreted in compliance with the interpretation contained in the Insolvency Regulation[10].

Section 111 (5) of the PILA also governs conditions for giving the assets out abroad to a foreign court upon its request. It may apply only to movable property, as immovable property cannot be technically handed over. However, the giving out of movables is also subject to certain conditions.

The first condition is that insolvency proceedings have not been instituted by a Czech court against a debtor at the time of delivery of the request to give out movable property of the debtor. Should such a request to render a debtor's property located in the CR reach a Czech court when insolvency proceedings in regard to the debtor's property are pending in the Czech Republic, the property may not be given out to the foreign court.

[10] BRODEC, *ibid*, p. 706.

The second condition is, as in the case of recognition of foreign decisions, reciprocity; again, the reciprocity must be carried out in practice, not just declared by the respective states.

The third condition, under which movable property may be given out, is to ascertain whether all rights of a debtor to exclude property from the estate have been satisfied. The term "right to exclude" comprises, for example, a decision on an application to exclude a property item from the estate of the pending insolvency proceedings where such application was lodged because movable property owned by a creditor, not the debtor, had been included in the estate. The legislator, stipulating such condition, expressed his preference of claiming such rights over giving out movables abroad, primarily to secure that giving out of such movable property to a foreign court does not complicate exercising the right to have an item excluded from the estate[11].

The fourth condition under which movable property may be given out abroad, is to ascertain whether all rights of secured creditors have been satisfied. The legislator stipulated his preference of exercising such rights over the giving out of movable property abroad to a foreign court especially in order to prevent complications in case of exercising the right to realize the pledged property and, subsequently, to satisfy the claims of the creditor from proceeds of such realization.

## 4. Legal regulation of international insolvency in international treaties

Before 1989, some issues of international insolvency in the then Czechoslovakia were governed by international treaties. The treaty with the Polish Republic on Mutual Execution of Enforcement Titles and Reciprocity in Bankruptcy Matters from 1937 may serve as an example[12]. This treaty is not effective anymore; it was replaced by the Treaty on Mutual Legal Transactions in Civil and Criminal Matters in 1949[13], in

[11] BRODEC, *ibid*, p. 707.

[12] No 38/1937 Sb.

[13] No 89/1949 Sb.

which bankruptcy played a rather marginal role, only in relation to inheritance proceedings (see its Art. 49).

The Treaty with Switzerland on Mutual Legal Assistance in Civil and Commercial Matters from 1928 may be another example[14]. Again, bankruptcy is mentioned only marginally in connection with service (see Art. 1). This treaty is still in effect.

No recently adopted international treaty deals with the issues of international insolvency. For example, the Treaty between the Czech Republic and Ukraine on Legal Assistance in Civil Matters from 2008[15] defines (Art. 1 (1)) "civil matters" as issues arising from civil and commercial relations, but it does not deal with the specific area of insolvency proceedings at all. Thus, each country would apply its own rules of private international law. In case of the Czech Republic, the PILA applies; on the Ukrainian part, the Ukrainian insolvency law (the Act to restore the solvency of a debtor and to declare the debtor's insolvency) applies. This Act contains rules on international insolvency that were inspired by the UNCITRAL Model Law.[16] This example illustrates that even a recent modern bilateral treaty does not tackle issues under consideration.

## 5. Conclusion

It may be summarized that the legal regulation of international insolvency appears to be satisfactory in the Czech legal system. Primarily, the clear distinction of international insolvency proceedings according to the COMI is to be stressed. The InsA includes provisions that apply along with the Insolvency Regulation where the COMI is located in an EU Member State. On the other hand, the PILA includes provisions that apply where the COMI is in a country outside the EU. One critical comment to conclude: the Czech legal regulation does not incorporate the

[14] No 9/1928 Sb.

[15] Communication of the Ministry of Foreign Relations No 123/2002 Sb.m.s., as amended by Protocol No 77/2008 Sb.m.s.

[16] See *Ukrainian Journal of Business Law*, http://www.ujbl.info/article.php?id=394 (accessed 28 April 2017).

UNCITRAL Model Law and there are no plans in this respect envisaged in the near future.

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# German Report on Cross-Border Insolvency Proceedings: Detecting Best Practices

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*Starting in 1999 and influenced by the ongoing competition between national legal systems as a result of globalisation, German insolvency law was subject to a considerable change: From a rigid regime focused on the satisfaction of creditors by mere liquidation procedures, it has developed to a more flexible and efficient system focusing on the reorganisation and restructuration of insolvent companies. During the last reforms the German legislator could use the InsR and now the InsRRecast as guidelines for national laws on cross-border insolvency proceedings that are not covered by the European regulation. As a result, the German conflict of law rules are fully in line with the InsRRecast. The slight differences concerning international jurisdiction and the recognition of foreign insolvency proceedings are necessary to establish an adequate level of protection against third countries and to provide legal certainty by a consistent set of national rules. With regard to the InsR/InsRRecast the German courts' rulings on international jurisdiction indicate a great awareness of the regulation's rationale reflected in its recitals and show – despite some ambiguities – a high degree of conformity, transparency and foreseeability/legal certainty in dealing with cross-border insolvency proceedings. In short, in respect of their individual challenges, both the German and European regulations and their practical implementation by the national courts can be qualified as best practices. However, the inquiry of legal practitioners shows that there is a demand for practical guidelines in order to deal with the leeways given by the InsR/InsRRecast.*

## 1.I. Insolvency proceedings in Germany

### a) From the Bankruptcy Code (Konkursordnung) to the Insolvency Statute (Insolvenzordnung)

For over a century, German insolvency law was codified in the Bankruptcy Code (Konkursordnung) of 1877. This code focused on the satisfaction of creditors while the reorganisation of insolvent companies was not considered a key issue[1].

In practice, under the Bankruptcy Code, creditors could very often not reach satisfaction. In most cases, the insolvency quota were very low or the insolvency courts even refused to open insolvency proceedings because the debtor's assets were insufficient to cover the costs of the proceedings[2]. In a familiar quotation, scholars deplored the "bankruptcy" of the German bankruptcy law[3]. It was almost commonly recognised that the German law was in urgent need of reform.

Therefore, after long discussions, the Bankruptcy Code was replaced by the Insolvency Statute (Insolvenzordnung, InsO) on 1 January 1999[4]. The Insolvency Statute aims at making insolvency proceedings more effective, especially with regard to the creditors´ satisfaction. At the same time, it pays more attention to the reorganisation of insolvent companies. In the best scenario envisaged by the legislator, a reorganisation of the company will go hand in hand with an optimal satisfaction of the creditors[5].

[1] PAPE, in: UHLENBRUCK/HIRTE/VALLENDER (eds), *Insolvenzordnung*, 14th ed. 2015, § 1 para. 1; REISCHL, *Insolvenzrecht*, 4th ed. 2016, para. 17. See also BT-Drucks. 12/2443, 74.

[2] SCHMIDT, *Insolvenzordnung*, 19th ed. 2016, Introduction para. 6; FOERSTE, *Insolvenzrecht*, 6th ed. 2014, para. 23; REISCHL, *Insolvenzrecht*, para. 17. For more detailed statistics see STÜRNER, in: *Münchener Kommentar zur Insolvenzordnung*, Vol. I, 3rd ed. 2013, Introduction paras. 33, 45d; BT-Drucks. 12/2443, 72.

[3] KILGER, *Konkurs Treuhand Sanierung* (KTS) 1975, 142; FOERSTE, *Insolvenzrecht*, para. 23.

[4] Insolvenzordnung (InsO) vom 5. Oktober 1994, BGBl. I, 2866.

[5] Cf. § 1 InsO: «The insolvency proceedings shall serve the purpose of *collective satisfaction of a debtor's creditors* by liquidation of the debtor's assets and by distribution of the proceeds, or by reaching an arrangement in an insolvency plan, *particularly in order to maintain the enterprise*» [*emphasis added*].

One of the main features of the new law consists in the rules on an insolvency plan which – in most cases – is presumed to provide for a reorganisation of the company. The rules on the insolvency plan as well as other rules aiming at facilitating a reorganisation were influenced by US-American law, especially the provisions contained in Chapter 11 of the United States Bankruptcy Code of 6 November 1978[6].

### b) Recent reform of the German law and future perspectives

The reform of the German insolvency law did not stop there. In 2011, a new law aiming at making the restructuring of enterprises in Germany even more effective and easy was enacted (Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen – ESUG)[7].

As the title indicates, the amendment shifts the focus from creditors´ satisfaction to restructuration[8]. Among other things, the new law promotes debtor-in-possession proceedings[9]. Moreover, it modifies the rules on insolvency plans. Most importantly, in contrast to the preceding law, the ESUG allows a debt-equity swap against the will of the current shareholders in an insolvency plan[10]. The legislator's intent was

[6] BT-Drucks. 12/2443, 105 et seq.; LÜER/STREIT, in: UHLENBRUCK/HIRTE/VALLENDER, *Insolvenzordnung*, Preliminary Remarks to § 217 para 9. In detail see EIDENMÜLLER, in: *Münchener Kommentar zur Insolvenzordnung*, Vol. III, 3rd ed. 2014, Preliminary Remarks to § 217 paras. 16 et seqq.

[7] Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen vom 7. Dezember 2011, BGBl. I, 2582. For several other modifications of the InsO before 2011 see AHRENS, in: AHRENS/GEHRLEIN/RINGSTMEIER (eds.), *Insolvenzrecht*, 3rd ed. 2017, § 1 paras. 63 et seqq.; SCHMIDT, *Insolvenzordnung*, Introduction paras. 8 et seqq.

[8] BT-Drucks. 17/5712, p. 17; SCHMIDT, *Insolvenzordnung*, Introduction para. 16. For a detailed analysis of the modifications see e.g. GÖB, *Neue Zeitschrift für Gesellschaftsrecht* (NZG) 2012, 371 et seqq.; LANDFERMANN, *Wertpapier-Mitteilungen* (WM) 2012, 821 et seqq., 869 et seqq.; VALLENDER, *Monatsschrift für Deutsches Recht* (MDR) 2012, 61 et seqq., 125 et seqq.

[9] See §§ 270 – 285 InsO.

[10] See Section 225a - Rights of the Shareholders: «*(1) The share rights and membership rights of those persons with a participating interest in the debtor shall remain unaffected by the insolvency plan, unless otherwise provided in the plan. (2) The constructive part of the plan may provide that the creditors' claims may be converted into share rights or membership rights in the debtor. Such conversion shall be ruled out if it is against the will of the creditors concerned. In particular, the plan may provide for a decrease or increase in capital, the provision of contributions in kind, the ruling out of subscription rights, or the payment of compensation to outgoing shareholders. (3) The plan may set out any rule permissible under company law, in*

that the new rules on debt-equity swap would attract foreign financial investors and encourage them to take part in restructuring the insolvent company.

Other modifications concern the appointment of insolvency administrators. Traditionally, insolvency administrators are appointed by specialised insolvency judges ("Insolvenzrichter") who in practice very often refer to an internal list of experts. However, after the reform of the insolvency code, the decision does not exclusively rest with the judge. If a provisional creditors´ committee unanimously suggests the appointment of an insolvency administrator who they deem extraordinarily qualified for their case, the judge is generally bound by their suggestion. In most cases, the person proposed by the provisional creditors´ committee is expected to have a detailed plan for the restructuring of the company[11].

The amendments to the German Insolvency Statute can at least in part be explained by the fact that, from a comparative perspective, there is a clear trend towards strengthening party autonomy and providing for a restructuring of distressed companies as opposed to mere liquidation procedures. In that context, it is worth mentioning that in the years before the reform, some German companies had moved their center of main interests (COMI) from Germany to England in order to open insolvency proceedings there. These cases caught considerable attention

*particular regarding the continuation of a dissolved enterprise or the transfer of share rights and membership rights. (4) Measures in accordance with subsection (2) or (3) shall not authorize the holder to rescind or terminate contracts to which the debtor is a party. Nor do they lead to the contracts being otherwise rescinded. Any contrary contractual agreements shall be invalid. Agreements reached on the basis of the debtor's breach of duty shall remain unaffected by the first and second sentences, insofar as they do not consist solely in a measure referred to in subsection (2) and (3) being contemplated or carried out. (5) Where a measure in accordance with subsection (2) or (3) represents an important reason for a person with a participating interest in the debtor leaving the legal entity or company without legal personality and if use is made of this right of withdrawal, the financial status which would have arisen if the debtor had been wound up shall be decisive in regard to determining the amount of any possible compensation. Payment of the compensation may be deferred over a period of no more than three years to avoid placing an inappropriate burden on the debtor's financial status. Interest shall be added to any unpaid compensation*».

[11] § 56 (1) InsO: «*From among all those persons prepared to take on insolvency administration work the insolvency court shall select and appoint as insolvency administrator an independent natural person who is suited to the case at hand, who is particularly experienced in business affairs and independent of the creditors and of the debtor* […]».

in scholarly writing as well as in the public debate[12]. While the reasons for this "insolvency tourism" might have varied from case to case, it cannot be denied that English law was believed to be more favorable to the restructuring of companies than German law. Therefore, it is reasonable to assume that the reform of the Insolvency Statute in 2011 contributed to the legislator´s decision to make German insolvency law more open to the restructuring of companies and more competitive in an international context.

### c) Assessment

The foregoing outline shows that, in the development of German insolvency law, the legislator did not only focus on improving the traditional rules of German law, but – while taking into consideration foreign legislation – was willing to implement fundamental reforms. In the political debate, there is a growing awareness of an ongoing competition between national legal systems. Therefore, the traditional German view that insolvency law generally leads to a liquidation of distressed companies has been replaced by a more flexible approach combining the persisting goal of optimal creditor satisfaction with the goal of restructuring companies. This seems to be a good legislative practice which is in line with the challenges of globalisation.

It seems very likely that there will be other reforms in the near future. In contrast to the laws of many other European countries, German law does not yet provide for pre-insolvency proceedings aiming at restructuring distressed companies[13]. However, the Proposal of a Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU of 22 November 2016[14]

[12] See e.g. RINGE, *European Business Organization Law Review* (EBOR) 2008, 579, 585 et seqq.; ANDRE/GRUND, *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* (NZI) 2007, 137 et seqq.; VALLENDER, *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* (NZI) 2007, 129 et seqq.; WELLER, *Zeitschrift für Unternehmens- und Gesellschaftsrecht* (ZGR) 2008, 835 et seqq.

[13] SCHMIDT, *Insolvenzordnung*, Introduction para. 18. The procedures introduced in §§ 270 and 270b InsO do not constitute indepedent pre-insolvency proceedings but are only variations to the regular opening procedure.

[14] See COM(2016) 723 final – 2016/0359 (COD).

has triggered a debate among German practitioners and politicians on the enactment of pre-insolvency proceedings in Germany. In the debate, it is clearly seen that the current lack of pre-insolvency procedures might be to the disadvantage of German companies and that there is a need for reform in this area[15].

## 1.II. Development of German law with regard to international insolvency

Before the enactment of the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (InsR), there were only some rather fragmented rules on international insolvency cases in the Introductory Act to the Insolvency Statute (Einführungsgesetz zur Insolvenzordnung – EGInsO). Most questions remained unanswered.

This changed with the InsR. Whereas the EGInsO now contains execution rules for the InsR and – with regard to insolvency proceedings opened after 26 June 2017[16] – the InsRRecast[17], §§ 335-358 InsO provide for a comprehensive set of autonomous German rules for international insolvency cases.

As European law holds precedence over national law, the rules of the InsRRecast will in most cases supersede §§ 335-358 InsO. However, §§ 335-358 InsO are still relevant when the InsRRecast is not applicable. This is especially the case if the insolvent debtor is a bank or an insurance company[18] or if the COMI is located outside the EU[19]. Finally and most importantly, German law deals with the recognition of foreign insolvency proceedings which are not covered by the

[15] See the articles in SEAGON/RIGGERT (eds.), *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* (NZI), special supplement 1/2017, pp. 1 et seqq.

[16] See Art. 84 (1) InsRRecast.

[17] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

[18] See Art. 1 (2) InsRRecast: «*2. This Regulation shall not apply to proceedings referred to in paragraph 1 that concern: (a) insurance undertakings, (b) credit institutions; (c) investment firms and other firms, institutions and undertakings to the extent that they are covered by Directive 2001/24/EC; or (d) collective investment undertakings*».

[19] GRUBER/WEHNER, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, , § 335 para. 9.

InsRRecast, namely proceedings conducted outside the EU. It is undoubtedly a good legislative practice to implement a comprehensive set of rules for international insolvency cases into the national law because the InsR/InsRRecast do not deal with all cases. Hereby, there are no regulatory gaps which are likely to create legal uncertainty.

## 1.III. International Jurisdiction

### a) International Jurisdiction for the opening and the conduct of principal proceedings

The German Insolvency Statute does not contain a specific rule on "international" jurisdiction; § 3 InsO only deals with "local" jurisdiction. However the rule on "international" jurisdiction can be derived from this rule on "local" jurisdiction by analogy[20].

Pursuant to § 3 InsO, the insolvency court in whose district the debtor has his place of general jurisdiction has local (and international) jurisdiction. If the centre of the debtor's self-employed business activity is located elsewhere, the insolvency court in whose district this place is located has jurisdiction.

§ 315 InsO contains a special rule for the insolvency proceedings of a decedent's estate. The insolvency court in whose district a decedent had his place of general jurisdiction at the time of his death has exclusive local jurisdiction for the insolvency proceedings to be opened for his estate. If the decedent had the center of his self-employed business activity in a different place, the insolvency court in whose district this place is located has exclusive jurisdiction.

However, it should be noted that as soon as the debtor´s COMI is situated within an EU member state, international jurisdiction for the opening of an insolvency proceeding is governed by the InsRRecast. As

[20] Oberlandesgericht Köln 23.4.2001 – 2 W 82/01, *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* (NZI) 2001, 380, 381; AHRENS, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, § 3 para. 48; GANTER/LOHMANN, in: *Münchener Kommentar zur Insolvenzordnung*, Vol. I, § 3 paras. 22, 24.

the InsRRecast takes precedence over national law, there is no room for an application of § 3 or § 315 InsO in these cases[21].

Therefore, in these cases, § 3 InsO can only applicable when the debtor is an entity not covered by the InsRRecast according to Art. 1 (2) InsRRecast. Even then, § 3 InsO applies only in so far as there are no other special rules: § 46e (1) of the German Banking Act (Gesetz über das Kreditwesen, KWG) determines the competent authority for the opening of insolvency proceedings CRR credit institutions in the European Economic Area[22]. § 312 (2) of the Act on the Supervision of Insurance Undertakings (Versicherungsaufsichtsgesetz, VAG) determines the international jurisdiction for insolvency proceedings concerning insurance companies[23].

### b) International Jurisdiction for the opening and the conduct of territorial insolvency proceedings

§ 354 InsO contains a rule for the opening of "territorial insolvency proceedings". These proceedings have a limited scope as they are restricted to the assets which are situated in Germany, while assets located in other states remain unaffected by the German territorial insolvency proceedings.

§ 354 InsO supposes that the German court does not have jurisdiction to open principal insolvency proceedings relating to all the assets of the debtor. If, however, the debtor has an establishment or other assets in Germany, § 354 (1) InsO stipulates that, on request from a creditor, separate insolvency proceedings shall be permissible with regard to the domestic assets of the debtor. Pursuant to § 354 (2) InsO, if the

[21] GRUBER/WEHNER, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, § 335 paras. 2, 4; KAMMEL, in: BECK/DEPRÉ, *Praxis der Insolvenz*, 3rd ed. 2017, § 33 paras. 22 et seq.

[22] § 46e (1) KWG: «*With regard to the assets of a CRR credit institution in the European Economic Area the administrative or judicial authorities of the institution's home member state shall be exclusively competent to open insolvency proceedings*». This provision transforms Art. 9 (1) of the Directive 2001/24/EC of 4 April 2001.

[23] § 312 (2) VAG: «*With regard to the assets of an insurance undertaking in the European Economic Area the administrative authorities of the company's home state shall be exclusively competent to open insolvency proceedings*». This provision is identical with the former § 88 (1a) VAG that transformed Art. 8 (1) of the Directive 2001/17/EC of 19 March 2001.

debtor has no establishment but only assets in Germany, the request of a creditor to open territorial insolvency proceedings shall only be admissible if the latter has a special interest in opening the proceedings, in particular if he is likely to fare much worse in foreign proceedings than in a German proceedings. According to § 354 (3) InsO, for the proceedings, the insolvency court shall have exclusive jurisdiction in whose district the establishment or, if there is no establishment, assets of the debtor are located.

§ 354 InsO has a limited sphere of application as in most cases, it is superseded by the InsRRecast. § 354 InsO can only be applied if the InsRRecast is not applicable, in particular if the debtor is an entity not covered by the InsRRecast according to Art. 1 (2) InsRRecast (provided that there are no special rules)[24] or, more importantly, if the debtor's COMI is situated outside the EU.

Just as in the InsRRecast, German law provides for two types of territorial insolvency proceedings. First, territorial insolvency proceeding can be opened prior to the opening of the main proceedings in another state ("isolated" territorial insolvency proceedings). Second, there can be territorial insolvency proceedings when there are main insolvency proceedings in another state (so-called secondary insolvency proceedings). The InsR contains exhaustive rules for the opening of secondary insolvency proceedings when main insolvency proceedings have been opened in an EU member state. Therefore, § 354 InsO is only applicable if the debtor is an entity according to Art. 1 (2) lit. c), d) InsRRecast,[25] and if a main insolvency proceeding has been opened in a state outside the EU and if at the same time the opening of this proceeding is recognised in Germany pursuant to § 343 InsO.

Even though § 354 InsO is modelled on Art. 3 (2)-(4) InsR[26] and (now) Art. 3 (2)-(4) InsRRecast, there are some differences. Whereas Art. 3 (2) InsR/InsRRecast allows a territorial insolvency proceedings

[24] If the debtor is a credit institution, § 46e (2) KWG prohibits territorial insolvency proceedings; according to § 312 (3) VAG, the same applies to insurance undertakings. In these cases, § 354 InsO is not applicable at all, cf. GRUBER/WEHNER, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, § 354 para. 4.

[25] As far as insurance undertakings (Art. 1 (2) lit. a InsRRecast), and credit institutions (Art. 1 (2) lit. b InsRRecast) are concerned, § 354 InsO Is not applicable (see preceding footnote).

[26] See Art. 3 (2)-(4) InsRRecast.

only in case of an establishment of the debtor in Germany, according to § 354 InsO – in case the creditor has a special interest in opening the proceedings – a territorial insolvency proceeding can already be opened when the debtor only has assets (but not necessarily an establishment) in Germany. Moreover, § 354 InsO does not adopt the additional prerequisites for secondary proceedings set out by Art. 3 (4) InsR/InsRRecast. Still, using the rules of the InsR/InsRRecast on territorial insolvency proceedings, as a model for similar proceedings under German law, can be considered a good legislative practice as it helps to avoid irreconcilable contradictions between the Regulation and the national German law.

### c) International Jurisdiction for the opening of territorial insolvency proceedings

Pursuant to the European Court of Justice (ECJ), Art. 3 InsR did not only confer jurisdiction with regard to the opening and the conduct of main insolvency proceedings. The ECJ held that this provision equally conferred international jurisdiction for (individual) actions deriving from the insolvency proceedings and those which are closely connected with them[27]. This solution has been confirmed by Art. 6 (1) InsRRecast. Alternatively, pursuant to Art. 6 (2) InsRRecast, where an action referred to in Art. 6 (1) InsRRecast is related to an action in civil and commercial matters against the same defendant, the insolvency practitioner may bring both actions before the courts of the Member State within the territory of which the defendant is domiciled, or, where the action is brought against several defendants, before the courts of the Member State within the territory of which any of them is domiciled, provided that those courts have jurisdiction pursuant to Regulation (EU) No 1215/2012.

German law does not contain a similar rule. Consequently, if the InsRRecast is not applicable – especially when the COMI of the debtor

[27] ECJ 12.2.2009 – C-339/07, Slg. 2009 I, 767 – Deko Marty Belgium. See also Bundesgerichtshof 19.5.2009 – IX ZR 39/06, in *Neue Juristische Wochenschrift* (NJW) 2009, 2215, 2216; GRUBER/SCHULZ, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, Anh. I, Art. 3 EuInsVO a.F. paras. 132 et seqq.; HAU, *Konkurs Treuhand Sanierung* (KTS) 2009, 382; MÖRSDORF-SCHULTE, *Zeitschrift für Wirtschaftsrecht* (ZIP) 2009, 1456 ff.; MOCK, *ZInsO* 2009, 470 ff.

is located outside the EU – the jurisdiction for individual actions is determined by the German Code on Civil Procedure (Zivilprozessordnung – ZPO)[28].

### 1.IV. Applicable law

With regard to the applicable law, § 335 InsO stipulates that, unless otherwise provided, the insolvency proceedings and their effects shall be subject to the law of the state in which the proceedings have been opened. Special rules deal with contracts on immovable objects (§ 336 InsO)[29] and employment (§ 337 InsO)[30], set-off (§ 338 InsO)[31], the contest of transactions in insolvency proceedings (§ 339 InsO)[32] and finally "organised markets" and pension transactions (§ 340 InsO)[33]. Again, it

[28] AHRENS, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, § 3 para. 3; GANTER/LOHMANN, in: *Münchener Kommentar zur Insolvenzordnung*, Vol. I, § 3 para. 3; MADAUS, in: *Beck'scher Onlinekommentar zur Insolvenzordnung*, 7th ed. 2017,, § 3 para. 2.

[29] § 336 InsO: «*The effects of the insolvency proceedings on a contract relating to a right in rem in an immovable object or a right to use an immovable object shall be subject to the law of the state in which the object is situated. With an article entered in the register of ships and the register of ships under construction, as well as in the register of liens on aircraft, the law of the state under whose supervision the register is kept shall be relevant*».

[30] § 337 InsO: «*The effects of the insolvency proceedings on employment shall be subject to the law which is relevant to the employment in accordance with Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177 of 4.7.2008, p. 6)*».

[31] § 338 InsO: «*The right of an insolvency creditor to set off shall remain unaffected by the opening of insolvency proceedings if in accordance with the law applicable to the debtor's claim he is entitled to set off at the time of opening the insolvency proceedings*».

[32] § 339 InsO: «*A transaction may be contested if the preconditions for contesting insolvency are met in accordance with the law of the state of the opening of proceedings unless the opponent of the contest demonstrates that the law of another state is relevant for the transaction and the transaction is by no means contestable in accordance with this law*».

[33] § 340 InsO: «*The effects of the insolvency proceedings on the rights and duties of participants in an organised market in accordance with section 2 subsection (5) of the Securities Trading Act (Wertpapierhandelsgesetz) shall be subject to the law of the state which applies to this market. The effects of insolvency proceedings on pension transactions within the meaning of section 340b of the Commercial Code as well as on novation contracts and set-off agreements shall be subject to the law of the state which applies to these contracts*».

should be noted that these rules only have a limited sphere of application as in most cases, the InsR takes precedence[34].

§ 335 InsO is identical with Art. 4 InsRRecast; and also §§ 336 – 340 InsO are identical with or at least very similar to the corresponding provisions of the InsRRecast. It was the declared intention of the German legislator to bring the German conflict of law rules in line with the provisions of the InsR/InsRRecast[35].

At a closer look, the German legislator was well advised to model the German conflict of law rules after the InsR. This helps to avoid the unequal treatment of cases which should be treated equally: If the debtor´s COMI is situated in France and there is an opening of an "isolated" territorial insolvency proceeding in Germany, the German law is generally applicable to this proceeding according to Art. 3 (2) and Art. 7 (1) InsRRecast[36]; however, pursuant to Art. 9 InsRRecast[37], the opening of insolvency proceedings shall not affect the right of creditors to demand the set-off of their claims against the claims of the debtor, where such a set-off is permitted by the law applicable to the insolvent debtor's claim. There is no reason for different conflict of law rules in case the debtor´s COMI is situated in a state outside the EU. Consequently, in this case, German law – basically copying the rules of the InsR/InsRRecast – comes to the same result on the basis of § 335 and § 338 InsO. So in a nutshell, modelling German conflict of law rules after the InsR/InsRRecast can be qualified as a good legislative practice as it avoids inconsistencies within the conflict of law rules.

[34] GRUBER/WEHNER, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, § 336 paras. 3 et seq., § 337 para. 2, § 338 para. 2, § 339 para. 2.

[35] BT-Drucks. 15/16, pp. 1 et seq., 18 et seqq.

[36] Former Artt. 3 (2) and 4 (1) InsR.

[37] Former Art. 6 InsR.

## 1.V. Recognition of the opening of an insolvency proceeding and preservation measures

### a) Development of the German law

Traditionally, in Germany it was held that foreign insolvency proceedings only had a territorial effect. So as a matter of fact, for a long time, foreign insolvency proceedings were not recognised at all in Germany. In retrospect, this seems inconsistent, as German insolvency proceedings were themselves considered to have a "universal" effect.

However, in 1985, in a landmark decision, the German Federal Court of Justice (Bundesgerichtshof) overturned this view and opted for the general possibility to recognise foreign insolvency proceedings in Germany[38]. After that, the recognition of foreign insolvency proceedings is standard, non-recognition is the exception.

Today, § 343 (1) InsO contains a rule on the recognition of the opening of insolvency proceedings. Pursuant to § 343 (2) InsO this rule applies mutatis mutandis to preservation measures taken after the request for the opening of insolvency proceedings, as well as to judgments handed down to implement or terminate recognised insolvency proceedings.

If the prerequisites of § 343 InsO are fulfilled, foreign insolvency decisions are automatically recognised without any further formalities[39]. This means that all the substantive and procedural effects of foreign insolvency proceedings are extended from the foreign state to Germany. Most importantly, the foreign insolvency administrator can take actions in respect of all the debtor's assets located in Germany.

### b) Prerequisities for recognition

Under § 343 InsO, there are only two reasons for the non-recognition of the opening of insolvency proceedings. First, the opening of a foreign

[38] Bundesgerichtshof 11.7.1985 – IX ZR 178/84, BGHZ 95, 256 et seqq. See also LÜKE, *Konkurs Treuhand Sanierung* (KTS) 1986, 1 et seqq.; MERZ, *Entscheidungen zum Wirtschaftsrecht* (EWiR) 1985, 605 et seq.; LÜDERITZ, *Juristenzeitung* () 1986, 96 et seq.

[39] GRUBER/WEHNER, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, § 343 para. 1; THOLE, in: *Münchener Kommentar zur Insolvenzordnung*, Vol. III, § 343 paras. 1, 67.

insolvency proceeding is not recognised if the courts of the state of the opening of proceedings do not have jurisdiction in accordance with German law (§ 343 (1) no. 1 InsO); secondly, the opening of the proceeding is not recognised where recognition leads to a result which is manifestly incompatible with major principles of German law, in particular where it is incompatible with basic rights (§ 343 (1) no. 2 InsO).

§ 343 (1) no. 1 InsO refers to the so-called "mirror-image principle" ("Spiegelbildprinzip") which is also used in § 328 (1) no. 1 ZPO and in § 109 (1) no. 1 of the Act on the Proceedings in Family Matters and in Matters of Non-contentious Jurisdiction (Gesetz über das Verfahren in Familiensachen und in den Angelegenheiten der freiwilligen Gerichtsbarkeit, FamFG). When applying § 343 (1) no. 1 InsO, it is (hypothetically) assumed that the German rules on international jurisdiction had been applicable in the state opening the insolvency proceedings. If (hypothetically) these courts had been competent pursuant to § 3 InsO[40], the requirement of § 343 (1) no. 1 InsO is fulfilled and the opening of the proceeding is recognised; if not, there is no recognition.

§ 343 (1) no. 2 InsO contains the public policy exception ("ordre public") which is a traditional reason for non-recognition. It is modelled after the equivalent exception in Art. 33 InsRRecast[41].

The provision does not define which proceedings can be qualified as "insolvency proceedings". It is suggested that the term "insolvency proceedings" in § 343 InsO – as the German rules are generally modelled after the InsR – should be defined in accordance with Art. 1 (1) of the Regulation. Therefore, a rather broad understanding of an "insolvency proceeding" should be used.

### c) Assessment

§ 343 InsO – especially with regard to the use of the "mirror-image principle" – is basically in line with the abovementioned rules on the recognition of foreign decisions in the ZPO and the FamFG. So quite

[40] Or pursuant to § 315 InsO if the insolvency proceedings concern a decedent's estate.

[41] Former Art. 26 InsR.

obviously, when introducing the provision, the German legislator focused on an internal harmonisation of German rules on recognition rather than on bringing German law in line with the InsR[42].

Nonetheless, the "mirror-image principle" used in § 343 (1) no. 1 InsO is also helpful to avoid conflicts with the InsRRecast. In most cases, when the debtor´s COMI is situated in an EU member state and there is an insolvency proceeding in a state outside the EU, the opening of this insolvency proceeding will not be recognised in Germany. This is due to the fact that – hypothetically assuming that the German rules on international jurisdiction (i.e. § 3 or § 315 InsO) had been in force in the state opening the insolvency proceedings – the foreign court did not have jurisdiction for the opening of such a proceeding. Therefore, § 343 (1) no. 1 InsO hinders the recognition of the foreign insolvency proceeding. This avoids conflicts with insolvency proceedings which are subsequently opened in a member state which – due to Art. 19 InsR[43] – have to be recognised in the member states.

However, it should be noted that § 3 and § 315 InsO are very similar to, but not completely identical to Art. 3 InsRRecast. So, at least in theory, there might be cases in which an application of § 343 (1) no. 1 InsO in connection with § 3 or § 315 InsO might not hinder the recognition of an insolvency proceeding in a third state despite the debtor´s COMI being in a member state. As a consequence, it is possible that two competing insolvency proceedings (one in a third state, one in an EU member state) – at least at first sight – fulfil the requirements for recognition in Germany.

From this perspective, when applying § 343 (1) no. 1 InsO, it would have been better to use the rules on international jurisdiction of the InsRRecast instead of § 3 and § 315 InsO. However, this does not seem

[42] The German legislator justified the deviation in particular by pointing out the necessity to examine each individual case in regard to third states before the rules of the InsRRecast, which are based on the principle of mutual trust in the rule of law and the operational capability of justice, can be applied, cf. BT-Drucks. 15/16, p. 13.

[43] Former Art. 16 InsR.

possible as § 343 no. 1 InsO explicitly refers to the "jurisdiction in accordance with German law"[44].

Despite this minor weakness § 343 InsO can be qualified as a reasonable rule which in most cases – while generally providing for a recognition of insolvency proceedings in third states – avoids conflicting recognitions of proceedings in third states and in member states.

## 1.VI. Recognition and enforcement of other decisions

Whereas Art. 19 InsR provides for the recognition of the opening of insolvency proceedings, Art. 32 InsRRecast[45] deals with the recognition and enforcement of preservation measures and also for recognition and enforcement of "judgments deriving directly from the insolvency proceedings and which are closely linked with them", even if they were not issued by the court opening the proceedings[46].

In German law, there is no such provision. Therefore, the recognition and enforcement of these decisions is governed by the rules of the ZPO, namely § 328 ZPO (as far as recognition is concerned) and §§ 722, 723 ZPO (which make enforcement conditional on a prior "judgment for enforcement" by a local or regional court).

[44] THOLE, in: *Münchener Kommentar zur Insolvenzordnung*, Vol. III, § 343 para. 28; IDEM, *Gläubigerschutz durch Insolvenzrecht*, 2010, pp. 774 et seqq.; BRINKMANN, in: SCHMIDT, *Insolvenzordnung*, § 343 para. 11; on the contrary cf. Oberlandesgericht Celle 24.11.2012 – 2 U 147/12, *Zeitschrift für Wirtschaftsrecht* (ZIP) 2013, 945, 946 – although under wrongful application of autonomous German law; GRUBER, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, § 343 para. 7 (supporting an additional requirement [COMI outside of the EU] to synchronize with the InsR); IDEM, in: FLÖTHER, *Handbuch zum Konzerninsolvenzrecht*, 1st ed. 2015, § 8 Rn. 160; KOLMANN/KELLER, in: GOTTWALD, *Insolvenzrechts-Handbuch*, 5th ed. 2015, § 134 para. 31; § 132 para. 13; GRAF, *Die Anerkennung ausländischer Insolvenzentscheidungen*, 2003, pp. 294 et seqq.

[45] Former Art. 25 InsR.

[46] BRINKMANN, in: SCHMIDT, *Insolvenzordnung*, Art. 25 EuInsVO paras. 6 et seqq.; FLÖTHER/WEHNER, in: AHRENS/GEHRLEIN/RINGSTMEISTER, *Insolvenzrecht*, Anh. I, Art. 25 EuInsVO a.F. paras. 2 et seqq.; LÜER, in: UHLENBRUCK/HIRTE/VALLENDER, *Insolvenzordnung*, Art. 25 EuInsVO paras. 3 et seqq.; THOLE, in: *Münchener Kommentar zur Insolvenzordnung*, Vol. IV, 3rd ed. 2016, Art. 25 EuInsVO paras. 5 et seqq.

## 1.VII. International agreements

In Germany, only few international conventions covering insolvency proceedings are in force. There are some very old conventions which were concluded between Switzerland and some German regions. These conventions are believed to be still in force today.

One of these conventions was concluded between Switzerland and the Kingdom Württemberg on 12.12.1825 and 13.5.1826[47]. However, the convention is only applicable to the region of the former kingdom of Württemberg and does not extend to the whole territory of the actual federal state of Baden-Württemberg[48].

Moreover, there is another old convention concluded between Switzerland and the former kingdom of Bavaria which is also believed to be still in force[49].

Finally, there are the Treaty between Germany and Austria on Bankruptcy, Winding-up, Arrangements and Compositions which was signed at Vienna on 25 May 1979 and the Convention between the Kingdom of the Netherlands and the Federal Republic of Germany on the Mutual Recognition and Enforcement of Judgments and other Enforceable Instruments in Civil and Commercial Matters which was signed at The Hague on 30 August 1962. However, pursuant to Art. 85 (1) lit. d, h InsRRecast, these Treaties are replaced by the InsR.

[47] The Swiss cantons of Neuenburg and Schwyz, however, are not bound by the convention, see BLASCHCZOK, *Zeitschrift für Wirtschaftsrecht* (ZIP) 1983, 141 (143); KOLMANN/KELLER, in: GOTTWALD, *Insolvenzrechts-Handbuch*, § 135 para. 24 (Fn 27).

[48] Schweiz. Bundesgericht Lausanne 15.6.2005, 7B.31/2005/blb, in *ZInsO* 2007, 608, reviewed by LIERSCH/WALTHER *Zeitschrift für das gesamte Insolvenzrecht* (ZInsO) 2007, 582 ff.; further WENNER/SCHUSTER, in: *Frankfurter Kommentar zur Insolvenzordnung* (FK-InsO), 8th ed. 2015, Preliminary Remarks to §§ 335 ff. para. 51; GOTTWALD, in: GOTTWALD, *Insolvenzrechts-Handbuch*, § 134 para. 25; for a different view see WOCHNER, *Konkurs Treuhand Sanierung* (KTS) 1977, 201, 210 et seqq. (who states that the relevant area is the district of the Oberlandesgericht Stuttgart).

[49] Oberlandesgericht München 11.8.1981 – 5 U 4070/80, *Konkurs Treuhand Sanierung* (KTS) 1982, 313, 316 et seq.; LIERSCH, *Zeitschrift für das gesamte Insolvenzrecht* (ZInsO) 2007, 582, 583. The Swiss cantons of Schwyz and Appenzell-Innerrhoden are not bound by that convention (cf. KOLMANN/KELLER, in: GOTTWALD, *Insolvenzrechts-Handbuch*, § 135 para. 24 (Fn. 25); AUFSICHTSBEHÖRDE DES KANTONS SCHAFFHAUSEN, *Zeitschrift für Wirtschaftsrecht* (ZIP) 1983, 200 (202); BLASCHCZOK, *Zeitschrift für Wirtschaftsrecht* (ZIP) 1983, 141).

## 1.VIII. Appointment of insolvency administrators

Apart from procedural issues, the rule in the German Insolvency Code on the appointment of insolvency administrators is rather vague. § 56 InsO stipulates that the insolvency administrator appointed by the insolvency court shall be an independent natural person who is suited to the individual case, particularly experienced in business affairs and independent of the creditors and of the debtor. As already mentioned above, § 56a InsO provides for a suggestion by a provisional creditors' committee, which – if the suggestion is based on a unanimous decision – is generally binding upon the insolvency court. The insolvency court may deviate from the unanimous proposal only if the person proposed is not suited to take on the office, § 56a (2) InsO[50].

Generally, the judges and/or the creditors´ committee have a broad discretion with regard to the appointment of an insolvency office holder. In larger cases involving bigger companies, only a few insolvency administrators – those with a dedicated infrastructure, i.e. several establishments in Germany and a large number of employees – will be taken into consideration. Pursuant to a traditional practice, courts will also verify whether the insolvency administrator has a record of successfully restructured companies in the past. On the downside, negative experience from previous proceedings such as insufficient insolvency reports, avoidable continuance of loss-making businesses, necessity to impose administrative fines, loss in liability suits may also be taken into consideration[51]. These are – as described in several articles and legal commentaries on that issue[52] – probably the most important factors in the decision on the appointment of insolvency administrators.

[50] Critical about § 56a InsO GRUBER, *Neue Juristische Wochenschrift* (NJW) 2013, 584 et seqq.

[51] GRAEBER, in: *Münchener Kommentar zu Insolvenzordnung*, Vol. I, § 56 para. 99; ZIPPERER, in: UHLENBRUCK/HIRTE/VALLENDER, *Insolvenzordnung*, § 56 para. 16.

[52] BLÜMLE, in: BRAUN, *Insolvenzordnung*, 7th ed. 2017, § 56 paras. 9 et seqq.; GRAEBER, in: *Münchener Kommentar zu Insolvenzordnung*, Vol. I, § 56 paras. 12 et seqq.; GÖCKE, in: *Beck'scher Onlinekommentar zur Insolvenzordnung*, § 56 paras. 14 et seqq.; KRUTH, *Deutsches Steuerrecht* (DStR) 2017, 669; FRIND, in: SCHMIDT, *Hamburger Kommentar zum Insolvenzrecht*, 6th ed. 2017, § 56 InsO paras. 12 et seqq.; IDEM, *Zeitschrift für das gesamte Insolvenzrecht* (ZInsO) 2016, 1083; PAPE, *Zeitschrift für das gesamte Insolvenzrecht* (ZInsO) 2015, 1650; SCHMIDT, *Zeitschrift für das gesamte Insolvenzrecht* (ZInsO) 2015, 672; UHLENBRUCK,

In recent years, however, cross-border insolvency cases have gained more and more importance. Therefore, not surprisingly, most of the insolvency administrators in the survey assert that the experience with regard to cross-border cases is also of relevance for the appointment of the insolvency office holder. With regard to the purposes of the InsRRecast, this seems to be a helpful practice.

## 1.IX. Cooperation between insolvency administrators

§ 357 InsO contains some rules on the cooperation between insolvency administrators in cases of a main proceeding and a secondary proceeding. Pursuant to § 357 (1) InsO, the insolvency administrator appointed in Germany shall inform the foreign insolvency administrator without delay of all circumstances which may be significant for the implementation of the foreign proceedings. He shall give the foreign administrator the opportunity to submit proposals for the disposition or other use of the domestic assets. § 357 (2) InsO entitles the foreign administrator to attend the creditors' assemblies. Pursuant to § 357 (3) InsO, an insolvency plan shall be forwarded to the foreign administrator for a statement. The foreign administrator shall be entitled to submit his own plan.

A considerable part of the practitioners participating in the survey state that they had trouble in communications between other insolvency administrators and courts. They suggest that every insolvency administrator involved in international cases should be able to communicate in English. Some practitioners make use of cross-border insolvency agreements (so-called protocols). According to their experience, these agreements are fully recognised in Germany and are considered to have a binding effect[53].

*Konkurs Treuhand Sanierung* (KTS) 1989, 229, 241; UHLENBRUCK/MÖNNING, *Zeitschrift für Wirtschaftsrecht* (ZIP) 2008, 157 et seqq; ZIPPERER, in: UHLENBRUCK/HIRTE/VALLENDER, *Insolvenzordnung*, § 56 paras. 13 et seqq.

[53] EIDENMÜLLER, *Zeitschrift für Zivilprozess* (ZZP) 114 (2001), 3, 10 et seqq.; also GRUBER/SCHULZ, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, Anh. I, Art. 31 EuInsVO a.F. para. 12; J. SCHMIDT, in: MANKOWSKI/MÜLLER/J. SCHMIDT (eds), *EuInsVO 2015*, 1st ed. 2016, EuInsVO 2017, Art. 56 paras. 19 et seqq.

## 2.I. European uniform rules in the German case law: Introduction

Generally, it can be said that in the application of the InsR/InsRRecast, the ECJ has brought clarification to many controversial issues. Germany is most probably the member state with the most published decisions on the InsR and the InsRRecast. The reported case law shows that German courts are very well aware of the ECJ´s decisions and generally follow the ECJ's guidelines. Therefore, a relatively high degree of legal unity and certainty has been reached.

## 2.II. Scope of application

### a) German insolvency proceedings

With regard to the scope of application of the InsR and now the InsRRecast, an evaluation of case law shows that courts have no problem determining the scope of application of the regulations. This is due to the fact that – while the definition of what has to be understood by "insolvency procedures" in Art. 1 InsR and now, after some amendments, in InsRRecast is rather vague – courts do not have to really apply this definition; instead, they can restrict themselves to checking whether a certain proceeding is listed in Annex A to the InsR/InsRRecast. So, what really matters in practice is not the definition in Art. 1 InsR/InsRRecast, but Annex A to the respective regulations[54].

With regard to German insolvency proceedings, it was questioned whether the procedures introduced in § 270a and § 270b InsO by the amendment of 2011 were also covered by the InsR/InsRRecast. These provisions provide for a debtor-in-possession management in the opening procedure, thereby enabling the debtor company to stay in charge of the management of the insolvency estate at least until the opening of

[54] BRINKMANN, in: SCHMIDT, *Insolvenzordnung,* Art. 1 EuInsVO para.. 2; GRUBER/SCHULZ, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, Anh. I, EuInsVO a.F. Einführung para. 3 and Art. 1 EuInsVO para.. 3 et seqq.; MÄSCH, in: RAUSCHER, *Europäisches Zivilprozess- und Kollisionsrecht*, 4th ed. 2015, Art. 1 EG-InsVO para.. 2; MANKOWSKI *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* (NZI) 2011, 876 et seqq.

the proceedings, but possibly also beyond that date. § 270a and § 270b InsO are not explicitly listed in Annex A to the InsR/InsRRecast.

Indeed, if the procedures in § 270a and § 270b InsO constituted independent insolvency proceedings, they would not, , be covered by the InsR/InsRRecast as they are not listed in Annex A. However, at a closer look, it is quite clear that § 270a and § 270b InsO do not provide for independent insolvency proceedings; instead, they allow for deviations from the regular opening procedure in which – in contrast to debtor-in-possession management provided for by § 270a and § 270b InsO – the insolvency court may designate a provisional insolvency administrator and impose a general prohibition on making dispositions on the debtor. So, it can be assumed that also § 270a and § 270b InsO fall into the scope of application of the InsR and the InsRRecast[55].

**b) Foreign insolvency proceedings**

With regard to foreign proceedings, a similar observation can be made: As German courts do not have to apply Art. 1 InsRRecast as such, but only have to check whether a proceeding is listed in Annex A, the decision on the application or non-application of the InsR is rather easy.

However, if a certain proceeding is not listed in Annex A, this does not mean that it cannot be recognised at all. This can be best illustrated by a decision of the Bundesgerichtshof on the (non-)recognition of an English "scheme of arrangement"[56]. The scheme of arrangement is a pre-insolvency instrument allowing for the restructuring of debts. It consists of an agreement between the company, the shareholders and the creditors; the latter are divided into different classes depending on how a certain group of creditors would be affected by an insolvency of the debtor. If the agreement between the parties is confirmed by the court, it is binding upon all the parties including dissenting creditors[57].

The Bundesgerichtshof had no difficulty in deciding that the recognition of the English scheme of arrangement could not be based on the

[55] GRUBER/SCHULZ, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, Anh. I, Art. 1 EuInsVO a.F. para. 10.

[56] Sec. 896 – 901 Companies Act 2006.

[57] Sec. 899 (3) Companies Act 2006.

InsR. It simply pointed to the fact that the scheme of arrangement is not listed in Annex A to the InsR.

It was more difficult to decide whether the scheme of arrangement could be recognised pursuant to § 343 InsO which presupposes that the "scheme of arrangement" could be qualified as an "insolvency proceeding". The Bundesgerichtshof denied that, arguing that the scheme of arrangement neither requires insolvency nor a collective proceeding. Under the circumstances of the case, the Bundesgerichtshof did not have to decide whether the "scheme of arrangement" could be recognised on the basis of the Brussels I Regulation[58]. The decision of the Bundesgerichtshof shows that national law might not always be very clear with regard to the (non-)recognition of foreign pre-insolvency proceedings and similar instruments[59].

## 2.III. International jurisdiction for the opening of proceedings

### a) Definiton of COMI

Pursuant to Art. 3 InsR, the courts of the Member State within the territory of which the debtor's COMI is situated shall have jurisdiction to open main insolvency proceedings[60]. In several decisions, the ECJ clarified the term COMI. Generally, the COMI shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties[61].

[58] Bundesgerichtshof 15.02.2012 – IV ZR 194/09, *Neue Juristische Wochenschrift* (NJW) 2012, 2113, reviewed by PAULUS, *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* (NZI) 2012, 425.

[59] With regard to the future recognition of proceedings in the UK after BREXIT see SAX/SWIERCZOK, *Zeitschrift für Wirtschaftsrecht* (ZIP) 2017, 601 et seq.

[60] See Art. 3 InsRRecast.

[61] ECJ 2.5.2006 – C-341/04, *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* (NZI) 2006, 360, 361 (Eurofood); BRINKMANN, in: SCHMIDT, *Insolvenzordnung*, Art. 3 EuInsVO paras. 11 et seqq.; LÜER, in: UHLENBRUCK/HIRTE/VALLENDER, *Insolvenzordnung*, Art. 3 EuInsVO paras. 9 et seqq; cf. MANKOWSKI, in: MANKOWSKI/MÜLLER/J. SCHMIDT, *EuInsVO 2015*, EuInsVO 2017 Art. 3 paras. 15 et seqq.

However, it cannot be denied that the location of the COMI must be determined in accordance with the circumstances of each individual case. Furthermore, it still remains doubtful whether in the case of companies, one should rather give preference to the state where the main seat of the company is located or rather to the state where the company mainly performs its business activities[62]. In most cases, these criteria will lead to the same state; but there are cases in which the seat of the company and the main business activities are located in different states[63].

### b) Factual findings and duty to justify decision on jurisdiction

However, the abstract definition of the COMI does not seem to be the primary concern. Case law shows that in some member states, courts access their decision on jurisdiction mainly on the information given by the debtor and refrain from own investigations. Such a practice might encourage false statements by the debtor who wishes to initiate an insolvency proceeding before a court which is most favourable to his interests (i.e. a quick reorganisation or a quick discharge of his debts). Under the InsRRecast, such a negligent practice will not be allowed any longer: Art. 4 of the InsRRecast stipulates that "a court seised of a request to open insolvency proceedings shall, of its own motion, examine whether it has jurisdiction pursuant to Article 3".

German practice is already in accordance with Art. 4 InsRRecast. Pursuant to § 5 InsO, the insolvency court shall investigate ex officio all circumstances relevant to insolvency proceedings. In particular, the court may hear witnesses and experts for this purpose[64]; in many cases,

[62] In German literature, there is a distinction between a „seat theory" and a „business activity theory", cf. GRUBER/SCHULZ, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, Anh. I, Art. 3 EuInsVO a.F. paras. 2, 29 et seqq.

[63] GRUBER/SCHULZ, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, Anh. I, Art. 3 EuInsVO a.F. paras. 13 et seqq., 29 et seqq.

[64] Cf. MANKOWSKI, in: MANKOWSKI/MÜLLER/J. SCHMIDT, *EuInsVO 2015*, EuInsVO 2017 Art. 3 paras. 72 et seqq. in regard to the insolveny court's scope to investigate circumstances in connection with the debtor's COMI.

the provisional insolvency administrator will provide the necessary factual information[65]. § 5 InsO also applies to international and local jurisdiction[66].

Moreover, quite rightly, Art. 4 (1) s. 2 InsRRecast imposes an obligation of the court to explain its decision. German law is again in line with this new rule: Art. 102 § 2 EGInsO stipulates that a German insolvency court, when it is presumed that assets of the debtor are located in another member state of the EU, has to briefly describe the actual findings and legal considerations on the basis of which jurisdiction in accordance with Art. 3 InsR emerges for the German courts. The provision provides for transparency; most importantly, in light of the justification given by the court, the parties concerned can decide whether they want to challenge the court´s decision[67].

### 2.IV. Relocation of COMI and "insolvency tourism"

In recent years, there have been some cases of German companies moving their COMI from Germany to England. Well-known cases of relocation involved the (former) German companies *Schefenacker* and *Deutsche Nickel* that succeeded in moving their COMI from Germany to England[68]. In the case of the German company *Hans Brochier*, however, an English court held that a relocation of the COMI had only been

[65] According to § 58 (1) 2 InsO in connection with § 21 (2) no. 1 InsO, at the request of the court at any time, the provisional insolvency administrator is obligated to give any specific information to the court.

[66] Bundesgerichtshof 19.07.2012 – IX ZB 6/12, *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* (NZI) 2012, 823 (regarding the local jurisdiction); Bundesgerichtshof 1.12.2011 – IX ZB 232/10, *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* (NZI) 2012, 151 (regarding the international jurisdiction); GANTER/LOHMANN, in: *Münchener Kommentar zur Insolvenzordnung*, Vol. I, § 5 paras. 13 et seq.; GRUBER/SCHULZ, in: AHRENS/GEHRLEIN/RINGSTMEIER, *Insolvenzrecht*, Anh. I, Art. 3 EuInsVO a.F. paras. 9, 54; STEPHAN, in: SCHMIDT, *Insolvenzordnung*, § 5 para. 3; PAPE, in: UHLENBRUCK/HIRTE/VALLENDER, *Insolvenzordnung*, § 5 para. 8.

[67] According to §§ 6, 34 (2) InsO, only the debtor is entitled to bring an immediate appeal (Sofortige Beschwerde) against the decision of the insolvency court to open the insolvency proceeding.

[68] Cf. RINGE, *European Business Organization Law Review* (EBOR) 2009, 579, 558 et seqq.; GRIFFITHS/HELLMIG, *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* (NZI) 2008, 418, 419; VALLENDER, *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* (NZI) 2007, 129,

pretended but in fact not taken place. Therefore, the court denied international jurisdiction for the opening of a proceeding in the UK[69].

German courts have only occasionally been confronted with a relocation of the COMI. This is mainly due to the fact that in most cases, there was a relocation of the COMI from Germany to England. Consequently, English courts (and not German courts) had to decide whether they were competent to open an insolvency proceeding or not.

Under the InsR and the InsRRecast, German courts are prevented from questioning the jurisdiction of English courts; the only remaining possibility was opening a secondary proceeding in Germany[70].

It is questionable whether a relocation of the COMI of a distressed company can be qualified as a good practice. Practitioners participating in the survey point out that there can be different driving forces behind a relocation of the COMI from Germany to England or other member states. It can be the insolvent company as well as the shareholders of the company or their consultants who suggest a relocation of COMI.

Practitioners said that from the shareholders´ point of view, the English procedures are especially attractive because they treat shareholders´ loans to the insolvent company generally in the same way as other claims, whereas under German law, claims arising out of shareholder loans to the company are generally subordinate to the claims of other creditors[71]. However, from a policy perspective, a relocation of the COMI which is in the interest of a small group of creditors – while being detrimental to others – does not seem to be in line with the purposes of the InsRRecast as well as the concept of fairness. Quite evidently, a

131 et seq.; UNDRITZ, in: SCHMIDT, *Hamburger Kommentar zum Insolvenzrecht*, Art. 3 EuInsVO para. 39.

[69] High Court of England and Wales, 15.8.2006 (Hans Brochier Holdings Ltd. v Exner), [2007] BCC 127 = [2006] EWHC 2594 (Ch), *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* (NZI) 2007, 187, reviewed by ANDRES/GRUND, *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* (NZI) 2007, 137 et seqq.; GRUBER, in: *Festschrift SCHILKEN*, 2015, pp. 679 et seqq.

[70] Amtsgericht Köln 23.01.2004 – 71 IN 1/04, *Neue Juristische Wochenschrift* (NJW-RR) 2004, 1055 (Automold); UNDRITZ, in: SCHMIDT, *Hamburger Kommentar zum Insolvenzrecht*, Art. 3 EuInsVO paras. 74, 86, 89.

[71] Cf. § 135 InsO.

relocation of the COMI should also not only serve the interests of consultants or lawyers who think that in the other member state, they are more likely to get appointed as an insolvency office holder and/or to get higher fees.

Generally, a relocation of the COMI should only be taken into consideration when it subserves the restructuring of the company. As a relocation of the COMI involves considerable costs[72], it should only be taken into consideration in exceptional cases. At any rate, with regard to the relocation of the COMI, there seems to be room and urgent need for the development of *best practices* in the field of legal counselling.

[72] EIDENMÜLLER/FROBENIUS/PRUSKO, *Neue Zeitschrift für Insolvenz- und Sanierungsrecht* (NZI) 2010, 545 et seqq.

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# Spanish Report on Cross-Border Insolvency Proceedings: Detecting Best Practices

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## 1. Overview

The Spanish regulation on bankruptcy has been historically characterized by its formal dispersion. Traditionally, the Spanish model was embodied in different Acts: the Commercial Code of 1829, the Civil Procedure Act of 2000 and the Law on Winding Up – "suspensión de pagos" – of 1922. This situation was corrected in 2003, when the Insolvency Act[1] was enacted. The Insolvency Act – Ins.A. – now provides for a single legal proceeding to cope with situations of insolvency[2] of the debtor, either a trader or an individual, a natural person or a legal person[3].

From the very beginning, the Spanish Legislator aimed to draft the rules on the Ins. A. for cross-border insolvency in accordance with the precepts set out by the 1346/2000 European Insolvency Regulation – EIR – and the UNCITRAL Model Law of 1997.

[1] Ley 22/2003, of 9 July, Concursal, Boletín Oficial del Estado (*BOE*) no. 164, 10 July, 2003.

[2] A debtor is considered insolvent whenever he is not able to pay his liabilities on a regular basis (Art. 2.2 Ins.A.).

[3] Art. 1.1 Ins.A.

The scope of application of the system outlined in the Ins.A. 2003 regarding cross-border insolvencies, is completely subject to the scope of application of the EIR Regulation.

Direct effect of the Regulation (and now of the EIR Recast) in the different Member States of the European Union severely restraints the application of the Spanish Ins.A. The Spanish legislator itself is aware of the subordination as, for example, Art. 199 Ins.A.[4] states that the rules on Private International Law included in Title IX of the Act[5] will be applied «*without prejudice to the rule of Regulation (CE) 1346/2000 on insolvency proceedings and any other European Community rules or international Convention rules which may govern this subject*».

This dependence of the Insolvency Act on the Regulation, in regards to cross-border insolvencies, has already been acknowledged by Spanish Courts concerning: 1) Jurisdiction to open the insolvency proceedings[6]; 2) the law applicable to the insolvency proceeding[7]; 3) recognition of foreign judgements on insolvency[8]. The case law on these subjects will continue to be influenced and directed by the new EIR Recast, and by the decisions of the European Court of Justice on the interpretation and application of its provisions.

The Spanish Insolvency Act has undergone several amendments, in order to adapt it to the interpretation and application of the EIR 2000 and to the trends and necessities of insolvency practice, particularly during the economic crisis of 2009 and forward. The Ins.A., thus, includes several provisions on pre-insolvency proceedings, that have been included in Annex A of the EIR Recast:

- *Procedimiento de homologación de acuerdos de refinanciación,* – Procedures of validation of refinancing agreements –

[4] Art. 199 is the first article of Chapter I – "General Aspects"- of Title XI – "International Private Law Rules"-

[5] The rules on international jurisdiction of Art. 10 Ins.A. are deemed included within its scope of application even though Art. 199 Ins.A. does not refer to them explicitly.

[6] Commercial Court of Alicante, of June 16, 2008 – *AC* 2008/1615.

[7] Commercial Court No. 7 of Madrid, of February 9, 2007 – RDCyPC, 6/2007.

[8] Supreme Court, of December 4, 2007 – *AC* 2006/108.

- *Procedimiento de acuerdos extrajudiciales de pago,* – Procedures of out-of-court payment settlements –
- *Procedimiento de negociación pública para la consecución de acuerdos de refinanciación colectivos, acuerdos de refinanciación homologados y propuestas anticipadas de convenio,* – Procedures of public negotiation for the achievement of collective refinancing agreements, validated refinancing agreements and early-agreement proposals.

We also find article 5 *bis* of the Spanish Ins.A., of *"Comunicación de negociaciones y efectos*" – Communication of negotiations and effects – which was enacted after the entry into force of the EIR Recast and thus falls outside its scope of application.

## 2. International Jurisdiction: the declaration of insolvency of foreign businesses and entrepreneurs

### a) International Jurisdiction

The Spanish Insolvency Act of 2003 contains certain rules on international jurisdiction relating to cross-border insolvencies. These rules, embodied in article 10 of the Act, were drafted in line with Article 3 of EIR 2000. These rules will only be of application in situations falling outside the scope of the EIR 2000 – now the EIR Recast.

The Insolvency Act foresees the existence of two different sorts of insolvency proceedings: first, an insolvency proceeding with a universal scope and aimed at encompassing all the debtor's assets, the so-called "main insolvency proceeding". Secondly, several different proceedings with a purely territorial scope, thus limited to the assets located in Spain[9]. Both proceedings, according to the Act, must be coordinated with one another.

Article 10.1.I of the Insolvency Act states that «*the judge of the commercial court in whose territory is the debtor's centre of main interests*

[9] Art. 10 Ins.A. lays out rules in regards to international jurisdiction and to domestic territorial jurisdiction. Contrariwise, Regulation 2015/848 limits itself to international jurisdiction.

*is located*» shall have jurisdiction to open insolvency proceedings. The *"centre of main interests"* of the debtor is deemed to be located: 1) as regards natural persons, «*where the debtor undertakes in a habitual manner and in a way recognizable to third parties, the administration of those interests*»[10]; 2) As to legal persons, "*in the place of the registered office"*[11]. Any change that may have taken place in the previous six months to the opening of the insolvency proceeding will be plainly disregarded.

When dealing with "*cross-border insolvencies"*, this proceeding will be granted the condition of "*main insolvency proceeding*". That means that it will be considered to have «*universal scope, encompassing all assets of the debtors, notwithstanding whether the assets are located in Spain or outside of Spain*».

The Spanish judge will exercise jurisdiction to open the insolvency proceeding on the basis of the EIR Recast and not of the Spanish Insolvency Act of 2003 whenever the centre of main interest of the debtor is located in Spain, as it is within the EU territory.

Article 10.3 of the act states that in case the centre of main interests of the debtors is located outside Spain, but the debtor possesses an establishment within the territory of Spain, Spanish Courts will be granted jurisdiction to open a secondary insolvency proceeding against the debtor in Spain. This proceeding will have a territorial scope covering only those assets of the debtor located in Spain. The Spanish Judge will only exercise its jurisdiction on the basis of Art. 10.3 of the Insolvency Act 2003 when the centre of main interests of the debtor is located in any country outside the EU, and there is also an establishment in Spain.

The rules on international jurisdiction embodied in the Spanish Insolvency Act are awarded mandatory character, not withstanding whether the insolvency proceeding opened by the court against the debtor is considered either a "main" proceeding or a "territorial" proceeding. This mandatory character is relevant to the capability of the

[10] Art. 10.1.II Ins.A.

[11] Art. 10.1.III Ins.A.

Judge to control his/her own international jurisdiction, either *ex officio* [12] or upon request of the parties[13].

According to Art. 11 of the Act, the exercise of jurisdiction by the Courts refers only to «*those legal actions based upon the Insolvency Act and on any other insolvency rules and which have an immediate relationship with the insolvency*».

Finally, the Act requires and envisages a high degree of coordination between either the main insolvency proceeding or the territorial insolvency proceeding opened in Spain against the debtor which may have been opened abroad[14].

### b) Detected *best practice*

A first ***best practice*** to highlight is precisely the application of international jurisdiction rules by the Courts, that have acknowledged and applied correctly, the scope of application of the EIR 2000 (we are assuming that this situation can be extrapolated to the EIR Recast), leaving the application of the Spanish international jurisdiction insolvency rules however close to the ones set out in the Regulation, to be applied residually and in those particular cases in which the main centre of interest is deemed to be situated outside the EU.

### c) Coordination between Courts: need for *best practices*

There appears to be a void in the process of coordination between the different courts of different Member States in terms of information needed in the scope of the cross-border insolvency proceedings. Even though the EU countries have coordination between different central authorities, the officials of the Courts miss more communication possibilities, especially those that may connect with one another personally, but also in terms of the language of the information and of the legal provisions. Due to the differences in national legislations on the treat-

[12] Art. 10.5 Ins.A.

[13] Art. 12. Ins.A.

[14] Art. 10.1.IV and 10.3.III Ins. A.

ment of legal data included in judicial proceedings, the desired communication is almost non-existent and, due to the difference in official languages, the information that does arrive is of little use for short-time purposes. A ***best practice*** proposed is the implementation of a closer communications mechanism between the different Courts in cross-border insolvency proceedings. A second-***best practice*** is the necessity of laying out a mechanism of translation of the different national provisions of the Member States so that they are available to the other Member States or, failing this, the translation of at least those provisions that are included in Annex A of the EIR Recast.

## 3. Applicable law

### a) Main issues

The existing parallelism between the Spanish Insolvency Act of 2003 and Regulation 1346/2000 (and now the EIR Recast) is also ascertainable as to the law applicable to the insolvency proceeding. As a general rule, article 200 of the Act states that in those cases in which the insolvency proceeding against the debtor has been opened in Spain by the Court in accordance with the Ins.A., that particular proceeding will be governed by Spanish law. This same rule is laid out in art.7 of the EIR Recast.

The Spanish Insolvency Act 2003 sets out several exceptions to the general rule of its article 200. These exceptions are, once again, drafted in line with articles 5 to 15 of the EIR 2000 (8 to 18 of the EIR Recast). In fact, almost every solution contemplated by the Recast – besides art. 15 EIR Recast – are also dealt with in the Ins.A. 2003.

### b) Main insolvency proceedings

There are several exceptions to the general rule of Article 200 Ins.A., all of them in line with those exceptions of articles 8 to 18 of the EIR Recast – besides the one exception of Art.15 of the EIR Recast, in terms of Community patents and trademarks, which is not included in the Insolvency Act 2003.

### b.1) Exceptions to the General Rule of article 200 Insolvency Act 2003

#### b.1.a) Rights *in rem* and reservation of title

It is article 201 that establishes the first exception to the general rule. Firstly, it states that effects of an insolvency proceeding over the rights *in rem* of a creditor, or a third party in respect to assets of any sort belonging to the debtor, which at the time of the opening of the insolvency proceeding are located within the territory of any other State "*shall exclusively be governed by the law of that State*". Second, that same rule will be applied to the seller's rights in regards to assets sold to the debtor with reservation of title. At the same time, the Act is clear when it states that an insolvency proceeding opened against the seller of an asset with reservation of title, after delivery of the asset situated in the territory of another State, shall not constitute ground for rescinding or terminating the sale and shall not prevent the purchaser from acquiring title.

#### b.1.b) Right of the debtor subject to registration

Art. 202 is almost identical to Article 14 EIR Recast as it states that the effects of insolvency proceedings on the rights of the debtor «*in immoveable property, ships or aircrafts subject to registration in a public register shall be accommodated to the law of the State under the authority of which the Register is kept*».

#### b.1.c) Third party purchasers

The rule stated in Article 203, in line with Art. 17 of the EIR Recast, determines that the validity of any act of disposition by the debtor for consideration of immoveable property, ships or aircrafts, subject to registration in a public register performed after the opening of the insolvency proceeding, shall be governed «*respectively, by the law of the State within the territory of which the immoveable asset is located or by the law of the State under the authority of which the register is kept*».

### b.1.d) Rights on securities and payment systems and financial markets

This particular rule, set out by Art. 204, departs in a way from the EIR Recast. *A)* It states that the effect of the insolvency proceeding on «*rights of negotiable securities represented by book entries across securities accounts will be governed by the law of the State of the register where these securities were credited*». The provision includes any securities Register legally recognized, included those kept by financial entities under legal supervision. *B)* In spite of the rule included in article 201 for third parties' *rights in rem* and reservation of title, the effect of insolvency proceedings «*on the rights and obligations of the parties to a payment or settlement system or to a financial market shall be governed solely by the law of the State applicable to that system or market*».

### b.1.e) Set-off

Article 205 of the Insolvency Act establishes the rule for the applicable law of the right to set-off by the creditor, in line with article 9 of the EIR Recast. It states that the opening of the insolvency proceeding shall not affect the right of a creditor to set-off its claim against the claims of debtors when such set-off is permitted by the law governing the insolvent debtor's claim.

### b.1.f) Contracts relating to immoveable property

Article 206 establishes the following exception to the general rule of the *lex concursus* of article 200. As for contracts relating to immoveable property, and almost reproducing the rule of article 11 of the EIR Recast, it states that the effects of an insolvency proceeding on a contract conferring the right to acquire or make use of immoveable property «*shall be governed solely by the law of the State where it is located*».

### b.1.g) Contracts of employment

Following the line of article 13 of the EIR Recast, it is Article 208 Ins.A. that declares that the effects of the insolvency proceeding on employment contracts and labour relationships «*shall be governed by the law of the State applicable to the contract*».

### b.1.h) Detrimental acts and effects of the insolvency proceeding on lawsuits pending

These are the last two exceptions to the general rule of article 200 and they embody the rules in regards to detrimental acts and the effects of the insolvency proceeding on pending lawsuits. *A)* Article 208, on the one hand, states that the actions for annulment, nullity or unenforceability according to the Insolvency Act shall be precluded when the person who benefited from an act which was detrimental to all creditors – "masa activa" – provides proof that said act is subject to the law of another State, which does not allow for any means of challenging it in any case. *B)* On the other hand, it is article 209, in accordance with Art. 18 of the EIR Recast (without a mention to arbitral proceedings), relates to the effects of insolvency proceedings on pending lawsuits concerning an asset or a right of which the debtor has been divested. The article states that it will be the law of the State in which the lawsuits are pending that will solely govern those effects.

### c) Territorial insolvency proceedings

The Spanish Insolvency Act 2003 includes a rule regarding the law applicable to territorial insolvency proceedings opened by Spanish Courts against the debtor in accordance with the Act. It is article 210 the one that lays out a general rule that states that the prospective territorial proceeding will be governed by the same set of rules applicable to the main insolvency proceeding. This rule will only be applied to any insolvency proceeding opened by Spanish Courts where –in accordance to art. 10 Ins.A. – an establishment of the debtor is located in Spain, and the centre of main interests of the debtor is outside the European Union.

The Insolvency Act 2003 also includes certain common rules for both the main insolvency proceeding and any territorial proceeding that may be opened by Spanish Courts. These rules are referred to: a) information for creditors abroad, b) right to lodge claims, c) publication and registration in a public register abroad, d) honouring of an obligation to the debtor abroad, e) return and imputation, f) languages.

### d) General principles and rules for the application of foreign laws

Spanish Courts have long established, via case law, the principles and rules for the application of foreign laws, a situation that is applied to the field of insolvency as well.

It is article 12 of the Spanish Civil Code that sets out the general rule of application of conflict-of-law rules, including the exceptions of public policy, the renvoi and the domestic overriding mandatory provisions. As for the public policy, the exception states that no foreign law will be applied in contradiction of the principle of public order. In regards to renvoi, it will only be allowed in the first degree and there is a steady and long-standing case law dealing with this particular problem. As for the domestic overriding mandatory provisions, even though there is no specific provision, the case law has interpreted article 12 to mean that all those national overriding mandatory provisions should be applied when facing a foreign law that contradicts them. This particular solution is in line with the solution provided by several EU Regulations and shall be applied for insolvency cases as well.

One of the main concerns of practitioners and Court officials points to the many exceptions included in the conflict-of-laws rules in cross-border insolvency proceedings. It is thought that this breaks the legal harmony of the idea of foreign applicable laws and that even though some of those exceptions are in place to apply better connected laws, some are plainly unnecessary and could be ruled by the same general rule of applicable law as it provides sufficient connection between the case and the law that shall be applied in a given case.

## 4. Recognition and enforcement of decisions

### a) Introduction

The Spanish Insolvency Act of 2003 addresses the recognition of foreign insolvency proceedings in Spain via its Chapter 2, Title IX. As previously stated, due to the direct dependence of the Act on the EIR 2000 first, and now on the EIR Recast, its rules on recognition only apply to "extra-communitarian" insolvency proceedings. That is, it will only be applied to the recognition of any judgement that opens insolvency proceedings handed down either by a Court of a non-European Union State or by a Court of an EU Member State that exercised jurisdiction without pursuing Article 3 of the EIR Recast. On the contrary, the recognition of any judgement handed down by an EU Member State in accordance with article 3 of the Regulation shall be governed by the Regulation itself.

Due to the fact that Chapter 2 of the Act addresses the recognition of "extra-communitarian" insolvency proceedings – outside the territorial scope of application of the EIR Recast – the Spanish legislator cannot take Chapter II of the Regulation into account when providing a set of rules to govern the issue[15]. As a result, the Act references the UNCITRAL Model Law on Cross-border Insolvency of 1997, which embodies rules designed for cases of incompatible legal situations in the field of transnational insolvencies.

### b) General Rule: Request for *exequatur*

Article 220 of the Insolvency Act states that foreign judgments that open an insolvency proceeding shall be recognized in Spain through the proceeding of *exequatur* laid out by the Law of International Judicial Cooperation in civil matters[16]. The recognition will depend upon the

[15] Based on the confidence in the European Judges and providing for immediate recognition of judgments concerning the opening, conduct and closure of insolvency proceedings.

[16] Arts 41 ff., Ley de Cooperación Jurídica Internacional, Ley 29/2015 de 30 de Julio. *BOE* no. 182 de 31 de Julio de 2015.

fulfilment of several conditions, and may be either modified or revoked by the Spanish Courts in particular cases.

### b.i) Conditions to be fulfilled: First: foreign insolvency proceeding

**First: there has to be a foreign insolvency proceeding:** In accordance with Article 220.1.1, Spanish Courts shall recognize a foreign judgment on insolvency provided that it refers to a collective proceeding based on the insolvency of the debtor in which «*the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation*». **Second: the judgement does not need to be final.** Notwithstanding the wording of article 44 of the Law of International Judicial Cooperation (Int.Jud.Coop.A.) that requests the foreign judgment to be final in order for it to be recognized in Spain, article 2201.1 Ins.A. admits the recognition of non-final foreign insolvency judgments in Spain. **Third: foreign Court's international jurisdiction.** The foreign judge or authority handing down the judgment must have had exercised jurisdiction in accordance with the criteria laid down by Art. 10 Ins.A., or must have had a *"reasonable connection of equivalent nature*" to the case for that foreign insolvency judgment to be recognised in Spain. **Fourth: not given in default of appearance.** The *exequatur* will be denied by Spanish Courts where the foreign judgment has been given in default of appearance by the debtor, or whenever the document which instituted the proceedings or an equivalent document was not served upon the debtor with time enough and in such a way as to enable him to arrange for his defence. **Fifth: not contrary to Spanish public policy.** The foreign insolvency judgment will be denied recognition in Spain if it is contrary to Spanish public order[17].

[17] Art. 46, Int.Jud.Coop.A.

### b.ii) Recognition of any other foreign decisions derived from the insolvency proceeding

The general rule set out by the Spanish system of international insolvency law states that once the proceeding has been granted the *exequatur* by Spanish Courts, any other judgments handed down in that particular insolvency proceeding and based on insolvency legislation, will be recognized in Spain with no further formalities as long as they comply with the conditions set out by article 220 Ins.A. In case recognition is opposed, any interested party will be allowed to apply for recognition of the foreign insolvency judgment as the principal issue through the *exequatur* proceeding provided by the Law of International Judicial Cooperation of 2015.

The foreign insolvency proceeding will be recognized in Spain as a foreign "*main insolvency proceeding"* in case it was opened by the Courts of the country where the centre of main interests of the debtor is located. Contrariwise, it will be awarded the condition of foreign *"territorial"* insolvency proceeding, in case an establishment of the debtor exists there, or a "reasonable connection of equivalent nature with the territory" of that country is ascertainable. The Act itself deems this condition as fulfilled when there is existence of assets devoted to an economic activity in that particular country.

### c) Precautionary measures

The Act 2003 contains a specific rule devoted to the recognition in Spain of judgments relating to provisional measures taken by the competent courts before the opening of main insolvency proceedings abroad. In accordance with this article, these judgments "*may*" – instead of "*shall*" – be recognized and enforced in Spain once they are granted the *"appropriate exequatur"* by Spanish Courts.

Before this recognition takes place, article 226.2 Ins.A. allows for the liquidator of the foreign insolvency proceeding to request the adoption of preservation measures before the Spanish Courts and in accordance with Spanish Law. These measures shall aim at ensuring that the foreign judgment may be fully effective in Spain once the *exequatur* has been awarded.

**d) Effects of recognition**.

Article 223.1 Ins.A. states that, subject to the exceptions set forth in Articles 201 to 209, foreign judgments will produce, once recognized in Spain, "*the same effects as under the law of the State of the opening of the proceeding*". Simultaneously, any person or body whose functions – even on a provisional basis – is to administer or liquidate the assets of which the debtor has been divested or to supervise the administration of his affairs, will be considered "administrator" of the foreign insolvency proceeding. Once the foreign insolvency judgment is recognized in Spain, the administrator will be compelled to carry on certain activities and certain powers will be vested in him.

The liquidator's appointment shall be evidenced by a certified copy of the original decision appointing him or by any other certificate issued by the court that has jurisdiction, or by the competent authority in accordance with Spanish Law requirements.

**e) Enforcement of foreign insolvency judgments**

An enforceable foreign judgment, according to the law of the State of the opening of the insolvency proceeding, is subject to the previous control of the *exequatur* in order to be enforceable in Spain, as stated in the Insolvency Act 2003. This is also the case in "extra-community" insolvency proceedings.

**f) Opening in Spain of a territorial insolvency proceeding**

The Insolvency Act 2003 sets forth the possibility of opening territorial insolvency proceedings in Spain with the recognition of a foreign main insolvency proceeding – without the debtor's insolvency being examined in Spain[18]. The proceeding, as stated before, will be governed by the rules applicable to the main insolvency proceeding.

The opening of this territorial proceeding, may be requested by any person empowered to request the opening of an insolvency proceeding

[18] Articles 211 and 220.3 Ins.A. 2003.

in accordance with Spanish law, or by the appointed administrator or liquidator of the foreign main insolvency proceeding.

### g) Coordination between concurrent insolvency proceedings

There is an obligation for the administrator of the insolvency proceeding opened in Spain to collaborate with the administrator of a foreign insolvency proceeding that has been recognized in Spain under the direct supervision of the courts and authorities, both Spanish and foreign. According to the wording of the Act, the obligation exists only when there is reciprocity as to the collaboration provided[19].

### h) Detected *best practices*

Among the case law, the Spanish Courts have followed the application of the international foreign decision's recognition regime set out by the EIR 2000 – and currently by the EIR Recast – without problems. The application of the public policy exception has been carried out carefully, if it has been applied at all. Since the only intra-EU regime available, is the one laid out by the Regulation. it does not seem to be causing problems in the future. There is plenty of case law provided by the European Court of Justice in regards to this particular problem too, and therefore, there does not appear to be any issues regarding the system.

## 5. The relationship between the additions to the EIR Recast and the Insolvency Act 2003

There seems to be consensus between the practitioners and Court officials, that the main problem that will be faced regarding the new additions to the EIR Recast, will be those related to the provisions on insolvency proceedings of a group of companies. There is a general belief that the appointment of the coordinator will generate problems of application between the Member States, and will need to be sufficiently clarified by the European Court of Justice.

[19] Articles 227 and 228 Ins.A. 2003.

As for the enhanced system of communication and the interconnection of the insolvency registries, the general feeling agrees on the benefits of the mechanism, although being somewhat weary in terms of the possibility of implementation in some European Member States.

**a) Proposal for best practices**

The idea in regards to the coordination of the group of companies is to eventually have a register of specific court-appointed coordinators, that will act in consensus with the other jurisdictions and legal systems involved. As for the communication and the interconnection of registries, the feeling is for the need to put in place a true European Insolvency Registry, which will provide legal certainty and guarantee the interconnection desired.

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# Italian Report on Cross-Border Insolvency Proceedings: Detecting Best Practices

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SUMMARY: 1.I. The different (pre-)insolvency proceedings in Italy. – 1.II. International Jurisdiction: the declaration of insolvency of foreign entrepreneurs by Italian courts. 1.III. International Jurisdiction: the declaration of insolvency of Italian entrepreneurs that have moved their principal seat abroad. – 1.IV. The *vis attractiva* rule in the legge *fallimentare*. – 1.V. Applicable law. – 1.VI. Recognition and enforcement of decisions. – 1.VII. International agreements. – 1.VIII. International cooperation and appointment of insolvency office holders. – 2.I. The Insolvency Regulation(s) in Italy. – 2.II. Scope of application. – 2.III. COMI and transfer of companies abroad. – 2.IV. Control of Jurisdiction. – 2.V. Secondary and territorial procedures: national practices and their evaluations. – 2.VII. Applicable law. – 2.VIII. Cooperation and communication: (lack of best) practices.

## 1.I. The different (pre-)insolvency proceedings in Italy

Italian domestic legislations on cross-border insolvency matters have traditionally been lacking[1]; the limited attention to cross-border insolvency proceedings in part found its *raison d'être* in the circumstance

* The present work is unitary in nature; only for academic purposes, part 1 is attributable to Ilaria Queirolo, whilst part 2 is attributable to Stefano Dominelli.

[1] CARBONE, *Il Regolamento (CE) n. 1346/2000 relativo alle procedure di insolvenza*, in SERGIO M CARBONE, MANLIO FRIGO, LUIGI FUMAGALLI, *Diritto processuale civile commerciale comunitario*, Milano, 2004, p. 87, p. 90 ff., and BURGIO, *Cross Border Insolvency - an Italian Approach*, in *International Insolvency Review*, 1999, p. 39, at 40. Similarly, for a time also Spain, for example, lacked a specific legal framework in the field of cross-border insolvency procedures, cfr. ESPLUGUES MOTA, *Procedimientos de insolvencia transfronterizos*, in ESPLUGUES MOTA (dri.), *Derecio del domercio internacional*, Valencia, 2015, p. 388.

that international insolvency matters were, in a historic perspective[2], relatively few. It is mainly around the 70s[3] that cross-border insolvencies started to make recurring appearances in the dockets of courts.

In Italy, there are different (pre)insolvency proceedings: under the Italian Insolvency Law (*legge fallimentare – lf*[4]), there is the traditional insolvency procedure (*fallimento*), a collective action for the liquidation of the assets of the debtor to the benefit of creditors (whereas for "big companies" an "extraordinary administration" to save the company, is envisaged[5]). Only economic entities are subject to such a procedure if there is a state of insolvency, identified as a situation of pathologic incapacity of the debtor to fulfil its obligations, bearing in mind that the debtor and the (majority) of creditors can reach an agreement (*concordato fallimentare*[6]).

[2] BECKER, *Transnational Insolvency Transformed*, in *The American Journal of Comparative Law*, 1981, p. 706, p. 707. Cfr. also VIRGÓS, GARCIMARTÍN, *The European Insolvency Regulation: Law and Practice*, The Hague, 2004, p. 3. For some notable exceptions in cross-border insolvencies, see ISRAËL, *European Cross-Border Insolvency Regulation. A Study of Regulation 1346/2000 on Insolvency Proceedings in the Light of a Paradigm of Cooperation and a Comitas Europaea*, Antwerp, 2005, p. 1 ff.

[3] Trib. Milano 14 settembre 1978, *Soc. Idera Business* contro *Fallimento Società Idera Business*, in *Rivista di diritto privato e processuale*, 1979, p. 125.

[4] Legge fallimentare (Regio Decreto 16 marzo 1942, n. 267). "Disciplina del fallimento, del concordato preventivo e della liquidazione coatta amministrativa". For an historic reading on the evolution of Italian insolvency law, see DI MARTINO, VASTA, *Companies' Insolvency and 'The Nature of the Firm' in Italy, 1920s–70s*, in *The Economic History Review*, 2010, p. 137 ff.

[5] Decreto Legislativo 8 luglio 1999, n. 270, "Nuova disciplina dell'amministrazione straordinaria delle grandi imprese in stato di insolvenza, a norma dell'articolo 1 della legge 30 luglio 1998, n. 274", G.U. 185 del 9 agosto 1999, art. 3.

[6] The Italian legislation also knows a "pre-emptive agreement" (*concordato preventivo*) proposed by the debtor to the creditors, where the former –experiencing a crisis– proposes a plan to repay the debts, possibly by continuing the economic activity. Regarding rules on international civil procedure matters, art. 161 *lf* provides a rule that is similar to those of the *fallimento* that are going to be analysed, with the exception that the former only considers the jurisdiction of the court of the place of the principal seat, thus not taking into direct consideration foreign companies that have in Italy the principal seat. Italian legislation also knows the so called "*Piano attestato di risanamento*" (art. 67(3)(d) *lf*). Such a procedure is not considered to be an insolvency proceeding, as such a certified restructuring plan does not foresee any kind of intervention or control by any court (cf. TRENTINI, *Piano attestato di risanamento e accordi di ristrutturazione dei debiti. Le soluzioni della crisi alternative al concordato preventivo*, Milano, 2016, p. 5).

The Italian legislation also knows an "administrative insolvency procedure", where the court –upon request of creditors or the administrative authority controlling the company– declares the state of insolvency. The administrative authority becomes responsible for the liquidation of the company, and the procedure is applicable to companies that are not subject to the *fallimento* –such as banks– and the main goal is the protection of general interests rather than those of specific creditors. As in the *fallimento*, competence rest with the court of the place of the principal seat of the company[7].

"Agreements to restructure the debt" (*accordi di ristruturazione del debito*) pursue the aim of saving the company which is experiencing a crisis. Following a legislative amendment[8], the debtor can ask the court –during the homologation– to suspend (even during negotiations[9]) executive individual actions (inhibited for 60 days after publication of the homologation for the creditors that are parties to the agreements). According to art. 182 *bis lf*, the debtor can conclude agreements, whose content is not legislatively set, with the creditors: the parties have an extended freedom to determine the content of their agreements[10] (mere postponed payment, partial payment, prosecution of the commercial activity, etc.). The agreements are then to be homologated by the tribunal; again, the provision only provides that the competence rests with the court of the place of principal seat of the company.

Following comparative trends, the Italian lawmaker introduced proceedings concerning consumers (*crisi da sovraindebitamento del consumatore*[11]), which were traditionally excluded from any insolvency and pre-insolvency proceeding. The debtor can conclude an agreement with the creditors; the proposal of the agreement is filed with the court

[7] *Lf*, artt. 195 ff.

[8] Art. 33 of the d.l. 22 giugno 2012, n. 83, convertito in legge con modificazioni dalla legge 7 agosto 2012, n. 134.

[9] But in this case, the agreements to be homologated must be filed with the court within 60 days (Tribunale di Novara - Sez. fall. - Sentenza 2 maggio 2011, n. 26).

[10] However, agreement must be feasible and not in prejudice of the creditors that are not party to the agreements (art. 182 *bis lf*).

[11] Legge 27 gennaio 2012, n. 3 pubblicata in Gazzetta Ufficiale 30 gennaio 2012, n. 24 e recante Disposizioni in materia di usura e di estorsione, nonché' di composizione delle crisi da sovraindebitamento.

of the place of residence of the debtor and if a conspicuous majority communicate their acceptance of the proposal to the court, this will homologate the agreement. A similar procedure to settle the crisis is also given for companies that are excluded from the scope of application of insolvency proceedings. Where the debtor excluded from the applicability of insolvency proceedings cannot settle the crisis, a "procedure for liquidation of the assets" (*procedura di liquidazione del patrimonio*[12]) is given, to be filed by the debtor, again before the court of his/her residence.

## 1.II. International Jurisdiction: the declaration of insolvency of foreign entrepreneurs by Italian courts

### a) International Jurisdiction

Under the 1865 code of civil procedure (*codice di procedura civile*, hereinafter *1865*cpc) no specific rule was given and relief was sought in the general rules on jurisdiction over foreigners (art. 105, and 106 *1865*cpc[13]). A long-awaited reform didn't come with the new, and current, code of civil procedure (hereinafter cpc), namely art. 4 cpc[14], nor

[12] Legge 27 gennaio 2012, n. 3, artt. 14 *ter* ff.

[13] According to such rules: i) foreigners not having their residence in Italy could have been summonsed before Italian courts even if being abroad if a) the action concerned movable and immovable properties located in Italy; b) the action related to a contractual or non-contractual obligation originated in Italy, or there to be executed; c) in all those cases in which such summons was admissible by way of reciprocity (art. 105 *1865*cpc). Additionally, ii) jurisdiction over foreigners was granted for obligations created abroad, if a) the foreigner had his residence in Italy, or if b) the foreigner, regardless of his residence, was physically present on Italian soil (art. 106 *1865*cpc).

[14] According to art. 4 cpc, now repealed (on which see *infra*), jurisdiction over foreigners was recognised upon Italian courts if i) the foreigner had his domicile or residence in Italy, or a legal representative authorised to represent him before a court of law, or if he accepted the Italian jurisdiction, unless claims are over immovable properties located abroad; ii) claims concerned properties over assets in Italy, or obligations created or to be executed in Italy; iii) the claim was connected with another one already pending before an Italian court, or regarded protective measures; iv) if – under the principle of reciprocity – Italian nationals were allowed to start proceedings before courts of foreigner's State.

with the new rules on the insolvency of entrepreneurs (*legge fallimentare*, *lf*). The question was whether art. 4 cpc could have set the rules on the international jurisdiction in insolvency matters. Some argued in favour of this solution, sustaining that the Italian rules on international jurisdiction were complete[15], whilst others gave credit that the Italian nationality of the company was not a condition for the exercise of the international jurisdiction of Italian courts, being here the international competence to be drawn from the territorial competence[16].

Also in the subsequent *lf* (which is still applicable where the debtor's centre of main interests is in a State not bound by European uniform rules on cross-border insolvencies[17]) no express provision on international jurisdiction can be found. Here, competence for the declaration of insolvency rests with the court of the place where the company has the principal seat (transfers of seat not being able to prejudice such a competence if they occur up until one year before the declaration of insolvency is sought[18]), whilst Italian courts can declare the insolvency of the foreign entrepreneur even if this has already been declared insolvent abroad (art. 9 *lf*)[19]. In this second scenario, courts have generally

[15] Tribunale Napoli 27 marzo 1975, *Laskos e al* contro *Harmony Ld*, in *Giur. C.omm*., 1975, II, p. 664, and Corte d'Appello di Milano 17 marzo 1931, *Fernegian* contro *Fallimento Fernegian*, in *Foro It.*, 1931, I, p. 918.

[16] GIULIANO, *La giurisdizione civile italiana e lo straniero*, Milano, 1970, p. 124 ff., and p. 132.

[17] BENEDETTELLI, *«Centro degli interessi principali» del debitore e forum shopping nella disciplina comunitaria delle procedure di insolvenza transfrontaliera*, in *Rivista di diritto internazionale privato e processuale*, 2004, p. 499, at 500 f., and QUEIROLO, *Le procedure d'insolvenza nella disciplina comunitaria. Modello di riferimento e diritto interno*, Torino, 2007, p. 166. For a reading of the (lack) of debate concerning third States in the adoption of the new uniform rules in cross-border insolvency matters, see most recently NISI, *The Recast of the Insolvency Regulation: A Third Country Perspective*, in *Journal of Private International Law*, 2017, p. 324 ff.

[18] This has been added by Decreto legislative 9 gennaio 2006, n. 5, 'Riforma organica della disciplina delle procedure concorsuali a norma dell'articolo 1, comma 5, della legge 14 maggio 2005, n. 80' (GU n. 12 del 16-1-2006 - Suppl. Ordinario n.13). On the "cancellazione" from the registry of companies, and the related issues on the declaration of insolvency of the company, see BOGGIO, *Trasferimenti fittizi, incompleti o "ultrannuali" della sede legale all'estero e fallimento della società cancellata dal registro delle imprese italiano*, in *Diritto commerciale*, 2014, p. 618 ff.

[19] The above conclusion does not however solve the subsequent (and different) question on which court is territorially competent. To this end, art. 9 (1) *lf* can be reconstructed in light of

excluded that a transitional economic activity is sufficient to ground their international (and territorial) jurisdiction in respect of foreign companies[20].

The subsequent adoption of the Private International Law Act (PIL Act[21]) in 1995 raised the further question on whether the PIL Act or still the rules on international jurisdiction drawn from the *lf,* were applicable[22]. The question is significant since the founding principles of the

art. 1 (cf. Cass. 20 luglio 1977, n. 3237, *Fiovavant* c. *Sacconi*, in *Rivista di diritto internazionale*, 1979, p. 164) and art. 9 (3) to argue that territorial jurisdiction rests with the court for the place of the secondary (*i.e.* the Italian) establishment where the "organised activity" is carried by the company, without which the lf would not even be applicable. This raises the issue of what has to be considered "secondary establishment" for the purposes of the provision at hand. This follows a case by case approach, in which material elements that show a certain degree of organisation must be evaluated by courts (excluding the jurisdiction of Italian courts for cases of a foreign company concluding contracts in Italy without any stable representative in Italy, see Cass. 4 luglio 1985, n. 4049, *Soc. Capisec international holding* c. *Soc. Banca privata italiana*, in *Giurisprudenza commerciale*, 1986, II, p. 590. On the contrary, the Italian jurisdiction has been declared in a case of a company with its seat in Luxemburg, who carried out all commercial activities only in Italy, via companies of the group, since in Italy the place of administration was found: Tribunale Milano, 29 ottobre 2010, in *Dejure*. More recently, see Cass. 12 dicembre 2011, n. 26518, *B.D. Holding* c. *Fall. B.D. Holding e altro*, in *Giustizia civile Massim.*, 2011, 12, 1760). Should a commercial activity be carried out within the jurisdiction of more than one tribunal, territorial competence rests with the court for the place where the activity has prevalently taken place (Tribunale Torino, 16 dicembre 1991, *Soc. Banque Dumenil Leblè e altro* c. *Soc. Dominion Trust corporation limited*, in *Fallimento*, 1992, p. 724; Cass. 12 dicembre 2011, n. 26518, *B.D. Holding* c. *Fall. B.D. Holding e altro*, cit.).

[20] The exercise of an organised economic activity, even though not necessarily through formal national establishments, was a sufficient element to ground international jurisdiction of Italian courts (cf. Cass. 22 marzo 1933, *Volpe* c. *Ditta Parravicini*, in *Rivista di diritto internazionale*, 1933, p. 456, but cf., requiring more than commercial activities, Tribunale Roma 26 marzo 1987, *Perpano* c. *Ammin. Finanze*, in *Fallimento*, 1988, p. 43). On the contrary, mere elements such as the possession of an Italian fiscal code have been considered not enough to ground the international jurisdiction of Italian courts (Tribunale Genova 8 giugno 2000, in *Fallimento*, 2001, p. 108). In this sense, transitory activities are not enough to ground the international jurisdiction of Italian courts: art. 1, and 9 *lf,* and art. 2082, and 2221 of the Italian civil code (hereinafter *codice civile*), require a structured activity; should this be lacking, the Italian court will have no jurisdiction. In legal writings, cf. HESS, *Scope of the Regulation*, in HESS, KOLLER, LAUKEMANN, MAGNUS, OBERHAMMER, PFEIFFER, PIEKENBROCK, SLONINA (General Reporters), *External Evaluation of Regulation No. 1346/2000/EC on Insolvency Proceedings*, JUST/2011/JCIV/PR/0049/A4, 2013, p. 70 f. (hereinafter referred to as "Heidelberg Report").

[21] Legge 31 maggio 1995, n. 218, Riforma del sistema italiano di diritto internazionale privato (GU n.128 del 3-6-1995 - Suppl. Ordinario n. 68).

[22] On the rules on international jurisdiction in Italy, see BURGIO, *Cross Border Insolvency - an Italian Approach*, cit., p. 40 f.

two acts could be believed to be different[23], the *lf* being still based on a traditional concept of jurisdiction and State sovereignty, opposed to the PIL Act – more based on principles that rest upon party autonomy, and international comity. It appears that the answer still favours the applicability of the *lf* in insolvency matters: this is *lex specialis* to the general PIL Act and the scheme of the *lf* has been maintained and confirmed in 2006, thus confirming also under the *lex posterior derogat priori* principle that the *lf* regulates international jurisdiction in insolvency matters. However, also in light of the above-mentioned case law, the inconsistency between the *lf* and the PIL Act could be excluded[24]: the domicile of the defendant under art. 3 PIL Act is not derogated from by the *lf* and this last act only provides for an additional head of jurisdiction in comparison to the general rules, admitting that an insolvency proceedings can be opened in Italy even where the debtor is not domiciled in Italy, but has at least carried out organised economic activities in Italy.

### b) Detected *best practice*

A first ***best practice*** can be inferred from the above case law (and upheld also in the context of EU regulations): Italian courts have rejected the idea that jurisdiction should be exercised over companies that do not have a significant connection with the Italian territory (i.e. do not exercise a minimum of structured and organised activity), regardless of whether Italian creditors (*rectius*, creditors that might seek justice before an Italian court of law) might experience more difficulties in enforcing their claims against the insolvent debtor.

[23] On the relationship between the *lf* and the PIL Act, see *ex multis* SALERNO, *Legge di riforma del diritto internazionale privato e giurisdizione fallimentare*, in *Rivista di diritto internazionale privato*, 1998, p. 5 ff.; CARBONE, *Il cd. fallimento internazionale tra riforma italiana di d.i.p. e normativa di diritto uniforme*, in *Il fallimento e le altre procedure concorsuali*, 1998, p. 945 ff., and QUEIROLO, *L'influenza del Regolamento comunitario sul difficile coordinamento tra legge fallimentare e legge di riforma del diritto internazionale privato*, in VENTURINI, BARIATTI (eds), *Nuovi strumenti del diritto internazionale privato – Liber Fausto Pocar*, Milano, 2009, p. 835 ff.

[24] SALERNO, *Legge di riforma del diritto internazionale privato e giurisdizione fallimentare*, cit., p. 10.

### c) Access to court (and to information): need for *best practices*

Under art. 6 (1) *lf*, proceedings for the declaration of insolvency are filed with the court by the debtor, or by one creditor (or –under certain conditions– by the District Attorney[25]). Foreign creditors are allowed to seize a court of law under the principle of reciprocity (art. 16 *disposizioni preliminari alla legge, codice civile*). Appeals against a declaration of insolvency can be filed with the court within thirty days by all those who have an interest in the appeal[26], bearing in mind that former administrators of the company also are considered to have an interest in the decision[27].

It stems however from the practical investigation that the real problem, rather than being connected to the right to seize an Italian court, is more connected with the exercise of rights in a different Member State. Practitioners sometimes complain about the difficulty to access information on the foreign law (both procedural and substantive), and difficulties in finding a trusted network of experts to cooperate with or to delegate duties and responsibilities to. In this sense, at least with regard to the first issue, it appears that one ***best practice*** should be followed: Member States could offer online (official/non-official) translations of the relevant laws, following the example of the German website *Gesetze im Internet*.

### d) Publicity of decisions: will need for *best practices* survive the new uniform rules?

As it stems from the practitioner consultation, Italian decisions declaring the state of insolvency of a company are always given notice – all are registered in the Italian Company registry. This makes it sometimes difficult, when operating from abroad and without the support of a legal professional in Italy, to determine if a company is already under an insolvency procedure. Some courts, for example in Milan, however also

[25] Art. 7, *lf*, as amended in 2006.

[26] Art. 18, *lf*.

[27] Cf. Cass. 22 maggio 1978, n. 2529, in *Diritto fallimentare e delle società commerciali*, 1978, 5, 2, p. 494, and Cass.17 agosto 1990, n. 8363, in *Fallimento*, 1991, p. 247.

publish online their decisions opening an insolvency proceeding: this ***best practice*** (that will co-exist with the new European interconnected registry) should be fostered and supported, even though possibly implemented so as to cover not only news regarding the opening of proceedings, but also on their developments. Most recently, according to the new art. 28 *lf*, last phrase, implementing the new European rules of the Recast Regulation that are supposed to cover a gap of the previous uniform rules[28], the Ministry of Justice has created an open registry that should display all the requested information.

## 1.III. International Jurisdiction: the declaration of insolvency of Italian entrepreneurs that have moved their principal seat abroad

### a) The general rule: cases of (legitimate) reallocation of the seat

According to current art. 9 (5) *lf*, which is a clear rule on *perpetuatio iurisdictionis*, once seized, Italian courts retain jurisdiction[29] if the company transfers its seat[30]. Territorial competence will rest with court that had jurisdiction before the transfer of the company[31]. Under the Italian legislation – namely art. 25 (3) PIL Act – there is a pre-condition for the transfer abroad: this must comply with both the law of the State of

[28] As can be read in the Conference Report: Insolvency Proceedings within the EU: Latest Developments, Era, 8 To 9 June 2017, published on Conflictoflaws.net (June 20, 2017), «*the publicity of proceedings and the lodging of claims was one of the major shortcomings of the EIR*».

[29] Tribunale Torino 16 dicembre 1991, *Soc. Banque Dumenil Leblè e altro* c. *Soc. Dominion Trust corporation limited*, in *Fallimento*, 1992, p. 724, and Cass. 23 gennaio 2004, n. 1244, *Soc. B. & C. fin*. c. *Soc. Immobiltrading e altro*, in *Banca borsa e titoli di credito*, 2006, 5, II, p. 549.

[30] Cass. 09 febbraio 2009, n. 3057, *Soc. Trusendi trasp*. c. *Eni e altro*, in *Il civilista*, 2011, 3, 74, and Cass. 25 giugno 2013, n. 15872, *Itam International Ltd*. c. *Fall. Itam International s.a.s. e altro*, in *Giustizia Civile Massimario*. In EU law, see CJ 17 January 2006, *Susanne Staubitz-Schreiber*, Case C-1/04.

[31] Cf. *lf*, art. 9 (2).

origin, and of the law of the new State[32] (and thus cease to exist as an Italian company[33]). This must be the case or the transfer will not be considered effective, and international jurisdiction[34] of Italian courts will stand.

### b) The case of fictious reallocation of the seat of the company

Accordng to art. 25 (3) PIL Act[35], the transfer is never[36] admitted, with the consequence that Italian courts will still hold jurisdiction, for cases of fictitious reallocation[37]: a reallocation is deemed fraudulent i) in case of fictitious transfer of the effective centre of management; ii) if the change only wishes to escape from an Italian insolvency procedure; iii) if administrators retain their residence in the State of the previous seat, and iv) this is also the place where the administration of the company is carried out in such a way that is recognisable to third parties[38]. With regard to the burden of proof on the fictitious reallocation, this rests

[32] PIL Act, art. 25 (3), and Cass. 09 settembre 2005, n. 17983, *D. C.* c. *Fall. Soc. L'Ecolucente 478/04 e altro*, in *Giustizia Civile Massimario*, 2005, 6.

[33] Tribunale Torino, 16 dicembre 1991, *Soc. Banque Dumenil Leblè e altro* c. *Soc. Dominion Trust corporation limited*, cit.; Cass. 23 gennaio 2004, n. 1244, *Soc. B. & C. fin.* c. *Soc. Immobiltrading e altro*, cit., and Tribunale Torino, sez. VI, 28 giugno 2011, in *Dejure*.

[34] Tribunale Torino, 16 dicembre 1991, *Soc. Banque Dumenil Leblè e altro* c. *Soc. Dominion Trust corporation limited*, cit.

[35] On the provision, see for all CONETTI, TONOLO, VISMARA, *Manuale di diritto internazionale privato*, Torino, 2015, p. 142 ff.

[36] Cf. Tribunale Napoli 4 dicembre 2003, *Soc. M. C.A.* c. *P. e altro*, in *Giurisprudenza di merito*, 2005, 1, p. 82; Cass. 16 dicembre, n. 3368, *M.* c. *I.,* in *Giustizia Civile Massimario*, 2006, 2, and Cass. 13 ottobre 2008, n. 25038, *S.S. Ltd.* c. *I.P.SE.MA*., in *Giustizia civile*, 2009, 2, I, p. 337.

[37] Cass. 16 febbraio 2006, n. 3368, cit.; Cass. 20 maggio 2005, n. 10606, *Soc. Interedil* c. *Soc. Intesa Gestione Crediti*, in *Giustizia Civile Massimario*, 2005, 5; Cass. 9 aprile 2010, n. 8426, *C.* c. *Fall. soc. A. e altro*, in *Dejure*; Cass. 3 ottobre 2011, n. 20144, *D.G.* c. *Soc. Equitalia Gerit e altro*, in *Giustizia Civile*, 2013, 3-4, I, 752, and Cass. 18 aprile 2013, n. 9414, *Gelfusa ed altro* c. *Fall. Centralconsulting Srl ed altro*, in *Giustizia Civile Massimario*, 2013.

[38] Cass. 17 febbraio 2016, n. 3059, *Fall. Zeta Office Distribuzione Srl* c. *Zeta Office Distribuzione Srl*, in *Dejure*; Cass. 20 luglio 2011, n. 15880, *Internetno Bratstvo In Mreza Dd Netfraternity Network Dd* c. *Pessi ed altro*, in *Giustizia Civile Massimario*, 2011, 7-8, 1087; Cass. 11 marzo 2013, n. 5945, *A. s.p.a.* c. *Fall. S. s.r.l*., in *Giustizia Civile Massimario*, 2013; Cass. 23 settembre 2014, n. 19978, *T. C.* c. *L.S.p.a*., in *Dejure*, and Cass. 18 marzo 2016, n. 5419, *Greci Agro industriale s.r.l*. c. *Fall. Zenith S.p.A*., in *Dejure*.

with the creditors[39], but courts, under art. 116 cpc, can draw arguments of proofs from the procedural behaviour of the parties[40].

### c) Detected *practices*¸ and room for possible implementation

There appears to be an acceptable "**legislative *good practice***": the Italian lawmaker acknowledges and accepts that entrepreneurs might take advantage from the fragmentation of the different substantive company laws and accepts such a reallocation, if this complies with the laws of the States concerned. At the same time, a step back is taken to ensure jurisdiction to Italian courts where the reallocation of the seat follows the request for a declaration of insolvency[41].

A second (inferred) ***best practice*** is that no role to party autonomy in the selection of the court is granted. Even where entrepreneurs make use of their rights to move the seat of their company, due to general interests in the management of an insolvency procedure, international jurisdiction of Italian courts cannot be derogated from by the will of the parties, as also confirmed by the case law[42].

[39] Cass. 26 maggio 2016, n. 10925, *Inpex srl ltd* c. *Claris Factor S.p.A. e altri*, in *Dejure*.

[40] Cass. 11 marzo 2013, n. 5945, *A. s.p.a.* c. *Fall. S. s.r.l.*, cit. (in relation to the difficulties connected to service of documents in the place of new seat).

[41] Cass. 17 febbraio 2016, n. 3059, *Fall. Zeta Office Distribuzione Srl* c. *Zeta Office Distribuzione Srl*, cit. The reallocation of seat is deemed fraudulent since its goal is also to make recovery of credits harder, if not only by making the case cross-border in nature. However, this provision rewards the "winner of the race". If the transfer is completed the day before a claim is filed, Italian courts should not have competence. This solution –introduced in 2006– is different from the first European choice, which did not opt for a *prorogatio jurisdictionis* before the Recast of the uniform rules. In the new InsRRec the presumed coincided between the COMI and the registered office does not find application if the registered office has been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings. However, having doubts on the added value of the provision, see OBERHAMMER, KOLLER, AUERNIG, PLANITZER, *Part 3: Insolvencies of Groups of Companies*, in the *Implementation of the New Insolvency Regulation, Recommendations and Guidelines, Study JUST/2013/JCIV/AG/4679*, 2016, p. 100, at p. 105.

[42] Cass. 13 ottobre 2008, n. 25038, *S.S. Ltd.* c. *I.P.SE.MA*., cit., and Cass. 3 ottobre 2011, n. 20144, *D.G.* c. *Soc. Equitalia Gerit e altro*, cit. The choice not to grant party autonomy in the selection of the courts, or –more precisely– to allow the parties to prorogate a foreign court to the detriment of the Italian jurisdiction, seems in general consistent with the role of party autonomy in insolvency matters and with the conceptualisation of insolvency proceedings, where general interests take over individual ones.

A last ***best practice*** can be inferred. When addressing fictitious reallocation of the seat, courts have taken a holistic and case-by-case approach to determine the centre of decision making, even though sometimes taking into consideration elements (such as the residence of managers) that might not be fully recognisable by third parties during business operations.

## 1.IV. The *vis attractiva* rule in the *legge fallimentare*

According to art. 24 *lf*, the court declaring the state of insolvency has also jurisdiction to decide connected claims[43]. The provision is applicable to actions to set aside transactions[44], to actions of the administrator to terminate contracts, and, more in general, to actions that seek the re-

[43] On insolvency related proceedings see, for all in the most recent writings, BARIATTI, VIARENGO, VILLATA, VECCHI, *Part 1: Scope of Application*, in the *Implementation of the New Insolvency Regulation, Recommendations and Guidelines, Study JUST/2013/JCIV/AG/4679*, 2016, p. 47 ff.

[44] The ordinary action (*revocazione ordinaria*) is always available and fall within the scope of application of the uniform European rules in civil matters – now Reg. 1215/2012 (cf. Cass. 13 aprile 1981, n. 2185, in *Giustizia civile*, 1981, I, 2662, and Cass. 16 marzo 2009, n. 6598, *Soc. Finmek* c. *Soc. Ericsson Ab*, in *Rivista di diritto internazionale privato e processuale*, 2010, p. 117). Insolvency actions to set aside (*revocatoria fallimentare*) aims at declaring the transaction ineffective to the benefit of all the creditors of the debtor and are governed by the specific rules on international jurisdiction in insolvency matters (these being the European ones if the Insolvency Regulation is applicable; cf. Cass. 4 agosto 2006, n. 17706, *Allgauland Kasereien GmbH* c. *Fall. soc. Grandis grandi magazzini discount*, in *Fallimento*, 2007, p. 632). On actions to set aside, see CARBONE, CATALDO, *Azione revocatoria: esercizio della giurisdizione e legge applicabile*, in *Diritto del commercio internazionale*, 2004, p. 27; BARIATTI, *Filling the Gaps of the EC Conflicts of Laws Instruments: The Case of Jurisdiction Over Actions Related to Insolvency Proceedings*, in VENTURINI, BARIATTI (eds), *Nuovi strumenti del diritto internazionale privato – Liber Fausto Pocar*, Milano, 2009, p. 23; DE CESARI, MONTELLA, *Una "vis attractiva" comunitaria sulla revocatoria fallimentare?*, in *Il Foro italiano*, 2009, IV Col.398-402; DE CESARI, *La revocatoria fallimentare tra diritto interno e diritto comunitario*, in *Rivista di diritto internazionale privato e processuale*, 2008, p. 989; LEANDRO, *Effet Utile of the Regulation No 1346 and Vis Attractiva Concursus: Some Remarks on the Deko Marty Judgment*, in *Yearbook of Private International Law*, 2009, p. 469 ff.; QUEIROLO, *The Impact of the European Court Judgments (ECJ) on the Case-law of the Italian Corte di Cassazione. The example of "revocatoria fallimentare"*, in *The European Legal Forum*, 2011, p. 16 ff., and CORSINI, *Revocatoria fallimentare e giurisdizione nelle fonti comunitarie: la parola passa alla Corte di Giustizia*, in *Rivista di diritto internazionale privato e processuale*, 2008, p. 429.

alisation of the rights of the creditors if such actions draw their existence from the declaration of insolvency[45], but for cases related to immovable properties[46].

The practical investigation has shown that in some cases the reconstruction of the autonomy of the claim is not plain[47]: for liability actions against former managers part of the case law argues that such an action is a right the company has before the declaration of insolvency, and that thus follows the ordinary rules on territorial jurisdiction[48], whilst other argues that such action is an autonomous right of the liquidator acting as a procedural substitute[49].

Art. 24 *lf* was not at first considered a rule on international jurisdiction, but merely a rule on the territorial competence. This has changed with the conjunct reading of the new PIL Act, whose art. 3 provides that, for matters falling outside the scope of application of the Brussels Regulation(s), international jurisdiction is also granted where Italian courts are recognised with territorial jurisdiction[50]. Hence, actions that are strictly connected with the insolvency proceeding, without which such actions would not be possible, do also fall within the international jurisdiction of the Italian court declaring the state of insolvency, since

[45] Cass. 15 luglio 2015, n. 14844, *Cofim Srl* c. *Fallimento Costruzioni Stradali Sas*, in *Giustizia Civile Massimario*, 2015.

[46] Tribunale Siena 4 maggio 2015, n. 396, in *Dejure*.

[47] For a study of the case where a court erroneously assumes jurisdiction over insolvency-related case, see FABÓK, *Grounds for Refusal of Recognition of (Quasi-) Annex Judgements in the Recast European Insolvency Regulation*, in *International Insolvency Review*, 2017, *forthcoming*.

[48] Cass. 6 ottobre 1981, n. 5241, *Nigris* c. *Fall. soc. Snal*, in *Rivista di diritto internazionale privato e processuale*, 1982, p. 371.

[49] Cass. 6 ottobre 2000, n. 15487, *Scammacca* c. *Fall. soc. Caruso*, in *Società*, 2001, p. 591; Cass. 28 novembre 1984, n. 6187, Foro it., 1985, I, 3179. The issue gained a practical relevance only in the last few years: after the creation of the "tribunal for companies" (Testo del decreto-legge 24 gennaio 2012, n. 1 (in Supplemento ordinario n. 18/L alla Gazzetta Ufficiale - Serie generale - n. 19 del 24 gennaio 2012), coordinato con la legge di conversione 24 marzo 2012, n. 27 (in questo stesso Supplemento ordinario alla pag. 1), recante: «Disposizioni urgenti per la concorrenza, lo sviluppo delle infrastrutture e la competitività», art. 2), a specialised chamber within the tribunals and court of appeals mainly sitting in the City Regional Seat, insolvency and ordinary proceedings might take place before courts in different territorial jurisdictions.

[50] Cass. 7 febbraio 2007, n. 2692, *Banca agricola commerciale della Repubblica di San Marino* c. *Fall. Mirone*, in *Fallimento,* 2007, p. 629.

the latter attracts the first to ensure a unitary management of all the matters related to the debt.

## 1.V. Applicable law

### a) Main issues

The Italian legal system misses a clear conflict of laws rule: according to art. 25 PIL Act, companies and associations are governed by the law of the State of incorporation, Italian law being applicable however, if the seat of the administration or the main object of the activity is to be found in Italy. The conflict of laws rule at hand –however – only determines the law governing internal relationships of the entity, and all the issues related to its management and its structure. With regard to insolvency proceedings opened in Italy, there is little doubt that the procedural aspects (such as the procedures, persons entitled to file the claim, conditions to file claims, organs of the procedure, and their powers) are governed by the law of the forum (*lex fori concursus*). This is confirmed at the legislative level by art. 12 PIL Act, according to which, with a general expression, the civil procedure taking place in Italy is regulated by Italian laws. Pre-conditions for the declaration of insolvency, namely that an entity can be defined as an "economic entrepreneur" are also regulated by the *lex fori concursus*; more in general, subjective and objective conditions of insolvency proceedings are governed by Italian law.

On the contrary, aspects that are not strictly related to the insolvency proceedings are still subject to the law applicable to the claim in accordance with the ordinary conflict of laws rules: in this sense, for example, the issue of the existence of a credit is regulated by the law applicable to the credit.

The issues that have found more resonance are mainly two:

*a)* insolvency actions to set aside transactions, the question being whether such actions – and their conditions – must be governed by the law of the forum, or by the law governing the act to set aside. Italian courts, by stressing that such actions are functional to the protection of

the creditors in insolvency proceedings, have argued that insolvency actions to set aside must be governed by the law of the State governing the declaration of insolvency[51], effects on third parties – that are not parties to the fraudulent operation to set aside – included[52];

*b)* the law governing the consequences of the declaration of the insolvency in respect of foreign holders of an Italian company (that are fully responsible with their capital for the debts of the company), as well as the law governing the survival of the company. Some argue that substantive effects of a declaration of insolvency (such as dispossession, or liquidation following the declaration of insolvency) should be governed by the *lex fori concursus*, whilst others are more in favour of the *lex societatis* since an innate connection between such matters and the insolvency procedure is not given. The Italian (substantive law) choice to liquidate insolvent companies is not seen as an "insolvency policy goal", but rather a substantive goal of company law, which should thus not be governed by the law governing the insolvency proceeding. Clearer, and on the contrary, the "spill-over effects" of a declaration of insolvency: under art. 147 *lf* a declaration of insolvency against a company is automatically extended over to its unlimited liable partners[53].

### b) General principles and rules in the application of foreign laws

Should a foreign law be applicable, a number of rules and principles become of relevance for courts. According to art. 14 PIL Act, the duty of ascertainment of the foreign law falls *ex officio* upon the court, which

[51] Cass. 7 febbraio 2007, n. 2692, *Banca agricola commerciale della Repubblica di San Marino* c. *Fall. Mirone*, cit., and Cass. 4 agosto 2006, n. 17706, *Allgauland Kasereien GmbH* c. *Fall. soc. Grandis grandi magazzini discount*, cit. Applying German law, Trib. Milano Sez. II 27 marzo 2007, *TGZ GmbH* c. *Manifattura di Legnano S.p.a.*, in *Fallimento*, 2007, p. 931.

[52] Corte appello Milano 3 ottobre 2000, *Banco Sardegna* c. *Unione Banche Svizzere Lugano*, in *Fallimento*, 2001, p. 937.

[53] The provision thus constitutes an exception to art. 25 (2) PIL Act, according to which the liability for default in payment is governed by the *lex societatis* (cf. Cass. 6 luglio 2005, n. 14196, *Soc. Sitav International* c. *Fall. soc. Finoper*, in Rivista di diritto internazionale privato e processuale, 2006, p. 169).

has to apply this law according to its own hermeneutic criteria and criteria of application in time[54]. Other general principles and rules that must be taken into consideration are i) the *renvoi*[55]; ii) the public policy exception[56], and iii) domestic overriding mandatory provisions[57]. Whilst on the last two specific provisions as a limit for the application of foreign laws in insolvency proceedings cases are not found, in general terms, Italian case law proves cautious in their application.

### c) Detected *best practice*

The general principles in the application of a foreign law are part of a ***judiciary best practice***. More specifically, also the case law related to the law applicable to actions to set aside transactions in insolvency matters is part of a ***good practice***: only substantive aspects that have a strong connection with the insolvency proceeding, without which the first would lose its *raisons d'être*, are to be governed by the *lex fori concursus*. The "serving nature" of proceedings imposes a unitary governing law, even where domestic courts are called to apply foreign laws if the insolvency has been declared abroad (whilst still applying Italian law for merely procedural matters)[58].

## 1.VI. Recognition and enforcement of decisions

### a) *Exequatur* procedure

The issue of recognition of foreign decisions in insolvency matters must be evaluated in light of the interconnections between such a declaration

[54] PIL Act, art. 15.

[55] PIL Act, art. 13.

[56] PIL Act, art. 16.

[57] PIL Act, art. 17.

[58] On avoidance actions, or actions to set aside, as well as their necessity to be dependent on the insolvency in order to be excluded from the scope of application of the Brussels I bis Regulation, see for all LINNA, *Actio Pauliana and Res Judicata in EU Insolvency Proceedings*, in *Journal of Private International Law*, 2015, p. 568, at p. 570 ff.

and the system of collective enforcement[59]: foreign decisions are subject to recognition in Italy following the ordinary common rules[60] if no specific international treaty (or EU act) is applicable. According to art. 64 PIL Act, foreign judgments are automatically recognised if i) the court delivering the judgment had jurisdiction according to the Italian rules on international jurisdiction; ii) the act introducing the procedure has been served according to rules of the State where the trial was held and the essential rights of the defendants were not infringed; iii) the parties to the trial appeared before the court according to the rules of the States where the trial was held, or the absentia of one party has regularly been declared; iv) the decision is res judicata in the State where it was delivered; v) it is not contrary to an Italian judgment which is res judicata; vi) no proceedings between the parties for the same object has been initiated in front of Italian courts, unless the foreign trial was initiated first; vii) its effects are not contrary to public order.

According to art. 67 PIL Act, enforcement follows a further stage. All those with an interest can request the ordinary judicial authority to verify the conditions for recognition[61]. The foreign judgment, together with the order of the court (that is only declaratory in nature, stating on the absence of a ground to refuse recognition and enforcement) are titles for the enforcement.

Stemming from the domestic case law, the term "judgment" must be understood in a non-technical sense. The name given to the act under the foreign law does not bear any relevance, as long as the act is delivered by a judicial authority and serves the purposes that, in Italy, are served by a judicial decision on the state of insolvency.

[59] See DANIELE, *Il fallimento nel diritto internazionale privato e processuale*, Padova, 1987, p. 114.

[60] BURGIO, *Cross Border Insolvency - an Italian Approach*, cit., p. 43 ff.

[61] The proceedings are governed by art. 30 of the legislative decree 1 September 2011, number 150.

### b) Effects of recognition

Recognition means, according to the case law, that the foreign judgment has in Italy the same effects it would have in its State of origin. However, this is only true in so far as the foreign decision, in its State of origin, embraces the universality principles, and is thus constructed to regulate the insolvency and its assets also beyond the border of the jurisdiction of the issuing court. Should this not be the case, under the territoriality principle, the foreign decision will have no effects in Italy[62]. Additionally, whereas foreign decisions in insolvency matters can be recognised in Italy under the common rules, as long as the content of such decisions finds similar institutions in Italian substantive law[63], and might recognise the role of the foreign administrator, it must be remembered that a foreign declaration of insolvency does not limit the jurisdiction of the Italian court in respect to a similar declaration against foreign entrepreneurs that exercize a structured activity in Italy.

### c) Detected *best practices*

There are a number of ***best practices*** that appears to be upheld. In the first place, the idea that "judgments" to be recognised must not be understood only in the light of the *lex fori* appears commendable. Both foreign decisions opening[64] an insolvency as well as further decisions fall within this definition.

The second ***best practice*** concerns the public policy exception: Italian courts tend to follow a restrictive interpretation of such a ground[65]: for example, the foreign declaration of insolvency declared after more than one year following the closure of the business (the maximum time-limit under Italian law for Italian courts to declare the insolvency of

[62] Trib. Napoli 10 gennaio 2008, *Dsk Chornomorske Morske Paroplavstvo*, in *Rivista di diritto internazionale privato e processuale*, 2008, p. 542.

[63] DANIELE, *Il fallimento nel diritto internazionale privato e processuale*, cit., p. 114.

[64] Corte appello Genova 24 maggio 1973, *Fall. Tamellini* c. *Tamellini*, in *Rivista di diritto internazionale privato e processuale*, 1975, p. 2306.

[65] Cass. 6 dicembre 2002, n. 17349, *Soc. Finleader* c. *Soc. Grant Thorton*, in *Dejure*.

entrepreneurs[66]) has not been considered against Italian public policy, resulting in the recognition of the foreign decision[67]. The *Corte di cassazione*, other than saying that the public policy in insolvency matters relates to fundamental aspects of the Italian insolvency law, such as the existence of an organised commercial activity, and a state of insolvency of the entrepreneur[68], also took into consideration (again under the lenses of the public policy exception) the issue of the right to defence in cases of decisions given *in absentia* to conclude that only where the debtor was not summoned in the foreign proceeding, the public policy exception can actually be invoked; where the default to appear is to be attributed to the debtor himself, the foreign decision will be recognised in Italy[69]. Similarly, foreign decisions providing that remaining debts of the debtor do not expire, have also been recognised in Italy[70]. Some decisions have also argued that the rules on inhibition of individual executive actions are not part of these fundamental principles of Italian insolvency law, and thus are not a ground to invoke the public policy exception[71].

Additionally, also regarding the narrow[72] interpretation of the public policy exception under domestic law, it is also noteworthy to remember that, where under Italian insolvency law only entrepreneurs were in the past to be declared insolvent, part of the case law excluded that a foreign

[66] Art. 10 *lf.*

[67] Cass. 9 gennaio 1975, n. 42, in *Rivista di diritto internazionale privato e processuale*, 1975, p. 779, p. 781 f. The Italian time-limit has been considered an element that represents subsidiary elements of the Italian legislation and does not concern fundamental rules of insolvency regulation.

[68] *Idem*, p. 782.

[69] *Idem*.

[70] Corte appello di Roma 16 marzo 1982, *Gottfried Steffen* c. *Nussbaum Artur*, in *Temi romana*, 1985, p. 707.

[71] Corte appello Bologna 18 luglio 2014, *Citibank N A* c. *Soc. Parmalat fin*., in *Int'l Lis*, 2015, p. 22.

[72] On the public policy exception in insolvency matters, see De Cesari, *Giurisdizione, riconoscimento ed esecuzione delle decisioni nel Regolamento comunitario relativo alle procedure di insolvenza*, in *Rivista di diritto internazionale privato e processuale*, 2003, p. 55, at 78 ff.

decision declaring non-entrepreneurs insolvent was against the Italian public policy, as the Italian Constitution was silent on such a point[73].

## 1.VII. International agreements

In Italy, few international conventions are in force[74], but are not applicable since the parties to the agreements are all European Union Member States (with open questions following a possible *Brexit* of the United Kingdom[75]). One of these agreements is the 1930 Agreement with France[76]; the (indirect[77]) rules on international jurisdiction grant international competence to the courts for the place of domicile (for natural persons) or incorporation (for legal entities), which also extends to connected claims[78], but for immovable properties. As a general rule,

[73] Corte appello Bologna 21 settembre 1991, *Banca Nazionale del Lavoro* c. *Francioni e Fabbri*, in *Giurisprudenza italiana*, 1992, I, 2, 170, on which see BURGIO, *Cross Border Insolvency - an Italian Approach*, cit., p. 44.

[74] No longer in force is – for example – the agreement between Italy and Serbia, Croatia, and Slovenia. Noting that, in general, lack of international multilateral agreements also rests with the will of the States to retain their jurisdiction over important insolvency matters, CONSALVI, *The Regime For Circulation of Judgements Under The EC Regulation on Insolvency Proceedings*, in *International Insolvency Review*, 2006, p. 147, at p. 149. This is not however an Italian peculiarity, as other States face a similar situations (with reference to Switzerland, see LEMBO, JEANNERET, *Il riconoscimento in Svizzera di un fallimento straniero: situazione attuale e considerazioni pratiche*, in *Rivista di diritto internazionale privato e processuale*, 2004, p. 1249, at p. 1251). In general, on the difficulties to conclude international agreements, also between European States, see DANIELE, *Il fallimento nel diritto internazionale privato e processuale*, cit., p. 187 ff., and JOHNSON, *The European Union Convention on Insolvency Proceedings: A Critique of the Convention's Corporate Rescue Paradigm*, in *International Insolvency Review*, 1996, p. 80 ff.

[75] Convenzione per il reciproco riconoscimento e l'esecuzione delle sentenze in materia civile e commerciale, firmata a Roma il 7/2/1964, as amended by Protocollo di emendamento of 14/7/1970.

[76] Convenzione sull'esecuzione delle sentenze in materia civile e commerciale, firmata a Roma il 3/6/1930.

[77] Part of the case law has argued that the provisions are direct provisions on international jurisdiction (Cass. 14 giugno 1980, sentenza n. 3796, *Soc. Valluit* c. *Alessi e altro*, in Rivista di diritto internazionale, 1981, p. 172); but cf. DANIELE, *Il fallimento nel diritto internazionale privato e processuale*, cit., p. 200 ff.

[78] Tribunale Genova 4 agosto 1956, *Fall. Sairn* c. *Compagnie d'assurances générales*, in *Diritto fallimentare e delle società commerciali*, 1956, II, p. 747. Such as compensation of credits, and even seizure of assets, since this is a consequence of the declaration of insolvency

decisions have effects in the second State, provided that in that second State a decision of a third country has not been recognised under an international treaty, and that the administrator appointed by the third State has invoked the treaty in the second State. Again, as a matter of general rule, executive actions following the declaration of the foreign insolvency are subject to *exequatur*. This means that, save for executive actions, the foreign decision has effects in the second State, and thus gives the administrator the possibility of taking actions in name of the debtor and the assets. The Agreement also has conflict of laws rules (*lex concursus*, but for sales of immovable that are governed by the *lex rei sitae)*.

The second international agreement is with the United Kingdom; this agreement does not contain direct rules on international jurisdiction, but only rules for the recognition of a decision. To that end, it is necessary that –in insolvency matters– the decision to be recognised in Italy is adopted by the foreign court having jurisdiction under its own rules on international jurisdiction. Recognition, under this treaty, is not automatic, since it has to be requested to the court of the second State (art. III)[79].

The third international agreement is with Austria[80], and explicitly deals with insolvency (and some related proceedings, such as *concordato fallimentare*). Universality inspires the convention, since the effects of the decision of the other State extend their effects (art. 2). Nonetheless, a number of elements prejudice uniformity: the subjective

(Cass. 6 febbraio 1984, n. 879, *Soc. manifattura Di Pont* c. *Fall. STTIA*, in *Rivista di diritto internazionale privato e processuale*, 1985, p. 748).

[79] The convention has not been applied in a significant number of cases. Amongst these cases, see Corte appello Venezia 11 settembre 1984, in *Il diritto marittimo*, 1986, p. 409; Corte appello Firenze 21 aprile 1981, in *Il diritto marittimo*, 1981, p. 573, and Corte appello Milano 29 dicembre 1975, in *Rivista di diritto internazionale privato e processuale*, 1976, p. 552, according to which – by way of exception – Italian jurisdiction can be derogated from in favour of English courts. However, always on the issue of the acceptance of the jurisdiction, rejecting the idea that such acceptance can be implied, see Cass. 25 settembre 1993, n. 9725, *Soc. Incoplan* c. *Goodview Manufacturer Company*, in *Foro it*., 1995, I, 320.

[80] Convenzione in materia di fallimento e concordato, firmata a Roma il 12/7/1977.

elements to determine the quality of those who can be declared insolvent are determined by law of the State requested of recognition[81]. Furthermore, key elements and definitions are not autonomously set by the convention. Competence rests for individuals with the court for the place of the centre of main interests (and not of domicile), whilst for legal entities the place of incorporation remains, unless the place of its main interests is located in the second State (art. 3). Recognition is not automatic[82]. The conventions provide for a number of conflict of laws, namely for working contracts (the effects of the insolvency declaration are regulated by the law of the place where the working activity takes place), and immovable properties (following the *lex rei sitae* rule). Consequences for the insolvent are, on the contrary, regulated by the *lex concursus* (limitations to work, and similar).

## 1.VIII. International cooperation and appointment of insolvency office holders

### a) Legislative framework

There is no specific legislation for international cooperation in insolvency matters in Italian domestic law, but only general rules for international cooperation between courts (e.g. to obtain proofs abroad). However, there are no express legislative rules on international communication between the courts, and between Italian courts and foreign liquidators. Nonetheless, since the insolvency procedure aims at verifying the existence of the conditions for the declaration of insolvency, it appears that informal communications might be taken into consideration by the Tribunal in the exercise of the pre-trial investigation.

In the framework of cooperation, the expertise of insolvency office holders appears crucial: it has emerged that some practitioners complain

[81] Art. 1 (3). See also in the case law Corte appello Venezia 11 giugno 1997, *Foscari Widmann Rezzonico* c. *Fall. Foscari Widmann Rezzonico*, in Giur. it., 1998, 1158.

[82] Even though reading art. 13 a different conclusion could be reached, art. 17 still speaks of "procedures to obtain a declaration of 'effectiveness' or enforcement.

about the methodologies for appointment (sometimes a "rotation" approach is followed) of insolvency office holders[83]. At the legislative level, art. 28 *lf* only identifies some categories of professionals that can be appointed (accountants, lawyers, etc), and excludes parents and creditors of the debtor, as well as those who have contributed in the state of financial distress, from covering such a role.

The much-needed international communication and cooperation that should be supported sometimes depends upon personal skills of insolvency officers themselves. Personal skills that could be enhanced by training sessions, which are today not particularly common nor specifically focused on private international law matters.

### b) Possible "*soft best practice*" to be adopted by Italian courts

Italian courts have proven that – at the domestic level – they can, and do, sometimes conclude protocols in insolvency matters, mostly with Tax Agencies and debt collectors institutions. Such protocols are not binding in nature, but they outline the approach courts and institutions will take, approaches that are coordinated to ensure the best –and quick– management of the case for the collective interests. In this sense, domestic courts could conclude such non-binding understandings with foreign courts. With regard to communication and cooperation between Italian courts and foreign insolvency office holders, the court could seek at least informal communication.

The possible development for communication and cooperation between insolvency office holders appears easier since their cooperation is easier to be approached in an informal manner (thus preserving the autonomy in their own jurisdictions). This, however, requires developed skills – in this respect, ***room for development of best practices*** mainly regards the appointment of the office holder by the Italian courts, that should proceed with the appointment by taking into careful consideration the international elements and the specific competences of the office holder to be appointed.

[83] For a comparative reading on appointments of insolvency practitioners, and a critique to "randomized" systems, see McCormack, Keay, Brown, *European Insolvency Law*, Cheltenham, 2017, p. 80 f.

## 2.I. The Insolvency Regulation(s) in Italy

As noted in academic writings[84], from a general perspective the application of the Insolvency Regulation[85] (InsR) has been quite satisfactory, whereas some issues, also related to the scope of application of the regulation – and namely its non-applicability to proceedings devoted to save distressed companies – has led the European lawmaker to adopt an Insolvency Regulation Recast[86] (InsRRe) which still appears in need of guidance for its application, and – in particular – on domestic best practices developed under the former legal regime, or still to be developed to ensure smooth cross-border cooperation, so as to maximise the possible positive outcomes of cross-border (pre)-insolvency proceedings.

## 2.II. Scope of application

### a) Current practices

The Italian case law appears to be in line with the goals of the InsR in as much as courts have consistently excluded the applicability of the instrument at hand in those cases where corporations excluded from rules on insolvency were at hand (eg. banks and credit corporations[87]

[84] In the most recent scholarship, BARIATTI, *Dibattito sul SidiBlog: La revisione del Regolamento sulle procedure di insolvenza. Considerazioni generali*, available at *sidiblog*; BEWICK, *The EU Insolvency Regulation, Revisited*, in *International Insolvency Review*, 2015, p. 172, at p. 174, and FAZZINI, WINKLER, *La proposta di modifica del Regolamento sulle procedure di insolvenza*, in *Diritto del commercio internazionale*, 2013, p. 141 ff.

[85] Council regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings, in OJ L 160, 30.6.2000, p. 1. For the application of the regulation in the case law in the first years after its entry into force, STEFANIA BARIATTI, *L'applicazione del Regolamento CE n. 1346/2000 nella giurisprudenza*, in *Rivista di diritto processuale*, 2005, p. 673 ff.

[86] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings, in OJ L 141, 5.6.2015, p. 19, as amended by Regulation (EU) 2017/353 of the European Parliament and of the Council of 15 February 2017 replacing Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings, in OJ L 57, 3.3.2017, p. 19.

[87] See, Cass. 28 luglio 2004, n. 14348, *Italfinanziaria Iberica S A* c. *Soc. Globo*, in *Rivista di diritto internazionale privato e processuale*, 2005, p. 441, and DELL'ATTI, *L'insolvenza co-*

and investment undertakings, not defined by the InsR, but whose definition is subject to an autonomous definition in light of all relevant European Union law[88]). On the other side, courts have affirmed that the InsR is applicable to all proceedings listed in its Annex I, such as the "amministrazione straordinaria" which has as its scope the salvation of the company[89].

Furthermore, courts have excluded the applicability of the InsR to all those actions that could have been started (by or against) the insolvent debtor regardless of a declaration of insolvency (as was the case for an action concerning a *Decreto ingiuntivo*[90] or actions for unduly received and to be recovered sums promoted by the administrator of an Italian company against a German company[91]) due to their weak connection to the insolvency procedure. Similarly, actions relating to penalties connected to the restitution of tourist resorts (leading to a credit to be lodged afterwards in the insolvency proceeding) are considered not covered by the InsR[92]. Italian courts have also excluded the applicability of the InsR to cases where the COMI is in one State, and no establishment is found in another State, regardless of the domicile, nationality or residence of creditors[93]. In this case Italian law is fully applicable, rules on the language for foreign creditors included[94]. On the

*munitaria*, in UGO PATRONI GRIFFI (ed.), *Manuale di diritto commerciale internazionale*, Milano, 2012, p. 529, at p. 531, and VALLAR, *La crisi dei gruppi bancari multinazionali. Metodi di diritto internazionale privato e coordinamento tra sistemi*, Milano, 2017.

[88] Tribunale Milano sez. II 17 dicembre 2009, n. 15164, *Industrie arti grafiche G. V.* c. *C. Service*, in *Dejure*.

[89] Cass. 21 settembre 2004, n. 18915, *Banca Fideuram* c. *Soc. Ferdofin siderurgica*, in Foro it., 2004, I, 3310.

[90] Cass. 16 marzo 2009, n. 6598, *Soc. Finmek* c. *Soc. Ericsson Ab*, cit.

[91] Cass. 27 marzo 2009, n. 7428, *Cda Datentrager Albrechts GmbH* c. *Fall. soc. Dvd Emiliana distribuz.*, in *Rivista di diritto internazionale privato e processuale*, 2009, p. 950.

[92] Cass. 21 luglio 2015, n. 15200, *Nesco Egypt For Tourism Investments Sae* c. *Soc. Valtur*, in Rivista di diritto internazionale privato e processuale, 2016, p. 541..

[93] Cass. 16 marzo 2009, n. 6598, *Soc. Finmek* c. *Soc. Ericsson Ab*, cit., and Tribunale Milano 18/06/2015.

[94] Tribunale Milano 18 giugno 2015, in *Dejure*.

contrary, the applicability of the InsR has been confirmed where a company moves its registered office in a third State, but reallocates its COMI in another Member State[95].

Lastly, courts have dealt with the scope of application of the InsR in respect to foreign proceedings (in this case, a *German Verfahren auf Eigenverwaltung*) not listed in Annex I, whose provisional liquidator is not listed in Annex III, and whose goal is not to divest the debtor's assets. Such proceedings have been excluded from the scope of application of the InsR[96], and accordingly not automatically recognised by operation of law.

### b) Evaluation of practices

It appears that with regard to the scope of application, and as also shown by practitioners' involvement, the current practices sufficiently ensure a correct application of the uniform rules, and thus do not need significant improvement.

## 2.III. COMI and transfer of companies abroad

### a) Current practices

Save some significant and well-known cases, such as the *Parmalat* and *Cirio* cases[97], most courts correctly acknowledge that the COMI is an autonomous concept that must be evaluated according to EU law, rather

[95] Cass. 3 ottobre 2011, n. 20144, *D.G.* c. *Soc. Equitalia Gerit e altro*, cit.

[96] Corte appello Trento, Sezione di Bolzano 25 gennaio 2016, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2016, p. 612, on which see REINSTADLER, REINALTERM, *Der Eröffnungsbeschluss auf Eigenverwaltung nach § 270a InsO ist kein Insolvenzverfahren im Sinne von Art. 1 EuInsVO 2002 (Corte d'Appello di Trento – Außenstelle Bozen, S. 612*), in *idem*, p. 614.

[97] Noting how in the context of such insolvency proceedings Italian courts the COMI in Italy, place of the administrative seat, without giving particular elements to substantiate the findings, see BENEDETTELLI, *«Centro degli interessi principali» del debitore e forum shopping nella disciplina comunitaria delle procedure di insolvenza transfrontaliera*, cit., p. 508 ff.

than to domestic legislation[98] in light of – as instructed by recital 13 InsR – the place where the debtor exercises its activity *in such a manner that is recognizable by third parties*[99]. For example, the mere presence of immovable properties has not been considered enough to rebut the presumption of art. 3 InsR[100]. This leads to two ***good practices***: on the one hand, the case law according to which a re-allocation of the company is only possible (art. 25 (3) PIL Act) if this is lawful under the law of both States concerned is not applicable in the context of the InsR[101], since this would mean that the definition of COMI would depend on domestic law. On the other hand, the fraudulent – i.e. an expedient to avoid proceedings[102] rather than a reasoned economic choice[103]– reallocation (that under Italian law would make art. 25 (3) PIL Act never

[98] Nonetheless, it has been argued by courts that Italian concepts and the COMI are substantially equal, meaning that – at least at the level of law on the books, no sensitive change has been introduced in the legal system by the InsR. Cf in the scholarship, BOGGIO, *Trasferimenti fittizi, incompleti o "ultrannuali" della sede legale all'estero e fallimento della società cancellata dal registro delle imprese italiano*, cit., p. 621.

[99] Corte appello Milano 14 maggio 2008, in *Dejure*.

[100] Cass. 28 gennaio 2005, n. 1734, *S. Maura S A* c. *Soc. Immobiltrading*, in *Fallimento*, 2005, p. 450.

[101] Cass. 28 luglio 2004, n. 14348, *Italfinanziaria Iberica S A* c. *Soc. Globo*, cit.

[102] Cass. 18 maggio 2009, n. 11398, *Soc. La Longeva* c. *Monte Paschi Siena*, in *Rivista di diritto internazionale privato e processuale*, 2010, p. 125.

[103] Cass. 3 ottobre 2011, n. 20144, *D.G.* c. *Soc. Equitalia Gerit e altro*, cit. Cf. also the new recital 5 InsRRec («[i]*t is necessary for the proper functioning of the internal market to avoid incentives for parties to transfer assets or judicial proceedings from one Member State to another, seeking to obtain a more favourable legal position to the detriment of the general body of creditors (forum shopping)*»). Interestingly, in spite of this goal, from a broad perspective, there is also who has noted that general evolutions in insolvency law have had the unwanted effect of fostering forum shopping: «*A further consequence of converging insolvency laws is that forum shopping is likely to become even more prominent than it already is today. The European Insolvency Regulation serves also insofar as a perfect model. Designed with the intent to prevent forum shopping by bringing the disparate insolvency legislations of the various member states closer together, this very regulation seems to have provoked forum shop-ping! The lesson obviously to be learned therefrom is that approximation incites the search for potential advantages*» (PAULUS, *Global Insolvency Law and the Role of Multinational Institutions*, in *Brooklyn Journal of International Law*, 2007, p. 1, at p. 10). The recital nonetheless leaves open the question on whether a reallocation might obtain significant benefits, for example in terms of recovery, but with some damages to the creditors. In this sense, it appears that the "economic reasonability test" might prove apt to interpret such a case. However, on forum shopping and the possibility for companies to move within the European judicial space and take advantage of the "concurrence" between domestic company laws, see BENEDETTELLI, *«Centro*

applicable, and thus always maintain Italian jurisdiction) is now addressed – rather than as an autonomous matter – under the broader context of the effective COMI, becoming an *ex abundantia cautela* argument in the identification of the effective COMI.

To determine the COMI[104], i.e. the place that is the focal point of the economic activity in which an institutionalised presence is to be found[105], to avoid fraudulent reallocation of the COMI, avoid insolvency forum shopping and ensure that the head of jurisdiction expresses a substantive connection, rather than a mere formal one[106], Italian courts evaluate the presence of significant assets, of the place of service of documents, of where managerial decisions are taken in a manner recognizable to third parties[107], whether or not the transfer of the company is not communicated to the registry of companies of the Member State of the (alleged) prior COMI, and whether or not bank accounts are opened in the State of registration[108]. More in particular, the presumption of coincidence between the place of registration and the COMI is rebutted if in the Member State of the registration the company has no employees, nor any asset, and at the place of registration there is only another company keeping the accounting documents of the first[109]. This seems consistent with the recent *Leonmobili* decision of the CJEU that, in a case of re-allocation of the COMI, has confirmed that the presumption of coincidence under art. 3 InsR can be rebutted and thus, that the COMI is not at the new place of registration but still remains at the previous place of registration – even without an establishment in that State – if

*degli interessi principali» del debitore e forum shopping nella disciplina comunitaria delle procedure di insolvenza transfrontaliera*, cit., p. 516 f.

[104] Cass. 29 marzo 2013, n. 7931, *G.* c. *Fall. soc. Edilsenese*, in *Ilforoitalianoonline*.

[105] In these very terms, VIRGÓS, GARCIMARTÍN, *The European Insolvency Regulation: Law and Practice*, cit., p. 37.

[106] In general, on fraudulent elements of connections, see LOPES PEGNA, *Collegamenti fittizi o fraudolenti di competenza giurisdizionale nello spazio giudiziario europeo*, in *Rivista di diritto internazionale*, 2015, p. 397 ff.

[107] Cass. 20 maggio 2005, n. 10606, *Soc. Interedil* c. *Soc. Intesa Gestione Crediti*, cit.; Cass. 18 maggio 2009, n. 11398, *Soc. La Longeva* c. *Monte Paschi Siena*, cit.; Cass. 11 marzo 2013, n. 5945, *A. s.p.a.* c. *Fall. S. s.r.l.*, cit., and Tribunale Parma 20 febbraio 2004, *Soc. Eurofood* c. *Liquidatore soc. Eurofood*, in *Dejure*.

[108] Cass. 18 marzo 2016, n. 5419, *Greci Agro industriale s.r.l.* c. *Fall. Zenith S.p.A.*, cit.

[109] Cass. 12 dicembre 2011, n. 26518, *B.D. Holding* c. *Fall. B.D. Holding e altro*, cit.

direction and control activities are still located in that State in a way that is recognizable to third parties[110].

The same criteria are followed to determine the COMI of a company that is part of a group; following the *Eurofood*[111] case, Italian courts, after giving outweighing prevalence to the place of where decision where taken to determine the COMI[112], have recognized that the presumption regarding the coincidence of the COMI with the State of registration can be rebutted for cases in which the company does not carry out any activity in the latter place and managerial decisions are taken by the mother company in another Member State[113]. There has been a trend of growing similarity between the case law of Italian (as well as other domestic[114]) courts (always privileging the place of decisions/administration) and that of the CJEU (initially privileging the place of activity of the company). The latter, with the *Interedil* and in the *Rastelli*

[110] CJEU 24 May 2016, *Leonmobili Srl and Gennaro Leone* v *Homag Holzbearbeitungssysteme GmbH and Others*, Case C-353/15, in *electronic Reports*.

[111] On which, see for all OBERHAMMER, *Group of Companies*, in *Heidelberg Report*, cit., p. 238 ff.; BARIATTI, *Le prime sentenze della Corte di Giustizia sull'applicazione del Regolamento comunitario n. 1346/2000 relativo alle procedure d'insolvenza*, in CARAVACA, RODRIGO (eds.), *Parmalat y otros casos de derecho internacional privado*, Madrid, 2007, p. 11, at p. 19 ff.; MANKOWSKI, *Art. 3 Internationale Zuständigkeit*, in MANKOWSKI, MÜLLER, SCHMIDT (eds.), *EuInsVO 2015*, München, 2016, RN, 44 ff.; LUPOI, *Conflitti di giurisdizione e di decisioni nel Regolamento sulle procedure d'insolvenza: il caso "Eurofood" e non solo*, in *Rivista trimestrale di diritto e procedura civile*, 2005, p. 1393, and ARNOLD, *The Insolvency Regulation*, in SHELDON (ed.), *Cross-Border Insolvency*, London, 2015, p. 16, at p. 32 ff.

[112] Tribunale Parma 20 febbraio 2004, *Soc. Eurofood* c. *Liquidatore soc. Eurofood*, cit. In the context of the Cirio proceedings, see also Tribunale Roma 14 agosto 2003, in *Rivista di diritto internazionale privato e processuale*, 2004, p. 685, Tribunale Roma 26 novembre 2004, in *idem*, p. 691.

[113] Consiglio di Stato sez. VI 25 gennaio 2007, n. 269, *Bank of America N A* c. *Min. attività produttive*, in *Rivista di diritto internazionale privato e processuale*, 2007, p. 457. *E.g.* a company, part of a group, proves to be an "empty box" that only serves the financial interests of the "mother" company (Tribunale Parma 20 febbraio 2004, *Soc. Eurofood* c. *Liquidatore soc. Eurofood*, cit.), or the company does not carry out any activity in the place of registration and managerial decisions are taken by the mother company in another Member State (Consiglio di Stato sez. VI 25 gennaio 2007, n. 269, *Bank of America N A* c. *Min. attività produttive*, cit.).

[114] Noting how domestic courts sought to offer an extensive interpretation of the COMI even after the Eurofood case, see and MANKOWSKI, *Art. 56 Zusammenarbeit und Kommunikation der Verwalter*, in MANKOWSKI, MÜLLER, SCHMIDT (eds.), *EuInsVO 2015*, München, 2016, Rn. 3, and NISI, *Centro degli interessi principali e trasferimento della sede statutaria: la Corte di Giustizia dell'Unione Europea torna sul regolamento n. 1346/2000 in materia di insolvenza transfrontaliera*, Liuc Papers n. 246, Serie Impresa e Istituzioni 29, febbraio 2012, p. 6.

cases, has in fact specified that the rebuttal of the presumption at hand not only is not available for "ghost companies"[115], but rather can be made use of in all those circumstances in which managerial decisions, in a way that is recognizable (element that does not require effective knowledge in third parties, but rather their possibility to acquire knowledge[116]) to third parties, rests in a State that is not the one of the registered seat. Where the place of decisions is not that of the registered office, elements such as assets, etc. can be used to rebut the presumption of art. 3 InsR. Recently, the *Corte di cassazione*[117] has argued that (in case of transfer of a company), the presumption of coincidence between the seat and the COMI can be rebutted if, from a global analysis, the lack of operation in the State of the seat, the lack of bank account in the State of the seat, and the fact that the manger does not have his habitual residence in the State of the seat are proof that a change in seat has not determined a change in COMI, but are rather elements that show a possible fraudulent re-allocation of the seat to avoid an insolvency proceeding.

[115] Using the term società "fantasma", CALVO CARAVACA, CARRASCOSA GONZÁLEZ, *Armas legales contra la crisis económica. Algunas respuestas del derecho internacional privado*, in *Cuadernos de Derecho Transnacional*, 2013, p. 38, at p. 59. Suggesting that such a case could recur for the facts of the Centros case, ISRAËL, *European Cross-Border Insolvency Regulation*, cit., p. 259, thus leading to a disconnection between the *lex fori concursus* and the *lex societatis* (on which topic see BENEDETTELLI, *«Centro degli interessi principali» del debitore e forum shopping nella disciplina comunitaria delle procedure di insolvenza transfrontaliera*, cit., p. 520 ff.; MOCK, *Zur Qualifikation der insolvenzrechtlichen Gläubigerschutzinstrumente des Kapitalgesellschaftsrechts*, in *Praxis des Internationalen Privat- und Verfahrensrechts*, 2016, p. 237 ff., and LATELLA, *Il trasferimento della sede e abuso del diritto nella riforma dell'insolvenza transfrontaliera*, in *Giurisprudenza commerciale*, 2015, p. 1005). More recently, on the broader issues of company mobility within the European Union and the *lex societatis*, see MEEUSEN, *Freedom of Establishment, Conflict of Laws and the Transfer of a Company's Registered Office: Towards Full Cross-border Corporate Mobility in the Internal Market?*, in *Journal of Private International Law*, 2017, p. 294 ff.

[116] In these terms, OBERHAMMER, KOLLER, AUERNIG, PLANITZER, *Part 3: Insolvencies of Groups of Companies*, cit., p. 102.

[117] Cass. 17 febbraio 2016, n. 3059, *Fall. Zeta Office Distribuzione Srl* c. *Zeta Office Distribuzione Srl*, cit.; Cass. 20 luglio 2011, n. 15880, *Internetno Bratstvo In Mreza Dd Netfraternity Network Dd* c. *Pessi ed altro*, in *Giust. civ. Mass*., 2011, 7-8, 1087; Cass. 11 marzo 2013, n. 5945, *A. s.p.a.* c. *Fall. S. s.r.l*., cit.; Cassazione civile, sez. un., 23/09/2014, n. 19978, T. C. c. L.S.p.a., in Dejure, and Cass. 18 marzo 2016, n. 5419, *Greci Agro industriale s.r.l.* c. *Fall. Zenith S.p.A*., cit.

Still, in some occasions, the case law (as in other Member States[118]) seems to privilege the place of decisions to determine the COMI. The *Corte di cassazione*[119] has argued that where entrepreneurs seated in another Member State enter a *de facto* company, established (in the absence of a statutory constitution) by the behaviour of the managers that ingenerate in third parties the belief that different entrepreneurs act as shareholders, and this can be shown by the "manifest managerial commingling", the COMI of this *de facto* company can be localised in Italy where decisions of the (foreign) companies are taken in Italy by the *de facto* company[120].

[118] In general, for the elements that are mainly taken into consideration in different jurisdictions to determine the COMI, see for all WESSELS, *EU Insolvency Regulation and its Impact on European Business*, in *CESifo DICE Report*, 2006, p. 16, at p. 18; BARIATTI, *Recent Case-Law Concerning Jurisdiction and the Recognition of Judgments under the European Insolvency Regulation*, in *Rabels Zeitschrift fuer auslaendisches und internationales Privatrecht*, 2009, p. 629, at p. 646 ff., and QUEIROLO, *Le procedure d'insolvenza nella disciplina comunitaria*, p. 196 ff.

[119] Cass. 6 febbraio 2015, n. 2243, *T.* c. *L.*, in *Dejure*. The Court, after having established that a *de facto* company is a company that can be declared insolvent, argues that under art. 3 of the Insolvency Regulation 1346/2000, the COMI has to be determined in light of all the circumstances of the given case; the presence of operative offices in the Member State of the registered seat is not sufficient to identify the COMI in that Member State if it is proved that the decisions on the management and the life of the company where taken, in a manner recognisible to third parties, in another Member State, which holds jurisdiction for the principal procedure (in the case at hand, decision of the English and Irish companies where taken in Italy by the managers, who did create a corporation by estoppel). In particular, the Court seems in this case to argue that from decision taken completely in Italy, the lack of "operative offices" in the State of the registered seat cannot follow, thus rebutting the *iuris tantum* presumption of the former Insolvency Regulation («*Nel ricorso ci si duole, in particolare, che il giudice di merito non abbia preso in considerazione circostanze ulteriori, rispetto a quelle valorizzate nell'impugnata sentenza, ed in particolare alcune deposizioni testimoniali, dalle quali si desumerebbe che le società E.M.I., in tempi diversi, avevano uffici anche a Londra e ed operavano investimenti all'estero. Dette circostanze, tuttavia, non sono state ignorate dalla corte territoriale, secondo la quale il fatto che le società in questione avessero in Inghilterra o in Irlanda alcuni uffici "funzionanti e pertanto in certo senso operativi" (sentenza impugnata, pag. 6) non basta ad inficiare le univoche risultanze da cui si ricava che la loro attività fosse unitariamente programmata in Italia e da qui diretta*»).

[120] Also critical, PILLONI, *Fallimento di società estere collegate a società di fatto avente sede operativa e decisionale in Italia e competenza giurisdizionale italiana*, in *Int'l Lis*, 2015, 2, p. 71 ff.

In general, if the allocation of the COMI is questioned[121], creditors must offer poof[122]; however, if a number of elements point towards the rebuttal of the presumption, the lack of production by the debtor of any proof that could substantiate a coincidence between the registration and the COMI has also been taken into consideration by courts[123] to determine if they effectively have jurisdiction[124].

If the re-allocation of the COMI is real, domestic courts have denied that this bears effects on international jurisdiction if re-allocation follows the introductory act[125], a solution that seems consistent with the jurisprudence of the CJEU in the *Interedil* and the *Staubitz-Schreber* Case.

**b) Evaluation of practices**

In relation to the burden of proof, should the effective COMI be challenged, it seems a ***good practice*** –consistent with the regulation– that the burden of proof rests with the challenging party[126]. However, there appears to be ***room for development of best practices*** where it is the court, *ex officio*, that questions this element based on procedural behaviours of the parties[127]. The lack of challenge of the parties should not bind the court and should not limit its duty to verify its jurisdiction.

Always connected with evidentiary and proof rules, it stems that the debtor is not obliged to inform the court of previous re-allocation of the COMI. It appears that a ***good practice that could be developed*** by courts

[121] Cass. 26 maggio 2016, n. 10925, *Inpex srl ltd* c. *Claris Factor S.p.A. e altri*, cit.; Cass. 11 marzo 2013, n. 5945, *A. s.p.a.* c. *Fall. S. s.r.l.*, cit., and Consiglio di Stato sez. VI 25 gennaio 2007, n. 269, *Bank of America N A* c. *Min. attività produttive*, cit.

[122] Cass. 11 marzo 2013, n. 5945, *A. s.p.a.* c. *Fall. S. s.r.l.*, cit., and Corte appello Bologna 18 luglio 2014, *Citibank N A* c. *Soc. Parmalat fin.*, cit.

[123] Cass. 11 marzo 2013, n. 5945, *A. s.p.a.* c. *Fall. S. s.r.l.*, cit.

[124] T.A.R. Roma sez. III 16 luglio 20074, n. 6998, *Eurofood IFSC Ltd. e altro* c. *Min. attività produttive e altro*, in *Dejure*.

[125] Cass. 11 marzo 2013, n. 5945, *A. s.p.a.* c. *Fall. S. s.r.l.*, cit., and Corte appello Bologna 18 luglio 2014, *Citibank N A* c. *Soc. Parmalat fin.*, cit.

[126] Cass. 26 maggio 2016, n. 10925, *Inpex srl ltd* c. *Claris Factor S.p.A. e altri*, cit.

[127] Cass. 11 marzo 2013, n. 5945, *A. s.p.a.* c. *Fall. S. s.r.l.*, cit. (in relation to the difficulties connected to service of documents in the place of new seat).

and parties in general is of immediate full disclosure of previous re-allocations of the COMI.

In the second place, regarding the possibility to determine that a re-allocation of the COMI is ineffective for the purposes of international jurisdiction, Italian courts appear in general to have adopted the solutions of the CJEU, which prescribes that the presumptions in articles 3 InsR and InsRRec can be rebutted from a holistic analysis that shows through elements recognisable by third parties that the centre of main interests is located in another State[128]. Nonetheless, there appears to be ***room for enhancement of the practice*** at least under two points of views. The first concerns the factual[129] nature of COMI. Practitioners highlight uncertainties in the identification of this element, and call for clearer and more detailed guidelines (whereas a "crystallization"[130]

[128] CJEU 20 October 2011, *Interedil Srl, in liquidation* v *Fallimento Interedil Srl and Intesa Gestione Crediti SpA*, Case C-396/09, in *electronic Reports*, and CJEU 24 May 2016, *Leonmobili Srl and Gennaro Leone* v *Homag Holzbearbeitungssysteme GmbH and Others*, Case C-353/15, cit.

[129] STARACE, *La disciplina comunitaria delle procedure di insolvenza: giurisdizione ed efficacia delle sentenze straniere*, in *Rivista di diritto internazionale*, 2002, p. 295, at p. 300, and there fn 11. Cf. also CRAWFORD, CARRUTHERS, *International Private Law: A Scots Perspective*, Edinburgh, 2015, p. 656; MCCORMACK, *Something Old, Something New: Recasting the European Insolvency Regulation*, in *The Modern Law Review*, 2015, p. 121, at p. 129, and BEAUMONT, MCELEAVY, *Anton & Beaumont: Private International Law*, Edinburgh, 2011, p. 1100 ff. *Contra*, BENEDETTELLI, *«Centro degli interessi principali» del debitore e forum shopping nella disciplina comunitaria delle procedure di insolvenza transfrontaliera*, cit., p. 520 (arguing that what is "interests" should be determined by substantive law, as in the A. view it would not be advisable to use a connecting criterion such as the main interests that are completely independent from the substantive insolvency law they render applicable). See also LEANDRO, *Il ruolo della lex concursus nel Regolamento comunitario sulle procedure di insolvenza*, Bari, 2008, p. 85 ff., noting that «[…] *la nozione di centro degli interessi principali del debitore [consiste] in una nozione economica che, in quanto tale, ha natura squisitamente fattuale, ma il cui accertamento nel caso concreto può dipendere da valutazioni giuridiche. Tali valutazioni hanno dunque carattere meramente strumentale in quanto servono per le indagini di fatto riferite alla determinazione del predetto centro*».

[130] Even though some might suggest a crystallization of the factual elements to determine the existence of the COMI, so as to have the same elements being evaluated in all the different Member States, it does not appear that such a solution would indeed be a best practice consistent with the legal framework of the uniform rules. These, as other private international law instruments, have adopted a factual element that is suitable to adapt legal concepts to multidimensional realities. Erasing such flexibility would possibly be against the intentions of the regulation, whose aim is to ensure jurisdiction for main proceedings to courts of the State of the real seat of the company. Nonetheless, on the necessity to seek clearer solutions in comparison to the text of the InsR, see KINDLER, *Crisi dell'impresa e insolvenza transnazionale alla luce del*

could not be appropriate, even though the regulations call for predictability[131]) to be followed by competent authorities and that are uniform throughout the different Member States. In this sense, under the second point of view, it seems that courts, after recalling the general principle, have also taken into consideration elements such as the difficulty to serve documents in the new State, or the retention of the habitual residence of the manager in the previous State. Whilst these might be, to some extent, elements recognizable by third parties, as recently recognized by the *Corte di cassazione*[132], it appears that such elements must only be invoked by courts *ex abundantia cautela*. This practice would be consistent with the general trend, under domestic law[133], to not exercize jurisdiction over foreign companies that do not carry out structured activities within the territory. All in all, in this delicate evaluation, courts should refrain from an over simplistic approach that could, and has in the past, led to localize almost automatically the COMI at the place of administration and of managerial decisions (regardless of whether the will of the company is effectively expressed to the public),

*Regolamento n. 1346/2000. Verso una riforma della competenza internazionale?*, in CARBONE (ed.), *L'Unione europea a vent'anni da Maastricht: verso nuove regole*, Napoli, 2013, p. 141, p. 143 ff.

[131] ISRAËL, *European Cross-Border Insolvency Regulation*, cit., p. 258.

[132] Cass. 23 marzo 2017, n. 7470, *S.* c. *F.*, in *Dejure*, arguing that «*Gli altri indicatori, pure rinvenuti dalla giurisprudenza di legittimità coerentemente con quanto affermato dalla Corte di Giustizia al riguardo, consistenti, nell'iscrizione nel registro delle imprese estero (S.U. 3598 del 2009); nella difficoltà di procedere alla notificazione del ricorso per fallimento dovuta all'irreperibilità della società (S.U. 15880 del 2011), sono stati presi in esame dalle pronunce sopra illustrate unitamente ad altri indicatori idonei a misurare l'effettività del trasferimento dell'attività d'impresa e la continuità della stessa sotto il profilo direzionale e gestionale. Essi, pertanto, non costituiscono, come sostenuto nel ricorso e nella memoria di parte ricorrente, indici univoci della corrispondenza della sede legale con quella effettiva ma, al contrario, al pari della cittadinanza estera dell'amministratore e della prefigurazione di un'attività d'impresa anche presso la nuova sede, devono essere valutati dal giudice della giurisdizione in modo globale e complessivo, in modo da poter far emergere il carattere formale o sostanziale dell'adeguamento eventualmente effettuato dalla società rispetto agli indici elaborati dalla giurisprudenza della Corte di Giustizia e di legittimità al fine di accertare la corrispondenza della nuova sede legale con la sede effettiva o la fittizietà del trasferimento*».

[133] Cass. 22 marzo 1933, *Volpe* c. *Ditta Parravicini*, cit., and Tribunale Genova 8 giugno 2000, cit.

as this might identify the "*main centre of interests*" rather than a "*centre of main interests*"[134].

In the third place, the evolution of practices regarding the ***determination of companies part of a group*** should also be assessed: as seen, there has been a lesser formalistic approach than the one adopted in *Eurofood*. Following *Interedil* and *Rastelli*, and the Italian case law that extended the rebuttal of the presumption from "ghost companies" to scenarios in which the COMI is recognizably in another State could foster a possible temptation for the managers to forum shop. Less formalism might indeed lead parties that foresee a season of economic troubles to relocate the place of managerial decisions, and ultimately allow themselves to choose the law applicable to the procedure[135]. In this scenario, the opening of secondary procedures for the protection of local creditors thus becomes of fundamental importance.

It also appears that both domestic ***courts*** (as they did interpreting national provisions), and the Court of Justice ***should clearly state that party autonomy is of no relevance*** in such a matter.

## 2.IV. Control of Jurisdiction

Whereas in Italy it was never questioned that courts had to determine their international jurisdiction under the InsR, the issue has emerged – and has been solved – with regard to the specific insolvency proceedings of "Amministrazione Straordinaria"[136]: where the decision to start the procedure is a competence of the Ministry for economic development, the insolvency status is subsequently declared by the court. This led to the question: which party was under the obligation to verify international jurisdiction (and whether the decision of the Ministry was binding upon the court). Whilst some decisions argue that the Ministry

[134] How in the context of such insolvency proceedings Italian courts the COMI in Italy, place of the administrative seat, without giving particular elements to substantiate the findings, see BENEDETTELLI, *«Centro degli interessi principali» del debitore e forum shopping nella disciplina comunitaria delle procedure di insolvenza transfrontaliera*, cit., p. 513 f.

[135] MONTELLA, *La Corte di Giustizia e il COMI: eppur (forse) si muove!*, in *Ilfallimentarista.it*.

[136] Tribunale Roma 14 agosto 2003, cit.

Decree was not a "decision on the opening of the procedure"[137] (with no duties regarding the control of jurisdiction), the State Council has differently settled the issue, arguing that the Ministerial Decree at hand is a "decision opening an insolvency procedure". The Ministry, therefore, has to verify the international jurisdiction, and the localization of the COMI must not subsequently be carried out by courts called to declare the insolvency of the company[138].

## 2.V. Secondary and territorial proceedings: national practices and their evaluations

There has been little doubt in the case law that territorial procedures can be opened regardless of the existence of a principal one in the State of COMI[139], and that secondary proceedings (sometimes seen by practitioners as ontologically pursuing the interests of local creditors[140]) can only be applied for in the State that is not the State of the principal procedure[141]. Problems however might arise in the context of secondary procedures in the context of a group of companies. Should a foreign court determine the COMI of a company in its State, Italian courts[142] are prevented from opening a principal procedure. Italian courts have nonetheless argued that a State may be left with the possibility of opening a secondary procedure, regardless of whether a "formal" establish-

[137] Cass. 3 ottobre 2011, n. 20144, *D.G.* c. *Soc. Equitalia Gerit e altro*, cit. Cf. Cass. 18 aprile 2013, n. 9414, *Gelfusa ed altro* c. *Fall. Centralconsulting Srl ed altro*, cit.

[138] Consiglio di Stato sez. VI 25 gennaio 2007, n. 269, *Bank of America N A* c. *Min. attività produttive*, cit.

[139] Tribunale Lodi 27 settembre 2002, *Fall. soc. Dam Italia*, in *Il Diritto fallimentare e delle società commerciali*, 2005, II, p. 975.

[140] However, stressing that useless secondary proceedings would run against the *effet utile* of the regulation, LEANDRO, *Amending the European Insolvency Regulation to Strengthen Main Proceedings*, in *Rivista di diritto internazionale privato e processuale*, 2014, p. 317, at p. 321.

[141] Tribunale Milano sez. II 17 dicembre 2009, n. 15164, *Industrie arti grafiche G. V.* c. *C. Service*, cit.

[142] For example, opening -at the seat of the "mother company"- principal proceedings against 19 European companies part to a group, see High

Court of Justice (England & Wales), 2009, in the *Nortel* case.

ment has been opened in that State, since the relevant notion of "establishment" is a factual element that rests upon "human means and goods". In this sense, where all the elements of a company are located in one State and the principal procedure is opened in another State because the COMI is identified with the COMI of the other company[143], the State is entitled to open a secondary procedure that interests the assets of the company in the State of the secondary procedure – which, in the case at hand *de facto* interests all of the assets of the company[144].

The judicial practice at hand has to be carefully evaluated, in as much as it appears to be a "reaction" of a given legal system to the impossibility of contesting the determination of the COMI made by courts of another Member State – all of which are bound by the principle of mutual trust. In particular, this appears one of the few cases where the secondary procedures limit all the powers of the main liquidator appointed by the court of the principal procedure. In this sense, **the practice raises some concerns** as, if further developed, might be construed as weakening mutual trust, and possibly "annul" all effects of foreign decisions that move freely within the European judicial space. However, their possibility to start a local procedure cannot be denied to local creditors. Given the complexity of the specific case, it is believed that – should a similar case arise again – the first ***best practice to be upheld*** is to ask the Court of Justice of the European Union for a preliminary ruling on the matter on how the provisions of the InsRRec should be interpreted and applied. In the second place, the concerned courts should work in strict cooperation, possibly appointing the same person as main and secondary liquidator.

[143] Noting how this is legitimate under the case law of the Court of Justice, which defends the corporate veil in cases of companies part of a group, but allows for the identification of the company's COMI at the COMI of the holding, VAN CALSTER, *COMIng, and Here to Stay: The Review of the European Insolvency Regulation*, in *European Business Law Review*, 2016, p. 735, at p. 746.

[144] Cass. 29 ottobre 2015, n. 22093, *Soc. Illochroma Italia* c. *S.*, in *Fallimento*, 2016, p. 829.

## 2.VI. Effects of recognition: practice and its evaluation

Effects related to decisions on the opening of the procedure are that courts of other Member States are prevented from questioning the jurisdiction of the court of origin by reassessing the COMI[145], (if the foreign procedure is listed in Annex I of the InsR[146]), or from verifying the existence of any rebuttal of the coincidence between the place of registration and of the COMI[147]. With the consequence that a State may only be left with the possibility of opening a secondary procedure[148] (even if this should interest the whole assets of the procedure[149]).

Additionally, barring courts of a Member State from re-evaluating the position of another European court, Italian courts have also argued that where the foreign court of an EU Member State opens an insolvency procedure, excluding that its jurisdiction derives from the InsR, the Italian court cannot come to a different conclusion when asked to open a secondary proceedings – the Italian court being bound by the evaluation of the applicability of the InsR made by that other court[150].

Recognition[151] is nowadays also recognized to foreign decisions provisionally appointing a liquidator that is retroactively confirmed by the foreign court even if, in between the provisional appointment and the subsequent confirmation, Italian courts have opened (in violation of the InsR) an insolvency procedure[152].

[145] Cass. 14 marzo 2008, n. 9743, *Soc. Gabriel Tricot* c. *Fortis Banque SA*, in *Fallimento*, 2008, p. 1149.

[146] Consiglio di Stato sez. VI 25 gennaio 2007, n. 269, *Bank of America N A* c. *Min. attività produttive*, cit.

[147] Cass. 29 ottobre 2015, n. 22093, *Soc. Illochroma Italia* c. *S.*, cit.

[148] Cass. 29 ottobre 2015, n. 22093, *Soc. Illochroma Italia* c. *S.*, cit.

[149] Cass. 29 ottobre 2015, n. 22093, *Soc. Illochroma Italia* c. *S.*, cit. The court argued that the secondary exclusive procedure is not against the principle of recognition of the opening of a principal procedure.

[150] Tribunale Milano sez. II 17 dicembre 2009, n. 15164, *Industrie arti grafiche G. V*. c. *C. Service*, cit.

[151] On which in general see CONSALVI, *The Regime For Circulation of Judgements Under The EC Regulation on Insolvency Proceedings*, cit.

[152] Consiglio di Stato sez. VI 25 gennaio 2007, n. 269, *Bank of America N A* c. *Min. attività produttive*, cit. *Contra*, before the decision of the Council of State, T.A.R. Roma sez. III 16

Following recognition on the opening of a procedure, the role of the principal liquidator is recognized, and individual enforcement[153] or provisional[154] actions cannot be lodged with courts, or continued. Additionally, it must be pointed out the ground to refuse recognition and enforcement under the InsR has not been significantly invoked, nor applied in practice, has also confirmed by the public consultation with practitioners.

All the ***practices above appear to be consistent*** with the goals of judicial cooperation. In this sense, there appears to be little necessity for significant improvement of the uniform rules.

## 2.VII. Applicable law

As regards the applicable law[155], it is settled in the Italian case law that the powers of the liquidator are governed by the law governing the insolvency declaration[156]. The same has been recognized for insolvency claw-back actions[157] under the consideration that such actions are functional to the protection of the *par condicium creditorum*, and thus should be governed by the same law governing the insolvency proceeding[158].

Nonetheless, with specific regard to claw-back actions, courts have excluded –under art. 13 InsR– that a bankruptcy claw back action can

luglio 20074, n. 6998, *Eurofood IFSC Ltd. e altro* c. *Min. attività produttive e altro*, cit., and Tribunale Parma 20 febbraio 2004, *Soc. Eurofood* c. *Liquidatore soc. Eurofood*, cit.

[153] Tribunale Venezia 23 dicembre 2010, *First cruise one corp.* c. *Delphin maritime Ltd.. e altro*, in *Il Diritto marittimo*, 2011, p. 619.

[154] Tribunale Venezia 24 febbraio 2011, *First cruise one corp.* c. *Delphin maritime Ltd.. e altro*, in *Il Diritto marittimo*, 2011, p. 622.

[155] On which see DANIELE, *Legge applicabile e diritto uniforme nel Regolamento comunitario relativo alle procedure di insolvenza*, in *Rivista di diritto internazionale privato e processuale*, 2002, p. 33.

[156] Cass. 29 luglio 2005, n. 15946, *Soc. Adm Import* c. *Fall. Miller Erich*, in *Il fallimento*, 2006, 3, p. 267.

[157] Cass. 4 agosto 2006, n. 17706, *Allgauland Kasereien GmbH* c. *Fall. soc. Grandis grandi magazzini discount*, cit.

[158] Cass. 7 febbraio 2007, n. 2692, *Banca agricola commerciale della Repubblica di San Marino* c. *Fall. Mirone*, cit.

be started if the contract subject to the action is governed by a foreign law under which no instrument to revoke it is given. This exception to the application of the *lex concursus* has been extensively interpreted, so as to make sure that no means to revoke the contract is given both under the *lex contractus* and the *lex concursus* of the other Member State. In such cases the burden of proof rests with the party invoking the law of another Member State as applicable to claw-back actions, and in no way does art. 13 also determine the lack of jurisdiction of the competent court in favor of the courts of the Member State whose law is applicable to the claw-back action[159].

## 2.VIII. Cooperation and communication: (lack of *best*) *practices*

### a) Current practices

From the Italian perspective, due to civil law's constraints, such a field has not consistently been addressed in the case law (even though a general framework protocol has been drafted between the major palyerfields in Italy, and France[160]). Courts are not used to entering into court-to-court agreements, nor to give Protocols the legal status of a judicial order (except for the more common cases with tax agencies). This being said, it appears undeniable that –also in light of the new rules in the InsRRec– courts will be less hesitant to seek cooperation with other courts. The issue will be the type of cooperation they are allowed by their respective law to enter into. Nonetheless, it appears that also where no cross-border judicial formal cooperation to coordinate hearings, exchange of information, is allowed, courts, on a personal and on

[159] Tribunale Roma sez. fallimentare 7 marzo 2012, *Alitalia Linee Aeree Italiane s.p.a. in A.S.* c. *Credit Suisse International*, in *ilfallimentarista.it*.

[160] *Protocollo per rafforzare la collaborazione tra i professionisti impegnati in procedure di insolvenza pendenti contestualmente nella Ue Roma 7/5/2010* has been signed bewteen the Consiglio nazionale forense, il Consiglio nazionale dei dottori commercialisti, and the Conseil National des administrateurs judiciaires et des mandataires judiciaires, appeared, in *Rassegna forense*, 2010, p. 167 ff, on which see CHERUBINI, *La Guida operativa relativa alle procedure d'insolvenza transnazionali disciplinate dal Regolamento UE n1346/2000 ed il Protocollo d'intesa sottoscritto tra professionisti italiani e francesi: prime riflessioni*, in *Rassegna forense*, 2010, p. 283.

a case by case basis, could follow a good practice of informal consultation with other courts.

Also protocols between liquidators and administrators are not particularly widespread in Italian practice –stemming from the consultation with practitioners, only few have experience of such formal (even though flexible) agreements. On the contrary, some have more informal communications with their counterparts in foreign proceedings with a number of difficulties, in particular, related to communication and language.

**b) Evaluation of practices**

In this sense, there appears to be ***significant room for implementation of good and best practices from the Italian perspective***: courts should at least seek informal communication with other courts, and, if deemed reasonable, seek and promote informal non-binding coordination for the management of the parallel procedures. At the same time, insolvency office holders should also, again to the extent possible and within the limits of their duty to confidentiality, seek at least informal communication, and possible informal cooperation.

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# Latvian Legislative Assessment Report on Cross-Border Insolvency Proceedings: Detecting Best Practices

**DANA RONE**

SUMMARY: 1. Introduction. – 2. Insolvency proceedings in Latvia. – 3. Development of Latvian law with regard to international insolvency. – 4. International Jurisdiction for the opening and the conduct of principal proceedings. – 5. Recognition and enforcement of decisions. – 6. International agreements. – 7. Appointment of insolvency administrators.

## 1. Introduction

With 1.92 million people residing in the country [1], Latvia takes 24th place in the European Union in terms of the amount of inhabitants, and is just a little more populated than Estonia, Cyprus, Luxembourg and Malta. Latvia's population is almost 42 times smaller than Germany, 34 times smaller than France, 33 times smaller than Great Britain and 31 times smaller than Italy. Continuing with statistics, the main countries of export for Latvian merchants are the markets of Lithuania, Estonia and Russia. Regarding import, the majority is from Lithuania, Estonia and Poland[2]. This directly impacts the legal environment in which insolvency law is applicable.

[1] See. Data published in the: http://countrymeters.info/en/Latvia

[2] See. Central Statistics Bureau of Latvia, data published: http://www.csb.gov.lv/sites-/default/files/nr_32_areja_tirdznieciba_preces-partneri_13_03q_lv_0.pdf.

## 2. Insolvency proceedings in Latvia

### a) National Laws in the Insolvency Sector

Normative enactments, in the field of insolvency law, have undergone significant changes in the years since the country re-gained independence on May 4, 1990. Needless to say, there was no commerce and thus, no insolvency law in the years of the Soviet Union. The insolvency law was therefore adopted in a rush to cover this new legal sector, previously unexplored for two generations. Therefore, legislative history of insolvency law in Latvia started on December 3, 1991, when the first law regulating insolvency issues was adopted. The law On the Insolvency and Bankruptcy of Undertakings and Companies (*Par uzņēmumu un uzņēmējsabiedrību maksātnespēju un bankrotu*) came into force on January 1, 1992 [3] and it had a rather short time of force until October 12, 1996. This law had three amendments during the time of its force.

The next law regulating insolvency issues named On the Insolvency of Undertakings and Companies (*Par uzņēmumu un uzņēmējsabiedrību maksātnespēju*) was adopted on September 12, 1996 and it came into force on October 12, 1996[4]. This law experienced 17 significant amendments made by the legislator in the period of time from April 17, 1997 to December 19, 2006.

Further, the Insolvency Law was adopted on November 1, 2007 and it came into force on January 1, 2008 (hereinafter – Insolvency Law 2008)[5]. The Insolvency Law 2008 had a very short time of action, lasting just 3 years. At the same time, this law managed to have one amendment during its time of force. The aim of the amendment adopted on June 11, 2009 was to promote companies who are facing short term financial difficulties to choose legal protection proceedings instead of insolvency process, as well as minimize financial burden for natural persons applying for personal insolvency.

[3] Published in the official gazette of Latvia – "Ziņotājs", 16.01.1992. No. 2/3.

[4] Published in the official gazette of Latvia – "Latvijas Vēstnesis", 02.10.1996. No. 165 (650).

[5] Published in the official gazette of Latvia – "Latvijas Vēstnesis", 22.11.2007. No. 188 (3764).

The current Insolvency Law (*Maksātnespējas likums*) was adopted on July 26, 2010 and it came into force on November 1, 2010[6]. By now it has been amended 11 times – 8 times by laws adopted by the Latvian parliament *Saeima* and 3 times by judgments of the constitutional court of Latvia *Satversmes tiesa*.

The aim of the first amendment made on October 4, 2010 and the third amendment made on February 23, 2012 to the current Insolvency Law was to refine minor drafting and deadline issues.

The second amendment to the current Insolvency Law was made by the judgment of the constitutional court of Latvia adopted on November 22, 2011 in the case No. 2011-04-01. The constitutional court declared as void transitional deadline articles in the Insolvency Law. These articles related to education and work experience requirements of the insolvency office holders, or as named in Latvia – insolvency administrators.

The forth amendment to the current Insolvency Law was made by the judgment of the constitutional court of Latvia adopted on April 20, 2012 in the case No. 2011-16-01. The constitutional court declared Article 62 as void, part one of the Insolvency Law and Article 363.-2 part two of the Civil Procedural Law regarding obligation to pay monetary deposits for the insolvency process if the initiator of the insolvency process is an employee, whose only legal protection safeguard measure is a declaration of the employer as insolvent.

The aim of the fifth amendment made on July 9, 2013 to the current Insolvency Law was to exclude from the legal protection process the following participants of the finance and capital market: an insurance company, an insurance brokerage company, a regulated market organiser, an investment brokerage company, a depository, an alternative investment asset management company, an investment management company, a credit union, a credit institution, and a private pension fund.

To adjust the Insolvency Law for currency transition from Latvian lats (LVL) to European euro (EUR) the sixth amendment was made to

[6] Published in the official gazette of Latvia – "Latvijas Vēstnesis", 27.10.2010. No. 170 (4362).

the Insolvency Law on September 12, 2013, and they came into force on January 1, 2014 when Latvia fully joined the euro zone.

The aim of the seventh amendment [7] to the current Insolvency Law, made on September 25, 2014 was to postpone alienation of the property belonging to the debtor – natural person, in the case young children or other people requiring financial support reside with the debtor. Changes were also made to shorten the common period of insolvency process for natural persons.

The eighth amendment to the current Insolvency Law made on December 18, 2014 was adopted to approximate insolvency procedural terms and deadlines provided in the Insolvency Law and in the Civil Procedural Law.

The tenth amendment to the Insolvency Law made on February 19, 2015 was adopted together with other amendments made into Consumer Rights Protection Law [8] [Patērētāju tiesību aizsardzības likums]. The legislator initially intended to release natural persons from excessive financial burdens during insolvency process. However, as noted in the annotation to these amendments[9], insolvency practice gives evidence that in fact the debtor's financial conditions are not improved. Improvements would be possible only if there were no claims from non-secured creditors or if the claims from the non-secured creditors were recognized, but the debtor, while fulfilling a plan for extinguishing obligations, covers claims of non-secured creditors, as well as claims of secured creditors in the uncovered part. In any other case when the debtor lacks financial resources to cover the creditor's claims this norm in no way improves conditions of the debtor, because in that case the debtor allocated resources to cover claims of non-secured creditors instead of secured creditors, which, as a result significantly restricted rights of secured creditors, and such restriction can't be justified with the improvement of the debtor's financial conditions. Also particular

[77] The aim of the amendments is stated in the annotation to the law, available at the web site of the parliament of Latvia: http://titania.saeima.lv/LIVS11/SaeimaLIVS11.nsf/0/B6E41-6CBC60262CEC2257A8400210058?OpenDocument.

[8] Adopted on March 18, 1999. Published in the official gazette of Latvia – "Latvijas Vēstnesis" on 01.04.1999. No. 104/105 (1564/1565).

[99] Available at the web site of the parliament of Latvia: http://titania.saeima.lv/LIVS12/-SaeimaLIVS12.nsf/0/BC57B10607C97704C2257DE3003E75C3?OpenDocument.

amendments were made taking into consideration significant decrease of bank credits issued for natural persons for purchase and construction of the real estate. Banks were strongly against the so called principle of "keys on the table", and that also influenced the adopted changes. As a result, the principle of "keys on the table" would be transferred from the Insolvency Law to the Consumer Rights Protection Law, providing that this principle is applicable only if parties – the creditor and debtor – have explicitly agreed on it. More changes were made to the Insolvency Law by these amendments regarding length of the insolvency process for the natural persons. In comparison with Lithuania and Estonia, where insolvency process for natural persons lasted 4,5 – 5,5 years and 5 – 7 years at the moment of those amendments, the time in Latvia is limited to 6 months – 3 years[10]. More speedy terms of insolvency process in Latvia is one of the main factors why citizens of Lithuania tend to start their natural persons insolvency cases in Latvia[11].

The eleventh amendment to the current Insolvency Law was made by the judgment of the constitutional court of Latvia adopted on December 21, 2015 in the case No. 2015-03-01. The constitutional court declared as void article in the Insolvency Law and article in the law "On Prevention of Conflict of Interest in Activities of Public Officials" [12] [*Par interešu konflikta novēršanu valsts amatpersonu darbībā*] regarding prohibition for sworn advocates to work also as insolvency administrators. Nevertheless, a comment shall be made that after this judgment of the constitutional court the legislator later adopted a valid rule according to which all insolvency administrators in Latvia are state officials. Thus, sworn advocates may not unite fulfilment of both professions due to Article 4, part one, Clause 26 of the law "On Prevention of Conflict of Interest in Activities of Public Officials".

The twelfth and final amendment for the moment of completion of this article was adopted on December 22, 2016 and was the most volu-

[10] Article 155 of the Insolvency Law.

[11] See Āboliņš Jānis. Fiziskās personas maksātnespējas process tiesu prakses atziņās. – "Jurista Vārds". No. 16 (715). 17.04.2012.

[12] Adopted on April 25, 2002. Published in the official gazette of Latvia – "Latvijas Vēstnesis" on May 5, 2002. No. 69 (2644).

minous amendment into the Insolvency Law. Initiative for these amendments partly came from the cross-border research made by auditing company "Deloitte" on the risks of malicious insolvency in Latvia[13]. Amendments provided a new model of admission of insolvency administrators to the profession and a significantly stronger supervision system on the performance of tasks of the administrators. Inter alia disciplinary liability of insolvency administrators was overviewed and regulated by the Insolvency Law.

Civil procedural order for insolvency process and legal protection process is provided in the Civil Procedure Law (hereinafter – CPL) adopted on October 14, 1998[14]. The CPL provides for fixed state fees to be paid to start insolvency procedure in the court. A state fee for submission of application in a case regarding insolvency proceedings of a legal person submitted by a creditor is EUR 355.72, for an application in a case regarding insolvency proceedings of a legal person or natural person submitted by a debtor – EUR 71.14, for an application in a case regarding legal protection proceedings – EUR 142.29, for an application in a case regarding insolvency or liquidation of a credit institution – EUR 355.72[15]. Equally a state fee in the amount of EUR 21.34 shall be paid if a complaint is submitted to the court in cases of legal protection proceedings, for complaints in cases of insolvency proceedings in relation to a decision of the meeting of creditors, in regard to complaints in relation to a decision or actions of an administrator of insolvency proceedings, in regard to complaints regarding decisions of the Insolvency Administration, also the performance of the activities laid down in Articles 33 and 37 of the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings[16].

[13] As stated in the annotation of the amendments in the web site of the parliament of Latvia: titania.saeima.lv/LIVS12/SaeimaLIVS12.nsf/0/46F0710633B835A1C22580650038AEF9?OpenDocument.

[14] Published in the official gazette of Latvia – "Latvijas Vēstnesis" on 03.11.1998. No. 326/330 (1387/1391).

[15] Article 34, part 1, point 3 of the Civil Procedure Law.

[16] *Ibid*, point. 13.

As provided in Article 43, part one, point 10 of the CPL, the insolvency administrators are exempted from obligation to pay court expenses – state fees – in claims that are brought for the benefit of persons in respect of which insolvency proceedings of a legal person and insolvency proceedings of a natural person have been announced, as well as when submitting an application in a case regarding insolvency proceedings of a legal person.

Insolvency cases are reviewed in courts of Latvia according to special rules of procedure contained in Chapters 45.-1, 46, 46.-1, 46.-2 and 47 of the CPL.

**b) National By-Law in the Insolvency Sector**

Several Cabinet of Ministers regulations are adopted on the basis of Insolvency Law.

a) On October 26, 2010 Cabinet regulations No. 1001 were adopted "On the Order how Insolvency Administration Chose and Suggest to the Court a Candidate of Insolvency Process Administrator" (hereinafter – Appointment Regulations)[17].

b) On October 26, 2010 Cabinet regulations No. 1005 were adopted "Rules on Order and Minimum Insurance Sum of the Mandatory Civil Liability Insurance of the Insolvency Process Administrator"[18].

c) On November 5, 2013 Cabinet regulations No. 1249 were adopted "Rules on Amount of Commercial Activity State Fee and the Amount of the Fee to be Paid in the Employee Claim Guarantee Fund for the Year 2014"[19].

d) On December 9, 2014 Cabinet regulations No. 751 were adopted "Rules on Amount of Commercial Activity State Fee and the

[17] Published in the official gazette of Latvia – "Latvijas Vēstnesis" on 29.10.2010. No. 172 (4364).

[18] Published in the official gazette of Latvia – "Latvijas Vēstnesis" on 29.10.2010. No. 172 (4364).

[19] Published in the official gazette of Latvia – "Latvijas Vēstnesis" on 08.11.2013. No. 219 (5025).

Amount of the Fee to be Paid in the Employee Claim Guarantee Fund for the Year 2015"[20].

e) On February 24, 2015 Cabinet regulations No. 88 were adopted "Order How Deposits are Paid in and out in the Legal and Natural Person Insolvency Process"[21].

f) On February 24, 2015 Cabinet regulations No. 89 were adopted "Order How Deposits are Paid in and out, if During Insolvency Process Such Debtor's Assets are Sold, Which had been as Security for the Secured Creditor Claim, whose Rights to Claim Depend on Condition"[22].

g) On April 19, 2016 Cabinet regulations No. 247 were adopted "Rules about Review on Performance of Insolvency Process Administrator and its Filling Order"[23].

h) On December 20, 2016 Cabinet regulations No. 836 were adopted "Rules on Amount of Commercial Activity State Fee for the Year 2017"[24].

i) On March 28, 2017 Cabinet regulations No. 169 were adopted "Rules about Office Licence of the Insolvency Administration Officials and Employees"[25].

j) On May 3, 2017 Cabinet regulations No. 233 were adopted "Disciplinary Terms of the Persons Supervising Legal Protection Process and Insolvency Process Administrators"[26].

[20] Published in the official gazette of Latvia – "Latvijas Vēstnesis" on 19.12.2014. No. 253 (5313).

[21] Published in the official gazette of Latvia – "Latvijas Vēstnesis" on 26.02.2015. No. 40 (5358).

[22] Published in the official gazette of Latvia – "Latvijas Vēstnesis" on 26.02.2015. No. 40 (5358).

[23] Published in the official gazette of Latvia – "Latvijas Vēstnesis" on 29.04.2016. No. 83 (5655).

[24] Published in the official gazette of Latvia – "Latvijas Vēstnesis" on 23.12.2016. No. 251 (5823).

[25] Published in the official gazette of Latvia – "Latvijas Vēstnesis" on 28.03.2017. No. 66 (5893).

[26] Published in the official gazette of Latvia – "Latvijas Vēstnesis" on 09.05.2017. No. 89 (5916).

k) On May 30, 2017 Cabinet regulations No. 286 were adopted "Rules on Record Keeping for Persons Supervising Legal Protection Process and Insolvency Process Administrators"[27].

l) On May 30, 2017 Cabinet regulations No. 287 were adopted "Pricelist and Payment Order of Services Provided by the Insolvency Administration"[28].

m) On May 30, 2017 Cabinet regulations No. 288 were adopted "Order of Learning and Examination of the Candidates of the Insolvency Process Administrators, Order of Work of Examination Commission and Order of Appointment, Recall, Release and Revoke from the Position of the Insolvency Process Administrators"[29].

The Cabinet regulations in a detailed for provides for organization of work of the administrators and their supervision.

**c) Assessment**

The foregoing outline is evidence that, in the development of Latvian insolvency law, the legislator rapidly follows urgent needs in the society for better insolvency process regulation. However, the speed in which these amendments are made and at times lack in-depth argumentation and legal debate before adoption of amendments lead to an ever further necessity to correct previous mistakes in legislation.

At the moment of completion of this report, there have been few cross-border insolvency cases for Latvian enterprises with their assets abroad and cross-border insolvency cases for foreign enterprises with the assets in Latvia.[30]. There are slightly more cross-border insolvency

[27] Published in the official gazette of Latvia – "Latvijas Vēstnesis" on 02.06.2017. No. 108 (5935).

[28] Published in the official gazette of Latvia – "Latvijas Vēstnesis" on 02.06.2017. No. 108 (5935).

[29] Published in the official gazette of Latvia – "Latvijas Vēstnesis" on 02.06.2017. No. 108 (5935).

[30] Statistics about cross-border insolvency processes of natural persons are not gathered yet according to: Bērziņš Gaidis. Pēcvārds jeb dažos vārdos par J. Āboliņa rakstā "Fiziskās personas maksātnespējas process tiesu prakses atziņās" paustajām tēzēm. – Jurista Vārds. 01.04.2013.

issues for natural persons from abroad, mainly from Lithuania[31], and for Latvian citizens in the United Kingdom. The case law so far does not reveal problematic legal issues, but instead work with practical interpretation issues of national Insolvency Law.

## 3. Development of Latvian law with regard to international insolvency

The Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (InsR) was the first cross-border normative enactment of such a scale which for the first time determined procedural rules of cross-border insolvency. For the Republic of Latvia the InsR became binding from the moment Latvia became a Member State of the European Union – namely, on May 1, 2004. With the adoption of the Insolvency Regulation II [32] (hereinafter – InsRRecast) the national law are further amended especially in the civil procedural order.

[31] See., for instance decision on the Appeal Court of Lithuania, Civil Case Division No. 2T-249/2011 as of October 3, 2011. See also Latvian court decisions where insolvency processes for Lithuanian citizens with COMI in Latvia were started: Talsi district court decision in case No. C36054411 on September 12, 2012; Riga city Vidzeme district court judgments in cases No. C30276315 and C30276215 on January 12, 2015; Ogre district court judgment in case No. C24194514 on January 21, 2015; Limbaži district court judgment in case No. C21051415 on June 19, 2015; 2015; Limbaži district court judgment in case No. C21070015 on November 10, 2015; Limbaži district court judgment in case No. C21072415 on December 3, 2015; Limbaži district court judgment in case No. 21030816 on March 31, 2016; Limbaži district court judgment in case No. C21036116 on May 10, 2016; Limbaži district court judgment in case No. 21040116 on June 13, 2016; Limbaži district court judgment in case No. C21046816 on August 9, 2016; Limbaži district court judgment in case No. 21048116 on August 24, 2016; Limbaži district court judgment in case No. C21065816 on December 22, 2016; Limbaži district court judgment in case No. C21020617 on January 17, 2017; Limbaži district court judgment in case No. C20121817 on January 23, 2017; Limbaži district court judgment in case No. C14030217 on February 28, 2017; Limbaži district court judgment in case No. C21032317 on March 30, 2017; Limbaži district court judgment in case No. C21038317 on June 19, 2017; and Limbaži district court judgment in case No. C21063716 on December 2, 2016.

[32] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings(recast).

## 4. International Jurisdiction for the opening and the conduct of principal proceedings

Articles 363.-1 and 363.-22 of the CPL provide for norms on international jurisdiction. As provided in Article 3(1) of the InsRRecast, which is a directly applicable legal instrument, main insolvency proceedings shall be started in the court of that Member State, within the territory of which the centre of debtor's main interests (hereinafter – COMI) is situated. Equally, the rule continued in Article 3(1) of the InsRRecast that the centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties is not repeated or rephrased in the Insolvency Law. Thus, Latvian courts, when establishing COMI, follow the norm provided in the InsRRecast. Regarding insolvency procedures for legal persons, Article 363.-1, part two of the CPL declares that "the case regarding the commencement of the insolvency proceedings laid down in Article 3(1) of InsR shall be examined by a court based on the location of the main interest centre of the debtor, but in the case of commencement of the insolvency proceedings laid down in Article 3(2) of this Regulation – based on the location of the debtor's undertaking (within the meaning of Article 2(h) of Council Regulation No 1346/2000)". Regarding insolvency procedures for natural persons, Article 363.-22, part two of the CPL provides that "the case regarding the commencement of the insolvency proceedings laid down in Article 3(1) of Council Regulation No 1346/2000 shall be examined by a court based on the location of the main interest centre of the debtor, but in the case of commencement of the insolvency proceedings laid down in Article 3(2) of this Regulation – based on the location of the debtor's undertaking (within the meaning of Article 2(h) of Council Regulation No 1346/2000)".

In the situations when the court discovers that the debtor´s COMI is situated within an EU Member State, international jurisdiction for the opening of an insolvency proceeding is governed by the InsRRecast. As the InsRRecast prevails Latvian law, regulation norms are of primary importance.

With regard to the insolvency of specifically regulated entities which are not covered by the InsRRecast, the Latvian normative enactments

provide special rules on international jurisdiction: Chapter X of the Latvian Law on Credit Institutions (*Kredītiestāžu likums*) regulates insolvency of banks and other credit institutions in the European Economic Area[33]. Unit G of the Insurance and Reinsurance Law (*Apdrošināšanas un pārapdrošināšanas likums*) determines the competent authority for the opening of insolvency proceedings concerning insurance companies[34].

## 5. Recognition and enforcement of decisions

The question about recognition of judgment of the Latvian court in insolvency matters, was first raised, when in June 2011 the first ever insolvency proceeding was completed in the citizen of Lithuania case[35]. At that time, there was no mechanism in the Republic of Lithuania for natural persons to undergo an insolvency process. Therefore, citizens of Lithuania were motivated to ask for insolvency proceedings in Latvia in the case they could submit evidence about fulfilment of criteria necessary for the commencement of the process. The first cross-border insolvency process for natural person reached its judgment on June 10, 2011 when Talsi city court announced insolvency proceedings for the citizen of Lithuania Mr Gitis J. The court *inter alia* ruled to make a prohibition writ in the public register of Lithuania "*Registrų centras*" on all real estates owned by the person, stating that any further activities are allowed only with a permission from the appointed insolvency administrator. When Mr Gitis J. requested the Appeal Court of Lithuania to recognize judgment of the Latvian court and to register prohibition in the public register, a partially positive decision was adopted on October 3, 2011 in the case No. 2T-249/2011 rejecting request on recognition and approving request of registration of prohibition in the public register.

[33] Adopted on October 5, 1995. Published in the official gazette of Latvia – "Latvijas Vēstnesis" on October 24, 1995, No. 163 (446).

[34] Adopted on June 18, 2015. Published in the official gazette of Latvia – "Latvijas Vēstnesis" on June 30, 2015, No. 124 (5442).

[35] See. Āboliņš Jānis. Fiziskās personas maksātnespējas process tiesu prakses atziņās. – "Jurista Vārds". No. 16 (715). 17.04.2012.

The Appeal Court of Lithuania ruled that decisions of courts of the European Union Member States and other documents to be fulfilled according to regulations of the EU shall be recognized in Lithuania, and it is allowed to fulfil them in conformity with EU regulations, Lithuanian civil procedural code and Lithuanian law on application of EU and international laws in the civil procedural sector. InsR provides for recognition and enforcement of the court's decision adopted in one EU Member State to start insolvency procedure and court decision regarding the insolvency procedures in another Member State. In this case, the Regulation (EC) No. 44/2001 (hereinafter – Brussels I) is applicable only in subsidiary – namely – in the amount where issues about starting of insolvency proceedings and recognition and enforcement of decisions in the insolvency cases are not regulated in the InsR.

Article 16 of the InsR, which is a special norm, provides that all decisions which start insolvency proceedings adopted by the court of the country to which the case is applicable, shall be recognized in other Member States from the moment the decision comes into effect in the country where procedure is started. Article 25 of the InsR explicitly provides that decisions on the beginning of insolvency proceedings as well as decisions connected with the insolvency process and termination of it shall be recognized without further formalities. In that way, the mutual trust principle between Member States is realised, which *inter alia* requires simplified recognition and enforcement of decisions adopted in these countries. Legal doctrine interprets this rule in a way that there is no necessity for specific recognition procedure regarding procedural decision of the court to start insolvency proceedings, namely, without need for either regular or simplified procedure. Such conclusion is reached on the basis that the claim to start insolvency proceedings is a claim about recognition, and adoption of the decision responding that claim imposes obligations as such. There is no need to recognize the fact which according to the EU legal norms is directly applicable and recognized as existing.

As already mentioned, decisions about beginning of insolvency proceedings shall be recognized according to Article 16 of the InsR, namely, automatic recognition principle is applicable. Article 25 of the InsR states that this rule is also applicable for recognition of other court

decisions connected with insolvency procedures. Therefore, recognition is not required for the part of the decision of the Latvian court regarding the order to make a prohibition writ in the public register "*Registrų centras*", so the property could be alienated only with explicit permission of the insolvency process administrator.

On the other hand, InsR does not provide that enforcement of decisions with whom insolvency procedure is started should be proceeded according to InsR or Brussels I regulation. The Appeal Court of Lithuania referred to the opinion of the Supreme Court of Lithuania, according to which, such decision is establishing facts, and therefore there is no need for enforcement[36]. Moreover, the enforcement procedure should not be provided. Therefore, in the particular case, part of the decision adopted on June 10, 2011 by the Talsi city court (Latvia) regarding the announcement of insolvency proceedings, establishes the fact and therefore there is no need for enforcement.

If there is a need to apply, in one Member State, the decision of the foreign court concerning the start of insolvency procedure or the decision of the court in an ongoing court procedure, the court of other Member State must check whether there was a decision of the court of other Member State to start insolvency proceedings, or was there a decision of the other court in the ongoing insolvency proceedings, and have these decisions came into effect.

However, the principle of automatic recognition of the decision in the insolvency proceedings does not include coercive enforcement of such decisions, if such decisions shall be executed. According to Article 25(1) of the InsR, the court decision which is recognized according to Article 16, about the beginning of the insolvency proceedings, shall be executed in conformity with the Brussels Convention as of September 27, 1968. In this case, the Lithuania citizen asks permission to execute part of the decision adopted on June 10, 2011 by the Talsi city court (Latvia) regarding the making of a prohibition writ in the public register "*Registrų centras*". This means that the court (in distinction, as it is, in the case of recognition of the court decision) shall resolve an issue about permission to enforce the decision in the insolvency procedure, and this

[36] As the Supreme Court of Lithuania ruled on February 12, 2007 in the civil case No. 3K-7-118/2007.

decision is not establishing facts, but is to be enforced. Brussels I Regulation replaces Brussels Convention 1968. Article 40 of the Brussels I Regulation provides that procedure regulating enforcement of decisions of the foreign court is set in the laws of that country, where the decision shall be enforced. In the Republic of Lithuania, it is regulated in the Lithuanian law on application of EU and international laws in the civil procedural sector. According to Article 4 of that law, such request is reviewed by one judge of the Appeal Court of Lithuania. If the request corresponds to requirements of form and contents stated in the Civil Procedure Law of Lithuania and the Lithuanian law on application of EU and international laws in the civil procedural sector, it is possible to enforce such decisions without examination as there are any grounds provided in the EU regulations when enforcement of decision could be rejected. Therefore, the court does not even express its opinion about the possible grounds of why Latvia's decision would not be enforceable. Due to the fact the request submitted to the Appeal Court of Lithuania to register a writ in the public register "*Registrų centras*" as provided by decision of the Latvian court meets requirement of form and contents of Lithuanian law, this part of the decision is enforceable.

This first and most significant decision of the Lithuanian court made solid grounds for next cross-border insolvency cases, where Latvian court decisions further went for enforcement to Lithuania, and where decisions from, mostly, the United Kingdom were sent to Latvia in the insolvency proceedings of natural persons[37].

## 6. International agreements

Latvia has not entered into international conventions covering insolvency proceedings. There are bilateral and multilateral treaties concluded on mutual legal assistance in judicial issues, civil cases included. However, insolvency matters are not subject to these treaties.

[37] See. to that effect clarifying answer from the State Insolvency Administration of Latvia in "Maksātnespējas administrācijas skaidrojumi un atziņas. 2008 – 2014". – Riga: Tiesu namu aģentūra, 2015, pp. 259 – 260. See also Riga city Vidzeme district court judgment in case No. C30542313 on July 15, 2013 regarding insolvency procedure started in Latvia with real estate auction to be approved for procedure in Bulgaria.

## 7. Appointment of insolvency administrators

Articles 13 – 18 of the Insolvency Law describe general requirements, restrictions, examination and further qualifications for candidates to become an administrator in Latvia. An insolvency administrator in a particular case, is a natural person who, according to Article 9 of the Insolvency Law, is appointed to the position of administrator and is therefore, a state official.

According to Article 363.-10 and Article 363.-26 of the CPL in the insolvency cases of natural or legal persons, a court immediately sends a true copy of the decision to initiate the case regarding insolvency proceedings to the Insolvency Administration. The Insolvency Administration proposes a candidate administrator to the court. After receipt of the proposal of the Insolvency Administration regarding the candidate for the position of the administrator, the judge assesses his or her compliance with the performance of the administrator's obligations in the relevant insolvency proceedings. A court appoints the candidate for the position of the administrator recommended by the Insolvency Administration as the administrator. Having found that restrictions on the performance of the administrator's obligations in the relevant insolvency proceedings exist for the candidate recommended by the Insolvency Administration, the judge takes a decision to refuse to appoint as the administrator the candidate for the position of the administrator and sends an invitation to the Insolvency Administration to recommend a new candidate for the position of the administrator.

In conformity with Article 19, part 2 of the Insolvency Law, the proposal of the Insolvency Administration for the court to appoint a candidate administrator is of a recommendatory nature and may not be contested or appealed in accordance with the procedures laid down in the Administrative Procedure Law.

According to the Appointment Regulations, the Insolvency Administration chooses a candidate from a list of administrators. A list of candidates is prepared after the candidate expresses his/her willingness to undertake the newcoming process. A list is kept electronically and the sequence is changed every year according to randomness principle. The Appointment Regulations explicitly provides the order how candidates are listed and after – chosen by the

Administration. Such regulations seems to be a well-working practice in Latvia.

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# Dutch Report on Cross-Border Insolvency Proceedings: Detecting Best Practices

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## 1. Rules Implementing the European Insolvency Regulation (EIR) and domestic Private International Law rules

### 1.1. Introduction

In the practice of international insolvency law in the Netherlands, the most important rules are those of the European Insolvency Regulation ("EIR"). However, the scope of the EIR is limited to the opening of insolvencies over persons or companies having their COMI in the EU

as well as issues of recognition and cooperation when insolvency proceedings are opened in an EU Member State. This still leaves ample room for the application of the domestic Dutch rules on private international law. Moreover, some provisions of the EIR need implementation into Dutch law. We open this section with a discussion of the written rules of cross-border insolvency in the Insolvency Law (paragraph 1.2). In paragraph 1.3 we will discuss the domestic private international law rules – in particular the rules on jurisdiction of the Dutch courts and the rules on recognition of foreign insolvencies. Special attention is being paid to the rules on transaction avoidance.

### 1.2. Rules implementing EIR and other rules relevant for cross-border insolvencies

Although the EIR as a Regulation has direct effect in the Netherlands, there are several provisions which can be seen as an implementation of the EIR ensuring its effectiveness.

Article 4 of the Insolvency Law (*Faillissementswet, hereafter Fw)* which contains rules on the content of the petition for insolvency, obliges the person filing the request for insolvency to include sufficient data to allow the court to assess its jurisdiction under the EIR. Article 6 Fw provides that when the court opens insolvency proceedings on the basis of the EIR, it should make explicit in its decision whether the procedure is a main procedure or a secondary procedure.[1]

The Insolvency Law further provides that requests under Article 33 EIR (Article 46 recast) in which a foreign administrator asks the court to stay the process of liquidation in a Dutch secondary procedure should be filed by a (Dutch) attorney.[2]

Article 6 Fw provides that if foreign main proceedings have been opened, the insolvency office holder (hereafter referred to as IOH) in those proceedings should be notified by the court clerk of the request for the opening of Dutch secondary proceedings and should be given

[1] See also below, on the *ex officio* application of the jurisdiction rules of the EIR.

[2] Article 5 sub 3 Fw: «*Verzoekschriften op de voet van artikel 33 van de verordening (EG) nr. 1346/2000 van de Raad van de Europese Unie van 29 mei 2000 betreffende insolventieprocedures (PbEG L 160) worden ingediend door een advocaat*» (Requests on the basis of Article 33 of Regulation 1346/2000 are submitted by an attorney at law).

the opportunity to make their position known to the court within a time frame to be specified by the court.

Article 14 Fw contains rules of the publication of the declaration of insolvency. Section 4 of this provision opens the possibility for the IOH to ask for publication of the information described in Article 21 EIR in four languages (Dutch, English, French and German).[3] This publication should take place in all instances in which an establishment in the meaning of Article 1 sub h EIR is located in the Netherlands. The court of The Hague is responsible for submitting the information on these (secondary) proceedings to the central insolvency register.[4]

Article 32 Fw implements Article 15 EIR and declares that the general provisions on the effect of insolvency on ongoing court procedures also apply to procedures concerning assets or rights over which a person or entity has lost their power of disposal due to foreign liquidation proceedings which are open to recognition under Article 16 of the EIR.

Article 127 Fw contains rules on submission of claims for verification. The strict terms for submission are not (fully) applicable to creditors who are not resident in The Netherlands and who for that reason have been unable to submit their claims within the given time frame. This rule does not refer to the EIR and can also be applied outside the European context.

In a similar manner the time frame for objecting to a third party request for insolvency is extended in case the debtor is not domiciled in the Netherlands (Article 8 sub 2 Fw).[5] Interestingly, the court of appeals of Leeuwarden applied this latter rule to a case in which the statutory seat of a company was in the Netherlands, but the registration at the chamber of commerce gave a postal address in Belgium.[6] According to

[3] «*Op verzoek van een curator in een insolventieprocedure op de voet van artikel 3, eerste of tweede lid, van de in artikel 5, derde lid, genoemde verordening geeft de griffier van de rechtbank Den Haag onverwijld in de Staatscourant kennis van de in artikel 21 van die verordening bedoelde gegevens. Een zodanige kennisgeving vindt in elk geval plaats wanneer de schuldenaar in Nederland een vestiging heeft in de zin van artikel 1, onder h, van de in de eerste zin bedoelde verordening. De gegevens, bedoeld in de eerste zin, worden aan de griffier verstrekt in de Nederlandse, Engelse, Duitse of Franse taal*».

[4] Article 19b Fw.

[5] See for an application of the latter provision: ECLI:NL:GHLEE:2011:BR3283.

[6] ECLI:NL:GHLEE:2011:BR3283.

the court a fair reading of the provision required to treat the company as not being domiciled in the Netherlands for the purpose of determining the objection period.

At the time of writing of this report, the changes mandated by the Recast were not yet incorporated in the legal system of The Netherlands; the description given in the preceding paragraph is based on the law as it implemented the old EIR. The governmental proposal of the new implementing statute which is currently pending in parliament is largely limited to changes in the references to the regulation made in the text of the Dutch law. The main novelties are (some not very detailed) rules on group consolidations (in the new Article 5a Fw) and a provision on the possibility to correct mistakes in the standard forms of Article 55 of the Recast.[7]

The law also contains some provisions which are mainly or exclusively relevant for non-EU insolvencies. These will be discussed below.

### 1.3. Private International Law

#### 1.3.1. Jurisdiction of the Dutch courts over international insolvencies not covered by the EIR.

Article 2 Fw contains the rules on jurisdiction and local competence of the Dutch courts with regard to the opening of insolvency proceedings. The article primarily awards jurisdiction to the place of domicile of the debtor. A legal entity is deemed to be domiciled at the location of its statutory seat.[8] If the debtor has moved his domicile outside the Netherlands,[9] the court of his last known domicile may assume jurisdiction.

[7] Parliamentary document no 34729, sub number 2 (text of the proposal) K II, 34729, no 2. See for a critical comment the advisory opinion of the Dutch society of lawyers (Nederlandse Orde van Advocaten) annex to parliamentary document K II, 34729, no 4.

[8] See Article 10 of book 1 of the Dutch Civil Code. For persons and legal entities domiciled outside The Netherlands, the location of an office or establishment in The Netherlands is deemed to create domicile with regard to the dealings of that office or establishment. (Article 14 book 1 Civil Code).

[9] Technically, the rules refer to the territory of the Kingdom of The Netherlands in Europe, thus excluding their application to the different parts of the Dutch Antilles.

If a person doesn't have domicile in the Netherlands, but is commercially or professionally active within the territory, the location of an office establishes jurisdiction. Lastly, for personal partnerships the court of establishment of the partnership also has jurisdiction. These rules that mainly address local competence are also used to attribute jurisdiction in cases that do not come within the scope of application of the EIR.

Recently the Supreme Court was seized in a case in which a company with its registered seat in The Netherlands had moved its COMI (presumably from Belgium) to the United Arab Emirates (and in particular Dubai) shortly before becoming insolvent. The company objected to the fact that insolvency proceedings were opened in the Netherlands. The Amsterdam court had assumed jurisdiction on the basis of Article 2 Fw. The Advocate-General rejected all claims made by the insolvent, stating that the EIR is only applicable to companies having their COMI in the EU. Hence, in this case jurisdiction is based on national law only. The fact that Dutch nationals as private persons can effectively move out of the jurisdiction whereas this is not possible for Dutch legal entities, does not lead to discriminatory practices.[10] The Supreme Court followed the AGs conclusion without further motivation.[11]

In the past, the Hague court has on several occasions assumed jurisdiction over petitions for the insolvency of foreign states, equating their embassies with an 'office' for the purpose of jurisdiction.[12] A declaration of insolvency is however not possible in those cases, as the insolvency of foreign states is deemed to violate their immunity.[13]

[10] ECLI:NL:PHR:2017:225.

[11] ECLI:NL:HR:2017:870. This is possible under the special rule of Article 81 sub 1 of the code for the judiciary (*Rechterlijke Organisatie*).

[12] Compare in the context of the Brussels I Regulation: CJEU C-154/11 Mahamdia v the People's Democratic Republic of Algeria, ECLI:EU:C:2012:491.

[13] Supreme Court 28 September 1990, no. 7812, *NJ* 1991, 247.

### 1.3.2. Effects of Dutch insolvency procedures abroad and outside of the EU

Regarding the effects of a Dutch insolvency procedure abroad, Dutch law adopts a universalistic approach: the opening of an insolvency procedure in the Netherlands has global effect and encompasses the debtor's assets wherever they are located.[14] Consequently, the Dutch IOH may try to bring foreign assets into the insolvent estate. In doing so an IOH will have to take account of foreign law, most notably whether the foreign jurisdictions recognize the Dutch insolvency proceedings and the ensuing powers of the IOH.

The Dutch law to some extent anticipates that not all jurisdictions will cooperate in bringing local assets into the Dutch insolvent estate. In order to make the universality claim more effective, the Dutch insolvency law provides that creditors who in any way recover their claims from assets of a Dutch insolvent in another country, must pay the proceeds into the insolvent estate.[15] This rule is similar to the rule in Article 20 EIR / 23 EIR Recast. The rule does not apply when the creditor can rely on a priority right with regard to the goods concerned which can be recognized in the Dutch procedure. A foreign priority right can be recognized when it is similar in content and purpose to priorities recognized in Dutch law. A Rule B attachment under New York law does not meet this standard.[16]

### 1.3.3. Effects of foreign non-EU procedure in the Netherlands

Where Dutch insolvency law assumes universality as to insolvency proceedings opened in the Netherlands, it does not fully reciprocate the hospitality it hopes to find abroad. The Dutch law contains no rules on the recognition and enforcement of foreign insolvencies. Enforcement of foreign judgements is only possible on the basis of a treaty or EU

[14] This has been held by the Dutch Supreme Court in its judgment of 14 April 1955, *NJ* 1955/542 (Kallir/Comfin).

[15] See Articles 203-205 Fw.

[16] Supreme Court 11 July 2014, ECLI:NL:HR:2014:1630, *JOR* 2014/254 (Seacastle), with a conclusion by AG Strikwerda and a case note by Schuijling.

regulation. But recognition can be based on unwritten rules, to be found in the case law.

Basically, as far as the effects of the foreign insolvency proceedings on goods and assets in the Netherlands are concerned the Dutch system still follows the principle of territoriality.[17] The foreign insolvency procedure does not create a general freezing of the assets located in the Netherlands, cooling down periods are not enforced and a foreign settlement does not affect the possibility for creditors to enforce their claim against assets located here.[18]

However, the Dutch system does allow foreign IOH to act upon their foreign mandate in the Netherlands by selling assets belonging to the insolvent, taking over (Dutch) legal proceedings etcetera as long as this doesn't make the prospect of recovery of other (Dutch) creditors illusory.[19] Previous formal recognition of the foreign insolvency is not necessary for this. When a party objects to (the recognition of) the mandate of the IOH, the court will check whether the foreign proceedings fulfils the unwritten requirements for recognition of judgments which consist of 1) a reasonable ground for jurisdiction, 2) fair trial (including notification), 3) no violation of Dutch public policy and 4) no conflict with a Dutch judgments or earlier foreign judgment.[20] In the (in)famous Yukos case on the insolvency of the Russian Yukos imperium, the Amsterdam court of appeals has recently refused to recognize the Russian insolvency, declaring the Russian proceedings in violation of public policy.[21]

[17] See for the consistent line of cases in this respect, Supreme Court 2 June 1967, *NJ* 1968/16 (Hiret/Chiotakis), Supreme Court 31 May 1996, *NJ* 1998/108 (De Vleeschmeesters) with case note DE BOER and Supreme Court 19 December 2008, *JOR* 2009/94 (Yukos Finance I) with case note VEDER.

[18] A foreign insolvency doesn't automatically stay proceedings in the Netherlands either. See e.g. ECLI:NL:RBMNE:2016:5043 in which a foreign company, without avail, requested a stay of the Dutch court procedure pending an Indian decision on the reorganization of the company.

[19] Other actions may include voting in shareholders meeting on behalf of the insolvent company: see ECLI:NL:HR:2008:BG3573 (Yukos I).

[20] For civil judgments in general see Supreme Court 26 September 2014 (ECLI:NL:HR:2014:2838, *NJ* 2015/478, Gazprombank, for insolvency see ECLI:NL:GHAMS:2017:1695.

[21] ECLI:NL:GHAMS:2017:1695. See on this insolvency also ECLI:NL:HR:2008:BG3573 (Yukos I). Supreme Court 13 September 2013, ECLI:NL:HR:2013:BZ5668 (Yukos II), ECLI:NL:HR:2015:3299 (Yukos III).

This finding was based inter alia on similar findings of the European Court of Human Rights.[22]

In summary: With regard to insolvencies not covered by the EIR, the position of the foreign IOH is rather strong in one respect, as the IOH can act in the Netherlands without prior court decision. The Dutch territorial approach with regard to local assets, however, results in the position of the foreign IOH being rather weak in several (other) important aspects.[23]

Interestingly enough, the Swiss supreme court in a 2015 judgment deemed the Dutch recognition practice to fulfil the reciprocity requirement under Swiss law. The automatic recognition of the powers granted to the IOH under the *lex concursus* was even deemed to be more 'universalistic' than the Swiss rule.[24]

The general position of only awarding limited effects to non-EU insolvency proceedings does however negatively affect the restructuring of international groups with assets of establishments in the Netherlands. A foreign, non-EU, composition plan will not be effective in the Netherlands as to assets held in the Netherlands. In two high profile cases, this resulted in a company offering a composition plan both in the US and in the Netherlands in order to ensure its effectiveness in the Netherlands as well.[25]

[22] ECHR Application no. 14902/04, Yukos Oil v. Russia, 20 September 2011 (merits, final since 8 March 2012) and 31 July 2014 (just satisfaction, final since 15 December 2014).

[23] E.g. because the foreign IOH has to respect attachments by creditors both predating and posterior to the foreign bankruptcy decision and foreign settlements and write-offs do not affect the right of creditors to seek enforcement of their claim in the Netherlands. See Supreme Court 13 September 2013, *JOR* 2014/50 (Yukos Finance II) with case note BERTRAMS.

[24] Schweizerisches Bundesgericht 27 March 2015, case 5a_248/2014, *Tijdschrift voor Insolventierecht* 2015/48 with case note F.H. VAN DER BEEK.

[25] See for an apt summary of both the position of Dutch law as to non-EU reorganisation procedures and the strategy applied, J. JOL, The Future of International Restructurings after the Implementation of WCO II and the Amendment of EIR: Is the Best yet to Come?, Report 2015 NACIIL, Eleven Publishing, 2015, p. 3.: «(..) *Versatel and UPC also knew that US Chapter 11 proceedings would not result in an effective restructuring in the Netherlands. This is caused by the position Dutch law took (and still takes) with regards to decisions of foreign bankruptcy courts. Simply put, if the bonds were effectively restructured in Chapter 11 proceedings in the US, this judgement would not be recognized in the Netherlands*».

### 1.3.4. Transaction avoidance / actio Pauliana

A remaining topic for academic debate is to what extent a foreign IOH can invoke transaction avoidance outside the context of the EIR, e.g. a Japanese IOH invoking transaction avoidance in the Netherlands. One could simply argue that a rather strict territorial approach would not allow a foreign IOH to invoke transaction avoidance. This is, however, not the general view. Already prior to the entering into force of the EIR, the Dutch Supreme Court held that a German IOH could invoke transaction avoidance in the Netherlands, provided that not only the German provisions on transaction avoidance would allow for such a claim, but also the Dutch rules[26] (the approach of course being very similar to section 13 EIR/16 EIR Recast). It is not clear whether the Supreme Court ruling should be understood as an anticipatory interpretation to the EIR, or as it was then the envisioned Treaty, or should be given a broader scope.[27]

## 2. Case law on the insolvency regulation

### 2.1. Some general remarks

As regards the application of the EIR by the Dutch courts, we studied all Supreme Court cases on the regulation (without any time restriction) plus all published lower court decisions dating from the period 2012-2017. Court cases are published on rechtspraak.nl – the official site of the Dutch judiciary. The selection of cases to be published there is based on the government decree of March 26, 2012.[28] The case law of the

[26] See Supreme Court, 24 October 1997, *NJ* 1999/316 (Gustafsen/Mosk) with case note DE BOER.

[27] See for the argument that the case should indeed be understood as a case of anticipatory interpretation, at least as far as preferences are concerned, C.R. ZIJDERVELD, R.J. DE WEIJS, De grenzen van internationale concern-faillissementen en hun inpassing in het Nederlandse Internationale Faillissementsrecht, Insolad Jaarbundel 2017.

[28] Before 2012, the case law was selected for publication by the courts themselves on more informal criteria.

Supreme Court is published unless the judgment evidently is not relevant for the application or interpretation of the law. For lower courts, publication depends on the topic and the legal and societal relevance of the case. In some instances, publication on the Dutch website is based on an obligation to do so under EU law. This is true of case law related to the Lugano Convention 2007 and related EU instruments.

Despite these rather broad selection criteria, only a minority of insolvency cases is actually published at rechtspraak.nl.[29] In 2014 the central bureau of statistic reported 9.669 insolvencies being opened. For the same year, a search of the official website yielded 1.440 published court decisions on insolvency.[30] A specific search for the insolvency regulation reduces the number of relevant cases considerably – leaving only 17 'cases' (judgments and/or opinions of the Advocate General) for 2014. These findings also demonstrate that cross-border insolvencies are a minority amongst the insolvency cases. This finding is confirmed by the experts in the interviews.

On June 8, 2017 a (not time-restricted) search for '1346/2000' rendered 175 hits amongst which 155 judgments and 20 opinions of the advocate general to the Supreme Court. The Recast ('2015/848') is mentioned in 17 cases and 2 opinions.[31] In our review we included all cases which were decided in 2012 and later. Earlier case law is taken into account on a selective basis only, focusing on Supreme Court judgments.[32]

## 2.2. Countries involved

The case law shows a wide variety in the countries involved, but also reflects the economic and geographical closeness of the neighbouring

[29] We found decisions declining jurisdiction, contentious cases, third party requests and insolvency related proceedings. Straight forward declarations of insolvency upon request of the insolvent will most likely not be published.

[30] Search term 'faillissement'. Insolvencies are also published in the special insolvency register, but this registration is removed six months after termination of the insolvency procedure. https://www.rechtspraak.nl/Registers/Paginas/Toelichting-insolventieregister.aspx.

[31] The search term 'insolventieverordening' produced 167 judgments and 21 opinions.

[32] The number of insolvencies leading to published case law will be lower than the number of hits, as the different stages of a single procedure all receive their own separate ECLI.

countries: Germany, Belgium and the UK are by far the most frequently involved second country. Other EU jurisdictions found in the case law are France, Austria, Spain and Poland. In the world at large we find Russia, USA, Dubai and India but also Switzerland and Iceland, the Virgin Islands, Gibraltar and the Dutch Antilles. This finding is supported by the interviews held with experts and insolvency office holders: a wide range of countries may be involved in Dutch insolvency cases. Because knowledge of these systems will not be readily available beforehand, the successful handling of cross-border insolvencies requires an international network which the IOH can fall back on as well experience with operating in an international and intercultural context.

### 2.3. Ex officio application of the Regulation and the presumption of Article 3.1 EIR

In approximately a third of the published cases, the international element doesn't seem to pose specific problems. In these cases, the court establishes ex officio that the COMI of the insolvent is located in the Netherlands, which allows a main procedure to be opened in the Netherlands. Often the international element is not specified in the published judgement. Examples of such judgements state: "As based on the information provided to the Court the COMI is evidently located in The Netherlands and more in particular in city X, the court considers on the basis of Article 3 sub 1 IER that it has jurisdiction to rule on the request."[33] Or "The registered office is located in the Netherlands. As it is neither stated nor apparent from the file that the COMI is in another Member State, the (Dutch) court may assume jurisdiction under Article 3.1 EIR."[34] These judgements suggest that courts do apply the regulation ex officio and when doing so, take the facts of the case into account when establishing the COMI. They also demonstrate the operation of the presumption regarding the presence of the COMI at the location of the seat.

Article 4 of the Dutch insolvency law obliges the applicant for insolvency to include information on the COMI in their application. The

[33] ECLI:NL:GHSHE:2015:1627.

[34] ECLI:NL:GHARL:2015:8748.

published judgements do not specify to what extent the court requested for additional information to be provided on the location of assets and activities. In the interviews with stakeholders it became clear that courts regularly do, especially when a company in distress files for insolvency itself.[35] As jurisdiction has a public policy character, also appellate courts may ex officio determine COMI and request extra information, if needed.[36]

This active information duty has to be balanced against the view we find in the case law as well, that the COMI of legal entities is deemed to be located in the statutory seat unless an interested party (usually the insolvent company itself) claims and proves that the COMI is located elsewhere.[37] The experts interviewed for this project warn against rebutting the presumption too readily.

***Best practice*:** Courts apply the IER ex officio and also routinely specify the grounds for jurisdiction (Article 3.1 or 3.2 EIR). The presumption is applied, but courts do check the presumption against the facts of the case. Dutch law obliges the applicant to provide the necessary information, but the courts may ask for additional information if necessary and regularly do so. It is difficult to find the exact balance between relying on the presumption of COMI and the duty to establish COMI on the basis of the facts.[38]

[35] See paragraph 3.5 of this report.

[36] See e.g. ECLI:NL:PHR:2015:147 and ECLI:NL:GHARL:2017:5510.

[37] ECLI:NL:GHSHE:2017:2301 paragraph 3.7.2: «*Indien de schuldeiser een rechtspersoon is, kan de schuldeiser de insolventie aanvragen bij de bevoegde rechter van de plaats waar de schuldenaar zijn statutaire zetel heeft en behoeft daarbij niet te stellen en te bewijzen dat de schuldenaar daar zijn COMI heeft. Indien de schuldenaar stelt dat de COMI zich ergens anders bevindt, dan dient hij dat te stellen en te bewijzen (zie o.m. advocaat-generaal L. Timmerman, ECLI:NL:PHR:2017:225, punt 2.4)*». Compare for the reverse scenario in which the registered seat is located in France, whereas the company is declared bankrupt in The Netherlands: ECLI:NL:GHSHE:2016:5728.

[38] See on this balance and the interpretation of the presumption of Article 3.1 inter also BOB WESSELS, International Insolvency Law 2006, 10565 ff.; A.J. BERENDS, Insolventie in het internationaal privaatrecht, Serie Recht en Praktijk insolventierecht dl.InsR2, Deventer: Kluwer 2011, 222 ff. and the advisory opinion of the Dutch society of lawyers (Nederlandse Orde van Advocaten) on the implementation of the Recast – annex to parliamentary document K II-34729-4.

### 2.4. Natural persons and private partnerships

A large number (close to a third) of the cases found in the database pertain to the insolvency of natural persons and/or commercial partnerships. In the Netherlands, until recently the rule prevailed that insolvency of a commercial partnership (*vennootschap onder firma*) automatically led to personal insolvency of the partners.[39] In 2015, however, the Supreme Court stipulated that this rule does not sit well with the system of the EIR as the COMI of the individual partners in a Dutch commercial partnership (*vennootschap onder firma*) may be located in other Member States than the COMI of the partnership itself. Hence, the court having jurisdiction over the partnership may not have jurisdiction over the individual partners.[40] Since the 2015 Supreme Court judgement, the courts are working on the basis that (jurisdiction over) the insolvency of the partners has to be established independently.

Natural persons may rely on the *Wet Schuldsanering Natuurlijke Personen* (WSNP, the law on debt restructuring of natural persons) which allows persons to cleanse themselves of all outstanding debts through a strict scheme of repayments. Both the standard insolvency procedure and the WSNP are covered by the EIR.[41] Several cases in the database relate to the interaction between a Dutch WSNP procedure (involving a partner) and a foreign insolvency procedure (involving the partnership) e.g. as regards the possibility to rely on the WSNP as a secondary proceedings.[42]

***Best practice:*** a strict separation between jurisdiction over the insolvency of a partnership and jurisdiction over the insolvency of the individual partners prevents overlap of jurisdictions when the COMI of the

[39] See for example ECLI:NL:HR:2009:BK3574.

[40] ECLI:NL:HR:2015:251. The reversal of the standing case law was a follow-up of the CJEU judgment in the Rastelli case (ECLI:EU:C:2011:838). See, for the financial consequences of the new rule ECLI:NLRBROT:2015:7345 (court fees are due over the applications against both the partnership and the individual partners – which can no longer be assumed to be a single application).

[41] See the annex to the Regulation.

[42] ECLI:NL:HR:2013:BY8092: ongoing Belgian insolvency allows for subsequent opening of Dutch WSNP procedure as secondary proceedings only.

partnership is located in another member state than the COMI of the partners.

### 2.5. Establishing the COMI of natural persons

The original EIR did not contain a presumption with regard to the COMI of natural persons. In 2004 the Supreme Court explicitly rejected any presumption in favour of the habitual residence in a case in which the insolvent himself had left the country, but his business interests had remained.[43] In practice, the habitual or official residence of the insolvent is regularly relied on by the insolvent to challenge the jurisdiction of the Dutch courts.[44] In the interviews, the experts remarked on the reluctance of Dutch courts to assume jurisdiction over non-resident private persons. This causes problems in bad faith cases in which the habitual residence of the insolvent has been moved out of the jurisdiction and/or is (made) uncertain.[45] Creditors applying for insolvency might have problems accessing the information needed to rebut the assumption in favour of the (newly established) habitual residence. Based on the published case law, we find that courts are regularly critical of removal of the COMI from the Netherlands, shifting the burden of proof to the insolvent. Yet it is also evident that very specific information on the whereabouts and financial interests of the insolvent may be needed to support the retention of COMI in the Netherlands in case the official residence has been moved elsewhere.

***Best practice:*** in case of relocation of private persons, the courts should critically assess whether a change of official residence can have the result of moving COMI to the detriment of creditors. Moving COMI out of the jurisdiction should not be enough – there should be a clear reestablishment of COMI in another EU member state.

[43] ECLI:NL:HR:2004:AN7896.

[44] See for some recent examples ECLI:NL:GHDHA:2017:1934 and ECLI:NL:GHDHA:-2017:1358.

[45] See for example ECLI:NL:PHR:2014:13.

### 2.6. Abusive forum shopping of companies

In paragraph 1.3.1 we discussed the finding that outside the context of the EIR, companies would have to move their statutory seat outside the Dutch jurisdiction in order to escape application of Dutch insolvency law. Moving the COMI without moving the seat would not affect the jurisdiction of the Dutch courts under Article 2 Fw. This is different under the EIR, where the statutory seat only constitutes a rebuttable presumption as regards the COMI. Further, in a 2011 case covered by the EIR, we find that migration of the statutory seat is not an easy task to accomplish. In the case of Atrecht Holding v Rabo Bank a Dutch limited company with its statutory seat in the Netherlands migrated to Belgium and acquired the status of BVBA under Belgian law.[46] The court of first instance deemed the migration to be made in bad faith and decided to ignore it under application of Article 3:13 of the Civil Code (the provision on *abus de droit*).[47] The court of appeal upheld the outcome, but based its decision on the fact that the Dutch company was never fully dissolved and hence continued to exist, despite the fact that the new company likewise existed and was fully registered in Belgium. As no commercial activities had taken place in Belgium, the COMI of the Dutch BV was still located in the Netherlands. This case is interesting in its open discussion of the possibility that Atrecht was actually abusing its right of migration under EU law to escape its creditors.

### 2.7. Secondary proceedings

The case law confirms the statement made by the experts during the interviews that secondary proceedings are rare, as they are usually avoided by IOHs. When the insolvency of a private partnership with COMI in the Netherlands was still deemed to entail the automatic insolvency of all partners, the courts would apply Article 3.2 EIR to the insolvency of partners having their (personal) COMI abroad, thus lim-

[46] ECLI:NL:GHLEE:2011:BR3283, *JOR* 2011/314, with case note WESSELS.

[47] Compare in the context of Article 13 EIR, CJEU 8 June 2017, Case C-54/16, ECLI:EU:C:2017:433, Vinyls Italia SpA v. Mediterranea di Navigazione SpA.

iting the effect of the personal insolvencies to assets located in the Netherlands.[48] The reverse situation was the subject of a 2013 Supreme Court case.[49] In that case a Belgian private partnership was declared insolvent, leading to co-insolvency of the partners under Belgian law. However, one of the partners, having his domicile in the Netherlands, applied for application of the WSNP. The Supreme Court allowed this, treating the WSNP procedure as secondary proceedings under Article 3.2 EIR.

The only other examples found concern secondary proceedings opened in the Netherlands for the sake of termination of contracts, most notably employment contracts. The special rules on dismissal create a legitimate interest in the opening of secondary proceedings for the IOH in the foreign main proceedings.[50] This relevance of the rules on dismissal is supported by the interviews with experts.

### 2.8. (non-)related proceedings

In 2008, the Dutch Supreme Court referred a question on the demarcation between the Brussels I system and the EIR to the CJEU.[51] This question led to the judgement in the German Graphics case (C-292/08) in which the court decided that an action over a reservation of title clause in a contract for the sales of goods is not closely related to the insolvency of the debtor and hence falls within the scope of application of the Brussels I regulation. The fact that the EIR contains an exception to the *lex concursus* with regard to retention of title does not mean the action itself is covered by the EIR for jurisdiction purposes.

A 2011 Supreme Court case dealt with the recognition of an English court order which obliged a Dutch company to provide the IOHs in an English insolvency with information on stocks of the insolvent held by the company.[52] This order was recognized and enforced on the basis of

[48] ECLI:NL:HR:2009:BK3574, see also ECLI:NL:GHSHE:2015:153.

[49] ECLI:NL:HR:2013:BY8092.

[50] ECLI:NL:RBROT:2016:9090 (Hanjin Shipping) and ECLI:NL:RBHAA:2010:BN9813 (Olympic Airlines).

[51] ECLI:NL:HR:2008:BD0138.

[52] ECLI:NL:HR:2011:BP1404.

the EIR. The classification of the English order as part of (English) insolvency law was based on the criteria developed by the CJEU in combination with an analysis of the relevant provisions of English law. It was deemed to be irrelevant whether Dutch insolvency law would allow for a similar order to be given.

Information duties also played a role in a Supreme Court case of 2015.[53] In this protracted case an individual was declared insolvent in 2013. He unsuccessfully tried to overturn this decision, up to the level of the Supreme Court. The IOH first asked and then summoned the insolvent to come to the Netherlands and provide him with the necessary information. When the insolvent failed to respond, the IOH asked for a personal retention order under the relevant provision of Dutch insolvency law. The insolvent was arrested in Spain and rendered to the Dutch authorities on the basis of a European arrest warrant.[54] This case demonstrates that Dutch law doesn't have to rely on the EIR to obtain information from insolvents who are not present within the territory, but may apply criminal laws cooperation mechanisms instead.

A special action of Dutch (insolvency) law is the so-called 'Peeters/Gatzen claim'. This claim sounds in tort, but is a prerogative of the IOH on behalf of the joint creditors against a third party involved in the withdrawal of assets from the insolvent estate or other acts prejudicing the position of the joint creditors. This claim is deemed to fall within the scope of application of the EIR. An example thereof is to be found in a 2013 appeals case.[55] The case concerned the insolvency of a *gerechtsdeurwaarder* (hussier/bailiff). This type of official is obliged to retain a special bank account for third party payments. In the case at hand, the insolvent withdrew money from the third-party account through a company account held at the Belgian bank Fortis. Because the court of appeals applies the IER to the claim against Fortis, the IOH may enter the claim in a Dutch court, despite the fact that Fortis is domiciled in Belgium and the withdrawal of the money from the account also took place in Belgium.

[53] ECLI:NL:PHR:2015:131; ECLI:NL:HR:2015:1225.

[54] Article 87 and 105 Insolvency law in combination with Article 194 section 1 of the Dutch Penal Code. See also ECLI:NL:HR:2015:840 and ECLI:NL:HR:2016:286.

[55] ECLI:NL:GHSHE:2013:CA2317, *JOR* 2013/318 with case note M. VEDER.

Director's liability is a well-known topic for discussion on the interaction between the EIR and the Brussels I regime which has found specific mention in the EIR recast preamble 35. In the Netherlands there are several statutory provisions which can form the basis of liability claims against directors of insolvent companies, not all of which are classified as part of insolvency law.[56] However, the topic was rarely raised in court: in the period studied we found only a few cases, dealt with by lower courts.

A 2012 case concerned the insolvency of a circus run by an English company in which several involved entities were held liable for mismanagement. One of the claims was based on a Dutch rule of company law (Article 2:138 Civil Code), which is applied also in case a foreign company which is submitted to Dutch company tax is declared bankrupt in the Netherlands (Article 10:121 Civil Code). Another was based on general tort law. The tort claim was deemed to be covered by Brussel I for jurisdiction purposes, the claim based on the special extension of Dutch company law was deemed to sound in insolvency and be covered by the EIR (under reference to Seagon/Deko C-339/07).[57] A 2015 case dealt with directors' liability towards the community of creditors in case of insolvency (Article 2:248 Civil Code). Again, referring to the case of Seagon/Deko C-339/07 the Dutch court assumed jurisdiction on the basis of Article 3.1 EIR.

The interaction between claims falling within and outside the scope of the EIR also played a role in a 2014 appeals case.[58] In this case a Dutch company demanded damages for non-performance of a contract entered into between the company and a French company that was subject to insolvency proceedings in France. The IOH in the French insolvency objects to the claim and enters a counter claim demanding voidance of the contract which is deemed to be a detrimental act based on fraud. Meanwhile, the IOH also starts an avoidance action in a French court. According to both the Dutch court of first instance and the court

[56] Compare Holterman Ferho C-47/14, ECLI:EU:C:2015:574 in which a claim for mismanagement of a company against its manager was based on the general law of companies, general tort law and the contract (of employment) between the parties.

[57] ECLI:NL:RBDOR:2012:BY7080, Article 10:121 BW in combination with Article 2:138 BW.

[58] ECLI:NL:GHAMS:2014:4077.

of appeals, the first claim falls within the scope of application of Brussel I, whereas the latter is covered by the EIR. According to the Court of First Instance, the fact that the two claims are mutually dependent should result in the court refusing to take jurisdiction over both claims. The court of appeals however, retains jurisdiction over the first claim, but halts the proceedings pending a decision in the French avoidance procedure. Interestingly enough, it is not obvious whether a similar case would in future be covered by Article 6 EIR recast as this is not a case involving multiple claims against a single defendant, but rather a situation in which the claimant in the non-EIR case is the defendant in the EIR case. The classification of a voidance action as such played a role in a 2015 case concerning the transfer of a house in Germany (see below, paragraph 2.9)[59].

### 2.9. Lex concursus and its exceptions

The Dutch courts routinely apply the IER to international insolvencies, also as regards the provisions on applicable law. Based on the interviews, we assume that most cases in which foreign law is applicable to certain aspects of a 'Dutch' insolvency do not come before the Dutch courts.

Reversely, we found two cases in which Article 10 EIR on employment contracts was deemed to create a relevant interest for the IOH in the foreign main proceedings in the opening of secondary insolvency proceedings in the Netherlands.[60] An interesting one is the insolvency of Olympic Airlines, in which the employees working in the Netherlands and the Dutch trade union objected to the opening of secondary proceedings in the Netherlands as this was seen as forum shopping leading to unequal treatment of workers in different member states and the undermining of the position of the workers. Their objection was dismissed.

Other case law we found consists of some incidences regarding the (non-)application of Article 5 EIR to foreign and domestic privileges,

[59] ECLI:NL:GHSHE:2015:3242.

[60] ECLI:NL:RBROT:2016:9090 (Hanjin Shipping) and ECLI:NL:RBHAA:2010:BN9813 (Olympic Airlines).

some cases of voidance of a detrimental act and one on the effect of a foreign insolvency on an ongoing Dutch legal procedure.

The Dutch courts seem to interpret the exception of Article 5 restrictively. We only found cases in which the 'privilege' relied on by the creditor was not deemed to be covered by Article 5 EIR.

In the Seacastle case, discussed in paragraph 1.3.2, the Dutch courts could assume jurisdiction on the basis of Article 3.1 EIR. Accordingly, Dutch law applied to the insolvency (Article 4 EIR). In this particular case, the IOH had claimed payment of the proceeds of a seizure of assets under the law of New York into the Dutch insolvent estate, basing his claim on Article 203 Dutch insolvency law. The beneficiary of the New York order relied on an analogous application of Article 5 EIR and on a subsidiary base, on equation of the New York order to a privilege under Dutch law. However, according to the Court of Appeals, the New York order did not constitute a right *in rem* in the meaning of Article 5 EIR. Both the Supreme Court and the Court of Appeals found that the order did not constitute a privilege open for recognition under the applicable Dutch insolvency law either.[61]

In a 2016 case, the court of appeals in Den Bosch dealt with a right of retention claimed by a Dutch company with regard to a seagoing vessel, owned by a Belgian company.[62] The yacht, which was put in winter storage with the Dutch company, was owned by the Belgian company, registered in the Belgian ship register and subject to both a ship mortgage and a general lien under Belgian law. When the Belgian company went bankrupt, the Dutch company sought to rely on a right of retention against the Belgian IOH and any other right holder until all bills for storage and repairs were paid. Under Dutch private international law, the existence and content of a right of retention is governed by the law applying to the underlying relationship (in this case, a contract). The exercise of the right is subject to the law of the country in which the retained object is situated at the time the right is relied on.[63] These attachments point to Dutch law. Accordingly, the question whether a right of retention (still) exists and which claims are covered by it, is governed

[61] ECLI:NL:HR:2014:1630.

[62] ECLI:NL:GHSHE:2016:3600.

[63] ECLI:NL:HR:2000:AA4123 and Article 10:129 Civil Code.

by Dutch law. However, the insolvency is opened in Belgium and under Article 4 EIR Belgian law would apply to the insolvency itself and the effects thereof on the rights of creditors. As Article 5 EIR is not applicable to the right of retention, and Article 11 also points to Belgian law, the effect of insolvency on the right of retention is governed by Belgian law. As the Belgian law on this point is not clear to the court, it withheld any decision until further information was provided.

In the procedure leading up to the 2015 decision of the Court of Appeals in Den Bosch, the IOH asked the Dutch court to avoid the transaction between the insolvents and their son in which a home in Germany was transferred to the son – allegedly below market price – shortly before the insolvency of the parents (and their commercial partnership).[64] The court based its jurisdiction on Article 3 EIR, and concluded that the fact that the real property in dispute was situated in Germany was irrelevant for the purpose of both jurisdiction and applicable law (Article 5 sub 4 EIR). Article 13 EIR was not relied on in this particular case.

In a similar manner, the effect of a Belgian insolvency on a sales contract regarding real property in the Netherlands was submitted to Belgian law (Article 4 paragraph 2 sub e). The effect of the insolvency on the ongoing legal procedure in the Netherlands was however submitted to Dutch law.

Based on Article 15 EIR (18 recast) the effects of insolvency proceedings on a pending lawsuit concerning an asset or a right which forms part of a debtor's insolvency estate, shall be governed solely by the law of the Member State in which that lawsuit is pending.[65] According to a 2009 Supreme Court judgment, this rule also applies to legal proceedings in which performance of a contract is demanded against the newly insolvent.[66] The Supreme Court followed the AG in declaring this issue to be an *act clair*. Hence, no reference to the CJEU was made.

In the case leading up to ECLI:NL:GHSHE:2012:BV6710 the IOH in a Dutch insolvency procedure, sought to retrieve money which the

[64] ECLI:NL:GHSHE:2015:3242. The facts of the case are a bit more complicated, but do not change the choice of law implications.

[65] ECLI:NL:RBROT:2013:CA3395.

[66] ECLI:NL:HR:2009:BK0867 paragraph 3.3.

insolvent had transferred from his Austrian bank account to a beneficiary in the Netherlands. The court applied the rules of Dutch law to the detrimental act, relying on Article 4 section 2 sub m EIR) and Austrian law to the relationship between Bank and account holder. The relevance of the latter law and the interaction between the two legal systems are not further clarified in the published part of the judgement. It seems that the court struggled with the international complexity of the case, changing the legal basis of the claim during the proceedings from undue payment to voidance of a detrimental act.

### 2.10. Recognition and enforcement

As has been discussed above, no special procedure is needed for IOHs to be able to act under their mandate within the Netherlands. Hence, the topic of recognition will not be put before the court in a direct way, but rather as a challenge to the validity of certain acts of the IOH or their standing in a specific procedure.

In the case of FNV v Olympic Airlines, the airlines had been declared bankrupt in Greece, but the Greek IOH had requested the opening of secondary proceedings in the Netherlands for the purposes of terminating the contracts of employment of the workers there. The trade union objected to the opening of the secondary proceedings on different grounds, none of them successful. Some of the objections dealt with recognition of the Greek decision. However, under Article 27 EIR there is no legal ground to check whether there are sufficient grounds for insolvency, as the Dutch court is bound by the findings of the Greek court. Although the Dutch union could not appeal against the Greek insolvency decision, this decision was not deemed to violate Dutch public policy under Article 26 EIR.[67]

A series of cases on Article 16 EIR were related to the voluntary assignment of debts incurred under a loan agreement between two parties established in The Netherlands to a company established in Jersey (UK). When the private debtors found themselves in a position in which they were unable to pay all outstanding debts, they tried to reach an agreement with their creditors in order to avoid a full 'insolvency' under

[67] ECLI:NL:RBHAA:2010:BN9813.

the WSNP. Article 287a of the Insolvency law allows the debtor to file for a forced restructuring agreement in case of hold out by one or several creditors. In all cases the Jersey company objected to the application of the agreement to it, based on its establishment abroad. In all cases, the courts stated that a forced settlement under Article 287a Insolvency law is not deemed to be open for recognition under Article 16 of the EIR. However, that doesn't mean that a foreign place of establishment could make the hold-out creditor immune to the operation of the rules on forced settlement, especially as the debt owed to the foreign company found its base in a contract between Dutch parties under Dutch law.[68] Accordingly, the settlement was deemed to apply equally to the foreign creditor, resulting in unenforceability of the part of the debt not covered by it.

An issue of indirect recognition arose in a case which came before the Supreme Court in 2004. The insolvent had applied for the special procedure for insolvent natural persons WSNP. To be admitted to this procedure, the over-indebtedness must be incurred in good faith. In the procedure, the question was raised to what extent a German judgement holding the debtor liable under German insolvency law for (inter alia) the belated opening of insolvency proceedings of a company under their direction constituted unrebuttable proof of bad faith.[69] The debtor had claimed that under the Dutch procedure only debts in the Netherlands could be taken into account for assessing bad faith. This territorial approach was explicitly rejected by the AG,[70] the Supreme Court followed without further motivation.[71]

Two cases dealt with the effect of German pre-insolvency proceedings on the opening of insolvency proceedings in the Netherlands. In 2017, the Hague court decided that an 'Insolvenzoffnungsverfahren' which has not led to insolvency does not stand in the way of the opening

[68] ECLI:NL:RBNHO:2016:1828; ECLI:NL:RBDHA:2015:15903, ECLI:NL:RBROT-:2016:7390 and ECLI:NL:RBLIM:2015:575.

[69] The judgment states that the insolvent has been handed a probationary sentence of one year imprisonment for fraud, disregard of the duty to keep records, non-payment of premiums and belated filing for insolvency.

[70] ECLI:NL:PHR:2004:AO1994.

[71] ECLI:NL:HR:2004:AO1994.

of a main insolvency in the Netherlands.[72] The pre-insolvency procedure itself was not deemed to fall within Article 2 EIR. According to the Rotterdam court, however, the 'vorläufiges Insolvenzverfahren' is covered by Article 2 in the interpretation thereof by the CJEU in Eurofood (C341/04).[73] Hence, the IOH in the German pre-insolvency proceedings could open secondary proceedings in the Netherlands.

## 3. The application of the EIR in practice – a stakeholder's view

### 3.1. Method of enquiry

This part of the report is based on discussions with invited groups of stakeholders and on responses to the questionnaire by members of the Dutch association for international insolvency law and the Dutch Ministry of Justice. We sent the questionnaire to all members of the Dutch association for international insolvency law –a professional association with 170 members, enlisting all Dutch legal experts in the field of cross-border insolvency law. The membership includes specialized judges, insolvency administrators as well as specialized legal counsel. Unfortunately the response was minimal. We likewise contacted all administrators in personal insolvencies through their administrative body, the WSNP-bureau – reaching approx. 585 registered administrators and 194 other interested parties. Unfortunately, we only received a very minimal response. We repeated the mailing to individual administrators, but found out that this group of officials as a rule do not encounter insolvencies with cross-border aspects. As a result, the terminology used in the questionnaire is unfamiliar to them, making it difficult to understand the questions. Based on this information we decided not to pursue this line of enquiry further.

With regard to the stakeholders in corporate insolvencies we chose to follow a different strategy and invited groups of stakeholders for a discussion on the topics raised by the questionnaire. The discussions

[72] ECLI:NL:RBDHA:2017:2770.

[73] ECLI:NL:RBROT:2016:9090.

took place on June 16, June 27 and July 6, 2017. The first two discussions we encountered interviewees with big international advisory practices, which mainly service parties with a financial interest (banks, private equity) and/or creditors of the companies in distress. The interview on July 6 specifically targeted insolvency office holders and administrating judges. To this meeting we invited insolvency office holders with known expertise in cross-border insolvency from different practices and regions as well as a judge of the Amsterdam court, who is widely acknowledged as the expert in the field. We also asked the ministry of justice to react to the questionnaire. They did so by email on July 4, 2017.

The answers were provided on the basis of anonymity; the draft report was sent to them for comments and corrections. The interviews were conducted by Aukje van Hoek, Cathalijne van der Plas and Arthur Salomons.

### 3.2. Appointment of insolvency administrators and other insolvency office holders

Insolvency administrators and other insolvency office holders (IOH) are appointed by the district courts which refer to an internal list of experts. This list contains information on the experience of the candidates with national and cross-border insolvencies and is deemed to contain confidential information. The rules for appointment as an IOH are laid down in internal rules of the courts which are published on the official website of the judiciary.

Neither the insolvent nor the creditors can officially influence the appointment of the IOH. When the insolvent suggests to appoint a certain person this often does carry some weight, however it differs from court to court whether such a suggestion is likely to be followed or not.

All respondents (both the advisors and the insolvency administrators) oppose a bigger role for creditors in the appointment of the IOH. The IOH should be fully independent and the respondents fear that influence of creditors will in practice mainly benefit banks and perhaps also the tax authorities. For this reason, the influence given to some stakeholders under the German and English systems is not generally approved of. However, the current Dutch system has some drawbacks

as well: it is not transparent and the introduction of an unknown IOH in a pre-pack situation may threaten the 'deal certainty' which is cherished by Anglo-American parties. English and American lawyers representing US private equity shareholders play an increasingly prominent role in the devolvement of large insolvencies; they like to exert influence on the appointment of the IOH, especially in case there is a pre-insolvency agreement.

***Best practices*:** The appointment criteria for the IOH could be more transparent, but there is no general support for giving the creditors direct influence on the choice of IOH.

### 3.3. Cross border experience and knowledge

Except for specialized international consultancy firms and a few major law firms, practitioners rarely deal with cross-border insolvencies. The IOH should be able to prove both knowledge (completion of an advanced course in insolvency law) and relevant practice to be eligible for registration with the courts for appointment. This is not a legal requirement but part of the code of good practice established by the courts themselves. To maintain registration, the IOH should participate in relevant permanent education programs.

Private international law (PIL) is not prescribed as part of the permanent education, but the basic training program for the IOH contains a few hours of PIL, which mainly functions as a 'red light' mechanism – alerting the IOH of the possible existence of PIL complications. According to our respondents, that does not give IOHs an adequate preparation for dealing with cross-border insolvencies. In a specific case the IOH would need to get specialized advice on the PIL aspects. This is relatively easy to accomplish but may be (too) costly.

However, knowledge of PIL rules is but one aspect and not the most important one: According to our respondents, the crucial requirement for successfully dealing with cross-border insolvencies is hands-on experience. The IOH should have experience in working with courts and office holders in different states and be able to work and deal in a cross-border insolvency environment. This cannot be learned or trained in a class room setting only. Furthermore, knowledge of the specific rules

and practices of the other involved states is crucial for a smooth devolvement of the insolvency. For this reason, most respondents recommend practical specialization – both in insolvency as such and in cross-border insolvency.

A similar problem arises as to the courts. The Dutch judiciary is of a high quality, but the judge supervising the insolvency (*rechter-commissaris*) has an atypical role (a relic of the 19th century, as one of our respondents said mockingly). That role requires specific knowledge and skills which judges do not routinely possess. The supervising judge has followed the training program for judges which contains some PIL; furthermore, judges are required to take part in four specialization trainings annually, but there is not always a PIL training available. So, like with the IOH, expertise comes with practice. Experience in cross-border insolvencies is considered when a supervising judge is assigned to a specific case, and courts sometimes appoint not one but two supervising judges in order to enable the more experienced one to train the other. This allows for some specialization within the group of supervising judges. However, the Dutch judiciary works with a rotational scheme – judges only perform a certain function for a limited number of years. For supervising judges this period is 6 years. This is longer than usual but according to our respondents, an even longer period would be recommended. The ministry of Justice acknowledges that supervising judges should have the required expertise to deal with international insolvencies, and is examining the possibility of concentrating cross-border cases in one specific court.

A separate problem occurs when the work load of the judiciary makes it difficult for supervising judges to spend sufficient time on the supervision of cross-border insolvencies.

***Best practices*:** Private international law is (and should be) part of the training programme of IOHs and supervising judges, but this alone is not sufficient to guarantee effective management of cross-border insolvencies.

Experience with cross-border insolvencies and the availability of a relevant international network are (and should be) taken into account when appointing an IOH in a cross-border insolvency.

The judiciary is allowed some extra time to specialize for the role of supervising judge.

As a result of these practices, we find a high level of specialization in the field of advisory work, a medium level as regards insolvency office holders and the lowest level of specialization in the courts.

The fact that these professions are organized in specialized communities (Recofa for the judges, Insolad for lawyers) helps maintain a high level of expertise.

### 3.4. Relocation of the Centre of main interest (COMI)

According to the experts, 'insolvency tourism' is mainly a problem in the case of a change of COMI of natural persons who want to make use of a foreign clean slate mechanism (UK) or have an interest in avoiding the Dutch insolvency law, by moving out of the jurisdiction without necessarily establishing a well-defined new COMI. In those cases, COMI migration mainly benefits the insolvent at the detriment of the creditors (most often banks) who will then try to (re)establish COMI in the Netherlands. The judges are usually reluctant to assume jurisdiction in cases where natural persons are involved, and the bank will have to convince the court that the COMI is still in the Netherlands.

COMI migration of companies (usually to England) does occur but is considered less of a problem; it is often performed at the initiative of major creditors – e.g. financing entities and large Anglo-Saxon private equity shareholders – and effectively often requires the cooperation of a majority of creditors. It is often used to unblock negotiations in which one or more creditors take a hold-out position. Also, the possibility to exert influence on the appointment of the IOH is mentioned as a reason to migrate. 'Bad faith COMI migration' is deemed to be rare. COMI migration performed to consolidate group insolvencies (for example: move the daughters to the mother) should be treated as a separate category of COMI migration (see below).

The number of COMI migrations decreased in recent years, as the UK scheme of arrangement does not require a COMI migration. [74] The

[74] It is noted by some experts that the English courts are not inclined to involve the CJEU in checking the applicability of Brussels I to the scheme of arrangement.

rules on COMI migration in the Recast of the European Insolvency Regulation (EIR) may be helpful to prevent fraudulent COMI migration of individuals, but is deemed useless in the case of companies because in practice COMI migration rarely involves moving the seat of the company. The respondents assume the risk of fraudulent COMI migration to be bigger when the insolvent files for bankruptcy himself.

The Ministry of Justice indicated not to regard COMI-migration as a problem per se. It is a problem, however, when it is intended to avoid regular insolvency proceedings. The Recast is meant to counteract 'abusive COMI migration' and we will have to wait and see whether this will be effective.

The English scheme of arrangement is well known to Dutch insolvency advisors as a procedure that can be used to restructure companies. The respondents have noticed that the Dutch draft bill on restructuring (which is deemed to come within the scope of the EIR) is perceived as a serious threat by English insolvency practitioners. Likewise, Brexit causes uncertainties as to the future of this type of forum shopping.

### 3.5. Determination of COMI by the court

The Netherlands hosts a relatively (very) large number of holding companies and financing vehicles. This does influence the type of cross-border complications that arise, as the production facilities of the group will most likely be situated outside the Netherlands. However, as these facilities are often organized in separate legal entities, it doesn't impact on the COMI of the Dutch legal entity. Dutch advisors, as a rule, make sure there is enough economic activity in The Netherlands for the COMI of such entities to be located here.[75] Courts should not and do not in practice take the specific economic situation of the Netherlands into account when interpreting the EIR. The respondents do not report major problems in the interpretation of the concept of COMI.

The typical fact pattern before the Dutch courts would be a company with registered seat in the Netherlands, which may or may not have its COMI abroad. The reverse scenario is rare (the example is given of small English limited companies that are active mainly or solely in the

[75] This is also necessary for tax purposes.

Netherlands). Due to some creditor friendly aspects of Dutch insolvency law, the Netherlands is not a country to which COMI-migration takes place in any significant amount.

Under the EIR the COMI is presumed to be in the place of the seat. The respondents support an active attitude of the court when establishing jurisdiction but some of them explicitly warn for departing from the legal presumption too readily – this may lead to aggressive litigation over the COMI, which will be detrimental for the company in distress. The court should ex officio check whether there has been a recent change of COMI, and if so, ask for an explanation and further information. Likewise, the court should ensure a sufficient factual basis for assuming jurisdiction, if need be by requesting additional information.

In declaring bankruptcy on a company registered in the Netherlands the courts largely rely on the information given by the applicant (consisting of information on the seat and the registration at the Chamber of Commerce) unless jurisdiction is contested or there is reason to assume that the COMI is actually located abroad (e.g. because all factories of the entity are in another jurisdiction); in such a case, further investigation by the court is in order. However, there is a difference between applications by the insolvent himself and third-party applications. In case the insolvent applies for insolvency himself the court routinely requires information on the location of the assets and activities for the purpose of selecting the IOH. This information is harder to come by in case of third party applications.[76] These differences in the general practice (for both domestic and cross-border insolvencies) also influences the way the COMI-check is performed.

According to the experts, the problem of being declared bankrupt in more than one country no longer really exists, thanks to clear rules on jurisdiction and the duty of mutual recognition, except for cases in which parties are unaware of foreign bankruptcies. The latter will hopefully to a large extent be solved by the public registry established under the Recast.

***Best practices*:** In case of applications for insolvency submitted by the company in distress itself, the court routinely requests information

[76] Also, applications for surseance are less informative than applications for insolvency.

on the location of assets and activities. This will help to identify problematic issues with regard to COMI.

### 3.6. Secondary proceedings and group insolvencies

According to all respondents, secondary proceedings are very rare. Cross-border insolvencies often relate to groups with independent foreign entities rather than to branches of a single company. If a secondary proceeding is opened by the IOH,[77] the reason for this is often related to problems with the termination of contracts (especially employment contracts – Art. 10 EIR, Art. 13 Recast) and/or issues regarding secured debts (Art. 5 EIR, Art. 8 Recast). Some practitioners point to the fact that the laws of the member states differ considerably regarding the rank of claims as well as the treatment of rights in rem or other surety on debts. If there is a main and a secondary proceeding, creditors often have to get actively involved in both proceedings in order to get the best result. However, the involvement in two proceedings incurs extra costs. Moreover, practitioners observe that if there is a main and a secondary proceeding, the insolvency administrators might get into a dispute over the question which assets belong to the main proceeding and which assets are left to the secondary proceeding. As in some jurisdictions the insolvency administrators' remuneration depends on the value of the assets of the respective proceeding, such disputes are likely to occur. Again it is argued that these disputes can lead to a waste of time and money. Moreover, as soon as there is more than one insolvency procedure the question arises whether the IOH can verify all incoming claims under a single law and if not, who decides on the law applicable to the verification process.

Accordingly, secondary proceedings are not very popular amongst the experts participating in the discussion. By contrast, the concept of 'synthetic secondary proceedings' of Article 36 of the Recast is mentioned as a good solution for some of the problems described above.

[77] The opening of secondary proceedings by third parties is seen as problematic by our respondents.

Insolvency protocols are known to our respondents, but mainly in cases involving non-EU parties. This is confirmed by the Leiden database on insolvency protocols,[78] which reveals that all examples recorded therein involve non-EU parties. The irrelevance of protocols in intra-EU cases is explained by the fact that within the EU the use of formal protocols is rarely needed. There are several reasons for that, amongst which the practice to actively avoid multiple insolvency proceedings (no cooperation needed in case of a single, consolidated insolvency) and the fact that the EIR both ensures mutual recognition and promotes information exchange. The Recast is not expected to add much – the rules on group insolvencies are widely deemed to be overly complicated. Therefore, practitioners are looking elsewhere for solutions, such as COMI-consolidation (moving the COMIs of all parts of a group to a single centre) and the appointment of a group IOH.

According to some of the respondents, a good solution might be to allow the appointment of a single group IOH for insolvencies of groups. Rather than trying to change the rules on cooperation, one should arrange for the possibility to appoint one head IOH who should cooperate with local experts for the handling of the local insolvencies. This could be achieved without changing the EIR again.[79] Others object to this suggestion, however, referring to the fact that in practice there will always be conflicts of interests between the members of the corporate group and their respective creditors.[80] In this context, it is noticed that bankruptcy of an entire group is not always necessary or in the interest of the stakeholders; therefore, it might be a good thing that it has been made more difficult to have groups of companies declared bankrupt in a common procedure.

The respondents are not very optimistic about the framework for cooperation and coordination introduced by the Recast in the case of insolvency proceedings relating to different members of a group opened in more than one member state; it is described as a half-baked compromise which probably won't work. In any case, the IOH of the holding should have the coordinating role, acting in accordance with the powers

[78] See <tri-leiden.eu/project/categories/insolvency-protocols-project/>.

[79] See preamble paragraph 50.

[80] Especially with regard to intra-company claims.

of the local IOH's. The Ministry of Justice was not prepared to comment on the suggestion by other respondents to appoint one single insolvency administrator for all bankruptcies within an international group; it prefers to wait and see how the new rules on group insolvencies of the Recast will function in practice.

***Best practices*:** Overall, the possibility to open secondary proceedings is not welcomed by the experts. Informal collaboration seems to be the popular approach for intra EU insolvencies.

### 3.7. Exchange of information and cooperation

According to our experts, gaining information on foreign insolvency proceedings is still a practical problem that has not yet been fully solved. Currently, the main source of information on ongoing insolvency proceedings is a commercial database.[81] Some of the current problems will be solved by the Recast which prescribes the creation of inter-connected insolvency registries (see Articles 24 et seq. of the Regulation 2015/848). However, this database is incomplete as only the opening of insolvency proceedings as such will be registered, not the earlier requests to open them and/or information which is released later on the process (list of creditors, settlement agreements etc.). It is recommended that the decisions entered into the register should specify the ground for jurisdiction and the type of proceedings (main or secondary) involved in order to avoid problems with recognition abroad.

Most respondents welcome the fact that the Savecomp Project will establish a new database of case law on the EIR. The Insol Europe database is no longer easy to use after its transfer to Lexis Nexis, according to some respondents. There is a preference for an open access database which should allow searches on the basis of EIR Article and possibly also keyword, country and year. The database should comprise full citation and (hyperlinks to) full text files (summaries do not suffice), sufficient information on the facts of the cases and preferably also case notes. For our respondents, Dutch, English, French and sometimes Scandinavian cases are the most interesting and relevant. The Dutch

[81] https://reorg-research.com/home.

databases on insolvencies and company law as well as the Juris DE database (with German keywords) are mentioned as good examples. The main challenge for any database (apart from the search engine) is to keep it up to date and sufficiently comprehensive.

Exchange of information between supervising judges is sometimes complicated by the differences in legal traditions. The Dutch supervising judges are relatively informal and may simply pick up the phone to call a foreign colleague. In other jurisdictions, these officials may need specific authorization to do so, or can only exchange information in writing. The duty to cooperate in the Recast may provide the latter with the necessary legal backing for their communications with courts or IOHs abroad.

The Recast likewise prescribes exchange of information and cooperation between IOHs. However, some experts comment that this duty is still abrogated in case of conflicting interests (Article 43 Recast).

***Best practices*:** A comprehensive, up to date database is needed in order to supply the actors with relevant information.

Informal direct communication is welcomed as this may improve the handling of cross-border insolvencies.

### 3.8. Applicable law

Though the special rules on applicable law (Articles 5 ff EIR, 8 ff Recast) rarely cause problems in practice, not all rules are met with approval.

The special rule for employment contracts is not criticized as such but does cause practical problems when applicable.[82] Dismissal may not be possible without involvement of a judge or other government authority. Also, the ranking of claims of employees may be problematic, especially in combination with the rules on termination.[83] In some countries the termination period is long but the ranking low (e.g. France), in

[82] In the Dutch situation of holding companies and financial vehicles, production units are often organized in separate legal entities. In that case the relationships with the foreign workers do not form part of the insolvent estate.

[83] Also, the ranking of bonus payments is mentioned as a problem area.

other countries the opposite solution prevails (e.g. NL). Can workers employed in France profit from the long French termination period, yet submit their claim as high priority debt in the Dutch insolvency proceedings?

The rule on property interests (Article 5 EIR, 8 Recast) has played a part in some recent insolvencies in retail – when stock was stored abroad or halted there during delivery. The interpretation of this provision as an 'immunity' is deemed to overstretch the purpose of the provision, foster unfair use and disrupt the balance between the creditors. Other, less disruptive, interpretations are preferred.

The ranking of claims is one of the problem areas per se. A specific group of claims in this respect are intra-company debts.

As to real property, it is noted that in several countries problems may arise with the entry of a foreign insolvency in the real estate registries (Article 11 EIR, 14 Recast).[84] Some experts also reported problems with the sale of foreign real estate in personal insolvencies involving homes abroad (Spanish holiday homes).[85]

Another provision that elicits criticism is Article 13 EIR (16 Recast) which imposes a double check in case of avoidance of detrimental transactions (*Actio Pauliana*). Especially the fact that a choice of law by the parties to the act itself may frustrate the protection of the community of creditors, is deemed subversive. Protection according to the law of the COMI at the time of the act is deemed sufficient to protect the legitimate interests of the parties involved in the litigious act. It is noted that Dutch law contains severe restrictions on the right of the IOH to annul detrimental acts and hence may be chosen by the parties to the act to make their dealings *Pauliana*-proof. The Regulation honours a choice of law even in cases which are otherwise purely domestic, unless bad faith is

[84] Problems are reported with Spain and Germany.

[85] Most personal insolvencies are dealt with under the law on personal insolvencies. These are administered by a different professional group (*bewindvoerders*) than the IOHs which are appointed in commercial insolvencies (*curatoren*). The level of expertise in the field of private international law of the non-commercial IOHs will likely to be much lower than for the commercial IOHs.

established.[86] However, the possibility to rely on Article 13 EIR is curtailed by the rule on the burden of proof that the CJEU established in Nike v. Sportland[87] and largely confirmed in Vinyls Italia v Mediterranea.[88]

***Best practices*:** It is hard to distil best practices in the area of applicable law. The experts mainly point out areas in which the provisions of the regulation may cause problems in interpretation and application and/or may foster unwanted practices.

[86] ECLI:EU:C:2017:433, Operative part: «*Article 13 of Regulation No 1346/2000 may be validly relied upon where the parties to a contract, who have their head offices in a single Member State on whose territory all the other elements relevant to the situation in question are located, have designated the law of another Member State as the law applicable to that contract, provided that those parties did not choose that law for abusive or fraudulent ends, that being a matter for the referring court to determine*».

[87] ECLI:EU:C:2015:690.

[88] ECLI:EU:C:2017:433.

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# Legislative Report: Scotland, United Kingdom

**JANEEN M. CARRUTHERS**[1]



## 1. Overview of regulatory schemes

There are four schemes of rules operative in Scottish courts to regulate insolvency proceedings having a cross-border dimension, viz.:

(a) Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) ('Insolvency Regulation Recast'), repealing Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings;

(b) Insolvency Act 1986, s.426;

(c) Cross-Border Insolvency Regulations 2006[2], giving force of law in Great Britain to the UNCITRAL Model Law on cross-border insolvency, as modified for application in Great Britain[3]; and

(d) pre-existing (residual national) Scottish conflict of laws rules.

[1] This report is drawn very largely from E.B. CRAWFORD, J.M. CARRUTHERS, *International Private Law – A Scots Perspective* (4th edition) W.Green (2015), Chapter 17, and due reference should be made to that publication. It is published here with the consent of Professor E. B. Crawford. For England and Wales, see COLLINS (Gen.Ed.), *Dicey, Morris & Collins The Conflict of Laws*, 15th edition (2012), Chs. 30 and 31; and I. FLETCHER, *Insolvency in Private International Law: national and international approaches*, 2nd dition (Oxford: Oxford University Press, 2005), *Supplement* (2007).

[2] SI 2006/1030.

[3] SI 2006/1030, regs.1 and 2, and Sch.1.

The scope of each scheme of rules, and the manner in which the schemes interact, is addressed.

## 2. The EU Insolvency Regulation/Recast Regulation[4]

### a) Non-application of rules of jurisdiction in Regulations 1215/2012 and 44/2001

Bankruptcy of individuals, and similar proceedings in relation to insolvent companies, are excluded from the scope of the Brussels I Recast Regulation and its predecessor Regulation 44/2001[5]. However, a company winding up can occur when a company is solvent, as well as when insolvent, and in the former case, Brussels I Recast Regulation/ Regulation 44/2001, as appropriate, will apply, directing the matter by way of the exclusive jurisdiction provision[6] to the court which is defined for constitutional purposes as the "seat" of the company[7].

Company winding-up is excluded from the intra-UK allocation effected by the Civil Jurisdiction and Judgments Acts 1982 and 1991 Sch.4[8], and must be governed by the rules contained in the Insolvency Act 1986. Scottish rules of jurisdiction in respect of personal bankruptcy are contained in the Bankruptcy (Scotland) Act 2016 (q.v.).

[4] See, generally, G. MOSS, I. FLETCHER, S. ISAACS, *The EC Regulation on Insolvency Proceedings: A Commentary and Annotated Guide*, 3rd edition (Oxford: Oxford University Press, 2016).

[5] Art.1.2(b). *SCT Industri AB (In Liquidation) v Alpenblume AB* (C-111/08) [2009] I.L.Pr. 43; *Byers v Yacht Bull Corp* [2010] EWHC 133 (Ch); *German Graphics Graphische Maschinen GmbH v van der Schee* (C-292/08) [2010] I.L.Pr. 1; and *Polymer Vision R&D Ltd v Van Dooren* [2012] I.L.Pr. 14. Contrast *F-Tex SIA v Lietuvos-Anglijos UAB Jadecloud-Vilma* (C-213/10) ECJ (First Chamber) [2012] I.L.Pr. 24. See cases under the Brussels Convention such as *Gourdain v Nadler* [1979] E.C.R. 733 at [4]; and *Thoars' Judicial Factor v Ramlort Ltd*, 1998 G.W.D. 29-1504, in respect of which see note by E.B. Crawford, 1999 J.R. 203.

[6] Art.24.2, Brussels I Recast; and art.22.2, Brussels I Regulation.

[7] Civil Jurisdiction and Judgments Acts 1982 and 1991 s.43, and Regulation 44/2001, art.60 / Brussels I Recast, art.63.

[8] Now Civil Jurisdiction and Judgments Order 2001 (SI 2001/3929).

### b) Regulation 1346/2000

The Council of Europe produced in 1990 a Convention on Certain International Aspects of Bankruptcy (the Istanbul Convention). The Convention[9] was not signed by the UK, in view of anticipated EU intervention in this area[10], and in time was overtaken by Council Regulation (EC) No.1346/2000 on Insolvency Proceedings, which came into force on May 31, 2002[11], and was directly applicable in all EU Member States except Denmark[12], with effect from that date[13].

Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) was published on 5 June 2015[14]. By virtue of art 91 of that instrument, Regulation (EC) No 1346/2000 is repealed. All references to the repealed Regulation are to be construed as references to the Insolvency Regulation Recast, and are to be read in accordance with the correlation table set out in Annex D to the recast instrument. The Insolvency Regulation Recast entered into force on 26 June 2015, and, in terms of art 92, shall apply, in the main, from 26 June 2017.

This commentary shall deal first with Regulation (EC) No 1346/2000, before turning to the Recast Regulation.

The aim of Regulation (EC) No 1346/2000 was to establish a framework, applicable to the insolvency of natural and legal persons, for the administration of insolvencies within the EU. After May 31, 2002,

[9] The Virgós-Schmit Report on the European Convention on Insolvency Proceedings was never formally adopted, but may be regarded as an authoritative commentary on the Convention and Regulation 1346/2000 which derives from it (*Re Olympic Airlines SA* [2013] E.W.C.A. Civ. 643, per Sir Bernard Rix at para [19]).

[10] D. McKenzie-Skene, *The EC Convention on Insolvency Proceedings*, in (1996) 4(3) *E.R.P.L.* 181, 182, 183.

[11] Art.47.

[12] Recital (33).

[13] In *Re Staubitz-Schreiber* (C-104) [2006] I.L.Pr. 30, the ECJ held that the Insolvency Regulation was applicable if no judgment opening insolvency proceedings had been delivered before the Regulation's entry into force on May 31, 2002, albeit that the request to open proceedings was lodged prior to that date. On the other hand, in *SCT Industri AB (In Liquidation) v Alpenblume AB* (C-111/08) [2009] I.L.Pr. 43, the Insolvency Regulation was held not to apply since the insolvency proceedings had been opened before its entry into force.

[14] OJ L141/19 (5.6.2015).

whenever the "centre of the debtor's main interests" (q.v.) is located within an EU Member State (excluding Denmark, but including UK), proceedings must be regulated by the European Regulation/recast Regulation; this is a mandatory scheme. Where the debtor's centre of main interests is outside the EU, the Insolvency Regulation has no application[15]. Notably, in determining whether the Regulation applies, there is no general and absolute condition that there have to be cross-border elements; *a fortiori*, it is not the case that for the Regulation to apply the circumstances must involve connecting factors with two or more Member States[16].

In the manner of many EU instruments of recent years in the conflict of laws, the scheme of the Regulation is to provide harmonised rules of jurisdiction, which in turn justify rules of mutual recognition and enforcement of judgments. The Regulation contains also provisions as to applicable law, and cross-border co-operation where there is more than one set of bankruptcy proceedings. The Regulation is a compromise between the unity and territoriality approaches, to the effect that insolvency proceedings may be opened in more than one Member State, but only one set of proceedings can have extraterritorial effect. Any other proceedings will have only intra-territorial effect.

The Regulation applies to «*collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator*»[17]. For the purposes of the UK, this comprises winding up by or subject to the supervision of the court; creditors' voluntary winding up with confirmation by the court; administration; voluntary arrangements under insolvency legislation; and bankruptcy or sequestration[18]. Notably, the Regulation does not apply to receivership since that essentially is an action at the instance of one creditor, and is not a collective procedure. Moreover, the Regulation shall not apply to insol-

[15] *HSBC Plc, Petitioner*, 2010 S.L.T. 281.

[16] *Schmid v Hertel* [2014] I.L.Pr. 11.

[17] Art.1(1).

[18] Regulation 1346/2000, Annex A.

vency proceedings concerning insurance undertakings, credit institutions, investment undertakings[19] which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings[20].

### c) Jurisdiction rules under Regulation 1346/2000

*Main proceedings (article 3)*

The Regulation applies to any debtor having the centre of his main interests in a Member State[21]. The connecting factor of "centre of a debtor's main interests" (henceforth "COMI") is the crux of the matter; the COMI must first be identified, and found to be within the EU (except Denmark) before the Regulation applies[22]. As explained above, application of art.3.1 does not, as a general rule, depend on the existence of a cross-border link involving two or more Member States[23]; the somewhat paradoxical rationale is that to hold up proceedings until such time as the locations of various ancillary aspects are determined would frustrate the Regulation's objectives of efficiency and effectiveness of insolvency proceedings having cross-border effects.

The COMI, the key concept of the Regulation, must be interpreted in a uniform way by reference to EU law[24]. Article 3.1 provides that the courts of the Member State within the territory of which the COMI is situated shall have jurisdiction to open[25] insolvency proceedings (the "main proceedings"). Such jurisdiction confers competence to hear and

[19] *Re Phoenix Kapitaldienst GmbH* [2008] B.P.I.R. 1082; and *Re HIH Casualty & General Insurance Ltd* [2008] UKHL 21

[20] Art.1(2).

[21] *Skjevesland v Geveran Trading Co Ltd (No.4)* [2003] B.P.I.R. 924; *Re BRAC Rent-A-Car International Inc* [2003] EWHC 128; [2003] 1 W.L.R. 1421; *Re Salvage Association* [2003] EWHC 1028; *Re Daisytek-ISA Ltd* [2004] B.P.I.R. 30; *Re Eurofood IFSC Ltd* (C-341/04) [2006] Ch. 508; *France v Klempka* [2006] B.C.C. 841 Cour de Cassation (France); *Hans Brochier Holdings Ltd v Exner* [2006] EWHC 2594 (Ch); and *Re BenQ Mobile Holding BV (Amsterdam)* [2008] B.C.C. 489.

[22] Preamble, recital (14). Cf. *Official Receiver v Mitterfellner* [2009] B.P.I.R. 1075.

[23] *Schmid v Hertel* [2014] I.L.Pr. 11, paras [29] – [30].

[24] *Interedil Srl (in liquidation) v Fallimento Interedil Srl* Case C/396/09; [2011] W.L.R. (D) 334.

[25] *Re Eurofood IFSC Ltd* [2006] Ch. 508.

determine actions which derive directly from the main proceedings and are closely connected to them[26]. This means that the Regulation may affect a company incorporated outside the EU as long as the COMI is situated within the EU[27].

Determination of the COMI will necessitate a detailed factual inquiry[28]. While there is no conclusive definition of this important connecting factor, identification is assisted by the provision in art.3.1 of a presumption that, with regard to companies and legal persons, the place of the registered office shall be presumed to be the COMI, in the absence of proof to the contrary[29]. That presumption can be rebutted only by factors that are both objective and ascertainable by third parties, i.e. potential creditors[30]. Where a debtor company is a subsidiary company whose registered office and that of its parent company are situated in different Member States, the presumption that the COMI of the subsidiary is situated in the Member State in which its registered office is situated can be rebutted only if factors, objective and ascertainable by third parties, enable it to be established that the actuality is different from that which location at that registered office is deemed to reflect[31]. If a party seeks to establish that a company or legal person has its COMI at a place other than its registered office, then the court will examine

[26] *Seagon v Deko Marty Belgium NV* (C-339/07) [2009] I.L.Pr. 25, in which the German court was thereby enabled to set aside a transaction on the grounds of insolvency of the debtor against a defendant having its statutory seat in Belgium; and *Re Jurisdiction to Set Aside a Transaction on Grounds of Insolvency* [2010] I.L.Pr. 6.

[27] Recital (14).

[28] e.g. *Re Ci4Net.com.Inc* [2004] EWHC 1941 (Ch).

[29] *Re Stanford International Bank Ltd (in receivership)* [2011] Ch. 33; and *Interedil Srl (in liquidation) v Fallimento Interedil Srl* Case C/396/09; [2011] W.L.R. (D) 334.

[30] *Re Eurofood IFSC Ltd* [2006] Ch. 508; and *Re Stanford International Bank Ltd (in receivership)* [2011] Ch. 33.

[31] *Re Eurofood IFSC Ltd* [2006] Ch. 508. Contrast *MPOTEC GmbH* [2006] B.C.C. 681 *Tribunal de Grande Instance* (Nanterre); and *Re Energotech Sarl* [2007] B.C.C. 123 *Tribunal de Grande Instance* (France) (relevant factors included the location of board meetings and of creditors, and locus of dealings with clients). As to a global group of companies, see *Bank of America NA v Minister for Productive Industries* [2008] I.L.Pr. 25 *Consiglio di Stato* (Italy); *Re Nortel Networks SA* [2009] EWHC 1482 (Ch); and *Re Lennox Holdings Plc* [2009] B.C.C. 155.

the "totality of evidence"[32], including the location of the company's bank account, the place of preparation of financial statements, and the place of employment of the majority of employees[33].

There is no presumption in relation to individuals, but recital (13) indicates that the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis, being therefore ascertainable by third parties[34].

Although a debtor reasonably may be held to have interests in one, or more than one, Member State(s), the Regulation does not apply unless one of these business bases can be said to be the "centre" of his interests. The criterion assumes in law that a debtor has only one centre of main business interests[35], but this might not always be the case in fact. In principle, the COMI of an individual, who is neither a professional nor someone carrying on business in his own right, is his place of habitual residence[36].

There is no temporal element in the COMI criterion as set out in art.3.1, a fact which may generate problems given that in business one would expect to find that the COMI of an individual or company might change over time. This issue was met with in *Shierson v Vlieland-Boddy*[37], in which the English court recognised the fact that the debtor's

[32] *Hans Brochier Holdings Ltd v Exner* [2006] EWHC 2594 (Ch); and *Sparkasse Hilden Ratingen Velbert v Benk* [2012] EWHC 2432 (Ch).

[33] e.g. *Re Daisytek-ISA Ltd* [2004] B.P.I.R. 30, which concerned a petition for administration orders to be made in an English court in respect of the English holding company of a pan-European group of companies, many of the members of which had registered offices in France and Germany. The English court had to perform a balancing exercise, assessing the size and importance of interests administered in England and elsewhere, respectively. The court held that there was sufficient evidence to rebut the presumption that the place of the registered office was the COMI, with the result that the English forum was competent. A large majority of potential creditors by value was aware that many important functions of the group companies were carried out in England.

[34] cf. *X v Fortis Bank (Nederland) NV* [2004] I.L.Pr. 37 Hoge Raad (NL).

[35] G. MAHER, B. RODGER, *Jurisdiction in Insolvency Proceedings*, in (2003) 48 *J.L.S.S.* 26, 30.

[36] *Stojevic v Komercni Banka AS* [2006] EWHC 3447 (Ch); and *O'Donnell v Bank of Ireland* [2012] EWHC 3749 (Ch).

[37] [2005] 1 W.L.R. 3966. Followed in *Cross Construction Sussex Ltd v Tseliki* [2006] EWHC 1056 (Ch); *Official Receiver v Eichler* [2007] B.P.I.R 1636; and *Official Receiver v Mitterfellner* [2009] B.P.I.R. 1075.

COMI had moved from England to Spain. The Court of Appeal held that the debtor's COMI was to be determined at the time when the court was required to decide whether to open insolvency proceedings and in the light of the facts as they were at the relevant time, which included historical facts. Moreover, the court held that it was important to have regard not only to what the debtor was doing, but also to what he was perceived to be doing by an objective observer, and to have regard to the need for an element of permanence. In this regard, the place where the debtor lives and has his home is likely to be relevant to a determination of where s/he conducts the administration of his interests. The court in *Shierson* took the view that there is no principle of immutability, and that a debtor should be free to choose where he carries on activities falling within the concept of administration of his interests. Since such a decision might be made for a self-serving purpose, for example, to alter the insolvency rules which would apply to him in respect of existing debts, the court would need to scrutinise the facts which are said to give rise to a change in the COMI, and be satisfied that a change in the place where the activities which fell within the concept of "administration of his interests" were carried on was based on substance and not an illusion. In 2014 the CJEU in *Schmid v Hertel*[38] confirmed that in order to determine which court had jurisdiction to open insolvency proceedings, the COMI had to be determined at the time when the request to open insolvency proceedings was lodged.

In *Re Opening of Insolvency Proceedings*[39], the Bundesgerichtshof decided to refer to the ECJ the question whether the court of the Member State which receives a request for the opening of insolvency proceedings retains jurisdiction to open insolvency proceedings if the debtor moves his/her COMI to the territory of another Member State after filing the request, but before the proceedings are opened, or whether the court of that other Member State acquires jurisdiction. The

[38] [2014] I.L.Pr.11. Further, the Court held that jurisdiction conferred on the courts of COMI, included international jurisdiction to hear and determine actions which derived directly from those proceedings and were closely connected with them, irrespective of whether the persons against whom the actions were brought were resident in another Member State or in a third country.

[39] *Re Opening of Insolvency Proceedings* (IX ZB 418/02) [2005] I.L.Pr. 4 Bundesgerichtshof (Germany).

ECJ responded, in *Staubitz-Schreiber*[40], to the effect that art.3.1 must be interpreted as meaning that the court of the Member State within which the COMI is situated at the time when the request is lodged to open insolvency proceedings retains jurisdiction to open those proceedings if the debtor moves the COMI to another Member State after the request has been lodged, but before the proceedings are opened.

Averments as to jurisdiction must acknowledge the primacy of the Regulation, and in a qualifying petition at the outset must aver that the COMI is in the forum petitioned.

*Allocation of jurisdiction within the UK*

The rules of jurisdiction set out in the Insolvency Regulation/Recast Regulation establish only international jurisdiction, i.e. they designate the Member State the courts of which may open insolvency proceedings. Territorial jurisdiction within that Member State must be established by the national law of the Member State concerned[41]. In other words, if the debtor's COMI is found to be in the UK, "UK national law" must determine the further allocation among the legal systems of the UK.

There is no set of rules equivalent to the Civil Jurisdiction and Judgments Act 1982 Sch.4 to serve to allocate jurisdiction among the courts of the constituent units of the UK. Assuming it can be established that the COMI is in the UK, the allocation thereafter will be done according to the pre-existing (i.e. non-Regulation) domestic insolvency rules (q.v.)[42].

*Secondary proceedings*

To protect the diversity of interests, the Regulation allows "secondary proceedings" to be opened in parallel with the main proceedings[43]. Ju-

[40] *Re Staubitz-Schreiber* (C-104) [2006] I.L.Pr. 30.

[41] Recital (15).

[42] G. MAHER, B. RODGER, *Civil Jurisdiction in the Scottish Courts*, Edinburgh, W.Green (2010), para.11-13.

[43] Art.27. e.g. *Bank Handlowy w Warszawie SA v. Christianapol sp z oo* (C-116/11) [2013] I.L.Pr. 21.

risdiction in respect of secondary proceedings is conferred upon the legal system of a Member State in which the debtor has an "establishment", meaning «*any place of operations where the debtor carries out a non-transitory economic activity with human means and goods*»[44]. The mere presence of assets in a Member State will not be sufficient to confer secondary jurisdiction. The issue of whether or not a debtor has an "establishment" for this purpose arises at the date on which the jurisdiction of the insolvency court is invoked[45]. There must be an element of permanence to the establishment, though the existence of a branch office is not necessary. More than one set of secondary proceedings may take place concurrently. Secondary insolvency proceedings, as well as protecting local interests, serve a useful purpose in cases of complex estates which are difficult to administer as a unit, or where there is wide variation in the laws of the jurisdictions in which the debtor has assets. The liquidator in the main proceedings may request the opening of secondary proceedings if it seems to him that the efficient administration of the estate so requires[46].

*Effect of main and secondary proceedings*

The main proceedings have extraterritorial effect, encompassing all of the debtor's assets. Article 3.1, therefore, can be seen to enshrine the principle of universality.

The effect of secondary proceedings is limited to assets situated within the Member State in which they are opened (i.e. they have intraterritorial effect only).

Given the different consequences attaching to main and secondary proceedings, respectively, it is important for a court to make clear the capacity in which it is acting.

If the COMI is situated in another Member State, main proceedings cannot be opened in Scotland, even though jurisdiction appears to exist in terms of pre-existing Scottish conflict of laws rules, e.g. where the

[44] Art.2(h). Sir Bernard Rix, in *Re Olympic Airlines SA* [2013] E.W.C.A. Civ. 643, para [19], places some reliance on the Virgós-Schmit commentary (para 71) in respect of the meaning of 'establishment'.

[45] *Re Olympic Airlines SA* [2013] E.W.C.A. Civ. 643.

[46] Preamble, recital (19).

registered office of an insolvent company is in Scotland. The jurisdiction of the Member State where the debtor's main interests are centred obliterates the jurisdiction otherwise available to the Scots court under its residual national rules, but without prejudice to the jurisdiction of the Scots court in relation to secondary proceedings under the Insolvency Regulation.

*Relationship between main and secondary proceedings*

There must be co-operation between the liquidator in the main proceedings and the liquidator(s) in the secondary proceedings (art.31)[47]. A creditor may lodge his claim both in the main proceedings and in any secondary proceedings (art.32). The main liquidator can request that the secondary proceedings be stayed (art.33). The stay will be refused only if the stay is manifestly of no interest to the creditors in the main proceedings. In the event of a stay, the main liquidator must guarantee the interests of creditors in the secondary proceedings. Any surplus assets in the state of secondary proceedings following payment of claims in that state must be remitted to the main liquidator (art.35).

### d) Choice of law rules under Regulation 1346/2000 (articles 4 and 28)

The Regulation harmonises conflict rules, not substantive rules. Article 4 directs that the applicable law shall be the law of the state in which the proceedings (main[48] or secondary[49], respectively) are opened. In other words, the opening, conduct and closure of the proceedings[50] will be conducted according to the law of the forum, termed the '*lex concursus*'.

[47] In *Bank Handlowy w Warszawie SA v. Christianapol sp z oo* (C-116/11) [2013] I.L.Pr. 21, the ECJ referred to principles of "sincere co-operation" and "mandatory co-ordination" between the courts in which the main and secondary proceedings, respectively, are opened. Assistance from the courts of other Member States also may require to be sought: *Re Nortel Networks SA* [2009] I.L.Pr. 42.

[48] Art.4. *Also MG Probud Gdynia sp z oo* (C-444/07) [2010] B.C.C. 453.

[49] Art.28.

[50] Recital (23).

More importantly, under art.4.2 the *lex concursus* also determines many essential matters, including the ascertainment of assets and liabilities[51]; the lodging and verification of claims; the ranking of claims; distribution of proceedings; the debtor's and liquidator's powers; the effects of the insolvency proceedings on contracts to which the debtor is a party and on proceedings brought by individual creditors[52]; any protection afforded by legal professional privilege[53]; the conditions for, and effects of, closure of insolvency proceedings (in particular by composition); and creditors' rights after closure.

*Articles 5–15*

Account must be taken of arts.5–15 which prescribe, by way of exception to arts.4 and 28, the circumstances in which certain other laws shall take precedence over the *lex concursus*. For example, the effect of insolvency proceedings on a contract conferring the right to acquire or make use of immoveable property shall be governed solely by the law of the state in which that property is situated[54]; and their effect upon employment contracts shall be governed solely by the law of the state applicable to the contract of employment[55]. It is obvious that the admission of a claim, if contractual, depends upon the validity of the claim according to its own (contractual) governing law, each EU forum applying to this question the relevant provisions, if applicable, of the Rome I Regulation.

More complex is art.7, which provides that the opening of insolvency proceedings against the purchaser of an asset shall not affect the seller's rights based on a reservation of title where, at the time of opening proceedings, the asset is situated within the territory of a Member State other than the state of opening proceedings. This rule gives prec-

[51] *German Graphics Graphische Maschinen GmbH v van der Schee* (C-292/08) [2010] I.L.Pr. 1.

[52] *Syska v Vivendi Universal SA* [2009] EWCA Civ 677.

[53] *Re Hellas Telecommunications (Luxembourg) II S.C.A.*, unreported, Companies Court (Chancery Division), 24 July 2013.

[54] Art.8 and recital (25).

[55] Art.10 and recital (28).

edence, therefore, to the *lex situs*, where it differs from the *lex concursus*[56]. Similarly, by art.5 (third parties' rights *in rem*), the opening of insolvency proceedings shall not affect the rights *in rem* of creditors or third parties in respect of assets (of all types) belonging to the debtor which are situated at that date within the territory of another Member State.

Articles 5–15 represent substantial, albeit defensible, derogations from the basic *lex concursus* rule.

**e) Recognition rules under Regulation 1346/2000 (articles 16–26)**

The principle in art.16 is that any judgment opening[57] insolvency proceedings handed down by a court of a Member State having jurisdiction under art.3 shall be recognised in all the other Member States without those other Member States being able to review the jurisdiction of the court of the "opening State"[58]. Recognition of proceedings, however, shall not preclude the opening in another Member State of secondary proceedings[59]. Article 25 lays down the principle of mutual recognition of judgments concerning the course and closure of insolvency proceedings. Grounds for non-recognition are minimal. In terms of art.26, a state may refuse to recognise the opening of insolvency proceedings, or

[56] Contrast the situation in *German Graphics Graphische Maschinen GmbH v van der Schee* (C-292/08) [2010] I.L.Pr. 1, in which German Graphics' assets, over which a reservation of title existed, were situated at the time of opening of insolvency proceedings in the Netherlands, the same Member State in which those proceedings had been opened.

[57] The ECJ in *Re Eurofood IFSC Ltd* [2006] Ch. 508 held that the appointment of a provisional liquidator, involving the divestment of the debtor of his powers of management over his assets, amounted to the "opening" of insolvency proceedings.

[58] *Re Eurofood IFSC Ltd* [2006] Ch. 508. Any challenge to jurisdiction must be made to the court in which it is sought to open proceedings: *France v Klempka (Administrator of ISA Daisytek SAS)* [2006] B.C.C. 841. Also *MG Probud Gdynia sp z oo* (C-444/07) [2010] B.C.C. 453. For discussion of relationship of art.16 with recognition provisions of the Brussels I Regulation, see *German Graphics Graphische Maschinen GmbH v van der Schee* (C-292/08) [2010] I.L.Pr. 1.

[59] *Re Nortel Networks SA* [2009] EWHC 1482 (Ch).

a judgment from such proceedings, only if it is manifestly contrary to its own public policy[60].

One notable exception to the "revenue law exception" (that revenue collection is local and cannot be enforced extra-territorially), which arises as a result of the promotion of equal treatment of creditors, is the recognition of the entitlement of tax authorities and social security authorities domiciled, habitually resident or having a registered office in a Member State other than the state of the opening of proceedings, to lodge claims in writing in any proceedings (art.39).

In terms of art.40, when insolvency proceedings are opened in a Member State, there is a duty upon the court of that state having jurisdiction, or the liquidator appointed by it, immediately to inform known creditors having their habitual residence, domicile, or registered office in other Member States, of the opening of such proceedings. This seems hardly capable of being satisfied; not only in a complex case are assets and creditors, known and unknown, likely to be found in more than one Member State so that provisions such as art.40 seem unrealistic of attainment even within Europe, but also assets and/or creditors may exist outside Europe, so that there will be an uneasy co-existence between the EU regulated area and pre-existing national rules.

### f) Review and reform of Regulation 1346/2000

Pursuant to art.46 of Regulation 1346/2000, in December 2012 the European Commission published its Report to the European Parliament, the Council and the European Economic and Social Committee on the application of Council Regulation (EC) No 1346/2000[61]. The Commission's conclusion was that «*the Regulation is generally regarded as a*

[60] *Re Eurofood IFSC Ltd* [2006] Ch. 508 at [62]–[64] and *MG Probud Gdynia sp z oo* (C-444/07) [2010] B.C.C. 453. But see *France v Klempka (Administrator of ISA Daisytek SAS)* [2006] B.C.C. 841.

[61] COM(2012) 743 Final (Strasbourg, 12.12.2012).

*successful instrument*»[62]. Various shortcomings[63], however, were identified in relation to the operation of the Regulation in practice, namely:

- *the scope of the Regulation*: the Regulation does not extend to national procedures which provide for company restructuring at a pre-insolvency stage ("pre-insolvency proceedings") or to proceedings which leave existing management in place ("hybrid proceedings").
- *the rules on jurisdiction*: while there is wide support for granting jurisdiction to open main proceedings to the Member State where the debtor's COMI is located, the concept has proved difficult to apply in practice, giving rise, in particular, to "bankruptcy-forum shopping" by means of abusive COMI-relocation.
- *the relationship between main and secondary proceedings*: the opening of secondary proceedings has the effect that the liquidator in the main proceedings no longer has control over assets located in the other Member State, rendering more difficult the sale of the debtor on a going concern basis.
- *the publicity of insolvency-related decisions and the lodging of claims*: there is no mandatory publication or registration of the decisions in the Member States where proceedings are opened, nor in Member States where there is an establishment. Judges and creditors alike ought to be better apprised of proceedings which have commenced elsewhere.
- *the absence of specific rules for the insolvency of members of a group of companies*: the basic premise of the Regulation is that separate proceedings should be opened for each individual member of a corporate group. «*The lack of specific provisions for group insolvency often diminishes the prospects of successful restructuring of the group as a whole and may lead to a break-up of the group in its constituting parts*»[64].

[62] Ibid., para.1.2.

[63] Proposal for a Regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (COM/2012/0744 final - 2012/0360 (COD) (Strasbourg, 12.12.2012), para.1.2.

[64] Ibid.

The Commission proposed to modernise the rules, to shift focus from liquidation to develop a new approach to help businesses overcome financial difficulties and to rescue economically viable debtors, while simultaneously protecting creditors' rights to recover their money. There was a strong desire on the part of the Commission and Member States to improve the framework for resolving cross-border insolvency cases to ensure the smooth functioning of the internal market, and to make it more resilient in times of economic crisis[65].

### g) Insolvency Regulation Recast

Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast) was published on 5 June 2015[66]. By virtue of art 91 of that instrument, Regulation (EC) No 1346/2000 is repealed. All references to the repealed Regulation shall be construed as references to the Insolvency Regulation Recast, and are to be read in accordance with the correlation table set out in Annex D to the recast instrument. The Insolvency Regulation Recast entered into force on 26 June 2015, and, in terms of art 92, shall apply, in the main, from 26 June 2017.

The UK, having opted in to the proposal to revise Regulation 1346/2000[67], recital (87) of the recast instrument makes clear that, in

[65] Ibid. See also Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: "A new European approach to business failure and insolvency" (COM(2012) 742 final) (Strasbourg, 12.12.2012). The Communication noted that the Commission was proposing the modernisation of Regulation 1436/2000, and that the changes suggested affect only cross-border cases. The Communication highlighted areas where differences among domestic insolvency laws, in the Commission's view, have "the greatest potential to hamper the establishment of an efficient insolvency legal framework in the internal market" and sought to identify the issues, on which the new European approach to business failure and insolvency should focus so as to develop the rescue and recovery culture across the Member States. See further Commission Recommendation on a new approach to business failure and insolvency (C(2014) 1500 final) (Brussels, 12.3.2014)).

[66] OJ L141/19 (5.6.2015).

[67] On 15 April 2013, the Parliamentary Under-Secretary of State for Business, Innovation and Skills (Jo Swinson) confirmed in a written ministerial statement that the UK would opt-in to the Regulation: «*... the proposed amendments to the Insolvency Regulation will benefit UK businesses affected by insolvency in the EU. The proposals support business rescue by expanding the scope of the Regulation to restructuring and pre-insolvency proceedings. Bankruptcy*

accordance with Protocol No 21 on the position of the UK and Ireland in respect of the area of freedom, security and justice, those countries are taking part in the adoption and application of the Recast Regulation.

Recital (10) articulates that the scope of the Recast Regulation extends to «*proceedings which promote the rescue of economically viable but distressed businesses and which give a second chance to entrepreneurs. It should, in particular, extend to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency, and to proceedings which leave the debtor fully or partially in control of its assets and affairs. It should also extend to proceedings providing for a debt discharge or a debt adjustment in relation to consumers and self- employed persons, for example by reducing the amount to be paid by the debtor or by extending the payment period granted to the debtor. Since such proceedings do not necessarily entail the appointment of an insolvency practitioner, they should be covered by this Regulation if they take place under the control or supervision of a court*». Similarly, by recital (11) the Recast Regulation applies to «*procedures which grant a temporary stay on enforcement actions brought by individual creditors where such actions could adversely affect negotiations and hamper the prospects of a restructuring of the debtor's business*».

With regard to jurisdiction, art 3(1) strengthens the definition of the 'centre of main interests' by providing in the body of the instrument, rather than in the shade of the recitals[68] that, «*the centre of main interests shall be the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties*». The presumption regarding the COMI of a company or legal person continues to apply, but only if the registered office has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings. A presumptive definition has been inserted regarding the COMI of an individual exercising an independent business or professional activity: the COMI shall be

*tourism will be tackled through new rules on determining jurisdiction and increased transparency for creditors. In addition, the proposals include new rules on publication of insolvency information via free online registers across the EU, in line with our Digital by Default strategy...*» (15 Apr 2013: Column 1WS).

[68] cf. Recital (13), Regulation 1346/2000.

presumed to be that individual's principal place of business in the absence of proof to the contrary (as in the case of companies and legal persons, the presumption applying only if the individual's principal place of business has not been moved to another Member State within the 3-month period prior to the request for the opening of insolvency proceedings). In the case of any other individual, the COMI shall be presumed to be the place of the individual's habitual residence in the absence of proof to the contrary. This last presumption shall only apply if the habitual residence has not been moved to another Member State within the 6-month period prior to the request for the opening of insolvency proceedings.

A balance is to be struck between preventing fraudulent or abusive forum shopping and preserving freedom of movement on the part of the debtor, including the ability to re-structure in the place that best serves the creditors' interest. The time limits imposed in art 3 of the Recast Regulation have the objective, as narrated by recitals (29) to (31), of preventing forum shopping. Importantly, per art 4.1, a court seised of a request to open insolvency proceedings is required, of its own motion, to examine whether or not there exists a valid ground of jurisdiction pursuant to art 3. To buttress this, a judgment opening insolvency proceedings must specify the grounds on which the jurisdiction of the court is based.

Cooperation between main and secondary proceedings has been enhanced. In relation to secondary proceedings, recognising that secondary insolvency proceedings may hamper the efficient administration of the insolvency estate[69], the Recast Regulation aims to secure a more efficient administration of proceedings by enabling a court to refuse the opening of secondary proceedings if they are not necessary to protect the interests of local creditors[70], or to provide for a temporary stay of such proceedings[71]. Further, the requirement that secondary proceedings must be winding-up proceedings has been abolished[72].

[69] Recital (41), Recast Regulation.

[70] Art. 36 and recital (42), Recast Regulation.

[71] Art. 38 and recital (45), Recast Regulation.

[72] cf. art. 3.3, Regulation 1346/2000 and art. 3.3, Recast Regulation.

With regard to publicity of proceedings and the lodging of claims, the Recast Regulation, in arts 24 – 27, requires Member States to establish and maintain public "insolvency registers" in order to improve the provision of information to relevant creditors and courts, and to prevent the opening of parallel insolvency proceedings. In order to facilitate access to that information for creditors and courts domiciled or located in other Member States, this Recast Regulation requires the publication of relevant court decisions in cross-border insolvency cases in a publicly accessible electronic register, and provides for the interconnection of national insolvency registers[73].

Finally, the Recast Regulation provides for the co-ordination of insolvency proceedings concerning different members of a corporate group by obliging the liquidators and courts involved in different sets of main proceedings to co-operate and communicate with each other[74].

## 3. Insolvency Act 1986, Section 426

The EU Insolvency Regulation is pre-eminent. However, by art.44(3)(b) of Council Regulation (EC) No 1346/2000 and art.85(3)(b) of the Insolvency Regulation Recast, respectively, the Regulation shall not apply in the UK to the extent that is irreconcilable with the obligations arising in relation to bankruptcy and the winding-up of insolvent companies from any arrangements with the Commonwealth existing at the time the Regulation entered into force. In effect, this preserves the operation of s.426 of the Insolvency Act 1986, entitled "Co-operation between courts exercising jurisdiction in relation to insolvency".

Section 426 provides for reciprocal recognition of insolvency proceedings in the constituent parts of the UK[75], and for an element of international co-operation. By s.426(1), an order made by any UK court in insolvency proceedings shall be enforced in any other part of the UK as if it were made by a court in the legal system addressed. However, s.426(2) provides that nothing in subsection (1) requires a court in any

[73] Recital (76).

[74] Arts. 56 – 58, and recitals (51) – (62), Recast Regulation.

[75] *Gerrard, Petitioner* 2009 S.C. 593, and *KPMG LLP v Hill* (unreported) 20 January 2012.

part of the UK to enforce, in relation to property situated in that part, any order made by a court in any other part of the UK. Further, by s.426(4) the courts having jurisdiction in relation to insolvency law in any part of the UK shall assist the courts having the corresponding jurisdiction in any other part of the UK[76] or in any "relevant country or territory"[77]. By s.426(11), "relevant country or territory" means (a) any of the Channel Islands or the Isle of Man, or (b) any country or territory designated for the purposes of s.426 by the Secretary of State by order made by statutory instrument[78].

Within the UK, there is also mutual recognition of receivers in terms of the Insolvency Act 1986 s.72 ('Cross-border operation of receivership provisions').

## 4. The Cross-Border Insolvency Regulations 2006[79]

In 1997 UNCITRAL adopted a Model Law on Cross-Border Insolvency, offering a legislative framework for adoption by states, and designed to assist states to equip their insolvency laws with a modern,

[76] Such help always was available at common law: e.g. *Re Kooperman* [1928] W.N. 101; *Obers v Paton's Trustees (No.3)* (1897) 24 R. 719.

[77] Section 426(5) provides that for the purposes of s.426(4), a request made is authority for the requested court to apply, in relation to any matter specified in the request, the insolvency law which is applicable by either court in relation to comparable matters falling within its jurisdiction. Section 426(5) concludes, «*In exercising its discretion . . . a court shall have regard in particular to the rules of private international law*». See, e.g. *Re HIH Casualty & General Insurance Ltd* [2008] UKHL 21; *Rubin v. Eurofinance SA and New Cap Reinsurance Corp Ltd (in Liquidation) v Grant* [2013] 1 A.C. 236; *McKinnon v Graham* [2013] EWHC 2870 (Ch.); and *In re Tambrook Jersey Ltd* [2014] Ch. 252.

[78] Designated countries, per Co-operation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986 (SI 1986/2123), currently are: Anguilla, Australia, The Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Republic Of Ireland, Montserrat, New Zealand, St. Helena, Turks and Caicos Islands, Tuvalu, Virgin Islands.

[79] Cross-Border Insolvency Regulations 2006 (SI 2006/1030) (entry into force April 4, 2006) ("the 2006 Regulations"). See also Act of Sederunt (Rules of the Court of Session Amendment No.2) (UNCITRAL Model Law on Cross-Border Insolvency) 2006 (SSI 2006/199); Act of Sederunt (Sheriff Court Bankruptcy Rules 1996) Amendment (UNCITRAL Model Law on Cross-Border Insolvency) 2006 (SSI 2006/197); and Act of Sederunt (Sheriff

harmonised and fair framework to address more effectively instances of cross-border insolvency[80]. By virtue of the 2006 Regulations, this Model Law was adopted, with certain modifications[81], for Great Britain, and applies where:

(a) assistance is sought in Great Britain by a foreign court or a foreign representative in connection with a foreign proceeding; or
(b) assistance is sought in a foreign State in connection with a proceeding under British insolvency law; or
(c) a foreign proceeding and a proceeding under British insolvency law in respect of the same debtor are taking place concurrently; or
(d) creditors or other interested persons in a foreign State have an interest in requesting the commencement of, or participating in, a proceeding under British insolvency law[82].

By inference, the provisions of the Model Law do not extend to the recognition or enforcement in one British court of insolvency proceedings in another British court, or to the recognition of an insolvency order made in another British court[83]. However, reg.7 of the 2006 Regulations provides that an order made by a court in either part of Great Britain in the exercise of jurisdiction in relation to insolvency proceedings shall be enforced in the other part of Great Britain as if it were made by a court exercising the corresponding jurisdiction in that other part.

In a sense, the Model Law overlaps in content with the rules in Regulation 1346/2000/Recast Regulation, though in scope the European Regulation is limited to the co-ordination of insolvency proceedings within the EU, i.e. where the debtor's COMI is situated within the EU. To the extent that the Model Law conflicts with any obligation of the UK under the EC Insolvency Regulation, the requirements of that EC

Court Company Insolvency Rules 1996) Amendment (UNCITRAL Model Law on Cross-Border Insolvency) 2006 (SSI 2006/200).

[80] Explanatory memorandum to 2006 Regulations, para.2.1.

[81] 2006 Regulations, reg.2(1).

[82] 2006 Regulations, Sch.1, art.1(1).

[83] *Gerrard, Petitioner* 2009 S.L.T.659, per Lord Glennie at [6].

Regulation prevail[84]. The Model Law seeks to provide a complementary regime of regulation and co-operation where the debtor's COMI is outside the EU: «*This will place Great Britain, by virtue of the operation of section 426 of the Insolvency Act 1986 in the unique position of having a suite of statutory procedures available in cross-border insolvency cases, as well as the flexibility of common law*»[85].

By reg.3(1) of the 2006 Regulations, "British insolvency law" shall apply[86], with such modification as the context requires, for the purpose of giving effect to the provisions of the 2006 Regulations, though by reg.3(2) in the case of conflict between any provision of "British insolvency law" or Part 3 of the Insolvency Act 1986 and the 2006 Regulations, the latter shall prevail.

In terms of the Model Law, the person administering a foreign insolvency may initiate an insolvency proceeding in Great Britain in relation to a debtor who is the subject of the foreign proceedings, and may participate in those British proceedings regarding that debtor[87]. Essentially, the purpose of the Model Law is to «*enable a foreign office holder to use British insolvency law to obtain the same relief against persons located in Great Britain as if the insolvency were on that was commenced and continued in* [Great Britain]»[88].

The Model Law does not address jurisdiction to open insolvency proceedings. Rather, art.4 ("Competent Court") designates the Court of

[84] 2006 Regulations, Sch.1, art.3. On the question of the interaction among the EC Insolvency Regulation, the Model Law and pre-existing UK law, see ANTON WITH BEAUMONT, *Private International Law*, 3rd edition, 2011, paras.25.168 – 25.175. Further, see *Re Olympic Airlines SA* [2013] EWCA Civ. 643, per Sir Bernard Rix at [18] - [20].

[85] Explanatory Memorandum to 2006 Regulations, para.7.4. See *Re HIH Casualty and General Insurance Ltd* [2008] UKHL 21.

[86] Guidance in practical matters as to the operation of the 2006 Regulations is to be found in *Re Rajapakse* [2007] B.P.I.R. 99.

[87] With regard to definition of debtor, see *Rubin v Eurofinance SA* [2009] EWHC 2129 (Ch) (and later on appeal at 2013] 1 A.C. 236) Strauss QC held that it would be perverse, and parochial, to give the word "debtor" any other meaning than that given to it by the foreign court in the foreign proceedings. Therefore, a trust was a debtor for the purposes of the 2006 Regulations and the Model Law, even though by English law it had no legal personality as an individual or a body corporate.

[88] *Akers v. Samba Financial Group* [2014] EWHC 540 (Ch), per Sir Terence Etherton at para.6.

Session as the court in Scotland having jurisdiction to exercise the function of recognising foreign proceedings and securing suitable co-operation with foreign courts[89]. The Model Law establishes criteria for deciding whether foreign insolvency proceedings are to be recognised[90], and if so, whether as "main" or "non-main" proceedings (depending on whether the foreign proceedings are taking place in the country where the main operations of the debtor are located[91]); and sets out the effects of recognition, and the relief available to a foreign representative.

A British court may grant discretionary relief for the benefit of any recognised foreign proceedings[92], although it must be satisfied that the interests of local creditors are adequately protected. Recognition of foreign proceedings does not prevent local creditors from initiating or continuing insolvency proceedings in Britain concerning the same debtor.

Rules also are provided to permit foreign creditors to commence and participate in insolvency proceedings in Britain. The Model Law seeks co-ordination between courts in different states in relation to concurrent insolvency proceedings concerning the same debtor, and authorises courts in one state to seek assistance from courts and representatives in another[93].

## 5. Pre-existing Scots conflict of laws rules for cross-border insolvencies

The pre-existing Scots conflict of laws rules will be invoked in two sets of circumstances:

[89] Article 2 defines, inter alia "foreign court", "foreign main proceeding", "foreign non-main proceeding" and "foreign proceeding".

[90] 2006 Regulations, Sch.1, Ch.III; *Re Stanford International Bank Ltd (In Receivership)* [2011] Ch. 33.

[91] 2006 Regulations, Sch.1, art.17(2); *Rubin v Eurofinance SA* [2011] Ch. 133 (and see, on appeal, [2012] UKSC 46).

[92] *Re Pan Ocean Co Ltd* [2014] E.W.H.C. 2124 (Ch).

[93] 2006 Regulations, Sch.1, arts.28-32. Explanatory Memorandum to 2006 Regulations, paras 7.7–7.17.

(a) where the centre of a debtor's main interests is situated in the UK and territorial jurisdiction in one legal system of the UK requires to be established under Council Regulation (EC) No.1346/2000/Recast Regulation[94]; or

(b) where the centre of the debtor's main interests cannot be said to be in any EU Member State (including the UK), and "non-Regulation proceedings" are to be taken in Scotland.

In such cases, the jurisdiction of the Scots court will be founded upon the provisions of the Bankruptcy (Scotland) Act 2016 (personal insolvency), or the Insolvency Act 1986, as amended (corporate insolvency)[95], and problems of choice of law and matters of recognition will be regulated by pre-existing national rules.

Until recently, the pre-existing national rules of jurisdiction were contained in the Bankruptcy (Scotland) Act 1985, as amended by the Bankruptcy and Diligence etc. (Scotland) Act 2007 (personal insolvency), and the Insolvency Act 1986, as amended (corporate insolvency). The 1985 Act, however, was repealed and replaced by the Bankruptcy (Scotland) Act 2016[96]. The purpose of the 2016 Act was to give a clearer, coherent structure to Scottish personal insolvency law by consolidating the various laws on personal insolvency into a single legislative instrument, viz. Bankruptcy (Scotland) Act 1985, the Bankruptcy (Scotland) Act 1993, Part 1 of the Bankruptcy and Diligence etc. (Scotland) Act 2007, Part 2 of the Home Owner and Debtor Protection (Scotland) Act 2010, the Bankruptcy and Debt Advice (Scotland) Act 2014, the Protected Trust Deeds (Scotland) Regulations 2013 and related enactments. The Bankruptcy (Scotland) Act 2016 was introduced on 30 November 2016, together with consolidated regulations. Any

[94] Recital (15); Recital (26), Recast Regulation.

[95] Bankruptcy (Scotland) Act 1985, Companies Act 1985, Insolvency Act 1986, Enterprise Act 2002, and Bankruptcy (Scotland) Regulations 2008 (SSI 2008/82) and Insolvency (Scotland) Rules 1986 (SI 1986/1915), each as amended.

[96] See also Bankruptcy (Scotland) Act 2016 (Consequential Provisions and Modifications) Order 2016 (SI 2016/1034); Act of Sederunt (Rules of the Court of Session, Sheriff Appeal Court Rules and Sheriff Court Rules Amendment) (Bankruptcy (Scotland) Act 2016) 2016 (SSI 2016/312); Bankruptcy (Scotland) Act 2016 (Commencement) Regulations 2016 (SSI 2016/294); and Bankruptcy and Debt Advice (Scotland) Act 2014 (Consequential Provisions) Order 2016 (SSI 2016/140).

bankruptcy application submitted prior to 30 November 2016 will continue to be subject to previous legislation. Any bankruptcy application submitted on, or after, 30 November 2016 will be subject to the 2016 Act and the consolidated regulations. The 2016 Act has a logical structure, leading the reader through the personal insolvency process from initial application or petition through to discharge of the debtor and the trustee. Section 231 concerns 'Proceedings under EC insolvency proceedings regulation: modified definition of "estate"'. See also section 236 'Sequestrations to which this Act applies'.

**a) Jurisdiction**

The jurisdiction rules for personal bankruptcy are contained now in the Bankruptcy (Scotland) Act 2016[97].

Section 15 (ex-section 9 of the 1985 Act), which is subject to art.3 of the EC Insolvency Regulation/Recast Regulation[98], establishes jurisdiction in Scotland, in the case of individuals, upon proof of an established place of business in the relevant sheriffdom, or proof of habitual residence there; and in the case of entities (such as partnerships), upon proof of an established place of business in the relevant sheriffdom, or constitution or formation under Scots law and proof that at any time it carried on business in the sheriffdom[99]. A claim by a (foreign) creditor in a Scots sequestration will subject the claimant to the jurisdiction of the Scots court by reconvention[100].

[97] See previously the Bankruptcy (Scotland) Act 1985, as amended by the Bankruptcy and Diligence etc. (Scotland) Act 2007and by the Bankruptcy and Debt Advice (Scotland) Act 2014. Also Act of Sederunt (Sheriff Court Bankruptcy Rules) 2008 (SSI 2008/119); and Insolvency Act 1986 for personal insolvency law for England only.

[98] S.15(9) (ex-s.9(6)).

[99] S.15(8) sets out the *tempus inspiciendum*, viz. any time in the year immediately preceding (as the case may be0 (a) the date of presentation of the petition; (b) the date the debtor application is made; or (c) the debtor's date of death.

[100] *Wilsons (Glasgow and Trinidad) Ltd v Dresdner Bank*, 1913 2 S.L.T. 437; ANTON WITH BEAUMONT, *Private International Law*, 3rd edition, Edinburgh, W Green, 2011, para.26.48, and cf. generally the salutary tale of incautious greed: *Guiard v De Clermont & Donner* [1914] 3 K.B. 145 (MORRIS, *Conflict of Laws*, 3rd edition, London, 1984, p.113).

The Insolvency Act 1986 is concerned with corporate insolvency law for Scotland and England (Pt IV – Winding up of companies registered under the Companies Acts; and Pt V – winding up of unregistered companies)[101]. The Act contains jurisdiction provisions for the Scots courts in the matter of winding-up of companies registered in Scotland[102], and for unregistered companies[103] (i.e. any association and any company, with the exception of a company registered under the Companies Act 2006 in any part of the United Kingdom – s.220). The exercise of jurisdiction by means of these provisions is subject to the operation of Regulation 1346/2000/Recast Regulation. Hence, where insolvency proceedings fall outside the scope of the Insolvency Regulation, by reason of subject matter or time, the Bankruptcy (Scotland) Act 2016 (ex-1985 Act) and the Insolvency Act 1986 provisions can operate: so long as the debtor's COMI is not situated in an EU Member State[104], the Scots court is justified in utilising the 2016 Act (personal insolvency) or 1986 Act (corporate insolvency) in order to take jurisdiction[105].

### b) Applicable law

Where the Scots court has jurisdiction by virtue of the pre-existing domestic insolvency rules set out above, the forum will apply, qua *lex fori*, its own domestic law, statutory or common law, to matters of administration and substance. Competing claims are decided by the *lex fori* of the bankruptcy[106]. With regard to personal insolvency, any rights ac-

[101] J.ST CLAIR, LORD DRUMMOND YOUNG, *The Law of Corporate Insolvency in Scotland*, 4th revised edn (Edinburgh: W.Green, 2011); and J. H. GREENE, I. M. FLETCHER, *The Law and Practice of Receivership in Scotland*, edited by I. M. FLETCHER and R. ROXBURGH, 3rd edition (Haywards Heath: Tottel, 2004).

[102] Ss.120 (jurisdiction where company is registered in Scotland) and 121.

[103] Ss.221 (jurisdiction where company has principal place of business in Scotland) and 225.

[104] Including the UK, but excluding Denmark.

[105] *HSBC Bank Plc, Petitioner*, 2010 S.L.T. 281.

[106] *Re Courteney Ex p. Pollard* (1840) Mont. & Ch. 239; *Re Anchor Line (Henderson Bros) Ltd* [1937] Ch. 483; *Scottish Union and National Insurance Co v James* (1886) 13 R. 928.

quired by the trustee in sequestration per the *lex fori* are subject, however, under national choice of law rules, to the overriding provisions of a foreign *lex situs*[107]: section 78 of the Bankruptcy (Scotland) Act 2016 (ex-section 31 of the Bankruptcy (Scotland) Act 1985, as amended), vests in the trustee in sequestration "the whole estate of the debtor" as at the date of sequestration, and wherever situated[108], for the benefit of the creditors. There is no territorial limitation, but in respect of property situated abroad it is for a foreign *lex situs* to determine the effect which it gives to a Scottish sequestration vis-à-vis property situated there[109].

The UNCITRAL Model Law, implemented in the UK *per* the Cross-Border Insolvency Regulations 2006, forms part of Scots law. Where the Model Law applies in any given case[110], the provisions of Chapter II ("Access of foreign representatives and creditors to courts in Great Britain") and Chapter IV ("Cooperation with foreign courts and foreign representatives) will prevail. Many provisions of the Model Law are facilitative and quasi-procedural, e.g. art.13, which provides that foreign creditors generally have the same rights regarding the commencement of, and participation in, a proceeding under British insolvency law as creditors in Great Britain, and stipulates that the provision shall not affect the ranking of claims in a proceeding under British insolvency law, except that the claim of a foreign creditor shall not be given a lower priority than that of general unsecured claims solely because the holder of such a claim is a foreign creditor.

Where the UNCITRAL Model Law does not supply the answer, recourse must be had to residual national rules, statutory or common law. At common law, there is no difference in principle in ranking simply because a claim is foreign[111], though ranking in general is the function

[107] *Re Reilly* [1942] I.R. 416.

[108] S. 79(1), 2016 Act; ex-S.31(1), (8), 1985 Act.

[109] Or vice versa: *Murphy's Trustees v Aitken*; sub nom. *Morley's Trustees v Aitken*, 1983 S.L.T. 78; 1982 S.C. 73: English trustee in bankruptcy took Scottish heritage subject to any inhibition registered against the bankrupt prior in date to trustee's appointment. See now, intra-UK, 2006 Regulations, reg.7.

[110] 2006 Regulations, Sch.1, art.1.

[111] *Re Kloebe* (1884) L.R. 28 Ch. D. 175 (succession).

of the *lex fori*[112]. If, however, such a creditor does not claim in the Scots bankruptcy, it would seem that, if he obtained the assets before the date of that bankruptcy, he may retain them, but, if he obtained them after that date and he is subject to the jurisdiction in bankruptcy of a Scots court, the Scottish trustee may recover the assets[113].

Discharge is governed by the *lex fori*. By s.145 of the Bankruptcy (Scotland) Act 2016 (ex-s.55(1) of the Bankruptcy (Scotland) Act 1985), on a debtor's discharge under the Act, s/he shall be discharged within the UK of all debts and obligations contracted by the debtor or for which the debtor was liable, at the date of sequestration[114]. Beyond this particularity, in a UK court a discharge in bankruptcy will have the effect of discharging a contractual obligation[115] only if it was granted under the same law as the proper law of the obligation[116].

### c) Recognition in Scotland of non-EU (or Danish) insolvency proceedings

Where a Scots court has jurisdiction under the pre-existing Scots conflict of laws rules for cross-border insolvencies[117], the Court of Session may be required to exercise the function of recognition of foreign insolvency proceedings[118]. In that connection, the terms of Chapter III

[112] Which may disadvantage foreign creditors, e.g. if their claims have prescribed by the law of the forum, but not by their own proper law: *Re Lorillard* [1922] 2 Ch. 638 (succession).

[113] *Stewart v Auld* (1851) 13 D. 1337; *Wilsons (Glasgow and Trinidad) Ltd v Dresdner Bank*, 1913 2 S.L.T. 437; *Murphy's Trustee, Petitioner*, 1933 S.L.T. 632; *Re Courtney Ex p. Pollard* (1840) Mont. & Ch. 239; *Re Oriental Island SS Co* (1874) L.R. 9 Ch. App. 557; *Ex p. Robertson* (1875) L.R. 20 Eq. 733; *Thurburn v Steward* (1871) L.R. 3 P.C. 478; *Ex p. Melbourne* (1870) L.R. 6 Ch. App. 64; *Banco de Portugal v Waddell* (1880) L.R. 5 App. Cas. 161; *Re Anchor Line (Henderson Bros) Ltd* [1937] Ch. 483; *Rousou's Trustee v Rousou* [1955] 1 W.L.R. 545. *Cheshire and North's Private International Law*, 12th edition, 1992, pp.908–911.

[114] *Dicey, Morris and Collins on the Conflict of Laws*, 15th edition, 2012, para.31-100 states that this is the case, irrespective of the law applicable to the contract or debt. See also rules 213 and 215.

[115] *Gardiner v Houghton* (1862) 2 B. & S. 743; *Ellis v McHenry* (1871) L.R. 6 C.P. 228.

[116] *Bartley v Hodges* (1861) 1 B. & S. 375; *Gibbs and Sons v Société Industrielle et Commercialle des Metaux* (1890) L.R. 25 Q.B.D. 399; and Rome I Regulation, art.12(1)(d).

[117] That is, where the COMI is outside the EU and the debtor company has its registered office in Scotland.

[118] 2006 Regulations, Sch.1, art.4(1).

("Recognition of a foreign proceeding and relief") and/or Chapter IV ("Cooperation with foreign courts and foreign representatives) of the Model Law, may be relevant.

To the extent that the UNCITRAL Model Law is not comprehensive, it may be necessary for a Scots court to refer to residual national conflict of laws rules concerning recognition and enforcement of foreign insolvency proceedings. At common law, a Scots court would regard a foreign court as competent if it had assumed jurisdiction on grounds similar to those assumed in Scotland, provided that the bankrupt was a party to the foreign proceedings[119]. Immoveable property in Scotland would not pass automatically at common law to the trustee under a foreign bankruptcy, but the Scottish court might assist the trustee in such a bankruptcy to deal with heritage in Scotland[120]. If so, the Scots heritage would pass subject to any charges attaching to the property under the Scots *lex situs*[121]. With regard to moveables, the Scots courts would recognise and enforce the right of a trustee under a foreign bankruptcy to all the bankrupt's moveable property without further process[122], with the result that all such property would be attached and fall to the trustee in preference to the claims of creditors who might have attached the assets after the date of the bankruptcy[123]. The rights of Scots creditors who had taken action such as diligence in Scotland prior to the date of the foreign bankruptcy would not be adversely affected because the foreign bankruptcy, assuming it were recognised, was regarded as taking effect only from its date onwards. Scots statutory provisions about dating back applied only to Scots bankruptcies[124]. The Scots rules as to

[119] *Wilkie v Cathcart* (1870) 9 M. 168; *Gibson v Munro* (1894) 21 R. 840; *Obers v Paton's Trustees (No.3)* (1897) 24 R. 719; *Re Davidson* (1873) L.R. 15 Eq. 383; *Re Lawson's Trusts* [1896] 1 Ch. 175; *Re Anderson (A Bankrupt)* [1911] 1 K.B. 896; *Re Craig*, 86 L.J. Ch. 62; *Bergerem v Marsh* (1921) 91 L.J. K.B. 80.

[120] *Rattray v White* (1842) 4 D. 880; *Araya v Coghill*, 1921 S.C. 462. The English courts applied the same principle: *Re Kooperman* [1928] W.N. 101.

[121] *Murphy's Trustees v Aitken*, 1983 S.L.T. 78.

[122] *Araya v Coghill*, 1921 S.C. 462.

[123] *Goetze v Aders* (1874) 2 R. 150; *Phosphate Sewage Co v Molleson* (1876) 3 R. (HL) 77; (1876) 5 R. 1125; (1876) 6 R. (H.L.) 113; *Obers v Paton's Trustees (No.3)* (1897) 24 R. 719; *Salaman v Tod*, 1911 S.C. 1214; *Home's Trustee v Home's Trustees*, 1926 S.L.T. 214.

[124] See now 1985 Act ss.34–37.

illegal preferences applied only to Scots bankruptcies and a foreign trustee did not have the right to cut down preferences, because the effect of a foreign bankruptcy in Scotland was prospective only[125]. Similarly, a Scots sequestration was regarded as taking effect abroad only from its date onwards so that it did not operate to cut down preferences already obtained there[126], i.e. ranking or entitlement to rank is governed by the law under which the sequestration/bankruptcy order is granted.

[125] *Goetze v Aders* (1874) 2 R. 150.

[126] *Galbraith v Grimshaw* [1910] A.C. 508.

# SCRITTI DI DIRITTO PRIVATO EUROPEO E INTERNAZIONALE

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